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Rights of Holder of Bill of Exchange against the Drawee

Ralph W. Aigler
University of Michigan Law School

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RIGHTS OF HOLDER OF BILL OF EXCHANGE AGAINST THE DRAWEE

IF THE question were put to the average layman whether the holder of a check, to take the most common instance of a bill of exchange, had any effective rights against the drawee bank, it is believed that the almost universal response would be to the effect that of course the holder may insist upon payment by the bank, if there are funds on deposit to cover the amount. And if the same question were propounded to the average lawyer, the reply generally would be — at least if the lawyer had in mind the provisions of the Uniform Negotiable Instruments Law — that the holder had no rights against the bank. It is the purpose of this paper to inquire into the accuracy of these two views.

Orders drawn on particular funds are generally construed as assignments in whole or in part, as the case may be, of the designated fund,[1] and it would naturally follow that the assignee would

[1] Row *v.* Dawson, 1 Ves. 331 (1749); Christmas *v.* Russell, 14 Wall. (U. S.) 69 (1871); Fourth Street Nat. Bank *v.* Yardley, 165 U. S. 634 (1897); Curry *v.* Shelby, 90 Ala. 277, 7 So. 922 (1890); Pope *v.* Huth, 14 Cal. 403 (1859); Walton *v.* Horkan, 112 Ga. 814, 38 S. E. 105 (1900); Brill *v.* Tuttle, 81 N. Y. 454 (1880); Kingman *v.* Perkins, 105 Mass. 111 (1870); Binns *v.* Slingerland, 55 N. J. Eq. 55, 36 Atl. 277 (1896). Many other cases are cited in 2 AM. & ENG. ENC. L., 2 ed., 1059–1061, and in 5 C. J. 922–926. See Tallman *v.* Hoey, 89 N. Y. 537 (1882), representative of the view that valuable consideration must appear to have been given, to make the case one of equitable assignment.

There is perhaps more reluctance to recognize an order for part of a particular fund as an assignment. And there are of course problems of administration and

have his appropriate remedies, whatever they may be, against the debtor.[2] Such orders are not bills of exchange, which must be free of the conditional element. An instrument could not serve the primary functions of a bill of exchange if its honor depended upon the existence or sufficiency of a specified fund. The financial responsibility of the parties thereto, indeed, may be difficult to determine as a practical matter of business, but such difficulty is inherent in any system of exchange built upon credit. The existence and amount of a particular fund would involve inquiries quite out of place in commercial transactions regarding bills of exchange, if they are really to be circulable like money.[3]

That orders on designated funds are interpreted as assignments seems to be due largely, if not entirely, to the fact that they were objectionable as bills of exchange. In *Row* v. *Dawson*[4] the question was whether the payees of an order had a preferred claim over other creditors of the drawer to a fund in the hands of a debtor of the latter. The "draft" was made on S, the deputy of W, "out of the money due to me from Horace Walpole out of the Exchequer." The drawer having become bankrupt, it was decreed that the payee was entitled to be paid out of the fund. The Lord Chancellor[5] said:

"This demand, and the instrument under which the defendants claim, is not a bill of exchange, but a draft; not to pay generally, but out of his particular fund, which creates no personal demand: therefore not a draft on personal credit to go in the common course of nego-

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procedure in such situations not encountered in directions to pay the entire fund.

An order to pay a specified sum "out of any balance due us remaining in your hands" is one drawn on a particular fund. *In re* Hanna, 105 Fed. 587 (E. D. Pa., 1900).

[2] What those remedies may be need not be considered here. To what extent the assignee may proceed at law, and what the proper procedure may be in case the assignment is partial, are problems outside the scope of this paper.

Though the instrument does not itself disclose that it is drawn upon a specific fund, such may still be the fact. Upon proof of such fact it may well be, within the principles hereinafter referred to, that the holder might be able to establish a position as assignee.

[3] The Uniform Negotiable Instruments Law excludes from the class of negotiable instruments those documents payable out of a particular fund. See Section 3.

[4] 1 Ves. 331 (1749).

[5] Hardwicke.

tiation, which is necessary to bills of exchange, by draft on the general credit of the person drawing, the drawee, and the indorser, without reference to any particular fund. . . . Then what is it, for it must amount to something? It is an agreement for valuable consideration before hand to lend money on the faith of being satisfied out of this fund; which makes it a very strong case. If this is not a bill of exchange, nor a proceeding on the personal credit of *Swinburn* or *Gibson,* it is a credit on this fund, and must amount to an assignment of so much of the debt: and though the law does not admit an assignment of a *chose in action* . . . this court does; and any words will do; no particular words being necessary thereto." [6]

If, however, the order is general, the well-nigh universal view has been that in the case of the ordinary bill of exchange [7] the payee acquires no proprietary interest in the fund.[8] The few cases [9] holding the contrary view appear to have been rejected. But such general order in conjunction with other facts may well make out a case of assignment.

There is no prescribed expression or combination of facts requisite to the accomplishment of an assignment. It is a matter

[6] At p. 332. A bill of exchange and an assignment would seem to be two essentially and fundamentally different things. The former, as its terms indicate, is an *order* directed to a party to pay a sum of money; the latter operates to vest in the assignee ownership, legal or equitable, of a fund, or part thereof, in the hands of another. In one case it was necessary for a court to reject a contention that since the drawee had funds in his hands belonging to the drawer the instrument was necessarily an assignment and not a bill of exchange. It was pointed out that bills usually are drawn on funds. Luff *v.* Pope, 5 Hill (N. Y.) 413 (1843). And it is not always easy to determine whether an instrument in question is a bill of exchange or assignment. See Windsor Cement Co. *v.* Thompson, 86 Conn. 511, 86 Atl. 1 (1913).

[7] It is intended hereby to exclude checks, which, though bills of exchange, have some special features.

[8] See the many cases cited in 5 C. J. 916, note 44.

Lord Chief Baron Eyre was mistaken when he said, in Gibson *v.* Minet, 1 H. Bl. 569, 602 (1791), that "The theory of a bill of exchange is, that the bill is an assignment to the payee of a debt due from the acceptor to the drawer, and that acceptance imports that the acceptor is a debtor to the drawer, at least has effects of the drawer's in his hands." In Wolfe *v.* Hart, 40 Nov. Sc. 17, 19 (1885), it is said: "The bill of exchange, which is a mere mercantile instrument in its origin, must remain a mere mercantile instrument and cannot be treated as conveying — even equitably — the funds which are required to pay it."

[9] Corser *v.* Craig, 1 Wash. 424, Fed. Cas. No. 3,255 (D. Pa., 1806) (See Christmas *v.* Russell, 14 Wall. (U. S.) 69 (1871)); Wheatley *v.* Strobe, 12 Cal. 92 (1859) (See Cashman *v.* Harrison, 90 Cal. 297, 27 Pac. 283 (1891)).

of intention to be gathered from the language used in and outside [10] the instrument and from the circumstances, the necessary intention being that the fund shall be appropriated.[11] In *Bank of Commerce* v. *Bogy* [12] Judge Bliss said: "I have found no case where a mere bill, though negotiated for a good consideration, is held of itself, without regard to the intention of the drawer, to operate as an assignment of the debt or fund, or so much thereof as is covered by the bill. Nor have I seen a case where the courts have refused to carry into effect the intention of the parties in relation to such debt or fund." In each case the inquiry is whether an intention to transfer ownership in the fund in the hands of the debtor has been carried out so that thereafter the drawer-assignor has no further control over the fund, authority to collect, or power of revocation.[13]

The question being of the nature it is, it would obviously be futile to attempt any comprehensive statement as to what does or does not amount to an assignment. There are, however, certain factors which more or less earmark the transaction.

(1) If the order is for an amount which represents the precise sum due the drawer from the drawee, the courts appear to be quite ready to find that an assignment has been effected.[14] In *Mandeville* v. *Welch* [15] Mr. Justice Story said:

"In cases also where an order is drawn for the whole of a particular fund, it amounts to an equitable assignment of that fund, and after

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[10] Risley *v.* Phenix Bank, 83 N. Y. 318 (1881); Wolfe *v.* Hart, 40 Nov. Sc. 17 (1885); Rinehart & Dennis Co. *v.* McArthur, 123 Va. 556, 96 S. E. 829 (1918).

[11] Dickenson *v.* Phillips, 1 Barb. (N. Y.) 454 (1847); Kimball *v.* Donald, 20 Mo. 577 (1855); Skobis *v.* Ferge, 102 Wis. 122, 78 N. W. 426 (1899); Rinehart & Dennis Co. *v.* McArthur, *supra;* Venturi *v.* Silvio, 197 Ala. 607, 73 So. 45 (1916). [12] 44 Mo. 13, 17 (1869). [13] Coates *v.* Bank, 91 N. Y. 20, 31 (1883).

[14] Mandeville *v.* Welch, 5 Wheat. (U. S.) 277, 286 (1820); Moore *v.* Davis, 57 Mich. 251, 23 N. W. 800 (1886); Varley *v.* Sims, 100 Minn. 331, 111 N. W. 269 (1907) (check — gift *causa mortis*); Walker *v.* Mauro, 18 Mo. 564 (1853); M'Menomy *v.* Ferrers, 3 Johns. (N. Y.) 71 (1808); Throop Grain Cleaner Co. *v.* Smith, 110 N. Y. 83, 17 N. E. 671 (1888); Kahnweiler *v.* Anderson, 78 N. C. 133 (1878); Gardner *v.* Bank, 39 Ohio St. 600 (1883); *Re* Estate of Taylor, 154 Pa. St. 183, 25 Atl. 1061 (1893) (check — gift *causa mortis*); Lee *v.* Robinson, 15 R. I. 369, 5 Atl. 290 (1886). See also Weber *v.* Salisbury, 149 Ky. 327, 148 S. W. 34 (1912); Bank *v.* O'Byrne, 177 Ill. App. 473 (1913); Phinney *v.* State, 36 Wash. 236, 78 Pac. 927 (1904), all involving gifts of donors' checks.

[15] 5 Wheat. (U. S.) 277, 286 (1820).

notice to the drawee it binds the fund in his hand. But where the order is drawn either on a general or particular fund, for a part only, it does not amount to an assignment of that part, or give a lien as against the drawee, unless he consent to the appropriation by an acceptance of the draft; or an obligation to accept may be fairly implied," etc.

And it is not necessary that the order itself disclose that it is for the full amount; that may be shown by evidence.[16] Some cases of this type, of course, overlap the type first suggested above, in which the order is not a good commercial bill of exchange, because it is drawn on a particular fund.[17]

(2) Where some documentary evidence of the debt due the drawer from the drawee accompanies the order there is strong likelihood that an assignment was intended. In *Robbins* v. *Bacon*,[18] for example, a copy of the account between the parties was attached to the instrument.[19] The indorsement of a deposit ticket to the payee of a check has been held to have the same effect.[20] But the mere exhibition of the deposit slip seems not to have such a result.[21]

(3) If the facts show that the payee took the order in payment (as distinguished from the normal conditional payment) or, perhaps, as security for a debt owing him by the drawer, there is a more ready disposition to treat the transaction as an assignment.[22] This seems to be a sensible conclusion, for the situation

[16] Throop Grain Cleaner Co. *v.* Smith, 110 N. Y. 83, 17 N. E. 671 (1888); Varley *v.* Sims, 100 Minn. 331, 111 N. W. 269 (1907).

[17] See, for example, Lee *v.* Robinson, 15 R. I. 369, 5 Atl. 290 (1886); M'Menomy *v.* Ferrers, 3 Johns. (N. Y.) 71 (1808).

[18] 3 Me. 346 (1825).

[19] See also Moore *v.* Davis, 57 Mich. 251, 23 N. W. 800 (1885); Provident Nat. Bank *v.* Hartnett, 45 Tex. Civ. App. 273, 100 S. W. 1024 (1907); Venturi *v.* Silvio, 197 Ala. 607, 73 So. 45 (1916).

[20] Hove *v.* Stanhope Bank, 138 Ia. 39, 115 N. W. 476 (1908).

[21] Peters *v.* Hardin, 168 S. W. 1035 (Tex. Civ. App., 1912). The trial court in this case had concluded that there was no assignment. The Court of Appeals upheld the conclusion but said: "Had the finding in the case before us been in appellee's favor on the issue of assignment vel non, we would be very much inclined to hold that the evidence warranted such a conclusion, but, after a careful consideration of the facts as presented in the record, we feel unable to say as a matter of law, that the evidence requires a finding in direct opposition to that made by the trial court."

[22] McWilliams *v.* Webb & Son, 32 Ia. 577 (1871); Merchants' and Miners'

would surely be unusual in which a creditor would take as payment of an existing indebtedness a mere order by the debtor on another, since the only recourse which the payee-creditor would have, in the absence of acceptance by the drawee, would be the personal responsibility of the drawer whose debt the instrument given is understood to pay. As to this Mr. Justice Ruger, in *Throop Grain Cleaner Co.* v. *Smith,* said:

"It would be quite absurd to suppose that Allis & Co. [the drawer] intended by the transaction to sell only their obligation upon the drafts as the makers thereof, or that the Farrell Company [payee] supposed they were buying one written obligation of Allis & Co. to apply upon another for the same debt." [23]

(4) Circumstances showing that the taker of the order parted with his property on the faith of the order rather than upon the general credit of the drawer-purchaser indicate that it was the intention that the payee-seller was to have an interest in the fund in the hands of the drawee, in other words, that an assignment was intended. An interesting and leading case of this sort is *Fourth St. National Bank* v. *Yardley.*[24] In that case it appears that the Keystone Bank, in Philadelphia, being embarrassed by a lack of ready cash to pay an indebtedness to the clearing house, applied to the plaintiff bank, another Philadelphia institution, for $25,000 in gold certificates. The proposal of the applicant was to give its own check on its account with its New York correspondent in the sum of $25,000; and a memorandum showing that it had upwards of the amount in question on deposit in the New York bank was exhibited to the plaintiff. Relying on the representations of the applicant and its statements as supported by the memorandum, the plaintiff delivered to the Keystone Bank the certificates requested, and the latter in turn handed the plain-

Bank *v.* Barnes, 18 Mont. 335, 45 Pac. 218 (1896) (taken as security); Throop Grain Cleaner Co. *v.* Smith, 110 N. Y. 83, 17 N. E. 671 (1888); Howell *v.* Mfg. Co., 116 N. C. 806, 22 S. E. 5 (1895); N. Y. Life Ins. Co. *v.* Patterson & Wallace, 35 Tex. Civ. App. 447, 80 S. W. 1058 (1904); Wolfe *v.* Hart, 40 Nov. Sc. 17 (1885) (*semble*); Dixie Lumber Co. *v.* Young, 203 Ala. 115, 82 So. 129 (1919) (security); Dunlap *v.* Bank, 50 Cal. App. 476, 195 Pac. 688 (1921).

[23] 110 N. Y. at 91, 17 N. E. at 674. The correspondence further fortified this view of the transaction.

[24] 165 U. S. 634 (1896).

tiff its check for $25,000. Payment of this check having been refused in New York and the Keystone Bank having gone into the hands of a receiver, the plaintiff claimed to be a priority creditor on the ground that the transaction with the insolvent institution amounted to an equitable assignment of the funds, to the extent of the check, in the New York bank. It was decided that the facts made out a case of assignment. After pointing out that the transaction between the Keystone Bank and the plaintiff bank was so unusual that not only was an explanation of its need by the Keystone Bank in order but also that the plaintiff would not be expected to accede to the request without full security, Mr. Justice White said:

"It follows that the same reason which imperatively required the Keystone Bank to disclose the cause for its request, also rendered it absolutely essential, in order to obtain the loan, that it indicate a specific source or means of payment outside of and beyond its mere general credit. In other words, that it should tender ample security for the loan which it requested. The deduction arises that, as it cannot be reasonably conceived that the loan would have been made without the reference to and assignment of the particular fund from which alone the hope of immediate payment was to be reasonably expected, the parties must have and did intend to create a particular appropriation, charge or lien on the property upon the faith of which they both dealt." [25]

In other cases circumstances have been found to warrant a similar view,[26] as where the bill is taken by the payee, and money advanced, on the understanding that proceeds of a shipment to the drawee would be applied to payment thereof,[27] or where re-

[25] At p. 651. It is clear that the Court considered the transaction between the banks an extraordinary one, and that under the circumstances it was quite unthinkable that the plaintiff bank would advance the certificates without a distinct understanding that the fund in the New York bank should stand as security. See also First State Bank *v.* Stockmen's State Bank, 42 S. Dak. 585, 176 N. W. 646 (1920). Although the decision in the latter case was rested on a general theory of estoppel, the result might well have been based on the ground announced in the Yardley case.

Cf. Peters *v.* Hardin, 168 S. W. 1035 (Tex. Civ. App., 1912).

[26] Muller *v.* Kling, 209 N. Y. 239, 103 N. E. 138 (1913); Bank *v.* Swift, 134 Tenn. 175, 183 S. W. 725 (1915).

[27] Cowperthwaite *v.* Sheffield, 3 N. Y. 243 (1850); First Nat. Bank *v.* Rogers, etc., Co., 151 Minn. 243, 186 N. W. 575 (1922).

mittances have been made to the drawee for the purpose of having the order honored.[28]

In *First National Bank* v. *Rogers-Amundson-Flynn Co.*,[29] it was the understanding[30] between a stock buyer and the plaintiff bank with which he did his banking business that funds to take care of checks issued to farmers in payment of stock should be provided out of the proceeds of drafts drawn by the buyer upon the defendant, a dealer in live stock in St. Paul. In spite of notice of this arrangement, the defendant-drawee failed to honor the draft, but used the proceeds of the shipment to apply upon an indebtedness due it from the drawer. It was concluded that the defendant was bound to pay the plaintiff bank the amount called for by the draft. The court appears to have been distinctly of the opinion that there was an equitable assignment of the proceeds to the amount of the order.[31] Apparently the court felt that its conclusions could rest also on another theory — that,

"if one to whom goods are consigned for sale receives the consignment with notice that the consignor has made a draft on him on the credit of the goods, he is bound to accept the draft. He may not take and retain the consignment with such notice and repudiate the draft. The acceptance of the goods is deemed the equivalent of a promise to accept the draft." [32]

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[28] De Bernales *v.* Fuller, 14 East, 590, 2 Camp. 426 (1810); Seligman *v.* Wells, 1 Fed. 302 (S. D. N. Y., 1880); Harwood *v.* Tucker, 18 Ill. 544 (1857); Ballard *v.* Bank, 91 Kan. 91, 136 Pac. 935 (1913); Gruenther *v.* Bank, 90 Neb. 280, 133 N. W. 402 (1911); Dolph *v.* Cross, 153 Ia. 289, 133 N. W. 669 (1911); Hitt Fireworks Co. *v.* Bank, 114 Wash. 167, 195 Pac. 13 (1921). See also Whitewater Bank *v.* Bank, 224 Ill. App. 26 (1922).

[29] 151 Minn. 243, 186 N. W. 575 (1922).

[30] There was no express agreement to this effect. It appeared that several times in the past the transaction had been so carried out, and it was concluded that there was an understanding.

[31] "In short, the evidence permits the inference that it was Rudisell's purpose to transfer enough of such proceeds to repay the money furnished him to buy the cattle; that he intended to give plaintiff an interest in the proceeds and made the draft to carry out his intention, receiving a valuable consideration from the plaintiff. As between them, under these circumstances there was an equitable assignment of $1,250 of such proceeds. . . . The fact that there were no funds in defendant's hands when the draft was drawn did not defeat the assignment." 151 Minn. at 246, 186 N. W. at 576.

[32] 151 Minn. at 248, 186 N. W. at 577. The court cites as authorities for this view: Nutting *v.* Sloan, 57 Ga. 392 (1876); Mercier *v.* Copelan, 73 Ga. 636

A somewhat similar situation was presented in *Ballard* v. *Home National Bank,*[33] where another stock buyer was involved. This dealer had been accustomed to pay for stock with checks on the defendant bank, borrowing the money from the bank to cover the disbursements; and the proceeds of the stock sales were then used, apparently, to pay off these notes. This plan proving unsatisfactory, an arrangement was arrived at whereby the bank was to continue to allow the dealer to draw checks in payment of his purchases, which checks the bank would pay despite the past due debt owed it by the customer, provided that he "beat them in" — by selling the stock purchased and putting the proceeds into the bank to provide a fund for their payment.[34] The court held that the check holders had a cause of action against the bank for the amounts called for. But whether their rights rested upon an equitable assignment,[35] or upon a contract between the drawer and the bank for the benefit of the plaintiffs,[36]

(1884); McCausland *v.* Wheeler Savings Bank, 43 Ill. App. 381 (1891); Hall *v.* Bank, 133 Ill. 234, 24 N. E. 546 (1890); Fisher *v.* Bank, 37 Ill. App. 333 (1890); Lowery *v.* Steward, 25 N. Y. 239 (1862); Helm *v.* Meyer, 30 La. Ann. 943 (1878); 1 PARSONS, NOTES & BILLS, 291. It is then said: "These authorities sanction a recovery from the consignee on the theory that under such circumstances the proceeds of the sale of the consignment are received for the payee who has a cause of action for money had and received to his use. Strictly speaking, the consignee is not charged with liability on the draft, but on the contract implied from his acts." 151 Minn. at 248–249, 186 N. W. at 577.

On just what ground the court really meant to rest the plaintiff's right of recovery is decidedly difficult to determine. *Cf.* Ballard *v.* Bank, 195 S. W. 559 (Mo. App., 1917).

[33] 91 Kan. 91, 136 Pac. 935 (1913).

[34] That such was the arrangement was settled by the verdict of the jury.

[35] After reference to the general rule that a check is not an assignment, the court points out that "special circumstances, however, may give to the issuance of a check the character of a *pro tanto* assignment, thereby vesting in the holder a right of action upon it against the bank on which it is drawn. *Fourth Street Bank v. Yardley,* 165 U. S. 634." 91 Kan. at 96, 136 Pac. at 936. *Cf. Re* Interborough Consol. Corp., 288 Fed. 334 (2nd Circ., 1923).

[36] But the court said: "The present actions are not brought simply on the promise of the bank to pay Stewart's checks issued in payment for stock. They are bought upon that promise, supplemented by the carrying out of the conditions on which it was based — the purchase of the stock, the issuance of the checks, the resale of the stock and the deposit of the proceeds to meet the checks — in effect the receiving by the bank of the money appropriated by agreement to that purpose." 91 Kan. at 97, 136 Pac. at 937. See also Goeken *v.* Bank, 100 Kan. 177, 163 Pac. 636 (1917); Scoby *v.* Bank, 112 Kan. 135, 211 Pac. 110 (1922).

or upon the notion that a trust had been created by the deposit for a specific purpose, the report of the case does not disclose. Each theory seems to have played some part in producing the result.

In the foregoing enumeration of several types of situations it must be understood that there has been no intention to lay down what may in any proper sense be called rules. The circumstances outlined afford more or less distinct indications that assignments were meant to be accomplished.[37]

There are, on the contrary, possible factors which indicate that an assignment was *not* intended. If, for example, the payee takes other security, as the indorsement of a third party,[38] or if no consideration is furnished by the payee,[39] or if the order covers

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[37] It may be added that if the payee acquired the instrument by *purchase,* that fact may be entitled to some weight as showing an intention in the same direction. Kahnweiler *v.* Anderson, 78 N. C. 133 (1878); Gardner *v.* Bank, 39 Ohio St. 600 (1883); Fidelity S. & L. Ass'n *v.* Rodgers, 180 Cal. 683, 182 Pac. 426 (1919) (*dictum*). In the case last cited, after pointing out that the order instrument was a bill of exchange which required acceptance to impose liability upon the drawee, the court added: "If it had been given for a valuable consideration, it would have operated as an equitable assignment of the demand of Mrs. Rounds against the plaintiff for the sum of money, and could have been enforced as such. . . . But it was intended as a gift in trust and was without valuable consideration." 180 Cal. at 686–687, 182 Pac. at 428.

But the mere fact that the payee gave consideration for the instrument, standing by itself, would almost certainly not be deemed a sufficient basis for concluding that the transaction amounted to an assignment. Gellert *v.* Bank, 107 Ore. 162, 214 Pac. 377 (1923).

In Coates *v.* Bank, 91 N. Y. 20 (1883), it was held that a direction by A Bank to B Bank to transfer credit in X Bank to the account of A Bank, carried out by bookkeeping entries and a direction by B Bank to X Bank, amounted to an assignment. The contest was between A Bank and an assignee of B Bank, the assignment having come to the notice of X Bank before it received the order from B Bank.

[38] Bank *v.* Dubuque Southwestern Ry. Co., 52 Ia. 378, 3 N. W. 395 (1879).

[39] Bank of Commerce *v.* Bogy, 44 Mo. 13 (1869) (*semble*); Tallman *v.* Hoey, 89 N. Y. 537 (1882).

That the payee took for value (amount of check then due payee) was deemed an important factor in treating the check as amounting to more than a mere revocable order, in Raesser *v.* Bank, 112 Wis. 591, 88 N. W. 618 (1902).

In Tallman *v.* Hoey, *supra,* at 539, Finch, J., said: "But the circumstance which justifies and induces that equitable construction which treats as an assignment what is not strictly and legally such, is the existence of a valuable consideration for the imperfect transfer. (*Brill* v. *Tuttle,* 81 N. Y. 457.) It proceeds upon a necessity demanded by the justice of the case, and to obviate an injury

only part of the fund,[40] or if there are no funds in the drawee's hands,[41] the inference that the payee was not to acquire a proprietary interest except as holder of a bill is strong.

The question obviously is one almost entirely of fact, and the courts must get at the purport of the transaction as best they can. At any rate it is clear that an order, in form a mere bill of exchange, may be given under such circumstances that the payee acquires an interest in a fund in the hands of the drawee and may proceed against him in whatever proceeding may be appropriate to the purpose.

The emphasis so far in this discussion has been upon the situation regarding bills of exchange in general rather than upon that most common sort of bill, a check, although, to be sure, a few check cases have been cited. In truth there has been more readiness to find a check amounting to an assignment than an ordinary bill not drawn on a bank. This is due, no doubt, to the contract between the depositor and the bank whereby the latter agrees to pay out the fund on the order of the former, though piecemeal, and to the further fact that it is ordinarily taken for granted that the check is drawn on funds. A bank, other difficulties aside, could not very well complain that the check as an assignment is objectionable because it is only partial. Before the Uniform Negotiable Instruments Law there were a considerable number of states,[42] — a minority, however, — which adhered to the view that a check was of itself an assignment of the fund

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or a wrong which would otherwise occur. Where the holder has parted with nothing, and so loses nothing by the application of ordinary legal rules, no pressure of justice requires the intervention and the help of an equitable doctrine."

See also note 37, *supra*.

[40] Skobis *v.* Ferge, 102 Wis. 122, 78 N. W. 426 (1899). And see note 14, *supra*. But there may be an assignment though only part of the fund is involved. Risley *v.* Phenix Bank, 83 N. Y. 318 (1881).

No doubt the idea of a possible hardship or inconvenience to the debtor-drawee and the procedural difficulties had considerable to do with this view.

[41] Surety Co. *v.* Price, 162 Ky. 632, 172 S. W. 1072 (1915). But see First Nat. Bank *v.* Rogers, etc., Co., 151 Minn. 243, 186 N. W. 575 (1922).

[42] In the extended note in L. R. A. 1916 C, 169, 170, the following states are said to have held this view: Illinois, Iowa, Kentucky, Louisiana, Minnesota, Nebraska, Oklahoma, South Carolina, and South Dakota. Many cases are there cited. See also 43 L. R. A. (N. S.) 100, note; Pease *v.* Landauer, 63 Wis. 20, 22 N. W. 847 (1885).

on deposit either in whole or part, as the case might be, depending on the amount of the check.

In the leading case supporting this minority view[43] it is declared that the contract between the depositor and the bank that the former may withdraw his deposit in parcels enures to the benefit of the check holders. Chief Justice Caton said:

"It [commercial custom] shows us that the banker, when he receives the deposit, agrees with the depositor to pay it out on the presentation of his checks, in such sums as those checks may call for, and to the person presenting them, and with the whole world he agrees that whoever shall become the owner of such check, shall, upon presentation, thereby become the owner, and entitled to receive the amount called for by the check, provided the drawer shall at that time have that amount on deposit. Who shall object to that portion of the contract which the law raises by implication on the part of the banker to the third person — to any body and to every body? Surely every sound lawyer will at once perceive a privity of contract between the banker and the holder of the check, created by the implied promise held out to the world by the banker, on the one side, and the receiving of the check for value and presenting it, on the other."

But when it came to the decision of the case the court seemed to abandon the third-party-beneficiary theory[44] and to rest the conclusion on the doctrine of assignments. It said:

"We hold then, that the check of a depositor upon his banker, delivered to another for value, transfers to that other, the title to so much of the deposit as the check calls for, which may again be transferred to another by delivery, and when presented to the banker, he becomes the holder of the money to the use of the owner of the check, and is bound to account to him for that amount, provided the party drawing the check has funds to that amount on deposit, subject to his check at the time it is presented."

The notion of a privity of contract between the holder and the bank is vigorously rejected by the Supreme Court in *Bank*

[43] Munn *v.* Burch, 25 Ill. 35, 40 (1860).

[44] It may be that the talk about the contract is merely to get the case free of the difficulty of a partial assignment enforcible at law. In Fourth Nat. Bank *v.* City Nat. Bank, 68 Ill. 398 (1873), the doctrine is put on the ground of an implied agreement in advance of issuance of check to accept.

of the Republic v. *Millard*,[45] perhaps the leading case on the majority side. It is pointed out that if there is such a contract relation, "the bank would be obliged to pay the check, although the drawer, before it was presented, had countermanded it, and although other checks, drawn after it was issued, but before payment of it was demanded, had exhausted the funds of the depositor." The Court was of opinion that if such were the result bankers would have to abandon the business of keeping deposit accounts for their customers.[46]

Whatever may be thought as to the merits of these two views, it is distinctly laid down by the Uniform Negotiable Instruments Law that neither a bill of exchange nor a check shall of itself amount to an assignment. Section 127 provides:

"A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accept the same."

Section 189 provides:

"A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check."

As to these provisions certain observations should be made. While the general language in the two sections is almost identical, there is in the latter part a significant difference: in regard to bills it is provided that unless and until they are accepted the drawee "*is not liable on the bill*"; as to checks it is stated that unless and until they are accepted or certified the bank "*is not liable to the holder.*" The conclusion that this variation in phraseology, in two sections dealing with a common problem and otherwise so much alike, must have been intentional seems

[45] 10 Wall. (U. S.) 152, 156 (1869).

[46] The Illinois court, on the contrary, thought that a denial of the holder's legal and equitable right, *after presentation of the check*, to demand payment "would destroy the most valuable feature of bank deposits and checks." It will be observed that the Illinois court is speaking of the holder's rights after presentation, while the Supreme Court deplores the consequences if the holder, *upon issuance*, had an effective claim against the bank.

almost inevitable. The practical results will be discussed later.[47] In the second place it must be noted that these sections simply provide that a bill or check *of itself* shall not amount to an assignment. If the bill or check *plus* something else might have amounted to an assignment or created a situation giving the holder without acceptance or certification a remedy against the drawee, such a result may just as well follow under the statute as before its enactment. Hence in the situations referred to above, wherein it was concluded that there were circumstances outside the mere issuance of the order that gave the holder a remedy against the drawee as upon an assignment, or in the case of a contract between the drawer and drawee for the holder's benefit, or that of the creation of a trust for the benefit of the holder, the same result would be reached today. In fact a number of the cases cited above were decided under the statute.[48]

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[47] See *infra,* pp. 883–884.

[48] For example, Varley *v.* Sims, 100 Minn. 331, 111 N. W. 269 (1907); Weber *v.* Salisbury, 149 Ky. 327, 148 S. W. 34 (1912); Bank *v.* O'Byrne, 177 Ill. App. 473 (1913); Phinney *v.* State, 36 Wash. 236, 78 Pac. 927 (1904); Venturi *v.* Silvio, 197 Ala. 607, 73 So. 45 (1916); Hove *v.* Stanhope Bank, 138 Ia. 39, 115 N. W. 476 (1908); Dixie Lumber Co. *v.* Young, 203 Ala. 115, 82 So. 129 (1919); Dunlap *v.* Bank, 50 Cal. App. 476, 195 Pac. 688 (1921); First State Bank *v.* Stockmen's Bank, 42 S. Dak. 585, 176 N. W. 646 (1920); Muller *v.* Kling, 209 N. Y. 239, 103 N. E. 138 (1913); Bank *v.* Swift, 134 Tenn. 175, 183 S. W. 725 (1915); First Nat. Bank *v.* Rogers, etc., Co., 151 Minn. 243, 186 N. W. 575 (1922); Ballard *v.* Bank, 91 Kan. 91, 136 Pac. 935 (1913); Gruenther *v.* Bank, 90 Neb. 280, 133 N. W. 402 (1911). See, however, the adverse comment on the case last cited in BRANNAN, THE NEGOTIABLE INSTRUMENTS LAW, 3 ed., 406.

Generally speaking, the courts in the states which had followed the view that a check was an assignment have shown a disposition to accept the obvious intent of the statute. Kaesemeyer *v.* Smith, 22 Ida. 1, 123 Pac. 943 (1912); Boswell *v.* Bank, 123 Ky. 485, 96 S. W. 797 (1906); Bank *v.* Hargis Comm. Bank, 170 Ky. 690, 186 S. W. 471 (1916); Cook *v.* Lewis, 172 Ill. App. 518 (1912); Gruenther *v.* Bank, 90 Neb. 280, 133 N. W. 402 (1911); Ballen *v.* Bank, 37 Okla. 112, 130 Pac. 539 (1912). The Iowa court seems to be a conspicuous and unfortunate exception. See 9 IOWA L. BULL. 64. In Murray *v.* Savings Bank, 197 N. W. 69, 70 (Ia., 1924), the court took occasion to say that under the statute a check in itself was not an assignment and that all that had been actually decided in McClain *v.* Torkelson, 187 Ia. 202, 174 N. W. 42 (1919), was that the provision of the Act (§ 189) "would not operate in favor of the garnisher of the drawee bank as against a check holder where the interest of the bank itself was in no manner affected."

The Wisconsin court, too, appears to be disinclined to go the whole way in applying the statutory provision. Raesser *v.* Bank, 112 Wis. 591, 88 N. W. 618 (1902), indicating, however, that the court would not, under the statute, allow

An unusual ground for holding a drawee bank liable to a check holder is found in the very recent case of *Murray* v. *American Savings Bank*,[49] decided by the Iowa court, February 12, 1924. The facts were these: A had on deposit in the bank $115.50, and he was indebted to the same bank on a note for $500 apparently then due; B was also a depositor and indebted to A. A check on the bank was given by B to A for $386.49. With this check A went to the bank to pay off his note, but on a suggestion by the cashier that he was too busy to attend to the matter just then A left; on returning to the bank the next morning A found the bank closed and insolvent. A, of course, claimed to be allowed to set off against his indebtedness to the bank not only the amount standing to his credit in his own account but also the amount of the check of B. The court pointed out that the bank was not liable as an acceptor or certifier, since such a relation would have to be agreed to in writing, and that even under its decisions, liberally disposed in that direction,[50] the check, since the statute, could not be treated as an assignment against the bank.[51] It allowed the set-off, however, on the theory that A had made a tender of payment of his debt, which tender, though not in legal money, was not objected to and was kept good. The court said:

"A tender of payment by a check or draft is as effective as a tender of currency unless there be objection by the creditor to such check

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an action by the holder against the drawee. It was pointed out that the earlier cases in the state treating the check as an assignment had not involved claims by the holder against the drawee for payment.

[49] 197 N. W. 69 (Ia., 1924). [50] See note 48, *supra*.

[51] The Iowa court seems to interpret Section 189 as a declaration that *as against the drawee bank* a check cannot in itself be an assignment. Attention is directed to the last part of the section which provides that *the bank* is not liable until it certifies and the inference is drawn that the earlier part of the section therefore deals only with the position of the drawee. "In all our prior cases decided since the enactment of the act the defeated party has been either a garnisher or other person not a party to the check." (At p. 71.) There are other courts, which, before the statute, had held a check to be an assignment, that have taken the same limited view as to the operation of Section 189. Farrington *v.* Fleming Comm. Co., 94 Neb. 108, 142 N. W. 297 (1913); Elgin *v.* Gross-Kelley & Co., 20 N. M. 450, 150 Pac. 922 (1915). But the better opinion seems the other way. Kaesemeyer *v.* Smith, 22 Ida. 1, 123 Pac. 943 (1912); Boswell *v.* Bank, 123 Ky. 485, 96 S. W. 797 (1906); Jones *v.* Crumpler, 119 Va. 143, 89 S. E. 232 (1916); Eastman Kodak Co. *v.* Bank, 231 Fed. 320 (S. D. N. Y., 1916).

or draft as a part of the tender. No such objection was made in this case. . . . We see nothing wanting herein to a complete and effective tender of the payment of this note. . . . As long as such tender was kept good, the bank could not sue upon its note." [52]

It is pretty clear, then, that even since the Uniform Act and even in the absence of acceptance or certification, the holder of a check or bill may have effective rights against the drawee. These rights may arise out of (1) an assignment, (2) a contract for his benefit, (3) a trust for his benefit,[53] or, possibly, (4) a tender.

So far in the discussion the problem has been considered as arising without any claimed payment by the drawee. Upon an alleged payment the question arises in two types of situations: (1) a rightful payment, and (2) a wrongful and therefore ineffective payment.

Surprisingly interesting and difficult questions may arise as to the rights of a holder against a drawee upon facts claimed to amount to a payment of the instrument. The facts in the leading case of *Oddie* v. *The National City Bank of New York* [54] may well serve to indicate one phase of the problem. It appeared in that case that, shortly before two o'clock, the plaintiffs delivered to a receiving teller of the defendant, for deposit, a check drawn on the defendant by X. Although the account of X was then overdrawn, the check was entered upon the plaintiffs' deposit ticket by the teller, and during the next hour the defendant's teller certified as good other checks drawn by X. Shortly before three o'clock, X's account not having been made good, the check was handed to the plaintiff's messenger with instructions to notify his principals that the check was not good. Demand was later made upon the defendant and refused, and action was started. It was held that the facts adduced warranted the conclusion that the check had been paid by the defendant, and that therefore the plaintiffs' deposit claim against the defendant was enlarged

[52] At p. 71.

[53] See Pile *v.* Bank, 187 Mo. App. 61, 173 S. W. 50 (1915) (action for money had and received allowed). See generally Allen *v.* Puritan Trust Co., 211 Mass. 409, 97 N. E. 916 (1912).

[54] 45 N. Y. 735, 741–742 (1871).

by the amount of the check in question. The court looked upon the transaction as amounting in substance to an actual payment of cash by the drawee to the holder and a deposit of the payment immediately thereafter by the holder with the drawee to the former's credit. "It is the right of the bank," the court said, "to reject it, or to refuse to pay it, or to receive it conditionally, as in *Pratt* v. *Foote* (9 N. Y. 463), but if it accepts such a check and pays it, either by delivering the currency, or giving the party credit for it, the transaction is closed between the bank and such party, provided the paper is genuine." [55]

Of course this is not really a case where a holder as such has rights against a drawee as such. In truth the parties no longer occupy such relationship to the instrument; the transaction is closed, the instrument has spent its force, and the relationship of debtor and creditor as between the drawee and holder has sprung up. Ordinarily no difficulty arises here, but when for some reason the drawee wants to retrace his steps and undo the transaction, or when the drawer attempts to revoke the order to pay as represented by the instrument,[56] the type of question considered in the *Oddie* case may arise. Many other cases to the same effect may be cited.[57]

It is a question of fact whether, when the drawee credits the account of the holder-presenter, such credit is intended as payment absolutely or only conditionally. In *First National Bank* v. *Burkhardt* [58] the jury was asked to determine whether there

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[55] Boyd *v.* Emmerson, 2 Ad. & Ell. 184 (1834), was distinguished on the ground that the facts therein failed to show an intention or assent to receive the instrument as a deposit.

[56] The drawer may attempt to stop payment, or death, assignment for benefit of creditors, etc., may be claimed to have revoked the order.

[57] First Nat. Bank *v.* Burkhardt, 100 U. S. 686 (1879); Bank *v.* Miller, 229 U. S. 517 (1913); City Nat. Bank *v.* Burns, 68 Ala. 267 (1880); Cohen *v.* Bank, 22 Ariz. 394, 198 Pac. 122 (1921); Arkansas T. & B. Co. *v.* Bishop, 119 Ark. 373, 178 S. W. 422 (1915); Bank *v.* Gregg, 138 Ill. 596, 28 N. E. 839 (1891); Nineteenth Ward Bank *v.* Bank, 184 Mass. 49, 67 N. E. 670 (1903); Bank *v.* Nat. Park Bank, 100 Misc. 31, 165 N. Y. Supp. 15 (1917); Consol. Nat. Bank *v.* Bank, 129 App. Div. 538, 114 N. Y. Supp. 308 (1908); Baldwin's Bank *v.* Smith, 215 N. Y. 76, 109 N. E. 138 (1915); Woodward *v.* Savings & Trust Co., 178 N. C. 184, 100 S. E. 304 (1919); Bryan *v.* Bank, 205 Pa. St. 7, 54 Atl. 480 (1903); Oregon Iron & Steel Co. *v.* Bank, 224 Pac. 569 (Wash., 1924).

[58] *Supra,* note 57.

had or had not been a consummated deposit.[59] Since banks do not ordinarily take instruments drawn on themselves for collection but for payment, it would seem reasonable that the burden of showing that the credit given was intended to be only conditional should be upon the one asserting this to be the fact.[60] As a matter of banking practice the situation would seem to be quite unlike the common case of crediting to a depositor's account items drawn on *other* drawees.[61] When a check is presented and the cash demanded, it is pretty clear that the drawee bank must determine before payment the state of the drawer's account; it may pay or not as conditions warrant; but having once paid, it cannot change its mind. If there is any hardship upon the drawee in applying the same rule to items presented for payment not in cash but in credit, it is easily within the power of the banks to provide by contract that credit shall be given only conditionally.[62] It is of course true that in the one case the drawee has parted with something tangible, so that a retracing of steps there involves affirmative proceedings, while in the other case only credit has been given and the remedy of self-help is feasible. From a business point of view, however, the transactions are essentially alike, and the same argument of business expediency would seem to be applicable in each case.

In these cases some courts unfortunately have spoken of the check as being "accepted" by the payment. As pointed out later herein, this is not an instance of "acceptance" in the technical sense of the word. The former holder's claim against the one-time drawee is not upon a promise to pay or honor the instrument but upon a creditor-debtor relationship created by the "payment."[63] It is occasionally stated that there has been "appro-

[59] Various facts are important in this respect,—stamping the check "Paid," placing it on spindle, entry of credit in pass book or upon deposit ticket, etc. See cases cited in note 57.

[60] See City Nat. Bank *v.* Burns, 68 Ala. 267, 277 (1880).

[61] The California courts, however, reject such distinction. Nat. Gold Bank & T. Co. *v.* McDonald, 51 Cal. 64 (1875). And it has been held, reasonably, it would seem, that in this connection different branches of the same bank are to be treated as distinct institutions. Chrzanowska *v.* Bank, 173 App. Div. 285, 159 N. Y. Supp. 385 (1916).

[62] See Snyder *v.* Bank, 65 Colo. 24, 172 Pac. 1069 (1918); Pollack *v.* Bank, 168 Mo. App. 368, 151 S. W. 774 (1912).

[63] See Cohen *v.* Bank, 22 Ariz. 394, 198 Pac. 122 (1921).

priated" to the holder the amount indicated. This may be misleading, for it is quite unlikely that a trust arises, and the doctrine holds even though the drawee has no funds, or insufficient funds, of the drawer to meet the instrument.[64]

As indicated above, some of the cases arise out of attempts to revoke the pay order; others grow out of efforts by drawees to avoid the consequences of hasty or ill-advised action or of mistake as to the actual state of affairs. If the order has been *paid*, there is nothing to revoke; if the drawee has acted hastily or ill-advisedly, there is no special equity in his favor; only in the case of mistake does he appear to occupy a position of real merit. The proper view in this last type of case involves a consideration of the principle roughly identified as the doctrine of *Price* v. *Neal*, a task quite beyond the scope of this paper.[65]

A situation midway, so to speak, between the payment of the order by turning over cash, on the one side, and by crediting the account of the presenter, on the other, was involved in *Hunt* v. *Security State Bank*.[66] A check drawn on the defendant was

[64] Cohen *v.* Bank, *supra;* Oddie *v.* Bank, 45 N. Y. 735 (1871); Oregon Iron & Steel Co. *v.* Bank, 224 Pac. 569 (Wash., 1924).

[65] That the rule of Price *v.* Neal, denying recovery by a drawee who has paid the amount called for by the instrument to a holder under the mistaken belief that the order is genuine as to the drawer's signature, is an exception to the normal rule that money paid under mistake of fact may be recovered, and that the exception is grounded upon business expediency, is now pretty generally accepted. See WOODWARD, QUASI-CONTRACTS, c. 5. In 4 HARV. L. REV. 297, Dean Ames declared that the rule was merely an application of the broad principle that as between equal competing equities the legal title shall prevail. This view has since been repeatedly expressed in the pages of the HARVARD LAW REVIEW, but has received scant acceptance by the courts. See WOODWARD, *op. cit.*, c. 5.

A contrary decision in Price *v.* Neal would have resulted unfortunately. Suppose every man who collects money on a bill of exchange (or check) had to be prepared to refund at any time if the drawee should learn that the order was not genuine! Lord Mansfield, as usual, saw the practical necessities of the situation. As has been suggested, the same argument of expediency may be made in the companion situations involving payment under mistake as to the genuineness of the indorsements and of the body of instrument. But here a counter argument of business expediency neutralizes the one first suggested. If the law in these last situations had not taken the shape it did, no drawee would dare honor the order without a more or less extensive inquiry or a virtual abstract of title. Payment by a drawee under mistake as to the state of the drawer's account presents a situation wherein the initial argument of expediency underlying Price *v.* Neal applies, and there is here no such neutralizing factor as in the cases mentioned above. *Cf.* 21 COL. L. REV. 805.

[66] 91 Ore. 362, 179 Pac. 248 (1919).

there mailed by another bank, the holder of the instrument, to the defendant, along with other items, with instructions to remit "in Portland Exchange." An officer of the defendant, after examining the check and the account of the drawer, stamped it "Paid" and placed it on a spindle so constructed as to mutilate the papers placed thereon. Before any steps had been taken toward making the remittance the drawer ordered payment stopped. The defendant, having ignored the stop order and remitted the amount called for to its correspondent, was sued for the amount so paid. The court, in allowing recovery, distinguished the case from those in which payment is made in cash and also those in which credit is given, and pointed out that the steps taken by the defendant's officer were merely preparatory to payment and showed only an *intention* to pay.

When, however, the question arises out of a failure of the drawee, the shoe pinches on the other foot, and the holder-presenter who urges so vigorously in the cases considered above that the transaction is closed is not so anxious to establish that the drawee is indebted to him. If the views above advanced are sound, the giving of credit in such a situation as that last suggested should equally amount to payment, and the drawee become the debtor instead of the drawer. The cases touching this question, however, are generally complicated by the question of authority in the drawee as a collecting agency to accept anything but cash in payment.

In *Sanitary Can Co.* v. *National Pickle & Canning Co.*,[67] an action was brought by a vendor for the sum due on the purchase price of merchandise. It appeared that the plaintiff had drawn on the defendant for the price and sent the draft with bill of lading attached to a bank with which the defendant happened to keep a deposit account. On presentation of the draft, the defendant drew a check for the amount thereof upon the presenting bank, there being then in the defendant's account ample funds to cover the check. The drawee bank (the presenter of the draft), however, unknown to the defendant, was hopelessly insolvent, and the next day it closed its doors without having remitted for the draft. The check had been stamped "Paid," but

[67] 191 Ia. 1259, 184 N. W. 354 (1921).

no book entries had been made. The defendant claimed that it had paid its debt to the plaintiff, whose claim should be made against the bank. It was held that the defendant was still liable, considerable reliance being placed upon the following language on the face of the draft: "This draft must be paid in cash or its equivalent, the bank named as payee acting only as agent to collect and remit to the drawer."

If the defendant in this case had paid the amount of the draft to the bank in cash, there could have been no doubt as to its discharge from liability; and if it had drawn its check on the collecting bank, presented it, secured the cash, and paid the amount so secured back to the bank as collecting agent, it would seem equally clear that the debt was paid. Should it be necessary to go through the motions of drawing out the cash and paying it back? [68] Would the directions on the face of the draft have been complied with only by such a transaction? [69] Probably the prevailing view in these collection cases, at least in the absence of specific provisions as to the type of payment that is permissible, is to the effect that an order by the debtor drawn upon funds in the hands of the collection agency, when received and accepted as payment, is effective as such though the drawee-collector fails to remit because of insolvency or other reason.[70]

If the amount called for has been paid by the drawee to someone not lawfully entitled thereto, some other considerations may enter into a determination of the rights of the lawful holder against such wrongfully paying drawee.

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[68] See Baldwin's Bank *v.* Smith, 215 N. Y. 76, 83, 109 N. E. 138, 140 (1915); Bartley *v.* State, 53 Neb. 310, 73 N. W. 744 (1898), aff'd on rehearing in 55 Neb. 294, 75 N. W. 832 (1898); Pollak Bros. *v.* Niall-Herin Co., 137 Ga. 23, 72 S. E. 415 (1911); Sayles *v.* Cox, 95 Tenn. 579, 32 S. W. 626 (1895).

[69] Of course a payment in cash derived from a source other than the collecting bank would swell the assets of that bank so that the possible dividend to creditors would be larger, but surely the court did not mean that cash drawn out of the collecting bank would not be acceptable for payment. Although the bank was insolvent (unknown to the depositor), the defendant had a credit in excess of the amount of the check, and while cash may not have been appropriated for the plaintiff's use, such credit well may have been.

Whether collected funds in the hands of the collecting bank may be claimed by the creditor as trust funds is a matter hardly within the scope of this paper. The answer to that question in the Iowa case has no direct bearing, it would seem, upon the question under examination.

[70] The cases are collected in a note in 18 A. L. R. 537.

A typical case of this sort would arise on the following facts: A gives a check drawn on the C Bank, payable to B or order, to B, or, perhaps, to B's agent; someone, X, gets possession of the unindorsed check, forges B's name on the back, and gets the money either directly from the drawee bank, or indirectly by getting the money through an intermediate indorsee; B then sues the C Bank, the drawee. It is clear that A may object to having such a check charged to his account, and there can be no doubt as to his right to insist that his bank restore to his credit the amount so paid; the bank may then proceed to secure reimbursement from those to whom the money was paid.[71]

If B's action is *on the instrument,* the theory must be acceptance.[72] In a few cases it has been held that a payment by the drawee, such as that indicated above, and the charging of the check to the drawer's account, amount to an acceptance (or certification).[73] But the better opinion would seem to have been

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[71] See Canal Bank *v.* Bank of Albany, 1 Hill (N. Y.) 287 (1841). The discussion of this problem is not within the scope of this paper.

[72] On acceptance in general, see *infra,* pp. 885–886.

[73] Pickle *v.* Muse, 88 Tenn. 380, 12 S. W. 919 (1890); McFadden *v.* Follrath, 114 Minn. 85, 130 N. W. 542 (1911) (*semble*). In the former case the holder of the check (improperly paid by the drawee to another) proceeded by a bill in equity against the drawee and drawer. The court sustained the action against the drawee, the language of the prevailing opinion (by Lurton, J.) clearly putting the decision on the ground of an acceptance *manifested by the drawee's acts.* In the other case the payee sued the drawer on the original indebtedness covered by the check which had been paid by the drawee on an unauthorized indorsement. It was held that the debt had been paid, not by the giving of the check but by the act of the bank in paying and charging it to the drawer's account, and that the remedy against the drawee bank was in the payee whose collecting agent had wrongfully indorsed and collected. At the time the case was presented, the law of the state as to whether a payee or holder could sue the drawee on the latter's refusal to pay on presentment was undetermined. The court pointed out that in some cases where it was considered that, on refusal by the drawee to pay to the holder there was no privity between the holder and drawee on which an action could be based, the requisite privity was deemed to be established by payment on an unauthorized indorsement and charge to the drawer's account, "the reason assigned being that the bank, by charging the check to the account of the drawer, thereby accepts the check, or undertakes to apply to the payment of the check the funds to be withdrawn from the account of the drawer." 114 Minn. at 89, 130 N. W. at 544. But whether the court meant to be understood as holding that on the facts there had been an acceptance is doubtful, for it was said further: "But, whatever the exact reason to be assigned therefor, it is the settled rule in this state that, under the circumstances

the other way.[74] In *First National Bank* v. *Whitman*[75] Mr. Justice Hunt said:

"We cannot recognize the argument that a payment of the amount of a check or sight draft under such circumstances amounts to an acceptance, creating a privity of contract with the real owner. It is difficult to construe a payment as an acceptance under any circumstances. The two things are essentially different. One is a promise to perform an act, the other an actual performance. A banker or an individual may be ready to make actual payment of a check or draft when presented, while unwilling to make a promise to pay at a future time. Many, on the other hand, are more ready to promise to pay than to meet the promise when required. The difference between the transactions is essential and inherent."

Whatever doubt there may be left as to the soundness of the conclusion reached in the cases last cited would seem to be removed by the Uniform Negotiable Instruments Law. In *Clark & Co.* v. *Savings Bank*[76] the court concluded that payment and the charging of the drawer's account could not amount to an acceptance under a statute providing that "no person within this state shall be charged, as an acceptor on a bill of exchange, draft or order drawn for the payment of money, exceeding $20.00, unless his acceptance shall be in writing, signed by himself or his lawful agent," and some language in an earlier case[77] in a higher court looking toward a contrary conclusion was disregarded because of the statute. The Uniform Act also provides that accept-

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of this case, an unauthorized payment and subsequent charge to the account of the drawer is a sufficient basis for a liability of the bank to the payee." *Ibid.* See also, as to this phase of the problem, Louisville & N. R. R. Co. *v.* Bank, 74 Fla. 385, 77 So. 104 (1917).

Occasionally but improperly cited as holding the same view are Dodge *v.* Nat. Exchange Bank, 20 Ohio St. 234 (1870); Seventh Nat. Bank *v.* Cook, 73 Pa. St. 483 (1873).

[74] First Nat. Bank *v.* Whitman, 94 U. S. 343 (1876); Houston Grocer Co. *v.* Bank, 71 Mo. App. 132 (1897); Sims *v.* Bank, 98 Ark. 1, 135 S. W. 356 (1911); Southern Trust Co. *v.* Bank, 148 Ark. 283, 229 S. W. 1026 (1921); Clark & Co. *v.* Savings Bank, 31 Pa. Super. Ct. 647 (1906); Ranch *v.* Bank, 143 Ill. App. 625 (1908); State Bank *v.* Mid-City Bank, 295 Ill. 599, 129 N. E. 498 (1920); Lone Star Trucking Co. *v.* Bank, 240 S. W. 1000 (Tex. Civ. App., 1922).

[75] 94 U. S. 343, 347 (1876).

[76] *Supra,* note 74.

[77] Seventh Nat. Bank *v.* Cook, 73 Pa. St. 483 (1873).

ances "must be in writing and signed by the drawee." [78] The facts under consideration do not admit of the application of the provisions of Section 137 regarding constructive acceptance by destruction of the instrument or refusal to return it.[79] So even *Pickle* v. *Muse* [80] today would not be good law in Tennessee.[81]

Sometimes it is claimed that B, in the case proposed above, may recover from the drawee bank, after the improper payment, on the theory of money had and received to the use of the holder. This notion no doubt is largely attributable to a remark made by Mr. Justice Davis in *Bank of the Republic* v. *Millard*.[82] After deciding that the payee of a check could not succeed against the drawee on the theory of an assignment, the Court said:

"*It may be,* if it could be shown that the bank had charged the check on its books against the drawer, and settled with him on that basis, that the plaintiff could recover on the count for money had and received, on the ground that the rule of *ex aequo et bono* would be applicable, as this bank, having assented to the order and having communicated its assent to the paymaster, would be considered as holding the money thus appropriated for the plaintiff's use, and, therefore, under an implied promise to him to pay it on demand." [83]

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[78] § 132.

[79] Chamberlain Co. *v.* Bank, 98 Kan. 611, 160 Pac. 1138 (1916), would seem to be opposed to this. See BRANNAN, THE NEGOTIABLE INSTRUMENTS LAW, 3 ed., 367, 368.

[80] *Supra,* note 73.

[81] Baltimore & O. R. R. Co. *v.* Bank, 102 Va. 753, 47 S. E. 837 (1904); The Elyria Sav. & B. Co. *v.* Walker Bin. Co., 92 Ohio St. 406, 409, 411, 111 N. E. 147, 148 (1915). In the latter case the court considers that under the last part of Section 189 — "the bank is not liable to the holder, unless and until it accepts or certifies the check" — the *only* case in which the drawee bank is liable to a holder is upon acceptance or certification. The court points out that payment of the amount called for by the check and the stamping it "Paid" cannot be tortured into an *agreement to pay.* "Payment is the natural and legitimate end of a check. Acceptance is essentially different."

An interesting case in which the court rejected a contention that stamping a check "Paid" and placing it on a spindle amounted to an acceptance so that thereafter a direction by the drawer to stop payment should be of no effect is Hunt *v.* Security State Bank, 91 Ore. 362, 179 Pac. 248 (1919). *Cf.* Oregon Iron & Steel Co. *v.* Bank, 224 Pac. 569 (Wash., 1924).

[82] 10 Wall. (U. S.) 152 (1869).

[83] At pp. 157–158. In First Nat. Bank *v.* Whitman, 94 U. S. 343, 344 (1876), the Court had before it the very case supposed. Just what the form of action was does not appear, but the Court said: "The question is this: Can the payee

This *dictum* has been applied.[84] Other cases refuse to allow a recovery on such ground.[85] The payment by the drawee bank is wholly ineffective as against the drawer, whose claim against the bank is in exactly the same amount after such payment as before. What the bank has done, it is said, has been simply to pay out some of its own funds on the mistaken understanding that the amount could be charged against the account of the drawer; the holding that thereby the bank receives money to the use of another is therefore said to be obviously untenable.[86] That the drawee in paying on a forged indorsement has committed a tort which might afford the basis of a *quasi*-contractual remedy will be considered later.[87]

While it is pretty well settled, as it seems, that in these cases of wrongful payment the holder has no remedy against the drawee as upon a contract in fact, it may well be that the holder has a remedy *ex delicto*. There are many cases allowing an action in the nature of trover by the payee or other holder against one, usually a bank, by whom the instrument with the forged or unauthorized indorsement of the plaintiff has been cashed.[88] It has

of a check, whose indorsement has been forged or made without authority, and when payment has been made by the bank on which it was drawn, upon such unauthorized indorsement, maintain a suit against the bank to recover the amount of the check?" The question was answered in the negative.

[84] Seventh Nat. Bank *v.* Cook, 73 Pa. St. 483 (1873) (See Clark & Co. *v.* Savings Bank, *supra*, note 74). See also Vanbibber *v.* Louisiana Bank, 14 La. Ann. 481 (1859), where the check holder was allowed to recover really on the ground suggested. In the Pennsylvania case the court also said that the acts of the drawee amounted to an acceptance.

[85] Clark & Co. *v.* Savings Bank, 31 Pa. Super. Ct. 647 (1906); Lonier *v.* Bank, 149 Mich. 483, 112 N. W. 1119 (1907).

[86] Such was the line of argument in Clark & Co. *v.* Savings Bank, *supra*. The same view was deemed applicable in Tibby Bros. Glass Co. *v.* Bank, 220 Pa. St. 1, 69 Atl. 280 (1908), where the payee sued not the drawee but another bank which had cashed the check with forged indorsement and then received the amount thereof from the drawee. See, however, the very recent case of Independent Oil Men's Ass'n *v.* Bank, 142 N. E. 458 (Ill., 1924), where the payee as against a bank, not the drawee, which had cashed checks on forged indorsements, was allowed to waive the tort and sue in assumpsit.

[87] See p. 883, *infra*.

[88] Lindenthal *v.* Bank, 221 Ill. App. 145 (1921); Higgin Mfg. Co. *v.* Banking Co., 222 Ill. App. 29 (1921); Gustin-Bacon Mfg. Co. *v.* Bank, 224 Ill. App. 457 (1922); s. c., 306 Ill. 179, 137 N. E. 793 (1923); Hope Vacuum Cleaner Co. *v.* Bank, 101 Kan. 726, 168 Pac. 870 (1917); Thomas *v.* Bank, 101 Miss. 500, 58 So. 478 (1911); Kaufman *v.* Bank, 151 Mich. 65, 114 N. W. 863 (1908); Kansas

been held that the drawer in such case may maintain the action.[89] Not infrequently the action is quite distinctly for money had and received.[90] If the intermeddling by such cashing bank amounts

City Casualty Co. *v.* Bank, 191 Mo. App. 287, 177 S. W. 1092 (1915); Williams *v.* Wall, 60 Mo. 318 (1875); Talbot *v.* Bank, 1 Hill (N. Y.) 295 (1841); Robinson *v.* Chemical Bank, 86 N. Y. 404 (1881); Standard Steam Specialty Co. *v.* Bank, 220 N. Y. 478, 116 N. E. 386 (1917); Crisp *v.* Bank, 32 N. Dak. 263, 155 N. W. 78 (1915); Knoxville Water Co. *v.* Bank, 123 Tenn. 364, 131 S. W. 447 (1910); First Nat. Bank *v.* Montgomery etc. Co., 101 So. 186 (Ala., 1924). Cases of forgery and diversion of funds may not always, on the facts, be readily distinguishable. Standard S. & S. Co. *v.* Bank, *supra.*

[89] Gustin-Bacon Mfg. Co. *v.* Bank, *supra,* criticized in 36 HARV. L. REV. 879.

[90] Allen *v.* Mendelsohn & Son, 207 Ala. 527, 93 So. 416 (1922); Schaap *v.* Bank, 137 Ark. 251, 208 S. W. 309 (1918); United States Co. *v.* Bank, 161 Colo. 334, 157 Pac. 202 (1916); Independent Oil Men's Ass'n *v.* Bank, 142 N. E. 458 (Ill., 1924); Buckley *v.* Bank of Jersey City, 35 N. J. L. 400 (1872); Merchants Bank *v.* National Capital Press, 288 Fed. 265 (App. D. C., 1923). Many other cases are referred to in the last case cited.

In some of these cases cited in this and the preceding notes it is difficult to determine what really was the nature of the action and the theory of the plaintiff's case. If the defendant has collected the amount of the instrument, even though the amount may have been in turn paid out to the forger, it would seem indeed a matter of indifference whether the action was trover or assumpsit for money had and received. As said by Cowen, J., in Talbot *v.* Bank, *supra:* "It is entirely clear that the plaintiff might (supposing the title not to have passed by his indorsement and putting the certificate in the post office), have maintained trover against the defendants, for a conversion of the certificate; and they having procured the money upon it, the plaintiff thereby became entitled to bring this action for money had and received, at his election." 1 Hill (N. Y.) at 296.

It has been held that the bank which cashed the check on a forged indorsement and then collected the amount of the instrument from the drawee bank was not liable in an action for money had and received. Tibby Bros. Glass Co. *v.* Bank, 220 Pa. St. 1, 69 Atl. 280 (1908). This case seems to be wrongly decided.

A question that appears to be troublesome but not within the scope of this paper involves the right of action by the payee whose indorsement has been forged, when the instrument has been ultimately paid by the drawee, against the drawer. It must be conceded that the drawer may insist that the drawee restore to the former's credit the amount which was paid out not in pursuance of the drawer's order. The case is put to the acid test when the drawee becomes insolvent before any steps are taken. Who should run the risk of loss — the drawer or the payee? See Mills *v.* Hurley Co., 129 Ark. 350, 196 S. W. 121 (1917); McFadden *v.* Follrath, 114 Minn. 85, 130 N. W. 542 (1911); Kansas City Casualty Co. *v.* Bank, 191 Mo. App. 287, 177 S. W. 1092 (1915); Bernheimer *v.* Hermann, 44 Hun (N. Y.) 110 (1887); Burstein *v.* Sullivan, 134 App. Div. 623, 119 N. Y. Supp. 317 (1909); Morrison *v.* Chapman, 155 App. Div. 509, 140 N. Y. Supp. 700 (1913).

And if the trover judgment recovered by the payee or other holder against the converter is satisfied, the defendant should thereby acquire ownership in the

to a conversion, on principle there ought not to be any reason to doubt that the subsequent payment by the drawee should make it too a converter. The cases so holding, however, are not numerous.[91] Though the owner of the instrument has an option to waive the tort action and sue in assumpsit when the proceeding is against a cashing bank,[92] it is not so clear that there is the same option to sue the drawee in assumpsit.[93]

The contention, of course, may be made that under the language of Section 189 of the statute, that "the bank is not liable to the holder, unless and until it accepts or certifies the check," there is no liability on the basis of contract, or tort, or anything else, in the absence of certification. The language quoted is sweeping, and that it was to be applied in that way was distinctly the opinion of the Ohio court in *The Elyria Savings & Banking Co.* v. *Walker Bin Co.*[94] The court there said:

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instrument (Talbot *v.* Bank, *supra*) with whatever rights such fact may give. Whatever doubt there may be as to the rights of the cashing bank which has satisfied a trover judgment, against the drawer, the right of the drawee bank, after satisfaction of such a judgment to charge the item to the drawer's account would seem clear. See also J. B. Ames, "The Doctrine of Price *v.* Neal," 4 HARV. L. REV. 297, 307.

[91] Louisville & N. R. R. Co. *v.* Bank, 74 Fla. 385, 77 So. 104 (1917); Bentley Murray & Co. *v.* Bank, 197 Ill. App. 322 (1916); Burstein *v.* Peoples Trust Co., 143 App. Div. 165, 127 N. Y. Supp. 1092 (1911) (approved in St. Joseph Society *v.* Trust Co., 178 App. Div. 57, 164 N. Y. Supp. 498 (1917)); Morris & Bailey Steel Co. *v.* Bank, 277 Pa. St. 81, 120 Atl. 698 (1923) (*semble*); Kentucky etc. Trust Co. *v.* Dunavan, 266 S. W. 667 (Ky., 1924). See also BRANNAN, *op. cit.*, 405.

Among the cases that might be cited as opposed are Southern Trust Co. *v.* Bank, 148 Ark. 283, 229 S. W. 1026 (1921), and Ranch *v.* Bank, 143 Ill. App. 625 (1908). But in neither one of these cases is the question of the drawee's tort liability given any consideration. In the Illinois case the action was assumpsit, with the common counts added.

[92] See note 90, *supra*.

[93] The answer to this question involves the troublesome problem as to the circumstances necessary to the waiver of the tort remedy and resort to *quasi*-contractual relief. Has the defendant, the drawee bank, in the case under consideration been unjustly enriched? As suggested above (p. 881), the payment by the drawee is not of funds received and held by it for such purpose; and the transaction between the drawee and the presenter certainly was not intended as in any sense a sale. On the general problem see WOODWARD, QUASI-CONTRACTS, c. 20.

[94] 92 Ohio St. 406, 414, 111 N. E. 147, 149 (1915).

"We are of the opinion that when the legislature enacted Section 189 it intended to cover the subject of the liability of a bank to the holder of a check. It prescribed when and when only there is a liability to the holder. In the absence of the conditions therein prescribed no right of action exists in favor of the holder." [95]

The provision relied on, however, immediately follows the declaration that "a check of itself does not operate as an assignment." It is quite likely that the legislative intention was merely to make clear that thereafter the drawee should not be deemed liable to a holder, as had theretofore been held in some states, *as an assignee,* at least in those situations where the holder's claim to be an assignee rested upon the instrument alone.[96]

After all, then, the liability of a drawee to a holder in the absence of acceptance is unusual. Such acceptance being lacking, generally the only liability on the part of the drawee is to the drawer and is based upon his duty to him. Failure to pay the instrument may amount to a breach of contract with the drawer, and this would normally be true where the order is drawn by a depositor upon a general commercial bank account. But usually the mere relationship of drawer and drawee, even when the latter has funds of the former, would not warrant the inference, as in the case of depositor and banker, of a contractual duty on the part of the drawee to honor the draft. The obligation of the

[95] The action was under the Code, so the notion of the pleader as to his *form of action* is more or less guess-work. The report states that the action was instituted "against the banking company to recover the sum of $310 and interest on account of the payment of these two checks upon a forged indorsement." No doubt the petition of the plaintiff set forth a statement of the facts upon which recovery was claimed, thus enabling the court, if so disposed on the law, to render judgment on any theory warranted. The opinion indicates that the point chiefly stressed was the "Paid" stamp amounting to an acceptance or certification; there is nothing to show affirmatively that the court gave attention to the possibility of a trover liability. But the language of the opinion, as indicated above, is sufficiently sweeping to be taken as a rejection of any such ground of liability.

[96] But the fact remains, as pointed out above (p. 869), that when the situation regarding bills of exchange generally was being provided for the language chosen was — "and the drawee is not liable *on the bill* unless and until he accepts the same." Section 127. Under that section a drawee might well be held upon a tort liability. If the framers of the act did not intend a difference in result under the two sections, why did they use strikingly varying language?

acceptor is obviously promissory. It might seem to run directly to the holder, thus making them stand to each other as immediate parties. But it has been considered not a little baffling that defenses that are normally available between immediate parties, such, for example, as lack of consideration, cannot be relied on by the acceptor against the holder. It has been pointed out[97] that the promise of the acceptor comes to the holder not directly as promisee but indirectly *via* the drawer-payee-indorser. In this view the difficulties referred to disappear.

It would unduly prolong this paper to consider in full the circumstances which may or may not amount to an acceptance (or certification) and the consequent rights and duties. Many of the former difficulties have disappeared under the statute. With exceptions to be noted presently, acceptances must be in writing and signed by the drawee,[98] and perhaps it would have been well if the framers of the American statute had followed the lead of the English Act and provided that the written acceptance must be on the instrument itself.[99] As before the statute, no set form of words is necessary; anything that in a business sense signifies the drawee's assent to the order of the drawer is sufficient.[100] With reference to the acceptance of an existing bill not written on the bill itself, the acceptor is not bound "except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value."[101] Non-existing bills may in effect be accepted by unconditional promises in writing, but such promises are effective as acceptances only in favor of persons who, upon the faith thereof, receive the bills for value.[102] As to such instruments the statute does not require that the acceptance (or promise) be "shown."[103]

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[97] Thus Byles points out, dealing with the problem of value, that the relationship between payee and acceptor or indorsee and acceptor is that of remote parties, while drawer and acceptor are immediate parties, as are drawer and payee or indorser and indorsee. BYLES, BILLS OF EXCHANGE, 18 ed., 137.

[98] § 132.

[99] Bills of Exchange Act, § 17 (2).

[100] Most of the trouble arises out of telegraphic communications. See 21 MICH. L. REV. 458; L. R. A. 1916 C, 178–180. [101] § 134. [102] § 135.

[103] Just what is required to satisfy the provision that the acceptance be "shown" is left undetermined by the statute. As to why there should be a

The exceptional acceptances not in writing are provided by Section 137: "Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same." [104]

Ralph W. Aigler.

UNIVERSITY OF MICHIGAN LAW SCHOOL.

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requirement that acceptances of existing bills not on the instrument itself should be "shown" to the one who, on the faith thereof, receives the bill for value, while unconditional promises to accept non-existing instruments need not be "shown" to the one who, on the faith thereof, receives the bill for value, is not apparent. See BRANNAN, *op. cit.*, 363.

[104] As to destruction of the bill, see Bailey & Co. *v.* Veneer Co., 126 Ark. 257, 190 S. W. 430 (1916). As to retention amounting to a refusal under the statute, see the cases cited in note 57, *supra;* First Nat. Bank *v.* Whitmore, 177 Fed. 397 (8th Circ., 1910); Chamberlain Co. *v.* Bank, 98 Kan. 611, 160 Pac. 1138 (1916).