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Paul D. Carrington

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# BANKING, COMMERCIAL PAPER AND INVESTMENT SECURITIES UNDER THE UNIFORM COMMERCIAL CODE

PAUL D. CARRINGTON\*

The banking, commercial paper and investment securities provisions of the Uniform Commercial Code<sup>1</sup> would replace a number of our present statutes, most importantly the Uniform Negotiable Instruments Law, the Bank Collection Code and the Uniform Stock Transfer Act. All of these statutes are, to varying degrees, in need of revision. It is, however, especially true of these parts of the Code that no sweeping law reform is accomplished. The Code is more in the nature of a technical changes act which clarifies language where ambiguities or conflicts have appeared and extends the basic principles to cover situations which were not considered by earlier drafters of uniform legislation. There is immense room for improvements of this kind in our present statutes. It is probably wise, however, that the drafters of the Code elected to stop short of drastic reform, for the present structure of our banking, commercial paper and investment securities laws seems reasonably sound and the commercial disruption which would be wrought by structural changes does not seem warranted. The portions of the Code presently under discussion would cause a minimum of disruption; indeed, it might almost be said that no changes in current business practices would be required by the adoption of the pertinent Articles 3, 4, 5 and 8.

## *Article 3—Commercial Paper.*

The Uniform Negotiable Instruments Law was never a good statute. It was poorly drafted; its sections are confusingly organized and confusingly proliferated and duplicative of one another. No less than 67 sections relate to presentment, notice of dishonor, and protest. Further, the Negotiable Instruments Law has not been handled wisely by courts throughout the United States. Because many of the lawyers and judges who handled problems arising under the Negotiable Instruments Law were unaccustomed to thinking in terms of statutory law, many cases were decided without any reference to the act and many more were decided in opinions which referred to the Negotiable Instruments Law as merely declaratory of the common law and then proceeded to a study of the prior law. Partly as a result of this myopia, many conflicts developed in the cases interpreting the Negotiable Instruments Law. These conflicts have made it impossible to predict the outcome of many cases presenting questions which have not been resolved authoritatively by the Supreme Court of Wyoming.

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\*Assistant Professor of Law, University of Wyoming.

1. These are Articles 3, 4, 5 and 8. This paper is a chapter of a report to the Legislative Research Committee of the Wyoming Legislature. A revision of the introductory portion of that report has already been published: it includes a general history of the Code, which has now been enacted in five states. Carrington, A Foreword to The Study of the Uniform Commercial Code, 14 Wyo. L.J. 17 (1959). None of the views expressed here are indorsed by the members of the Committee.

## PART 1: FORM AND INTERPRETATION

There are no dramatic changes effected by this Part of the Code, but there are six minor changes in policy from that prevailing under the present Uniform Law which are worthy of mention. First, under existing law it is clear that a written promise or order to pay which is limited to payment out of a particular fund is not negotiable regardless of the character of the fund.<sup>2</sup> The Code would abolish this requirement where the instrument is issued by a government or governmental agency or unit.<sup>3</sup> The present rule is a doctrinaire extension of the rule that a negotiable instrument must contain an absolute promise or order to pay; it serves no functional purpose and is a distinct handicap to local government financing for it denies negotiability to instruments payable from the proceeds of a particular tax or from other sources of revenue. The change would clearly be desirable, for it would improve the marketability of local government issues.

Secondly, the Code reverses the same rule as applied to instruments issued by a partnership, unincorporated association, trust or estate which are payable out of the entire assets of the issuer.<sup>4</sup> Again the present rule is doctrinaire and useless, and the change would be a useful facilitation of business conducted by partnerships, unincorporated associations, trusts or estates.

A third change expands the requirement of existing law that a negotiable instrument must be payable at a definite time. The present Uniform Law defines "payable at a definite time" to include instruments payable upon an event certain to happen but uncertain as to time.<sup>5</sup> The Code reverses this rule.<sup>6</sup>

The official Comment explains that:

Almost the only use of such instruments has been in the anticipation of inheritance or future interests by borrowing on post-obituary notes. These have been much more common in England than in the United States. They are at best questionable paper, not acceptable in general commerce, with no good reason for accordng them free circulation as negotiable instruments. As in the case of the occasional note payable "one year after the war" or at a similar uncertain date, they are likely to be made under unusual circumstances suggesting good reason for preserving defenses of the maker.

The change seems clearly desirable.

A fourth change, or group of changes, deals with the effect of acceleration provisions on the negotiability of commercial paper. Frequently, creditors will wish to reserve the right to accelerate the maturity of instru-

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2. Uniform Negotiable Instruments Law § 3, WS 13-289.

3. Uniform Commercial Code § 3-105 (1) (g). All references are to the 1957 Official Text.

4. Uniform Commercial Code § 3-105 (1) (h).

5. Uniform Negotiable Instruments Law § 4 (3), WS 13-290 (3).

6. Uniform Commercial Code § 3-109 (2).

ments upon default, or upon the impairment of the value of the security, or because of the impending insolvency of the maker. Present law fails to clarify the effect of such provisions on the negotiability of the instrument and the courts have struggled for many years, with frequently conflicting results, to fit various kinds of acceleration provisions within the language of the Negotiable Instruments Law. The Code expressly and simply approves all acceleration clauses provided that the instruments are otherwise payable at a definite time.<sup>7</sup> Consistent with this policy decision, the Code reverses the old rule<sup>8</sup> and permits a clause authorizing sale of collateral upon any default of the maker and not just defaults at maturity.<sup>9</sup> The Code likewise permits a clause requiring the maker to maintain the collateral upon pain of accelerated maturity;<sup>10</sup> such a clause would seem to render the instrument non-negotiable under existing law. The policy judgment favoring the negotiability of instruments containing acceleration provisions seem wise. Debtors are adequately protected against capricious and needlessly embarrassing acceleration by their bargaining power and by the absolute requirement, imposed by the Code, that creditors exercise their power "in good faith."<sup>11</sup> There is a genuine business need for acceleration provisions and there is no sound reason why their use should impair negotiability.

A fifth change alters the responsibility of makers of incomplete instruments. Under existing law, it is curiously safe to sign a whole book of blank checks. If the *blank* check is *delivered* by the maker, the bearer is authorized to complete it and a subsequent holders in due course can enforce it according to the terms supplied.<sup>12</sup> And likewise, a *completed* check which is *not delivered* but stolen from the maker can be enforced as a negotiable instrument by a holder in due course.<sup>13</sup> It is therefore anomalous that the two circumstances together—incompleteness and failure of delivery—provide the maker with a defense against subsequent holders without notice.<sup>14</sup> This present rule seems clearly wrong. The man who executes blank checks should be the one to bear the risk that they will be stolen and completed, and not the subsequent purchaser who cashes the checks for the thief. This is the result under the Code:<sup>15</sup> the maker must, bear the risk so long as the contents of the paper at the time he signs it indicate that it is intended to become an instrument. This qualification is a reasonable limitation which protects one who simply signs his name to a blank paper with no expectation that his signature will later come to have commercial significance. The change thus removes a

7. Uniform Commercial Code § 3-109 (1) (c).

8. Uniform Negotiable Instruments Law § 5 (1), WS 13-291 (1).

9. Uniform Commercial Code § 3-112 (1) (b).

10. Uniform Commercial Code § 3-112 (1) (c).

11. Uniform Commercial Code § 1-203.

12. Uniform Negotiable Instruments Law § 14, WS 13-300. See *State v. Grider*, 74 Wyo. 88, 284 P.2d 400 (1955).

13. Uniform Negotiable Instruments Law § 16, WS 13-302.

14. Uniform Negotiable Instruments Law § 15, WS 13-301.

15. Uniform Commercial Code § 3-115.

perplexing curiosity from the present law and offers a desirable stimulus to the free circulation of commercial paper.

The sixth change relates to the interpretation of instruments which are payable to persons identified as agents or officers. The customary expectation of makers of such instruments is that they will be payable to the principal of the agent or officer as well as named payee. But this is not the result prescribed by our present statute<sup>16</sup> unless the agent or officer happens to be a cashier or fiscal officer of a bank or corporation. The Code makes all such instruments payable to the principal of the payee and authorizes the named payee to act as holder.<sup>17</sup> This is more in accord with the probable expectations of the parties and hence it is more sound than the present rule.

This Part of Article 3 also makes a number of technical improvements in the language and organization of the Uniform Negotiable Instruments Law. Many of these improvements are intended to resolve specific controversies concerning the meaning of existing provisions; indeed no less than nineteen such disputes would be resolved by this Part alone. Such clarifications may be the most useful service afforded by the Code to Wyoming law.

For example, there is presently a dispute as to whether a note which contains a reference to a separate security agreement is negotiable. There should be a ready answer to this question but the Uniform Negotiable Instruments Law does not supply it. Most courts which have faced the problem have recognized the reference as an informative record only, which does not impair negotiability or put subsequent holders on notice of possible defenses which might arise out of the separate agreement. But a few courts have reasoned that such a reference incorporates into the note all the terms of agreement referred to, and makes the promise to pay conditional upon performance of that agreement. There is very little to be said for this minority view, but it does raise a cloud of doubt about the law in Wyoming, where the question has never been authoritatively decided,<sup>18</sup> which would be removed by adoption of the Code.<sup>19</sup>

None of these nineteen questions have been resolved in Wyoming, so that it might be said that adoption of this Part of the Code would spare us the expense of nineteen appellate cases. For the most part, these questions are all like the rules of the road—it is much more important that they be firmly resolved than that they be “rightly” resolved. Because these nineteen clarifications are minor, technical, and possessed of very little policy content, it seems unduly burdensome to the readers to include here a complete explanation of all of them. The official Comments pro-

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16. Uniform Negotiable Instruments Law § 42, WS 13-328.

17. Uniform Commercial Code § 3-117 (a).

18. The majority view is consistent with the holding in *Brown v. Cow Creek Sheep Co.*, 21 Wyo. 1, 126 Pac. 886 (1912).

19. Uniform Commercial Code § 3-105 (1) (e).

vide a complete explanation for anyone who may have a special interest in them.<sup>20</sup>

One other feature of this Part of the Code needs mention. In some communities, an instrument made payable at a bank is accepted as an order to the bank named to pay the instrument. In other communities, such an instrument is accepted more literally and is taken only to identify a place of payment. The drafters of the Code have elected not to try to resolve this conflict and Section 3-121 is offered alternatively to accord with either view. The five states which have at this writing adopted the Code have adopted Alternative A which treats such instruments as orders to pay. This is in accord with a special Wyoming statute,<sup>21</sup> and it is this Alternative which would be appropriate for this state. It may be regretted that the drafters of the Code did not adopt Alternative A, for it would certainly seem to be an appropriate subject for uniformity.

#### PARTS 2 AND 3: TRANSFER, NEGOTIATION AND THE RIGHTS OF HOLDERS

These two inter-related Parts of Article 3 would effect four significant changes in existing law. First, under existing law, it appears that an instrument payable to a person under a name other than his own or a name which is misspelled, may be effectively indorsed by the payee in either the name set forth in the instrument or in his own name. This rule is continued under the Code, but the indorsee is given the right to insist upon indorsement in both names.<sup>22</sup> The indorsee does not have this right under the Uniform Negotiable Instruments Law, but the double indorsement is clearly the only way to prevent confusion and the indorsee should have the right to insist upon it. The change is therefore desirable.

Second, the Code resolves much confusion about conversion of bearer paper to order paper by special indorsement. Bearer paper is paper which can be negotiated by delivery without indorsement. Section 9(5) of the Uniform Negotiable Instruments Law provides that an instrument is payable to bearer "when the only and last indorsement is an indorsement in blank." Section 40, on the other hand, provides that bearer paper which is specially indorsed payable to a special person may nevertheless be negotiated by simple delivery. There has been considerable confusion and conflict about the application of these two sections, but the emerging rule seems to be that Section 40 applies only to paper which is originally

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| 20. (1) § 3-102, Comment 2 | (11) § 3-110, Comment 1      |
| (2) § 3-104, Comment 1     | (12) § 3-110, Comments 2 & 3 |
| (2) § 3-105, Comment 1     | (13) § 3-110, Comment 5      |
| (4) § 3-105, Comment 2     | (14) § 3-111, Comment 1      |
| (5) § 3-105, Comment 3     | (15) § 3-112, Comment 4      |
| (6) § 3-105, Comment 4     | (16) § 3-113, Comment        |
| (7) § 3-106, Comment 1     | (17) § 3-118, Comment 1      |
| (8) § 3-107, Comment 1     | (18) § 3-119, Comment 5      |
| (9) § 3-108, Comment       | (19) § 3-122, Comment 2      |
| (10) § 3-109, Comment 4    |                              |

21. WS 13-37.

22. Uniform Commercial Code § 3-203.

payable to bearer. Thus, original bearer paper must remain always thus, but paper which is originally order paper may be converted from the one to the other by each successive indorsement. The Code resolves all the conflict and abandons the rule of Section 40 by providing that the signature of a special indorsee is always necessary to negotiation.<sup>23</sup> This change may be criticized. Should the transferee of a check or note which is payable to bearer be charged with the duty of consulting the reverse side of the instrument to consider any special indorsements? Arguably not, but the Code solution to the problem seems acceptable for two reasons. First, the purpose of Section 40 was to protect the issuer of bearer bonds from the burden of worrying about indorsements when time came for payment; this purpose is otherwise served by the Code in Article 8 which gives special treatment to investment securities. And, absent this consideration, the question does not seem to be too important so long as it is clearly resolved. The Code does seem to remove all doubts. On balance, therefore, the Code section is clearly an improvement.

Third, the Code alters the effect of a restrictive indorsement. A restrictive indorsement is one which prohibits further transfer, or is conditional, or indicates a purpose of deposit or collection, or otherwise states that it is not for the benefit of the indorsee. Under the existing law, such a restrictive indorsement destroys the negotiability of the instrument.<sup>24</sup> The Code recognizes that this rule is an unreasonable handicap to banks engaged in the process of collection and accordingly provides that a holder who takes under or after a restrictive indorsement must apply the proceeds of the instrument consistently with the indorsement, but to the extent that this is done such a holder may be a holder in due course.<sup>25</sup> Thus the banks engaged in collection, all save the first depository bank, are free of responsibility for the performance of the restriction. Likewise, if the restrictive indorsement is made for the benefit of the indorser or a third party, the indorsee is bound to apply the proceeds according to the restriction, but subsequent holders are not exposed to the peril that the indorsee may fail to do so. Only if the subsequent holder has knowledge of a breach of duty by the indorsee is he denied the protections afforded the holder in due course. The Code provision is an improvement on the Uniform Negotiable Instruments Law; the interests of the restrictive indorser are adequately protected under the Code without giving the restrictive indorser the unfair and unnecessary advantage he now holds over innocent subsequent holders.

The fourth change pertains to stale checks. The Uniform Negotiable Instruments Law provides that one who takes an instrument "an unreasonable time" after issue cannot be a holder in due course.<sup>26</sup> The Code preserves this rule, but adds an important presumption that a domestic

23. Uniform Commercial Code § 3-204 (1).

24. Uniform Negotiable Instruments Law § 37, WS 13-323.

25. Uniform Commercial Code § 3-206 (1) and (4).

26. Uniform Negotiable Instruments Law § 53, WS 13-338.

check that is thirty days old in stale.<sup>27</sup> This is a shorter period than that usually found to be "unreasonable" under existing law, but it seems to be abundantly long in the jet age.

As with Part 1, the most numerous changes wrought by Parts 2 and 3 are those which clarify and reorganize the existing law and its meaning. Again, most of these are minor, technical and possessed of little policy content and the reader is simply referred to the Official Comments which provide adequate explanation to those who may have a special interest in them.<sup>28</sup> Two of these "clarifications" may however, for different reasons, bear examination here.

Section 3-307 is an excellent example of the sort of improvements which are wrought by the Code. It replaces Section 59 of the Uniform Negotiable Instruments Law which cryptically provides:

#### WHO DEEMED HOLDER IN DUE COURSE

Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired title as a holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

Section 3-307 renders essentially the same rule. But first, paragraph (1) adds new matter which clarifies and codifies the rules concerning the burden of proof in establishing signatures; this paragraph is largely declaratory of existing case law in other states, and is consistent with the philosophy of a narrower Wyoming statute,<sup>29</sup> that one who challenges the authenticity of a signature should do so promptly in order that the holder will not be surprised and will have an opportunity to gather proof on the question. In order that the reader may compare for himself the technique of the two statutes, it seems desirable here to provide the whole text of Section 3-307:

#### BURDEN OF ESTABLISHING SIGNATURES, DEFENSES, AND DUE COURSE

(1) Unless specifically denied in the pleading each signature on an instrument is admitted. When the effectiveness of a signature is put in issue,

(a) The burden of establishing it is on the party claiming under the signature; but

(b) the signature is presumed to be genuine or authorized except where the action is to enforce the obligation of a purported signer who has died or become incompetent before proof is required.

27. Uniform Commercial Code § 3-304 (3) (c).

28. (1) § 3-201, Comment 3

(2) § 3-202, Comment 5

(3) § 3-202, Comment 6

(4) § 3-202, Comment 2

(5) § 3-304, Comment 6

(6) § 3-304, Comment 11

(7) § 3-305, Comment 1

(8) § 3-305, Comment 7

29. WS 13-29.



(2) When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense.

(3) After it is shown that defense exists a person claiming the rights of a holder in due course has the burden of establishing that he or some person under whom he claims is in all respects a holder in due course.

The foregoing Section 3-307 is in all respects a superior statute to that presently in force in Wyoming. Unlike the present statute, it is possessed of a title which gives some hint of its contents. It is more comprehensive and anticipates and resolves many questions which might arise in the interpretation of Section 59. Its diction is clearer, and it is much better organized. Although it brings no significant changes in the substance of the law, the adoption of this section would effect a significant improvement in Wyoming law. This is equally true of many other sections of the Code.

Another section of the Code which is simply declaratory of the present law is Section 3-202 (3) which would replace Section 32 of the Uniform Negotiable Instruments Law. The Code provision reads:

(3) An indorsement is effective for negotiation only when it conveys the entire instrument or any unpaid residue. If it purports to be of less it operates only as a partial assignment.

This section improves on the language of Section 32 and is mentioned here only because it is thought that further improvement might be possible. The Code, as quoted above, permits the partial indorsement to operate as a partial assignment, but leaves open the question of the effect of a partial assignment. The Official Comments explain that this question is left to the local law of contracts. But the Wyoming case law is silent on the question of the validity and effect of partial assignments and there is considerable diversity in other jurisdictions as to the applicable rules. It has been most often held that a partial assignment of a contract is valid as between the parties, but that an obligor may not be compelled to perform piecemeal: an action against the obligor to enforce the contract must therefore join all interested parties as plaintiffs. This seems to be a sound rule and one that might be usefully codified insofar as it applies to commercial paper. Such a codification might well spare Wyoming litigants and courts a significant expense of time and money. It is therefore suggested that consideration be given to amending Section 3-202 (3) to read as follows:

(3) An indorsement is effective for negotiation only when it conveys the entire instrument or any unpaid residue. If it conveys less, it is operative only as a transfer and, if the payor has not contracted to make a partial performance, no legal proceeding can be maintained by the partial transferee against the payor unless all persons having an interest in the instrument are joined in the proceeding.

This report does not suggest that it will be feasible to modify the Code so as to resolve all possible questions pertaining to the field of commercial

law, nor does it even suggest that an effort should be made to resolve as many questions as possible. The Code should not be cluttered with a large number of local amendments which would disrupt the internal harmony of the statute and do a disservice to the cause of interstate uniformity. But there may be a few instances where narrow, technical, but significant and unsettled, questions may be usefully resolved without harm to the Code and without introduction of broad, legislative policy considerations which might win new enemies for what is presented to us as a technical law reform. Section 3-202 (3) seems to be one such opportunity.

#### PART 4: LIABILITY OF PARTIES

This Part of Article 3 would replace the weakest portions of the Uniform Negotiable Instruments Law, which is curiously sketchy in defining the liability of the various parties to negotiable instruments. Much of this Part is therefore devoted to entirely new material, which is largely declaratory of existing case law not heretofore codified. For instance, our present statutes are silent on the liability of a guarantor of a negotiable instrument. The Code, codifies the case law and makes one change of substance. That is that a holder in due course under the Code takes free of the guarantor's personal defenses as well as the maker's or indorser's.<sup>30</sup> This change is consistent with the general purpose of the law of negotiability and is therefore a desirable removal of an anomaly which prevails under our present statutes. The guarantor is, on the other hand, assured by the Code of recourse against his principal;<sup>31</sup> this is an equitable right which the guarantor certainly should have, but the courts seemed to find some difficulty in affording it under the present law. The clarification should therefore be a welcome one which would benefit guarantors.

This Part of the Code would also bring some changes in the present statutes. First, there are some changes in the law pertaining to the formalities and consequences of acceptance of a bill of exchange. Sections 161-170 of the Uniform Negotiable Instruments Law pertain to acceptance for honor; this is an obsolete practice and the sections which provide for it are therefore omitted. The Code would require that an acceptance be written on the draft;<sup>32</sup> this provision eliminates the obsolete and commercially impractical custom of "collateral acceptance." The separate writing by which a drawee undertakes to pay a draft no longer will operate as an acceptance of it and reliance must be placed on the separate writing itself, as in the case of a letter of credit. The present statute treats the separate writing as an acceptance, although this serves no useful purpose and create unnecessary opportunities for confusion and fraud; the change is therefore desirable.

30. Uniform Commercial Code § 3-416 makes the guarantor a party to the instrument so that the rules of holding in due course apply to him. The Uniform Negotiable Instruments Law makes no provision for such a party and the guarantor's defenses are therefore cut off only if he guarantees as an indorser or co-maker.

31. This follows from the same § 3-416.

32. Uniform Commercial Code § 3-410(1).

The Code alters slightly the consequences of an acceptance which varies the terms of the draft. If the holder assents to such an acceptance, the drawer and indorsers are discharged, unless they also assent. Under the Code, this assent must be affirmatively expressed by the prior parties;<sup>33</sup> under present law, their silence alone is sufficient to prevent the discharge.<sup>34</sup> The Code rule seems to be the fairer and to be more consistent with the expectations of the drawer and indorsers. The Code would abolish the rule of the Uniform Negotiable Instruments Law which provides that refusal to return a bill presented for acceptance operates as a constructive acceptance.<sup>35</sup> Such a refusal operates under the Code as a conversion of the instrument, so that the holder has immediate recourse against the drawee who refuses to return the instrument.<sup>36</sup> This is a more satisfactory remedy for the aggrieved holder because, under existing law, he has no remedy until the maturity date and no instrument which he might negotiate meanwhile—hence his expectations in taking a negotiable draft are defeated.

In addition to these provisions pertaining to acceptance, this Part of the Code changes the rule pertaining to the effect of an innocent or immaterial alteration of a negotiable instrument. Under existing law, any alteration avoids the instrument,<sup>37</sup> under the Code, mere spoliation does not.<sup>38</sup> There is no apparent reason why the maker should be relieved of liability on the instrument by innocent or immaterial alteration and the Code rule therefore seems preferable.<sup>39</sup>

The Code provides that one who contributes by his negligence to the material alteration of an instrument or to the making of an unauthorized signature is precluded from asserting such alteration or lack of authority against the drawee or a subsequent holder in due course.<sup>40</sup> Insofar as this section pertains to the protection of drawees, it is declaratory of a common law rule announced in 1827,<sup>41</sup> but the extension of protection to holders in due course is a change in existing law. The limitation in the common law rule was based on a narrow concept of "duty of care," the theory being that the negligent maker or holder had no duty to the subsequent holder. The limitation seems unnecessarily conceptualistic and unjust and the changes therefore seems wise.

This Part of the Code also makes its share of technical minor improvements in existing statutes and resolves a number of conflicts in the case

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33. Uniform Commercial Code § 3-412 (3).

34. Uniform Negotiable Instruments Law § 142, WS 13-428.

35. Uniform Negotiable Instruments Law § 137, WS 13-423.

36. Uniform Commercial Code § 3-419 (1).

37. Uniform Negotiable Instruments Law § 124, WS 13-410.

38. Uniform Commercial Code § 3-407 (2).

39. The Code would not affect the result in cases like *First National Bank v. Ford*, 30 Wyo. 110, 216 Pac. 691 (1923), which held that the maker who asserts an alteration has the burden of proving it.

40. Uniform Commercial Code § 3-406.

41. *Young v. Grote*, 4 Bing. 253 (1827).

law concerning the construction of language. Again, of the Official Comments which explain these clarifying provisions are cited.<sup>42</sup>

PARTS 5 AND 6: PRESENTMENT, NOTICE OF DISHONOR,  
PROTEST AND DISCHARGE

In contrast to the preceding Part of Article 3, these Parts are a revision of the most ornate and prolix provisions of the Uniform Negotiable Instruments Law. The most important changes wrought by these Parts would be the technical simplification of the sometimes almost savage rituals required by the present law of a holder making a presentment or giving a notice of dishonor or protest. Again, there is no apparent need for explaining these changes in detail; they are adequately explained in the Official Comments, if any reader finds a special interest in them.<sup>43</sup> It is sufficient here to note that any notice or demand that is adequate under existing law is also adequate under the Code.

Some entirely new provisions were, however, also deemed desirable. An example in Section 3-510 which codifies the rules of evidence pertaining to proof of dishonor or notice of dishonor. New provisions are also found in Section 3-606 which restates and expands the present codification of the suretyship defenses which are available to indorsers and other parties to negotiable instruments.<sup>44</sup>

The Code makes a change in the law pertaining to the negotiation of mature paper. Under the Uniform Negotiable Instruments Law, one who indorses an instrument after maturity is discharged unless there is a prompt presentment and notice of dishonor.<sup>45</sup> Inasmuch as a negotiation

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| <p>42. (1) § 3-404, Comment 3<br/>         (2) § 3-405, Comment 2<br/>         (3) § 3-408, Comment 2<br/>         (4) § 3-413, Comment<br/>         (5) § 3-415, Comment 3<br/>         (6) § 3-415, Comment 5<br/>         (7) § 3-417, Comment 9</p>   | <p>(8) § 3-418, Comment 2<br/>         (9) § 3-418, Comment 3<br/>         (10) § 3-418, Comment 4<br/>         (11) § 3-419, Comment 3<br/>         (12) § 3-419, Comment 4<br/>         (13) § 3-419, Comment 5</p>                                      |
| <p>43. (1) § 3-501, Comment 4<br/>         (2) § 3-501, Comment 6<br/>         (3) § 3-503, Comment 3<br/>         (4) § 3-504, Comment 1<br/>         (5) § 3-504, Comment 2<br/>         (6) § 3-504, Comment 3<br/>         (7) § 3-504, Comment 4</p> | <p>(8) § 3-508, Comment 2<br/>         (9) § 3-508, Comment 4<br/>         (10) § 3-509, Comment 5<br/>         (11) § 3-509, Comment 4<br/>         (12) § 3-509, Comment 5<br/>         (13) § 3-511, Comment 6<br/>         (14) § 3-511, Comment 7</p> |
44. Uniform Commercial Code § 3-606 would overrule an old Wyoming case which was not expressly overruled by the Uniform Negotiable Instruments Law, but which was clearly contrary to the weight of authority in other states. In *Trabing v. Commissioners of Albany County*, 1 Wyo. 302, (1876), the plaintiff and one Finrock had been co-sureties on a \$1000 bond. Upon payment of \$250, the Commissioners agreed to the discharge of Finrock; they then sought to levy against the plaintiff for the balance owing. The plaintiff sought to enjoin foreclosure on the ground that the discharge of Finrock was also a discharge as to him. The territorial court held that this was an appropriate occasion for the exercise of its equity powers and required the plaintiff to pay another \$250 to secure the discharge. This was contrary to the general rule that a discharge of one surety is a discharge of all, and the Code provision which states this general rule would operate to reverse the rule of the case. The Code does provide that the creditor may protect himself in such a situation by expressly reserving his rights against the remaining sureties and by promptly notifying them of the reservation.
45. Uniform Negotiable Instruments Law § 7, WS 13-293.

after maturity can have little purpose except fraud, the Code has taken the position that such an indorsee is not entitled to the protection of these formal requirements.<sup>46</sup> A related change pertains to the defense of payment against a holder in due course who takes mature paper. Under present law, it would seem that a holder in due course takes an instrument subject to the possible defense of payment, for payment discharges the instrument.<sup>47</sup> This is manifestly unfair for the loss should fall upon the payor who failed to pick up the instrument and destroy it at the time of payment. Probably this result was not considered or intended by the drafters of the Uniform Negotiable Instruments Law and the contrary declaration of the Code<sup>48</sup> is clearly a welcome one.

This latter change is part of the more sweeping abolition of the concept of "payment in due course," which is defined in Section 88 of the Uniform Negotiable Instruments Law. Under existing law, a payor who is notified of a claim by an indorser is put in a quandary: if he pays the holder, he risks liability to the claimant and if he refuses payment, he risks liability to the holder. The Code imposes on the claimant the burden of the moving oar—he must either secure an injunction against payment or post security to protect the payor.<sup>49</sup> These provisions are similar to those found in the Wyoming Statute<sup>50</sup> which protect the carrier who is notified of a claim against the holder of an order bill of lading.

Finally, charges are made in the law pertaining to a delay in presentment of an instrument. The Code limits the consequences of a delay: the drawer of the bill would be discharged only to the extent of the loss occasioned by delay and this result is to be achieved by means of an assignment to the holder of the drawer's right against the drawee who failed to pay upon delayed presentment.<sup>51</sup> Also, the Code redefines the timeliness of a presentment of a check. Existing law indicated that a "reasonable time" for the presentment of a check is one day.<sup>52</sup> This period is unreasonably short for merchants who handle many checks or for farmers or ranchers who do not have ready access to a bank, and the Code specifically extends this period to 30 days insofar as it relates to liability of the drawer and 7 days insofar as it relates to the liability of an indorser.<sup>53</sup>

#### PARTS 7 AND 8: ADVICE OF INTERNATIONAL SIGHT DRAFT AND MISCELLANEOUS

These brief Parts of Article 3 are intended to pick up a few loose ends left by the Uniform Negotiable Instruments Law and by the Preceding Parts of Article 3. A few questions which persist at present concerning the effect of an instrument on the vitality of the underlying

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46. Uniform Commercial Code §§ 3-108, 3-501 (4).  
 47. Uniform Negotiable Instruments Law § 119, WS 13-405.  
 48. Uniform Commercial Code § 3-602.  
 49. Uniform Commercial Code § 3-603 (1).  
 50. WS 34-293.  
 51. Uniform Commercial Code § 3-502 (1).  
 52. WS 13-124.  
 53. Uniform Commercial Code § 3-503 (2).

obligation are resolved.<sup>54</sup> A procedure for "vouching in" prior parties to negotiable instruments is assured.<sup>55</sup> And a procedure for collection of lost, destroyed or stolen instrument is provided.<sup>56</sup> The three sections mentioned seem to be the only portions of these Parts of the Code which hold significant interest for Wyoming lawyers or businessmen.

#### *Article 4—Bank Deposits and Collections*

The changes in Wyoming law which would be wrought by adoption of this Article are fewer, narrower, and less significant than those effected by the preceding Article. Perhaps the most important single provision of Article 4 is Section 4-102 which provides that the liability of a bank for its activities in connection with the collection process is to be measured by the law of the place where the bank is situated. This is a highly beneficent change from the existing case law, for it affords bankers with a new measure of certainty as to the nature of their responsibilities. It is perfectly fair to drawers, payees and indorsers who must know that action is likely to be taken with respect to an ambulatory instrument almost anywhere, and who cannot therefore be said to be surprised or disappointed to find their rights measured by the law of the situs of the bank who handles or pays the instrument.

The substance of Article 4 may be considered in two parts. The portion dealing with the relation of bank to customer, which would replace a few local statutes, is largely declaratory of existing common law, but does contain a few policy judgments as to the extent and nature of the bankers' responsibilities. There has heretofore been no uniform legislation whatever on this general subject, although harmony does seem to be appropriate and desirable. The other portion, dealing with collection procedures, is largely technical and most of its changes are designed to simplify the process of bank handling of commercial paper. The need for uniformity in this area is pressing, but for reasons that are unclear that objective has never been achieved. The Code does replace the American Bankers' Association's statute, the Bank Collection Code, which was adopted in Wyoming in 1931, but which failed of adoption in many states.

#### *Relation of Bank and Customer*

The Code would effect five changes in the existing Wyoming law concerning the responsibility of the bank to its customers. First, there would be a slight change in the liability of a bank for wrongful dishonor of a check. The policy of the present statute, is that the bank should be liable only for actual damage resulting from the dishonor.<sup>57</sup> This policy is continued under the Code, except that it is made clear that the damage

54. Uniform Commercial Code § 3-802.

55. Uniform Commercial Code § 3-803.

56. Uniform Commercial Code § 3-804. This would not change the result in cases like *Caswell v. Ross*, 27 Wyo. 1, 188 Pac. 977 (1920), where the plaintiff's testimony was not sufficiently persuasive that there had ever been an instrument and judgment was therefore rendered against her.

57. WS 13-30.

may be caused through an arrest or prosecution resulting from the wrongful dishonor and that the questions of causation of damage is one of fact.<sup>58</sup>

Secondly, the Code would alter the present law relating to the vitality of a stop order. Under existing law, a stop order is binding on the bank for 90 days and may be renewed only in writing, each renewal in turn being binding for the same period of 90 days.<sup>59</sup> The Code reduces the period of validity of an oral stop order to 14 days, but extends the life of a written order or renewal to six months.<sup>60</sup> These changes are not too important, but seem acceptably desirable. The oral stop order is a burden to the bank which it should not have to bear for a long period without a written record supplied by the depositor; for a written order, on the other hand, it may be an unreasonable burden on the depositor to require quarterly renewals. The distinction between oral and written orders is one which has considerable factual justification from the viewpoint of the bank which must respond to them.

Thirdly, the Code would reverse the common law rule, which presumably prevails in Wyoming, to the effect that the death or incompetence of a depositor stands as an immediate revocation of the authority of the bank to pay items thereafter presented. This rule imposes the burden on a bank of bearing the risk that the maker of every check it pays may have died or become incompetent and thereby revoked the bank's authority. The Code more wisely provides that the bank must have a reasonable opportunity to learn of the death or disability before it becomes operative as a revocation, and that even with notice the bank may pay items for ten days after a stop order is received from the representative of the deceased.<sup>61</sup>

An existing Wyoming Statute provides in part:

No bank shall be liable to a depositor for the payment by it of a forged or raised check or forged indorsement of any check unless within thirty days after the return to the depositor of the voucher of such payment such depositor shall notify the bank that the check so paid was forged or raised.<sup>62</sup>

The comparable Code provision is much more ornate.<sup>63</sup> In lieu of the thirty day limit, the Code provides that the depositor must exercise due care and promptness in examining his statements; thus in many instances the depositor will become bound to accept the forgery or alteration in less than thirty days. In the event of extenuating circumstances, however, the Code provides much longer maximum limitations, which take effect without regard to the due care of the depositor: one year for discovery of forged signature or alternation and three years for discovery of a forged indorsement. The Code furthermore provides that the negligent depositor

58. Uniform Commercial Code § 4-402.

59. WS 13-38.

60. Uniform Commercial Code § 4-403.

61. Uniform Commercial Code § 4-405.

62. WS 13-29.

63. Uniform Commercial Code § 4-406.

is precluded from asserting not only the unauthorized signature or alteration which in the first instance he failed to discover, but also any other unauthorized signature or alteration by the same wrongdoer which is paid in good faith by the bank in reliance upon the silence of its depositor. These more complex Code provisions seem preferable to the existing law which is too simple and direct to deal fairly with the many variant situations which may arise to present the problem dealt with. For example, the absolute limit of 30 days within which the depositor must discover a forged indorsement may in many instances deprive the depositor of a fair chance to protect himself. On the other hand, the 30 days may be far longer than a depositor may reasonably need to discover many false charges to his account.

One further change may affect the relation of bank to depositor only indirectly. It appears that a bank may, under existing law, waive its rights to charge the depositor who negligently fails to discover the false debit and proceed against the collecting bank which warranted the indorsement. The Code would preclude such a waiver and extends the protection afforded the payor to include collecting banks as well; if the payor elects to waive its rights, it cannot, under the Code, thereafter assert the same unauthorized indorsement against the collecting bank.<sup>64</sup> It would seem that the collecting bank should be entitled to the same protection as the payor bank and the change therefore seems desirable.

Finally, the Code would limit the power of the bank to disclaim its responsibilities to depositors. Section 4-103(1) provides:

The effect of the provisions of this Article may be varied by agreement except that no agreement can disclaim a bank's responsibility for its own lack of good faith or failure to exercise ordinary care or can limit the measure of damages for such lack or failure; but the parties may by agreement determine the standards by which such responsibility is to be measured if such standards are not manifestly unreasonable.

The extent to which this Section is a change in existing law is doubtful. To be sure, many courts have held limitations of liability written into stop order forms invalid without benefit of any statute and on a number of grounds. The statute seems unobjectionable except on an irresponsible and overreaching basis and a codification of the rules pertaining to such disclaimers would seem to benefit bankers as well as depositors. At the very least, this Section would add an element of certainty to the law of Wyoming which does not now exist.

#### *The Collection Process*

None of the changes which the Code proposes to make in the law pertaining to the collection process possess broad significance, but a number are perhaps worthy of mention. First, it should be noted that the Code would reduce the significance of the oft-litigated question of whether

64. Uniform Commercial Code § 4-406(5).



a particular bank is the owner of an item or the agent of the owner. The Code extends the present presumption of agency to apply without regard to the form of indorsement or lack of indorsement, but also provides that when an item is handled by a bank for the purpose of collection, the statutory provisions apply even though the parties clearly indicate that the bank takes the item as owner. This is a sensible change for, as the official Comment<sup>65</sup> explains:

Where the tremendous volume of items handled makes impossible the examination by all banks of all indorsements on all items and where in fact this examination is not made, except perhaps by depositary banks, it is unrealistic to base the rights and duties of all banks in the collection chain on variations in the form of indorsements. It is anomalous to provide throughout the ABA Code that the *prima facie* status of collecting banks is that of agent or sub-agent but in Section 4 to provide that subsequent holders (sub-agents) shall have the right to rely on the presumption that the bank of deposit (the primary agent) is the owner of the item. It is unrealistic, particularly in this background, to base rights and duties on status of agent or owner.

The Bank Collection Code streamlined the indorsement required of a bank to a considerable degree by obviating the need for the legend "prior indorsements guaranteed"; under existing law, such a guaranty is presumed in a transfer from one bank to another.<sup>66</sup> The Code takes the next logical step and reduces the bank-to-bank indorsement to a number; it provides that any indorsement which identifies the transferor is sufficient to effect a transfer of the item from one bank to another, and all the usual warranties can be inferred from such an indorsement.<sup>67</sup> It would seem that this change should ease slightly the burden of the transferor and thereby speed the collection process.

The Code would also liberalize slightly the requirements as to the media which a collecting bank may accept as a remittance without exposing itself to liability as a guarantor of collection. Under the present law<sup>68</sup> the collecting bank can accept almost any valuable paper except a draft on the paying bank, which would be a device for extending credit to the payor at the expense of the owner of the item. The Code would relax this limitation to permit acceptance of a cashier's check of a remitting bank which is a member of the same clearing house or group as the collecting bank;<sup>69</sup> this change is made because this is just as satisfactory a means of settlement through a clearing house as any other commercial paper would be and may, in some instances, be a means to achieve greater speed in clearing.

Perhaps the most desirable change which the Code would bring to

65. Uniform Commercial Code § 4-201. Comment 6.

66. Bank Collection Code § 4, WS 13-115.

67. Uniform Commercial Code § 4-206.

68. Bank Collection Code § 9, WS 13-119.

69. Uniform Commercial Code § 4-211(1) (b).

the law of bank collections is the resolution of the much abused question of when a payment becomes final. This question is one of importance in determining the priority of items, notices, stop-orders, legal process and set-offs and is the point at which many provisional settlements become final. No fewer than ten different rules have been employed by courts to resolve this question and the Bank Collection Code leaves the problem in profound confusion.<sup>70</sup> The Code lists a number of acts by the payor bank which will constitute final payment and thereby resolves the doubts.<sup>71</sup> In general, the test is whether the payor bank has manifested a decision to pay the item. This test is fairest to payor banks and does not prejudice the rights of owners or of collecting banks because of the payor's duty to honor or dishonor the item within the time limits otherwise provided.

It has become common practice for depositary banks to supply the missing indorsement of its customer when he neglects to provide it, but this custom is not sanctioned by existing law and questions can arise concerning the authority and responsibility of a bank which takes the instrument later in the process of collection in reliance upon such an unauthorized indorsement. The Code specifically authorizes a depositary bank to supply the missing indorsement in the absence of contrary instructions by the maker.<sup>72</sup> The prevailing practice is clearly sound: it is useless and dilatory to return the item for indorsement by the customer. The Code provision is therefore a desirable one.

The Code gives a collecting bank implied authority to grant a one-day extension to the payor bank for the purpose of securing payment of an item which would otherwise be dishonored.<sup>73</sup> The purpose of this provision is to permit the collecting bank to give solvent payors a chance to cover overdrafts. A bank which indulges in such a practice under existing law risks liability to prior parties and the discharge of secondary parties. The change seems desirable from the viewpoint of all the parties involved, all of whom are interested in securing payment.

Sections 4-202 and 4-212 contain optional provisions which have been adopted in the five states which have enacted the Code which would authorize intermediary or payor banks to return unpaid items directly to the depositary bank. This would short-circuit the complex routing which the collection process sometimes takes and thereby hasten the return. Particularly with reference to unpaid instruments, speedy handling is very desirable. There seems to be no virtue in requiring that the item return by the same circuitous route which it may have followed and the change therefore seems desirable.

Finally the Code would add new provisions which regulate the handling of documentary drafts payable by parties other than banks.

70. But see Bank Collection Code §7, WS 13-117.

71. Uniform Commercial Code § 4-213 (1).

72. Uniform Commercial Code § 4-205 (1).

73. Uniform Commercial Code § 4-108 (1).

One change permits the bank handling such an instrument to make a presentment by notifying the primary party that the instrument is held at the bank for acceptance or payment as the case may be.<sup>74</sup> This eases the burden of the bank which need no longer follow the obligor around town to make presentment. Part 5 of Article 4 contains new provisions, which are largely declaratory of existing common law, concerning the rights and liabilities of banks handling such drafts.

Obviously, these changes are minor and will have no significant effect on collection procedures presently employed by Wyoming banks. A number of disputes which might arise during the course of the present procedures may however be resolved in advance by adoption of Article 4 of the Code and this is the principal benefit to be obtained from its enactment in Wyoming.

#### *Article 5—Letters of Credit*

A letter of credit is a device now seldom used in Wyoming. In general terms, it is an undertaking by a bank or other person to meet the yet unassumed obligations of a customer whose credit is thus assured. There are two principal kinds of letters of credit. A documentary letter of credit is one in which the issuer's obligation is conditioned upon presentment of documents of title which may be used to secure reimbursement of the issuer by its customer. This type of letter of credit is generally issued by a bank to a seller of goods and affords a relatively cheap, convenient means of financing a sale; it is the most satisfactory means of third-party financing of a sales transaction where the buyer and seller are unknown to one another and who are therefore likely to need the sound credit of a bank to provide a basis for dealing. It is therefore not surprising to find that documentary letters of credit are very common in international trade. The other kind of credit is known as a "clean" letter of credit: the obligation of the issuer to pay is not conditioned upon a presentment of documents. This type of credit is most useful to travelers and is a cheaper, more flexible device than the travelers' check, which is more common.

This Article of the Code would codify the rules pertaining to letters of credit which have become settled under the case law of New York, Massachusetts and California, where there has been some litigation concerning them, and under the Uniform Customs and Practice for Commercial Documentary Credits promulgated by the International Chamber of Commerce in 1951. The Article is not as comprehensive as the other Articles of the Code and a number of questions, particularly concerning interpretation and the problem of defining the adequacy of documentary presentment, are left open. The theory of the sponsors of the Code was that the letter of credit is an instrument still in the process of development and that complete codification would be premature. On the other

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74. Uniform Commercial Code § 4-210(1).

hand, it was felt that some questions which were settled might be usefully codified.

Time might well prove this brief Article to be among the most beneficial portions of the Code to Wyoming bankers and businessmen. The letter of credit is potentially a useful device which is now largely unknown; the Code would familiarize us with the instrument and clarify many of the consequences of its use and thus open up a new pattern for commercial transactions for bankers and businessmen who might choose to take advantage of it.

#### *Article 8—Investment Securities*

This Article would replace the Uniform Stock Transfer Act, which was adopted in Wyoming in 1945, and also the Uniform Negotiable Instruments Law insofar as it applied to transfers of bonds. The Code provisions are not a blue sky law and do not purport to regulate the responsibilities of issuers and sellers of securities for truthful representation or for the sound value of the issue, but only to provide for the mechanics of transfer and the rights of the various parties to a transaction in investment securities. It has for some time been apparent that the Uniform Negotiable Instruments Law was not a satisfactory statute insofar as it applied to bonds representing an investment; the parties to such a bond are generally in a different relation to one another than the parties to an ordinary negotiable instrument, and the same rules cannot be satisfactorily applied to both situations. For this reason, the drafters of the Uniform Commercial Code sought to withdraw bonds from the application of the general negotiable instruments rules and treat them generically with other investment securities such as corporate shares.

Adoption of Article 8 would effect a number of changes in existing law, but all of these changes need not be discussed here. A few of them are simply extensions of changes made in the analogous rules pertaining to negotiable instruments which were considered in our discussion of Article 3. For example, the changes made in the law pertaining to the unauthorized completion of securities and to lost securities are very much like the analogous changes made by Article 3, which we have already considered and which would secure the same advantages over existing law.<sup>75</sup> There are also a number of technical changes which make the law more consistent with the practices of the investment securities business which have developed in the last quarter century. For example, the Code would re-define the formal requirements of delivery so as to make them more sensible in light of the modern practice and usages of investment workers.<sup>76</sup> And again, there are a number of clarifying changes which would set aside some of the case law which has developed

75. Compare §§ 3-115 and 8-206 with §§ 3-804 and 8-405

76. Compare Uniform Commercial Code §§ 8-313 and 8-314 with Uniform Negotiable Instruments Law § 191, WS 13-281 and Uniform Stock Transfer Act § 22, WS 17-100.

under the uniform acts in other jurisdictions; these changes are adequately explained in the Official Comments and we will adhere to the practice of referring readers to these.<sup>77</sup>

There are, however, a number of changes deserving of more careful consideration and explanation. First, there is an entirely new provision which would negate the defense of an issuer that a particular security is an "overissue" not authorized by the corporate charter and therefore not payable or issuable by the corporation. The Code provision would require the issuer to obtain equivalent securities in the open market, if available, or make restitution to the purchaser, in order to cover its obligation assumed under an instrument which it did in fact issue.<sup>78</sup> It is not clear to what extent this is a change in existing Wyoming law, but it is clear that the old rule that a corporation is powerless to meet such an obligation is needlessly conceptualistic and unfair and that the Code provision is consistent with a general modern trend which prevents corporations from taking advantage of their own lack of authority in their dealings with parties who are outside the internal framework of the organization.

Under the Uniform Negotiable Instruments Law, an incorporation by reference of the terms of another agreement robs the instrument of negotiability. It is, however, almost necessary to incorporate into many corporate bonds the terms of the trust indenture under which they are issued, or else the instruments become unmanageably long. The result has been that many purchasers of bonds have been deprived of the rights of holders in due course because the instruments they purchased contained such incorporations by reference. This result would be changed by the Code which provides that an incorporation by reference of another document does not charge the purchaser with notice of a defect pertaining to the validity of the instrument.<sup>79</sup> This seems to be a sounder and fairer rule than that now prevailing under the Uniform Negotiable Instrument Law.

The established rule that a holder in due course must take the instrument before maturity is another which has worked poorly as applied to investment securities which may be subject to call for redemption or exchange. The Code would modify the rule and preserve the negotiability of investment securities for a period after such a call.<sup>80</sup>

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| 77. (1) § 8-201, Comment 2 | (9) § 8-307, Comment 1  |
| (2) § 8-202, Comment 2     | (10) § 8-310, Comment 1 |
| (3) § 8-202, Comment 6     | (11) § 8-312, Comment 1 |
| (4) § 8-205, Comment 1     | (12) § 8-317, Comment 2 |
| (5) § 8-207, Comment 1     | (13) § 8-401, Comment 2 |
| (6) § 8-208, Comment 5     | (14) § 8-403, Comment 3 |
| (7) § 8-304, Comment 1     | (15) § 8-404, Comment 2 |
| (8) § 8-306, Comment 1     | (16) § 8-405, Comment 3 |
78. Uniform Commercial Code § 8-104.  
79. Uniform Commercial Code § 8-202.  
80. Uniform Commercial Code § 8-203.

Still another general rule which would be modified by Article 8 is the requirement that a holder in due course must take with all necessary indorsements. Section 8-31 makes a distinction between the issuer's defenses and adverse claims of ownership. A perfect chain of indorsements is not necessary to free the holder from the defenses of the issuer under Section 8-202, but are necessary to protect him from the ownership claims of third parties under Section 8-307. The reason for this special rule is found in the fact that investment securities are so often held in the possession of brokers and are sold and delivered without necessary indorsements; a purchaser under such circumstances is entitled to some protection and there is no sound reason why the issuer should have its defenses preserved because of the technicality of an absent indorsement.

The Code would absolve the indorser of an investment security of secondary liability for the obligations of the issuer. As the Official Comment<sup>81</sup> explains:

In view of the nature of investment securities and the circumstances under which they are normally transferred an indorser cannot be held to warrant as to issuer's actions. As a transferor he, of course, remains liable for breach of the warranties set forth in this Article (Section 8-306).

It would seem unlikely that a purchaser of investment securities would rely upon the secondary liability of an indorser or accommodation party in the absence of special circumstances, and certainly the ordinary transferor of securities does not expect to be held responsible for faithful performance by the issuer, so the Code rule does seem more in accord with the expectations of the parties than the present rule. And it should be noted that where the parties wish to impose such a surety obligation on the indorser, it may be expressly provided.

Finally, the Code would reverse the rule, which has developed in the case law of other states, that a transfer agent cannot be held liable by a holder or owner of a security for his nonfeasance of duty in wrongfully refusing to register a transfer or to issue new securities. The Code thus wisely recognizes that a transfer agent is more than an agent of the issuer and has a semi-public responsibility which runs not only to the issuer, but also to the holder or owner of the securities as well.<sup>82</sup>

Article 8 leaves open two questions which have never been resolved in Wyoming and which should perhaps be closed by a comprehensive codification such as the Code. One question pertains to the extent to which an issuer may restrict the transfer of securities. The Code does provide that such a restriction is not effective against a purchaser without notice unless it is conspicuously noted on the instrument,<sup>83</sup> but the

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81. Uniform Commercial Code § 8-308, Comment 1.

82. Uniform Commercial Code § 8-406(1)

83. Uniform Commercial Code § 8-204.

basic question of the validity of restrictions is left open. On balance, this omission is probably wise. All courts which have considered the question have held that a restraint which amounts to a simple option to repurchase is valid; on the other hand, all are agreed that a total restraint is invalid. The question is one of drawing a line and a number of considerations are entitled to weight: the extent of the restraint, the purpose of the restraint, the nature and organization of the corporation, and the extent to which its shares are widely-held by investors. Any statutory provision which would seek to state a rule for determining the validity of such restraints must be either too general in terms to afford any certainty of application or else too crude to handle fairly all the variant situations which might arise. For this reason, it seems best to leave the question open so that flexibility may be retained.

On the other hand, the second question which the Code leaves open is one which should be answered. This pertains to the effect of a partial transfer of an investment security. The Code provides that:

An indorsement purporting to be only of part of a security representing units intended by the issuer to be separately transferable is effective to the extent of the indorsement.<sup>84</sup>

This recognizes the validity of a partial transfer as between the parties, but it fails to clarify the rights of a bona fide purchaser under a partial indorsement to take free of adverse claims of ownership by third parties. It is often necessary to make such a partial transfer as where the holder of a certificate for 300 shares wishes to sell only 100 shares. The purchaser of such an interest should be entitled to the protections afforded bona fide purchasers if he has taken delivery of the certificate and the indorsements are otherwise in order. This protection could be specifically afforded by the addition of a paragraph (2) to Section 8-302 which would read as follows:

Where a necessary indorsement purports to be only of part of a security representing units intended by the issuer to be separately transferable, the purchaser is a bona fide purchaser to the extent permitted by such a partial indorsement.

This change in the Code would be a useful clarification of Wyoming law and would not unduly burden the Code with superfluties.

#### CONCLUSION

These Articles of the Code would improve our present laws in many ways. They would not dislocate present banking or commercial practices but would rather give fairer and more certain legal protection to those practices and could spare us considerable needless litigation. A study of these Articles clearly supports the conclusion that the Code should be adopted in Wyoming immediately.

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84. Uniform Commercial Code § 8-308 (5).