THE AMERICAN LAW REGISTER

FOUNDED 1852.

UNIVERSITY OF PENNSYLVANIA

DEPARTMENT OF LAW

VOL. { 50 O. S. / 41 N. S. } MARCH, 1902. No. 3.

THE CERTIFICATION OF CHECKS.

The certified check is a modern form of negotiable instrument which had its origin in the custom of merchants, and has become common because of the ease with which the certification is accomplished and the security it affords. From the time it was first known to the present, the custom of merchants has never distinguished the certification of checks by the banks at the request of any party to the instrument, while the present weight of judicial opinion is in favor of distinguishing the check as certified by the bank at the request of the payee-holder, either in person or at his request, and the check as certified by the bank for the drawer of the check.

It is with this peculiar anomaly that this paper is concerned, though it may not be out of place to add some general statements and rules of law as affecting certified checks in general. Several papers have been written upon the subject, but none of recent date, and several recent and important decisions render the subject worthy of attention.[1]

[1] See the articles of W. A. Bryant, *27* AMERICAN LAW REGISTER, N. S. 141 (1888); W. F. Elliott, 31 *Central Law Journal*, 373 (1889), and Francis R. Jones, 6 *Harvard Law Review*, 138 (1892).

THE HISTORY.

Like many other customs, the origin of certification in both England and the United States seems clouded in obscurity. No mention is made of it in Kyd's Treatise, written in 1790, nor in Byle's Treatise, written in 1829. Further than that no mention is made of the "marked check" in either of these English works. In this country Story, who wrote in 1843, makes no mention of it even in an edition printed in 1853, though some mention is made of it in the seventh edition by Thorndike, published in 1878. Parsons, first writing in 1874, makes but slight mention of it. Gilbert, in an elaborate "History of Banks and Banking," published in London in 1827 and revised by Michie in 1882, makes no mention of the custom as affecting English banks.

But later writers such as Grant (England) in 1876, Morse (United States) 1879, Redfield and Bigelow, 1871, Daniels, 1882, and others who have followed, have treated of the subject elaborately, and the innumerable decisions of late years have justified all and more than has already been said on the subject.

In no case, however, has any one of these writers even attempted to fix the origin of the custom, nor has the present writer been able to find one word as to its history. An attempt has been made to trace its origin in the English custom of "crossed checks" but the comparison must fail. The crossed-check was invented for the purpose of restricting negotiability and the only feature which gives color to such a comparison is the writing of one or more Bankers' names across the face of the check.

A much closer analogy may be found between the English custom of "marked checks" and our present custom of certification, though this early English custom was deemed of so little importance as to merit no words either pro or con by the writers of that period.

The first instance of "marked checks" in the English law appears in the case of *Robson* v. *Bennett*,[2] decided in 1810. In the facts of that case appears the following statement:

[2] 2 Taunton, 388.

"It is customary among bankers in London, *in their dealings with each other* not to pay any check which is presented by or on behalf of another banker, after 4 p. m., but merely to give an answer to the person so presenting it, whether it is a good check or not, and in case the check is approved, a mark is made on it, either by the person presenting it or by the person who gives the answer. And a check so marked is considered entitled to a priority of payment on the next day." The court in this case held that "the effect of marking is similar to the accepting of a bill, for he (the banker) admits hereby assets, and makes himself liable to pay."

The rules which seem to have been drawn from this decision are questionable because no promise seems to have been behind the marking, but rather a simple conveyance of information. At that time, however, it was thought that the effect of this custom was to create, by the marking, an obligation upon the banker to appropriate the customer's assets in his hands to that particular check in priority to others. This case stands alone, unfortified by any decision of value; but what is more important, perhaps, it has never been overruled. The decision was based upon the rule that had obtained for some time, that an oral acceptance was perfectly valid. This rule remained in force until 1856, and this custom of marking checks certainly lasted until that time. It is easy to see how the custom, existing among bankers, was extended to merchants and others, and finding its way across the Atlantic, was used by the merchants and banks of the United States. If this theory have any weight, the custom was a long time in coming over, as the first cases appearing in the United States on the subject of certification appear in the following order of time. New York, 1853; Massachusetts, 1854; Pennsylvania, 1861; Illinois, 1866; and the United States Supreme Court, 1870. Nothing more appears in the English courts until 1860, when the case of *Keene* v. *Beard*[3] decided that a check, while generally not treated as a bill and presented for acceptance, *might* be so treated.

But *certification* as first used by the bankers and mer-

[3] 5 C. B. N. S. 371.

chants of the United States and as now used differs entirely in operation and effect from this custom in England. The analogy, if there be any whatever, is not strong enough to support more than the idea that this early English custom may have been the basis of the custom as used in this country, and that around the idea the American bankers and merchants formulated rules as to operation and effect which bear no analogy to the early English custom.

From these few meagre facts we are led to conclude (1) That certification is peculiarly an American custom. (2) That it was first used about 1850. (3) That it originated among the bankers of New York. Finding it adapted to the commercial interests, it rapidly spread, until to-day it is in use in every city and hamlet, and in the words of Justice Swayne of the United States Supreme Court, "We could hardly inflict a severer blow upon the commerce and business of the country than by throwing a doubt on their (certified checks) validity."[4]

The English Rule.

In England, the statement that a check is a bill of exchange drawn on a banker, and that it does not differ in construction from a bill payable on demand, seems to have been reiterated time and time again. The "marking" spoken of in *Robson* v. *Bennett* (supra) seems never to have been recognized to any extent by the courts, yet at that time it was recognized as an *acceptance,* even though the signature of the banker was not attached. Treated thus, it followed the rules of acceptance, which permitted of an oral acceptance, and it is taken for granted that this rule applied until statutes were enacted requiring the acceptance to be in writing.

These statutes were enacted in 1856, and amended in 1878. Since 1856 there have been no cases in England because the rule then enacted requiring the acceptance to be in writing and on the face of the instrument, has been rigidly adhered to.

In *Keane* v. *Beard,* decided in 1860, already spoken of,

[4] *Merchants' Bank* v. *State Bank,* 10 Wall, 604.

the acceptance of a check was one of the facts in issue, and the court there stated that the acceptance of a check is not usual, but there is no reason why it may not be so accepted, and if so, the liability of the bank is the same as that of an acceptor of a bill. Now, there is no acceptance of a check.[5] Stated broadly then, the law in England is as follows: (1) A check is a bill drawn on a bank. (2) In construction, it is treated as a bill payable on demand. (3) With these exceptions, (*a*) there is now no acceptance of a check; (*b*) the drawer remains liable even if not duly presented, unless prejudiced thereby. Certification, therefore, as we understand it, is not known in England.

Bill of Exchange and Check Distinguished.

The English Bills of Exchange Act (adopted in 1882) as well as the American Negotiable Instruments Law (adopted in 1897) are somewhat misleading in their statements that with certain exceptions, checks are to be treated as bills of exchange, and "check" is defined in both acts as "a bill of exchange drawn on a bank, payable on demand." The statements are misleading for they imply no distinction between checks and bills of exchange. Yet both acts contain sections which are devoted entirely to rules relating to checks as distinguished from bills of exchange and promissory notes, thus implying checks to be different from both of these forms of negotiable instruments.[6] "To our mind, the differential traits decidedly preponderate: and the more correct method is to treat the check as an altogether independent and distinct instrument from the bill of exchange."[7]

The reported cases, from an early time to the present, invariably sustain the above statement, and it seems to be settled beyond all controversy "that a check, though analogous in many respects to a bill of exchange, is not a bill of exchange."[8]

Indeed, the analogy may be summed up in a few words

[5] Willis Neg. Securities, 170 (London, 1896).
[6] Bigelow, 294.
[7] Morse on Banking, 3d ed., § 380.
[8] Jones in 6 *Harvard Law Review*, 138.

as follows: (*a*) Both contain an order. (*b*) The order is for the payment of a sum certain in money. (*c*) There are three parties, drawer, drawee and payee. (*d*) The duties as to notice to parties secondarily liable (indorsers in the case of checks) are the same. (*e*) Neither instrument is an assignment of any money in the hands of the drawee to the payee.

Beyond these points of resemblance, the ways part. Their points of difference are more numerous, and in part are as follows:

(*a*) A check is always drawn on a bank.

(*b*) Grace is not allowed in a check.

(*c*) The drawer of the check is not discharged by laches of the holder in presentment for payment, unless he can show he is prejudiced thereby.

(*d*) The check is not due until payment is demanded and the statute of limitations runs only from that time.

(*e*) The check must be drawn on funds in the hands of the bank.[9]

(*f*) The death of the drawer revokes the check, while it has no effect upon the duties of the parties to a bill.[10]

(*g*) The purchaser of an over-due check gets good title irrespective of equities.[11]

(*h*) Acceptance (certification) of a check discharges the drawer, while the acceptance of a bill leaves him secondarily liable.

It follows, *a fortiori,* that checks as negotiable instruments are in a class by themselves, quite as distinct from bills of exchange as bills of exchange are from promissory notes, which no court and no text writer ever doubted for an instant.

CERTIFICATION.

The certification of a check is a thing *sui generis,* unknown to the Common Law and not in use in England. It originated with the merchants and bankers of New York,

[9] *Merchants' Bank* v. *State Bank* (*supra*).

[10] Zane on Banks and Banking, p. 223 and cases therein cited.

[11] *London Etc. Co.* v. *Groome,* 8 Q. B. D. 288.

and this custom has long been recognized as law. The custom created the law, but as we shall see later, the law has stepped in and changed this custom in one particular at least, and in doing this has stultified itself, declaring certification in one case to be a thing in and by itself, unlike acceptance, and having no counterpart in the rules affecting acceptance; while in another case it is recognized as an acceptance of a bill of exchange.

Mr. Justice Peckham in the *First National Bank* v. *Leach*,[12] states generally the law on the subject, and his statement is fortified by many similar opinions both before and since this case was decided.

"The theory of the law is that where a check is certified to be good by a bank, the amount thereof is then charged to the account of the drawer in the bank certificate account. Every well-regulated bank adopts this practice to protect itself. The reason therefor is so strong, that the law presumes it is adopted by the banks.

"It follows that after a check is certified, the drawer of the check cannot draw out the funds then in the bank necessary to meet the certified check. The money is no longer his.

"If he apprehended danger from the suspected failure of the bank, he could not draw out that money, because it had already been appropriated by means of the check thus certified; as to him, it was precisely as if the bank had paid the money upon the check, instead of making a certificate of its being good."

This general statement of the law arising from custom has never been controverted, and it is upon this basis that all banks proceed in doing business.

But while the general statement is undoubtedly the law, there exists an anomalous situation which may be stated as follows:

1. Certification by the bank for the payee-holder discharges the drawer.

2. Certification by the bank for the drawer, at the request of the payee, discharges the drawer.

[12] 52 N. Y. 350.

3. Certification by the bank for the drawer, like the acceptance of a bill, leaves the drawer secondarily liable.

4. The custom of banks and bankers recognizes no such distinction, nor have they ever recognized it.

As to the first proposition above made, the law is too well settled to admit of any extended consideration. Mr. Daniels well summarizes the result.[13] (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."

The reason therefor, says Mr. Zane,[14] is that novation takes place. The depositor owes his creditor, and the bank owes the depositor. The three agree that the bank may owe the creditor, and the depositor is discharged. While agreeing with Mr. Zane as to the reason therefor, we apprehend that his use of the word "novation" is unhappy. This is neither novation nor adoption but an entirely separate agreement aside from and independent of the original transaction. What has really happened is that the holder has obtained a new obligation or promise from a party who is not obliged to give it to him, which he accepts in lieu of the obligation of his debtor. It is quite the same as if the creditor had accepted United States Treasury notes in lieu of the check, or had agreed to accept a horse in lieu thereof, or had taken a certificate of deposit from the bank. All of these are inconsistent with the nature and purpose of a check, and the same proposition applies with equal force to the acceptance of a certification.

As to the second proposition, that certification by the bank for the drawer, at the request of the payee, discharges the drawer, the law is not well settled. But the reasons already stated apply with equal force to this proposition as to the first, for the payee by requesting the drawer to have the check certified accepts thereby the contract or agreement of the bank. Some doubt has been thrown on this proposition by the decision in the *Randolph National Bank*

[13] Daniels, Negotiable Instruments, § 1601.

[14] Zane on Banks and Banking, 255.

v. *Hornblower,*[15] where the court decided that there was no distinction between the drawer requesting certification at his own volition and requesting it at the instance of the payee. In the latter case the bank certifies it for the use and convenience of the payee-holder, quite as much as though the payee-holder presented it in person. This reason is given in the majority of cases on the subject as distinguishing the two positions, and if the decision above stated obtain as law, it will go far to undermine the cases which fortify the principle that there is a distinction between certification as procured by the holder and as procured by the drawer. This decision is certainly antagonistic to previously decided cases and is unsound. It is submitted that there is no distinction between the first and second propositions, and that the two should be stated together as follows: Where the check is certified by the bank for the payee-holder, in person or at his request, the drawer is thereby discharged.

Running through practically all the cases from the first on the subject to the very last we are impressed by one statement more than any other viz, certification is something different and more than the acceptance of a bill of exchange. And this statement is found even in the cases which proceed to contradict themselves and hold it to be the same. This brings us to the third proposition, in effect, that where the drawer secures the certification at his own volition, it operates exactly as the acceptance of a bill and the drawer is not discharged thereby, but becomes secondarily liable: *i. e.,* where the bank for any reason whatsoever, refuses or does not pay the check, the drawer can be held.

This is unquestionably the law in the majority of jurisdictions. Beginning with the first cases on the subject, in point of time, that of *Bickford* v. *First National Bank*[16] and continuing on down to the latest important case, that of *Minot* v. *Russ,*[17] the rule seems to have been decided uniformly with the statement made, though for a multitude of reasons.

[15] 160 Mass. 401.

[16] 42 Ill. 238.

[17] 156 Mass. 458.

As has been ably pointed out by Mr. Jones,[18] the Illinois rule was established on the ground that a certified check did not operate as money, and that the check was like a bill of exchange and, further, that the check operated as an assignment of the maker's funds in the bank. When we consider that a bill of exchange has, by the preponderating weight of authority, never been treated as an assignment of money in the hands of the drawee and, further, that neither law nor custom has maintained that a check was money, there seems to be an inconsistency in this kind of reasoning. This reasoning, however, seems to have been the basis of similar decisions in the United States Circuit Courts,[19] and in Ohio[20] as well as in Colorado. In New Jersey and in Louisiana the courts proceeded upon little or no reason whatever. The New York rule was established on the ground that a certification of a check does not differ from an acceptance because of the warranties of the banks, *i. e.*, that the bank admits nothing save the genuineness of the drawer's signature and the existence of the payee. This has never been doubted.

The Indiana rule is based on the reason that there has been no third party to the agreement and therefore no transfer or acceptance of the obligation of the bank by the payee, there having been no payment of a debt between the drawer of the check and the payee. We leave this for discussion later.

The last important decision on this subject is the case of *Minot* v. *Russ*,[21] decided in 1892. The court advanced no reason for its position save a statement that the weight of authority is in favor of the proposition and cited all the cases of the various jurisdictions as the basis of its position. As clinching all these conflicting ideas comes the Negotiable Instruments Law adopted in 1897 and thereafter, by more than sixteen states, and in a way settles the question. By that law, certification is regarded as the equivalent of accept-

[18] 6 *Harvard Law Rev.*, p. 138.
[19] *Essex Co. Etc. Bank* v. *Bank of Montreal*, 7 Biss. 193.
[20] *Cinti. Etc. Co.* v. *Bank*, 51 Oh. St. 106.
[21] 156 Mass. 458.

ance, and for the reason given for the New York rule, to wit, the warranties are the same as in acceptance.

The law also establishes the long existing rule that where the holder procures the certification, the drawer and all indorsers are discharged thereby.[22]

Mr. Crawford, who drew the act, advances as the reasons for the section making certification the equivalent to acceptance, the United States Supreme Court case of the *Merchants' Bank* v. *State Bank*,[23] the first case in point of time in that court, and the New York cases of *Cooke* v. *Bank*[24] and *Farmers', etc. Bank* v. *Butchers', etc. Bank*.[25] Then to further fortify the section he cites the case of the *First National Bank* v. *Northwestern National Bank*.[26]

We can only think that the learned compiler of the act misconstrued the language of these decisions, for a cursory glance at them leads to entirely different conclusions. In the *Merchants' Bank* v. *State Bank*, the court said: "By the law merchant of this country the certificate of the bank that a check is good is equivalent to acceptance. It implies that the check is drawn upon sufficient funds in the hands of the drawee (does acceptance imply this?), that they have been set apart for its satisfaction (is this implied in acceptance?), and that they shall be so applied whenever the check is presented for payment. (Would such a statement apply to an acceptance?) It is an undertaking that the check is good then and shall continue, and this agreement is as binding upon the bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume." If this be what is meant by acceptance of a bill of exchange, then our present ideas must undergo a revolution.

In *First National Bank* v. *Leach*, which is quoted in part on page 133 one is left to no other conclusion than that a certification is not in any way analogous to the acceptance of a bill, and the mystery is how can the case be cited in support of the rule?

[22] The Negotiable Instruments Law, §§ 187, 188.
[23] 10 Wall, 648.
[24] 52 N. Y. 96.
[25] 16 N. Y. 125.
[26] 152 Ill. 296.

In *First National Bank* v. *Northwestern Bank*[27] the question of acceptance *vs.* certification was not raised.

The court (*dictum*) says "a check payable to order is a bill of exchange payable to order on demand," and then says that as in acceptance, the acceptor does not admit the genuineness of the indorser's signature, so a bank in certifying does not admit it, but is "conclusively presumed" (*sic*) to know the drawer's signature.

No one ever doubted the proposition that the bank cannot deny its customer's signature but just how does it prove that acceptance and certification are the equivalent of each other?

In *Minot* v. *Russ* the court said, "So far as the question has been considered, *it has been decided* that the certification of a bank check is not, in all respects, like the making of a certificate of deposit, or the acceptance of a bill of exchange, but that it is a thing *"sui generis."*

Born v. *The First National Bank,*[28] establishing what is known as the Indiana rule, is a case around which much controversy has arisen. In that case the court said: "We agree with the appellant's council that . . . if the holder elects to procure the certification of the bank, it becomes, in his hands, *substantially a certificate of deposit.* By his own act he makes the bank his debtor, and releases the drawer of the check. *The reason for the rule is that the moment the check is certified the funds cease to be under the control of the original depositor and pass under the control of the person who procures the certification of the check drawn in his favor."* No other construction can be placed upon this statement, which is in accord with all decided cases, than that when the holder secures the certification, it operates as a payment, and for the reason stated. But the court sees a distinction when the drawer secures certification, and holds that such a certified check is not payment because there is no substitution of one debtor for another. But does the rule above stated, "the funds cease to be under the control of the original depositor, and pass under the

[27] 152 Ill. 296, 1894.

[28] 123 Ind. 78.

control of the person" for whom the certification is secured, cease to operate?

It is true that the drawer may return the certified check and thus again secure control, but our question is concerned with the *delivery* of a certified check by the drawer to some third party. Certain it is that the drawer has no right of action against the bank for it, for "after certification, they (the drawers) had no control over the fund or action of the bank in reference to it, nor any right to sue the bank for it. Nor did the bank owe them (the drawers) any duty in relation to it. It no longer possessed the character of a check."[29]

Further, to hold this proposition as law carries with it a hardship to the drawer. He cannot withdraw the amount of the certification, yet he is liable, if the bank fails to pay. He is, therefore, in the position of guaranteeing the solvency of the bank, with no power to protect himself. Certainly no such situation was ever dreamed of by the courts where the holder procures the certification.

No good reason exists for distinguishing the act of certification as procured by the different parties. The act is the same in both cases, the instrument is identical in every respect. If the check when certified in one case no longer possesses the character of a check, it certainly follows that it does not in the other, the act being the same and the instrument being identical. To hold otherwise, is, to use the language of Mr. Jones, to have two legal consequences for the same act, or to import different rights for negotiable instruments which are exactly the same.

Further, we are forced to agree with one or two able critics of the Negotiable Instruments Act, and say that the drafters thereof seem to have been careless in some portions of their work, and this is especially true in the sections affecting the certification of checks; for no one of the authorities relied upon to support their rules that certification and acceptance are equivalent, really holds it to be such.

Lastly, of what importance or effect is all this to the bank, and in what way will the real situation affect the bank? To

[29] *Essex Co. Nat. Bank* v. *Bank of Montreal*, 7 Biss. 193.

both we may answer, none whatever. A careful inquiry made to a number of bank officials results in the statement that no bank recognizes a distinction as to the party who requests certification. If this were true, and were it of any importance to the bank, a careful entry would be made of the party whether drawer or holder seeking the certification, which has never been done and probably never will be done. Custom recognizes no distinction. Upon certification the bank charges it to the account of the drawer, and regards the amount so taken as no longer belonging to the drawer, but to it (the bank), and in its disposition of the fund so taken the bank disregards the drawer entirely. As to whether the drawer, procuring certification before delivery, shall be secondarily liable, the bank cares nothing, because it is none of its concern.

It would be interesting to note how far a bank may go in revoking a certification, but such a question is hardly relevant to the question in hand. It only remains to say that which has before been implied; certification and the rules affecting it arose from the necessities of commerce, and is based wholly upon the custom of bankers and merchants. It is as peculiarly a custom as is negotiability, why should it not be accepted in its entirety? Did valid reasons exist in favor of the change, it were well to consider them; neither reason nor justice require it, but, on the contrary, fortify the custom, and it were better to let well enough alone.

Leslie J. Tompkins.

New York University Law School,
New York City.