THE
NEGOTIABLE INSTRUMENTS LAW
OF
KENTUCKY

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The Kentucky Negotiable Instruments Law

ANNOTATED

BY
JOHN C. MILLER
OF THE
LOUISVILLE BAR

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TO
ONE WHO WAS ALWAYS A HELP
AND AN INSPIRATION

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PREFACE AND HISTORY AND CONSTRUCTION OF THE ACT.

In 1878 Judge Chalmers published his Digest of the English law relative to bills of exchange. Two years thereafter the Institute of Bankers and the Associated Chambers of Commerce instructed him to prepare a bill on the subject. This he did. His aim, to use his own words, was "to reproduce as exactly as possible the existing law, whether it seems good, bad, or indifferent in its effects." This act was passed by the British Parliament in 1882 and was entitled the "Bills of Exchange Act." Recognizing the necessity of uniformity in these matters in this country, at a meeting of the National Conference of State Boards of Commissioners for Promoting Uniformity of Legislation held in August, 1895, a committee was appointed who drafted a bill codifying the laws of negotiable instruments. This codification was submitted to the conference at its annual meeting in 1896 and was adopted. This draft was entitled "The Negotiable Instruments Law."

This draft has been adopted with a few modi-

fications by the following States, Territories and Districts: Alabama, Arizona, Colorado, Connecticut, District of Columbia, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Missouri Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

The act as originally prepared with certain changes has been adopted by this State. Section 19 originally read "the signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agencies." For this was substituted by the Kentucky Legislature the following: "The signature of any party may be made by an agent duly authorized in writing."

Sections 95 and 96 in the original draft read as follows: Section 95. "A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact mislead

thereby." Section 96 was, "A notice may be in writing or merely oral and may be given in any terms which sufficiently identify the instrument and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mail." As adopted by this State these sections read as follows: Section 95. "A written notice need be signed, and an insufficient written notice may be supplemented and validated by a written communication. A misdescription of the instrument does not vitiate unless the party to whom the notice is given is in fact mislead thereby." Section 96 as adopted reads: "The notice may be in writing, and may be given in any terms which sufficiently identify the instrument and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mail." Under these sections it has been held by the Court of Appeals that a notice must be in writing and signed. See notes to these sections.

Down to and including Section 189 this State has adopted the original draft, with certain modifications, and with the same number as to sections. It omitted Section 190 which gave a title to the act, for the reason that that title was found in the caption. Sections 190, 191, 192, 193 and

194 of our Act are the same as Sections 191, 192, 193, 194 and 195 of the original draft.

Our Act omits Section 196 of the original draft, which is as follows: "In any case not provided for in this act the rules of the law merchant shall govern." We suppose this was omitted for the reason that this would have been the law without it.

Sections 197 and 198 of the original draft enumerated what laws were repealed and when the law should take effect. What laws are repealed are stated in Section 195 of our Act, which provides that all laws that are "inconsistent with this act are hereby repealed." Our Statute was approved by the Governor on March 25, 1904, and under Section 55 of our State Constitution became a law on June 13, 1904.

As we have stated, the English Bills of Exchange Act was nothing more nor less than a codification of the law merchant with all its good and bad effects. So the Negotiable Instruments Law as prepared by its authors followed in the same line and was only a codification. These views have been adopted by the Court of Appeals of this State. In the case of Wettlaufer v. Baxter, 137 Ky. 362, 125 S. W. 741, the Court of Appeals said: "The negotiable instrument act is not a new law. It is with few exceptions merely

the codification of old laws that were in force and effect by virtue of judicial pronouncement or legislative enactment, and generally uniform. In many of the States, including our own, there was very little statutory law on the subject of bills and notes previous to the passage of this act. Some of these statutes were not uniform, nor indeed were the opinions of the courts altogether in harmony. And so, to remove the confusion and uncertainty that was caused in commercial affairs by the lack of uniformity in legislative enactments and harmony in judicial opinions, a committee of gentlemen learned in the commercial law prepared the negotiable instrument act, not with a view of making any radical changes in the law as generally understood and administered, but to remove the doubt as well as conflict that had in some instances come into existence from difference in statutory laws as well as court opinions. The result of their labors was the present act, which has become the law in a large majority of the States. And looking to the intention of the law and the purpose of its preparation and enactment, if there is doubt about the meaning of any of its provisions, and that doubt can be solved by a reference to the law merchant as it was theretofore administered, this law should be looked to, and the act if practicable given such a construc-

tion as will make it harmonize with the general principles of commercial law in force before its enactment." And again, in Campbell v. Fourth Nat. Bank, 137 Ky. 555, 126 S. W. 114, the court says: "The negotiable instrument act is in the main merely a codification of the common law rules on the subjects to which it relates. It was intended principally to simplify the matter by declaring the rule as established by the weight of authority. There are a few innovations in the law merchant as before settled by the courts. Where it lays down a new rule, it controls; but, where its language is consistent with the rule previously recognized, it should be construed as simply declaratory of the law as it was before the adoption of the act." To the same effect see Mechanics & Farmers' Savings Bank v. Katterjohn, 137 Ky. 427, 125 S. W. 1071; Williams v. Paintsville Nat. Bank, 143 Ky. 781, 137 S. W. 535; First Nat. Bank v. Bickel, 143 Ky. 754, 137 S. W. 790.

In Young v. Exchange Bank, 152 Ky. 293, 153 S. W. 444, this act was applied to a draft drawn, indorsed and accepted before the passage of this act. In that case it was held that this act was but a codification of the law merchant and should be applied to a draft drawn before its passage where our Court of Appeals had not

passed upon the question. In other words, this act was but a statement of the law as the Court of Appeals would have decided the law to be without the act.

From this history of the law and these decisions may be deduced three rules; first, the great and controlling factor in the construction of this act is that it is a codification of the law as it existed previous to its adoption. Second, that the purpose of this act was to establish uniformity of rule in the various States of this Union. Third, where a new rule is stated it obtains.

The first result of these rules is the fact that since this act is a codification of the law merchant it does not control the construction or enforcement of the rights and liabilities of parties to any contract which is not under the terms of this act a negotiable instrument. Eades v. Muhlenberg County Savings Bank, 157 Ky. 416, 163 S. W. 494.

The next result is that where this act does not establish a new rule and is only a codification of the law as it previously existed, the decisions of our Court of Appeals are the best evidence in this State of what the law means. A thorough understanding of these decisions is therefore essential to a proper construction of the act.

It is obvious that the uniformity sought by

this act will be statutory. The courts of the various States will construe it according to the light that they have; and one State will not yield to the construction given it by another State except to the extent that the rule of reason may prevail. Therefore, under this rule decisions of our Court of Appeals on the construction of this act will determine what the law is in this State.

Even the statement that where a new rule is introduced it must prevail is not so very important when we remember that this act is a codification. No rule in the act as originally written was absolutely new. Such rules are new only in certain jurisdictions. They once obtained in a majority of the States and were introduced into the act for the sole purpose of uniformity. Take for instance the question of the law of checks. The law once in this State was that a check was nothing more nor less than a bill of exchange. To this general rule exceptions were afterwards made by the courts. The Legislature merely restored the law to what it once was. Or, take the most radical change that has been made in Kentucky by the act (Section 184) which has made all promissory notes, which possess the essentials laid down by Section 1, negotiable. Even this, while making a new rule as to promissory notes, has introduced no new element in the

law of this State with regard to negotiable instruments.

From the beginning our Court of Appeals grasped with clear understanding the principles governing a bill of exchange. Both our Courts and Legislature refused to extend these principles to ordinary promissory notes. Unless such notes were discounted by banks whose private charters raised them to the footing of a bill of exchange or under the act of 1865, now Section 483 of the Kentucky Statutes, they remained with but little difference mere contracts for the payment of money. But under this act a promissory note possessing the elements of negotiability is just as negotiable as a bill of exchange. The only difference is that one is an order and the other a promise. When once launched on their commercial journey they have the same characteristics and under the same conditions reach the same end. They are upon the same footing. Or to use technical language, a negotiable promissory note is now, *at its inception,* on the footing of a bill of exchange. The act even at this vital point introduces no new rule, but only enlarges the class to which this rule applies.

So that under all these rules the practicioner must, in the first instance, rely upon the opinions of our own court of last resort. Before the pass-

age of this act we had over one hundred and ten years of judicial construction of the law merchant. And since its passage ten years of judicial construction of this act.

My single purpose in the preparation of this book has been to set forth as best I could the law merchant as it exists in Kentucky. No attempt has been made to go outside our State for decisions. I believe that in the decisions of our Court of Appeals will at least be found a foundation, and in many cases, the whole structure of the law.

In conclusion the author wishes to acknowledge his obligations to the work of Mr. Charles M. Lindsay, whose annotations to this act were published in 1904 and have been found most valuable.

JOHN C. MILLER.

January 1, 1915.

EXPLANATION.

The sections of this Act have been cross-referenced not by annotation but by inserting after the word or phrase the number of the section to which it is desired to attract the reader's attention. For instance, in Subsection 1 of Section 1 after the word "writing" have been inserted the figures 190, which refer the reader to Section 190 where it is declared that the word "written" includes the word "printed."

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THE KENTUCKY
NEGOTIABLE INSTRUMENTS LAW

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§ 1. **Requirements of a Negotiable Instrument.**—"An instrument to be negotiated must conform to the following requirements:

(1) "It must be in writing (Sec. 190) and signed (Sec. 19) by the maker or drawer.

(2) "Must contain an unconditional (Sec. 3) promise or order to pay a sum certain (Sec. 2) in money (Sec. 6, Sub. 5).

(3) "Must be payable on demand (Sec. 7) or at a fixed or determinable future time (Sec. 4).

(4) "Must be payable to the order of a specified person (Secs. 8, 190) or to bearer (Sec. 9); and

(5) "Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty."

See note to Section 184 on the question of what is negotiability.

In the original draft the word *negotiable* was used.

Signed. "When the law requires any writing to be signed by a party thereto, it shall not be deemed to be signed unless the signature be subscribed at the end of such writing." (Ky. Stats., Sec. 468).

The signature may be by mark unattested. Hinkle v. Dodge, 7 K. L. R. 526; Staples v. Bedford Loan & Deposit Bank, 98 Ky. 451, 33 S. W. 403, 17 K. L. R. 1035.

In the Staples case it is said "the words 'James
His
X Staples' do not constitute the signature of the
Mark
appellant, but the cross mark or sign is that signature."

But it seems to have been held that an unattested signature by mark does not have the same evidential effect as a signature in writing. Chadwell's Adm'r. v. Chadwell, 98 Ky. 643, 33 S. W. 1118, 17 K. L. R. 1207; Vanover v. Murphy's Adm'r., 15 S. W. 61, 12 K. L. R. 733.

This applies even where there is no plea of *non est factum.* Chadwell's Adm'r. v. Chadwell supra.

"No person shall be bound as the surety of another by the act of an agent, unless the authority

of the agent is in writing, signed by the principal; or, if the principal does not write his name, then by his sign or mark made in the presence of at least one creditable attesting witness." (Kentucky Statute, Section 482). Ragan v. Chenault, 78 Ky. 546; Billington v. Commonwealth, 79 Ky. 400).

Section 482 applies to signature to power of attorney and not to signature to original obligation. See Staples case supra and Measles v. Morton, 93 Ky. 50, 18 S. W. 1028, 13 K. L. R. 958 It is not surety's signature even though made by his agent in his presence. Billington case supra. Nor can such signature be ratified verbally. Ragan case supra. But such signature can be ratified by writing, Riggan v. Crain, 86 Ky. 249, 5 S. W. 561, 9 K. L. R. 528; or signer may be estopped to deny it, Rudd v. Matthews, 79 Ky. 479; Union Central Life Insurance Co. v. Johnson, 76 S. W. 335, 25 K. L. R. 682.

Money. "Bills, drafts or checks, payable in bank notes or currency, or other funds, wheresoever drawn or payable, shall be deemed negotiable, and treated in all respects as if drawn for money, except as to the value of the currency in which they are payable." (Ky. Statutes 478).

It will be observed that this statute does not in terms include promissory notes. Whether or not this act which makes a promissory note ne-

gotiable in the same manner as a bill of exchange would bring such notes within the perview of Section 478 is a question that has not been passed upon by the Court of Appeals.

For different kinds of money see Piner v. Clary, 17 B. Mon. 663; Morrison v. Tate, 1 Met. 569; Johnson v. Vickers, 1 Duv. 267; Smith's Adm'r. v. Dillon's Adm'r., 2 Duv. 153; Glass v. Pullen, 6 Bush 351.

An order in the form of a bill of exchange but payable in merchandise is not a bill of exchange. Coyle's Extx. v. Satterwhite's Adm'r., 4 T. B. Mon. 124; May v. Landsdown, 6 J. M. 165.

Payable to the order of a specified person or bearer. The use or nonuse of these words distinguishes a negotiable instrument from one which is merely assignable. In the case of Wettlaufer v. Baxter, 137 Ky. 362, 125 S. W. 741, it is said: "It will thus be seen that it was uniformly held that, in order to make a note or bill negotiable, the words 'to order' or 'to bearer' or equivalent words, must be used in the body of the note. It will be kept in mind, however, that the absence of these words does not affect the validity of a note or render it nontransferable or nonassignable. Their only effect is to make the instrument negotiable and thereby cut off defenses that the maker or either of the parties to the paper might

have and make against the holder in due course if the note was negotiable."

The words *payable to order* are synonymous with the words *payable and negotiable.* McCormack v. Clarkson, 7 Bush 519.

A note payable "to D. L. or order negotiable and payable at M. N. Bank" is a negotiable instrument. Alexander & Co. v. Hazelrigg, 123 Ky. 677, 97 S. W. 353.

See Jett v. Standafer, 143 Ky. 787, 137, S. W. 513.

§ 2. **Sum Payable Must Be Certain.**— "The sum payable is a sum certain within the meaning of this act, although it is to be paid:

(1) "With interest; or

(2) "By stated installments; or

(3) "By stated installments, with a provision that upon default of payment of any installment, the whole shall become due; or

(4) "With exchange, whether at a fixed rate or at the current rate; or

(5) "With costs of collection or an attorney's fee, in case payment shall not be made at maturity."

Installments. Robertson v. Commercial Security Co., 152 Ky. 336, 153 S. W. 450.

Attorney's Fee. While the provision in a note

providing for the collection of an attorney's fee does not render a note non-negotiable, yet in this State such a provision is deemed contrary to public policy and void. Thomasson v. Townsend, 10 Bush 114; Gaar v. Louisville Banking Co., 11 Bush. 189; Rilling v. Thompson, 12 Bush 310; Witherspoon v. Musselman, 14 Bush 214; Pryse v. Peoples B. L. & S. Ass'n., 19 K. L. R. 752, 41 S. W. 514; Kentucky Trust Co. v. Third Nat'l Bank, 106 Ky. 232, 20 K. L. R. 1797, 50 S. W. 43; Southern Warehouse & Transfer Co. v. Mechanic's Trust Co., 56 S. W. 162, 21 K. L. R. 1734; Fidelity Trust & Safety Vault Co. vs. Ryan, 109 Ky. 240, 58 S. W. 610, 22 K. L. R. 734.

Even though such a fee is recoverable under the law of the State where a note is payable, it cannot be recovered in this State, because such a provision is contrary to the public policy of this State. Carsey & Co. v. Swan & James, 150 Ky. 473, 150 S. W. 534.

§ 3. **When An Order or Promise Is Unconditional.**—"An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with it:

(1) "An indication of a particular fund, out of which reimbursement is to be made, or a particular account to be debited with the amount; or

(2) "A statement of the transaction which gives rise to the instrument.

"But an order or promise to pay out of a particular fund is not unconditional."

A mere indication of a fund out of reimbursement may be made or an account to be debited does not make order or promise conditional. Bank of Kentucky v. Sanders, 3 A. K. Mar. 184; Early v. McCart, 2 Dana 414; Biesenthall v. Williams, 2 Duv. 329. Nor does the fact that the obligation is secured by a lien. Duncan v. Louisville, 13 Bush 278; McCarty v. Louisville Banking Co., 100 Ky. 4, 37 S. W. 144, 18 K. L. R. 569; Hargis v. Louisville Trust Co., 30 S. W. 877, 17 K. L. R. 218. But an order or promise to pay out of a fund is conditional. Nichols' Adm'r. v. Davis, 1 Bibb 490; Mershon v. Withers, 1 Bibb 503; Curle v. Beers, 3 J. J. Mon. 170; Carlisle v. Dubree, 3 J. J. Mon. 542; Strader v. Bachelor, 8 B. Mon. 168. The rule is: "It is an essential quality of a good bill that it attach to itself the personal responsibility of the drawer, and be not drawn on the credit of any particular fund." Nichols v. Davis supra. Of course the same rule applies to a promissory note, in which case the maker must be personally liable and not a particular fund. Or to put it in other words, does the note or bill

carry the personal liability of the maker or drawer or only the liability of a particular fund?

Of course a statement in the instrument of an illegal transaction would be notice thereof to every holder.

§ 4. **What Is a Determinable Future Time.**—"An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable:

(1) "At a fixed period after date or sight; or

(2) "On or before a fixed or determinable future time specified therein; or

(3) "On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

"An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect."

An instrument payable on a contingency is not negotiable. Nichols v. Davis, 1 Bibb 490; Strader v. Bachelor, 8 B. Mon. 168; Early v. McCart, 2 Dana 414.

§ 5. **Provisions Affecting Negotiability.**—"An instrument which contains an order or promise to do an act in addition to the payment of money is not negotiable; but the

negotiable character of an instrument otherwise negotiable is not affected by a provision which:

(1) "Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or

(2) "Authorizes a confession of judgment if the instrument be not paid at maturity; or

(3) "Gives the holder an election to require something to be done in lieu of payment of money.

"But nothing in this section shall validate any provision or stipulation otherwise illegal."

As to vendor's and mortgage liens see note to Section 3.

While an authority to confess judgment, given before an action is instituted, is void in Kentucky (Ky. Stat. 416), yet such a provision in an instrument neither makes the instrument void, nor, by the very words of the above section, makes it non-negotiable. And here it may be said that this act, where it merely states that any particular provision in an instrument shall not affect its negotiability, does not make that valid which otherwise is illegal; nor on the other hand does a law, which makes certain contracts void, affect the *negotiability* of an instrument otherwise complete

and legal, except where it is denounced by a *statute* as void. See note to Section 57.

§ 6. **Negotiable Character, When Not Affected.**—"The validity and negotiable character of an instrument are not affected by the fact that:

(1) "It is not dated (Secs. 13, 14, 17); or

(2) "Does not specify the value given (Secs. 24, 190), or that any value has been given therefor; or

(3) "Does not specify the place where it is drawn or the place where it is payable (Secs. 13, 14); or

(4) "Bears a seal; or

(5) "Designates a particular kind of current money in which payment is to be made (Sec. 1, Sub. 2).

"But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument."

The date is a material but not an essential part of a negotiable paper. Stout v. Cloud, 5 Litt. 205. As to particular kind of money, see Hord v. Miller, 2 Duv. 103; Ledford v. Smith, 6 Bush 129; Glass v. Pullen, 6 Bush 346; Murray v. Meagher, 8 Bush 574.

As to statement of consideration, see note to Section 57 on "Peddlers' Notes."

§ 7. **When Payable on Demand.**—"An instrument is payable on demand:

(1) "Where it is expressed to be payable on demand, or at sight, or on presentation; or

(2) "In which no time for payment is expressed.

"Where an instrument is issued, accepted or endorsed when overdue, it is, as regards the person so issuing, accepting or endorsing it, payable on demand (Sec. 45)."

This abolishes former distinctions between paper payable at sight and on demand.

§ 8. **When Payable to Order.**—"The instrument is payable to order where it is drawn payable to the order of a specified person or to him or to his order. It may be drawn payable to the order of:

(1) "A payee who is not maker, drawer, or drawee; or

(2) "The drawer or maker; or

(3) "The drawee; or

(4) "Two or more payees jointly (Sec. 41); or

(5) "One or some of several payees; or

(6) "The holder of an office for the time being.

"Where the instrument is payable to order, the payee must be named or otherwise indicated therein with reasonable certainty."

Payable to order of one or several payees.

Such notes are now not payable on a contingency within the meaning of this act.

This section is cited in Wettlaufer v. Baxter, 137 Ky. 362, 125 S. W. 741.

§ 9. **When Payable to Bearer.**—"The instrument is payable to bearer:

(1) "When it is expressed to be so payable; or

(2) "When it is payable to a person named therein or bearer; or

(3) "When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or

(4) "When the name of the payee does not purport to be the name of any person; or

(5) "When the only or last endorsement is an endorsement in blank (Sec. 34)."

Notice the words in Subsection 5 *only or last.*

One who indorses a note payable neither to order nor bearer, does not incur any liability as indorser, arising under this Act. (Wettlaufer v. Baxter, 137 Ky. 362, 125 S. W. 741).

Where the last indorsement on a lost note was in blank, it is necessary that the plaintiff execute bond required by Section 7 of the Civil Code. Hoyland v. National Bank of Middlesborough, 137 Ky. 682, 126 S. W. 356; but where

it is payable to order and not indorsed in blank, no such bond is required. Foster's Adm'r. v. Metcalfe, 144 Ky. 385; 138 S. W. 314.

§ 10. **Sufficient Terms.**—"The negotiable 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 (Sec. 17)."

§ 11. **Date, Presumption.**—"When the instrument or an acceptance or any indorsement thereon is dated, such date is deemed *prima facie* to be the true date of the making, drawing, acceptance or indorsement, as the case may be (Sec. 45)."

§ 12. **Antedated or Post-Dated—Effect Of.**—"The instrument is not invalid for the reason only that it is ante-dated or post-dated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered, acquires the title thereto as of the date of delivery."

§ 13. **When Holder May Insert True Date.**—"When an instrument expressed to be payable at a fixed period after date is issued undated or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert there-

in the true date of issue or acceptance and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date (Sec. 14)."

§ 14. **When Blanks May Be Filled.**— "Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered (Secs. 15 and 16) by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a *prima facie* authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within reasonable time. But if any such instrument, after completion, is negotiable* to a holder in due course it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time."

*In the original draft the word "negotiated" was used.

It should be noted that this section gives only the right to *complete* the instrument. Where any words are added to a *complete* note, it is an alteration. See Section 125 and Blakey v. Johnson, 13 Bush 197. Also that the instrument must be *delivered*. See Section 15. Such a paper is negotiable only *when completed*.

In the cases of Bank of Limestone v. Penick, 5 T. B. Mon. 25; Taylor v. Craig, 2 J. J. Mon. 449; Bank of Com. v. Curry, 2 Dana 142; Bank of Kentucky v. Garey, 6 B. Mon. 626; Patton v. Shanklin, 14 B. Mon. 13; Jones v. Shelbyville Fire & L. Ins. Co., 1 Met. 58; Rogers v. Poston, 1 Met. 643; Smith v. Lockridge, 8 Bush 423; Woolfolk v. Bank of America, 10 Bush 504; Cason v. Grant County Deposit Bank, 97 Ky. 487; 31 S. W. 40, 17 K. L. R. 344; and Stanley v. Davis, 107 S. W. 773, 33 K. L. R. 1135; involving notes executed before the passage of this Act, it was held that where one signed and delivered a blank note, he was liable for any amount or any stipulation inserted in the proper blank, irrespective of any limitation of authority, of which limitation the payee or holder had no notice. This is undoubtedly yet the law as to a holder in due course as defined in this act, as is shown by the words of this section and the case of Diamond Distilleries Co. v. Gott, 137 Ky. 585, 126 S. W. 131; but the ques-

tion seems to be open as to the rights of a *payee*, under this section, where the note is filled out in violation of the directions of the signer. In the case of Hermann's Exor. v. Gregory, 131 Ky. 819, 115 S. W. 809, it was contended that, where H. signed a blank note for a certain purpose, and where it was filled out and payees' names inserted by the attorney of the payees and in their presence and then signed by principal debtor and delivered for another purpose, but payees were ignorant of the limitation, H. was not liable. It was argued that payees were parties to the note before its completion; that the note had not been *negotiated* to them (Section 30), because not being payable to bearer was therefore not negotiable by delivery, but being payable to order of payees was of course not *negotiated* to them by indorsement; that payees were not *holders in due course* (Sec. 52, Subsec. 4) and that they were *immediate parties* (Section 16). The Court said: "Without wholly giving our consent to the contention of appellant, let us see whether his testator's estate can escape liability under the rule laid down by himself," and the Court proceeded to hold that the directions of appellant had not been violated. But we suggest that such signer might yet be held estopped by reason of his negligence in delivering the paper in blank. See note to Section 124.

Where a bill is left blank as to date, amount and address, these blanks may be filled and a holder in due course is not affected by the fact that the authority may be exceeded. Smith v. Lockridge, 8 Bush 423.

§ 15. **Incomplete Instrument**—"Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder (Sec. 190), as against any person whose signature was placed thereon before delivery (Secs. 14, 16)."

"See note to Section 16.

§ 16. **Delivery.**—"Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting, or endorsing as the case may be; and in such case the delivery may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all par-

ties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved (Secs. 15, 16, 23)."

The distinction between this section and Section 15 is that this section deals with *completed* instruments and Section 15 with *incompleted* instruments. If the bill or note is incomplete, it will not be valid if filled out and negotiated without authority against any person signing before delivery. But if it is complete and payable to bearer, as provided by Section 9, it is valid in the hands of a holder in due course even if stolen. But of course this is not the rule where the holder claims through a forged signature (Section 23).

See generally Caruth v. Thompson, 16 B. Mon. 572 and Prather v. Weissiger, 10 Bush 117; Greenwell v. Hayden, 78 Ky. 332.

But notice the rule as between *immediate parties.* This may change the rule laid down in many of the authorities cited in note to Section 14, where it was held that a note delivered to an agent, who in turn delivered it to an innocent payee, in violation of his private instructions, was binding in the hands of the *payee,* who, it would

appear, is now an *immediate* and not a *remote* party.

§ 17. **Ambiguous Instruments — How Construed.**—"Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply:

(1) "Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount.

(2) "Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue (190) thereof.

(3) "Where the instrument is not dated, it will be considered to be dated as of the time it was issued (Sec. 13).

(4) "Where there is conflict between the written and printed provisions of the instrument, the written provisions prevail.

(5) "Where the instrument is so ambiguous that there is doubt whether it is a bill or a note, the holder may treat it as either, at his election (Secs. 122, 184).

(6) "Where a signature is so placed upon

the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser (Secs. 64 to 69 inclusive).

(7) "Where an instrument containing the words, 'I promise to pay,' is signed by two or more persons, they are deemed to be jointly and severally liable thereon."

Sum payable in words and figures. See Woolfolk v. Bank of America, 10 Bush 504.

Interest. This provision seems to be in accord with the previous decisions in this State. See Whitton v. Swope, 1 Litt. 160; Miller v. Kavanaugh, 99 Ky. 377; 35 S. W. 920; 18 K. L. R. 183. The Court in the last case said, concerning a note payable two years after date, "with interest at the rate of six per centum per annum from * * * until paid." "It (the note) was to be paid at a given date, and it is unreasonable to suppose that a note for the payment of money on a particular day, with interest at a certain rate per annum until paid, could be construed to mean that the interest should commence on the day of payment, and not before, for the law would give interest from that date." In the case of White v. Shepherd, 140 Ky. 349, 131 S. W. 17, it was held that the insertion of the words "with

interest at 6 per cent." was a material alteration.

Subsection 5. See Piner v. Clary, 17 B. Mon. 645; Bradley v. Mason, 6 Bush 602.

Subsection 6 is cited in Young v. Exchange Bank, 152 Ky. 293; 153 S. W. 444, in deciding that an accommodation indorser on a draft, executed before this act went into effect, was not a surety.

§ 18. **Liability Where Signature Does Not Appear—Trade or Assumed Names.**—"No person is liable on the instrument whose signature does not appear thereon (Secs. 20, 42), except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name."

As to partnership signatures. Hykes v. Crawford, 4 Bush 19; Macklin's Exr. v. Crutcher, 6 Bush 401; Carter v. Mitchell, 94 Ky. 261, 22 S. W. 83, 15 Ky. L. Rep. 53; National Exchange Bank v. Wilgus, 95 Ky. 309, 25 S. W. 2, 15 Ky. L. R. 763; Faris v. Cook, 110 Ky. 867, 62 S. W. 1043, 63 S. W. 600, 23 Ky. L. R. 328. It should be observed that all these cases were decided prior to the passage of this Act.

§ 19. **Signature by Agent.**—"The signature of any party may be made by an agent duly authorized in writing (Secs. 42, 190)."

This makes a radical change in our law. Of course the authority of an *agent* must be in writing. But what of that of a principal officer of a corporation? In Star Mills v. Bailey, 140 Ky. 194, 130 S. W. 1077, it is said: "But more is needed to make a promissory note of a corporation than the signature of the corporate name by its president. His authority must be shown." If so, then it must be in writing. On the other hand it was held as to transactions occurring, after the passage of this Act, that: "The cashier of a bank has general authority to discount and rediscount paper owned by the bank, and to sell and *assign* paper owned by it for a valuable consideration * * *. First State Bank's Rec. v. Farmers' Bank, 155 Ky. 693, 160 S. W. 250. And the same was held in Citizens' Bank v. Bank of Waddy's Rec., 126 Ky. 169, 103 S. W. 249. But in Citizens' Bank case it was pointed out that "the money borrowed was paid to the Bank of Waddy and was used by the Bank of Waddy" and "the only officer it really had was the cashier." If these citations were intended to be material, they mean that the cashier's authority was not

derived from his office, but from facts which had to be proved by parol evidence.

See Introduction.

§ 20. **Liability or Persons Signing As Agent.**—"Where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of the principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character without disclosing his principal, does not exempt him from personal liability."

This section makes personally liable an agent, with full authority where he does not disclose his principal; or where he discloses his principal but lacks authority.

See the following cases as to signatures of agents and when they individually or their principal were bound: McBean v. Morrison, 1 A. K. Mar. 545; Offutt v. Ayres, 7 T. B. Mon. 356; Burbank v. Posey, Adm'r., 7 Bush 372; Track v. Roberts, 1 B. Mon. 201; Whitney v. Sudduth 4, Met. 296; Pack v. White, 78 Ky. 243; Moffett v. Hampton, 31 S. W. 881, 17 K. L. R. 534; McKensey v. Edwards, 88 Ky. 272, 10 S. W. 815, 10 K. L. R. 854; Yowell v. Dodd, 3 Bush 581; Caphart v. Dodd,

3 Bush 584; Carson v. Lucas, 13 B. Mon. 213; Warford v. Temple, 73 S. W. 1023, 24 K. L. R. 2268; Bank of Kentucky v. Sanders, 3 A. K. Mar. 184; Lewis v. Harris, 4 Met. 353. All of these cases were decided prior to the passage of this Act.

§ 21. **Signature by Procuration.**—"A signature by *procuration* operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority.

§ 22. **Indorsement or Assignment by Infant or a Corporation Lacking Capacity.**—"The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon."

An assignment of a note by an infant is voidable but not void. Semple v. Morrison, 7 T. B. Mon. 298.

Where one indorses a bill drawn by a corporation, he is not released by reason of the fact that the corporation was not liable, because it did not possess the capacity to draw the bill.

M. V. Monarch Co. v. Farmers' & Drovers' Bank, 105 Ky. 430, 49 S. W. 317, 20 K. L. R. 1351.

§ 23. **Forged or Unauthorized Signature.**—"Where a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority."

No recovery can be had on note to which maker's name was forged. Hon. v. Harned, 38 S. W. 688, 18 K. L. R. 864.

A forged or unauthorized signature of an accommodation indorser will not prevent a recovery on the instrument, where holder does not claim through such indorsement. Jett v. Standafer, 143 Ky. 787, 137 S. W. 513.

"A forged indorsement cannot transfer any interest in the bill, and the holder thereof has no right to demand the money." Farmers' National Bank v. Farmers' & Traders' Bank, 159 Ky. 141, 166 S. W. 986. And see note to Section 185.

ARTICLE II.

CONSIDERATION.

Section 24. Presumption of consideration.
25. What constitutes a consideration.
26. Holder for value.
27. Holder for value; lien.
28. Absence or failure of consideration.
29. Liability of accommodation party.

§ 24. **Presumption of Consideration.**—"Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value (Sec. 6, Sub. 2)."

Section 471 of the Kentucky Statutes placing all writings for the payment of money, etc., without a seal, upon the same footing with sealed writings, makes every such written promise import a consideration; and it is therefore unnecessary to allege a consideration on a promissory note. Bronston's Adm'r. v. Lakes, 135 Ky. 173, 121 S. W. 1021. As to bills of exchange and promissory notes placed on the footing of bills of exchange, see Early v. McCart, 2 Dana 414 and Beattyville Bank v. Roberts, 117 Ky. 689, 78 S. W. 901.

For form of plea of no consideration, see Evans v. Stone, 80 Ky. 78; Mullikin v. Mullikin, 23, S. W. 352, 25 S. W. 598, 15 K. L. R. 612; Allnutt v. Allnutt's Exr., 127 S. W. 986; Bronston's Adm'r. v. Lakes, *supra.*

The burden of proof is on the person alleging no consideration. Radford's Adm'r. v. Harris, 144 Ky. 809, 139 S. W. 963.

But if the pleader unnecessarily sets out the consideration he must prove it. Bronston's Adm'r. v. Lake, *supra,* and cases cited therein.

§ 25. **What Constitutes a Consideration.**—"Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes a value, and is deemed such, whether the instrument is payable on demand or at a future time."

Sections 25, 26 and 27 are so intimately connected that they are annotated together.

Decisions Prior to Passage of Negotiable Instrument Act.

Prior to the enactment of this law it was held in this State that where one received a negotiable instrument in payment of an antecedent debt, or in consideration of the suspension of a previous right of action, or the relinquishment

of any security, he was a purchaser for value; Alexander v. Springfield Bank, 2 Met. 534. This was also the law as to a simple contract; May v. Quimby & Co., 3 Bush 96. But one, who merely took negotiable paper as security for a pre-existing debt, was not a holder for value; Lee's Adm'r. v. Smead, etc., 1 Met. 628; Thompson v. Poston, 1 Duv. 389. The same was true of a pledge of shares of stock; Shuster v. Jones, 58 S. W. 595, 22 K. L. R. 568. In the case of Walker v. Harris, 114 S. W. 775, it was decided that the pledge of shares of stock to secure a note payable one day after date and given for a pre-existing debt was not supported by a valuable consideration, that one day after date was not a real suspension of a right of action and that the Negotiable Instrument Act did not apply because the note was executed before its enactment. But the question arises does this Act change the law of consideration except where negotiable paper is concerned; and would it not have been well to have placed the decision on that ground? It was not negotiable instruments but shares of stock that were pledged.

Decisions Involving Negotiable Instrument Act.

Value. Extension of time given the principal, is a sufficient consideration to bind sureties sign-

ing the new note, although they had been released, without their knowledge, on the old note; Steger v. Jackson, 102 S. W. 329; Davis v. Bank of Clarkson, 144 Ky. 417 138 S. W. 246. Taking a note in payment of a previous note constitutes one a holder for value. Campbell v. Fourth Nat. Bank, 137 Ky. 555, 126 S. W. 114. But where one deposits his own check on another bank, and is permitted to check against the same, but under an agreement to reimbuse the collecting bank if check is not paid, the collecting bank is not a holder for value, Boswell v. Citizens' Savings Bank, 123 Ky. 485, 96 S. W. 797.

Value paid at any time. In each of the following cases the holder was held to be a holder for value. Where after the delivery of the note the payee paid debts of the maker of equal amount, Hermann's Exr. v. Gregory, 131 Ky. 819, 115 S. W. 809. Where one deposited a check and at the time drew out part of the money and drew balance before bank received notice of dishonor, Choteau Trust & Banking Co. v. Smith, 133 Ky. 418, 118 S. W. 279.

Where A deposited in R Bank two checks for $1,000.00, each on F Bank, one certified and the other not; and both checks were dishonored, but R. Bank was not notified of dishonor of uncertified check and permitted A to withdraw the

amount of both checks, held that R. Bank paid value for both checks; that its action in doing so was proper, for it had the right to assume that the certified check would be paid, First Nat. Bank v. Bank of Ravenswood, 141 Ky. 671, 133 S. W. 581. Also see American Nat. Bank v. J. S. Minor & Sons, 142 Ky. 792, 135 S. W. 278, where it was held that an extension given a debtor was a sufficient consideration to support a pledge of a note to secure the debt extended and for the payment "of any other liability of mine to said bank due or to become due, or that may hereafter be contracted."

Where C delivered a negotiable note to J, in consideration of his becoming surety for C, under agreement that the note was to be the property of J if he had to pay the note on which he was surety, and J did pay that note, held that he was the holder for value and owner of the note pledged, Jett v. Standafer, 143 Ky. 787, 137 S. W. 513.

The renewal by a bank of certain obligations of a corporation is a sufficient consideration to support an agreement by certain directors "in consideration of loans already made and to be made," by the bank to the corporation, to become jointly liable on all obligations of the corporation indorsed by either of them. First Nat. Bank v. Doherty, 156 Ky. 386, 161, S. W. 210.

Lien to secure a pre-existing debt. Where one holds a note as security for a pre-existing debt, he is a holder for value, Wilkins v. Usher, 123 Ky. 696, 97 S. W. 37, 29 K. L. R. 1232; Citizens' Bank v. Bank of Waddy's Rec., 126 Ky. 169, 103 S. W. 248, 31 K. L. R. 365; Campbell v. Fourth Nat. Bank, 137 Ky. 555, 126 S. W. 114; Diamond Distilleries Co. v. Gott, 137 Ky. 585, 126 S. W. 131; American Nat. Bank v. Minor, *supra.*

Where there is a good defense as between the parties, the pledgee in due course can recover only the amount of the debt for which note was pledged, Elk Valley Coal Co. v. Third Nat. Bank, 157 Ky. 617, 163 S. W. 766. But in this case it was held that plaintiff could not be required to look to its other collaterals first; while in the Bank of Waddy case it was held that it could be so compelled.

"Without receiving value therefor" evidently means receiving no value for the instrument. It does not mean that an individual or a surety company, receiving a premium to become a surety or accommodation party, has received value within the meaning of this section. *"No portion of the proceeds* was paid by the bank to him. It was not executed for his accommodation," Mechanic's & Farmers' Savings Bank v. Katterjohn, 137 Ky. 427, 125 S. W. 1070; and in First Nat. Bank v. Bickel, 143 Ky. 754, 137 S. W. 890, it is empha-

sized that "the indorsers received *nothing of the proceeds* of the note.

In an action against certain persons who had indorsed in blank the note of a corporation of which they were directors and stockholders, payable to plaintiff, it was alleged that they had sought to borrow the money from the bank, had agreed to give the corporation's note therefor with them as sureties, that credit was given alone to them and the money at their request was paid to the corporation, and that they, and not the corporation, were the parties accommodated. But the Court said: "Reading Section 115 with Section 29, we think it means that the endorser for whose accommodation the instrument was made or accepted is the one who receives value therefor, and not the one who signs it simply for the purpose of lending his name to some other person. * * *. The note was not made for their accommodation *within the meaning of the act.*" Bickel case *supra.* To same effect see Grayson County Bank v. Elbert, 143 Ky 750, 137 S. W. 792; First Nat. Bank v. Bickel, 154 Ky. 11, 156 S. W. 856, and Katterjohn case *supra.*

§ 26. **Holder For Value.**—"Where value has at any time been given for the instrument, the holder is deemed a holder for value

in respect to all parties who became such prior to that time (Sec. 54)."

See note to Section 25.

§ 27. **Holder For Value—Lien.**—"Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien."

See note to Section 25.

§ 28. **Absence or Failure of Consideration.**—"Absence or failure of consideration is a matter of defense as against any person not a holder in due course (52), and partial failure of consideration is a defense *pro tanto*, whether the failure is an ascertained and liquidated amount or otherwise."

See First State Bank v. Morton, 146 Ky. 287, 142 S. W. 694; Elk Valley Coal Co. v. Third Nat. Bank, 157 Ky. 617, 163 S. W. 766.

§ 29. **Liability of Accommodation Party.**—"An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for

value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."

As to liability of accommodation parties on negotiable paper before the passage of this Act, see Gazzam v. Armstrong, 3 Dana 554; Eldridge v. Duncan, 1 B. Mon. 101; Turner, Wilson & Co. v. Browder, 5 Bush 216; Young v. Exchange Bank, 152 Ky. 293, 153 S. W. 444, and cases cited.

ARTICLE III.

NEGOTIATION.

Section 30. Negotiation, how made.
31. Indorsement, how made.
32. Indorsement must be of entire instrument.
33. Kinds of Indorsement.
34. Special Indorsements; Indorsements in blank.
35. Conversion of blank indorsement into special indorsement.
36. Restrictive Indorsement.
37. Effect of restrictive indorsement.
38. Qualified indorsement.
39. Conditional indorsement.
40. Indorsement of instrument payable to bearer.
41. Indorsement where payable to order of two or more persons.
42. Instrument drawn or indorsed to person as cashier or other fiscal officer.

43. Indorsement where name is misspelled or wrongly designated.
44. Indorsement in representative capacity.
45. Presumption as to time of indorsement.
46. Place of indorsement; presumption.
47. Negotiability—when ended.
48. Striking out indorsement.
49. Transfer without indorsement; effect.
50. When prior party may negotiate instrument.

§ 30. **Negotiation—How Made.**—"An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof, if payable to bearer (Secs. 9, 34), it is negotiated by delivery (Sec. 190); if payable to order (Sec. 8), it is negotiated by the indorsement of the holder, completed by delivery."

Where one indorsed a note in Kentucky but it was delivered in Ohio, where it was dated and

payable, held that the Ohio law governed the indorsement because the delivery was necessary to complete the contract of indorsement. Young v. Harris, 14 B. Mon. 447.

This section is cited in Wettlaufer v. Baxter, 137 Ky. 362, 125 S. W. 741, and Foster's Adm'r. v. Metcalf, 144 Ky. 385, 138 S. W. 314.

§ 31. **Indorsement—How Made.**—"The indorsement must be written (Sec. 190) on the instrument or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement (Secs. 63, 64, 66)."

A certain signature on the back of a bill of exchange held not a sufficient indorsement to pass the title to the bill. Gray Tie & Lumber Co. v. Farmers' Bank, 109 Ky. 694, 60 S. W. 537, 22 K. L. R. 1333.

Referring to the former case of First Nat. Bank v. Bickel, 143 Ky. 754, 137 S. W. 790, the Court in the same styled case, 154 Ky. 11, 156 S. W. 856, said: "In short the ruling of the court in that case was that a person who places his name upon paper other than as maker, drawer,

or acceptor, is deemed to be an indorser, unless he indicates by proper words in the indorsement his intention to be bound in some other capacity, or his intention to be bound in some other capacity than indorser appears on the paper in connection with and as a part of the indorsement," and further held that a paper attached to the note, where these persons agreed "to sign the note for security" did not show any intention that they signed other than indorsers.

A detached paper cannot bind one as indorser on a negotiable instrument. First Nat. Bank v. Doherty, 156 Ky. 386, 161 S. W. 211.

§ 32. **Indorsement Must Be of Entire Instrument.**—"The indorsement must be an indorsement of the entire instrument. An indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument; but where the instrument has been paid in part, it may be indorsed as to the residue."

An assignment of a part of the amount payable does not transfer the title to the paper, but

constitutes assignor trustee for the assignee. Bank of Galliopolis v. Trimble, 6 B. Mon. 599 But the assignment of a note with a credit does pass the title. Bledsoe v. Fisher, 2 Bibb 471.

§ 33. **Kinds of Indorsement.**—"An indorsement may be either in blank or special, and it may also be either restrictive or qualified, or conditional."

§ 34. **Special Indorsements — Indorsements in Blank.**—"A special indorsement specifies the person to whom or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery (Sec. 65)."

An indorsement in blank of a non-negotiable note did not convert it into a negotiable instrument, nor did it give the holder any rights against the indorser under this Act; but the holder is relegated to his rights as assignee. Wettlaufer v. Baxter, 137 Ky. 362, 125 S. W. 741.

§ 35. **Conversion of Blank Indorsement**

Into Special Indorsement.—"The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement."

The above was the law of Kentucky. Bradford v. Ross, 3 Bibb 239; Caruth v. Thompson, 16 B. Mon. 572; Needhams v. Page, 3 B. Mon. 465; and such indorsement is irrevocable and may be filled up after death of indorser. Cope v. Daniel, 9 Dana 415.

But the rule laid down in these cases that the holder could not recover until he had written over the blank indorsement a formal assignment to himself, was afterwards modified to the extent of holding that one, who alleges that he is the holder and owner of the bill, may recover without filling up such indorsement, unless his title is denied, in which case plaintiff could and should do so. Gaar v. Louisville Banking Co., 11 Bush 180; Barrett v. Fort Pitt Nat. Bank, 44 S. W. 97, 19 K. L. R. 611.

But it seems that this is not the rule, even as modified, under this Act. By Section 9 it is provided that when the only or last indorsement is an indorsement in blank "the instrument is payable to bearer;" and by Section 51 that "the

holder of a negotiable instrument may sue thereon in his own name." Of course upon issue made, it becomes a matter of evidence. See Callahan v. Louisville Dry Goods Co., 140 Ky. 712, 131 S. W. 995.

§ 36. **Restrictive Indorsement.**—"An indorsement is restrictive which either:

(1) "Prohibits the further negotiation of the instrument; or

(2) "Constitutes the indorsee the agent of the indorser; or

(3) "Vests the title in the indorsee in trust for or to the use of some other person. But the mere absence of words implying power to negotiate does not make an indorsement restrictive."

An indorsement to a bank for "collection and credit" and one for "collection on account" amount to the same thing and constitute the bank the agent of the depositor. This results in making the bank not liable for the negligence of the collecting bank if it has exercised due care in the selection. And even though the bank credit the depositor with the amount of the draft or note, it may cancel such credit if it does not receive the money. Again, payment direct to the depositor by the collecting bank will not make for-

warding bank liable to an equitable owner of the draft of which equity the collecting bank had no notice. The forwarding bank is not the owner of the draft. Commercial Nat. Bank v. First Nat. Bank, 158 Ky. 392, 165 S. W. 398 and cases cited, and case of Caldwell v. Evans, 5 Bush 380.

Notice that under Section 1 the *instrument* to be negotiable must be payable to order or to bearer, while, under Subsection 3, the *indorsement* does not have to have these words or their equivalents.

§ 37. **Effect of Restrictive Indorsement.** "A restrictive indorsement confers upon the indorsee the right:

(1) "To receive payment of the instrument.

(2) "To bring any action thereon that the indorser could bring.

(3) "To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

"But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement."

The rule laid down in First Nat. Bank v. Payne, 42 S. W. 736, 19 K. L. R. 839, that an indorsee for collection cannot sue in its own name (see Civil Code, Sec. 18), is changed by Subsection 2. But

while it may sue in its own name, a plea of payment to the owner is a good defense. Commercial Nat. Bank v. First Nat. Bank, 158 Ky. 392, 165 S. W. 398. The owner of a draft deposited for collection can treat the forwarding bank as his agent until the money is actually received, and where the collecting bank has collected the draft and credited the proceeds to the forwarding bank, the owner can claim the proceeds as against the forwarding bank. Armstrong v. Nat. Bank of Boyertown, 90 Ky. 431, 14 S. W. 411, 12 K. L. R. 393. But payment to an unknown holder of a note, indorsed finally to a named bank for collection, is made at payor's risk. Barnett v. Ringgold, 80 Ky. 289.

§ 38. **Qualified Indorsement.**—"A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words 'without recourse' or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument (Sec. 65)."

Where the words "without recourse" are written between the signatures of two indorsers, parol evidence is competent to show which indorsement they qualify. Goolrick v. Wallace, 154 Ky. 596,

157 S. W. 920. But "the purpose of the statute is to exclude parol evidence, and make the written instrument control the rights of the parties." First Nat. Bank v. Bickel, 143 Ky. 754, 137 S. W. 790. And it is well to read Section 110 in this connection. It provides that where waiver of notice "is written above the signature of an indorser, it binds him only."

§ 39. **Conditional Indorsement.**—"Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated, will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally."

§ 40. **Indorsement of Instrument Payable to Bearer.**—"Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as to* make title through his indorsement (Sec. 5, Subsecs. 9, 67)."

*The word "to" is not in the original draft.

§ 41. **Indorsement Where Payable to**

Order of Two or More Persons.—"Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse unless the one indorsing has authority to indorse for the others (Sec. 19)."

§ 42. **Instrument Drawn or Indorsed to Person As Cashier or Other Fiscal Officer.**—"Where an instrument is drawn or indorsed to a person as *cashier* or other fiscal officer of a bank or corporation, it is deemed *prima facie* to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer."

In case of Tyler v. First Nat. Bank, 150 Ky. 515, 150 S. W. 665, recovery was had on a note payable to "Joel Bailey, Pt." and indorsed "Joel Bailey, Pt., by G. A. Hurst, Cashier." The same rule applies to non-negotiable paper. Eades v. Muhlenberg County Savings Bank, 151 Ky. 416, 163 S. W. 494. See Caldwell v. Evans, 5 Bush 380.

§ 43. **Indorsement Where Name Is Misspelled or Wrongly Designated.**—"Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the in-

strument as therein described, adding, if he thinks fit, his proper signature."

When a note was payable to one individually an assignment by him as "Administrator of T., deceased," was valid, the words being merely descriptive. McClure v. Biggstaff, 37 S. W. 294, 18 K. L. R. 601.

§ 44. **Indorsement in Representative Capacity.**—"Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability (Sec. 20)."

§ 45. **Presumption As to Time of Indorsement.**—"Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed *prima facie* to have been affected* before the instrument was overdue (Sec. 52.)"

*"Effected" is used in the original draft.

See Alexander & Co. v. Springfield Bank, 2 Met. 534.

§ 46. **Place of Indorsement—Presumption.**—"Except where the contrary appears every indorsement is presumed *prima facie* to have been made at the place where the instrument is dated."

The place of indorsement is important in fixing the rights of the parties. The indorsement is a new contract and the rights and liabilities of the indorser are fixed by the law of the place where the indorsement is made and completed. Piner v. Clary, 17 B. Mon. 645; Short & Co. v. Trabue & Co., 4 Met. 299; Carlisle v. Chambers, 4 Bush 268; Hyatt v. Bank of Kentucky, 8 Bush 193; Wettlaufer v. Baxter, 137 Ky. 362, 125 S. W. 741.

But the contract of indorsement is not completed until delivery. The law of the place of delivery governs even though the physical act of writing be done elsewhere. Goddin v. Shipley, 7 B. Mon. 575; Young v. Harris, 14 B. Mon. 447; Hyatt v. Bank of Kentucky *supra.*

But while the indorser may not be liable by reason of the law of the place where the indorsement is made, yet his indorsement does not change the character of the paper nor affect its legality as between the other parties, and is effective to transfer the title. Carlisle v. Chambers *supra* and Hyatt v. Bank of Kentucky *supra.* The holder of a note valid in the state where it was made, but which would be void in Kentucky, can enforce its collection in this State against the maker even through an assignment made in this State. Arnett v. Pinson, 108 S. W. 852, 33 K. L. R. 36.

§ 47. **Negotiability—When Ended.**—"An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed (Secs. 36, 37) or discharged by payment or otherwise (Secs. 119-125 inclusive)."

§ 48. **Striking Out Indorsement.**—"The owner may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument."

See Bell v. Morehead, 3 A. K. Mar. 158; Tuggle v. Adams, 3 A. K. Mar. 429; Long, etc., v. Bank of Cynthiana, 1 Litt. 290; Clark v. Schwing, 1 Dana 333; Hawkins, etc., v. Armstrong, 6 Dana 128; Bank of Tennessee v. Smith, 9 B. Mon. 609. But may not the holder sue in his own name without striking out subsequent indorsements? See Section 51.

§ 49. **Transfer Without Indorsement—Effect.**—"Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferrer had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferrer (Sec. 65). But for the

purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made."

See Gray Tie & Lumber Co. v. Farmers' Bank, 109 Ky. 694, 60 S. W. 537, 22 K. L. R. 1333. In the case of Callahan v. Louisville Dry Goods Co., 140 Ky. 712, 131 S. W. 995, the petition of appellee, alleging that it was the successor of payee corporation and was the owner and holder of the note, was held good on demurrer, though the note had not been indorsed to it. But the Court was in error in the *dictum* that appellee was a holder *in due course*. See Section 52 and case of Foster's Admr. v. Metcalf, 144 Ky. 385, 138 S. W. 314.

§ 50. **When Prior Party May Negotiate Instrument.**—"Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this Act, reissue and further negotiate the same (Secs. 47,48) ; but he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable."

See note to Section 119.

ARTICLE IV.

RIGHTS OF HOLDER.

Section 51. Right of holder to sue and receive payments.
52. Holder in due course; definition.
53. On demand; negotiation; time.
54. Notice before full amount paid.
55. When title defective.
56. What constitutes notice of defect.
57. Rights of holder in due course.
58. When subject to defenses.
59. Holder deemed a holder in due course.

§ 51. **Right of Holder to Sue and Receive Payments.**—"The holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course (Sec. 88) discharges the instrument."

Cited in Choteau Trust & Banking Co. v. Smith, 133 Ky. 418, 118 S. W. 279; Callahan v. Louisville Dry Goods Co., 140 Ky. 712, 131 S. W. 995.

See notes to Sections 48 and 49.

§ 52. **Holder in Due Course—Definition.** "A holder in due course is a holder who has

taken the instrument under the following conditions:

(1) "That the instrument is complete and regular upon its face.

(2) "That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact.

(3) "That he took it in good faith and for value (Secs. 24, 25, 26).

(4) "That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it (Secs. 54, 56)."

Cases Decided Prior to Passage of Negotiable Instruments Act.

Complete and regular: Woolfolk v. Bank of America, 10 Bush 504.

Holder before maturity: Theobold v. Hare, 8 B. Mon. 39; Greenwell v. Haydon, 78 Ky. 332; Lester & Co. v. Given, 8 Bush 357; Woolfolk v. Bank of America *supra;* Clark v. Tanner, 100 Ky. 275, 38 S. W. 11, 19 K. L. R. 590.

Value: See note to Section 25.

Notice and good faith: See note to Section 56.

Cases involving Negotiable Instruments Act.

The above section was cited in Choteau Trust & Banking Co. v. Smith, 133 Ky. 418, 118 S. W. 279; Campbell v. Fourth Nat. Bank, 137 Ky. 555, 126 S. W. 114; Gahren, Dodge & Maltby v. Parkersburg Nat. Bank, 157 Ky. 266, 162 S. W. 1135; American Nat. Bank v. Minor & Son, 142 Ky. 792, 135 S. W. 278; Jett v. Standifer, 143 Ky. 787, 137 S. W. 513. But it does not apply to a non-negotiable note. Wettlaufer v. Baxter, 137 Ky. 362, 125 S. W. 741.

Complete and regular: A note, complete and regular, is not deprived of these attributes by being detached from another writing. Robertson v. Commercial Security Co., 152 Ky. 336, 153 S. W. 450; Harrison v. Ford, 158 Ky. 467, 165 S. W. 663.

Holder before maturity: One who buys a note after maturity is not a holder in due course; Austin v. First Nat. Bank, 150 Ky. 113, 150 S. W. 8. A note, dated September 21, and payable one day after date, is not overdue at any time on September 22; Wilkins v. Usher, 123 Ky. 696, 97 S. W. 37, 29 K. L. R. 1232. But the fact that a note was purchased one day before the maturity of its first installment, is competent testimony in connection with other facts on the question of good faith; Harrison v. Ford *supra.*

For further citations, see notes to the proper sections of this article.

The question of can and when, *under this Act,* a p*ayee* be held a holder in due course is very important. This and the fact that the Court of Appeals has refused to pass upon it (Hermann's Exr. v. Gregory, 131 Ky. 819, 115 S. W. 809) leads the writer to depart from his rule not to cite any but Kentucky cases.

The Supreme Courts of Iowa and Massachusetts have disagreed in their construction of the Negotiable Instruments Act on this point. Vander Ploeg v. Van Zunk, 135 Iowa 350, 13 L. R. A. (N. S.) 490, 112 N. W. 807; Boston Steel & Iron Co. v. Steuer, 183 Mass. 140, 97 Am. St. Rep. 426, 66 N. E. 646.

The Iowa case was that the defendant with P signed a blank note and intrusted it to P, with authority to fill it out for not more than $200, the proceeds to be used in a business in which defendant and P were partners. P filled it out for $2,000, made it payable to plaintiff and delivered it to him in payment of a personal past due obligation. The Court, for the purpose of discussion, assumed that the note was complete when delivered to plaintiff and that he knew nothing of the restricted authority of P. Applying this

and Sections 14, 57, 59, and the definition of "holder" in Section 190, the Court held that plaintiff was not a holder in due course, saying: "It seems to us, under these definitions and the applications thereof, the plaintiff was a holder of the note but not a holder in due course. The latter term seems unquestionably to be used to indicate a person to whom, after completion and delivery, the instrument has been negotiated." The Court differentiates between intrusting an instrument to one for delivery and the delivery to the payee, saying "Before such delivery the person intrusted with it was not a holder. After such delivery, the payee was a holder, but, not as we thing, a holder in due course." And a judgment for defendant was affirmed. But the opinion went on to say: "We do not mean to say that in no case can the person named as payee in a negotiable instrument be a holder thereof 'in due course.' If A, purchasing a draft to be transmitted to B in payment of A's debt to B, causes the draft to be drawn payable to B, no doubt A is a holder of such draft, and B taking it for value becomes a holder in due course." Citing Armstrong v. American Exchange Nat. Bank, 133 U. S. 433.

In the Massachusetts case the plaintiff sued the defendant for a debt. She pleaded payment.

The testimony conduced to prove that she had intrusted to her husband two checks, one complete and the other signed by her in blank, the blank one to be filled out by her husband and both to be delivered to plaintiff in payment of her debt to him; but that plaintiff with the husband's consent had filled out the blank check and both had been delivered to and accepted by plaintiff in part payment of a debt due by the husband to plaintiff but without plaintiff's knowledge of restriction on the husband's authority. As to the complete check, the Court held that the plaintiff was a holder in due course. The reasoning was that a "payee" could be a "holder"' (Section 190) and that any "holder" could be a "holder in due course" (Section 59). But applying Section 14 to the facts shown as to the blank check, it was held that the plaintiff was not a holder in due course as to it. (See note to Hermann case under Section 14).

Upon a similar state of fact the Court of King's Bench refused to construe the Bills of Exchange Act, and, saying: "The question is purely one of estoppel at common law," held defendant liable. Lloyd's Bank v. Cooke (1907) 1 K. B. 794.

§ 53. **On Demand—Negotiation—Time.** —Where an instrument payable on demand

is negotiated an unreasonable length of time Secs. 186, 192) after its issue, the holder is not deemed a holder in due course."

One to whom a check was negotiated two days after it was drawn, took it before it was overdue Asbury v. Taube, 151 Ky. 142, 151 S. W. 372.

§ 54. **Notice Before Full Amount Paid.** —"Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him."

§ 55. **When Title Defective.**—"The title of a person who negotiates an instrument is defective within the meaning of this Act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud."

See note to Section 57 on void instruments. This section was applied in Asbury v. Taube, 151 Ky. 142, 151 S. W. 372; Gahren, Dodge & Maltby v. Parkersburg Nat. Bank, 157 Ky. 266,

162 S. W. 1135; Harrison v. Ford, 158 Ky. 467, 165 S. W. 663; Muir v. Edelin, 156 Ky. 42, 160 S. W. 1048.

§ 56. **What Constitutes Notice of Defect.**—"To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

The above states the common law rule. Kelly & Co. v. Smith, etc., 1 Met. 313; Beattyville Bank v. Roberts, 117 Ky. 689, 78 S. W. 901, 25 K. L. R. 1796; Greenwell v. Hayden, 78 Ky. 332.

The decision in Clark v. Farmer, 100 Ky. 275, 38 S. W. 11, 19 K. L. R. 590, that the holder must have actual knowledge of the fraud or such as "by the exercise of ordinary diligence he could have acquired" is not now the law nor do we think it was the law, for in Woolfolk v. Bank of America, 10 Bush 504, it is said: "Neither want of ordinary care nor gross negligence will divest the holder of his title, and he must be allowed to recover unless he obtains the paper *mala fide*." The above section declares he must have "actual

knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." Instructions using the very words of the statute were approved in Childers v. Billiter, 144 Ky. 53, 137 S. W. 795 and Harrison v. Ford, 158 Ky. 467, 165 S. W. 663.

Coming to individual cases, we find that: "It is true the discount might be so great as to be strong evidence, in connection with other circumstances tending to prove notice of the infirmity of the paper, that the bank had notice at the time it bought the paper of its infirmity," (Nicholson v. National Bank of New Castle, 92 Ky. 251, 17 S. W. 627, 13 K. L. R. 478). Yet the fact *alone* that 90 per cent. was paid (Bothwell v. Corum, 135 Ky. 766, 123 S. W. 291), or 50 per cent. was paid (Jett v. Standafer, 143 Ky. 787, 137 S. W. 513), or even only 33 1-3 per cent. was paid (Ham v. Merritt, 150 Ky. 11, 149. S. W 1131), for the paper is not by itself proof of knowledge of defect.

The transfer of a negotiable note, secured by a lien on real estate, to a holder in due course, carries with it the lien free from all defenses between the original parties. Duncan v. Louisville, etc., 13 Bush 378. Nor did the fact that the deed, in which the lien was retained, con-

tained a covenant that, if certain things were not done, the notes were to be returned, affect a purchaser for value and without actual knowledge of the convenant. McCarty v. Louisville Banking Co., 100 Ky. 4, 37 S. W. 144, 18 K. L. R. 569.

The holder of lien notes, payable to and indorsed by an assignee for the benefit of creditors, is not affected by a partial failure of consideration of which it had no notice. Hargis v. Louisville Trust Co., 30 S. W. 877, 17 K. L. R. 218. But where a note is payable to and indorsed by one as *trustee* or a check is signed by one as *sheriff*, it is sufficient to put a person, not a holder in due course, on inquiry to ascertain whether there has been a breach of trust. Prather v. Weissiger, 10 Bush 117; Hill v. Flemming, 128 Ky. 201, 107 S. W. 764, 32 K. L. R. 1065. The case of Mitchell v. Reed's Exr., 106 S. W. 833, 32 K. L. R. 683, goes very far when it holds that one, who takes by proper indorsement a negotiable note payable to an assignee for creditors, is, by that fact, coupled with an apparent erasure and alteration, but on notice of its infirmity. See *contra* Prather v. Weissiger *supra* at pages 126 and 127.

Where the only fact proven was that the attorney for the holder was the president of the beneficiary corporation, the holder was not held to

have received notice; for it would not be presumed that he would communicate to his client facts which he knew as president, where the attitude of the parties was hostile. Davis v. Boone County Deposit Bank, 80 S. W. 161, 25 K. L. R. 2078. The holder bank was not charged with notice, by reason of the facts that its president was a stockholder and vice president of the payee, which committed the alleged fraud, and was the attorney for the first indorsee, especially where it was not shown that he had actual knowledge of the fraud. Robertson v. Commercial Security Co., 152 Ky. 336, 153 S. W. 450. Where the vice president of a bank was an accommodation indorser on a note payable to the bank, he was entitled to notice of non-payment in the absence of a by-law or custom of the bank making it his duty to give the notice in such cases. First Nat. Bank v. Bickel, 154 Ky. 11, 156 S. W. 856.

An officer has no power to use the money of his corporation for his individual benefit, and holders of notes, executed by such an officer in the name of the corporation payable to himself, are put on notice of this fact. Chemical Nat. Bank v. Wagner, 93 Ky. 525, 20 S. W. 535, 14 K. L. R. 510; Kenyon Realty Co. v. National Deposit Bank, 140 Ky. 133, 130 S. W. 965. This is

but the application of Section 19. The agent must be "duly authorized."

For cases citing facts which were held to constitute or not prove notice, see Thompson v. Poston, 1 Duv. 389; Bothwell v. Corum, 135 Ky. 766, 123 S. W. 291; Asbury v. Taube, 151 Ky. 142, 151 S. W. 372; Renfrow v. Condor, 153 Ky. 701, 156 S. W. 385.

Denial of notice of fraud is sufficient without denial of fraud. Bothwell v. Corum *supra.*

This section is cited in Wilkins v. Usher, 123 Ky. 696, 97 S. W. 37; Choteau Trust & Banking Co. v. Smith, 133 Ky. 418, 118 S. W. 279; Gahren, Dodge & Maltby v. Parkersburg Nat. Bank, 157 Ky. 266, 162 S. W. 1135.

§ 57. **Rights of Holder in Due Course.**—"A holder in due course (Sec. 52) holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount (Sec. 54) thereof against all parties liable thereon."

This section is the climax of this Act. All the other sections look to it. By them these rights are acquired or lost. Every decision referred to has, either directly or by implication, defined such

holder's rights to be the same as given by it. For this reason we shall here merely cite those cases in which this section has been cited in terms and discuss those exceptions to this general rule which are not made elsewhere by the Act. Even to this we make the further exception that we will not discuss the question of capacity of the parties.

Void and illegal instruments. In the leading case of Early v. McCart, 2 Dana 414, Judge Robertson said: "The same authorities and others, however, abundantly show, that proof of fraud, or of no consideration or of an *illegal* consideration, as between the drawer and payee, or any other proof tending to throw suspicion on the title of the indorsee, will throw on him the burden of showing that he is an innocent holder for a valuable consideration. A gaming or usurious consideration is an exception from the general rule, because as each of them is *declared by statute* as sufficient to render the bill *altogether void*, either will be a good defense even against a *bona fide* indorsee for valuable consideration." (Our italics).

The above distinction between being *illegality* and being declared *void by statute*, seems yet to be the law.

In the case of American Nat. Bank v. Madison,

144 Ky. 152, 137 S. W. 1076, the facts were that parents executed a negotiable note to one, from whom their son had embezzled money, in order to prevent his prosecution and thereby compound the offense. The note was indorsed to plaintiff who was a holder in due course. When sued by plaintiff, they made this defense and further made their answer a cross petition against the payee, praying judgment against him for such sum as plaintiff might recover. The Court held that this contract had for its consideration and purpose the compounding of a felony. Citing many authorities to the effect that the contract was *void* at *common law*, it held it so illegal that it would neither enforce it nor give relief against it. Therefore the cross petition was dismissed. But it gave judgment for the holder because it was a holder in due course. While the opinion does not elaborate this point, yet the holding of the Court makes clear that a negotiable instrument, however void or illegal it may be at common law, will be enforced in the hands of such holder. And this is the law as laid down by the text writers cited in the following cases.

Before the passage of this Act, the Court held that a "peddler's note," which the *statute* (Ky. Stat., Sec. 4223) denounces as *void* if not indorsed as it required, was void in the hands of a holder

in due course. Union Nat. Bank v. Brown, 101 Ky. 354, 41 S. W. 273, 19 K. L. R. 540. Since it has held that these acts must be read together and that such notes are yet void in the hands of such a holder. Lawson v. First Nat. Bank, 102 S. W. 324, 31 K. L. R. 318; McAfee v. Mercer Nat. Bank, 104 S. W. 287, 31 K. L. R. 863. (As to what are "peddler's notes," see above cases and Citizen's Bank v. Crittenden Record Press, 150 Ky. 634, 150 S. W. 814).

Paper given for a gambling debt is also denounced by the *statute* as *void* and is held void in the hands of a holder in due course. Alexander & Co. v. Hazelrigg, 123 Ky. 677, 97 S. W. 353, 29, K. L. R. 1212. As to renewal of such paper, see Campbell County Bank v. Schmitt 143 Ky. 421, 136 S. W. 625.

But the maker may be estopped to make this defense as against a holder in due course, who takes the note upon the assurance of the maker that the note is valid. Holzbog v. Bakrow, 156 Ky. 161, 160 S. W. 792. And a "peddler's note" valid in the State where it was executed will be enforced in this State. Arnett v. Pinson, 108 S. W. 852, 33 K. L. R. 36. Would a gambling note be enforced under the same circumstances?

As to liability of indorser of such a void note, see Section 66, Subsection 2.

Usury. When in Early v. McCart the learned judge referred to a usurious consideration, he evidently had in mind a statute which made the whole contract void. But our statute only makes the excess above legal interest void. Of course if the note on its face bears an illegal rate it is notice to every holder. Since no usury can be paid until the whole debt and interest has been paid, a payment of an usurious rate of interest amounts only to a partial payment on the principal. Paine v. Levy, 142 Ky. 619, 134 S. W. 1160 and cases cited. This would seem to make such payments a defense only as against a holder with notice.

A distinction exists between the sale of a note for a less amount than its face (see note to Section 56) and the transfer of a note for the purpose of borrowing money. Pilcher v. The Banks, 7 B. Mon. 548. In the one case the note is irredeemable and in the other it is not. Usury under our present statute is very like an agreement to pay an attorney's fee. Each is void to the extent that it enlarges the face of the bill, but the bill, at its face value, is valid.

Except as to usury under our present statutes,

where a part of the consideration is illegal, the whole contract is invalid as between the parties and to the extent above indicated in the hands of a holder in due course. Collins v. Merrill, 2 Met. 163; Kimbrough v. Lane, 11 Bush 556; Lawson v. First Nat. Bank *supra;* McAfee v. Mercer Nat. Bank *supra.*

Miscellaneous. In Wilkins v. Usher, 123 Ky. 696, 97 S. W. 37, 29 K. L. R. 1232, indorsee and holder in due course sued defendants on a negotiable note. The makers contended that they had been deceived as to the nature and purpose of the note. The Court instructed the jury to find for plaintiff "unless they believed from the evidence that at the time the writing sued on was executed by defendants, Wilkins brothers, A. L. Brand (Brand held not to be agent of holder), who presented said note for their signature, fraudulently concealed from them the real nature of the writing sued on and that defendants were thereby deceived and induced to sign said writing." The Court affirmed the judgment for the holder and in effect approved this instruction, saying: "The evidence does not warrant the conclusion that the Wilkins brothers did not know the real nature of the writing when they signed it. They were deceived as to the purpose for which the writing was wanted, but they both saw the note

before they signed it, and had ample opportunity to read it." No authorities are cited, but the Court seems to draw the distinction between the signature of a person to a negotiable instrument which he believes and has a right to believe is something else, and where he knows or ought to know what he is signing and is deceived as to the purpose for which it is to be used. The authorities in other states are divided on this question. And see note to Section 52 on notes detached from contracts; for in those cases it might be contended that makers were deceived into signing the notes by the implied representation that they were inseparable parts of the contract.

"We think that the rule is now well-established that as between himself and the party accommodated, the accommodation party is in effect a surety, and his right to recourse against the party accommodated is that of a surety aganist a principal debtor. As to other holders of the paper, his liability is in general that of a similar party (maker, acceptor, or indorser) who receives value, but he is so far a surety as to holders with notice of his accommodation character that he will be discharged by arrangements made to his prejudice with the principal debtor without his knowledge." Morehead v. Citizens' Deposit Bank, 130 Ky. 414, 113 S. W. 501.

The fact that the holder sued the maker of a check and did not sue the indorser, is not proof that it was no longer the real holder and was suing for the benefit of the indorser. Holder had right to sue any or all parties. Choteau Trust & Bank-ink Co. v. Smith, 130 Ky. 418, 118 S. W. 279.

The cancellation of a contract which was the consideration of a note did not affect the rights of a holder in due course, a bank, but maker was entitled to certificates of deposit issued to payee as purchase price for the notes, all three being parties to the action. Southern Ins. Co. v. Milligan, 154 Ky. 216, 157 S. W. 37.

This section is cited in Bothwell v. Corum, 135 Ky. 766, 123 S. W. 291; Jett v. Standafer, 143 Ky. 787, 137 S. W. 513.

Notice that under this section a holder in due course can "enforce payment of the instrument for the *full* amount thereof against *all* parties liable thereon." This changes the rule as between the holder and his immediate indorsee laid down in Pilcher v. The Banks *supra.*

§ 58. **When Subject to Defenses.**—"In the hands of any holder other than in due course (Sec. 52), a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and

> who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter."

See Lester v. Given, 8 Bush 357; Greenwell v. Haydon, 78 Ky. 332; Greer v. Bently, 43 S. W. 219, 19 K. L. R. 1251; Childers v. Billiter, 144 Ky. 53, 137 S. W. 795; Austin v. First Nat. Bank, 150 Ky. 113, 150 S. W. 8.

In Cline v. Templeton, 78 Ky. 550, A executed his note to B, who indorsed to C, who discounted it in a bank. It was not paid at maturity and was taken up by C, who at the time he purchased it from B, knew of its infirmity, held that C could not recover. It will be noticed that in this case C knew of the infirmity at the time he purchased the note, and hence he could not then recover on it. He could not strengthen his title by further negotiation. But if he had not been a party to the note before it had come into the hands of a holder in due course, and if he had not been a party to the fraud or illegality, and he had bought it for value from such holder, his knowledge would be no defense.

Where A executed his note to B, who indorsed it to C, who indorsed it to D, who sued A upon it and A pleaded a good defense and that D had notice of it at the time of his purchase, held that

D could not rely on the fact that C was a holder in due course unless he alleged that fact. Childers v. Billiter *supra.*

§ 59. **Holder Deemed a Holder in Due Course.**—"Every holder is deemed *prima facie* to be a holder in due course (Sec.52); 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 the 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."

Every holder is deemed a holder in due course. See Rice v. Hogan, 8 Dana 133; Hargis v. Louisville Trust Co., 30 S. W. 875, 17 K. L. R. 218; McCarty v. Louisville Banking Co., 100 Ky. 4, 37 S. W. 144, 18 K. L. R. 569; Wilkins v. Usher, 123 Ky. 696, 97 S. W. 37, 29 K. L. R. 1232.

Every holder is deemed to be the owner. Crosthwait v. Misner, 13 Bush 543; Callahan v. Louisville Dry Goods Co., 140 Ky. 712, 131 S W. 995. Not every holder in due course is absolute owner; he may only have a lien on the paper under Section 26; and it is obvious that one may be the owner and yet not a holder in due course.

Burden of proof. The old rule was that, since "Every holder is deemed *prima facie* to be a holder in due course," this presumption "cannot be overcome by mere allegation, in defense of an action on the note, of anything short of facts, which if true, would render the note absolutely void from the beginning, so as to shift the burden of proof upon the plaintiff. And in all cases, except where the allegations in defense are of facts which would render the instrument sued on void from the beginning, allegation and proof must be made by the defendant, who is bound on the negotiable instrument, of facts that would remove the presumption, such fraud in its inception, or circumstances raising a strong suspicion of fraud, before the plaintiff can be required to show by testimony when, by what means, and the circumstances under which he acquired the right to and the possession of the note, in order to show his right to recover thereon." McCarty v. Louisville Banking Co. *supra,* and see David v. Merchants' Nat. Bank, 103 Ky. 586, 45 S. W. 878, 20 K. L. R. 263.

But this rule as an entirety is not now the law. The burden of proof shifts only when it is "shown" (by the face of the paper, or by allegations undenied, or by proof) that the holder's title is *defective* as defined in Section 55. See Arnett v.

Pinson, 108 S. W. 852, 33 K. L. R. 36; Campbell v. Fourth Nat. Bank, 137 Ky 555, 126 S. W. 114; Asbury v. Taube, 151 Ky. 142, 151 S. W. 372; Muir v. Edelen, 156 Ky. 212, 160 S. W. 1048; Harrison v. Ford, 158 Ky. 467, 165 S. W. 663.

ARTICLE V.

LIABILITIES OF PARTIES.

Section 60. Liability of maker.
61. Liability of drawer.
62. Liability of acceptor.
63. Who deemed an indorser.
64. Liability of signer in blank, not otherwise a party.
65. Warranty; where negotiated by delivery or qualified indorsement.
66. Liability of general indorser.
67. Liability of indorser on paper negotiable by delivery.
68. Liability of indorsers as between themselves.
69. Liability of Agent, etc.; without indorsement.

§ 60. **Liability of Maker.**—"The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse (Sec. 184)."

Maker is estopped to deny the existence and

capacity of payee. Depew v. Bank of Limestone, 1 J. J. Mon. 378; Jones v. Bank of Tennessee, 8 B. Mon. 122; Johnson v. Mason, 106 Ky. 838, 51 S. W. 620, 21 K. L. R. 493.

§ 61. **Liability of Drawer.**—"The drawer (Secs. 126, 185) by drawing the instrument admits the existence of the payee and his then capacity to indorse, and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder."

See Pilcher v. The Banks, 8 B. Mon. 550.

Where both the drawer and indorser signed for the accommodation of the acceptor the rights and liabilities as between them will be adjudged according to facts of the case. Edelen v. White, 6 Bush 408.

§ 62. **Liability of Acceptor.**—"The acceptor by accepting (Secs. 132, 187) the instrument engages that he will pay it according

to the tenor of his acceptance (Sec. 124), and admits:

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

(2) "The existence of the payee and his then capacity to indorse."

Since the acceptor "admits the existence of the drawer and the genuineness of his signature," ordinarily a bank, which pays a forged check of its depositor, cannot recover back the money (Deposit Bank of Georgetown v. Fayette National Bank, 90 Ky. 10, 13 S. W. 339, 11 K. L. R. 803); yet, since it does not admit the same of the indorsers, and since every indorser "warrants he has a good title to it," it was held that where Bank A paid a check drawn on bank B, on which both the names of the drawer and indorser were forged and without identification, which check was indorsed by Bank A and paid by bank B, that Bank B could recover of bank A the money. (Farmers' Nat. Bank v. Farmers' & Traders' Bank, 159 Ky. 141, 166 S. W. 986).

The acceptor is the principal debtor and not a surety, although he accepted for accommodation only. Anderson v. Anderson, 4 Dana 352; McCandless v. Hadden, 9 B. Mon. 186; Trimble v.

City Nat Bank, 15 S. W. 853, 12 K. L. R. 909.

The presumption is that the acceptor is indebted to the drawer or has funds of the drawer with which to meet the bill. Ray, etc., v. Bank of Kentucky, 3 B. Mon. 510; Byrne, etc., v. Schwing, 6 B. Mon. 203.

Yet this presumption is not conclusive and the obligation growing out of the bill, as between the drawer and acceptor, will depend on the facts of the case and the nature of the contract between them. Turner v. Browder, 5 Bush 216; Bailey v. Wood, 114 Ky. 27, 69 S. W. 1103, 24 K. L. R. 801.

§ 63. **Who Deemed An Indorser.**—"A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity."

As to indorsement of non-negotiable notes by one not a party to the paper, see the cases of Needhams v. Page, 3 B. Mon. 465 and Kellogg v. Dunn, 2 Met. 215, decided before the passage of Section 481, Kentucky Statutes; and the case of Williams v. Obst, 12 Bush 266 and Kracht's Admr. v. Obst, 14 Bush 34, decided afterward.

In Smith v. Lockridge, 8 Bush 423, it was held that B, who was not a drawee, but who attempted

to accept the bill, already accepted by the proper drawee, "was not a party to the bill by reason of his name being placed upon it." Here the bill was signed by both drawer and drawee, who then became acceptor; and the signature of B was held to be a nullity. In such a state of case and without words indicating his intention to be bound in some other capacity, would he not under this section be deemed an indorser? It seems to be the purpose of this section, Subsection 6 of Section 17 and Section 64, to attach the liability of indorser to everyone signing a negotiable paper, except those who sign as maker, drawer, or acceptor, or by appropriate words indicate their intention to be bound otherwise.

While the Court of Appeals in Owensboro Savings Bank & Trust Company's Rec. v. Haynes, 143 Ky. 534, 136 S. W. 1004, seemed uncertain as to whether one, who had written his name on the back of a negotiable note, could prove by parol that he was a surety, they had only one year before in Mechanics' & Farmers' Savings Bank v. Katterjohn, 137 Ky. 427, 125 S. W. 1071, decided that very question in the negative; and fifteen days after passed upon it again, deciding it in the same way. First Nat. Bank v. Bickel, 143 Ky. 754, 137 S. W. 790. These cases were followed by Grayson County Bank v. Elbert, 143 Ky. 750, 137

S. W. 792; First Nat. Bank v. Bickel, 154 Ky. 11, 156 S. W. 856; Lyons Lumber Co. v. Stewart, 147 Ky. 653, 145 S. W. 376. In these cases it was held that one who placed his name on the back of a negotiable instrument without words in the indorsement showing a different intention, was liable to the holder as indorser only and that parol evidence could not be introduced to show that he was a surety or a guarantor or bound in any capacity other than as indorser. In the first Bickel case it was said: "The purpose of the statute is to exclude parol evidence and to make the written instrument control the rights of the parties." But in the same case it was held, *dicta*, that, as between the parties, parol evidence could be introduced "to show whose debt it is, that the real debtor may be required as between the debtors themselves to discharge his own debt rather than one who is secondarily liable for it."

In Young v. Exchange Bank, 152 Ky. 293, 153 S. W. 444, this section was held to be declarative of the common law and applied to the liability of an accommodation indorser on a draft drawn and indorsed before this Act was passed.

This section was cited and applied in Hoyland v. National Bank, of Middlesborough, 137 Ky. 682, 126 S. W. 356; Williams v. Paintsville Nat. Bank, 143 Ky. 781, 137 S. W. 534; Ken-

tucky Title Savings Bank, etc. v. Langan, 144 Ky. 46, 137 S. W. 846.

§ 64. **Liability of Signer in Blank, Not Otherwise a Party.**—"Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

(1) "If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.

(2) "If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

(3) "If he signs for the accommodation (Secs. 29, 68) of the payee, he is liable to all parties subsequent to the payee."

See note to Sections 63 and 68.

Where a married woman, not a party to the draft, indorsed it in blank, she was held an accommodation indorser thereby undertaking to answer for the default of another, and therefore not liable. Kentucky Title Savings Bank & Trust Co. v. Langan, 144 Ky. 46, 137 S. W. 846.

Notice that in order to hold one under this section he must sign *in blank* and *before delivery*.

§ 65. **Warranty—Where Negotiated by**

Delivery or Qualified Indorsement.—"Every person negotiating an instrument by delivery (Secs. 30, 190) or by a qualified indorsement (Sec. 38) warrants:

(1) "That the instrument is genuine and in all respect what it purports to be.

(2) "That he has a good title to it.

(3) "That all prior parties had capacity to contract.

(4) "That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

"But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee.

"The provisions of subdivision three of this section do not apply to persons negotiating public or corporate securities, other than bills and notes."

See note to Section 66 and note to Section 57 on void instruments.

The first three subsections seem to be but a codification of the common law. Maupin v. Compton, 3 Bibb 214; Cope v. Asberry, 2 J. J. Mar. 296; Ware v. McCormack, 96 Ky. 139, 28 S. W. 157, 959, 16 K. L. R. 385; Wilcoxen v. Morse, 44 S. W. 142, 19 K. L. R. 1830; Monarch v. Farmers' & Drover's Bank, 105 Ky. 430, 49 S. W. 317, 20 K. L. R. 1351.

In Markley v. Withers, 4 T. B. Mon. 14, it was held that one who transferred a note by delivery did not warrant the solvency of the maker; and in Johnson v. Welby, 2 B. Mon. 122, such a transferor of a bill could not be held except for a failure of consideration, the court intimating that the fraud should amount to knowledge that the bill would not be paid and could not be enforced. All these cases are founded on the collateral warranties which would accompany the sale of a chattel. But under this Act the warranties are a part of the contract of negotiation. So if one indorses *without recourse* he is liable, if the instrument is not genuine, or if he has not a good title to it, or if he knew of any fact which would impair its validity (such, for instance, as a gambling debt), or would render it valueless.

§ 66. **Liability of General Indorser.**—"Every indorser who indorses without qualification, warrants to all subsequent holders in due course (Sec. 52):

(1) "The matters and things mentioned in Subdivisions 1, 2 and 3 of the next preceding section; and

(2) "That the instrument is at the time of his indorsement valid and subsisting.

"And, in addition, he engages that on due presentment, it shall be accepted or paid, or

> both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it."

See Callahan v. Bank of Kentucky, 82 Ky. 235.

Although a "Peddler's note" not properly indorsed as such is void as between a holder in due course and the maker, yet the indorser would be liable because he warrants the paper to be valid, *dicta*, in Union Nat. Bank v. Brown, 101 Ky. 354, 41 S. W. 272, 19 K. L. R. 273.

Since the indorser warrants the genuineness of the paper and his title to it, a bank which pays upon a forged indorsement a forged check upon another bank, and then indorses the check for collection and it is paid, cannot hold the money. Farmers' Nat. Bank v. Farmers' & Traders' Bank, 159 Ky. 141, 166 S. W. 986.

This section makes it unnecessary to prosecute the maker of a negotiable note to insolvency in order to hold the indorser. Williams v. Paintsville Nat. Bank, 143 Ky. 781, 137 S. W. 535.

This section was held to be declarative of the common law. Young v. Exchange Bank, 152 Ky. 293, 153 S. W. 444.

§ 67. **Liability of Indorser on Paper Negotiable by Delivery.**—"Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser (Sec. 40)."

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

For cases decided prior to the passage of this Act, see Denton v. Lytle, 4 Bush 597 and cases cited therein. Lewis v. Williams, 4 Bush 678; Edelen v. White, 6 Bush 408; Bailey v. Wood, 114 Ky. 27, 69 S. W. 1103, 24 K. L. R. 801.

This section is cited in First Nat. Bank v. Bickel, 143 Ky. 754, 137 S. W. 790, to the effect that parol evidence is competent as between indorsers to show the real agreement between themselves.

This section changes the rule laid down in Dodge v. Bank of Kentucky, 2 J. J. Mar. 610 and Higgins v. Morrison, 4 Dana 100, that notice of dishonor to one joint indorser was notice to all. Now notice to one joint indorsers is sufficient to

hold him; but notice to one is not notice to all, and all joint indorsers not given notice are discharged. Williams v. Paintsville Nat. Bank, 143 Ky. 781, 137 S. W. 535.

§ 69. **Liability of Agent, Etc.—Without Indorsement.**—"Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by Section 65 of this Act, unless he discloses the name of his principal, and the fact that he is acting only as agent."

ARTICLE VI.

PRESENTMENT FOR PAYMENT.

Section 70. Presentment for payment; effect on parties.
71. Presentment; time.
72. Presentment; sufficiency.
73. Place of presentment.
74. Instrument must be exhibited.
75. Presentment where instrument is payable at a bank.
76. Presentment where person primarily liable is dead.
77. Presentment to partners.
78. Presentment to joint debtors not partners.
79. When presentment not required to charge drawer.
80. When presentment not required to charge indorser.
81. Excuse for delay in making presentment.
82. When presentment may be dispensed with.
83. Dishonor for non-payment.

84. Liability of person secondarily liable when instrument is dishonored.
85. Maturity; days of grace abolished; Sunday, holidays.
86. Computation of time.
87. Instrument payable at a bank, equivalent to an order on the bank.
88. Payment in due course.

§ 70. **Presentment For Payment—Effect on Parties.**—"Presentment for payment is not necessary in order to charge the person primarily (Sec. 191) on the instrument; but if the instrument is, by its terms, payable at a special place (Sec. 87), and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers."

Presentment for payment is not necessary to charge the person primarily liable. Rice v. Hogan, 8 Dana 136; Pace v. Welmending, 12 Bush 141; Marion Nat. Bank v. Phillip's Admr., 35 S. W. 910, 18 K. L. R. 159.

Compliance with the above provisions as to

tender, if the tender is kept good, will stop interest. Lewis v. Helton, 144 Ky. 595, 139 S. W. 772.

But presentment is necessary to charge the drawer or indorsers. Strader v. Batchelor, 8 B. Mon. 168; Williams v. Paintsville Nat. Bank, 143 Ky. 781, 137 S. W. 535; Hoyland v. National Bank of Middlesborough, 137 Ky. 682, 126 S. W. 356. In the Hoyland case it was held that an allegation "that upon the maturity of the note, same was duly presented for payment, and payment thereof demanded but refused" was not sufficient; but facts, showing a legal demand at the proper time and place and in the proper manner should be set forth.

In the original draft the word *liable* is inserted after the word *primarily*.

§ 71. **Presentment—Time.**—"Where the instrument is not payable on demand, presentment must be made on the day it falls due (Secs. 82, 85). Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time (Sec. 192) after the last negotiation thereof."

The paper need not be presented for accept-

ance before it is due, but if it is so presented and not accepted, notice must be given. Union Nat. Bank v. Marr's Exr., 6 Bush 614.

As to time of presentment of paper payable on demand, see Piner v. Clary, 17 B. Mon. 645; Cawein v. Browinski, 6 Bush 457.

§ 72. **Presentment — Sufficiency.**—"Presentment for payment, to be sufficient, must be made:

(1) "By the holder (Sec. 190), or by some person authorized to receive payment on his behalf.

(2) "At a reasonable hour (Sec. 75) on a business day.

(3) "At a proper place as herein defined (Sec. 73).

(4) "To the person primarily liable (Secs. 76, 77, 78, 191) on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made."

As to time of presentment, see Stivers, etc. v. Prentice, etc., 3 B. Mon. 461.

§ 73. **Place of Presentment.**—"Presentment for payment is made at the proper place:

(1) "Where a place of payment is specified in the instrument and it is there presented (Sec. 140).

(2) "Where no place of payment is specified and the address of the person to make payment is given in the instrument and it is there presented.

(3) "Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment.

(4). "In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence."

Where a bill is made payable at a particular house, a presentment there, with the answer that there were no funds there with which to pay it, is sufficient without further inquiry for the acceptor. McClane v. Fitch, 4 B. Mon. 600; Stivers, etc. v. Prentice, 3 B. Mon. 461.

§ 74. **Instrument Must Be Exhibited.**— "The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it."

The custody by a bank of a note, payable at the bank, on the day of its maturity, is a sufficient presentment. Huffaker, etc. v. National Bank of Monticello, 13 Bush 644.

§ 75. **Presentment Where Instrument Is Payable at a Bank.**—"Where the instrument is payable at a bank (Sec. 190), presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient."

See note to Section 74.

But presentment after banking hours is good, where payment was refused because there were no funds to meet the draft. Barbaroux v. Waters, 3 Met. 304.

§ 76. **Presentment Where Person Primarily Liable Is Dead.**—"Where the person primarily liable (Sec. 191) on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if with the exercise of reasonable diligence he can be found."

§ 77. **Presentment to Partners.**—"Where the persons primarily liable (Sec. 191) on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm."

§ 78. **Presentment to Joint Debtors Not Partners.**—"Where there are several persons, not partners, primarily liable (Sec. 191) on the instrument, and no place of payment is specified, presentment must be made to them all (Sec. 82)."

§ 79. **When Presentment Not Required to Charge Drawer.**—"Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument."

The presumption is either that the drawee had funds of the drawer to meet the bill or was indebted to him, and presentment is required to charge the drawer, until the contrary is shown. Baxter v. Graves, 2 A. K. Mar. 152; Ray & Thornton v. Bank of Kentucky, 3 B. Mon. 510; Byrne v. Schwing, 6 B. Mon. 199. But where it is shown that the drawer has no funds in the hands of the drawee or that the drawee is not indebted to him, the presumption is that the drawer had no right to expect or require the bill to be paid. Humphries v. Bicknell, 2 Litt. 296; Barbaroux v. Waters, 3 Met. 304; Taylor v. Bank of Illinois, 7 T. B. Mon. 576; Clarke v. Castleman, 1 J. J. Mon. 69.

§ 80. **When Presentment Not Required to Charge Indorser.**—"Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented."

Risk v. Bridgeford, 15 K. L. R. 206.

The person accommodated is the one who gets the proceeds of the paper and not the one on whose name it is advanced. First Nat. Bank v. Bickel, 143 Ky. 754, 137 S. W. 790.

§ 81. **Excuse For Delay in Making Presentment.**—"Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence (Sec. 105). When the cause of delay ceases to operate, presentment must be made with reasonable diligence."

For instance a state of war between the country of the holder's residence and that of the drawee is a good excuse for not making presentment. Berry v. Southern Bank of Kentucky, 2 Duv. 379; Bell, etc. v. Hall's Exr., 2 Duv. 288.

§ 82. **When Presentment May Be Dispensed With.**—"Presentment for payment is dispensed with:

(1) "Where, after the exercise of reasonable diligence, presentment as required by this act can not be made.

(2) "Where the drawee is a fictitious person.

(3) "By waiver of presentment, express or implied."

A waiver of presentment, embodied in the paper, binds an indorser. Owensboro Savings Bank, etc., Rec. v. Haynes, 143 Ky. 534, 136 S. W. 1004.

§ 83. **Dishonor for Non-Payment.**—"The instrument is dishonored by non-payment when:

(1) "It is duly presented for payment and payment is refused or can not be obtained; or

(2) "Presentment is excused and the instrument is overdue and unpaid."

§ 84. **Liability of Person Secondarily Liable When Instrument Is Dishonored.**—"Subject to the provisions of this Act, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable (Sec. 191) thereon, accrues to the holder."

§ 85. **Maturity—Days of Grace Abolished—Sunday, Holidays.**—"Every negotiable instrument is payable at the time fixed therein, without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day."

As to what days are holidays, see Kentucky Statutes of 1909, Sections 2089a and 2089b, which are as follows:

"Section 2089a. The 1st day of January, the 22nd day of February, the 30th day of May, the 4th day of July, the 25th day of December of each year, and all days appointed by the President of the United States or by the Governor of this Commonwealth as days of fasting or thanksgiving, are declared holidays, on which all the public offices of this Commonwealth may be closed; and shall be treated and considered as Sunday or the Christian Sabbath for all purposes regarding the presenting for payment or acceptance, and of protesting for and giving notice of the dishonor of bills of exchange, bank checks and promissory notes, placed by law upon the footing of bills of exchange. If any of those days named as holidays shall occur on Sunday, the next day thereafter shall be observed as a holiday; but bills of exchange or other paper may be presented for payment or ac-

ceptance on the Saturday preceding such holiday, and proceeded on accordingly."

"Section 2089b. The first Monday in September known as Labor Day shall be a legal holiday, and no person shall be compelled to labor on said day by any person or corporation. (This section is an Act of March 17, 1902.)"

Act of March 14, 1910:

"The 12th day of October of the year 1910 and the 12th day of October thereafter is hereby declared a legal holiday to be known as "Columbus Day," and the same shall be recognized, classed, and treated as other legal holidays under the laws of this State."

This section abolishes days of grace and also changes the law (Section 2089a *supra*) as to the date of presentment.

A note reading "one hundred and eighty days pay, etc.," means payable after and not within that time. Moreland's Admr. v. Citizen's Savings Bank, 114 Ky. 577, 71 S. W. 520, 24 K. L. R., 1354.

§ 86. **Computation of Time.**—"Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is

determined by excluding the day from which the time is to begin to run, and by including the date of payment."

§ 87. **Instrument Payable at a Bank, equivalent to An Order on the Bank.**—"Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon."

But making a note payable at a bank does not of itself constitute the bank agent of the holder to receive the money. Caldwell v. Evans, 5 Bush 380. Nor does a deposit in bank by a payor to payee's credit, without her authority, constitute a payment. Morgan v. Perkins, 159 Ky. 98, 166 S. W. 799.

§ 88. **Payment in Due Course.**—"Payment is made in due course (Sec. 74) when it is made at or after maturity of the instrument to the holder (Sec. 190) thereof in good faith and without notice that his title is defective."

Payment to one joint payee is payment to all. Legrand v. Baker, 6 T. B. Mon. 245; Morrow's Heirs v. Starke's Admr., 4 J. J. Mar. 367; Perry v. Perry, 98 Ky. 242, 32 S. W. 755, 17 K. L. R. 868.

Payment to an unknown holder of a note, indorsed to a bank *for collection* is made at payor's risk. Barnett v. Ringgold, 80 Ky. 289.

ARTICLE VII.

NOTICE OF DISHONOR.

Section 89. To whom notice of dishonor must be given.
90. Notice; by whom given.
91. Notice given by agent.
92. Effect of notice given on behalf of holder.
93. Effect of notice as to subsequent parties and holder.
94. Notice by agent.
95. Notice—Sufficiency—Misdescription.
96. Notice—Form and how delivered.
97. To whom notice may be given.
98. Notice where party is dead.
99. Notice to partners.
100. Notice to persons jointly liable not partners.
101. Notice to bankrupt or insolvent.
102. When notice must be given.
103. Notice where parties reside in same place.

104. Notice where parties reside in different places.
105. Where sent by mail; sufficiency.
106. Deposit in postoffice; when deemed.
107. Notice to antecedent party; time of.
108. To what place notice must be sent.
109. Waiver of notice.
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111. Waiver of protest is waiver also of presentment and notice.
112. When notice is dispensed with.
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114. When notice need not be given to drawer.
115. When notice need not be given to the indorser.
116. Notice of non-payment where notice of non-acceptance given.
117. Effect of omission to give notice of non-acceptance to holder in due course.
118. When protest can and when must be made.

§ 89. **To Whom Notice of Dishonor Must Be Given.**—"Except as herein otherwise pro-

vided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged."

To give cross references to this section would require citations to nearly every section of this article. The reader is referred to them for all exceptions, modifications and definitions.

This section states the law as it was in Kentucky. Young v. Exchange Bank, 152 Ky. 293, 153 S. W. 444; Higgins v. Morrison, 4 Dana 102; Todd v. Edwards, 7 Bush 89; Young, etc. v. Bennett, 7 Bush 474; Sebree Deposit Bank v. Moreland, 96 Ky. 150, 28 S. W. 153, 16 K. L. R. 404; Hays v. Citizen's Savings Bank, 101 Ky. 201, 40 S. W. 573, 19 K. L. R. 367; Murphy v. Citizen's Savings Bank, 110 Ky. 225, 61 S. W. 25, 25 K. L. R. 1672; Brown v. Crofton, 76 S. W. 372, 25 K. L. R. 753.

If the holder presents a bill before its maturity for acceptance and if it is then dishonored, he must give notice, even though he was not bound to present it until its maturity. Landrum v. Trowbridge, etc., 2 Met. 281; Union Nat. Bank v. Marr's Admr., 6 Bush 614.

Notice of dishonor must, under this section,

be given to every drawer and indorser whether for accommodation or otherwise. Mechanic's & Farmers' Savings Bank v. Katterjohn, 137 Ky. 427, 125 S. W. 1071; Williams v. Paintsville Nat. Bank, 143 Ky. 781, 137 S. W. 535; First Nat. Bank v. Bickel, 143 Ky. 754, 137 S. W. 790; Grayson County Bank v. Elbert, 143 Ky. 750, 137 S. W. 792; First Nat. Bank v. Bickel, 154 Ky. 8, 156 S. W. 859.

An allegation that an indorser was "duly notified of the non-payment of the same" is insufficient. The facts, such as that the notice was in writing (Section 95 and Grayson County Bank v. Elbert, 143 Ky. 750, 137 S. W. 792) and the time when given and all other facts made necessary by this article, must be alleged. Hoyland v. National Bank, 137 Ky. 682, 126 S. W. 356.

§ 90. **Notice—By Whom Given.**—"The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given."

The holder may constitute the acceptor his agent to give notice of dishonor, but the notice given by the agent must be given in the same

time it could have been given by the holder, Sebree Deposit Bank v. Moreland, 96 Ky. 150, 28 S. W. 153, 16 K. L. R. 404 Notice may be given by a notary in his behalf. Stivers v. Prentice, 3 B. Mon. 461. See Section 91.

This section, in connection with Section 89, gives the holder the right to give notice to one of several joint indorsers so as to charge him, he having the right to notify his fellow joint indorsers, if he desires to hold them. Williams v. Paintsville Nat. Bank, 143 Ky. 781, 137 S. W. 535.

§ 91. **Notice Given by Agent.**—"Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not."

If the notary in making presentment and giving notice be held to act as the agent of the holder, the holder's responsibility for the notary's acts is the same as for his own. Lyddane v. Owensboro Banking Co., 106 Ky. 706, 51 S. W. 453, 21 K. L. R. 320. But if the notary has a right to act, has the right as notary to protest and give notice, then the holder is not responsible for the ignorance of the notary of the addresses of the

persons to whom notice should be sent. Mulholland & Bros. v. Samuels, 8 Bush 63.

Therefore the question is what instruments can be protested, and what are the notary's duties. The first question is discussed in note to Section 118 and the second in note to Section 153.

§ 92. **Effect of Notice Given on Behalf of Holder.**—"Where notice is given by or on behalf of the holder, it insures for the benefit of all subsequent holders and all prior parties who have a right or* recourse against the party to whom it is given."

*The word *of* is used in the original draft.

If the holder intends to hold any or all the indorsers or the drawer he should give notice to such as he intends to hold so that the ones notified can give notice to those whom they intend to hold. Todd v. Edwards, 7 Bush 89; Lyddane v. Owensboro Banking Co., 106 Ky. 706, 51 S. W. 453, 21 K. L. R. 320.

§ 93. **Effect of Notice As to Subsequent Parties and Holder.**—"Where notice is given by or on behalf of a party entitled to given* notice, it insures for the benefit of the holder and all parties subsequent to the party to whom notice is given.

*The word *give* is used in the original draft.

Hickman v. Ryan, 5 Litt. 24; Triplett v. Hunt, 3 Dana 126.

§ 94. **Notice by Agent.**—"Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he gives notice to his principal, he must do so within the same time as if he were the holder, and the principal, upon the receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder."

Farmers' & Merchants' Bank v. Turner, 2 Litt. 19. But the rule in the text is not extended so as to cover notice from agent to agent so as to give the agent at each place until the next day to forward the notice. Slack v. Longshaw (Sup. Ct.), 8 K. L. R. 166.

§ 95. **Notice—Sufficiency—Misdescription.**—"A written notice need be signed, and an insufficient written notice may be supplemented and validated by a written communication. A misdescription of the instrument does not vitiate unless the party to whom the notice is given is in fact misled thereby."

For a history of this and Section 96, see Gray-

son County Bank v. Elbert, 143 Ky. 750, 137 S. W. 792, where it was held that a notice must be in writing and signed. See also Introduction.

A notice need not name the holder. Shrieve v. Duckham, 1 Litt. 194.

§ 96. **Notice—Form and How Delivered.** —"The notice may be in writing, and may be given in any terms which sufficiently identify the instrument and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails (Sec. 106)."

(1) Formerly a verbal notice was sufficient. Bank of Kentucky v. Brooking, 2 Litt. 44; Higgins v. Morrison, 4 Dana 105. Now, however, the notice must be in writing and signed. See note to Section 95.

As to what is a sufficient notice, see Todd v. Edwards, 7 Bush 489, and Rudd v. Deposit Bank, 105 Ky. 443, 49 S. W. 207, 20 K. L. R. 1276.

(2) Formerly a notice to a person, where the parties lived in the same place, had to be delivered to the one notified in person or left at his dwelling or place of business. Todd v. Edwards, 7 Bush 93; Neal v. Taylor, 9 Bush 380. Now it may be mailed.

§ 97. **To Whom Notice May Be Given.**—"Notice of dishonor may be given either to the party himself or to his agent in that behalf."

§ 98. **Notice Where Party Is Dead.**—"Where any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if, with reasonable diligence, he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased."

§ 99. **Notice to Partners.**—"Where the parties to be notified are partners, notice to any one partner is notice to the firm, even though there has been a dissolution."

Notice to a partner is notice to the firm; and where one partner was cashier of holder bank, he and therefore his firm were presumed to have received notice. Citizens' Savings Bank v. Hayes, 96 Ky. 365, 29 S. W. 20, 16 K. L. R. 505; Hayes v. Citizens' Savings Bank, 101 Ky. 201, 40 S. W. 573, 19 K. L. R. 367.

§ 100. **Notice to Persons Jointly Liable Not Partners.**—"Notice to joint parties who are not partners must be given to each of

them, unless one of them has authority to receive such notice for the others"

The rule formerly was that notice to one joint indorser was notice to all. Dodge v. Bank of Kentucky, 2 A. K. Mar. 615; Higgins v. Morrison, 4 Dana 105. Under this section notice must be given to each joint indorser sought to be held, and any joint indorser not notified is released. Williams v. Panitsville Nat. Bank, 143 Ky. 781, 137 S. W. 535.

§ 101. **Notice to Bankrupt or Insolvent.** —"Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee."

In Callahan v. Bank of Kentucky, 82 Ky. 231, notice was given alone to an assignee for creditors, and in Moreland v. Citizens' Savings Bank, 114 Ky. 577, 71 S. W. 520, 24 K. L. R. 1354, the notice was given to the assignor alone, and both were held sufficient.

§ 102. **When Notice Must Be Given.**— "Notice may be given as soon as the instrument is dishonored, and unless delay is excused as hereinafter provided, must be given within the time fixed by this Act."

While a bill payable on a day certain need not be presented before that time for acceptance, yet if it is so presented and dishonored, notice must be given. Landrum v. Trowbridge, etc., 2 Met. 281; Union Nat. Bank v. Marr's Admr, 6 Bush 614.

§ 103. **Notice Where Parties Reside in Same Place.**—"Where the person giving and the person to receive notice reside in same place, notice must be given within the following times:

(1) "If given at the place of business of the person to recive notice, it must be given before the close of business hours or on the day following.

(2) "If given at his residence, it must be given before the usual hours of rest on the day following.

(3) "If sent by mail, it must be deposited in the postoffice in time to reach him in the usual course on the day following."

Where the parties live in the same place, notice given the day after dishonor is sufficient. Bank of Frankfort v. Markley, 3 A. K. Mar. 505; Shrieve v. Duckham, 1 Litt. 195; Bank of Kentucky v. Eades, 1 Litt. 277; Pearson v. Duckham, 3 Litt. 385; Todd v. Edwards, 7 Bush 89; Neal v. Taylor, 9 Bush 380; Monarch v. Farmers' &

Drover's Bank, 105 Ky. 430, 49 S. W. 317, 20 K. L. R. 1351. But the rule laid down in several of these cases that, under these circumstances, the notice is insufficient if mailed in time to reach the person but not received during the second day, is changed by the above section, which makes the notice good if it is *deposited* in the postoffice *in time* to reach him *in the usual course* on that day.

Subsection 3 also applies where the person sought to be notified does not live in the same place where the bill is dishonored, but it is his postoffice or the one nearest his residence. Bondurant v. Everett, 1 Met. 658.

§ 104. **Notice Where Parties Reside in Different Places.**—"Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

(1) "If sent by mail, it must be deposited in the postoffice in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter.

(2) "If given otherwise than through the postoffice, then within the time that notice would have been received in due course of mail, if it had been deposited in the post-

office within the time specified in the last subdivision."

Notice deposited in the mail on the day or day after the day of dishonor was sufficient. Hickman v. Ryan, 5 Litt. 24; Stivers v. Prentice, 3 B. Mon. 461; Mitcherson v. Grays, 4 B. Mon. 399; McClane v. Fitch, 4 B. Mon. 600.

Where an indorser is in the habit of receiving his mail at two or three postoffices, a notice directed to any one is sufficient. Menzies v. Farmers' Bank of Kentucky, 3 K. L. R. 822.

A pleading, alleging that the notices were mailed in the proper time to the acceptor and he at once duly notified the drawer and indorser, is bad on demurrer, because not having mailed the notices directly to these parties, the holder lost the presumption the law gave to mailed notices. Sebree Deposit Bank v. Moreland, 96 Ky. 150, 28 S. W. 153, 16 K. L. R. 404.

§ 105. **Where Sent by Mail—Sufficiency.** —"Where notice of dishonor is duly addressed and deposited in the postoffice, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails."

While the holder is only required under the above section to mail the notice duly addressed,

yet both these facts are essential. McGowan v. Bank of Kentucky, 5 Litt. 271; Taylor v. Bank of Illinois, 7 T. B. Mon. 576.

§ 106. **Deposit in Postoffice — When Deemed.**—"Notice is deemed to have been deposited in the postoffice when deposited in any branch postoffice or in any letter box under the control of the Postoffice Department."

Since under Section 105 the sender is deemed to have given notice when he has mailed the same properly addressed, it would seem that in order to avail himself of this presumption of law, he must comply strictly with this section. Hence he must prove that the proper notice was deposited in a postoffice, or branch postoffice, or a letter box under the control of the Postoffice Department.

§ 107. **Notice to Antecedent Party— Time Of.**—"When a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor."

See Triplett v. Hunt, 3 Dana 126; Smith v. Roach, 7 B. Mon. 17.

In the case of Williams v. Paintsville Nat. Bank, 143 Ky. 781, 137 S. W. 535, the meaning

of the word "antecedent" was called in question. The defendant, one of several joint indorsers, was the only one notified of the non-payment of the note. He contended that he could not notify the others because they were joint indorsers with him and none of them were antecedent to him. In response to this the Court said: "Antecedent parties within the meaning of Section 107 are those antecedent in liability, and to whom the person giving the notice has a right to look for reimbursement; for by Section 90 any party to the instrument may give the notice 'who upon taking it up would have the right to reimbursement from the party to whom the notice is given.' As to his part of the debt, a joint indorser may be looked to for reimbursement by his co-indorser who receives notice of dishonor from the holder. As to his part of the debt he is an antecedent party; for to this extent it is, as between them, his debt. The operation of Section 107 is not confined to those who are antecedent in liability as to the whole of the debt; but it applies to all who are antecedent as to any part of it. The indorsers know their relation to each other better than the holder, and the purpose of the Act is to provide a uniform rule which the holder may follow in all cases as the rule was applied in the case of successive indorsers at common law."

§ 108. **To What Place Notice Must Be Sent.**—"Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows:

(1) "Either to the postoffice nearest to his place of residence, or to the postoffice where he is accustomed to receive his letters; or

(2) "If he lives in one place and has his place of business in another, notice may be sent to either place; or

(3) "If he is sojourning in another place, notice may be sent to the place where he is sojourning.

"But where the notice is actually received by the party within the time specified in this Act, it will be sufficient, though not sent in accordance with the requirements of this section."

Subsection 1 was the law. Bondurant v. Everett, 1 Met. 658.

The place where a bill was dated was presumed *prima facie* to be the residence of the drawer and payee. Page v. Prentice, 5 B. Mon. 7.

Where the person to be notified is a transient person, a notice sent to his most usual place of resort is good. McClain v. Waters, 9 Dana 55.

Where the notice is actually received within the

legal time, it matters not how or where it was sent. McClain v. Waters, 9 Dana 55; Moreland v. Citizens' Savings Bank, 97 Ky. 211, 30 S. W. 637, 17 K. L. R. 88; Monarch v. Farmers' etc., Bank, 105 Ky. 430, 49 S. W. 317, 20 K. L. R. 1351.

§ 109. **Waiver of Notice.**—"Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied"

Before the passage of this Act the law was that, where an indorser or drawer had been released by reason of not having been given the proper notice, a mere promise made thereafter to pay the instrument was without consideration and uninforcible. Lawrence v. Ralston, 3 Bibb. 102; Ralston v. Bullitts, 3 Bibb 261; Bank of Tennessee v. Smith, 9 B. Mon. 609; Bank of United States v. Leathers, 10 B. Mon. 64; Landrum v. Towbridge, 2 Met. 281; Sebree Deposit Bank v. Moreland, 96 Ky. 150, 28 S. W. 153, 16 K. L. R. 404. And money paid by an indorser after he has been released, but in ignorance of that fact, could be recovered back. Ray & Thornton v. Bank of Kentucky, 3 B. Mon. 510. While there are words in some of the above opinions concerning ignorance on the part of the promisor, we think

as a whole these cases decided as we have stated.

But such a promise is *prima facie evidence* of the fact that due notice was given, but only *prima facie*. Lawrence v. Ralston, Bank of Tennessee v. Leathers, Sebree Deposit Bank v. Moreland, all *supra*.

But see Murphey v. Citizens' Savings Bank, 110 Ky. 225, 61 S. W. 25, 22 K. L. R. 1672, and on rehearing, 110 Ky. 930, 62 S. W. 1028, 22 K. L. R. 1872. In the original opinion it seems that the Court held a released accommodation indorser, upon a renewal bill, on the ground that at the time he signed the renewal, he must have known of the dishonor of the original. But on rehearing the Court held him on the ground that the extension given the principal debtor by the renewal was a sufficient consideration.

Since the passage of this Act, the Court of Appeals has applied the above section to such a state of case but once. Mechanics' & Farmers' Savings Bank v. Katterjohn, 137 Ky. 427, 125 S. W. 1071. In this case the Court seems to lean to the old law, for it was held that an oral promise to renew the note was good neither as a promise nor a waiver. To the same effect see Young v. Exchange Bank, 152 Ky. 293, 153 S. W. 444.

The waiver may be oral. Maples v. Traders' Deposit Bank (Sup. Ct.), 15 K. L. R. 879.

§ 110. **Waiver in or on Instrument.**—"Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written (Sec. 190) above the signature of an indorser, it binds him only."

A waiver embodied in the face of the instrument is binding on all parties. Bryant v. Merchants' Bank, 8 Bush 43; Smith v. Lockridge, 8 Bush 423; Swope v. Boone County Deposit Bank, 101 S. W. 334, 31 K. L. R. 48; Owensboro Savings Bank & Trust Co., etc. v. Haynes, 143 Ky. 534, 136 S. W. 1004; Atkinson v. Skidmore, 152 Ky. 413, 153 S. W. 456.

Where a waiver of presentment, protest and notice was *printed* on the *back* of a note, it was held to bind an indorser, even where the indorsement was entirely disconnected with the printed waiver, and parol evidence was held inadmissible to show otherwise. Farmers' B*ank of* Kentucky v. Ewing, 78 Ky. 264. It is a question whether this would now be the rule. The word "written includes printed" (Section 190). If the waiver was written and not printed it would, under this section, bind only the indorser who signed under it. Of this there can be no doubt. But since the one word includes the other, it seems that the above case is not now authority on this point.

§ 111. **Waiver of Protest Is Waiver Also of resentment and Notice.**—"A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of a presentment and notice of dishonor."

See Atkinson v. Skidmore, 152 Ky. 413, 153 S. W. 456.

§ 112. **When Notice Is Dispensed With.**—"Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it can not be given to or does not reach the parties sought to be charged (Secs. 105, 106)."

See Lawrence v. Ralston, 3 Bibb 104. As to duties of a notary public where he does not know address of party to be notified, see note to Section 118.

§ 113. **Excuse For Delay in Giving Notice.**—"Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence."

See Lawrence v. Ralston, 3 Bibb 102. The existence of the Civil War furnished a good excuse, where one of the parties was in the Confederate and the other in the Federal lines, Berry v. Southern Bank of Kentucky, 2 Duv. 382. But when communication was regularly opened, the excuse for further delay ceased. Morgan v. Bank of Louisville, 4 Bush 82.

The facts, that the holder of a draft accepted from the acceptor a check on a bank in a distant city in payment of the draft and then cancelled the draft and delivered it to the acceptor and the check was dishonored, do not show that the delay in giving notice to an indorser was caused by circumstances beyond the control of the holder. Nor does the fact that the indorser was not damaged by the delay affect the question. Young v. Exchange Bank, 152 Ky. 293, 153 S. W. 444.

§ 114. **When Notice Need Not Be Given to Drawer.**—"Notice of dishonor is not required to be given to the drawer in either of the following cases:

(1) "Where the drawer and the drawee are the same person.

(2) "Where the drawee is a fictitious person or a person not having capacity to contract.

(3) "Where the drawer is the person to

whom the instrument is presented for payment.

(4) "Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument.

(5) "Where the drawer has countermanded payment."

The maker of a note payable to his own order and indorsed by him, is not entitled to notice. Pace v. Welmending, 12 Bush 142. The same is true of an accommodation maker. Marion Nat. Bank v. Phillips, 35 S. W. 910, 18 K. L. R. 159.

If the drawer had no funds in the hands of the drawee and if he had no right to expect the drawer to honor the bill he was not entitled to notice. Humphries v. Bicknell, 2 Litt. 296, Clarke v. Castleman, 1 J. J. Mar. 70; Taylor v. Bank of Illinois, 7 T. B. Mon. 581; Barbaroux v. Waters, 3 Met. 304.

While the presumption is that the drawer has funds in the hands of the drawee or has a right to expect the drawee to honor the instrument, yet this presumption is rebutable. In order to dispense with notice for these reasons, the plaintiff must allege and prove that the drawee had no funds or that the drawer had no right to expect that the bill would be honored. Baxter v. Graves, 2 A. K. Mar. 152; Frazier v. Harvie, 2 Litt. 185;

Ray & Thornton v. Bank of Kentucky, 3 B. Mon. 512; Todd v. Edwards, 7 Bush 92.

§ 115. **When Notice Need Not Be Given to the Indorser.**—"Notice of dishonor is not required to be given to an indorser in either of the following cases:

(1) "Where the drawee is a fictitious person, or a person not having capacity to contract and the indorser was aware of the fact at the time he indorsed the instrument.

(2) "Where the indorser is the person to whom the instrument is presented for payment.

(3) "Where the instrument was made or accepted for his accommodation."

The fact that the indorser is not injured by reason of failure to receive notice in due time does not dispense with such notice. Young v. Exchange Bank, 152 Ky. 293, 153 S. W. 444.

Where the proceeds of a note were paid by the payee to the maker, the fact that the money was lent at the request of the indorser and on his credit, does not show that the note was made for the indorser's accommodation. The person accommodated is the one who gets the money. First Nat. Bank v. Bickel, 143 Ky. 754, 137 S. W. 790; Grayson County Bank v. Elbert, 143 Ky. 750, 137 S. W. 792. See also Mechanics' & Farmers'

Savings Bank v. Katterjohn, 137 Ky. 427, 125 S. W. 1071, and First Nat. Bank v. Bickel, 154 Ky. 11, 156 S. W. 856.

Where a note was executed to cover a debt from the maker to the payee, the fact that it was discounted by a bank as a favor to the payee, does not bring the case within the rule laid down by Subsection 3, for the note was not made for the payee's accommodation but to evidence a debt from the maker to him. Brown v. Crofton, 76 S. W. 372, 25 K. L. R. 753

§ 116. **Notice of Non-payment Where Notice of Non-acceptance Given.**—"Where due notice of dishonor by non-acceptance has been given notice of a subsequent dishonor by non-payment is not necessary, unless in the meantime the instrument has been accepted."

§ 117. **Effect of Omission to Give Notice of Non-acceptance to Holder in Due Course.**—"An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission."

§ 118. **When Protest Can and When Must Be Made.**—"Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment as

the case may be; but protest is not required, except in the case of foreign bills of exchange."

Under the law merchant protest was absolutely necessary to hold the drawer or indorser of a foreign bill of exchange or of a promissory note placed on the footing of a foreign bill of exchange. Dodge v. Bank of Kentucky, 2 A. K. Mar. 610; Read v. same, 1 T. B. Mon. 91; Chenowith v. Chamberlain, 6 B. Mon, 60; Piner v. Clary, 17 B. Mon. 645.

But protest of an inland bill of exchange was not only unnecessary, but the production of such protest in evidence proved nothing in favor of the holder. Taylor v. Bank of Illinois, 7 T. B. Mon. 580; Whiting v. Walker, 2 B. Mon. 262; Bank of the United States v. Leathers, 10 B. Mon. 64.

The same was true of an ordinary promissory note. Bank of the United States v. Leathers *supra.*

After these decisions several statutes were enacted relative to the duties of notaries public as to the protest of bills and notes. The first of these, which is Section 479 of the Kentucky Statutes, was adopted in the Revised Statutes of 1852. It is:

"Section 479. The protest of a notary public,

under his seal, of the non-acceptance or non-payment of a bill, shall be *prima facie* evidence of its dishonor."

The second, the material parts of which are to be found in Sections 3723, 3724, 3725 and 3726 of the Kentucky Statutes, was passed in 1864 (Meyer's Supplement, page 354). They are:

"Section 3723. It shall be the duty of the notaries public of this Commonwealth to record in a well-bound and properly indexed book, kept by them for that purpose, all protests by them made for the non-acceptance or non-payment of all bills of exchange, checks or promissory notes, placed on the footings of the bills of exchange, and on which a protest is now required by law, or of the dishonor of which such protest is now evidence by law, and a copy of such protest, certified by the said notary public under his notarial seal, shall be *prima facie* evidence in all the courts of this Commonwealth.

"Section 3724. Upon the resignation of such notary public or the expiration of his term of office, and he is not reappointed, it shall be his duty to place such book in the office of the clerk of the County Court in and for the county in which said notary was appointed; and when the notary shall die, his representative shall deposit the said book with the clerk aforesaid, and thereafter

a copy of such record, certified by the clerk, shall be evidence in all the courts of this Commonwealth.

"Section 3725. It shall hereafter be the duty of notaries public, upon protesting any of the instruments mentioned in Section 3723, to give or send notice of the dishonor of such paper to such of the parties thereto as are required by law to be notified, to fix their liability on such paper; and when the residence of the parties is known to the notaries public and he shall send the notices to the holders of such paper, and he shall state in his protest the names of the parties to whom he sent or gave such notices, and the time and manner of giving the same, and such statement in such protest shall be *prima facie* evidence that such notices were sent or given as therein stated by such notary.

"Section 3726. When any bill of exchange or commercial paper has heretofore or shall hereafter be protested in any other State of these United States, in which the same is made payable, and by the laws of said State a notary public or other officer legally authorized to protest the same is required to give or send notice of the dishonor thereof to the parties, or when his certificate or a copy thereof that such notice or notices were sent is evidence thereof in the courts of such

State, the same shall be received as evidence in all the courts of this Commonwealth, in all actions of such bills of exchange and have the same effect as evidence as is given in such evidence in the courts of such State."

We are of the opinion that these statutes are not repealed by the Negotiable Instruments Act. (But see note 2 to Section 96). Under Section 118 of this Act and the authorities above cited it is clear that protest is still necessary on a foreign bill of exchange. But while it is not under this section necessary that a domestic bill or a negotiable note shall be protested, yet the question arises, where such a note or bill is protested, is the notary's certificate evidential under the above statutes of its dishonor and of the notice given as recited in the certificate? We think it is.

It will be noted that neither in Section 479 nor in Sections 3723 and 3725 is the word "foreign" used. In Section 479 the language is "a bill." And in Section 3723 the words are "all bills of exchange or promissory notes, placed on the footings of bills of exchange."

Section 3723 could have no reference to Section 483, Kentucky Statutes, placing on the footing of foreign bills of exchange notes which are discounted by any bank chartered in this State or any Federal bank located in this State, because

Section 483 was not passed until over one year after Section 3723 (Meyer's Supplement, page 60). Before that time certain banks had been granted charters which placed notes discounted by them on the footing of foreign bills. Whether any charter placed such notes on the footing of inland bills, we do not know. But it was possible that such a charter might be granted and if so, no doubt the above statute would have applied.

But all the decisions of the Court of Appeals since that time, with possibly one exception (Young v. Bennett, 7 Bush 474), that we have found, have applied these statutes to inland bills of exchange. Section 479 was applied to an inland bill in Trabue v. Sayre, 1 Bush 129. Sections 3723 and 3725 were applied to inland bills of exchange in Todd v. Edwards, 7 Bush 89; Neal v. Taylor, 9 Bush 380, and Moreland's Admr. v. Citizens' Savings Bank, 114 Ky. 577, 71 S. W. 520, 24 K. L. R. 1354; Monarch v. Farmers', etc., Bank, 105 Ky. 430, 49 S. W. 317, 20 K. L. R. 1351.

In these cases the Court did not deem it of sufficient importance to state in terms that the papers involved were inland bills and these facts can only be discovered by reading the facts stated in each opinion. Sections 3723 and 3725 are referred to and discussed at length in the cases of Mulholland v. Samuels, 8 Bush 63, and Lyddane

v. Owensboro Banking Company, 106 Ky. 706, 51 S. W. 453, 21 K. L. R. 320. In neither of these cases is it disclosed in the opinion whether the bills were inland or foreign. This silence of the Court indicates that this was an immaterial question and that these statutes applied to both character of bills.

Next, does Section 184 of this Act, which makes notes payable to order or bearer negotiable, place them upon the footing of a bill of exchange? We would not discuss this but for the doubt thrown upon it by dicta in Southern National Bank v. Schimpler, 159 Ky. 372, 167 S. W. 148. (See note to Section 184). The very origin of the negotiability of promissory notes is the Statute of Third and Fourth Anne which declares that promissory notes "shall have the same effect and be negotiable in like manner as inland bills of exchange according to the custom of merchants." In addition, the Court of Appeals in two cases (German Nat. Bank v. Zimmer, 141 Ky. 401, 132 S. W. 1023 and Stevens v. Gregg, 89 Ky. 461, 12 S. W. 775, 11 K. L. R. 686) held that an Ohio statute, almost identical to Section 184 of this Act, placed an Ohio note "on the footing of a bill of exchange."

The case of Young v. Bennett *supra* involved an inland bill of exchange which was drawn and

completed between the time of the passage of Section 479 and Sections 3723, etc. The Court does not refer to any statute, but held: "And while it may have been wholly immaterial whether the bill was protested or not, yet inasmuch as it was done, and the notice of such protest gave to appellee information of its dishonor, he cannot avoid the legal effect of the same, by reason of the fact that the protest itself and a notice of the same were superfluous and unnecessary."

It thus appears that these statutes were applied to inland bills of exchange in every case that has come before the Court of Appeals except possibly in the Young case. And in that case the statute was not referred to nor was the Court's attention called to it, and the Court having held that the appellee had received sufficient notice, anything said beyond that was superfluous. In addition, the above section (118) of this Act expressly gives the holder the right to have protested an inland bill or a negotiable note. To give this right and then to say that the protest would prove nothing is to render it a nullity.

Section 3726 applied in Harmon v. Wilson, 1 Duv. 323.

The protest having been duly made, is *prima facie* evidence of such facts stated herein as are

specified and required by Sections 479, 3723, 3725 and 3726.

For note on how and by whom the protest should be made, see notes to Sections 153 and 154. And as to sufficiency and manner of giving notice, see notes to other sections of this article.

ARTICLE VIII.

DISCHARGE OF NEGOTIABLE INSTRUMENTS.

Section 119. How instrument discharged.
120. What discharges a person secondarily liable.
121. Rights of party secondarily liable who pays instrument.
122. Renunciation by holder.
123. Unintentional cancellation; burden of proof.
124. Material alteration; effect of.
125. What is a material alteration.

§ 119. **How Instrument Discharged.**—"A negotiable instrument is discharged:

(1) "By payment in due course (Sec. 88) by or on behalf of the principal debtor.

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

(3) "By the intentional cancellation (Sec. 123) thereof by the holder.

(4) "By any other act which will discharge a simple contract for the payment of money.

(5) "When the principal debtor be-

comes the holder of the instrument at or after maturity in his own right."

A note in the hands of the maker and indorsed by the payee is presumed to have been paid. Long v. Bank of Cynthiana, 1 Litt. 290; Ellis v. Blackerby, 78 S. W. 181, 25 K. L. R. 1557. But this presumption can be overthrown by plea and proof that the paper was indorsed for the accommodation of the principal debtor. Callahan v. First Nat. Bank, 78 Ky. 604; Callahan v. Bank of Kentucky, 82 Ky. 231.

The payment must be made by or on behalf of the principal debtor. Thus where two indorsers purchased from the holder a *release* from all liability on the bill, it was held in a suit by the holder that the sums so paid did not inure to the benefit of the parties antecedent to said indorsers, even though the aggregate of the two payments exceeded the amount due on the bill. Bank of Kentucky v. Floyd, 4 Met. 159.

Of course a payment by an indorser does not discharge the bill as between him and antecedent parties. Bowman v. Wright, 7 Bush 375.

Subsection 4 must refer to the acceptance of a chattel in satisfaction of the paper, or a cancellation of the contract which was its consideration, a settlement or a new binding contract or any

other satisfaction as between the holder and those liable. Thus the maker of a note has the same right to purchase his note as a stranger; hence a contract between the payee and the payor, wherein it was agreed that on a certain date, before the maturity of the note, the payor would pay the payee, and he would accept in satisfaction a sum less than the value of the note, was held binding. Bell v. Pitman, 143 Ky. 521, 136 S. W. 1026.

This subsection must be construed with Section 57, wherein it is provided that a holder in due course is not affected by any defenses that may exist between prior parties. For instance the cancellation of a deed operates as a discharge of notes given under it and held by a holder *not* in due course. Wheeler v. Preston, 107 S. W. 274, 32 K. L. R. 791. But the cancellation of a contract, as between the parties to it, does not affect the notes, given under it, in the hands of a holder in due course. Pennebaker Bros. v. Bell City Mfg. Co., 130 Ky. 592, 113 S. W. 829.

The rule laid down in Subsection 5 is illustrated by the case of Logan County Nat. Bank v. Barclay, 104 Ky. 97, 46 S. W. 675, 20 K. L. R. 773, where it was held that the purchase of a note after maturity by a firm of which one maker was a member, discharged the note. The same

rule was applied in Davenport v. Green River Deposit Bank, 138 Ky. 352, 128 S. W. 88. In the last case one partner purchased a one-half interest in the firm note *before* maturity. The decision can be reconciled with the statute upon the grounds, first, that the partner was still the owner at the maturity of the note, or, second, that his purchase inured to the benefit of his firm.

§ 120. **What Discharges a Person Secondarily Liable.**—"A person secondarily liable Sec. 191) on the instrument is discharged:

(1) "By an act which discharges the instrument (Sec. 119).

(2) "By the intentional cancellation (Sec. 123) of his signature by the holder.

(3) "By the discharge of a prior party.

(4) "By a valid tender of payment made by a prior party.

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

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

Subsection 3 should be read in connection with Sections 90 and 107. It does not mean that the failure of the holder to give notice to indorsers, antecedent to the indorser duly notified, releases the notified indorser, for the one notified can hold those prior to him by giving them notice. Williams v. Paintsville Nat. Bank, 143 Ky. 781, 137 S. W. 535. Nor does a release in bankruptcy which discharges one party to an instrument release any other party. National Bankruptcy Act of 1898, Section 16-a; Austin v. First Nat. Bank, 148 Ky. 587, 147 S. W. 35. We think this subsection means that the discharge must be the act of a subsequent party to the paper, and such a discharge as will prevent the party complaining from enforcing his rights under this Act. Floyd v. Bank of Kentucky, 4 Met. 159.

As illustrative of the rule in Subsection 4, we cite the cases of Pursiful v. Pineville Banking Co., 97 Ky. 154, 30 S. W. 203, 17 K. L. R. 38; Bank of Taylorsville v. Hardesty, 91 S. W. 729, 28 K. L. R. 1285; Burgess v. Deposit Bank of Sadieville, 97 S. W. 761, 30 K. L. R. 177; Eades v. Muhlenberg County Savings Bank, 157 Ky. 416, 163 S. W. 494. The first and fourth of these cases hold that where the principal debtor has on deposit at maturity sufficient funds to pay a note held by the bank, and the deposit is not so applied, a surety

on the note is released. The second and third cases extend the principle to deposits made after maturity. But this is denied in the last case which does not refer to any Kentucky authority.

The reason for the rule in Subsection 5, which holds a party secondarily liable after the release of the principal debtor if the holder's rights against him are reserved, irrespective of the consent of the party secondarily liable, is that the principal debtor's consent that the holder may have recourse against the indorser or drawer implies his consent that they may have recourse against him.

If the holder made no such reservation, the law construed the contract to mean that the holder would not proceed against the party secondarily liable, for the reason that the principal debtor had purchased immunity not only against the holder, but as against all parties. If the holder were permitted to proceed against a party secondarily liable, such party could at once proceed against the principal debtor and thus nullify the release. But when the reservation is made, the holder can at once proceed against the party secondarily liable and he in turn can proceed against the principal debtor. Or if the party secondarily liable so desires he can take up the paper and at once proceed against the principal debtor. So no one is

injured by the agreement with the reservation.

But it will be noticed that the words "principal debtor are used in this subsection instead of the words "person primarily liable." As to whether this was intentional we express no opinion. But we suggest that since the person primarily liable is the one "who by the *terms of the instrument* is absolutely required to pay" (Section 191), he may not always be the principal debtor. The maker or acceptor may be accommodating parties, and any other parties may be the ones accommodated; in which case, while not parties primarily liable, they are yet the real debtors. Take this case of fact; if the holder did not know that the acceptor or maker was the accommodating party and he released the party accommodated, an indorser or drawer, would he by this release of the real debtor have released the drawer or maker? We cannot think this would be held by the courts.

But where the converse appears, that is, that the holder knew that the maker of a note was the accommodating party and that the payee who was the first indorser was the person accommodated, it was held that this knowledge was very material and that where the holder with this knowledge gave a binding extension to the payee without the consent of the maker, the maker was

released. Schuff v. Germania Safety Vault & Trust Co., 43 S. W. 229, 19 K. L. R. 1457; Morehead v. Citizens' Deposit Bank, 130 Ky. 414, 113 S. W. 501.

Notice that under Subsection 6 the agreement to extend the time must be binding on the holder and founded upon a new and valuable consideration. Higgins v. Morrison, 4 Dana 100; Bank of Kentucky v. Floyd, 4 Met. 159; Davies County Bank, etc., v. Wright, 129 Ky. 21, 110 S. W. 361, 33 K. L. R. 457; Morehead v. Citizens' Deposit Bank, *supra;* Corrydon Deposit Bank v. McClure, 140 Ky. 149, 130 S. W. 971. It should be noticed also that the reservation mentioned in this subsection must be incorporated in the original instrument.

§ 121. **Rights of Party Secondarily Liable Who Pays Instrument.**—"Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties (Sec. 68), and he may strike out his own and subsequent indorsements, and again negotiate the instrument (Sec. 47), except:

(1) "Where it is payable to the order of a third person, and has been paid by the drawer; and

(2) "Where it was made or accepted for

accommodation, and has been paid by the party accommodated."

The person secondarily liable who pays the instrument has the right to proceed against prior parties. Bradford v. Ross, 3 Bibb 239; Bell v. Morehead, 3 A. K. Mar. 158; Clark v. Schwing, 1 Dana 334; Miller v. Henshaw, 4 Dana 326; Eldridge v. Duncan, 1 B. Mon. 101; Scott v. Doneghy, 17 B. Mon. 321; Bowman v. Wright, 7 Bush 375.

There is no difference between the rights and liabilities of accommodation indorsers as between themselves and ordinary indorsers. They are, in the absence of agreement to be found other wise, liable in succession. Hixon v. Reed, 2 Litt. 176; Crutcher v. Bank of Kentucky, 4 Litt. 436; Smith v. Bacon, 3 J. J. Mar. 313; Denton v. Lytle, 4 Bush 599. But these rights and liabilities may be changed by agreement. See note to Section 68.

Possession of the instrument by one secondarily liable is evidence that he has taken it up. Bell v. Morehead, 3 A. K. Mar. 159; Tuggle v. Adams, 3 A. K. Mar. 429; Miller v. Henshaw, *supra*; Bank of Tennessee v. Smith, 9 B. Mon. 612.

Where a bill is payable to a drawer's order and indorsed to his agent, the indorsement is virtually to himself, and no averment of his having

paid it is necessary. Rice v. Hogan, 8 Dana 136.

§ 122. **Renunciation by Holder.**—"The holder may expressly renounce his rights against any party to the instrument before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.

§ 123. **Unintentional Cancellation—Burden of Proof.**—"A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority."

§ 124. **Material Alteration—Effect Of.**—"Where a negotiable instrument is materially altered (Sec. 125) without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, au-

thorized (Sec. 14) or assented to the alteration and subsequent endorsers.

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

Subject to the second paragraph, this section avoids any instrument "materially altered" with the one exception "as against a party who has himself made, authorized or assented to the alteration and as to subsequent indorsers." But the law formerly was that such an alteration did not avoid the paper if made by a stranger. Lee v. Alexander, 9 B. Mon. 26; Terry v. Hazlewood, 1 Duv. 109; Blakey v. Johnson, 13 Bush 202. But in Lisle v. Rogers, 18 B. Mon. 539, it was said: "The cases in which the circumstance of the alteration having been made by a third person, without the privity of the person claiming, prevents it being fatal, are those in which the plaintiff had, previously to the alteration, required (sic) a good *right* and *title* to the money on the note, of which he could not be divested by the improper act of a stranger, committed without his privity or consent. But the present case is of a different description altogether, the alteration having been made before the plaintiff acquired any title to the

note, any title that he has must have attached alone to the instrument in its altered condition." While subject to the above limitations an alteration by a stranger did not avoid the note, yet when the alteration is established, and the proof does not disclose how, by whom, or when it was done, the holder must suffer, since the burden of proof is upon him. Elbert v. McClelland, 8 Bush 577; Mitchell v. Reed, 106 S. W. 833, 32 K. L. R. 683. But this section seems to have changed the law, so as to avoid the instrument, it matters not who made the alteration.

Nor could new life be imparted to a note once discharged by an alteration in the nature of an insertion by erasing the alteration. Cotton v. Edwards, 2 Dana 106; Locknane v. Emmerson, 11 Bush 69. But now a holder in due course could recover on the paper according to its original tenor.

It was also the rule that a material alteration avoided the paper altogether and no recovery could be had upon it. Rucker v. Howard, 2 Bibb. 167; Cotton v. Edwards, 2 Dana 106; Lisle v. Rogers, 18 B. Mon. 528; Duker v. Franz, 7 Bush 273; Elbert v. McClelland, 8 Bush 577; Mitchell v. Reed, 106 S. W. 833, 32 K. L. R. 683. But again a holder in due course can now recover on it according to its original tenor. However,

the holder could recover on the original indebtedness. See Ramsey v. Utica Deposit Bank, 156 Ky. 263, 160 S. W. 943, and cases cited.

Of course no party who makes or assents to a material alteration can object to it. Tyler v. First Nat. Bank, 150 Ky. 515, 150 S. W. 665; Robertson v. Commercial Security Co., 152 Ky. 336, 153 S. W. 450.

While a party may not have assented to or authorized a material alteration of the instrument, yet he may still be held liable, on the principle of estoppel, where he has negligently left blank spaces which have been filled out not only without his authority, but in violation thereof. For example, a note was executed by the maker for five hundred dollars. The words were written "five hundred" with a space both before them and after and between them and the word "dollars." The note was raised by writing the word "twenty" before and the words "and fifty" after them, making the note read "twenty-five hundred and fifty dollars." The note was discounted in appellee bank, which had no notice of the raise, nor was there anything on the note to indicate the alteration. It was held that where the maker had himself, by careless execution of the note, left room for insertion to be made without exciting the suspicion of a careful man, he was

liable to a holder in due course. The reason given was that by leaving the blank space, he afforded opportunity for what had been done, that he had invited the public to receive it, and that he should bear the loss and not the innocent purchaser. Hackett v. First Nat. Bank, 114 Ky. 193, 70 S. W. 664, 24 K. L. R. 1002. For cases applying this rule to blanks and partially blank spaces, see Woolfolk v. Bank of America, 10 Bush 514; Blakey v. Johnson, 13 Bush 204; Hall v. Smith, 14 Bush 614; Newell v. First Nat. Bank, 13 K. L. R. 775; Cason v. Grant County Deposit Bank, 97 Ky. 487, 31 S. W. 40, 17 K. L. R. 344; Diamond Distilleries Co. v. Gott, 137 Ky. 585, 126 S. W. 131. But it must be affirmatively pleaded that the maker's negligence made the alteration possible and that this negligence was the proximate cause of the loss. |Bank of Commerce v. Halderman, 109 Ky. 222, 58 S. W. 587, 22 K. L. R. 717.

§ 125. **What Is a Material Alteration.**—"Any alteration which changes:

(1) "The date.

(2) "The sum payable, either for principal or interest.

(3) "The time or place of payment.

(4) "The number of the relations of the parties.

(5) "The medium or currency in which payment is to be made.

"Or which adds a place of payment where no place of payment is specified (Secs. 140, 142, 143), or any other change or addition which alters the effect of the instrument in any respect, is a material alteration."

Date. Stout v. Cloud, 5 Litt. 205; Bank of Commonwealth v. McChord, 4 Dana 191; Hall v. Bank of Commonwealth, 5 Dana 258; Lee v. Alexander, 9 B. Mon. 25; Lisle v. Rogers, 18 B. Mon. 535; Duker v. Franz, 7 Bush 283; Kimbrough v. Lexington City Nat. Bank, 150 Ky. 336, 150 S. W. 325.

Amount, principal. Newell v. First Nat. Bank, 13 K. L. R. 775; Bank of Commerce v. Halderman, 109 Ky. 222, 58 S. W. 587, 22 K. L. R. 717; Hackett v. First Nat. Bank, 114 Ky. 193, 70 S. W. 664; 24 K. L. R. 1002.

Interest. White v. Shepherd, 140 Ky. 349, 131 S. W. 17 and cases cited.

Time of payment. Blakey v. Johnson, 13 Bush 197; First Nat. Bank v. Payne, 42 S. W. 736, 19 K. L. R. 839.

Place of payment. Cason v. Grant County Deposit Bank, 97 Ky. 487, 31 S. W. 40, 17 K. L. R. 344; Mitchell v. Reed, 106 S. W. 833, 32 K. L. R.

683; Diamond Distilleries Co. v. Gott, 137 Ky. 585, 126 S. W. 131.

Number or relation of the parties. The word "or" was used in the original draft. Bank of Limestone v. Penick, 5 T. B. Mon. 25; Pulliam & Withers, 8 Dana 98; Shipp v. Duggett, 9 B. Mon. 5; Singleton v. McQuerry, 85 Ky. 41, 28 S. W. 652; Rumley v. Wilcher, 66 S. W. 7, 23 S. W. 1745; Tyler v. First Nat. Bank, 150 Ky. 575, 150 S. W. 665.

Addition of place of payment where none is specified. Whitesides v. Northern Bank of Kentucky, 10 Bush 501. See note to Section 141 on acceptance to pay at a particular place and not elsewhere.

Alteration of effect of instrument. To be material the alteration must change the legal effect of the obligation. Terry v. Hazlewood, 1 Duv. 104; Smith v. Lockridge, 8 Bush 429; Phillips v. Breck, 79 Ky. 465; Tranter v. Hibbard, 108 Ky. 265, 56 S. W. 169, 21 K. L. R. 1710; Stanley v. Davis, 107 S. W. 773, 32 K. L. R. 1135. A case showing the great change wrought by this act is Maxwell v. Goodrum, 10 B. Mon. 286. There it is said: "A mere promissory note, for the payment of money, has the same effect under our statute and the law which operates in this State upon such writings, with or without the words

'or order' following the name of the payee. These words are not necessary to render it assignable, nor do they impart any additional validity to the writing. They are, therefore, an immaterial and not a substantial part of the note." But now they are very material and constitute one difference between a negotiable and a non-negotiable instrument.

The tearing off of a complete negotiable note from a writing to which it was attached by a perforated line, is not such a material alteration as to affect it in the hands of a holder in due course. Robertson v. Commercial Security Co., 152 Ky. 336, 153 S. W. 450. But if the plaintiff was not a holder in due course, he holds it subject to the original contract. Harrison v. Ford, 158 Ky. 467, 165 S. W. 663.

TITLE II.—BILLS OF EXCHANGE.

ARTICLE I.

FORM AND INTERPRETATION.

Section 126. Bill of exchange defined.
127. Bill not an assignment of funds; liability of drawee.
128. Bill addressed to two or more drawees.
129. Inland and foreign bills.
130. When bill may be treated as a promissory note.
131. Referee in case of need.

§ 126. **Bill of Exchange Defined.**—"A bill of exchange is an unconditional (Sec. 3) order in writing (Sec. 190) addressed by one person to another, signed (Sec. 1) by the person giving it, requiring the person to whom it is addressed to pay on demand (Sec. 7), or at a fixed or determinable future time (Sec. 4), a sum certain in money (Sec. 2), to order (Sec. 8) or to bearer (Sec. 9)."

The various elements of a bill of exchange which this section demands, have been covered

by notes to the proper sections. For definition of a bill of exchange, see Rice v. Hogan, 8 Dana 134; Biesenthal v. Williams, 1 Duv. 333; Gaar v. Louisville Banking Co., 11 Bush 186.

The signature of a drawer is essential to a bill of exchange. Tevis v. Young, 1 Met. 197.

§ 127. **Bill Not An Assignment of Funds—Liability of Drawee.**—"A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same (Sec. 189)."

Where the drawee refuses to accept an order he cannot be compelled to pay, especially where the order is less than the amount due. Weinstock v. Bellwood, 12 Bush 139. But where he accepts the bill, it amounts to an assignment of the funds in his hands, though less than the amount of the bill. Buckner v. Sayre, 18 B. Mon. 746. For the rule on this point as to checks, see note to Section 189.

§ 128. **Bill Addressed to Two or More Drawees.**—"A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession."

§ 129. **Inland and Foreign Bills.**—"An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this State. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill (Sec. 152)."

Formerly the question of whether or not a bill was inland or foreign was determined first by the face of the paper, and where it did not speak, by the facts of the case. A bill was inland which purported on its face to be or was in fact both drawn and payable within the same State. Taylor v. Bank of Illinois, 7 T. B. Mon. 576; Young v. Bennett, 7 Bush 477. Any bill was foreign which purported to be or was in fact drawn in one state and payable in another. Chenowith v. Chamberlain, 6 B. Mon. 61; Gray Tie & Lumber Co. v. Farmers' Bank, 109 Ky. 694, 60 S. W. 537, 22 K. L. R. 1333.

Where nothing appeared on the bill the holder was often at a loss to determine whether his bill was inland or foreign. In order to do away with this uncertainty, this section provides that the holder may treat any bill as inland which does not appear on its face to be foreign.

There is no conflict between the first two sentences of this section and the last. A bill is

inland which is in fact, or so purports on its face, both drawn and payable in this State. Any other is a foreign bill. The holder can preserve all his rights by proceeding according to the definition. But while in fact it may be a foreign bill, if it does not purport on its face to be such, the holder is protected if he treats it as an inland bill. The purpose of the last sentence is not to confuse inland with foreign bills, but to protect the holder against uncertainty. This is done by permitting him to treat as an inland bill one, which in fact is foreign, but which does not disclose that fact.

In Harmon v. Wilson, 1 Duv. 323, the bill did not show on its face where it was drawn, but it did show that the drawee resided in Ohio and the evidence showed the drawer resided in Kentucky. It was held a foreign bill. Under the above section we believe the same would be decided in a similar case.

It will be noticed that the above section does not provide that an inland bill is one which is drawn and payable within the *same* State, but "within *this State.*" If this construction be right, the case of Piner v. Clary, 17 B. Mon. 660, would be good law; for if we treat the certificate of deposit in that case as a bill it does not show on its face that it was both drawn and payable in this State. In fact, it was both drawn and payable in

the State of Ohio, and would therefore seem to be a foreign bill under this section.

This is not the first time this State has by statute placed what under the law of merchant would be an inland bill on the footing of a foreign bill. In the early days charters were granted various banks which provided that all bills and notes discounted by them were placed on a footing of foreign bills. Under these charters it was held that an inland bill discounted by such a bank became in effect a foreign bill. Farmers' & Merchants' Bank v. Turner, 2 Litt. 13; Bank of Kentucky v. Brooking, 2 Litt. 41; Battertons v. Porter, 2 Litt. 388. See also Section 483 Kentucky Statutes.

§ 130. **When Bill May Be Treated As a Promissory Note.**—"Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument at his option, either as a bill of exchange or a promissory note (Sec. 17)."

In Gray Tie & Lumber Co. v. Farmers' Bank, 109 Ky. 694, 60 S. W. 537, 22 K. L. R. 1333, it was held that a bill drawn by an agent on his principal by the principal's authority was equiva-

lent to a draft drawn by the principal on himself and need not be accepted, in other words was the same as the drawee's promissory note. This case on this point seems to be in conflict with Buckner v. Sayre, 18 B. Mon. 746. In the last case the Insurance Company drew a bill on Wheeler, its agent, payable to Sayre, and it was held a bill, and a bill which when accepted had the effect of assigning to Sayre what funds were in its agent's hands.

§ 131. **Referee in Case of Need.**—"The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need; that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not, as he may see fit."

ARTICLE II.

ACCEPTANCE.

Section 132. Acceptance defined.
133. Acceptance, holder's rights.
134. Acceptance on separate paper; to whom available.
135. Promise to accept; to whom available.
136. Time for acceptance.
137. Acceptance by refusal to return or destruction of bill.
138. When bill can be accepted.
139. Acceptances; qualified, general.
140. General acceptance.
141. Qualified acceptance.
142. Rights of parties as to qualified acceptance.

§ 132. **Acceptance Defined.**—"The acceptance of a bill is the signification (Secs. 134, 135) by the drawee of his assent to the order of the drawer. The acceptance must be in writing (Sec. 190) and signed by the drawee (Sec. 19). It must not express that

the drawee will perform his promise by any other means than the payment of money."

Notice that the acceptance must be in writing.

§ 133. **Acceptance—Holder's Rights.**—"The holder of a bill presenting the same for acceptance may require that the acceptance be written (Sec. 190) on the bill, and if such request is refused may treat the bill as dishonored."

§ 134. **Acceptance on Separate Paper—To Whom Available.**—"Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value."

§ 135. **Promise to Accept—To Whom Available.**—"An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value."

The rule laid down in this section was declared in Vance v. Ward, 2 Dana 95. But the case of Read v. Marsh, 5 B. Mon. 8, which held that a letter of the drawee promising to accept

the bill was binding as to a holder who had no knowledge of it, is not now the law. This Act holds the drawee only as to a holder, who, upon the faith thereof received the bill for value.

§ 136. **Time For Acceptance.**—"The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill; but the acceptance, if given, dates as of the day of presentation."

§ 137. **Acceptance by Refusal to Return or Destruction of Bill.**—"Where a drawee to whom a bill is delivered for acceptance destroys the same or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same."

§ 138. **When Bill Can Be Accepted.**—"A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is

entitled to have the bill accepted as of the date of the first presentment."

§ 139. **Acceptances—Qualified—General.**—"An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn."

See note to Section 142.

§ 140. **General Acceptance.**—"An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only and not elsewhere (Sec. 73)."

See note to Section 142.

§ 141. **Qualified Acceptance.**—"An acceptance is qualified which is:

(1) "Conditional; that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated.

(2) "Partial; that is to say, an acceptance to pay part only of the amount for which the bill is drawn.

(3) "Local; that is to say, an acceptance to pay only at a particular place.

(4) "Qualified as to time.

(5) "The acceptance of some one or more of the drawees but not of all."

See note to Section 142.

In Brannin v. Henderson, 12 B. Mon. 61, an acceptance in the following words: "I will see the within paid, eventually," it was held that the acceptor was bound to pay "within a reasonable time, at least, after the promise, if not forthwith, and without regard to the happening of any contingency or event whatever, where none is specified in the contract."

§ 142. **Rights of Parties As to Qualified Acceptance.**—"The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or an endorser receives notice of a qualified acceptance, he must within a reasonable time, express his dissent to the holder, or he will be deemed to have assented thereto."

In Rogers v. Poston, 1 Met. 643 and Todd

v. Bank of Kentucky, 3 Bush 626, it was held, where a bill did not specify a place of payment and was accepted generally and afterwards words were written above the acceptance adding a place of payment, that this was not a material alteration, and did not release the acceptor or drawer; that no place of payment being fixed, there was an implied authority to appoint such a place. But now (Sec. 125) it is a material alteration "which adds a place of payment where none is specified." This would discharge the acceptor. Under Section 141, "an acceptance to pay only at a particular place" is a qualified acceptance; and by this section the drawer and indorsers are discharged by a qualified acceptance unless they have authorized it or subsequently assented to it.

But it will be noticed that, by Section 140, "an acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there *and not elsewhere*" and that in Subsection 3 of Section 141 the word *only* is used.

ARTICLE III.

PRESENTMENT FOR ACCEPTANCE.

Section 143. When presentment for acceptance must be made.
144. When failure to present or negotiate releases drawer and indorser.
145. Presentment; how made.
146. When presentment may be made.
147. Presentment; reasonable diligence.
148. Where presentment is excused.
149. Where a bill is dishonored by non-acceptance.
150. Where bill is treated as dishonored by non-acceptance.
151. Rights of holder where bill not accepted.

§ 143. **When Presentment For Acceptance Must Be Made.**—"Presentment for acceptance must be made:

(1) "Where the bill is payable after sight, or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or

(2) "Where the bill expressly stipulates

that it shall be presented for acceptance; or

(3) Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

"In no other case is presentment for acceptance necessary in order to render any party to the bill liable."

Although a bill payable at a fixed time need not be presented for acceptance, yet if it is so presented and dishonored notice must be at once given, otherwise the drawer and indorsers are released. See note to Section 102.

§ 144. **When Failure to Present or Negotiate Releases Drawer and Indorser.**—"Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time (Sec. 192). If he fail to do so, the drawer and all indorsers are discharged."

§ 145. **Presentment—How Made.**—"Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour on a business day, and before the bill is overdue, to the drawer or some person authorized (Sec. 19) to accept or refuse acceptance on his behalf; and

(1) "Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority (Sec. 19) to accept or refuse acceptance for all, in which case presentment may be made to him only.

(2) "Where the drawee is dead (Sec. 148), presentment may be made to his personal representative.

(3) "Where the drawee has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee."

§ 146. **When Presentment May Be Made.**—"A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of Sections 72 and 85 of this Act."

§ 147. **Presentment — Reasonable Diligence.**—"Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for

payment is excused and does not discharge the drawers and endorsers."

§ 148. **Where Presentment Is Excused.** —"Presentment for acceptance is excused and a bill may be treated as dishonored by non-acceptance, in either of the following cases:

(1) "Where the drawee is dead or has absconded or is a fictitious person or a person not having capacity to contract by bill.

(2) "Where, after the exercise of reasonable diligence, presentment can not be made.

(3) "Where, although presentment has been irregular, acceptance has been refused on some ground."

The bill which is the foundation of this Act was prepared by a committee appointed at the National Conference of the Board of Commissioners for Promoting Uniformity of Legislation, and was entitled "The Negotiable Instruments Law." This draft has been adopted by many States and Territories. The original draft and that of the statutes as adopted elsewhere contain the word *other* before the word *ground* in Subsection 3. It is our opinion that the word *other* was omitted from this Act by inadvertence.

§ 149. **Where a Bill Is Dishonored by Non-acceptance.**—"A bill is dishonored by non-acceptance:

(1) "When it is duly presented for acceptance and such an acceptance as is prescribed by this Act is refused or can not be obtained (Secs. 137, 150); or

(2) "When a presentment for acceptance is excused and the bill is not accepted."

§ 150. **Where Bill Is Treated As Dishonored by Non-acceptance.**—"Where a bill is duly presented for acceptance and is not accepted within the prescribed time (Sec. 136), the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers."

§ 151. **Rights of Holder Where Bill Not Accepted.**—"When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder and no presentment for payment is necessary."

ARTICLE IV.

PROTEST.

Section 152. When protest necessary.
153. Protest, how made.
154. Protest, by whom made.
155. Protest, time of, noting.
156. Protest, where made.
157. Protest for non-payment after protest for non-acceptance.
158. Protest before maturity where acceptor bankrupt or insolvent.
159. When protest dispensed with.
160. Protest where bill is lost, etc.

§ 152. **When Protest Necessary.**—"Where a foreign bill (Sec. 129) appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored, by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face (Sec. 129) to be a foreign bill, protest thereof, in case of dishonor, is unnecessary."

See note to Section 129 on foreign and inland bills.

The old rule that a foreign bill must be protested, else the drawer and indorsers were discharged (Read v. Bank of Kentucky, 1 T. B. Mon. 91; Chenowith v. Chamberlain, 6 B. Mon. 60; Piner v. Clary, 17 B Mon. 645; Hays v. Citizens' Savings Bank, 101 Ky. 201, 40 S. W. 573, 19 K. L. R. 367) is still the law.

As to what instruments can be protested see note to Section 118.

While a negotiable promissory note may be protested (Sec. 118), yet protest is not necessary. A negotiable note, while on the footing of a bill of exchange (see note to Sec. 184) is no longer on the footing of a *foreign* bill.

Section 483 of Kentucky Statutes is repealed by this Act. Williams v. Paintsville Nat. Bank, 143 Ky. 781, 137 S. W. 535; Southern Nat. Bank v. Schimpler, 159 Ky. 373, 167 S. W. 148.

§ 153. **Protest—How Made.**—"The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify:

(1) "The time and place of presentment.

(2) "The fact that presentment was made and the manner thereof.

(3) "The cause or reason for protesting the bill.

(4) "The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found."

Prior to the passage of this Act, the seal of the notary was not essential, Bank of Kentucky v. Pursley, 3 T. B. Mon. 238; Huffaker v. National Bank of Monticello, 12 Bush 287. But under this section it is necessary.

Section 3721, Kentucky Statutes, requires that the certificate of a notary shall state the expiration of his commission, but the failure to state this fact does not invalidate his certificate. Harbour Pitt Shoe Co. v. Dixon, 60 S. W. 186, 22 K. L. R. 1169.

As to evidential effect of notary's certificate, see note to Section 118.

When the bill protested is shown to be the bill sued on, the mere fact, that the protest showed that the last indorsee was the holder, does not deprive the real holder of the benefit of the protest. Thus where the last indorsee was a holder merely for collection, the real owner may strike out the indorsement to such holder, and sue on the bill as owner and use the protest as evidence in his behalf. Bank of Tennessee v. Smith, 9 B. Mon. 612.

§ 154. **Protest—By Whom Made.**—"Protest may be made by:

(1) "A notary public; or

(2) "By any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses."

The fact that the notary who protested the bill, was also the cashier of the holder bank, did not disqualify him as notary. Moreland v. Citizens' Savings Bank, 97 Ky. 211, 30 S. W. 637, 17 K. L. R. 88.

Where it was shown by the evidence that in New Orleans, La., it was a custom that presentment could be made by the *clerk* of the notary, it was held sufficient in this State, McClane v. Fitch, 4 B. Mon. 599. This was followed by Chenowith v. Chamberlain, 6 B. Mon. 60, where it was held that such a presentment by the *clerk* of the notary and certificate thereof by the notary was not good in the absence of proof of such a custom at the place of presentment. In the next case, Bank of Kentucky v. Garey, 6 B. Mon. 626, the Court made a distinction between a notary's *clerk* and his *deputy,* and while it would not be presumed that a presentment by a *clerk* was in pursuance of an universal custom, such a presumption would be indulged in favor of a *deputy;* especially when the place of presentment was a large

city and the duties of the notary were consequently multitudinous. The next case was Lee, etc. v. Buford, 4 Met. 7. In this case a statute of Louisiana was introduced in evidence This statute authorized the notary to appoint deputies and made the notary responsible for his deputy's act. The Court held that a protest made by the notary based on a presentment made by the deputy was good; that under that statute the act of the deputy was the act of the notary, and the protest by the notary furnished the same evidence of presentment as if it had stated that the notary had presented the bill in person.

Subsection 2 is the same as the old law, Read v. Bank of Kentucky, 1 T. B. Mon. 91; Bank of Kentucky v. Pursley, 3 T. B. Mon. 238. Of course, in such a state of case the protest must be drawn and certified by the *respectable resident* just as it would have to be by the notary when presented by his deputy. But how is the resident making the protest to be proven *respectable?* We presume from evidence *aliunde.* But it will be observed that in case of protest in this manner, there is no statute which makes the protest evidence of any other fact than presentment and dishonor; whereas if made by a notary in this State it is also *prima facie* evidence of the notices given as certified by the notary. See note to Section 118.

§ 155. **Protest — Time Of — Noting.**— "When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting."

In Smith v. Roach, 7 B. Mon. 17, it was held that a notation by the notary as follows, "Pro. N. A. April the 19th, 1842. John D. Campbell, Not. Pub. N. Y.," was competent evidence as to the *fact* of presentment for acceptance and dishonor, that where a presentment was made by a notary and the bill was dishonored and protested this fact could be proven by any other evidence in their power. But see Section 154 and note. Under this section it seems that the notation of the notary is only the foundation for the complete certificate, which can and must be extended afterward as of the date of the notation.

§ 156. **Protest—Where Made.**—"A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable; and no other pre-

sentment for payment to, or demand on, the drawee is necessary."

§ 157. **Protest For Non-payment After Protest For Non-acceptance.**—"A bill which has been protested for non-acceptance may be subsequently protested for non-payment."

§ 158. **Protest Before Maturity Where Acceptor Bankrupt or Insolvent.**—"Where the acceptor has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and endorser."

§ 159. **When Protest Dispensed With.**—"Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence."

§ 160. **Protest Where Bill Is Lost, Etc.**—"Where a bill is lost or destroyed or is wrongly detained from the preson entitled to hold it, protest may be made on a copy or written particulars thereof."

ARTICLE V.

ACCEPTANCE FOR HONOR.

Section 161. When bill may be accepted for honor.
162. Acceptance for honor; requisites.
163. General acceptance for honor deemed for honor of drawer.
164. To whom acceptor for honor liable.
165. Engagement of acceptor for honor.
166. Maturity of bill payable after sight accepted for honor.
167. Bill accepted for honor, etc., must be protested for non-payment.
168. Presentment for payment to acceptor for honor.
169. Excuse for delay in presentment to acceptor for honor.
170. Dishonor by acceptor for honor; protest.

§ 161. **When Bill May Be Accepted For Honor.**—"Where a bill of exchange has been protested for dishonor by non-acceptance or protested for better security, and is not overdue, any person not being a party already

liable thereon may, with the consent of the holder, intervene and accept the bill *supra* protest for the honor of any party liable thereon or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn, and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party."

It will be noticed that there can be no acceptance for honor until after protest.

There is no case in this State involving an acceptance for honor; and only one on payment for honor (Gazzam v. Armstrong, 3 Dana 554) which will be referred to under the next article.

§ 162. **Acceptance For Honor — Requisites.**—"An acceptance for honor *supra* protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor."

§ 163. **General Acceptance For Honor Deemed For Honor of Drawer.**—"Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer."

§ 164. **To Whom Acceptor For Honor Liable**—"The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted."

§ 165. **Engagement of Acceptor For Honor.**—"The acceptor for honor by such acceptance engages that he will, on due presentment, pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also, that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given to him."

§ 166. **Maturity of Bill Payable After Sight Accepted For Honor.**—"When a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honor."

§ 167. **Bill Accepted For Honor, Etc., Must Be Protested for Non-payment.**—"Where a dishonored bill has been accepted or honor *supra* protest or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need."

§ 168. **Presentment For Payment to Acceptor For Honor.**—"Presentment for payment to the acceptor for honor must be made as follows:

(1) "If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity.

(2) "If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in Section 104."

§ 169. **Excuse For Delay in Presentment to Acceptor For Honor.**—"The provisions of Section 81 apply where there is delay in making presentment to the acceptor for honor or referee in case of need."

§ 170. **Dishonor by Acceptor For Honor —Protest.**—"When the bill is dishonored by the acceptor for honor, it must be protested for non-payment by him."

ARTICLE VI.

PAYMENT FOR HONOR.

Section 171. Who may pay for honor.
172. Requisites of payment for honor.
173. Declaration before payment for honor.
174. Preference of parties offering to pay for honor.
175. Subrogation of payer for honor.
176. Rights of holder who refuses payment for honor.
177. Rights of payer for honor.

§ 171. Who May Pay For Honor.— "Where a bill has been protested for non-payment, any person may intervene and pay it *supra* protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn."

The only case involving a payment for honor in this State is Gazzam v. Armstrong, 3 Dana 554. The facts in this case were that on the 1st of December, 1832, James Adams, Jr. & Co. drew a bill on Armstrong payable four months after

date to the order of Darlington at the Branch Bank of the United States at Cincinnati. It was indorsed by Darlington, accepted by Armstrong and sold to the Branch Bank of the United States at Pittsburg, which forwarded it to the Cincinnati bank for collection. The bill fell due on April 1, 1833, but days of grace extended this to April 4. Adams wrote Gazzam asking him to take up the bill, offering to secure him by an acceptance, but also telling him he could look to Armstrong's acceptance until he was paid. On the 3rd of April and before protest Gazzam paid and took up the bill, but without any declaration of his motive or object in doing so. Gazzam sued the acceptor, Armstrong, and failed to recover. In affirming the judgment the Court held he could not recover because, first, the payment was not made after protest (Sec. 171); second, because at the time of payment he did not declare that he paid it for the honor of the acceptor (Sec. 173); third, that his only recourse was against the drawer, and that because of his request; lastly, it held that waiving all these questions, Gazzam could only succeed to the rights of the drawer, that the drawer in that case could not recover against the acceptor because the acceptor had accepted for the accommodation of the drawer.

Note also that under this Act payment for honor is limited to a *bill.* It does not extend to promissory notes. Such was the law originally. See the Gazzam case *supra.*

§ 172. **Requisites of Payment For Honor.**—"The payment for honor *supra* protest in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honor which may be appended to the protest or form an extension to it."

See note to Section 171.

§ 173. **Declaration Before Payment For Honor.**—"The notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays."

See note to Section 171.

§ 174. **Preference of Parties Offering to Pay For Honor.**—"Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference."

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

See note to Section 171.

§ 176. **Rights of Holder Who Refuses Payment For Honor.**—"Where the holder of a bill refuses to receive payment *supra* protest, he loses his right of recourse against any party who would have been discharged by such payment."

§ 177. **Rights of Payer For Honor.**—"The payer for honor on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest."

ARTICLE VII.

BILLS IN A SET.

Section 178. Bills in a set constitute one bill.
179. Rights of holder where different parts are negotiated.
180. Liability of indorsers of two or more parts.
181. Acceptance of bills in sets.
182. Payment of bills in sets.
183. When payment of one part discharges whole.

§ 178. **Bills in a Set Constitute One Bill.**—"Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitute one bill."

§ 179. **Rights of Holder Where Different Parts Are Negotiated.**—"Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him."

§ 180. **Liability of Indorsers of Two or More Parts.**—"Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills."

§ 181. **Acceptance of Bills in Sets.**—"The acceptance may be written on any part and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill."

In Johnson v. Offutt, 4 Met. 19, the acceptor of a bill, drawn in a set of two, was sued upon one part. He moved the Court to compel the plaintiff to file the other part. This motion was overruled by the trial Court and this ruling was affirmed by the Court of Appeals.

§ 182. **Payment of Bills in Sets.**—"When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon."

§ 183. **When Payment of One Part Discharges Whole.**—"Except as herein otherwise provided where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged."

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TITLE III.—ARTICLE I.

PROMISSORY NOTES AND CHECKS.

Section 184. What is a negotiable promissory note?
185. What is a check?
186. When a check must be presented.
187. Certification of check equivalent to acceptance.
188. Certification procured by holder.
189. Check does not operate as an assignment of fund.

§ 184. **What Is a Negotiable Promissory Note?**—"A negotiable promissory note within the meaning of this Act is an unconditional promise (Sec. 3) in writing (Sec. 190) made by one person to another, signed (Sec. 1) by the maker engaging to pay on demand (Sec. 7) or at a fixed or determinable future time (Sec. 4), a sum certain (Sec. 2) in money (Sec. 6) to order (Sec. 8) or to bearer (Sec. 9). Where a note is drawn to the maker's own order, it is not complete until endorsed by him."

This section revolutionized the law of Ken-

tucky. This State held obstinately to the common law rule that a promissory note had only the virtues of a simple contract. To this there was but one exception and that had to be strictly followed. That exception was an implied liability on the part of an assignor.

At common law the assignee could not sue on such a contract in his own name, but had to proceed in the name of the assignor for the benefit of the plaintiff. This was changed by the Act of 1796 which vested in the assignee of all bonds, bills, notes of hand and all other writings the right to sue in his own name. This Act was repealed by the Act of February 10, 1798 (Littell's Statute Law of Kentucky, Vol. 2, page 75) which gave this right only to assignees of all bonds, bills, or notes for money or property. This law in various forms continued to the present and is now found in Section 474 of the Kentucky Statutes. So far from recognizing that promissory notes were different from ordinary contracts, this statute classified them with bonds for property.

But it was early in the history of this State discovered that there was a popular understanding that the assignor of a note in some way incurred a personal liability by his assignment. At common law there was only one implied warranty to the sale of *personal* property, and that was of

the title. There was no implied warranty of quality or value. In order to prevent what would have been a general fraud, the Court of Appeals seized upon and enforced this popular idea in Smallwood v. Woods, 1 Bibb. 532, saying: "The idea of the assignor's being responsible by his assignment, has been long and generally prevalent, strengthened and confirmed by these decisions, insomuch, that if at first erroneous, the maxim, '*communis error facit jus*,' if applicable to any case, may now be well applied to this. The responsibility of the assignor may indeed be now embraced by a rule of ethics, that the expectation of the one party to an agreement, known, and silently indulged by the other party, ought to be fulfilled in the same manner as if it were expressed."

But this case carried the doctrine no further than to make the assignor refund the amount paid him by the assignee. This rule was codified in Section 475 Kentucky Statutes. The action was not on the note but to recover a consideration that had failed. This right was not then given until, with certain exceptions, the assignees had prosecuted with diligence the maker to insolvency and secured a return of *nulla bona*. This doctrine has always been strictly adhered to; and not even an allegation of insolvency is sufficient where no

such suit and diligence has been shown. Francis v. Gant, 80 Ky. 190.

Nor had an assignor any *legal* right against a remote assignee. Mardis v. Tyler, 10 B. Mon. 376. But he could proceed *in equity* against his immediate assignee and all remote assignees. McFadden v. Finnell, 3 B. Mon. 121. This was the limit of an assignee's rights against assignors.

Recognizing the necessities of the commercial world, the Legislature raised certain bills and notes to the footing of foreign bills of exchange, by providing in the charters of various banks that "all bills and notes discounted by it shall be placed on the footing of foreign bills of exchange." Farmers' & Merchants' Bank v. Turner, 2 Litt. 13; Bank of Kentucky v. Brooking, 2 Litt. 411; Battertons v. Porter, 2 Litt. 388. This was done in order to make such notes negotiable. Following precedent, the Legislature adopted almost verbatim the words of the Statute of 3rd and 4th Anne, c. 9, which declared that all promissory notes "shall have the same effect and be negotiable in like manner as inland bills of exchange according to the custom of merchants," changing the word "inland" to "foreign." By the Statute of 1865, Myer's Supplement, page 60, which is now found in Section 483 Kentucky Statutes, these special charters were supplanted by a

general law. Before going further, we will state that this section has been repealed by this Act. Williams v. Paintsville Nat. Bank, 143 Ky. 781, 137 S. W. 535; Gahren Dodge & Maltby v. Parkersburg Nat. Bank, 157 Ky. 266; Southern Nat. Bank v. Schimpler, 159 Ky. 372, 167 S. W. 148.

This brings us to Section 184 of this Act and the question of its meaning and effect. We think that by making a promissory note negotiable, it places it on the footing of a bill of exchange. This question is important because our statutes concerning the duties of notaries public as to protest and the statute of limitations use the words "placed upon the footing of a bill of exchange." As we have shown, these words had an accepted meaning and were used by the British Parliament and by the Kentucky Legislature in order to make promissory notes negotiable.

In construing Section 483, the Court of Appeals held that the words "payable to order" were legally synonymous with "payable and negotiable." McCormack v. Clarkson, 7 Bush 519. Thus showing that the statute by using the words "negotiable and payable" was using words to the same effect as those in Section 1 of this Act, which sets forth the elements of a negotiable instrument. In Southern Nat. Bank v. Schimpler, *supra,* a doubt is raised. Referring to Kentucky Statutes,

Section 483, the Court says: "At that time a negotiable promissory note could be put on the footing of a bill of exchange only by discounting the same before its maturity at an incorporated bank, whereas under the Negotiable Instruments Act now in force, such a note may be placed upon such footing by its sale and indorsement to *any person,* and all defenses are cut off in favor of the holder, just as they formerly were when discounted at a bank."

With all due respect for the Court, we are compelled to say that this is a misconception of the law. In the first place an ordinary promissory note was not "negotiable" at common law or under any previous statute. It was by special charters and finally by Section 483 made negotiable when discounted and not until it was so discounted. The attribute of "negotiability" was acquired by the discount. In the second place under this Act a note does not become negotiable or what is the same thing, placed upon the footing of a bill of exchange, by "its sale and indorsement to any person." In order, under this Act, to be a negotiable instrument it must at its birth have all those elements required by Section 1. Nothing that happens to it afterward can change a non-negotiable instrument into one that is negotiable. This is made clear by the case

of Wettlaufer v. Baxter, 137 Ky. 362, 125 S. W. 741. In that case it was contended that one who indorsed in blank a non-negotiable note converted it under Section 9 into a note payable to bearer. Judge Carroll, rendering the opinion, very pertinently said: "When a paper is started on its journey into the commercial world, it should retain to the end the character given it in the beginning and written into its face. If it was intended to be a negotiable instrument, and was so written, it should continue to be one. If it was intended to be a non-negotiable instrument and was so written, it should so remain." The words "negotiable" and "placed upon the footing of a bill of exchange" mean the same thing. In this we are borne out by previous decisions of the same Court. In Stevens v. Gregg, 89 Ky. 461, 12 S. W. 775, 11 K. L. R. 686, it was held that a statute of Ohio similar to this Act placed a note drawn and payable in Ohio on the footing of a bill of exchange. It was not held in that case that "the sale and indorsement" of the note placed the note upon that footing, but: "There can be no doubt *that the above statute* places a note payable to a person or his order, or assigns upon the footing of a bill of exchange. * * *" This was followed by German Nat. Bank v. Zimmer, 141 Ky. 401, 132 S. W. 1023, decided after the passage

of this Act, which construed this same statute of Ohio and held the same way.

Since writing the foregoing the Court of Appeals has rendered a modified opinion on rehearing (November 11, 1914) in the case of Southern National Bank vs. Schimpeler. In this modified opinion it is said: "So much of the original opinion as holds that Section 2515 of the Kentucky Statutes, in so far as it applies to negotiable notes placed upon the footing of bills of exchange, is no longer in force, is withdrawn. But the five-year limitation therein provided is applicable only when the note has been actually negotiated before maturity and thereby placed upon the footing of a bill of exchange and is in the hands of a third party. *So long, however, as the instrument remains in the hands of the original payee, and has not been assigned or transferred to a third person, it is not upon the footing of a bill of exchange,* and is controlled by our fifteen-year statute of limitation as to the principals therein, and the seven-year statute as to the sureties therein."

We again most respectfully but earnestly insist that the Court of Appeals is in error. Without reiteration we repeat it is our conception of this law that a promissory note is, at its birth, if payable to order or bearer, negotiable; and by

reason of that very fact it is placed upon the footing of a bill of exchange.

Section 2515 of the Kentucky Statutes providing that actions must be brought within five years after the cause of action accrued states. "An action upon a bill of exchange, check, draft or order or any indorsement thereon or upon a promissory note placed upon the footing of a bill of exchange." It will be noticed that any section upon a bill of exchange or any check or draft or order or any indorsement thereof must be brought within five years after the cause of action accrued. It is not necessary with respect to any of these instruments that they be negotiated, that they come into the hands of any third person. In the very first instance, it matters not who may be the holder, the action must be brought within five years. The reason for the distinction between this section and Section 2514, which is the fifteen-year statute, is that checks, bills of exchange and drafts possess when first issued the element of negotiability and by their negotiation defenses can be cut off. The statute goes further and says that actions upon notes placed upon the footing of bills of exchange shall be barred within five years. This merely extends the same law to notes. It is the fact that these defenses *can* be cut off and not the fact that they

are cut off that caused the Legislature to reduce the time of limitation from fifteen to five years.

GENERAL NOTES.

Although it was held in Piner v. Clary, 17 B. Mon. 645, that a certificate of deposit by reason of its indorsement became a bill of exchange, yet under this Act, we think, it would be a promissory note. See Krebs v. Blatz, 134 Ky. 505, 121 S. W. 436, and authorities cited.

While a surety, on a promissory note, is liable only as surety as against a payee with knowledge of the fact that he is a surety, Weller v. Ralston, 89 S. W. 698, 28 K. L. R. 572, yet under this Act he is only a maker and therefore not entitled to presentment, demand or notice, Fritts v. Kirchdorfer, 136 Ky. 643, 124 S. W. 882. Nor can an indorser for accommodation be treated as a surety. First Nat. Bank v. Bickel, 143 Ky. 754, 137 S. W. 790; Grayson County Bank v. Elbert, 143 Ky. 750, 137 S. W. 792.

The note sued on in Mechanics & Farmers' Savings Bank v. Katterjohn, 137 Ky. 427, 125 S. W. 1071, possessed all the requirements of negotiability required by this Act. See on this point Wettlaufer v. Baxter, 137 Ky. 362, 125 S. W.

1071, where it was held that a note not payable to order or to bearer was not negotiable.

On the question of *limitation* see Arnett v. Howard, 156 Ky. 458, 161 S. W. 531, where it was held that the assignor of a non-negotiable promissory note was released unless the action was brought in five years. But a note which is payable to order and made negotiable by the statute of the State, in which it was executed and payable, is barred in five years (see Kentucky Statutes, Section 2515), German Nat. Bank v. Zimmer, 141 Ky. 401, 132 S. W. 1023. Notwithstanding all these decisions it was held in Southern Nat. Bank v. Schimpler, 159 Ky. 372, 167 S. W. 148, that Section 2515 of Kentucky Statutes was repealed by this Act and that a surety was not released until seven years after the cause of action accrued (Section 2551, Kentucky Statutes).

For annotations involving void notes and peddler's notes not properly indorsed, see note to Section 57.

As to notes made payable to the order of the maker, see Section 480 of the Kentucky Statutes and the cases of Pace v. Welmending, 12 Bush 142, and Bramlett v. Caldwell, 105 Ky. 202, 48 S. W. 982, 20 K. L. R. 1123.

As to what is a complete note under this sec-

tion, see Robertson v. Commercial Security Co., 152 Ky. 336, 153 S. W. 450.

As to protest of negotiable promissory notes, see notes to Sections 118, 154 and 155.

§ 185. **What Is a Check?**—"A check is a bill of exchange drawn on a bank (Sec. 190) payable on demand. Except as herein otherwise provided, the provisions of this Act applicable to a bill of exchange payable on demand apply to a check."

In Shrieve v. Duckham, 1 Litt. 195 and Humphries v. Bicknell, 2 Litt. 297, the Court of Appeals gave the same definition of a check as that given in the above section. Afterwards, as will be shown in notes to the succeeding sections of this article, the Court drew certain distinctions between bills of exchange and checks, which no longer exist under this Act.

Since a check is now a bill of exchange and governed by the same rules, except as modified by Sections 186, 187, 188 and 189, it follows that a drawer of a check is released where the check was presented, dishonored, and due notice not given to him. See Section 89. This has changed the law of this State to this extent. See Lester v. Given, 8 Bush 357, where it was held that the drawer of a check was "in some sort the prin-

cipal debtor and he was not discharged by any laches of the holder * * * in not giving him notice of dishonor, unless he suffered some loss or injury thereby and then only *pro tanto*."

Where a forged draft was paid by a bank by placing the proceeds to the credit of the holder (who was a party to the forgery) and he in turn paid a debt by a check on this deposit, and the bank paid this by giving the creditor credit by placing it to his credit and giving him a pass book evidencing his deposit, it was held that his and his assignee's rights were not affected by the original forgery, of which they knew nothing. J. M. Robinson & Co. v. Bank of Pineville, 146 Ky. 538, 142 S. W. 1065. To this extent this would be good law under this Act. But the holding in that case that the check to a third party gave the holder a right of action against the bank, is not now the rule. See Section 189 and note.

While it is a general rule that a bank must know the signatures of its depositors, and having paid a forged check to a holder in due course cannot recover back the money (Deposit Bank of Georgetown v. Fayette Nat. Bank, 90 Ky. 10, 13 S. W. 339, 11 K. L. R. 803), yet where the paying bank failed to have the holder identified and paid the forged check upon a forged indorsement, and thereafter the check was paid by the bank upon

which it was drawn, it was held that the money could be recovered by it from the paying bank, because first, of the negligence of the paying bank in not requiring identification and, second, because the paying bank warranted the forged indorsement. Farmers' Nat. Bank v. Farmers' & Traders' Bank, 159 Ky. 141, 166 S. W. 986.

For cases on protest see notes to Sections 118, 153 and 154.

§ 186. **When a Check Must Be Presented.**—"A check must be presented for payment within a reasonable time (Sec. 192) after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay."

The facts being admitted the question of when a check should be presented is one of law to be determined by the Court, and where the parties and the bank on which the check is drawn are all residents of the same town, the check need not be presented for payment until the next secular day in order to hold the drawer. Cawein v. Browinski, 6 Bush 457.

But it will be noticed that this section refers exclusively to the drawer. If the check is not presented within a reasonable time the drawer is discharged only to the extent of loss caused by the delay. Lester v. Givens, 8 Bush 357; Smith v.

Jones, 2 Bush 103. But an entirely different question arises when we come to the liability of indorsers or the question of whether the holder is one in due course. A check being a bill of exchange payable on demand (Section 185) and governed by Section 71, must be presented within a reasonable time after its last negotiation, in order to hold the indorsers. If a paper payable on demand is negotiated for an unreasonable length of time after its issue, the holder is not deemed a holder in due course (Section 53). So it was held that where one acquired title to a check two days after it was drawn, he took it before it was overdue. Asbury v. Taube, 151 Ky. 142, 151 S. W. 372.

§ 187. **Certification of Check Equivalent to Acceptance.**—"Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance (Sec. 62)."

This section is materially affected by Section 188.

The certification of a check makes the bank, so certifying, an insurer of the check; and a bank which has received such a certified check may permit the one who deposits it to withdraw the proceeds after it has received notice of its protest

and dishonor, and still be a holder for value. First Nat. Bank v. Bank of Ravenswood, 141 Ky. 671, 133 S. W. 581.

§ 188. **Certification Procured by Holder.**—"Where the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon."

The reader will notice that in order to relieve the drawer and indorsers under this section, the certification must be procured by the *holder*. The reason for this is that the holder could have received the money at the time he had the check certified, and if he would rather use the check certified than receive the money, he should bear the loss if any. A certification of a check amounts to the same thing as a withdrawal of the money and a new deposit to the credit of the holder of the check.

§ 189. **Check Does Not Operate As An Assignment of Fund.**—"A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies (Sec. 187) the check."

This is again a violent change in the law of

this State. Before this statute was enacted the drawing and delivery of a check operated, without acceptance by the bank, as an assignment of the depositor's funds in the hands of the bank. Commonwealth v. Kentucky Distilleries & Warehouse Co., 132 Ky. 521, 116 S. W. 766 and cases cited. So also formerly the holder of the check could sue the bank directly. Columbia Finance & Trust Co. v. First Nat. Bank, 116 Ky. 364, 76 S. W. 156, 25 K. L. R. 561 and cases cited. But now the check does not operate as an assignment of the fund nor does the bank become liable to the holder until it accepts or certifies the check.

But even though the Court of Appeals persistently held to the doctrine that a check was an assignment of the fund and gave the holder a right of action against the bank, it departed from the inevitable result of the rule by holding that the death of the drawer and notice of that fact to the bank operated as a revocation of the check, Wieland v. State Nat. Bank, 112 Ky. 310, 65 S. W. 617, 66 S. W. 26, 23 K. L. R. 1517; Throgmorton v. Grigsby, 124 Ky. 572, 99 S. W. 650, 30 K. L. R. 66. Since now a check is not an assignment of any fund and since the bank incurs no liability to the holder until it accepts or certifies the check, it would seem that, subject to the rights of the holder or any indorser, anything

which would revoke a bill of exchange would revoke a check.

In Boswell v. Citizens' Saving Bank, 123 Ky. 485, 96 S. W. 797, 29 K. L. R. 988, the Court of Appeals was called upon to decide two questions, "(1) Whether a check drawn upon a deposit in a bank before an attachment or garnishment served upon the bank, takes precedence of the attachment, although the check may not be presented till after the service of the attachment. (2) Whether a certified check places the deposit beyond garnishment process, although it may not have gone into the hands of another holder for value in the due course of business." The Court refers to the old law and to this Act which was passed after these events had happened, and passing by the first question, held that no check, whether certified or not, was superior to the attachment unless it was in the hands of a holder in due course.

But while the holder cannot now recover from the bank *on the check,* yet where the money is deposited with the bank with the understanding that it is to be used in the payment of a particular debt, the creditor can sue the bank and the check will be evidential of the agreement. With this qualification the case of First Nat. Bank v. Barger, 115 S. W. 726, would still hold good.

TITLE IV.—ARTICLE I.

GENERAL PROVISIONS.

Section 190. Definitions.
191. Who primarily or secondarily liable.
192. Reasonable time?
193. Sunday or holiday.
194. What instruments affected by this Act.
195. Inconsistent laws repealed.

§ 190. **Definitions.**—"In this Act, unless the context otherwise requires:

" 'Acceptance' means an acceptance completed by delivery or notification.

" 'Action' includes counterclaim and set-off.

" 'Bank' includes any person or association of persons carrying on the business of banking, whether incorporated or not.

" 'Bearer' means the person in possession of a bill or note which is payable to bearer.

" 'Bill' means bill of exchange, and 'note' means negotiable promissory note.

" 'Delivery' means transfer of possession, actual or constructive, from one person to another.

" 'Holder' means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.

" 'Indorsement' means an indorsement completed by delivery.

" 'Instrument' means negotiable instrument.

" 'Issue' means the first delivery of the instrument, complete in form, to a person who takes it as a holder.

" 'Person' includes a body of persons, whether incorporated or not.

" 'Value' means valuable consideration.

" 'Written' includes printed, and 'writing' includes print."

As to holder, see note to Section 49.

§ 191. **Who Primarily or Secondarily Liable.**—"The persons 'primarily' liable on an instrument is the person who, by the terms of the instrument, is absolutely required to pay the same. All other parties are 'secondarily' liable."

§ 192. **Reasonable Time.**—"In determining what is a 'reasonable time' or an 'unreasonable time' regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case."

§ 193. **Sunday or Holiday.**—"Where the day or the last day, for doing an act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day."

As to what are holidays see note to Section 85.

§ 194. **What Instruments Affected by This Act.**—"The provisions of this Act do not apply to negotiable instruments made and delivered prior to the passage hereof."

This Act was approved by the Governor on March 25, 1904. There was no emergency clause, and therefore became a law ninety days after the adjournment of the Legislature, or on June 13, 1904. Therefore, it could not affect a note executed on April 21, 1903. Dotson v. Owsley, 141 Ky. 452, 132 S. W. 1037.

§ 195. **Inconsistent Laws Repealed.**—"All laws inconsistent with this Act are hereby repealed."

The Court of Appeals has held that this Act repealed Section 483 of the Kentucky Statutes. See note to Section 184. But it has also held that this Act has not repealed previous statutes which declared certain character of contracts void. See note to Section 57.

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