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Essential Attributes of Commercial Paper - Part I

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ESSENTIAL ATTRIBUTES OF COMMERCIAL PAPER
PART I†
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The elements necessary to make an instrument negotiable are
totally a matter of form and are governed by the provisions of
Article 3 of the Uniform Commercial Code. An instrument meeting
the form requirements of the Code enjoys special treatment under
the law, and negotiable instruments make up a large part of the paper
used in business. This article will discuss the various requirements of
form which go to make up a negotiable instruments, leaving the
effects of negotiability for other places.

1 SECTIONS GOVERNING SCOPE OF ARTICLE 3

Three sections of Article 3 define the type of instruments that
come within the Article. Section 3-103 is exclusionary:

(1) This Article does not apply to money, documents of title, or
investment securities.

(2) The provisions of this Article are subject to the provisions of the
Article on Bank Deposits and Collections (Article 4) and Secured
Transactions (Article 9).

Subsection (1) illustrates a definite change in policy from the
Uniform Negotiable Instruments Law (U.N.I.L.).¹ Soon after that
act gained adoption by a number of states it was held to include
stocks, bonds, and other instruments common to the securities
market.² The Code has excluded such instruments from Article 3

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1. "[I]t might have been expected that the new Commercial Code would recodify in one
article all the law of negotiability as it applies to all types of negotiable paper, with special
sections reserved for variation such as occur in investment papers, commodity papers and
the like. However, the draftsmen saw fit to adopt a contrary policy. Article 3 on Commer-
cial Paper, instead of covering the entire field, reverts to the English scheme of drafting a
narrow act encompassing only checks, drafts, simple promissory notes and certificates of
deposit... Thus, vast amounts of what were formerly negotiable paper within the scope of
the N.I.L. have been excluded from the new Article." Beutel, Comparison of the Proposed
Commercial Code, Article 3, and the Negotiable Instruments Law, 30 Neb. L. Rev. 531, 536
(1951).

2. "When the N.I.L. was first enacted it was argued by eminent authors that the act, like
the B.E.A. [English Bill of Exchange Act], covered only checks, drafts and notes, leaving
other instruments to their normal common law development; but when the full intent of the
codifiers of the N.I.L. was understood, it became apparent that it covered the entire field of
and provided a separate Article, Article 8, governing them. Even where a security meets the formal requirements of Article 3 and is within its scope, it is excluded from that Article.³

Documents of title are governed by Article 7 of the Code, and are never within Article 3.⁴ As will be discussed, the cleavage between Article 9 and Article 3 is not so clear.⁵ There is no reason why one instrument cannot serve as both a security interest and commercial paper,⁶ but where there is conflict between Article 9 and Article 3, the former prevails. The rules of Article 4 basically govern interbank relationships⁷ and the relationship between a bank and its customers.⁸ Generally, when Article 4 is operative commercial paper is involved, but the Code has spelled out different rules in certain cases just because the participants are banking institutions or because the relationships between banks are different from those between non-banks.⁹ Money is also excluded from Article 3,¹⁰ as it is from Article 8.¹¹

The second important section governing the scope of Article 3 is negotiability. Although the courts for a time continued the application of common law to the unusual or new types of instruments, as the full force of the N.I.L. was called to their attention, they began to apply it unhesitatingly to the complete extent of its literal meaning.” Beutel, Negotiability by Contract, 28 Ill. L. Rev. 205, 206 (1933).

3. U.C.C. § 8-102(1)(b): “A writing which is a security is governed by this Article and not by Uniform Commercial Code-Commercial Paper even though it also meets the requirements of that Article. . . .”

In White v. Merrill Lynch, Pierce, Fenner & Smith, 96 N.J. Super. 565, 218 A.2d 655 (1966), the court applied Article 3 to a transaction involving stock. To fill the gaps in Article 8 and to aid in the construction of that Article, Article 3 was applied by analogy to stock warrants attached to debentures in E. F. Hutton & Co. v. Manufacturers Nat’l Bank, 259 F. Supp. 513 (E.D. Mich. 1966), Annot. Willier & Hart, U.C.C. Reporter-Digest § 8-302, A2. Article 3 was also misapplied in Brazos River Authority v. Carr, 405 S.W.2d 689 (1966), a case involving revenue bonds and attached coupons.

In, Rago v. Cosmopolitan Nat’l Bank, 89 Ill. App.2d 12, 232 N.E.2d 88 5 U.C.C. Rep. 172 (1967), Annot. Willier & Hart, U.C.C. Reporter-Digest § 3-307, A22, a note and attendant mortgage were held to be governed by Article 3 since the mortgage was not a “security” within Article 8.

4. See U.C.C. § 7-104.


6. Id.

7. U.C.C. §§ 4-102, 4-201 et seq., 4-301 et seq.

8. U.C.C. §§ 4-102, 4-401 et seq.


Section 3-104(1). This section provides the essential attributes of commercial paper, thereby restricting the scope of the Article. It provides:

(1) Any writing to be a negotiable instrument within this Article must

(a) be signed by the maker or drawer; and
(b) contain an unconditional promise 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 this Article; and
(c) be payable on demand or at a definite time; and
(d) be payable to order or to bearer.

This section provides for two types of negotiable instruments: drafts and notes. Section 3-104(2) defines these along with two particular types of instruments that form a small subgroup:

(2) A writing which complies with the requirements of this section is

(a) a ‘draft’ (‘bill of exchange’) if it is an order;\(^1\)\(^2\)
(b) a ‘check’ if it is a draft drawn on a bank and payable on demand;
(c) a ‘certificate of deposit’ if it is an acknowledgment by a bank of receipt of money with an engagement to repay it;
(d) a ‘note’ if it is a promise other than a certificate of deposit.

Subsection (2) is largely descriptive and primarily useful in drafting later sections of the Code.

The final section in Article 3 bearing on its scope is Section 3-805. It provides:

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.

Thus, Article 3 provides for a sort of quasi-negotiable instrument, one that does not have the primary characteristic of commercial

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1. Assuming postal domestic money orders are negotiable within the meaning of Article 3 of the Code, Section 5104 of Title 39 of the U.S.C.A., contrary to U.C.C. Sections 3-301 and 3-206, prohibits more than one endorsement and therefore the instruments are non-negotiable. United States v. First Nat'l Bank, 263 F. Supp. 298 (D. Mass. 1967).

paper, but which is governed by the Article anyway.\footnote{13}{Such instruments are not truly negotiable, because the prime attribute of negotiable paper is the ability of a good faith purchaser, holder in due course as he is called, to take greater rights than those of his transferor.} Section 3-104 is the key to any investigation of the type of instruments covered by Article 3. This article is devoted to a discussion of its provisions and of other Code provisions that affect it.

## II

### ESSENTIAL ATTRIBUTES OF COMMERCIAL PAPER IN GENERAL

A judge once said that to be negotiable, an instrument must be a "courier without luggage." It is true that there is a definite advantage if the takers of negotiable instruments do not have to be bothered with cumbersome and uncertain terms. Their interest is expressed in terms of the dollars and cents they can collect on the instrument and when and from whom they can collect it. Thus, a negotiable instrument must be precise and clear in these respects, and that is the essence of Section 3-104. This is not to say that the courier cannot have an attache case containing a toothbrush, razor, and other items harmless to the directness of his mission.

the article is intended simply to outline the stage setting. The sections that follow add the flats, scrim, paint, lights, and furnishings.

A. Person Entitled to Payment

A negotiable instrument must be payable to the order of a specified person, entity, or office, or to bearer.\(^1\)\(^5\) It is payable to bearer if it so states or if it is payable to a "non-person," such as cash.\(^1\)\(^6\) The reasons for this requirement are twofold:

1. Assuming no transfer of the instrument, the maker of a note and the drawee of a draft must know who is entitled to payment.

2. In case of transfer, the transferee must know by whom and how the transfer can be made.

B. Authentication by Person or Entity Whose Credit is Pledged

For an instrument to have worth in money, someone must undertake to pay it even when others do not. At the time of issuance this is the maker of a note or the drawer of the draft. Obviously, he must indicate his undertaking on the instrument. Traditionally, this is by his signature, usually found in the lower right corner. However, "signed" really means any overt act which "authenticates" the undertaking.\(^1\)\(^7\) An "X" or a thumbprint will do. Entities, such as corporations and trusts and officeholders, can authenticate only through real persons who do so in a legally acceptable and authorized manner.

C. Worth of the Paper in Money

It must not be necessary for a holder to employ a computer or mathematician to determine how much money he will receive when the instrument is paid. The sum payable must be certain—i.e., readily ascertainable from the face of the instrument.\(^1\)\(^8\) Nothing prevents terms which add to or decrease that sum, such as interest or prepayment rebates, so long as the amount remains ascertainable.\(^1\)\(^9\)


15. U.C.C. § 3-104(1)(d), 3-110.
16. U.C.C. § 3-111.
17. U.C.C. § 1-201(39).
18. U.C.C. § 3-104(1)(b).
19. U.C.C. § 3-106.
Payment of *money*, whether foreign or domestic, is the essential obligation; "payment" in goods, services, or other property is not acceptable.

**D. When Payment Can Be Obtained**

One taking an instrument wants to know not only how much it is worth, but also when it is payable. Thus, an instrument must be payable either on demand (that is, any time after its issuance) or at a definite, that is, a specific date or one measurable by the terms of the instrument on which in all events payment will be made.\(^{20}\) If the instrument states a definite time, it may also contain terms allowing the holder to demand payment earlier or to grant additional time.\(^{21}\)

If the instrument states no maturity date, it is payable on demand.\(^{22}\)

**E. Certainty of Payment Without Irrelevant or Extraneous Hindrances**

For an instrument to be transferred freely with each transferee giving something of worth for it, it cannot require that the holder investigate obligations and events other than the obligations to pay contained in the instrument itself. As the statute says, the promise or order must be "unconditional" and singular.\(^{23}\) Language or terms having to do with other obligations, or which are explanatory of the underlying transaction or the source of payment, do not necessarily affect the promise or order.\(^{24}\) On the other hand, obligations subjected to extraneous agreements or restricted to sole sources of payment are clearly beyond the pale of "unconditional."\(^{25}\)

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23. U.C.C. § 3-104(1)(b).

24. U.C.C. § 3-105.

25. U.C.C. § 3-105(2).
III

IMPORTANCE OF FORM: GUIDELINES FOR INTERPRETATION

A. "Strict" or "Liberal" Construction of Section 3-104

Whether an instrument is within the scope of Article 3 is wholly a matter of form.\(^2\) If any of the requisites of Section 3-104 are lacking, Article 3 does not apply in any litigation involving the instrument.\(^2\)\(^7\) The applicability of Article 3 must be determined from the instrument itself, without reference to other documents or oral agreements. The "four-corners test" is still applicable: the determination of negotiability under Article 3 must be made by inspecting only the instrument itself.\(^2\)\(^8\)

Form has always played an important role in the law of negotiable instruments. Initially, form was used to avoid the medieval restrictions on assignability. With the development of the law of assignments, the form of negotiable instruments took on a different significance. Since the law gave special qualities to some, but not all, promises and orders, it was necessary to be able to tell exactly which promises and orders acquired those qualities. This is one of the functions that the requisites of negotiability now perform. This function is most dramatically illustrated by the requirement that the promise or order must run either "to bearer" or "to order." Although the distinction between order paper and bearer paper is important,\(^2\)\(^9\) a primary function of this requirement is as a signal of what constitutes negotiable paper. The law could just as well say that paper, to be negotiable, "must be printed on red or green paper."

Another purpose of form at the present time relates to the choice of the types of promises that will be endowed with the special attributes of negotiability. It has been frequently said that only paper that is readily transferable in the marketplace should be negotiable, and that this is the rationale behind most of the present requirements

\(^{26}\) "It will be noted that the formal requisites of negotiability (§ 3-104) go to matters of form exclusively.... " Official Comment 2 to U.C.C. § 3-103. See also, Associates Discount Corp. v. Elgin Organ Center, Inc., 375 F.2d 97, 4 U.C.C. Rep. 36, (7th Cir. 1967), Annot. Willier & Hart, U.C.C. Reporter-Digest § 3-403, A14.

\(^{27}\) Unless, of course, the element lacking is words of negotiability, e.g., "to order" or "to bearer," in which case the Article does apply but no one can become a holder in due course. See § I supra.

\(^{28}\) This is clear from the mandatory language of § 3-104, and from the following language from the Official Comment to § 3-105 found under the heading "Purposes of Changes:" "The section is intended to make it clear that, so far as negotiability is affected, the conditional or unconditional character of the promise or order is to be determined by what is expressed in he instrument itself...."

\(^{29}\) The distinction goes to the manner in which the paper must be transferred by the payee.
For example, it is argued that only if the sum to be paid is certain and clearly ascertainable from the instrument are businessmen likely to buy the paper, and the paper should be negotiable only if there is this likelihood. Thus, we have the requirement that the instrument state a sum certain.

The requisites of negotiability found in the Code and in the prior Uniform Negotiable Instruments Law are not necessarily compelled by reason. They represent a policy choice by the draftsmen and legislatures as to what type of promises and orders are to be given the attributes of negotiability. Essentially, by stating the necessary elements of negotiability, the draftsmen of Article 3 have determined the situations in which good faith transferees are given greater rights than their transferor had. The decision could have been to permit all assignees to take free of defenses and of adverse claims, or negotiability could have been restricted more than it has been under the Code.

Courts, in interpreting Section 3-104 and the explanatory sections that follow, will continue to make policy decisions by expanding or contracting the boundaries of negotiability. The factors that influence courts are, however, different from those affecting the legislature.

The draftsmen’s basic premise underlying Article 3 is clear: only those instruments that are readily transferable in the marketplace are negotiable. The value of the instrument, assuming the solvency and willingness to pay of the obligor, must be ascertainable from the face of the instrument; the time that payment can be demanded must be clear, and the promise or order must not be conditional. These, and the other attributes of negotiability, effectively forward this policy. Just how certain the sum must be, or exactly what constitutes a conditional promise, must be determined on a case-by-case basis. In deciding these cases, courts should attempt to follow the policies of the statute.

Whether a “strict” or “liberal” approach should be adopted by the courts is a spurious question, and it is difficult to suggest any broad approach to the correct statutory interpretation of the applicable sections. Courts must balance the basic Code mandate that the Act be liberally construed and applied to “permit the continued expansion of commercial practices through custom, usage, and agreement of the parties” with the limited purpose of negotiability that is dictated by Article 3. Business practices are not to be burdened, but

30. Perhaps the most famous statement is found in Carlos v. Fancourt, 5 Term Rep. 482 (1794). See § IV for a discussion of this case.
31. U.C.C. § 1-102(2)(b).
there must be a showing that the instrument under consideration is consonant with the rationale for making instruments negotiable.

Two narrower considerations should be applied by the courts. First, the reason for including the particular requisite, and its application to the general purposes of the Code and negotiability should affect the court’s decision. Second, in some, if not most cases, it is important to take into account the reason that the questionable clause was included in the instrument.

B. Importance of the Situation Giving Rise to the Use of the Instrument

The question of whether an instrument is negotiable within the meaning of Article 3 arises only in a limited number of situations. Competent lawyers advising businessmen have no difficulty drafting documents that meet the requirements of negotiability. The use of standardized forms, with little variation across the country, also tends to minimize problems.

One situation leading to a question of negotiability arises where there is a business reason for including a clause that renders the negotiability of the instrument doubtful. For example, in Universal C.I.T. Credit Corp. v. Ingel, the issue was whether a note stated a sum certain when it included a cause providing that it was to bear interest after maturity “at the highest lawful rate.” Apparently, the note was drafted for use in several states where the highest interest rate might differ, and the clause was convenient from a business standpoint.

Excluding those cases where grossly incompetent professional draftsmanship was the cause, the only other situation that frequently raises the question of negotiability involves “homemade” notes which are usually given in a noncommercial context.

The reason that the note was not drafted so as to avoid any question of its negotiability is important in the decision of cases. Where there is a legitimate business purpose for exclusion of the questionable clause, courts should strive to interpret the instrument and construe the Code in favor of negotiability. Section 1-102(2)(b) dictates that the Code is designed to promote new business practices and not to restrict commercial developments. Nothing in Article 3 contradicts that basic mandate.\footnote{32. 347 Mass. 119, 196 N.E.2d 847 (1964), Annot. Willier & Hart, U.C.C. Reporter-Digest § 3-104, A2. The case is discussed in § XII[1] infra. 33. The intent of those closest to the Code is indicated by the amicus brief filed by the Permanent Editorial Board in Universal C.I.T. Credit Corp. v. Ingel, 347 Mass. 119, 196 N.E.2d 847 (1964). The Board argued that the note in question should be held negotiable as July 1971}
Where an instrument is drafted by one of the parties to a non-commercial transaction, there is no reason to favor negotiability. It is unlikely that in a private loan transaction either of the parties has any thought that the instrument is to have the affects associated with negotiable instruments. Litigation over such transactions should not affect the growth and development of commercial law, and decisions should be made in these cases as automatically as possible. Where, in fact, the parties do execute an instrument that clearly meets all of the requirements of negotiability, then the instrument must be considered negotiable; but in the case of doubt or ambiguity, the instrument should be denied negotiability.

There is little danger that this will frustrate the expectations of the individuals. The only difficulty that can arise from such an approach is that courts will use decisions restricting the scope of Article 3 in cases between individuals dealing in a nonbusiness context as authority that a like approach is to be taken where the instrument is within a commercial setting. However, the demonstrated ingenuity of courts in avoiding similar but different precedents makes this unlikely.

C. Omission of Section 10 of the Uniform Negotiable Instruments Law

Section 10 of the Uniform Negotiable Instruments Law provided that:

Terms When Sufficient.—The instrument need not follow the language of this act, but any terms are sufficient which clearly indicate an intention to conform to the requirements thereof.

There is no comparable section in the Uniform Commercial Code. Official Comment 5 to Section 3-104 explains the omission in the following way:

This Article omits the original Section 10, which provided that the instrument need not follow the language of the act if it ‘clearly indicates an intention to conform’ to it. The provision has served no useful purpose, and it has been an encouragement to bad drafting and liberality in holding questionable paper to be negotiable. The omission is not intended to mean that the instrument must follow the language of this section, or that one term may not be recognized as clearly the equivalent of another, as in the case of ‘I undertake’ instead of ‘I promise,’ or ‘Pay to holder’ instead of ‘Pay to bearer.’ It does mean that either the language of the section or a clear

the questionable clause did not adversely affect the transferability of the instrument prior to default. This case is discussed more fully in § XI[1] infra. See also, United Milk Prod. Co. v. Lawndale Nat'l Bank of Chicago, 392 F.2d 876, 5 U.C.C. Rep. 143 (7th Cir. 1968), in which a letter and a telegram were held sufficient as a check under § 3-104(2)(b).
equivalent must be found, and that in doubtful cases the decision should be against negotiability.

It is doubtful whether any significance should be given to the omission of U.N.I.L. Section 10. Under the U.N.I.L., it is conceivable that a note could have been made negotiable simply by stating on it "This note is negotiable," on the ground that the parties thereby "clearly indicated an intention to conform" to the act, but courts rejected this argument. Under the Code, the result would be the same. 34

In other cases where the former Section 10 might be persuasive, such as where the word "promise" is not used but some other term that has the same meaning, it would also seem that the Code would not change the law. In many instances, the Code specifically sanctions "substitute" language, such as the use of "assigns" instead of "order" for words of negotiability. 35 Where the language of the Code is not so explicit, negotiability still is unaffected so long as the words used are "clearly equivalent" to that of the Code.

There is no doubt, however, that Comment 5 to Section 3-104 does indicate that close decisions should go against negotiability. However, this must be viewed in light of the policy adopted by the draftsmen of Article 3 limiting its scope to paper that is in fact transferred freely in the business community. Where the instrument is of this sort, there is no reason for treating the note or draft any differently from the way in which businessmen treat it if it essentially meets the tests of the Article.

The argument is sometimes made that certainty in the law of negotiability is essential and that decisions holding questionable instruments negotiable destroy certainty. 36 In actual fact, there is little to support this position except that it sounds correct. The lawyer does have to be able to draft an instrument that is clearly negotiable, but this is relatively easy under the Code as it was under the U.N.I.L. As long as the draftsman does not approach the border of the doubtful zone, he can be assured that the instrument will be treated as negotiable by the courts. But there is always an area where the result is difficult to forecast, no matter how well the statute may have been drafted. A rule that in all cases of doubt the court will rule against negotiability is no different from a rule that in all cases the court will hold in favor of negotiability, and neither rule has much

35. See Official Comment 1 to U.C.C. § 3-104.
36. U.C.C. § 3-110.
37. See Britton, Bills and Notes § 11 (2d ed. 1961).
use or persuasive force. Neither adds to predictability or certainty. The only possible approach under the common-law system is to take each case as it arises and to strive for results that are consistent with the policy of the various Code rules, advance the basic Code principles, are in furtherance of legitimate business practices, and reflect the reasonable expectations of the parties.

IV

NEGOTIABILITY BY CONTRACT OR ESTOPPEL

The English Bill of Exchange Act was the original codification of the laws governing negotiable instruments. It covered only checks, drafts, and notes, leaving other commercial instruments within the domain of the common law. When the Uniform Negotiable Instruments Law was first enacted, its authors took the position that it was similar to the English act in scope, but it was not so limited by its language and courts soon began applying it to any case in which the question of negotiability was in issue. However, there were strong arguments for negotiability by contract under the U.N.I.L.

The approach of the Code is the opposite of that taken by the U.N.I.L. Section 3-104 states that “Any writing to be a negotiable instrument within this Article” (emphasis supplied) must meet certain requirements. Articles 7 and 8 also deal with “negotiable” instruments, and the Official Comments to Section 3-104 clearly state that it was the intent of the Code draftsmen to permit parties and courts to attach the attributes of negotiability to instruments that come within none of the Code Articles.

Official Comment 2 to Section 1-102 states that:

[T]he Code seeks to avoid the type of interference with evolutionary growth found in Manhattan Co. v. Morgan, 242 N.Y. 38, 150 N.E. 594 (1926). Thus private parties cannot make an instrument negotiable within the meaning of Article 3 except as provided in Section 3-104; nor can they change the meaning of such terms as ‘bona fide purchaser,’ ‘holder in due course,’ or ‘due negotiation,’ as used in the Act. But an agreement can change the legal consequences which would otherwise flow from the provisions of the Act.

And, Comment 1 to Section 3-104, in discussing the nonnegotiability of instruments payable in commodities, states:

Even if retention of the old statutes [providing for the negotiability of such paper] is regarded in any state as important, amendment of this section may not be necessary, since ‘within this Article’ in sub-

39. See § 1, n. 1, supra.
40. See Beutel, Negotiability by Contract, 28 Ill. L. Rev. 205 (1933).
section (1) leaves open the possibility that some writings may be made negotiable by other statutes or by judicial decision. The same is true as to any new type of paper which commercial practice may develop in the future.

Official Comment 2 to the same subsection also deals with this question:

While a writing cannot be made a negotiable instrument within this Article by contract or by conduct, nothing in this section is intended to mean that in a particular case a court may not arrive at a result similar to that of negotiability by finding that the obligor is estopped by his conduct from asserting a defense against a bonafide purchaser. Such estoppel rests upon ordinary principles of the law of simple contract; it does not depend upon negotiability, and it does not make the writing negotiable for any other purpose. But a contract to build a house or to employ a workman, or equally a security agreement does not become a negotiable instrument by the mere insertion of a clause agreeing that it shall be one.

The approach of the Code has been severely criticized by one writer: "The proposal to reject uniformity as a national goal is an invitation to scatter some or all of the aspects of negotiability upon a variety of nonconforming instruments, thereby increasing the area of uncertainty in the law, rendering it more unpredictable and stimulating needless litigation."1

Such criticism harks back to an old English case, Carlos v. Fanscourt,42 which has had a considerable influence on the concept of negotiable instruments for the past two centuries. In the Carlos case, Lord Kenyon and Judge Ashhurst both attempted to explain why an instrument must meet certain formalistic requirements which have become the formal requisites of negotiability under Article 3:

Lord Kenyon: 'It would perplex the commercial transactions of mankind, if paper securities of this kind were issued out into the world encumbered with conditions and contingencies, and if persons to whom they were offered in negotiation were obliged to enquire when these uncertain events would probably be reduced to a certainty.'

Judge Ashhurst: 'Certainty is a great object in commercial instruments; and unless they carry their own validity on the face of them, they are not negotiable: on that ground bills of exchange, which are only payable on a contingency, are not negotiable, because it does

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2. 5 Term Rep. 482 (1794).
not appear on the face of them whether or not they will ever be paid.

'The same rule then that governs bills of exchange in this respect must also govern promissory notes.'

Lord Kenyon attempted to express a rationale for his rule. His statement, however, is not valid. No one is ever required to purchase an instrument, whether or not it is clear on its face when it is to be paid, how much is to be paid, etc. If one wants to purchase a bill that is payable only on a contingency, why should he be discouraged from doing so by a rule that makes the instrument nonnegotiable? Lord Kenyon does not face this question.

The argument of Lord Kenyon and others who simply said that negotiable instruments must be like "couriers without luggage" should be ascribed to the Code draftsmen in only a very limited sense. The approach of the Code is different from that of the U.N.I.L. The premise of Article 3 is that the attributes of negotiability are to be given only to paper that is in fact commonly transferred in the business community. Since paper that is conditional, or whose value is not clear from its face, does not normally circulate, it should not be considered "commercial paper" under Article 3. But the real question in any litigation is not whether an instrument is negotiable or "commercial paper." It is whether the plaintiff or defendant should prevail under the circumstances of the transaction, and this will depend upon the rights and obligations imposed by the law. In many, if not most cases, the ultimate issue is whether an alleged defense can be raised by the defendant or whether he is precluded from doing so by virtue of the plaintiff's position as a good faith purchaser. This issue can be hidden from view by letting it depend solely upon whether the instrument meets the requirements of a statute, but there is no guarantee that this will render the law any more certain or decrease litigation. In fact, it may have just the opposite effect, for it would force the courts to stretch and strain the statutory language to find negotiability under the statute where the equities of the case were clearly with the plaintiff.

The law could take the position that defenses are cut off whenever property is transferred to a good faith purchaser. Neither the common law nor any of the Code Articles go that far. Such a position is probably unwise. Certainly, there is no need for Article 3 to go that far. Its purpose is simply to provide a convenient method by which the commercial community can create a money substitute.\(^4\)\(^3\) Once it

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43. "To the argument that this will destroy uniformity, the author would reply, at the risk of oversimplification, that all needs of uniformity are met if a central core of uniformity exists. With such a core, the lawyer representing a client with multi-state or even
has accomplished this goal it has served its purpose, and it need not, and should not, prohibit parties from so arranging their deal as to accomplish some of the same purposes. Except perhaps for situations involving contracts of adhesion, no purpose is served by restricting an individual's freedom to waive his right to assert defenses as against a subsequent transferee.\textsuperscript{44}

Likewise, there is no advantage in restricting the courts from using the well-developed principle of estoppel in appropriate cases to accomplish results similar to those worked by the statute. The most significant jurisprudential accomplishment of the Uniform Commercial Code is its approach to the problem of drafting statutes for use in a common-law country. It is truly a "common-law code" designed for use in a society that has a tradition of case-made law. It is a statute designed to complement, and to be complemented by, decisional law, and Article 3 reflects this approach. It provides for certainty where it is needed, giving to the lawyer a method of accomplishing the results of negotiability without fear that a court will upset his plans. It leaves to the courts the settlement of cases where the parties have not so provided in the documents they used, but where circumstances indicate that similar results are desirable.

V

IN WRITING

The Code definition\textsuperscript{44,5} of "written" is capable of some rather unusual interpretations. For example, the catchall phrase "or any other intentional reduction to tangible form" could include recordings of various types and information electronically stored. It is unlikely, however, that there will be much difficulty with this requirement in practice. Where doubt exists as to whether there is a writing, the better rule is to hold that no negotiable instrument, as defined by Article 3, exists. There is a definite policy to include within this international operations can devise an instrument clearly negotiable anywhere." Leary, Article 3 Commercial Paper, Uniform Commercial Code Handbook 87, 91 (1964).

44. Article 9 specifically provides for one of the attributes of negotiability where the parties so provide. Section 9-206 states: "Subject to any statute or decision which establishes a different rule for buyers or lessees of consumer goods, an agreement by a buyer or lessee that he will not assert any claim or defense which he may have against the seller or lessor is enforceable by an assignee who takes his assignment for value, in good faith and without notice a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under the Article on Commercial Paper (Article 3)."

45. "'Written' or 'writing' includes printing, typewriting or any other intentional reduction to tangible form." U.C.C. § 1-201(46). This definition is broader than that of the U.N.I.L. which stated that "'Written' includes printed, and 'writing' includes print." U.N.I.L. § 191.
Article only those instruments which are likely to circulate freely, and it will almost certainly follow that an instrument will not be transferable in the ordinary sense where there is a question of whether it is in writing.

Unusual cases, generally hypothetical, such as writings on a cake of soap, on a cow, or on one’s shirt are useful for instructional purposes, but pose no real problem in the commercial world. If, perchance, such “instruments” were to find their way into litigation, they should be held to be outside Article 3 because they serve no function as commercial paper.

Section 1-201(46) does specify that writing includes printing and typewriting. There is no question but that writing also includes duplicated instruments of any sort, e.g., mimeographed, offset, engraved. There is no requirement that the writing be permanent or indelible, and an instrument written in pencil or other erasable form is sufficient.

Tangential problems may arise in connection with the use of data processing equipment. At the present stage of this development, there is a question whether the numbers imprinted on a check for sorting and routing purposes are a part of the instrument. It is conceivable, for example, that a depositor could have two accounts in the same bank, each of which would be assigned different account numbers. In one account he may have a sizable balance, in the other little money. If he draws a check using an instrument imprinted with the number representing the account with little money, which would overdraw that account but which would not overdraw the other account, there is a question of whether the bank should pay the check from the depositor’s other account. If the data processing number is a part of the writing number, the bank should not pay as the order would be for payment out of that account only.

In such cases, the number should not be considered a part of the instrument any more than the bank’s identification number and the routing code symbol which are also contained on checks. The imprinted number is clearly a “reduction to tangible form” of information, but there is no indication that the customer had the intent to adopt it as part of his writing. The number is for the convenience

46. See §§ III, IV supra.
48. As a humorous protest, a taxpayer in Albany, New York, attempted to pay his federal income taxes with a check drawn on his shirt. His explanation was that they were taking everything else he had so they might as well get the shirt off his back.
50. A contrary holding might render all checks so imprinted nonnegotiable as it would mean that they are drawn against a particular fund. See § IX [4] supra.
of the bank, and the check is a simple unconditional order on the bank.

As the use of computers becomes more sophisticated, it is conceivable that the written check will be partially displaced by remote computer units capable of crediting and debiting accounts at the banks. A businessman may be able to pay his bills by pressing the correct keys without leaving his office or store. Assuming this occurs, it is unlikely that Article 3 in its present form will be satisfactory in settling disputes.

VI

SIGNED BY THE MAKER OR DRAWER

"Signed" is defined in Section 1-201(39) as including "any symbol executed or adopted by a party with present intent to authenticate a writing." The Official Comment clearly states that a complete signature is unnecessary, and that the symbol may be printed, typed, or written. The general definition of "signed" is supplemented by Section 3-401(2) which states that a signature may be made by the use of "any name, including any trade or assumed name . . . or by word or mark used in lieu of a written signature."

Both of these sections lead to the conclusion that the signature requirement of negotiability is easy to satisfy and that no particular format is prescribed by the Code. Some caution is required, however, in applying these sections. The definition found in Section 1-201(39) is drafted for use in many situations. It applies to all ten Articles of the Code and cases interpreting it for the purpose of one Article are not necessarily useful in relation to cases arising out of another Article. Section 3-401(2), although within Article 3, is aimed primarily at determining when one becomes liable, not whether the instrument is negotiable.

In deciding whether an instrument is signed for the purpose of satisfying this requirement of negotiability, the test should be whether it appears from the face of the instrument that someone undertook to assume the liability of a maker or drawer. An important consideration under Section 1-201(39) is whether the party using the symbol intended to authenticate the writing. Objective intent governs, and where the issue is whether the instrument is

51. A system presently being contemplated would employ the telephone as a remote unit. See Next Stop in Banking: Pay Bills by Phone, Bus. Week, Nov. 13, 1965, at 82.
52. Suggested changes in the Code that would bring at least some of its provisions into use were such a system employed are contained in a recent article, Dunne, Variations on a Theme by Parkinson or Some Proposals for the Uniform Commercial Code and the Checkless Society, 75 Yale L.J. 788 (1966).
53. See also Official Comment 2 to U.C.C. § 3-401: "It may be made by mark, or even by thumbprint."
negotiable, only the intent evidenced by the instrument itself is relevant. For the instrument to be within Article 3, the symbol alleged to constitute a signature must be so written and situated on the instrument as to demonstrate that it was adopted as a signature. Section 3-402, and especially the Official Comment thereto, supports this position although it deals with another question. Where the type of liability assumed by a signor comes into issue, parol evidence generally is not admissible to show the capacity.\(^5\)\(^4\) There is even less reason for allowing parol evidence to show the signor's intent on the question of negotiability.

Official Comment 2 to Section 3-401 states that “Parol evidence is admissible to identify the signor, and when he is identified the signature is effective.” This Comment applies when the question is who is liable, i.e., who adopted a symbol or mark which does not on its face identify any one individual. Evidence extrinsic to the instrument should not be admitted to determine whether the instrument is negotiable.\(^5\)\(^5\)

If a name or other mark appears in the lower right-hand corner of an instrument containing the other requisites of negotiability, the instrument is clearly negotiable, even though the alleged maker or drawer denies that he ever signed it or that he intended to authenticate it by the adopted mark.\(^5\)\(^6\) He can, of course, raise forgery or fraud in the execution as a defense, but this is a question separate from the issue of negotiability.

Instruments that are not subscribed have the potential of causing the most trouble. The Official Comments to both Sections 3-401 and 1-201(39) evidence an intent by the draftsmen to continue the pre-Code rule that a signature need not be subscribed, at least for the purpose of imposing liability.\(^5\)\(^7\) The example used by the Comment, “I, John Doe, promise to pay—” is common. The Comment does not require a decision in all cases that the instrument is negotiable when in this form, and although the inclusion of the name “John Doe” satisfies the requirement that an instrument be signed in many cases, it does not in others. For example, if the instrument is wholly type-written and there is a signature line in the normal position which has

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54. U.C.C. § 3-402. The Official Comment states that the section is designed to provide that “any ambiguity as to the capacity in which a signature is made must be resolved by a rule of law that it is an endorsement. Parol evidence is not admissible to show any other capacity, except for the purpose of reformation...”

55. See Official Comment 8 to U.C.C. § 3-105.

56. See New Waterford Bank v. Morrison Buick, Inc., 38 D.&C.2d 371, U.C.C. Rep. 426 (Lawrence County Ct., Pa., 1965), Annot. Willier & Hart, U.C.C. Reporter-Digest § 3-304, A5, in which a check with two signature lines but only one signature was held negotiable.

57. This is in accord with pre-Code caselaw. See, e.g., Donohoe's Estate, 271 Pa. 554, 114 A. 878, 20 A.L.R. 392 (1922).
not been completed, the instrument should be held to be non-negotiable. If, on the other hand, a typewritten instrument contained no place for a subscribed signature, and the name of "John Doe" was inserted in handwriting, the instrument is "signed" for the purposes of Section 3-104.\(^5\)\(^8\)

The Official Comment to Section 1-201(39) indicates that a signature may be found in a letterhead or billhead. This question arises most frequently where a writing is necessary to satisfy statute of fraud sections in other Articles of the Code, and it was probably these cases that caused inclusion of the Comment. In the statute of fraud cases, there is good reason to stretch the concept of "signed" to permit the plaintiff to introduce proof of the alleged contract. There is no similar policy favoring an expanded definition of "signed" where negotiable instruments are concerned. A letterhead or billhead should normally not be sufficient by itself to satisfy the signature requirement of negotiability. It is unlikely that such instrument would be transferable, and there is little intent from the face of the instrument that the letterhead or billhead was intended to operate as a signature.

VII

WHO IS LIABLE

Separate from the issue of whether an instrument is negotiable, is the question of who becomes liable when an instrument is signed and the extent of that liability. The nature of the liability assumed by various parties to an instrument is discussed elsewhere. This section treats the following problems: (1) pleading and proof surrounding the authenticity of a signature; (2) the type of liability undertaken by a party signing; (3) signatures by agents; (4) the liability of forgers and agents who sign without authority; and (5) plural signatures.

No person is liable on an instrument governed by Article 3 unless his signature appears on it.\(^5\)\(^9\) Conversely, one whose signature does appear must pay according to his contract unless he can establish a defense. A signature can be made by any word or mark, so long as it was adopted by the signor to indicate his liability. A duly authorized

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59. U.C.C. § 3-401(1). As will be seen, there is one situation where this is not quite true. Where one signs another's name without authority, the signor is liable as though he signed his own name. U.C.C. § 3-404(1).
representative can sign for his principal, and if an agent with authority signs, the principal is liable just as though he himself had signed.  

When an agent signs with authority, the agent undertakes no liability, provided he indicates that he is signing in a representative capacity and discloses his principal. Where, however, an agent who has no authority to do so purports to sign for another, the agent becomes liable just as though he had signed his own name because the unauthorized signature operates as the signature of the forger.

Since there are several types of liability that one can undertake on an instrument, e.g., that of a drawer, endorser, or acceptor, it is important to determine the liability undertaken by a person affixing his signature. Where there is doubt, the Code says that a signature is to operate as an endorsement.

Often, two or more parties sign in the same capacity, e.g., as makers. Generally, under the Code, they become jointly and severally liable.

A. Necessity of Signature for Liability: Use of Mark or Assumed Name: Parol Evidence

In order for one to be liable on a negotiable instrument, his signature must appear on it. There are no exceptions to this rule under the Code, outside of the case where one signs for another without authorization. Of course, there may be liability based upon the transaction giving rise to the instrument. Thus, if a corporation obtains a benefit from a deal, the fact that one of its agents signed a note promising to pay for the benefit will not relieve the corporation from paying even though the corporation was not named by the agent. But, the liability will be based upon the underlying contract or on a count sounding in quasi-contract. Undisclosed principals can still be liable on a transaction, but not upon any instrument given by their agents as part of the deal.

61. U.C.C. § 3-403.
62. U.C.C. § 3-404(1).
63. U.C.C. § 3-402.
64. U.C.C. § 3-118(e).
65. "Nothing in this section is intended to prevent any liability arising apart from the instrument itself. The party who does not sign may still be liable on the original obligation for which the instrument was given, or for breach of any agreement to sign, or in tort for misrepresentation, or even on an oral guaranty of payment where the statute of frauds is satisfied. He may of course be liable under any separate writing. The provision is not intended to prevent an estoppel to deny that the party has signed, as where the instrument is purchased in good faith reliance upon his assurance that a forged signature is genuine." Official Comment 1 to U.C.C. § 3-401.
Under pre-Code law, a promise to accept a draft in a separate document was enforceable as an acceptance whether made before or after the draft was issued.\(^6\) "Virtual" and "collateral" acceptances no longer are enforced as acceptances under the Code.\(^6\)\(^7\) However, an attempted acceptance of the draft of the instrument is tantamount to a promise to accept and it will have much the same effect as an actual acceptance.\(^6\)\(^8\) If anyone changes his position in reliance upon the promise to accept, this will constitute consideration for the promise to accept and make it enforceable.\(^6\)\(^9\) However, the action will not be on the instrument, but upon the promise.

The definition of "signed" in Section 1-201(39) is augmented by Section 3-401(2) which provides that "a signature is made by the use of any name, including any trade or assumed name, upon an instrument, or by any word or mark used in lieu of a written signature." That the inclusion of this more detailed section in Article 3 does not preempt the general definition in Article 1 is indicated by the Definitional Cross References following Section 3-401 which refers to Section 1-201. The two definitions are compatible and Section 1-201(39) is necessary to an understanding of Section 3-401(2). In fact, the more detailed definition in Section 3-401 adds little or nothing to the general definition and the draftsmen's purpose in including it is not clear. An intent to authenticate is obviously necessary under Article 3. Section 3-401 fails to specifically require this, but Section 1-201(39) does.

Since the use of a word or mark other than the signor's own name does not identify him, parol evidence is obviously admissible to supply the connection.\(^7\)\(^0\) Where local non-Code law requires that a

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\(^{66}\) U.N.I.L. § § 134, 135.
\(^{67}\) U.C.C. § 3-410.
\(^{68}\) See U.C.C. § 3-409 and Official Comment 3 to U.C.C. § 3-410.
\(^{70}\) "Note that uncertainty as to the admissibility of parole evidence has arisen in a few cases where attempts have been made to prove that an authorized agent's signature, appearing alone on the instrument, was in reality the trade or assumed name of the principal under U.N.I.L. § 18 (N.Y.N.I.L., § 37). See Manufacturer's Bank v. Love, 13 App. Div. 561, 43 N.Y.S. 812 (4th Dep't 1897), above; and National Deposit Bank of Owensboro v. Ohio Oil Co., 240 Ky. 288, 62 S.W.2d 1048 (1933). This problem would remain; it would not be solved by the Code.\ldots\n
This leads to the rather surprising conclusion, relevant to Section 3-401(1), that whereas it is an established rule that parol evidence is not admissible to render liable on the instrument a person whose name does not appear on it, such evidence is admissible to prove that whatever does appear on the instrument—even something which might, on occasion, look like an agent's signature—is actually the person's signature in disguise, in the form of a trade or assumed name. Thus parol evidence does, after all, render him liable as a party.

While this may seem anomalous, the issue, after all, is one of fact. It is not perceived
signature by mark be witnessed or otherwise proved in a particular way, the rule prevails under the Code.\(^7\) Similarly, although neither the Code nor the Comment specifically so state, general requirements for a valid corporate signature should be the same for commercial paper. Thus, if a statute or corporate charter requires that a signature by an authorized officer be countersigned by another officer, or that the corporate seal be affixed, this would be necessary to effectuate a signature by the corporation.

Article 3 does not refer to non-Code statutes that provide a presumption of validity when signatures are sealed or witnessed although this is specifically mentioned in the Comment to Section 2-203 which discusses the use of a seal in contracts for the sale of goods.\(^7\) Such statutes would not be repealed by the general repealer section of the Code, are not inconsistent with any section in Article 3, and should be given effect. In practice, Section 3-307 will probably lead to results similar to those reached under non-Code provisions.

B. Proof Required to Establish Authenticity of Signatures

Most signatures identify a particular person, e.g., David D. Drawer, but they do not, of themselves prove that this person actually wrote the signature. Common experience, however, shows that forgeries are uncommon. The Code recognizes that contests over whether thy person actually signed his name are rare and provides: (1) if a signature is not specifically denied in the pleadings, it is admitted; and (2) where properly denied, the burden of establishing\(^7\) a signature's

that harm can result from permitting occasional incursions into the general principle stated by subsection 3-401(1) when the particular facts are such as to make out a case of trade or assumed name under subsection 3-401(2).

"There would be no change in the rule, either, that an undisclosed principal cannot, by parol evidence, be rendered liable on a negotiable instrument unless his signature—in some form or other—does appear there. Such evidence would be inadmissible to show that the payee or other holder had always understood that the agent signed merely as an agent and that the principal was liable instead." 2 N.Y. L. Rev., Comm'n Study of the U.C.C., 981 N.Y. Leg. Doc. No. 65 (1965).

71. "This section [U.C.C. § 3-401] is not intended to affect any local statute or rule of law requiring a signature by mark to be witnessed, or any signature to be otherwise authenticated, or requiring any form of proof." Official Comment 2 to U.C.C. § 3-401.

72. The seal still has some efficacy under Article 3 where the general law of the state has not abolished it. It might be argued that Section 3-307 is in conflict with state statutes giving presumptive effect to the validity of sealed signatures. Close comparison of the Code section with the particular non-Code statute in question is necessary to make a final determination.

73. "'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 non-existence." U.C.C. § 1-201(31).
authenticity is on the party claiming under it, but there is a presumption\textsuperscript{74} of its authenticity.\textsuperscript{75}

A general denial by a defendant will not put into issue the authenticity of his alleged signature, but a specific denial “on information and belief” will.\textsuperscript{76} The validity of a signature may also be put into issue by denying “information sufficient to form a belief” provided that local rules of procedure permit this. \textsuperscript{77} An answer omitting a specific denial may be amended to include a denial, again assuming that this is proper under local procedure.\textsuperscript{78}

The only effect of a defendant’s failure to deny the authenticity of a signature is to admit that he, or his authorized representative, did in fact write his name. Admission of the authenticity of a signature, or the failure to deny it, does not prevent a party from raising the defense that the signature was procured by fraud. That is a separate defense, which assumes that the defendant did in fact sign his name. However, where the defendant intends to claim that the signature was made by an agent who exceeded his authority, this defense would be lost unless specifically pleaded as it is grounded upon the effectiveness of the signature to bind the defendant.

Once the authenticity of a signature is put into issue by a proper denial, the burden of establishing it is on the plaintiff, but the signature is presumed to be genuine except where the defendant is dead or incapacitated at the time proof is required. “Burden of establishing” a fact and “presumption” are both defined in Section 1-201, and Official Comment 1 to Section 3-307 attempts to explain the practical effect of these terms. It states:

‘Burden of establishing’ is defined in the definitions section of this Act (Section 1-201). The burden is on the party claiming under the signature, but he is aided by the presumption that it is genuine or authorized stated in paragraph (b). ‘Presumption’ is also defined in this Act (Section 1-201). It means that until some evidence is introduced which would support a finding that the signature is forged or unauthorized the plaintiff is not required to prove it is authentic. The presumption rests upon the fact that in ordinary experience

\textsuperscript{74} “‘Burden of establishing’ a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its non-existence.” U.C.C. § 1-201(8).

\textsuperscript{75} U.C.C. § 3-307.

\textsuperscript{76} U.C.C. § 3-307(1). “The purpose of the requirement of a specific denial in the pleadings is to give the plaintiff notice that he must meet a claim of forgery or lack of authority as to the particular signature, and to afford him an opportunity to investigate and obtain evidence.” Official Comment 1 to U.C.C. § 3-307.

\textsuperscript{77} Official Comment 1 to U.C.C. § 3-307. See Betsos, \textit{Modern U.C.C. Litigation Forms}, 4 Bender’s U.C.C. Serv. § 3-307, Form 1.

\textsuperscript{78} Official Comment 1 to U.C.C. § 3-307.
forged or unauthorized signatures are very uncommon, and normally any evidence is within the control of the defendant or more accessible to him. He is therefore required to make some sufficient showing of the grounds for his denial before the plaintiff is put to his proof. His evidence need not be sufficient to require a directed verdict in his favor, but it must be enough to support his denial by permitting a finding in his favor. Until he introduces such evidence the presumption requires a finding for the plaintiff. One such evidence is introduced the burden of establishing the signature by a preponderance of the total evidence is on the plaintiff.

If the defendant takes the stand and denies that he signed the instrument, or that his agent was authorized to sign for him, this would be sufficient proof to "support" a finding in his favor and the case should go to the jury on the point. The question of the defendant's credibility would be for the jury to decide, but if they believed him, and no evidence on this issue were presented by the plaintiff, the defendant should prevail. Since the presumption has been "overcome" it is of no significance and should not be mentioned in the jury instruction. In fact, from the Code definition of "presumption" and "burden of establishing," the jury instruction should simply be, "If you believe the defendant's testimony that his signature was not authentic, you must find in his favor."

Where the plaintiff rebuts the defendant's evidence and brings forward his own proof that the signature is authentic, the Code definition of "burden of establishing" sets out this burden of proof: The plaintiff must persuade "the trier of facts that the existence of the fact is more probable than its non-existence." This may be somewhat different than the burden of proof normally required by most jurisdictions in civil suits, since the instructions are usually phrased in terms of "the preponderance of the evidence." The Code standard should be adopted in the appropriate cases. This will mean that judges should charge in these cases that "it is the duty of plaintiff to persuade the jury that it is more probable that the signature was that of the defendant than that it was not" instead of telling them that "the plaintiff must establish by a fair preponderance of the evidence that the signature was valid."

C. Type of Liability Assumed by Signature

Assuming the authenticity of a signature, a dispute may arise as to the type of liability the signing party assumed, e.g., whether he is a maker, drawer, acceptor, or endorser. Section 3-402 provides that one undertakes the liability of an endorser unless the instrument clearly indicates that the signature was made in some other
capacity. Since the instrument must show a contrary capacity, parol evidence is not admissible, even as between the parties, to explain the intended liability of the signor. However, the Official Comment states that usage and custom may be used to explain the parties' intent.

A signature in the lower right-hand corner of a note or draft normally is a clear indication that the signor is liable as maker or drawer. This is due to custom and usage for there is no Code rule to that effect. Similarly, if the local custom is for a drawee to simply write his name across the front of a draft to signify his acceptance, this should be recognized.

The exclusion of parol evidence contributes to the certainty of the obligations represented by a negotiable instrument; however, when the rule is applied in litigation between the immediate parties to the instrument, it may result in decisions that are apparently unjust. If, for example, the defendant has signed on the rear of the instrument, evidence could not be introduced to prove that he had agreed to be liable the same as a maker, and if the plaintiff-payee failed to make a proper presentment or to give notice of dishonor, the defendant would be discharged not only on the instrument but also upon the underlying obligation. This seems unfair, but it is no more so than other results reached by application of the parol evidence rule to written contracts. Since negotiable instruments are one of the most formal types of contracts, the undesirable result that may be reached in a very few cases should not be allowed to override the more important policy of certainty.

When there is an attempt to hold someone as a drawer or maker when he has signed in such a way to indicate that he is an endorser, this amounts to an attempt to add a waiver of presentment and notice to his signature. The plaintiff's argument, in effect, is that the signor guaranteed payment. The addition of this element to the obligation implied by the law to his signature because of a parol promise is directly contrary to the normal operation of the parol evidence rule. Section 3-416, which distinguishes the contract of a guarantor and imposes different liability upon him, also shows a statutory scheme for determining liability only from the appearance of the instrument and the language contained therein.

Location of the signature may not be the sole determinant of the

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80. See Official Comment to U.C.C. § 3-402.
81. See, e.g., In Re Ciccantelli, 5 U.C.C. Rep. 735 (U.S.D.C., E.D. Pa. 1968), wherein the position of certain signatures, together with a printed legend on the instrument, were determinative of the type of liability undertaken by those who signed.
signor's liability. If, for example, three signatures appeared in the lower right-hand corner of a note, and under two of the signatures, the word "maker" was placed, the third signor should be held to be an endorser. Since the liability of two parties is clearly indicated, this creates an ambiguity as to the third person's liability. Also, if a note reading, "I, Mike Maker, promise to pay" were signed by Mike Maker and another in the lower right-hand corner, the other signor should be held to be an endorser as the body of the note causes his signature to be in an ambiguous capacity.

D. Plural Signatures

When two or more parties sign an instrument in the same capacity and as part of the same transaction, they are jointly and severally liable unless the instrument otherwise specifies. If this rule is to be varied, it should be done so clearly. Section 3-118(e) specifies that the rule applies even though the body of the instrument "contains such words as 'I promise to pay.'" It seems clear that where the instrument contains the words "We promise to pay," the parties are also jointly and severally liable.

Successive endorsers are severally and not jointly liable. In some cases, this would be true even though they both signed to effectuate the same transaction. For example, if the payee wished to have his check cashed at a friend's bank and they both endorsed, the payee to effectuate the transfer and his friend as surety, they should not be held jointly liable. Where, however, an instrument is payable to two or more payees, and all sign the instrument to transfer it, the apparent meaning of the Code is that they are jointly and severally liable even though the signatures were made at different times. This would be the result regardless of whether the payees were designated


84. U.C.C. § 3-414(2): "Unless they otherwise agree endorsers are liable in the order in which they endorse, which is presumed to be the order in which their signatures appear on the instrument."
in the alternative if they both did in fact sign to transfer the instrument.

VIII
ORDER OR PROMISE TO PAY

Only instruments promising or ordering the payment of money come within the scope of Article 3. This is a rather substantial restriction as it removes from the scope of the Article instruments that either simply acknowledge the existence of a debt or request that a third party advance funds. The restriction is arbitrary, but indicative of the general Code policy of including within the ambit of Commercial Paper only those items which circulate as a money substitute in normal commercial channels. Although an IOU can in fact be transferred by assigning the obligation that it represents, this is not frequently done in the business community.

A. Order to Pay

An order to pay is defined as a direction to pay. It must be more than an authorization or request. The distinction between a "direction" and an "authorization" or "request" will be unclear in some cases. Words of politeness, such as "please pay" should not defeat negotiability. What is required of the Code is a clear indication that the drawer is telling the drawee to pay. There must be some sense of authority in the verb used. Thus, such verbs as order, direct, command, instruct, and bid should be sufficient, whereas verbs such as ask, request, implore, adjure, beg, entreat, supplicate, plead, etc. may not be. Similarly, verbs such as authorize, empower, permit, allow, let, and commission are generally sufficient. However, the entire wording of the instrument should be given consideration and it may be clear from other words used that the verb has a different connotation. In view of the desirability of having negotiable instruments clearly identifiable, in doubtful cases the court should hold the instrument to be outside the scope of Article 3.

1. Drawee Must be Identified. The person who is to pay the instrument must be identified with reasonable certainty. Under the Uniform Negotiable Instruments Law, it has been held that an

85. See §§ 1, IV, supra.
86. U.C.C. § 3-102(1)(b): "An 'order' is a direction to pay and must be more than an authorization or request."
87. "The prefixing of words of courtesy to the direction—as 'please pay' or 'kindly pay'—should not lead to a holding that the direction has degenerated into a mere request. On the other hand informal language—such as 'I wish you would pay'—would not qualify as an order." Official Comment 2 to U.C.C. § 3-102.
88. U.C.C. § 3-102(1)(b).
instrument order in form that did not name a drawee was negotiable and that the person signing was liable as the maker of a note. Under an early draft of the Code, such a result would have been difficult to reach as an order was defined as a "clearly expressed direction to pay," and a promise was defined as a "clearly expressed undertaking." Under the present Code wording, the result of the pre-Code cases would seem to be correct. Section 3-118 gives force to this conclusion by providing that where there is doubt as to whether an instrument is a draft or a note, a holder may treat it as either. Although no promise is specifically contained in an order instrument where a drawee is not named, it would appear that the one signing did intend to undertake some liability. It seems reasonable, in light of Section 3-118, to hold him as a maker of a note as the liability of a drawer of a draft is conditioned upon the presentment and notice of dishonor. Presentment obviously cannot be made on a nonexistent drawee.

Another approach, which reaches the same result for all interests and purposes, is to hold the signor liable as a drawer, but to excuse the requirement of presentment. This tack, however, flies in the face of the specific provision of Section 3-102(1)(b) requiring that the drawee of a draft be identified.

Whether a holder can become a holder in due course of an instrument drawn in order form but lacking the name of a drawee is another question. Section 3-304(1)(a) states that a purchaser has notice destroying his status as a holder in due course where the instrument is so incomplete as to call into question its terms. An order instrument without a designated drawee would quite clearly fall into this classification.

2. Plural Drawees. An instrument may be addressed to two or more persons jointly or in the alternative, but not in succession. The conjunction "or" would operate to make an instrument drawn in the alternative. The conjunction "and" is not as clear an indication that the drawer intended that the drawees be named jointly as "and" can just as well be read to mean that payment can be demanded from either named party. Although not directly applicable, Section 3-116 and the Official Comment thereto indicates quite clearly that "and" should be construed as a designation that the drawees are joint. If the instrument is payable in the alternative, any named drawee in


90. This was true only in the 1949 study draft of the Code. See Cosway, Innovations in Articles 3 and 4 of the Uniform Commercial Code, 16 Law & Contemp. Prob. 284 (1951).

91. See U.C.C. § 3-511.
possession may negotiate, discharge, or enforce it; if the instrument is not payable in the alternative, it is considered payable jointly and all named parties must join in negotiation, discharge, or enforce-
ment. Section 3-118(e) provides that two or more parties signing undertake joint and several liability unless otherwise specified. This section should not affect decisions involving the question of whether drawees are in the alternative or joint as the issues are not analogous.

The difference between joint or alternative drawees and successive drawees turns upon the operative facts of a dishonor. If the drawees are either joint or alternate, a refusal to honor the instrument by any named drawee constitute a dishonor. If the drawees are successive, then the drawee after a dishonor by one. Until all of the named drawees refused to honor the instrument, there would be no dis-

3. Partnership, Trust, Estate, or Unincorporated Association as Drawee. It seems clear that an instrument may be drawn against a partnership, trust, estate, or unincorporated association without de-
stroying its negotiability. Section 3-105(h) indicates as much although the section was apparently written with these entities in mind as makers of notes.

4. Drawer and Drawee Same Person. A draft may be drawn by the drawer on himself without affecting its negotiability. When a drawer draws the instrument on himself, it is effective not as a draft but as a note. Hence, there is no requirement of presentment or notice of dishonor. In addition, the drawer may make the instrument payable to himself.

B. Promise to Pay

A promise to pay is an undertaking to pay. It must be more than an acknowledgment of an obligation. Except as indicative of a distinction between promises to pay and recognitions of obligation, the definition is not of great help. Controversy can arise over instru-
ments using language as: "I agree to pay," "I will pay," "I am obli-


93. See § VII.

94. See § IX supra.


96. U.C.C. § 3-102(1)(c).
gated to pay," etc. Cases where this question arises are usually of marginal importance to society and the development of commercial practices and a court should lean toward nonnegotiability.

C. Instruments Payable at a Bank

A promissory instrument will operate as an order instrument when made payable at a bank in those states which have adopted Alternate A of Section 3-121.⁹⁷ In states which have adopted Alternate B,⁹⁸ the fact that the note is made payable at a bank operates only as a designation of the place of payment. When Alternate A has been adopted, the instrument "is the equivalent of a draft." This means that all of the rules governing drafts are applicable.⁹⁹

IX

UNCONDITIONAL NATURE OF PROMISE OR ORDER

The usual reason given for requiring that the promise or order contained in a negotiable instrument be unconditional is that promises or orders to be performed only upon the happening of a condition are not acceptable in the commercial world as a substitute for currency.¹⁰⁰ No one has even proved this, and, in fact, whatever evidence exists is to the contrary. Every case in which the issue of whether a promise or order is conditional has been litigated represents a situation where someone has taken an instrument that is at least arguably conditional.

97. Alternative A reads as follows: "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 A has been adopted in Alaska, Conn., Del., D.C., Hawaii, Ky., Maine, Mass., Mo., Nev., N.H., N.J., N.Y., N.D., Ohio, Pa., R.I., Tex., Vt., Virgin Islands, and Wyo. 1 Willier & Hart, U.C.C. Reporter-Digest § 3-121 (State Variations).

98. Alternative B reads as follows: "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." Alternative B has been adopted in Ala., Ariz., Ark., Cal. (with variations), Colo., Fla., Ga., Ida., Ill., Ind., Ia., Kan., Md., Mich., Minn., Miss., Mont., Neb., N.M., N.C., Okla., Ore., S.C., S.D., Tenn., Utah., Va. (with variations), Wash., W.Va., and Wis., 1 Willier & Hart, U.C.C. Reporter-Digest § 3-121 (State Variations).

99. Where a note was the equivalent of a draft under § 3-121, Alternative A, payee's complaint was not insufficient for failure to allege presentment, because under §§ 3-501(2) and 3-502(1)(b) loss incurred by the maker was a matter of defense to be pleaded in the answer with the tender of assignment of the defendant's rights against the bank. County Restaurant & Bar Equip. Co. v. Shaw Mechanical Contractors, Inc., 290 N.Y.S.2d 377 (Nassau County Ct. 1968).

100. "The purpose of this requirement is obvious. Promises or orders performable only upon the happening of specified conditions or subject to discharge upon the occurrence of conditions subsequent are not suitable for general circulation." Britton, Bills and Notes, § 11 (2d ed. 1961).

"The usefulness of commercial paper would be seriously impaired if businessmen and others proposing to take such instruments in commercial transactions were driven to weigh the value of an order or promise in conditional form." Aigler, Conditions in Bills and Notes, 26 Mich. L. Rev. 471 (1928).
Actually, it is the law, and not the business community, that has placed this restriction on negotiability. The law has determined that the special attributes of negotiable paper should be reserved for unconditional promises and orders. There is, of course, some sense to this decision. It is true that the type of promise or order that is most likely to circulate as money is that which contains no condition to its payment. Such paper is the best money substitute. By requiring that the promise or order be unconditional, the law encourages the business community to make all of its money substitutes unconditional thereby decreasing the problems that arise when the happening of a condition must be proved. It also tends to exclude from the commercially oriented rules of Article 3 nonbusiness transaction where the expectations of the individuals are different from those of businessmen.

A. Implied and Constructive Conditions

Section 3-105(1)(a) provides that an instrument is not rendered nonnegotiable by the fact that it is subject to an implied or constructive condition. Thus, only express conditions affect negotiability. The purpose of the section is to remove any doubt about whether constructive conditions normally associated with contract law destroy negotiability. For example, a buyer of goods normally does not come under a duty to pay for them until and unless he receives them. His obligation to pay is "conditional" upon the seller's performance. However, if the buyer pays in advance by check, the check is not a conditional order and is negotiable.

Although the Code does not expressly cover the question, it would seem that an express condition which merely repeats a condition implied in law or fact should not destroy negotiability. Thus, if an instrument otherwise negotiable contains the language "payable only if properly endorsed," the instrument's negotiability is not affected by the legend.

B. Statement of Consideration

An instrument's negotiability is not affected by the fact that it

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101. While a check may contain an unconditional promise to pay, and thus be negotiable in form, the promise is conditional as between the parties to the contract pursuant to which the check was issued. Mansion Carpets, Inc. v. Marinoff, 24 App. Div. 2d 947, 265 N.Y.S.2d 298, 3 U.C.C. Rep. 68 (1965), Annot. Willier & Hart, U.C.C. Reporter-Digest § 2.511, A3.
contains a statement of the consideration for which the instrument was given even though the statement indicates that the consideration has not yet been furnished. This provision, in Section 3-105(1)(b), is simply an amplification of the rule just noted: Implied or constructive conditions do not affect negotiability. The Code also provides that the negotiability of an instrument is not affected by the lack of a recital of consideration.104

C. Reference to Underlying Transaction

It is fairly common to make reference in a negotiable instrument to the transaction that gave rise to the issuance of the instrument. The language used in making the reference is critical in determining whether the instrument's negotiability is thereby affected. Generally, if the reference is so made as to cause liability on the note to depend upon the underlying transaction, the promise is conditional and the instrument is nonnegotiable. Where, however, there is simply a reference to the underlying transaction, negotiability is not affected.105

Under Section 3-105, the promise or order does not become conditional if it states "that the promise or order is made or the instrument matures in accordance with or 'as per' such transaction."106 Also, language indicating that the instrument "arises out of a separate agreement" does not affect negotiability, nor does a mere reference to a separate agreement.107 In addition, an instrument may provide that it is drawn under a letter of credit without destroying negotiability.108 However, the promise is made conditional if it states that it is "subject to or governed by any other agreement."109

105. "Here again it is not difficult to state what the law is—the promise or order must be absolute and if the language of the instrument, fairly construed, amounts to making the promise or order payable only on a condition, then there is no note or bill, consequently no negotiable instrument. The chances for differences of opinion lie in the process of construction which must necessarily take into account not only the precise words used but their position in the document, their relationship to the other language therein, even, perhaps, the punctuation." Aigler, Conditions in Bills and Notes, 26 Mich. L. Rev. 471, 484 (1928). See, e.g., Anderson v. Consolidated Auto Wholesalers, Inc., 4 U.C.C. Rep. 205 (N.Y. Super. Ct., Bronx County 1967).
106. U.C.C. § 3-105(1)(b).
107. U.C.C. § 3-105(1)(c).
108. U.C.C. § 3-105(1)(d).
The fact that the words "as per" are within quotation marks in contrast to other words of the section is not overly significant. Clearly, the section indicates that it is always safe to use these specific words in referring to another document, but clearly they are not the only words that may be used without destroying negotiability. The Official Comment\(^{110}\) indicates that the reason for putting them within quotation marks stems from a definite split in the pre-Code cases as to whether these particular words operated to condition the promise.

Prior to the Code, some states placed considerable emphasis on the collocation of the clause giving rise to possible nonnegotiability. Where the questionable language, be it "as per," "subject to," or something else, appeared to qualify the promise, the instrument was held nonnegotiable. Where, however, it was so positioned on the note, or within the note, as to indicate that it did not qualify the promise, then the instrument was negotiable.\(^{111}\) There is no specific indication whether the Code has adopted or refuted this test, but the language of Section 3-105 would seem to indicate that it has rejected it. Even if it has not, it would seem clear that use of quotation marks around the word "as per" constitutes an express approval of the use of those words as a term of reference that does not destroy negotiability.

Section 3-119(2) makes it clear that the conditional or unconditional character of an instrument is to be determined from the terms of the instrument itself.\(^{112}\) It does not depend upon whether the agreement referred to is conditional. An instrument is nonnegotiable if it contains "any language which, fairly construed, requires the holder to look to the other agreement for the terms of pay-

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110. Official Comment 2 to U.C.C. § 3-105 reads in part: "The final clause is intended to resolve a conflict in the decisions over the effect of such language as 'This note is given for payment as per contract for the purchase of goods of even date, maturity being in conformity with the terms of such contract.' It adopts the general commercial understanding that such language is intended as mere recital of the origin of the instrument and a reference to the transaction for information, but is not meant to condition payment according to the terms of any other agreement." See also D'Andrea v. Feinberg, 45 Misc.2d 270, 256 N.Y.S.2d 504, 2 U.C.C. Rep. 410 (Sup. Ct. 1965), Annot. Willier & Hart, U.C.C. Reporter-Digest § 3-105, A2.


112. The Official Comment to U.C.C. § 3-105 also says as much: "The section is intended to make it clear that, so far as negotiability is affected, the conditional or unconditional character of the promise or order is to be determined by what is expressed in the instrument itself. . . ." See also Milwaukee Acceptance Corp. v. Dore, 43 Wis.2d 412, 168 N.W.2d 594, 6 U.C.C. Rep. 1065 (1969).
Hence, such pre-Code cases as *United States v. Farrington* are affirmed by the Code.

In one instance Section 3-105 does permit reference to another agreement for a term. An instrument's negotiability is not affected by a clause which "refers to a separate agreement for rights as to prepayment or acceleration." Thus, an instrument is not rendered nonnegotiable by a clause reading, "Holder has the right to accelerate payment of this instrument in accordance with the security interest under which these notes are executed." Such a clause clearly requires the holder to consult a separate document to determine whether he can accelerate payment, but it neither conditions payment nor makes the ultimate time of payment uncertain. In all events, the note will become due on the date provided in the note. At the election of the holder, it may become due sooner upon the happening of some event spelled out in the security agreement, but this need not concern one purchasing the instrument unless he wants to accelerate. Since the obligation to pay is not affected, only the time that the obligation arises, it would seem that even the use of the words "subject to" in connection with an acceleration clause in another document should not destroy negotiability. For example, a clause reading "acceleration rights of holder are subject to a security agreement of equal date" does not condition payment on the provisions of the security agreement, rather it simply "refers to a separate agreement for rights as to . . . acceleration."

If an instrument contains no provisions as to time of payment, and refers to a separate document for this term, it would be nonnegotiable. Although such a note could be considered a demand instrument, this would not be the expressed intent of the parties. Such an instrument indicates that specific payment terms have been agreed upon, but that these are in a collateral document. Since the collateral document must be examined to determine what the payment terms are, negotiability is destroyed.

### D. Reference to Particular Funds or Accounts From Which Payment is to Be Made

Under prior law a promise or order that was payable out of a

116. "If the reference . . . provides that payment must be made according to the terms of the agreement, it falls under paragraph (a) of subsection (2)" and negotiability is destroyed. Official Comment 3 to U.C.C. § 3-105.
particular fund was held to be nonnegotiable on the ground that the obligation to pay was conditioned upon the existence of the fund or source named.\textsuperscript{117} This rule has been retained by the Code which provides that "A promise or order is not unconditional if the instrument \ldots states that it is to be paid only out of a particular fund or source." Exceptions are made, however, where the instrument "is limited to payment out of the entire assets of a partnership, unincorporated association, trust or estate by or on behalf of which the instrument is issued,"\textsuperscript{118} and where the instrument is issued by a government or governmental agency or unit.\textsuperscript{119}

Pre-Code law is also followed by the Code provision which states that a promise is not made conditional where the instrument "indicates a particular fund to be debited or any other fund or source from which reimbursement is expected."\textsuperscript{120} In these situations, the theory is that there is no conditioning of the promise because payment is still due if the fund indicated does not exist.

Many of the reported cases involve a determination of whether specific language in an instrument makes the instrument payable out of a particular fund or constitutes merely an indication of the account or fund to be charged. The language of the Code is different from that of the Uniform Negotiable Instruments Law, and the change may be of importance in some cases. Under the Code, the promise becomes conditional if the payment is to be made "only" out of a particular fund. The word "only" was not used in the comparable U.N.I.L. section. It would seem that this would lead to a different result in such cases as \textit{Gendora Bank v. Davis}. In that case the court held nonnegotiable a note that contained the following recital:

This note is given in payment of merchandise and is to be liquidated by payments received on account of sale of such merchandise.

Under the U.N.I.L., the question was whether this was a "promise to pay out of a particular fund." Under the Code the issue would be whether it was a "promise to pay only out of a particular fund or source."

Although the Code allows an instrument to be payable only out of the entire assets of a partnership, unincorporated association, trust, or estate, payment is not so limited merely because the maker or drawer signs on behalf of the entity. There must be a clear limitation

\textsuperscript{118} U.C.C. § 3-105(1)(h).
\textsuperscript{119} U.C.C. § 3-105(1)(g).
in the instrument restricting payment to the assets of the partnership or association. Thus, a note signed "A.B.C. Partnership by A" is not limited to payment solely out of partnership assets. All members of the partnership are liable on the note under the rules of partnership law. Even where the note contains a clause limiting payment to the assets of the partnership, Section 3-105(1)(f) has no effect on the liability of the partners; this would be determined by the partnership law of the state. All the Code does is remove any question as to the negotiability of the instrument. Non-Code law would likewise control as to the liability of members of an unincorporated association where the instrument attempts to restrict liability.

E. Statement That Obligation Is Secured

Following the majority holding of pre-Code cases, the Code specifically provides that a statement on an instrument that "it is secured, whether by mortgage, reservation of title or otherwise," does not destroy negotiability.\(^1\)\(^2\) The only question covered by this section, however, is that of negotiability. The section does not say that a notation, "this note secured by a mortgage given by maker," makes an acceleration clause in the mortgage effective in a suit brought on the note. Whether it does is a separate question.\(^1\)\(^2\)\(^2\) The Code also provides that certain references to collateral are permissible without destroying negotiability.\(^1\)\(^2\)\(^3\)

X

OTHER PROMISES, ORDERS, OBLIGATIONS, AND POWERS GIVEN BY THE MAKER

In addition to a promise or order to pay a sum certain in money, a negotiable instrument may include additional promises, orders, obligations, and powers specifically permitted by Article 3,\(^1\)\(^2\)\(^4\) as set out in Section 3-112. The section is limited in its effect: It provides only that the inclusion of the permitted terms does not affect the negotiability of the instrument, and it specifically preserves all non-Code cases and statutes, such as prohibition against confession of judgment clauses, that invalidate any term otherwise permitted by the section.\(^1\)\(^2\)\(^5\)

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122. See § X supra.
123. U.C.C. §§ 3-105(1)(e), 3-112(1)(b).
124. U.C.C. § 3-104.
125. U.C.C. § 3-112(2): "Nothing in this section shall validate any term which is otherwise illegal."
A. References to Collateral

Subsection (1)(b) of Section 3-112 provides that an instrument may include:

...a statement that collateral has been given to secure obligations either on the instrument or otherwise of an obligor on the instrument or that in case of default on those obligations the holder may realize on or dispose of the collateral. ... 

Where collateral is given to secure performance of an obligation, this constitutes the creation of a security interest in the collateral by the debtor.\textsuperscript{126} Article 9 governs this aspect of the transaction and defines the rights and duties of both the immediate parties and third parties in relation to the collateral. If the note contains a description of the collateral, a clause granting a security interest, and the grantor's signature, it will be effective as a security agreement under Article 9.\textsuperscript{127} If, however, there is no description of the collateral or no granting clause, it cannot be used as a security agreement. Where it meets the requirements of a security agreement, it may be filed where this is necessary to perfect the security interest of the creditor if it also contains the address of the debtor (maker) and both the signature and address of the second party (holder).\textsuperscript{128}

Often, however, notes referring to collateral do so only in a general way. "This note is secured by certain property deposited with the Payee of this note" is a typical clause.\textsuperscript{129} Also, reference to collateral is usually made only when the payee, or a subsequent holder, intends to keep possession of the collateral until the obligation is paid. Where the debtor is to have possession, a separate security agreement is normally drafted, and the note will refer to the security agreement.

Although Section 3-112(1)(b) speaks only of a statement that

\textsuperscript{126} U.C.C. § 9-102.
\textsuperscript{127} U.C.C. § 9-203(1): "[A] security interest is not enforceable against the debtor of third parties unless ... (b) the debtor has signed a security agreement which contains a description of the collateral. ..." "Security agreement" is defined in § 9-105(1)(h) as "an agreement which creates or provides for a security interest."

Two cases have held that a financing statement does not operate as a security agreement, but the reasoning of the cases is subject to question. See Mid-Eastern Elec., Inc. v. First Nat'l Bank, 380 F.2d 355 (4th Cir. 1967), criticized in Willier & Hart, U.C.C. Reporter-Digest § 9-203; All American Card Co. v. H.M.H.C., 97 R.I. 59, 196 A.2d 150 (1963), criticized in Willier & Hart, U.C.C. Reporter-Digest § 9-203, A6. See also 2 Hart & Willier, Forms and Procedures Under the U.C.C., para. 92.03.
\textsuperscript{128} U.C.C. § 9-402.

\textsuperscript{129} Where the secured party has possession of the collateral, as is true in the case of a "pledge" of the collateral, there is no need for a written security agreement. U.C.C. §§ 9-113, 9-203.
collateral has been given, neither a description of the collateral nor a clause granting a security should destroy negotiability of the instrument.\textsuperscript{130} Even where a note has been changed by the deletion or addition of particular items of collateral, this should not destroy negotiability. In no way does this diminish the certainty of the maker’s obligation on the instrument; it affects only the enforceability of his duties.

Section 3-112(1)(b) also permits a statement that the collateral may be realized on or disposed of upon default of any obligation.\textsuperscript{131} If such a statement does not spell out the holder’s rights in any detail, the provisions of Article 9 will be applicable and any realization or disposition will have to be made in accordance with the mandates of that Article.\textsuperscript{132} To the extent that variations in the rules of Article 9 are permissible,\textsuperscript{133} they may be included in the note without destroying negotiability.

The section requires that the right to reach the collateral be only in the case of default. If the lower Pennsylvania court cases involving confession-of-judgment clauses are indicative, this requirement will be strictly construed. The reasoning of those cases leads to the result that a clause giving a right to dispose of the collateral not dependent upon default would render the instrument nonnegotiable on the ground that there was no definite time for payment. This problem can be avoided by defining what constitutes default or by the use of an acceleration clause. Acts prejudicial to the holder’s ability to collect, such as a diminution in the collateral’s value, insolvency of the holder, etc., may be stated as constituting a default, or such events may be made acts that trigger acceleration.

Section 3-112(1)(c) allows a promise or power in the note to maintain or protect the collateral or to give additional collateral. Here, again, an acceleration clause or a definition of default is important to give the holder an immediate right of action on the instrument if the obligations are not fulfilled. Otherwise, the clause is of

\textsuperscript{130} The 1949 draft edition of the Code contained the following clause as § 3-104(3): “A writing which purports to create or reserve security rights does not fall within this Article, even though it also contains a promise to pay.” This subsection was deleted before the 1952 edition, which was the first version of the Code approved by the ALI and National Conference of Commissioners on Uniform State Laws. See Leary, Article 3, Commercial Paper, Uniform Commercial Code Handbook 87 (1964).

\textsuperscript{131} In Standard Premium Plan Corp. v. Hirschorn, 5 U.C.C. Rep. 163 (N.Y. Super. Ct., N.Y. County 1968), the court held the promise to pay in a note not uncertain, even though it contained a clause granting the holder the right to cancel an attendant insurance policy upon default.

\textsuperscript{132} U.C.C. § 9-501 et seq. See 1 Coogan, Hogan & Vagts, Secured Transactions Under the U.C.C. § 18.01 et seq.

\textsuperscript{133} See U.C.C. § 9-501 for restrictions on agreements that alter the effect of the Code’s provisions on default.
COMMERCIAL PAPER

little value as it would give the holder only a right to sue on the promise. For example, if the maker of a note promises to maintain collateral with a value of at least twice the amount of the note, unless breach of this promise is made to constitute a default or to accelerate the time of payment, the holder’s only remedy would be to sue on the promise to maintain the collateral. Even assuming that he could obtain an order requiring the debtor to increase the amount of collateral, this would be of little practical value in many situations.

B. Confession-of-Judgment Clauses

Confession-of-judgment clauses are permitted by Section 3-112(1)(d), provided they are not invalid under non-Code state law. However, the right to confess judgment may be authorized only in instances where the instrument is not paid when due. Several cases have already held notes nonnegotiable where the right to confess judgment was not so restricted, and Official Comment 2 to the section clearly indicates that this was the draftsmen’s intent.

A confession-of-judgment clause may be coupled with an acceleration clause. Thus, an instrument could be subject to acceleration “whenever the holder deems himself insecure,” and upon acceleration the holder could be given the right to confess judgment.

In the majority of states, confession-of-judgment clauses are held invalid by non-Code statutes, and in those states, the Code does not affect the validity of the clause. However, the inclusion of a confession-of-judgment provision, even in states that have outlawed them, should not affect the negotiability of the instrument. The instrument is negotiable, but that particular clause is unenforceable. If a state prescribes procedures or requirements regarding confession of judgment clauses, these are still operative and must be fulfilled if the clause is to be given effect.

136. “As under the original Section 5 (a) [of the U.N.I.L.], 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.” Official Comment 2 to U.C.C. § 3-112.
137. There may be some risk to this.
138. U.C.C. § 3-112(2).
C. Waiver of Rights

Section 3-112(1)(e) permits "a term purporting to waive the benefit of any law intended for the advantage or protection of any obligor." This provision, like that allowing confession-of-judgment clauses, does not affect non-Code law limiting the effect of a waiver. Waivers may be made by any obligor on the instrument, and the Code clearly contemplates waivers of right unconnected with Article 3. Thus, homestead exemption can be waived as well as the right to presentment or notice, without affecting negotiability, but the validity of the waiver will be judged by non-Code law.\textsuperscript{139}

D. Endorsement Constitutes Full Satisfaction

Section 3-112(1)(f) permits a clause providing that endorsement or cashing of the instrument constitutes full satisfaction of an obligation. Again, the section does not determine what effect the clause has on the rights and obligations of the parties; it deals solely with the question of negotiability.

Section 3-802 provides that the giving of an instrument for an underlying obligation normally suspends the right to sue on the obligation. If the instrument is paid, or the obligor is discharged by some other act, there is a discharge of liability on the underlying debt. If the instrument is dishonored, however, the obligation is revived and the holder may sue either on it or on the instrument.

Section 3-802 can be varied by agreement.\textsuperscript{140} The Code does not indicate whether a "full-satisfaction" provision making endorsement or cashing of the instrument full satisfaction of the underlying obligation alters the result of the section and bars recourse on the underlying obligation when the instrument is dishonored, but such a clause should not be given that effect. The normal reason for including a full-satisfaction clause is to avoid any subsequent dispute over whether the underlying obligation has been fully paid, where the instrument is paid. The check operates as a receipt showing what debt was paid, and also operates as a discharge of the entire obligation even though less than full payment is made. The drawer or maker seldom, if ever, intends that it operate to restrict recovery to the instrument in the event that it is dishonored. This position is supported by the language of Section 3-802(3) of the 1952 version of the Code.\textsuperscript{141} That subsection, which dealt with the effect of a

\textsuperscript{139} See e.g., Fairfield Credit Corp. v. Donnelly, 7 U.C.C. Rep. 4 (Conn. Super. Ct. 1969), where the court held a waiver of defense clause ineffective to give the holder of a consumer-goods-conditional-sales contract the rights of a holder in due course and void as against public policy.

\textsuperscript{140} See U.C.C. § 1-102(3).

\textsuperscript{141} In the 1952 Official Text of the Code, Subsection (3) to 3-802 read: "Where a check or similar payment instrument provides that it is in full satisfaction of an obligation
full-satisfaction clause, specifically gave effect to the clause only where the instrument had been paid. If any change in the general rule of Section 3-802(1) had been intended, the draftsmen would have so provided in Subsection (3).

Traditional contract law holds that a debtor cannot discharge a debt by payment of a lesser sum where his liability is not disputed and the amount of his debt is certain.\footnote{142} In such cases, there is no consideration for the promise of the creditor not to enforce his right to the amount not paid, or as some courts have held, no consideration for the discharge given by the creditor to the debtor. Where there is a good faith dispute as to either liability or the amount owed, the parties may enter into a compromise, settlement, or accord and satisfaction.\footnote{143} Also, some states have relaxed (or dispensed with) the necessity of consideration in such cases.\footnote{144}

Article 3 of the Code, as presently enacted in all states, does not deal with this question. The 1952 Official Text did by including a Subsection (3) to Section 3-802. It read:

Where a check or similar payment instrument provides that it is in full satisfaction of an obligation the payee discharges the underlying obligation by obtaining payment of the instrument unless he establishes that the original obligor has taken unconscionable advantage in the circumstances.

This subsection was deleted from the Official Code in 1956 because "it evoked criticism on the ground that it would work hardship, and was open to abuse."\footnote{145} Apparently, the intent was to leave the question of the effectiveness of a full satisfaction clause to other state law.

There is a certain mystique and confusion that has grown up around the enforceability of full-satisfaction clauses. Such terms as "accord and satisfaction," "settlement," and "compromise" only cloud the question. In reality, the problems pertain to two requirements of a contract: (1) offer and acceptance, and (2) consideration.

The clause is an instrument, "endorsement or cashing of this instrument constitutes full satisfaction of all obligations owed payee,"
is clearly an offer to exchange the check for the payee's promise not to sue on the obligation, or, in other words, for a discharge. Where the instrument is taken by the payee and endorsed or cashed, this act constitutes his acceptance of the offer, and the first requisite for a contract is satisfied.\textsuperscript{146}\textsuperscript{6}

The payee must be on notice that there are strings attached to his use of the check—"he is to use it only if he is willing to accept the terms of the full-satisfaction clause. Where the payee is a large corporation whose clerks process payments, this may cause some difficulty, but the Code's provisions on notice,\textsuperscript{147}\textsuperscript{7} although not strictly applicable, should be persuasive.

Where there has been an offer and acceptance, the next question is whether there is consideration supporting the discharge or promise not to enforce the unpaid portion of the debt. The traditional rule, stemming from the famous case of \textit{Foakes v. Beer},\textsuperscript{148} is that a debt cannot be discharged by payment of a lesser sum. This rule applies, however, only where there is no good faith dispute as to liability and where the amount of the debt is certain. Where the obligor contests either the existence or amount of the debt, in good faith and with some reason, his payment of less than the full amount claimed has traditionally been held to be sufficient consideration for the discharge.

The rule of \textit{Foakes v. Beer} probably represents the majority view of United States courts, but there is a respectable minority of jurisdictions that hold to the contrary and enforce discharges where a lesser sum is actually paid, and the trend seems to be toward a relaxation of the consideration requirement.\textsuperscript{149} Tentative Draft Number 2 of the \textit{Restatement of Contracts (Second)} preserves the rule of \textit{Foakes v. Beer} in Section 76A, but the Reporter's Comments indicate that the desirability of the rule is doubtful.

Section 1-107 expressly repudiates the \textit{Foakes v. Beer} doctrine where the \textit{underlying obligation} for which the instrument is given arose from an alleged breach of agreement governed by the Code. The section provides:

\begin{quote}
Any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party.
\end{quote}

\textsuperscript{146} But cf. Hanna v. Perkins, 2 U.C.C. Rep. 1044 (Westchester County Ct., N.Y. 1965) in which payee's endorsement with the notation "Deposited under protest" was held to be a reservation of rights in the face of payor's full satisfaction clause.

\textsuperscript{147} See U.C.C. §§ 1-201(26), 1-201(27).

\textsuperscript{148} L.R. 9 App. Cas. 605 (1884).

\textsuperscript{149} 1A Corbin on Contracts § 187 (1963).
The section requires (1) a written waiver, (2) the signature of the creditor, and (3) delivery. All three requirements should be met by a clause indicating that the check is offered in full satisfaction of the obligation for which it is tendered. Although the legend or clause may not be in terms of a waiver, in most cases this will be the clear intent. In other words, the person offering the check is saying, “You may have this instrument only if you waive any rights that you may have to additional compensation.” An endorsement of the instrument, even though done by a stamp, would be sufficient to constitute a signature, and the delivery would be accomplished when the check was presented to the drawer’s bank for payment and filed with the drawer’s account. The Official Comment indicates that the general requirement of good faith found in Section 1-203 is applicable to a waiver or renunciation, but good faith means only “honesty in fact in the conduct or transaction concerned.” Discharges obtained by duress or unconscionable bargaining would fail as not being made “in good faith.” This approach is consideration as such in the full-satisfaction cases.

Thus, where the instrument is given in full satisfaction of an obligation arising out of a sale of goods, no consideration would be necessary to make the discharge binding provided there was good faith in making the offer.

E. Drafts in Sets—Order Effective Only If No Other Part Honored

Section 3-112(1)(g) was added in 1956 at the suggestion of the New York Law Review Commission. It provides that negotiability is unaffected by “a statement in a draft drawn in a set of parts (Section 3-801) to the effect that the order is effective only if no other part has been honored.” For drafts to constitute drafts in a set, they must contain this, or an equivalent, clause. The purpose of this subsection is simply to insure that the clause does not destroy this negotiability.

XI

SUM CERTAIN

The essence of the requirement that an instrument contain a sum certain is perhaps best expressed in Official Comment 1 to Section 3-106:

It is sufficient if at any time of payment the holder is able to determine the amount then payable from the instrument itself with any necessary computations.

The Code provisions do not always strictly follow this direction, but the statement nonetheless indicates the fundamental characteristics
of the requirement. As in other Code sections that describe the requirements of negotiability in defining sum certain, there is an attempt to resolve specific problems that have arisen under the common law and the Uniform Negotiable Instruments Law.

A. Provisions for Interest

Section 3-106 provides that the sum is a sum certain even though it is to be paid:

(a) with stated interest or by stated installments; or
(b) with stated different rates of interest before and after default of a specified date.

This is an expansion of the language used by the Uniform Negotiable Instruments Law which simply provided that "the sum payable is a sum certain . . . although it is to be paid: (1) with interest."

Perhaps the most important question raised by the change is whether any implication should be drawn from the inclusion of the word "stated." At least one commentator has said that it is meaningless, and there is one case to that effect. The question arises where a note fails to specify a rate of interest but includes the clause "with interest." It would seem that such a note is negotiable because Section 3-118 provides that:

... unless otherwise specified a provision for interest means interest at the judgment rate at the place of payment from the date of the instrument, or if it is undated from the date of issue.

Although it could be argued that Section 3-118 deals only with the construction of an instrument and not its negotiability, the section would be meaningless if it were held that those instruments at which it is aimed were not within Article 3 because they failed to meet the requirements of Section 3-106. It is also significant that Section 3-106 does not require that there be a stated rate of interest, only that the interest provision be stated.

Of course instruments without a stated rate of interest do not meet the basic test of a sum certain: that the sum payable be ascertainable from the face of the instrument. To determine the interest, a

152. Under § 3-118, a note containing provision for interest but with no rate specified is not materially altered by a later insertion of the phrase "at 6%," since 6% was the judgment rate and thus determinative of the interest rate before alteration. Epstein v. Paskow & Epstein, 4 U.C.C. Rep. 1066 (N.Y. Super. Ct., N.Y. County 1968). See also, Carr Estate, 436 Pa. 47, 258 A.2d 628, 7 U.C.C. Rep. 49 (1969); Whitestone Credit Corp. v. Barbory Realty Corp., 5 U.C.C. Rep. 176 (N.Y. Super. Ct., Queens County 1968).
holder must first consult Section 3-118 and then go to another statute to determine the judgment rate of interest in the proper state. If it is a foreign jurisdiction, this may take some doing, but in most cases the interest due is not as important as the principal sum and there is little uncertainty in fact. A potential purchaser of the instrument can usually make a pretty good estimate of what is due in interest.

Although instruments payable simply "with interest" appear to be negotiable under the Code, those that refer to a specific extrinsic source for the rate of interest are nonnegotiable. Thus, instruments which carry interest at the "current rate" are not within Article 3. In one case, *Universal C.I.T. Credit Corp. v. Ingel*, the court held that a clause reading "with interest after maturity at the highest lawful rate" was negotiable under Article 3. The decision, or at least the rationale of the decision, may be peculiar to Massachusetts where the case was decided because that state has a statute outside the Code, providing that the interest rate for any obligation is to be 6 percent in absence of a different agreement between the parties. The court in *Ingel* held that this statute provided the highest rate of interest in Massachusetts under the circumstances, and that the note in question was no different from one that simply said "with interest."

The reasoning of the Massachusetts court is open to question;
the decision, however, is correct on other grounds. The quoted language expresses an interest rate that is to come into play only after maturity. Once an instrument has matured, it no longer has its function as a money substitute and it is immaterial whether it is payable thereafter in a sum certain. No person can become a holder in due course, and it will not circulate in the business community.

The Massachusetts decision leads, almost inevitably, to the conclusion that an instrument bearing interest "at the highest lawful rate" before maturity is also negotiable. It would seem from the language of the section and from the Comments that there is a requirement that the amount be ascertainable from the face of the instrument, and that such a clause should be held to destroy negotiability. This requirement is unfortunate in at least one instance. There is good reason for providing that the interest rate vary in line with the market where a note is to be outstanding for some time. For example, a provision that the interest rate is to be "at the prime rate when and where paid" would be useful in a long-term note. There is little real difficulty in evaluating the worth of such a note, and no good reason why it should be held nonnegotiable.

The rate of interest may vary before and after default or before and after a specified date. If different rates apply before and after a particular date, the date must be specified. Thus, an instrument which bore interest "of 5 percent until maker becomes twenty-one and 6 percent thereafter" would not be negotiable unless the day upon which the maker became twenty-one was apparent from an inspection of the note. On the other hand, the fact that the note is a demand note or one subject to acceleration would not prohibit a clause raising the interest rate after default. Even though the time of demand, and hence the time of default, is uncertain, the policy of the Code is clearly to approve of both acceleration clauses and demand instruments, and Section 3-106 does not restrict the use of different rates after default to situations where the day of default is ascertainable.

Statutes providing for maximum interest rates or requiring disclosure of interest rates are not affected by the Code. The recently enacted Federal Truth in Lending Act and the proposed Uniform Consumer Credit Code require that interest be shown, in covered

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stated rate of interest unless the 'sum certain' can be computed 'without reference to any outside source.' Obviously, a holder of a note payable 'with interest at the judgment rate' cannot compute the 'sum certain' without referring to Mass. Gen. Laws Ann. Ch. 107, § 3 (1958). Willier & Hart, U.C.C. Reporter-Digest § 3-104, A2.

157. See U.C.C. § 3-304(3).
transactions, in accordance with certain rules. Although a failure to comply with these and other similar statutes will not destroy the negotiability of the instrument, it may give rise to a defense.

**B. Payment in Installments**

Section 3-106 provides that the fact that an instrument is payable by "stated installments" does not render the sum uncertain. This is a restatement of the former law with no change.

**C. Discounts and Additions**

Section 3-106(1)(c) permits a clause providing for a "stated discount or addition if paid before or after the date fixed for payment." This differs little from changing the interest after default, but taken literally, the statutory language is more restrictive than that used by the draftsmen in wording the clause permitting a different rate after default. If a demand instrument contained a clause "the sum due is to be discounted by 10 percent if paid upon demand," this would technically fail to come within either the provision on differing interest rates or this provision. However, it would seem that such a clause should not destroy negotiability as it is within the spirit of both sections. It could be argued that the date fixed for payment in a demand note is the date upon which demand is made and that Subsection (1)(c) applies. It could also be argued that the quoted clause is, in effect, a change in the interest rate in the event of default.

It would also seem that Subsections (1)(c) and (1)(b) should be construed to permit a discount, or addition, if the note were paid or not paid on a specified date. Hence, a note payable on June 15, 1975 which contained a clause stating that "a discount of 10% (or of $50) will be given if the note is paid on or before June 15, 1973" should be held negotiable.

**D. With Exchange**

Under Section 3-106(1)(d), exchange dates may be added to or deducted from the face amount of the instrument. Either a fixed rate or the current rate may be made applicable.

**E. Costs of Collection and Attorney's Fees**

Section 3-106(1)(e) provides that the sum is not rendered uncertain by including a clause requiring the obligor to pay the amount "with costs of collection or an attorney's fee or both upon default." There are two minor changes from the wording of U.N.I.L. Section 2(5) which cover the same question:

1. Under the Code it is clear that both an attorney's fee and the costs of collection may be added.
(2) The provisions for an attorney's fee and collection costs may be made applicable upon any default under the Code, while the U.N.I.L. provided for them only 'in case payment shall not be made at maturity.'

F. Ambiguities in Stating Sum to Be Paid

Lack of certainty as to the sum to be paid can also result from a failure to state the sum unambiguously. The most common case of ambiguity results where the figures on a check or note fail to correspond with the amount as written out. In such cases, Section 3-118(c) provides that "Words control figures except if the words are ambiguous figures control." Section 3-118(b) is applicable where there are discrepancies between handwritten, typewritten, and printed material on the instrument. It provides that "Handwritten terms control typewritten and printed terms, and typewritten control printed." Where the application of one or both of these rules results in a specific sum due, there should be no doubt about the negotiability of the instrument.

XII

IN MONEY

To be negotiable within Article 3, instruments must be payable in money. "Money" is defined in Section 1-201(24) as "a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency." This definition rejects the view that only legal tender constitutes money. The medium in which the instrument is payable must, however, be sanctioned by some government as part of its currency, and the fact that there is a custom or usage that a particular medium is acceptable is not sufficient.

Section 3-107 requires that the medium of exchange stated in the instrument be recognized at the time the instrument is "made." It would appear that this means at the time it is issued, although a literal reading of the section may lead to the result that the time it is drawn and signed is critical. There is no reason, however, for requiring that the instrument be payable in money until it is issued and thus passed into the commercial world. In fact, the better rule would appear to require only that the instrument be payable in money (as defined by Section 1-201(24)) at the time one claiming under it purchased it, but this seems clearly contrary to the wording of Sec-

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159. "That definition rejects the narrow view of some early cases that 'money' is limited to legal tender. Legal tender acts do no more than designate a particular kind of money which the obligee will be required to accept in discharge of an obligation. It rejects also the contention sometimes advanced that 'money' includes any medium of exchange accepted in a particular community, whether it be gold dust, beaver pelts, or cigarettes in occupied Germany." Official Comment 1 to U.C.C. § 3-107.
tion 3-107. Thus, if an instrument were drawn and issued payable in a medium not recognized by a government as money, it would remain nonnegotiable even though the medium were subsequently recognized. No one, not even a taker after the recognition had been given, could become a holder in due course.

It is immaterial what government affords recognition. Thus, an instrument payable in French francs would be negotiable even though it was drawn in the United States, circulated only locally, and payable in this country. Or, as Section 3-107 states: "A promise or order to pay a sum stated in foreign currency is for a sum certain..."

Where an instrument is stated in foreign currency, it may be paid either in the foreign currency or in dollars unless the instrument specifies the foreign currency as the medium of payment. Since there is a presumption that either dollars or the foreign currency may be tendered in payment, a clear indication that only the foreign currency is acceptable must appear on the instrument. Probably, nothing less than a legend such as "This note is payable only in German marks" would suffice. The number of dollars that must be tendered is based upon the number of dollars that could be purchased by the stated foreign currency at the time, and presumably at the place, where the instrument is payable. If the instrument is payable on demand, then the date demand is made controls. If the parties desire to establish a different rule for computing exchange, this would be permissible and should not affect the negotiability of the instrument.

New York has omitted the last sentence of Section 3-107(2), thereby apparently making it impossible to require that instruments be payable only in a foreign currency. The amendment has been criticized by the Permanent Editorial Board of the U.C.C. as being restrictive of international trade practices.160

160. California initially deleted the same sentence as New York but restored the language. The response of the Permanent Editorial Board of the U.C.C. to the New York omission is instructive:

The variation in this subsection and the reasons advanced for it evidence possible misconceptions as to the purpose of the subsection and its potential effect.

Part 1 of Article 3, in which § 3-107 appears, deals with form and interpretation of negotiable instruments. Subsection (2) of § 3-107 states affirmatively that a promise or order to pay a sum stated in a foreign currency is for a sum certain in money and, therefore, does not destroy negotiability. The subsection then goes on to state a presumption that such an obligation may be satisfied by payment in dollars in an amount determined by the buying sight rate of the foreign currency on the day the instrument becomes payable. However, New York and California object to and have deleted the additional
Where an instrument payable only in a foreign currency is dishonored, an American court will give judgment in dollars. In so doing, they should compute the amount by the buying sight rate of the foreign currency at the time and place that payment was due.

Instruments payable in goods—or something other than money—are not negotiable within Article 3, but Official Comment 1 to Section 3-107 strongly indicates that this is not meant to restrict courts, or the legislatures, from giving the attributes of negotiability to such instruments. Thus, even in spite of the issuer's attempt to restrict their alienability, trading stamps may be given some of the attributes of negotiability: e.g., that a good faith purchaser from a thief has right as against the issuing company and the "true" owner. Merchandise certificates are in a similar situation as are "free" coupons distributed with some products.

The subsection does not say that every promise or order to pay a sum stated in a foreign currency must be paid in the foreign currency. The general presumption is the other way, namely, that it may be satisfied by payment in dollars at a designated exchange rate. It is only if an instrument specifies a foreign currency as the medium of payment that it then becomes so payable. To come within this special rule, presumably an instrument would have to include a special phrase such as 'This instrument is payable only in French francs' or some equivalent language.

With the steady increase in international transactions there may be good reason for a drawer of a draft or a maker of a note to specify a particular foreign currency in which payment is to be made. If this is done, there is good reason for a rule of law stating that payment should be made as specifically so prescribed. If such an order is directed to a bank, this will not impose a duty on the bank to pay in the foreign currency unless the drawer has an account with the bank in that currency or has made arrangements with the bank to have such currency available. As specifically provided in subsection (1) of § 3-409, a check or draft does not of itself operate as an assignment and the drawee is not liable on the instrument until he accepts it. This carries forward the longstanding rule of N.I.L. § 127. Under these rules (absent an acceptance) the drawee's only duty runs to the drawer and if the drawer has not provided the foreign currency to meet the check or draft, the drawee may dishonor in the same way it may dishonor a dollar check or draft where the drawer has no account or there are insufficient funds in the drawer's account to meet the check or draft.

The fact that Federal and state courts in the United States will grant judgments only in terms of United States dollars is beside the point. American courts will not grant judgments in terms of wheat, aluminum or other property but parties repeatedly obligate themselves to deliver wheat, aluminum and many other kinds of property. American courts render judgments in United States dollars for failure to deliver wheat or aluminum, and, similarly, can render judgments in United States dollars (in appropriate cases against appropriate parties) for failure to pay an instrument in a foreign currency.

The Editorial Board does not believe the criticisms are sound and sees no good reason to amend this subsection.

161. See § IV supra.
The Code does not deal directly with instruments that promise to pay money or to perform some other act. Section 3-104(1)(b) requires a promise or order to pay money "and no other promise, order, obligation, or power given by the maker or drawer except as authorized by this Article." Since this is in the conjunctive, it can be interpreted to prohibit only other promises, orders, obligations, and powers that are given in addition to a promise to pay money. This interpretation would tend to preserve the pre-Code rule that held negotiability unaffected by an option given the holder to demand either money or some other act. Although this construction is reasonable, it is not in keeping with the apparent legislative policy of Article 3 and should be rejected.

The contrary interpretation—that an option given to the holder destroys negotiability—is just as tenable from a reading of the Code language and more in keeping with the overall policy of the Code. The decision has been made by the legislature that Article 3 is to govern only that portion of transferable rights that normally circulate as a substitute for money. Instruments giving the holder an option to take money or something else may be useful in some special circumstance but they are not of that ilk. If they are to be given some, or all, or the attributes of negotiability, this should be done by case-law development outside the Code. Analogies to Code rules should be drawn, but the instrument should be treated as sui generis. The omission of any provision comparable to Subsection 5(4) of the Uniform Negotiable Instrument Law strongly supports the suggested interpretation as does the Official Comment to Section 3-112.


163. Section 5(4) of the U.N.I.L. read: "...But the negotiable character of an instrument otherwise negotiable is not affected by a provision which ... (4) Gives the holder an election to require something to be done in lieu of payment of money."

164. "Subsection (4) of the original § 5 [quoted in n. 163 supra] is omitted because it has been important only in connection with bonds and other investment securities now covered by Article 8 of this Act. An option to require something to be done in lieu of payment of money is uncommon and not desirable in commercial paper." Official Comment (Purpose of Changes and New Matter) to U.C.C. § 3-112.