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The Liability of Collecting Banks

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T H E S I S .

THE LIABILITY OF COLLECTING BANKS.

- - - BY - - -

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C O N T E N T S

THE LIABILITY OF COLLECTING BANKS.

A special contract is not necessary to be entered into by a bank with a depositor of commercial paper for collection, in order to clothe the bank with all the rights and duties, and to subject it to all the liabilities of a collecting agent.

A mutual understanding between a bank and a depositor of paper for collection is implied by law, in the absence of a special stipulation, from the obvious circumstances and situation of both parties, whereby, the bank, by accepting the commercial paper, promises on its part to undertake to procure the payment of the bill in accordance with its tenor; and, in case of the non-acceptance or failure to obtain its payment; then, to do every act in pursuance of the law regulating those transactions necessary for the protection of the rights and interestsof the

owner of the paper. The depositor in return agrees, that the bank shall receive from the sum collected the usual charges and commissions incident to the undertaking of such transactions.

It is thus that the bank, by virtue of the authority either expressed by a special agreement or implied by law from the fact of its receiving the paper so endorsed for collection by the holder, becomes the agent duly empowered to receive payment and to discharge and cancel all claims and obligation in regard to the bill, in the same manner and to such an extent as is proper and consistent with the rights of the holder. The duties of the bank under such circumstances, as enumerated by Mr. Daniel (I) are three fold: they are, first, " to endeavor to procure acceptance, and upon refusal, to protest for non-acceptance; secondly, to advise the remitter of the recceipt, acceptance or protesting; and thirdly, to advise any third person that is concerned, and that without delay.

The bank in general, like any agent, after receiving the paper with authority to collect must use ordinary care and diligence in making presentment, demand, protest and the giving of such notices as are in law and

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(I) Daniels on Negotiable Instruments, Vol. 1., # 323.

mercantile usage necessary to fix the liability of all the parties to whom its principal has a right to resort for payment. In that way the bank becomes under strict obligations to the owner of the paperto comply in every particular with those duties, whether as we have seen, they are implied by the law or are the subject of a special agreement between the parties. And it follows that a failure or a violation on the part of the banks to fulfill any or all of the recognized duties, that are embraced in the business of collection and necessary to protect the owner of the paper, whether it is caused by negligence, default, misconduct or otherwise, must necessarily, subject them to liability for whatever loss that may resul to the depositor by reason of the non-compliance on their part with the terms of the contract.

Mr. Morse (2) in his work on banking, speaking of this subject, says: that, " If any breech or neglect on the part of the bank occurring in any portion of its duties in the task of collection, results in any loss to any party interested in the paper whether his name appears

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(1) Daniel on Negotiable Instruments, Vol. I., # 323.
(2) Morse on the Law of Banks & Banking, 402.

thereon or not, such party will have his right of action against the bank to recover reimbursements or damages for the injury."

What acts or omissions committed on the part of the bank receiving the paper will be considered as negligence, default or misconduct in the management of the collection, or as abranch of those duties which it owes and assumes to perform in behalf of the depositor of the bill, and for which it must become answerable in damages for such injury as originates therefrom, is a question upon which the courts of the different States are somewhat at variance. The point of conflict in thereported decisions of those States seem to arise as to the question of the liability of the home bank, which takes a bill to be collected at some remote city or place, for the default, negligence or misconduct of all agents, other than those engaged in the regular service of the bank, whom, from the nature and terms of the paper, it becomes necessary to employ in order to effect the collection of the paper. Unquestionably, the receiving bank is responsible for any injury or loss that flows from the acts or omissions of the officers and immediate employees in the execution of its own duties .

Such seems to be the rule universally recognized by the courts in this country. Mr. Morse says: (1) "Any act of negligence committed by the first bank itself renders it liable for the loss or injury resulting therefrom to the depositor." Their responsibility in such instances rests upon the general rule of the law, "That banks and other corporations, as well as individuals, are liable for the acts or omissions of their general officers and servants in relation to any business e ntrusted to the corporation or individual to be transacted." (2)

But courts of high authority differ as to whether or not a bank in receiving negotiable paper to be collect- at a place distant from where it is carrying on business, should be liable for whatever loss results or is occasioned by the default or misconduct of any agent or correspondentat such distant place, whose services, of necessity it must employ, in order to make the needed presentment and give, if required, the usual notice of dishonor for the preservation of the owners rights in the bill. This question and conflict has also arisen as to the liability of a bank for the default of a notary employed

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(1) Morse on the Law of Banks and Banking, 428.
(2) Chancellor Walworth in Allen v. Bank, 22 Wend. 215.

to make presentment and protest in case of its non-acceptance.

As to the liability of the home bank for the defaults of a corrospondent bank, two principal classes of conflicting doctrines prevail. The one class favors the holding of the receiving bank absolutely responsible to the customer for the negligence of its corrospondent. This class, which may fittingly be termed the New York rule, since it was first adjudicated in that State, has recently been followed by the courts of New Jersey, Ohio, Michigan, Montana, Indiana, by the Supreme Court of the United States, and by the House of Lords in England. It is based upon the general rule of agency which holds " the primary agent is responsible for all acts and defaults committed by sub-agents employed by him." (1)

The other class of cases, which at present is the predominating rule in this country, contends that the bank is entirely exonerated from all liability to the customer, providing that it has used due care and ordinary diligence in selecting a competent and trustworthy corrospondent. Such was the early rule and the one now taken by the courts of Massachusetts, Connecticut, Illinois, Wisconsin,

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1() Story on Agency ##14 387.

Iowa, Mississippi, Missouri, Tennessee, Pennsylvania and Louisana . The courts of these States insist that an exception to the general rule as stated is applicable in these cases. The exception is, " that authority to appoint subordinate agents without assuming responsibility for them may be inferred from the conduct of the original contracting parties, or from the usage of trade, so well established, that both principal and agent must have understood to have contracted with reference to it."(1)

The true solution and reason for this variance between the New York rule and the early rule of liability in such cases will be found to lie in what the different courts regard as being the extent and natural scope of the banking business. This will be manifest from the arguments and contentions of the exponents of the various doctrines.

The courts which hold the New York rule, consider the home bank as contracting its service to collect the bill; as contracting to be prepared on its part to take the necessary measures to accomplish its collection; and as contracting to preserve all the rights and interest

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(I) American Law Review, Vol. XX., 889.

which in law are given to the owner against the other partieson the bill, all of which from the time of delivery and acceptance of the bill,by the bank are entrusted with its control and management.

On the other hand the courts that endorse the early rule, urge to sustain their proposition that the depositor from the very contents of the paper; the location of the receiving bank relative to the place of payment of the note; and the usage and custom of trade in such business; must have known and contemplated the impossibility of the ordinary agents of the bank ever effecting its presentment for acceptance or payment. Under such circumstances, they consider the employment of a correspondent bank at that place to complete process of collection, to have been intended and anticipated on the part of the depositor of the instrument. It is also insisted upon by them that there is no consideration sufficient to support an undertaking to warrant the holder against the acts and misconduct of the correspondent, and that the bank, for that reason, should be held to undertake merely to transmit the bill with proper instructions to some trustworthy correspondent. In view of these facts and the

and the situation of both parties, the depositor is said to have tacitly assented to the entire transaction, provided due care and diligence was exercised by the bank in selecting a competent agent at that place.

The substance of this early rule is well stated by Chancellor Walworth, (1) who says: (after reciting the general principle of the liability of an agent to his principal) "But this rule does not apply to a case where from the nature of the business to be performed it cannot be done by any of the ordinary officers or servants of the corporation or individual, but must be entrusted to sub-agents employed for that special purpose, or where by the usage of trade it is customary to employ a special agent for the purpose of transacting the business."

Mr. MOrse says: (2) " The contract is not that the bank shall employ its own usual agents but that it shall employ proper agents."

In the case of Fabens v. Mercantile Bank, (3) a leading authority sustaining the early doctrine, the defendant, a banking corporation, doing buskness at Boston,

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(1) Allen v. Merchants Bank, 22 Wend., 215.
(2) Morse on the Law of Banks and Banking, 416.
(3) Fabens v. Mercantile Bank, 22 Pick.,(Mass.) 330.

received from the plaintiff a certain promissory note payable at Philadelphia for collection. It was forwarded by the defendant in due season to the Bank of the United States, with whom they were accustomed to deal at that place. And, although the note was received by that bank, yet on account of the neglect of its officers to make the requisite presentment for payment, and to give notice of its dishonor, the plaintiff lost his right of action against the endorsers on the bill. In the action to recover the amount of the note, the home bank was held not answerable for the neglect or default of its corrospondent at Philadelphia. Justice Shaw, writing the opinion of the court, said: "It is well setled that when a note is deposited with a bank for collection, which is payable in another place, the whole duty of the bank so receiving the note in the first instance is seasonably to transmit the same to a suitable bank or other agent at the place of payment. And, as a part of the same doctrine, it is well setled that if the acceptor of a bill or promisor of a notehas his residence in another place, it shall be presumed to have been intended and underatood between the depositor for collection and the bank that it was to be

transmitted to the place of the residence of the promisor, and the same rule shall then apply as if on the face of the note, it was payable at that place."

The fallacy, however, in these arguments and contentions, set forth in the opinions of the courts that support the early rule, is apparent at once in the light of the recent adjudicated cases on this subject. The courts in all jurisdictions are firm in their holding, that in no event can an exception to the universal rule of the liability of an agentto his principal, exist or be recognized, where the agent contracts to transact the business of his principal and is entrusted by him with the entire control and care of the transaction. Did the bank contract for such an undertaking, and were the bills entrusted to its management by the depositor? appears to be the correct and practical test of the two propositions, and it would seem to be the only important inquiry to ascertain the better doctrine. If the bank contracted for such an undertaking, then all servants employed by it to assist in the collection are regarded as its agents and not the sub-agents of the principal; the primary agent alone being responsible to his principal for any neglect, miaconduct

or default of such servant for the manner in which the duties of the collection are executed. No privity of contract exists between such servant and the principal, and it concerns in no degree the depositor of the paper, what individual or corporation perform the service agreed upon; since the agent must take the risk and be responsible for all loss or damage occasioned by a non-performance on his part of the well established duties.

Attention, then, it would seem, should not be given to the fact,so strenuously urged on behalf of the early rule, that the depositor must have intended or contemplated the employment of a corrospondent bank or other agent at the distant place. For it is obvious that thebank, also, must have known the necessity of making the demand at the place where the bill became due and payable; and it is equally certain that the bank must have anticipated the need of securing a corrospondent at that place to execute its orders and effect the collection of the paper. That the bank officials in such a case are fully informed as to the precise nature of the task; as to the absolute need of a demand at no other place; as to the nature and extent of the depositors interest and property in the

bill, and that he has entrusted that interest to them; regard being had to their ability, skill and experience in the business, is manifestly beyond dispute. As we have seen, banks are also fully informed as to the requirements and the law regulating those transactions. They need no directions from the depositors. No special authorization in a bank's charter is necessary to invest the bank with the right to undertake collections. No special contract is necessary to clothe it with all the duties and liabilities of a collecting agent. Yet, they seek to evade the responsibility of such correspondents default and misconduct on the mere pretense that the holder of the note must have expected or contemplated that a bank or other agent at that place would be necessary to make the needed presentment. Granting that such are the facts, for the very bill itself evidences to all parties the necessity of such a demand at a foreign place, yet, is it not equally true that neither the depositor nor the bank expectsthe president, or even the cashier, of the institution to effect the collection any more than in the case of the collection of domestic paper? But rather, on the contrary, inboth instancesit is contemplated that the bank

will select some one, whether it be an individual or a correspondent bank, chosen precisely the same as in the case of immediate clerks and other servantsof the bank, solely with reference to their experience, responsibility, and ability for executing the functions and performing the transactions incident to the banking business. Such is the relation of the bank to its ordinary employees, for whose neglect, misconduct and default in the management and control of domestic collections, their responsibility has never been questioned. Why not in such an instance interpose the same objection, that the depositor must have known the need of employing an agent at home to execute or to assist in performing one of the many functions of the banking enterprise? In the case of a transmitting bank employing a correspondent to assist or execute the duties of collection; precisely the same obligations and control is contemplated between the parties as in the case of a domestic collection; precisely the same relations between the two banks exist, as in the case of the immediate employees of the bank, each being chosen with reference to their responsibility and other qualifications; and precisely the same ordinary function in the banking busi-

ness is called into operation. Under such circumstances, it is evident that it concerns the depositor very little whether a bank or other agent resident at that place, or a special agent is sent to procure the bill's collection. The presentment, the protest at that place in due time and in proper manner, the giving of the requisite notices, and these alone, are the essential objects and duties which the depositor intends, expects and contracts for the bank to accomplish. It is plain that the bank by receiving a bill for collection, whether it be foreign or domestic, is alike under the same obligations, and is entrusted with the same management of the owners interest and propertyin each case, and should be absolutely liable to him under the rule as stated, for any loss which the depositor may suffer by reason of its misconduct or default. And any other rule would be truly a harsh one.

But it is further insisted, that there is no consideration sufficient to support an undertaking by the bank to warrant the depositor against the acts or omissions of the corrospondent. Such, however, is not the case. The benefit derived from the use of the money while in their hands; the extention of their business; the adcan-

tage of settling their accounts with a distant bank without being compelled to send the currency; and the commissions or exchange often charged; have repeatedly been held to furnish a sufficient consideration for the undertaking to collect the bill. Mr. Daniels, on this question of consideration, says: (I) "Frequently the banks charge a commission for collections to be made in distant places. But the advantages arising from business associations, and the possible and probable temporary use of the money are a sufficient considerationfor the undertaking to collect it." This appears to be generally approved by the courts and, however small the consideration may be, it would seem, in view of the right of action for reimbursement which the home bank has against the defaulting corrospondent, that no unfairness or injustice could arise between the various banks.

Lastly, on the part of the advocates of the early rule we are informed that according to a general usage in dealings by banks, the undertaking on their part is merely to transmit the paper with proper instructions in due time to to a competent agent at the place named. This position is

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(I) Daniels on Negotiable Instruments, # 324.

clearly untenable. No authority is necessary to be cited to defeat such a contention. No principle of law is better settled than, that a general prevailing usage or custom, assuming the knowledge of the parties, can never be allowed to violate or vary the fundamental duties contracted for or to change the character of a contract existing between the parties. A custom or usage is aften allowed to govern the mode of performance by the parties for their own convenience and accommodation, but such would not be the effect in the present instance. It would not be permissible to vary the liability in the case of the collection of domestic paper, nor could it for a like reason, as has been stated, be a defense to an action in the case of the collection of a foreign bill.

The fact that the undertaking of collections is a function of the bankibg business, and within the implied scope and effect of the organization of a banking company-no charter being necessary to confer the privilege-it being one of the many offices in common with banking, would seem to add great force to the irresistable conclusion that it shouald be wholly responsible for any loss that may arise from an omission to execute all the duties relative to

such undertaking. It is true that in early times banks were regarded merely as affording a safe place for the deposit of money. This idea, however, has long been abandoned by the banks and other institutions of a similar character, and the ~~depositing~~ collection of ~~money~~ paper is now regarded as one of the essential and profitable sources of income.

The fact, also, that banks negotiate as a general rule with corrospondents of good standing and credit, located in remote towns and cities, especially in large cities, for the regular transaction of their respective collections in their particular locality; and often times, in order to obtain those collections from which they share the commissions, even execute a bond or give other security for the protection and faithful performance of the collections entrusted to them; and, together with the privilege of the bank, either to stipulate, if for any cause it does not desire to become answerable for the default of a corrospondent to be employed, for a limited liability in the event of loss;or to refuse in toto to undertake the collection; seem to allow the bank ample opportunity to guard against their own loss, and, also, to add great weight and to demonstrate the inevitable necessity and

practability of the rule as promulgated by the New York court of the Correction of Errors.

Senator Verplank, who delivered the opinion of the majority of the court in the famous case of Allen v. Mercantile Bank, (I) has ably stated the reason for the rule as adopted by the court, he says:- " What then is the ordinary undertaking, contract or agreement of a bank with one of its dealers in the case of an ordinary deposit of a domestic note for collection? It is a contract made with a corporate body, having only officers and agents, or if it be a private banker, he too is known to carry on his business with checks or agents. The contract itself is to perform certain duties necessary for the collection of the paper and the security of the holder, but neither legal construction or the common understanding of menof business can regard this contract (unless there be some express understanding to this effect) as an appointment as an attorney or personal representative of the ownerof the paper, authorized to select other agents for the purpose of collecting the note and nothing more.

In a very recent case, that of the St. Nicholas Bank of New York v. State National Bank, (2) decided in

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(I) 22 Wend. 215.
(2) I28 N. Y. 30.

June, 1891, the Court of Appeals again had occasion to reaffirm the rule of the absolute liability of the home bank, and, it may be said, to have settled beyond question the rule in this State. That was an action to recover the amount of a check, drawn on a bank in Texas, which had been forwarded by the plaintiff, a bank in New York City, to the defendant, a bank in Memphis, Tenn., for collection. The latter bank received the check, and in turn, forwarded it to a banker at Dallas, Texas, who after collecting the check and before remitting the proceeds of the collection, became insolvent. Judge Earl, in delivering the unanimous opinion of the court, said:- " In such a case the collecting bank assumes the obligation to collect and pay over or remit the money due upon the paper, and the agents its employs to effect the collection, whether they be in its own banking house or in some distant place, are its agents and in no sense the agents of the owner of the paper. Because they are its agents it is responsible for their misconduct, neglect, or other defaults."

Judge Morse of the Supreme Court of Micgigan, expressing the opinion of that court for the first time,

in the case of Simpson v. Walby, (I)wherein this question was envolved, says:- " The learned jurists (refering to to those supporting the early doctrine) holding otherwise all admit, that if a person entrusts a home draft or bill to a bank for collection, such bank is responsible to the customer for any negligence or default of its agents, officers or employees. I cannot see why any different rule should prevail in the selection of a foreign bill..... If I leave an endorsed note against a personin my own town for collection and consequent demand and protest, I know that some agent or employee of the bank will do the work, or some part of it. I contract, however, with the bank that suitable agents will be employed anf hold it responsible for its a acts..... If I entrust the same bank with the collection of a foreign draft, I also know that they will employ some agent or corrospondent abroad,of the their selection, not mine, of whom I know nothing and with whom they are supposed to have business relations."

But not until the Supreme Court of the United State in the case of the Exchange National Bank v. Third National

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(I) 30 N. W. Rep. (1845) 199.

Bank of New York, decided (I) as a principal of mercantile law (purely), that a bank receiving paper for collection abroad, is answerable for the defaults, negligence and misconduct of its corrospondents, to its customers, have the courts which so ably supported the doctrine , deemed it proper to regard the rule beyond criticism, and to regard it as 'res adjudicata'.

In the case just citedthe plaintiff, a bank in Pittsburg, had discounted several drafts drawn on Walter M. Conger, Secretary of the Newark Tea Tray Company, and sent them to the defendant bank for collection. They in turn were forwarded by the defendant to a bank in Newark, N. J. with proper instructions to complete the collection. The Newark bank received them and made the necessary presentment, but took the individual acceptance of Conger, he refusing to accept as Secretary of the Tea Tray Company . No notice whatever of such an acceptance was given to the Pittsburg bank until after the maturity of the first draft and the insolvency of the endorsers on the paper. In an action to recover for the loss of the draft, a recovery against the defendant bank was granted by Mr. Justice Blatchford in his opinion said:- " The nature of the

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(I) 112 U. S.

contract is the test, if the contract is only for the immediate service of the agent, and for his faithful conduct as representing his principal, the responsibility ceases with the limits of the personal service undertaken. But where the contract looks to the thing to be done and the undertaking is for the due care of all proper means of performance, the responsibility extends to all necessary and proper means to accomplish the object by whomsoever used. . . . . The bank is not merely appointed an attorney to select other agents to collect the paper. its undertaking is to dc the thing, nct merely to procure it to be done. In such a case, the bank is held to agree to answer for any default in the performance of its contract; and, whetherthe paper is to be collected in the place where the bank is situated or at a distant place, the contract is to use all proper means to collect the paper, and the bank by employing subagents to perform a part of what it had contracted to do becomes responsible to its customers."

In England at an early day, the House of Lords in the case of Makasy v. Ramsays (I) endorsed the New York doctrine.In his decision, Lord Campbell disposed of this question by saying :- " The general rule

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(I) 9 Cl.& Fin., 818.

of law that an agent is liable for a subagent employed by him, is not confined to the case where the principal has reason to suppose that the act may be done by the agent himself without employing a subagent .....If there was any negligence in the conduct of the parties actually employed to receive the money, it could only affect those by whom they were so immediately employed , for certainly they were not the agents of the costomer."

No greater force could be brought - nor would it seem necessary - to support the principals of the NewYork courts than the endorsement of them by the UnitedStates Supreme Court and the House of Lords in England.

As to the liability of the receiving bank for the acts and ommisions of notaries employed to make demands and give the usual notices of dishonor, that by law are required of them, the same conflict in the authorities prevail. The New York courts presistently adhere to the strict rule of the liability of agents, to wit that, "in the absence of any authority , either expressedor implied, to employ a subagent , the trust commited to an agent is exclusively personal, and cannot be delegated by him to another so as to effect the rights

of the principal. In such acase, if the agent empdoys a substitute he does it at his own rish and upon his own responsibility." (1) Alike view is taken by the courts in Indiana, New Jersey, Missouri, and Kansas, and rests upon the same arguments and reasons as led to an overthrow of the early rule and the adaption of what is now known as the New York ruleof liability for default of all subagents, namely, that the bank undertakes as we have seen among other duties " to present the bill for exceptance and upon refusal to protest for non-acceptance ." and that, if in the other instances it contracts to execute those duties then there is no ground or reason for this excuse or exception, it promises to follow the law in that particular as well as in matters relating to the time of payment and must be answerable for a failure , should loss or injury result to its consumer.

Judge Earl, in the case of Ayrault v. Pacific Bank(2) says: " The doctrine was established in NewYork at an early period and has since been maintained, that a bank receiving negotiable paper for collection in the absence of an express agreement or recognized custom, limiting its liability, stands in the attitude of an independemt con-

(1) Appletors Bank v. Mc. Gilvray, 5Gray 578.
(2) 47 N. Y.

tractor and that if, in the course of the performance it employs a notary to present the paper for payment and to give proper notices to charge the parties, the notary is the agent of the bank and is therefore liable for his negligence."

The weight of authority, however, is decidedly against the doctrine as laid down in New York. The exception in the cases rests upon a different and and apparently more tenable contention than the one urged for the absolving of the home bank from all liability in the event of the default of its corrospondents. Thus, where a bill is placed in the hands of a notary for demand and protest by a bank, it is held "that such permission to delegate the responsibility may be inferred when by law such power is indispensible to accomplish the end proposed." (1) The frequent illustration of this exception to the agents liability for his defaults, is where an agent is directed to sell the property of his principal, and such sales are required by statute to be made by an auctioneer duly licensed for that purpose. In such a case it is obvious, that authority to employ such an auctioneer will be

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(1) American Law Review, Vol. XX., 889.

inferred by the courts from the direction of the principal to make the sale.

But this illustration should not be confused with the case where the agent contracts to do the thing itself, and to conform and execute the sale entrusted to him in a proper manner. In the former instance, the agent acts in conjunction with the principal, and in accordance with the directions he receives; while in the latter, although the principal expects him to employ an auctioneer and to conform to the law in every particular, yet he contemplates that such duties and terms shall be observed and executed according to the contract, and that under no conditions will any loss or injury from the sale be suffered by him. That such an exception as urged, is not applicable to the case of a bank undertaking, and as we concluded, contracting for the performance of certain duties relative to the collection of business paper , is clearly apparent and much more in harmony with the preferable doctrine of holding a bank absolutely liable for the defaults of its correspondents and other agents.

In jurisdictions where banks are held to be free from liability for the defaults of their correspondents,

the same rule is almost uniformly extended, for like reasons, to this case of the default of notaries in not making proper presentments and giving the regular notices, the only exception to this in the decisions being in the State of ~~Wisconsin~~ Missouri where the converse is true. This exception in the case of the default of notaries has, nevertheless, been sanctioned by many of the courts which endorse the New York rule in respect to the default of a correspondent bank. Noticebly among these decisions is that of the Supreme Court of the United States, which affords a leading authority in this country in support of this exception in the case of a default of a notary to whom a bill is entrurted to make a demand, and if refused, to protest. The case of Britton v. Nicholls (I) decides this question. The defendants in this action were bankers doing business at Natchez, Miss.. They received from the plaintiff for collection several promissory notes all payable at Natchez. The notes being unpaid at maturity, they were handed to a notary for presentment and protest. The notary failed to make a proper demand, but protested and gave the usual notices

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(I) 104 U. S. 757.

of dishonor. In an action to recover the value of the notes, the Supreme Court of the United States, although following the New York rule as to the liability of a bank for the negligence of its correspondents, held that no recovery in the case of a notary could be had. The court said:- "It is enough that the notary public was not in this matter the agent of the bankers. He was a public officer whose duties are prescribed by law, and when the notes were placed in his hands in order that such steps should be taken by him as would bind the endorsers, if such notes were not paid, he became the agent of the holder of the note. For any failure on his part to perform his whole duty, he alone was liable. The bankers were no more liable than they would have been for the unskillfulness of a lawyer of reputed ability and learning to whom they might have handed the notes for collection."

In Ohio, the Supreme Court of that State, in the case of Bank v. Butler, (1) followed the doctrine of the Supreme Court of the United States and even went so far as to hold the bank absolved from liability in a case where a protest was unnecessary and unauthorized by stat-

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(1) 41 Ohio St., 521.

in order to protect the holder's right of action against the endorsers on the bill. Justice Martin, in his opinion, says: "We think under our legislation and in the circumstances stated, a bank's customers, in the act of delivering a note for collection, must be held to contemplate the preference given by protest and to direct the employment in due course of a notary; and that the bank in taking the paper for collection is, if not paid, to hand it to reputable notary in season. We think this may be said to be the natural import of the act of the delivery by the one and taking by the other, especially in a jurisdiction where the notary can act only as an independent public officer"

This seems to be the generally prevailing rule at present, and suffice it to say, that the exception in the case of a notarie's default is too well established by the decisions to be disregarded by the courts.

The fact, however, that notaries as a rule are irresponsible persons, whose circumstances and ability the correspondent or the bank who employs him, alone, is in a ~~condition~~ situation to ascertain, and together with the fact that a bond is not commonly required to secure the faithful dis-

charge of the duties of that office, demonstrate clearly the practicability of the holding of the New York courts to facilitate the dispatch of business and to give ample protection to the holder's rights and property in his paper. And, in those States where the exception to the general rule prevails, it would seem to be a proper subject for legislative control, by either authorizing a recovery from the bank for the default of notaries employed by them, or by requiring a security bond from the notary, to protect the holder against lossby reason of their individual negligence to faithfully execute the duties of their office.

The right of the owner of the paper to recove the proceeds of the bill from a corrospondent, after collection is dependent, says Mr. Daniels, (1) upon, "the recognized practice and usage of collecting banks in the United States where the endorsee collecting bank collects paper which has passed through the hands of a series of collecting banks, to remit, or credit the proceeds to the lastforwarder or indorser for collection, without regard to the actual ownership of the paper." This practice among banks is uniform and fully recognized by the authorities as a

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(1) Daniels on Negotiable Instruments, # 334(a).

discharge of their trust and as a complete bar to a recovery by the holder of the paper.

The owner, however, in a majority of the States, is permitted to recover from a corrospondent in any case, providing sufficient notice of his property in the bill has been given, and also, of his intention to hold them responsible for its proceeds.

Mr. Chief Justice Tanney, speaking of this subject, said:- (1)" We think the rule very clearly established, that whenever, by express agreement between the parties, a subagent is to be employed by the agent to receive money for the principal, or where an authority to do so may be fairly implied from the usual course of trade, the principal may treat the subagent as his agent; and when he has received the money, may recover it in an action for money had and received."

Under those circumstances, the corrospondent bank becomes directly answerable to the depositor for the sums collected over and above their commissions. But their liability in this instance only becomes absolute where the bill has been collected; where the proceeds remain in

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(1) Wilson v. Smith, 3 How., (U. S.) 769.

their control, no remittance having been made to its predecessor; and where in short a recovery would in no way be prejudicial to the rights of the corrospondent.

For the purpose of determining what constitutes a sufficient notice in this connection, many important cases have arisen; and the decision in nearly every case has depended entirely upon the terms of the endorsement on the bill.

The common and usual way of endorsing a bill,so intended for collection is, by what is known in legal phraseology, as a restrictive endorsement; the words 'for collection' or other words of like import being written after the holders signature on the bill. By this means the owner is said to notify all persons in whose hands the paper comes in the process of its collection, of his rights and interestin it; and, even after collection, many courts say the proceeds are held by the bank as a trust fund , and a distinct and seperate fund from the common monies of the bank. There seems to be no conflict in the holding of the courts upon this proposition; and, even in jurisdictions where the receiving bank is held liable for the acts and omissions of its corrospondents, this right of a recovery

by the owner directly from the correspondents after collection and before remittance by them, has never been denied him. The courts of those Statesgive the holder the option of recovering from either the distant correspondent or from the home bank. The home bank in all cases where it answers for the default and misconduct of its correspondents, is allowed to recover by action, reimbursement, from such defaulting correspondent.

But it frequently happens that abill deposited for collection is merely endorsed in blank; the holder to all appearances, transferring the absolute title to the endorsee- the bank which is to make the collection. The duties and obligations of a corrospondent who receives such a bill - in the absence of other notice of its real owner- runs directly to his immediate endorser, and such is the case, even if the bill is many times endorsed , and forwarded in turn to several corrospondents in the process of its collection.

The depositor under those circumstances can recover as before, only upon giving su ch corrospondent or agent notice before they remit the proceeds or divest themselves of any rights , which theywould have otherwise protected

themselves against, were it not for the anticipated proceeds of the bill. For this purpose the distant agent is considered as the agent of the holder as well as of the transmitting bank. Many nice questions have arisen as to what constitutes a remittance in this connection; and as to when a recovery by the owner would prejudice the rights of the corrospondent. Hence, it often occurs, that a corrospondent retains the proceeds of a note or bill which it has collected, and applies the same to a balance due it from its immediate endorser - the transmitting bank. Many cases involving the owners right of recovery in such an instance have been decided; but the nature of my subject and the limited time at my disposal will not permit any lengthy discussion of this subject. The prevailing rule in this country may be briefly stated in the words of Mr. Chief Justice Tanney, who, in the celebrated case of the Bank of the Metropolis v. New England Bank, (I) when this case came before the court upon a second appeal, said;- "If the jury find that the course of dealings between the Commonwealth Bank and the Bank of the Metropolis was such as was stated in the testimony: that they

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(I) 6 How. (U. S.) 225.

always appeared to be , and treated each other as the true owners of the paper mutually re mitted, and had no notice to the contrary: and that balances were from time to time suffered to remain in the hands of each other, to be met by the proceeds of negotiable paper deposited or expected to be transmitted in the usual course of dealings between them, then the plaintiff in error is entitled to retain for the amount due on the settlement of the account."

Willis V. Gridley.