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A BLUE PRINT FOR THE CERTIFIED CHECK*

ROSCOE T. STEFFEN** AND WILLIAM F. STARR***

In the growth of an institution¹ there are often many stages, before it reaches old age and is cast aside, if that time ever comes. It is the resultant of a variety of forces, some enlightened, some blind. It is shaped this way and that to answer varying demands of business, of politics, of law, of ethics. It may be constricted for a time, or even lose its identity entirely, by being forced into some category with other things—a consequence of too limited imagination, or the urge to standardize. At all events the certified check has been no exception. Like other legal-economic institutions it has been builded piecemeal, with many builders and few architects, much tearing down and rebuilding, and, of course, much argument throughout. But, though it has survived and at times flourished for at least a century as a distinctive American institution,² things have now come to a point where some careful planning³ is needed to safeguard its immediate future.

THE CURRENT DIFFICULTIES

The first cause of present concern grows out of a relatively small matter. It appears that in 1915 a draft for \$629.80 drawn by a St. Louis bank upon the National City Bank of Chicago was stolen from the mail while in transit to the payee. The thief, a person named Manning, erased the payee's name, inserting his own in its stead, and presented the draft to Barnett Bros., Chicago, in purchase of diamonds to the fair value of \$600. For reasons that do not appear—but may be surmised—Barnett asked to be permitted to have the check certified, apparently before releasing the diamonds. In any case the item indorsed by Manning was regularly certified by the National City Bank, the amount being charged to the drawer's account, and was later paid through the clear-

* The writers are very much indebted to Friedrich Kessler, Privatdozent at the Handelshochschule, Berlin, Rockefeller Fellow at the Yale Law School, for preparation of the notes on points of comparative law.

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¹ The discourse by Hamilton on the Institution in 7 ENCYC. OF SOC. SCIENCES 84-89 (1932) is good reading.

² The earliest American case found treating of the practice is that of Phoenix Bank v. Bank of America (1842) 1 N. Y. LEG. OBS. 26. See *infra* note 69 *et. seq.*

³ The present study proceeds upon the assumption that, although many things apparently just happen, it is quite possible in a world of choice to shape affairs, within certain limits, to accomplish desired purposes. See BEARD, THE OPEN DOOR AT HOME (1934) pp. 33-34. Of course, whether use of the certified check should be encouraged or discouraged, is recognized as a problem of values at the bottom of the whole inquiry.

ing house to the Bank of the Republic with which it had been deposited by Barnett. Upon the fraud being discovered, shortly after, the National City Bank reccredited the drawer's account, as obviously it had to, and the question then was: Who should take the loss?

There were two almost equally arguable technical positions, neither paying much attention to the welfare of the certified check. It was contended by the drawee that upon all the decisions, both in this country⁴ and in England,⁵ the amount of the check could be recovered from the Bank of the Republic as money paid under mistake of fact. And of course the point cannot be gainsaid; the *Price v. Neal* doctrine⁶ went no further than to charge the drawee with knowledge of the drawer's signature and the state of his account, matters peculiarly within the drawee's knowledge. For the holders it was contended, however, that under the N. I. L., section 62, the drawee by certifying admitted the existence of the payee and agreed to pay according to the tenor of its certification. And to the suggestion that this meant the original and not the altered tenor it was pointed out that the drawee could not well admit the existence of a payee of whom it had never heard,⁷ and that the most reasonable interpretation of its promise to pay was that it undertook according to the tenor of the paper as it appeared when certified.

The matter had finally to be taken up for a decision upon the "law." It was ruled by the Illinois court⁸ in 1921 that the holder had the right of the matter and the drawee was denied recovery; the statute had changed the common law, or at least it was so held.⁹ And, although the case had come up on a narrow set of facts, for it is not often that

⁴ First Nat. Bank v. Northwestern Nat. Bank, 152 Ill. 296, 38 N. E. 739 (1894); Metropolitan Nat. Bank v. Merchants Nat. Bank, 182 Ill. 367, 55 N. E. 360 (1899); Parke v. Roser, 67 Ind. 500 (1879); Marine Nat. Bank v. National City Bank, 59 N. Y. 67 (1874); Security Bank v. Nat. Bank of Republic, 67 N. Y. 458 (1876). And see Continental Nat. Bank v. Tradesman's Nat. Bank, 173 N. Y. 272, 65 N. E. 1108 (1903) (where the drawee had disregarded an advice of drawing). In Continental Nat. Bank v. Metropolitan Nat. Bank of Chicago, 107 Ill. App. 455 (1903) recovery was denied due to delay of five years in making demand. Apparently the only common law case squarely *contra* is Louisiana Nat. Bank v. Citizen's Bank, 28 La. Ann. 189, 26 Am. Rep. 92 (1876).

⁵ See Imperial Bank of Canada v. Bank of Hamilton (1903) A. C. 49.

⁶ 3 Burr. 1354 (K. B. 1762). And see Aigler, *The Doctrine of Price v. Neal* (1926) 24 MICH. L. REV. 809.

⁷ Of course the drawee almost never knows or cares who the payee is as a matter of actual practice; it therefore may be said ordinarily to admit the existence of a payee of whom it knows nothing.

⁸ National City Bank of Chicago v. National Bank of the Republic, 300 Ill. 103, 132 N. E. 832 (1921).

⁹ Had the payee's indorsement simply been forged there is no doubt upon the decisions that the bank's certification would be unenforceable as regards any person holding through the forged indorsement. The court did not purport to overrule its prior decisions to that effect. First Nat. Bank v. Northwestern Nat. Bank, 152 Ill. 296, 38 N. E. 739 (1894); State Bank v. Mid-City Trust & Savings Bank, 295 Ill. 599, 129 N. E. 489 (1920).

the payee's name is erased and that of the forger substituted, it followed from the holding that the many cases involving raised paper would be ruled in the same way.¹⁰ Clearly, if certification is an undertaking speaking as of the time of the certification, the undertaking in the case of raised paper is to pay the raised amount. The vista thus opened to certifying banks indicating large losses in future was by no means reassuring.¹¹ The outlook, moreover, was particularly discouraging, since there was no suggestion of any recourse over, except of course that against the forger, if he could be found.

The commentators upon the question, as is their wont, contented themselves for the most part with demonstrating that the case was wrongly decided.¹² And probably it was; as a technical matter.¹³ The argument that Section 132, which provides that by acceptance "the acceptor signifies his assent to the order of the drawer," and so not to that of the forger,¹⁴ should have been considered in construing Section 62,

¹⁰ The case of *Central Nat. Bank v. F. W. Drosten Jewelry Co.*, 203 Mo. App. 646, 220 S. W. 511 (1920) involved exactly these facts, except that the jeweler, substituted payee, asked for the drawee bank's cashier's check instead of its certification. It was held that, in effect, this was merely a payment of the check and according to rules established for many generations the raised amount could be recovered back as money paid under mistake of fact. It was immaterial that the jeweler had first been told orally by the bank that the check was good and that he had not delivered over the jewelry to the forger until after receiving the cashier's check.

¹¹ Probably no rule is better established than that the holder takes the risk that his paper may have been raised—that is, when he receives payment alone rather than certification followed by payment. *White v. Continental Nat. Bank*, 64 N. Y. 316, 21 Am. Rep. 612 (1876). Of course the drawee may nonetheless, in a proper case, be estopped by its conduct from recovering. *United States v. National Exchange Bank*, 270 U. S. 527, 46 Sup. Ct. 388 70 L. ed. 717 (1925); *Interstate Trust Co. v. United States Nat. Bank*, 67 Colo. 6, 185 Pac. 260 (1919). But if holders were to be able, by adopting the simple device of procuring certification ahead of payment, to throw all losses of this character on the paying banker, a very great aggregate loss would be shifted. Whether the banker *should* bear this loss, nonetheless, is a question to be considered.

¹² See the following notes adversely criticizing the decision: (1922) 6 MINN. L. REV. 405; (1922) 16 ILL. L. REV. 615; (1922) 22 COL. L. REV. 260 and (1922) 31 YALE L. J. 548. Approving the decision, principally as a matter of policy: (1922) 35 HARV. L. REV. 749; (1922) 31 YALE L. J. 522 and (1923) 4 ILL. L. Q. 202.

¹³ The one decision holding the same way prior to the N. I. L. appears to have grown out of a misunderstanding of the scope of the *Price v. Neal* doctrine. *Louisiana National Bank v. Citizens Bank of Louisiana*, 28 La. Ann. 189, 26 Am. Rep. 92 (1876). Likewise the decisions regarding accepted bills, for even the two or three cases where the acceptor has been held liable upon bills altered by the drawer are in no real sense *contra*; in such case the acceptance is simply an agreement to pay according to the drawer's order as in any case. See *Langton v. Lazarus*, 5 M & W 629 (Exch. 1839) and discussion, Bigelow, *Alteration of Negotiable Instruments* (1893) 7 HARV. L. REV. 1, 7, 8. The decisions subsequent to the adoption of the act have been in accord. *Interstate Trust Co. v. United States Nat. Bank*, 67 Colo. 6, 185 Pac. 260 (1919); *National Reserve Bank v. Corn Exchange Bank*, 171 App. Div. 195, 157 N. Y. Supp. 316 (1916). So much for *stare decisis*.

¹⁴ PATON, DIG. OF LEG. OP. (1926) Op. 108a at p. 1070. But the further point that because Section 124 N. I. L. provides that upon alteration an instrument is

certainly is hard to meet. The act is to be construed as a whole, not phrase by phrase.¹⁵ Moreover, there is no intimation anywhere that either the draftsman of the American act, or of the earlier English act after which it was patterned,¹⁶ had any idea that the case law was being changed on this point. In fact quite the contrary. And while it is true that Dean Ames gratuitously asserted that the act had overthrown the common law,¹⁷ his construction appears to have derived fully as much from bitter criticism¹⁸ of the statute as a whole as from any carefully reasoned study upon the point. So, when the California court¹⁹ in 1930 followed the Illinois case upon similar facts, its decision also was widely criticized—and with somewhat greater confidence.²⁰

But whether these cases were right or wrong, the banks long since took measures to meet the situation. Being repulsed in their efforts to have the act amended²¹ to provide clearly that certification has to do only with the original tenor of the paper, a great many proceeded to qualify their certification stamp to read, "Payable only as originally drawn."²² Let the "law" be what it would they undertook to pay only according to the original tenor of the instrument. A large number, in less commercial sections of the country, found that they could refuse certification entirely,²³ except at the request of the drawer, and thus sidestep the question. Many, of course, continued their former practice relying on insurance and the possibility of beating the case when it should come up in their states for decision. Not a happy spectacle altogether but yet one quite easily understood!

But there have been several other certification questions to come

avoided as to all parties, except the wrongdoer "and subsequent indorsers," it must be avoided as to the acceptor, while logical enough, somehow fails to carry much conviction. It is a little too much to suppose that the draftsman had this precise case in mind when the section was framed.

¹⁵ Or at least so we are told. Beutel, *The Necessity of a New Technique of Interpreting the N. I. L.* (1931) 6 TULANE L. REV. 1.

¹⁶ See, CHALMERS, *BILLS OF EXCHANGE* (9th ed. 1927) 214.

¹⁷ *The Negotiable Instruments Law* (1900) 14 HARV. L. REV. 241, 243 and see the earlier discussion upon "principle": *The Doctrine of Price v. Neal* (1891) 4 HARV. L. REV. 297, 306-307.

¹⁸ See Beutel, *The Proposed Uniform Bank Collection Act* (1935) 9 TULANE L. REV. 378 at 388.

¹⁹ *Wells Fargo Bank & Union Trust Co. v. Bank of Italy*, 292 Pac. 281 (Cal. App. 1930).

²⁰ See particularly Greely, *The Effect of Acceptance of an Altered Bill* (1933) 27 ILL. L. REV. 519 and a very good note in (1930) 19 CALIF. L. REV. 210.

²¹ For a discussion of this effort on the part of the General Counsel of the American Banker's Association see, PATON, *DIG. OF LEGAL OP.* (1926) Op. 108a, p. 1071.

²² Or words to similar effect. This statement is based upon recent correspondence with a large number of banks throughout the country.

²³ See Turner, *A Factual Analysis of Certain Proposed Amendments to the N. I. L.* (1929) 38 YALE L. J. 1047, 1060.

before the courts in recent years which have given concern to the banker. One of these, related theoretically to the altered instrument difficulty has had to do with the irregularly indorsed instrument. It has been good collection practice—built on rather insecure legal foundations—²⁴ for a drawee bank to which such paper is presented by mail or through the clearing house for payment to certify it, although it would be unwilling to make payment. By so doing the drawer's account is embargoed, indeed the drawer may be discharged upon the paper,²⁵ while it is being returned for proper indorsement. In most cases this serves to speed up and make more certain the collection process.²⁶ But when the needed indorsement is not forthcoming—and this may happen for a variety of reasons—the extent of the bank's obligation upon its certification is again a matter of doubt.

The New York courts have been inclined to say upon these facts that "a new contract was made between the bank and the holder."²⁷ In the early *Freund* case²⁸ the transaction was visualized as an assignment of a chose in action, the certification constituting the bank's, or debtor's, assent. And from this it followed, without citation of chose in action authority, that the bank had, at its peril, elected to pay the person procuring certification. As it happened in the particular case the drawer had no complaint except that he had given the paper to the payee for his accommodation and, though the latter had pledged it upon a prior indebtedness, apparently contrary to the drawer's private expectations, that was a legitimate use of the instrument. The bank, on its part, had no personal reason for not making payment. This was scarcely a case upon which the drawer could hold the bank responsible for having paid according to its certification, if he could ever recover in such case. But, however carefully the case may be limited technically, the impression created was again that certification speaks as of the date of the certification, a theory consistent with the view of the California and Illinois courts mentioned above in the alteration cases.

²⁴ In an era of bank failures it may actually be more dangerous for the collecting agent to accept a bank's certification than to receive the paper back unpaid, particularly since upon certification for an owner of the paper all secondary parties are discharged. The authorities holding that an agent in possession of an unaccepted time bill must present for acceptance are not necessarily in point for there the secondary parties would continue liable even after acceptance. *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276, 5 Sup. Ct. 141, 28 L. ed. 722 (1884).

²⁵ If in fact the person presenting the check is its owner or an agent on his behalf. Sec. 188 N. I. L.

²⁶ It is proposed, in the Uniform Bank Collection Act now being prepared, expressly to authorize the practice in the interest of speeding the collection process. *HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS* (1934) 162.

²⁷ *Meuer v. Phenix Nat. Bank*, 94 App. Div. 331 at 335, 88 N. Y. S. 83 at 83 (1904).

²⁸ *Freund v. Importers and Traders Nat. Bank*, 76 N. Y. 352 (1879).

It is necessary, therefore, to examine somewhat more closely into the nature of this "peril" to the certifying banker. Shortly after the *Freund* case was decided, the New York court itself relieved the apparent burden somewhat by differentiating the case where certification was procured by the drawer.²⁹ There, the court said, the bank's undertaking must be deemed conditional upon the payee's indorsement being obtained, the paper being drawn payable to his order. This obviously was a very strained position, for a good faith purchaser should at least be permitted to prove his title in court, even in the absence of indorsement.³⁰ But the serious case apparently controlled by these decisions had to do with the forged or unauthorized indorsement, for it would seem to follow that the apparent holder upon obtaining certification could require payment regardless of title, as upon a new contract. If that were to be the case certification would indeed be perilous. But, as pointed out, the *Freund* case did not actually go so far and no court since, with the missing indorsement case before it, has ever so decided. In the forged indorsement case, moreover, where certification has been procured by a purported holder subsequent to the forgery, it has been consistently held that the bank's undertaking is not enforceable,³¹ in fact it may be completely avoided even as against a subsequent *bona fide* purchaser of the item as certified.³²

Actually, therefore, the risk to the bank certifying an irregularly indorsed instrument does not run to the apparent holder at all, as suggested by these courts, but to the drawer. The wrong, where there is a wrong, consists in charging the drawer's account without authority, and for so doing the bank can be held liable on familiar principles for the ensuing loss.³³ With one indorsement missing, certification obviously could not be said to have been made in due course. But, however that may be, the "peril" seemed sufficiently real to require action when, in 1920, the New York court again asserted,³⁴ though much more guardedly than before³⁵, that the drawee upon certification is liable to

²⁹ *Lynch v. First Nat. Bank of Jersey City*, 107 N. Y. 179, 13 N. E. 775 (1887).

³⁰ At times it becomes physically impossible actually to indorse paper. In such case court proceedings to establish title should be sufficient to allow recovery in the absence of any other defense.

³¹ See, for example, *State Bank v. Mid-City Bank*, 295 Ill. 599, 129 N. E. 428 (1921); see also *Gaspar v. Security State Bank*, 109 Neb. 495, 191 N. E. 654 (1922).

³² Sec. 23 N. I. L.

³³ See MORSE, BANKS AND BANKING (6th ed. 1928) §458.

³⁴ *Lipten v. Columbia Trust Co.*, 194 App. Div. 384, 185 N. Y. Supp. 198 (1920).

³⁵ *Ibid.*, p. 391, 392 "There being no obligation on the part of the drawee to certify a check, there is no hardship in holding it liable to the lawful owner if it sees fit to certify a check payable to order after it has been transferred without the indorsement of the payee, and in the absence of fraud, forgery or mistake in certifying, it is well settled that it is so liable. . . ."

the person procuring certification, whether or not he has the payee's indorsement. The general counsel for the American Banker's Association recommended widespread recourse to contract again as a safeguard.³⁶ As a matter of fact many banks, possibly as a consequence of the *Freund* case, had long before incorporated into their certification stamps the phrase, "when properly indorsed,"³⁷ for use on all occasions. The practice is now widely established; one might say it has become institutional.³⁸

It may be that banker nervousness on this point derived partly from knowledge that certifications are on occasion made through error. So long ago as *Price v. Neal*³⁹ it has been held as to bills, and the point is codified as to checks in the N. I. L.,⁴⁰ that should the drawer's name turn out to be forged or should a mistake be made as to the adequacy of his account, the acceptor may nonetheless be required to pay. This for the good business reason that it is more important that commercial paper be freed of such defences, particularly since the bank can ordinarily avoid losses of the kind by careful practice, than that abstract justice be done in each individual case.⁴¹ Such at least was Lord Mansfield's thought upon the matter in 1762. But the banks, or possibly their attorneys only, have steadily resisted this position, though they have never had sufficient assurance, apparently, to attempt here also to contract out of liability. Possibly they suspect that a further qualification inserted in their certification stamp, "payable only if the drawer's signature is genuine, etc., etc.," would be going too far. At all events, the holder without indorsement should have given them no concern on this score, for it was early decided in the *Goshen* case⁴² that he at least could not require the bank to pay in the face of such a defense. Indeed, the courts have so far departed from the early faith of *Price v. Neal*, that the bank is now permitted to go to great lengths to correct its errors.⁴³

What is only justice when urged by the drawee, however, may be something else again when the drawer is involved. Of course he too

³⁶ PATON, DIG. OF LEGAL OP. (1926) Op. 75a, p. 1059.

³⁷ See, for example, *Blake v. The Hamilton Dime Savings Bank Company*, 79 Ohio St. 189, 87 N. E. 73 (1908), concerning a check certified for the payee in 1903 as follows: "Good for \$275.00 when properly endorsed." See also *Dorsey v. Abrams*, 85 Pa. 299 (1877).

³⁸ See Moore and Hope, *An Institutional Approach to the Law of Commercial Banking* (1929) 38 YALE L. J. 703.

³⁹ 3 Burr. 1354 (K. B. 1762).

⁴⁰ Sec. 62, N. I. L.

⁴¹ An excellent statement of the various rationalizations in support of the rule is given in *First Nat. Bank v. United States Bank*, 100 Ore. 264, 197 Pac. 547 (1921).

⁴² *Goshen Nat. Bank v. Bingham*, 118 N. Y. 349, 23 N. E. 180 (1890).

⁴³ For discussion of the inroads being made upon the *Price v. Neal* doctrine as regards certification, see *infra* note 136.

has made mistakes—or been defrauded—and issued checks which later he has wanted to recall. But when he has sought to have payment stopped, his banker has usually considered it a complete answer to say quite virtuously that unfortunately the holder has already procured certification. In other words, as visualized by the courts, perhaps with some prompting by the banks, when a check is certified for the holder it is as though the drawer's money is paid out to the holder and at once redeposited on an entirely separate certificate of deposit basis.⁴⁴ Of course this is fiction but not the less potent for all that. The drawer has been discharged upon the check⁴⁵ and the transaction is closed, so far as he is concerned. The certified check is too important a commercial instrument to be subjected to hazards of this character, that is, when it is the drawer's money which is at stake.

Of course, it has been only too clear that the banker who should allow his customer to stop payment upon a certified check would find himself occupying a position midway between the upper and nether millstones. He might be liable to the drawer for paying and also to the holder should he refuse to pay. No banker is comfortable in such a situation, particularly since he regards check paying at best as little more than a necessary courtesy extended to his customer, a service performed gratuitously or nearly so. And it must be said that the courts on their part have been careful to extricate the banker from any such position where possible. In the early *Freund* case, discussed above,⁴⁶ the bank was held to be under no obligation to the drawer to stop payment even though the person procuring certification did not have the payee's indorsement and so could not be a holder in due course. The recent cases, almost without exception, have taken an equally satisfactory banker position.⁴⁷

⁴⁴ It is interesting to compare this "as though" argument as it comes up in the constructive trust setting. Where a collecting bank receives payment by check upon itself some courts say the case is "as though" the bank first paid the check and then received the money back again, wherefore its estate has been augmented to that extent and a preferred claim can be allowed. Others say, more coldly, that no such transaction actually took place. See Turner, *Bank Collections—The Direct Routing Practice* (1930) 39 YALE L. J. 468, 487.

⁴⁵ Sec. 188, N. I. L.

⁴⁶ *Freund v. Importers and Traders Nat. Bank*, 76 N. Y. 352 (1879), cited *supra* note 28.

⁴⁷ See *Carnegie Trust Co. v. First Nat. Bank*, 213 N. Y. 301, 107 N. E. 693 (1915) (drawer sought to assert set-off against payee); *Bulliet v. Allegheny Trust Co.*, 284 Pa. 561, 131 Atl. 471 (1925) (drawer attempted to stop because of irregularity in transaction with payee). For earlier cases denying stop payment on these facts see *Meridian Nat. Bank v. First Nat. Bank*, 7 Ind. App. 322, 33 N. E. 247, 34 N. E. 608 (1893); *Central Guaranty Trust Co. v. White*, 206 Pa. 611, 56 Atl. 76 (1903) (denying stop payment "in absence of fraud"). See further, note 58 *infra*.

The New Jersey court, in the *Times Square* case,⁴⁸ however, became unduly enamored of the idea that the bank really pays out the drawer's money, when it certifies a check for the holder. Conversely, it reasoned, certification for the drawer obviously could not be pictured quite that way. Wherefore it followed, in the court's opinion, that a drawer's defense of fraud or failure of consideration would be "open both to him and to the bank"⁴⁹ were the drawer rather than the holder to have procured certification. This was in 1909. In 1918 the Missouri court,⁵⁰ with a case before it where the drawer had procured certification, ruled that the drawee bank might interplead holder and drawer, thus for the first time actually making the drawer's defenses available against a holder. And then, in 1923, the New Jersey court, in the *Sutter* case,⁵¹ had the question squarely presented whether the drawee could be held liable to the drawer for refusing to recognize the drawer's stop order. The court chose to approve the earlier dictum in the *Times Square* case, but actually gave judgment for the bank since, as it stated, the drawer had failed to show the extent of his injury at the hands of the payee, or that he had been injured at all.

The fat was in the fire once more. The general counsel of the New Jersey Banker's Association was in something of a quandary what to advise. If the bank must honor its customer's stop payment orders where he has procured certification, the bank seemingly could not demand indemnity. It was accordingly suggested either that the banks should discontinue certifying checks for the drawer entirely—issuing their cashier's checks instead—or that legislation be obtained to reverse the holding in the *Sutter* case.⁵² The point caused much concern in commercial banking circles, the truly dark days to come ten years later not being even dimly imagined as yet. At all events, the New Jersey legislature very promptly and obediently passed a brief statute reading "No bank or trust company shall stop payment of any check certified by such bank or trust company at the request of the drawer";

⁴⁸ *Times Square Automobile Co. v. Rutherford Nat. Bank*, 77 N. J. L. 649, 73 Atl. 479 (1909). To the same effect, *Jones v. Nat. Bank of North Hudson*, 95 N. J. L. 376, 113 Atl. 702 (1920).

⁴⁹ *Ibid.*, p. 650.

⁵⁰ *Bathgate v. Exchange Bank of Chula*, 199 Mo. App. 583, 205 S. W. 875 (1918). An even stronger case was *McGinn v. Interstate Nat. Bank*, 178 Mo. App. 347, 166 S. W. 345 (1914) where the bank was allowed to interplead the drawer of a certified check as against the assignee of cashier's checks given to the payee of the certified check by way of payment. The issue was fraud. Two years after the Bathgate case the Kansas court refused interpleader in a more or less similar situation. *McAdoo v. The Farmer's State Bank of Zanda*, 106 Kan. 662, 189 Pac. 155 (1920). And see, *Herrmann Furniture & Plumber's Cabinet Works v. German Exchange Bank*, 87 N. Y. Supp. 462 (1904).

⁵¹ *Sutter v. Security Trust Co.*, 95 N. J. Eq. 44, 122 Atl. 381 (1923). See notes in (1924) 22 MICH. L. REV. 367 and (1924) 72 UNIV. OF PA. L. REV. 318.

⁵² PATON, DIG. OF LEG. OP. (1926) Op. 49a, p. 1049.

and further, it evidently having occurred to the draftsman that no penalty was provided for a violation of this provision, that "the certification of any check at the request of the drawer shall be of the same effect as if said check had been certified at the request of the holder thereof."⁵³ That seems to have taken care of the situation in New Jersey.

The situation in other states continued uncertain. First the banker was advised to discontinue certifying for the holder, in order to avoid the alteration risks put upon him by the Illinois and California decisions, and next to refuse to certify for the drawer, in order to avoid being caught between two fires should the drawer order payment stopped. If this advice were all followed, certification would become a thing of the past. And it is true that there is no very obvious way of escape open to the banker to contract out of responsibility, unless, indeed, the drawer should be requested, when his item is certified, to waive any privilege of stopping payment.⁵⁴ At all events some banks do absolutely refuse to certify for the drawer, preferring to issue their cashier's check instead.⁵⁵ Many banks indicate upon their certification stamps, or in any case upon their records, whether certification was for holder or for drawer.⁵⁶ This merely assumes that the distinction raised by the New Jersey court may be followed in other states and serves to provide the bank with the necessary information to determine whether a stop order must be obeyed. On the whole the result is confusion.

It will not bring certainty forthwith to do so, but still it should be pointed out that the court in both New Jersey decisions appears to have misconceived the situation. After all, stop payment as applied to a certified or accepted item is a misnomer, technically speaking. The question is purely one of what defenses are to be available to the acceptor when sued by the holder. The court did not notice the well established doctrine that a primary party, having no defense of his own upon the paper, is not privileged ordinarily to set up a defense personal to a secondary party against the holder.⁵⁷ That is a matter for such

⁵³ L. 1925, C 115, p. 333.

⁵⁴ Probably such a provision would be enforceable in view of the more recent decisions upon stop-payment waivers. See, *Gaita v. Windsor Bank*, 251 N. Y. 152, 167 N. E. 203 (1929) discussed in (1930) 39 *YALE L. J.* 542. Upon the question of stop payments of *uncertified* paper see Moore, Sussman and Brand, *Stop Payment Orders* (1933) 42 *YALE L. J.* 817, 1198.

⁵⁵ Turner, *loc. cit.*, *supra* note 23.

⁵⁶ A practice has grown up in recent years, also, to photostat each check upon payment. It would seem preferable to photostat upon certification for, while this would not show for whom it was certified, it would provide very valuable information in case the instrument were subsequently lost or altered. After all the bank has no voucher in its possession upon certification to justify its charge to the drawer's account. See discussion, *Mussey v. Eagle Bank*, cited *infra* note 94.

⁵⁷ Section 58 N. I. L. is in point if, upon acceptance or certification, the drawee becomes a primary party and, in effect, the drawer and payee may be regarded as first and second indorsers, respectively. There is then no question but that

parties to adjust between themselves, unless indeed the holder has obtained the paper by fraud or has an otherwise defective title.⁵⁸ In such later case payment by the bank would not be in due course,⁵⁹ and it would seem a notice given to it of such facts, irrespective of whether drawer or payee had the paper certified,⁶⁰ must be given heed. This is little more than to say that the age old law relative to constructive trusts applies to bankers as well as to others. But except in this limited situa-

failure of consideration arising in the transaction between the secondary parties would not be available as a defense to the drawer. That it is usual to regard the parties in substantially this position upon acceptance, see *Haddock, Blanchard & Co., Inc., v. Haddock*, 192 N. Y. 499, 85 N. E. 682 (1908).

⁵⁸ Defective title is defined in §55 N. I. L. Possibly a majority of courts hold, even here, that this affords no defense to the maker and acceptor. *Prouty v. Roberts*, 6 Cush. 19 (Mass. 1850); *Kinney v. Kruse*, 28 Wis. 183 (1871). There certainly are a number of well reasoned cases, however, holding that such defenses are in fact available. See particularly *Parsons v. Utica Cement Co.*, 82 Conn. 333, 73 Atl. 785 (1909); *Drinkall v. Movius State Bank*, 11 N. D. 10, 88 N. W. 724 (1902) (cashier's check); *Merchants Exch. Nat. Bank v. New Brunswick Sav. Inst.*, 33 N. J. L. 170 (1868). In this last case the court said: "To hold otherwise would be, in effect, to admit that a court of justice may sometimes, knowingly, permit itself to be used in furtherance of a premeditated fraud." In *Wilson v. Mid-West State Bank*, 193 Ia. 311, 186 N. W. 891 (1922) the drawer gave a \$1,000 check for 15 gallons of whiskey, which turned out to be Missouri River water "without a kick." The court granted the drawer an injunction to restrain payment by the bank and held that the transferee had the burden of proving himself a holder in due course—a difficult matter since the consideration was a small amount of cash plus a past indebtedness arising out of "the noble game of craps." This notwithstanding it was the payee who had procured the certification.

⁵⁹ Looked at from this angle it would seem that the *Prouty v. Roberts* doctrine can no longer be sustained, for Section 88 N. I. L. provides that payment is made in due course only when made to the holder and "without notice that his title is defective." Surely it is not to be expected that the drawee may not assert the holder's fraud as a defense and yet, if he pays the holder, continue liable to the drawer. See discussion, *BIGELOW, BILLS, NOTES AND CHECKS* (3rd ed. 1928) §496 and note.

⁶⁰ Even picturing the transaction of certification for the holder as a payment of the drawer's funds to the holder and a redeposit of them, there is no reason at all on the "adverse claim" decisions why the repayment of this amount cannot be stopped—assuming the payee obtained the check or the money in fraud. See, for example, *Shotwell v. Sioux Falls Savings Bank*, 34 S. D. 109, 147 N. W. 288 (1914). And there is considerable support for the position in the certified check cases. In *Greenberg v. World Exchange Bank*, 227 App. Div. 413, 237 N. Y. Supp. 200 (1929) the drawer of a check certified for the payee was substituted as party defendant to plead his defense of fraud against the payee. And see, *Marie Antoinette Realty Co. v. Yorkville Bank*, 123 Misc. Rep. 522, 205 N. Y. Supp. 395 (1924); *McGinn v. Interstate Nat. Bank*, 178 Mo. App. 347, 166 S. W. 345 (1914). Even the case of *Blake v. Hamilton Dime Savings Bank*, 79 Ohio St. 189, 87 N. E. 73 (1908) is not a real exception, for there the drawer was endeavoring to stop payment of a check certified for the payee, not to set up any fraud against himself, but the fraud of the transferee against the payee, a *Prouty v. Roberts* situation. Of course a great deal of the uncertainty lies in the vagueness of the different categories, which range all the way from theft, through various degrees of fraud and duress, to simple failure of consideration. At all events if the drawer has procured the certification it is not at all clear that, even in New Jersey where the statute says he may no longer stop payment, it follows that the bank would be discharged if it paid a check to a holder with full knowledge of his fraud.

tion,⁶¹ stop payment has no application to the certified check, that is, technically speaking.

One recent certification skirmish between bank and depositor, at least, has resulted in complete victory to the bank, thanks probably in large part to this whole accumulation of uncertainties. The banker may say, rather arbitrarily as noticed above, that hereafter he will refuse to certify for the holder, but it is another matter to square action of that sort with his obligation to the drawer. Of course, the banker has long cultivated the view that he is under no obligation to the drawer to certify the latter's paper.⁶² According to the banker's version of the deposit contract it is merely that the bank will pay upon demand, not certify, but the case authority in support of his position has been almost nil. And, on the other hand, the Negotiable Instruments Law provides⁶³ that the drawer undertakes that his "instrument will be *accepted* or paid, or both, according to its tenor. . . ." Since "certification" is expressly made "equivalent to an acceptance"⁶⁴ it would seem to follow inescapably that the drawer at least could be held directly liable to the holder as upon a dishonor in case the bank should refuse certification.

The danger to the banker from this latter line of reasoning was all too obvious, for it would seem to follow that the drawer, if held upon the paper, might in turn hold the banker liable for injury to his credit. Actions by drawers for slander of credit, though not on these facts, have resulted in serious losses to the banker in the past.⁶⁵ Accordingly, in 1928, a case appeared before the New York court,⁶⁶ almost as if by design, to test the question, indirectly. It seems a check holder demanded certification in due form from the drawee bank and, upon refusal, without anything being said about payment, gave notice of the facts to the drawer and brought suit. The court, in the face of the express provisions of the statute, gave judgment for the defendant. It

⁶¹ A similar situation is presented where the bank which has issued a commercial letter of credit is ordered by the buyer to stop payment to the seller because of alleged defects in the goods shipped. The New York court in *O'Meara v. National Park Bank*, 239 N. Y. 386, 146 N. E. 636 (1925) refused to permit such a defense to be interposed. See discussion, Turner, *Letters of Credit as Negotiable Instruments* (1926) 36 YALE L. J. 245, 252. It should be noted that on its facts this was probably a failure of consideration case; the court carefully refrained from saying what it would do in a case of fraud, as where the seller were to present forged documents.

⁶² All the text writers appear to have echoed this view. See BIGELOW, *BILLS, NOTES AND CHECKS* (3rd ed. 1928) §204. The reason given here is that the check by its terms does not call for certification but payment, a reason which applies equally, of course, to the terms of the bill of exchange.

⁶³ Sec. 61, N. I. L.

⁶⁴ Sec. 187, N. I. L.

⁶⁵ *Supra* note 33.

⁶⁶ *Wachtel v. Rosen*, 249 N. Y. 386, 164 N. E. 326 (1928). Cf. *Gregg v. George*, 16 Kans. 546 (1876).

preferred to follow its early lower court decision which in fact involved a suit upon the underlying consideration for which the check was given.⁶⁷ In so doing it adopted the court's statement that the banker is under no duty to his customer to certify paper, as stating "the" common law contract. It thus ignored the whole ensuing development in the practice of certifying checks.⁶⁸ It ignored further the fact that it was setting a trap for the unwary holder who might reasonably assume that a refusal to certify was in fact a dishonor and, by not going through the further formality of demanding payment, release the drawer.

There may have been substantial practical reasons for the decision. Indeed, the lower court, intimated as much in its suggestion that change, if desirable, should come by legislation, "at which time the rights of all parties could be adequately protected." What situation the court had in mind, is necessarily conjectural. That many banks will not certify very small checks for reasons of economy would seem a case *de minimus*. That a bank should not be required to certify a carelessly drawn check could easily be covered by decision. In fact a great many banks now use a protectograph to show the exact amount for which they certify, thus minimizing any reason for refusal on that score. There may be other considerations, but they certainly are not obvious. What the decision actually did, however, was to give the banker a free hand, as he wanted, to combat decisions such as the Illinois and California holdings above discussed. Taking a long view of the matter the decision was not particularly statesmanlike.

From this brief review of current certification troubles one gets the impression that the banks have been running before their shadows. Of course there is no denying that there have been some real risks involved, but in the hurry to avoid them the certified check itself has been unduly battered around. There has been very little concern regarding the function which certification performs in modern commercial affairs, nor, one suspects, much understanding of how it has come to be. As to the future, it has been enough, apparently, that the evil of the moment be avoided; tomorrow may take care of itself.

⁶⁷ *Bradford v. Fox*, 39 Barb. 203 (N. Y. 1863). Apart from a dictum in *Minot v. Russ*, 156 Mass. 458, 31 N. E. 489 (1892) this is the only authority at all near the point. The *Wachtel* case was quite generally approved in the reviews: (1927) 27 COL. L. REV. 735; (1929) 28 MICH. L. REV. 74; (1928) 77 UNIV. OF PA. L. REV. 126 and (1929) 15 VA. L. REV. 683. See *contra* (1928) 38 YALE L. J. 112.

⁶⁸ The subsequently developed picture of certification at the request of the holder as being "really" a payment, discharging the drawer, was not mentioned. On this theory all that the holder asked for was payment and it would seem to follow that a refusal to so pay was a dishonor. It still could have been made a separate question whether the bank should be liable to the drawer.

THE EARLY ENVIRONMENT

Before any solution of current certification problems can well be attempted, some investigation of antecedents is essential. There is a certain continuity in the development of an institution, however unpredictable its course may appear to be. The English banking practice of "marking" checks, first noticed in the case of *Robson v. Bennett*⁶⁹ in 1810, appears to have been the start of the thing. Marked checks, when presented for payment the following day, were entitled to preference over other checks of the drawer actually presented at the same time.⁷⁰ The practice, thus, to begin with was merely an aid in the collection of checks, a function which it still serves, as mentioned above, in the case of irregularly indorsed paper. Moreover, the thing was deemed private to bankers, as perhaps might be expected. The *Robson* case decided that "marking" did not affect the drawer's liability,⁷¹ and as for the drawee, its obligation was generally thought to run only in favor of bankers,⁷² and that for a very limited period.⁷³

In England only one step in the direction of a *widespread* use of the certified, or marked, check was made. The drawer of a check, intending to use it to take up documents, might have it "marked" by the drawee as an assurance that it was drawn against actual deposits. But even this use gave way in 1905, the banker preferring to issue his own

⁶⁹ 2 Taunt. 388 (C. P. 1810). For the operation of the marked cheque in connection with the clearings, see also *Pollard v. Bank of England*, 25 L. T. R. 415 (Q. B. 1871).

⁷⁰ That the drawee might not give priority to its own claims ahead of those of other persons presenting paper for payment was reasonably clear. *Kilsby v. Williams*, 5 B. & Ald. 815 (K. B. 1822). The preference to the banking fraternity holding "marked" checks seems not to have been questioned.

⁷¹ On the day the "check," as it was then spelled even in England, was drawn it was presented to the drawee by a collecting bank, but since it was after 4 P.M. it was marked for payment at the clearing house the next morning. The drawer claimed to be discharged because of failure on the part of the collecting bank to make due presentment, for it was presented to the drawee at the clearing house and not at the drawee's counter. The court construed the mark as an acceptance to pay at a particular place, and found that presentment at the clearing house was equivalent to presentment at the banking house. The court neither saw nor considered the question to arise over sixty years later in America as to whether mere marking at the request of the holder released the drawer. See *infra* note 100.

⁷² Judge Cockburn, in *Goodwin v. Roberts*, L. R. 10 Exch. 337, 352 (1875), speaking of the growth of commercial customs in general, observed, "A custom has grown up among bankers themselves of marking cheques as good for the purpose of clearance, by which they become bound to one another." The opinion that the obligation runs to bankers only is based on Bills of Exchange Act, s. 17 (2). 1 HART, LAW OF BANKING (4th ed. 1931) 341. But if the banker were to sign as well as mark, it would be an acceptance within the Act. BYLES, BILLS OF EXCHANGE (19th ed. 1931) 21, 22.

⁷³ PAGET, THE LAW OF BANKING (4th ed. 1930) 169. Although it does not appear to have been settled in England, a week has been regarded in Scotland as a reasonable time for the bank to retain funds to meet the marked cheque. For a general discussion of the marked cheque in England, see *id.* pp. 164-169.

"transfer check" instead.⁷⁴ However, there was at least one real obstacle to an extensive development of certification in England, again a purely fortuitous one; the statute⁷⁵ giving the Bank of England a limited monopoly of note issue was too broadly drawn. It provided in effect that no bank doing business within sixty-five miles of London should become obligated upon bills or notes payable within less than six months. This statute was early, and literally, construed to forbid acceptance of short term drafts, even when drawn against actual deposits.⁷⁶ At all events the certified check, thus for all practical purposes excluded from the London district, never obtained a foothold there or elsewhere in England.⁷⁷

It is difficult to give any precise date when the practice of certifying checks commenced in this country—and even more to say what the consequences of certification were understood to be. Writing in 1845, on the law of bills, notes and checks, so scholarly an authority as Mr. Justice Story omits any mention of certification.⁷⁸ In fact, inferentially at least, he repeats his statement,⁷⁹ made in 1843 in the case of *Matter*

⁷⁴ HART, *op. cit.*, *supra* note 72, at 341, referring to a resolution of the London Clearing Bankers. Since 1905 this use of the marked cheques has become comparatively rare. *Id.* at 587.

⁷⁵ 3 & 4 W. 4, c. 98 (1833).

⁷⁶ *Bank of England v. Anderson*, 2 Keen 328 (Rolls Ct. 1837). The case involved a twenty-one-day draft drawn on a London bank by a country banker. It was strenuously argued, but to no avail, that since the draft was drawn against actual deposits it was not in violation of the statute.

⁷⁷ Certification, however, is a recognized practice in Canada and Newfoundland, following in general the rules developed in the United States. FALCONBRIDGE, *BANKING AND BILLS OF EXCHANGE* (4th ed. 1929) 858 *et seq.*

The Uniform Cheque Law (C. 294. M. 137. 1931. II B.), approved at the International Conference for the Unification of the Laws of Bills of Exchange, Promissory Notes, and Cheques, held at Geneva under the auspices of the League of Nations in 1931, and now enacted in many European countries, does not permit the acceptance of cheques. (§4). The underlying theory is that the real nature of a cheque calls for prompt payment and not acceptance. (*Cf.* RECORDS OF THE CONFERENCE n. 32). However, this rule, based on doctrinaire preconceptions, is to some extent nullified by Article 6 of Annex II which allows, "Each of the High Contracting Parties" to "provide that a drawee may write on the cheque a statement of certification, confirmation, visa, or other equivalent declaration, provided that such statement shall not operate as an acceptance, and may also determine the legal effect thereof." Pursuant to this provision, Section 6 of the Einführungsgesetz zum German Scheckgesetz of August 14, 1931, permits the Reichsbank, but no other bank, to certify cheques. The certification, however, is not an acceptance, for the Reichsbank is discharged from liability if the cheque is not presented for payment within "the time of presentation" which, for inland cheques, is eight days after the drawing. Practically, but not legally, it amounts to a discharge of secondary parties. Under similar rules, and with similar effect, all the banks of Scandinavian countries are permitted to certify cheques. KESSLER, *SHECKGESETZ* (1934) Art. 4 (1 to 3), p. 47 *et seq.*; FELLER, *Unification of Laws Concerning Checks* (1932) 44 HARV. L. REV. 668, 679.

⁷⁸ STORY, *PROMISSORY NOTES* (1st ed. 1845), in which he includes his discussion of checks. His previous work on *Bills of Exchange*, published in 1843, does not consider the check.

⁷⁹ STORY, *PROMISSORY NOTES* (1st ed. 1845) 619. After stating that days of grace are not allowed, it is said "In any other view, the check might be presented

of *Brown*,⁸⁰ that "checks are never presentable for mere acceptance, but only for payment."⁸¹ There is reason to believe, however, that the practice was already more or less general, for in the very year of publication certified checks were before the courts in Massachusetts⁸² and in Alabama.⁸³ Moreover, as attested by the Massachusetts case, certification had already come to mean more than was implied by the marking practice in England. The bank was relieved of an obligation to the holder only because its teller was deemed to be without authority to certify.⁸⁴ This line of banker defense was slow in giving way, thus serving as a shock absorber while the institution was taking shape.⁸⁵

Even before this, in 1839, Justice Cowen, making possibly the first comment of an American court of record upon the practice of marking checks for presentation through the clearing house, said that it was considered "equivalent to acceptance,"⁸⁶ and in 1842 a New York court so held.⁸⁷ While the actual decision, since it involved bankers only, may have gone no farther than an English court might have gone, the concept that, as in the case of acceptance, certification "equally gives

for, and require, acceptance; and yet it is understood that such acceptance is never called for, or given."

⁸⁰ 2 Story's Cir. Ct. Rep. 502 (1843), quoted in footnote *STORY, op. cit., supra* note 79, at 621.

⁸¹ *Id.* at 512.

⁸² *Mussey v. Eagle Bank*, 9 Metc. 306 (Mass. 1845).

⁸³ *Smith v. Branch Bank*, 7 Ala. 880 (1845).

⁸⁴ In this first case the Massachusetts court, alarmed at the prospect of deliberate fraud, denied that the teller had implied authority to certify any checks, in an opinion which would deny that any single officer had such authority. *Farmers etc. Bank v. Butchers etc. Bank*, 14 N. Y. 623 (1856); *id.*, 16 N. Y. 125 (1857); *id.*, 28 N. Y. 425 (1857) established the authority of the teller, and took the position that, while no officer had actual authority to certify checks unless drawn against adequate deposits (thus ignoring a then more or less prevalent custom to over-certify as a method of making a loan, discussed *infra* note 138), still the innocent holder could not be expected to determine at his peril the sufficiency of the drawer's account.

⁸⁵ The high water mark on the authority issue was reached in *Merchants Bank v. State Bank*, 77 U. S. 604, 19 L. ed. 1008 (1870), which held that the cashier, by virtue of his position as financial officer of the bank, had authority to certify, while away from the bank, checks totalling \$525,000, although it would seem that it was evident to the payee that the checks were not drawn against deposits. In *Muth v. St. Louis Trust Co.*, 94 Mo. App. 94, 67 S. W. 978 (1902), the court went clear back to *Mussey v. Eagle Bank*, 9 Metc. 306 (Mass. 1845), and denied the authority of a teller to certify, although the holder could have apparently been denied recovery because of fraud. See further *Peoples Bank v. International Finance Corp.*, 30 F. (2d) 46 (C. C. A. 4th, 1929). The cases are collected in *STEFFEN, CASES ON AGENCY* (1933) §26.

⁸⁶ *Harker v. Anderson*, 21 Wend. 372 (N. Y. 1839). The point at issue was whether the holder could sue the drawer before presentment at the bank. The opinion is criticized by Story, J., in *Matter of Brown*, 2 Story's Cir. Ct. Rep. 502 (1843), as drawing too close an analogy between bills and checks.

⁸⁷ *Phoenix Bank v. Bank of America* (1842) 1 N. Y. LEG. OBS. 26. This appears to have been the first reported direct holding on certified checks as distinguished from the English "marked cheque."

currency to the paper,"⁸⁸ is evidence of a radically different outlook. The certified check was about to be made a highly important medium of currency, whether that accorded with the bankers' wishes in the premises or not.

The case of *Willets v. The Phoenix Bank*,⁸⁹ decided in 1853, was finally to divorce certification from the English marked check practice.⁹⁰ It was argued on behalf of the bank, with considerable justification in view of the origin of the practice, that it was customary to certify checks for presentation on the following day only, and that if they were not so presented the bank might with safety allow the account to be withdrawn. Its argument was perhaps inspired by the fact that the drawer had in fact been allowed to withdraw his monies. But the court regarded the obligation of the bank as a matter of more consequence, not dissimilar to the obligation it would incur upon issuance of its own notes, that is, "an unconditional promise of payment, whenever payment shall be demanded. . . ."⁹¹ Putting the currency idea in more positive form, Oakley, C. J., said: "The sole and manifest object of the maker or holder of a check in requiring it to be certified, is to enable him to use it as money."⁹¹ The proposition that certification ran in favor of bankers only was scarcely given a hearing.

By this resort to the money analogy the court had definitely put the certified check upon a new level, at least temporarily, even as in an earlier day Lord Mansfield had developed the bill of exchange. Possibly, when one considers the unsettled monetary conditions which prevailed during the period when this case was decided, its result may be said to have been dictated by the times. Representing actual money on deposit—at least in the public mind—the business community welcomed the certified check as delineated by the court. There was crying need of some form of stable money. By the time of the "green-

⁸⁸ *Id.* at 27.

⁸⁹ 2 Duer 121 (N. Y. Super. Ct. 1853).

⁹⁰ The notion that it was merely a clearing house device reappeared in *Flour City Nat. Bank v. Traders Nat. Bank*, 105 N. Y. 550, 12 N. E. 55 (1887), a case which without citation of authority held that certification should be limited to the settlement of accounts between the drawee and the clearing house bank which had presented the paper.

⁹¹ *Willets v. The Phoenix Bank*, 2 Duer 121 (N. Y. Super Ct., 1853), at 132. It was entirely consistent with this currency aspect for the court in *Girard Bank v. Bank of Penn Township*, 39 Pa. 92 (1862) to hold that the statute of limitations would not start to run against the bank's obligation until demand for payment was made, thus putting it on the basis of the certificate of deposit or bank note; a view more articulately expressed in *Metropolitan Bank v. Jones*, 137 Ill. 634, 27 N. E. 533 (1891), which described certification as analogous to payment and redeposit. The same currency theory supports the view that a purchaser of a stolen check two or three years after certification is not subject to defenses as on an overdue instrument. *Nolan v. Bank of Nat. Banking Assn.*, 67 Barb. 24 (N. Y. 1873).

back era," following the War between the States, certified checks, registered and payable in gold, circulated as a medium superior to that of the national currency.⁹² The average circulation in New York City alone was conservatively estimated in 1870, according to Mr. Justice Swayne, "at not less than one hundred millions of dollars"⁹³ daily.

Though the certified check had thus "arrived," so to speak, as a continuing bank obligation, the problem of what to do with the secondary obligations upon the paper was to trouble the courts for many years. Judge Oakley had advised in the *Willetts* case that upon certification the drawer's account should be immediately charged, after which the sum in question should "remain as a deposit in the bank to the credit of the check, and be forever withdrawn from the control of the maker, except as a holder of the check."⁹⁴ But if the drawer's account was to be charged upon certification as upon payment, the question remained as to the effect of the transaction upon the drawer's liability. So long as the bank continued solvent, of course, the problem was purely an academic one, but to anyone who looks back across the troubled history of American banking it is obvious that the question was one which would have to be decided and that shortly.

The issue was first to come before the Illinois court in two cases decided in 1866. In each, the checks had been certified for the drawer and delivered by him to the payee, but were not paid owing to the untimely failure of the bank to open its doors next morning. In the *Bickford* case,⁹⁵ the court was impressed with the idea that certification is equivalent to acceptance, and, since the drawer of a time bill is not discharged upon acceptance, it followed that the drawer of a check continued liable upon certification. The companion case of *Rounds v. Smith*⁹⁶ encountered greater difficulty. There had been no charge to

⁹² See *Nolan v. Bank of Nat. Banking Assn.*, 67 Barb. 24 (N. Y. 1873). Judge Brady, speaking of the period from 1865 on, states that such certified checks were used by the mercantile community "as gold." He does not explain what is meant by "registered," nor whether the obligation to pay in gold was expressed upon the check.

⁹³ See *Merchants Bank v. State Bank*, 77 U. S. 604, 648, 19 L. ed. 1008, 1019 (1870).

⁹⁴ *Willetts v. The Phoenix Bank*, 2 Duer 121, 131 (N. Y. Super. Ct. 1853). Mr. Justice Swayne in 1870 stated that this had already become the practice "in well regulated banks." See *Merchants Bank v. State Bank*, 77 U. S. 604, 648, 19 L. ed. 1008, 1019 (1870). The necessity of charging the drawer's account was indeed recognized by the Massachusetts court in *Mussey v. Eagle Bank*, 9 Metc. 306 (Mass. 1845), but it deemed it an almost insuperable difficulty that the bank would be without a voucher until the check was paid. This difficulty is actually greatly accentuated in the telegraphic certification cases but has given little trouble. *Garretson v. No. Atchison Bank*, 39 Fed. 163 (C. C. Mo. 1889). *Kahn v. Walton*, 46 Oh. St. 195, 20 N. E. 203 (1889). *Relaying telegram by phone upheld*, *Selma Bank v. Webster Co. Bank*, 182 Ky. 604, 206 S. W. 870 (1918).

⁹⁵ *Bickford v. First Nat. Bank of Chicago*, 42 Ill. 238 (1866).

⁹⁶ 42 Ill. 245 (1866).

the drawer's account upon certification; indeed, as the court said, "the teller made no memorandum of it, except 'in his head,' where it seems he kept such transactions."⁹⁷ The case was thus one for the jury in the courts view. In fact there had been no charge to the drawer's account in the *Bickford* case.⁹⁸ At all events, by the next year, the court in *Brown v. Leckie*⁹⁹ reached the conclusion that it was quite immaterial whether the drawer's account had been charged or not. The only effect of certification, it then said, is to give the check additional currency by adding the obligation of the bank—and the assurance that the check was drawn against actual funds.

It was not until the panic year of 1873 that the converse case, where the holder had procured certification, was presented. But in *Bank v. Leach*¹⁰⁰ the facts were as good as if made to order to present the issue sharply. Certification had been obtained in the morning but presentment for payment, though made in the afternoon, was in vain for the drawee had suspended meanwhile. It was obviously not possible to urge that the drawer was discharged by any delay on the holder's part; the case must turn on the effect of certification. Although there had been previous dicta to the contrary,¹⁰¹ the reasoning of the Illinois cases, *supra*, seemed to force the conclusion that the drawer continued liable. And, although the court was evidently again impressed with the fact that the drawer's account had been charged, a circumstance depriving him of any opportunity to withdraw his funds, it conceded that a charge would likewise be made in the case of a time bill and there the drawer admittedly continues liable nonetheless.¹⁰²

But there were several other ways of reasoning the case. The court pointed out that the check was due when it was presented, thus differentiating it from the time bill, and then proceeded to the position, unsupported by prior decisions, that the holder is given no authority

⁹⁷ *Id.* at 254. The same method was pursued by a teller of a St. Louis bank as late as 1902. *Muth v. St. Louis Tr. Co.*, 94 Mo. App. 94, 67 S. W. 978 (1902).

⁹⁸ See *Rounds v. Smith*, 42 Ill. 245, 254 (1866). The court in the *Bickford Case*, at 241, said, "The bank is supposed to charge it to the account of the drawer, and appropriate the funds to the credit of the check."

⁹⁹ 43 Ill. 497 (1867). In this case the bank continued solvent but dishonored the check by refusing to pay cash, offering only to give the holder credit against the latter's obligation to the bank. The court concluded that this was a dishonor, on the theory that the holder of a check—even of a certified check—is an agent of the drawer to withdraw funds.

¹⁰⁰ *First Nat. Bank of Jersey City v. Leach*, 52 N. Y. 350 (1873). Admittedly reaching its decision "on principle," the court expressed the opinion that if the drawer again came into possession of the check he would hold the bank not upon the original deposit but solely upon the check as any other holder.

¹⁰¹ In *Andrews v. German Nat. Bank*, 56 Tenn. 211 (1872), the drawer procured certification and was held liable upon the bank's failure the next morning, but the court expressed the opinion, without amplification, that certification for the holder would discharge the drawer.

¹⁰² NEGOTIABLE INSTRUMENT LAW §61.

by the drawer to present a check for acceptance. From this the conclusion was reached, not altogether logically, that the loss must fall upon the holder if he elects to take certification in lieu of payment. Certification, so far from being "equivalent to acceptance" had thus become "equivalent to payment."¹⁰³ Or, if you prefer, a new contract had been substituted for—not added to—that of the drawer.¹⁰⁴ Or, as the Tennessee Court put it in 1874, "When the holder . . . presents it, it is his own fault if he fails to receive the money."¹⁰⁵ Almost, it would seem, any reason would suffice, provided it served to discharge the drawer.

The point is now "settled law," duly obscured with many reasons. Still, it is fair to ask: Why in fact did the court depart from the accepted bill analogy? How could it say that there was no authority in the holder to procure certification, in the face of a custom of perhaps fifty years standing for holders to do just that? Why was it the holder's "fault" for not obtaining payment, when drawers had known all this time that a holder might procure certification if he saw fit? A clew to the answer may lie in the fact that the court was keenly aware in 1873 that many banks would fail causing large unavoidable losses to drawers. It chose therefore to force the holder to demand payment in cash, without stopping to weigh the point that the risk of unavoidable loss by theft in such alternative, might well come to be greater than that from bank failure. Nor was any thought given to the subsequent bona fide purchaser; if the drawer must be discharged, apparently he is discharged as to all parties, whether they know who procured certification or not.

At all events, by 1889, and the next depression, the rule, and especially its reasons, had become so well established that the case of *Born v. Bank of Indianapolis*¹⁰⁶ caused a considerable furor. This was a

¹⁰³ Judge Allen in 1870 perhaps first used this expression. *Smith v. Miller*, 43 N. Y. 171, 176 (1870). It was seized upon by a Federal court in 1876 to support the decision that a collecting bank became liable to its depositor as for money received where it had a check certified, thereby releasing the drawer. *Essex County Nat. Bank v. Bank of Montreal*, 7 Biss. 193 (C. C. 1876). On the same theory the collecting bank was held liable to the creditors of the depositor in a garnishment action. *Nat. Com. Bank v. Miller*, 77 Ala. 168 (1884).

¹⁰⁴ See *Boyd v. Nasmith*, 17 Ont. 40, 41 (1889), the first Canadian decision on the point. In holding the drawer discharged upon certification for the holder, the court said, "When it was presented upon the following day [after certification] payment must be taken to have been demanded not upon the drawer's original contract, but upon the promise to pay of the bankers which the plaintiffs [holders] had procured to be substituted for it."

¹⁰⁵ *Freeman, J.*, in *French v. Irwin*, 63 Tenn. 401, 403 (1874).

¹⁰⁶ 123 Ind. 78, 23 N. E. 689 (1889). See also *Larson v. Breene*, 12 Colo. 480, 21 Pac. 498 (1889). Before this, and also subsequent to the *Leach Case*, an indorser who had had a check certified was held liable to his transferee. *Mutual Nat. Bank v. Rotge*, 28 La. Ann. 933 (1876).

case where the drawer, as in the *Bickford* case, had had the check certified for a payee who would not otherwise receive it. The bank failed before the check could be presented next morning. Were the court to follow the "reasoning" in the *Leach* case, that certification works a permanent charge to the drawer's account "equivalent to payment," it would result in discharging the drawer. And after all, it was argued, was not the certified check received by the business world almost as money on the faith of the bank's undertaking alone, not that of the drawer? The court decided to hold the drawer liable. The check was not money; the drawer had chosen the bank he saw fit to trust; the effect of certification at his request was merely to add,—not substitute—the obligation of the bank. It remained for the Massachusetts court in 1892,¹⁰⁷ with both situations before it at once, to settle the dialectical difficulty by saying that the certified check is neither exactly like a certificate of deposit nor yet in all respects the same as an accepted bill of exchange, it is "a thing *sui generis*."¹⁰⁸ And subsequent courts have continued to hold the drawer in the one case¹⁰⁹ and to discharge him in the other.¹¹⁰

In all this debate no one apparently paused to measure the duration or extent of the drawer's secondary liability. One might suppose from the criticism¹¹¹ of the *Born* case that where he procures certification he is bound indefinitely as a sort of guarantor of the bank's solvency. Still, the instrument though certified continues to be a check¹¹²

¹⁰⁷ *Minot v. Russ*, 156 Mass. 458, 31 N. E. 489 (1892).

¹⁰⁸ *Id.* at 460, 31 N. E. at 490.

¹⁰⁹ See *Railway Express Agency v. Thomas*, 5 Fed. Supp. 345 (E. D. Mich. 1933); *Commercial Investment Trust Co. v. Windsor*, 197 N. C. 208, 148 S. E. 42 (1929). And see *infra* note 113. As in *Rounds v. Smith*, 42 Ill. 245 (1866), the fact that the payee would not take the check until certified was held immaterial in *Randolph Nat. Bank v. Hornblower*, 160 Mass. 401, 35 N. E. 850 (1894); *Davenport v. Palmer*, 152 App. Div. 761, 137 N. Y. Supp. 796 (1912), *reversed on another point*, 211 N. Y. 596, 105 N. E. 800 (1914). See further, *Gaden v. Newfoundland Savings Bank*, [1899] A. C. 281, an English case arising from Newfoundland, and noted in (1899) 106 L. T. 453, 454, where the writer makes a prophesy which has not been fulfilled: "This is the first reported decision of an English Court on certified cheques, but it is safe to assume that they will not infrequently be the subject of judicial decision in the future. The convenience which has led to the spread of certification on the other side of the Atlantic is likely to lead to its adoption by business men in this country."

¹¹⁰ *Continental Nat. Bank v. Cornhouse*, 37 Ill. App. 475 (1890); *McCarty Bros. v. Fort Dearborn Nat. Bank*, 208 Ill. App. 282 (1917); *Meridian Nat. Bank v. Bank of Shelbyville*, 7 Ind. App. 322, 36 N. E. 833 (1893); *Bank of Detroit v. Currie*, 147 Mich. 72, 110 N. W. 499 (1907); *Cincinnati Oyster Co. v. Nat. Lafayette Bank*, 51 Ohio St. 106, 36 N. E. 833 (1894). *Warrensburg Assoc. v. Zoll*, 83 Mo. 95 (1884), is a seeming, but not actual, exception. But see *Central Hanover Bank & Trust Co. v. The Mirror*, 279 N. Y. Supp. 671 (1935).

¹¹¹ There was general discussion of the question: Francis R. Jones, *Liability of the Maker of a Check after Certification* (1892) 6 HARV. L. REV. 138; Leslie J. Tompkins, *The Certification of Checks* (1902) 41 AM. L. REG. (N. S.) 127; also a communication published (1890) 31 CENT. L. J. 93.

¹¹² *Andrews v. German Nat. Bank*, 56 Tenn. 211, 221 (1872), disapproving the language which it quotes from Morse, *Banks and Banking*, "The check ceases in

and, according to a rule of long standing, presentment for payment must be made within a reasonable time or the drawer will be discharged to the extent of the loss caused by the delay.¹¹³ Which, as translated somewhat freely by Rugg, C. J., in the recent case of *Seager v. Dauphinee*,¹¹⁴ means that if the holder does not collect his paper promptly the drawer is completely and forthwith discharged. The court simply ignored the negative implication of the rule, that the drawer continues liable to the extent that he has not suffered loss by the delay, and remitted the holder to his action against the bank to recover that amount at his leisure.¹¹⁵ Not a bad result,¹¹⁶ though it is true the court without much warrant forced the holder to forego his immediate recourse against the drawer. If the drawer's secondary obligation is to continue no longer than is required for prompt collection, however, there is actually little reason left for giving him an immediate discharge when it is the holder who procures certification. In view of the unreality today of the requirement that the holder should demand

fact to be a check, and becomes a promise to pay. Accordingly the rules which govern a check no longer govern this instrument."

¹¹³ Chancellor Kent, writing in 1828 (3 KENT'S COMM. (1st ed. 1828) 58) traces the rule as to checks in general no further back than his own decision in *Conroy v. Warren*, 3 Johns. Cas. 259 (N. Y. 1802), where he appears to reach his conclusion without prior authority. The drawer had withdrawn his account after giving the check. Sec. 186 N. I. L. codifies the common law rule, "A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability to the extent of the loss caused by the delay." It seems generally to have been taken for granted that except in so far as he suffers loss, the drawer of a check remains liable indefinitely or until the statute of limitations has run. However, a check is a demand bill and subject to the rules applying to demand bills, except as otherwise provided. Sec. 185. Under §71 the drawer of a demand bill is discharged if it is not presented within a reasonable time after the last negotiation, without reference to any loss. Technically, therefore, two periods of reasonable time are set up, one measured from the time of issue of the check and the other from the time of the last negotiation, with different results.

¹¹⁴ 284 Mass. 96, 187 N. E. 94 (1933). The check, certified for the drawer, was not presented until after the lapse of at least three days more than would have been allowed for the presentment of an uncertified check. This is possibly the only direct holding in the case of a certified check; but several cases contain dicta that to charge the drawer of a certified check presentment must be made, as upon an ordinary check, before the close of business of the day after it is received, where bank and payee are in the same town. *Bickford v. First Nat. Bank of Chicago*, 42 Ill. 238 (1866); *Andrews v. German Nat. Bank*, 56 Tenn. 211 (1872).

¹¹⁵ The matter is of further importance to the holder where, though drawer and holder are within the same jurisdiction, the bank is in another. Of course the alternative, in a suit against the drawer, of asking the jury to determine what might ultimately be paid out upon the bank's liquidation is not exactly scientific. It has been proposed to amend §186 of the Negotiable Instruments Law to clarify the matter. See HANDBOOK, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS (1933) 204.

¹¹⁶ Section 74 (3) of the English Bills of Exchange Act provides for the same effect in the case of the uncertified cheque, by giving the holder a claim against the bank to the extent to which the drawer is discharged.

cash the drawer might well be asked to stand sponsor of his bank at least so long.¹¹⁷ Both cases could then be put on the same footing, but of course this would nullify much of the mental effort in this connection on the part of judge and lawyer during the last half century, and for that reason is simply unthinkable.

All of which prompts an inquiry whether the certified check is actually so *sui generis* as supposed, if the question may be so expressed. A check is a bill of exchange drawn upon a bank payable upon demand, at least that is the way the draftsman of the N. I. L. conceived of it in the 90's.¹¹⁸ As late as 1860, however, the question was still in issue, when the court in *Keene v. Beard*¹¹⁹ had to decide whether or not an indorser of a check should be liable to a remote indorsee, as upon a bill of exchange. And, of course, as pointed out above, the *Willets* case¹²⁰ had only a few years before definitely put the bank's certification obligation upon the same footing as that of an acceptance of a bill. It was clearly therefore not going beyond the prior case law to generalize the matter in the N. I. L., although it was deemed necessary to make express exception to provide for certain supposed differences.

Even earlier in the century many courts had said, rather loosely, that the check was a bill of exchange,¹²¹ notwithstanding the view was disapproved by Mr. Justice Story.¹²² He saw many differences and his views carried weight, enough at least to delay complete identification of the two for a time. One was entitled to days of grace the other not, a distinction, which if ever valid,¹²³ is now of no moment since days of grace have been abolished.¹²⁴ One was drawn against

¹¹⁷ At least the holder may inquire whether the drawer is good without discharging him. *Simpson v. Pacific, etc., Ins. Co.*, 44 Cal. 143 (1872). After all, one of the principal functions of a bill or check is to keep money *out of circulation*. This purpose would be furthered by permitting the holder to have the check certified and collected through usual banking channels, without making it an automatic discharge of the drawer.

¹¹⁸ NEGOTIABLE INSTRUMENTS LAW §185.

¹¹⁹ 8 C. B. (N. S.) 372, 380 (1860). The court supported the conclusion that the indorser was liable by resort to the analogy with the bill of exchange, and in comparing the two observed, "though in practice the banker does not *accept* the draft [check] he might for ought I know do so."

¹²⁰ *Willets v. The Phoenix Bank*, 2 Duer 121 (N. Y. Super. Ct. 1853).

¹²¹ Upon the issue of whether the drawer could be sued before presentment to the bank, *Cruger v. Armstrong*, 3 Johns. Cas. 484, 490 (N. Y. 1802); *Harker v. Anderson*, 21 Wend. 372 (N. Y. 1839). Upon the question of whether it could be accepted orally, *Barnet v. Smith*, 10 Foster 256 (N. H. 1855).

¹²² STORY, PROMISSORY NOTES (1845) 621.

¹²³ *Id.* at 616, where this is cited as a distinction between bills and checks. However, in his work on *Bills of Exchange* (1843) 418, he states that no days of grace were allowed on demand bills, although they were allowed on sight bills. The distinction, therefore, would seem to be between demand bills or checks and time bills.

¹²⁴ NEGOTIABLE INSTRUMENTS LAW §85. The distinction between demand bills and sight bills is eliminated by §7.

"money in bank" the other against general credit, another supposed difference not true in fact, for bank deposits as every one knows today are not so much *made*, as *created* by loan. Again, the drawer of a check was to be regarded as a principal debtor¹²⁵ and, as the N. I. L. now provides, not to be wholly discharged by delay in presentment,¹²⁶ while the drawer of a bill was something else again. Here too the difference was perhaps only one of words for the drawer of a bill is surely as much a principal debtor in his dealings with the payee as is the drawer of a check—and both are, or should be, creditors of the drawee. Moreover, it is not at all clear that even the drawer of a bill is *wholly discharged* by delay in presentment,¹²⁷ though to concede this may require some restatement of widely accepted principles to the contrary.

¹²⁵ As expressed by Nisbet, J., "The drawer of a check is not a surety, but a principal debtor; he is an original undertaker to pay. . . . [The check] is an appropriation of so much money, belonging to the drawer in the hands of the drawee, to the holder, there to remain until called for." Whereupon he reasoned that the drawer had no right to complain of delay unless there had been some injury. *Daniels v. Kyles*, 1 Ga. 304, 305 (1846).

¹²⁶ NEGOTIABLE INSTRUMENTS LAW §186.

¹²⁷ Text writers generally state the rule to be that failure to make due presentment of a bill discharges the drawer both upon the bill and upon the underlying consideration, citing some authority and much dicta. *Smith v. Miller*, 43 N. Y. 171 (1870); 3 DANIEL, NEGOTIABLE INSTRUMENTS (7th ed. 1933) §1467; BYLES, BILLS OF EXCHANGE (19th ed. 1931) 204. Chalmers, however, in the latest edition indicates some degree of doubt as to the finality of the rule by stating, "such party, it seems, is also discharged from liability upon the debt." BILLS OF EXCHANGE (10th ed. 1932) 157. And a footnote asks—without answering—the pertinent question, "Must the party discharged be prejudiced by the omission?"

The Uniform Law of Bills and Notes, approved at the International Conference held under the auspices of the League of Nations at Geneva in 1930, (C. 360. M. 151. 1930. II., and see *supra* note 77), leaves the solution of this problem to the separate determination of each country. Art. 15, Annex II. By the law of France today both the drawing of a bill and its indorsement operate as an assignment of whatever claim the drawer may have against the drawee at the time the bill comes due, giving the holder a direct right of action against the drawee of an unaccepted bill. This means that although the drawer is discharged by delay in presentment, for example, the holder nevertheless has such right against the drawee as the drawer would have in the premises. THALLER et PERCEROU, TRAITÉ ÉLÉMENTAIRE DE DROIT COMMERCIAL (7th ed. 1925) No. 1419 *et seq.*; Wahl, *Die französische Wechselprovisionslehre* (1930) 4 *Zeitschrift für ausländisches und internationales Privatrecht* 405.

By the German law, where the holder of a bill, because of delay in presentment or the statute of limitations, has lost his recourse on the bill against prior parties, he may yet recover from the drawer or the drawee the amount to which either has been unjustly enriched thereby. Law of June 21, 1933, 1933 WECHSELGESETZ art. 89.

Nor does it appear that there is any direct holding either in the United States or England which would preclude recovery by the holder, under the same doctrine of unjust enrichment, of the amount by which the drawer of a bill benefited by the discharge. See *Commercial Investment Trust Co. v. Lundgren-Wittenstein Co.*, 173 Minn. 83, 84, 216 N. W. 531, 532 (1927), in which the court suggests that the check rule of *pro tanto* discharge would apply in the case of a demand bill. See also, as to time bills, *Mogadara v. Holt*, 1 Holt, K. B. 113, 90 Eng. Repr. 961. (1692).

When one looks still further back, however, it is evident that Mr. Justice Story had considerable support for his views. In the seventeenth century, when the English merchant began to draw orders upon his goldsmith banker,¹²⁸ it does not appear that he thought he was applying to the new institution of banking the already well known bill of exchange device.¹²⁹ The goldsmith receiving deposits of coin or valuable chattels was accustomed to issue a "running cash note," possibly the ancestor of the promissory note,¹³⁰ which carried the obligation of the banker to the holder; but because the amounts were not standardized circulation was not convenient. Or the goldsmith might issue a "depositor's list," something akin to the duplicate deposit slip or the commercial bank passbook—and of no more assurance to one dealing with the depositor. Merely to avoid the necessity of personal appearance, the goldsmith later became content to allow a transfer or withdrawal upon the written order of the depositor.¹³¹ It is to this device probably that the check is to be traced;¹³² in fact some of the original characteristics still persist.¹³³ But whatever its lineage it must be remembered the check is now, by law, a bill of exchange drawn upon a bank payable on demand.

Moreover, one may well doubt whether the carefully worked out differences between accepted bills and certified checks are as real as they seem. These probably grew out of a failure to differentiate demand bills from time bills. It is only the latter which, being generally accepted before maturity, have been looked upon as two name paper. Demand bills, like checks, are usually paid on presentment. And, as might be expected, there is extremely little "law" with respect to acceptances upon demand bills; it was even doubted at one time that they could be accepted.¹³⁴ And it is true that, if one omits the accepted

¹²⁸ See THE MYSTERY OF THE NEW-FASHIONED GOLDSMITHS OR BANKERS, published in 1676, and incorporated by Martin in his book, *Grasshopper in Lombard Street* (1892) 285. In England the goldsmith became a banker of a sort about the year 1646, or somewhat before. But he was more a warehouseman than a modern banker. POWELL, *EVOLUTION OF THE MONEY MARKET* (1915) 58, 62. Upon the continent banking had a somewhat earlier start. 8 HOLDSWORTH, *HISTORY OF ENGLISH LAW* (1926) 178.

¹²⁹ POWELL, *op. cit.*, *supra* note 128 at 102. Holdsworth, however, stated that from the beginning the check was regarded as a bill of exchange. *Op. cit.*, *supra* note 128, at 190.

¹³⁰ POWELL, *op. cit.*, *supra* note 128, at 99, *et seq.*

¹³¹ The earliest cheque which has been preserved is dated April 12, 1671. "The earliest printed cheques are those of Child's, and are believed to date from 1762." *Id.* at 103, citing PRICE, *LONDON BANKERS* 28.

¹³² BISSCHOP, *RISE OF THE LONDON MONEY MARKET* (1910) 55.

¹³³ For example, the view that the death of the drawer revokes the authority of the bank to pay the check. 3 DANIEL, *NEGOTIABLE INSTRUMENTS* (7th ed. 1933) §1817.

¹³⁴ See *Bank v. Leach*, 52 N. Y. 350 (1873), distinguishing between the check and the time bill.

accommodation bill, which may conceivably be drawn at demand on occasion, it is only when a drawee may wish to accept payable at his bank in lieu of giving his check or when a banker's draft is accepted during collection while indorsements are being completed, that the thing happens at all. In this state of affairs one would be rash to predict that where the holder of a demand bill has it accepted the drawer actually continues liable.¹³⁵ It would be fully as easy to say that a reasonable time for presentment for payment has run, thus discharging secondary parties, whenever the holder has brought the paper to the drawee—unless, indeed, he may be given a brief time thereafter, as suggested above in the case of checks, in which to make collection. At all events the difference is not great.

Of course, all this is not to say that there are no important differences between certified checks and accepted bills, even accepted demand bills, for the contrary is the case.¹³⁶ But the differences do not lie so much in the form¹³⁷ of the instrument as in the safeguards being thrown around the drawee's obligation in the one case as compared with the complete absence of any such thing in the other. The statutory requirements forbidding, under threat of heavy punishment, the certification of any check except it be drawn against actual deposits¹³⁸

¹³⁵ See CHALMERS, *BILLS OF EXCHANGE* (10th ed. 1932) 162, where he refers to a possibility of accepting a demand bill payable at a bank.

¹³⁶ As an example, there have been serious inroads made in the check cases on the *Price v. Neal* doctrine. Indeed many courts, in allowing the bank to go to extreme lengths to correct its errors—so long as the person procuring certification has not changed his position—have not even seen that the rule developed in the case of bills had any application. *Irving v. Wetherald*, 36 N. Y. 335 (1867), set the example and it has been widely followed. See *Dillaway v. Northwestern Nat. Bank*, 82 Ill. App. 71 (1898); *Second Nat. Bank v. Western Nat. Bank*, 51 Md. 128 (1878); *Metropolitan Co. v. Bank of U. S.*, 259 N. Y. 365, 182 N. E. 18 (1932), noted in (1932) 46 HARV. L. REV. 151; *Security Savings Bank v. King*, 69 Ore. 228, 138 Pac. 465 (1914). In the *Metropolitan Co.* case the bank had overlooked its lien on the drawer's account. *Contra* in result, though an extra day had elapsed: *Riverside Bank v. Bank of Shenandoah*, 74 Fed. 276 (C. C. A. 2d, 1896). Where the bank has paid cash or credited the holder, instead of certifying, courts have been more reluctant to allow the bank to correct its error. 2 MORSE, *BANKS AND BANKING* (6th ed. 1928) §§451, 455. It is interesting to note the willingness of the courts to analyze these cases to find a change of position, while in the question whether an antecedent debt constitutes value, which likewise must be justified on an estoppel or change of position basis, the thing early crystallized into a hard and fast rule, not admitting of analysis. Both results, however, favor the banker.

¹³⁷ See BERLE, *LIQUID CLAIMS AND NATIONAL WEALTH* (1934) 175, in which this failure to distinguish form from the substance of the differing underlying transactions in the development of commercial paper is discussed.

¹³⁸ The National Bank Act created a precedent for such statutes. 3rd March, 1869, c. 135, 15 STAT. 335; REV. STAT. §5208. This act specifically provides that the bank shall be liable to an innocent holder notwithstanding the violation by the certifying officer. A Michigan statute without such specific provision has been interpreted to the same effect. *Union Trust Co. v. Preston Bank*, 136 Mich. 460, 99 N. W. 399 (1904); *Bank v. Union Trust Co.*, 158 Mich. 94, 122 N. W. 547 (1909). Over half the states have similar statutes. See PATON'S DIGEST OF LEG.

did little more than to spell out the public conception of certification as an assurance that the banker had real money in hand. In fact there was no more money than always¹³⁹ but it did discourage signing officers somewhat from being unduly generous with the bank's obligation. But as banking becomes more stable, particularly as deposits are guaranteed by the Federal government,¹⁴⁰ it becomes very clear that the certified check moves in an environment quite different from that of the merchant's bill of exchange. The day of the independent—and hazardous—private banker has long since passed. And though the certified check is still not drawn against actual "money in bank," perhaps it may come to be regarded as substantially the equivalent of that.

Viewed from this angle the certified check has reached a new stage in its development. Though akin to money it has advantages not possessed by money; the indorsement requirement affords the holder a considerable protection and control, while money, as has been said, has no earmarks. It becomes something of an anachronism, moreover, to speak any longer of a secondary liability on the part of the individual drawer and indorser. As in the case of corporate and municipal securities the principal obligation overshadows all else.¹⁴¹ It is probable that the writers who criticized the early *Born* decision so vehemently, though they argued their case very technically, had much this conception of the effect of certification. Their vision, however, was destined to be shattered, somewhat rudely, by the depression of 1893, and the earth-bound imagination of the courts of that time. Whether the present is a more favorable time to launch the view that certification—whether for holder or drawer—*should* discharge *all* secondary parties may perhaps

Op. (1926) *op. 29a*. Overcertification appears to have been more or less common at one period. *Bank of Republic v. Baxter*, 31 Vt. 101 (1858); *Espy v. Bank of Cincinnati*, 85 U. S. 604, 21 L. ed. 947 (1873).

¹³⁹ It is still possible to take a depositor's note, covering the proceeds into his account, and then to certify his checks against the amount—a bookkeeping transaction but entirely legal. The distinction lies in the fact that many people ordinarily pass upon the note transaction while certification can be by the teller alone. The theory that the bank can loan its money but not its credit is also illustrated in the guaranty cases. *Bowen v. Needles Nat. Bank*, 87 Fed. 430 (C. C. S. D. Cal. 1898); *id.*, 94 Fed. 925 (C. C. A. 9th, 1899); *Merchant Bank v. Baird*, 160 Fed. 642 (C. C. A. 8th, 1908). But the distinction, if it ever existed, was exploded when national banks were permitted to issue letters of credit. *Border Nat. Bank v. Am. Exch. Nat. Bank*, 282 Fed. 73 (C. C. A. 5th, 1922).

¹⁴⁰ THE BANKING ACT OF 1933, 48 STAT. 168, 12 U. S. C. A. Supp. VII §264 (1933). Whether the holder of a certified check is included as a depositor within the protection of the deposit guaranty provision is not certain. However, the holder of a certified check was held not to be a depositor protected by the guaranty fund in Kansas. *Lloyd v. Butler County State Bank*, 122 Kans. 835, 253 Pac. 906 (1927). See further *Lumos Cotton Gin Co. v. Walker*, 195 Ala. 552, 70 So. 754 (1916).

¹⁴¹ See Steffen, *A Proposed Uniform Act Making Investment Instruments Negotiable* (1934) 34 COL. L. REV. 632, 645.

be doubted. It may be that the way to do is to await the outcome of events; if few more banks fail, secondary liability will in fact become a purely academic matter, though it may still take at least another generation for the courts to awake to the situation and treat payment by certified check as a discharge and not as conditional¹⁴² settlement only.

THE NEW INSTRUMENT THEORY

When this picture of an increasingly important certified check is set off against the confusion now prevailing, as first above described, the contrast is not reassuring. So far from being about to enter upon a new estate the institution appears to be actually sickening and perhaps about to die. Some banks do not certify checks at all any longer; many refuse to certify except for the drawer; and all apparently make use of lawyer drawn phrases of one kind or another to absolve themselves from risk. The whole thing may be called shortsighted, since the banker gains as much as anyone else in the community when commercial obligations are liquidated promptly and with a minimum of uncertainty. Payment when made should be final, or as nearly so as may be, if transactions are to move freely. But shortsighted or not, the situation exists. There is no gainsaying the point, therefore, that some effort should be made to clear away the ills that beset certification and to give direction to its future growth.

At the core of the banker's present discomfiture, insofar as certification matters trouble him at all, is the action of the Illinois and California courts in putting all loss upon the bank where altered paper is certified. To those who see negotiable instruments questions only through the eyes of the bona fide purchaser, without counting costs, those decisions should be codified without qualification. If the bank must take a dead loss, since recourse against the forger is not promising, it can of course insure. Why not? The court in the *Wells Fargo* case, in fact, went out of its way to deny the bank any other recourse by saying that the holder makes no warranties to the drawee.¹⁴³ This was the Ames dictum, the holder and the drawee bank deal at arms length.¹⁴⁴ But while there is reason apparent for charging the drawee with responsibility for the

¹⁴² See 3 DANIEL, NEGOTIABLE INSTRUMENTS (7th ed. 1933) §1447, *et seq.*

¹⁴³ *Wells Fargo Bank & Union Trust Co. v. Bank of Italy*, 292 Pac. 281, 285 (Cal. App. 1930). And the further holding, that the drawee "admits" the existence of the payee—even when the name is the substituted name of the forger—works to the same end by estopping the bank from raising any question on the point, even as regards the person procuring the certification.

¹⁴⁴ The case is presented also where share certificates are offered for transfer. See Ames, *Forged Transfers of Stock: Another View* (1904) 17 HARV. L. REV. 543. But the Ames view has not been followed in these cases. *Starkey v. Bank of England*, [1903] A. C. 114. For general discussion see Steffen, *A Proposed Uniform Act Making Investment Instruments Negotiable* (1934) 34 COL. L. REV. 632, 654.

regularity of its drawer's signature and for the adequacy of his account—both matters peculiarly within the bank's knowledge—the same cannot be said for alterations in the body of the paper. On generally accepted risk analysis principles¹⁴⁵ it is the person who takes the paper from the forger, often at a substantial discount,¹⁴⁶ often with more than a suspicion of the fraud,¹⁴⁷ who should take this risk.

The first suggestion, therefore, is to provide that the person who presents a check for certification warrants¹⁴⁸ to the bank not only that he has title to the item but that it has not been materially altered. The purchaser *after* certification, however, should be deemed to make no warranty to the drawee, either by indorsement or presentment for payment, except of course that his title to the item *as certified* is good.¹⁴⁹ This suggestion proceeds upon the theory that, upon certification for the holder, the check is in effect paid—even as pictured by the court in

¹⁴⁵ See Turner, *Revision of the Negotiable Instruments Law* (1928) 38 YALE L. J. 25, at pages 27 to 30, for a formulation of principles. Of course if the alteration can be easily detected—even though only by a skilled banker—it is necessary that payment, and by parity of reasoning certification also, be refused, for the bank is not given a discharge except for payment in due course. See NEGOTIABLE INSTRUMENTS LAW §88.

¹⁴⁶ This profit differential in favor of the purchaser serves as a means of self-insurance. By contrast the bank must pay full face value on presentment.

¹⁴⁷ This may be a very real factor but one at the same time very difficult to establish as a certainty. When the paper comes to the bank, however, as in the Illinois case, it is given no opportunity to weigh the situation. Insofar as the relative ability of the parties to avoid the risk is a factor in these cases, therefore, it is clear that the holder has the greater, in fact the only, opportunity so to do.

¹⁴⁸ There have been many *dicta* in the cases to the effect that the holder makes some warranty to the drawee upon presenting paper to the drawee for payment. See *Judge v. West Phila. Title & T. Co.*, 68 Pa. Super. Ct. 310 (1917). This case and several others are quite properly criticized in Brannan's *Negotiable Instruments Law* (5th ed. 1932) 699, 748, as having no support under §§65 and 66 N. I. L., since those sections provide only for warranties to subsequent holders, not to the drawee. It, of course, does not follow that a court may not treat the matter as one of omission ruled by the common law. That there is authority prior to the act to the effect that a holder makes "a representation and warranty" to the drawee that the paper he presents has not been raised, see *City Bank v. National Bank*, 45 Tex. 203 (1876). It will be observed that by putting recovery on a contract basis the drawee's claim is lifted out of the uncertainties and delays attendant upon a recovery as for money paid under mistake of fact, the present basis of the drawee's action.

¹⁴⁹ It may perhaps be questioned why the holder *after* certification should not be responsible for alterations occurring between the time of certification and his purchase of the paper. Some courts have held that an overpayment by the bank on these facts may be recovered back. *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A. C. 49; *Nat. Bank of Commerce v. Nat. Mechanics Banking Ass'n of N. Y.*, 55 N. Y. 211 (1873). It is believed, however, that since the bank has—or should have—a complete record of the amount for which it certified, the better rule would be to require it to ascertain at its peril the amount before making payment. There is strong support for this position. See *United States v. National Exchange Bank of Baltimore*, 270 U. S. 527, 46 S. Ct. 388, 70 L. ed. 717 (1926); *Clews v. Bank of New York Nat. Bk. Ass'n.*, 114 N. Y. 70, 20 N. E. 852 (1889).

the *Leach* case¹⁵⁰ in holding that the drawer was discharged—and the bank is put in much the same position as if it had taken up the check and issued its cashier's check instead, as is often done. The bank in so doing runs only the usual business risks involved in paying items generally. The purchaser in good faith of the certified item, on his part, takes the instrument in confidence¹⁵¹ and at its face value. There would thus be no need for the banker either to abandon the practice of certifying checks for the holder or to qualify his undertaking so scrupulously.

Actually only a relatively simple provision is needed to clarify this aspect of the problem. And since the matter of warranties to the drawee, as distinguished from warranties in favor of subsequent holders, is one not covered in any respect by the present Negotiable Instruments Law,¹⁵² a section covering the point should be added to the act. Such a provision¹⁵³ could be worded as follows:

- 1 Section 65a Warranty to the Drawee. A person who, as holder,
- 2 without express stipulation to the contrary, indorses an instru-
- 3 ment, or presents an instrument for payment, acceptance or
- 4 certification, by such indorsement or presentment, warrants to
- 5 the drawee:
- 6 1. That he has a good title to the instrument;
- 7 2. That it has not been raised or otherwise materially altered;
- 8 and
- 9 3. That he has no knowledge that the signature of the drawer
- 10 (or of the person making or accepting the instrument pay-
- 11 able at a bank) is forged or unauthorized;
- 12 provided that, where a check or other demand instrument (ex-
- 13 cept one overdue)¹⁵⁴ is accepted or certified, no such warranty

¹⁵⁰First Nat. Bank of Jersey City v. Leach, 52 N. Y. 350 (1873), discussed *supra* note 100.

¹⁵¹Indeed, it would contribute not a little to the holder's confidence if the courts would stiffen their attitude when dealing with the banker defense that certification was made by mistake, that is, in the *Price v. Neal* situation. To force a holder to prove that he has changed his position, in order that he may enforce the bank's obligation, is simply ruinous of confidence—and an exception, apparently, peculiar to certification. See *supra* note 136. The writer of the Note, *Rescission of Certification Induced by Mistake* (1930) 43 HARV. L. REV. 631, while rationalizing the certification cases, failed wholly to appreciate the commercial significance of the problem in approving their result. Even in the letter of credit cases both court and banker have seen the importance of making the issuing bank's undertaking in fact irrevocable, whether or not given under mistake. See Turner, *Letters of Credit as Negotiable Instruments* (1926) 36 YALE L. J. 245.

¹⁵²NEGOTIABLE INSTRUMENTS LAW §65. This provision, fixing the indorser's warranties, applies only in favor of one to whom the paper has been negotiated. There is no suggestion that the section should be amended.

¹⁵³A similar provision has been prepared for adoption in the proposed Uniform Bank Collection Act. See HANDBOOK, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS (1934) 162, 163.

¹⁵⁴Technically a matured time instrument is deemed payable upon demand, at least as regards parties dealing with it thereafter. NEGOTIABLE INSTRUMENTS LAW §7. There seems very little reason for purposes of the present section to treat such paper on the same basis with checks.

14 on the part of any person who shall have so indorsed or pre-
 15 sented it prior thereto shall run in favor of the drawee ex-
 16 cept it designate upon the face of its acceptance or certification
 17 the holder or purported holder for whom it acted, and no war-
 18 ranty on the part of any person who shall so present or indorse
 19 such an instrument after its acceptance or certification,¹⁵⁵
 20 shall extend to any matter except that mentioned in sub-divi-
 21 sion one and that only with respect to the instrument after
 22 its acceptance or certification.

This section would clarify many matters now uncertain from the viewpoint of the paying banker.¹⁵⁶ On the other hand it would cause one and possibly two changes in his certification practice. The first is wholly salutary, that the banker hereafter exercise as much care—and he need use no more—in certifying paper as he has been accustomed to employ in making payments of cash. Indeed the *Wachtel v. Rosen* decision, discussed above,¹⁵⁷ has given him even greater leeway than he has any need of, since his risk in one case should be no greater than in the other. The other point will require more definite change but again it is believed a change for the better. Though many banks, concerned with stop payment questions, have indicated whether they certified for holder or for drawer,¹⁵⁸ it has never been customary to show upon the face of the paper exactly who procured certification. The section as drafted would require this change, partly because the certifying bank should have the information for its own protection, but largely to clear the record for the benefit of subsequent purchasers. At present a person in taking a certified check is unable to tell who may have had it certified, and accordingly he does not know whether the drawer and indorsers have been discharged or not, a very

¹⁵⁵ It might be well to insert at this point the phrase: "Who was not himself a party to any fraud or illegality affecting the instrument nor a holder thereof prior to its acceptance or certification." It may be, however, that the courts can be trusted to deal with the problem satisfactorily as cases arise.

¹⁵⁶ Among these is the matter of the holder's guaranty of prior indorsements. The section makes it unnecessary for the holder to use an express guaranty for the purpose, as is customary, particularly where the bank presenting the paper appears to be an agent only for the forwarder. See *National Bank of Commerce v. Bossemeyer*, 101 Neb. 96, 162 N. W. 503, L. R. A. 1917E 374 (1917). This is accomplished by the words "as holder" in the first line of the section, it being assumed that the phrase includes agent holders as well as all others. In fact it should be noted that the section carries even further in that the instrument is likewise warranted against alteration. The reason for this is the same as that which gave rise to the use of the warranty of indorsements. Whether both matters are covered by the customary phrase, Prior indorsements guaranteed, is perhaps doubtful. *New York Produce Exch. Bank v. Twelfth Ward Bank*, 134 App. Div. 953, 119 N. Y. Supp. 988 (1909). See note, *Interpretations of "all prior indorsements guaranteed"* (1933) 11 N. C. L. REV. 318-20.

¹⁵⁷ *Supra* note 66.

¹⁵⁸ See *supra* note 56.

unsatisfactory state of affairs,¹⁵⁹ but obviously one rather easily remedied.¹⁶⁰

There may be other flies in the ointment, but one which must be considered, concerns the matter of title. Anglo-American law with respect to order paper, except indeed as respects the paying banker in England,¹⁶¹ differs from that of the rest of the commercial world in its insistence upon genuine, duly authorized, indorsements.¹⁶² For many generations the person whose indorsement has been forged, when armed with the action of conversion, has been permitted to follow his instrument into whosoever hands it may have gone. The law of continental Europe, on the contrary, protects the good faith purchaser,¹⁶³ as it does in the situation where altered paper has been accepted,¹⁶⁴ though strangely enough the use of checks at least has never become so widespread there as here. Nonetheless the operation of our rule is particularly disquieting to the person who has taken a certified check—without discount—more or less as though it were cash. Some limitation is suggested.

Fortunately a way out of the difficulty has already been foreshadowed, and this without sacrifice of any of the protection afforded by our present indorsement requirements. As a matter of fact, when a

¹⁵⁹ It is provided without qualification in §188 N. I. L. that "the drawer and all indorsers are discharged" where the holder procures certification. It is difficult to argue that this discharge is personal to the particular holder and does not affect subsequent purchasers, as is the case where defaulted demand paper is further negotiated without notice of dishonor to secondary parties. *O'Keefe v. Dunn*, 6 Taunt. 305 (C. P. 1815).

¹⁶⁰ The suggestion that the bank indicate upon its certification stamp the name of the holder procuring certification would not entail any serious burden. Of course, if and when the suggestion *supra* is adopted eliminating secondary liability in the case of certified paper the point will be of lesser importance. But even in such case it will carry an assurance to the purchaser as to the freshness of his title.

¹⁶¹ *BILLS OF EXCHANGE ACT* §60. See discussion in *LORENZEN, THE CONFLICT OF LAWS RELATING TO BILLS AND NOTES* (1919) 48.

¹⁶² *NEGOTIABLE INSTRUMENTS LAW* §23; *BILLS OF EXCHANGE ACT* §24. And see generally *United States v. Guaranty Trust Co. of N. Y.*, 293 U. S. 340, 55 Sup. Ct. 221, 79 L. ed. 199 (1934).

¹⁶³ Under the Geneva Uniform Law of Bills and Notes (C. 360. M. 151. 1930. II.), which followed the German law on the point, a holder who acquires an instrument in good faith, under an uninterrupted series of indorsements, has a good title notwithstanding that one or more of the indorsements were forged. Art. 16. The same rule is embodied in the Geneva Uniform Cheque Law, (C. 294. M. 137. 1931. II B.), Arts. 19, 21. Concerning this "most striking conflict between the Anglo-American and Continental systems," see *Hudson and Feller, Unification of Laws of Bills of Exchange* (1930) 44 *HARV. L. REV.* 333, 354; *CHALMERS, IN LEAGUE OF NATIONS UNIFICATION OF LAWS RELATING TO BILLS OF EXCHANGE AND PROMISSORY NOTES* (1923) 103.

¹⁶⁴ The Geneva Uniform Law of Bills and Notes (C. 360. M. 151. 1930. II.), provides: Art. 69, "In case of alteration of the text of a bill of exchange, parties who have signed subsequent to the alteration are bound according to the terms of the altered text; parties who signed before the alteration are bound according to the terms of the original text." The same rule is contained in the Geneva Uniform Cheque Law (C. 294. M. 137. 1931. II.B.), Art. 51. See *supra* note 77.

check is certified for a holder—if the newly issued instrument picture is to be fully respected—the bank's certification obligation, at least, should be stripped of all prior defect of title questions, as fully as if the bank had issued its own cashier's check in payment. Were this fully recognized the result would be to bring our law and that of the continental countries closely together at this point, though of course no rights to the certified paper could thereafter be acquired in this country except by indorsement in due course. Nor, of course, would the holder be given any recourse to parties prior to the person procuring certification. As for the person whose indorsement had been forged, his rights could be worked out as though he still held the check presented for certification.¹⁶⁵ In other words a sharp line would be drawn at the point of certification. The result should be greatly to ease the transfer of certified paper and at no expense to the traditions.

The matter, once more, can be rather easily handled by the addition of a provision to the Negotiable Instruments Law. The present section 62 of the act,¹⁶⁶ which gave the trouble to the Illinois and California courts, was quite evidently drafted with only the time bill of exchange in mind. When faced with the problem whether to force the certified check into the time paper mold or to rework the section, those courts chose to do the latter, with the results which have been seen. Chalmers, the draftsman of the section of the British act after which the American section 62 was patterned, gave very little if any thought to the problem of the accepted demand bill¹⁶⁷ and of course had had no experience with the certified check. In fact there would be little cause to mention the accepted demand bill even now, but since, as has been suggested,¹⁶⁸

¹⁶⁵ The situation is similar to that where a registered bond has been transferred upon a forged indorsement, a bearer instrument being issued in its stead. In such case the issuing company is liable to the person whose indorsement was forged and also to the purchaser of the transferred instrument. See *Davis v. The Bank of England*, 2 Bing. 393 (C. P. 1824), and general discussion, Steffen and Russell, *Registered Bonds and Negotiability* (1933) 47 HARV. L. REV. 741, 747. The comparable situation as to share certificates at common law is reviewed in *Rand v. Hercules Powder Co.*, 129 Misc. 891, 223 N. Y. Supp. 383 (1927).

¹⁶⁶ There is obviously no need to amend §62 of the N. I. L. since that section has never been construed to make the acceptor of time paper liable according to the altered tenor of the paper at the time of acceptance. And even in Illinois and California the adoption of the proposed section relative to checks and demand paper would probably suffice to point the distinction.

¹⁶⁷ BILLS OF EXCHANGE ACT §54. See CHALMERS, BILLS OF EXCHANGE (9th ed. 1927) 214 *et seq.*

¹⁶⁸ Beutel, *Bank Collections Act* (1935) 9 TULANE L. REV. 378, 388. It is true that Beutel fails to make any distinction between time and demand paper within §62. He may consider that the two decisions respecting certified checks, one in Illinois and the other in California, have completely reversed the settled Anglo-American law on the point as respects time bills. In so doing he would have no decided case in his favor and the position as regards certified checks is itself by no means generally approved. The cases are collected in BRANNAN, *op. cit.*, *supra* note 148, at 607 *et seq.*

it should probably be put on the same footing with the certified check, rather than upon that of the accepted time instrument, the proposed section is drafted broadly to cover both.¹⁶⁹ The point as regards demand bills is of minor practical consequence. The following is accordingly suggested:

1 Section 62a. LIABILITY OF ACCEPTOR OF DEMAND
 2 INSTRUMENT. The acceptor by accepting or certifying a
 3 check or other demand instrument, at the request of a holder or
 4 purported holder, without express stipulation to the contrary,
 5 admits the matters and things mentioned in section 62 and in
 6 addition engages to pay the instrument, to the person so pro-
 7 curing it to be accepted or certified, according to its tenor
 8 or purported tenor as presented, that is to say if it has
 9 been raised or otherwise altered according to its tenor as
 10 so raised or altered, but subject to any warranty as mentioned
 11 in section 65a.

12 The person so procuring acceptance or certification shall
 13 have power to negotiate the instrument and a subsequent holder
 14 in due course thereof shall hold it as so accepted or certified
 15 free of any defect of title on the part of the person so pro-
 16 curing acceptance or certification or of any prior party,¹⁷⁰
 17 but without any rights against any such latter party upon or
 18 in connection with the instrument. Where the person so pro-
 19 curing acceptance or certification is a purported holder,¹⁷¹ the
 20 real owner may draw up a copy of the instrument as presented
 21 for certification and have such rights on and in connection
 22 therewith as against all parties prior to such holder in due
 23 course, including the drawee,¹⁷² as he would have had upon
 24 the original instrument had it not been so accepted or certi-
 25 fied,¹⁷³ and no others.

The implications of this provision deserve a further word of comment. The bank's obligation upon certification would always be in

¹⁶⁹ By so doing any need to distinguish closely between certification and acceptance of demand paper is avoided.

¹⁷⁰ This provision is extremely important if the holder after certification is to be fully protected. For example, in case a check once delivered to a payee were to be stolen and the name of the forger substituted for that of the payee, there would be nothing whatever in present law to prevent the payee from suing any subsequent party to whom it might be negotiated in conversion—and that, whether the item had been certified after or before the alteration. Which, of course, would cut away many of the supposed advantages to be gained by the construction put on §62 N. I. L. by the Illinois and California courts.

¹⁷¹ Either because of a missing prior indorsement or because a purported indorsement may have been forged or made without authority.

¹⁷² The point is in conflict whether a drawee which has paid an instrument at the request of someone holding through a forged indorsement should be liable in conversion. The cases are collected in BRANNAN, *op. cit.*, *supra* note 148, at 1070 *et seq.*; and note (1934) 12 TEX. L. REV. 226-8.

¹⁷³ This assumes that the acceptance in such case would not be binding on the drawee in favor of the person whose indorsement was forged, as is usually held. See particularly *First Nat. Bank v. Whitman*, 94 U. S. 343, 24 L. ed. 229 (1876).

terms, at least, to pay to the order of the person who as holder had procured the certification, even although he may have stolen the paper and perhaps have raised it in amount. It will be observed, however, that in case he were a forger its obligation would be met and nullified by his express warranties; he would acquire no additional rights by virtue of the certification. What then of the position of the jeweler in the Illinois case with which this discourse started? Quite positively he would have to refund the amount of the check, contrary to the court's decision and the views of the many apologists¹⁷⁴ for that decision. So far as the bank could determine the check was presented to it by Barnett as a holder, it had been indorsed by the forger, and Barnett should therefore be held to fully warrant his title and the regularity of the paper. To do otherwise would be to put him in an even better position than if he had been paid in cash.¹⁷⁵

Finally, and quite apart from the fortunes of Mr. Barnett, for he no doubt has long since forgotten about the matter, what of the position of the certified check? It is believed that the forward looking banker, zealous of the good name of his own institution, will consider that the bargain here proposed is a fair one. If so, and legislation of the character suggested is adopted,¹⁷⁶ he will discontinue use of qualify-

¹⁷⁴ In addition to those cited *supra* note 12, see Beasley, *Liability of Drawee Bank, etc.* (1931) 10 TENN. L. REV. 87, who sees no basis for any difference between the cases where the drawer's signature is forged and those where some third person may have altered the instrument. His failure to distinguish the two situations is based on nothing more substantial than his opinion that the bank "has the means of possessing a better knowledge of the genuineness of the instrument than a holder who has perhaps never taken a check of the drawer before" and further because, "The drawee bank is in a position to know the custom of the drawer, the usual amounts of his checks, and the person to whom he usually gives checks, all from its previous experience in paying them." *Id.* at 105. The argument is preposterous as applied to a large city account and ignores completely the many other considerations involved. See *supra* notes 146, 147.

¹⁷⁵ See, granting recovery to the drawee in such case, *Farmer's Bank v. Bank of Abbeville*, 29 Ga. App. 472, 116 S. E. 204 (1923). The court said in effect that the holder in presenting paper for payment warrants that it has not been altered. Of course, in the Illinois case, had the forger procured the certification and then sold his paper to the jeweler the case would have been entirely different. In such case under the proposed section there would be no liability on his part to the drawee. Moreover, in either case, the collecting banks handling the certified paper would not be responsible upon warranty to the certifying bank. Its paper would be handled at face value.

¹⁷⁶ There is already legislation in the field which would have to be repealed. See ORE. CODE (1930) 22-1402. This section would probably deny all recovery to a purported holder where the forgers name had been substituted for that of the payee since the banks engagement is stated to be only according to the original tenor of the paper. In addition §4 of the widely adopted Bankers' Collection Code would also have to be repealed or at least modified. For an able discussion of this act with citations to most of the state statutes see Townsend, *The Bank Collection Code of the American Banker's Association* (1933) 8 TULANE L. REV. 21. The preference parts of the statute have recently been held inapplicable to national banks. See Note (1934) 44 YALE L. J. 341.

ing stamps agreeing to pay only according to original tenor. The promiscuous use of the "when properly indorsed" clause, likewise, will go; it would be no longer necessary. The result, it would seem, would be to give the institution a renewal of its lease upon life; checks might well be certified once more as freely for the holder as for the drawer. Instead of the certified check being an instrument to compare unfavorably with the merchant's bill of exchange, as Miller J. regarded it in the *Espy* case,¹⁷⁷ it would have far outstripped the bill as a ready and dependable medium of exchange. If nothing is done, this study, so far from suggesting a blue print for the future widespread use of the certified check, might perhaps better serve as an obituary notice.

¹⁷⁷ *Espy v. Bank of Cincinnati*, 85 U. S. 604, 620; 21 L. ed. 947, 951 (1873).