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tecting a confessed wrongdoer. *Ethically,* it might be claimed that a denial of the privilege invites breaches of confidence; the layman abhors the idea of a minister listening sympathetically to a confession only to turn upon a confiding penitent, announce his wrong to the world, and hand him over into the clutches of the law. A Catholic, firmly wedded to his confessional, and protected in his freedom to worship God as he pleases, would no doubt revolt at the idea of the Father Confessor publishing to the world his sins of the month. But law regards the law of the land as a duty higher than the moral duty arising out of friendship and sympathy; friends are frequently called upon to testify against friends and even the bonds of family kinship are sometimes broken in the vigorous prosecution of those who have broken the laws of the land.

Sociologically, the privilege might be defended because it tends to encourage men to yield to their better natures, confess their past errors, and reform. But sociology is also interested in deterring law-breaking; if we provide a way by which men may relieve themselves of the compulsions to confess, a very important factor in the detection of crime will have been destroyed. *Psychologically,* where the privilege is protected, this enables the criminal to find release for suppressed fears and inhibited worries by confessing to a minister. The minister having given the assurance of divine forgiveness, it would appear that we would have fewer confessions to the police and other authorities and, therefore, more of the wrongdoers would go unpunished, for once the compulsion to confess has found an outlet, there would be no "drive" operating in the criminal's mind tending to force him to confess.

The common law cases show considerable conflict, but His Honor, Judge McRae, was clearly justified in admitting the testimony, though he could have found ample authority to support a contrary opinion. The numerous American statutes point to a tendency away from the "common law" view toward a recognition of the privilege.

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WHEN IS A CHECK PAID—LIABILITY OF COLLECTING AGENT

It is universally conceded that a check given in payment of a debt in the ordinary course of business does not discharge the debt until it be paid, in the absence of any agreement to the contrary. In a recent North Carolina case[1] the plaintiff in suing to enjoin the sale of his

[1] *Litchfield v. Reid,* 195 N. C. 161, 141 S. E. 543 (1928).

land for taxes pleaded payment and offered in evidence his cancelled check which had been endorsed by the tax collector, stamped "paid" by the drawee bank, and charged to plaintiff's account. On the same day that the drawee bank cancelled the check and charged it to plaintiff's account that bank became insolvent. If anything further was done in the way of payment such did not appear on the record. It was shown that the payee got nothing. The trial judge ruled for the defendant tax collector as a matter of law. *Held*—Error. The issue of payment should have gone to the jury since the plaintiff had sustained his burden of showing payment.

In the instant case the question resolved itself into whether the drawer of the check was discharged. If the check was paid his debt was discharged. Since no point was made of the matter in the opinion it must be taken that the insolvency of the drawee bank took place after the check was cancelled and charged to plaintiff's account. If the contrary had been true there would have been no payment in this case because it is certain that cash was not paid, which means that the bank had done no more than assume the debt, and such assumption by an insolvent drawee could not discharge the drawer.[2] However, cash payment of a check by an insolvent bank to one innocent of the insolvency would be irrevocable.[3]

Assuming solvency at the time the check reaches the drawee bank the question arises as to just when payment takes place. It would hardly be possible to fix upon a point of time that would fit every case. As a general proposition it has been said that payment of checks received through the mail or handled through the clearing house occurs at that physical point of time when the drawer's account is charged with the amount of the check.[4] Now charging the drawer's account and cancelling the check is not the exact equivalent of an acceptance by the drawee bank but it does make that bank liable on

[2] *Exchange Bank of Wheeling v. Sutton,* 78 Md. 577, 28 Atl. 563, 23 L. R. A. 173 (1894).

[3] *Hayes v. Beardsley,* 136 N. Y. 299, 32 N. E. 855 (1892).

[4] It is suggested in Paton's Digest that as to checks sent through the clearing house or by mail for payment the physical time of payment is "the point of time when the check is actually charged to the drawer's account." Paton's Digest, Vol. II, p. 1389. In Massachusetts it has been held that where a bank under an agreement to pay the notes of a depositor received one for payment, marked it paid, and made out a remittance check for the amount just before it was informed of the depositor's insolvency, such constituted payment even though no changes had been made on the books of the bank. *Nineteenth Ward Bank v. First Nat. Bank,* 184 Mass. 49, 67 N. E. 670 (1903).

the indebtedness.[5] Up to that point, however, without more, the drawer is not discharged because the owner of the check or his agent has not accepted the credit of the drawee bank in preference to that of the drawer and nothing has passed to the owner of the check. If such owner accepts either a credit with the drawee bank, its acceptance or certification of the check, or its paper in lieu of the check, the drawer is normally discharged because the owner of the check has a right to payment in cash and accepts anything other than cash at his own risk.[6] But it is in the more common case involving collecting agents that the trouble arises. A consideration of that angle of the problem follows herein.

The mere fact that a check has been marked "paid" in the customary manner, without more, simply raises a rebuttable presumption of payment.[7] It seems more logical for a drawee bank to mark a check paid after it has been charged to the drawer rather than before but the inverse order has been followed by some banks.[8] Where this practice is followed there are more likely to be facts to rebut the presumption of payment. In the North Carolina case under consideration the check had been charged to the drawer's account as well as cancelled. Though it did not appear what disposition, if any, had been made of the amount charged to the drawer, in the words of the court, "upon the facts shown by the evidence plaintiff has no concern as to such disposition." The court thought that a jury might

[5] Acceptance by the drawee bank discharges the drawer. See *Lipten v. Columbia Trust Co.*, 185 N. Y. Supp. 198, 194 App. Div. 384 (1920). Merely stamping the check "paid" does not amount to an acceptance. *Hunt v. Security State Bank*, 91 Ore. 362, 179 Pac. 248 (1919). Checks are normally presented for payment and not certification so the mere marking a check "paid" without more does not indicate an intent to become bound on the instrument as an acceptor. Where the drawee bank is also an agent for collection of the check it has been held that there can be no acceptance until the check is charged to the account of the drawer and credited to the account of the remitting bank. *First Nat. Bank of Murfreesboro v. First Nat. Bank of Nashville*, 127 Tenn. 205, 154 S. W. 965 (1913). Under the N. I. L., sec. 187, the certification of a check is made the equivalent of an acceptance.

[6] See *Cleve v. Craven Chemical Co.*, 18 Fed. (2d) 711 (1927).

[7] "In the absence of other evidence a paid check drawn to payee or order is prima facie a receipt from the payee to the drawer. It is not conclusive but is open to explanation or denial." *Patterson v. Bank of Humboldt*, 73 Neb. 384, 102 N. W. 765 (1905). It is the general rule that possession of an instrument by the obligor after maturity raises a presumption of payment. *Vann v. Edwards*, 130 N. C. 70, 40 S. E. 853 (1902); *Poston v. Jones*, 122 N. C. 536, 29 S. E. 951 (1898). That the drawee bank marked a check "paid," debited the drawer's account, and sent him the cancelled check is a stronger case for such a presumption. Since payment is a matter of fact such a presumption is always a rebuttable one.

[8] *First Nat. Bank v. First Nat. Bank, supra*, note 5, is a case illustrative of this practice.

have found from the evidence that the drawee bank had paid the holder of the check. But assuming that the drawee bank had done nothing further than cancel the check and charged the drawer's account, would that have discharged the latter? As already suggested, it is the writer's opinion that it would not have done so, because the process of payment would not be complete even as to the drawer until something in the form of credit or otherwise had passed to the holder of the check.

The drawer of a check is discharged if he has sustained any loss by reason of a want of due diligence on the part of his creditor in presenting the check for payment.[9]

Unless the check is drawn on a local bank it is necessary, of course, to collect it through collecting agents. The cases do not make it clear just what effect this factor has upon the problem as to payment of checks. In spite of the universal practice among banks to make payment in exchange or by keeping mutual accounts with correspondent banks, the common law rule that in the absence of special authorization an agent for collection may accept cash and that only in payment of the debts of his principal still prevails. It is applicable to banks that are acting as agents for the collection of checks.[10]

There are two lines of decisions as to the liability of collecting banks. Under the so-called New York rule, followed by the Federal courts, the original agent is held absolutely liable for the defaults of his sub-agents as an independent contractor for collection while the sub-agents are deemed not to be in privity with the principal, so not responsible to him.[11] But under the Massachusetts rule the original agent may be held responsible for his own defaults, which includes negligence in selecting sub-agents, and the sub-agents are deemed directly responsible to the principal for their defaults as such.[12] The

[9] *Kilpatrick v. Home Building and Loan Ass'n.*, 119 Pa. 30, 12 Atl. 754 (1888). And see note to *Dille v. White*, 10 L. R. A. (N. S.) 541. But if the drawer has not been injured by such want of diligence he is not thereby discharged. *Bull v. Bank of Kasson*, 123 U. S. 105 (1887). It has been held in North Carolina where a debtor had given a cashier's check in payment which check reached the drawee bank after it had closed its doors due to the negligence of the creditor that the debtor was thereby discharged. *Federal Land Bank of Columbia v. Barrow*, 189 N. C. 303, 127 S. E. 3 (1925).

[10] *Federal Reserve Bank v. Malloy*, 264 U. S. 160, 44 Sup. Ct. 196, 68 L. Ed. 617, 31 A. L. R. 1261 (1923).

[11] *Hammerberg v. State Bank of Slayton*, 212 N. W. (Minn.) 16 (1927); *First Nat. Bank of Denver v. Fed. Res. Bank of Kansas City*, 6 Fed. (2d) 339 (1925); and see the collection of cases in 13 Cal. L. Rev. 231, at p. 232.

[12] See collection of cases in 13 Cal. L. Rev. 231, at p. 233.

North Carolina court follows the latter rule.[13] It is thus the one accepted for the purposes of this discussion.

Suppose the collecting agent accepts the draft of the drawee bank for the check. Unless the draft was expressly taken in final payment the receipt of it is only conditional payment as to the drawee bank and such bank would still be liable if the draft were dishonored. If the draft is to be deemed as taken in conditional payment is the drawer of the check thereby discharged? He would not be discharged if he had assented to such conditional payment[14] but in the normal case he is not in a position to give such assent save in advance. An agent for collection may, unless forbidden, accept a check from the debtor himself in conditional payment.[15] The question now is whether he may so accept the draft of the debtor's drawee in payment of the former's check. In a late North Carolina case it was held, without mention of the factor of conditional payment, that where the collecting agent takes the drawee bank's draft for the check the payee's right to have cash is thereby waived and the drawer discharged.[16] The solution seems to be that the drawee's payment to the agent with a draft is not conditional payment at all as to the drawer but final payment. It is treated as conditional here in the sense that the drawee is still liable on the draft in case it is dishonored. Since the drawer is discharged by such payment by the drawee it would be only a fair protection to the payee to hold that the collecting agent accepts such payment at his own risk. Notwithstanding such a holding custom may be strong enough to permit a collecting agent to accept the drawee's draft in payment of a check without thereby incurring liability,[17] though it has been held that such usage is unreasonable.[18] It appears then that such factors may modify the question of the liability of a collecting bank for accepting something other than cash in payment.

The North Carolina Code of 1927, sec. 220 (aa) gives drawee banks the option to pay all checks drawn on them in exchange, unless

[13] Mechem, *Agency*, 2d ed. (1914), p. 685.

[14] *Farmers', etc. Bank v. Union Nat. Bank*, 42 N. D. 449, 173 N. W. 789 (1919). See also *Barnes v. Trust Co.*, 194 N. C. 371, 139 S. E. 689 (1927).

[15] *Bank v. Floyd*, 142 N. C. 187, 55 S. E. 95 (1906).

[16] *Dewey v. Margolis*, 195 N. C. 307, 142 S. E. 22 (1928). Accord, *Palmer v. Harrison*, 141 S. E. 276 (Ga., 1928).

[17] 24 Col. L. Rev. 903. For such a custom or usage to be binding it is not necessary that the principal have actual knowledge thereof. *Hilsinger v. Trickett*, 86 Ohio State 286, 99 N. E. 305 (1912).

[18] *Nat. Bank of Commerce v. American Exch. Bank*, 151 Mo. 320, 52 S. W. 265 (1899).

it be specified thereon to the contrary, "when any such check is presented by or through any Federal Reserve Bank, Post Office, or Express Co., or any respective agent thereof."[19] This statute does not relieve a drawee bank from liability merely upon its giving exchange but leaves it still liable under such circumstances until its exchange draft is paid.[20] Its effect is, if not to modify the common law rule that an agent for collection can accept only cash in payment of the debt owing his principle, certainly to limit the operation of that rule in North Carolina to the extent of the option granted. And it has been held under this statute that it is not negligence for a Federal Reserve Bank to accept exchange instead of cash.[21] That decision is reasonable because under the statute the drawer who does not specify on the check to the contrary immediately agrees that it shall be payable in exchange. And because of this implied assent of the drawer to payment in exchange such payment has been held not to discharge him, but leaves him still liable if the exchange draft is dishonored.[22]

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THE TIME FOR TAKING EXCEPTION TO THE COURT'S CHARGE

Bills of exception were founded on the statute of Westminster 2d (13 Edw. 1) Ch. 31. That statute does not expressly mention at what time the exception is to be tendered, but the reason of the thing, the practice of the common law courts, and the precedents and authorities on the subject, prove that it must be at the time of the trial.[1] When an exception is taken to the charge of the court, it must be tendered before a verdict is rendered by the jury in open court. Otherwise the exception is not available. This was the gen-

[19] *Graham v. Warehouse,* 189 N. C. 533, 127 S. E. 540 (1925).

[20] This statute was called forth by the recent struggle between the Federal Reserve Banks and the small non-par banks in which the former tried to force par clearance upon the latter by presenting checks over the counter for payment in cash. The North Carolina Legislature came to the rescue of the small North Carolina banks involved and enacted the statute in question. The North Carolina court held the statute unconstitutional in *Farmers, etc. Bank v. Federal Reserve Bank of Richmond,* 183 N. C. 546, 112 S. E. 252 (1922), but its decision was overruled by the Supreme Court of the United States on appeal. 262 U. S. 649, 43 Sup. Ct. 651 (1922). For a further discussion of the subject see C. T. Murchison, "Par Clearance of Checks," 1 N. C. L. Rev. 133 and a note by the same writer in 2 N. C. L. Rev. 36. See also 37 Harv. L. Rev. 133.

[21] *Cleve v. Chemical Co., supra,* note 6.

[22] *Ibid.*

[1] *Morris v. Buckley,* 8 S. & R. 211 (Pa., 1822).