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CERTIFICATION OF BANK CHECKS.

OUR article will be divided into the following heads :

- I.—General rules applicable to the certification of all bank checks.
- II.—Rules applicable to a bank check that has been certified on the request of the payee, or subsequent holder.
- III.—Rules applicable to a bank check that has been certified on the request of the drawer.

I.—GENERAL RULES APPLICABLE TO THE CERTIFICATION OF ALL BANK CHECKS. Many of these rules will require little or no comment beyond their bare statement, as the law stated in them is undisputed, while upon others have arisen most of the differences between the various courts.

What amounts to the certification of a bank check. In general it may be stated that no particular form of words is necessary to the certification of a check, nor need it be even in writing. Any language, verbal or written, used by the bank signifying to the person presenting the check that it is good and will be paid when presented for payment amounts to a certification: *Pope v. Bank of Albion*, 59 Barb. 226; *Espy v. Bank of Cincinnati*, 18 Wall. 604; *Nelson v. First Nat'l Bank*, 48 Ill. 36. It is clearly settled that there is no difference in this respect between a bill of exchange and a check; and whatever in the case of a bill amounts to an acceptance will in the case of a check be treated as a certification. To effect a certification does not even require language on the part of the

bank, but the end may be accomplished by conduct, and what conduct is to be considered as amounting to an acceptance or certification is determined by the rules applicable to bills of exchange: *Colorado Nat'l Bank v. Boettcher*, 5 Colo. 185. Whether the conduct of the bank in a particular case is such as to amount to an acceptance is a question properly left to the jury: *Northumberland Bank v. Mr. Michael*, 106 Pa. St. 460. The usual method of certification is in the cashier or teller writing the word "good" across the face of the check, together with his name and official title, and, in many instances, a simple stamp is used for this purpose by the bank. The courts have nearly all regretted the rule that allows bills of exchange to be accepted by parol, but it is well established, except where changed by statute, and it has been extended to the certification of checks. The effect of this disposition to regret verbal acceptances will probably be to cause courts to construe strictly, and limit, as far as possible, verbal certifications of checks: *Espy v. Bank of Cincinnati*, 18 Wall. 604; *Clews et al. v. Bank of N. Y. Nat'l Banking Ass'n*, 89 N. Y. 418; s. c., second appeal, 105 Id. 398.

Undertaking of the bank on certifying a check. We have had a number of decisions as to the undertaking of the bank on certifying a check, all more or less different; but with a leaning which indicates that, in all probability, the analogy to bills of exchange will be continued, and the certifying bank held to no greater liability than the acceptor of a bill. In two States the question has been authoritatively settled by the courts of last resort, while in the Federal Courts a decision by the Supreme Courts leaves the matter in grave doubt as to what will be the view there taken. The cases that have arisen are upon the liability of a bank that certifies a check as good, the amount of which has been raised since its delivery by the drawer and before its presentation for certification. In New York it is settled law that the certification of a check in the usual form simply affirms the genuineness of the signature of the drawer and that he has funds sufficient to meet it, and engages that they will not be withdrawn to the prejudice of the holder of the check, but does not warrant the genuineness of the body of the check: *Marine Nat'l Bank v. Nat'l City Bank*, 59 N. Y. 67;

Security Bank v. Nat'l Bank, 67 Id. 458; *Clews et al. v. Bank of N. Y. Nat'l Banking Ass'n*, *supra*. The bank is not held bound to pay the check when the amount has been raised before certification; and to hold it to any greater liability than thus laid down, the form of certification must be so changed as to indicate the additional undertaking; *Marine Nat'l Bank v. Nat'l City Bank*, 59 N. Y. 67.

In Louisiana, on the other hand, under the same state of facts, exactly the contrary doctrine was held, and the certifying bank was made liable for the genuineness of the entire instrument: *Louisiana Nat'l Bank of N. O. v. Citizens' Bank of Louisiana*, 28 La. An. 189. This case was decided after that of the *Marine Nat'l Bank v. The Nat'l City Bank* in New York, and an attempt was made to distinguish between the two; but without any foundation, as shown by the later New York decisions. So that it may be considered that there is a direct conflict of authority between courts of the two States. These are the only States that have, as yet, passed upon this point.

In the Federal Courts a middle ground appears to have been taken, holding with the New York court in the case of a verbal, and with that of Louisiana in the case of a written, certification: *Espy v. Bank of Cincinnati*, 18 Wall. 604. The only point actually decided by the court was in regard to the effect of a verbal certification, and as to this it held, in entire accord with the New York courts, that the bank was held only to a knowledge of the drawer's signature and the state of his account. And while the court expressly made no decision as to the effect of a written certification in the usual way, the fact that a distinction between written and verbal certifications was made at all and the reasoning employed in its making, together with the *dicta* as to the effect of the written undertaking, all plainly show that the opinion of the court leaned to what we may term the Louisiana doctrine upon this point. It seems that the court was in favor of making the bank a warrantor of the value of the check as it came from its hands; but, regretting that the bank should be liable at all upon a verbal certification, determined to limit this liability as much as possible.

In New York the rule was settled after the case of *Espy v.*

Bank of Cincinnati was decided, and the leading cases expressly repudiate any distinction between verbal and written certifications: *Marine Nat'l Bank v. Nat'l City Bank*, 59 N. Y. 67. But some late cases would seem to show that a distinction is to be made to some extent, and the bank not to be held to as great care in the one as in the other. *Clews et al. v. Bank of N. Y. Nat'l Banking Association*, *supra*, DANFORTH and TRACY, JJ., dissenting.

It would seem that if the courts are to be governed by principle alone, and at the same time by the settled maxims of the law, they must give the verbal the same effect they do to written certifications, and not accord to either any greater force than is given to the acceptance of a bill of exchange, which is to make the acceptor liable for the signature and not the body of the bill; but the uncertain position of the Supreme Court of the United States and the effect its decisions may have upon the State courts leaves the matter in some doubt.

Forgery of certification. All the rules of forgery applicable to bills of exchange will probably be extended to the certification of checks. Some have just been noticed and others remain to be determined. If the certificate of the bank be forged and the check be then presented to the teller to ascertain if the certification is genuine, and he responds that it is, the bank is bound by the admission. *Continental Nat'l Bank v. Nat'l Bank of the Commonwealth*, 50 N. Y. 575. But if the amount of the check be raised after certification and it then be presented to the teller to ascertain whether it be genuine and he answers that it is, the answer is supposed to relate only to the certifying marks and not to the amount, and the bank will only be bound to the sum for which it lawfully certified: *Clews v. Bank of N. Y. Nat'l Banking Association*, *supra*. It is a question for the jury, however, in such case whether the teller be guilty of negligence for failing to compare such certification with his book of certified checks, and thus avail himself of all the information within his reach: *Clews v. Bank of N. Y. Nat'l Banking Association*, *supra*.

Certifications that are not binding on the bank. To innocent *bona fide* holders the bank will always be liable to the extent of its undertaking for checks which it sends forth properly certified,

although, as against the drawer or the party presenting it for certification it might have been able to stop payment. But if the check be not properly certified and carries on its face sufficient evidence to give notice to every one into whose hands it may come and put them upon inquiry, the bank will not be liable to any subsequent holder, if in the first place it was not bound. Thus, if the certifying words be signed by an officer whose official designation attached to his name shows him to be one who has not authority, *virtute officii*, to certify checks, the bank will not be liable to a holder if it had not previously granted this authority expressly or impliedly: *Pope v. Bank of Albion*, 57 N. Y. 127. Or if the proper bank officer certifies one of his own checks, the certification will not be binding on the bank, on the theory that a trustee is not at liberty to deal with the subject-matter of his trust to his own benefit; and the fact that the names of the drawer and the party certifying are the same is sufficient notice to all holders: *Clafin v. Farmers' and Citizens' Bank*, 25 N. Y. 293. So if the check be post-dated it carries on its face, until the day named actually arrives, warning to all parties: *Clarke Nat'l Bank v. Bank of Albion*, 52 Barb. 593. If the check recites on its face that it is to be held as collateral, a certification will not bind the bank, as it is wholly outside its business to become security for the performance of collateral duty by the payee, and carries this evidence to all parties into whose hands it may come: *Dorsey v. Abrams*, 85 Pa. St. 299.

In case the drawer has no funds and the bank certifies a check by mistake, it may relieve itself of the responsibility incurred by acting with such promptness as to prevent any change of circumstances on the part of the holder to his disadvantage; but if it fails to do this and a loss must fall upon either the bank or a holder for value, the bank must stand it to the extent of its undertaking: *Farmers' and Mechanics' Bank, etc., v. Butchers' and Drovers' Bank*, 16 N. Y. 125; *Irving Bank v. Wetherald*, 36 Id. 335; *Bank of Republic v. Baxter*, 31 Vt. 101; *French v. Irwin*, 4 Baxter 401; *Second Nat'l Bank of Baltimore v. Western Nat'l Bank*, 51 Md. 128; *Hill v. Nat'l Trust Company*, 108 Pa. St. 1.

By whom checks may be certified. Certification being a con-

tract on the part of the bank, it may be entered into through any of the methods by which a corporation makes contracts, as by a vote of the board of directors or the stockholders, or by the acts of a duly authorized agent. Almost universally it is through the medium of an agent in the shape of one of the bank officers or authorized employees, as the president, cashier, or teller; of these officers it is certain that the president and cashier have this power, *virtute officii*, and, it would seem, the teller also, on the theory that his office is simply part of that of the cashier: *Merchants' Bank v. State Bank*, 10 Wall. 604; *Girard Bank v. Bank of Penn Township*, 39 Pa. St. 92; *Farmers' and Mechanics' Bank, etc., v. Butchers' and Drovers' Bank*, 16 N. Y. 125; *Cooke v. State Nat'l Bank*, 52 Id. 96.

All the above cases, and many more to be found in the New York reports, uphold the proposition that whatever the actual authority of the officer certifying may be, if he has been permitted so to do by the bank, and no objection has been made, the bank will be bound; or if there is a general usage among banks that a certain officer has pertaining to his office the duty of certifying checks a bank will be bound by this usage to *bona fide* holders. In Massachusetts alone it is believed a contrary doctrine prevails, and, unless expressly granted to them, all officers are there denied the power of thus binding the bank, either by virtue of their office or from custom, the court holding that such a usage, even if established, would be bad: *Mussey v. Eagle Bank*, 9 Metc. 306; *Atlantic Bank v. Merchants' Bank*, 10 Gray 532. Some doubt may exist in Pennsylvania also: *Hill v. Nat'l Trust Company*, 108 Pa. St. 1.

The authority may be given even to a clerk in the bank: *French v. Irwin*, 4 Baxter 401. But the assistant cashier has not authority to certify checks by virtue of his office, and in the absence of proof of authority or of usage in the exercise of it the bank cannot be held liable upon his certification, and the burden of proof is upon the party asserting the liability to show that such subordinate officer had this authority or that the bank is estopped from denying it: *Pope v. Bank of Albion*, 57 N. Y. 126. This case, however, was decided differently by the Supreme Court (59 Barb. 226), the bank being held liable, and the above decision reversing the first judgment was by the Commission of

Appeals, which was almost equally divided in opinion, and on the whole it does not seem to be entirely in accord with the reasoning of SELDEN, J., in *Farmers' and Mechanics' Bank, etc., v. Butchers' and Drovers' Bank*, 16 N. Y. 125. In this latter case the reason for departing from the Massachusetts rule is stated to be that the act of certifying a check is not so much a pledging of the credit of the bank as it is simply answering the supposed inquiry of one about to take the check, whether the bank has funds of the drawer to meet it, and that the duty of answering such inquiries naturally pertains to the office of the cashier, he being the custodian of the bank's funds. The liability of the bank upon the teller's certification is put expressly upon the ground that the appointment of a teller is virtually a division of the office of cashier, and it is difficult to see in what respect the office of assistant cashier differs from that of teller, both being divisions of the duties of cashier, and especially as in most banks the assistant cashier actually performs about all the duties of the cashier. From this it would seem that the opinion of the Supreme Court in *Pope v. Bank of Albion* is more in accord with the settled law of New York than is that of the Commission of Appeals in reversing it. See also *Hill v. Nat'l Trust Co.*, 108 Pa. St. 1.

Usage in connection with certification. We have seen that banks are bound by a general usage which gives to certain officers the power of certifying checks, and to an extent that in the case of the president, cashier, and teller gives to these offices the power *virtute officii* so far as holders for value are concerned, and that in the case of subordinate officers the presumption is they cannot bind the bank and the usage for them must be proven. As the nature and meaning of the contract entered into by the various parties on the certification of a check is clearly defined by the law, the effect of it cannot be changed by any evidence of a usage as to what it was understood to mean among bankers: *Security Bank v. Nat'l Bank*, 67 N. Y. 458. But a custom may exist among banks to certify checks for certain purposes between themselves by which the certification has not the meaning given to it in the ordinary mode of business, and the banks will be bound by such custom even to an extent of taking away the negotiability of the instrument:

Flour City Nat'l Bank of Rochester v. Traders' Nat'l Bank, 105 N. Y. 550. Evidence is properly rejected showing the existence of a usage that a certification made in error could not be revoked before new rights had been acquired on the faith of such certification. Such a usage even if established would be so unreasonable and unjust as to be void: *Second Nat'l Bank of Baltimore v. Western Nat'l Bank of Baltimore*, 51 Md. 128.

In all respects banks will be governed by usages in the same manner and to the same extent that other departments of business are governed.

II. RULES APPLICABLE TO A BANK CHECK THAT HAS BEEN CERTIFIED ON THE REQUEST OF THE PAYEE OR SUBSEQUENT HOLDER.—There seems to be little or no controversy upon any of the points under this portion of our subject. The result of a certification obtained from the bank on the request of the payee or subsequent holder is well summarized by Mr. Daniels, who states it to be as follows: (1) "The bank becomes the principal and only debtor; (2) the holder by taking a certificate of the check from the bank, instead of requiring payment, discharges the drawer; (3) and the check then circulates as the representative of so much cash in bank, payable on demand to the holder." 2 Dan. Neg. Inst. § 1601. These rules, of course, are to be taken subject to the general principles illustrated by the above citations.

The bank becomes the principal and only debtor. A check so far resembles a bill of exchange that the bank by certification becomes liable to the same extent as the acceptor of a bill; but the law goes a step further, and by discharging the drawer makes the bank, not alone the principal, but the only debtor as well. The transaction is in the nature of a novation by which the creditor extinguishes the original debt and takes in lieu thereof a new debt and a new debtor; and, as it is well settled that the creditor cannot be compelled to take a third party as his debtor without an express agreement to that effect, the theory of the law is that by presenting a check for certification instead of payment the holder thereby enters into such express agreement. The drawer of a check undertakes that it shall be presented for payment within a reasonable time, but not that it

is to be presented for acceptance and the money left in bank still at his risk; and if it be so presented he is discharged from liability and the bank is thus left the only debtor. The bank is presumed to say to a holder presenting the check for certification, "The check is good, the money is here, and you can have it, but if you prefer us to keep it for you we will withdraw it from the account of the drawer and keep it here solely to meet your checks." And, as a matter of fact, the amount called for in the check is thus transferred from the account of the drawer to that of certified checks. By this transaction the holder discharges the drawer and accepts the bank as his principal and only debtor: *Merchants' Bank v. State Bank*, 10 Wall. 604; *First Nat'l Bank v. Leach*, 52 N. Y. 350; *Girard Bank v. Bank of Penn Township*, 39 Pa. St. 99; *Andrews v. German Nat'l Bank*, 9 Heisk. 211; *Nat'l Commercial Bank v. Miller*, 77 Ala. 168; *Drovers' Nat'l Bank, etc., v. Anglo-American, etc., Co.*, 117 Ill. 100; *Simpson v. Pacific M. L. Ins. Co.*, 44 Cal. 139. The New York reports abound in cases announcing the same rule, and all the above have become leading cases. See also *Mussey v. Eagle Bank*, 9 Metc. 306; *Bank of Republic v. Baxter*, 31 Vt. 101.

So long as the statute of limitations does not interfere, the holder may sue the bank for the amount it certified for, even if the funds of the drawer have been withdrawn or if he had none there in the first place; as in one case, four years after the check was certified, payment was refused and the bank held liable: *French v. Irwin*, 4 Baxter 404; and in another case, seven years: *Girard Bank v. Bank of Penn Township*, 39 Pa. St. 92.

The bank is so far the primary debtor that it may be reached by attachment or garnishee process in favor of a creditor of the holder of a certified check: *Bills et al. v. Nat'l Park Bank*, 89 N. Y. 343; *Nat'l Commercial Bank v. Miller*, 77 Ala. 168.

The drawer cannot stop payment of a certified check. As to him it is as though the check was paid at the time it was presented for certification: *Freund et al. v. Importers' & Traders' Nat'l Bank*, 76 N. Y. 352.

The holder by getting a check certified thereby discharges the
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drawer and all previous indorsers. This proposition follows from the preceding as a necessary corollary. There cannot be two principal and only debtors, and as the bank has already become such, the drawer must of necessity be discharged. As it is nothing more nor less than a novation of contract in which a new debtor is substituted, the rules pertaining to novation must be followed, and one of the most indispensable is that the original liability be extinguished. The citations of authority made under the previous rule all maintain this further proposition as to the discharge of the drawer, and need not be here repeated. See *Simpson v. Pacific M. L. Ins. Co.*, 44 Cal. 139.

In regard to the indorsers, no case in point can be adduced, but it follows, on all the principles of mercantile law, that any conduct on the part of the holder of a check that discharges the drawer will also discharge the indorsers. A passage in the work of Mr. Daniel is in this respect calculated to mislead the reader and announce a different rule: 2-Dan. Neg. Inst. § 1604. He says: "If the holder of a certified check indorse it, his indorsee may hold him liable as well as the bank." This is undoubtedly correct so far as an indorser subsequent to certification is concerned, he becoming in that case simply a surety for the bank; but the case cited by Mr. Daniel to support the rule is based upon a wholly different proposition, and this fact, in connection with the section in which it is cited, would seem to imply that the indorser may be held in cases where the drawer is discharged. The case relied upon is that of *Mutual Bank v. Rotgé*, 28 La. Ann. 933, which was one where two indorsers themselves had the check certified, and then delivered it to the holder, who presented it to the bank for payment, and on its dishonor sued the drawer and indorsers. The court decided only as to the liability of the indorsers. Not being a case in which the check was presented for certification by the payee, or subsequent holder, it was decided upon principles wholly different from those now under discussion, and need not be further noticed here.

A general rule for indorsers would seem to be that all those whose names are on the check at the time it comes into the hands of the holder will be discharged by his presenting it for certification instead of for payment, while those who put their

names to the check after certification are to be treated as indorsers of a promissory note, and discharged only under those circumstances which discharge indorsers of promissory notes. Before certification, the check is substantially a bill of exchange, and the drawer and indorsers are discharged by any conduct of the holder that increases or prolongs their liability; after certification the check is substantially a promissory note, of which the bank is maker, and the maker and indorsers are discharged by the rules governing negotiable promissory notes.

A certified check circulates as the representative of so much cash in bank, payable on demand to the holder. This rule, too, legitimately follows from the act of certification, the bank thereby practically issuing its promissory note. Should the check be indorsed in blank, or made payable to bearer, it might be looked at as an ordinary bank note and governed by some of the rules that pertain to bank notes. But probably the nearest analogy is to be found in certificates of deposit, as the certified check is nothing more or less than a certificate of deposit, payable on demand. The only difference that might arise in a distinction of this kind would be in the application of the statute of limitations; and this, it is believed, can have no effect in general. If, under any circumstances, a certified check is to be treated as a bank note it is certain that the statute of limitations can have no bearing on the liability of the bank, whether demand for payment be made or not; but if the check is to be treated only as a promissory note, or a certificate of deposit, there may be some doubt; while the general rule seems well settled that the statute of limitations does not begin to run against a certificate of deposit until its presentation for payment and dishonor by the bank: *Howell v. Adams*, 68 N. Y. 314; *Munger v. Albany City Nat'l Bank et al.*, 85 Id. 580; *Bellows Falls Bank v. Rutland County Bank*, 40 Vt. 377; *Finkbone's Appeal*, 86 Pa. St. 368; *Fells Point Savings Institution v. Weedon*, 18 Md. 320; *Smiley v. Fry*, 100 N. Y. 262; *Lang v. Strauss*, 107 Ind. 94, following *Smiley v. Fry*, *supra*; *McGough v. Jamieson*, 107 Pa. St. R. 336; *Riddle v. First Nat'l Bank*, U. S. C. Ct., W. Dist. Pa., April 21, 1886, 27 Fed. R. 503. There are cases that, holding certificates of deposit to be strictly promissory notes, have applied to them the rule of promissory

notes, that is, when payable on demand they are due immediately, and the statute begins to run from date: *Brummagin v. Tallant*, 29 Cal. 503; *Tripp v. Curtinius*, 36 Mich. 494; *Curran v. Witter*, 68 Wis. 16; and see also *Hunt v. Devine*, 37 Ill., 137; *Gregg et al. v. Union County Nat'l Bank*, 87 Ind. 238. *Tripp v. Curtinius* has been disapproved in *Birch v. Fisher*, 51 Mich. 36, the court saying that were it an open question, they would be inclined to follow the New York rule; and it is hardly probable that this view will be taken in States where the question has not as yet been passed upon. (But see *Curran v. Witter*, *supra*.)

The only State that has as yet passed directly on the statutes of limitations in connection with certified checks is Pennsylvania; and it was there held that the statute did not commence to run until demand for payment had been made, and the check dishonored: *Girard Bank v. Bank of Penn Township*, 39 Pa. St. 92. As showing the similarity between certified checks and certificates of deposit, this case was held authority for applying the same rule to certificates of deposit: *Finkbone's Appeal*, 86 Pa. St. 368. But in Michigan the reason for holding that demand need not be made in the case of a certificate of deposit to enable the statute to commence to run, was put expressly upon the ground that in this respect it differed from a certified check, and it therefore declined to follow the Pennsylvania case: *Tripp v. Curtinius*, 36 Mich. 494.

From these decisions, the rule would appear to be certain that the statute of limitations does not begin to run on a certified check until presentment and dishonor; those States applying this rule to certificates of deposit extending it to certified checks, and those holding to the contrary in regard to certificates of deposit making a distinction in favor of certified checks.

III.—RULES APPLICABLE TO A BANK CHECK THAT HAS BEEN CERTIFIED ON THE REQUEST OF THE DRAWER.—Some of our text writers and annotators have failed to make any distinction between checks certified on the request of the payee and those certified on the request of the drawer; and so have cited cases as conflicting which are really in entire accord: *Morse, Banks and Banking*, 311; notes to *Andrews v. German Nat'l*

Bank, 24 Am. Rep. 300; *Mutual Nat'l Bank v. Rotgé*, 26 Id. 126; *French v. Irwin*, 27 Id. 769. The judicial decisions show, however, that so clearly and radically do they differ that no case in which the question of a difference ever arose has failed to make the distinction. In general a check certified on the request of the drawer and by him delivered to the holder does not differ from an uncertified check so far as the rules of presentment, payment, dishonor, notice, and acceptance are concerned; but some of the rules in connection with it require attention.

The bank becomes primarily liable to the payee and subsequent holders. While the exact position of the bank upon the certification of a check at the request of the drawer has never been defined, there can be no question as to its being practically the same as though the check had been presented for certification by the payee. In both cases the bank occupies the position of an acceptor of a bill and is the primary debtor, and in this one case the only debtor.

Such a check differs from one that is uncertified in that there can arise none of the disputed questions as to the liability of the bank to a holder who has presented the check for payment and been refused; and as to whether the giving of a such a check by the drawer is an assignment of the funds drawn upon. It would seem clear that the principles underlying the loss of certified checks would cause such a check to be an assignment of the funds drawn upon and place them beyond the reach of the creditors of the drawer; and such appears to be the view of the Alabama Supreme Court: *Nat'l Commercial Bank v. Miller*, 77 Ala. 168. But so long as the check remains in the hands of or under the control of the drawer the fund has not been assigned and may be reached by his creditors: *Bills et al. v. Nat'l Park Bank of N. Y.*, 89 N. Y. 343; *Gibson et al. v. Nat'l Park Bank of N. Y.*, 98 Id. 87.

The drawer and indorsers are not discharged except by such acts of the holder as would discharge the drawer and indorsers of an uncertified check. This rule is so open to misapprehension that we will notice more in detail the various cases which have passed upon it. The only judicial authority that can by any possibility be construed to controvert it is a *dictum* of HUNT, J., in *First Nat'l Bank of Washington v. Whitman*, 94 U. S. 343.

It is there stated rather broadly that no difference by whom the certification is obtained, the effect of the contract is the same; but an examination of the case will show that the question of certification was not before the court at all, so that all that was said upon it was *obiter*. And the learned judge only intended by this to say that no matter by whom the certification is obtained, the liability of the *bank* is the same, that being the point he was illustrating—a proposition that is undoubted.

The principle upon which the drawer of a check is discharged when the payee, instead of having the check paid, takes in lieu thereof the certificate of the bank, has already been noted; but, as said by PECKHAM, J., in the leading New York case, "this would not discharge the drawer of a check who himself procured it to be certified, and then put it in circulation; the reason of the rule fails to apply to him in such case." The undertaking of the drawer in such case is the same as though the check were uncertified, namely, that the bank will pay the check when presented for payment; and until such presentment is made this undertaking is not broken; and it is not affected at all by the previous agreement of the bank with the drawer that the check will be so paid. So that if the payee in the due course of business presents his check for payment and is met with a dishonor there can be no reason for denying him his remedy against the drawer. Were this not true certified checks might in many instances be a more uncertain security than those that are uncertified; for should the bank happen to fail before the payee had time to present his check in the due course of business and the drawer held to be discharged, the payee would have no remedy whatever.

But we are not without abundant judicial authority to show that this reasoning is sound. The earliest case passing upon the point is that of *Dickford v. First Nat'l Bank*, 42 Ill. 238, decided in 1886, in which a very able opinion is delivered by BRUSE, J. The case was decided before the subject of certified checks had come under judicial notice to any great extent, and, in consequence, the language is somewhat general and may be applied to certifications of both kinds, as, perhaps, too, was intended by the learned judge at the time. The facts were that the check had been certified on the request of the drawer and the court held

that the bank thereby became primarily liable; but also held that the secondary liability of the drawer was not thereby released. Beyond the exact point decided, the case will probably not be deemed authority even in Illinois, as the general language used will not be held to apply to checks certified on the request of the payee, in view of the subsequent development of the law on the subject. This case has been followed in the same State and the same point decided by the courts of other States until its correctness is not to be questioned: *Rounds v. Smith et al.*, 42 Ill. 245; *Brown v. Leskie*, 43 Id. 500; *Andrews v. German Nat'l Bank*, 9 Heisk. 211; *First Nat'l Bank v. Leach*, 52 N. Y. 350; *Thomson et al. v. Bank of British America*, 82 Id. 1; *Mutual Nat'l Bank v. Rotgé*, 28 La. An. 933; *Essex County Nat'l Bank v. Bank of Montreal*, 7 Bissell 193. In illustration of the inherent justness of the rule itself and the equitable basis upon which all the rules of the law merchant rest, it is to be noted that these cases were nearly all decided within a few years of one another and the decisions of the courts were not had by one another, so that the cases represent the independent judgments of different tribunals arriving at the same conclusions.

The New York cases afford us the best illustration of the distinction between the two classes of certified checks. In *First Nat'l Bank v. Leach*, PECKHAM, J., recognized the distinction and pointed it out in his opinion; but so far as holding the drawer to any liability, when the check had been certified on his request, this remained a *dictum* until *Thomson v. Bank of British America* was decided. In this case, SEDGEWICK, J., delivered an able opinion, while it was in the Superior Court of the city of New York, forcibly and clearly presenting the distinction and overruling counsel's reliance on the *dictum* of HUNT, J.: *Thomson et al. v. Bank of British America*, 45 N. Y. Superior Ct. 1, and this opinion on review was affirmed by the Court of Appeals: *Thomson et al. v. Bank of British America*, 82 N. Y. 1. The same principles have been followed in subsequent cases: *Bills et al. v. Nat'l Park Bank of N. Y.*, 89 N. Y. 343; *Gibson et al. v. Nat'l Park Bank of N. Y.*, 98 Id. 87.

The Louisiana case was one in which two indorsers had the check certified and then gave it to the holder; but there can be