## LEGISLATION

UNIFORM BANK COLLECTION LAWS—It is a commonplace that the modern world of business revolves largely around a system of credits rather than actual cash transactions. Equally well known is the fact that this development has been paralleled by a weltering mass of conflicting decisions and statutes regulating this system of credits. A discussion of the need for uniformity would now be superfluous. But the fact that the widespread realization of this need has already given rise to two concrete suggestions—the *Bank Collection Code* [1] and the *Uniform Bank Collection Act* [2]—as to the form which that uniformity shall take, makes it necessary to review the relationships arising out of the collection of commercial paper and to determine the effect of the proposed legislation upon the resultant legal incidents.

When commercial paper is deposited in a bank it usually creates one of two relationships between the depositor and the bank, depending upon the purpose for which it is deposited. If the transaction between the customer and the bank is a sale, it creates the relation of debtor and creditor; if deposited for collection, the relation of principal and agent results. It is usually said that in the latter case there is also a trust in the paper until it is collected.[3] Therefore, if the bank becomes insolvent, the depositor can reclaim the instrument.[4] Of course, in the case of a sale, the depositor no longer has any rights in the instrument, but is merely a general creditor of the bank in respect to the credit received in exchange.[5] While it is relatively easy to outline the resulting incidents when the nature of the transaction has been established, such determination itself, however, often proves difficult. An important *indicium* employed by the courts in this respect is the manner in which the paper is endorsed.[6] If the indorsement is restrictive—that is, one "which constitutes the indorsee the agent of the indorser, or vests title in the indorsee in trust for or to the use of some other person" [7]—the relationship is one of agency. If the indorsement is non-restrictive, whether special or in blank, then whether the instrument has been discounted by the bank is an important consideration.[8] Again, the difficult problem is not the nature of the incidents arising out of the type, but the determination of what type the particular indorsement is. At common law, there was much diversity of opinion as to the nature of such in-

---

[1] Hereinafter referred to as the "Code". It is sponsored by the American Bankers' Association and has been adopted in the following eighteen states: Idaho, Illinois, Indiana, Kentucky, Maryland, Michigan, Missouri, Nebraska, New Jersey, New Mexico, New York, Oregon, Pennsylvania, South Carolina, Washington, West Virginia, Wisconsin, and Wyoming. Note (1932) 41 YALE L. J. 432, 433, n. 8.

[2] Hereinafter referred to as the "Act." It has been proposed by the Commissioners on Uniform State Laws. See Third Tentative Draft in HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS (1931) 256. No changes were made at the 1932 Conference.

[3] Goodyear Tire & Rubber Co. v. Hanover State Bank, 109 Kan. 772, 204 Pac. 992 (1922); Hawaiian Pineapple Co., Ltd., v. Browne, 69 Mont. 140, 220 Pac. 1114 (1923); Federal Reserve Bank of Richmond v. Peters, 139 Va 45, 123 S. E. 379 (1924).

[4] Corn Exchange Bank v. Blye, 101 N. Y. 303, 4 N E. 635 (1886); United States National Bank v. Geer, 55 Neb. 462, 75 N. W. 1088 (1898); SELOVER, BANK COLLECTIONS (1901) 31.

[5] Goshorn v. Murray, 210 Fed. 880 (C. C. A. 3d, 1914), Doppelt v National Bank of Republic, 175 Ill. 432, 51 N. E. 753 (1898); Cody v City National Bank of Grand Rapids, 55 Mich. 379, 21 N. W. 373 (1884).

[6] Baker, *Bank Deposits and Collections*, 11 MICH. L. REV. 212, 216, 224 (1913)

[7] NEGOTIABLE INSTRUMENTS LAW § 36.

[8] Baker, *supra* note 6, at 222.

dorsements as "for deposit",[9] and "pay any bank or banker".[10] This situation has not been clarified by the proposed legislation, the *Code*[11] making them restrictive, and the *Act*,[12] non-restrictive. It would seem, on analysis, that in such cases it is obvious that the purpose of the indorser is to manifest an intention to retain title in himself, thus bringing it within the definition of a restrictive indorsement as contained in the *Negotiable Instruments Law*. Further, sound policy should dictate that any doubts be resolved in favor of considering the indorsement restrictive. The depositor would thereby be protected, since upon the bank's insolvency he could reclaim the item, if still uncollected, from either the bankrupt bank or its transferee.[13] Nor does such construction affect adversely the interests of the bank, the point becoming material only in case of the bank's insolvency. To the extent that any credit extended has been drawn upon, the bank automatically has a lien and as to this the general creditors, upon insolvency, are entitled to their *pro rata* share; but as to the balance there is no reason why they should participate since the bank's assets have not in any respect been dissipated on account thereof. No matter which construction is given, it cannot be denied that unanimity as to the effect of any particular indorsement is highly desirable.

Assuming that the paper has been deposited for collection and that therefore an agency relation exists, it next becomes important to determine the relation between the owner of the item and any correspondent bank to which the first bank has forwarded the paper for collection. Under the New York rule the bank of deposit, by selecting the correspondent bank, makes the latter its agent for the purpose of fulfilling the duty it has assumed to the customer, namely the collection of the paper.[14] On the other hand, the Massachusetts rule considers the correspondent bank the agent of the customer, on the theory that the customer, realizing that the bank of deposit would not personally collect the paper, impliedly authorized the selection of a correspondent bank.[15] It seems artificial, however, to suppose what the depositor's intent is and then formulate the rule of law accordingly. It may safely be said that in the ordinary situation the depositor lacks a definite intent.[16] Therefore, a more intelligent approach to the problem would be to disregard the bases of the two rules and to adopt that one which in practice shows itself to be the most convenient and suitable for our purposes.

---

[9] For cases holding the indorsement restrictive see: Midwest National Bank & Trust Co. v. Niles & Watters Savings Bank, 190 Iowa 752, 180 N. W. 880 (1921); First National Bank v. Morrell, 53 S. D. 496, 221 N. W. 95 (1928); National Bank v. Lumber Co., 107 N. J. L. 492, 155 Atl. 762 (1931).

The indorsement has also been held non-restrictive: Security Bank v. Northwestern Fuel Co., 58 Minn. 141, 59 N. W. 987 (1894); American Trust Co. v. Gueder Mfg. Co., 150 Ill. 336, 37 N. E. 227 (1894); Morris v. First Nat. Bank, 201 Pa. 160, 50 Atl. 1000 (1902).

[10] That "pay any bank or banker" is restrictive, see: Citizens' Trust Co. v. Ward, 195 Mo. App 223, 190 S. W. 364 (1916); People's & Drovers' Bank v. Craig, 63 Ohio St. 374, 59 N. E. 102 (1900); First Nat. Bank v. Weitzel, 239 Fed. 497 (C. C. A. 6th, 1917).

The indorsement has often been held non-restrictive: Nat. Bank v. Bossemeyer, 101 Neb. 96, 162 N. W. 503 (1917); Interstate Trust Co. v. National Bank, 67 Colo. 6, 185 Pac. 260 (1919); Sands v. Parker, 153 Tenn. 664, 284 S. W. 902 (1926).

[11] § 4.

[12] § 2.

[13] See *supra* note 4.

[14] Allen v. Merchants Bank, 22 Wend. 215 (N. Y. 1839); Gilpin v. Columbia Nat. Bank, 220 N. Y. 406, 115 N. E. 982 (1917); Hoover v. Wise, 91 U. S. 308 (1875). See also Note (1924) 12 CALIF. L. REV. 209 at 211, Pierson, *Legislation Relating to Problems of Check Collection* (1928) 14 A. B. A. J. 406.

[15] 1 MORSE, BANKS AND BANKING (6th ed. 1928) § 250; MAGEE, BANKS AND BANKING (3d ed. 1921) § 286.

[16] (1901) 14 HARV. L. REV. 384.

Where the paper is still uncollected, no problem is presented, since under either view, it may be reclaimed by the customer. Where collected, and the correspondent bank becomes insolvent before remitting the proceeds to the bank of deposit, the New York rule permits the customer to recover in full from the bank of deposit.[17] Under the Massachusetts rule, however, the bank of deposit is not responsible for the continued solvency of its correspondent, and the customer has only a general claim against the defunct correspondent.[18] On the other hand, if at a point after collection and before remittance, the bank of deposit becomes insolvent, the customer can recover in full from the correspondent under the Massachusetts view,[19] but is only a general creditor of the bank of deposit under the New York view.[20] The situation then, under this latter rule, is one in which the bank of deposit is unfairly saddled with the burden of any loss arising out of the correspondent's insolvency. On the other hand, if the bank of deposit becomes insolvent, its general creditors are unjustly enriched to the extent of the proceeds in the hands of the correspondents, since such proceeds would never have formed part of the insolvent bank's assets were it not for the collection process. It would seem rational to avoid both these results and have the financial status of the bank of deposit affected as little as possible by the part it plays in the collection of the instruments; and this is accomplished by the Massachusetts rule. A realization of the advantages of the Massachusetts rule soon led bankers in jurisdictions which followed the New York rule to secure by contract with depositors, the results obtaining under the Massachusetts rule.[21] To the same effect were regulations adopted by the Federal Reserve Board for member banks.[22] It is significant that this is the view adopted by both the *Code* [23] and the *Act*.[24]

The one objection to the Massachusetts rule is that it fails to protect the customer where the correspondent bank fails before remittance. This difficulty can be met by establishing in the assets of the defunct bank a preference in favor of the customer. As already indicated, the common law allowed the depositor merely a general claim.[25] The reason usually assigned for refusing a preference was that no trust or similar relation was ever contemplated so far as the proceeds were concerned.[26] Of late, however, the courts found such an intention more frequently; and accordingly, allowed preferences on this basis.[27] But even where such preference was allowed, its practical importance was considerably diminished by requiring the depositor to trace the actual proceeds received in payment of the item.[28] To remedy this situation statutes were passed

[17] See *supra* note 14.

[18] Lippitt v. Thames Loan & Trust Co., 88 Conn. 185, 90 Atl. 369 (1914); Smith & Co. v. Montgomery, 209 Ala. 100, 95 So. 290 (1923); Milling Co. v. Cosmopolitan Trust Co., 242 Mass. 181, 136 N. E. 333 (1922). See also Note (1928) 14 VA. L. REV. 473, 476.

[19] *Supra* note 15.

[20] *Supra* note 14.

[21] See Pierson, *supra* note 14, at 406. HANDBOOK OF THE NAT'L CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS (1929) 249.

[22] FEDERAL RESERVE REGULATION J. (1928) § 5.

[23] § 2.

[24] § 42.

[25] See *supra* note 18.

[26] Anheuser-Busch Brewing Ass'n v. Clayton, 56 Fed. 759 (C. C. A. 5th, 1893); Gonyer v. Williams, 168 Cal. 452, 143 Pac. 736 (1914); Lippitt v. Thames Loan & Trust Co., *supra* note 18. See also Bogert, *Failed Banks, Collection Items, and Trust Preferences* (1931) 29 MICH. L. REV. 545, 548.

[27] Spokane & Eastern Trust Co. v. U. S. Steel Products Co., 290 Fed. 884 (C. C. A. 9th, 1923); Skinner v. Porter, 45 Idaho 530, 263 Pac. 993 (1928); Bogert, *supra* note 26, at 550. (See n. 11 for cases).

[28] Spokane & Eastern Trust Co. v. U. S. Steel Products Co., *supra* note 27; Skinner v. Porter, *supra* note 27; Sabine Canal Co. v. Crowley Trust & Savings Bank, 164 La. 33, 113 So. 754 (1927).

in several states [29] eliminating the need of tracing in such a case. Both the *Code* [30] and the *Act* [31] have included similar provisions. Although some writers have deplored so radical a departure from old and long established concepts,[32] it cannot be doubted that the complexity of the bank collection system makes such a step imperative,[33] for otherwise the depositor is left completely unprotected. Since the drawer has been discharged by the payment of the item,[34] the contest is purely between the owner of the item and the general creditors of the defunct bank. The establishment of a preference, of course, diminishes the assets available to the general creditors, and it has been argued that since they have not received any benefit from the transaction involving the item, they should not be penalized with losses resulting from the collection process.[35] But closer analysis reveals that this is not an unjust discrimination against the general creditors since the proceeds of the collected item would not otherwise have formed part of the assets of the defunct bank.[36] In other words, here, as above, in the case of the bank of deposit, it seems advisable to separate the business of collection from the routine business of the bank, and to hold that the proceeds of one have no connection with the proceeds of the other. It is then evident that the creation of a preference in favor of the customer does not in fact diminish the assets available for the claims of the general creditors, since the preference is satisfied out of funds which have no real connection with the funds to which the creditors would normally look for satisfaction. The practicality of such a view is emphasized by a comparison of the benefit that each individual creditor would receive from a *pro rata* distribution of the proceeds as compared with the importance to the customer of being granted a preference.

It has been suggested that the risk of loss be in some way placed on the whole commercial-paper-using class, but even the exponent of this idea realized the administrative difficulties in the way of such a plan.[37] Nor would a form

---

[29] Colo. Laws 1925, c. 63; La. Laws 1926, 78; N. C. Laws 1927, 356; S. C. Laws 1927, p. 369; Utah Laws 1927, c. 49.

[30] § 13 (3).

[31] § 31.

[32] See Bogert, *supra* note 26, at 559. "The trust institution has long been based on the theory of the necessity of a specific equitable interest in a specific thing as a basis for its existence. To establish a rule by decision or statute that a trust can exist without definite subject matter, or to create fictions about subject matter and state that it exists where in fact it does not, is vicious in that it makes the law uncertain and contradictory."

[33] See Townsend, *Constructive Trusts and Bank Collections* (1930) 39 YALE L. J. 980, 1012. In Note (1927) 36 YALE L. J. 682 at page 687, it was said that the trust doctrine, requiring tracing, limits or restricts preferences. It is, therefore, for purposes of commercial paper, inadequate as applied.

[34] Certainly a payment by the drawee to the correspondent constitutes a payment in due course which discharges the instrument. NEGOTIABLE INSTRUMENTS LAW § 119(1).

[35] See Bogert, *supra* note 26, at 563; Note (1932) 41 YALE L. J. 432, 434.

[36] Turner, *Bank Collections—The Direct Routing Practice* (1930) 39 YALE L. J. 468 at 487: ". . . . had the item been presented to the drawee through the local clearing house and paid, the amount would have been irrevocably separated from the assets of the failed bank. This would not be regarded as in any sense inequitable to the depositors. When, for reasons of general efficiency, this additional collection step is eliminated, and the payment is received by the drawee for direct remittance, the general creditors are in no worse position if a preferred claim is given the forwarder."

"Deeming the collecting banks as agents, the general depositors are not in any way injured by allowing a preferred claim since in no real sense did the estate ever receive the item or its proceeds as part of its general assets." HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS (1931) p. 254.

[37] Bogert, *supra* note 26, at 565.

of insurance similar to that employed in the Guaranty Deposit System[38] be expedient. Experience has taught that such a form of insurance is worthless during times of financial crisis when security is most needed.

While both the *Code* and the *Act* allow such a preference, the *Code* unrestrictedly permits its enforcement against any assets,[39] while the *Act* excludes fixed assets.[40] The underlying theory is that the fixed assets cannot properly be considered to have come to the insolvent bank as a result of the paper received through the collection system,[41] and therefore should not be subjected to a liability arising out of a collection. This accords with the distinction suggested above—that there is some line which separates the collection business from the routine business.

A third situation arises where the item has been surrendered to the drawee bank which then fails without having made payment. If the item had been charged against the account of the drawer the usual common law rule discharged the drawer and gave the owner of the paper only a general claim against the insolvent drawee.[42] Here again, the *Code* and *Act* provide for a preference in favor of the owner.[43] This cannot be defended on the ground that to deny a preference would result in unjust enrichment to the general creditors by analogy to the situations discussed above relative to a defunct bank of deposit or correspondent bank. Here we are unable to argue that the assets have been augmented as a result of the collection system. Therefore, to allow a preference is in fact to reduce the fund on which general creditors have a right to rely for security.

It should be noted that such a preference under the *Act* is not given where the drawee has not yet charged the drawer's account; in which case the owner's action is restricted to the drawer and other parties secondarily liable, and then only if due notice of dishonor has been given.[44] A provision in the *Act*[45] excuses any delay or omission on the part of the closed bank in returning the item to the owner and in giving notice to secondary parties. But this relates only to the bank and cannot be construed to continue the liability of secondary parties who, under the *Negotiable Instruments Law,* would be discharged by lack of notice of dishonor.[46] The only effect of this provision then is to deprive the owner of the item of an action against the defunct bank for failure to give notice; but such right is of doubtful value anyway, since the owner would share only as a general creditor. If the framers intended deeper implications, the section should certainly be rephrased.

---

[38] A certain percentage of the bank's deposits was paid into a central fund as a form of insurance in case of the bank's failure. But oftentimes the costs of such a system of insurance exceeded the bank's earning power; the protection it gave was inadequate, and during financial crises, there was seldom a sufficiently large fund to adequately protect the depositors. See Butts, *Guaranty of Bank Deposits in Eight States* (1931) 3 MISS. L. J. 186 for excellent discussion on this subject.

[39] See § 13 of the Code.

[40] See § 31 of the Act.

[41] See Turner, *supra* note 36, at 488; Note (1932) 41 YALE L. J. 432; HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS (1931) p. 254.

[42] Seventh Nat'l Bank v. Cook, 73 Pa. 483 (1873); Pratt v. Foote, 9 N. Y. 463 (1854); State v. Cox, 325 Mo. 938, 30 S. W. (2d) 46 (1930); Planter's Mercantile Co. v. Armour Packing Co., 109 Miss. 470, 69 So. 293 (1915). See also Note (1931) 40 YALE L. J. 802, 807; Note (1929) 8 N. C. L. REV. 55, 56; Wallace, *Comments on the Proposed Uniform Check Collection Code* (1930) 16 VA. L. REV. 792, 807; 1 MORSE, *op. cit. supra* note 15, § 410. See § 7 of the Code and § 8 of the Act.

[43] See *supra* notes 30 and 31.

[44] NEGOTIABLE INSTRUMENTS LAW § 89.

[45] § 50. The Code contains no similar provision on this matter.

[46] *Supra* note 44.

We must now consider the manner in which the drawee received the item—that is, whether by mail or over the counter. The practice of transmitting items deposited for collection directly to the drawee bank has long been frowned upon by the courts as being negligent.[47] But during the past decade or two, direct routing has been more firmly established by means of contractual arrangements between bank and depositor[48] and also by statutes.[49] Although both the *Code*[50] and the *Act*[51] sanction this practice, the attendant disadvantages are too significant to be overlooked. To use the traditional language, it is said that this constitutes the drawee bank agent to collect from itself,[52] and that the natural tendency to delay enforcing against one's self the claim of another renders the drawee bank unsuited for this purpose.[53] Analysis discloses that such practice does in fact tend to defeat the interest of the depositor of the item. For instance, the drawee may delay in making payment. Meanwhile, its assets are being diminished by payment of other obligations either over the counter or through the clearing house, and the chance is not too remote that insolvency may intervene before the item sent by mail is paid. In such case, if the drawer's account has been debited with the amount of the item, the instrument is considered paid[54] and the drawer is accordingly discharged under the *Negotiable Instruments Law*.[55] And where the drawer's account has not been debited, the unreasonable delay in acting upon the item constitutes a dishonor;[56] and since it can hardly be expected that the drawee will give notice of its own dishonor, the drawer is discharged for this reason.[57] In either case, therefore, the owner's only remedy is recourse as a general creditor against the defunct drawee. If, however, there had been a personal presentment by a correspondent the item would have been either paid, or, if payment were refused, immediate notice of dishonor would be given to parties secondarily liable whose liability would therefore continue.

---

[47] Western Wheeled Scraper Co. v. Sadilek, 50 Neb. 105, 69 N. W. 765 (1897); Anderson v. Rodgers, 53 Kan. 542, 36 Pac. 1067 (1894). See also Pierson, *supra* note 14, at 407; Turner, *supra* note 36, at 471; 1 MORSE, *op. cit. supra* note 15, § 236.

In England and New York a contrary rule has been stated. Heywood v. Pickering, L. R. 9 Q. B. 428 (1874); Indig v. Nat. City Bank, 80 N. Y. 100 (1880). The New York case, however, has since been overruled or at least has been strictly limited to its facts. See National Revere Bank v. National Bank of the Republic, 172 N. Y. 102, 108, 64 N. E. 799, 801 (1902).

[48] Such stipulations were usually printed in the depositor's pass book. Turner, *supra* note 36, at 472; Pierson, *supra* note 14, at 407.

[49] Following the passage of FEDERAL RESERVE BOARD REGULATION J. (1924) authorizing Federal Reserve Banks to send items directly to the drawee banks, statutes were passed in various states also permitting this practice. Ark. Laws 1921, No. 496; Cal. Stats. 1925, 513; Colo. Laws 1923 c. 64; Ky. Acts 1904, 80; Minn. Laws 1919 c. 319; MONT. REV. CODE (Choate, 1921) § 6108; Ore. Laws 1920 § 6217; Va. Laws 1924, n. 502; Vt. Laws 1896, No. 38; Wyo. Laws 1923 c. 84.

[50] § 6 (a).

[51] § 40.

[52] Bank of Rocky Mount v. Floyd, 142 N. C. 187, 55 S. E. 95 (1906); 1 MORSE, *op. cit. supra* note 15, at § 236; MAGEE, *op. cit. supra* note 15, at § 282; Turner, *supra* note 36, at 473; Note (1928) 12 MINN. L. REV. 744, 745; 1 DANIEL, NEGOTIABLE INSTRUMENTS (6th ed. 1913) § 328a.

[53] In Bank of Rocky Mount v. Floyd, *supra* note 52, the Court said at 193, 55 S. E. at 97: "How can the debtor be the proper agent of the creditor in the very matter of collecting the debt? His interests are all adverse to those of his principal. If the debtor is embarrassed there is the temptation to delay."

[54] *Supra* note 42.

[55] NEGOTIABLE INSTRUMENTS LAW § 120 (1).

[56] "The instrument is dishonored by nonpayment when it is duly presented for payment and payment is refused or can not be obtained." NEGOTIABLE INSTRUMENTS LAW § 83 (1).

[57] NEGOTIABLE INSTRUMENTS LAW § 89.

It is argued that the *Code* and *Act* nullify the evils of direct routing by giving the owner a preference in the assets of the drawee. But this is true only where the drawer's account has been charged; there is no such preference where the drawee bank fails without having acted in any way to pay the paper.[58] Nor would the situation be remedied by an amendment to provide for a preference even where the drawer's account has not been charged so long as the account is sufficient to cover the item. It might easily occur that several items drawn on the same account would be received by the drawee at the same time. The interesting question then arises as to which if any is to be preferred.

The supporters of direct routing contend that the risk is no less great where a bank other than the drawee is selected as agent to collect—that it is just as likely to collect and then fail before remitting as is the drawee.[59] It has already been shown that the owner is fully protected under the *Code* and *Act* by a preference in the assets of the correspondent who fails after collecting but before remitting; but in the situation where the drawee fails after receiving the item but before the drawer is debited, the owner may be left unprotected under the system of direct routing, which would not be true if presented by a correspondent bank. It is wrong, therefore, to speak of the risks as equal.

Possibly the principal advantage of direct routing is that it expedites the collection process.[60] It is true that it probably takes a day or two longer to collect the item through a correspondent than to send it directly to the drawee.[61] But this can hardly be said to be so inconvenient as to outweigh the safeguards of collection through a correspondent bank. The argument that the delay entails interest losses of magnitude[62] is similarly answered by a comparison between the almost negligible loss to each owner and the comparative security accorded to him.

Analogous to the growth of direct routing and in proportion to the modern use of credits is the increasing tendency[63] to accept something other than cash in payment of the item. Undoubtedly, conditions of today require a more facile method of making payment than transmission of actual cash.[64] Here again, as in the case of direct routing, the antagonism of the common law has been circumvented by the agreements between customers and banks,[65] legislative enact-

---

[58] See *supra* notes 30 and 31.

[59] Wallace, *supra* note 42, at 800.

[60] Turner, *supra* note 36.

[61] *Id.* at 473 n. 19.

[62] *Ibid.*

[63] ". . . it would be impossible to handle the volume of collections required to transact modern business if only money could be used in transmission." Turner, *supra* note 36, at 483.

[64] Courts have usually held, in absence of stipulation or contractual arrangements or of legislation to the contrary, that it was negligent for a bank receiving a check or note for collection to accept anything other than cash. Ward v. Smith, 7 Wall. 447 (U. S. 1868); Federal Reserve Bank v. Malloy, 264 U. S. 160, 44 Sup. Ct. 296 (1924); Fifth Nat. Bank v. Ashworth, 123 Pa. 212, 16 Atl. 596 (1889). See also Pierson, *supra* note 14, at 408; Note (1931) 40 YALE L. J. 802.

A minority line of decisions held that the remittance draft was merely conditional payment; and since the holder retained his right against the drawer, acceptance of the draft as payment was not negligence. Graham v. Warehouse, 189 N. C. 533, 127 S. E. 540 (1925); Lake Charles Feed Co. v. Sabatier, 12 La. App. 89, 125 So. 318 (1929).

The majority view arose undoubtedly from the rule that an agent is liable to his principal for accepting anything other than money in payment of a check. 1 MECHEM, AGENCY (2d ed. 1914) § 946. This rule was said to apply to collecting banks as well. Federal Reserve Bank v. Malloy, *supra*. In the latter case, the Court held that a Federal Reserve Regulation permitting Federal Reserve Banks to practice direct routing did not impliedly authorize the acceptance of a remittance draft in payment.

§ 74 of the NEGOTIABLE INSTRUMENTS LAW, too, might be construed as requiring only the payment of cash and surrender of the instrument. See Turner, *supra* note 36, at 478.

[65] Pierson, *supra* note 14, at 408; Turner, *supra* note 36, at 483.

ments,[66] and its sanction by both the *Code*[67] and the *Act*.[68] It is undoubtedly the rule that the medium of payment does not prevent the discharge of the drawer;[69] therefore, if the drawee pays with a remittance draft and fails before such draft is paid, the owner has only his claim against the defunct bank unless a preference is allowed, as it is under both *Act* and *Code*.

Both the enactments provide that payment may be made by entering an unconditional credit in the books of one bank in favor of another.[70] It has been contended that such credit is mere bookkeeping; that where the drawee fails before such credit is drawn upon, it should be treated as still holding the proceeds and consequently the owner's action must be against the drawee rather than against the correspondent.[71] This argument fails to realize that unconditional credit is payment only when it is requested or authorized by the bank to whom payment is made.[72] Such bank, therefore, voluntarily assumes the risk of the continued responsibility of the paying bank in respect to these credits and should bear any loss incident thereto.

Where the rights of the parties are conditioned by the fact of payment it sometimes becomes important to determine just when payment of the paper takes place. The tendency is to consider that this happens as soon as possible,[73] but for purposes of convenience and certainty an act sufficient to constitute payment should be definite and one reasonably capable of being established as a fact.[74] Earlier cases were in great conflict, some selecting the moment of charging the drawer's account,[75] others upon the crediting of the collecting bank[76] or upon the mailing of a remittance draft.[77] It is obvious that the earlier the point at which payment is deemed made, the smaller is the depositor's risk of loss arising out of such situations as the death of the drawer, or stop order, or attachment made on the drawer's account.[78] The *Code*[79] provides that in the case of a solvent drawee, payment occurs when the amount is finally charged to the account of the maker or drawer. By negative inference it has been argued that payment cannot take place at an earlier time.[80] To thus limit the number of possibilities when payment may occur seems to handicap the

[66] The following states, prior to the drafting of the Bank Collection Code, permitted by statute the acceptance of remittance drafts in lieu of currency: Cal. Stats. 1925, c. 312, § 5; Colo. Laws 1923, c. 64; Mont. Laws 1925, c. 65; Ore. Laws 1920, § 6217; S. C. Acts 1927, No. 202; S. D. Laws 1921, c. 31; Tenn. Acts 1921, c. 37.

[67] See § 9.

[68] See § 41.

[69] Anderson v. Gill, 79 Md. 312, 29 Atl. 527 (1894); Noble v. Doughton, 72 Kan. 336, 83 Pac. 1048 (1905); see also Note (1929) 4 WASH. L. REV. 39, 40.

[70] See § 9 of the Code and §§ 39 and 41 of the Act.

[71] See Turner, *supra* note 36, at 482.

[72] Crediting is not deemed payment between banks unless it is accompanied by some understanding or agreement that it shall be so considered. See Equitable Trust Co. v. Rochling, 275 U. S. 248, 48 Sup. Ct. 58 (1927); Commercial Nat. Bank v. Hamilton Nat. Bank, 42 Fed. 880 (C. C. Ind. 1890). See also 1 MORSE, *op. cit. supra* note 15, at § 250 p. 612.

[73] Note (1931) 40 YALE L. J. 802, 807.

[74] *Id.* at 808.

[75] Planter's Mercantile Co. v. Armour Packing Co.; Seventh Nat. Bank v. Cook; Pratt v. Foote, all *supra* note 42.

[76] Stone v. Wachovia Bank & Trust Co., 145 S. C. 166, 143 S. E. 27 (1928); Briggs v. Central Nat. Bank, 89 N. Y. 182 (1882). See also Wallace, *supra* note 42, at 802 and 806; Note (1931) 40 YALE L. J. 802, 809, n. 29.

[77] Nineteenth Ward Bank v. First Nat. Bank, 184 Mass. 49, 67 N. E. 670 (1903); Marland Refining Co. v. Penn Soo Oil Co., 54 S. D. 10, 222 N. W. 594 (1928); Wells Oil Co. v. Marcus Oil & Supply Co., 206 Iowa 1010, 221 N. W. 547 (1928).

[78] Death of the drawer revokes the bank's authority to pay the check. Johnston v. Thomas, 93 Fla. 67, 111 So. 541 (1927); Sneider v. Bank of Italy, 184 Cal. 595, 194 Pac. 1021 (1921); 1 MORSE, *op. cit. supra* note 15, at § 400; Turner, *supra* note 36, at 481.

[79] § 7.

[80] Turner, *supra* note 36, at 479.

depositor unnecessarily. It would be preferable to provide, as does the *Act,* that payment takes place immediately upon the occurrence of any of the acts mentioned above.[81]

The determination of when payment occurs is further complicated by the provision of the *Code*[82] giving the collecting bank the option, in case the remittance draft given in payment of the original item is not honored, to treat the original item as dishonored; in which case recourse may be had against prior parties. This is patently inconsistent with the *Negotiable Instruments Law* which discharges parties secondarily liable upon payment of the instrument.[83] A revival of liability after payment has been deemed made is an unwarranted alteration of the *Negotiable Instruments Law.*

In general, a major criticism of both enactments is the undue emphasis placed upon banking convenience to the prejudice of the customer's interest. As has been shown, it would be comparatively simple to safeguard the customer without subjecting the banks and their general creditors to unreasonable burdens. A more serious criticism might well be that the concurrent promulgation of two enactments, differing in their provisions, each designed to secure a uniformity in the law of bank collections, defeats the desired end. It is urged that the proponents of both unite their activities and agree upon the form such legislation should assume. Only then will uniformity be possible.

*M. M. Y.*

---

[81] See § 15 of the Act which provides that payment may occur upon:
". . . (1) Receipt by the payor of any agreed equivalent as payment of the item;
(2) The item being charged against the drawer's account, although the charge may create an overdraft; or
(3) Credit being given or remittance being made for the item according to authority."

[82] § 11.

[83] NEGOTIABLE INSTRUMENTS LAW § 119 (1).