THE LAW

OF

BANK COLLECTIONS

BY

ARTHUR W. SELOVER, B. A., LL. M.,

Author of Treatise on the Negotiable Instruments Laws, etc.

ST. PAUL, MINN.
KEEFE-DAVIDSON LAW BOOK CO.
1901.

WEBB PUBLISHING CO. PRESS, ST. PAUL.

PREFACE.

It has been the aim of the author to make this work an accurate and exhaustive treatise on the law of bank collections, and with that end in view, he has endeavored to consult and incorporate all the decisions on this important branch of banking law. It is believed that the importance of the subject justifies the labor required to follow out such a mode of treatment, and it is hoped that the result is a book which shall be of practical service to both lawyer and banker.

The treatment which the subject of bank collections has received heretofore in general works on banks and banking is incomplete and inadequate in many respects. A great deal of the law on the subject is comparatively new, and necessitates, in some cases, a modification or a complete change of old rules and principles.

Special care has been taken to determine and state the true relation between the collecting bank and its customer, for many of the difficulties encountered in this branch of the law are traceable to a misconception of the relation between the parties.

Great care has also been taken to analyze and explain the conflicting decisions on the question of the liability

of the collecting bank for the defaults of notaries and correspondent banks. To do this properly, it was necessary to set forth the gist of the decisions of the various jurisdictions *seriatim,* and to compare them somewhat at length. While there is little hope that the irreconcilable conflict on this point can be settled by anything short of a uniform statute covering the matter, the *resume* given will at least serve to show the strong and weak points of each side of the controversy.

Another question which has received careful and enlarged treatment in this book is that of the right to follow the proceeds of a collection as a trust fund. The modern rules of equity as administered in England and the United States have been applied in determining the existence of this right under varying circumstances.

A separate chapter has been given to the consideration of the rights and liabilities growing out of the collection of forged or altered paper.

Throughout the work, the author has endeavored to state the governing rules of law definitely and concisely. The rules given are based on the authorities cited thereto, and not on the *ipse dixit* of the author, though the author has not refrained from drawing from the decisions what he believes to be logically legitimate conclusions. For the benefit of bankers and lawyers who do not have access to large law libraries, many of the decisions have been fully analyzed in the text, and numerous pertinent quotations have been made from them. For the benefit of this class, also, the author has added to the citations from the official reports, parallel citations from other legal publications.

With these observations, this work is respectfully submitted to the public, in the hope that its demerits may

be viewed with charity, and that its merits, if any, may be used to advantage.

A. W. S.

Minneapolis, Minnesota, May 10, 1901.

TABLE OF CONTENTS.

CHAPTER I.

THE RELATION AND ITS INCIDENTS.

(A) In General.

Page.

§ 1. Introductory statement 2
2. Collecting bank as bailee..... 3
3. Collecting bank as agent..... 6
4. Collecting bank as trustee..... 8
5. Relation when paper is payable at bank..... 9
6. What law governs relation..... 11
7. Consideration for undertaking to collect..... 13
8. Inception of relation in general..... 15
9. —— Estoppel of bank..... 16
10. Effect of custom and usage..... 17

(B) Title to Paper and Special Property Rights of Banks.

§ 11. As a general rule, title remains in depositor..... 19
12. Title does not pass to bank insolvent when paper was received 21
13. Title to paper received and treated as cash passes to the bank 21
14. —— Presumptions 23
15. Effect of credit in advance of collection—Cancellation of credit on dishonor of paper..... 25
16. —— Credit of checks drawn on collecting bank..... 28
17. Title as affected by form of indorsement..... 29
18. —— Blank indorsement passes title..... 32
19. —— Parol evidence..... 34
20. Bank discounting paper has title..... 35
21. When title of bank revests in depositor..... 37
22. Special interest of bank as bailee..... 37
23. Lien of bank and right to set-off..... 39

CHAPTER II.

AUTHORITY OF COLLECTING BANK IN GENERAL.

Page.
§ 24. Bank has implied power to make collections..... 44
25. —— National bank..... 45
26. General scope and limitations..... 46
27. Special instructions as to mode of collection..... 47
28. Authority of bank to sue in its own name..... 48
29. —— For possession of paper..... 51
30. —— As real party in interest..... 52
31. Termination of authority to collect..... 53
32. —— Insolvency of bank..... 54
33. —— Revocation of authority by owner of paper..... 54
34. —— Renunciation by bank..... 55

CHAPTER III.

DUTIES AND LIABILITIES OF COLLECTING BANK IN GENERAL.

§ 35. Degree of care required of bank..... 59
36. Contractual limitation of liability..... 60
37. Representation of bank by cashier..... 62
38. Defaults of depositor—Bank not liable..... 63
39. Liability for loss of paper—Negligence presumed from loss 64
40. —— Failure to make inquiry and give notice within reasonable time..... 66
41. Surrender of bills of lading accompanying drafts for price of goods..... 67
42. Application of deposits to payment of depositor's paper held for collection..... 71
43. —— Check or draft not an assignment of fund..... 76
44. Time and manner of receiving payment..... 78
45. —— Extensions and renewals..... 79
46. Medium of payment—As general rule, bank can take money only..... 80
47. —— Checks on other banks..... 82
48. —— Claims against collecting bank—Certificates of deposit..... 85
49. —— Same—Checks on collecting bank..... 86
50. Collecting bank also a creditor of obligor—Cannot obtain preference—Exceptions..... 86

Page.
§ 51. Collection of interest 90
52. Liability of collecting bank for depreciation 91
53. Liability of collecting bank as general indorser 92
54. Duties as to paper sent to a correspondent—Forwarding instructions and information 94
55. Fraud and mistake 95
56. Negligence a question of fact—Province of court and jury 95
57. Waiver of negligence of collecting bank 97

CHAPTER VI.

TAKING STEPS NECESSARY TO CHARGE PARTIES TO PAPER.

§ 58. General rules 101
59. Bank is a "holder" for purposes of collection 102
60. Presentment for acceptance 103
61. —— Excuses for failure to present for acceptance 105
62. —— Bank liable for taking acceptance not according to tenor of bill 106
63. Presentment for payment 107
64. —— Time of maturity and days of grace 108
65. —— Paper payable at bank 111
66. —— Checks 112
67. —— Effect of custom 114
68. Protest 115
69. —— Excuses and defenses 116
70. Notice of dishonor 117
71. —— What indorsers entitled to notice from bank 120
72. Owner may sue bank without first suing indorser 121
73. Enforcement of paper taken in payment 122
74. Return of dishonored paper 123
75. —— Effect of custom 125
76. Ratification and waiver of negligence of bank 126

CHAPTER V.

EMPLOYMENT OF AGENTS AND CORRESPONDENTS, AND LIABILITY FOR THEIR DEFAULTS.

(A) In General.

§ 77. Bank must use reasonable care in selection of agents and correspondents 132

Page.

§ 78. Drawee or obligor not a suitable agent or correspondent.. 133
79. —— Effect of custom..... 138
80. Contracts and dealings between banks in general..... 140
81. Employment of notaries, and liability for their acts and defaults 141
82. —— Notary an officer or employe of bank..... 143
83. —— Notary a public officer..... 144
84. Employment of agents other than notaries and banks and liability for their defaults..... 146

(B) Liability of Initial Bank for Default of Correspondent.

§ 85. In general 148
86. England 149
87. Federal courts of the United States..... 149
88. New York 151
89. New Jersey 153
90. Ohio 153
91. Georgia 154
92. Michigan 154
93. Minnesota 156
94. Montana 157
95. North Dakota 157
96. South Dakota 158
97. Colorado 159
98. Texas 159
99. Massachusetts 160
100. Connecticut 161
101. Pennsylvania 162
102. Maryland 164
103. North Carolina 164
104. Indiana 165
105. Illinois 166
106. Wisconsin 167
107. Iowa 167
108. Kansas 168
109. Nebraska 169
110. Missouri 170
111. Kentucky 170
112. Tennessee 171
113. Alabama 172
114. Mississippi 173

Page.
§ 115. Louisiana 173
116. Conclusions from the decisions..... 174
117. Effect of special agreements..... 177
118. Effect of custom..... 177
119. Effect of insolvency of correspondent..... 178
120. Liability of correspondent bank to initial bank..... 179

CHAPTER VI.

COMPLETION OF COLLECTION AND REMITTANCE OF PROCEEDS.

§ 121. Collection complete on receipt of money and entry of absolute credit—Change of bank's status from bailee to debtor 182
122. Collection not complete on mere credit in advance of collection 184
123. —— Exceptions from estoppel or particular course of dealing 186
124. Completion of collection by application of deposits to payment—Effect of failure to so apply deposits..... 189
125. —— Withdrawal of deposits..... 190
126. Effect of payment to correspondent bank..... 191
127. How remittance made—Check, draft, or certificate of collecting bank 191
128. Payment by mistake, and recovery of payments made by mistake 192
129. —— Mistake as to solvency of obligor, or sufficiency of customer's deposits 194
130. Voluntary payment by bank cannot be recovered back.. 197

CHAPTER VII.

RIGHTS AND LIABILITIES AS TO PROCEEDS.

(A) In General.

§ 131. Who entitled to proceeds in general..... 200
132. Bona fide holders of paper..... 203
133. Rights of creditors of owner..... 204
134. Proceeds of paper belonging to firm or partner..... 206

Page.

§ 135. Proceeds of judgment on joint claims of bank and depositor 207
136. Liability of correspondent bank to owner..... 207
137. —— For conversion 208
138. Liability of correspondent to initial bank..... 209
139. Title and rights as between initial and correspondent banks in general..... 210
140. —— Estoppel of initial bank to deny ownership..... 211
141. Effect of rules and usages of clearing houses..... 212
142. Lien of correspondent bank on proceeds for debt of initial bank 213
143. —— When correspondent a bona fide purchaser of paper 216
144. —— Notice of real ownership of paper..... 219
145. —— Proceeds of paper originally indorsed in blank..... 223

(B) Enforcing Preference or Establishing Trust.

§ 146. In general 225
147. Fraudulent conversion as creating preference or trust.. 227
148. Remittance made by draft or check—Drawer or drawee bank insolvent 229
149. Refusal to pay customer's check does not give preference 231
150. Tracing and following proceeds into insolvent estate of collecting bank 232
151. —— Proceeds never in possession of bank..... 237
152. —— Amount of note against customer charged to his account before insolvency of bank..... 239
153. —— Proceeds disposed of before insolvency..... 239
154. —— Proceeds collected by assignee or receiver..... 241
155. Bank as owner of paper and proceeds..... 243
156. Preference limited to assets realized at time of failure of bank 245
157. Waiver of preference or trust..... 245

CHAPTER VIII.

COLLECTION OF FORGED OR ALTERED PAPER.

§ 158. What law governs liability of collecting bank..... 248
159. Name of maker or drawer forged..... 250
160. —— Estoppel of bank by acts of cashier..... 253

Page.
§ 161. Drawee bank not charged with knowledge of alterations 254
162. Indorsement of payee forged..... 254
163. Diligence in notifying parties to paper..... 258
164. Liability of collecting bank on its indorsement of forged paper 260
165. Charging back amount of forged or altered paper..... 262
166. Recovery back of payments made on forged or altered paper 264
167. —— Bank's agency undisclosed..... 269
168. —— Effect of certification of paper by drawee bank.... 271
169. Ratification and waiver..... 271

CHAPTER IX.

ACTIONS AGAINST BANK FOR NEGLIGENCE.

§ 170. Right of action in general..... 274
171. Surrender of paper as condition precedent to action... 276
172. Limitation of action..... 277
173. Declaration or complaint..... 278
174. Answer 280
175. Presumptions and burden of proof..... 281
176. Admissibility of evidence..... 283
177. Pleading and proof—Variance..... 284
178. —— Matters admissible under general denial..... 285
179. Verdict and judgment..... 286

CHAPTER X.

MEASURE OF DAMAGES.

§ 180. Compensatory damages in general..... 288
181. Nominal damages 289
182. Face value of paper..... 290
183. For failure to charge indorsers..... 292
184. —— Costs of unsuccessful suits against indorsers..... 293
185. For conversion 294
186. Recovery of interest..... 294
187. Matters that may be shown in mitigation of damages.. 295

LAW OF BANK COLLECTIONS.

CHAPTER I.

THE RELATION AND ITS INCIDENTS.

(A) IN GENERAL.

§ 1. Introductory statement.
2. Collecting bank as bailee.
3. Collecting bank as agent.
4. Collecting bank as trustee.
5. Relation when paper is payable at bank.
6. What law governs relation.
7. Consideration for undertaking to collect.
8. Inception of relation in general.
9. —— Estoppel of bank.
10. Effect of custom and usage.

(B) TITLE TO PAPER, AND SPECIAL PROPERTY RIGHTS OF BANK.

§ 11. As a general rule, title remains in depositor.
12. Title does not pass to bank insolvent when paper was received.
13. Title to paper received and treated as cash passes to bank.
14. —— Presumptions.
15. Effect of credit in advance of collection—Cancellation of credit on dishonor of paper.
16. —— Credit of checks drawn on collecting bank.
17. Title as affected by form of indorsement.
18. —— Blank indorsement passes title.
19. —— Parol evidence.
20. Bank discounting paper has title.
21. When title of bank revests in depositor.
22. Special interest of bank as bailee.
23. Lien of bank and right to set-off.

(A) In General.

The relation between a depositor of commercial paper for collection and the collecting bank is that of bailor and bailee; but some courts treat it as that of principal and agent. Though fiduciary in its nature, the relation is not a trust; yet a trust may, under certain circumstances, grow out of the relation, and attach to the proceeds of the collection.

Where the paper is payable at the collecting bank, the latter can act for the payee or holder only; the place of payment being designated merely for convenience.

The law of the place of the performance of the contract governs the relation between the collecting bank and its customer.

The general profits of the business of handling the paper, and the advantage from the rates of exchange, form a sufficient consideration for the undertaking of the bank to collect. If the bank accepts the paper for collection, and takes steps to that end, it is bound to perform the undertaking.

The relation takes its inception from the delivery and acceptance of the paper for collection, and the bank may, by its acts, become estopped to deny the relation.

All general, reasonable, and lawful customs of banks enter into the relation.

§ 1. Introductory statement.

In defining the exact relation existing between one who delivers commercial paper to a bank for collection and the bank which accepts the paper for that purpose, we at once encounter the great difficulty of distinguishing between a "bailment," an "agency," and a "trust."

While it is true that these terms stand for relations having some common characteristics, such as the existence in all of a more or less clearly defined fiduciary

element, and it is also true that the result reached in deciding similar cases on different theories is often the same, nevertheless it is to be regretted that so many courts of last resort have adopted different theories of the relation between the collecting bank and its customer, and that so many courts use the above terms loosely and interchangeably.[1] The actual result of this confusion of terms, as we shall see later, has been a serious and irreconcilable conflict of authority on some branches of the law relating to collections by banks. It is fitting, therefore, that proper attention be given at the outset to determining the true relation between the parties to the contract for collection.

§ 2. Collecting bank as bailee.

Mr. Edwards, in his work on Bailments, treats a delivery and acceptance of negotiable paper for collection as creating a contract of mandate,[2] which he defines as a "bailment of goods without reward, to be carried from place to place, or to have some act performed about them."[3] This position would be correct were it not for the fact that the courts do not regard the undertaking of a bank to collect commercial paper as gratuitous.[4]

In Louisiana, the delivery of paper to a bank for collection is designated as a bailment, technically known as an "irregular deposit."[5] This is according to Poth-

[1] The opinion in Foster v. Rincker, 4 Wyo. 484, 35 Pac. 470, is a good illustration of the confusing use of these terms.

[2] Edwards, Bailments (2d Ed.) § 91.

[3] Edwards, Bailments (2d Ed.) § 74.

[4] See post, § 7.

[5] Amelungs' Syndics v. Bank of United States (La.) 1 Mart. (O. S.) 322, 348.

ier's (civil law) classification of bailments for hire into regular and irregular, and his definition of the latter class as bailments where the specific thing bailed is not to be returned, but a thing of similar nature and equal value.[6] The difficulty with this classification is that title passes to the bailee under an irregular deposit,[7] whereas it is universally held that title does not pass to the bank under the ordinary contract for collection,[8] at least until collection is made and absolute credit given.[9]

Inasmuch, therefore, as the courts do not consider the bailment of paper to a bank for collection as gratuitous, or as passing title to the bailee, the contract falls more properly under that division of bailments designated as *locatio operis faciendi,* or the hire of work and labor, or care and services, to be bestowed on the property bailed for a reward.[10]

This view of the nature of the bailment of paper for collection is sustained by the United States court of appeals for the district of Massachusetts in the case of Beal v. City of Somerville,[11] where Putnam, C. J., says: "A mere deposit would only require a bank to keep; but a usage requiring the bank to do in this case something more has continued so long, and is so notorious and universal, that the law can take judicial

[6] Pothier, de Depot, § 82.

[7] Jones, Bailments, § 102; Story, Bailments, § 370a; Pothier, de Depot, § 82.

[8] See post, § 11.

[9] See post, § 121 et seq.

[10] Story, Bailments (9th Ed.) § 370; Coggs v. Bernard, 2 Ld. Raym. 909, 913.

[11] 5 U. S. App. 14, 50 Fed. 649.

notice of it, and it happens that its terms and limitations cannot be mistaken. The bank must use due diligence to collect; and, as collections are completed, the bank no longer holds the avails as bailee, but is authorized to mingle them with its other funds, and thus constitute itself a debtor. This, of course, makes the entire transaction something more than a mere 'deposit,' in any proper sense; but the word well gives color to all that follows, and converts all that is done between the customer and the bank, to and including the actual turning of the checks into money, into *locatio operis,* according to its meaning as explained by Judge Story in his work on Bailments (chapter 6, art. 2). Aside from the right of the bank to constitute itself a debtor from the time the checks are converted into cash, or its equivalent, * * * no qualification of the strict legal relations created by a bailment is deducible from the general nature of the transaction, the terms in which it is expressed, or the settled custom, or is shown by the appellant."

Many of the courts, however, do not take the pains to determine the particular kind of bailment that arises from the relation, but content themselves with the simple designation of "bailment."[12]

Thus, in Central Georgia Bank v. Cleveland Nat. Bank, the supreme court of Georgia states: "A bill

[12] Foster v. Rincker, 4 Wyo. 484, 35 Pac. 470; Young v. Noble's Ex'rs, 2 Disn. (Ohio) 487; Yerkes v. National Bank of Port Jervis, 69 N. Y. 382, 386; Central Georgia Bank v. Cleveland Nat. Bank, 59 Ga. 667; First Nat. Bank of Birmingham v. First Nat. Bank of Newport, 116 Ala. 520, 22 So. 976.

A deposit of paper with an express company for collection is a bailment. American Express Co. v. Parsons, 44 Ill. 312.

is sent forward, in respect to which certain services, appropriate to the business of a bank, are to be rendered. This is a bailment. In contemplation of law, the bailor agrees to pay for the services, reasonable compensation. The bailee receives the bill and retains it, in the usual course of business, giving no notice that the bailment is declined, or the instructions will not be complied with. In contemplation of law, there is an undertaking to comply."[13]

In view of the above authorities, and of the facts that, like any other bailee for hire, a bank holding paper for collection is entitled to possession of it for the purposes of collection,[14] is charged with ordinary care or diligence in making the collection,[15] and must account for the paper or its proceeds when the collection is completed;[16] and of the further fact that the bailment theory is the only one that will meet and solve satisfactorily all the difficulties arising out of the employment of agents and correspondent banks, regarding which there is such a lamentable conflict of authority,[17] —there ought to be no hesitation about adopting it as the true theory of the relation between the initial collecting bank and its customer.

§ 3. Collecting bank as agent.

It is doubtless due to the fact that the rules and doctrines of agency can be applied readily to a part of the

[13] 59 Ga. 667.
[14] See post, § 22.
[15] See post, § 35.
[16] See post, §§ 74, 131.
[17] See post, §§ 85-120.

process of collection, viz., the receipt of the money, that so many courts use the term "agency" to designate and characterize the relation of the parties during the whole process. No particular harm is done by the use of this terminology beyond the confusion of terms alluded to above, until it comes to the discussion of the rights, duties, and liabilities arising from the employment by the initial collecting bank of agents and correspondents. Then the agency theory requires an elaboration, unnecessary under the bailment theory, of the troublesome doctrine of delegation of powers; for the idea of derivative power is of the essence of the relation of principal and agent.

In deference, however, to the very respectable line of authorities which treats the relation between the collecting bank and its customer broadly as an agency,[18] we shall be compelled to use that term in dealing with those authorities; but elsewhere we shall endeavor to use the term only within the limited scope given it in the first paragraph of this section.

There is another limitation of the so-called agency of the collecting bank. It is the agent of the payee or person depositing the paper for collection, to receive payment, but is not the agent of the maker or payer.[19]

[18] Bank of Mobile v. Huggins, 3 Ala. 206; Prescott v. Leonard, 32 Kan. 142; Jones v. Kilbreth, 49 Ohio St. 401, 31 N. E. 346; Alley v. Rogers, 19 Grat. (Va.) 366; Smith v. Essex County Bank, 22 Barb. (N. Y.) 627; Scott v. Ocean Bank, 23 N. Y. 289; People v. Bank of Dansville, 39 Hun, 187; Freeman's Nat. Bank v. National Tube-Works Co., 151 Mass. 413, 24 N. E. 779, 21 Am. St. Rep. 461, 8 L. R. A. 42.

[19] Smith v. Essex County Bank, 22 Barb. (N. Y.) 627, and cases cited. Relation where paper is payable at collecting bank, see

The obligor, however, by depositing money with the bank holding a bill against him for collection, with instructions to apply it to payment of the bill, makes the bank his agent for its payment;[20] but, as we shall see later, the obligor cannot, by such a deposit in case of paper payable at a bank, make the bank the agent of the payee or holder, if the paper is not actually in the bank.[21]

§ 4. Collecting bank as trustee.

A trust, technically speaking, can be administered, and the rights and remedies of the trustee and the *cestui que trust* determined, only in a court of equity.[22] This feature differentiates the trust proper from other confidential relations, which, though popularly and loosely designated as "trusts," come under the jurisdiction of the courts of common law.[23] Applying this test, the relation between a collecting bank and its customer, at its inception, at least, is not a trust. Nor does any known authority hold directly that the relation is a trust; though some authorities come dangerously near such a holding, indirectly, in determining the right of the owner to follow the proceeds as a trust fund.[24] In this connection we shall see later that the equitable doc-

post, § 5. Authority to receive payment for payee after dishonor, see post, § 44.

[20] Moore v. Meyer, 57 Ala. 20.

[21] See post, § 5.

[22] 1 Perry, Trusts (5th Ed.) § 17, and cases cited.

[23] See 1 Perry, Trusts (5th Ed.) § 1.

[24] See post, §§ 150-153.

trines as to following trust funds are applied, under certain circumstances, to enable the owner to recover the proceeds of the collection.[25]

§ 5. Relation when paper is payable at bank.

Where an instrument is made payable at a bank, and is left there for collection, the bank is entitled to receive payment as the agent of the payee or holder.[26] But, if the instrument, though payable at the bank, is not left there for collection, payment to the bank does not satisfy it; since the bank, in receiving the money in such case, acts only as the agent of the payor.[27]

On this point, in Adams v. Improvement Commission,[28] which is referred to in Bank of Montreal v. Ingerson[29] as an unusually well-considered case, the court says: "If maturing paper be left with the banker for

[25] See post, §§ 146-157.

[26] Smith v. Essex County Bank, 22 Barb. (N. Y.) 627; Ward v. Smith, 7 Wall. (U. S.) 447. See, also, cases cited in next note.

[27] First Nat. Bank of Omaha v. Chilson, 45 Neb. 257; Bank of Montreal v. Ingerson, 105 Iowa, 349, 75 N. W. 351 (overruling Lazier v. Horan, 55 Iowa, 75, 7 N. W. 457); Caldwell v. Evans, 5 Bush (Ky.) 380; Adams v. Hackensack Improvement Commission, 44 N. J. Law, 638, and cases cited; St. Paul Nat. Bank v. Cannon, 46 Minn. 95, 48 N. W. 526; Hills v. Place, 48 N. Y. 520; Cheney v. Libby, 134 U. S. 68, 10 Sup. Ct. 498; Ward v. Smith, 7 Wall. (U. S.) 447; Williamsport Gas Co. v. Pinkerton, 95 Pa. St. 62; Wood v. Merchants' Saving, Loan & Trust Co., 41 Ill. 267; Grissom v. Commercial Nat. Bank, 87 Tenn. 350, 10 S. W. 774; Moore v. Meyer, 57 Ala. 20; Pease v. Warren, 29 Mich. 9.

The same rule applies to paper payable at the office of some named person. Englert v. White, 92 Iowa, 97, 60 N. W. 224; Klindt v. Higgins, 95 Iowa, 529, 64 N. W. 414; Keene Five-Cents Sav. Bank v. Archer, 109 Iowa, 419, 80 N. W. 505.

[28] 44 N. J. Law, 638.

[29] 105 Iowa, 349, 75 N. W. 351.

collection, he becomes the agent of the holder to receive payment; but unless the banker is made the holder's agent by a deposit of the paper with him for collection, he has no authority to act for the holder. The naming of a bank in a promissory note as the place of payment does not make the banking association an agent for the collection of the note or the receipt of the money. No power, authority, or duty is thereby conferred upon the banker in reference to the note, and the debtor cannot make the banker the agent of the holder by simply depositing with him the funds to pay it with."

The naming of the bank is, in such case, a mere designation of the place where the note is to be paid, not of the person to whom it is to be paid.[30]

So, a provision in a bond making it payable at a particular bank merely imports a stipulation that the holders will produce it at the bank when due, to receive payment, and that the obligors will then and there produce the funds for payment.[31]

Nevertheless, if an instrument is made payable at a bank, but is not lodged there at the time for payment, but the obligor is there at that time with funds to pay it, he "so far satisfies the contract that he cannot be made responsible for any future damages, either as costs of suit or interest, for delay."[32] If, however, there are no funds of the maker in the bank at the ma-

[30] Wood v. Merchants' Saving, Loan & Trust Co., 41 Ill. 267; Caldwell v. Evans, 5 Bush (Ky.) 380. See, also, Ridgely Nat. Bank v. Patton, 109 Ill. 479, and cases cited in note 27, supra.

[31] Ward v. Smith, 7 Wall. (U. S.) 447, 450.

[32] Ward v. Smith, 7 Wall. (U. S.) 447.

turity of the note, it cannot be seriously contended that the bank has implied authority to pay it.[33]

The rules above announced apply to a bank on which a check is drawn, making it the agent of the sender on receiving the check for collection.[34] The authority of a bank at which an instrument is payable, to apply the deposits of the obligor to payment thereof, is a question akin to those discussed in this section, but will be fully considered later.[35]

§ 6. What law governs relation.

It is generally conceded that the law of the place of performance of the contract for collection governs it.[36]

So, where a draft drawn on a resident of North Carolina came into the possession of an Illinois bank, which sent it to a North Carolina bank for collection, and the latter, after accepting the collection by letter, transmitted the paper to another bank in North Carolina, and the last-named bank failed after making the collection, the contract of collection was a North Carolina contract, and governed by the laws of that state.[37]

[33] Merchants' & Planters' Bank v. Meyer, 56 Ark. 499, 510; Coates v. Preston, 105 Ill. 470.

[34] Exchange Bank of Wheeling v. Sutton Bank, 78 Md. 577, 28 Atl. 563, 23 L. R. A. 173.

[35] See post, § 42.

[36] Saint Nicholas Bank v. State Nat. Bank, 128 N. Y. 26; Kent v. Dawson Bank, 13 Blatchf. 237, Fed. Cas. No. 7,714.

What law governs liability of bank paying forged paper, see post, § 158.

[37] Kent v. Dawson Bank, 13 Blatchf. 237, Fed. Cas. No. 7,714.

See, also, post, § 103.

An instructive case on this question was recently decided by the New York court of appeals. Plaintiff, a New York bank, sent, in the usual course of business, to defendant, a Tennessee bank, for collection, a check drawn on a Texas bank, and defendant sent the paper, indorsed by it for collection, to the Texas bank, which collected it, and remitted to defendant a sight draft on a firm in New York City. Defendant forwarded the sight draft to a New York bank for collection, but payment of the draft was refused on due presentment by the last-named bank, the drawee being insolvent. The defendant claimed that the contract was a Tennessee contract, and that by the law of that state, as shown in the case of Bank of Louisville v. First Nat. Bank of Knoxville,[38] it would not be liable for the loss. The court found that there was nothing in the case to show that the contract had its inception in Tennessee, and that, as the defendant was to collect the draft in Texas, and pay its proceeds to plaintiff in New York, the contract was to be performed in Texas and New York, and, as between the laws of Tennessee and New York, was governed by the laws of New York.[39]

As to the effect of the Tennessee decision above cited, as evidence of the common law on the subject in New York, the court in the case now under consideration said: "There is no common law peculiar to Tennessee. But the common law there is the same as that which prevails here and elsewhere, and the judicial exposi-

[38] 8 Baxt. (Tenn.) 101. This case holds that the duty of the initial bank is fully performed by a transmission of the paper to a suitable and responsible bank at the place of payment. See, also, post, § 112.

[39] Saint Nicholas Bank v. State Nat. Bank, 128 N. Y. 26.

tions of the common law there do not bind the courts here. The courts of this state and of other states and of the United States would follow the courts of that state in the construction of its statute law. But the courts of this state will follow its own precedents in the expounding of the general common law applicable to commercial transactions."[40]

Where the contract is both made and to be performed in the same state, it is governed by the law of that state, though the owner of the draft is a resident of another state, and sends the draft from there to be collected.[41]

§ 7. Consideration for undertaking to collect.

The undertaking to collect, though apparently gratuitous, is supported by a sufficient consideration, if the collection is entered upon by the receipt of the paper, and the taking of steps for its collection;[42] for there is an implied contract, on the part of one delivering paper to a bank for collection, to pay a reasonable compensation therefor, and on the part of the bank to take the steps necessary for collection.[43]

The custom of receiving paper for collection cannot be considered as a mere act of gratuitous courtesy on the part of the bank; but is beneficial to the bank be-

[40] Saint Nicholas Bank v. State Nat. Bank, 128 N. Y. 26.

[41] Kent v. Dawson Bank, 13 Blatchf. 237, Fed. Cas. No. 7,714.

[42] Young v. Noble's Ex'rs, 2 Disn. (Ohio) 485; First Nat. Bank of Lyons v. Ocean Nat. Bank, 60 N. Y. 278, 19 Am. Rep. 181; Funkhouser v. Ingles, 17 Mo. App. 232.

[43] Central Georgia Bank v. Cleveland Nat. Bank, 59 Ga. 667.

Pleading consideration, see post, § 175.

cause the proceeds may, and often do, remain in the bank for some time, and thus become a source of profit. The benefit thus accruing to the bank from the general profits of the business, and the profits arising from exchange rates, form a sufficient consideration to support an implied undertaking by it to take the steps necessary to insure payment of the paper.[44]

Strictly in consonance with this doctrine it has been held that an agreement to forward a bill to the place of payment, and pay the owner the whole proceeds of the paper when collected, without commission or other compensation, if entered upon by receiving the bill and forwarding it for that purpose, is based on a sufficient consideration.[45]

If a bank is retained to collect a draft for an agreed commission, and accepts the draft for purposes of collection, there is, of course, an implied promise on the

[44] Exchange Nat. Bank of Pittsburgh v. Third Nat. Bank of New York, 112 U. S. 276, 288, 5 Sup. Ct. 141, 28 L. Ed. 722; Kershaw v. Ladd, 34 Or. 375, 56 Pac. 402; Titus v. Mechanics' Nat. Bank at Trenton, 35 N. J. Law, 588; Mechanics' Bank at Baltimore v. Merchants' Bank at Boston, 6 Metc. (Mass.) 13, 20; Bailie v. Augusta Sav. Bank, 95 Ga. 277, 21 S. E. 717, distinguishing Merchants' Nat. Bank of Savannah v. Guilmartin, 88 Ga. 804; Yerkes v. National Bank of Port Jervis, 69 N. Y. 382, 386; Bank of Utica v. McKinster, 11 Wend. (N. Y.) 473, affirming 9 Wend. 46; Bank of Utica v. Smedes, 3 Cow. (N. Y.) 662, affirming Smedes v. Bank of Utica, 20 Johns. 372; Dyas v. Hanson, 14 Mo. App. 363, 373; Gerhardt v. Boatman's Sav. Institution, 38 Mo. 60, 64. See, also, Miller v. Drake, 1 Caines (N. Y.) 45; Forster v. Fuller, 6 Mass. 58; Union Turnpike Road v. Jenkins, 1 Caines (N. Y.) 389. The subsequent reversal of the case last cited was on other grounds, and does not affect this point. See Goshen & Minisink Turnpike Road v. Hurtin, 9 Johns. (N. Y.) 217.

[45] Young v. Noble's Ex'rs, 2 Disn. (Ohio) 485.

part of the bank to faithfully perform the duty of collection.[46]

The doctrines relating to consideration apply not only to sustain the undertaking as against the bank, but also as against the depositor, and in favor of the bank.[47] But though the bank is entitled to recover compensation for its services, it is limited to such services and the necessary expenses incident thereto; and so, where it did not discount a bill delivered for collection, it cannot recover the damages on protest of the bill, but only the expenses of protest.[48]

§ 8. Inception of relation in general.

Like any other bailment, the contract takes its inception from the delivery of the paper to the bank, and its acceptance for collection.[49]

A receipt printed on a postal card in the usual form given by the bank in acknowledging receipt of papers, with the blanks filled in in the handwriting of the collection clerk working under the supervision of the cashier, whose name in print is signed thereto, is sufficient evidence of the receipt of papers by the cashier for collection.[50]

[46] American Express Co. v. Pinckney, 29 Ill. 392, 407; Streeter v. Horlock, 8 E. C. L. 390, 1 Bing. 34.

[47] Runyon v. Latham, 5 Ired. (N. C.) 551.

[48] Runyon v. Latham, 5 Ired. (N. C.) 551.

[49] Sherman v. Commercial Printing Co., 29 Mo. App. 31; Lloyd v. West Branch Bank, 15 Pa. St. 172; Rodgers v. Stophel, 32 Pa. St. 111; Houghton v. Lynch, 13 Minn. 85 (Gil. 80).

Whether a bill was taken in payment of a debt, or merely for collection, held, under the circumstances, to be a question for the jury. Stephens v. Thornton, 26 Ill. 323.

[50] First Nat. Bank of Birmingham v. First Nat. Bank of Newport,

§ 9. —— Estoppel of bank.

The bank may become estopped to dispute the relation. A case involving this question recently arose in Utah. A depositor loaned his deposit to the bank for its accommodation, in order that it might reloan it, as represented by the cashier, to a customer, on condition that the bank guaranty payment of such second loan, and the depositor's account was debited with the amount loaned to the bank, and such debit was never canceled or replaced by a credit. The bank afterwards arranged with such customer to pay up part of a prior loan from the bank, and take a reloan of the balance, and accordingly such customer executed to the bank a note for an amount equal to that borrowed by the bank from its depositor. On receipt of this note, the cashier represented to the depositor that it represented the money loaned by such depositor to the bank, and gave to him a receipt reciting that said note was left with the bank for collection and credited to his account. Thereafter interest paid on the note was credited to the depositor, but on collection of the note the bank refused to pay over the proceeds to him, or credit him with the amount. Held, that the note was the property of such depositor, and was held by the bank only for collection for his benefit, as the bank, under the circumstances, was estopped to repudiate the acts and representations of its cashier.[51]

116 Ala. 520, 22 So. 976. See, also, Magdeburg v. Uihlein, 53 Wis. 165, 10 N. W. 363.

[51] First Nat. Bank of Nephi v. Brown, 20 Utah, 85, 57 Pac. 877.

Estoppel as between banks, see post, § 140.

§ 10. Effect of custom and usage.

One placing commercial paper in a bank for collection is deemed to assent to the reasonable customs and usages of banks in transacting business of that character.[52] But a custom, to be binding, must be general as to place, and not confined to any particular bank or banks; it must also be certain and uniform, and there must be reasonable ground to suppose that it was known to both parties, or was so general that both would be presumed to know it.[53]

Where the custom is general and reasonable, the depositor of paper for collection is bound thereby, though he did not know of it.[54] So the owner of paper deposited for collection is bound by the general custom of

[52] Freeman's Nat. Bank v. National Tube-Works Co., 151 Mass. 413, 24 N. E. 779; National Bank of Commerce of Seattle v. Johnson, 6 N. D. 180, 69 N. W. 49, 51; Davis v. First Nat. Bank of Fresno, 118 Cal. 600, 50 Pac. 666; Bank of Washington v. Triplett, 1 Pet. (U. S.) 25; Hallam v. Tillinghast, 19 Wash. 20, 52 Pac. 329; Howard v. Walker, 92 Tenn. 452, 21 S. W. 897; Jefferson County Sav. Bank v. Commercial Nat. Bank, 98 Tenn. 337, 39 S. W. 338.

The customers of banks are not bound by the usages of clearing house associations, for "the rules and methods observed by such institutions are adopted for their own individual safety or convenience, and they are alone entitled to the advantages accruing, and alone assume the risks and responsibility arising therefrom." Louisiana Ice Co. v. State Nat. Bank of New Orleans, 1 McGloin (La.) 181, 187; Overman v. Hoboken City Bank, 30 N. J. Law, 61, 31 N. J. Law, 563.

[53] Grissom v. Commercial Nat. Bank, 87 Tenn. 350; Dabney v. Campbell, 9 Humph. (Tenn.) 686; Adams v. Otterback, 15 How. (U. S.) 545.

[54] Jefferson County Sav. Bank v. Commercial Nat. Bank, 98 Tenn. 337, 39 S. W. 338; Sahlien v. Bank of Lonoke, 90 Tenn. 221, 16 S. W. 373; Howard v. Walker, 92 Tenn. 452, 21 S. W. 897; Bank of Washington v. Triplett, 1 Pet. (U. S.) 25.

banks to mingle the proceeds with their general funds;[55] also, as we shall see, by the custom to receive checks in payment.[56] But a custom or usage which is contrary to public policy or the general law will not prevail.[57] Nor will one that negatives the plain and unambiguous terms of the contract. For example, an indorsement in the words: "Pay to A., or order, for account of B.," cannot be shown by proof of custom to pass title to A., instead of a mere right to collect for B.[58]

The fact that a bank, in making a collection, followed a custom of banks which was reasonable and not contrary to law, goes to show the exercise by it of reasonable care.[59]

(B) Title to Paper and Special Property Rights of Bank.

As a general rule, the title to paper deposited for collection remains in the depositor. This is especially true if the collecting bank was insolvent, within the knowledge of its officers, when it received the paper.

But if the deposit is treated as a cash item, by an entry of absolute credit and the drawing and honoring of drafts against such credit, title passes to the bank. A conditional

[55] Freeman's Nat. Bank v. National Tube Works Co., 151 Mass. 413, 24 N. E. 779, 21 Am. St. Rep. 461, 8 L. R. A. 42; Dorchester & Milton Bank v. New England Bank, 1 Cush. (Mass.) 177.

[56] See post, § 47.

[57] Dabney v. Campbell, 9 Humph. (Tenn.) 680; Sahlien v. Bank of Lonoke, 90 Tenn. 221, 16 S. W. 373; National Bank of Commerce v. American Exchange Bank, 151 Mo. 320, 52 S. W. 265; Dern v. Kellogg, 54 Neb. 560, 74 N. W. 844.

[58] White v. National Bank, 102 U. S. 658.

[59] Davis v. First Nat. Bank of Fresno, 118 Cal. 600, 50 Pac. 666; Warren Bank v. Suffolk Bank, 10 Cush. (Mass.) 582.

credit in advance of collection does not pass title; and the credit may be canceled on nonpayment of the paper.

The form of the indorsement often determines the question of title. Title to paper expressly indorsed for collection does not pass to the bank; but a blank indorsement carries apparent title to the bank. In most jurisdictions, the indorsement may be explained by parol, to show the true relation of the parties.

If the bank discounts the paper, it does not act as a collecting medium, but takes title to the paper.

The collecting bank, as bailee, has a special property interest in the paper, which entitles it to possession as against all persons but the true owner. This right protects the paper, while in possession of the bank as bailee, against garnishment or attachment proceedings by creditors of the owner.

The collecting bank has also a lien on the paper in certain cases; and a right to set off the paper against an indebtedness of the depositor on general account.

§ 11. As a general rule, title remains in depositor.

In pursuance of the general bailment theory of the nature of the contract for collection, it is practically a universal rule that title to paper deposited with a bank for collection in the ordinary course of business does not pass to the bank.[60] In other words, a mere deposit for collection does not make the bank a purchaser of the paper.[61]

This position is also in harmony with the general

[60] Oppenheim v. West Side Bank, 22 Misc. Rep. 722, 50 N. Y. Supp. 148; Yerkes v. National Bank of Port Jervis, 69 N. Y. 382, 386; First Nat. Bank of Ft. Worth v. Payne (Ky.) 42 S. W. 736.

See, also, cases cited in remaining notes to this section.

[61] Bailie v. Augusta Sav. Bank, 95 Ga. 277, 21 S. E. 717; Wilson v. Tolson, 79 Ga. 137; Merchants' Nat. Bank v. McNulty, 36 Iowa, 229.

rule applicable to negotiable instruments, viz., that a transfer for collection without indorsement does not pass title.[62]

From a careful study of all the cases, we find one acknowledged test in determining the question of title independently of the form of the indorsement. The only difference in the cases arises from slight variations in the application of this test to particular circumstances. This test may be stated in the form of a general rule that title does not pass to the bank unless it has become, by the nature of the transaction, absolutely responsible to the depositor for the amount of the deposit.[63] Consequently the question whether title passes in a particular transaction is usually and almost necessarily one of fact.[64]

If the bank is authorized to collect the note and apply the proceeds on a debt of the owner to the bank, the bank is merely an agent of such owner, and title does not pass, unless the bank received the note as collateral.[65]

[62] Carter v. Lehman, 90 Ala. 126, 7 So. 735; Fuller v. Bennett, 55 Mich. 357, 21 N. W. 433. Contra, see French v. Jarvis, 29 Conn. 347.

[63] Dickerson v. Wason, 47 N. Y. 439, 7 Am. Rep. 455, reversing 54 Barb. (N. Y.) 230; Scott v. Ocean Bank, 23 N. Y. 289; National Butchers' & Drovers' Bank v. Hubbell, 117 N. Y. 384, 15 Am. St. Rep. 515; Armour Packing Co. v. Davis, 118 N. C. 548, 24 S. E. 365; In re State Bank, 56 Minn. 119, 45 Am. St. Rep. 454.

[64] United States Nat. Bank of Omaha v. Geer, 53 Neb. 67, 73 N. W. 266; Metropolitan Nat. Bank v. Loyd, 25 Hun, 101, 90 N. Y. 530; National Park Bank v. Seaboard Bank, 114 N. Y. 28, 34, 20 N. E. 632, 11 Am. St. Rep. 612; Titus v. Mechanics' Nat. Bank, 35 N. J. Law, 589; In re State Bank, 56 Minn. 119, 57 N. W. 336; Fifth Nat. Bank v. Armstrong, 40 Fed. 46; St. Louis & San Francisco Ry. Co. v. Johnston, 133 U. S. 566, 10 Sup. Ct. 390, 27 Fed. 243.

[65] Prescott v. Leonard, 32 Kan. 142, 4 Pac. 172.

The owner of municipal bonds, who leaves them as a special deposit with a bank, which was also the agent of the municipality for payment of the interest and principal on the bonds, does not lose or impair his title thereto by allowing the bank to collect and pay over to him the proceeds of the interest coupons; and hence can recover against the municipality in case the bank failed after using, for other purposes, the money deposited with it by the city for payment of the principal.[66]

§ 12. Title does not pass to bank insolvent when paper was received.

Title does not pass where the bank at the time of receiving the paper is hopelessly insolvent, within the knowledge of the officers.[67] This, of course, is on the ground that the contract for collection was fraudulent in its inception.

§ 13. Title to paper received and treated as cash passes to the bank.

If the paper is deposited and treated as cash, the case comes within our general rule that title passes if the bank makes itself absolutely liable to the depositor for the amount of the deposit.[68]

[66] Gibson v. City of Erie, 196 Pa. St. 7, 46 Atl. 102.

[67] City of Philadelphia v. Eckels, 98 Fed. 485; St. Louis & San Francisco Ry. Co. v. Johnston, 133 U. S. 566, 10 Sup. Ct. 390; Richardson v. Denegre, 93 Fed. 572; Peck v. First Nat. Bank of New York, 43 Fed. 357; Importers' & Traders' Nat. Bank v. Peters, 123 N. Y. 272, 25 N. E. 319, affirming 51 Hun, 640, 4 N. Y. Supp. 599.

[68] United States Nat. Bank of Omaha v. Geer, 53 Neb. 67, 73 N.

The chief facts going to show an intention to treat the deposit as a cash deposit are the entry of absolute credit for the amount of the paper, and the drawing and honoring of drafts on the fund.[69] Thus it has been held that a general deposit for which credit is given to the depositor does not create a bailment, but the relation of debtor and creditor;[70] and that a deposit of paper indorsed "for deposit and credit," followed by drafts against an immediate credit given therefor under a long-continued course of dealing with the bank, pass title to the bank;[71] and that if paper, indorsed in blank, is sent by the owner for collection and credit, and he at the same time draws a sight draft against the fund in accordance with a long-continued custom, title passes on receipt of the paper.[72] So, also, if the paper is simply indorsed in blank, and deposited for credit, and the depositor is allowed to draw against the fund.[73]

Sometimes the combination of circumstances makes it very clear that title passed to the bank. Thus, where it was the intent of the parties that the paper delivered to a bank should be immediately turned into cash, and credit was immediately given before the bank had disposed of the paper or collected its proceeds, and inter-

W. 266; Higgins v. Hayden, 53 Neb. 61, 73 N. W. 280; Friberg v. Cox, 97 Tenn. 550, 37 S. W. 283; Williams v. Cox, 97 Tenn. 555, 37 S. W. 282; Commercial Bank of Albany v. Hughes, 17 Wend. (N. Y.) 94, 100; Pacific Bank v. Mitchell, 9 Metc. (Mass.) 297.

[69] See cases cited in notes 70-73, infra.

[70] Commercial Bank of Albany v. Hughes, 17 Wend. (N. Y.) 94, 100.

[71] Fourth Nat. Bank of Cincinnati v. Mayer, 89 Ga. 108.

[72] Clark v. Merchants' Bank, 2 N. Y. 380, reversing 1 Sandf. 498.

[73] Williams v. Cox, 97 Tenn. 555.

est was paid on such credit, and it was subject to draft, title passed to the bank, as the transaction was a sale, and not merely a delivery for collection, notwithstanding the fact that the paper was indorsed "for account of" and was transmitted ostensibly "for collection and credit."[74]

Equally clear is a case where negotiable paper was delivered to a bank with the understanding that it was to credit the amount thereof against existing overdrafts, and such credit was given, and the bank cashed outstanding checks pursuant to such understanding, and also cashed a check drawn contemporaneously with the deposit; the conduct of the parties being entirely inconsistent with the theory of a mere bailment for collection.[75] So, also, where a check was deposited and accepted as cash, and so charged to another bank, to which it was sent for collection, and the sending bank gave therefor to the depositor cash and a certificate of deposit for part, and absolute credit for the balance, of the amount.[76] If, however, a check is credited as a check, and not as cash, the bank is not a purchaser.[77]

§ 14. —— Presumptions.

The supreme court of California has laid down the rule distinctly that "when a check on the same bank is

[74] United States Nat. Bank of Omaha v. Geer, 53 Neb. 67, 73 N. W. 266. See, also, Beal v. City of Somerville, 1 C. C. A. 598, 50 Fed. 647.

[75] Higgins v. Hayden, 53 Neb. 61, 73 N. W. 280.

[76] Friberg v. Cox, 97 Tenn. 550, 37 S. W. 283.

[77] Bailie v. Augusta Sav. Bank, 95 Ga. 277, 21 S. E. 717. In this case, the entry in the depositor's pass book was, "Check on First National Bank of Wilmington, $1,000."

presented by a depositor with his pass book to the receiving teller, who merely receives the check and notes it in the pass book, nothing more being said or done, this does not of itself raise a presumption that the check was received as cash or otherwise than for collection."[78] The court in the argument quotes with approval from the decision of Lord Denham, C. J., in Boyd v. Emerson,[79] to the effect that the depositor in that case, who had merely said, "Place this to my account," or "to my credit," should have made some definite statement that he intended it as a cash deposit, if he did so intend.

A different presumption applies in case of checks or drafts drawn in favor of the bank in which they are deposited. In the language of the supreme court of Pennsylvania: "Drafts or checks held by banks, drawn in their own favor, are *prima facie* presumed to have been received by them on deposit as cash from their customers, and not to have been deposited for collection merely, unless some evidence is adduced to show that fact. That a check was taken as cash, it may well be impossible for a bank, in the multiplicity of its transactions, to trace and prove. It would be credited in the depositor's account simply as so much money, and no entry necessarily made in any other book to show from whom it was received. As it was drawn in favor of the cashier of the bank, the indorsement of the depositor would not be required. It is not a good argument, therefore, to say that, if the bank gave value for this check, it was incumbent on them to prove it. The presumption resting

[78] National Gold Bank & Trust Co. v. McDonald, 51 Cal. 64, 68.

[79] 2 Adol. & El. 184.

on the usual course of transactions of this nature was in their favor, and *stabit praesumptio donec probetur in contrarium.*"[80]

§ 15. Effect of credit in advance of collection—Cancellation of credit on dishonor of paper.

Considerable litigation has arisen out of the practice of banks to credit in advance of collection, and charge back the amount in case of nonpayment.[81] The decided weight of authority is to the effect that the practice of at once crediting paper, deposited for collection, to the account of the depositor, is a mere gratuitous favor on the part of the bank, and does not amount to a binding custom, no matter how long continued,[82] and hence does not preclude the bank from charging back the amount of the credit if, without negligence on its part, the paper is not paid.[83] This is, of course, equivalent to a holding that title does not pass, though the bank makes advances

[80] Gettysburg Nat. Bank v. Kuhns, 62 Pa. St. 88, 92.

[81] See, also, post, § 165, for right to charge back amount of forged or altered paper.

[82] Balbach v. Frelinghuysen, 15 Fed. 675, 683, citing Morse, Banks & Banking, p. 427; Armour Packing Co. v. Davis, 118 N. C. 548, 24 S. E. 365; In re State Bank, 56 Minn. 119, 45 Am. St. Rep. 454; National Butchers' & Drovers' Bank v. Hubbell, 117 N. Y. 384, 15 Am. St. Rep. 515. See, also, Scott v. Ocean Bank, 23 N. Y. 289, 292, where it was held that the bank had not elected to give credit absolutely before the proceeds had been realized.

[83] Bailie v. Augusta Sav. Bank, 95 Ga. 277, 281, 21 S. E. 717; Trinidad First Nat. Bank v. Denver First Nat. Bank, 4 Dill. 290, Fed. Cas. No. 4,810; Levi v. National Bank of Missouri, 5 Dill. 104, Fed. Cas. No. 8,289; Beal v. City of Somerville, 50 Fed. 647; Armour Packing Co. v. Davis, 118 N. C. 548, 24 S. E. 365; Giles v. Perkins, 9 East, 12.

or remittances on general account on the strength of the anticipated collection.[84]

If there is a tacit agreement arising from the customary dealings of the parties that, though credit is given and drafts honored at once for the amount of paper deposited for collection, the amount thereof shall be charged back against his account in case of nonpayment, the transaction is merely a bailment for collection, and the bank has only the title of a bailee for that specific purpose.[85] So a credit "subject to payment" is merely provisional, and if the bank, using due diligence, fails to collect, it may charge back or cancel the credit.[86]

Where a bank receives paper "for collection on account" or "for collection and credit," it does not own the amount until it is collected, and though credit be given therefor before collection, the bank may cancel such credit if the paper is dishonored.[87]

Even an unqualified indorsement to the bank, coupled with the giving of credit to the depositor, will not pass title to the bank, if, on nonpayment of the paper, the amount thereof is to be charged back.[88] It has also been

[84] Dickerson v. Wason, 47 N. Y. 439, 7 Am. Rep. 455, reversing 54 Barb. 230; Hoffman v. Miller, 9 Bosw. (N. Y.) 334.

[85] Armour Packing Co. v. Davis, 118 N. C. 548, 24 S. E. 365; First Nat. Bank of Richmond v. Davis, 114 N. C. 343, and cases cited.

[86] Fifth Nat. Bank v. Armstrong, 40 Fed. 46; Givan v. Bank of Alexandria (Tenn. Ch.) 52 S. W. 923.

[87] Armstrong v. National Bank of Boyertown, 90 Ky. 431.

[88] Armour Packing Co. v. Davis, 118 N. C. 548, 24 S. E. 365. A bank account settled up under the mistaken belief that certain drafts deposited for collection had been paid may be opened and corrected on a showing that the drafts had not been paid. Mechanics' Bank v. Earp, 4 Rawle (Pa.) 383.

held that the title to a draft does not pass to a bank in which the drawer, after acceptance by the drawee, deposits the draft for "collection and credit," where a rule of the bank, known to the depositor, provides that the bank acts only as agent in making collections, and assumes no liability other than in the selection of suitable subagents, and in forwarding the paper to them, and it is the custom of the bank, also known to the depositor, to charge back against the account of a customer the amount of a draft deposited by him, in case the drawee or acceptor does not pay it in due course.[89]

There are some cases which apparently hold differently from the authorities just considered, but on careful examination it will be found that the same practical result is reached. These cases hold that title passes to the bank in which checks are deposited for collection under an agreement to credit their amount to the account of the depositor, and to charge back such amount if the checks were not duly paid; but that, in such case, on nonpayment of the checks, and rescission of the credit, the title of the bank is devested.[90]

There are a few decisions, however, that are in direct conflict with the rules here announced. They hold that where the bank, following a long-continued custom or prearrangement, or pursuant to a contract with the depositor of paper for collection, immediately places the amount to his credit, and allows him to draw against

[89] South Park Foundry & Machine Co. v. Chicago G. W. Ry. Co., 75 Minn. 186, 77 N. W. 796; In re State Bank, 56 Minn. 119, 57 N. W. 336.

[90] Brusegaard v. Ueland (In re Receivership of Washington Bank) 72 Minn. 283, 75 N. W. 228.

the same as cash, title passes to the bank, though, if the paper is not paid, the bank has the reserved right to charge it back.[91]

§ 16. —— Credit of checks drawn on collecting bank.

A credit given to a customer of the bank on depositing for collection checks on that bank may be canceled on subsequently discovering that the drawer had no funds there, or had overdrawn and become insolvent.[92]

On the question of the bank's duty, in such case, to notify the depositor at once of the state of the drawer's account, the court, in Kilsby v. Williams,[93] states that the enforcement of such a duty "might be productive of serious inconvenience, inasmuch as it is often impossible to ascertain, till the close of the day at the clearing house, what sums of money may be paid in to each particular account, and what the drafts are upon it. I think, therefore, that the defendant might, in this case, receive the check in question, subject to its being honored or not, according to the course of Robertson's [the drawer's] dealing with them on that day." The same doctrine is recognized by the supreme court of Pennsylvania in the statement that "it is manifestly impossible for the officers of a bank to keep ever in memory the state of each depositor's account."[94]

[91] Ayres v. Farmers' & Merchants' Bank, 79 Mo. 421; Bullene v. Coates, 79 Mo. 426; Clark v. Merchants' Bank, 2 N. Y. 380. See, also, Scott v. Ocean Bank, 23 N. Y. 289, 292.

[92] National Gold Bank & Trust Co. v. McDonald, 51 Cal. 64.

[93] Kilsby v. Williams, 5 Barn. & Ald. 815; Boyd v. Emmerson, 2 Adol. & El. 184.

[94] Peterson v. Union Nat. Bank, 52 Pa. St. 206, 209.

If the depositor of a check for collection in the bank on which it was drawn knew at the time he deposited it that it was worthless for want of any funds of the drawer in the bank to meet it, the right of the bank to cancel a credit given on receipt of the paper is unquestionable, for the whole transaction is a fraud on the bank, both on the part of the drawer and the depositor of the check.[95]

§ 17. Title as affected by form of indorsement.

If the depositor of paper for collection desires to have the contract express beyond doubt his intention to retain title, he should place on it a formal indorsement "for collection." Such an indorsement is restrictive,[96] and destroys further negotiability,[97] and prevents the passage of the title to the paper.[98]

[95] Peterson v. Union Nat. Bank, 52 Pa. St. 206, 209. See, also, County of Middlesex v. State Bank, 32 N. J. Eq. 467.

[96] Freeman's Nat. Bank v. National Tube Works Co., 151 Mass. 413, 24 N. E. 779, 21 Am. St. Rep. 461, 8 L. R. A. 42; Balbach v. Frelinghuysen, 15 Fed. 675; Goetz v. Bank of Kansas City, 119 U. S. 551; Ward v. Smith, 7 Wall. (U. S.) 447; Commercial Bank of Pennsylvania v. Armstrong, 148 U. S. 50; Claflin v. Wilson, 51 Iowa, 15; Merchants' Nat. Bank of St. Paul v. Hanson, 33 Minn. 40; National Butchers' & Drovers' Bank v. Hubbell, 117 N. Y. 384; Bowman v. First Nat. Bank of Spokane, 9 Wash. 614; Mechanics' Bank v. Valley Packing Co., 70 Mo. 643, affirming 4 Mo. App. 200; Blakeslee v. Hewett, 76 Wis. 341, 44 N. W. 1105; People's Bank of Lewisburg v. Jefferson County Sav. Bank, 106 Ala. 524.

[97] Williams v. Jones, 77 Ala. 294, 305; People's Bank of Lewisburg v. Jefferson County Sav. Bank, 106 Ala. 524, 17 So. 728; Mechanics' Bank v. Valley Packing Co., 70 Mo. 643. See, also, cases cited in preceding note.

[98] Balbach v. Frelinghuysen, 15 Fed. 675; Evansville Bank v. German-American Bank, 155 U. S. 556, 562; People's Bank of Lewis-

A little broader statement of the rule is that when an instrument is indorsed to a bank for collection and credit, the bank obtains no title thereto, and no right to hold it in any other capacity than as bailee or agent, and that the indorsement for collection is notice to any person into whose hands the paper may come that the owner has not parted with his beneficial title, and that whoever secures possession of it in the course of its transmission from bank to bank in the process of collection holds it as the property of the owner.[99] The collecting bank cannot, therefore, become an innocent purchaser for value of an instrument indorsed restrictively to it for collection.[100]

burg v. Jefferson County Sav. Bank, 106 Ala. 524, 17 So. 728; Best v. Nokomis Nat. Bank, 76 Ill. 608; Locke v. Leonard Silk Co., 37 Mich. 479; Crane v. Fourth St. Nat. Bank, 173 Pa. St. 566; Sutherland v. First Nat. Bank of Ypsilanti, 31 Mich. 230; First Nat. Bank of Crown Point v. First Nat. Bank of Richmond, 76 Ind. 561; Rock County Nat. Bank v. Hollister, 21 Minn. 385; Williams v. Jones, 77 Ala. 294, 305; Treuttel v. Barandon, 8 Taunt. 100; Sigourney v. Lloyd, 8 Barn. & C. 622; Lloyd v. Sigourney, 5 Bing. 525. See, also, cases cited in the two preceding notes.

[99] Tyson v. Western Nat. Bank of Baltimore, 77 Md. 412, 26 Atl. 520, 23 L. R. A. 161; National Bank of Commerce of Seattle v. Johnson, 6 N. D. 180, 69 N. W. 49; Evansville Bank v. German-American Nat. Bank, 155 U. S. 556, 15 Sup. Ct. 221; Commercial Nat. Bank v. Armstrong, 148 U. S. 50, 13 Sup. Ct. 533; Boykin v. Bank of Fayetteville, 118 N. C. 566, 24 S. E. 357; Manufacturers' Nat. Bank v. Continental Bank, 148 Mass. 553, 20 N. E. 193; Freeman's Nat. Bank v. National Tube-Works Co., 151 Mass. 413, 24 N. E. 779; Naser v. First Nat. Bank, 116 N. Y. 492, 22 N. E. 1077; National Butchers' & Drovers' Bank v. Hubbell, 117 N. Y. 384, 22 N. E. 1031; Blaine v. Bourne, 11 R. I. 119; Hoffman v. First Nat. Bank of Jersey City, 46 N. J. Law. 604; Merchants' Nat. Bank of St. Paul v. Hanson, 33 Minn. 40, 21 N. W. 849.

[100] People's Bank of Lewisburg v. Jefferson County Sav. Bank, 106

Though the bank does not become the equitable owner of the paper under such an indorsement, it may be said to have the bare legal title, as bailee, for purposes of collection only.[101] The legal title to paper so indorsed passes to the indorsee bank only so far as to enable it to demand and enforce payment, and the owner may control the paper until paid, and intercept the proceeds in the hands of an intermediate agent.[102]

There are several variations of the simple indorsement "for collection," evidencing the same intent to retain title in the indorser. Thus an indorsement "for collection for account of" a certain person does not pass title;[103] nor does the indorsement: "Pay to A., or order, for account of B.;"[104] nor do the indorsements "for collection on account," or "for collection and credit."[105] But an indorsement by the payee, "Pay to the 2nd National Bank of M., for collection for account of H., executor of A., deceased," has been held to pass all his title to the bank.[106] As to the effect of an indorsement "for deposit," there seems to be a difference of opinion,

Ala. 524, 17 So. 728; Wilson v. Tolson, 79 Ga. 137; Abell Note Brokerage & Bond Co. v. Hurd, 85 Iowa, 559, 52 N. W. 488; Cottle v. Cole, 20 Iowa, 485.

[101] Evansville Bank v. German-American Nat. Bank, 155 U. S. 556. Payment of a note, payable at a bank, and specially indorsed to it for collection, should be made to the bank or its agent, and a payment to any other person is made at the payor's risk. Barnett v. Ringgold, 80 Ky. 289, 291.

[102] Branch v. United States Nat. Bank, 50 Neb. 470, 70 N. W. 34; Dickerson v. Wason, 47 N. Y. 439.

[103] First Nat. Bank of Crown Point v. First Nat. Bank of Richmond, 76 Ind. 561.

[104] White v. National Bank, 102 U. S. 658.

[105] Armstrong v. National Bank of Boyertown, 90 Ky. 431.

[106] Fawsett v. National Life Ins. Co., 5 Ill. App. 272.

for it has been held that an indorsement "for deposit to the credit of" the depositor does not pass title to the bank;[107] and it has also been held, to the contrary, that an indorsement by the payee of a draft, "for deposit" in a specified bank to his credit, creates more than a mere agency for collection, and gives authority to the bank to treat the proceeds as an absolute general deposit, and use them accordingly.[108] The latter rule is probably the better law. It must be understood, however, that a long-continued custom or business usage between the bank and the depositor, making a delivery of paper with the indorsement "for deposit" a delivery for collection only, will control as between them.[109]

If the delivery of paper indorsed "for collection and credit" be followed by acts negativing an intention to retain title, such as a deposit of the paper as cash, title passes to the bank.[110]

§ 18. —— Blank indorsement passes title.

That a blank indorsement by the payee or holder or-

[107] Freeman v. Exchange Bank of Macon, 87 Ga. 45. But see Fourth Nat. Bank of Cincinnati v. Mayer, 89 Ga. 108.

See, also, Central Railroad v. First Nat. Bank of Lynchburg, 73 Ga. 383.

The indorsee cannot sue the indorser. White v. National Bank, 102 U. S. 658; Lee v. Chillicothe Branch Bank, 1 Bond, 387, Fed. Cas. No. 8,186.

[108] Metropolitan Nat. Bank v. Merchants' Nat. Bank, 182 Ill. 367, 55 N. E. 360, affirming 77 Ill. App. 316; Ditch v. Western Nat. Bank of Baltimore, 79 Md. 192, 29 Atl. 72, 138.

[109] National Commercial Bank v. Miller, 77 Ala. 168.

[110] Midland Nat. Bank v. Roll, 60 Mo. App. 585. See, also, ante, § 13.

dinarily carries the title to the bank is hardly subject to question.[111]

A bank in possession of a note indorsed in blank has power to sell or pledge it, since it has all the indicia of title.[112]

In New York, the rule is that where a customer, having a general account, deposits a check indorsed in blank, and receives credit to the amount thereof on his pass book, which is returned to him, title to the check passes to the bank, the court stating, however, that, if the check had been deposited for collection, the property would have remained in the depositor.[113] Yet, as to all persons having notice of the fact that the paper was delivered for collection only, it will remain the

[111] Doppelt v. National Bank of Republic, 175 Ill. 432, 51 N. E. 753, affirming 74 Ill. App. 429; Vickrey v. State Savings Ass'n, 21 Fed. 773; Cody v. City Nat. Bank of Grand Rapids, 55 Mich. 379; Gaar v. Louisville Banking Co., 11 Bush (Ky.) 180, 21 Am. Rep. 209; Miller v. Henry, 54 Ala. 120; Farwell v. Meyer, 36 Ill. 510; Bowers v. Trevor, 5 Blackf. (Ind.) 24; Whitworth v. Pelton, 81 Mich. 98, 45 N. W. 500.

Option of bank to discount or collect paper indorsed in blank, see post, § 20.

Rights of correspondent bank in proceeds, where paper was indorsed in blank to initial bank, see post, § 145.

[112] Greneaux v. Wheeler, 6 Tex. 515.

The fact that one in possession of a note payable to bearer, or payable to order and indorsed in blank, is an attorney at law, is not notice to a purchaser that he holds it for collection only. Id.

[113] Metropolitan Nat. Bank v. Loyd, 90 N. Y. 530, 535. See, also, Brooks v. Bigelow, 142 Mass. 6, where the court finds the law of New York to be as stated in the text; Scott v. Ocean Bank, 23 N. Y. 289; Brahm v. Adkins, 77 Ill. 263; Bank of Republic v. Millard, 10 Wall. (U. S.) 152; Story, Bailments, § 88.

In St. Louis & San Francisco Ry. Co. v. Johnston, 133 U. S. 566, 575, the case of Metropolitan Nat. Bank v. Loyd, 90 N. Y. 530, 535,

property of the depositor, notwithstanding his indorsement in blank.[114]

At variance, however, with the doctrine of the text, is a Kansas case holding that a bank receiving a note from the payee indorsed in blank by him, with authority to collect and apply the proceeds to a debt due from him to the bank, is merely an agent for collection, and does not hold the note as collateral security, or as owner.[115]

§ 19. —— Parol evidence.

It is a rule very generally applied that the true relationship between the parties, and the real nature of the transaction, may be shown, notwithstanding the form and terms of the indorsement.[116] Hence, the fact that an indorsement is unrestricted is not always conclusive on the question of title; but it may be shown by parol that it was intended for collection only.[117]

is cited to the proposition that if the bank had transferred the draft to one occupying the position of a bona fide holder, such transfer would have conferred title on its transferee by reason of its reputed ownership, so far as the latter was concerned.

[114] Blaine v. Bourne, 11 R. I. 119.

[115] Prescott v. Leonard, 32 Kan. 142. To same effect is Balbach v. Frelinghuysen, 15 Fed. 675.

[116] United States Nat. Bank of Omaha v. Geer, 53 Neb. 67, 73 N. W. 266; Roberts v. Snow, 27 Neb. 425, 43 N. W. 241; Corbett v. Fetzer, 47 Neb. 269, 66 N. W. 417; Holmes v. First Nat. Bank of Lincoln, 38 Neb. 326, 56 N. W. 1011. See, also, Davis v. Morgan, 64 N. C. 570.

[117] Lawrence v. Stonington Bank, 6 Conn. 521; Barker v. Prentiss, 6 Mass. 430; Armour Packing Co. v. Davis, 118 N. C. 548, 24 S. E. 365. See, also, cases cited in preceding note.

An unrestricted indorsement made without consideration "to the order of" another bank held to be for collection only. Freeman's

Where the indorsement is clear and unequivocal, the federal courts refuse to allow its terms to be varied by parol, and have held that parol evidence is not admissible to show that title passed under an indorsement to pay "to A., or order, for account of B.," on its face creating merely an agency for collection.[118]

§ 20. Bank discounting paper has title.

Discounting is merely loaning money on commercial paper, with the right to take interest in advance.[119]

In the words of Justice Story: "Nothing can be clearer than that, by the language of the commercial world, and the settled practice of banks, a discount by a bank means, *ex vi termini*, a deduction or drawback made upon its advances or loans of money upon negotiable paper, or other evidences of debt, payable at a future day, which are transferred to the bank."[120] There is no question but that, if the bank actually discounts the paper, it obtains title thereto.[121]

A bank is the owner of a note purchased by it from the payee before maturity, though, after maturity, on sending the note to another bank for collection, it sent

Nat. Bank v. National Tube Works Co., 151 Mass. 413, 24 N. E. 779, 21 Am. St. Rep. 461, 8 L. R. A. 42.

[118] White v. National Bank, 102 U. S. 658. Proof of custom is not admissible to vary the effect of such indorsement. Id.

[119] Niagara County Bank v. Baker, 15 Ohio St. 68; Fleckner v. Bank of United States, 8 Wheat. (U. S.) 338, 350; New York Firemen Ins. Co. v. Ely, 2 Cow. (N. Y.) 678, 699; People v. Utica Ins. Co., 15 Johns. (N. Y.) 358, 392; Farmers' & Mechanics' Bank v. Baldwin, 23 Minn. 198.

[120] Fleckner v. Bank of United States, 8 Wheat. (U. S.) 338, 350.

[121] See cases cited in notes 122-126, infra.

to the maker, for execution by him, a new note, payable to the original payee, and extending the time of payment; it appearing that it was the custom of the bank to have renewals executed in this manner, and afterwards indorsed by the payee.[122]

The fact that a bank had adopted and followed a general rule that, in receiving checks or drafts on deposit or for collection, it acted only as the collecting agent of the depositor, will not prevent the bank from waiving such rule in a particular case, and taking absolute title to a draft by discounting it.[123] And a bank actually discounting a draft accompanying a bill of lading becomes the owner of the goods to the extent of the amount of the draft, and, the draft having been dishonored, may enforce its claim as against creditors of the drawer, though its usual custom was to act merely as collecting agent, and charge back the amount of all unpaid drafts.[124]

A bank instructed to apply the proceeds of paper indorsed in blank in a certain manner, but not instructed as to how to realize the proceeds, may elect to discount or collect;[125] but if it be given the option to hold the paper for collection under the indorsement to that effect, or to discount it and send a check for the amount, and it sends the check accordingly, it is the owner of the paper.[126]

[122] First Nat. Bank of Ft. Collins v. Hughes (Cal.) 46 Pac. 272.

[123] American Trust & Savings Bank v. Austin, 25 Misc. Rep. 454, 55 N. Y. Supp. 561.

[124] American Trust & Savings Bank v. Austin, 25 Misc. Rep. 454, 55 N. Y. Supp. 561.

[125] Drown v. Pawtucket Bank, 15 Pick. (Mass.) 88.

[126] Payne v. Albany City Nat. Bank, 3 Ind. App. 214, 28 N. E. 432.

§ 21. When title of bank revests in depositor.

Where, however, title to checks deposited in a bank for collection has once vested in the bank, it is not devested by the mere failure of the bank before collection is made;[127] but is devested on a rescission of credit given in advance of collection, made pursuant to an agreement to that effect, in case the paper is not paid when due.[128]

It is only a rescission based on nonpayment of the paper that will work such a revesting of title. So, where the owner of a certificate of deposit indorsed it to a bank, and received credit therefor, the title to the certificate did not repass to him, so that it could be attached as his property, by the action of the bank in charging the amount of the certificate back to his account because of a mere suspicion of the insolvency of the issuing bank.[129]

§ 22. Special interest of bank as bailee.

Though title does not pass to the bank, nevertheless, as bailee, it has a special interest in the paper and any accompanying collaterals. This special interest as bailee entitles the bank to possession as against all but the bailor,[130] and hence will prevent an attachment of the

[127] Brusegaard v. Ueland (In re Receivership of Washington Bank) 72 Minn. 283, 75 N. W. 228.

[128] Brusegaard v. Ueland (In re Receivership of Washington Bank) 72 Minn. 283, 75 N. W. 228. See, also, ante, § 15.

[129] First Nat. Bank of Los Angeles v. Dickson, 6 Dak. 301, 50 N. W. 124.

[130] Corn Exchange Bank of Chicago v. Blye, 2 N. Y. St. Rep. 112; People's State Bank v. St. Landry State Bank, 50 La. Ann. 528, 24 So. 14.

paper by a creditor of the bailor during the term of the bailment.[131] This is also in accord with the rule that unpaid commercial paper, payable to the order of the supposed trustee, is not attachable by trustee process; for "it is not money, goods, effects, or credits, in the sense of the statute. It may never be paid."[132]

[131] Corn Exchange Bank of Chicago v. Blye, 2 N. Y. St. Rep. 112; Hartford v. Jackson, 11 N. H. 145; Truslow v. Putnam, 4 Abb. Dec. (N. Y.) 425, and note. See, also, First Nat. Bank of Los Angeles v. Dickson, 6 Dak. 301, 50 N. W. 124. But see United States v. Graff, 67 Barb. (N. Y.) 304.

As to attachable interest of bailee in general, see Wheeler v. Train, 3 Pick. (Mass.) 255; Meagher v. Campbell, 12 Misc. Rep. 426, 33 N. Y. Supp. 700; Megee v. Beirne, 39 Pa. St. 50.

Right of creditors of depositor to attach or garnish proceeds, see post, § 133.

[132] Hancock v. Colyer, 99 Mass. 187.

Mere collecting agents are not chargeable as garnishees for the amount of uncollected paper, unless it was received as cash, or title had passed to them by reason of a purchase, or the giving of an absolute credit therefor. Allen v. Erie City Bank, 57 Pa. St. 129, 136.

One holding securities of another as an investing agent for him is not chargeable in trustee process at the instance of a creditor of the principal, such securities being merely choses in action. Fuller v. Jewett, 37 Vt. 473.

An attorney holding an unpaid note for collection is not subject to process of foreign attachment. Howland v. Spencer, 14 N. H. 580.

But in Trunkey v. Crosby, 33 Minn. 464, a garnishment of a note indorsed to the garnishee for collection and safe keeping was sustained.

In Wisconsin it has been held that an answer of a bank, summoned as garnishee, showing that it holds a draft for collection for defendant, and that the moneys to be collected on the draft are to be "used only for account of" the defendant, and not averring that defendant had transferred his title to the draft, shows, prima facie, an indebtedness to defendant. John R. Davis Lumber Co. v. First Nat. Bank, 90 Wis. 464, 63 N. W. 1018.

Where commercial paper has been pledged to a bank as collateral for a loan, the interest of the pledgor is subject to attachment before the paper has been collected, as a demand against the person, within the meaning of the New York Code of Civil Procedure (section 649).[133]

The rule is different in Connecticut, where it has been held that unmatured notes in the hands of a bank as pledgee are mere choses in action, and not subject to the process of foreign attachment.[134]

§ 23. Lien of bank and right to set-off.

Analogous to the rule that a bank may apply a general deposit in payment of a debt due to it from the depositor[135] is the rule that a bank has a lien on paper deposited for collection by its debtor if the debt has matured.[136]

In discussing the right of the collecting bank to a lien, the court, in Muench v. Bank,[137] says: "The general lien

[133] Warner v. Fourth Nat. Bank, 115 N. Y. 251, reversing 44 Hun, 374.

[134] Grosvenor v. Farmers' & Mechanics' Bank, 13 Conn. 104.

[135] Schuler v. Laclede Bank, 27 Fed. 424; Merchants' & Planters' Bank v. Meyer, 56 Ark. 499, 20 S. W. 406; Second Nat. Bank of Lafayette v. Hill, 76 Ind. 223, 40 Am. Rep. 239; Knapp v. Cowell, 77 Iowa, 528, 42 N. W. 434.

[136] Cockrill v. Joyce, 62 Ark. 216, 35 S. W. 221. This is so, though the notes were deposited for collection at the request of the cashier of the bank to enable the bank to make a good showing before the bank examiner. Id.

The collecting bank has a lien on paper of partnership for balance due on firm account. Studebaker Bros. Mfg. Co. v. First Nat. Bank of Sulphur Springs (Tex. Civ. App.) 42 S. W. 573. See, also, Hakman v. Schaaf, 5 Wkly. Law Bul. (Ohio) 851.

[137] 11 Mo. App. 144.

of bankers is part of the law merchant. That bankers have a lien on all money and funds of a depositor in their possession for the balance of the general account is undisputed. A banker's lien does not arise on securities deposited with him for a special purpose; otherwise, we have no doubt that when a discount has been made by the bank, and the note has matured, so as to create an indebtedness from the depositor of the bank, all funds of the depositor which the bank has at the date of the maturity of the discounted note, or which it afterwards acquires in the course of business with him, may be applied to the discharge of his indebtedness to the bank; and this is true not only of the general deposit of the customer, but the rule applies to any commercial paper belonging to the depositor in his own right, and placed by him with the bank for collection." But the lien does not attach until some indebtedness is actually in existence and matured.[138] In other words, actual credit must have been given by the bank on the strength of paper actually in its possession.[139] The rule holds in case the debt matures while the paper is in the hands of the bank, uncollected, though it was not mature at the time of the deposit for collection.[140] It seems, however, that the respective claims of the depositor and the bank must be capable of liquidation by calculation.[141]

[138] Gibbons v. Hecox, 105 Mich. 509, 63 N. W. 519; Merchants' Nat. Bank v. Ritzinger, 20 Ill. App. 29; Commercial Nat. Bank v. Proctor, 98 Ill. 558; Zelle v. German Savings Inst., 4 Mo. App. 401.

[139] Russell v. Hadduck, 8 Ill. 233; Bank of Metropolis v. New England Bank, 1 How. (U. S.) 234.

[140] Gibbons v. Hecox, 105 Mich. 509, 63 N. W. 519.

[141] Gibbons v. Hecox, 105 Mich. 509, 63 N. W. 519. See, also, Giles v. Perkins, 9 East, 12.

The test generally applied in determining the right to a lien is embodied in the rule that a banker has a general lien on paper deposited for collection for a general balance, unless the existence of such a lien is inconsistent with the relation of the parties.[142] This rule is of such general application that the courts take judicial notice of it.[143]

The existence of a general balance in favor of the bank is to be determined by the nature of the dealings and transactions between the parties, rather than by the nature of the entries in the books of the bank.[144] Sometimes the lien of the bank is in the nature of that of a pledgee. Thus, if checks are deposited to cover an overdraft, or the amount credited is immediately drawn against, the bank may hold the checks until the overdrafts are made good.[145]

If the paper has been actually pledged to the bank to secure an indebtedness, the bank has a lien as pledgee, with power to collect, and the proceeds, when collected, take the place of the paper, and are subject to the same lien.[146]

The bank's lien is not only effective against the debtor, but follows his property in the hands of his assignee

[142] Cockrill v. Joyce, 62 Ark. 216, 35 S. W. 221; Bank of Metropolis v. New England Bank, 1 How. (U. S.) 234 (lien as between correspondent banks); Reynes v. Dumont, 130 U. S. 354, 381; Wyman v. Colorado Nat. Bank, 5 Colo. 30.

[143] Wyman v. Colorado Nat. Bank, 5 Colo. 30.

[144] Amelungs' Syndics v. Bank of United States (La.) 1 Mart. (O. S.) 322, 346.

[145] Balbach v. Frelinghuysen, 15 Fed. 675; Titus v. Mechanics' Nat. Bank, 35 N. J. Law, 592.

[146] Warner v. Fourth Nat. Bank, 115 N. Y. 251.

for creditors, and may be enforced as against such assignee. Thus, a bank to which paper was indorsed for collection before the maker thereof assigned for the benefit of creditors may set off the amount of the paper in a suit against it by the assignee to recover the maker's deposits in the bank.[147] So, too, if the owner of a half interest in notes deposited with a bank for collection assigns for the benefit of creditors, the bank's lien for a general balance against him attaches to his half of a dividend declared on the notes by a trustee for the creditors of the maker.[148]

The lien of the bank on paper deposited for collection, for a debt of the depositor to the bank, is not lost by the insolvency of the depositor and the execution by him of a general assignment for the benefit of creditors, though the bank accepted such assignment; if the bank in no way consented to a devesting of its lien by such assignment.[149]

Where the owners discount notes at a bank for their own benefit under a rule of the bank that the discount shall be on personal security only, the bank cannot claim a lien for a balance of a general account against them.[150]

[147] Penn Bank v. Farmers' Deposit Nat. Bank, 130 Pa. St. 209, 20 Atl. 150.

[148] Greene v. Jackson Bank, 18 R. I. 779, citing Lehman v. Tallassee Mfg. Co., 64 Ala. 567, 595; Central Nat. Bank v. Connecticut Mutual Life Ins. Co., 104 U. S. 54, 71; Ex parte Pease, 1 Rose, 232.

[149] Joyce v. Auten, 21 Sup. Ct. 227. See, also, cases in notes 147, 148, supra.

[150] Amelungs' Syndics v. Bank of United States (La.) 1 Mart. (O. S.) 322, 347. The same rule applies with greater force if the discounting was for the benefit of third persons. Id.

CHAPTER II.

AUTHORITY OF COLLECTING BANK IN GENERAL.

§ 24. Bank has implied power to make collections.
25. —— National bank.
26. General scope and limitations.
27. Special instructions as to mode of collection.
28. Authority of bank to sue in its own name.
29. —— For possession of paper.
30. —— As real party in interest.
31. Termination of authority to collect.
32. —— Insolvency of bank.
33. —— Revocation of authority by owner of paper.
34. —— Renunciation by bank.

A bank, whether state or national, has implied power to make collections of commercial paper as part of the general business of banking.

The general scope of the bank's authority is as broad as the contract, including the general and reasonable usages and customs of banks.

In case there were special agreements or instructions, they are to govern.

In some jurisdictions, the collecting bank may sue in its own name, on the paper; in others, it may not. In most cases, this depends on whether or not the bank is considered as the real party in interest.

Generally speaking, the authority of the bank terminates only on performance of its contract. If it has possession of the paper after its dishonor, it may collect it; but if the bank becomes insolvent, its authority is at an end.

The authority of the bank may be revoked by the owner prior to actual collection, or by judicial process. It may also be renounced by the bank itself.

§ 24. Bank has implied power to make collections.

The power to receive commercial paper for collection, and to collect it, is necessarily implied from, and included in, the power to do a general banking business.[1]

On this point, the court, in Keyes v. Bank of Hardin,[2] says: "Admitting the rule to be as claimed by counsel, that corporations have only such powers as are expressly or impliedly given by their charters or acts of incorporation, and yet there can be no doubt as to the necessary authority in this bank to receive and collect commercial paper for its patrons. It is not so named nor denied in its charter, but is necessarily implied from the character of its business. The defendant was organized to, and was in the conduct of, a general banking business; and within the limits of that business the receiving on deposit, and for collection, of commercial paper, is, by the common understanding, part and parcel of such business."

The power of a bank, with general banking powers, to collect commercial paper, is seldom questioned in these days; but in an early Alabama case, the point was raised, and it was held that charter authority to "deal in bills of exchange, and discount notes made negotiable and payable at the bank, with two or more good and sufficient sureties," authorizes the taking of bills of exchange for collection, as the power to "deal" in bills of exchange "necessarily extends to all transactions with

[1] Keyes v. Bank of Hardin, 52 Mo. App. 323, 330; Jockusch v. Towsey, 51 Tex. 129, 132; Tyson v. State Bank, 6 Blackf. (Ind.) 225; Yerkes v. National Bank of Port Jervis, 69 N. Y. 382.

[2] Keyes v. Bank of Hardin, 52 Mo. App. 323, 330.

bills of exchange, which are in themselves lawful, and considered by the bank as expedient to enable it to transact its business or increase its profits."[3] The court also intimates, in this case, that a general power to receive moneys on deposit authorizes the collection of all kinds of commercial paper, where the only acts to be performed are to forward the paper, and demand and receive payment.

Indeed, the exercise by banks of the implied power to collect commercial paper is so universal, and such a matter of course, that the courts take judicial notice that it is a part of the ordinary course of their business.[4]

In any event, if a bank attempts a collection, it cannot, in a subsequent suit against it for negligence with respect to the collection, set up a want of charter power to make a contract to collect commercial paper.[5]

§ 25. —— National bank.

Collecting commercial paper being, then, a part of regular banking business, a national bank has power to make collections, and, in exercising the power, is governed by the same rules that govern other banks.[6] In

[3] Branch Bank v. Knox, 1 Ala. 148. The restriction as to sureties was held to apply only to promissory notes. Id.

[4] First Nat. Bank of Birmingham v. First Nat. Bank of Newport, 116 Ala. 520, 22 So. 976.

[5] Tyson v. State Bank, 6 Blackf. (Ind.) 225, 226.

[6] Mound City Paint & Color Co. v. Commercial Nat. Bank, 4 Utah, 353, 9 Pac. 709; White v. Third Nat. Bank of Cincinnati, 4 Wkly. Law Bul. (Ohio) 791; Yerkes v. National Bank of Port Jervis, 69 N. Y. 382; Exchange Nat. Bank of Pittsburgh v. Third Nat. Bank of

the words of the New York court of appeals: "It has never been doubted that they (national banks) have the right and power to do this kind of business as forming a legitimate part of banking business. If included under any specification of the statute (Rev. St. U. S. § 5136), it is under that of "Negotiating promissory notes, drafts, bills of exchange, and other evidences of debt."[7]

§ 26. General scope and limitations.

The authority of the collecting bank extends to, and is limited by, the scope of the original agreement between the parties,[8] including such customs and usages as may properly be said to form part of the contract.[9] Whatever is necessarily incidental to the effective collection of the paper, the bank has implied authority to do. Thus, possession of a negotiable instrument, with authority to collect, confers a right to indorse the instrument.[10]

This rule, as stated in the new negotiable instruments laws, is that an indorsee for collection may transfer his right, as such indorsee, where the form of the indorse-

New York, 112 U. S. 276, 5 Sup. Ct. 141; Merchants' Nat. Bank of Philadelphia v. Goodman, 109 Pa. St. 422, 2 Atl. 687.

[7] Yerkes v. National Bank of Port Jervis, 69 N. Y. 382. The decision as to this point is probably dictum, for the contested point in the case was as to the power of a national bank to contract with a customer to exchange for him nonregistered United States bonds for registered bonds, and it was held that the bank had such power, citing Leach v. Hale, 31 Iowa, 69, and Van Leuven v. First Nat. Bank of Kingston, 54 N. Y. 671.

[8] Contractual limitation of liability, see post, § 36.

[9] As to customs and usages, see ante, § 10.

[10] Willison v. Smith, 52 Mo. App. 133.

ment authorizes him to do so.[11] On the same ground of necessity and expediency, an indorsement "for deposit" by a customer having an account with the bank, followed by an entry of a credit on the pass book, and a draft against the deposit, according to long-established custom between the bank and the customer, authorizes the bank not only to collect the check, but to have it certified by the bank on which it was drawn, if that is deemed necessary by the collecting bank.[12] But a bank which has received paper for collection only has no implied authority to sell it.[13]

§ 27. Special instructions as to mode of collection.

There is an implied contract on the part of a bank receiving paper for collection, with specific instructions, that it will follow such instructions.[14] It is bound to

[11] Negotiable Instruments Laws: Colorado (Laws 1897, c. 64) § 37, subd. 3; Connecticut (Laws 1897, c. LXXIV) § 37, subd. 3; District of Columbia (U. S. Stat. at Large 1897-99, c. 47) § 37, subd. 3; Florida (Laws 1897, c. 4524, No. 10) § 37, subd. 3; Maryland (Laws 1898, c. 119) § 56, subd. 3; Massachusetts (Acts and Resolves 1898, c. 533) § 37, subd. 3; New York (Laws 1897, c. 612) § 67, subd. 3; North Carolina (Pub. Laws 1899, c. 733) § 37, subd. 3; North Dakota (Laws 1899, c. 113) § 37, subd. 3; Oregon (Laws 1899, p. 18) § 37, subd. 3; Rhode Island (Laws 1899, c. 623, p. 24) § 45, subd. 3; Tennessee (Laws 1899, c. 94) § 37, subd. 3; Utah (Laws 1899, c. 83) § 37, subd. 3; Virginia (Acts Assem. 1897-98, c. 866) § 37, subd. 3; Washington (Laws 1899, c. CXLIX) § 37, subd. 3; Wisconsin (Laws 1899, c. 356, § 1676-7, subd. 3.

[12] National Commercial Bank v. Miller, 77 Ala. 168, 54 Am. Rep. 50.

[13] Fuller v. Bennett, 55 Mich. 357, 21 N. W. 433; Russell v. Drummond, 6 Ind. 216. But see ante, § 18, as to authority of bank under indorsement in blank.

[14] Central Georgia Bank v. Cleveland Nat. Bank, 59 Ga. 667. See,

follow instructions if, by a reasonable exercise of diligence, they can be followed.[15] Where the instructions are ambiguous and reasonably susceptible of two constructions, the bank is not chargeable with negligence if, in good faith, it adopts and follows either construction.[16] But the fact that the instructions are ambiguous will not justify the bank in disregarding them entirely.[17]

§ 28. Authority of bank to sue in its own name.

As to the authority of the collecting bank to sue on the paper in its own name, there is a slight conflict of authority. On the one hand, it is held that the bank, as an indorsee for collection, may sue in its own name.[18]

also, Butts v. Phelps, 90 Mo. 670; First Nat. Bank of Texarkana v. Munzesheimer (Tex. Civ. App.) 26 S. W. 428.

Special instructions as to renewals, see post, § 45.

Special instructions as to application of debtor's deposits, see post, § 42.

Effect of custom, see ante, § 10.

On effect of custom and usage as abrogating or modifying written or printed instructions to an agent, see Mechem, Agency, p. 327, note 2; Wanlers v. McCandless, 38 Iowa, 20; D. M. Osborne & Co. v. Rider, 62 Wis. 235, 22 N. W. 394; Greenstine v. Borchard, 50 Mich. 434, 15 N. W. 540; Day v. Holmes, 103 Mass. 306; The Reeside, 2 Sumn. 567, 20 Fed. Cas. 458, No. 11,657.

[15] National Bank v. City Bank, 103 U. S. 668, 670.

[16] Oxford Lake Line v. First Nat. Bank of Pensacola, 40 Fla. 349, 24 So. 480; Mechem, Agency, § 315. See, also, Drown v. Pawtucket Bank, 15 Pick. (Mass.) 88.

[17] Oxford Lake Line v. First Nat. Bank of Pensacola, 40 Fla. 349, 24 So. 480.

[18] First Nat. Bank of Ft. Collins v. Hughes (Cal.) 46 Pac. 272; Cross v. Brown, 19 R. I. 220, 33 Atl. 147; Roberts v. Parrish, 17 Or. 583, 22 Pac. 136; Wilson v. Tolson, 79 Ga. 137, 3 S. E. 900; Roberts v. Snow, 27 Neb. 425, 43 N. W. 241; Chase v. Burnham, 13

This is also the doctrine in force in the states that have adopted the new negotiable instruments laws. The rule established by these laws is very broad, for under them a restrictive indorsement confers on the indorsee the right to "bring any action respecting the paper that the indorser could bring."[19]

Where the indorsement is in blank, though the delivery was for collection only, the indorsee may sue on the paper in his own name,[20] and so may one to whom the

Vt. 447; Simmons v. Belt, 35 Mo. 461; Laplin v. Sherman, 28 Ill. 391; King v. Fleece, 7 Heisk. (Tenn.) 273; Edgerton v. Brackett, 11 N. H. 218; McCallum v. Driggs, 35 Fla. 277; Moore v. Hall, 48 Mich. 143. See, also, Eaton v. Alger, 47 N. Y. 345.

Any defenses available against the real owner are available in a suit by a bank as collecting agent. Abell Note Brokerage & Bond Co. v. Hurd, 85 Iowa, 559, 52 N. W. 488; Cottle v. Cole, 20 Iowa, 485; Wilson v. Tolson, 79 Ga. 137.

An allegation that plaintiffs held the paper for collection as an accommodation and that there was no express authority to sue on it, negatives their ownership and right to sue. Kampmann v. Williams, 70 Tex. 568, 8 S. W. 310.

[19] Negotiable Instruments Laws: Colorado (Laws 1897, c. 64) § 37, subd. 2; Connecticut (Laws 1897, c. LXXIV) § 37, subd. 2; District of Columbia (U. S. Stat. at Large 1897-99, c. 47) § 37, subd. 2; Florida (Laws 1897, c. 4524, No. 10) § 37, subd. 2; Maryland (Laws 1898, c. 119) § 56, subd. 2; Massachusetts (Acts and Resolves 1898, c. 533) § 37, subd. 2; New York (Laws 1897, c. 612) § 67, subd. 2; North Carolina (Pub. Laws, 1899, c. 733) § 37, subd. 2; North Dakota (Laws 1899, c. 113) § 37, subd. 2; Oregon (Laws 1899, p. 18) § 37, subd. 2; Rhode Island (Laws 1899, c. 623, p. 24) § 45, subd. 2; Tennessee (Laws 1899, c. 94) § 37, subd. 2; Utah (Laws 1899, c. 83) § 37, subd. 2; Virginia (Acts Assem. 1897-98, c. 866) § 37, subd. 2; Washington (Laws 1899, c. CXLIX) § 37, subd. 2; Wisconsin (Laws 1899, c. 356) § 1676-1, subd. 2.

Indorsement for collection is restrictive. See ante, § 17.

[20] Bank of Louisiana v. Stansbury, 4 La. 530; French v. Jarvis, 29 Conn. 347.

paper is delivered for collection without any indorsement.[21]

Where a bank, in which a note indorsed in blank is deposited for collection, is allowed to retain possession until after protest, it may sue on the note in its own name.[22] It has also been held that a bank holding a note and mortgage as trustee for collection for another bank may sue to foreclose in its own name.[23]

The cases denying the right of the bank to sue in its own name proceed on the theory that it is no part of the duties of a bank with which notes have been deposited, without any specific contract specifying distinct obligations, to employ counsel[24] and bring suit on the notes;[25] or, in other words, that it is not within the scope of the agency of the collecting bank to sue on the paper.[26] On this point, the United States circuit court

[21] Sherwood v. Rays, 14 Pick. (Mass.) 172; Little v. O'Brien, 9 Mass. 423. Contra, see Nichols v. Gross, 26 Ohio St. 425.

[22] Sterling v. Marietta & Susquehanna Trading Co., 11 Serg. & R. (Pa.) 179. The bank in this case would, of course, be accountable to the depositor for the proceeds recovered. Id.

[23] Lanier v. Nash, 121 U. S. 404, 7 Sup. Ct. 919, 30 L. Ed. 947.

[24] Ryan v. Manufacturers' & Merchants' Bank, 9 Daly (N. Y.) 308. And hence the bank is not liable for the false representations of its president to the owner of the paper as to the amount of trouble and expense the collection ultimately made by such attorney would involve. Id.

[25] Crow v. Mechanics' & Traders' Bank, 12 La. Ann. 692; Ryan v. Manufacturers' & Merchants' Bank, 9 Daly (N. Y.) 308; Freeman v. Citizens' Nat. Bank, 78 Iowa, 150, 42 N. W. 632.

[26] First Nat. Bank of Evansville v. Fourth Nat. Bank of Louisville, 56 Fed. 967, 972, 6 C. C. A. 183, 16 U. S. App. 1; First Nat. Bank of Ft. Worth v. Payne (Ky.) 42 S. W. 736; Crow v. Mechanics' & Traders' Bank, 12 La. Ann. 692; Wetherill v. Bank of Pennsylvania, 1 Miles (Pa.) 399; Ryan v. Manufacturers' & Merchants' Bank, 9 Daly (N. Y.) 308.

of appeals for the sixth circuit, after stating and approving the general rule that such a suit is not within the scope of the agency of the bank, says: "It may be, however, that under special circumstances, as where delay to bring suit—the collecting bank being the indorsee—would operate to discharge a surety, and there was not time to wait for advices from the owner of the paper, or where an immediate attachment was necessary to prevent the fraudulent removal or disposition of his property by the debtor to avoid payment, it would be the duty of the collecting bank to bring suit."[27]

§ 29. —— For possession of paper.

Since, however, the bank, as bailee, is entitled to possession for the purposes of collection, it ought, logically, to have the right to sue in its own name to enforce such right at least. So it has been held that a bank to which a draft with collaterals is delivered by the payee for collection has such a special interest in the paper, that it may recover possession from the receiver of a correspondent bank, to which it sent the paper for collection prior to its suspension.[28]

It has also been held that where the bank which issued a certificate of deposit refused, on receiving the same from a collecting bank, either to pay it or to surrender it, the collecting bank may maintain an action for possession of the certificate, since it, in turn, is ac-

[27] First Nat. Bank of Evansville v. Fourth Nat. Bank of Louisville, 56 Fed. 967, 972, 6 C. C. A. 183, 16 U. S. App. 1.

[28] Corn Exchange Bank of Chicago v. Blye (1886) 2 N. Y. St. Rep. 112.

countable to its principal either for the certificate itself, or for the amount thereof.[29]

§ 30. —— As real party in interest.

An indorsee for collection is the "real party in interest," within the meaning of the statutes of Iowa, requiring every action to be prosecuted in the name of such party;[30] the doctrine there being that one "holding the legal title of a note or instrument may sue on it, though he be an agent or trustee, and liable to account to another for the proceeds of the recovery."[31] But in Indiana and Minnesota, the principal is the real party in interest, within the meaning of a like statute, and the agent cannot sue in his own name.[32]

In denying the right of a bank to sue in its own name on paper indorsed to it "for collection," the supreme court of Minnesota says: "It was held, in some cases, that the beneficial owner of a negotiable bill or note, payable to bearer, or indorsed in blank, might institute suit on it in the name of any one who would allow his name to be used for that purpose, and that, unless the maker had a defense to the note, good against the real

[29] People's State Bank v. St. Landry State Bank, 50 La. Ann. 528, 24 So. 14. The collecting bank in this case having brought suit for payment or return of the certificate, the court held an exception to the cause of action as an entirety, untenable, in view of the fact that the action was maintainable for the recovery of possession of the paper. Id.

[30] Abell Note Brokerage & Bond Co. v. Hurd, 85 Iowa, 559, 52 N. W. 488; Cottle v. Cole, 20 Iowa, 485.

[31] Cottle v. Cole, 20 Iowa, 485.

[32] Black v. Enterprise Ins. Co., 33 Ind. 223; Rock County Nat. Bank of Janesville v. Hollister, 21 Minn. 385.

owner, he could not be permitted to show that the plaintiff was not the real party in interest.[33] Although this rule might be correct at common law, it certainly is not good under the statute of this state, which provides that 'every action shall be prosecuted in the name of the real party in interest.' Gen. St. c. 66, § 26. To this there are exceptions made by section 28; but the case of this indorsement would not come within them. * * * The relation of the indorser and indorsee is that of principal and agent; the agent cannot be the 'real party in interest' in a suit brought on the note."[34]

In New York, an ordinary agent for collection is not the real party in interest,[35] but becomes such, and hence entitled to sue in his own name if he is to collect at his own expense, and retain a portion of the proceeds.[36]

§ 31. Termination of authority to collect.

In the absence of specific instructions, the authority of the collecting bank continues up to the time of the completion of the collection, and the remittance and receipt of the proceeds. We shall see later, however, that, if the paper is dishonored, the bank, unless otherwise instructed, should take the proper steps to charge the parties, and immediately return the paper to the owner.[37] But if the bank retains possession of the paper

[33] Citing Morton v. Rogers, 14 Wend. (N. Y.) 575; Lowell v. Everton, 11 Johns. (N. Y.) 52; Conroy v. Warren, 3 Johns. Cas. (N. Y.) 259, 264.

[34] Rock County Nat. Bank of Janesville v. Hollister, 21 Minn. 385.

[35] Bell v. Tilden, 16 Hun (N. Y.) 346; Killmore v. Culver, 24 Barb. (N. Y.) 656.

[36] Eaton v. Alger, 47 N. Y. 345.

[37] See post, § 74.

after dishonor, its authority continues as long as the paper remains at the bank; and the debtor may safely pay the amount thereof to the bank if he has no notice that the bank no longer has any authority to receive payment.[38]

§ 32. —— Insolvency of bank.

The insolvency of the collecting bank at once terminates its authority to collect, or to proceed further with the collection.[39] Insolvency of the bank, known to its officers at the time the paper is received for collection, negatives any authority to collect, from the very inception of the relation.[40]

§ 33. —— Revocation of authority by owner of paper.

As a general rule, the owner may revoke the authority given the collecting bank at any time prior to collection, unless the bank, in the usual course of business, has obtained title to, or a lien on, the paper.[41] So, at any time before a depositor of paper for collection has drawn against it, he may revoke the so-called agency,

[38] Alley v. Rogers, 19 Grat. (Va.) 366, 383; Sterling v. Marietta & Susquehanna Trading Co., 11 Serg. & R. (Pa.) 179.

[39] Jockusch v. Towsey, 51 Tex. 129; Bank of Clarke County v. Gilman, 81 Hun, 486, 30 N. Y. Supp. 1111, affirmed in 152 N. Y. 634; Audenried v. Betteley, 8 Allen (Mass.) 302; Manufacturers' Nat. Bank v. Continental Bank, 148 Mass. 553, 20 N. E. 193, 12 Am. St. Rep. 598, 2 L. R. A. 699; First Nat. Bank of Meridian v. Strauss, 66 Miss. 479, 6 So. 232. See, also, First Nat. Bank of Crown Point v. First Nat. Bank of Richmond, 76 Ind. 561, 40 Am. Rep. 261.

[40] Richardson v. Denegre, 93 Fed. 572, and cases cited under section 12, ante.

[41] Balbach v. Frelinghuysen, 15 Fed. 675, 684.

and reclaim the deposit;[42] but he cannot revoke the authority, and reclaim the paper after the amount has been credited to him on the books of the bank, and he is consequently at liberty to draw on the fund in accordance with the bank's usual mode of dealing.[43] This is, of course, on the theory that in such case title has passed to the bank.[44] If the paper has been expressly indorsed for collection, the indorsement itself may be canceled at any time before the paper is actually delivered over or transmitted for collection.[45] The authority of the bank may be revoked, and the paper withdrawn from it, after it has actually entered on the process of collection, if it fails to take proper steps to insure collection.[46]

The authority to collect may also be revoked by judicial process. Thus, where a depositor obtains an injunction against the bank with which he has left a check for collection, and against the clearing house, restraining them from passing the check, the so-called agency of the collecting bank is revoked.[47]

§ 34. —— Renunciation by bank.

The bank itself may renounce its authority to collect. Its authority as to a particular item is renounced by an account stated between the bank and the customer,

[42] Louisiana Ice Co. v. State Nat. Bank of New Orleans, 1 McGloin (La.) 181.

[43] Flannery v. Coates, 80 Mo. 444.

[44] See ante, § 13.

[45] People's Bank of Lewisburg v. Jefferson County Sav. Bank, 106 Ala. 624, 17 So. 728. See, also, Watervliet Bank v. White, 1 Denio (N. Y.) 608, 612; Manhattan Co. v. Reynolds, 2 Hill (N. Y.) 140.

[46] Bank of Mobile v. Huggins, 3 Ala. 206, 221.

[47] Louisiana Ice Co. v. State Nat. Bank of New Orleans, 1 Mc-

wherein the item is charged back to the latter; and the renunciation will be considered to have been accepted if no objection thereto is made within a reasonable time.[48] The bank may also be considered as having renounced its authority where, after dishonor, it has returned the paper to the owner, thereby admitting its inability to effect collection.[49]

Gloin (La.) 181. Any person who is aware of the issuing of the injunction is charged with notice of the revocation of the agency. Id.

[48] First Nat. Bank of Evansville v. Fourth Nat. Bank of Louisville, 56 Fed. 967, 973, 6 C. C. A. 183, 16 U. S. App. 1.

[49] See post, § 74.

CHAPTER III.

DUTIES AND LIABILITIES OF COLLECTING BANK IN GENERAL.

§ 35. Degree of care required of bank.
36. Contractual limitation of liability.
37. Representation of bank by cashier.
38. Defaults of depositor—Bank not liable.
39. Liability for loss of paper—Negligence presumed from loss.
40. —— Failure to make inquiry and give notice within reasonable time.
41. Surrender of bills of lading accompanying drafts for price of goods.
42. Application of deposits to payment of depositor's paper held for collection.
43. —— Check or draft not an assignment of fund.
44. Time and manner of receiving payment.
45. —— Extensions and renewals.
46. Medium of payment—As general rule, bank can take money only.
47. —— Checks on other banks.
48. —— Claims against collecting bank—Certificates of deposit.
49. —— Same—Checks on collecting bank.
50. Collecting bank also a creditor of obligor—Cannot obtain preference—Exceptions.
51. Collection of interest.
52. Liability of collecting bank for depreciation.
53. Liability of collecting bank as general indorser.
54. Duties as to paper sent to a correspondent—Forwarding instructions and information.
55. Fraud and mistake.
56. Negligence a question of fact—Province of court and jury.
57. Waiver of negligence of collecting bank.

A bank must use ordinary care in making collections.

As to contractual limitation of liability, the better rule is that the bank cannot contract against liability for its own negligence, though it may contract against liability for negligence of its agents or correspondents. If the rules and customs of the bank have been brought home to the customers, they may limit the liability of the bank to their terms and conditions.

The cashier represents the bank in making collections, and it is bound by his acts and representations within the scope of his duties.

The bank is not liable for any loss directly traceable to a default of the depositor, in failing to give sufficient information, etc.

Negligence on the part of the bank is presumed from the loss of the paper itself after delivery for collection. This presumption may be rebutted by proof of special exonerating circumstances; but if the bank, after loss of the paper, fails to make due and timely inquiry, it is liable.

Where bills of lading accompany time drafts sent for collection, the bank may surrender the bills on acceptance of the drafts; but in case of sight drafts, the bank must hold the bills of lading until payment of the drafts. This rule may, however, be modified by special instructions.

The weight of authority denies to a bank at which paper is made payable any right to apply a deposit of the obligor to payment thereof without special instructions to that effect. The rule is different where the paper is made negotiable and payable at the bank. This rule is in harmony with the rule that a check or draft is not an assignment of the fund on which it is drawn.

The bank usually receives payment at maturity, but may accept it before maturity in special cases. It may also accept payment after dishonor if it still has the paper. It cannot accept partial payment or grant extensions or renewals without special authority.

As a general rule, the bank can accept money only in pay-

ment. If it takes a check in payment, it does so at its own risk; but if the taking of checks be justified by general custom, the bank will be protected in some jurisdictions; in others it is held that such a custom is unreasonable and against public policy.

The bank cannot take in payment a claim against itself in the shape of a certificate of deposit or a check on itself. But here, again, the bank may be justified by general custom.

If the bank is also a creditor of the obligor on the paper, it cannot, except in exceptional cases, secure its own claim, to the prejudice of the claim of its customer. It should either decline the collection or deal fairly with the customer and give him preference.

There is some conflict of authority as to the liability of the bank on its general indorsement of paper indorsed to it restrictively, for collection. In some jurisdictions, including those where the new negotiable instruments laws are in force, the bank is liable in such case as a general indorser; in other jurisdictions it is not liable as general indorser.

If the paper be sent to a correspondent, the bank should forward to the correspondent any and all special instructions and necessary information.

Negligence of the bank is usually a question of fact for the jury, but is a question of law for the court if the facts are undisputed.

The negligence of the bank may be waived or ratified, but full knowledge of all the essential facts is requisite to an effectual waiver or ratification.

§ 35. Degree of care required of bank.

The degree of care required in the case of any other bailment for hire governs the duties and liabilities of a collecting bank; and therefore, in collecting paper delivered for that purpose, it must use ordinary care and

diligence.[1] What constitutes ordinary care depends for the most part on the circumstances of each case;[2] but there are some rules governing duties common to all collections, and of these we shall treat in the succeeding sections of this chapter, and in the following chapter.

§ 36. Contractual limitation of liability.

Reasoning by analogy from the rules rendering a stipulation by a common carrier against liability for its own negligence void as against public policy,[3] and the rules rendering like stipulations by a master void for the same reason,[4] it would seem that a bank ought not to be permitted to contract against liability for its negligence. But the rule is otherwise in Illinois at least, where it has been held that a bank has a right to stipulate against the ordinary liabilities of the business of collecting paper.[5] The decision more in detail is that where the initial bank undertakes a collection only on

[1] Sahlien v. Bank of Lonoke, 90 Tenn. 221, 16 S. W. 373; Merchants' & Manufacturers' Bank v. Stafford Nat. Bank, 44 Conn. 565; Yerkes v. National Bank of Port Jervis, 69 N. Y. 382, 386; First Nat. Bank of Birmingham v. First Nat. Bank of Newport, 116 Ala. 520, 22 So. 976; Young v. Noble's Ex'rs, 2 Disn. (Ohio) 487.

Degree of care required of a merchant or other nonbanker attempting a collection, see Young v. Noble's Ex'rs, 2 Disn. (Ohio) 485; Dyas v. Hanson, 14 Mo. App. 363.

[2] See post, §§ 56, 58.

[3] Louisville & Nashville R. Co. v. Grant, 99 Ala. 325, 13 So. 599; Same v. Dies, 91 Tenn. 177, 18 S. W. 266; St. Joseph & G. I. R. Co. v. Palmer, 38 Neb. 463, 56 N. W. 957; Union Pacific Ry. Co. v. Rainey, 19 Colo. 225, 34 Pac. 986.

[4] Richmond & Danville R. Co. v. Jones, 92 Ala. 218, 9 So. 276; Runt v. Herring, 2 Misc. Rep. 105, 21 N. Y. Supp. 244.

[5] Fay v. Strawn, 32 Ill. 295.

condition that it shall incur no liability, and that the money, when paid to their correspondent at the place of payment, shall be sent to the initial bank by express, and the express package, on receipt, shall be turned over to the owner, the initial bank is not liable for the proceeds in case the correspondent fails after collecting, but before remitting, though the correspondent had, by mistake, and contrary to instructions, passed the amount received to the credit of the initial bank.[6]

Special instructions to take particularly designated steps in making the collection will not be construed to limit the liability of the bank to the taking of such steps only, and so a direction to the collecting bank to protest in case of nonpayment does not constitute a special contract with the bank limiting its liability and duty to merely that of a special agent, with authority to employ a notary for the performance of the duties incident to protest, but requires the bank to take all the steps necessary to charge all parties liable on the paper.[7]

The collecting bank may, however, contract against liability for the negligence of its correspondents. This right is recognized in those cases where the bank merely contracts to transmit to a suitable correspondent.[8] But such a limitation will not excuse the bank from its own negligence in not selecting a proper correspondent.[9]

[6] Fay v. Strawn, 32 Ill. 295.

[7] Ayrault v. Pacific Bank, 47 N. Y. 570, 575, affirming 29 N. Y. Super. Ct. 337; Coddington v. Davis, 1 Comst. (N. Y.) 186.

[8] See post, §§ 99-115. See, also, Fay v. Strawn, 32 Ill. 295.

[9] Minneapolis Sash & Door Co. v. Metropolitan Bank, 76 Minn. 136, 44 L. R. A. 504.

How far the rules of the bank and notices posted in the bank or printed on its stationery limit its liability depends on whether they have been brought home to the customer in such manner that they form a part of the contract in the particular case. If they do form part of the contract, the depositor is, of course, bound by them.[10]

§ 37. Representation of bank by cashier.

The collecting bank is bound by the acts of its cashier in the ordinary course of business, as he is the general executive officer of the bank, and the public at large "usually have no other knowledge of the powers of the cashier of a particular bank than such as is derived from the usage and practice of banks in general; and, even though his powers may be expressly limited by the directors, such limitation will not affect those to whom it is unknown, if the transaction was one within the scope of the ordinary course of business of banking institutions."[11] Hence a bank is bound by the cashier's receipt for paper received for collection,[12] and is estopped to repudiate representations made by him that

[10] Pendleton v. Bank of Kentucky, 1 T. B. Mon. (Ky.) 171, 182; Wingate v. Mechanics' Bank, 10 Pa. St. 104. See, also, Heath v. Portsmouth Sav. Bank, 46 N. H. 78; Schoenwald v. Metropolitan Sav. Bank, 57 N. Y. 418.

[11] First Nat. Bank of Birmingham v. First Nat. Bank of Newport, 116 Ala. 520, 22 So. 976; Merchants' Bank v. State Bank, 10 Wall. (U. S.) 604, 650, and cases cited in notes; Warren v. Gilman, 17 Me. 360.

Paying teller not authorized to receive deposit to take up note held for collection, see post, § 42.

[12] See ante, § 8.

certain paper would be held by the bank for collection, where it received the benefits of the transaction.[13] But if the paper was delivered to the cashier in his individual capacity, and the proceeds were placed to his credit in the bank, and used by him, the bank is not liable.[14]

§ 38. Defaults of depositor—Bank not liable.

The bank cannot properly be charged with negligence if the owner fails to inform it of material facts, or gives erroneous addresses of the parties, or fails to observe known rules of the bank, and any one of such defaults is the proximate cause of the resulting loss. Under this rule, the failure of the depositor for collection to impart to the bank his knowledge of the insolvency of the obligor, and the worthlessness of the paper, will prevent a recovery against the bank, as such failure is a fraud on the bank.[15] And a bank receiving for collection a note payable at the "Bank of Kent, Kent, N. Y.," without other information as to the postoffice address of that bank, performs its whole duty by sending it to the address indicated, and is not liable if the note fails to reach the bank of Kent.[16]

Where the rules of the collecting bank require the depositor to deposit, in advance, the costs of protest, he cannot hold the bank liable for neglecting to protest, if he fails to deposit such costs in advance.[17] This hold-

[13] See ante, § 9.

[14] McLennan v. Bank of California, 87 Cal. 569, 25 Pac. 760.

[15] Peterson v. Union Nat. Bank, 52 Pa. St. 206; County of Middlesex v. State Bank, 32 N. J. Eq. 467.

[16] Chapman v. Union Bank, 32 How. Pr. (N. Y.) 95.

[17] Pendleton v. Bank of Kentucky, 1 T. B. Mon. (Ky.) 171, 182.

ing, of course, is based on the supposition that the rules of the bank are taken as fixing the extent of its engagement to collect.

§ 39. Liability for loss of paper—Negligence presumed from loss.

It sometimes happens that paper delivered to a bank for collection is lost, either in the bank or in the mails, during the course of its transmission by the bank. For the rules governing the liability of the bank in such cases, we again have recourse to the general rules applicable to bailments. Thus, a recent Alabama case lays down the doctrine that the loss of paper by a bank to which it was delivered for collection is presumed to be the result of negligence of the bank, as "it is a general rule that in actions against a bailee for failure to redeliver the property bailed, if the proof shows such failure, *prima facie* negligence will be imputed to the bailee."[18] This is also the doctrine of the United States supreme court, which has held that negligence on the part of the collecting bank is presumed from the fact that paper sent there for collection was lost after having been actually in the bank.[19] If the fact of the loss be capable of explanation, the facts are so within the

[18] First Nat. Bank of Birmingham v. First Nat. Bank of Newport, 116 Ala. 520, 22 So. 976, and cases cited.

Waiver of negligence of bank, see post, §§ 57, 76.

Measure of damages, see post, § 180.

[19] Chicopee Bank v. Philadelphia Bank, 8 Wall. (U. S.) 641, 19 L. Ed. 422. But see Davis v. First Nat. Bank of Fresno, 118 Cal. 600, 50 Pac. 666.

peculiar knowledge of the officers of the bank that the burden of proof rests on it to show due diligence.[20]

In a case where the lower court had instructed the jury that, if the note was lost by defendant, and defendant does not show under what circumstances it was lost, it is presumed that it was lost by carelessness, the reviewing court said: "When a party is intrusted with property, and is unable to account for it except by proving that it has been lost, and can show no circumstances attending its loss,—if not a legal presumption of carelessness, it is of that strong character that the court would not be inclined to reverse a judgment for giving such an instruction, even if it were not a legal conclusion. It is so strong that such an instruction could not mislead the jury by informing them that it created a legal presumption."[21]

It seems, however, that if the collecting bank sends the paper, not for the purpose of collection, but for a special purpose consistent with a due regard for the rights of the owner, the rule is different. Thus, where the defendant bank sent a draft to the drawee bank merely for identification of the signature of the drawer, and the draft was there lost, it was held to have been error to charge generally that a *prima facie* case of negligence was made out if defendant failed to return the draft or its proceeds, but that the court should have charged as to what facts would constitute negligence, under the peculiar circumstances of the case.[22] But

[20] Chicopee Bank v. Philadelphia Bank, 8 Wall. (U. S.) 641, 19 L. Ed. 422.

[21] American Express Co. v. Parsons, 44 Ill. 312, 318.

[22] Davis v. First Nat. Bank of Fresno, 118 Cal. 600, 50 Pac. 666.

where a bank either lost a note sent to it for collection, or, by its negligence, permitted the note to get into the hands of an unauthorized person, who collected it, it is liable to the owner for the amount thereof, as a collecting bank must either return the note or account for its proceeds.[23]

The presumption of negligence from the loss of paper after its receipt for collection may, of course, be rebutted by a showing of facts consistent with the exercise of due care.[24]

§ 40. —— Failure to make inquiry and give notice within reasonable time.

The bank may render itself liable by a failure to make due inquiry for the paper within a reasonable time. So, where it forwarded by mail a check which, in due course, would have reached the correspondent the next day, but failed to discover that it was lost, and to notify the principal of that fact, for fourteen days after mailing it, during which time the drawee became insolvent, it is liable for the loss sustained.[25] So, also, failure of the collecting bank to make any inquiry as to a sight draft mailed by it on the day of its receipt, and lost in the

[23] McClure v. D. M. Osborne & Co., 86 Ill. App. 465.

[24] Chicopee Bank v. Philadelphia Bank, 8 Wall. (U. S.) 641, 650, 19 L. Ed. 422; Davis v. First Nat. Bank of Fresno, 118 Cal. 600, 50 Pac. 666. See, also, Chapman v. Union Bank, 32 How. Pr. (N. Y.) 95; Day v. Riddley, 16 Vt. 48; Dawson v. Chamney, 5 Q. B. 164.

Where the collecting agent forwards a note to a foreign port, for collection, by the regular government mail, with the knowledge and assent of the owner, such agent is not liable for its loss in transmission. Jacobsohn v. Belmont, 20 N. Y. Super. Ct. 14.

[25] Shipsey v. Bowery Nat. Bank, 59 N. Y. 485, reversing 36 N. Y. Super. Ct. 501.

mails, or to notify the owner of its nonpayment, for one month after the draft was mailed, renders it liable for the full amount in case of the insolvency of the drawee before the expiration of such time.[26]

§ 41. Surrender of bills of lading accompanying drafts for price of goods.

Drafts for the price of goods, when delivered to a bank for collection, are usually accompanied by the bills of lading. Whether the bank should surrender the bills of lading on the mere acceptance of the drafts, or should hold them until actual payment of the drafts, is a question that arises frequently, and is made to depend on whether the drafts are "sight" or "time" drafts. The general rule, deducible from the decisions, and sustained by the great weight of authority, is that, in the absence of instructions to the contrary, a bill of lading of merchandise deliverable to order, when attached to a time draft, and forwarded with the draft to a bank for collection, may be surrendered to the drawee on his acceptance of the draft, and that the bank is not required to hold the bill until actual payment of the draft.[27]

[26] First Nat. Bank of Trinidad v. First Nat. Bank of Denver, 4 Dill. 290, Fed. Cas. No. 4,810.

[27] National Bank of Commerce of Boston v. Merchants' Nat. Bank of Memphis, 91 U. S. 92, 23 L. Ed. 208; Woolen v. New York & Erie Bank, 12 Blatchf. 359, Fed. Cas. No. 18,026; Lanfear v. Blossman, 1 La. Ann. 148; Moore v. Louisiana Nat. Bank, 44 La. Ann. 99, 10 So. 407, 32 Am. St. Rep. 332; Schuchardt v. Hall, 36 Md. 590; Second Nat. Bank of Columbia v. Cummings, 89 Tenn. 609, 18 S. W. 115; Commercial Bank of Manitoba v. Chicago, St. P. & K. C. Ry. Co., 160 Ill. 401, 43 N. E. 756, affirming 58 Ill. App. 438; Oxford Lake Line v. First Nat. Bank of Pensacola, 40 Fla. 349, 24 So. 480;

The court in the leading case decided in the United States supreme court says, as to a time draft: "The acceptance is not asked on the credit of the drawer of the draft, but on the faith of the consignment. The drawee is not asked to accept on the mere assurance that the drawer will, at a future day, deliver the goods to reimburse the advances. He is asked to accept in reliance on a security in hand. To refuse him that security is to deny him the basis of his requested acceptance. It is remitting him to the personal credit of the drawer alone. An agent for collection having the draft and attached bill of lading cannot be permitted, by declining to surrender the bill of lading on the acceptance of the bill, to disappoint the obvious intentions of the parties, and deny to the acceptor a substantial right which by his contract is assured to him."[28] But if the bills accompanying a time draft are taken to the order of the consignors, and are by them indorsed to the cashier of the bank through which they are to be transmitted for collection, these facts rebut the presumption (arising from the fact that the paper was a time draft) that there was a sale on credit, and show an intent that the

Wisconsin Marine & Fire Ins. Co. v. Bank of British North America, 21 Upper Can. Q. B. 284, affirmed in 2 Upper Can. E. & A. Rep. 282; Clark v. Bank of Montreal, 13 Grant's Ch. 211; Shepherd v. Harrison, L. R. 4 Q. B. 493, L. R. 5 H. L. 133; Coventry v. Gladstone, L. R. 4 Eq. 493.

Waiver of negligence of bank, see post, § 57.

[28] National Bank of Commerce of Boston v. Merchants' Nat. Bank of Memphis, 91 U. S. 92, 23 L. Ed. 208. The court in this case distinguishes Gilbert v. Guignon, 8 Ch. App. 16, Seymour v. Newton, 105 Mass. 272, Newcomb v. Boston & Lowell Railroad Corp., 115 Mass. 230, and Stollenwerck v. Thatcher, 115 Mass. 224.

bills of lading be held as security until payment of the draft.[29] On this point, the supreme court of the United States said: "These bills of lading, unexplained, are almost conclusive evidence of an intention to reserve to the shipper the *jus disponendi,* and prevent the property in the wheat from passing to the drawees of the drafts."[30]

The rule as to sight drafts is that the bank must hold the accompanying bills of lading until actual payment of the drafts.[31] If specific instructions as to the holding of the bills of lading accompany them and the drafts, the bank must follow the instructions strictly. Hence a bank receiving for collection time drafts with bills of lading, accompanied by specific instructions for delivery of the bills of lading only on payment of the drafts, cannot divest its principal of ownership of the goods by delivering the bills of lading prior to payment, contrary to instructions.[32] But express instructions to the col-

[29] Second Nat. Bank of Columbia v. Cummings, 89 Tenn. 609; Dows v. National Exchange Bank of Milwaukee, 91 U. S. 631; Security Bank of Minnesota v. Luttgen, 29 Minn. 366; Benjamin, Sales (Corbin Ed.) § 565.

In the Minnesota case above cited, there was evidence of a special parol agreement that the bills should not be delivered until payment of the drafts, but the court holds the above doctrine independently of such evidence.

[30] Dows v. National Exchange Bank of Milwaukee, 91 U. S. 631.

[31] Second Nat. Bank of Columbia v. Cummings, 89 Tenn. 609; National Bank of Commerce of Boston v. Merchants' Nat. Bank of Memphis, 91 U. S. 92, 23 L. Ed. 208. See, also, cases cited in note 27, supra.

[32] Dows v. National Exchange Bank of Milwaukee, 91 U. S. 618; Dows v. Wisconsin Marine & Fire Ins. Co., 91 U. S. 637; Stollenwerck v. Thatcher, 115 Mass. 224.

lecting bank to "deliver" certain papers accompanying a draft only on payment of the draft are not violated by the bank by simply allowing the drawee to open the package containing the papers, and to examine them before payment of the draft; such a temporary and qualified possession not being a "delivery."[33] Where the instructions are ambiguous, the bank must nevertheless use ordinary business judgment as to the course it will pursue. So, where two drafts, one at sight and the other on time, were sent to a bank for collection and remittance, with special instructions to procure acceptance of the time draft, and deliver the bill of lading accompanying the drafts "only on payment of the drafts," the bank is liable for any damages caused by its delivery of the bill of lading on payment of the sight draft, but without procuring an acceptance of the time draft, though the bank, in good faith, believed that it was acting for the best interests of the principal.[34]

By a wrongful surrender of the bills of lading, amounting in fact to a delivery of the goods, before payment of the drafts, the bank makes itself liable for conversion of the goods.[35]

[33] People's Nat. Bank v. Freeman's Nat. Bank, 169 Mass. 129, 47 N. E. 588, and cases cited.

[34] Oxford Lake Line v. First Nat. Bank of Pensacola, 40 Fla. 349, 24 So. 480, and authorities cited.

Waiver of negligence of bank, see post, § 57.

[35] Hobbs v. Chicago Packing & Provision Co., 98 Ga. 576, 25 S. E. 584. The bank in this case having been a partnership, and delivery of the bills of lading having been made by one partner only, without the knowledge of the other, it was held that the act was within the scope of the partnership business, and that both were individually liable. Id. It does not appear in this case whether the drafts were "time" or "sight" drafts.

If the bank discounts the draft, it is entitled to hold the bill of lading as security for the acceptance and payment of the draft,[36] and has sufficient title to the draft to enable it to enforce its claim against the goods in case the draft is dishonored by the consignee, as against other creditors of the drawer, though its usual custom was to charge back the amount of unpaid drafts.[37]

§ 42. Application of deposits to payment of depositor's paper held for collection.

The rule adopted by the decided weight of authority is that a bank at which negotiable paper is made payable has no authority, by reason of that fact, to apply funds of the maker or acceptor on deposit at maturity to payment of the paper, in the absence of a well-defined custom binding on the maker or acceptor, or of an express authorization.[38] This rule is certainly reason-

[36] Dows v. National Exchange Bank of Milwaukee, 91 U. S. 618; Security Bank of Minnesota v. Luttgen, 29 Minn. 363.

[37] American Trust & Savings Bank v. Austin, 25 Misc. Rep. 454, 55 N. Y. Supp. 561.

[38] Adams v. Hackensack Improvement Commissiou, 44 N. J. Law, 638, 43 Am. Rep. 406; Wood v. Merchants' Saving, Loan & Trust Co., 41 Ill. 267, 270; Ridgely Nat. Bank v. Patton, 109 Ill. 479, 483; Haines v. McFerren, 19 Ill. App. 172; National Exchange Bank v. National Bank of North America, 132 Mass. 150; Scott v. Shirk, 60 Ind. 160; Grissom v. Commercial Nat. Bank, 87 Tenn. 351, 10 S. W. 774; St. Paul Nat. Bank v. Cannon, 46 Minn. 95, 48 N. W. 526; Walton v. Henderson, Smith (N. H.) 168; Gordon v. Muchler, 34 La. Ann. 604; Sebag v. Abitbol, 4 Maule & S. 462; Turner v. Hayden, 4 Barn. & C. 1.

The rule as stated in McGill v. Ott, 10 Lea (Tenn.) 147, is that "a man who receives the money as agent of another cannot simply,

able, and any other involves an unwarranted enlargement of the authority of a collecting bank. There are some authorities, however, that hold a contrary doctrine.[39]

The case of Mandeville v. Union Bank of Georgetown[40] is frequently cited to the proposition that the bank is authorized, by a note made payable at the bank, to advance to the owner of the note the sum named therein on the credit of the maker; but the exact language of Chief Justice Marshall in that case was: "By making a note negotiable in bank, the maker authorizes the bank to advance on his credit to the owner of the note the sum expressed on its face," and it will be found, on careful examination, that the only matter considered was whether one who has authorized a bank to discount his note can thereafter set off debts he held against the payee of the note.

The case of Commercial National Bank v. Henninger[41]

in that capacity, make an application of such money to the payment of his principal's debt without the assent, expressed or implied, of the principal."

Application of proceeds of collection belonging to member of firm, to payment of firm's note held for collection, see post, § 134.

[39] Indig v. National City Bank of Brooklyn, 80 N. Y. 100, 106; Aetna Nat. Bank v. Fourth Nat. Bank, 46 N. Y. 82, 88; Robarts v. Tucker, 16 Adol. & El. (N. S.) 578; Forster v. Clements, 2 Camp. 17; Whitaker v. Bank of England, 6 Car. & P. 700. See, also, Riverside Bank v. First Nat. Bank of Shenandoah, 74 Fed. 276.

The first case cited above was decided by a divided court, and relied in part on Lazier v. Horan, 55 Iowa, 75, 7 N. W. 457, which has since been overruled by Bank of Montreal v. Ingerson, 105 Iowa, 349, 75 N. W. 351.

[40] 9 Cranch (U. S.) 9.

[41] 105 Pa. St. 496. See, also, Home Nat. Bank v. Newton, 8 Bradw. (Ill.) 563.

is also frequently cited as holding contrary to the doctrine of the text, but on examination is found to hold merely that a bank may apply a deposit to payment of a note due the bank from the depositor, and cannot waive this right of set-off, to the prejudice of an indorser on the note.

Statutes recently adopted in many of the states provide that, where a negotiable instrument is made payable at a bank, it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.[42] At first blush, these provisions seem at variance with the principles just announced, but a closer

[42] Negotiable Instruments Laws: Colorado (Laws 1897, c. 64) § 87; Connecticut (Laws 1897, c. LXXIV) § 87; District of Columbia (U. S. Stat. at Large 1897-99, c. 47) § 87; Florida (Laws 1897, c. 4524, No. 10) § 87; Maryland (Laws 1898, c. 119) § 106; Massachusetts (Acts and Resolves 1898, c. 533) § 87; New York (Laws 1897, c. 612) § 147; North Carolina (Pub. Laws 1899, c. 733) § 87; North Dakota (Laws 1899, c. 113) § 87; Oregon (Laws 1899, p. 18) § 87; Rhode Island (Laws 1899, c. 623, p. 24) § 95; Tennessee (Laws 1899, c. 94) § 87; Utah (Laws 1899, c. 83) § 87; Virginia (Acts Assem. 1897-98, c. 866) § 87; Washington (Laws 1899, c. CXLIX) § 87; Wisconsin (Laws 1899, c. 356) § 1687-17.

A "bank," within the meaning of the negotiable instruments laws, includes "any person or association of persons carrying on the business of banking, whether incorporated or not." Negotiable Instruments Laws: Colorado (Laws 1897, c. 64) § 191; Connecticut (Laws 1897, c. LXXIV) art. 1; District of Columbia (U. S. Stat. at Large 1897-99, c. 47) art. 1; Florida (Laws 1897, c. 4524, No. 10) art. 1; Maryland (Laws 1898, c. 119) § 14; Massachusetts (Acts and Resolves 1898, c. 533) § 191; New York (Laws 1897, c. 612) § 2; North Carolina (Pub. Laws 1899, c. 733) § 191; North Dakota (Laws 1899, c. 113) § 191; Oregon (Laws 1899, p. 18) § 190; Rhode Island (Laws 1899, c. 623, p. 24) § 2; Tennessee (Laws 1899, c. 94) art. 1; Utah (Laws 1899, c. 83) § 191; Virginia (Acts Assem. 1897-98, c. 866) § 191; Washington (Laws 1899, c. CXLIX) § 191; Wisconsin (Laws 1899, c. 356) § 1675.

examination shows that they do not necessarily mean that the bank has authority to apply the deposit of the obligor to the payment of the claim in any event. They merely make the instrument an "order" which, like any other order, is not binding as between the creditor and the bank until acceptance by the bank.[43] Any other interpretation would place these provisions in direct conflict with other provisions of the same statutes, considered in the next section.

That a bank has no implied authority to pay a note given by one of its customers payable at the bank, and deposited with it for collection, cannot well be disputed if the maker has no funds in the bank at the maturity of the note;[44] and the bank is not required to appropriate to the part payment of the note money deposited by the maker after maturity of the note.[45] Nor is a bank bound to apply a balance of current account in favor of a customer to payment of a bill of exchange drawn by him, of which it is an indorsee for collection; and in a suit by the bank against the acceptor of such bill, the fact that there was such a balance in favor of

[43] Harris v. Clark, 3 N. Y. 115; Cowperthwaite v. Sheffield, 1 Sandf. (N. Y.) 416; Weinstock v. Bellwood, 12 Bush (Ky.) 139.

[44] Merchants' & Planters' Bank v. Meyer, 56 Ark. 499, 20 S. W. 406; Coates v. Preston, 105 Ill. 470; In re Brown, 2 Story, 502, Fed. Cas. No. 1,985.

[45] Merchants' & Planters' Bank v. Meyer, 56 Ark. 499, 510, 20 S. W. 406; National Bank of Newburgh v. Smith, 66 N. Y. 271; Voss v. German American Bank of Chicago, 83 Ill. 599; People's Bank of Wilkes-Barre v. Legrand, 103 Pa. St. 309; First Nat. Bank of Lancaster v. Shreiner, 110 Pa. St. 188; Coates v. Preston, 105 Ill. 470; In re Brown, 2 Story, 502, Fed. Cas. No. 1,985.

the drawer after protest does not show a payment or satisfaction of the bill by the drawer.[46]

Special instructions from the debtor may modify or negative the operation of the general rule as stated in the first paragraph of this section. If a bank is instructed by the debtor to apply the proceeds of certain drafts, deposited by him, to payment of his note held by it for collection, it is liable to him for the amount of the drafts in case it makes any other disposition thereof.[47] But a deposit of funds at a bank, with directions to apply them to payment of an accepted bill payable there, will be presumed to have been made by the acceptor, and not by the maker; so that, while the presumption is unrebutted, the former is the only one that can maintain an action against the bank for negligence in not applying the funds as directed.[48]

To hold a bank liable for nonapplication or misapplication of money left to take up paper held for collection, the money should be left with the proper officer of the bank; and it has been held that a bank at which an accepted bill is payable is not liable for not applying to payment thereof money left with the paying teller for that purpose, there being also a receiving teller in the bank, in the absence of proof of a custom to allow the paying teller to act as receiving teller also, as the teller, in such case, is the agent of the depositor, and not of the bank.[49]

[46] Citizens' Bank of Steubenville v. Carson, 32 Mo. 191.

[47] First Nat. Bank of Texarkana v. Munzesheimer (Tex. Civ. App.) 26 S. W. 428.

[48] Thatcher v. Bank of State of New York, 7 N. Y. Super. Ct. 121, 130.

[49] Thatcher v. Bank of State of New York, 7 N. Y. Super. Ct. 121.

The authority and duty of the collecting bank as to application of deposits to take up paper payable at the bank must be carefully distinguished from its authority and duty in case the paper is made negotiable at the bank. By reference to the decision of Chief Justice Marshall, quoted above in this section, it is seen that paper of the latter class gives authority to the bank to advance the amount thereof on the credit of the maker. It may also pay such paper out of the funds of the maker or drawer in its hands.[50]

§ 43. —— Check or draft not an assignment of fund.

Supplementing and enlarging the rule announced in the previous section is the doctrine that a negotiable check or draft does not operate as an equitable assignment of the fund on which it is drawn, and that the bank or other drawee is not liable to the holder prior to acceptance or certification.[51] This is also the rule

[50] Bedford Bank v. Acoam, 125 Ind. 584; Mandeville v. Union Bank of Georgetown, 9 Cranch (U. S.) 9.

[51] Check not an assignment of fund. Bank of Republic v. Millard, 10 Wall. (U. S.) 152; Georgia Seed Co. v. Talmadge, 96 Ga. 254; Colorado Nat. Bank of Denver v. Boettcher, 5 Colo. 185; Exchange Bank of Wheeling v. Sutton Bank, 78 Md. 577, 23 L. R. A. 173; Bank of Antigo v. Union Trust Co., 149 Ill. 343; Carr v. National Security Bank, 107 Mass. 45; First Nat. Bank of Union Mills v. Clark, 134 N. Y. 368; Akin v. Jones, 93 Tenn. 353, 25 L. R. A. 523.

Draft not an assignment. Bosworth v. Jacksonville Nat. Bank, 64 Fed. 615; Meldrum v. Henderson, 7 Colo. App. 256, 43 Pac. 148; Whitney v. Eliot Nat. Bank, 137 Mass. 351; Lynch v. First Nat. Bank of Jersey City, 107 N. Y. 179; Sunderlin v. Mecosta County Sav. Bank, 116 Mich. 281, 74 N. W. 478.

See, also, People v. Merchants' & Mechanics' Bank of Troy, 78 N. Y. 269; City Bank of Hopkinsville v. Blackmore, 21 C. C. A. 514, 75 Fed. 771; Nonotuck Silk Co. v. Flanders, 87 Wis. 237, 58 N. W.

adopted, in substantially the same langnage, in the negotiable instruments laws.[52] The rule is based on the theory that, prior to acceptance or certification, there is no contract relation, either express or implied from the nature of the transaction, between the bank and the holder of the paper, and is undoubtedly sound.[53]

Yet we have decisions holding that a check drawn on a bank operates as an assignment of the fund in the bank,[54] and other decisions that it so operates unless

383, overruling McLeod v. Evans, 66 Wis. 401, 28 N. W. 173, 214, Francis v. Evans, 69 Wis. 115, 33 N. W. 93, and Bowers v. Evans, 71 Wis. 133, 36 N. W. 629.

But if drawn on a particular fund (and therefore not negotiable), a check or draft may operate as an equitable assignment. Kahnweiler v. Anderson, 78 N. C. 133; Robbins v. Bacon, 3 Me. 346; Ballou v. Boland, 14 Hun (N. Y.) 355. But see Grammel v. Carmer, 55 Mich. 201.

[52] Negotiable Instruments Laws: Colorado (Laws 1897, c. 64) §§ 127, 189; Connecticut (Laws 1897, c. LXXIV) §§ 127, 189; District of Columbia (U. S. Stat. at Large 1897-99, c. 47) §§ 127, 189; Florida (Laws 1897, c. 4524, No. 10) §§ 127, 189; Maryland (Laws 1898, c. 119) §§ 146, 208; Massachusetts (Acts and Resolves 1898, c. 533) §§ 127, 189; New York (Laws 1897, c. 612) §§ 211, 325; North Carolina (Pub. Laws 1899, c. 733) §§ 127, 189; North Dakota (Laws 1899, c. 113) §§ 127, 189; Oregon (Laws 1899, p. 18) §§ 127, 189; Rhode Island (Laws 1899, c. 623, p. 24) §§ 135, 197; Tennessee (Laws 1899, c. 94) §§ 127, 189; Utah (Laws 1899, c. 83) §§ 127, 189; Virginia (Acts Assem. 1897-98, c. 866) §§ 127, 189; Washington (Laws 1899, c. CXLIX) §§ 127, 189; Wisconsin (Laws 1899, c. 356) §§ 1680a, 1684-5.

[53] Luff v. Pope, 5 Hill (N. Y.) 413; Colorado Nat. Bank of Denver v. Boettcher, 5 Colo. 185; Bailey v. Southwestern Railroad Bank, 11 Fla. 266; Bullard v. Randall, 1 Gray (Mass.) 605; First Nat. Bank of Northumberland v. McMichael, 106 Pa. St. 460. See, also, cases cited in note 51, supra.

[54] Fonner v. Smith, 31 Neb. 107, 47 N. W. 632, 11 L. R. A. 528; Columbia Nat. Bank of Lincoln v. German Nat. Bank, 56 Neb. 803,

the check is for an amount larger than the amount in the bank to the credit of the drawer.[55]

§ 44. Time and manner of receiving payment.

The general authority of the collecting bank to receive payment for the owner[56] is usually exercised at the time the paper is due; but there is authority for the doctrine that the bank may receive payment before maturity. So it has been held that where the bank has general unrestricted authority to collect a draft, the debtor will be protected in making payment to such

77 N. W. 346; Farmers' Bank & Trust Co. v. Newland, 97 Ky. 464; Lester v. Given, 8 Bush (Ky.) 357; Morrison v. McCartney, 30 Mo. 183.

[55] C. M. Henderson & Co. v. United States Nat. Bank (Neb.) 80 N. W. 898; Rouse v. Calvin, 76 Ill. App. 362; Bank of Antigo v. Union Trust Co., 149 Ill. 343, 36 N. E. 1029, 23 L. R. A. 611; Coates v. Preston, 105 Ill. 470; Dana v. Third Nat. Bank, 13 Allen (Mass.) 445; Beauregard v. Knowlton, 156 Mass. 395, 31 N. E. 389.

The circuit court of the United States for the northern district of Illinois, in Essex County Nat. Bank v. Bank of Montreal, 7 Biss. 193, 199, Fed. Cas. No. 4,532, follows Bank of Republic v. Millard, 10 Wall. (U. S.) 152, and repudiates the Illinois doctrine, stating that, though the transaction arose in Illinois, the court was not bound by the decisions of that state, since the matter involved commercial securities, and belonged to the domain of general jurisprudence. See, also, Township of Pine Grove v. Talcott, 19 Wall. (U. S.) 666.

[56] Alley v. Rogers, 19 Grat. (Va.) 366; King v. Fleece, 7 Heisk. (Tenn.) 273; Padfield v. Green, 85 Ill. 529. See, also, ante, §§ 24, 25.

This rule has been embodied in the negotiable instruments laws adopted recently in so many states. Negotiable Instruments Laws: Colorado, Connecticut, District of Columbia, Florida, Massachusetts, North Carolina, North Dakota, Oregon, Tennessee, Utah, Virginia, Washington (§ 37); Rhode Island (§ 45); Maryland (§ 56); New York (§ 67); Wisconsin (§ 1676-7).

bank, before the draft is due, so that if the bank fails after receiving such payment, but before the draft is due, the loss falls on the owner of the draft.[57] The bank may also receive payment after dishonor, if the paper remains in its possession.[58] It must, however, obtain payment in full, for it has no implied authority to accept part payment.[59]

§ 45. —— Extensions and renewals.

In the absence of specific instructions, the collecting bank has no authority to give the debtor an extension of time, or to renew the obligation at his instance.[60] But the bank is sometimes expressly authorized to extend or renew the debt on certain conditions, or for a fixed period, and is held to a strict accountability for any departure from the specific instructions given.[61] Thus, where the collecting bank was, before maturity of the paper, instructed to grant a renewal on condition that a solvent indorser be obtained for the new instrument, the bank is liable to the holder in case it grants a renewal without such indorsement, and surrenders the old instrument to the acceptor thereon, who thereafter becomes insolvent before the maturity of the new instrument.[62] And a collecting bank, authorized by the

[57] Bliss v Cutter, 19 Barb. (N. Y.) 9.

[58] See ante, § 31.

[59] Lowenstein v. Bresler, 109 Ala. 326, 19 So. 860; Capitol State Bank v. Lane, 52 Miss. 677.

[60] Scott v. Gilkey, 153 Ill. 168, 39 N. E. 265.

[61] Central Georgia Bank v. Cleveland Nat. Bank, 59 Ga. 667; Omaha Nat. Bank v. Kiper (Neb.) 82 N. W. 102.

[62] Central Georgia Bank v. Cleveland Nat. Bank, 59 Ga. 667. The court in this case considers the question of the solvency of the

holder to give the debtor a twenty-day extension, is liable for any loss sustained through giving him a thirty-day extension instead.[63]

§ 46. Medium of payment—As general rule, bank can take money only.

As commercial paper is payable in money only,[64] a collecting bank is not authorized to receive in payment thereof anything but money.[65] "Currency," so called,

maker as affecting the amount of damages, and states that there is no evidence in the case which tends to negative the general presumption that the debt was that of the acceptor, and not a debt, primarily, of the drawer.

[63] Omaha Nat. Bank v. Kiper (Neb.) 82 N. W. 102.

[64] Hodges v. Clinton, 1 N. C. 79; Fry v. Rousseau, 3 McLean, 106, Fed. Cas. No. 5,141.

[65] National Bank of Commerce of Seattle v. Johnson, 6 N. D. 180, 69 N. W. 49; Levi v. National Bank of Missouri, 5 Dill. 104, 15 Fed. Cas. 415-417; Ward v. Smith, 7 Wall. (U. S.) 447; Marine Bank v. Fulton Bank, 2 Wall. (U. S.) 252; German American Bank v. Third Nat. Bank, 18 Abb. Law J. 252, Fed. Cas. No. 5,359; Libby v. Hopkins, 104 U. S. 307; Foster v. Rincker, 4 Wyo. 484, 35 Pac. 470; Merchants' Nat. Bank of Philadelphia v. Goodman, 109 Pa. St. 422, 2 Atl. 687; McCulloch v. McKee, 16 Pa. St. 289; Fifth Nat. Bank v. Ashworth, 123 Pa. St. 212, 16 Atl. 596; Commercial Bank of Pennsylvania v. Union Bank of New York, 1 Hun (N. Y.) 203; People v. City Bank of Rochester, 96 N. Y. 32; Nunnemaker v. Lanier, 48 Barb. (N. Y.) 234; Whipple v. Walker, 2 Thomp. & C. (N. Y.) 456; Midland Nat. Bank of Kansas City v. Brightwell, 148 Mo. 358, 49 S. W. 994; National Bank of Commerce v. American Exchange Bank, 151 Mo. 320, 52 S. W. 265; Scott v. Gilkey, 153 Ill. 168, 39 N. E. 265; Lochenmeyer v. Fogarty, 112 Ill. 572; Padfield v. Green, 85 Ill. 529; Western Brass Mfg. Co. v. Maverick, 4 Tex. Civ. App. 535, 23 S. W. 728; Second Nat. Bank of Columbia v. Cummings, 89 Tenn. 609, 620; Graydon v. Patterson, 13 Iowa, 258; McCarver v. Nealey, 1 G. Greene (Iowa) 360; Drain v. Doggett, 41 Iowa, 682.

is not money, and the bank is not authorized to receive it in payment.[66]

A collecting bank has no authority to receive depreciated bank notes in payment, though such notes constituted the principal currency for ordinary business in that locality at that time.[67]

Confederate money or currency was also under the ban, and banks have been held liable for taking it in payment during the Civil War.[68]

Nor, in the absence of custom or agreement rendering checks,[69] drafts or other evidences of debt, "money," for the purpose of the particular transaction, is a bank authorized to receive them in payment.[70] So, it is an irregularity for the initial bank to take from its correspondent in payment a draft by it on another bank;[71] but the irregularity is waived by the owner if, after the draft has been dishonored on presentation, and with

[66] Graydon v. Patterson, 13 Iowa, 256, 81 Am. Dec. 432; Carter v. Talcott, 10 Vt. 471; McCarver v. Nealey, 1 G. Greene (Iowa) 360. "Illinois currency" or "currency" is not money. Id.; Ruidskoff v. Barrett, 11 Iowa, 172. But see Butler v. Paine, 8 Minn. 324 (Gil. 284).

[67] Ward v. Smith, 7 Wall. (U. S.) 447. See, also, Ontario Bank v. Lightbody, 13 Wend. (N. Y.) 105 (bank bill of suspended bank).

[68] Alley v. Rogers, 19 Grat. (Va.) 366, 386; Waterhouse v. Citizens' Bank of Louisiana, 25 La. Ann. 77; Strauss v. Bloom & Co., 18 La. Ann. 48. A suit for the amount collected, and not for the paper or its value, was not a ratification of the act of the bank in receiving Confederate money. Id.

[69] See post, § 47.

[70] Hazlett v. Commercial Nat. Bank, 132 Pa. St. 118, 19 Atl. 55, and cases cited in notes 65, supra, and 71, infra.

[71] Hazlett v. Commercial Nat. Bank, 132 Pa. St. 118, 19 Atl. 55.

knowledge of that fact, he directs that the draft be held for a day or two.[72]

The bank cannot accept in payment a note running to itself;[73] nor, as we shall see in sections 48 and 49, can it properly accept in payment a claim against itself.

If the collecting bank accepts the certification of the drawee bank on a check delivered for collection in lieu of actual payment, it assumes the risk of nonpayment by such drawee,[74] and if, instead of payment, it takes the mere acceptance of the drawee bank on the check, with a view to a general settlement with that bank the following day, and the latter fails before such settlement, the former bank cannot hold the maker.[75]

§ 47. —— Checks on other banks.

It is a general rule of commercial law that, as between obligor and obligee, a check does not operate as a payment unless and until it is paid.[76] And there is no good reason why a bank should be allowed to accept, for the owner of paper in its hands for collection, other paper in the form of a check on another bank. There are good reasons, however, why it should not be allowed to

[72] Hazlett v. Commercial Nat. Bank, 132 Pa. St. 118, 19 Atl. 55.

[73] Scott v. Gilkey, 153 Ill. 168, 39 N. E. 265. But see Citizens' Bank of Paris v. Houston, 98 Ky. 139, 32 S. W. 397.

[74] Essex County Nat. Bank v. Bank of Montreal, 7 Biss. 193, Fed. Cas. No. 4,532.

[75] La Banque Jacques-Cartier v. La Corporation de Limoilou, 17 Rep. Jud. Que. C. S. 211.

[76] Lowenstein v. Bresler, 109 Ala. 326, 19 So. 860; Burkhalter v. Second Nat. Bank of Erie, 42 N. Y. 538, 40 How. Pr. 324; Hamill v. German Nat. Bank, 13 Colo. 203; Steinhart v. National Bank of D. O. Mills & Co., 94 Cal. 362.

do so. Aside from the fact that such a transaction involves a double collection, with the delay incident thereto, there is the further and more potent objection that the check may not be paid on presentation. Not only does the interest of the customer forbid the acceptance of a check in payment, but also the interest of the bank itself; for if it takes a check, and loss results, the bank is the loser. By surrendering to the obligor the paper left for collection, and taking from him his check for the amount thereof, the bank assumes the risk of nonpayment of the check.[77]

As intimated above, this strict rule may be modified by a general and long-continued custom of such standing as to create a presumption that all persons dealing with banks have knowledge of it.[78] So, it has been held that a custom of local banks to accept in payment of drafts sent for collection certified checks on one of their own number in good standing, and to present such checks at 11 a. m. each day, and leave them for examina-

[77] German-American Bank v. Third Nat. Bank, 18 Alb. Law J. 252, Fed. Cas. No. 5,359; Levi v. National Bank of Missouri, 5 Dill. 104, Fed. Cas. No. 8,289; Marine Bank v. Fulton Bank, 2 Wall. (U. S.) 252; Ward v. Smith, 7 Wall. (U. S.) 447; Fifth Nat. Bank v. Ashworth, 123 Pa. St. 212, 16 Atl. 596 (cashier's check); Merchants' Nat. Bank v. Goodman, 109 Pa. St. 422, 2 Atl. 687; McCulloch v. McKee, 16 Pa. St. 289; Commercial Bank of Pennsylvania v. Union Bank of New York, 1 Kern. (N. Y.) 203; Graydon v. Patterson, 13 Iowa, 258; National Bank of Commerce v. American Exchange Bank, 151 Mo. 320, 52 S. W. 265; Second Nat. Bank of Columbia v. Cummings, 89 Tenn. 609, 620; Western Brass Mfg. Co. v. Maverick, 4 Tex. Civ. App. 535, 23 S. W. 728; Nunnemaker v. Lanier, 48 Barb. (N. Y.) 234.

Where check is on collecting bank, see post, § 49.

[78] Jefferson County Sav. Bank v. Commercial Nat. Bank, 98 Tenn. 337, 39 S. W. 338; Farmers' Bank & Trust Co. v. Newland, 97 Ky. 464.

tion, is reasonable, and will relieve the collecting bank from liability in case the certifying bank fails after 11 a. m. on the day of presentment, and a check is returned unpaid, though the owner of the paper was ignorant of the custom.[79] Yet, again, it has been held that a usage under which banks surrender drafts sent for collection, on receiving merely the check of the drawee, is unreasonable;[80] and that where the obligor is a trust company, the existence of a custom in the city where it did business, of taking its checks without certification, in the same manner as bank checks, is no defense.[81]

The supreme court of Kentucky considers good faith on the part of the bank as the chief factor in determining its liability, and has held that, if the bank acts in good faith for its customer in taking a subsequently dishonored check for the amount of paper deposited for collection, it is not liable to him;[82] and that no recovery can be had against a bank for alleged negligence in surrendering to the drawer a check delivered to it for collection, after nonpayment and protest, and receiving a check on another bank payable to itself in lieu thereof, the latter also having been dishonored, if the drawer was insolvent when he drew the first check, and the bank acted in good faith throughout as the agent of the original payee, and substituted the new check merely in the hope of subserving the interests of such payee.[83]

[79] Jefferson County Sav. Bank v. Commercial Nat. Bank, 98 Tenn. 337, 39 S. W. 338.

[80] National Bank of Commerce v. American Exchange Bank, 151 Mo. 320, 52 S. W. 265.

[81] Nunnemaker v. Lanier, 48 Barb. (N. Y.) 234.

[82] Farmers' Bank & Trust Co. v. Newland, 97 Ky. 464.

[83] Citizens' Bank of Paris v. Houston, 98 Ky. 139, 32 S. W. 397. The court in this case states further: "The fact of the new check

§ 48. —— Claims against collecting bank—Certificates of deposit.

A collecting bank is not authorized to receive in payment a claim against itself, in the absence of a well-defined custom, or an express authorization.[84] The reason for this is quite apparent; for the bank might see fit to delay or defeat enforcement of the claim, and could do so readily. So it has been held that a collecting bank is not authorized to receive in payment its own certificates of deposit.[85] But, inasmuch as certificates of deposit are treated as cash by almost universal custom among banks, the rule is that, where such custom is in force, a payment to the bank in its own certificates of deposit is a sufficient payment.[86]

In Iowa, this custom is considered to be so general that the courts take judicial notice of it.[87]

being made payable to the cashier of defendant is no evidence of its intention to assume ownership of the check, or become liable to plaintiff therefor, because, he being absent, it had to be drawn in that way in order to procure proper presentation and payment."

[84] Bank of Montreal v. Ingerson, 105 Iowa, 349, 75 N. W. 351; National Life Ins. Co. v. Goble, 51 Neb. 5, 70 N. W. 503; State Bank of Midland v. Byrne, 97 Mich. 178, 56 N. W. 355; Francis v. Evans, 69 Wis. 115, 33 N. W. 93.

[85] Francis v. Evans, 69 Wis. 115, 33 N. W. 93.

As to sufficiency of evidence to show that payment was made in money, and not in certificates of deposit, see Wallace v. Stone, 107 Mich. 190, 65 N. W. 113.

[86] British & American Mortgage Co. v. Tibballs, 63 Iowa, 468, 19 N. W. 319 (Reed, J., dissenting). But see Drain v. Doggett, 41 Iowa, 682; McCarver v. Nealey, 1 G. Greene (Iowa) 360; Marine Bank of Chicago v. Chandler, 27 Ill. 526.

[87] British & American Mortgage Co. v. Tibballs, 63 Iowa, 468, 19 N. W. 319.

§ 49. —— Same—Checks on collecting bank.

On the same theory, a bank ought not to be allowed to accept a check on itself in payment of a collection unless the transaction is sanctioned by agreement or custom. But custom governs here also, and it has been held that a payment to the collecting bank by a check on itself is equivalent to a payment in money, though the bank fails the same day.[88] It has also been held that a check on the collecting bank, which is in funds to meet it, coupled with a charge against the account of the drawer of the check, operates as a payment.[89]

To the same effect is a decision that a complete collection of a note takes place where the collecting bank receives the check of the maker, who has a deposit in the bank more than sufficient to cover the check, and a sufficient amount of the general funds of the bank are actually appropriated to pay the note, so that the owner of the note is the owner of the money so appropriated, as against a receiver of the bank.[90]

§ 50. Collecting bank also a creditor of obligor—Cannot obtain preference—Exceptions.

It is a general rule of agency that an agent who has any business to transact on his own personal account, conflicting with that intrusted to him by his principal, must always give the latter the preference.[91] This rule

[88] Sayles v. Cox, 95 Tenn. 579, 32 S. W. 626.

[89] Scott v. Gilkey, 153 Ill. 168, 39 N. E. 265. But see Second Nat. Bank of Columbia v. Cummings, 89 Tenn. 609.

[90] Arnot v. Bingham, 55 Hun, 553, 9 N. Y. Supp. 68.

[91] Commercial Bank v. Red River Valley Nat. Bank, 8 N. D. 382, 79 N. W. 859.

is embodied in the statutes of North Dakota,[92] and an instructive case arose thereunder. A Fargo bank received for collection from a New York bank, two notes against a resident of Fargo, which had been previously turned over to the New York bank for collection. At the time it received the notes, the Fargo bank had a claim against the same debtor, and knew him to be in failing circumstances, but, without notifying the New York bank of that fact, retained possession of the notes until fourteen and thirty days, respectively, after their maturity, at which time it reported that the notes had not been paid, and that there was no prospect of payment, as the debtor was insolvent. In the meantime, and before the maturity of either of the notes, the Fargo bank had taken from the debtor as security for its own claim, mortgages covering all the debtor's property. The court held that it was the duty of the Fargo bank either to decline the trust *in toto*, or to discharge it faithfully, and that it was liable to the New York bank for the damages sustained.[93]

Another very pertinent application of the rule is found in a North Carolina case holding that a bank which voluntarily assumes the agency to collect a check, when it is a heavy creditor of the drawer, and is aware of his financial embarrassment, and has secured most of his effects, and is taking other measures to further

[92] Civil Code, § 4111.

[93] Commercial Bank v. Red River Valley Nat. Bank, 8 N. D. 382, 79 N. W. 859. See, also, Dern v. Kellogg, 54 Neb. 560, 74 N. W. 844; Mound City Paint & Color Co. v. Commercial Nat. Bank of Ogden, 4 Utah, 353, 9 Pac. 709.

Measure of damages, see post, § 182.

secure itself, is guilty of negligence, as a matter of law, in not presenting the check or taking any measures to collect it for four days, since "the rule of good faith, which is equity, will not allow the agent to sacrifice the interests of his principal to his own."[94] Such a procedure on the part of a collecting bank is nothing less than actual fraud, which no custom or usage among banks will justify.[95]

It is not necessary, in such a case, for the plaintiff to show with certainty that payment would have been made but for the default and misconduct of the collecting bank; but a *prima facie* case is made on a showing of a reasonable probability of payment.[96]

In an action against a collecting bank for negligence and fraud in refusing to turn over a draft to attorneys to enforce payment until after the drawee had become insolvent, and the bank had obtained a mortgage to secure a claim of its own against the same debtor, it is no defense that the order to turn the draft over to the attorneys was received after banking hours on Saturday, and the mortgage was obtained on Monday morning;[97] nor was it a defense that the draft was improperly indorsed to defendants by a collection agency, through whose hands it had passed.[98] There are, however, circumstances under which it has been deemed proper for a collecting bank to secure its own claim against the

[94] Bank of New Hanover v. Kenan, 76 N. C. 340.

[95] Dern v. Kellogg, 54 Neb. 560, 74 N. W. 844.

[96] Dern v. Kellogg, 54 Neb. 560, 74 N. W. 844; Commercial Bank v. Red River Valley Nat. Bank, 8 N. D. 382, 79 N. W. 859.

[97] Finch v. Karste, 97 Mich. 20, 56 N. W. 123.

[98] Finch v. Karste, 97 Mich. 20, 56 N. W. 123.

common debtor, to the prejudice of the rights of the owner of the collection. Thus, it has been held that a bank holding paper for collection merely, without specific instructions, and with no duty to perform except the proper presentation of the papers, may, after fulfilling that duty properly, take security from the debtor on a claim of its own against him, and thus obtain a preference, if the transaction is free from misrepresentation or fraudulent concealment.[99]

It has also been held that where a bank, without fraud or concealment, performs to the letter the special instructions it has received in regard to the collection, viz., to telegraph the senders in case of nonpayment, an attachment by the bank on a claim of its own against the common debtor, levied two days after it telegraphed the fact of nonpayment, will stand.[100] The bank in this case having been instructed to telegraph the fact of nonpayment, and await a reply, and having received no reply within the two days, was deemed to be under no obligation to bring suit for its customer immediately on nonpayment.[101]

While the cases last considered may be good law because based on a technical performance of specific instructions, yet they are hardly compatible with entire good faith on the part of the bank, for there is at least one very material fact within the knowledge of the bank

[99] United States Nat. Bank of Omaha v. Westervelt, 55 Neb. 424, 75 N. W. 857, distinguishing Dern v. Kellogg, 54 Neb. 560, 74 N. W. 844; Freeman v. Citizens' Nat. Bank, 78 Iowa, 150, 42 N. W. 632; First Nat. Bank of Abilene v. Naill, 52 Kan. 211, 34 Pac. 797.

[100] Freeman v. Citizens' Nat. Bank, 78 Iowa, 150, 42 N. W. 632.

[101] Freeman v. Citizens' Nat. Bank, 78 Iowa, 150, 42 N. W. 632.

which has not been made known to the customer. That is the fact that the bank is also a creditor of the same debtor. That being so, and the bank being on the ground, and in touch with the common debtor and his property, self interest prompts it to look out for itself first. Decisions permitting this, even though the bank has technically performed all the instructions given it, are objectionable. Perfect good faith on the part of the bank requires it, in such a case, to decline the collection, or to look out primarily for the interests of its customers.

§ 51. Collection of interest.

We have seen that a bank is sometimes justified in accepting payment before maturity of the paper.[102] If the obligation bears interest from date until maturity, it is conceived that the bank would not be justified in cutting off part of the interest by taking payment before maturity. But if the instrument is not so worded, a different rule applies, as appears from a decision that a bank with which a certificate of deposit payable on demand, to draw interest only in case it is held until after maturity, is left "for collection when due," without other instructions as to the time of collection, is not liable for six months' interest on the certificate in case it collects the face of the certificate immediately, without interest.[103]

[102] See ante, § 44.

[103] Ide v. Bremer County Bank, 73 Iowa, 58, 34 N. W. 749, distinguishing Guelick v. National State Bank of Burlington, 56 Iowa, 434, 9 N. W. 328.

§ 52. Liability of collecting bank for depreciation.

Any depreciation occurring after the collection is made by the collecting bank, and the funds mingled with its general fund, and credit for the amount given to the customer, up to the time of a draft or demand by the customer for the amount collected, falls upon the collecting bank, as title to the funds is in it.[104]

In a case where paper was deposited with a bank for collection, and thereafter depreciated in value, the court said: "In determining this case, it will be proper first to determine whether the deposits made by appellee were a bailment only for safe keeping by the bank, or were made to be passed to appellee's credit, in the usual course of business. If for the former purpose, then the appellee must be responsible for any depreciation in the value of the funds which occurred before a demand was made, if the appellant in good faith preserved the identical funds placed in the hands of the bank. If the relation of the bank to the appellee was simply that of a bailee for safe keeping, and the identical funds were preserved, and a loss occurred by depreciation, no rule of law, principle of reason or justice, can hold the bank liable for such a loss. If, on the contrary, the deposits were designed by the parties to have become a loan to, or indebtedness by, the bank, the relation of the parties would have been that of a debtor and creditor. In this case, the evidence shows that the deposits arose

[104] Marine Bank v. Fulton Bank, 2 Wall. (U. S.) 252, 17 L. Ed. 785.

When title to proceeds passes to collecting bank, see post, § 121.

Bank cannot receive depreciated money or currency in payment. See ante, § 46.

from collections made by the bank for the appellee. The latter, at various times, forwarded to the former, perhaps without an exception, bills, notes, and checks, which, when collected, were placed to the appellee's credit. The funds thus received were placed in the general funds of the bank, and paid out indiscriminately in the course of the business of the bank." On this state of facts, the court held that the relation of the parties was that of debtor and creditor, and that the rules of agency did not apply to the case, and that consequently the bank was liable for the full amount of the collections, regardless of the depreciation.[105]

§ 53. Liability of collecting bank as general indorser.

It is important for the collecting bank to know precisely what liability it assumes, or what risks, if any, it runs, in indorsing, generally, paper indorsed to it restrictively for collection.

In the states that have adopted the new negotiable instruments law, a bank to which paper has been indorsed restrictively for collection is liable as a general indorser on subsequently indorsing the paper without qualification.[106] As this rule changes the law previous-

[105] Marine Bank of Chicago v. Chandler, 27 Ill. 525, 546. To same effect see Marine Bank of Chicago v. Rushmore, 28 Ill. 463.

[106] Negotiable Instruments Laws: Colorado (Laws 1897, c. 64) § 66; Connecticut (Laws 1897, c. 74) § 66; District of Columbia (U. S. Stat. at Large 1897-99, c. 47) § 66; Florida (Laws 1897, c. 4524, No. 10) § 66; Maryland (Laws 1898, c. 119) § 85; Massachusetts (Acts and Resolves 1898, c. 533) § 66; New York (Laws 1897, c. 612) § 116; North Carolina (Pub. Laws 1899, c. 733) § 66; North Dakota (Laws 1899, c. 113) § 66; Oregon (Laws 1899, p. 18) § 66;

ly in force in some of those states,[107] and is contrary to the rule in force in the federal courts,[108] its importance cannot well be overestimated. To avoid the effect of this rule, the collecting bank should adopt some special form of qualified indorsement negativing a general liability.

Rhode Island (Laws 1899, c. 623, p. 24) § 74; Tennessee (Laws 1899, c. 94) § 66; Utah (Laws 1899, c. 83) § 66; Virginia (Acts Assem. 1897-98, c. 866) § 66; Washington (Laws 1899, c. 149) § 66; Wisconsin (Laws 1899, c. 356) §§ 1677-6. See Selover, Neg. Inst. Laws, p. 200.

A general indorser warrants to all subsequent holders in due course that the instrument is genuine and in all respects what it purports to be. Crosby v. Wright, 70 Minn. 251.

General indorser warrants that he has title to the paper. Furgerson v. Staples, 82 Me. 159.

He also warrants that all prior parties had capacity to contract. Warranty that maker had capacity: Dalrymple v. Hillenbrand, 62 N. Y. 5; Archer v. Shea, 14 Hun (N. Y.) 493; Kilgore v. Bulkley, 14 Conn. 362. Warranty that prior indorser had capacity: Prescott Bank v. Caverly, 7 Gray (Mass.) 217; Ogden v. Blydenburgh, 1 Hilt. (N. Y.) 182.

Such indorser also warrants that the instrument is, at the time of the indorsement, valid and subsisting, and engages that on due presentment it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings in dishonor he duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. Ankeny v. Henry, 1 Idaho, 229.

All of the above rules have been adopted in the negotiable instruments laws in the sections last above cited.

Indorsement of forged paper, see post, § 164.

[107] National Park Bank v. Seaboard Bank, 114 N. Y. 28; La Farge v. Kneeland, 7 Cow. (N. Y.) 456; Mowatt v. McLelan, 1 Wend. (N. Y.) 173; Herrick v. Gallagher, 60 Barb. (N. Y.) 566.

[108] United States v. American Exchange Nat. Bank, 70 Fed. 232.

§ 54. Duties as to paper sent to a correspondent—Forwarding instructions and information.

It is the duty of the initial collecting bank to transmit to its correspondent any specific instructions or information given by the owner on leaving the paper for collection.[109]

In a very pertinent Minnesota case on this point it appeared that the initial bank was intrusted with a note indorsed by one S. S. Eaton, who lived at Nininger, Minnesota. In view of the fact that there was another S. S. Eaton, who lived in St. Paul, Minnesota, where such bank had its place of business, the owner specially informed the bank that the indorser was the S. S. Eaton who lived in Nininger; but the bank failed to give this information to its correspondent at St. Anthony, Minnesota, to whom it forwarded the note. The latter bank consequently failed to notify the proper Eaton, whereby he was discharged. It was held, very properly, that the initial bank was liable for the loss sustained.[110]

It is also the duty of the initial bank, on transmitting a collection to a correspondent in another state, to notify it of the laws and customs governing protest in the place where the contract was made; in default of which it will be liable for a failure of such correspondent to comply with such laws and customs.[111]

[109] Mechanics' Bank v. Earp, 4 Rawle (Pa.) 384; Borup v. Nininger, 5 Minn. 523 (Gil. 417, 437).

[110] Borup v. Nininger, 5 Minn. 523 (Gil. 417, 437).

[111] Allen v. Merchants' Bank, 22 Wend. (N. Y.) 215.

§ 55. Fraud and mistake.

If the collecting bank perpetrates any fraud on its customer, or overreaches him, or secures any unjustifiable advantage over him by means of its relation and the facilities for fraud which it offers, it is liable for the damages sustained.[112] The relation is a confidential one, and banks are held to a strict accountability where fraud is shown.[113] The bank is also held strictly accountable for careless mistakes, such as mistaking the date of a note plainly dated.[114]

Where a bank receives from the debtor's agent the money with which to pay a note left for collection, and by mistake returns the wrong note to such agent, and thereafter the right note is presented to the debtor by the owner thereof, and is paid, the debtor may maintain an action against the bank, after returning the other note, and demanding repayment.[115] The question of payment by mistake and recovery back of such payments will be considered later.[116]

§ 56. Negligence a question of fact—Province of court and jury.

The question of the negligence of the collecting bank

[112] Commercial Bank v. Red River Valley Nat. Bank, 8 N. D. 382, 79 N. W. 859; Bank of New Hanover v. Kenan, 76 N. C. 340; Dern v. Kellogg, 54 Neb. 560, 74 N. W. 844; Finch v. Karste, 97 Mich. 20, 56 N. W. 123.

[113] See cases cited in last preceding note.

[114] Bank of Delaware County v. Broomhall, 38 Pa. St. 135.

Mistake as to time of presentment and days of grace, see post, § 64.

[115] Andrews v. Suffolk Bank, 12 Gray (Mass.) 461. The bank cannot in such case take advantage of the negligence of the debtor's agent in accepting the wrong note. Id.

[116] See post, §§ 128, 129, 166-168.

is usually one of fact for the jury.[117] On this point, the court, in a well-considered Maryland case,[118] says: "It is true beyond doubt that in cases of this character a court may, by proper legal inference from the nature of the undertaking, determine in general the things required to be done in performing it, and that the failure to do any of the things so required to be done would amount to negligence; but it has no such power when the question as to due diligence is made to depend on a state of facts and circumstances of a character so unusual that they could not have been contemplated by the parties to the undertaking, and to which no settled rule of law can be applied. The principle for testing the force of this objection (to an instruction submitting the question to the jury) is, we think, correctly stated in the case of Baltimore & Ohio R. Co. v. Worthington, 21 Md. 275. It was there said, a majority of the court concurring, 'that negligence, in the ordinary legal sense, imports an absence or want of such care as the law requires in the performance of any given undertaking, and, generally speaking, is a fact, the finding of which is for the jury, although the court may declare the legal nature and extent of the duties incident to the undertaking, as well as those facts which, by inference of law, are essential to its performance;' and again, that the court may determine the question in cases 'where the negli-

[117] Sahlien v. Bank of Lonoke, 90 Tenn. 221; 16 S. W. 373; National Bank v. City Bank, 103 U. S. 668; Diamond Mill Co. v. Groesbeeck Nat. Bank, 9 Tex. Civ. App. 31, 29 S. W. 169.

Ratification of negligence a question for jury, see post, § 57.

[118] Merchants' Bank of Baltimore v. Bank of Commerce of New York, 24 Md. 12, 53.

gence alleged may be deduced from the absence of any fact which the law of the contract presupposes, and requires should be shown.' "

Pursuant to the general rule first above stated, it has been held that, where a clerk of the collecting bank had inquired of one of two holders of the note as to the residence of the makers, without obtaining the required information, the question whether it was negligence not to inquire of the other should have been submitted to the jury.[119] Where there is no dispute as to the facts, the question of negligence is one of law for the court.[120]

§ 57. Waiver of negligence of collecting bank.

The negligence of a collecting bank, like the negligence of any other bailee, may be waived or ratified.[121] Thus, the owner of notes may waive delay of the collecting bank in enforcing them by acquiescing in such delay with full knowledge thereof.[122] But the mere fact that the owner of a note left for collection permitted the cashier of defendant bank to hand to him or his attorney a second note, accompanied with a statement that the original was lost, and the further fact that plaintiff retained the second note some little time before returning it to the bank, is not conclusive evidence of a ratifica-

[119] Ayrault v. Pacific Bank, 29 N. Y. Super. Ct. 337, affirmed in 47 N. Y. 570.

[120] Selz v. Collins, 55 Mo. App. 55.

[121] See cases cited in notes 122-124, infra. See, also, post, § 76.

[122] Toole v. Durand, 7 Rob. (La.) 363.

Waiver of negligence in collecting on forged indorsement of payee's name, see post, § 169.

Waiver of negligence resulting in discharge of indorser, see post, § 76.

tion of the bank's negligence, but is merely some evidence of it; so that a verdict that there was no ratification would not be disturbed as against the evidence.[123] Full knowledge of all the material facts is essential to an effective waiver or ratification.[124]

So, it has been held that the acceptance by the principal of the proceeds of a sight draft sent to defendant bank together with a time draft and a bill of lading, with instructions to deliver such bill only on payment of the sight draft and acceptance of the time draft, is not a ratification of the act of the bank in delivering the bill of lading without procuring the acceptance of the time draft, if it appears that the principal had no knowledge that the bill of lading had been delivered without such acceptance, and that the bill of lading was surrendered on an understanding between the bank and the drawee that the amount due from the drawee to the principal would be ascertained by some future adjustment.[125]

[123] Roanoke Nat. Bank v. Hambrick, 82 Va. 135.

[124] Bryant v. Moore, 26 Me. 84; Wheeler v. Northwestern Sleigh Co., 39 Fed. 347; Bennecke v. Insurance Co., 105 U. S. 355; Baldwin v. Burrows, 47 N. Y. 199; Holm v. Bennett, 43 Neb. 808, 62 N. W. 194; Davis v. Talbot, 137 Ind. 235, 36 N. E. 1098; Dean v. Bassett, 57 Cal. 640; Humphrey v. Havens, 12 Minn. 298 (Gil. 196); Town of Madison v. Newsome, 39 Fla. 149, 22 So. 270.

[125] Oxford Lake Line v. First Nat. Bank of Pensacola, 40 Fla. 349, 24 So. 480.

CHAPTER IV.

TAKING STEPS NECESSARY TO CHARGE PARTIES TO PAPER.

§ 58. General rules.
59. Bank is a "holder" for purposes of collection.
60. Presentment for acceptance.
61. —— Excuses for failure to present for acceptance.
62. —— Bank liable for taking acceptance not according to tenor of bill.
63. Presentment for payment.
64. —— Time of maturity and days of grace.
65. —— Paper payable at bank.
66. —— Checks.
67. —— Effect of custom.
68. Protest.
69. —— Excuses and defenses.
70. Notice of dishonor.
71. —— What indorsers entitled to notice from bank.
72. Owner may sue bank without first suing indorser.
73. Enforcement of paper taken in payment.
74. Return of dishonored paper.
75. —— Effect of custom.
76. Ratification and waiver of negligence of bank.

The collecting bank must take all steps necessary and proper to secure to the owner his remedies against the other parties to the paper. For the purpose of taking these steps, the bank is deemed to be a "holder" of the paper.

The bank must make due presentment for acceptance in all proper cases, and is liable for a failure to do so. It is charged with knowledge of the general rules of law relating to presentment. It is not excused from failing to present for acceptance by its own custom of not presenting certain kinds of paper, nor by the insolvency of the drawee. The bank is

liable to the holder if it takes an acceptance not according to the tenor of the bill.

The bank must present paper for payment in all proper cases, and is liable for any damages caused by a failure to present at maturity. The bank is liable for careless mistakes as to the time of maturity and days of grace, but is not liable for a mistake of judgment in cases where the law is doubtful, and the question has not been decided by the courts. The bank need not make formal presentment of paper payable at the bank if the paper is there at maturity, and no one is there to make payment. Checks should be presented within a reasonable time; what is a reasonable time depending upon the circumstances of each case. The action of the bank at variance with the general rules relative to presentment may be justified by a general custom of banks.

The bank must duly protest the paper after dishonor, and the word "protest" includes all steps necessary to charge the parties.

The bank must give due notice of dishonor to the proper parties, and is charged with knowledge of the law relating to notice of dishonor. Actual notice to an indorser does not supply the want of proper formal notice by the bank. The bank need notify only its principal or immediate indorser; but the rule is otherwise in some states.

Where an indorser has been discharged by failure of the bank to take the proper steps to charge him, the owner may sue the bank without first suing the indorser.

Where the bank takes other paper in payment, it must use due diligence to enforce the payment thereof.

The bank should seasonably return all dishonored paper unless notified to the contrary, so that the owner may take such measures as he sees fit for his further security. The bank may, however, be justified by a general custom in retaining paper after dishonor.

The negligence of the bank in failing to take proper steps to charge the parties may be waived, but full knowledge of the facts is essential to a complete waiver or ratification. Meas-

ures taken by the owner to secure or protect himself from the negligence of the bank do not amount to a waiver or ratification of such negligence.

§ 58. General rules.

A collecting bank is charged with the duty of taking all steps necessary and proper to charge all parties to the paper, so that the owner may obtain the full benefit of the obligation against the parties primarily liable, or, on their default, against all parties secondarily liable.[1]

As was said in a well-considered Connecticut case:[2] "The general duty of an agent who receives for collection a bill of exchange is to use due diligence in presenting the same for acceptance, and in presenting it for payment if it has been accepted, and to give the holder and other parties to the paper, by the next day's post, the notices of dishonor required by law in case acceptance or payment is refused, and to give to his principal any special notice which is required by the terms of the

[1] West v. St. Paul Nat. Bank, 54 Minn. 466, 56 N. W. 54; Borup v. Nininger, 5 Minn. 523 (Gil. 417); Jagger v. National German American Bank of St. Paul, 53 Minn. 386, 55 N. W. 545; Bank of New Hanover v. Kenan, 76 N. C. 340; Merchants' & Manufacturers' Bank v. Stafford Nat. Bank, 44 Conn. 565; Tyson v. State Bank of Indiana, 6 Blackf. (Ind.) 225; Smedes v. Bank of Utica, 20 Johns. (N. Y.) 372, 3 Cow. 662; Bank of Utica v. McKinster, 11 Wend. (N. Y.) 473; Allen v. Suydam, 20 Wend. (N. Y.) 321; Fabens v. Mercantile Bank, 23 Pick. (Mass.) 330; Bank of Washington v. Triplett, 1 Pet. (U. S.) 25.

[2] Merchants' & Manufacturers' Bank v. Stafford Nat. Bank, 44 Conn. 565. See, also, Walker v. Bank of New York State, 5 Seld. (N. Y.) 582; Hamilton v. Cunningham, 2 Brock. 350, Fed. Cas. No. 5,978.

instructions to the agent, or of the contract which the agent has entered into with his principal. The agent is also required to protest, in case of nonacceptance or nonpayment, if protest is not forbidden, and to send the protest to the holders."

The bank must use reasonable skill and care in taking the steps necessary to charge the parties to the paper,[3] and the retention of a check by a collecting bank for several days without presentation or notice of nonpayment, or any efforts to collect, renders it liable for any resulting loss.[4]

We have seen that the efforts of the bank must be directed towards obtaining payment of the obligation in money,[5] and consequently all steps taken by the bank must tend in that direction.

§ 59. Bank is a "holder" for purposes of collection.

The extent of the duties and liabilities of the collecting bank as to taking the steps necessary to charge the parties to the paper is epitomized in the rule that, for the purposes of presentment, protest, and notice, the bank is deemed to be a "holder" of the paper.[6] On this

[3] Bartlett v. Isbell, 31 Conn. 296, 299; Tiernan v. Commercial Bank of Natchez, 7 How. (Miss.) 648; Bank of Delaware County v. Broomhall, 38 Pa. St. 135; La Banque Jacques-Cartier v. La Corporation de Limoilou, 17 Rap. Jud. Que. C. S. 211. See, also, ante, § 35.

[4] Bank of New Hanover v. Kenan, 76 N. C. 340.

See, also, West Branch Bank v. Fulmer, 3 Pa. St. 399; Ivory v. Bank of State, 36 Mo. 475; Costin v. Rankin, 3 Jones (N. C.) 387.

[5] See ante, § 46.

[6] State Bank of Troy v. Bank of Capitol, 41 Barb. (N. Y.) 343, 27 How. Pr. 57, 17 Abb. Pr. 364; Mead v. Engs, 5 Cow. (N. Y.) 303;

point, the supreme court of Connecticut uses these words: "Such agents are recognized in the law as 'holders for collection;' for all the purposes of demand and notice and the exercise of due diligence after dishonor they are 'holders' of the note; and the law imposes upon them the duty of doing all that the owner would be required to do for the protection of his rights, and makes them liable over to the owner for default in that duty."[7]

§ 60. Presentment for acceptance.

For a statement of the general rules determining the kind of paper that requires presentment for acceptance, and all other general rules regarding presentment for acceptance which apply to any holder as well as to a bank holding for collection, the reader is referred to the general works on bills and notes, or on negotiable instruments.[8]

For the purposes of this work, a collecting bank is presumed to know the general rules of law governing presentment, protest, and notice,—a knowledge imputed alike to all persons dealing in commercial paper. We

Howard v. Ives, 1 Hill (N. Y.) 263; Bank of United States v. Davis, 2 Hill (N. Y.) 451; Sheldon v. Benham, 4 Hill (N. Y.) 129; Farmers' Bank of Bridgeport v. Vail, 21 N. Y. 487, 488; Ogden v. Dobbin, 2 Hall (N. Y.) 129; Burnham v. Webster, 19 Me. 232; Freeman's Bank v. Perkins, 18 Me. 292; Warren v. Gilman, 17 Me. 360; Blakeslee v. Hewett, 76 Wis. 341; Manchester Bank v. Fellows, 28 N. H. 302.

[7] Bartlett v. Isbell, 31 Conn. 296, 299.

[8] For the rules adopted in the new negotiable instruments laws, see the author's treatise on those laws, chapter 7 (1900; Keefe-Davidson Law Book Company, St. Paul, Minn.).

shall consider here, however, the cases where the courts have made specific application of these rules to collecting banks. From a survey of these cases, it seems that banks do not always know these rules, or, at least, that they do not always follow them. For example, a bank should know that a bill stating no time of payment is payable on demand,[9] and consequently need not be presented for acceptance;[10] so that, if it fails to present such a bill for payment in time, but, instead, presents it for acceptance, and sends for instructions as to protest, and loss results, it is liable for the damages sustained.[11] So, too, a collecting bank must present for acceptance a sight draft on a person having an office in the same city, on the same or on the next day after its receipt, though the bank does not know that the drawee is embarrassed.[12]

Where a bank, sued for damages for failure to present a draft, defends on the ground that the draft was presented by telephone, it has the burden of proving that fact.[13]

[9] First Nat. Bank of Davenport v. Price, 52 Iowa, 570, 3 N. W. 639; Keyes v. Fenstermaker, 24 Cal. 329; Bacon v. Page, 1 Conn. 404; Ervin v. Brooks, 111 N. C. 358; Messmore v. Morrison, 172 Pa. St. 200.

[10] First Nat. Bank of Davenport v. Price, 52 Iowa, 570, 3 N. W. 639; Lester v. Given, 8 Bush (Ky.) 357; Townsley v. Sumrall, 2 Pet. (U. S.) 170, 178; Sweet v. Swift, 65 Mich. 90; Fall River Union Bank v. Willard, 5 Metc. (Mass.) 216.

[11] First Nat. Bank of Davenport v. Price, 52 Iowa, 570, 3 N. W. 639.

Ratification of act of bank, see post, § 76.

[12] Citizens' Nat. Bank of Lawrenceburg v. Third Nat. Bank of Greensburg, 19 Ind. App. 69, 49 N. E. 171.

[13] Gray's Harbor Commercial Co. v. Continental Nat. Bank, 74 Mo. App. 633.

§ 61. —— Excuses for failure to present for acceptance.

The collecting bank is not excused from liability for negligence in not presenting a sight draft for acceptance by the fact that the *bona fide* indorsee, suing for the negligence, failed to inquire whether the drawer had a right to draw, or had reason to expect that the draft would be paid;[14] nor by the fact that, at the time the draft was drawn, such indorsee knew that the drawer was indebted to the drawee, and that there was no reasonable ground to believe that the draft would be accepted;[15] nor by a custom of its own of not presenting for acceptance drafts on a certain concern, when sent by plaintiff for collection;[16] nor by the insolvency of the drawee, the draft having been indorsed to plaintiff.[17]

In a recent case, where the collecting bank, sued for negligence in not presenting a sight draft for acceptance, attempted to defend on the ground that the drawer had no funds with the drawee, and was insolvent and without credit, the court said: "The insolvency of the drawer would not necessarily have prevented the collection from the drawer. Insolvency does not mean a total want of property. The insolvent debtor may yet have means to secure or pay the diligent creditor. The answer does not negative the possibility

[14] Citizens' Nat. Bank of Lawrenceburg v. Third Nat. Bank of Greensburg, 19 Ind. App. 69, 49 N. E. 171.

[15] Citizens' Nat. Bank of Lawrenceburg v. Third Nat. Bank of Greensburg, 19 Ind. App. 69, 49 N. E. 171.

[16] Citizens' Nat. Bank of Lawrenceburg v. Third Nat. Bank of Greensburg, 19 Ind. App. 69, 49 N. E. 171.

[17] Citizens' Nat. Bank of Lawrenceburg v. Third Nat. Bank of Greensburg, 19 Ind. App. 69, 49 N. E. 171.

that the drawer might have secured the assistance of friends, or have himself secured the appellee (owner)."[18]

§ 62. —— Bank liable for taking acceptance not according to tenor of bill.

Banks have also been known to forget or ignore the rule that an acceptance must follow the tenor of the bill;[19] and the collecting bank is liable for any loss occasioned by taking an acceptance not according to the tenor of the bill, as where it takes the acceptance of a corporation by its treasurer in his representative capacity only, on a bill drawn by the corporation on him personally, instead of treating the bill as dishonored, and giving notice accordingly.[20]

Conversely, it is negligence for a bank receiving for collection a draft on the secretary of a corporation as such, which draft was considered and known by it to be a draft on the corporation, to take the personal acceptance of the secretary on his refusal to accept for

[18] Citizens' Nat. Bank of Lawrenceburg v. Third Nat. Bank of Greensburg, 19 Ind. App. 69, 49 N. E. 171.

[19] See Lindley v. First Nat. Bank of Waterloo, 76 Iowa, 629; Brinkman v. Hunter, 73 Mo. 172; Murdock v. Mills, 11 Metc. (Mass.) 5.

[20] Walker v. State Bank, 9 N. Y. 582, affirming 13 Barb. 636.

The agent is not personally liable in such case, in the absence of a showing of absolute want of authority in fact to use the corporate name. Id. On this point, see, also, Dusenbury v. Ellis, 3 Johns. Cas. (N. Y.) 70; White v. Skinner, 13 Johns. (N. Y.) 307. The doctrine seems to have been modified in later cases. See White v. Madison, 26 N. Y. 123; Dung v. Parker, 52 N. Y. 499; Noe v. Gregory, 7 Daly (N. Y.) 283. See, also, West London Commercial Bank v. Kitson, 13 Q. B. Div. 360.

the corporation, instead of giving immediate notice of dishonor.[21]

§ 63. Presentment for payment.

The general rules governing presentment for payment are the same, whether the holder is a bank or not, and therefore the same considerations apply here as apply with regard to presentment for acceptance, and the reader is referred to the general works on bills and notes or on negotiable instruments for a statement of such rules.[22]

The collecting bank must, however, present the paper for payment in all proper cases, and is liable for any damages caused by a failure to present at maturity.[23] By failing to demand payment in proper time, the bank makes the bill its own, and becomes liable for the amount thereof to the depositor.[24]

The collecting bank is bound to know the law relating to presentment and demand as to paper left for collection, and is hence liable for any loss sustained where

[21] Exchange Nat. Bank of Pittsburgh v. Third Nat. Bank of New York, 112 U. S. 276, 292, 5 Sup. Ct. 141, 28 L. Ed. 722; Tradesman's Nat. Bank of Pittsburgh v. Third Nat. Bank of New York, 112 U. S. 293, 5 Sup. Ct. 149, 28 L. Ed. 728. See, also, Hardy v. Pilcher, 57 Miss. 18.

[22] For the rules adopted in the new negotiable instruments laws, see the author's treatise on those laws, chapter 11 (1900; Keefe-Davidson Law Book Company, St. Paul, Minn.)

[23] Fabens v. Mercantile Bank, 23 Pick. (Mass.) 330, 34 Am. Dec. 59; Steele v. Russell, 5 Neb. 211; Coghlan v. Dinsmore, 22 N. Y. Super. Ct. 453; Kirkham v. Bank of America, 26 App. Div. 110, 49 N. Y. Supp. 767, affirmed in 165 N. Y. 132, 58 N. E. 753. See, also, cases cited in note 1, supra.

[24] Bank of Washington v. Triplett, 1 Pet. (U. S.) 25, 31.

it expressly instructed its notary, at maturity, not to present the paper or make demand at the late residence of the obligor, who died at or before maturity of the paper, but to protest it, which was done, thereby releasing an indorser.[25]

The bank is, as we have seen, a "holder" for the taking of all steps necessary to charge the parties to the paper,[26] and hence is a "holder," within the rule that a presentment for payment must be made by the "holder," or by some person authorized to receive payment on his behalf. This is a general rule of the law merchant,[27] as well as the rule incorporated into the negotiable instruments laws.[28]

§ 64. —— Time of maturity and days of grace.

It sometimes happens that the collecting bank renders itself liable to the owner through some negligence or mistake with regard to the maturity of the paper and days of grace.

[25] Huff v. Hatch, 2 Disn. (Ohio) 63.

[26] See ante, § 59.

[27] Freeman's Bank v. Perkins, 18 Me. 292; Blakeslee v. Hewett, 76 Wis. 341, and other cases cited in note 6, supra.

See, also, Cole v. Jessup, 10 N. Y. 96; Baer v. Leppert, 12 Hun (N. Y.) 516; Sussex Bank v. Baldwin, 17 N. J. Law, 487.

[28] Negotiable Instruments Laws: Colorado (Laws 1897, c. 64) § 72, subd. 1; Connecticut (Laws 1897, c. 74) § 72, subd. 1; District of Columbia (U. S. Stat. at Large 1897-99, c. 47) § 72, subd. 1; Florida (Laws 1897, c. 4524, No. 10) § 72, subd. 1; Maryland (Laws 1898, c. 119) § 91, subd. 1; Massachusetts (Acts and Resolves 1898, c. 533) § 72, subd. 1; New York (Laws 1897, c. 612) § 132, subd. 1; North Carolina (Pub. Laws 1899, c. 733) § 72, subd. 1; North Dakota (Laws 1899, c. 113) § 72, subd. 1; Oregon (Laws 1899, p. 18) § 72, subd. 1; Rhode Island (Laws 1899, c. 623, p. 24) § 80,

As a check payable at a future date is a bill of exchange, and entitled to grace,[29] it is negligence for a bank having such check for collection to present the same for payment on the day named therein, without grace.[30] A collecting bank is also liable for the damages sustained by its carelessness in mistaking the date of a note, and consequently presenting it for payment and protesting it ten days before it was due, thereby discharging the indorser.[31]

It is often a matter of great difficulty to determine the proper course to pursue with regard to a particular instrument, and the collecting bank is not held to a strict knowledge of the law as to days of grace on a bank post note, where, at the time the note fell due, the question had not been judicially determined, and the practice of business men and bankers was not uniform in the matter, and hence is excusable for presenting it for payment without grace, though it was held to be entitled to grace in a subsequent decision of the highest court in the state.[32]

So, also, a bank with which a note payable on Sunday

subd. 1; Tennessee (Laws 1899, c. 94) § 72, subd. 1; Utah (Laws 1899, c. 83) § 72, subd. 1; Virginia (Acts Assem. 1897-98, c. 866) § 72, subd. 1; Washington (Laws 1899, c. 149) § 72, subd. 1; Wisconsin (Laws 1899, c. 356) § 1678-2, subd. 1.

[29] Ivory v. State Bank, 36 Mo. 475, 88 Am. Dec. 150; Merchants' Bank v. Woodruff, 6 Hill (N. Y.) 174; Hawley v. Jette, 10 Or. 31; Brown v. Lusk, 4 Yerg. (Tenn.) 210; Harrison v. Nicollet Nat. Bank of Minneapolis, 41 Minn. 488, 5 L. R. A. 746.

[30] Ivory v. State Bank, 36 Mo. 475, 88 Am. Dec. 150.

[31] Bank of Delaware County v. Broomhall, 38 Pa. St. 135.

[32] Mechanics' Bank at Baltimore v. Merchants' Bank at Boston, 6 Metc. (Mass.) 13, 32. But see Georgia Nat. Bank v. Henderson, 46 Ga. 487, 12 Am. Rep. 590.

was deposited before maturity for collection is not chargeable with negligence in not protesting it till the Thursday after its maturity, though such delay discharged the indorser, where the confused condition of the statute relating to holidays and days of grace rendered the proper course for the bank to pursue very doubtful, and the question had not been judicially determined.[33] But a bank with which a bill is left for collection is liable for negligence in presenting it for payment and protesting it on the day of maturity without grace, whereby the indorser was discharged, though it was doubtful whether the instrument was a bill or a mere check, where the indorser had expressly notified the bank that the instrument was entitled to grace; since, had it been a mere check, and not entitled to grace, such action on the part of the indorser would have been a waiver by him of presentment on the day of maturity.[34] The duties and liabilities of a collecting bank as to the matters just considered are much more simplified and defined in the states that have abolished days of grace entirely. This is the case in most of the states that have adopted the negotiable instruments laws.[35]

[33] Morris v. Union Nat. Bank of Sioux Falls, 13 S. D. 329, 83 N. W. 252. The indorser on the note involved in this case was held to have been discharged by the delay, in Morris v. Bailey, 10 S. D. 507, 74 N. W. 443.

[34] Georgia Nat. Bank v. Henderson, 46 Ga. 487. See Henderson v. Pope, 39 Ga. 361, where the instrument in question was held to be a bill, and entitled to grace.

[35] Negotiable Instruments Laws: Colorado (Laws 1897, c. 64) § 85; Connecticut (Laws 1897, c. LXXIV) § 85; District of Columbia (U. S. Stat. at Large, 1897-99, c. 47) § 85; Florida (Laws 1897, c. 4524, No. 10) § 85; Maryland (Laws 1898, c. 119) § 104; New York

§ 65. —— Paper payable at bank.

A note payable at a particular bank at a specified time is duly dishonored for nonpayment if, at the time it is due and payable, it is at the bank for collection, and no one calls to make payment; and hence the bank is not liable for not making formal presentment and demand of payment.[36] Nor is it necessary in case of a note payable at a bank, and in its hands for collection at the time it is due, that the bank's books be examined to see if the maker had sufficient funds in the bank at that time to pay the note, no one having called to pay it.[37] The fact that there were no funds of the maker in the bank at maturity of a note payable there, and in possession of the bank for collection at maturity, excuses presentment, demand, and refusal of payment.[38]

(Laws 1897, c. 612, Amendments in Laws 1898, c. 336) § 145; North Dakota (Laws 1899, c. 113) § 85; Oregon (Laws 1899, p. 18) § 85; Tennessee (Laws 1899, c. 94) § 85; Utah (Laws 1899, c. 83) § 85; Virginia (Acts Assem. 1897-98, c. 866) § 85; Washington (Laws 1899, c. 149) § 85; Wisconsin (Laws 1899, c. 356) § 1678-15.

In Rhode Island the negotiable instruments law gives three days' grace on sight drafts (Laws 1899, c. 623, § 93). In North Carolina the law gives three days' grace on notes, acceptances and sight drafts (Pub. Laws 1899, c. 733, § 197). In Massachusetts the negotiable instruments law originally abolishing days of grace (Acts and Resolves 1898, c. 533, § 85) has been amended (Act March 6, 1899) so as to allow three days' grace on sight drafts.

[36] State Bank v. Napier, 6 Humph. (Tenn.) 269; Ogden v. Dobbin, 2 Hall (N. Y.) 129; Folger v. Chase, 18 Pick. (Mass.) 63; Goodloe v. Godley, 13 Smedes & M. (Miss.) 233; Bank of United States v. Carneal, 2 Pet. (U. S.) 543.

[37] State Bank v. Napier, 6 Humph. (Tenn.) 269; Bank of United States v. Carneal, 2 Pet. (U. S.) 543.

[38] Hallowell v. Curry, 41 Pa. St. 322; Jenks v. Doyelstown Bank, 4 Watts & S. (Pa.) 505; Rahn v. Philadelphia Bank, 1 Rawle (Pa.)

In the absence of evidence to the contrary, it will be presumed that a demand note payable at a bank was at the bank, and that some officer of the bank was in attendance to receive payment.[39] But where a letter containing an acceptance specially payable at a particular bank was sent there, and, though received in due time, and actually in the bank, was lost by reason of having fallen through a crack in the cashier's desk, the physical presence of the bill in the bank does not amount to a presentment for payment, though the acceptor had no funds there and did not call at the bank.[40]

Where a note held by a bank for collection is made payable at another bank on a date specified in the note, and not "on or before" a specified date, the holder bank is not obliged to have the note at the bank of payment before the date fixed for payment.[41]

§ 66. —— Checks.

As a customer's bank check is not intended for general circulation as a medium of exchange, it should be presented for payment with all the despatch and diligence consistent with the circumstances of the case and the transaction of other commercial business.[42]

335; Phipps v. Chase, 6 Metc. (Mass.) 492; Bank of United States v. Carneal, 2 Pet. (U. S.) 543; Fullerton v. Bank of United States, 1 Pet. (U. S.) 617; Bank of United States v. Smith, 11 Wheat. (U. S.) 177; Sanderson v. Judge, 2 H. Bl. 509; Bailey v. Porter, 14 Mees. & W. 44.

[39] Folger v. Chase, 18 Pick. (Mass.) 63. This was an action against an indorser.

[40] Chicopee Bank v. Philadelphia Bank, 8 Wall. (U. S.) 641, 648.

[41] Bank of Montreal v. Ingerson, 105 Iowa, 349, 75 N. W. 351.

[42] Western Wheeled Scraper Co. v. Sadilek, 50 Neb. 105, 69 N.

The general rule is that a check must be presented for payment within a reasonable time after its receipt for collection;[43] but what constitutes a reasonable time depends generally on the circumstances of each case.[44] A bank should present local checks on the day of their receipt, otherwise it will be liable to the drawer for any loss sustained by the failure of the drawee bank at the close of such day.[45] As to out-of-town checks, the bank must use reasonable diligence, and when a bank, on the day it receives checks on a bank in another city, only twenty-seven miles distant, and connected by telegraph, telephone, and railroad, without informing such bank or inquiring if the checks were good, sent them to a bank in a third city, which in turn sent them to a bank in a fourth city, by which they were sent to the drawee bank five days after they were received by the first bank, and

W. 765; First Nat. Bank of Wymore v. Miller, 37 Neb. 500, 55 N. W. 1064.

[43] Morris v. Eufaula Nat. Bank, 106 Ala. 383, 18 So. 11; First Nat. Bank of Wymore v. Miller, 37 Neb. 500, 55 N. W. 1064; Bank of New Hanover v. Kenan, 76 N. C. 340.

[44] For presentments held to have been made with reasonable diligence, see Woodruff v. Plant, 41 Conn. 344; First Nat. Bank of Grafton v. Buckhannon Bank of West Virginia, 80 Md. 475, 27 L. R. A. 332; Nebraska Nat. Bank of Omaha v. Logan, 35 Neb. 182; Rosenthal v. Ehrlicher, 154 Pa. St. 396; Lloyd v. Osborne, 92 Wis. 93.

For cases holding that there was unreasonable delay in presentment, see Morris v. Eufaula Nat. Bank, 106 Ala. 383, 18 So. 11; Anderson v. Rodgers, 53 Kan. 542, 27 L. R. A. 248; Anderson v. Gill, 79 Md. 312; Holmes v. Roe, 62 Mich. 199; Bank of New Hanover v. Kenan, 76 N. C. 340.

[45] Morris v. Eufaula Nat. Bank, 106 Ala. 383, 18 So. 11.

Payment of check by drawer does not waive negligence of bank, see post, § 76.

were then protested, the first bank did not present the checks within a reasonable time, and the indorsers were discharged.[46]

It is no defense to an action for negligence in failing to seasonably present a check that it would not have been paid had it been duly presented.[47]

§ 67. —— Effect of custom.

Conduct of the collecting bank at variance with the general rules governing presentment for payment may be justified by custom.[48] Thus, where the last day of grace was Sunday, the collecting bank was held not chargeable with negligence in not demanding payment on that day, payment having been duly demanded on the next Monday, in accordance with an established custom at such bank.[49] So, also, a custom among banks to treat certificates of deposit payable in "current funds" as payable without grace is a good defense to an action by an indorsee against the bank for negligence in so treating the paper, and thereby discharging an indorser.[50]

Another important application of the rule that custom may modify the strict rules of law in these matters is a leading Massachusetts case, holding that evidence is

[46] First Nat. Bank of Wymore v. Miller, 37 Neb. 500, 55 N. W. 1064.

[47] Bank of New Hanover v. Kenan, 76 N. C. 340.

[48] Custom of retaining paper after dishonor, on promise of debtor to pay, see post, § 74.

[49] Patriotic Bank of Washington v. Farmers' Bank of Alexandria, 2 Cranch, C. C. 560, Fed. Cas. No. 10,811.

[50] Haddock v. Citizens' Nat. Bank, 53 Iowa, 542, 5 N. W. 766, citing Mechanics' Bank at Baltimore v. Merchants' Bank at Boston, 6 Metc. (Mass.) 13.

admissible, on behalf of a bank sued for not duly demanding payment of a note, that it was the custom of defendant and of all other banks in the same city to keep notes until the close of business hours, and, if not paid at the end of such time, to put them in the hands of a notary, and that this custom was followed by defendant in case of the note in suit.[51]

§ 68. Protest.

The collecting bank's position as a "holder" for purposes of collection[52] requires it to duly protest dishonored paper, and renders it liable for any damages sustained by its failure to protest it.[53]

The term "protest," when used by the depositor of paper for collection in his instructions to the bank, and in its popular sense, means "simply a demand of payment in proper form, and at a proper time; and, in case of nonpayment, due and reasonable notice to the indorsers by the bank, or any of its clerks or servants, or other suitable person."[54] In other words, it requires the bank to take steps essential to charge the drawer and in-

[51] Warren Bank v. Suffolk Bank, 10 Cush. (Mass.) 582. In this case it was shown that defendant had been plaintiffs' collecting agent for more than ten years, and had invariably placed their notes in the hands of a notary for demand and protest, and that plaintiffs knew of the custom.

[52] See ante, § 59.

[53] Chapman v. McCrea, 63 Ind. 360; American Express Co. v. Haire, 21 Ind. 4; Steele v. Russell, 5 Neb. 211; Thompson v. State Bank, 3 Hill (S. C.) 77, Riley's Law Cases, 81; Coghlan v. Dinsmore, 22 N. Y. Super. Ct. 453; City Nat. Bank of Dayton v. Clinton County Nat. Bank of Wilmington, 49 Ohio St. 351, 30 N. E. 958.

[54] Ayrault v. Pacific Bank, 47 N. Y. 570, 575, affirming 29 N. Y. Super. Ct. 337.

dorsers.[55] But, generally speaking, a collecting bank, not specifically instructed in the matter, is bound to protest the paper only when protest is necessary to preserve the owner's recourse against the parties contingently or secondarily liable to him.[56]

Sometimes specific orders are given to the bank not to protest the paper. But, on an issue as to whether such orders had been given, where the collection clerk had testified that he had received such orders, and made a contemporaneous note to that effect in the collection book, and the book was in evidence, testimony that the clerk was cautious and careful, and had not previously made any mistakes, is immaterial.[57]

§ 69. —— Excuses and defenses.

It is a good defense on the part of a bank sued for not protesting drafts that, before the drafts in question were sent to it, it had notified plaintiff not to send any more drafts marked "protest," and that, pursuant to such notice, many drafts not so marked had been received from plaintiff, and had not been protested, and that many of them had been collected after maturity, and the proceeds remitted to plaintiff.[58] But a bank sued for failing to take proper steps to charge indorsers cannot defend *pro tanto* on the ground that the maker,

[55] Wood River Bank v. First Nat. Bank of Omaha, 36 Neb. 744.

[56] West Branch Bank v. Fulmer, 3 Pa. St. 399. See, also, Porthouse v. Parker, 1 Camp. 82; Taylor v. Young, 3 Watts (Pa.) 344; Gowan v. Jackson, 20 Johns. (N. Y.) 176.

[57] Jagger v. National German American Bank of St. Paul, 53 Minn. 386, 55 N. W. 545.

[58] First Nat. Bank of Arkansas Pass v. St. Charles Sav. Bank (Tex. Civ. App.) 37 S. W. 768.

who was indebted to the indorsers, paid them, before maturity of the note, a part of the amount thereof, on their promise to pay the note at maturity, and give him additional credit, since the payment was for the benefit of the maker, and not of the holder.[59] And a bank which has undertaken to collect notes delivered to it for that purpose is not excused from liability for negligence in failing to protest them by the fact that its office building was burned, and the affairs of the bank confused thereby.[60]

If, however, a note is made a special deposit, and placed in the private envelope of the depositor, to which he had access at all times, the bank is not liable for a failure to protest, whereby the indorser was discharged.[61]

§ 70. Notice of dishonor.

One of the principal steps, or perhaps the principal step, in the process of protesting, as defined above, is the giving of notices of dishonor to the proper parties. Here, again, we refer the reader to the general works on bills and notes or negotiable instruments, for the general rules applying to all holders, whether banks or not. These general rules a collecting bank is, of course, presumed to know. It should know, for instance, that it

[59] Coghlan v. Dinsmore, 22 N. Y. Super. Ct. 453.

[60] Merchants' State Bank v. State Bank of Phillips, 94 Wis. 444, 69 N. W. 170.

[61] Bohl v. Carson, 63 Fed. 26, 32, 11 C. C. A. 16, 22 U. S. App. 493; New Orleans Canal & Banking Co. v. Escoffie, 2 La. Ann. 830, 832. There was also evidence in the case last cited that the bank was directed not to protest, at the time the notes were deposited for safe-keeping.

is liable if it fails to notify its principal of the nonacceptance of the bill;[62] and that it must give notice of nonacceptance to the indorsee of a sight draft, though the drawer is insolvent.[63] But a failure to give notice to the drawer that, on presentment for acceptance, the drawee was not found at home, is not such negligence as discharges the drawer.[64]

The bank should know, too, that its position as "holder" for collection requires it to give proper notices of dishonor, and renders it liable for default in this respect.[65] And the notices should be in the proper legal form, and actually delivered or properly mailed to the proper parties; for mere knowledge on their part of dishonor is not equivalent to notice.[66]

The rule is different, however, in Pennsylvania, where it has been held that if the indorser actually receives notice of dishonor, accidentally or otherwise, in due time, the collecting bank is excused from liability for failure to give the notice.[67]

[62] Exchange Nat. Bank of Pittsburgh v. Third Nat. Bank of New York, 4 Fed. 20.

[63] Citizens' Nat. Bank of Lawrenceburg v. Third Nat. Bank of Greensburg, 19 Ind. App. 69, 49 N. E. 171.

[64] Bank of Washington v. Triplett, 1 Pet. (U. S.) 25, 35.

[65] Fabens v. Mercantile Bank, 23 Pick. (Mass.) 330, 34 Am. Dec. 59; Mead v. Engs, 5 Cow. (N. Y.) 303; Manchester Bank v. Fellows, 28 N. H. 302; Sheldon v. Benham, 4 Hill (N. Y.) 129; Burnham v. Webster, 19 Me. 232; Blakeslee v. Hewett, 76 Wis. 341; Chapman v. McCrea, 63 Ind. 360; City Nat. Bank of Dayton v. Clinton County Nat. Bank of Wilmington, 49 Ohio St. 351, 30 N. E. 958; Thompson v. State Bank, 3 Hill (S. C.) 77, Riley's Law Cases, 81.

[66] Jagger v. National German American Bank of St. Paul, 53 Minn. 386, 55 N. W. 545.

[67] Hallowell v. Curry, 41 Pa. St. 322, 328.

It has also been held in that state that, where the indorsers were also the makers of a note, not payable at any particular place, the collecting bank is not chargeable with negligence in not giving them notice, the fact of dishonor having been known to them.[68] But it is believed that the Pennsylvania rule is too lenient with the bank, and too loose altogether. It is much the better rule that formal notice be given to all parties entitled to notice.

A bank on which a check is drawn, after having received the same for collection, is liable to the sender for any damages caused by its failure to give to the drawer notice of nonpayment.[69] And a bank agreeing to collect paper payable at a distance for a certain per cent. of the amount of the paper must give timely notice of nonpayment to the sender.[70]

A bank ordered to protest paper if not paid should give notice of nonpayment to the bank which sent the paper not later than the next day after dishonor; and if it holds the paper for two days to enable the drawer to provide funds, it is liable as on an implied acceptance of the paper.[71]

While a bank may sometimes justify its course under a general custom of banks, a bank, after having aban-

[68] West Branch Bank v. Fulmer, 3 Pa. St. 399. See, also, Porthouse v. Parker, 1 Camp. 82; Taylor v. Young, 3 Watts (Pa.) 344; Gowan v. Jackson, 20 Johns. (N. Y.) 176.

[69] Exchange Bank of Wheeling v. Sutton Bank, 78 Md. 577, 28 Atl. 563, 23 L. R. A. 173.

[70] Wingate v. Mechanics' Bank, 10 Pa. St. 104.

[71] Wood River Bank v. First Nat. Bank of Omaha, 36 Neb. 744, 55 N. W. 239; First Nat. Bank of Northumberland v. McMichael, 106 Pa. St. 460.

doned a custom of giving notice of dishonor by mail, where the indorser and holder lived in the same town, cannot rely on such custom, though it is still followed by other banks.[72]

§ 71. —— What indorsers entitled to notice from bank.

The collecting bank need not notify all prior parties, but need only notify its own principal or immediate indorser.[73] So, it has been held that, in the absence of special agreement, a correspondent which has received for collection from the initial bank a note indorsed by the initial bank, and by a prior indorser, the initial bank appearing by the indorsements to be the owner of the paper, is bound, after demand of payment and dis-

[72] Isbell v. Lewis, 98 Ala. 550, 13 So. 335.

[73] McCullock v. Commercial Bank, 16 La. 566; State Bank of Troy v. Bank of Capitol, 41 Barb. (N. Y.) 343, 27 How. Pr. 57, 17 Abb. Pr. 364; Cardwell v. Allan, 33 Grat. (Va.) 167; Phipps v. Millbury Bank, 8 Metc. (Mass.) 79; Colt v. Noble, 5 Mass. 167; Eagle Bank v. Chapin, 3 Pick. (Mass.) 180; Mead v. Engs, 5 Cow. (N. Y.) 303; Haynes v. Birks, 3 Bos. & P. 599; Firth v. Thrush, 8 Barn. & C. 387.

Contra, see Smedes v. Bank of Utica, 20 Johns. (N. Y.) 372, holding that the bank must notify all indorsers.

An indorsee who delivered the note to an express company for collection without any indorsement to the company is nevertheless entitled to due notice of nonpayment. Rosson v. Carroll, 90 Tenn. 90, 16 S. W. 66, 12 L. R. A. 727.

That a collecting bank as indorser for collection is entitled to notice, see McNeil v. Wyatt, 3 Humph. (Tenn.) 125; Seaton v. Scovill, 18 Kan. 435.

For effect of intermediate agency for collection on time required for notice to successive obligors, see Slack v. Longshaw, 8 Ky. Law Rep. 166; Warren v. Gilman, 17 Me. 360; McNeil v. Wyatt, 3 Humph. (Tenn.) 125.

honor, to give due notice to the initial bank, in order to enable it to give due notice to such parties as it intended to look to for payment, and is not bound to notify the prior indorser.[74] And, in the absence of custom or usage to that effect, the mere fact that the bank undertakes to send notices to prior parties, while some evidence of a special agreement to notify them, is not sufficient evidence of such an agreement.[75] Nor can a second indorser, to whom the collecting bank has given due notice of protest, on taking up the note, sue the bank for not notifying the first indorser, as the bank, if responsible at all, is responsible only to its principal.[76]

§ 72. Owner may sue bank without first suing indorser.

Indorsers, legally discharged by a presentment by the collecting bank without grace, of a note entitled to grace, will be presumed to intend to avail themselves of the discharge if sued; hence plaintiffs are not bound to institute a fruitless suit against them before suing the bank for negligence.[77] On the same theory, the owner

[74] Phipps v. Millbury Bank, 8 Metc. (Mass.) 79.

Where the executors of a deceased indorsee (the payee) had duly qualified before maturity of the note, and notices of protest had been mailed by the initial bank to the correspondent bank to be sent to the indorsers, but neither such executors nor a surviving indorser were served with the notices, the latter bank is liable for any loss sustained by the holder of the note. Bird v. Louisiana State Bank, 93 U. S. 96, 23 L. Ed. 818.

[75] State Bank of Troy v. Bank of Capitol, 41 Barb. (N. Y.) 343, 27 How. Pr. 57, 17 Abb. Pr. 364.

[76] McCullock v. Commercial Bank, 16 La. 566.

[77] Mechanics' Bank at Baltimore v. Merchants' Bank at Boston, 6 Metc. (Mass.) 13, 26.

may sue the bank for negligence in failing to protest or give notice before suing the indorser.[78]

§ 73. Enforcement of paper taken in payment.

We have seen that, in the absence of special agreement or binding custom, the collecting bank, in accepting paper instead of money in payment, does so at its own risk. It behooves the bank, then, for its own protection, as well as for the benefit of the owner, to use diligence in obtaining payment of paper so received.[79] So, a bank receiving a check of the drawee of a draft, and surrendering the draft, should present the check on the day of its receipt.[80]

It is also liable to the depositor of paper for collection for any loss sustained by its negligence in failing to protest, on nonpayment, a draft received by it in payment of the collection.[81]

A peculiar case involving the duty of the bank to enforce paper received in payment was recently decided in Colorado. A deed and a check for the price of the land to be conveyed were deposited with defendant bank, with instructions to deliver the deed on collection of the check, which was on a bank in another state. The latter bank mailed to defendant bank its draft for the amount, less exchange, payable to

[78] Downer v. Madison County Bank, 6 Hill (N. Y.) 648; Canonge v. Louisiana State Bank (La.) 3 Mart. (N. S.) 344.

[79] See ante, §§ 46, 47.

[80] Nunnemaker v. Lanier, 48 Barb. (N. Y.) 234. See, also, First Nat. Bank of Meadville v. Fourth Nat. Bank of New York City, 77 N. Y. 320, 33 Am. Rep. 618.

[81] Capitol State Bank v. Lane, 52 Miss. 677.

defendant bank, but, pursuant to request from the drawer of the check, made while the draft was in the mails, defendant bank returned the draft to him. It was held that defendant bank had no authority to return the draft, and that, by its wrongful act in so doing, it estopped itself to deny receipt of the proceeds of the check, and that, since the mailing constituted a delivery, defendant bank held the proceeds in trust for the owner of the check.[82] In this case, an attempt was made to apply the doctrine of stoppage *in transitu,* but the court held that the doctrine did not apply because the mailing of the draft, under the circumstances, constituted a delivery.[83]

§ 74. Return of dishonored paper.

The collecting bank is bound to return dishonored paper within a reasonable time.[84] If it does not, after having given absolute credit therefor, it will be considered as a debtor for the amount of the paper.[85]

The retention of a sight draft for forty-seven days without informing the sender of nonpayment or of the in-

[82] Gregg v. Bi-Metallic Bank, 14 Colo. App. 251, 59 Pac. 852.

[83] Gregg v. Bi-Metallic Bank, 14 Colo. App. 251, 59 Pac. 852. See, also, Whiting v. City Bank of Rochester, 77 N. Y. 363; Muller v. Poudir, 55 N. Y. 325; Canterbury v. Bank of Sparta, 91 Wis. 53, 64 N. W. 311.

[84] Kirkham v. Bank of America, 165 N. Y. 132, 58 N. E. 753, affirming 26 App. Div. 110, 49 N. Y. Supp. 767; Kershaw v. Ladd, 34 Or. 375, 56 Pac. 402; Mound City Paint & Color Co. v. Commercial Nat. Bank of Ogden, 4 Utah, 353, 9 Pac. 709; Whitney v. Merchants' Union Exp. Co., 104 Mass. 152, 6 Am. Rep. 207.

[85] Kirkham v. Bank of America, 165 N. Y. 132, 58 N. E. 753. See, also, other cases cited in preceding note.

ability to collect by reason of the insolvency of the drawee, which was known to the bank, renders the bank liable for the loss sustained.[86]

An interesting decision, recently affirmed in the New York court of appeals, involved the following state of facts: Defendant bank forwarded a draft, left by a regular customer for collection, to its agent at the place of payment, and the latter received the drawee's sight draft on its correspondent in another city in payment, and defendant credited the depositor with the amount of the draft. The sight draft was not paid, and the depositor demanded the return of the original draft, or the remittance of the amount thereof. The credit was finally canceled by the bank about a month after it knew of the dishonor of the second draft, during which time defendant repeatedly requested the depositor to try to get the drawee to provide funds to meet it. The original draft was not returned. It was held that the bank was liable for the amount of such draft. In this case, the court said: "To justify it in canceling that credit, or refusing to pay on demand, it was at least bound to deliver to him the draft properly protested, so as to charge the drawer, and, in the absence of such return of the draft, it was liable for the money."[87]

The same rule has been applied to express companies, and it has been held that, where a draft is sent to an express company with instructions to return it at once

[86] Mound City Paint & Color Co. v. Commercial Nat. Bank of Ogden, 4 Utah, 353, 9 Pac. 709.

[87] Kirkham v. Bank of America, 26 App. Div. 110, 49 N. Y. Supp. 767, affirmed in court of appeals, 165 N. Y. 132, 58 N. E. 753.

if not paid, the company is liable for the loss occasioned to the drawer by retaining the draft in its possession for four days without presentment, in order that the drawee might make inquiries as to a supposed mistake in the amount of the draft, the drawee having become insolvent in the meantime.[88] But a failure of the collecting bank to return to the drawer a dishonored check until after the insolvency of the drawee is not actionable negligence if the drawer was, nevertheless, enabled to and did sue the drawee without it.[89]

The question of negligence of a bank in failing to return an accepted bill after nonpayment by the acceptor until after the acceptor became insolvent is for the jury.[90]

§ 75. —— Effect of custom.

The duties and responsibilities of the collecting bank with respect to an immediate return of dishonored paper may be modified by proof of custom, and it has been held that one sending paper to a bank for collection without special instructions is bound by a custom of the bank to hold paper sent for collection for some time after presentment in case it receives a promise of payment.[91]

[88] Whitney v. Merchants' Union Exp. Co., 104 Mass. 152, 6 Am. Rep. 207.

[89] Kershaw v. Ladd, 34 Or. 375, 56 Pac. 402.

[90] Fox v. Davenport Nat. Bank, 73 Iowa, 649, 35 N. W. 688. In this case it was held proper to refuse to submit to the jury the question of negligence in failing to present or collect the bill.

[91] Sahlien v. Bank of Lonoke, 90 Tenn. 221; 16 S. W. 373.

Effect of custom as to time and manner of presentment for payment, see ante, § 67.

§ 76. Ratification and waiver of negligence of bank.

The same general rules applied above to the waiver of the negligence of the collecting bank in other particulars[92] apply to its negligence in taking the necessary steps to charge the parties. Accepting and acting on the negligent conduct of the bank with full knowledge of the facts amounts to a waiver or ratification here as well as there.[93] So, where the collecting bank notified, by mail, the drawee, who resided in the country at some distance from the bank, in accordance with its usual custom, and later notified the sender that the drawee had called at the bank, and, on presentment, had accepted the draft and stated that he could not pay it before the next week, and the sender allowed the draft to remain in the bank without further instructions until the next week, when the drawee became insolvent, the bank is not chargeable with negligence.[94] But ignorance of negligence or of a material part of it materially alters the rule.[95] Thus, a promise to pay the note, made by an indorser after his discharge by the negligence and laches of defendant bank in failing to protest and give notice, but without knowledge of such laches, and the consequent discharge, is not binding;[96] and an indorser who actually paid the note to

[92] See ante, § 57.

[93] See Hobbs v. Straine, 149 Mass. 212, 21 N. E. 365.

[94] Crouse v. First Nat. Bank of Penn Yan, 137 N. Y. 383, 33 N. E. 301, affirming 61 Hun, 618, 15 N. Y. Supp. 408.

[95] See, also, ante, § 57.

[96] City Nat. Bank of Dayton v. Clinton County Nat. Bank of Wilmington, 49 Ohio St. 351, 360, 30 N. E. 958; Tebbetts v. Dowd, 23 Wend. (N. Y.) 379. Aliter of a promise made with knowledge of the facts. See Hobbs v. Straine, 149 Mass. 212, 21 N. E. 365.

the collecting bank in ignorance of the fact that no demand of payment had been made on the maker, and no notice served on himself (the attempt to notify the indorser having been abortive), can recover back the money from the bank as money paid under a misapprehension of fact, as well as a mistake of law.[97] Nor does an indorser waive his right to a discharge for want of protest and notice, by giving an extension of time to the maker in ignorance of the fact of his legal discharge.[98] On the same theory, negligence of the collecting bank in failing to take steps to charge indorsers is not waived by them by accepting from the maker, who was indebted to them, before maturity, part of the amount of the note, and promising to pay it at maturity, and give the maker further credit, where such payment and promise were not known to the holder until after he began suit against the bank for the negligence.[99]

Measures taken by the owner to secure or protect himself from the negligence of the bank do not amount to a waiver or ratification of such negligence. On this theory, it has been held that an indorser discharged by want of demand on the drawer, or notice of protest to himself, will not be presumed to have waived such defaults by attending a meeting of creditors of the drawer to obtain security against his indorsement;[100] also, that negligence of a bank in failing to present for payment

[97] Garland v. Salem Bank, 9 Mass. 408, 414.

[98] City Nat. Bank of Dayton v. Clinton County Nat. Bank of Wilmington, 49 Ohio St. 351, 30 N. E. 958.

[99] Coghlan v. Dinsmore, 22 N. Y. Super. Ct. 453.

[100] Miranda v. City Bank of New Orleans, 6 La. 740, 26 Am. Dec. 493.

in time a bill stating no time of payment, and therefore payable on demand, where the bank had, instead, presented it for acceptance and sent for instructions as to protest, is not ratified by subsequent telegraphic instructions to protest;[101] and that withdrawing the paper from the collecting bank after its failure to take proper steps for collection is not a waiver of the right to recover for the negligence of the bank.[102]

So, also, it has been held that negligence of the collecting bank in not seasonably returning a dishonored check given it in payment of an indorsed draft is not waived by the owner of the draft, who had received absolute credit for the amount of the draft on the receipt of the check, by assisting the bank to procure payment of the check from the indorser of the draft.[103]

This theory also forms the basis of a Mississippi case holding that the depositor of the original collection, by calling for and receiving from the bank a draft taken by it in part payment, ratified the act of the bank in so taking it in part payment, but did not thereby waive his right of action for the negligence of the bank in failing to charge the drawers of such draft by failing to protest it on nonpayment.[104]

The facts that the owner of a note which defendant bank had failed to protest received from defendant's cashier a renewal note, with a statement that the first

[101] First Nat. Bank of Davenport v. Price, 52 Iowa, 570, 3 N. W. 639.

[102] Bank of Mobile v. Huggins, 3 Ala. 206, 221.

[103] Kirkham v. Bank of America, 165 N. Y. 132, 58 N. E. 753, affirming 26 App. Div. 110, 49 N. Y. Supp. 767.

[104] Capitol State Bank v. Lane, 52 Miss. 677.

Bank has no authority to receive part payment, see ante, § 44.

note had been lost, and retained the renewal note for some time, though evidence of a ratification of the acts of the bank, are not conclusive.[105]

Payment by the drawer of a local check of the amount thereof to a collecting bank will not prevent a recovery by him against the bank for negligence in failing to present it on the day of its receipt, the drawee bank having failed at the close of such day.[106]

[105] Roanoke Nat. Bank v. Hambrick, 82 Va. 135, 137.

[106] Morris v. Eufaula Nat. Bank, 106 Ala. 383, 18 So. 11.

CHAPTER V.

EMPLOYMENT OF AGENTS AND CORRESPONDENTS, AND LIABILITY FOR THEIR DEFAULTS.

(A) In General.

§ 77. Bank must use reasonable care in selection of agents and correspondents.
78. Drawee or obligor not a suitable agent or correspondent.
79. —— Effect of custom.
80. Contracts and dealings between banks in general.
81. Employment of notaries, and liability for their acts and defaults.
82. —— Notary an officer or employe of bank.
83. —— Notary a public officer.
84. Employment of agents other than notaries and banks, and liability for their defaults.

(B) Liability of Initial Bank for Default of Correspondent.

§ 85. In general.
86. England.
87. Federal courts of the United States.
88. New York.
89. New Jersey.
90. Ohio.
91. Georgia.
92. Michigan.
93. Minnesota.
94. Montana.
95. North Dakota.
96. South Dakota.
97. Colorado.
98. Texas.
99. Massachusetts.
100. Connecticut.

101. Pennsylvania.
102. Maryland.
103. North Carolina.
104. Indiana.
105. Illinois.
106. Wisconsin.
107. Iowa.
108. Kansas.
109. Nebraska.
110. Missouri.
111. Kentucky.
112. Tennessee.
113. Alabama.
114. Mississippi.
115. Louisiana.
116. Conclusions from the decisions.
117. Effect of special agreements.
118. Effect of custom.
119. Effect of insolvency of correspondent.
120. Liability of correspondent bank to initial bank.

(A) In General.

When the collecting bank employs notaries, correspondent banks, or other agents to assist in making the collection, it must in all cases use reasonable care in the selection of such agents.

The bank on which the paper is drawn is not a suitable agent or correspondent for the collection of the paper, though it is the only bank at the place of payment. This rule may be modified or nullified by express instructions, and, in some jurisdictions, by general custom; but in other jurisdictions, a custom of sending paper for collection directly to the drawee bank is regarded as unreasonable and against public policy.

There is considerable conflict of authority as to the liability of a bank for the defaults of a notary selected by it to assist in the collection. The better rule is that the bank is liable; but the numerical weight of authority is to the contrary. The same conflict appears over the question of the liability of the

bank in case the notary is one of its officers or regular employes. The fact that the notary is a public officer required by law to properly protest commercial paper is deemed by some courts sufficient reason for relieving the bank from liability.

The collecting bank is liable for the acts of agents, other than notaries and banks, which it has selected to make presentment and receive payment.

§ 77. Bank must use reasonable care in selection of agents and correspondents.

In taking the steps necessary to perform its duties as a bailee for collection, the collecting bank may employ notaries or other agents to make presentment, demand, and protest, and to give notice of dishonor, if these steps, or any or some of them, are necessary to complete the collection.[1] If the paper is payable at a distance, the bank employs its correspondent bank at the place of payment, if it has one there, or, if not, some other bank or individual at that place or near it, to take these steps for it.

Waiving, for the present, all discussion of the question whether the collecting bank is authorized, by virtue of its relation with its customer, to employ an agent or correspondent for such customer, who shall himself be liable directly to such customer, or may merely, as bailee and independent contractor, select its own agents and correspondents, for whose defaults it is liable to the customer,[2] we may state it as a general rule that,

[1] Warren v. Gilman, 17 Me. 360. See, also, cases cited in notes 27 to 44, infra.

[2] See post, §§ 85-116.

if agents or correspondents are employed to assist in the collection, the bank must use reasonable care in their selection.[3]

The collecting bank is bound to employ a suitable and competent person to give notice to indorsers, and is liable in case it intrusts that duty to one, not a notary public, whose acts in attempting to perfect service of the notice plainly showed that he was either ignorant of the legal requirements in such cases, or was careless.[4] But the mere knowledge of a suspicion of the insolvency of a correspondent which has a good reputation for solvency in the city where it does business, and is believed by the initial bank to be solvent, does not render the initial bank guilty of negligence in sending paper to such correspondent.[5]

§ 78. Drawee or obligor not a suitable agent or correspondent.

Common sense and business experience dictate the rule that a collecting bank must not transmit the paper directly to the bank or other party by whom payment is to be made; for "no party on whom rests the obligation to pay upon presentation can be deemed a suitable agent, in contemplation of law, to enforce, on behalf of another, a claim against itself."[6]

[3] First Nat. Bank of Girard v. Craig, 3 Kan. App. 166, 42 Pac. 830; Bank of Lindsborg v. Ober, 31 Kan. 599, 3 Pac. 324; Smedes v. Bank of Utica, 20 Johns. (N. Y.) 372, 385; Aetna Ins. Co. v. Alton City Bank, 25 Ill. 243; Masich v. Citizens' Bank, 34 La. Ann. 1207.

See, also, post, § 78.

[4] Smedes v. Bank of Utica, 20 Johns. (N. Y.) 372, 385.

[5] Fay v. Strawn, 32 Ill. 295.

[6] Minneapolis Sash & Door Co. v. Metropolitan Bank, 76 Minn. 136,

On the question of the suitableness of the bank primarily liable on paper to be made agent for its collection, or, in other words, the propriety of sending paper directly to such bank for collection, the Colorado supreme court says: "Even if we can conceive of such an anomaly as one bank acting as the agent of another to make a collection against itself, it must be apparent that the selection of such an agent is not sanctioned by businesslike prudence and discretion. How can the debtor be the proper agent of the creditor in the very matter of collecting the debt? His interests are all adverse to those of his principal. If the debtor is embarrassed, there is the temptation to delay; if wanting

78 N. W. 980, 44 L. R. A. 504; German Nat. Bank of Denver v. Burns, 12 Colo. 539, 21 Pac. 714; Drovers' Nat. Bank v. Anglo-American Packing & Provision Co., 117 Ill. 100, affirming 18 Ill. App. 191; First Nat. Bank of Evansville v. Fourth Nat. Bank of Louisville, 56 Fed. 967, 6 C. C. A. 183, 16 U. S. App. 1; National Bank of Commerce of Seattle v. Johnson, 6 N. D. 180, 69 N. W. 49; First Nat. Bank of Chicago v. Citizens' Sav. Bank of Detroit (Mich.) 82 N. W. 66; Givan v. Bank of Alexandria (Tenn. Ch.) 52 S. W. 923; Lowenstein v. Bresler, 109 Ala. 326, 19 So. 860; Merchants' Nat. Bank of Philadelphia v. Goodman, 109 Pa. St. 422, 2 Atl. 687; Wagner v. Crook, 167 Pa. St. 259, 31 Atl. 576; Anderson v. Rodgers, 53 Kan. 542, 36 Pac. 1067, 27 L. R. A. 248, and notes; First Nat. Bank of Corsicana v. City Nat. Bank of Dallas, 12 Tex. Civ. App. 318, 34 S. W. 459; Western Wheeled Scraper Co. v. Sadilek, 50 Neb. 105, 69 N. W. 765; 1 Daniel, Neg. Inst. 328a.

The negligence of a bank in selecting the drawee of a check as its agent for collection thereof is matter of defense in an action by the bank against the drawers of the check to whom it had paid value therefor, and should be set up in the answer. Nebraska Nat. Bank v. Logan, 29 Neb. 278, 45 N. W. 459.

Entrusting a check to the drawee for collection does not operate as an extinguishment or payment of the check. Lowenstein v. Bresler, 109 Ala. 326, 19 So. 860.

in integrity, there is the opportunity to destroy and deny the evidence of the indebtedness."[7]

In arguing this same point, the supreme court of Illinois says: "The same person cannot be both debtor and creditor at the same time, and in respect of the same debt. How, then, can he who is debtor be at the same time and in respect of the same debt the disinterested agent of the creditor? Can it be said to be reasonable care in selecting an agent to select one known to be interested against the principal? To place the principal entirely in the hands of his adversary? The interest of the creditor when his debtor is failing is that steps be taken promptly and prosecuted with vigor to collect his debt. But at such a time the inclination of the creditor quite often, and it may be sometimes his interest, too, is to proscrastinate. The debtor may often be interested in bringing about a compromise with his creditors, whereby his debt may be discharged for less than its face, but the creditor whose debt can all be collected by legal proceedings can never be interested in producing that result. Surely it could not be held reasonable care and diligence in an agent, holding for collection the promissory note given by one individual to another individual, to send the promissory note to the maker, trusting to him to make payment, delay it, or destroy the evidences of indebtedness and repudiate the transaction, as his conscience might permit. If this would not be held to be reasonable care

[7] German Nat. Bank of Denver v. Burns, 12 Colo. 539, 21 Pac. 714, distinguishing People v. Merchants' & Mechanics' Bank of Troy, 78 N. Y. 269, and Indig v. National City Bank of Brooklyn, 80 N. Y. 100.

and diligence, why should the same conduct be held to be reasonable care and diligence when applied to a bank?"[8]

The bank is liable in case loss occurs because of sending the paper directly to the drawee or the party to make payment, though it notified its customer, on receiving the paper for collection, that it would act merely as agent for him, and would assume no liability from the negligence or omissions of subagents, to whom it might forward the paper for collection, as it was bound to exercise reasonable care and diligence in adopting a method of presenting the paper to its drawee for payment.[9]

It is unquestionably negligence for a bank to send a customer's check, intrusted to it for collection, directly to the drawee bank, if there is, in the same town, another bank in good standing and credit.[10] The rule holds good, also, though the drawee bank was the only bank in good standing,[11] or actually the only bank,[12] at the place of payment.

The general rule is modified and sometimes wholly nullified by the instructions sent with the paper. Thus,

[8] Drovers' Nat. Bank v. Anglo-American Packing & Provision Co., 117 Ill. 100, 107.

[9] Minneapolis Sash & Door Co. v. Metropolitan Bank, 76 Minn. 136, 78 N. W. 980, 44 L. R. A. 504.

[10] Farwell v. Curtis, 7 Biss. 160, Fed. Cas. No. 4,690; Western Wheeled Scraper Co. v. Sadilek, 50 Neb. 105, 69 N. W. 765. See, also, cases cited in note 6, supra.

[11] Minneapolis Sash & Door Co. v. Metropolitan Bank, 76 Minn. 136, 78 N. W. 980, 44 L. R. A. 504, Start, C. J., dissenting.

[12] American Exchange Nat. Bank of Lincoln v. Metropolitan Nat. Bank of Kansas City, 71 Mo. App. 451.

where a certificate of deposit issued by a private banker at B. was sent to a bank in D. for collection, with a statement by the sender that, "We note you have a correspondent at B.," and a direction to obtain the lowest rate of exchange possible, the collecting bank was not negligent because it sent the certificate directly to the banker at B., where it appeared that he conducted the only bank at B., and was the only correspondent there of the collecting bank, which fact was known to the sender, and the lowest rate of exchange could be obtained only by sending the paper to him.[13]

The rule making it *prima facie* negligence to send the paper direct to the party primarily liable does not apply where a draft was sent to the drawee bank merely to secure identification of the signature of the drawer, he having been unable to obtain identification of his signature in any other manner.[14] So, where there was evidence that a stranger presenting a draft for collection was wholly unable to identify himself or his signature, and that the collecting bank, with his consent, sent the draft to the drawee bank for identification of the signature, it was error to charge that under the evidence there was no need of forwarding the draft to any place for identification of the signature.[15]

On the question whether the liability of the bank is affected by the fact that the result would have been the same if it had sent the paper through proper channels, there is a difference of opinion; the courts of Mis-

[13] First Nat. Bank of Chicago v. Citizens' Sav. Bank of Detroit (Mich.) 82 N. W. 66.

[14] Davis v. First Nat. Bank of Fresno, 118 Cal. 600, 50 Pac. 666.

[15] Davis v. First Nat. Bank of Fresno, 118 Cal. 600, 50 Pac. 666.

souri[16] and Minnesota[17] holding that the fact that the paper would probably have met the same fate if sent to a third person for collection is immaterial; and those of Texas, holding that negligence of the collecting bank in sending a draft directly to the drawee is offset by a showing, with reasonable certainty, that had the draft been sent properly, through a third person, its fate would have been the same.[18] But before the failure of the drawee, the fact that, if the collecting bank had delayed sending a draft for the extreme limit of time allowable, without being chargeable with negligence, the paper would not have reached its destination before the failure of the drawee, will not excuse it from liability for negligence in sending it directly to the drawee, where it also appears that if it had been sent properly to a third person for collection at the time it was sent to the drawee, it would have been collected.[19]

§ 79. —— Effect of custom.

The weight of judicial authority in America is to the effect that no custom among banks to send checks and drafts, payable at other banks at distant points, to the drawee directly, by mail, will excuse or justify the bank in so sending the paper, since such a custom is un-

[16] American Exchange Nat. Bank of Lincoln v. Metropolitan Nat. Bank of Kansas City, 71 Mo. App. 451.

[17] Minneapolis Sash & Door Co. v. Metropolitan Bank, 76 Minn. 136, 78 N. W. 980, 44 L. R. A. 504.

[18] First Nat. Bank of Corsicana v. City Nat. Bank of Dallas, 12 Tex. Civ. App. 318, 34 S. W. 458.

[19] First Nat. Bank of Corsicana v. City Nat. Bank of Dallas, 12 Tex. Civ. App. 318, 34 S. W. 458.

reasonable and opposed to the policy of the law.[20] But there are American cases holding that a general and universal custom among banks to send paper payable in a distant city, where they have no correspondent, directly to the drawee bank in that city, will relieve a bank from liability for sending an ordinary unindorsed check, delivered to it for collection and deposit, directly to the drawee for payment, such a custom being reasonable and lawful.[21]

In England, the courts uphold broadly a custom of this kind, and have held that a London bank having no agent in Jersey is not negligent in sending a check, payable there, directly to the drawee bank, it being the custom of London bankers to so present checks on foreign drawees in case they have no agent at the place of payment.[22] A custom of sending the paper to the drawee, not for collection, but for a special lawful purpose, has been properly sustained by the supreme court of California, which holds that a bank sued for negligence in sending a draft direct to the drawee bank

[20] Drovers' Nat. Bank v. Anglo-American Packing & Provision Co., 117 Ill. 100, affirming 18 Ill. App. 191; Merchants' Nat. Bank of Philadelphia v. Goodman, 109 Pa. St. 422, 2 Atl. 687; Minneapolis Sash & Door Co. v. Metropolitan Bank, 76 Minn. 136, 78 N. W. 980, 44 L. R. A. 504; American Exchange Nat. Bank of Lincoln v. Metropolitan Nat. Bank of Kansas City, 71 Mo. App. 451.

[21] Kershaw v. Ladd, 34 Or. 375, 56 Pac. 402; Indig v. National City Bank of Brooklyn, 80 N. Y. 100, 104. The decision in the case last cited was based partly on the fact that no damage was shown. See, also, dissenting opinion of Start, C. J., in Minneapolis Sash & Door Co. v. Metropolitan Bank, 76 Minn. 136, 78 N. W. 980, 44 L. R. A. 504.

[22] Heywood v. Pickering, L. R. 9 Q. B. 428; Bailey v. Bodenham, 16 C. B. (N. S.) 288.

for identification of the signature of the drawer, the check having been lost while in possession of the drawee bank, should be allowed to show the custom and usage of banks in regard to the identification of strangers presenting paper for collection, and that it followed such custom as to the draft in suit.[23]

§ 80. Contracts and dealings between banks in general.

There are a few general rules governing the dealings between the initial and the correspondent bank, which are of considerable importance. One is that, in contracting for mutual arrangements for collections, banks are presumed to agree that each will act according to the general well-established and recognized rules and customs of the banking business.[24] Another is that there is an implied agreement that the funds realized shall be mingled with the general funds of the collecting bank; and this rule is perfectly consistent with an express agreement between the banks for daily remittances.[25] A third rule is that an implied agreement to continue in business as a bank enters into the express contracts between banks for mutual services in making collections, and, after its failure, the collecting bank has no authority to act in the matter, much less to receive payment.[26]

[23] Davis v. First Nat. Bank of Fresno, 118 Cal. 600, 50 Pac. 666.

[24] First Nat. Bank of Richmond v. Davis, 114 N. C. 343, 19 S. E. 280, 41 Am. St. Rep. 795; Planters' & Farmers' Nat. Bank of Baltimore v. First Nat. Bank of Wilmington, 75 N. C. 534; Marine Bank v. Fulton Bank, 2 Wall. (U. S.) 252.

[25] First Nat. Bank of Richmond v. Davis, 114 N. C. 343, 19 S. E. 280, 41 Am. St. Rep. 795.

[26] Manufacturers' Nat. Bank v. Continental Bank, 148 Mass. 553,

§ 81. Employment of notaries, and liability for their acts and defaults.

There is no doubt but that the collecting bank may avail itself of the services of a notary in making its collection;[27] and one employed by the cashier of the collecting bank will be considered as having been employed by the bank.[28] But when it comes to determining the liability or nonliability of the bank for the acts and omissions of the notary selected by it, we at once encounter a direct conflict in the authorities; a conflict primarily growing out of a difference of opinion as to the exact relation between the collecting bank and its customer. We have adopted the bailment theory of the relation,[29] and under this theory, notaries employed by the bank as bailee are its own agents, for whose acts and defaults it is liable.[30] This position necessarily involves the adoption of the rule that the bank, in accepting paper for collection, undertakes to "collect" in the full sense of the term, and to perform

20 N. E. 193, 12 Am. St. Rep. 598, 2 L. R. A. 699; First Nat. Bank of Crown Point v. First Nat. Bank of Richmond, 76 Ind. 561, 40 Am. Rep. 261; Cragie v. Hadley, 99 N. Y. 131; Audenried v. Betteley, 8 Allen (Mass.) 302.

[27] Warren v. Gilman, 17 Me. 360.

[28] Warren v. Gilman, 17 Me. 360.

Representation of bank by cashier in general, see ante, § 37.

[29] See ante, § 2.

[30] Davey v. Jones, 42 N. J. Law, 29, 36 Am. Rep. 505; Thompson v. State Bank, 3 Hill (S. C.) 77, Riley's Law Cases, 81; Ayrault v. Pacific Bank, 47 N. Y. 570, affirming 6 Rob. 337, 1 Abb. Pr. (N. S.) 381; Montillet v. Bank of United States (La.) 1 Mart. (N. S.) 365; Oakey v. Bank of Louisiana, 17 La. 386; Pritchard v. Louisiana State Bank, 2 La. 415; Miranda v. City Bank of New Orleans, 6 La. 740, 26 Am. Dec. 493.

all acts necessarily incidental to collection;[31] and it is believed that this rule is sound. As a necessary result of these doctrines, the notary employed by the collecting bank is not liable to the owner for his defaults or mistakes in making protest, there being no privity between them.[32]

In New York, the custom of employing a notary to make presentment and give notice of dishonor does not excuse the bank from making proper presentment and giving due notice, since the notary is the agent of the bank, and the positive legal duty of the bank and its selected agent cannot be varied by custom.[33] But the majority of the courts of the various states of the Union that have passed on the question, and the federal courts, have adopted the contrary rule, that if the collecting bank uses reasonable care in the selection of the notary, it is not liable for his acts or defaults.[34] If, therefore,

[31] See ante, § 26, and post, § 116.

[32] Oakey v. Bank of Louisiana, 17 La. 386, 388. Contra, see Britton v. Niccolls, 104 U. S. 757. See, also, Hyde v. Planters' Bank of Mississippi, 17 La. 560.

[33] Ayrault v. Pacific Bank, 47 N. Y. 570, 7 Am. Rep. 489, affirming 6 Rob. 337, 1 Abb. Pr. (N. S.) 381.

See, also, Allen v. Merchants' Bank of New York, 15 Wend. (N. Y.) 482, where it was held that, in the absence of a prior judicial determination of the question, the holder may show that it was customary for a bank receiving paper for collection to assume the obligation to answer for the negligence or default of its agents.

[34] First Nat. Bank of Manning v. German Bank of Carroll County, 107 Iowa, 543, 78 N. W. 195; Citizens' Bank of Baltimore v. Howell, 8 Md. 530; Tiernan v. Commercial Bank of Natchez, 7 How. (Miss.) 648; Agricultural Bank v. Commercial Bank of Manchester, 7 Smedes & M. (Miss.) 592; Bellemire v. Bank of United States, 4 Whart. (Pa.) 105; Britton v. Niccolls, 104 U. S. 766; Warren Bank v. Suffolk Bank, 10 Cush. (Mass.) 582; Stacy v. Dane County Bank,

it may properly be said that the rule adopted by the greater number of courts is the better rule of law, the rule that the collecting bank fully performs its duty by using due care in the selection of a notary is certainly the better rule. Pursuant to this latter theory, it has been held that it is presumed that a notary public, properly commissioned, is a fit person for the collecting agent to intrust with the protest of commercial paper;[35] and that, in the absence of special agreement, the collecting bank, which has turned the paper over for protest to the notary usually employed by it for that purpose, is not liable for his failure to perform his duty.[36]

§ 82. —— Notary an officer or employe of bank.

There is also some difference of judicial opinion on the question of the liability of the bank in case the notary employed by it is a regular officer or employe of the bank. In Nebraska it has been held that where a bank receives a bill for collection, with orders to protest it if not paid, and it is delivered to the president of the bank, who is also a notary public, for pro-

12 Wis. 629; May v. Jones, 88 Ga. 308, 14 S. E. 552; First Nat. Bank v. Butler, 41 Ohio St. 519; Isham v. Post, 141 N. Y. 100, 38 Am. St. Rep. 775, note, 35 N. E. 1084; Mechem, Agency, § 514; 3 Am. & Eng. Enc. Law (2d Ed.) 808.

In Stacy v. Dane County Bank, 12 Wis. 629, the notary demanded payment before the note was due, and deposited the notice for the indorser in the postoffice. The indorser was absent from the city, but had a residence therein.

[35] Stacy v. Dane County Bank, 12 Wis. 629, 635.

[36] Citizens' Bank of Baltimore v. Howell, 8 Md. 530, 63 Am. Dec. 714.

test, but such president, with knowledge of the order to protest, delays noting for protest or giving notice for such a time as effects a discharge of the indorsers, the notary is the agent of the bank, and the bank is liable for his default.[37] But in Georgia it has been held that a bank is not liable for the acts of its notary in maliciously and wrongfully publishing the protest of a bill of exchange, though he was also an employe of the bank.[38] Here, however, the notary obviously went outside of the scope of the ordinary duties of a notary.

How the liability of the bank is affected by the fact that the notary it employs is a public officer, as well as an officer or employe of the bank, is considered in the next section.

§ 83. —— Notary a public officer.

That a notary is a public officer, one of whose official duties it is to properly protest negotiable paper delivered to him for that purpose, is deemed by some courts sufficient reason for relieving the collecting bank from all liability for his acts or defaults.[39] Where the

[37] Wood River Bank v. First Nat. Bank of Omaha, 36 Neb. 744, 55 N. W. 239; Commercial Bank of Kentucky v. Barksdale, 36 Mo. 563.

[38] May v. Jones, 88 Ga. 308, 14 S. E. 552, 15 L. R. A. 637, 30 Am. St. Rep. 154.

[39] Britton v. Niccolls, 104 U. S. 757; Hyde v. Planters' Bank of Mississippi, 17 La. 560; Stacy v. Dane County Bank, 12 Wis. 629; First Nat. Bank of Manning v. German Bank of Carroll County, 107 Iowa, 543, 78 N. W. 195; Baldwin v. Bank of Louisiana, 1 La. Ann. 13; Tiernan v. Commercial Bank of Natchez, 7 How. (Miss.) 648; Agricultural Bank v. Commercial Bank of Manchester, 7 Smedes & M. (Miss.) 592; Bowling v. Arthur, 34 Miss. 41; May v. Jones, 88 Ga. 308, 311.

notary employed is not only a public officer, but also an officer or employe of the bank, the rule in some states is that the bank is not liable for his acts or defaults, because his private status is merged in his public status, as to acts prescribed by law as part of his official duties.[40]

On this point, Lumpkin, J., speaking for the supreme court of Georgia, says: "The plaintiff's theory is that, as Jones, the notary public, was also an employe and agent of the bank, 'the action of defendant Jones in the matter, he acting under the authority of the defendant bank, is the action of said bank.' This is all the allegation touching the bank's liability. Although there is conflict in the cases, the prevailing and better holding seems to be that a bank is not liable for the negligence or misconduct of a notary employed by it to protest negotiable paper. The reason is that the notary is not a mere agent or servant of the bank, but is a public officer, sworn to discharge his duties properly. He is under a higher control than that of a private principal. He owes duties to the public, which must be the supreme law of his conduct. Consequently, when he acts in his official capacity, the bank no longer has control over him, and cannot direct how his duties shall be done. * * * That the notary is also an employe and agent of the bank does not alter the case. There is still a sharp dividing line between his duties as agent and his duties as a public officer. When his

[40] May v. Jones, 88 Ga. 308, 311; First Nat. Bank of Manning v. German Bank of Carroll County, 107 Iowa, 543, 78 N. W. 195; Baldwin v. Bank of Louisiana, 1 La. Ann. 13; Gerhardt v. Boatman's Savings Inst., 38 Mo. 60, 67.

public service comes into play, his private service is for the time suspended."[41] But it is also held that if the statutes of the state where the notary was appointed do not authorize or require him to protest commercial paper, the bank is liable for his acts and defaults, the reason being that he is not, in such case, acting in an official capacity.[42] Thus, where the notary was regularly employed by the bank at a fixed salary, and the instrument regarding which he was negligent was a negotiable note, which could be protested by any person under the statutes of the state, the bank is liable for his negligence, though he is also a public officer, as, in the case at hand, it was not necessary to employ him, and he therefore acted as the bank's agent, and not as an independent officer.[43]

Another doctrine under which the bank is relieved from liability is that, though the notary employed by the collecting bank be a regularly commissioned public officer, the owner impliedly consents to his employment by the bank as part of the contract of collection, and thus makes the notary his subagent, for whose defaults the bank is not chargeable.[44]

§ 84. Employment of agents other than notaries and banks, and liability for their defaults.

In Kansas, the rule determining the liability of the collecting bank for defaults of its selected agents other

[41] May v. Jones, 88 Ga. 308, 311.

[42] Allen v. Merchants' Bank of New York, 22 Wend. (N. Y.) 215, 34 Am. Dec. 289; Gerhardt v. Boatman's Savings Inst., 38 Mo. 60, 67; Bank of Linsborg v. Ober, 31 Kan. 599, 3 Pac. 324.

[43] Gerhardt v. Boatman's Savings Inst., 38 Mo. 60, 67.

[44] Park v. Butler, 41 Ohio St. 519, 52 Am. Rep. 94.

than notaries or correspondent banks is found in a decision holding that a collecting bank, whose only instructions were, "when due, collect, and apply proceeds to my paper," is liable to the depositor of the paper for the default of one voluntarily selected by the bank to make presentment, who collected the amount of the paper, but failed to turn over the proceeds; such person being the agent of the bank only.[45]

In a case where the bank either lost a note sent to it for collection, or negligently permitted it to get into the hands of an unauthorized person, who collected it, it was held that an agency between such person and the bank could not be shown by evidence of his declarations to that effect, there having been no prior evidence establishing a *prima facie* case of agency.[46]

(B) Liability of Initial Bank for Default of Correspondent.

There is an irreconcilable conflict of authority on the question of the liability of the initial collecting bank for the acts and defaults of its correspondent bank. The rule in force in England, and adopted in New York and several of the other states, is that the initial bank is liable for the defaults of its selected correspondent, on the ground that the correspondent is the agent of the initial bank only. This rule is consistent with the bailment theory of the relation between the initial bank and its customer.

On the other hand, the rule in force in Massachusetts, and followed in many of the states, is that the owner of paper

[45] First Nat. Bank of Girard v. Craig, 3 Kan. App. 166, 42 Pac. 830; Cummins v. Heald, 24 Kan. 600. See, also, Bank of Lindsborg v. Ober, 31 Kan. 599, 3 Pac. 324.

[46] McClure v. D. M. Osborne & Co., 86 Ill. App. 465.

payable at a distance, by depositing it in a local bank for collection, impliedly assents to the employment of a bank at the place of payment, and that, consequently, the correspondent is an agent of the owner, and that the initial bank is not liable for its defaults if it used due care in selecting the correspondent.

The rule that the initial bank is liable for the defaults of its correspondents may be modified or negatived by proof of a special agreement to the contrary.

Some courts hold that such rule may be negatived by proof of a general custom to the contrary.

As a necessary corollary to the rule that the initial bank is liable for the defaults of its correspondent is the rule that the initial bank has a remedy over against the correspondent for all such defaults of the latter as render the former liable to the owner.

§ 85. In general.

The question of the liability of the initial collecting bank for the acts or defaults of its correspondent bank in making or failing to make the collection is one that presents a conflict of authorities which is absolutely irreconcilable. One line of authorities holds that, in the absence of special agreement to the contrary, a bank receiving for collection paper payable at a distance is liable for the acts and defaults of its correspondents; the other line of authorities exonerates the initial bank if it has used reasonable care in the selection of the correspondent.

We shall defer drawing any conclusions as to which is the better doctrine until we have thoroughly examined all the cases, and have set forth at length and examined the reasoning used to sustain each doctrine.

§ 86. England.

The court of king's bench, in Van Wart v. Woolley,[47] briefly but emphatically lays down the rule that the initial bank is liable for the defaults of its chosen correspondent; and, in a later case,[48] the house of lords affirmed the rule, without qualification, using the old maxim, *qui facit per alium, facit per se.*

§ 87. Federal courts of the United States.

Whatever confusion may have resulted from the uncertainty as to the exact holding of the supreme court of the United States in the early case of Bank of Washington v. Triplett,[49] it is certain that all confusion and uncertainty as to the position of that court has been overcome in Exchange National Bank v. Third National Bank.[50] Before taking up the issue, the court, in that

[47] 3 Barn. & C. 439, 444.

[48] Mackersy v. Ramsays, 9 Clark & F. 818, 849-852. See, also, Prideaux v. Criddle, L. R. 4 Q. B. 455; Cobb v. Becke, 6 Q. B. 930.

[49] 1 Pet. (U. S.) 25. The opinion in this case states that the paper was delivered to the bank for "the purpose of being transmitted," and the case has been cited by the adherents of each theory; one side contending that the decision in the case that the initial bank was not liable for the defaults of its correspondent was due solely to the fact that the original contract was merely for "transmission," and not for "collection;" the other side contending that the word "transmission" was used in a broader sense, and that there was nothing in the case to show but that the undertaking was an ordinary contract for "collection," and hence maintaining that the case was authority for the doctrine that the initial collecting bank is not liable for the defaults of its correspondents, but that the latter are the agents of the owner.

[50] 112 U. S. 276, 5 Sup. Ct. 141. See, also, Hoover v. Wise, 91 U. S. 308; Hyde v. First Nat. Bank of Lacon, 7 Biss. 156, Fed. Cas. No. 6,970.

case, makes the following general observations: "The question involves a rule of law of general application. Whatever be the proper rule, it is one of commercial law. It concerns trade between different and distant places, and, in the absence of statutory regulations or special contract or usage having the force of law, it is not to be determined according to the views or interests of any particular individuals, classes or localities, but according to those principles which will best promote the general welfare of the commercial community." The court then states its decision of this disputed point as follows: "Whether a draft is payable in the place where the bank receiving it for collection is situated, or in another place, the holder is aware that the collection must be made by a competent agent. In either case, there is an implied contract of the bank that the proper measures shall be used to collect the draft, and a right, on the part of its owner, to presume that proper agents will be employed, he having no knowledge of the agents. There is, therefore, no reason for liability or exemption from liability in the one case which does not apply to the other. * * * The distinction recurs between the rule of merely personal representative agency and the responsibility imposed by the law of commercial contracts. This solves the difficulty, and reconciles the apparent conflict of decision in many cases. The nature of the contract is the test. If the contract be only for the immediate services of the agent, and for his faithful conduct as representing his principal, the responsibility ceases with the limits of the personal services undertaken. But where the contract looks mainly to the thing to

be done, and the undertaking is for the due use of all proper means to performance, the responsibility extends to all necessary and proper means to accomplish the object, by whomsoever used."

§ 88. New York.

The leading case in New York is Allen v. Merchants' Bank,[51] holding that the initial collecting bank is liable to the owner of paper payable at a distance for the default of a correspondent bank at the place of payment, to which it sent the paper for collection; the specific default being the failure of a notary, employed by the correspondent bank, to give notice of dishonor. The ground of the decision is that the initial bank undertakes to "collect" the paper, and that any banks employed by it to assist in the collection are its own agents, and not the agents of the owner of the paper. This decision is severely criticised by the courts holding the opposite view, mainly on the ground that it was rendered by a divided court; fourteen senators having concurred in the decision, and ten, including the chancellor, having dissented. But however divided the court may have been on the question at that time, both the supreme court and the court of appeals have since uniformly adopted and applied the rule on reason as well as on the principle of *stare decisis*.[52]

[51] 22 Wend. (N. Y.) 215, reversing 15 Wend. 482.

[52] Montgomery County Bank v. Albany City Bank, 7 N. Y. 459; Commercial Bank of Pennsylvania v. Union Bank of New York, 11 N. Y. 203, affirming 19 Barb. 391, 1 Kern. 203; Naser v. First Nat. Bank, 116 N. Y. 498; Saint Nicholas Bank v. State Nat. Bank, 128 N. Y. 26, 27 N. E. 849; Castle v. Corn Exchange Bank, 148 N.

Strictly in harmony with this rule, it has also been held in New York that, where the initial bank sends a draft for collection to its correspondent, which, in turn, sends the paper to its correspondent at the place of payment, the two correspondent banks are not jointly liable to the initial bank for failure of the bank at the place of payment to present the paper and give notice of nonpayment; but the latter bank is liable only to its immediate correspondent, which is liable severally to the initial bank.[53]

The same rule has been applied in New York to express companies, and it has been held that where a note delivered to an express company for collection at a place beyond its line is turned over by it to another express company, the latter company becomes the agent of the former, and the first company is liable for the negligence of such agent, and for its noncompliance with instructions accompanying the note.[54] This holding is based on the theory that a contract to carry, and not a contract to forward, arises where a note is de-

Y. 122, 42 N. E. 518; Kirkham v. Bank of America, 26 App. Div. 110, 49 N. Y. Supp. 767, affirmed in 165 N. Y. 132, 58 N. E. 753.

In an early case (1847) decided by the circuit judge of the then New York circuit, it was held that a bank sending paper, payable at a distance, to a collecting agency at the place of payment, was not liable for its defaults. Escharte v. Clark, 2 Edm. Sel. Cas. (N. Y.) 445.

[53] Montgomery County Bank v. Albany City Bank, 7 N. Y. 459, 464, affirming 8 Barb. 396. The objection that defendants are not jointly liable may be taken at the trial. Id.

[54] Palmer v. Holland, 51 N. Y. 416, 10 Am. Rep. 616. In this case the owner of the note did not know, at the time the note was delivered to the first company, that its line did not extend to the place where the note was payable.

livered to an express company with directions to take it to the place of the maker's residence and present it, and to sue and collect it in case of nonpayment.[55] The analogy between this contract to "carry" and a bank's contract to "collect" is apparent.

§ 89. New Jersey.

The New Jersey court of errors and appeals, in adopting the English and New York rule that the initial bank is liable for the defaults and mistakes of its chosen correspondents, states that the rule is no hardship on the bank, as it can always look to its correspondent bank, to which transmission is made, for indemnification from its neglect.[56] In this case, the court, in commenting on the contrary position of the Massachusetts court,[57] states: "The decisions in Massachusetts, which our courts are accustomed to respect, are much weakened by the fact that in the first case reliance was had upon the decision of the supreme court of New York in Allen v. Merchants' Bank, which was afterwards reversed in the court of errors,[58] and on the misapprehension that it was the opinion of the supreme court of the United States in Bank of Washington v. Triplett.[59]

§ 90. Ohio.

When the supreme court of Ohio came to the parting

[55] Palmer v. Holland, 51 N. Y. 416, 10 Am. Rep. 616.
[56] Titus v. Mechanics' Nat. Bank, 35 N. J. Law, 588.
[57] See post, § 99.
[58] See ante, § 88.
[59] See ante, § 87.

of the ways, it deliberately chose to follow the path marked out by the English and the New York courts. Its decision is consequently that the correspondent bank is the agent of the transmitting bank, and not a subagent of the owner.[60] The later decisions in the same state are strictly in harmony with this first decision.[61]

§ 91. Georgia.

In the first and leading case in Georgia, the supreme court of that state, in adopting the rule that the initial bank is liable for the defaults of its correspondents, bases its decision on the general rules of agency, and states that, "in the selection of the correspondent, the customer for whom the collection is to be made is not consulted. As a rule, he does not know the name or the financial standing of the correspondent, and it is not contemplated that they shall have any communication with each other."[62] The court in this case also states that the doctrine that the initial bank is responsible for the acts of its subagents is not only in accord with the principles of agency, but with considerations affecting the general welfare of the commercial community.

§ 92. Michigan.

The supreme court of Michigan has expressed its opinion on this question in no uncertain language. In

[60] Reeves v. State Bank, 8 Ohio St. 465.

[61] First Nat. Bank of Cincinnati v. Moore (Ohio) 8 Am. Law Rec. 97, 4 Wkly. Law Bul. 291; Young v. Noble's Ex'rs, 2 Disn. (Ohio) 485.

[62] Bailie v. Augusta Sav. Bank, 95 Ga. 277, 21 S. E. 717.

the leading Michigan case the court says: "As long as banks and bankers or other persons hold themselves out to collect such bills or drafts for a compensation, or their advantage, they ought to be governed by the same rules of law that apply to other persons, and if they wish to avoid responsibility, it is very easy for them to accept such business only on a special agreement as to their duties and liabilities. Failing to do this, I think they must, in taking such bills or drafts, be responsible, as other business men are, for the misconduct of their selected agents at home or abroad."[63]

The court thus refuses to recognize any distinction between the duty and liability of the bank in case the paper is payable in the place where it does business or at a distance, and its further reasoning is as follows: "The learned jurists holding otherwise all admit that, if a person intrusts 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 employes. I cannot see why any different rule should prevail in the collection of a foreign bill. It is, in every case that I have examined, sought to be maintained upon the theory that the customer knows the bank must act through some other person or persons at a distance, and therefore impliedly, from the very nature of the course of business, assents to the employment of such persons, and makes them his agents. This reasoning does not strike me as sound. If I leave an indorsed note against persons in my own town for collection,

[63] Simpson v. Waldby, 63 Mich. 439, 30 N. W. 199.

and consequent demand and protest, I know that some agent or employe of the bank will do the work, or some part of it, and I do not know or inquire who will do it. I contract, however, with the bank that suitable agents will be employed, and hold it responsible for their acts. The law authorizes me to do this. If I intrust the same bank with the collection of a foreign draft, I also know that it will employ some agent or correspondent abroad, of their selection, not mine, of whom I know nothing, and with whom they are supposed to have business relations. I do not inquire whom they are to select. I presume, and have a right to presume, that they have business knowledge of such agent or agents, which I do not and cannot possess, by the very course of their dealings as bankers. In each case the bank holds itself out, for a consideration, to collect my paper, and it can make no difference whether the compensation is great or small. In each case it selects its own agents in the premises. In each case I have no part in or control over such selection. In each case there is no privity between the party selected and myself. I fail to perceive why, in the one case more than the other, I adopt the immediate party collecting or protesting the bill as my agent. I cannot find any good reason for making this particular case of the collection of a foreign bill an exception to the general rule of agency."[64]

§ 93. Minnesota.

The Minnesota supreme court employs similar reasoning, and, among other things, says: "The plaintiffs had no voice in the selection of appellant's agent or correspondent, and it is difficult to see why banks and bank-

[64] Simpson v. Waldby, 63 Mich. 451, 30 N. W. 199, 205.

ing houses should be exempt from the application of a cardinal and well-established principle of law that every person is liable for the acts of such agents as may be appointed or designated by him to transact such business as he has undertaken to perform for others. The appellant, having undertaken the collection of the paper, stands in the attitude of an independent contractor, who, having unrestrained liberty so to do, has designated a subagent, and is therefore answerable for his neglect, failure, or default."[65]

§ 94. Montana.

The supreme court of Montana, after a very thorough discussion of all the cases, holds that, "in the absence of a special contract, a bank is absolutely liable for any laches, negligence, or default of its correspondent, whereby the holder of negotiable paper suffers loss;" and states that "banks can easily avoid the effects of this stringent rule by making special contracts in special cases, or declining to undertake collections at points where they have any fears as to the reliability or solvency of the agents whom they will be obliged to employ."[66]

§ 95. North Dakota.

In North Dakota, the relation of the parties is determined in a recent case (1899) holding that, where notes are indorsed to a bank for collection, and the bank forwards them to a bank in another city for collection,

[65] Streissguth v. National German-American Bank, 43 Minn. 50, 44 N. W. 797.

[66] Power v. First Nat. Bank of Fort Benton, 6 Mont. 251, 270.

the latter bank becomes the agent of the former, as between them, and is also a subagent of the payees of the notes.[67] As to the liability of the parties, the court, after mentioning the conflict of authorities, says: "But in this state the controversy has been set at rest by section 4133 of the Revised Codes, which is as follows: 'A mere agent of an agent is not responsible as such to the principal of the latter.' Applying this rule to the case at bar, the defendant (correspondent bank) is not legally responsible to E. P. R. & Co. [the payees], who own the notes in question, and who are the principals of the plaintiff. The owners of the notes have no contractual relations with the defendant. They dealt solely with the plaintiff [initial bank], and, under the rule of law which obtains in New York and in this state, they are required only to look to the plaintiff for redress or damages for any acts of negligence to their detriment, done either by the plaintiff or by agents appointed by the plaintiff."[68] The court then states that, as a necessary corollary, the initial bank may compel the correspondent bank to respond in damages to it for any negligence of the latter bank for which the former must respond to the owners.[69]

§ 96. South Dakota.

South Dakota has fallen into line in a decision that, where a note payable at a bank is sent to that bank for

[67] Commercial Bank v. Red River Valley Nat. Bank, 8 N. D. 382, 79 N. W. 859.

[68] Commercial Bank v. Red River Valley Nat. Bank, 8 N. D. 382, 79 N. W. 859.

[69] See post, § 120.

collection, without special instructions, but indorsed for collection and remittance, the bank has no implied authority to employ another bank in another city to make the collection, and one so employed is the agent of the bank, and not of the owner, so that a payment to the second bank is not a payment to the owner.[70] It will be seen, however, that in this case the note was sent for collection to the bank where it was payable, and that it is this bank which is denied the right to employ a subagent for the owner, or, as the court expresses it, to "delegate its powers."

§ 97. Colorado.

The question has not yet been squarely presented to the courts of Colorado, but the supreme court of that state, in deciding that a bank primarily liable on the paper is not a suitable subagent for its collection, seems to intimate that if the question had been fairly presented it would have held the transmitting bank liable for the defaults of its chosen correspondent, for it says: "Even if we were to follow the rule that the collecting bank could relieve itself from liability by sending the paper in due season to a suitable agent, with proper instructions, we feel constrained to hold" that the agent must be some one other than the party who is to make payment.[71]

§ 98. Texas.

In the first Texas case passing on the question the

[70] Sherman v. Port Huron Engine & Thresher Co., 8 S. D. 343, 66 N. W. 1077.

[71] German Nat. Bank of Denver v Burns, 12 Colo. 539, 544.

court of civil appeals adopts the theory that the initial bank is liable for the defaults of all its correspondents and agents.[72] Strictly in harmony with this decision is a later one by the same court, that where a note is deposited in a bank to be collected at a distant point, where such bank has no regular agent or correspondent, and it transmits the note to a bank at such place for collection and remittance, in the absence of special agreement or binding custom, the second bank is the agent of the first, and not of the owner, and that the first is responsible to the owner for the defaults of the second.[73]

§ 99. Massachusetts.

The first Massachusetts case passing directly on the question is Fabens v. Mercantile Bank,[74] which is usually considered as the leading case for the doctrine that the initial bank is not liable for the defaults of its correspondent, if it used due care in selecting the correspondent. The decision is very concise, and states that, "when a note is deposited with a bank for collection, which is payable at 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

[72] State Nat. Bank of Ft. Worth v. Thomas Mfg. Co., 17 Tex. Civ. App. 214, 42 S. W. 1016, citing Exchange Nat. Bank of Pittsburgh v. Third Nat. Bank of New York, 112 U. S. 276, 5 Sup. Ct. Rep. 141.

[73] Schumacher v. Trent, 18 Tex. Civ. App. 17, 44 S. W. 460.

[74] 23 Pick. (Mass.) 330. See criticism of this decision by supreme court of New Jersey, ante, § 89.

of the same doctrine, it is well settled that, if the acceptor of a bill or promisor of a note has his residence in another place, it shall be presumed to have been intended and understood 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." This rule has been since consistently followed in Massachusetts,[75] and, as we shall see, in many of the other states.

§ 100. Connecticut.

In Connecticut, the question arose in a case where the initial collecting bank had indorsed the bill in blank, and forwarded it for collection to another bank, which also indorsed it in blank for collection to a bank at the place of payment. The money was paid to the last bank, and the owners of the bill sued it for money had and received for their use. Recovery was allowed on the ground that "all the indorsees were merely agents of the plaintiffs for the collection and transmission of their money."[76]

Later, in East Haddam Bank v. Scovil,[77] the question of liability or nonliability of the initial collecting bank for the defaults of its correspondent was squarely presented, and the court, after stating that the bill was payable in a city other than the city where the initial

[75] Dorchester and Milton Bank v. New England Bank, 1 Cush. (Mass.) 177; Warren Bank v. Suffolk Bank, 10 Cush. (Mass.) 582 (default of notary).

[76] Lawrence v. Stonington Bank, 6 Conn. 521, 527.

[77] 12 Conn. 303, 314.

bank did its business, says: "Under such circumstances, it cannot justly be claimed that the plaintiffs [initial bank] should have become insurers against the defaults of their correspondents. Such a doctrine would be as inequitable as it might be oppressive and ruinous to banks who are merely the medium through which the holders of bills and drafts, payable in other states, transmit them for collection. If they act in good faith in the selection of an agent to protect the interests of the holder of the bill, in cases where it is obvious an agent must be selected for such purpose, what principle of justice or commercial policy requires that they should be held liable for any neglect of duty on the part of such agent? To impose this liability would make a special contract excluding it necessary in all cases; or it would render the collection of bills of this description extremely difficult."

§ 101. Pennsylvania.

Pennsylvania can hardly be said to sanction the broad rule that the transmitting bank is liable for the acts and defaults of its chosen correspondents. The first case, Mechanics' Bank v. Earp,[78] held the initial bank not liable for the default of its correspondent at the place of payment, because the owner gave specific instructions as to the manner of presentment at the place of payment at the time of the initial delivery for collection, and that, consequently, the contract was merely to "transmit," and not to "collect."

[78] 4 Rawle (Pa.) 384. See, also, Bellemire v. Bank of United States, 4 Whart. (Pa.) 104.

Later decisions in Pennsylvania are to the effect that a bank receiving commercial paper for "transmission" only is not liable for the defaults of its correspondent if it exercised due care in the selection of such correspondent; otherwise, if it accepted the paper for "collection;"[79] and that a receipt "for collection" shows an undertaking to collect, and not a mere undertaking to remit for collection to some other person or bank, and hence a collection agency giving such a receipt is liable for the default of its selected agent, to whom it remitted the paper for collection.[80]

In a still later Pennsylvania case, a collection agency was held liable for the misconduct of an attorney into whose hands it placed the claim; but it appeared from the receipt given that the claim was "to be forwarded by us for collection by suit or otherwise, at our discretion," and in the margin of the receipt were the words: "Collections made in all parts of the United States and Canada."[81]

It will thus be seen that the supreme court of Pennsylvania practically requires a special express contract to "collect" as the foundation of any decision that the transmitting bank or agency is liable for defaults of its

[79] Wingate v. Mechanics' Bank, 10 Pa. St. 104. The court in this case takes pains to show the conformity of its decision to that in Mechanics' Bank v. Earp, 4 Rawle (Pa.) 384.

[80] Bradstreet v. Everson, 72 Pa. St. 124, 13 Am. Rep. 665.

[81] Morgan v. Tener, 83 Pa. St. 305.

In the case of Siner v. Stearne, 155 Pa. St. 62, the same court, following Bradstreet v. Everson, 72 Pa. St. 124, 13 Am. Rep. 665, and Morgan v. Tener, 83 Pa. St. 305, holds that a collecting agency which undertook the actual "collection" of the claim was responsible for the negligence of an attorney employed by it.

correspondent, and holds, in effect, that, in the absence of such special contract, the only duty of the initial bank is to transmit to a suitable correspondent. This interpretation of the Pennsylvania cases is expressly recognized by a statement in the case of Merchants' National Bank v. Goodman,[82] to the effect that: "In our state, the principle has, in several instances, been maintained that a collecting bank is an agent for transmission to a subagent to collect, and when this is properly done, its duty is performed, and its responsibility is at an end," and by dicta in the same case to the same effect.

§ 102. Maryland.

The supreme court of Maryland refuses to sanction the doctrine that, in the absence of a special agreement or of special instructions, a bank receiving paper for collection thereby undertakes to do all that is proper and necessary to effect the collection, but adopts the doctrine that, if it selects a suitable subagent, it performs its whole undertaking.[83]

§ 103. North Carolina.

The supreme court of North Carolina follows the opinions and the wording of the Massachusetts decisions, and consequently holds that a subagent must

[82] 109 Pa. St. 422, 427.

[83] Citizens' Bank of Baltimore v. Howell, 8 Md. 530. The exact point in the case was, however, as to the liability of the bank for the default of a notary. See, also, Jackson v. Union Bank, 6 Har. & J. (Md.) 146, where nonliability of the initial bank was based on proof of local custom.

necessarily be employed from the very nature of the undertaking, and that the assent of the owner of the paper must necessarily be implied, and hence, if the initial bank uses due care in the selection of a correspondent, it is not liable for its defaults.[84]

§ 104. Indiana.

The Indiana cases have been usually cited as holding the initial bank liable for the defaults of its correspondents, but they will not bear such an interpretation.

The case of Tyson v. State Bank of Indiana[85] was an action against a bank for the negligence of one of its branches, and consequently the negligence of the bank itself, for a failure to present a bill either for acceptance or payment, whereby all remedy on the bill was lost. The opinion proceeds entirely on the theory that there is only one bank in the case, and the decision is that the bank, "having undertaken, for a reasonable reward, to collect the plaintiff's debt, placed itself in the position of an agent or attorney, who, for reward, undertakes to perform services for another in the line of his business or profession. He is bound to a faithful discharge of his duty, and is responsible to his employer for all damages arising from his neglect."

The case of American Express Co. v. Haire,[86] the

[84] Planters' & Farmers' Nat. Bank of Baltimore v. First Nat. Bank of Wilmington, 75 N. C. 534.

[85] 6 Blackf. (Ind.) 225.

[86] 21 Ind. 4.

For liability of collecting attorney in Indiana, see Abbott v. Smith, 4 Ind. 452.

other Indiana case supposed to hold that the initial collecting bank is liable for the defaults of its correspondents or other agents, is not at all in point. In the first place, the collecting medium was an express company, and not a bank, and, in the second place, the exact holding was that the express company was liable to the owner for its own negligence in not delivering the bill to a notary at the proper time, i. e., in delivering it to the notary for demand and protest one day before demand and protest could be properly made, thereby misleading the notary into taking such steps prematurely, and discharging the drawer and the indorsers.

The first and leading Indiana case which passes directly on the question is Irwin v. Reeves Pulley Company,[87] and the court there adopts the doctrine that the initial bank is not liable for the defaults of its correspondent, and discharges its full duty if it exercises reasonable skill and care in the selection of its correspondent; on the theory, adopted generally in this class of decisions, that the owner impliedly consents to the employment of subagents to make the collection at the place of payment.

§ 105. Illinois.

The courts of Illinois have consistently held, from the time when the first case involving the point came up for decision, that where paper payable at a distance or drawn on nonresidents is deposited for collection

[87] 20 Ind. App. 101, 48 N. E. 601, 603, 50 N. E. 317, distinguishing Tyson v. State Bank, 6 Blackf. (Ind.) 225, and American Express Co. v. Haire, 21 Ind. 4.

with a local bank, such bank fully discharges its duty by transmitting the paper in due season to a suitable bank or agent at the place of payment, with proper instructions, and is not liable for loss occasioned by negligence or default of the agent so employed; on the ground that, by depositing paper so payable, the owner impliedly consents to the employment of a subagent at the place of payment, and hence the latter is the agent of the owner, and not of the transmitting bank.[88]

§ 106. Wisconsin.

In Wisconsin, a case arose where, in view of the fact that there was no bank at the place of payment, the transmitting bank sent the paper to an express company at such place. The court held that "the contract implied by the reception of the note against a party residing at a distance from its place of business was not absolutely to make due presentment and give due notice, but to place the note in the hands of some competent and responsible agent doing business at the residence of the maker, and that, having done this, it is itself discharged from liability."[89]

§ 107. Iowa.

In Iowa, the question was settled in the case of Gue-

[88] Waterloo Milling Co. v. Kuenster, 158 Ill. 259, 41 N. E. 906, 29 L. R. A. 794, affirming 58 Ill. App. 61; Drovers' Nat. Bank v. Anglo-American Packing & Provision Co., 117 Ill. 100, affirming 18 Ill. App. 191; Fay v. Strawn, 32 Ill. 295; Aetna Ins. Co. v. Alton City Bank, 25 Ill. 243, 247, 79 Am. Dec. 328; Anderson v. Alton Nat. Bank, 59 Ill. App. 587, 591; Carlinville Nat. Bank v. Wilson, 78 Ill. App. 339, affirmed in 58 N. E. 250.

[89] Stacy v. Dane County Bank, 12 Wis. 629, 634.

lich v. National State Bank,[90] where the court said, as to the liability of collecting banks for the defaults of correspondents: "They do not undertake themselves to collect the bills, but to intrust them to other banks at the place payment is to be made. The holder of the paper, having full notice of the course of business, must be held to assent thereto. He therefore authorizes the bank with whom he deals to do the work of collection through another bank."

§ 108. Kansas.

The position of the Kansas courts is parallel to that of the Pennsylvania courts. On the strength of an erroneous interpretation of the case of Bank of Linsborg v. Ober,[91] Kansas has heretofore been enumerated as one of the states in which it is held broadly that the initial collecting bank is not liable for the defaults of its selected correspondent. But, though its tendency is in that direction, an examination of that case will show that the question of the liability of the initial bank was not before the court, for the opinion states: "Whether the First National Bank of Selina [the initial bank] or John McPhail [an incompetent notary employed by the correspondent bank] is liable or not are questions not necessary to be determined in this case, as the case is now presented to this court. The only question necessary to be determined by this court is whether the Bank of Linsborg [correspondent bank] is liable or not." The court then expressly bases its

[90] 56 Iowa, 434, 9 N. W. 328, distinguishing Hoover v. Wise, 91 U. S. 308.

[91] 31 Kan. 599, 3 Pac. 324.

decision that such correspondent is liable directly to the owner of the paper on a specific finding of the court below, and its own finding that the note was delivered to the initial bank "with the understanding that the note would be forwarded by such bank to the Bank of Linsborg for collection." Such findings, however, were based on evidence of general custom, and of a special course of dealing between the owner and the banks involved.

A recent case decided by the Kansas court of appeals places this interpretation on the case just considered, and itself holds that a bank actually undertaking to "collect" paper assumes the same liability as an attorney at law does under the same circumstances; and undertakes to actually "collect," and not merely to remit for collection to another responsible bank.[92] This decision, the court states, is in harmony with that of Bank of Linsborg v. Ober, for each holds that "the agent of the owner is liable to the owner for acts of subagents selected by the said agent upon his own responsibility."

§ 109. Nebraska.

The rule in Nebraska is that, where a bank receives for collection a note or bill payable at a distant point, with the understanding that such collection is an accommodation only, or that it shall receive no compensation therefor beyond the customary exchange, and it transmits such paper to a reputable and suitable correspondent at the place of payment, with proper in-

[92] First Nat. Bank of Girard v. Craig, 3 Kan. App. 166, 42 Pac. 830.

structions for the collection and remittance of the proceeds, it will not be liable for the defaults of its correspondent.[93] In such case, the holder will be held to have assented to the employment in his behalf of such agents as are usually selected by banks in the course of business in making collections through correspondents, and the correspondent so selected will, in the absence of negligence by the intermediate agents and servants of the transmitting bank, become the agent of the holder only.[94]

§ 110. Missouri.

In the first Missouri case directly involving the point in issue, the court decides to follow what it considers the weight of the authorities, and holds that, "where the bank with which the bill or draft is placed or deposited for collection uses due diligence and transmits the paper to a proper correspondent for collection, with proper instructions for the collection of the same, its responsibility is at an end, unless by some after act it makes itself responsible."[95]

§ 111. Kentucky.

The court of appeals of Kentucky also adopts the doctrine that, where paper payable at a distance is depos-

[93] First Nat. Bank of Pawnee City v. Sprague, 34 Neb. 318, 51 N. W. 846.

[94] First Nat. Bank of Pawnee City v. Sprague, 34 Neb. 318, 51 N. W. 846.

[95] Daly v. Butchers' & Drovers' Bank of St. Louis, 56 Mo. 94. To same effect is American Exchange Nat. Bank of Lincoln v. Metropolitan Nat. Bank of Kansas City, 71 Mo. App. 451.

ited in a bank for collection, the owner "must know the bank cannot send one of its officers or agents to such point to make the collection. He is presumed to know the method employed by banks in making such collections. He knows that the bank must select some other bank or agency to aid in accomplishing the undertaking imposed on it. He has made the bank his agent for that purpose. He has employed the bank to do, through its method of making collection, that which would cost him much time and money to do himself. When he so engages the bank, and makes it his agent to make the collection, he does so with the implied understanding that the bank will follow the customary method in making such collections, which necessitates the selection of agents or correspondents at other points to carry out the undertaking, and the bank can only be held responsible for the exercise of due care and diligence in making such selection."[96]

§ 112. Tennessee.

The supreme court of Tennessee, in the first case that arose in that state involving this question, reviewed briefly the conflicting authorities, and adopted, as the more just and equitable rule, the doctrine that a bank receiving for collection paper payable at a distance performs its full duty by transmitting the paper in due season to a suitable and reputable bank or other agent at the place of payment, and that in such case it is manifest that a subagent must be employed, and therefore the owner impliedly consents to the employment

[96] Farmers' Bank & Trust Co. v. Newland, 97 Ky. 464, 31 S. W. 38.

of such subagent.[97] The same court again affirms the same doctrine in Bank v. Cummings,[98] where the court reiterates that the correspondent or agent at the place of payment is the agent of the owner of the paper, and not of the transmitting bank, and that the liability of the latter is limited to its own negligence.

The same doctrine is again announced and prior cases followed in the recent case of Givan v. Bank of Alexandria.[99] In view of this uniformity of decision, there can be no doubt as to the position of the courts of Tennessee on this disputed question.

§ 113. Alabama.

The question whether one delivering paper to a bank for collection at a remote place impliedly authorizes the bank to appoint a subagent at that place has not yet been judicially determined in Alabama; but the supreme court of that state has decided that, even if it be admitted that such is the rule in that state, the rule does not apply where a draft sent by the initial bank to a bank at the place of payment was payable "on arrival of car" of merchandise, to the order of the cashier of the initial bank, and was indorsed by it for collection on its own account, and the sale of the merchandise was rescinded for good cause by the drawee of the draft (the purchaser of the goods) after he had paid the amount of the draft to the correspondent bank, and before remittance of the amount to the initial bank;

[97] Bank of Louisville v. First Nat. Bank of Knoxville, 8 Baxt. (Tenn.) 101, 35 Am. Rep. 691.

[98] 89 Tenn. 609, 618.

[99] (Tenn. Ch., 1898) 52 S. W. 923.

since, in such case, the rescission related back to the time of the sale, and by relation "the plaintiff [drawee] was deemed owner of the money at the moment it was paid. It was paid in mistake of fact, and its receipt was possessed of the same attributes as the receipt of money equitably belonging to the plaintiff under any other circumstances."[100]

§ 114. Mississippi.

The supreme court of Mississippi, in Third National Bank v. Vicksburg Bank,[101] determines that its prior decisions as to the liability of a collecting bank for the default of a notary[102] control, and that, consequently, a bank receiving paper for collection is not liable for the defaults of correspondent banks, if it has used due care in their selection. To this decision, however, Chief Justice Campbell dissents strongly, both on principle, and because he considers that the prior Mississippi cases are not authority on the point in issue.

§ 115. Louisiana.

The supreme court of Louisiana adopts the rule that the power to appoint a subagent "is implied whenever the principal knows that the mandatary will necessarily be obliged to act by a substitute. The plaintiffs knew that the bank could not go personally to Natchez [place of payment], nor send its cashier there, because his absence would have been extremely inconvenient to them,

[100] Eufaula Grocery Co. v. Missouri Nat. Bank, 118 Ala. 408, 24 So. 389.

[101] 61 Miss. 112.

[102] See ante, § 81.

and his traveling expenses burthensome to plaintiffs; so that they could not expect that the defendants would resort to any other than the ordinary mode of collection, to wit, the agency of a bank at the place of payment."[103] The court also states that it was not the duty of the bank to decline the handling of the paper, nor to notify plaintiffs that they forwarded it to a bank at the place of payment at plaintiffs' risk. But the same court holds the collecting bank liable for failure to select a "prudent and reliable subagent," and so holds a bank receiving lottery tickets as pledgee and for collection liable for overcharges made by its correspondent by way of commissions for collecting.[104]

§ 116. Conclusions from the decisions.

As pointed out in discussing the analogous question of the liability of the bank for the acts or defaults of a notary employed by it, the conflict of authorities arises primarily from a difference of opinion as to the exact relation between the collecting bank and its customer. The bailment theory of the relation, applied there as well as elsewhere in this work, when applied here, makes the bank liable for the acts or defaults of its selected correspondents. It is believed, also, that a proper application of the doctrines of agency results in holding the bank liable for such acts and defaults. It is only by a careful avoidance of the rules of agency forbidding the delegation of power in respect to an undertaking

[103] Hum v. Union Bank, 4 Rob. (La.) 109.

[104] Masich v. Citizens' Bank, 34 La. Ann. 1207. See, also, ante, § 77.

involving confidential services,[105] and the rules making an agent personally liable for the acts of any subagents appointed by him,[106] and by the unwarranted injection into the relation of an implied agreement on the part of the depositor in the case of paper payable at a distance, that the bank may employ entire strangers to him, whose acts he cannot control, as his agents, and by the adoption of the legal quibble that a bank receiving paper for collection does not really undertake to "collect," but merely undertakes to find some other suitable person or bank to do the collecting, that the theory of the nonliability of the initial collecting bank for the defaults of its correspondents has been evolved. It is difficult to see why, if the agency theory is adopted, the collecting bank should be made an exception to some of the cardinal rules of agency.

Some of the courts holding the nonliability theory seem to be influenced by the smallness of the consideration received by the initial bank; but this is a matter which is certainly within its power to remedy.

Each side claims that its position is supported by considerations affecting the stability of banking and general commercial business, and the general welfare of the business world; but it is believed that a policy

[105] Mechem, Agency, § 185. But see the same work, section 195, subd. 3, where the author intimates that a collecting bank may be authorized by custom and usage to appoint a subagent for the owner in case of paper payable at a distance, and thus delegate its power to collect. Story, Agency (9th Ed.) §§ 14-16, 29, 34, 108. The same author, in section 514, treats the question of the liability of the collecting bank, but merely gives the conflicting authorities, and does not decide which is the better rule.

[106] Mechem, Agency, § 197; Story, Agency (9th Ed.) §§ 217a, 231a.

which holds the initial collecting bank to a strict accountability can in no way prejudice any of such interests. Such a policy is certainly in keeping with a careful administration of the business of banks, who hold themselves out to the public as mediums for the speedy and safe collection of paper payable in any part of the country.

Mr. Daniel, in his work on Negotiable Instruments, takes the view that the initial bank is liable for any laches or negligence whereby the holder of the paper suffers loss, stating that "any other rule opens the door to carelessness in the conduct of banking business, which should be conducted with every safeguard to the customer who intrusts his interests to the keeping of such agents. If they are averse to dealing with distant and unknown parties, they should decline undertaking the collection or handling of the paper, and, if they assume it, they should do so for a sufficient compensation, and be held responsible."[107]

Then, too, the remedy over against the correspondent bank, which the law allows to the initial bank,[108] affords the latter bank ample protection in most cases, and takes away all appearance of harshness from the rule holding the initial bank liable.

As the result, therefore, of an impartial consideration of all the authorities and the reasoning on which they are based, we have no hesitation in adopting the rule holding the initial bank liable for the defaults of

[107] Daniel, Neg. Inst. (3d Ed.) § 342.

Mr. Morse, in his work on Banks and Banking (3d Ed. §§ 275, 276) takes the opposite view.

[108] See post, § 120.

its selected correspondents, as the one more in harmony with the strict legal relation of the parties, and with the interests of the business world.

§ 117. Effect of special agreements.

Any special express agreement forming part of the original contract for collection, and negativing any liability for the defaults of correspondents, will control the rights and liabilities of the parties as to that matter.[109] In fact, we have seen that this is the ruling principle in the Pennsylvania and Kansas cases considered above, and is pretty generally recognized in all the cases bearing on the matter. That there is an implied agreement negativing such liability where the initial bank uses diligence in selecting a correspondent is, as we have seen, the peculiar doctrine of those cases only which deny liability where such diligence has been used.

§ 118. Effect of custom.

In some jurisdictions, it has been held that the doctrine that a bank undertaking the collection of paper payable in another place is liable for the defaults of its selected agents or correspondents may be modified or negatived by proof of a custom and usage to the contrary.[110] But in order that proof of custom among

[109] Allen v. Merchants' Bank, 22 Wend. (N. Y.) 215, 236; Power v. First Nat. Bank of Fort Benton, 6 Mont. 251; Exchange Nat. of Pittsburgh v. Third Nat. Bank of New York, 112 U. S. 276; Simpson v. Waldby, 63 Mich. 451, 30 N. W. 199, 205.

[110] Allen v. Merchants' Bank of New York, 22 Wend. (N. Y.) 215, 236; Schumacher v. Trent, 18 Tex. Civ. App. 17, 44 S. W. 460. See, also, Jackson v. Union Bank, 6 Har. & J. (Md.) 146; Bank of

bankers may overthrow the general rule, the proof must show a usage so uniform and general as to raise a presumption that it was known to all persons dealing with banks.[111] Such a custom cannot be proved by the mere opinions of merchants.[112]

As to express companies, it has been held that where it was the custom of the receiving company to deliver demands for collection at places beyond its line to a connecting express company, with which it had no general business arrangements or agreements except that, in case of collections, the connecting company reported to the general agent of the receiving company, and followed his directions, such custom is evidence of an agreement by the receiving company to treat a note received for collection according to its established custom, though it does not, as a matter of law, impose on the receiving company any obligation with regard to the collection of the note after its delivery to the connecting company.[113]

§ 119. Effect of insolvency of correspondent.

In those cases which assert the liability of the initial bank for the defaults of its correspondent, the insolvency of the correspondent bank after having made the collection does not relieve the initial bank from liabil-

Linsborg v. Ober, 31 Kan. 599, 3 Pac. 324; Fabens v. Mercantile Bank, 23 Pick. (Mass.) 330.

111 Schumacher v. Trent, 18 Tex. Civ. App. 17, 44 S. W. 460.

112 Allen v. Merchants' Bank of New York, 22 Wend. (N. Y.) 215.

113 Knapp v. United States & Canada Exp. Co., 55 N. H. 348.

ity.[114] Indeed, in many of those cases the insolvency of the correspondent was the default complained of.[115]

§ 120. Liability of correspondent bank to initial bank.

It is a necessary corollary to the rule holding the initial bank liable for the default of its correspondent that it have a remedy over against such correspondent.[116] The correspondent bank is therefore liable to the transmitting bank for the negligence of an agent of the correspondent bank, in failing to properly charge the drawer and indorsers.[117] It is also liable to the initial bank for failing to notify it of important facts affecting the collection, from want of which knowledge the initial bank paid the paper, and sustained loss.[118]

[114] Saint Nicholas Bank v. State Nat. Bank, 128 N. Y. 26; Reeves v. State Bank, 8 Ohio St. 465; Simpson v. Waldby, 63 Mich. 439, 30 N. W. 199; Williamsport Gas. Co. v. Pinkerton, 95 Pa. St. 62; First Nat. Bank of Omaha v. First Nat. Bank of Moline, 55 Neb. 303, 75 N. W. 843, citing Story, Agency (9th Ed.) p. 274, § 231a, and Taber v. Perrot, 2 Gall. 565, Fed. Cas. No. 13,721.

[115] See cases cited in notes 49 to 73, supra.

[116] Commercial Bank v. Red River Valley Nat. Bank, 8 N. D. 382, 79 N. W. 859; Commercial Bank of Pennsylvania v. Union Bank of New York, 11 N. Y. 203, affirming 19 Barb. 391; Ayrault v. Pacific Bank, 47 N. Y. 570; Montgomery County Bank v. Albany City Bank, 7 N. Y. 459; Mound City Paint & Color Co. v. Commercial Nat. Bank, 4 Utah, 353, 9 Pac. 709; Simpson v. Waldby, 63 Mich. 439, 30 N. W. 199; Streissguth v. National German-American Bank, 43 Minn. 50, 44 N. W. 797; Exchange Nat. Bank of Pittsburgh v. Third Nat. Bank of New York, 112 U. S. 276, 5 Sup. Ct. 141; Titus v. Mechanics' Nat. Bank, 35 N. J. Law, 588.

[117] Commercial Bank of Pennsylvania v. Union Bank of New York, 11 N. Y. 203, affirming 19 Barb. 391; Commercial Bank v. Red River Valley Nat. Bank, 8 N. D. 382, 79 N. W. 859.

[118] Merchants' & Manufacturers' Bank v. Stafford Nat. Bank, 44 Conn. 564, Fed. Cas. No. 9,438.

The initial collecting bank may recover from its correspondent the amount of paper sent for collection with explicit instructions to protect and return it if not paid at maturity, where the cashier of the defendant bank by fraud and collusion with the obligor on the paper had allowed it to accumulate, unpaid, without protest or notice, and without entering the items on the books of the bank, or informing the directors of its possession; the initial bank having had no knowledge of the facts constituting the fraud, and having paid to other banks the amount of the paper.[119]

The negligence of the correspondent, and its consequent liability to the initial bank, may be waived or released by acts which would discharge the initial bank from liability. But where the drawee was insolvent, and the drawer, after receiving notice of dishonor from the initial collecting bank, paid the amount of the draft to that bank in ignorance of the fact that a correspondent bank had been guilty of negligence in failing to collect the draft, such payment, having been made under a mistake entitling the drawer to a return of the money, in no wise discharged or suspended the liability of the correspondent bank to the initial bank; and the latter bank may recover from the former for the use of the drawer, though the draft had not been returned to the defendant.[120]

[119] National Pahquioque Bank v. First Nat. Bank of Bethel, 36 Conn. 325.

[120] Merchants' Bank of Baltimore v. Bank of Commerce, 24 Md. 12, 52, citing Merryman v. State, 5 Har. & J. (Md.) 423, and Whiting v. Independent Mutual Ins. Co., 15 Md. 298.

CHAPTER VI.

COMPLETION OF COLLECTION AND REMITTANCE OF PROCEEDS.

§ 121. Collection complete on receipt of money and entry of absolute credit—Change of bank's status from bailee to debtor.
122. Collection not complete on mere credit in advance of collection.
123. —— Exceptions from estoppel or particular course of dealing.
124. Completion of collection by application of deposits to payment—Effect of failure to so apply deposits.
125. —— Withdrawal of deposit.
126. Effect of payment to correspondent bank.
127. How remittance made—Check, draft, or certificate of collecting bank.
128. Payment by mistake, and recovery of payments made by mistake.
129. —— Mistake as to solvency of obligor, or sufficiency of customer's deposits.
130. Voluntary payment by bank cannot be recovered back.

The collection is complete on receipt of the money and the entry of absolute credit therefor. It is not complete, however, on a mere credit in advance of actual collection; for such a credit may be canceled on nonpayment of the paper. The entry of a credit on receipt of a draft or check in payment, instead of money, does not amount to a collection until the check or draft is itself paid.

Exceptions to the above rules may arise from an estoppel of the bank by acts inconsistent with them, or from a particular course of dealing.

The collection may also become complete if the bank, under

definite instructions to that effect, applies and appropriates the deposits of the obligor to payment of the paper.

In those jurisdictions where the correspondent bank is held to be an agent of the initial bank only, a payment to the correspondent is a payment to the initial bank, which is thereafter chargeable for the amount as for a completed collection.

The bank need not remit the actual money collected unless so expressly instructed. The custom of remitting by check or draft is so universal that the courts take judicial notice of it. But the collection is not complete in such case until the paper sent in payment is itself paid.

Where a payment has been made by mistake, it may be recovered back if the owner will lose none of his rights thereby. But a mistake as to the solvency of the obligor, or the sufficiency of a customer's account, is not such a mistake as will authorize a recovery of payments made.

A voluntary payment by the collecting bank cannot be rerecovered.

§ 121. Collection complete on receipt of money and entry of absolute credit—Change of bank's status from bailee to debtor.

We have seen that the title to paper deposited for collection in the ordinary course of business remains in the depositor.[1] This is because the bank is a mere bailee, or, as some authorities designate it, an agent, for the depositor. But when the paper has been converted into cash, and this cash has been placed at the absolute disposal of the depositor, though still in the possession of the bank, a new relation arises.

The rule governing this new state of affairs is that the relation of bailor and bailee, or of principal and

[1] See ante, §§ 11-19.

agent, ceases, and that of creditor and debtor begins, when the money is collected and placed in the general fund of the bank, and absolute credit given therefor.[2] But the relation of debtor and creditor does not arise until after the collection has been actually made, and the bank is in actual possession of the proceeds.[3]

In some cases, as we shall see later,[4] the bank is held to the liabilities of a trustee from the mere facts of collection and credit, but the better authorities are nearly uniform in denying the right to charge the bank with any

[2] In re Bank of Madison, 5 Biss. 515, Fed. Cas. No. 890; Bank of Commerce v. Russell, 2 Dill. 215, Fed. Cas. No. 884; Balbach v. Frelinghuysen, 15 Fed. 675; First Nat. Bank of Richmond v. Wilmington & W. R. Co., 23 C. C. A. 200, 77 Fed. 401; Armstrong v. Commercial Bank of Pennsylvania, 148 U. S. 50, 13 Sup. Ct. 533; Beal v. National Exchange Bank of Dallas, 55 Fed. 894, affirming 50 Fed. 355; Marine Bank v. Fulton Bank, 2 Wall. (U. S.) 252, 17 L. Ed. 785; First Nat. Bank of Richmond v. Davis, 114 N. C. 343, 19 S. E. 280; Commercial & Farmers' Nat. Bank of Baltimore v. Davis, 115 N. C. 226, 20 S. E. 370; National Bank of Commerce of Seattle v. Johnson, 6 N. D. 180, 69 N. W. 49; Freeman's Nat. Bank v. National Tube-Works Co., 151 Mass. 413, 24 N. E. 779; Manufacturers' Nat. Bank v. Continental Bank, 148 Mass. 553, 20 N. E. 193; Pacific Bank v. Mitchell, 9 Metc. (Mass.) 297; Hallam v. Tillinghast, 19 Wash. 20, 52 Pac. 329; Union Nat. Bank v. Citizens' Bank of Union City, 153 Ind. 44, 54 N. E. 97; Gordon v. Rasines, 5 Misc. Rep. 192, 25 N. Y. Supp. 767.

The bank may become estopped to deny receipt of the money by wrongfully returning a draft given in payment by the drawee bank. Gregg v. Bi-Metallic Bank, 14 Colo. App. 251, 59 Pac. 852.

[3] Beal v. City of Somerville, 5 U. S. App. 14, 50 Fed. 649; Evansville Bank v. German-American Bank, 155 U. S. 556, 562, citing Sweeny v. Easter, 1 Wall. (U. S.) 166; White v. National Bank, 102 U. S. 658; Commercial Bank of Pennsylvania v. Armstrong, 148 U. S. 50; Beal v. National Exchange Bank of Dallas, 55 Fed. 894, affirming 50 Fed. 355.

[4] See post, § 146 et seq.

greater responsibility in such case than that of a simple debtor, even though the bank became insolvent before actual remittance.[5]

§ 122. Collection not complete on mere credit in advance of collection.

We have also seen that the mere entry of a credit on receipt of the paper is conditional upon ultimate payment, and may be canceled and the amount charged back in case of nonpayment.[6] It follows that a mere credit of the amount of the paper, in advance of collection, cannot operate to change the relation of bailor and bailee, or principal and agent, to that of creditor and debtor; in other words, such a credit is not equivalent to collection or payment.[7] So, the mere crediting by

[5] See post, § 146 et seq.

[6] See ante, § 15.

[7] Thompson v. Gloucester City Savings Inst. (N. J. Ch.) 8 Atl. 97; Boykin v. Bank of Fayetteville, 118 N. C. 566, 24 S. E. 357; National Bank of Commerce v. Manufacturers' & Traders' Bank, 122 N. Y. 367, 25 N. E. 355; National Park Bank v. Seaboard Bank, 114 N. Y. 28, 34, 20 N. E. 632, 11 Am. St. Rep. 612; National Bank of Commerce of Seattle v. Johnson, 6 N. D. 180, 69 N. W. 49; Armstrong v. National Bank of Boyertown, 90 Ky. 431, 437; Levi v. National Bank of Missouri, 5 Dill. 104, Fed. Cas. No. 8,289; Marine Bank v. Fulton Bank, 2 Wall. (U. S.) 252.

But a bank can make itself liable to the owner as debtor for the amount of a note deposited with it for collection, by giving credit to the depositor on his bank book, and suing, in its own name, the maker and his surety, having thus assumed property in the note. Wetherill v. Bank of Pennsylvania, 1 Miles (Pa.) 399.

The crediting in this case was made by mistake, and was afterwards erased and canceled by the bank, but the owner, before suit by the bank on the note, had notified it that he would hold it responsible for the amount of the note.

a collecting bank of the amount of a bill, at maturity, to the account of the holder, is not such a payment as will discharge an accommodation acceptor thereon; but the bank succeeds to the rights of the holder, and may recover against the acceptor.[8]

Paper taken in payment cannot take the place of cash, under the above rules, and, where a bank, holding notes for collection, accepted other notes of the maker payable to the bank, and credited the payee's account therewith, and surrendered the old notes, but no cash passed, and the account of the maker of the notes was not charged with their amount as money borrowed, there was no payment of the collection, and the owner of the surrendered notes may recover against the maker thereof.[9]

As the authority of the collecting bank to credit the owner with the proceeds is revoked by its failure and suspension, a credit entered after insolvency by an assignee or receiver cannot avail to change the relation of the parties to that of debtor and creditor.[10] For the same reason a transfer of a credit, from the drawer to the payee, of the amount of a check, made by the assignees of the bank, in advance of collection, is not a payment of the check.[11]

[8] Pacific Bank v. Mitchell, 9 Metc. (Mass.) 297, 302.

[9] Scott v. Gilkey, 153 Ill. 168, 39 N. E. 265.

Authority of bank to receive paper in payment, see ante, §§ 46-49.

[10] First Nat. Bank of Circleville v. Bank of Monroe, 33 Fed. 408; First Nat. Bank of Crown Point v. First Nat. Bank of Richmond, 76 Ind. 561, 40 Am. Rep. 261. See, also, Jockusch v. Towsey, 51 Tex. 129, and ante, § 32.

[11] Exchange Bank of Wheeling v. Sutton Bank, 78 Md. 577, 28 Atl. 563, 23 L. R. A. 173.

It has also been held that where a bank, having checks drawn on a banking partnership, sent them to the firm for collection, but the firm was dissolved by the death of a partner before the checks were received, the surviving partner has no authority to charge the checks to the drawers, and credit the amount to the bank on the firm's books.[12] Nor can the bank so change the relation of the parties by giving a credit in advance of collection, on the day of its failure, and while it is, as it were, *in articulo mortis;*[13] especially if such credit is entered before maturity of the paper.[14]

§ 123. —— Exceptions from estoppel or particular course of dealing.

The bank may, however, become estopped by its own remissness to deny that it became a debtor for the amount, though it did not receive it in cash. Thus, a collecting bank which received from its correspondent, in payment, a check on a local bank, and gave credit to its customer therefor, and failed to cancel or revoke such credit for twenty-one days after knowledge of the dishonor of the check, is precluded from denying that it became a debtor to the customer for the amount; the court stating that the action of the defendant "was con-

[12] First Nat. Bank of Alexandria v. Payne & Co.'s Assignees, 85 Va. 890, 9 S. E. 153. The bank in such case can reclaim the money in full from the assignee for creditors of the firm. Id.

[13] Levi v. National Bank of Missouri, 5 Dill. 104, Fed. Cas. No. 8,289.

[14] Jones v. Kilbreth, 49 Ohio St. 401, 31 N. E. 346; Levi v. National Bank of Missouri, 5 Dill. 104, Fed. Cas. No. 8,289; In re Armstrong, 33 Fed. 405; Gordon v. Rasines, 5 Misc. Rep. 192, 25 N. Y. Supp. 767.

clusive evidence of an intention to change its status from that of a mere collecting agent to that of a debtor."[15] So, also, where a credit given the initial bank by its correspondent is canceled because of mistake in supposing the collection to have been made, and the amount is charged back to such bank, which notifies its correspondent that the latter will be held responsible, and continues for over two years uncanceled, a credit given to the owner, during which time the accounts between the banks were several times rendered and settled, there was an "account stated," precluding the initial bank from denying its liability to the owner.[16]

The bank may also become estopped to deny that it is a debtor for the amount, though it never received the money, by wrongfully returning to the drawee bank a draft sent in payment of a check, pursuant to a request of the drawer of the check made after the draft had been mailed.[17]

The general rule may also be modified by a general course of dealing between banks. For example, a bank which received for collection a check drawn on another bank, which for fifteen years had been its correspondent under an agreement that all collections made by it for the former bank should be credited to such bank in a weekly settlement, sent the check to the drawee bank and received the customary credit. The drawee at the

[15] Kirkham v. Bank of America, 165 N. Y. 132, 58 N. E. 753, affirming 26 App. Div. 110, 49 N. Y. Supp. 767. See, also, Eufaula Grocery Co. v. Missouri Nat. Bank, 118 Ala. 408, 24 So. 389.

[16] Harley v. Eleventh Ward Bank, 7 Daly, 476, affirmed in 76 N. Y. 618.

[17] Gregg v. Bi-Metallic Bank, 14 Colo. App. 251, 59 Pac. 852.

same time charged the account of the drawer with the amount of the check, and suspended payment next day. It was held that, under the arrangement between the banks, the drawee had the right to substitute itself as debtor in the place of the drawer, and that the collecting bank must be regarded as having accepted the responsibility of the drawee, upon its credit in the collection account, as payment of the check.[18]

A recent Tennessee case also exemplifies the exception to the rule. The correspondent bank, on presentment of a draft to the drawee, was directed by him to present it at a certain bank, and did so, such bank having sufficient funds of the drawee to pay it. The latter bank took up and canceled the draft, and delivered it up to the drawee, and took credit therefor on a settlement with him, but paid no money out on account of the draft. In a settlement between such bank and the correspondent bank, the draft was embraced and credit given therefor to the correspondent bank, which in turn credited the initial sending bank, but remitted no money to it. Both of the banks other than the initial bank became insolvent; the correspondent bank having at the time a large credit in its favor on the books of the other insolvent bank. It was held, in view of the general custom of banks to make settlements by mutual credits and debits, that, as between the holder and the drawee, the draft was collected and paid.[19]

[18] Briggs v. Central Nat. Bank, 89 N. Y. 182, 42 Am. Rep. 285, affirming 10 Daly, 179, 61 How. Pr. 250, and distinguishing Indig v. National City Bank, 80 N. Y. 100.

[19] Howard & Co. v. Walker, 92 Tenn. 452.

§ 124. Completion of collection by application of deposits to payment—Effect of failure to so apply deposits.

Where a bank, holding for collection a bill against one of its customers, receives from him a deposit sufficient to pay it, with special instructions to apply such deposit to its payment, but becomes insolvent without having done so, and after having merely given the drawee a general credit on its books for the sum deposited, the bill is not paid as between the holder and the drawee.[20] The same rule applies where the bank customarily uses a customer's deposits to pay claims against him received for collection, so that a deposit of funds to meet a particular claim and others does not constitute a payment as against the creditor in case the bank fails before such funds are appropriated as directed.[21]

The same principle was applied in an important Michigan case, on a somewhat different state of facts. The maker of a note payable at a bank deposited with another bank, before maturity, money with which to take it up, and directed it to so apply such money, but the latter bank failed after receiving the note from the holder, indorsed to its order for collection, without having remitted to the holder or canceled the note or the credit given the depositor at the time of the deposit. It was held that, as between the holder and the maker, the note was not paid.[22] But it has been held recently in Arkansas that, where the maker of a note sent for col-

[20] Moore v. Meyer, 57 Ala. 20.

Authority of collecting bank to apply customer's deposits to payment of paper, see ante, § 42.

[21] Moore v. Meyer, 57 Ala. 20.

[22] Sutherland v. First Nat. Bank of Ypsilanti, 31 Mich. 230.

lection to a bank where he had a deposit sufficient to cover it, directed the bank to apply it on the note, and the bank thereupon charged his account with the amount thereof, and credited the sending bank, there was a payment of the note, precluding a recovery by the sending bank against the maker, the collecting bank having failed without indorsing any payment on the note or paying the sending bank.[23]

Another interesting case in point was recently decided by the Kansas court of appeals. In that case the holders of school district orders caused them to be sent for collection to a private bank, composed solely of the treasurer of the school district, who, at the time, had in his possession money of the school district sufficient to pay them, and marked them "Paid," credited himself as treasurer with the amount, and delivered the canceled orders to the clerk of the school district. He also entered payment of the orders on the collection registry of the bank, but a draft given by him as the bank for the amount of the orders was protested for nonpayment. It was held that, as between the holders of the orders and the school district, the orders had been paid.[24]

§ 125. —— Withdrawal of deposit.

Where the deposit is on an express condition, as where a note is sent for collection to a bank in which the maker has funds, and the maker instructs the bank to pay it out of such funds on condition that no interest or exchange be charged, the maker can withdraw his funds

[23] Daniel v. St. Louis Nat. Bank, 67 Ark. 223, 54 S. W. 214.

[24] Globe Furniture Co. v. School District No. 22, 6 Kan. App. 889, 50 Pac. 978.

at any time before an actual appropriation of the funds is made [25] to payment of the note. Such appropriation did not take place where the senders of the collection were informed of the condition, and gave no assent thereto.[26]

§ 126. Effect of payment to correspondent bank.

The doctrine that the collecting bank is a bailee, and that its correspondents are its own agents, necessarily results in holding that payment of the collection to the correspondent bank, and an entry of the proceeds to the credit of the initial bank on the books, the initial bank being at the time apparently solvent, and the correspondent having no notice of its insolvency, is a payment to the initial bank which, *instanter*, becomes debtor to the owner for the amount collected.[27] So, also, where a note is payable at the bank to which it is sent for collection, and such bank has no express authority to employ another bank as subagent, but nevertheless employs one, a payment to the latter is not a payment to the owner.[28]

§ 127. How remittance made—Check, draft, or certificate of collecting bank.

As the relation of bailor and bailee or of principal and agent ceases when the money is actually collected, and that of debtor and creditor begins, the collecting

[25] Bellows v. Norton, 12 Heisk. (Tenn.) 319.
[26] Bellows v. Norton, 12 Heisk. (Tenn.) 319.
[27] Reeves v. State Bank, 8 Ohio St. 465, 482.
[28] Sherman v. Port Huron Engine & Thresher Co., 8 S. D. 343, 66 N. W. 1077.

bank is not bound to remit the identical money collected, nor is it the duty of the payor to see that it does so.[29] If the bank had been expressly instructed to hold the proceeds as a special deposit, it would, of course, have to keep the identical cash received intact. But, in the absence of any such instructions, the custom of remitting by check or draft or certificate for the proceeds of a collection, instead of remitting the exact money collected, is so general and universal that the courts take judicial notice of it.[30]

However, it has been held that where the collecting bank gives its own draft for the proceeds of a collection actually received, the transaction does not amount to a remittance until that draft is paid.[31] This is in accord with the general rule of commercial paper that, unless it is so specifically agreed, a check or draft for the amount thereof is not a payment of a negotiable instrument.[32]

§ 128. Payment by mistake, and recovery of payments made by mistake.

A bank which has paid the amount of a draft to the

[29] First Nat. Bank of Richmond v. Wilmington & W. R. Co., 23 C. C. A. 200, 77 Fed. 401; Bowman v. First Nat. Bank of Spokane, 9 Wash. 614, 38 Pac. 211; Hallam v. Tillinghast, 19 Wash. 20, 52 Pac. 329.

[30] Bowman v. First Nat. Bank of Spokane, 9 Wash. 614, 38 Pac. 211; First Nat. Bank of Richmond v. Wilmington & W. R. Co., 23 C. C. A. 200, 77 Fed. 401. See, also, Hallam v. Tillinghast, 19 Wash. 20, 52 Pac. 329.

[31] People v. Bank of Dansville, 39 Hun (N. Y.) 187.

Authority of bank to receive paper of debtor in payment, see ante, §§ 46-49.

[32] Burkhalter v. Second Nat. Bank of Erie, 42 N. Y. 538, 40 How.

payee before maturity, in the mistaken belief that the draft had been accepted and paid, may recover it back, if such payee has lost none of his rights against the drawer by reason of the mistake.[33] So, too, where the correspondent bank has paid over the amount to the transmitting bank, and the latter to the holder, in the mistaken belief that the paper had been paid, the correspondent may recover the amount from the holder.[34]

A Kentucky case applying the same rule holds that where the initial bank has paid the amount of a draft to the owner, and he has given a receipt to the debtor, on mistaken information from a correspondent that the draft had been paid, such correspondent being accountable to the initial bank, may recover the amount of the draft from such owner, the receipt being merely *prima facie* evidence of payment, and hence subject to contradiction.[35]

Where a bank receives and holds money paid to it under a mistake of fact by the drawee of a draft sent to it by the owner for collection, the drawee, by giving notice to that effect before the agent bank had turned over the money to its principal, may elect to hold either

Pr. 324; Hamill v. German Nat. Bank, 13 Colo. 203; Western Brass Mfg. Co. v. Maverick, 4 Tex. Civ. App. 535, 23 S. W. 728.

[33] De Nayer v. State Nat. Bank, 8 Neb. 104. It was no defense that the maker had called at the bank before maturity of the draft, and expressed surprise at its payment before maturity, and stated to the officers of the bank that he would protect the draft, and that, if it was not paid, he had money with which to pay it. Id.

[34] Bank of Orleans v. Smith, 3 Hill (N. Y.) 560.

[35] First Nat. Bank of Chattanooga v. Behan, 91 Ky. 560, 16 S. W. 368, citing Mayer v. City of New York, 63 N. Y. 457.

responsible as for money had and received.[36] But an election once made to hold one of them is binding, and constitutes a renunciation of all right to recourse against the other.[37]

The effect of the payment of forged or altered paper, and the right to recover back payments made on such paper, will be considered in a later chapter.[38]

§ 129. —— Mistake as to solvency of obligor, or sufficiency of customer's deposits.

As a bank is required to know the state of a customer's account, and pays his checks at its own risk, so far as third persons are concerned, it is no defense to an action against a bank on a draft given by it for the amount of a customer's check that the draft was given in the mistaken belief that the customer had sufficient funds in the bank to pay the check.[39] But it has been held in New York that the fact that a note payable at a bank, after having been delivered to it by the holder for collection, and charged to the account of the maker, which was not good for the amount, was paid by the bank to the holder, and stamped with a cancellation mark, does not show that the note was paid and extinguished as between the bank and the maker, but the

[36] Eufaula Grocery Co. v. Missouri Nat. Bank, 118 Ala. 408, 24 So. 389, and cases and authorities cited.

[37] Eufaula Grocery Co. v. Missouri Nat. Bank, 118 Ala. 408, 24 So. 389; Cook v. Cook, 28 Ala. 660; Fowler v. Bowery Sav. Bank, 113 N. Y. 450, 21 N. E. 172, 10 Am. St. Rep. 479.

[38] Chapter 8.

[39] First Nat. Bank of Denver v. Devenish, 15 Colo. 229, 25 Pac. 177, 22 Am. St. Rep. 394.

bank may sue him on it as a subsisting security.[40] On examination of this case, however, it will be seen that, under the rules and practice of the bank, the cancellation mark meant merely that the paper had been charged to the account of the maker.

A bank's certification of a note payable at the bank, the maker having an account there, makes the note the primary absolute obligation of the bank, regardless of the sufficiency of the maker's account to meet the note, and the bank, as against the holder, cannot rescind its contract on the ground of mistake as to that fact.[41]

The general rule that, where money has been paid by one joint agent to another through mistake, and has not been forwarded by the latter to the principal, or he has not done some act before notice of the mistake, on the assumption that the payment was good, by which he would suffer some damage if it should be held not good, the agent so paying may recover back the money so paid,[42] does not apply to relieve a collecting bank which had taken the worthless check of the drawee in payment of a draft sent it for collection, and surrendered the draft to him, and remitted cash for the amount to another intermediate collecting bank, since by so doing without authority it had made the check its own,

[40] Watervliet Bank v. White, 1 Denio (N. Y.) 608. To same effect is Manufacturers' Nat. Bank v. Thompson, 129 Mass. 438.

[41] Riverside Bank v. First Nat. Bank of Shenandoah, 20 C. C. A. 181, 74 Fed. 276. The certification in this case was made at the instance of another bank, acting as collecting agent for the holder of the paper.

[42] Herrick v. Gallagher, 60 Barb. (N. Y.) 566; Cox v. Prentice, 3 Maule & S. 348; Buller v. Harrison, 1 Cowp. 568; Mechem, Agency, §§ 560-562.

and mere mistake as to the solvency of the drawee in such case is not such a mistake of fact as is contemplated by such general rule.[43]

As to the right of a bank to rescind its contract evidenced by its draft or check given in payment, after the same has been actually placed in the mails, on a subsequent discovery of the insolvency of the obligor, or of the insufficiency of his deposits to meet the claim, there is a conflict of authority. The better rule is found in a Wisconsin decision that, where a bank to which a draft was sent for collection advanced the funds to pay the same at the request of the drawee, and mailed its own draft to the payee with a letter stating that it was in payment of the draft sent for collection, and the bank thereafter, on discovering the insolvency of the drawee, withdrew the letter from the mails, and destroyed its draft, it was liable to the drawer of the first draft for the amount thereof, with interest.[44] Posting the draft in such case was a delivery thereof to the payee, and after the posting, the bank had no right to take the draft from the mails.[45]

[43] National Bank of Commerce v. American Exchange Bank, 151 Mo. 320, 52 S. W. 265; Boylston Nat. Bank v. Richardson, 101 Mass. 287; Canterbury v. Bank of Sparta, 91 Wis. 53, 64 N. W. 311.

[44] Canterbury v. Bank of Sparta, 91 Wis. 53, 64 N. W. 311. See, also, Gregg v. Bi-Metallic Bank, 14 Colo. App. 251, 59 Pac. 852; Boylston Nat. Bank v. Richardson, 101 Mass. 287; Pratt v. Foote, 9 N. Y. 463; Whiting v. City Bank of Rochester, 77 N. Y. 363; Eaton v. Cook, 32 Vt. 58.

[45] Canterbury v. Bank of Sparta, 91 Wis. 53, 64 N. W. 311; Gregg v. Bi-Metallic Bank, 14 Colo. App. 251, 59 Pac. 852; Buell v. Chapin, 99 Mass. 594; Kirkman v. Bank of America, 2 Cold. (Tenn.) 397; Mitchell v. Byrne, 6 Rich. Law (S. C.) 171; 1 Daniel, Neg. Inst. § 67.

But the supreme court of California has come to a different conclusion on a similar state of facts. The payee delivered a note to a bank for collection, and the maker, who was a customer of the bank, on presentment, directed the bank to charge the amount to his account, but at the time was indebted to the bank, and had no money on deposit. The bank, supposing his credit to be good, charged his account, and canceled the note, and wrote out a check, which it deposited in the post office; but, on discovering on the same day the insolvency of the maker of the note, indorsed on the note that it had been erroneously canceled, and withdrew its check from the mails. It was held that there was no payment of the note, the bank having a right to rescind its contract on the ground of mistake.[46]

§ 130. Voluntary payment by bank cannot be recovered back.

A payment by the bank, not made by mistake, but voluntarily, on the credit of the maker, cannot be recovered back.[47]

[46] Steinhart v. National Bank of D. O. Mills & Co., 94 Cal. 362, 29 Pac. 717, 28 Am. St. Rep. 132.

[47] Whiting v. City Bank of Rochester, 77 N. Y. 363. Unsworn declarations of the assistant cashier, who was not the person alleged to have made the mistake, are not sufficient evidence that a payment by the bank was made by mistake, and not voluntarily. Id.

CHAPTER VII.

RIGHTS AND LIABILITIES AS TO PROCEEDS.

(A) In General.

§ 131. Who entitled to proceeds in general.
132. Bona fide holders of paper.
133. Rights of creditors of owner.
134. Proceeds of paper belonging to firm or partner.
135. Proceeds of judgment on joint claims of bank and depositor.
136. Liability of correspondent bank to owner.
137. —— For conversion.
138. Liability of correspondent to initial bank.
139. Title and rights as between initial and correspondent banks in general.
140. —— Estoppel of initial bank to deny ownership.
141. Effect of rules and usages of clearing houses.
142. Lien of correspondent bank on proceeds for debt of initial bank.
143. —— When correspondent a bona fide purchaser of paper.
144. —— Notice of real ownership of paper.
145. —— Proceeds of paper originally indorsed in blank.

(B) Enforcing Preference or Establishing Trust.

§ 146. In general.
147. Fraudulent conversion as creating preference or trust.
148. Remittance made by draft or check—Drawer or drawee bank insolvent.
149. Refusal to pay customer's check does not give preference.
150. Tracing and following proceeds into insolvent estate of collecting bank.
151. —— Proceeds never in possession of bank.
152. —— Amount of note against customer charged to his account before insolvency of bank.

153. —— Proceeds disposed of before insolvency.
154. —— Proceeds collected by assignee or receiver.
155. Bank as owner of paper and proceeds.
156. Preference limited to assets realized at time of failure of bank.
157. Waiver of preference or trust.

(A) In General.

The collecting bank is liable to the owner for the proceeds when collected by itself or its agents. If special directions have been given by the owner to pay to some other person, the bank must govern its actions accordingly.

Bona fide holders of the paper are entitled to the proceeds thereof from the collecting bank. The general rules of commercial paper govern in determining who are bona fide holders.

The rights of creditors of the owner of the paper, after a completed collection, depend on the ownership of the proceeds as between the bank and the debtor. In Georgia, the proceeds of paper originally indorsed "for deposit and credit" are subject to garnishment as the property of the indorser. If the paper was unindorsed, the proceeds in the hands of the bank are not subject to trustee process at the instance of a creditor of the payee.

The proceeds of paper belonging to a member of a firm cannot be used without his consent to pay partnership obligations; but the proceeds of firm paper may be so used if such use is justified by a course of dealing.

The correspondent bank may, in certain cases, become responsible to the owner for the proceeds, but is not liable for conversion, in the absence of a demand. Mere insolvency of such bank does not amount to a conversion.

As between banks which are members of a clearing house association, the rules and customs of such association as to the disposition of the proceeds of collections are binding; but, as against the original owner, the effect of such rules and

customs may be negatived by the form of the indorsement on the paper, or other notice of his ownership.

The right of the correspondent bank to a lien on the proceeds for an indebtedness of the sending bank depends on the nature of the dealings between the banks, the character of the paper and its indorsements, and the knowledge of the creditor bank of the real ownership of the paper. In some jurisdictions, the correspondent bank may become a holder for value, as against the original owner, by reason of the antecedent debt of the initial bank; but it cannot become a bona fide holder if it has notice of the real ownership of the paper. An indorsement to the initial bank "for collection" is such notice. Where the paper was originally indorsed in blank, the lien of the correspondent bank for a debt of the initial bank is usually sustained.

§ 131. Who entitled to proceeds in general.

It may be stated as a general rule that the collecting bank is liable to the owner for the payment of the money when collected by itself,[1] and, in those jurisdictions

[1] Hyde v. First Nat. Bank of Lacon, 7 Biss. 156, Fed. Cas. No. 6,970; First Nat. Bank of Leadville v. Leppel, 9 Colo. 594, 13 Pac. 776.

But a bank holding a customer's demand note has a lien on the proceeds of drafts delivered to it for collection after the giving of the note, though collected after the filing of a petition in bankruptcy, and can apply such proceeds on the note. In re Farnsworth, 5 Biss. 223, Fed. Cas. No. 4,673. As to general lien of bank on the paper, see ante, § 23.

In an action against a bank for the proceeds of a collection, the books of the bank showing original entries are admissible to establish a balance due the bank. McLennan v. Bank of California, 87 Cal. 569, 25 Pac. 760, and cases cited.

The maker of a note who has paid the amount thereof to the bank at which it was payable, and to which it had been indorsed by the payee for collection, and obtained a surrender of the note, cannot maintain an action against the bank for misappropria-

holding that persons or banks employed by the initial bank are its agents, it is liable to such owner for the proceeds when collected by such agents.[2]

So, too, in those jurisdictions allowing the bank to sue on the paper in its own name, the amount recovered is, of course, held by the bank for the use and benefit of the owner.[3] Sometimes, however, the bank is ordered by the owner to pay the proceeds to a designated person, or has special notice or instructions relative to payment of the proceeds, and in any of such cases its actions should be governed accordingly.[4] Thus, an order by the customer to the collecting bank to "deliver" the proceeds of drafts, if they had been collected and credited to the customer, to a designated third person, is equivalent to an order to "pay" to such person the amount of the drafts if then collected, so that an accept-

tion of the fund, since he was, by such payment, absolutely discharged from liability. Smith v. Essex County Bank, 22 Barb. (N. Y.) 627. The bank in this case was agent of the payee only. Id.

A written promise to account for the proceeds of notes left for collection with the promisor is not negotiable, as the amount to be paid is not a sum certain. Fiske v. Witt, 22 Pick. (Mass.) 83.

That an action on the case will not lie against the collecting bank for failure to turn over the proceeds of the collection, see Tinkham v. Heyworth, 31 Ill. 519.

[2] Hyde v. First Nat. Bank of Lacon, 7 Biss. 156, Fed. Cas. No. 6,970; Reeves v. State Bank, 8 Ohio St. 482; Sherman v. Port Huron Engine & Thresher Co., 8 S. D. 343, 66 N. W. 1077. See, also, cases cited under sections 86-98, ante.

[3] Bank of Louisiana v. Stansbury, 4 La. 530; Padfield v. Green, 85 Ill. 529; Cottle v. Cole, 20 Iowa, 485; Merchants' Bank of Baltimore v. Bank of Commerce, 24 Md. 12, 52.

[4] Commercial State Bank v. Rowland, 31 Neb. 483, 48 N. W. 149.

ance of the order by the bank, and a payment of the proceeds to the person so designated, operated as a payment of the debt of the bank to the customer.[5]

A bank will also be protected in paying the proceeds of checks, payable to a corporation, to one who had been accustomed to collect moneys and pay bills for the corporation at the bank, with the knowledge and consent of the officers of the corporation, and who had indorsed the name of the corporation on the checks; the corporation being, in such case, estopped to deny the authority of such person to receive the money.[6] But, where a note for the price of timber was left at a bank for collection, and the bank was notified that the note was the property of the vendor of the timber, though made payable to one who had been employed to cut the timber, and was also indemnified against the claim of such person, the bank is liable to such vendor for the full amount of the collection, after having paid it over to the employe, notwithstanding the notice.[7]

[5] Weedsport Bank v. Park Bank, 2 Rob. (N. Y.) 418.

[6] Craig Medicine Co. v. Merchants' Bank, 59 Hun, 561, 14 N. Y. Supp. 16.

See, also, Central Nat. Bank of Baltimore v. Connecticut Mutual Life Ins. Co., 104 U. S. 54, where it was held that a bank in which the general agent of a corporation had deposited its funds, as its general agent, but had deposited his own funds in the same account, and drew checks on it for his private use, was charged with notice of the equitable rights of the company, and could not retain a lien for a private debt of the agent as against the beneficial ownership of the company. Citing Duncan v. Jaudon, 15 Wall. (U. S.) 165; Shaw v. Spencer, 100 Mass. 382, and other cases. To same effect, see Importers' & Traders' Nat. Bank v. Peters, 123 N. Y. 272. See, also, Englar v. Offutt, 70 Md. 78, 16 Atl. 497.

[7] First Nat. Bank of Wellsborough v. Bache, 71 Pa. St. 213, cit-

A recent Iowa case determines the right to the proceeds where collection was made after the bank had redelivered the paper to the depositor. In that case credit was given by a bank for the amount of a draft indorsed to it and delivered for collection, and the draft was forwarded to the drawee bank, where it was protested. On its return, it was redelivered to the depositor, and the amount charged back to him. Thereafter he again sent the draft to the drawee, and it was paid to such drawee by the drawer. It was held that the proceeds belonged to the depositor, so that he could recover damages for the wrongful garnishment thereof by one having no valid claim against such depositor.[8]

§ 132. Bona fide holders of paper.

Bona fide holders of the paper occupy the same favorable position with respect to the proceeds of a collection that they occupy with respect to other transactions affecting the paper.[9] So, where a banker, with whom drafts indorsed in blank were left for collection, wrongfully sold them, the purchaser, having no knowledge that he was not the real owner, is a *bona fide* holder, and may retain the proceeds as against the real owner.[10] The latter could easily have restricted the indorsement in the first place, and thus protected himself.

As against the collecting bank, an indorsee of a draft

ing Farmers' & Mechanics' Nat. Bank v. King, 57 Pa. St. 202. The court in the first case above cited treated the fund as a trust fund for the benefit of the vendor.

[8] Pickering v. Cameron, 103 Iowa, 186, 72 N. W. 447.

[9] Correspondent bank as bona fide holder, see post, §§ 143, 155.

[10] Coors v. German Nat. Bank, 14 Colo. 202, 23 Pac. 328.

in payment of an antecedent debt is a *bona fide* purchaser.[11] But a purchaser of one of several overdue and dishonored mortgage notes, which was fraudulently transferred by an agent of the collecting bank after protest, is not a *bona fide* holder, and is not entitled to share as such in the proceeds of a subsequent sale under the mortgage.[12]

§ 133. Rights of creditors of owner.

We have seen, in treating of the special property rights of the bank as bailee for collection prior to receipt of the proceeds, that the paper itself is not attachable before collection, at the instance of creditors of the depositor.[13] The right of creditors of the depositor to attach or garnish the proceeds in the hands of the bank depends primarily on the question of the ownership of the proceeds, as between the depositor and the bank.[14]

The supreme court of Georgia holds that the payee of a bill who indorses it "for deposit and credit" is not only the owner of the bill, but retains ownership of the proceeds after collection, so that it is subject to garnishment as his property in the hands of the collecting

[11] Citizens' Nat. Bank of Lawrenceburg v. Third Nat. Bank of Greensburg, 19 Ind. App. 69, 49 N. E. 171; Straughan v. Fairchild, 80 Ind. 598.

Rights of bank taking paper for antecedent debt of sending bank, see post, § 143.

[12] Foley v. Smith, 6 Wall. (U. S.) 492.

[13] See ante, § 22.

[14] Pickering v. Cameron, 103 Iowa, 186, 72 N. W. 447. As to title to paper, see ante, §§ 11-23.

bank.[15] In a later case, however, the same court holds that if a regular customer of a bank indorses paper to the bank "for deposit and credit" to his account, and receives credit against which he is allowed to draw, the proceeds of the paper in the hands of a correspondent of the initial bank are not subject to garnishment as the property of such indorser, since they are the property of the initial bank.[16]

In Massachusetts it has been held that a bank to which a note without any indorsements was sent for collection is not chargeable in trustee process (garnishment) at the instance of a creditor of the payee, where it shows that, on the day the writ was served, it had the note in its possession, and collected it, and passed the proceeds to the credit of the sending bank on its open account, in accordance with directions received with the note; that it had never received notice from defendant (the payee) that the proceeds belonged to him; and that the sending bank, on notification of the service of the writ, had replied that it would "take care of it."[17]

A bank which has received a note for collection cannot defend an action by the depositor for the proceeds of the note, on the ground that the note was originally executed to defraud creditors of a third person, and that a garnishment proceeding was pending, seeking to subject the note to payment of a debt of such third per-

[15] Freeman v. Exchange Bank of Macon, 87 Ga. 45.

[16] Fourth Nat. Bank of Cincinnati v. Mayer, 89 Ga. 108, distinguishing Freeman v. Exchange Bank of Macon, 87 Ga. 45, and Central Railroad v. First Nat. Bank of Lynchburg, 73 Ga. 383.

[17] Richards v. Stephenson, 99 Mass. 311. See, also, Hancock v. Colyer, 99 Mass. 187.

son, if the bank itself was not one of the creditors; it appearing that the bank was in no way liable in the garnishment proceeding.[18]

§ 134. Proceeds of paper belonging to firm or partner.

In the absence of express instructions, a banker has no authority to apply the proceeds of a collection to discharge a note, not payable at the bank, executed by a firm of which the owner of the collection was a member, for the claims are in different rights.[19]

Even if the paper was entirely unindorsed, a bank with actual notice prior to collection, of a transfer of the claim to plaintiff by the payee, cannot use the proceeds to pay to a third person a note, not payable at the bank, executed by a firm of which plaintiff's transferror was a member.[20] But a custom of a particular firm to deposit its customers' notes in a bank for collection, and to allow the bank to treat the paper as collateral for the debts of the firm to the bank, and credit the proceeds of collections on the firm's account, justifies the bank in retaining the proceeds of notes so deposited and collected, and applying the amount on a balance due on the firm's account.[21]

[18] First Nat. Bank of Leadville v. Leppel, 9 Colo. 594, 13 Pac. 776.

[19] Commercial State Bank v. Rowland, 31 Neb. 483, 48 N. W. 149, citing 1 Morse, Banks & Banking, § 326.

[20] Commercial State Bank v. Rowland, 31 Neb. 483, 48 N. W. 149.

[21] Studebaker Bros. Mfg. Co. v. First Nat. Bank of Sulphur Springs (Tex. Civ. App.) 42 S. W. 573, citing Bank of Metropolis v. New England Bank, 1 How. (U. S.) 234, 6 How. 211, and Central Nat. Bank of Baltimore v. Connecticut Mutual Life Ins. Co., 104 U. S. 54, 77.

§ 135. Proceeds of judgment on joint claims of bank and depositor.

A peculiar case arose in California, where, it appears, it is permissible for the collecting bank to join in one suit the claim of its customer and a claim of its own against the same debtor. A bank agreed to collect notes against one who was also indebted to the bank, and agreed to pay the proceeds over to the owner of the notes, after deducting the cost of collection. The bank joined its own claim with the claim on the notes in one suit, and recovered judgment for the aggregate of both claims, and bought in the debtor's property at a sale on execution under the judgment, there being no other bidders, for the benefit of itself and the owners of the notes. The proceeds of the sale were not sufficient to pay both claims. It was held that the bank and the owners of the notes were entitled to share in the proceeds of the sale in the proportion in which their respective claims had paid the purchase price at the sale.[22]

§ 136. Liability of correspondent bank to owner.

Where there are no mutual accounts between the initial and correspondent banks, but remittances of collections are made at stated periods, the owner may recover the proceeds of a collection directly from the correspondent prior to the time of an actual remittance by the correspondent, or of a credit by the initial bank of

[22] Marks v. Bodie Bank (Cal.) 8 Pac. 807. The title having been taken by the bank, was held in trust for the owners of the notes to the extent of their interest. Id.

the proceeds to the account of the owner.[23] A somewhat different statement of the rule is that the correspondent, not having remitted the proceeds collected to the initial bank, and not having a right of set-off, is liable directly to the owner of the paper if the indorsement and instructions plainly show that he still has title to the paper.[24] And under this rule the owner may recover the proceeds from the correspondent bank, though it has credited the amount to an intermediate collecting bank.[25]

Where there are mutual accounts and dealings between the banks, whereby the correspondent bank takes the paper for collection as the property of the initial bank, without notice that it is not the real owner, the rules are different, as we shall see later.[26]

§ 137. —— For conversion.

The correspondent bank is not, however, liable to the owner for conversion of a draft received in payment of the collection, and lawfully coming into its possession, in the absence of a demand by him for the draft or its proceeds.[27] And where the proceeds of the collections

[23] National Exchange Bank of Dallas v. Beal, 50 Fed. 355, affirmed in 55 Fed. 894.

[24] First Nat. Bank of Circleville v. Bank of Monroe, 33 Fed. 408; Boykin v. Bank of Fayetteville, 118 N. C. 566, 24 S. E. 357; Commercial Nat. Bank of Cincinnati v. Hamilton Nat. Bank of Ft. Wayne, 42 Fed. 880.

[25] Branch v. United States Nat. Bank of Omaha, 50 Neb. 470, 70 N. W. 34; Boykin v. Bank of Fayetteville, 118 N. C. 566, 24 S. E. 357.

[26] See post, §§ 142-145.

[27] Castle v. Corn Exchange Bank, 148 N. Y. 122, 42 N. E. 518. An order from the drawer of the paper collected, to hold the

made on commission, and under an agreement for daily remittances, were mingled with the other funds of the collecting bank at a time when its cashier had no knowledge of its insolvency, the collecting bank is not chargeable with conversion of the funds, though it was in fact insolvent when it received them, and failed soon after.[28]

§ 138. Liability of correspondent to initial bank.

As a logical deduction from the rules that the initial bank is liable for the defaults of its correspondents, that it must account to the owner for the paper or its proceeds, and that it has a resultant remedy over against the correspondent, it may be stated that the correspondent bank is liable to the initial bank for the proceeds of the collection when realized.[29] It has been held, however, in one of the jurisdictions which upholds the contrary doctrine, viz., that the correspondent bank is the agent of the owner of the paper, and that the initial bank is not liable for its defaults, that on refusal or failure of the correspondent bank to pay over the money to the initial collecting bank, the latter cannot sue the former, but the owner of the paper is the real party in interest, and must bring the suit.[30]

draft, is not a demand on behalf of the owner, no agency being shown. Id.

That trover will not lie by the owner where the paper was indorsed in blank, and the correspondent advanced money on it to initial bank, see post, § 145.

[28] First Nat. Bank of Richmond v. Davis, 114 N. C. 343, 19 S. E. 280, 41 Am. St. Rep. 795.

[29] See ante, §§ 85-98.

[30] Abrams v. Cureton, 74 N. C. 523; Boykin v. Bank of Fayetteville, 118 N. C. 566, 24 S. E. 357.

§ 139. Title and rights as between initial and correspondent banks in general.

It is a settled rule that title to the proceeds of commercial paper received for collection by a bank, and forwarded to its correspondent in due course of business, without any express agreement in reference thereto, does not pass to the correspondent, even if it remitted on general account, in anticipation of collection.[31]

Credit given "subject to payment" on receipt of paper for collection, under a contract with the sending bank permitting unpaid items to be charged back, is merely provisional, and does not create a debt or change the ownership of the paper or proceeds.[32]

It is also a settled rule of law that where the banks have no mutual arrangement that remittances shall be credited on previous accounts, and no advances are made on the faith of any particular collection, no lien exists in favor of the initial bank which will prevent the owner from recovering the amount of the collection, though such bank has credited the amount to its correspondent in payment of its indebtedness.[33]

[31] Dickerson v. Wason, 47 N. Y. 439; Scott v. Ocean Bank, 23 N. Y. 289; National Park Bank v. Seaboard Bank, 114 N. Y. 28, 34, 20 N. E. 632, 11 Am. St. Rep. 612. See, also, ante, §§ 15, 16, and McBride v. Farmers' Bank of Salem, 26 N. Y. 450.

Certain correspondence between banks held to constitute a contract for collection of items forwarded by one to the other, and not a contract to purchase. Richardson v. Louisville Banking Co., 36 C. C. A. 307, 94 Fed. 442.

[32] Manufacturers' Nat. Bank v. Continental Bank, 148 Mass. 553, 20 N. E. 193, 12 Am. St. Rep. 598, 2 L. R. A. 699; Levi v. National Bank of Missouri, 5 Dill. 104, Fed. Cas. No. 8,289. See, also, ante, § 15.

[33] Millikin v. Shapleigh, 36 Mo. 596, 88 Am. Dec. 171; Wilson

§ 140. —— Estoppel of initial bank to deny ownership.

The initial bank may become estopped to deny its ownership of the paper and its proceeds. Thus, where a draft for the price of goods, payable to the order of the cashier of a bank at the place of the drawer's residence, "on arrival of car" containing the goods, was indorsed by such bank for collection for its own account, and was sent by it to a bank at the place of residence of the drawee, and the drawee paid the amount to the latter bank under a mistake of fact entitling him to a recovery back, and without knowledge that the draft was not the property of the sending bank, such sending bank, though it never received the money, is estopped, as against the drawee, from denying actual ownership of the draft, and setting up a mere agency to collect.[34]

This decision was not based on the ground that the admission of evidence to show agency would be allowing the contradiction of a written instrument by parol, but solely on the ground that the drawee had acquired his rights without knowledge of any agency, and that a principal will not be allowed to take advantage of

v. Smith, 3 How. (U. S.) 763; Jones v. Milliken, 41 Pa. St. 252; McBride v. Farmers' Bank of Salem, 26 N. Y. 450, affirming 25 Barb. 657; Hackett v. Reynolds, 11 Pa. St. 328, 6 Atl. 689; First Nat. Bank of Clarion v. Gregg, 79 Pa. St. 384; Stark v. United States Nat. Bank, 41 Hun (N. Y.) 506; Dod v. Fourth Nat. Bank of New York, 59 Barb. (N. Y.) 265; Lindauer v. Fourth Nat. Bank, 55 Barb. (N. Y.) 75; Hutchinson v. Manhattan Co., 9 Misc. Rep. 343, 29 N. Y. Supp. 1103; Commercial Bank of Clyde v. Marine Bank, 3 Keyes (N. Y.) 337.

[34] Eufaula Grocery Co. v. Missouri Nat. Bank, 118 Ala. 408, 24 So. 389. See, also, Cook v. Cook, 28 Ala. 660.

his own wrong where, with his authority, the agent received the money, though he never turned it over to the principal.

§ 141. Effect of rules and usages of clearing houses.

We have seen that the rules and usages of clearing house associations are not binding on the customers of the various banks forming the association.[35] They are, however, binding on the banks that are members of the association.[36] Yet it may be that the form of the indorsement on the paper negatives the right of a bank to rely on the usages of the clearing house association. Thus, where a draft on a bank which was a member of a clearing house association was expressly indorsed by the owners "for collection" to another bank, which was also a member of the same association, the indorsement will prevent the association from appropriating the proceeds to payment of the indebtedness of the indorsee bank to the association, under an agreement by which the exchanges of such bank could be retained by the association until the payment of any balance against such bank;[37] consequently, a payment to the association by the drawee bank is no defense to an action by the owners against such bank for the proceeds.[38]

That the rules of the clearing house cannot affect the ownership of the proceeds after there has been an actual absolute payment through the clearing house is exem-

[35] See ante, § 10.

[36] Overman v. Hoboken City Bank, 30 N. J. Law, 61, 31 N. J. Law, 563; O'Brien v. Grant, 146 N. Y. 173; Atlas Nat. Bank v. National Exchange Bank, 176 Mass. 300, 57 N. E. 605.

[37] Crane v. Fourth Street Nat. Bank, 173 Pa. St. 566.

[38] Crane v. Fourth Street Nat. Bank, 173 Pa. St. 566.

plified in a recent case holding that, where a bank sent to another bank its cashier's check on a third bank for the amount of collections made, such third bank having at the time sufficient funds of the drawer to pay the check, and the check was paid in due course through the clearing house, there was a complete appropriation of the fund to the payee bank, and, the drawer being insolvent, a subsequent temporary restoration of the money by the payee bank to the drawee bank on demand made by it under the rules of the clearing house of which both were members, requiring repayment on demand, and adjustment of the merits of the claim afterwards, did not affect its ownership of the fund.[39]

§ 142. Lien of correspondent bank on proceeds for debt of initial bank.

In the course of the transmission of paper from bank to bank for collection, it often happens that it comes into the hands of a bank to which the sending bank is indebted on general account. The right of the creditor bank in such case to retain the proceeds to liquidate such debt depends on the nature of the dealings between the banks, the character of the paper and its indorsements, and the knowledge of the creditor bank of the real ownership of the paper.

Where there has been a course of mutual dealings between two banks, under which paper sent by one to the other was treated as the property of the sending bank,

[39] National Union Bank v. Earle, 93 Fed. 330. The drawee bank in this case having paid over the money to a receiver of the drawer bank, the payee bank was held entitled to recover directly from him, as a trustee for its benefit. Id.

and credits and debits entered accordingly, and balances remitted at stated intervals, or when called for, the receiving bank has a lien as against the owner, on paper sent to it for collection, for an unpaid balance of account against the sending bank, if the receiving bank had no notice, from the nature of the indorsements, or otherwise, that title was not in the sending bank.[40] The correspondent bank is bound to know that it has no lien on paper sent by the initial bank for collection, for a balance against such bank, unless the initial bank was owner of the paper.[41]

If the correspondent bank, on the faith of the ultimate collection of unmatured paper sent to it and in its possession for collection, allows the remitting bank to draw on the expected funds, and thus realize the proceeds of the paper before its maturity or payment, it has a lien on the paper as against the transmitting bank for the amount of the advances until reimbursed.[42] The rule is analogous to the rule allowing a lien on collaterals for advances made.[43] But, in the absence of previous ar-

[40] Carroll v. Exchange Bank, 30 W. Va. 518, 4 S. E. 440; Bank of Metropolis v. New England Bank, 1 How. (U. S.) 234, 6 How. 212; Rathbone v. Sanders, 9 Ind. 217; Wilson v. Smith, 3 How. (U. S.) 763. Contra, see Lawrence v. Stonington Bank, 6 Conn. 521.

The right of the correspondent to set off a debt due it from the initial bank cannot be adjudicated in a suit between the owner and the initial bank, to which the correspondent is not a party. National Exchange Bank of Dallas v. Beal, 50 Fed. 355.

[41] Van Amee v. Bank of Troy, 8 Barb. (N. Y.) 312, 321.

[42] Williams v. Jones, 77 Ala. 294, and cases cited. The correspondent bank may enforce the lien against an assignee for the creditors of the transmitting bank. Id.

[43] Williams v. Jones, 77 Ala. 294.

rangements or mutual dealings, a correspondent bank which has received the paper for collection only from the initial bank to which it has been delivered for collection cannot retain the paper as against the owner for an unpaid balance due from the initial bank.[44]

As was said by Holmes, J., in Millikin v. Shapleigh:[45] "But where there is no such mutual arrangement or previous course of dealing between the parties whereby it is expressly or impliedly understood that such remittances of paper are to go to the credit of the previous account when received, and no advance is made and no credit is given on the basis of the particular bill, or on the faith of such course of dealing or such remittances, or where the special circumstances are inconsistent with the hypothesis of such mutual understanding, and the one bank merely passes the proceeds of paper remitted for collection to the credit of the other on a subsisting indebtedness which it happens at the time to have standing against the other, there is no such lien, and no right to retain and apply the money collected in that manner; but the real owner of the funds may maintain an action to recover the amount."

So, a mere credit by the correspondent bank to the initial bank does not change the relation to that of creditor and debtor, the initial bank not being indebted to the correspondent bank at the time.[46] And no mere

[44] Millikin v. Shapleigh, 36 Mo. 596; Van Amee v. Bank of Troy, 8 Barb. (N. Y.) 312; Hoffman v. Miller, 9 Bosw. (N. Y.) 334, following Warner v. Lee, 2 Seld. (N. Y.) 144, and Scott v. Ocean Bank, 23 N. Y. 289.

[45] 36 Mo. 596. See, also, Wilson v. Smith, 3 How. (U. S.) 763.

[46] Guignon v. First Nat. Bank of Helena, 22 Mont. 140, 55 Pac.

custom among banks, whereby the collecting bank credits the transmitting bank instead of remitting, can prevail to the prejudice of the rights of the owner of the paper.[47] If the correspondent bank, on making the collection, credits the proceeds to the sending bank after the latter is insolvent, and in the hands of the bank examiner, the credit does not amount to a payment as against the owner of the paper, though the crediting bank did not know of such insolvency when the credit was made.[48]

Where a bank has in good faith accepted the draft of a national bank one day prior to the latter's insolvency, the lien of the former on the proceeds of collections on paper belonging to the latter attaches at the date of the acceptance.[49]

§ 143. —— When correspondent a bona fide purchaser of paper.

It is the law in New York that a bank receiving notes for collection from another bank acquires no better title

1051, 1097. See, also, Metropolitan Nat. Bank v. Merchants' Nat. Bank, 182 Ill. 367, 55 N. E. 360, affirming 77 Ill. App. 316.

[47] Armstrong v. National Bank of Boyertown, 90 Ky. 431, 438; First Nat. Bank of Clarion v. Gregg, 79 Pa. St. 384; Lawrence v. Stonington Bank, 6 Conn. 521.

[48] Evansville Bank v. German-American Bank, 155 U. S. 556, 562, distinguishing Commercial Bank of Pennsylvania v. Armstrong, 148 U. S. 50.

[49] In re Armstrong, 41 Fed. 381.

Rev. St. U. S. § 5242, invalidating transfers of the commercial paper of a national bank after its insolvency does not prevent the lien from attaching in this case. Id.

See, also, Dana v. Third Nat. Bank in Boston, 13 Allen (Mass.) 445; Laclede Bank v. Schuler, 120 U. S. 511, 7 Sup. Ct. 644.

than the remitting bank had unless it becomes a purchaser for value; and, prior to the adoption of the negotiable instruments law, the mere existence of a balance against the remitting bank on open account, and for discounts made, did not constitute the correspondent bank a holder for value.[50] This is also the law in Mississippi.[51] It was also the law in North Carolina prior to the adoption of the negotiable instruments law in that state.[52] But the negotiable instruments law as adopted in New York and North Carolina provides that an antecedent or pre-existing debt constitutes value and hence changes the above rule to that extent.[53] Yet, if the correspondent had notice, from the form of the indorsement or otherwise, that the sending bank did not own the paper, it would not be a *bona fide* purchaser,

[50] Commercial Bank of Clyde v. Marine Bank, 3 Keyes (N. Y.) 337; Van Amee v. Bank of Troy, 8 Barb. (N. Y.) 312; McBride v. Farmers' Bank of Salem, 26 N. Y. 450. The court in the case last cited refuses to follow the decisions of the United States supreme court in Bank of Metropolis v. New England Bank, 1 How. (U. S.) 234, 6 How. 212, and Swift v. Tyson, 16 Pet. 1, but follows Coddington v. Bay, 20 Johns. (N. Y.) 637; Rosa v. Brotherson, 10 Wend. (N. Y.) 86; Stalker v. McDonald, 6 Hill (N. Y.) 93, and Youngs v. Lee, 2 Kern. (N. Y.) 551, on the proposition that an antecedent or pre-existing debt is not a sufficient consideration to establish a purchase for value.

See, also, Clark v. Merchants' Bank, 2 Comst. (N. Y.) 380; Commercial Bank of Pennsylvania v. Union Bank of New York, 1 Kern. (N. Y.) 203; Warner v. Lee, 2 Seld. (N. Y.) 144; Scott v. Ocean Bank, 23 N. Y. 289.

[51] First Nat. Bank of Meridian v. Strauss, 66 Miss. 479, 6 So. 232.

[52] Stevenson v. Fidelity Bank of Durham, 113 N. C. 485, 18 S. E. 695.

[53] Laws N. Y. 1897, c. 612, § 51; Public Laws N. C. 1899, c. 733, § 25.

notwithstanding the above provision of the negotiable instruments law as to what constitutes value.[54]

So, though paper delivered for collection and sent by the initial bank to its correspondent carries upon it evidence by way of an indorsement that the legal title has passed to the correspondent, the correspondent will not be protected, as against the true owner of the paper, unless it is a *bona fide* holder, and took the paper without notice that it was not the property of the initial bank before it obtained possession.[55] Where, however, a banker is made the payee of a draft, intended only for collection by him, and indorses the draft to a bank for collection and credit to his personal account at a time when he was indebted to such bank, the latter becomes a *bona fide* purchaser, and may retain the proceeds as against the original owner, though it was notified by telegraph before it received the proceeds, but after the draft had been paid, that the draft was not the property of such banker when he so delivered it for collection.[56]

[54] See People's Bank of Lewisburg v. Jefferson County Sav. Bank, 106 Ala. 523, 17 So. 728; Stevenson v. Fidelity Bank of Durham, 113 N. C. 485, 18 S. E. 695, and cases cited in notes to section 144, infra.

[55] Van Amee v. Bank of Troy, 8 Barb. (N. Y.) 312. See, also, Brandao v. Barnett, 3 Man., G. & S. 519, where the house of Lords held (reversing the decision of the court of exchequer chamber [6 Man. & G. 630], which had reversed the decision of the court of common pleas [1 Man. & G. 908]) that where an agent deposited exchequer bills in a tin box at a banker's, of which box he retained the key, and delivered them to the bankers only for the purpose of receiving the interest and exchanging the bills for new ones, which he again locked up in the box, the bank had no lien on the bills for a balance of the agent's personal account at the bank, though it had no notice of the agency, the bills not having been deposited with the bank as a bank.

[56] Wyman v. Colorado Nat. Bank, 5 Colo. 30, 40 Am. Rep. 133.

An interesting case on this point, decided by the supreme court of the United States, involved the following facts: A Cincinnati bank transferred a note payable at its office, and a mortgage securing it, to a bank in New York, which discounted the note, and placed the proceeds to the credit of the first bank, which credit had not been canceled at the time of a subsequent suit by the second bank to foreclose the mortgage. Specific directions were given to the second bank to notify the mortgagee and collect the amount due at maturity and to foreclose in their own name. The note was for three years, but the transfer was made within thirty days of maturity. There was no indorsement to the second bank on the note, but, when sent, it was accompanied by a formal separate instrument containing a guaranty by the first bank of collection and payment,—the guaranty to take effect if the second bank took the note and mortgage. It was apparent that the transfer was made to enable the second bank to sue in its own name, and escape defense available against the first bank. It was held that the second bank was merely a trustee for collection, and was not a *bona fide* purchaser.[57]

§ 144. —— Notice of real ownership of paper.

Notice to the correspondent bank, from the nature of the indorsements on the paper or from other sources, that title to the paper and its proceeds was not in the

The court in this case applies the doctrine that, where one of two innocent parties must suffer by the act of a third, that one must suffer who by his acts made it possible for such third person to occasion the loss.

[57] Lanier v. Nash, 121 U. S. 404, 7 Sup. Ct. 919, 30 L. Ed. 947.

sending bank, but remained in the original depositor, negatives any right of the correspondent to retain the proceeds on a debt of the sending bank to itself.[58]

An indorsement "for collection" is notice to all parties or banks into whose hands the paper comes that it was forwarded for collection only, and that there was no intention to transfer the title to the paper or its proceeds, and that the indorser is still the owner of the paper and its proceeds. Hence a correspondent bank receiving paper so indorsed cannot retain the proceeds on an indebtedness of the sending bank, to the prejudice of the original indorser.[59] And no agreement between the initial and correspondent banks, nor any method of bookkeeping or of charging and crediting accounts

[58] See cases cited in notes 59-63, infra.

[59] Evansville Bank v. German-American Bank, 155 U. S. 556, 562, 15 Sup. Ct. 221; Fifth Nat. Bank v. Armstrong, 40 Fed. 46; Commercial Nat. Bank of Cincinnati v. Hamilton Nat. Bank of Ft. Wayne, 42 Fed. 880; Bank of Metropolis v. First Nat. Bank of Jersey City, 19 Fed. 503; Sweeny v. Easter, 1 Wall. (U. S.) 166, 173; Blaine v. Bourne, 11 R. I. 119; Third Nat. Bank of Syracuse v. Clark, 23 Minn. 263; Merchants' Nat. Bank of St. Paul v. Hanson, 33 Minn. 40; National Bank of Commerce of Seattle v. Johnson, 6 N. D. 180, 69 N. W. 49; People's Bank of Lewisburg v. Jefferson County Sav. Bank, 106 Ala. 524, 17 So. 728; Northwestern Nat. Bank of Chicago v. Bank of Commerce of Kansas City, 107 Mo. 402, 17 S. W. 982, 15 L. R. A. 102; Mechanics' Bank v. Valley Packing Co., 70 Mo. 643, 4 Mo. App. 200; National Park Bank v. Seaboard Bank, 114 N. Y. 28, 20 N. E. 632, 11 Am. St. Rep. 612; Naser v. First Nat. Bank, 116 N. Y. 492, 22 N. E. 1077; Cecil Bank v. Farmers' Bank of Maryland, 22 Md. 148; Claflin v. Wilson, 51 Iowa, 15, 50 N. W. 578; Hoffman v. First Nat. Bank of Jersey City, 46 N. J. Law, 604; First Nat. Bank of Crown Point v. First Nat. Bank of Richmond, 76 Ind. 561; Manufacturers' Nat. Bank v. Continental Bank, 148 Mass. 553, 20 N. E. 193; Sutherland v. First Nat. Bank of Ypsilanti, 31 Mich. 230; Boykin v. Bank of Fayette-

among themselves, can prejudice the rights or title of the true owner of the paper, if he had indorsed it restrictively for collection in the first instance.[60] So, where the indorsement to the initial bank, which has become insolvent, was an unambiguous one for collection, the correspondent cannot retain the proceeds collected before notice of insolvency for a debt due it from the initial bank, as against the owner, though it had notified the initial bank of the collection, and had given it credit on the books of the bank.[61] And where the paper was originally indorsed for collection, the correspondent bank is not discharged from liability to the owner, on the insolvency of the initial bank, by having credited the amount to such bank, where no cash was paid to the initial bank, and the credit entry could be negatived by

ville, 118 N. C. 566, 24 S. E. 357; National Citizens' Bank of New York v. Citizens' Nat. Bank, 119 N. C. 307, 25 S. E. 971; People's Bank of New York v. Citizens' Nat. Bank, 119 N. C. 310, 25 S. E. 1023.

[60] National Citizens' Bank of New York v. Citizens' Nat. Bank, 119 N. C. 307, 25 S. E. 971; Boykin v. Bank of Fayetteville, 118 N. C. 566, 24 S. E. 357; Stevenson v. Fidelity Bank, 113 N. C. 485, 18 S. E. 695; People's Bank of Lewisburg v. Jefferson County Sav. Bank, 106 Ala. 524, 17 So. 728, distinguishing Commercial Bank of Pennsylvania v. Armstrong, 148 U. S. 50, 13 Sup. Ct. 533; Hackett v. Reynolds, 114 Pa. St. 328, 6 Atl. 689; Evansville Bank v. German-American Bank, 155 U. S. 556, 15 Sup. Ct. 221; Commercial Nat. Bank of Cincinnati v. Hamilton Nat. Bank of Ft. Wayne, 42 Fed. 880; Bank of Metropolis v. First Nat. Bank of Jersey City, 19 Fed. 303; Blaine v. Bourne, 11 R. I. 119; Arnold v. Clark, 3 N. Y. Super. Ct. 491; Lawrence v. Stonington Bank, 6 Conn. 521.

[61] People's Bank of Lewisburg v. Jefferson County Sav. Bank, 106 Ala. 524, 17 So. 728. In this case the initial bank had not credited the proceeds to the account of the owner prior to its insolvency nor subsequently.

a counter entry with a notice to the initial bank that the money had been paid to the owner.[62]

So, also, where the last of a series of corresponding banks receives and enters on its books, for collection only, a draft which had been restrictively indorsed for collection by each of the prior transmitting banks, it cannot, in reliance on the draft as security, make payment to its immediate indorser, and then, on the latter bank's suspension, recover the amount of the advances from the owner of the draft, who had stopped payment before it matured.[63]

The fact that the correspondent had credited the proceeds of paper originally indorsed for collection to the sending bank, which in turn credited the owner, and that, under an arrangement with the sending bank, the correspondent had ordered a third bank, a creditor of the sending bank, to credit the owner with the amount, will not relieve the correspondent from liability to the owner for the proceeds, the sending bank being insolvent, where it appears that there was sufficient time after the failure of the sending bank for the correspondent to have countermanded its order to such third bank, but the order was not countermanded.[64]

In Texas it has been held broadly that, if the owner indorses for collection to the initial bank, the correspondent bank holds the proceeds in trust for the owner, and cannot apply it to any indebtedness due it from the

[62] Boykin v. Bank of Fayetteville, 118 N. C. 566, 24 S. E. 357.

[63] Freeman's Nat. Bank v. National Tube Works Co., 151 Mass. 413, 24 N. E. 779, 21 Am. St. Rep. 461, 8 L. R. A. 42, and cases cited.

[64] Commercial Nat. Bank of Cincinnati v. Hamilton Nat. Bank of Ft. Wayne, 42 Fed. 880.

initial bank, regardless of the question of notice of its insolvency.[65]

Where, in addition to an original indorsement for collection, the paper, when transmitted to the correspondent, is accompanied by a letter of advice, also negativing any title in the sending bank, the correspondent is doubly notified as to the ownership, and cannot claim title to the paper or a lien on the paper or its proceeds for a debt of the sending bank.[66]

§ 145. —— Proceeds of paper originally indorsed in blank.

Where the paper was originally indorsed in blank to the initial bank, and by it indorsed to its correspondent for collection, the latter, having no notice from the paper itself, or otherwise, that it did not belong to the initial bank, may retain the proceeds for a general balance of account against the initial bank, where there had been mutual dealings and customs of long standing between the banks, whereby collections were credited and debited currently, and statements of account and balances were periodically exchanged.[67] An indorsement in blank to the first bank, coupled with such mu-

[65] City Bank of Sherman v. Weiss, 67 Tex. 331, 3 S. W. 299.

[66] Williams v. Jones, 77 Ala. 294, and cases cited; Lawrence v. Stonington Bank, 6 Conn. 521; People's Bank of Lewisburg v. Jefferson County Sav. Bank, 106 Ala. 524, 17 So. 728; First Nat. Bank of Circleville v. Bank of Monroe, 33 Fed. 408. In the last case just cited, the indorsement was "for collection," and the instructions were to "collect and credit proceeds." In the Alabama case above cited, the indorsement was "for account of," and the instructions were for "collection and credit."

[67] Vickrey v. State Savings Ass'n, 21 Fed. 773; Cody v. City Nat. Bank of Grand Rapids, 55 Mich. 379; Doppelt v. National Bank

tual dealings between the two banks, will also authorize the correspondent to credit the proceeds absolutely to the sending bank, and allow it to draw out the fund, in which case it will not be liable therefor to the payee of the paper in case of the insolvency of the sending bank.[68] Under such circumstances, if money was actually advanced by the correspondent bank on the faith of the paper as the property of the initial bank, the paper must be considered as the property of such initial bank, so that trover would not lie against the correspondent by the owner.[69]

A bank receiving from a correspondent bank, in due course, a check indorsed in blank, and in good faith parting with value therefor, or giving an extension on an existing debt by reason thereof, is entitled to the proceeds as against the owner, though actual collection was not made until after the failure of the sending bank.[70]

(B) Enforcing Preference or Establishing Trust.

By the great weight of authority, the mere collection of the proceeds and the giving of credit therefor does not establish a trust. The bank becomes merely a debtor for the amount collected.

Fraudulent conversion does not per se establish a trust or give a right to a preference; but some courts hold that if the

of Republic, 175 Ill. 432, 51 N. E. 753, affirming 74 Ill. App. 429. Contra, see First Nat. Bank of Meridian v. Strauss, 66 Miss. 479, 6 So. 232.

[68] Doppelt v. National Bank of Republic, 175 Ill. 432, 51 N. E. 753, affirming 74 Ill. App. 429.

[69] Cody v. City Nat. Bank of Grand Rapids, 55 Mich. 379.

[70] Winfield Nat. Bank v. McWilliams, 9 Okla. 493, 60 Pac. 229.

paper was received when the bank was insolvent within the knowledge of its officers, the proceeds are a trust fund.

Where remittance was made by a draft or check of the collecting bank, and the drawer or drawee bank became insolvent before such paper was paid, it is the rule in some jurisdictions that a trust is impressed on the assets of the insolvent bank for the amount of the collection; in other jurisdictions, no trust arises in such a case. But if the bank was expressly authorized to send its check or draft in payment, and failed after doing so, and the paper was not paid, no trust arises.

If, however, the proceeds never came into the possession of the bank, its assets cannot be impressed with a trust therefor; nor can they be so impressed if the proceeds were disposed of before insolvency. But the proceeds of paper paid to the assignee or receiver of the bank after its insolvency form a special trust fund recoverable in full.

The proceeds once determined to be a trust fund may be followed into the insolvent estate if they can be traced into the assets, or identified as forming part of the assets. The mere mingling of the proceeds with the other funds of the collecting bank will not defeat the trust.

The right to a trust or preference is not lost or waived by the mere filing of a claim as a general creditor, but is waived by proceeding for, and obtaining, an actual adjudication on the claim as a general claim.

§ 146. In general.

In a leading English case it is laid down broadly that, if a fiduciary relation exists, the equitable right to follow funds or property left with the fiduciary in that capacity exists, whether his exact status be that of agent, bailee, or trustee.[71] This rule has been followed con-

[71] Knatchbull v. Hallett, 13 Ch. Div. 696.

sistently in England, and the case is a recognized authority in America. But we have found that the great weight of authority is to the effect that on the mere collection of the proceeds and the giving of credit therefor, the relation becomes that of creditor and debtor.[72] This being so, it precludes the possibility of treating the bank as a fiduciary having the status either of an agent, a bailee, or a trustee, except under special conditions, which will be considered in the remaining sections of this chapter. Nevertheless, the doctrine that, as soon as the proceeds are collected in cash and credited to the owner, the bank becomes a debtor to the owner for the amount, has been extended by some courts, which take the position that the bank then becomes a trustee for the owner, and not merely a simple debtor.[73] As a result of this enlarged doctrine, neither the paper nor its proceeds is an asset of the bank; consequently, neither passes by a general assignment of the bank, and the trust may be enforced against a receiver or assignee, and the amount recovered in full.[74] In any case, the

[72] See ante, § 121. See, also, post, §§ 150-154.

[73] Jones v. Kilbreth, 49 Ohio St. 401, 31 N. E. 346; State v. Bank of Commerce of Grand Island (Neb.) 85 N. W. 43; Anheuser-Busch Brewing Ass'n v. Morris, 36 Neb. 31, 53 N. W. 1037; Nurse v. Satterlee, 81 Iowa, 491, 46 N. W. 1102; Louisiana Ice Co. v. State Nat. Bank of New Orleans, 1 McGloin (La.) 181; City Bank of Sherman v. Weiss, 67 Tex. 331, 3 S. W. 299.

Where a bank to which a mortgage was sent for collection and remittance of the proceeds failed to remit, the sender may pursue the proceeds as a trust fund in the hands of a receiver of the bank. Wallace v. Stone, 107 Mich. 190, 65 N. W. 113. A trust also arises where the paper was sent "for collection and returns." Continental Nat. Bank of New York v. Weems, 69 Tex. 489, 495.

[74] Louisiana Ice Co. v. State Nat. Bank of New Orleans, 1 Mc-

burden of establishing a trust is on the party seeking to recover the funds in full, and he must establish a clear case.[75]

§ 147. Fraudulent conversion as creating preference or trust.

We again encounter a conflict of authority on the question whether a fraudulent conversion by the bank, arising from the fact that it received the paper for collection when it was insolvent within the knowledge of its officers, or from the fact that it was otherwise guilty of a conversion of the paper or its proceeds, creates a trust or a right to preference. In the federal courts and some of the state courts the rule is that a trust, and a consequent right of preference, arises from the fraud of the bank in receiving the paper knowing itself to be hopelessly insolvent.[76] Consistently with this rule, it

Gloin (La.) 181; Griffin v. Chase, 36 Neb. 328, 54 N. W. 572; Anheuser-Busch Brewing Ass'n v. Morris, 36 Neb. 31, 53 N. W. 1037; Nurse v. Satterlee, 81 Iowa, 491, 46 N. W. 1102; Farmers' & Mechanics' Nat. Bank v. King, 57 Pa. St. 202; Peak v. Ellicott, 30 Kan. 156, 1 Pac. 499.

[75] In re Bank of Madison, 5 Biss. 515, Fed. Cas. No. 890.

[76] St. Louis & San Francisco Ry. Co. v. Johnston, 133 U. S. 566, 10 Sup. Ct. 390, 33 L. Ed. 683; City of Philadelphia v. Eckels, 98 Fed. 485; Importers' & Traders' Bank v. Peters, 123 N. Y. 272, 278, 25 N. E. 319, affirming 51 Hun, 640; Harrison v. Smith, 83 Mo. 210; German Fire Ins. Co. v. Kimble, 66 Mo. App. 370.

Money was deposited in a national bank by a city treasurer merely for safe keeping over night, under an arrangement with the bank that the part of the money belonging to the city should be separated from state funds the next morning, and credit given to the city. Credit was so given the next morning before banking hours, at a time when the bank was in the hands of the bank examiner under orders from the comptroller. The officers knew at the time the deposit was received, and the credit entered, that

has been held that an allegation in a petition to recover the proceeds as a trust fund that the bank received the paper as bailee, for collection, is not inconsistent with an allegation that the deposit of the paper was obtained by a fraudulent concealment of the insolvency of the bank, and a prayer for rescission of the contract.[77]

On the other hand, other courts hold that, on the collection of the paper and the actual mingling of the proceeds with other funds of the collecting bank, the relation of creditor and debtor arises, so that the creditor is entitled to no preference, though the bank was insolvent, within the knowledge of its officers, when it received the paper, and failed after collection and before remittance.[78] A parallel holding is that the right to follow trust funds is a property right, not based on the theory of fraudulent conversion, and that a fraudulent conversion does not establish a trust.[79] Between these

the bank was insolvent. Held, that the funds never became the property of the bank, and were recoverable in full from a receiver of the bank. City of Philadelphia v. Eckels, 98 Fed. 485.

[77] Higgins v. Hayden, 53 Neb. 61, 73 N. W. 280; St. Louis & San Francisco Ry. Co. v. Johnston, 133 U. S. 566.

[78] Commercial & Farmers' Nat. Bank of Baltimore v. Davis, 115 N. C. 226, 20 S. E. 370; Thuemmler v. Barth, 89 Wis. 381, 62 N. W. 94; Blake v. State Sav. Bank, 12 Wash. 619, 41 Pac. 909; Bruner v. First Nat. Bank of Johnson City, 97 Tenn. 540, 37 S. W. 286; Sayles v. Cox, 95 Tenn. 579; Akin v. Jones, 93 Tenn. 353.

[79] Slater v. Oriental Mills, 18 R. I. 352, 27 Atl. 433; Nonotuck Silk Co. v. Flanders, 87 Wis. 237, 58 N. W. 383; Cavin v. Gleason, 105 N. Y. 256, 260; Bank of Florence v. United States Savings & Loan Co., 104 Ala. 297, 16 So. 110; In re Seven Corners Bank, 58 Minn. 5, 59 N. W. 633.

See, also, Illinois Trust & Savings Bank of Chicago v. First

two lines of authority there seems to be no compromise, or intermediate position. It therefore becomes a question merely of choosing "whom ye shall serve."

§ 148. Remittance made by draft or check—Drawer or drawee bank insolvent.

The diversity of judicial opinion on the question of the existence of a trust, or the right to a preference in the proceeds of a collection, is further illustrated by the cases which pass on the right to a preference or the existence of a trust where remittance was made by draft or check, and the drawer or drawee bank failed before such paper was paid. The supreme court of Mississippi holds that, where a collecting bank takes, in payment of a note, a check on itself, drawn by one having sufficient funds in the bank to pay the check, debits his account with the amount, remits by its own check, and thereafter fails, the owner of the note is not entitled to preference or priority in the distribution of the assets.[80]

Nat. Bank of Buffalo, 15 Fed. 858; Philadelphia Nat. Bank v. Dowd, 38 Fed. 172, 2 L. R. A. 480. The debt being, then, a simple contract debt, complainant has an adequate remedy at law. In re Seven Corners Bank, 58 Minn. 5, 59 N. W. 633; Crothers v. Lee, 29 Ala. 337.

[80] Billingsley v. Pollock, 69 Miss. 759, 13 So. 828, 30 Am. St. Rep. 585. The court in this case, while reaffirming the doctrines laid down in Ryan v. Paine, 66 Miss. 678, 6 So. 320, and Kinney v. Paine, 68 Miss. 258, 8 So. 747 (considered later in this section of the text), refuses to extend the "trust" theory to the case at bar, remarking that, "wherever there is a trust, it may be enforced as such, but calling one sort of claim a trust merely to place it on a better footing is not allowable. It has been done in some instances, where hard cases have made bad precedents, which we will not follow."

To the same effect is a Pennsylvania decision that, where the account of the drawee of a draft indorsed to a bank for collection was charged with the amount, and a draft given therefor by the bank, which failed before its draft was presented for payment, no special lien or priority arises; it appearing that the bank did not receive any money as the proceeds of the collection, and that no part of the funds of the bank had been set apart to pay the amount of the collection.[81]

The rule is the same where the bank had authority to remit by check or draft, or its action in so doing was ratified by the owner. Thus, where the collecting bank was directed to send New York exchange in payment of a collection, it was thereby ordered not to send the specific money collected, and was authorized to use the money and to send a check on a New York bank for the amount collected; so that, in case of the insolvency of the collecting bank, and the dishonor of the check, the owner of the collection is a general creditor only and no trust relation arises.[82]

So, also, where a collecting bank issued its own draft for the amount of a collection, and the draft was accepted by the owners of the collection, and was, in turn, forwarded for collection, but was not paid because of the suspension of the bank, no trust arises, but the relation of the parties is simply that of debtor and creditor.[83] The same rule holds where remittance by check or draft is justified by general custom.[84]

[81] Freiberg v. Stoddard, 161 Pa. St. 259, 28 Atl. 1111.

[82] Akin v. Jones, 93 Tenn. 353, 27 S. W. 669, 42 Am. St. Rep. 921, 25 L. R. A. 523.

[83] Bowman v. First Nat. Bank of Spokane, 9 Wash. 614, 38 Pac. 211, 43 Am. St. Rep. 870.

[84] Hallam v. Tillinghast, 19 Wash. 20, 52 Pac. 329.

There are some cases, however, holding broadly that a bank which remitted by a draft on another bank, which failed before the draft was paid, holds the proceeds of the collection as a trust fund for the owner.[85]

Where the drawer, whose account was overdrawn, gave a check in payment of the draft, and the drawee bank failed after sending a draft for the amount to the collecting bank, the latter may enforce a trust in the debt due by such drawer as against the parties to a consent decree made in a suit to settle priorities between creditors of the drawee bank; the collecting bank not having been a party to that suit.[86]

§ 149. Refusal to pay customer's check does not give preference.

The mere refusal of a bank to pay a customer's check does not give any right of preference. So, where the drawee bank, to which a check was sent by the collecting bank with directions to apply the proceeds on a debt due from the collecting bank, failed before complying with such directions, the drawer, on the refusal of the drawee to pay the check out of his funds, and after payment by him of the check, has a right of action on the check against the drawee bank, but no right to pri-

[85] Foster v. Rincker, 4 Wyo. 484, 35 Pac. 470; People v. Bank of Dansville, 39 Hun (N. Y.) 187.

[86] Kinney v. Paine, 68 Miss. 258, 8 So. 747. The parties to such suit cannot be considered as bona fide purchasers of the debt of the drawer, which was merely a book account. Id.

The fact that the drawer's account was overdrawn distinguishes this case from Billingsley v. Pollock, 69 Miss. 759, previously considered in this section.

ority in the distribution of the assets of such bank on its insolvency.[87]

§ 150. Tracing and following proceeds into insolvent estate of collecting bank.

The old theory that trust money mingled with other money cannot be followed as a trust fund because money has no ear-marks[88] has been thoroughly supplanted by the more modern equity doctrine, first definitely announced by Lord Justice Knight Bruce in Pennell v. Deffell,[89] and later followed in Frith v. Cartland,[90] and in the great case of Knatchbull v. Hallett,[91] that equity will follow trust money, though mingled with other moneys or changed, transformed, or substituted, so long as the money in its original or substituted form can be traced, and that the right to follow ceases only when the means of ascertainment fail.

In the last case above mentioned Sir George Jessel, M. R., says: "If the bailee sells the goods bailed, the bailor can in equity follow the proceeds, and can follow the proceeds wherever they can be distinguished, either being actually kept separate, or being mixed up with other moneys. I have only to advert to one other point, and that is this: Supposing * * * the moneys were simply mixed with other moneys of the trustee,

[87] Romanski v. Thompson (Miss.) 11 So. 828.

[88] Deg v. Deg, 2 P. Wms. 414; Whitecomb v. Jacob, 1 Salk. 161; Ryall v. Rolle, 1 Atk. 165; Ex parte Sayers, 5 Ves. 169; Taylor v. Plumer, 3 Maule & S. 562.

[89] 4 De Gex, M. & G. 372.

[90] 2 Hem. & M. 417. See also, Ex parte Cooke, 4 Ch. Div. 123.

[91] 13 Ch. Div. 696, where the earlier cases are thoroughly discussed.

using the term again in its full sense as including every person in a fiduciary relation, does it make any difference, according to the modern doctrine of equity? I say none. It would be very remarkable if it were to do so."

This doctrine has been very generally adopted in determining the right to follow the proceeds of a collection made by or through a bank which became insolvent after collection, and before remittance.[92] The right to follow as a trust fund, and recover in full, the proceeds of a collection, is usually sustained if the proceeds can be traced to any particular fund in the hands of the assignee or receiver,[93] though the identity of the particu-

[92] Commercial & Farmers' Nat. Bank of Baltimore v. Davis, 115 N. C. 226, 20 S. E. 370; Freiberg v. Stoddard, 161 Pa. St. 259, 28 Atl. 1111; In re Seven Corners Bank, 58 Minn. 5, 59 N. W. 633; Westfall v. Mullen, Id.; Little v. Chadwick, 151 Mass. 109; Edson v. Angell, 58 Mich. 336, 25 N. W. 307; Sherwood v. Milford State Bank, 94 Mich. 78, 53 N. W. 923; In re Waterbury, Id.; Midland Nat. Bank of Kansas City v. Brightwell, 148 Mo. 358, 49 S. W. 994; Cavin v. Gleason, 105 N. Y. 256, 11 N. E. 504; Atkinson v. Rochester Printing Co., 114 N. Y. 168, 21 N. E. 178; Holmes v. Gilman, 138 N. Y. 376, 34 N. E. 205; Foster v. Rincker, 4 Wyo. 484, 35 Pac. 470; Philadelphia Nat. Bank v. Dowd, 38 Fed. 172, 2 L. R. A. 480; Illinois Trust & Savings Bank of Chicago v. First Nat. Bank of Buffalo, 15 Fed. 858, citing Kip v. Bank of New York, 10 Johns. (N. Y.) 63; Kansas State Bank v. First State Bank of Marion (Kan. Sup.) 64 Pac. 634.

[93] Nurse v. Satterlee, 81 Iowa, 491, 46 N. W. 1102, citing Independent District of Boyer v. King, 80 Iowa, 497, 45 N. W. 908, and Davenport Plow Co. v. Lamp, 80 Iowa, 722, 45 N. W. 1049.

Where the fund is actually in the hands of the receiver, the creditor need not sue in equity to establish his rights, but may make summary application by petition. People v. Bank of Dansville, 39 Hun, 187; In re Le Blanc, 14 Hun, 8.

lar money is lost.[94] And it is the rule in some jurisdictions that the proceeds form a trust fund recoverable in full, though they cannot be specifically traced to any particular fund, if they can be traced generally to the insolvent estate.[95]

Further enlarging the doctrines of equity, the courts of Missouri hold that the proceeds of a collection made by a bank immediately before, and in its possession at the time of, its assignment, form a trust which is impressed on all the assets, and entitles the owner to a preference, though such proceeds never came into the hands of the assignee, either in their original or in a substituted form.[96] The position of the Missouri courts is that, "to an amount thus wrongfully converted, the assignee can lay no claim in equity, and that the wrongful conversion immediately preceding the assignment is of itself evidence of a corresponding increase in the as-

[94] Cavin v. Gleason, 105 N. Y. 256, 11 N. E. 504; White v. Commercial & Farmers' Bank of Rockhill (S. C.) 38 S. E. 453.

[95] Cavin v. Gleason, 105 N. Y. 256; Freiberg v. Stoddard, 161 Pa. St. 259, 28 Atl. 1111; In re Seven Corners Bank, 58 Minn. 5, 59 N. W. 633; Westfall v. Mullen, Id.; Nonotuck Silk Co. v. Flanders, 87 Wis. 237, 58 N. W. 383 (overruling McLeod v. Evans, 66 Wis. 401, 28 N. W. 173, 214, and Francis v. Evans, 69 Wis. 115, 33 N. W. 93; Bowman v. Evans, 71 Wis. 133, 36 N. W. 629); Sherwood v. Milford State Bank, 94 Mich. 78, 53 N. W. 923; In re Waterbury, Id.; Peak v. Ellicott, 30 Kan. 156, 1 Pac. 499. See, also, Central Nat. Bank of Baltimore v. Connecticut Mutual Life Ins. Co., 104 U. S. 54; Van Alen v. American Nat. Bank, 52 N. Y. 1; People v. City Bank of Rochester, 96 N. Y. 32; Farmers' & Mechanics' Nat. Bank v. King, 57 Pa. St. 202.

[96] First Nat. Bank of Lapeer v. Sanford, 62 Mo. App. 394, following Harrison v. Smith, 83 Mo. 210.

signed assets."[97] This position is believed to be an unwarranted enlargement of the general rules of equity relating to trusts and the following of trust funds. It is also obnoxious to the doctrine that the right to a preference or to follow the proceeds as a trust is not based on mere conversion of the proceeds.[98] The position of the Missouri courts is also considered later in treating of the right to follow, as a trust fund, proceeds which have been disposed of by the bank before insolvency.[99]

There is some difference of judicial opinion as to the effect of mingling the proceeds with other funds of the bank. The better rule, following the general principles of equity considered above, is that such a mingling of the proceeds will not prevent the enforcement of a preference or trust, if it can be shown that the proceeds came into the hands of the receiver along with the other funds.[100] Indeed, many courts assert squarely that the fact of mingling the proceeds of the collection with the general funds of the bank itself establishes a trust and a right to priority.[101] But if the funds arising from the collection have become so mingled with other funds

[97] First Nat. Bank of Lapeer v. Sanford, 62 Mo. App. 394; Harrison v. Smith, 83 Mo. 210.

[98] See ante, § 147.

[99] See post, § 153.

[100] Thompson v. Gloucester City Savings Inst. (N. J. Ch.) 8 Atl. 97; Hoffman v. First Nat. Bank of Jersey City, 46 N. J. Law, 604; First Nat. Bank of Montgomery v. Armstrong, 36 Fed. 59.

Where the trust money has been mingled by the bank with its own funds, a payment from the combined fund will be presumed to have come from the funds of the bank, and not from the trust fund. State v. Bank of Commerce of Grand Island (Neb.) 85 N. W. 43; Continental Nat. Bank of New York v. Weems, 69 Tex. 489.

[101] Windstanley v. Second Nat. Bank of Louisville, 13 Ind. App.

that it is impossible to trace or identify them as forming a part of the fund sought to be charged, they lose their trust and preferential character.[102]

However, the mere fact that a subagent of the correspondent bank had collected paper sent for collection to the correspondent, which had failed, does not amount to such a commingling of the funds with the general funds of the correspondent bank as will deprive the funds of their trust character.[103] So, too, where the collecting bank received the check of the drawee on another bank in payment of the collection, and the check was collected through the clearing house, and a memo-

544, 41 N. E. 956; German Fire Ins. Co. v. Kimble, 66 Mo. App. 370; Ryan v. Phillips, 3 Kan. App. 704, 44 Pac. 909.

[102] Little v. Chadwick, 151 Mass. 110, 23 N. E. 1005; Englar v. Offutt, 70 Md. 78, 16 Atl. 497; Goodell v. Buck, 67 Me. 514; Thompson's Appeal, 22 Pa. St. 16; Columbian Bank's Estate, 147 Pa. St. 422, 23 Atl. 625, 626, 628; Van Alen v. American Nat. Bank, 52 N. Y. 1; Holmes v. Gilman, 138 N. Y. 369, 34 N. E. 205; Union Nat. Bank of Chicago v. Goetz, 138 Ill. 127, 27 N. E. 907; Neely v. Rood, 54 Mich. 134, 19 N. W. 920; Sherwood v. Milford State Bank, 94 Mich. 78, 53 N. W. 923; Wallace v. Stone, 107 Mich. 190, 65 N. W. 113; Central Nat. Bank of Baltimore v. Insurance Co., 104 U. S. 54, 68; Peters v. Bain, 133 U. S. 670, 693, 10 Sup. Ct. 354; Illinois Trust & Savings Bank of Chicago v. First Nat. Bank of Buffalo, 15 Fed. 858; 2 Story, Eq. Jur. §§ 1258, 1259; 2 Pomeroy, Eq. Jur. § 1058; 1 Lewin, Trusts (1 Am. Ed.) 241. Contra, see Ryan v. Phillips, 3 Kan. App. 704, 44 Pac. 909.

[103] Commercial Bank of Pennsylvania v. Armstrong, 148 U. S. 50, 13 Sup. Ct. 533, 37 L. Ed. 363; Armstrong v. Commercial Bank of Pennsylvania, Id., affirming 39 Fed. 684. If the correspondent in such case was indebted to its subagent, and, on collection by the latter, the former was credited with the amount, the proceeds of the collection were thereby brought into the possession of the correspondent. Id.

randum placed with the bank's cash, indicating that the proceeds of the collection were the property of the sender, there was not such a mingling of the proceeds with the general funds as to destroy the trust and preferential character of the proceeds.[104]

Money received by a bank for the express purpose of transmitting the same to the owner of a note, in order to take it up, and immediately mingled with its general funds, becomes, on the subsequent failure of the bank without having transmitted it, a trust fund recoverable in full from the assignee of the bank, though not specifically traceable to the funds in his hands.[105]

Where the initial bank becomes insolvent after the collection has been made by its correspondent, and the proceeds mingled with the general fund, but, before insolvency, the correspondent had remitted some of the proceeds of its collections generally, and, after insolvency, had remitted to the assignee part of the funds remaining in its hands as the proceeds of all collections made for the insolvent bank, the owner has no specific lien on, or preference in, the funds in the hands of the assignee.[106]

§ 151. —— Proceeds never in possession of bank.

Where the proceeds were never actually realized by the collecting bank, as where the bank, instead of col-

[104] First Nat. Bank of Montgomery v. Armstrong, 36 Fed. 59. In this case the court says: "The old idea that, because money has no earmarks, it cannot be followed when mingled with the funds of a wrongdoer, has long since been exploded."

[105] Ryan v. Phillips, 3 Kan. App. 704, 44 Pac. 909.

[106] Reeves v. State Bank, 8 Ohio St. 465, 483.

lecting, took a new note to itself from the obligor, the owner cannot, on the failure of the bank, recover the amount of the note as a trust fund from the assignee of the bank, though he might recover the note itself.[107] So, too, where a draft was received for "collection and return," and the bank took the check of the debtor, one of its depositors, and merely charged the amount to him and credited the account of the drawer, without separating the amount from other funds of the bank, no trust arose which would create a preference in case of the bank's insolvency.[108]

Even the supreme court of Missouri, which has gone as far as any other court in extending the equitable doctrines as to following trust funds, denied a preference to the initial collecting bank in the assets of its insolvent correspondent, where the latter had received no money in payment, but had accepted payment partly by a draft of another bank, which since became insolvent before paying the draft, and partly by charging the account of its depositors; on the ground that the assets of the correspondent bank had in no wise been augmented by the collection.[109]

It goes almost without saying that a bank is not liable as trustee for money collected by its president as a trustee, and paid into the bank on a certificate of deposit in

[107] Harrison Nat. Bank of Cadiz v. Ellicott, 31 Kan. 173, 1 Pac. 593, citing People v. Merchants' & Mechanics' Bank, 78 N. Y. 269, 34 Am. Rep. 532; Morse, Banks & Banking, 384 et seq.

[108] Anheuser-Busch Brewing Ass'n v. Clayton, 6 C. C. A. 108, 56 Fed. 759, 13 U. S. App. 295. But see Continental Nat. Bank of New York v. Weems, 69 Tex. 489.

[109] Midland Nat. Bank of Kansas City v. Brightwell, 148 Mo. 358.

his name, where the bank was in no way connected with the trust.[110]

§ 152. —— Amount of note against customer charged to his account before insolvency of bank.

The mere charging of the amount of the paper to the account of a customer, which is sufficient to pay it, and the return of the paper to him, is not such a specific appropriation of any part of the funds of the bank to the payment of the debt as will create a trust in the assets of the bank on its insolvency.[111] But it has been held that, where a bank receiving for collection, from one not a customer of the bank, a note made by one of its depositors, charges the amount thereof to the account of the maker, who has at that time sufficient funds in the bank to meet it, the bank holds the amount of the collection in trust for the owner of the note, and he may recover in full from its receiver.[112]

§ 153. —— Proceeds disposed of before insolvency.

The extreme limit of the extension of the equitable doctrines as to following the proceeds of a collection as a trust fund is exemplified in the cases holding that the beneficiary—that is, the owner—is entitled to prefer-

110 Alpena Nat. Bank v. Greenbaum, 80 Mich. 1, 44 N. W. 1123.

111 People v. Merchants' & Mechanics' Bank, 78 N. Y. 269, 34 Am. Rep. 532; Anheuser-Busch Brewing Ass'n v. Clayton, 6 C. C. A. 108, 56 Fed. 759, 13 U. S. App. 295; Billingsley v. Pollock, 69 Miss. 759, 13 So. 828, 30 Am. St. Rep. 585; Freiberg v. Stoddard, 161 Pa. St. 259, 28 Atl. 1111; Midland Nat. Bank of Kansas City v. Brightwell, 148 Mo. 358, 49 S. W. 994.

112 People v. Merchants' Bank of Binghamton, 92 Hun, 159, 36 N. Y. Supp. 989; Arnot v. Bingham, 55 Hun, 553, 9 N. Y. Supp. 68.

ence, though the insolvent had exhausted such proceeds in paying its own debts, and consequently the proceeds never entered into the estate of the insolvent, nor formed part of the assets.[113] The better rule is that the funds must be traced into the hands of the receiver or assignee, and that, if they have been used up by the bank prior to its failure and the appointment of the assignee or receiver, no trust or preference can be enforced.[114]

In harmony with this latter rule, it has been held that, where no specific instructions were given as to the disposition of the proceeds, and they were mingled with the other funds of the collecting bank, and credited to the sending bank, and drawn against, the sending bank is an ordinary creditor, and not entitled to preference

[113] First Nat. Bank of Lapeer v. Sanford, 62 Mo. App. 394; Harrison v. Smith, 83 Mo. 210; Davenport Plow Co. v. Lamp, 80 Iowa, 722, 45 N. W. 1049; McLeod v. Evans, 66 Wis. 401, 28 N. W. 173; Francis v. Evans, 69 Wis. 115, 33 N. W. 93.

The two cases last cited were overruled in Nonotuck Silk Co. v. Flanders, 87 Wis. 237, 58 N. W. 383.

The Iowa case above cited was severely criticised in Slater v. Oriental Mills, 18 R. I. 352, 27 Atl. 443, for making no distinction between funds remaining in the estate, and going to swell the assets, and funds that have been dissipated, and do not go to swell the assets.

The supreme court of Missouri expressly admits that it is somewhat in advance of the doctrines of the English chancery courts, and of most of the courts of the various states of the Union. See Midland Nat. Bank of Kansas City v. Brightwell, 148 Mo. 358, 49 S. W. 994.

[114] Frank v. Bingham, 58 Hun, 580, 12 N. Y. Supp. 767; Bruner v. First Nat. Bank of Johnson City, 97 Tenn. 540, 37 S. W. 286; Thuemmler v. Barth, 89 Wis. 381, 62 N. W. 94; In re Seven Corners Bank, 58 Minn. 5, 59 N. W. 633; Westfall v. Mullen, Id.

in case of the insolvency of the collecting bank.[115] The same rule applies where a check deposited in a bank for collection is sent to the clearing house, and there used up in liquidating the balance due the clearing house from the collecting bank on that day's business, and the owner is not entitled to a preference in case the collecting bank becomes insolvent on the same day, though the assignee received from the clearing house, in the bank's general account, more than enough to pay the check.[116] Nor is the receiver of a bank to which a draft had been delivered for collection liable to the owner for the proceeds of the draft as a trust fund, where such bank, before insolvency, had converted the draft by sending it to another bank to be applied on the former's overdrafts, though the latter bank had security for the overdrafts, since the proceeds of the draft never came into the possession of the receiver.[117]

§ 154. —— Proceeds collected by assignee or receiver.

The proceeds of a collection paid to the receiver of the collecting bank after its insolvency are held by him as a special trust fund, which may be recovered in full.[118]

[115] State v. Southern Bank, 33 La. Ann. 957. See, also, Williams v. Cox, 97 Tenn. 555.

[116] In re Seven Corners Bank, 58 Minn. 5, 59 N. W. 633; Westfall v. Mullen, Id. Contra, see Kansas State Bank v. First State Bank of Marion (Kan. Sup.) 64 Pac. 634, where the use of the paper and proceeds in making daily clearance is held to augment the assets.

[117] Thuemmler v. Barth, 89 Wis. 381, 62 N. W. 94, and cases cited. See, also, In re Hallett [1894] 2 Q. B. Div. 237; Ex parte Blane, Id.

[118] Henderson v. O'Conor, 106 Cal. 385, 39 Pac. 786; Jockusch v. Towsey, 51 Tex. 129; Guignon v. First Nat. Bank of Helena,

It is readily seen that, in such case, the proceeds form a distinct part of the assets of the bank. The rule is especially pertinent if the paper was originally sent to the bank "for collection," and was credited "subject to payment."[119] The rule has been applied where the collecting bank took the check of the debtor for the amount of paper left for collection, but the check was not paid until after the collecting bank had suspended;[120] and where the bank accepted a check in payment, and, instead of demanding payment, took a certification of the check, and suspended before it was paid, payment having been made ultimately to the receiver;[121] and where the bank failed before checks deposited for collection were collected, but the proceeds came into the hands of the receiver, and there had been no agreement that the checks should be treated as cash, or could be drawn against.[122]

The proceeds of commercial paper fraudulently received by a bank for collection when it was insolvent, within the knowledge of its officers, are sufficiently

22 Mont. 140, 55 Pac. 1051, 1097. See, also, cases cited in notes 119-124, infra.

Checks deposited in a bank for collection at a time when its condition was such as to charge its officers with knowledge of its hopeless insolvency, and remaining uncollected when the bank suspended, may be reclaimed by the owner from the receiver of the bank. Richardson v. Denegre, 93 Fed. 572.

[119] First Nat. Bank of Wellston v. Armstrong, 42 Fed. 193.

[120] German-American Bank v. Third Nat. Bank, Fed. Cas. No. 5,359, 18 Alb. Law J. 252.

[121] Levi v. National Bank of Missouri, 5 Dill. 104, Fed. Cas. No. 8,289.

[122] Beal v. City of Somerville, 50 Fed. 647, 1 C. C. A. 598, 5 U. S. App. 14.

traced to establish a preference where it is shown that they are included in a fund paid over to the receiver by a correspondent as the proceeds of credits made after failure of the bank, but before notice thereof to the correspondent.[123]

Where the initial bank fails after notice of a completed collection by its correspondent in another state, and after crediting the amount without authority from the owner, and its receiver receives the proceeds, he holds them in trust for the owner.[124]

§ 155. Bank as owner of paper and proceeds.

Consistent with the rules heretofore considered as to the circumstances under which title passes to the bank is the doctrine that no preference is allowable where the paper was indorsed in blank and deposited for credit, and the depositor allowed to draw out part of the fund;[125] and that no right to a preference for the proceeds of a check exists where it was deposited and treated as cash, and charged as such to a correspondent bank to which it was sent, and the initial bank gave to the depositor, for part of the amount, cash and a certificate of deposit, and absolute credit for the balance, prior to insolvency.[126]

So, also, where a running account is kept, and an absolute debit and credit given, between the two banks, and

[123] Bruner v. First Nat. Bank of Johnson City, 97 Tenn. 540, 37 S. W. 286, and cases cited.

[124] Henderson v. O'Conor, 106 Cal. 385, 39 Pac. 786.

[125] Williams v. Cox, 97 Tenn. 555; State v. Southern Bank, 33 La. Ann. 957.

[126] Friberg v. Cox, 97 Tenn. 550, 37 S. W. 283.

a balance is struck at regular periods, and remittances immediately made accordingly, the proceeds of the collections having been mingled with other funds of the collecting bank, the creditor bank has no lien on any specific funds, and is not entitled to a preference in case of the insolvency of the collecting bank.[127] In such case, the relation is merely that of debtor and creditor, and "each sum collected, as it came in, became the property of the collecting bank, who simply became liable to account for it to the other on the next settling day."[128] Nor can a claim of preference be predicated of the proceeds of a collection sent with directions to "forward draft to me for balance," less the bank's charges, since, in such case, title to the proceeds, when realized, is in the bank.[129]

Where it was the intention of both parties that the owner of a note in the hands of a bank for collection should receive credit for the proceeds when collected, and that the bank could treat the funds as it did funds of other depositors, the bank had a right to mingle the funds with the other funds, so that, on its subsequent insolvency, the owner was simply an ordinary creditor, and was not entitled to a preference, and could not follow the proceeds as a trust fund.[130] But where the collecting bank had not been in the habit of crediting the proceeds of collections as a deposit for a particular customer, but had always remitted the proceeds promptly,

[127] People v. City Bank of Rochester, 93 N. Y. 582.

[128] People v. City Bank of Rochester, 93 N. Y. 582.

[129] Sayles v. Cox, 95 Tenn. 579, 32 S. W. 626.

[130] Union Nat. Bank v. Citizens' Bank of Union City, 153 Ind. 44, 54 N. E. 97.

the customer, on its failure after collecting paper for him, may receive in full from the receiver.[131]

§ 156. Preference limited to assets realized at time of failure of bank.

Where the bank fails after collecting, but before remitting, and its assets, at the time of the failure, are less in amount than the proceeds of the collection, the trust nature and lien following the proceeds is limited to the cash on hand at the time of the failure, the presumption being that such cash is the residuum of the trust money, and does not extend to the fund subsequently realized by the receiver out of other assets.[132]

§ 157. Waiver of preference or trust.

The right to follow the proceeds of a collection as a preferential trust fund is not lost or waived by merely filing a claim as a general creditor;[133] nor by accepting a dividend from an insolvent collecting bank, as a general creditor, in ignorance of the fact that the bank, when it received the paper for collection, was hopelessly insolvent, within the knowledge of its officers, and had

[131] Hunt v. Townsend (Tex. Civ. App.) 26 S. W. 310, citing Continental Nat. Bank of New York v. Weems, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85.

[132] Boone County Nat. Bank v. Latimer, 67 Fed. 27.

That the trust for the amount of the proceeds is impressed on all the assets, see Continental Nat. Bank of New York v. Weems, 69 Tex. 689, 6 S. W. 802, 5 Am. St. Rep. 85, and cases cited in notes 95, 96 and 100 supra.

Presumption that payments made from fund with which proceeds were mingled were made from the portion belonging to the bank and not from the trust money, see supra, note 100.

[133] Nurse v. Satterlee, 81 Iowa, 491, 46 N. W. 1102.

thus committed a gross fraud on the depositors, where a second dividend was refused, and the first refunded, after knowledge of the facts.[134] But the right to preference is lost by proving up the claim as an unpreferred claim, and obtaining an adjudication thereon as a general claim, and accepting dividends on it as such.[135]

[134] Importers' & Traders' Nat. Bank v. Peters, 123 N. Y. 272, 25 N. E. 319, affirming 51 Hun, 640, 4 N. Y. Supp. 599. See, also, Allerton v. Allerton, 50 N. Y. 670.

[135] Anheuser-Busch Brewing Ass'n v. Morris, 36 Neb. 31, 53 N. W. 1037.

CHAPTER VIII.

COLLECTION OF FORGED OR ALTERED PAPER.

§ 158. What law governs liability of collecting bank.
159. Name of maker or drawer forged.
160. —— Estoppel of bank by acts of cashier.
161. Drawee bank not charged with knowledge of alterations.
162. Indorsement of payee forged.
163. Diligence in notifying parties to paper.
164. Liability of collecting bank on its indorsement of forged paper.
165. Charging back amount of forged or altered paper.
166. Recovery back of payments made on forged or altered paper.
167. —— Bank's agency undisclosed.
168. —— Effect of certification of paper by drawee bank.
169. Ratification and waiver.

The laws of the place where the immediate acts constituting the mistaken or wrongful payment of forged paper are performed govern the liability of the collecting bank to the owner.

The general rule that the drawee is charged with knowledge of the signature of the drawer renders the drawee bank liable to a bona fide holder of paper paid by it, on which the signature of the drawer was forged. The rule does not apply in favor of a payee who indorsed the forged paper to the bank.

The drawee bank is not, however, charged with knowledge of the genuineness of the body of the instrument as between itself and others having equal means of ascertaining the existence of an alteration.

A collecting bank is liable to the true owner if it pays the paper on a forged indorsement of the name of the payee; but

an indorsement of the payee's name is not forged if made by the person intended as payee, though the paper was procured by his fraud and false representations as to his identity.

The bank must use reasonable diligence in notifying the parties of the forgery or alteration.

In some jurisdictions, the collecting bank, on indorsing forged paper without restriction or qualification, is liable as a general indorser, though the paper had been previously indorsed to it restrictively for collection. The rule is different in the federal courts. If the collecting bank itself indorses the paper for collection, it is not liable as general indorser.

The right to recover back payments made on forged or altered paper is governed, for the most part, by the rules governing the recovery of payments made by mistake. If the collecting bank, before notice of the forgery or alteration, paid the amount over to the sending bank, it is not liable; but a mere credit is not a payment within this rule. Successive indorsers who have in turn paid money on the paper by mistake, the name of the first indorser having been forged, may recover, each from his immediate indorser.

The bank is accountable for money received on forged paper if it did not disclose its so-called agency for collection.

The acts of the bank may be waived or ratified, as where a settlement is made with the wrongdoer, with full knowledge of all the facts.

§ 158. What law governs liability of collecting bank.

Reasoning by analogy from the rules determining what law governs the relation between the depositor and the collecting bank,[1] we may state that the laws of the place of the performance of the immediate acts constituting the mistaken or wrongful payment of forged paper by a collecting bank govern its liability therefor

[1] See ante, § 6.

to the true owner. No American case directly in point has been found, but a very instructive English case is available.

In deciding what law governed the liability of a London bank, with a branch in Paris, to the owner of a cheque crossed generally, and drawn on the London bank, which had been presented to the Paris branch for collection, and paid by it on a forged indorsement of the name of the last indorsee, the laws of France exonerating the collecting bank in such a case, and the laws of England rendering it liable for conversion, the court of queen's bench recently (1896) said: "Collection had to be obtained by acts done partly in Paris and partly in England, and as soon as the person carrying out these acts—if I may assume that they were all carried out by one person for the collecting bank—reached England, he came under English law, and anything done by him subsequently, if it amounted to a wrong, must be justified, if at all, by English law. But that is not conclusive of the matter. It is necessary to consider whether any acts were done in England for the purpose of carrying out what was legitimate by French law, but which, constituting a legal wrong in England, are unprotected by English law. Upon behalf of the plaintiffs it was contended that the case ought to be dealt with as if the post office did not exist, and the bank in Paris consisted of one individual, who personally carried out the complicated transaction which was in fact effected through the medium of the post, and the cross entries made in the books of the bank. Under such circumstances, it would be necessary for the individual to carry the cheque to England, and proceed to London for the

purpose of cashing it for a person who was not the true owner. If the individual presented it for payment in England, and received payment there, he would by both those acts have committed what amounts to conversion in English law. Upon analysis it will be seen that those acts were done by the French bank,—it is immaterial whether by traveling to England or by means of third persons,—and the question is whether, according to English law, the transaction amounts to a conversion."[2]

§ 159. Name of maker or drawer forged.

As a general rule, the drawee of a check or draft is charged with knowledge of the handwriting of its customer or correspondent, the drawer, and, if the drawee pays the paper, it must stand the loss if the paper was a forgery, and has passed into the hands of a *bona fide* purchaser.[3]

The leading case on this question states that it was

[2] La Cave & Co. v. Credit Lyonnais, 66 Law J., Q. B. 226. See, also, Kleinwort v. Le Comptoir Nationale d'Escompte de Paris, 63 Law J., Q. B. 674, [1894] 2 Q. B. Div. 157.

[3] Northwestern Nat. Bank of Chicago v. Bank of Commerce of Kansas City, 107 Mo. 402, 410, 17 S. W. 982, 15 L. R. A. 102; Stout v. Benoist, 39 Mo. 277, and cases cited; United States Nat. Bank v. National Park Bank, 59 Hun, 495, 13 N. Y. Supp. 411, affirmed (on opinion of court below) in 129 N. Y. 647, 29 N. E. 1028; Crawford v. West Side Bank, 100 N. Y. 54, 2 N. E. 881; Oppenheim v. West Side Bank, 22 Misc. Rep. 722, 50 N. Y. Supp. 148; First Nat. Bank of Carthage v. Yost, 58 Hun, 606, 11 N. Y. Supp. 862; 3 Am. & Eng. Enc. Law, 222; Price v. Neal, 3 Burrows, 1354.

The fact that the signature of the drawer had been, touched up somewhat with a brush or quill, a "t" crossed, an "i" dotted, and a period added, does not render it a forgery. United States Nat. Bank v. National Park Bank, supra, which see for sufficiency of evidence as to forgery of the drawer's signature.

incumbent on the drawee to satisfy himself "that the bill drawn upon him 'was the drawer's hand' before he accepted or paid it;" and that, having paid it to a *bona fide* indorser for value, he cannot recover back the money from him, though the signature of the drawer was forged.[4]

In a Massachusetts case, decided in January, 1901, Holmes, C. J., in holding that the drawee bank cannot recover back money paid through the clearing house to a collecting bank, on a forged check payable to cash and unindorsed, on the ground that it was charged with knowledge of the signature of the drawer, and that, under the evidence, it could not have been misled by the lack of indorsement, said: "The plaintiff's argument is directed to proving that we should not adopt the rule laid down in Price v. Neal, 3 Burrows, 1354, according to which a drawee paying a forged draft or check to a *bona fide* purchaser cannot recover back the money paid. We are aware that this rule has been questioned by some text writers; but it is of such universal, or nearly universal, acceptance, that we shall go into no extended discussion. * * * Probably the rule was adopted from an impression of convenience, rather than for any more academic reason; or perhaps Lord Mansfield took the case out of the doctrine as to payments under a mistake of fact, by the assumption that a holder who simply presents negotiable paper for payment makes no representation as to the signature, and that the drawee pays at his peril."[5]

[4] Price v. Neal, 3 Burrows, 1355. To same effect is Smith v. Mercer, 6 Taunt. 76.

[5] Dedham Nat. Bank v. Everett Nat. Bank (Mass.) 59 N. E. 62. See, also, cases and authorities cited in above case.

The doctrine that the drawee, who has paid a forged check or draft, is charged with knowledge of the drawer's signature, is not available to the payee, who took the check from a stranger without inquiry, though in good faith, and himself indorsed it, and thereby gave it currency and credit; since the indorsement by the payee gives the paper the appearance of genuineness, and tends to divert the drawee from scrutiny and inquiry.[6]

This modification of the general rule is of general application; and will relieve the drawee from liability to any party to the paper who has in any way contributed to the success of the fraud, or to the mistake of fact under which the payment was made.[7]

A peculiar case decided by the supreme court of Louisiana is governed by this modification of the general rule. The holding in that case is that, where a steamboat agent, after being informed by letter that a draft drawn on the captain of the boat had been deposited in a certain bank for collection, went to the bank on the day it was due, described and called for the draft, and voluntarily paid it without further inquiry, the bank, which received no compensation for the transaction, and made no entries of it on the books, is not liable to him for the amount thereof, both the letter and the draft having been forged, where it appeared that the draft was de-

[6] National Bank of North America v. Bangs, 106 Mass. 441; Ellis v. Ohio Life Insurance & Trust Co., 4 Ohio St. 628; Birmingham Nat. Bank v. Bradley, 103 Ala. 109, 15 So. 440, and cases cited. See, also, Green v. Purcell Nat. Bank, 1 Ind. Ter. 270, 37 S. W. 50.

[7] Gloucester Bank v. Salem Bank, 17 Mass. 33, 42; Ellis v. Ohio Life Insurance & Trust Co., 4 Ohio St. 628; National Bank of North America v. Bangs, 106 Mass. 441.

posited by a stranger with instructions that, if no one called to pay it before three o'clock, it was to be given to a notary for protest, and plaintiff called and paid it a few minutes later, and the amount was turned over to the depositor on the same day.[8]

§ 160. —— Estoppel of bank by acts of cashier.

While it is true that the cashier is the general executive officer of the bank for whose acts it must stand as sponsor, yet, to create an estoppel against the bank by reason of his acts and representations as to forged paper, his connection with the transaction must be definitely shown. The force of this rule is well shown in a case where a forged certificate of deposit was sent by plaintiff to defendant for collection, and by the latter sent to the bank purporting to have issued it. The cashier of the last-named bank passed it to the bookkeeper with other paper received from defendant, and a check was sent covering the aggregate amount of all the paper so received. The forgery was not discovered until after business hours of that day, when the bank immediately notified plaintiff and its principal of the forgery. On the next day it returned the certificate to defendant, who recredited such bank with the amount thereof under a general agreement to that effect respecting commercial paper found not good. It was held that defendant was justified in refunding the money to such bank as money paid by mistake, and that the passing of the forged certificate over to the bookkeeper did not amount to such a recognition of the genuineness of the certificate as would

[8] Stephenson v. Mount, 19 La. Ann. 295.

preclude the bank from setting up the subsequently discovered forgery, in the absence of a showing that the cashier actually passed on the genuineness of the certificate, or that it was his duty to do so, or that his acts were communicated to plaintiff or to defendant.[9]

§ 161. Drawee bank not charged with knowledge of alterations.

The rule considered in the preceding section, that the drawee is charged with knowledge of the signature of the drawer, does not charge the drawee with knowledge of anything but the signature of the drawer. It does not charge him with knowledge of the genuineness of the body of the instrument, as between himself and other parties having equal means of determining the existence of an alteration.[10]

§ 162. Indorsement of payee forged.

A bank which collects and pays to the depositors thereof checks, payable to order, on which the indorsement

[9] Allen v. Fourth Nat. Bank of New York, 59 N. Y. 12, affirming 5 Jones & S. 137, distinguishing Price v. Neal, 3 Burrows, 1354, and citing Goddard v. Merchants' Bank, 4 Comst. (N. Y.) 149, and National Bank of Commerce v. National Mechanics' Banking Ass'n, 55 N. Y. 211, note.

[10] Crawford v. West Side Bank, 100 N. Y. 54, 2 N. E. 881; United States Nat. Bank v. National Park Bank, 59 Hun, 495, 13 N. Y. Supp. 411, affirmed (on opinion of court below) in 129 N. Y. 647, 29 N. E. 1028; National Bank of Commerce v. National Mechanics' Banking Ass'n, 55 N. Y. 211; White v. Continental Nat. Bank, 64 N. Y. 316; Oppenheim v. West Side Bank, 22 Misc. Rep. 722, 50 N. Y. Supp. 148; Metropolitan Nat. Bank v. Merchants' Nat. Bank, 182 Ill. 367, 55 N. E. 360, affirming 77 Ill. App. 316; First Nat. Bank of Chicago v. Northwestern Nat. Bank, 152 Ill. 296, 38 N. E. 739.

of the payee had been forged before deposit in the bank, is liable to the payee for conversion of the checks, though it was ignorant of the forgery, and acted in good faith.[11]

Where a bank has collected the amount of a check received on a forged indorsement of the name of the payee, to whom the instrument had never been delivered, such payee, by a subsequent demand on the bank for the proceeds, ratifies the indorsement, and makes the check his property to such an extent as to sustain an action by him for the proceeds.[12] The supreme court of Tennessee says further as to the objection of want of privity: "The action against the wrongdoer does not rest upon privity, but upon the fact that he has intermeddled with property not his own, and, asserting a hostile claim, he has interfered with the lawful use and dominion of the owner of the property."[13] But an indorsement of the payee's name is not forged when made by the person named and intended to be named as payee, who received

[11] Farmer v. People's Bank, 100 Tenn. 187, 47 S. W. 234; Pickle v. Muse, 88 Tenn. 381, 12 S. W. 919; Chism v. First Nat. Bank of New York, 96 Tenn. 641, 36 S. W. 387; Talbot v. Bank of Rochester, 1 Hill (N. Y.) 295; Buckley v. Second Nat. Bank of Jersey City, 35 N. J. Law, 400; Shaffer v. McKee, 19 Ohio St. 526; Salomon v. State Bank, 28 Misc. Rep. 324, 59 N. Y. Supp. 407.

One whose property has been wrongfully converted is not bound to take it back, but may abandon it from the moment of its conversion, and sue for its value. Id.; People v. Bank of North America, 75 N. Y. 564.

Liability of bank on its indorsement of the paper, see post, § 164.

[12] Farmer v. People's Bank, 100 Tenn. 187, 47 S. W. 234; Pickle v. Muse, 88 Tenn. 381, 12 S. W. 919; Talbot v. Bank of Rochester, 1 Hill (N. Y.) 295; Buckley v. Second Nat. Bank of Jersey City, 35 N. J. Law, 400.

[13] Farmer v. People's Bank, 100 Tenn. 187, 47 S. W. 234.

the paper from the drawer, and was the actual person with whom the whole transaction was made, though he had fraudulently procured the draft by using as security a worthless note and mortgage purporting to have been, but not having been, executed by a man and wife having the same surname as such payee.[14] The same rule holds where the payee had fraudulently represented himself to be the owner of land, and had obtained the paper by impersonating the real owner, but was, nevertheless, the person dealt with and intended as the payee of the paper.[15]

In England, the liability of the bank is now governed by statute. The English Bills of Exchange Act 1882, § 82, providing that, "where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment," protects a bank collecting for a customer the amount of a crossed cheque, on a forged indorsement of the payee's name, though at the time of receiving payment, and crediting it to the customer, his account was overdrawn and a part of the credit canceled the overdraft.[16]

[14] First Nat. Bank of Ft. Worth v. American Exchange Nat. Bank, 49 App. Div. 349, 63 N. Y. Supp. 58.

[15] Emporia Nat. Bank v. Shotwell, 35 Kan. 360, 369; Crippen v. American Nat. Bank of Kansas City, 51 Mo. App. 509, and cases cited; Land Title & Trust Co. v. Northwestern Nat. Bank, 196 Pa. St. 230, 50 L. R. A. 75, and note collecting cases.

[16] Clarke v. London & County Banking Co., 66 Law J., Q. B. 354.

This section of the act is applicable, however, only in case the bank is dealing with a "customer;" and a stranger to the bank, whose only transaction with the bank is the passage on it of the forged instrument, is not a "customer," within the meaning of the act, and, in such case, the collecting bank, if it pays the amount of the paper to such stranger, is liable to the true owner for conversion of the funds.[17]

The rule applied above, as to the effect of the indorsement to the collecting bank of paper on which the name of the drawer had been forged, applies also where the bank receives the paper from one who had indorsed it following a forged indorsement of the payee's name. Thus, where plaintiff in good faith took a check on a forged indorsement of the payee, and indorsed it in blank and delivered it to defendant bank for collection, and received the proceeds from the bank, the latter, on discovering the forgery and refunding the money to the drawee bank, may reimburse itself out of the first moneys of the plaintiff that come into its possession, though it had not notified plaintiff of the forgery; since plaintiff guarantied the genuineness of the payee's indorsement, and having received the proceeds, was chargeable with notice of the forgery.[18]

The payee of a check, by suing the bank which collect-

[17] La Cave & Co. v. Credit Lyonnais, 66 Law J., Q. B. 226; Matthews v. Brown & Co., 10 Times Law R. 386, [1894] 63 L. J. Q. B. 494; Kleinwort v. Le Comptoir Nationale d'Escompte de Paris, 63 Law J., Q. B. 674, [1894] 2 Q. B. Div. 197; Arnold v. Cheque Bank, 45 Law J., C. P. 562, 1 C. P. Div. 578.

[18] Green v. Purcell Nat. Bank, 1 Ind. Ter. 270, 37 S. W. 50. See, also, Mayer v. City of New York, 63 N. Y. 455, 457; Indig v. National City Bank, 80 N. Y. 100, 105.

ed and paid over the amount thereof on a forged indorsement of his name for conversion of the check, affirms and ratifies the payment of the check by the maker.[19]

§ 163. Diligence in notifying parties to paper.

The collecting bank must exercise reasonable diligence in notifying the holder or party from whom it received the paper of the forgery or alteration.[20] But the bank is under no obligation to give notice of the forgery of an indorsement of the payee's name to one who had indorsed the forged paper in blank to the bank for collection, and had received the proceeds.[21] We shall also see later that a collecting bank may be required to repay, though it had paid the money over to its principal before notice of the forgery, where it had not disclosed its agency for collection when it received payment.[22]

In case of an alteration, the bank exercises due diligence if it notifies the holder personally, on the day it is itself notified of the fraud, and also informs him of the same fact by letter three days later.[23]

The English rule is that "the holder of a bill is entitled to know, on the day when it becomes due, whether it

[19] Salomon v. State Bank, 28 Misc. Rep. 324, 59 N. Y. Supp. 407; White v. Sweeny, 4 Daly (N. Y.) 223.

[20] Bank of Commerce v. Union Bank, 3 N. Y. 230; Oppenheim v. West Side Bank, 22 Misc. Rep. 722, 50 N. Y. Supp. 148.

[21] Green v. Purcell Nat. Bank, 1 Ind. Ter. 270, 37 S. W. 50, and cases cited; Birmingham Nat. Bank v. Bradley, 103 Ala. 109, 15 So. 440, and cases cited. See, also, National Bank of North America v. Bangs, 106 Mass. 441.

[22] See post, § 167.

[23] Oppenheim v. West Side Bank, 22 Misc. Rep. 722, 50 N. Y. Supp. 148.

is an honored or dishonored bill," and hence, where a forged acceptance is delivered to the acceptor's bankers on the day it is due, and they pay it on that day, but discover, on the following day, that it is a forgery, and give notice on that day to the holder, it cannot recover back the money paid;[24] *aliter* if notice was given on the day when payment was made.[25]

On the question of the difference between negligence in discovering a forgery or alteration and negligence in failing to give notice after the discovery, the supreme court of New York, in a well-considered case, says: "A failure to discover, though resulting in a loss to another who might, if sooner apprised, have apprehended the forger, and recovered the money, gives no right of action, and for obvious reasons, one of which alone need be mentioned. There is no duty imposed on one who receives a forged check from another to unearth the crime. He receives it presuming, as he has a right to do, that all the signatures and indorsements are genuine, which is impliedly warranted by the person from whom it is received. This presumption, and the right to rely on this implied warranty, are only destroyed when, by inspection, the forgery could be detected because apparent on the face of the check or bill, or where, from the surrounding circumstances, the suspicions of the persons receiving the note, check, or bill should be aroused, and his scrutiny challenged. Not so after discovery, for then the duty is incumbent on the one detecting the imperfection to act promptly in giving notice, and, if

[24] Cocks v. Masterman, 9 Barn. & C. 902.

[25] Wilkinson v. Johnson, 3 Barn. & C. 428.

he fails therein to the injury and damage of the one entitled to notice, he will be prevented from recovering the damage or injury shown to have been actually incurred."[26]

§ 164. Liability of collecting bank on its indorsement of forged paper.

We have already considered the liability of a collecting bank on its indorsement of genuine paper.[27] If it indorses, without qualification or restriction, paper to which the signature of the maker or drawer was forged, it is liable to a *bona fide* holder on its implied warranty of the genuineness of the instrument,[28] and the genuineness of the signature of the maker or drawer.[29] Under the negotiable instruments laws, this is true, though the paper had been previously indorsed to the bank restrictively for collection.[30]

The federal courts, however, hold that the general indorsement of a collecting bank does not imply a warranty that a prior indorsement is genuine. The case resulting in this decision arose over a pension draft, to which the name of the payee had been forged after her death. The draft was indorsed "for collection" to defendant bank by the initial bank, and, after having been indorsed generally by defendant, was paid to it

[26] Third Nat. Bank of New York City v. Merchants' Nat. Bank, 76 Hun, 475, 27 N. Y. Supp. 1070.

[27] See ante, § 53.

[28] Crosby v. Wright, 70 Minn. 251.

[29] Brown v. Ames, 59 Minn. 476; Condon v. Pearce, 43 Md. 83; First Nat. Bank of Chicago v. Northwestern Nat. Bank, 40 Ill. App. 640; Turnbull v. Bowyer, 40 N. Y. 456.

[30] See ante, § 53.

by the United States, and the money remitted to the initial bank. It was held that defendant bank was not liable to the United States for the amount of the draft; the court stating that, "in such cases, the indorsement by the collecting agent, who has no proprietary interest, does not import any guaranty of the genuineness of all prior indorsements, but only of the agent's relation to the principal, as stated upon the face of the draft; and as this relation is evident upon the draft itself, the payor cannot claim to have been misled by the indorsement of the agent, or any right to rely on that indorsement as a guaranty of the genuineness of the payee's indorsement."[31]

As to the effect of a collecting bank's restrictive indorsement "for collection," placed on paper to which the signature of the maker or drawer was forged, the supreme court of Missouri has rendered an instructive decision. Defendant bank cashed and paid full value for a forged draft presented to it by the payee, and indorsed by him. The payee had been introduced to the defendant by a letter from the cashier of another bank, showing the payee's genuine signature. When the letter was presented, the payee of the draft had also deposited in defendant bank a genuine certificate of deposit, issued by the bank that gave the letter, and later drew out only a small portion of his deposit. He was dressed neatly, and did nothing to cause suspicion. The forgery was so well done that the drawer bank at first thought the draft to be genuine. It was held that

[31] United States v. American Exchange Nat. Bank, 70 Fed. 232, distinguishing Onondaga County Sav. Bank v. United States, 12 C. C. A. 407, 64 Fed. 703.

defendant was a *bona fide* purchaser, and, having indorsed the draft merely "for collection," was not accountable to the drawee bank which paid it.[32]

The indorsement of the collecting bank on a forged check payable to cash, and not otherwise indorsed, and the presentment thereof to the drawee through the clearing house, is not equivalent to an indorsement by the payee, since not made for the purpose of transfer; but is merely equivalent to a presentment by the bank in person.[33]

§ 165. Charging back amount of forged or altered paper.

A collecting bank which has credited the amount of a check, but has remitted no money on account thereof, may charge back the amount thereof on discovering that it had been raised before it was delivered to the bank.[34] This rule is in harmony with the general rules previously considered, as to the right to charge back a credit given for worthless paper.[35]

Where the bank has not been guilty of negligence with respect to altered paper, and the holder had notice of facts putting him on inquiry, the bank will be protected. A case in point arose where plaintiff, a merchant in Philadelphia, received from a total stranger, in payment of a bill of goods, a certified check on a New York bank, payable to his order for a sum largely in excess of the price of the goods bought. Plaintiff,

[32] Northwestern Nat. Bank of Chicago v. Bank of Commerce of Kansas City, 107 Mo. 402, 412, 17 S. W. 982, 15 L. R. A. 102.

[33] Dedham Nat. Bank v. Everett Nat. Bank (Mass.) 59 N. E. 62.

[34] Birmingham Nat. Bank v. Bradley, 103 Ala. 109, 15 So. 440.

[35] See ante, § 15.

before accepting the check or paying the difference to the purchaser, took the check to the defendant bank, where he had an account, and asked the advice of the cashier, who advised him, solely because of the suspicious nature of the transaction, to have nothing to do with the check, though it was apparently good and regular. The cashier told plaintiff, however, that he could deposit it with the bank for collection in the due course of business, and that the bank would forward it for that purpose, which was done, and credit given accordingly. The check was paid by the drawee bank, but had been altered, before certification, as to the date and the name of the payee, and had been raised from $7.75 to $900.00, but the alterations were so skillfully made that they could not be detected by examination, and were discovered only when the drawer's account was balanced at the end of the month. It was held that defendant bank was not guilty of negligence, and that, on the discovery of the alterations, it was justified in refunding to the drawee bank, and charging back the amount against the account of the plaintiff.[36]

While it may be true that a bank would be estopped to claim a right to charge back the amount of raised paper, if its cashier had represented to the holder that it was good, and the holder had acted on this representation to his injury, the fact that the discount and collection teller of the collecting bank stated to the holder, after inquiry by him, that the check was "all right," at a time when neither party knew of any alteration, or had any suspicion that the check was raised,

[36] Rapp v. National Security Bank, 136 Pa. St. 426, 20 Atl. 508.

and that the holder, in reliance on the statement, paid over money to the one from whom he received the check, does not estop the bank, which subsequently discovered the alteration, from claiming a right to charge back the amount it had credited to the holder in excess of the amount of the check before alteration, as the duties of such teller relate only to the discount and collection of commercial paper, and his statement must consequently be limited to the fact of its payment by the drawee, and cannot be extended to the genuineness of the body of the check.[37]

§ 166. Recovery back of payments made on forged or altered paper.

The general rule is that money paid upon a raised check may be recovered back, providing the one seeking to recover has not, by his careless or negligent act, injured or prejudiced the rights of the person from whom recovery is sought.[38] But since a collecting bank, to which the payee of a forged or raised check indorsed the same, and from which he received full face value there-

[37] Oppenheim v. West Side Bank, 22 Misc. Rep. 722, 50 N. Y. Supp. 148. See, also, Espy v. Bank of Cincinnati, 18 Wall. (U. S.) 604; Marine Nat. Bank v. National City Bank, 59 N. Y. 67; Security Bank of New York v. National Bank of Republic, 67 N. Y. 458.

[38] National Bank of Commerce v. National Mechanics' Banking Ass'n, 55 N. Y. 211; Marine Nat. Bank v. National City Bank, 59 N. Y. 67, 77; Clews v. Bank of New York National Banking Ass'n, 89 N. Y. 419; National Park Bank of New York v. Eldred Bank, 90 Hun, 285, 35 N. Y. Supp. 752; Oppenheim v. West Side Bank, 22 Misc. Rep. 722, 50 N. Y. Supp. 148.

for, is under no obligation to such payee to discover the fraud,[39] it may recover back the money so paid.[40]

Where the collecting bank has received money by mistake, as under forged or raised paper, and has paid it over to its principal before receiving notice of the forgery, or other fraud inducing the payment, it cannot be compelled to repay.[41] The rule is different, however, if the bank, as last indorsee of paper on which the indorsement of the payee had been forged, received payment from the drawee without disclosing its so-called agency for collection.[42] If the collecting bank has not paid over any money or made an actual remittance to its principal, but has merely credited to it the

[39] See ante, § 163.

[40] Birmingham Nat. Bank v. Bradley, 103 Ala. 109, 15 So. 440; Green v. Purcell Nat. Bank, 1 Ind. Ter. 270, 37 S. W. 50. See, also, Carpenter v. Northborough Nat. Bank, 123 Mass. 66; White v. Continental Nat. Bank, 64 N. Y. 316; Susquehanna Valley Bank v. Loomis, 85 N. Y. 207; National Park Bank v. Seaboard Bank, 114 N. Y. 28, 20 N. E. 632.

[41] National Park Bank v. Seaboard Bank, 114 N. Y. 28, 20 N. E. 632, 11 Am. St. Rep. 612, distinguishing Metropolitan Nat. Bank v. Loyd, 90 N. Y. 530; La Farge v. Kneeland, 7 Cow. (N. Y.) 460; Mowatt v. McLelan, 1 Wend. (N. Y.) 173; Herrick v. Gallagher, 60 Barb. (N. Y.) 566; Story, Agency, § 300. In the case first cited in this note, there was evidence that the proceeds of the draft involved in suit, and also the entire amount that the principal bank had to its credit with the collecting bank at the time the proceeds of the draft were turned over to the principal, had been drawn out at least two weeks before the alteration of the draft was discovered, and the court applied the familiar rule as to application of payments,—that where there is no specific direction, the payment will be applied to the oldest items (page 35); citing Sheppard v. Steele, 43 N. Y. 52; Allen v. Culver, 3 Denio (N. Y.) 284; Webb v. Dickenson, 11 Wend. (N. Y.) 63.

[42] See post, § 167.

amount of the paper, which credit has never been drawn against, the collecting bank is liable as for money paid to it under mistake.[43]

Each of several successive indorsers of a bill, who have successively paid money thereon by mistake, the name of the first indorser having been forged, may recover from his immediate indorser.[44]

An interesting case on the question of the right of the drawee bank to recover back money paid to a collecting bank on forged paper was recently decided by the New York court of appeals. The forger first cashed a check for $2,400 at the defendant bank by forging the name of one of its depositors. He thereafter deposited in plaintiff bank a forged draft on a third bank for $6,000, which plaintiff collected, but afterwards repaid to the drawee bank on discovery of the forgery. Prior to the discovery of this second forgery, and while the $6,000 was still to his credit in plaintiff bank, the forger drew out substantially all of that amount, and among his drafts on that fund was a check for $2,400 on plaintiff bank to the order of the person whose name he had forged to the check cashed at defendant bank.

[43] United States Nat. Bank v. National Park Bank, 59 Hun, 495, 13 N. Y. Supp. 411, affirmed (on the opinion of the court below) in 129 N. Y. 647, 29 N. E. 1028; Bank of Commerce v. Union Bank, 3 N. Y. 236; National Park Bank v. Seaboard Bank, 114 N. Y. 28, 20 N. E. 632.

[44] Canal Bank v. Bank of Albany, 1 Hill (N. Y.) 287, 294; Nassau Bank v. National Bank of Newburgh, 159 N. Y. 456, 54 N. E. 66, affirming 32 App. Div. 268, 52 N. Y. Supp. 1118, and 34 App. Div. 623, 54 N. Y. Supp. 1110; Rapp v. National Security Bank, 136 Pa. St. 426, 20 Atl. 508; Green v. Purcell Nat. Bank, 1 Ind. Ter. 270, 37 S. W. 50.

This check he deposited in defendant bank to the credit of such person, and defendant collected it from plaintiff before it had any knowledge of the forgeries. It was held that defendant bank was not liable to plaintiff bank for the amount of the $2,400 check on plaintiff.[45] In the opinion in this case, the court applies the rule that "when money has been received by a person in good faith, in the usual course of business, and for a valuable consideration, it cannot be pursued into his hands by one from whom it has been obtained through the fraud of a third person. If it has been used, as is claimed in the present case, to pay an indebtedness owing by the third person, with innocence in the recipient, there is a consideration for its payment by him, which, despite the fraud through which the money was obtained, and for reasons based upon policy and the need for such security in ordinary commercial transactions, supports and protects its possession against the world."[46]

On the question whether the deposit by the forger of the good check on plaintiff bank in defendant bank to the credit of the one from whose account in the latter bank he had previously received the same amount on a forged check constituted a payment of the claim of that bank against him by reason of such forgery, the said bank at the time having been ignorant of the

[45] Nassau Bank v. National Bank of Newburgh, 159 N. Y. 456, 54 N. E. 66, affirming 32 App. Div. 268, 52 N. Y. Supp. 1118, and 34 App. Div. 623, 54 N. Y. Supp. 1110.

[46] Citing Justh v. National Bank of Commonwealth, 56 N. Y. 478; Stephens v. Brooklyn Board of Education, 79 N. Y. 183; Hatch v. Fourth Nat. Bank, 147 N. Y. 184, 41 N. E. 403.

forgery, the court says: "Taylor was a debtor, by reason of his forgeries, as well to those who were injured in their property rights thereby, as to the law for his criminal act; and it is of no conceivable importance, in my opinion, that the existence of the fact of indebtedness was not known at the time when he sought to make reparation by repaying the moneys feloniously taken. Having made the payment, he could not reclaim it, and no interest in the money remained in him. It satisfied the claim which the bank undoubtedly possessed against him, and the discovery or knowledge of such a claim was not necessary to its existence."

A collecting bank may obligate itself to pay the difference between the original amount of a draft and the amount as fraudulently altered and raised, by an offer to the drawer bank, accepted by it, to pay such difference if the draft was returned with an affidavit of the true amount, and the matter not made public, which conditions were all complied with by the drawer;[47] but an agreement of this kind is rescinded by a direction from the drawer to either pay the difference as agreed, or return the draft and affidavit, followed by a return thereof, together with a refusal to pay.[48]

Where the drawee paid, by mistake, a fraudulently raised draft, to a bank holding it for collection, it may

[47] National Bank of Commerce v. Manufacturers' & Traders' Bank, 122 N. Y. 367, 25 N. E. 355.

[48] National Bank of Commerce v. Manufacturers' & Traders' Bank, 122 N. Y. 367, 25 N. E. 355.

On this state of facts, an action for money had and received could not be maintained by the drawer bank against the collecting bank. Id.

sue such bank for the overpayment, after a demand and a refusal to refund, without tendering back the paper itself.[49]

§ 167. —— Bank's agency undisclosed.

Where the money is received on forged or raised paper by a collecting bank ostensibly as owner, without disclosing its true relation to the paper as bailee or so-called agent for collection, it is uniformly held accountable as for money received by mistake.[50]

Consequently it has been held that a collecting bank, which was the last of several indorsers of a draft payable to order, the first of whom was ostensibly the payee whose name had been forged, having received payment from the drawee on presentment without disclosing its agency, must repay the amount as money received by mistake on an instrument to which it had no title, though it was not notified of the forgery for two months after it had turned over the money to its principal.[51] In this case, in answer to the argument that, the equities of the parties being equal, the defendants, having possession, must prevail, the court states: "No doubt the parties were equally innocent in a moral point

[49] Metropolitan Nat. Bank v. Merchants' Nat. Bank, 182 Ill. 367, 77 Ill. App. 316, affirmed. See, also, Brewster v. Burnett, 125 Mass. 68, where it was held that a purchaser of counterfeit United States bonds need not return them before suing for the amount paid therefor. To same effect is Kent v. Bornstein, 12 Allen (Mass.) 342, with regard to the return of a counterfeit bank bill.

[50] See cases cited in notes 51-54, infra.

[51] Canal Bank v. Bank of Albany, 1 Hill (N. Y.) 287. The payee of the draft was not disqualified by interest from testifying for plaintiffs in such case. Id.

of view. The conduct of both was *bona fide,* and the negligence, or rather misfortune, of both, the same. It was the duty, or, more properly, a measure of prudence, in each to have inquired into the forgery, which both omitted. But this raises no preference at law or in equity in favor of the defendants, but against them. They have obtained plaintiff's money without consideration; not as a gift, but under a mistake."

Proof of a custom of collecting banks not to disclose their agency on the paper is not admissible to charge the drawee of a forged draft, who paid the same to the collecting bank, with notice of the fact that such bank was merely an agent, though the agency was not disclosed, in the absence of proof of a further custom of banks not to collect paper as principals.[52]

The supreme court of Illinois has recently rendered a decision involving the effect of the undisclosed agency of the receiving bank both to collect and clear for the initial bank. In that case the indorsements on a raised draft, following an indorsement by the payee, for deposit, to the American Trust & Savings Bank, were as follows: "American Trust & Savings Bank. Paid Feb. 14, 1894. Paid through the Chicago Clearing House to Metropolitan National Bank." The first-named bank was not a member of the clearing house association, and its paper was customarily cleared through the second-named bank, but the drawee bank (plaintiff) had paid the draft as raised to the Metropolitan (defendant) three days before the discovery of the fraud, and there was no evidence that prior to such discovery plaintiff

[52] Canal Bank v. Bank of Albany, 1 Hill (N. Y.) 287, 294.

knew that the defendant was the clearing agent for the American, or was its collecting agent. It was held that the indorsements passed title to the draft to the defendant, and did not make it merely agent for collection.[53]

§ 168. —— Effect of certification of paper by drawee bank.

The certification by the drawee bank of a draft merely vouches for the genuineness of the signature of the drawer, and the existence of sufficient funds of his at the bank to pay the draft. It does not warrant the genuineness of the body of the instrument, and, in case the draft was raised before certification, will not prevent the drawee bank from recovering the difference between the original and altered amount from a bank to which it paid the amount without knowledge of the alteration.[54] Recovery in such cases is based on the double ground of mistake and want of consideration.[55]

§ 169. Ratification and waiver.

The acts of the bank may be waived or ratified.[56]

[53] Metropolitan Nat. Bank v. Merchants' Nat. Bank, 182 Ill. 367, 55 N. E. 360, affirming 77 Ill. App. 316.

[54] Metropolitan Nat. Bank v. Merchants' Nat. Bank, 182 Ill. 367, 55 N. E. 360, affirming 77 Ill. App. 316.

On effect of certification of check, in general, see Merchants' Bank v. State Bank, 10 Wall. (U. S.) 604, 647.

As to liability of bank after certification of raised check and subsequent statement to a purchaser that the certification was good, see Clews v. Bank of New York National Banking Ass'n, 114 N. Y. 70.

[55] Metropolitan Nat. Bank v. Merchants' Nat. Bank, 182 Ill. 367, 55 N. E. 360, affirming 77 Ill. App. 316.

[56] As to ratification or adoption of forged signature in general, see Greenfield Bank v. Crafts, 4 Allen (Mass.) 447; Wellington v.

Thus, the payee of a government check, payable to order, ratifies the action of a bank in collecting it on a forged indorsement of her name, by accepting from the wrongdoer in settlement, with full knowledge of the facts, a part of the proceeds of the check and a note.[57]

Jackson, 121 Mass. 157; Howard v. Duncan, 3 Lans. (N. Y.) 174,—holding that a ratification may take place, though there was no agency or facts creating an estoppel in pais, and no new consideration.

Ratification or adoption of a forged signature may take place where the proceeds of the instrument are used with knowledge of the forgery. Ballston Spa Bank v. Marine Bank, 16 Wis. 120.

Ratification also takes place if the person whose name was forged accepts indemnity or security against the forgery. Fitzpatrick v. School Commissioners, 7 Humph. (Tenn.) 224; Jones v. Hamlet, 2 Sneed (Tenn.) 256; Bell v. Waudby, 4 Wash. 743.

Mere silence is not a ratification. California Bank v. Sayre, 85 Cal. 102; De Land v. Dixon Nat. Bank, 111 Ill. 323; Walters v. Munroe, 17 Md. 150.

[57] Hughes v. Neal Loan & Banking Co., 97 Ga. 383, 23 S. E. 823.

Ratification by payee of payment by maker on forged indorsement of former's name, see ante, § 162.

CHAPTER IX.

ACTIONS AGAINST BANK FOR NEGLIGENCE.

§ 170. Right of action in general.
171. Surrender of paper as condition precedent to action.
172. Limitation of action.
173. Declaration or complaint.
174. Answer.
175. Presumptions and burden of proof.
176. Admissibility of evidence.
177. Pleading and proof—Variance.
178. —— Matters admissible under general denial.
179. Verdict and judgment.

The cause of action for failure to collect is primarily one for negligence quasi ex contractu, and not on the contract. Consequently the cause of action seems to be unassignable.

Where the initial collecting bank is held liable for the defaults of its correspondents, the owner's right of action for negligence of the correspondent is against the initial bank only, which has a remedy over against the correspondent. Where the correspondent is held to be the agent of the owner, the latter's right of action for its negligence is against it only.

A tender or surrender of the paper to the bank is not a condition precedent to a suit and recovery against it for negligence.

Where the action proceeds as for a breach of the contract to collect, the contract should be alleged in the complaint, and the relation of the parties shown. The complaint should also show damage to plaintiff. The solvency of a party discharged by the negligence of the bank is sufficiently stated in an alle-

gation that he was in reputable credit, and continued in business.

An answer attempting to negative liability under a custom or mode of dealing with plaintiff must show his knowledge of the custom, and a continuing agency for him.

The burden of proof is on plaintiff to show negligence and loss. He must show the solvency of parties discharged by the negligence of the bank, and the insolvency of the remaining obligors.

The holder at the time of suit is presumed to have been the holder at maturity of the paper.

Parol evidence of the contents of a placard claimed to form part of the contract is admissible after notice to the bank to produce it, and a failure of the bank to do so. The statutes of limitations are also admissible to show that the claim had become barred by the negligence of the bank. Insolvency of the parties may be proved by reputation and lack of property.

Surplusage and matters not directly in issue need not be proved.

Evidence in mitigation of damages may be shown under a general denial. So may evidence of a waiver of the requirements of the law merchant.

To sustain a judgment for plaintiff for a failure to give notice of dishonor, a special verdict must find that notice was not given, or facts from which the court can draw that conclusion as a matter of law.

§ 170. Right of action in general.

Where the depositor of the paper for collection and the collecting bank are the only parties in any way concerned in the collection, the right of such depositor to sue the bank for negligence in making or failing to make the collection is self-evident. But the cause of action is for negligence or tort, *quasi ex contractu*, and

is not on contract.[1] For this reason, it is doubtful whether a cause of action for negligence in not taking the steps necessary to charge an indorser is assignable.[2] But, admitting the assignability of such a cause of action, an assignment of it is not effected by an assignment of the indorsed instrument, together with the mortgage securing it.[3]

The action is usually brought by some party to the paper, but one in possession of a promissory note indorsed in blank by the payee thereof may sue the collecting bank for failure to protest in due time and give notice to the indorsers, though his name is not on the note, and defendant received it from its correspondent with a special indorsement for collection.[4]

In those jurisdictions holding the initial bank liable for the defaults of its correspondents, the owner's right of action for negligence of the correspondent is against

[1] Merchants' Bank of Baltimore v. Bank of Commerce, 24 Md. 12, 52; Bank of Utica v. McKinster, 11 Wend. (N. Y.) 473; Borup v. Nininger, infra.

Holder may sue bank before suing indorser, see ante, § 72.

[2] Borup v. Nininger, 5 Minn. 523, 539 (Gil. 417, 433), citing Gardner v. Adams, 12 Wend. (N. Y.) 297; People v. Tioga Common Pleas, 19 Wend. (N. Y.) 73; People v. Gibbs, 9 Wend. (N. Y.) 29; North v. Turner, 9 Serg. & R. (Pa.) 244; O'Donnel v. Seybert, 13 Serg. & R. (Pa.) 54.

In Bank of Utica v. McKinster, 11 Wend. (N. Y.) 473, it is held that where a note was transferred by a debtor, as collateral, under an agreement for a return thereof to the debtor in case of its nonpayment, and was thereafter deposited by the pledgee in a bank for collection, the debtor and not the pledgee was the proper party to sue the bank for negligence in failing to give notice of nonpayment

[3] Borup v. Nininger, 5 Minn. 523 (Gil. 417, 433).

[4] Cotton v. Union Bank, 15 La. 369.

the initial bank only.[5] In such case, as we have seen, the initial bank has a remedy by action over against the correspondent.[6] In the jurisdictions holding that the correspondent is an agent of the owner, and not of the initial bank, the owner's cause of action for negligence of the correspondent is against the correspondent only.[7]

§ 171. Surrender of paper as condition precedent to action.

Tender back of the paper is not a condition precedent to a recovery against a bank sued for negligence in failing to correct it.[8] Nor is the return of the draft to the defendant bank a condition precedent to an action against it by the drawer, who paid the draft by mistake in ignorance of the fact that defendant had been negligent in failing to collect from the drawee; such action being for negligence, and not on the draft.[9]

In a Louisiana case, however, it was ordered that

[5] See ante, §§ 86-98.

[6] See ante, § 120.

[7] See ante, §§ 99-115. See, also, First Nat. Bank of Crown Point v. First Nat. Bank of Richmond, 76 Ind. 561; Guelich v. National State Bank of Burlington, 56 Iowa, 434.

A dictum of Nelson, C. J., in Bank of Orleans v. Smith, 3 Hill (N. Y.) 560, is to the effect that the owner may sue either the initial bank or its correspondent for the negligence of the latter in making the collection.

Liability of correspondent bank to owner for proceeds, see ante, §§ 136, 137.

[8] First Nat. Bank of Meadville v. Fourth Nat. Bank of New York City, 89 N. Y. 413.

Necessity of tender of forged or altered paper to bank before suit to recover payment made, see ante, § 166.

[9] Merchants' Bank of Baltimore v. Bank of Commerce, 24 Md. 12, 52.

execution be not issued on a judgment against the bank till plaintiff had delivered the note to it or deposited it with the clerk, together with an assignment of all rights thereon.[10]

§ 172. Limitation of action.

There is a dearth of authorities on the question of limitations with respect to actions against banks for negligence in collecting; but, since such actions are technically in tort, *quasi ex contractu,* the statute begins to run from the time of the default, and its running is not postponed until actual damage occurs.[11]

There are a few other authorities that may be of service by way of analogy. Thus, as to actions against collection agencies for the negligence or misconduct of their collecting attorney, the statute of limitations begins to run from the time the attorney received the proceeds of the paper.[12] If, however, the attorney was guilty of fraud, as where he fraudulently executed a satisfaction of judgment on the claim, and the collection agency, in response to frequent inquiries of the owner, reported that the claim was uncollectible, the statute does not begin to run until the discovery of the fraud.[13]

[10] Pritchard v. Louisiana State Bank, 2 La. 415.

[11] Angell, Limitations, p. 123; Wood, Limitation of Actions, p. 362; Bank of Utica v. Childs, 6 Cow. (N. Y.) 238. In this case the action was by the collecting bank against its notary, for whose default the bank had been compelled to respond to the owner of the paper. See, also, Miller v. Adams, 16 Mass. 456.

That statutes of limitation are admissible in evidence to show that claim was lost through negligence of the bank, see post, § 176.

[12] Rhines' Adm'rs v. Evans, 66 Pa. St. 195.

[13] Morgan v. Tener, 83 Pa. St. 305.

If the negligence of the bank was such as to charge it with conversion of the paper or proceeds, the statute would begin to run from the time of the conversion.[14]

§ 173. Declaration or complaint.

Where the action proceeds on the theory of a breach of a contract to collect, the declaration or complaint must state the contract.

An averment that plaintiff had retained and employed defendant to collect a draft for a commission and reward to be paid to defendant, followed by an averment of defendant's acceptance of the draft for purposes of collection, in pursuance of such retainer and employment, is a sufficient statement of the contract to collect.[15]

The so-called relation of principal and agent is also sufficiently shown in a complaint stating that plaintiff delivered a draft to a collection agency, procured its indorsement, and "caused said draft so indorsed to be sent by mail, together with a statement" of the account of the firm on which it was drawn, to the defendant bank

[14] See Parker v. Harden, 121 N. C. 57, 28 S. E. 20; Fishwick's Adm'r v. Sewell, 4 Har. & J. (Md.) 393; Quinn v. Gross, 24 Or. 147.

That an action by a receiver of a bank for proceeds of collections of paper sent to a trust company is an action for conversion within the California statutes of limitation, see Hawkins v. State Loan & Trust Co., 79 Fed. 50.

But if possession was obtained lawfully, a demand is necessary before an action for conversion, and the statute runs from the time of the demand. See Haire v. Miller, 49 Kan. 270, 30 Pac. 482; Montague v. Sandwich, 7 Mod. 99.

[15] American Express Co. v. Pinckney, 29 Ill. 392, 407.

for collection.[16] And a declaration in an action against a bank for failure to protest a note, which alleges that it was delivered to defendant for collection before its maturity, is sufficient as to the time of the inception of the relation.[17]

When there was a stipulated consideration for the contract to collect, it should be stated; but where there was no express contract as to the compensation of the bank, the implied consideration need not be stated.[18] But, assuming that it is necessary to set out the implied agreement as to consideration, it has been held that a complaint, defective for want of allegations of an implied contract on the part of the bank to follow instructions, and on the part of the owner to pay a reasonable compensation, is amendable.[19]

The complaint must show damage to plaintiff.[20] So, a petition in a suit for failure to collect, which does not allege that the defendant could have collected the amount of the paper at any time after it received it for collection, or that an alleged negligent surrender of the paper to the payor prevented collection, or that the payor refused to redeliver the paper, or that the alleged negligence caused plaintiff to lose his claim against the

[16] Finch v. Karste, 97 Mich. 20, 56 N. W. 123.

[17] Roanoke Nat. Bank v. Hambrick, 82 Va. 135.

[18] Matters implied by law need not be alleged or proved, see post, § 177.

A complaint in tort against a collecting bank for wrongful conversion of a note need not allege a consideration for the undertaking to collect. Keyes v. Bank of Hardin, 52 Mo. App. 323, 330.

[19] Central Georgia Bank v. Cleveland Nat. Bank, 59 Ga. 667, 674.

[20] Morris v. Enfaula Nat. Bank, 106 Ala. 383, 18 So. 11.

payor, is defective.[21] But a declaration alleging a negligent retention of a draft, without efforts to collect, until after the drawee became insolvent, so that it was impossible to collect the claim, sufficiently shows that defendant's default caused loss to plaintiff.[22]

That the drawer of the paper was solvent up to a certain time is sufficiently stated in a complaint alleging that, up to that time, he remained in reputable credit and continued in business.[23] Further, on the question of solvency, it has been held that the complaint in an action for failing to collect before the drawee became insolvent need not negative any knowledge on the part of plaintiff that the drawee was in failing circumstances.[24]

§ 174. Answer.

An answer attempting to negative liability under a custom or mode of dealing with plaintiff must show plaintiff's knowledge of the custom, or a general continuing agency. So, an answer averring a custom of plaintiff to send to defendant for collection, at intervals, drafts on a certain company, and a custom of defendant not to present any of such drafts for acceptance, but not averring that plaintiff knew of the custom not to present them for acceptance (all such drafts prior to the one in suit having been paid without such present-

[21] Farmers' Bank & Trust Co. v. Newland, 97 Ky. 464, 31 S. W. 38.

[22] Finch v. Karste, 97 Mich. 20, 56 N. W. 123.

[23] Citizens' Nat. Bank of Lawrenceburg v. Third Nat. Bank of Greensburg, 19 Ind. App. 69, 49 N. E. 171, distinguishing West v. Saint Paul Nat. Bank, 54 Minn. 466, 56 N. W. 54.

[24] Finch v. Karste, 97 Mich. 20, 56 N. W. 123.

ment), and not averring an express agreement in regard to such drafts, or that plaintiff constituted defendant its continuing agent for their collection, does not show a continuing agency, but that such item constituted a separate transaction, and that, consequently, defendant's custom not to present for acceptance was not binding on plaintiff.[25]

§ 175. Presumptions and burden of proof.

To charge a bank with liability for negligence in collecting or failing to collect paper, the owner has the burden of proof, and must show that the paper was collectible, and that the loss of it was due to the bank's negligence.[26] And, to hold the collecting bank liable for negligence, some actual loss by reason thereof must be shown.[27] Thus, no damages can be recovered for the

[25] Citizens' Nat. Bank of Lawrenceburg v. Third Nat. Bank of Greensburg, 19 Ind. App. 69, 49 N. E. 171.

Answer in suit to charge collecting bank with negligence in failing to present a sight draft for acceptance held not to show that the drawer had no right to draw. Citizens' Nat. Bank of Lawrenceburg v. Third Nat. Bank of Greensburg, 19 Ind. App. 69, 49 N. E. 171.

[26] Sahlien v. Bank of Lonoke, 90 Tenn. 221, 232, 16 S. W. 373.

Where part of a claim sent to an attorney for collection has been collected, the principal, in order to charge the attorney with the remainder, must show that such remainder was collectible. Bruce v. Baxter, 7 Lea (Tenn.) 477, 482.

Presumptions as to title to paper, see ante, § 14.

Presumption of negligence from loss of paper, see ante, § 39.

Presumption that indorser will take advantage of his discharge from liability, see ante, § 72.

[27] Hallowell v. Curry, 41 Pa. St. 322; Finch v. Karste, 97 Mich. 20, 56 N. W. 123; Farmers' Bank & Trust Co. v. Newland, 97 Ky. 464, 474, 31 S. W. 38; Indig v. National City Bank of Brooklyn,

alleged negligence of a bank in failing to realize on a draft after acceptance, and before the insolvency of the drawee, if the evidence fails to show a reasonable probability that the draft would have been paid if the drawee had been pressed for payment during such time.[28] For the same reason, one suing a bank for negligence in failing to take steps to charge an indorser must show the solvency of the indorser and the insolvency of the maker.[29]

A little broader statement of the rule is that, before the owner can recover the face of the paper from a bank whose negligence has caused the discharge of one solvent party to the paper, he must show that the remaining parties are insolvent.[30] In Louisiana, however, the rule is different.[31] And in Mississippi it has been held that, in the absence of any showing whatever as to the solvency of the drawers in an action for negligence in failing to charge them, they will be presumed to be solvent.[32]

But the burden of proof as to an actual loss to plain-

80 N. Y. 100, 104; Givan v. Bank of Alexandria (Tenn. Ch.) 52 S. W. 923; Bruce v. Baxter, 7 Lea (Tenn.) 477; Collier v. Pulliam, 13 Lea (Tenn.) 114, 118; Toole v. Dnrand, 7 Rob. (La.) 363, 368.

[28] Crouse v. First Nat. Bank of Penn Yan, 137 N. Y. 383, 33 N. E. 301, affirming 61 Hun, 618, 15 N. Y. Supp. 408.

[29] Bornp v. Nininger, 5 Minn. 523 (Gil. 417).

But see Coghlan v. Dinsmore, 22 N. Y. Super. Ct. 453, where it was held that a bank sued for not taking the necessary steps to charge indorsers has the burden of showing that they are insolvent.

[30] Bank of Mobile v. Hnggins, 3 Ala. 206.

[31] Durnford v. Patterson, 7 Mart. (La.) 460; Crawford v. Louisiana State Bank, 1 Mart. (La.; N. S.) 214; Montillet v. Bank of United States, 1 Mart. (La.; N. S.) 365.

[32] Capital State Bank v. Lane, 52 Miss. 677, 681.

tiff is sustained by evidence of the obligor's insolvency after he had given a mortgage on his property to defendant bank to secure its own claim against him, and evidence of the return of plaintiff's claim unpaid; no evidence having been adduced by defendant to show that the claim was still collectible.[33]

The holder of a bill at the time of a suit by him against the collecting bank for negligence in making presentment and protest without allowing grace is presumed to have been the holder at the maturity of the paper.[34]

§ 176. Admissibility of evidence.

The decisions available on the questions relating to the admissibility of evidence in actions against collecting banks for negligence are based for the most part on some particular state of facts involved in each case.[35] Thus, it has been held that parol evidence of the contents of a placard posted in the bank offering to make collections on stated terms is admissible after notice to the bank to produce it, and the failure of the bank to do so, without evidence that plaintiff saw the placard and relied on it.[36] Also, that letters written by plaintiff to the obligors on the paper after it had been returned to plaintiff by the bank are admissible to show diligence on the part of plaintiff.[37]

[33] Finch v. Karste, 97 Mich. 20, 56 N. W. 123.

[34] Georgia Nat. Bank v. Henderson, 46 Ga. 487, 12 Am. Rep. 590.

[35] Proof of custom, see ante, § 10.
Matters admissible under general denial, see post, § 178.

[36] Wingate v. Mechanics' Bank, 10 Pa. St. 104, 107.

[37] Diamond Mill Co. v. Groesbeeck Nat. Bank, 9 Tex. Civ. App. 31, 29 S. W. 169.

In an action against the initial bank, which had agreed to "collect," for negligence of its correspondent in another state in failing to collect or give notice of dishonor or return the paper, the statutes of that state are admissible in evidence to show that the bank held the note until action thereon was barred by the statute of limitations.[38]

That one is insolvent may be proved by evidence that such was his general reputation in the community where he resides;[39] and an execution against the maker, and a return of *nulla bona* and a certificate of the parish recorder that the maker had no property standing in his name in the parish of his domicile, are admissible to show insolvency of the maker.[40]

§ 177. Pleading and proof—Variance.

An allegation that, when the paper was delivered to the bank for collection, the owner instructed the bank to take all necessary steps to hold the indorsers in case of nonpayment, is surplusage, and need not be proved, since it states merely what the law implies in the absence of express instructions.[41] Nor is it necessary to prove matters not directly in issue. Thus, in a suit to recover from a bank the cost of substituting new transfers of land certificates for transfers negligently lost by

[38] Wingate v. Mechanics' Bank, 10 Pa. St. 104.

[39] West v. St. Paul Nat. Bank, 54 Minn. 466, 56 N. W. 54; Ninninger v. Knox, 8 Minn. 140 (Gil. 110); Burr v. Willson, 22 Minn. 211; Angell v. Rosenburg, 12 Mich. 241, 251; Bank of Middlebury v. Town of Rutland, 33 Vt. 414; State v. Cochran, 2 Dev. (N. C.) 63.

[40] Eichelberger v. Pike, 22 La. Ann. 142.

[41] Jagger v. National German-American Bank, 53 Minn. 386, 55 N. W. 545.

the bank after their delivery to it to collect the amount for which they were given as collateral, plaintiff need not prove the execution of the transfers, that not being in issue.[42] But, in an action against a bank for failing to notify an indorser, where the fact of notice to the bank of the residence of the indorser was in issue, evidence of special instructions given to the bank at the time the paper was left for collection, as to the residence of the indorser, was admissible.[43]

§ 178. —— Matters admissible under general denial.

Evidence in mitigation of damages is admissible under a general denial.[44] So, too, a bank sued for negligence in not presenting a sight draft for acceptance may show, under a general denial, that the requirements of the law merchant in such case had been dispensed with by special agreement; the complaint having alleged an agreement to collect and to promptly present for acceptance, as required by the rules of the law merchant and the custom of banks.[45] But a defense to a suit by the holder for failure to protest and give notice, that defendant received the paper from its correspondent under special indorsement without notice of any title in plaintiff (whose name was not on the paper), and that the correspondent was largely in-

[42] First Nat. Bank of Birmingham v. First Nat. Bank of Newport, 116 Ala. 520, 22 So. 976.

[43] Nininger v. Knox, 8 Minn. 140 (Gil. 110).

[44] Citizens' Nat. Bank of Lawrenceburg v. Third Nat. Bank of Greensburg, 19 Ind. App. 69, 49 N. E. 171.

[45] Citizens' Nat. Bank of Lawrenceburg v. Third Nat. Bank of Greensburg, 19 Ind. App. 69, 49 N. E. 171.

debted to defendant, is not available unless specially pleaded. It cannot be shown under a general denial.[46]

§ 179. Verdict and judgment.

In an action against a bank for negligence consisting principally of a failure to give proper notice of nonpayment, a special verdict which does not find that notice was or was not given, or any facts from which the court could pass upon it as a question of law, will not sustain a judgment for plaintiff.[47]

[46] Cotton v. Union Bank, 15 La. 369.

[47] Locke v. Merchants' Nat. Bank, 66 Ind. 353, 364. See, also, Gazette Printing Co. v. Morss, 60 Ind. 153.

CHAPTER X.

MEASURE OF DAMAGES.

§ 180. Compensatory damages in general.
181. Nominal damages.
182. Face value of paper.
183. For failure to charge indorsers.
184. —— Costs of unsuccessful suits against indorsers.
185. For conversion.
186. Recovery of interest.
187. Matters that may be shown in mitigation of damages.

The measure of damages for negligence of the collecting bank is the actual loss occasioned by its default. This rule applies as well between the initial and correspondent banks, as between the former bank and the owner. It also applies where the paper itself was lost by the collecting bank.

In some cases, nominal damages are allowed for negligence resulting in the discharge of some of the parties to the paper, if proper steps had been taken as to remaining solvent parties.

The right to recover the full face value of the paper depends on the reasonable probability of collection had due diligence been used. The bank may be charged with the full value of the paper where its negligence resulted in the discharge of the drawer, or of the drawee. The full face value of the paper is also the measure of damages where the bank had secured, or fraudulently obtained payment of, its own claim against the obligor, to the exclusion of the rights of its customer, the owner of the paper.

For a negligent failure to properly charge the indorsers, the bank is liable, prima facie, for the full value of the paper,

if the remaining parties are insolvent. And a remote and contingent possibility of recovery against parties not discharged will not prevent a recovery of the full value of the paper.

The costs of unsuccessful suits against indorsers discharged by the negligence of the bank do not form a proper element of damage, and are not recoverable.

If the acts of the bank amount to a conversion, the measure of damages is the full value of the paper.

Interest cannot be recovered unless some pecuniary benefit has, or could have, accrued to the bank from the possession of the paper or its proceeds.

The bank may show, in mitigation of damages, the solvency of the maker, the insolvency of the indorser discharged by its negligence, or any other fact that will lessen the actual loss to the owner.

§ 180. Compensatory damages in general.

The collecting bank is liable only for the actual loss occasioned by its negligence. In other words, it can be required to pay indemnity, and no more, for the loss caused by its fault.[1] So, where the correspondent bank, which was ordered to return a draft if unpaid, gave the initial bank erroneous information that the draft had been paid, whereupon the latter paid the amount, less certain charges, to the drawer, the measure of damages in an action by the initial bank against its corre-

[1] Bank of Mobile v. Huggins, 3 Ala. 206; First Nat. Bank of Meadville v. Fourth Nat. Bank of New York City, 77 N. Y. 320, 89 N. Y. 412; Borup v. Nininger, 5 Minn. 523 (Gil. 417); American Express Co. v. Parsons, 44 Ill. 312; Mott v. Havana Nat. Bank, 22 Hun, 354; Omaha Nat. Bank v. Kiper (Neb.) 82 N. W. 102; Givan v. Bank of Alexandria (Tenn. Ch.) 52 S. W. 923.

spondent is the amount so paid out by it; that amount of loss having been shown.[2]

On the same theory of compensatory damages, a bank which negligently lost transfers of land certificates, sent to it for collection, by one holding them as collateral, is chargeable, as an element of damages, with the necessary costs and expenses of suits to establish such transfers, not exceeding their value as security, though the sender could have avoided such expenses if he had recorded his transfers, as the failure to record in no way contributed to the loss of the transfers; and is also chargeable with all expenses of procuring substitutes, including all necessary traveling expenses and attorneys' fees; but is not chargeable with the expense of foreclosing a mortgage given to secure the same debt by the original debtor after re-establishment of the transfers.[3]

§ 181. Nominal damages.

In some cases where the bank has been guilty of a technical breach of duty, but no injury has resulted, merely nominal damages are allowed. No more than nominal damages can be recovered by the payee of a draft from the collecting bank for its failure to present for payment a check given in payment of the draft, unless it be shown that the drawer of the draft, against whom a remedy had been preserved by the bank, is in-

[2] Merchants' & Manufacturers' Bank v. Stafford Nat. Bank, 44 Conn. 564.

[3] First Nat. Bank of Birmingham v. First Nat. Bank of Newport, 116 Ala. 520, 22 So. 976.

solvent.[4] And the sending bank is entitled to nominal damages only, for negligence of the correspondent bank in sending the paper directly to the bank primarily liable, where the agency had been renounced, and the plaintiff had acquiesced in the renunciation.[5]

§ 182. Face value of paper.

The right to recover the full amount of the paper from the bank on the ground of negligence in failing to collect depends on the reasonable probability of collection had diligence been used in pursuing the obligor or notifying the owner of the paper,[6] and is consequently a question of fact for the jury.[7]

If there is a reasonable probability that the debt would have been collected but for the negligence of the collecting bank, the measure of damages is the amount of the claim.[8]

The bank may be charged with the face value of the

[4] First Nat. Bank of Meadville v. Fourth Nat. Bank of New York City, 77 N. Y. 320, 33 Am. Rep. 618, 89 N. Y. 412. Aliter if the drawer was discharged by the negligence of the bank. See next section.

[5] First Nat. Bank of Evansville v. Fourth Nat. Bank of Louisville, 56 Fed. 967, 6 C. C. A. 183, 16 U. S. App. 1.

[6] Selz v. Collins, 55 Mo. App. 55; Fahy v. Fargo, 63 Hun, 625, 17 N. Y. Supp. 344; Leinau v. Dinsmore, 41 How. Pr. (N. Y.) 97; Failing v. Fargo, 12 Wkly. Dig. (N. Y.) 121.

[7] Selz v. Collins, 55 Mo. App. 55. See, also, Dyas v. Hanson, 14 Mo. App. 363; First Nat. Bank of Trinidad v. First Nat. Bank of Denver, 4 Dill. 290, Fed. Cas. No. 4,810.

[8] Omaha Nat. Bank v. Kiper (Neb.) 82 N. W. 102; First Nat. Bank of Meadville v. Fourth Nat. Bank of New York City, 77 N. Y. 328; Dern v. Kellogg, 54 Neb. 560, 74 N. W. 844.

paper, where its negligence resulted in a loss of all remedies against the drawer. Thus, on a showing that it had been adjudged, in an action in another state against the drawer, that he was discharged from liability on the draft by the bank's failure to duly present his check given in payment thereof, the measure of damages is the full amount of the draft.[9]

The rule is the same as to negligence resulting in the discharge of the drawee, and a failure to present a sight draft for payment within a reasonable time, whereby remedy is lost against the drawee, renders the bank liable for the face value of the draft.[10] And a finding that the drawee had real and personal property more than sufficient to meet the draft at and after maturity raises a presumption that, if the bank had used due diligence, and promptly returned the draft on nonpayment, the owner could have collected the whole amount from the drawee by the ordinary modes of judicial procedure.[11]

The measure of damages for failing to demand payment of the acceptor, who afterwards stopped payment and became insolvent, and for want of ordinary diligence in securing the liability of the other parties to the paper, is the amount of the paper.[12]

Where the collecting bank fraudulently obtains pay-

[9] First Nat. Bank of Meadville v. Fourth Nat. Bank of New York City, 89 N. Y. 413.

[10] Gray's Harbor Commercial Co. v. Continental Nat. Bank, 74 Mo. App. 633.

[11] Fahy v. Fargo, 63 Hun, 625, 17 N. Y. Supp. 344.

[12] Armington's Ex'r v. Gas Light & Banking Co., 15 La. 414.

ment of, or secures, a claim of its own against the obligor on the paper, thereby preventing the owner of the paper from realizing anything thereon, the measure of the damages recoverable by the owner is the full face value of the paper.[13]

An aggravated case of this nature arose in North Carolina, and it was held that the measure of damages for failing to present a check or take any measures to collect it for four days after its receipt, the maker having been embarrassed during such time, within the knowledge of the bank, which, during such time, had taken measures to secure its own claims against the drawer, is the full amount of the check.[14] Decisions of this kind ought to make a lasting impression on banks tempted to overreach their customers in the manner above indicated.

§ 183. For failure to charge indorsers.

The measure of damages for a failure of the collecting bank to duly and properly protest the paper and give notice of dishonor, thereby discharging solvent indorsers, is, *prima facie,* the face value of the paper if the maker or drawer is insolvent.[15]

[13] Commercial Bank v. Red River Valley Nat. Bank, 8 N. D. 382, 79 N. W. 859; Dern v. Kellogg, 54 Neb. 560, 74 N. W. 844.

Right of bank to secure its own claim against the common debtor, see ante, § 50.

[14] Bank of New Hanover v. Kenan, 76 N. C. 340, 346. The check having been drawn on, and payable at, the bank in this case, the conduct of the bank amounted to an acceptance of the check. Id. 346.

[15] Merchants' State Bank v. State Bank of Phillips, 94 Wis. 444,

A remote and contingent possibility of recovery against parties not discharged by the negligence of the bank will not prevent a recovery of the face value of the paper. Thus, where the maker died insolvent, at maturity of a note left with defendant bank for collection, the measure of damages for negligence in failing to present the note or make demand at the late residence of the maker, whereby the sole solvent indorser on the note was discharged, was held to be the full amount of the paper, though there was a possibility of creditors obtaining a small percentage of their claims out of the insolvent estate.[16]

So, also, where two out of four indorsers of a note were discharged by the negligence of the collecting bank in failing to give proper notices of protest, and the third had removed from the state, and it was doubtful if a recovery could be had against the fourth by reason of a defect in the notarial certificate of protest, the owner of the note is entitled to judgment for the face of the paper.[17]

§ 184. —— Costs of unsuccessful suits against indorsers.

In New York, the rule as to the right to recover the costs of suit against the indorsers is that, where the collecting bank, sued for negligence in not taking proper

69 N. W. 170; Borup v. Nininger, 5 Minn. 523 (Gil. 417); Chapman v. McCrea, 63 Ind. 360; American Express Co. v. Haire, 21 Ind. 4; Montgomery County Bank v. Albany City Bank, 7 N. Y. 459; Downer v. Madison County Bank, 6 Hill (N. Y.) 648.

What may be shown in mitigation of damages, see post, § 187.

[16] Huff v. Hatch, 2 Disn. (Ohio) 63.

[17] Pritchard v. Louisiana State Bank, 2 La. 415.

steps to charge the indorsers, did not guaranty the collectibility of the paper, or in any way induce the owners to bring suits, which proved unsuccessful, against the indorsers, the bank is not liable for the costs of such suits.[18] Another New York decision is to the same effect, the court stating that since the suits against indorsers have a very remote, if any, connection with the breach of the bank's undertaking, the bank ought not to be answerable for the costs and expenses incurred therein.[19]

In Louisiana, however, the rule is different, and the costs of unsuccessful suits against indorsers are a proper element of damage.[20]

§ 185. For conversion.

The measure of damages for an actual conversion of the paper by the collecting bank is the face value of the paper,[21] or, more strictly speaking, the amount due on the instrument.[22]

§ 186. Recovery of interest.

The rule as to interest is that it is not allowable in an action against a collecting bank for negligence, where

[18] Ayrault v. Pacific Bank, 1 Abb. Pr. (N. S.) 38, affirmed in 47 N. Y. 570.

[19] Downer v. Madison County Bank, 6 Hill (N. Y.) 648.

[20] Pritchard v. Louisiana State Bank, 2 La. 415.

[21] American Express Co. v. Parsons, 44 Ill. 312.

[22] Salomon v. State Bank, 28 Misc. Rep. 324, 59 N. Y. Supp. 407; People v. Bank of North America, 75 N. Y. 547; Robinson v. Chemical Nat. Bank, 86 N. Y. 404; Talbot v. Bank of Rochester, 1 Hill (N. Y.) 295; Hynes v. Patterson, 95 N. Y. 1.

no pecuniary benefit has, or could have, accrued to defendant from the possession of the funds.[23] So, though the funds in the hands of the receiver of the collecting bank be charged with a trust to the extent of the proceeds directly traceable into his custody, plaintiff will not be allowed interest on the amount.[24] And a receiver of a defunct national bank cannot be charged with interest on the proceeds of collections traced into his possession, as funds coming into his hands are turned over to the comptroller of the currency, and cannot earn interest.[25]

§ 187. Matters that may be shown in mitigation of damages.

As was said in Borup v. Nininger:[26] "The defendants may mitigate the damages by showing either the solvency of the maker, the insolvency of the indorser, or that the paper was partially or wholly secured, or any other fact that will lessen the actual loss to the plaintiff." Thus, in an action for failing to demand

[23] Gray's Harbor Commercial Co. v. Continental Nat. Bank, 74 Mo. App. 633.

Interest was, however, allowed in the cases of Downer v. Madison County Bank, 6 Hill (N. Y.) 648, and First Nat. Bank of Meadville v. Fourth Nat. Bank of New York City, 89 N. Y. 413.

As to rate of interest recoverable, see First Nat. Bank of Meadville v. Fourth Nat. Bank of New York City, 89 N. Y. 413.

[24] Guignon v. First Nat. Bank of Helena, 22 Mont. 140, 55 Pac. 1051, 1097.

[25] Richardson v. Louisville Banking Co., 36 C. C. A. 307, 94 Fed. 442. As a general rule, trustees are not chargeable with interest, in equity, unless they have mismanaged the trust, or have used the fund so that it actually earned interest. Id.

[26] Borup v. Nininger, 5 Minn. 523 (Gil. 417); First Nat. Bank of

payment of the acceptor, and give notice of nonpayment to the drawer, whereby he was discharged, the insolvency of the drawer may be shown in mitigation of damages.[27]

So, also, in an action by the owner of a note against a collecting bank for failure to take proper steps to charge an indorser, the question of the solvency of the maker is material in fixing the measure of damages.[28] But, in such case, the bank cannot show, in mitigation of damages, that lands mortgaged to plaintiff by the maker to secure the note were worth more than she bid them in for at foreclosure sale.[29] On a parallel state of facts, however, the supreme court of New York has come to a contrary decision. It holds that the collecting bank, when sued for negligence in failing to protest a conditional sale note, thereby discharging the indorser, may show, in mitigation of damages, that plaintiff bought in the subject-matter at an execution sale under a judgment rendered in a suit on the note brought by him against the maker, and that the value of the article greatly exceeded the price paid at such sale, since, in such case, defendant is entitled to credit for the value of the article over and above the amount applied on the execution.[30]

Meadville v. Fourth Nat. Bank of New York City, 77 N. Y. 320, 329; American Express Co. v. Parsons, 44 Ill. 312, 317; Mott v. Havana Nat. Bank, 22 Hun, 354.

[27] Stowe v. Bank of Cape Fear, 3 Dev. (N. C.) 408.

[28] West v. St. Paul Nat. Bank, 54 Minn. 466, 56 N. W. 54.

[29] West v. St. Paul Nat. Bank, 54 Minn. 466, 56 N. W. 54.

[30] Mott v. Havana Nat. Bank, 22 Hun, 354.

It may be shown, in mitigation of damages for failure to present a sight draft for acceptance, that plaintiff failed to realize a possible dividend out of the assigned estate of the drawer in the hands of the drawer's assignee.[31]

[31] Citizens' Nat. Bank of Lawrenceburg v. Third Nat. Bank of Greensburg, 19 Ind. App. 69, 49 N. E. 171.

TABLE OF CASES.

[NUMBERS REFER TO PAGES.]

A.

Abbott v. Smith..... 165
Abell Note Brokerage & Bond Co. v. Hurd.....31, 49, 52
Abrams v. Cureton..... 209
Adams v. Hackensack Improvement Commission.....9, 71
v. Otterback 17
Aetna Ins. Co. v. Alton City Bank.....133, 167
Aetna Nat. Bank v. Fourth Nat. Bank..... 72
Agricultural Bank v. Commercial Bank of Manchester.....142, 144
Akin v. Jones.....76, 228, 230
Allen v. Culver..... 265
v. Erie City Bank 38
v. Fourth Nat. Bank of New York..... 254
v. Merchants' Bank 94
v. Merchants' Bank of New York.....142, 146, 177, 178
v. Suydam 101
Allerton v. Allerton..... 245
Alley v. Rogers.....7, 54, 78, 81
Alpena Nat. Bank v. Greenbaum..... 239
Amelungs' Syndics v. Bank of United States.....41, 42
American Exchange Nat Bank of Lincoln v. Metropolitan Nat. Bank of Kansas City.....136, 138, 139, 170
American Express Co. v. Haire.....115, 166, 292
v. Parsons 5, 65, 288, 294, 295
v. Pinckney 15, 278
American Trust & Sav. Bank v. Austin.....36, 71
Anderson v. Alton Nat. Bank..... 167
v. Gill 113
v. Rogers 113, 134

Andrews v. Suffolk Bank..... 95
Angell v. Rosenburg..... 284
Anheuser-Busch Brewing Ass'n v. Clayton.....238, 239
v. Morris 226, 227, 246
Ankeny v. Henry 93
Archer v. Shea..... 93
Armington's Ex'rs v. Gas Light & Banking Co..... 291
Armour Packing Co. v. Davis.....20, 25, 26, 34
Armstrong, In re.....186, 216
v. Commercial Bank of Pennsylvania.....183, 236
v. National Bank of Boyertown.....26, 31, 184, 216
Arnold v. Cheque Bank..... 257
v. Clark 221
Arnot v. Bingham 86, 239
Atkinson v. Rochester Printing Co..... 233
Atlas Nat. Bank v. National Exchange Bank..... 212
Audenried v. Betteley 54
Ayrault v. Pacific Bank.....61, 97, 115, 141, 142, 179, 294
Ayers v. Farmers' & Merchants' Bank..... 28

B.

Bacon v. Page 104
Baer v. Beppert 108
Bailey v. Bodenham..... 139
v. Southwestern Railroad Bank..... 77
Bailie v. Augusta Sav. Bank.....14, 19, 23, 25, 154
Balbach v. Frelinghuysen.....25, 29, 34, 41, 54, 183
Baldwin v. Bank of Louisiana.....144, 145
v. Barrows 98
Ballou v. Boland..... 77
Ballston Spa Bank v. Marine Bank..... 272
Bank v. Butler..... 146
Bank of Antigo v. Union Trust Co.....76, 78
Bank of Clarke County v. Gilman..... 54
Bank of Commerce v. Russell..... 183
v. Union Bank 258, 266
Bank of Delaware County v. Broomhall.....95, 102, 109
Bank of Florence v. United States Savings & Loan Co..... 228
Bank of Lindsborg v. Ober.....133, 146, 147, 178
Bank of Louisiana v. Stansbury.....49, 201
Bank of Louisville v. First Nat. Bank of Knoxville.....12, 172

Bank of Madison, In re....183, 227
Bank of Metropolis v. First Nat. Bank of Jersey City...220, 221
v. New England Bank....40, 41, 206, 214, 217
Bank of Middlebury v. Town of Rutland.... 284
Bank of Mobile v. Huggins....7, 55, 128, 282, 288
Bank of Montreal v. Ingerson....9, 72, 85, 112
Bank of New Hanover v. Kenan....88, 95, 101, 102, 113, 114, 292
Bank of Orleans v. Smith....193, 276
Bank of Republic v. Millard....33, 76, 78
Bank of United States v. Carneal....111, 112
v. Davis.... 103
Bank of Utica v. McKinster....14, 101, 275
v. Smedes 14
Bank of Washington v. Triplett....17, 101, 107, 118
Barker v. Prentiss.... 34
Barnett v. Ringgold.... 31
Bartlett v. Isbell....102, 103
Beal v. City of Somerville....4, 23, 25, 183, 242
v. National Exchange Bank of Dallas.... 183
Beauregard v. Knowlton.... 78
Bedford Bank v. Acoam.... 76
Bell v. Tilden.... 53
v. Waudby 272
Bellemire v. Bank of United States....142, 162
Bellows v. Norton.... 191
Bennecke v. Insurance Co.... 98
Best v. Nokomis Nat. Bank.... 30
Billingsley v. Pollock....229, 231, 239
Bird v. Louisiana State Bank.... 121
Birmingham Nat. Bank v. Bradley....252, 258, 262, 265
Black v. Enterprise Ins. Co.... 52
Blaine v. Bourne....30, 34, 220, 221
Blake v. State Sav. Bank.... 228
Blakeslee v. Hewett....29, 103, 108, 118
Blane, Ex parte.... 241
Bliss v. Cutter.... 79
Bohl v. Carson.... 117
Boone County Nat. Bank v. Latimer.... 245
Borup v. Nininger....94, 101, 275, 282, 288, 292, 295
Bosworth v. Jacksonville Nat. Bank.... 76
Bowers v. Evans.... 77

Bowers v. Trevor..... 33
Bowling v. Arthur..... 144
Bowman v. Evans..... 234
v. First Nat. Bank of Spokane.....29, 192, 230
Boyd v. Emerson.....24, 28
Boykin v. Bank of Fayetteville.....30, 184, 208, 209, 220, 221, 222
Boylston Nat. Bank v. Richardson..... 196
Bradstreet v. Everson..... 163
Brahm v. Adkine..... 33
Branch v. United States Nat. Bank.....31, 208
Branch Bank v. Knox..... 45
Brandao v. Barnett..... 218
Brewster v. Burnett..... 269
Briggs v. Central Nat. Bank..... 188
Brinkman v. Hunter..... 106
British & American Mortgage Co. v. Tibballs..... 85
Britton v. Niccolls.....142, 144
Brooks v. Bigelow..... 33
Brown, In re..... 74
v. Ames..... 260
v. Lusk..... 109
Bruce v. Baxter.....281, 282
Bruner v. First Nat. Bank of Johnson City.....228, 240, 243
Brusegaard v. Ueland.....27, 37
Bryant v. Moore..... 98
Buckley v. Second Nat. Bank of Jersey City..... 255
Buell v. Chapin..... 196
Bullard v. Randall..... 77
Buller v. Harrison..... 195
Burkhalter v. Second Nat. Bank of Erie.....82, 192
Burnham v. Webster.....103, 118
Burr v. Willson..... 284
Butler v. Paine..... 81
Butts v. Phelps..... 47

C.

Caldwell v. Evans.....9, 10
California Bank v. Sayre..... 272
Canal Bank v. Bank of Albany.....266, 269, 270
Canonge v. Louisiana State Bank..... 122
Canterbury v. Bank of Sparta.....123, 196

Capitol State Bank v. Lane....79, 122, 128, 282
Cardwell v. Allan.... 120
Carlinville Nat. Bank v. Wilson.... 167
Carpenter v. North Borough Nat. Bank.... 265
Carr v. National Security Bank.... 76
Carroll v. Exchange Bank.... 214
Carter v. Lehman.... 20
v. Talcott.... 81
Castle v. Corn Exchange Bank....151, 209
Cavin v. Gleason....228, 233, 234
Cecil Bank v. Farmers' Bank of Maryland.... 220
Central Georgia Bank v. Cleveland Nat. Bank....5, 6, 13, 47, 79, 279
Central Nat. Bank of Baltimore v. Connecticut Mutual Life Ins. Co....42, 202, 206, 234, 236
Central Railroad v. First Nat. Bank of Lynchburg....32, 205
Chapman v. McCrea....115, 118, 292
v. Union Bank....63, 66
Chase v. Burnham.... 48
Cheney v. Libbey.... 9
Chicopee Bank v. Philadelphia Bank....64, 65, 66, 112
Chism v. First Nat. Bank of New York.... 255
Citizens' Bank of Baltimore v. Howell....142, 143, 164
Citizens' Bank of Paris v. Houston.... 82
Citizens' Bank of Steubenville v. Carson.... 75
Citizens' Nat. Bank of Lawrenceburg v. Third Nat. Bank of Greensburg....104, 105, 106, 118, 204, 280, 281, 285, 296
City Bank of Hopkinsville v. Blackmore.... 76
City Bank of Sherman v. Weiss....223, 226
City Nat. Bank of Dayton v. Clinton County Nat. Bank of Wilmington....115, 118, 126, 127
City of Philadelphia v. Eckels....21, 227, 228
Claflin v. Wilson....29, 220
Clark v. Bank of Montreal.... 68
v. Merchants' Bank....22, 28, 217
Clarke v. London & County Banking Co.... 256
Clews v. Bank of New York Nat. Banking Ass'n....264, 271
Coates v. Preston....11, 74, 78
Cobb v. Becke.... 149
Cockrill v. Joyce....39, 41
Cocks v. Masterman.... 259
Coddington v. Bay.... 217

Coddington v. Davis..... 61
Cody v. City Nat. Bank of Grand Rapids.....33, 223, 224
Coggs v. Bernard..... 4
Coghlan v. Dinsmore.....107, 115, 117, 127, 282
Cole v. Jessup..... 108
Collier v. Pulliam..... 282
Colorado Nat. Bank of Denver v. Boettcher.....76, 77
Colt v. Noble..... 120
Columbia Nat. Bank of Lincoln v. German Nat. Bank..... 77
Columbian Bank's Estate..... 236
Commercial Bank v. Red River Valley Nat. Bank.....
86, 87, 88, 95, 158, 179, 292
Commercial Bank of Albany v. Hughes..... 22
Commercial Bank of Clyde v. Marine Bank.....211, 217
Commercial Bank of Kentucky v. Barksdale..... 144
Commercial Bank of Manitoba v. Chicago, St. P. & K. C. Ry. Co. 67
Commercial Bank of Pennsylvania v. Armstrong.....
29, 183, 216, 221, 236
v. Union Bank of New York.....80, 83, 151, 179, 217
Commercial Nat. Bank v. Armstrong..... 30
v. Henninger 72
v. Proctor 40
Commercial Nat. Bank of Cincinnati v. Hamilton Nat. Bank of
Fort Wayne.....208, 220, 221, 222
Commercial State Bank v. Rowland.....201, 206
Commercial & Farmers' Nat. Bank of Baltimore v. Davis.....
183, 228, 233
Condon v. Pearce..... 260
Conroy v. Warren..... 53
Continental Nat. Bank of New York v. Weems....226, 235, 238, 245
Cook v. Cook..... 194, 211
Cooke, Ex parte..... 232
Coors v. German Nat. Bank..... 203
Corbett v. Fetzer..... 34
Corn Exchange Bank of Chicago v. Blye.....37, 38, 51
Costin v. Rankin 102
Cottle v. Cole.....31, 49, 52, 201
Cotton v. Union Bank.....275, 286
County of Middlesex v. State Bank.....29, 63
Coventry v. Gladstone..... 68
Cowperthwaite v. Sheffield..... 74
Cox v. Prentice..... 195

Cragie v. Hadley..... 141
Craig Medicine Co v. Merchants' Bank..... 202
Crane v. Fourth St. Nat. Bank.....30, 212
Crawford v. Louisiana State Bank..... 282
v. West Side Bank.....250, 254
Crippen v. American Nat. Bank of Kansas City..... 256
Crosby v. Wright.....93, 260
Cross v. Brown..... 48
Crothers v. Lee..... 229
Crouse v. First Nat. Bank of Penn Yan.....126, 282
Crow v. Mechanics' & Traders' Bank..... 50
Cummins v. Heald..... 147

D.

Dabney v. Campbell.....17, 18
Dalrymple v. Hillenbrand..... 93
Daly v. Butchers' & Drovers' Bank of St. Louis..... 170
Dana v. Third Nat. Bank.....78, 216
Daniel v. St. Louis Nat. Bank..... 190
Davenport Plow Co. v. Lamp.....233, 240
Davey v. Jones..... 141
Davis v. First Nat. Bank of Fresno.....17, 18, 64, 65, 66, 137, 140
v. Morgan 34
v. Talbot 98
Dawson v. Chamney..... 66
Day v. Holmes..... 48
v. Riddley 66
Dean v. Bassett..... 98
Dedham Nat. Bank v. Everett Nat. Bank.....251, 262
Deg v. Deg..... 232
De Land v. Dixon Nat. Bank..... 272
De Nayer v. State Nat. Bank..... 193
Dern v. Kellogg.....18, 87, 88, 89, 95, 290, 292
Diamond Mill Co. v. Groesbeeck Nat. Bank.....96, 283
Dickerson v. Wason.....20, 26, 31, 210
Ditch v. Western Nat. Bank of Baltimore..... 32
D. M. Osborne & Co. v. Rider..... 48
Dod v. Fourth Nat. Bank of New York..... 211
Doppelt v. National Bank of Republic.....33, 223, 224
Dorchester & Milton Bank v. New England Bank.....18, 160
Downer v. Madison County Bank.....122, 293, 294

Dows v. National Exchange Bank of Milwaukee.....69, 71
v. Wisconsin Marine & Fire Ins. Co..... 69
Drain v. Doggett.....80, 85
Drovers' Nat. Bank v. Anglo-American Packing & Provision Co. 134, 136, 139, 167
Drown v. Pawtucket Bank.....36, 48
Duncan v. Jaudon..... 202
Dung v. Parker..... 106
Durnford v. Patterson..... 282
Dusenbury v. Ellis..... 106
Dyas v. Hanson.....14, 60, 209

E.

Eagle Bank v. Chapin..... 120
Eaton v. Alger.....49, 53
v. Cook 196
Edgerton v. Brackett..... 49
Edson v. Angell..... 233
Eichelberger v. Pike..... 284
Ellis v. Ohio Life Insurance & Trust Co..... 252
Emporia Nat. Bank v. Shotwell..... 256
Englar v. Offut.....202, 236
Englert v. White..... 9
Ervin v. Brooks..... 104
Escharte v. Clark..... 152
Espy v. Bank of Cincinnati..... 264
Essex County Nat. Bank v. Bank of Montreal.....78, 82
Eufaula Grocery Co. v. Missouri Nat. Bank.....173, 187, 194, 211
Evansville Bank v. German-American Nat. Bank..... 29, 30, 31, 183, 216, 220, 221
Exchange Bank of Wheeling v. Sutton Bank.....11, 76. 119, 185
Exchange Nat. Bank of Pittsburgh v. Third Nat. Bank of New York 14, 45, 107, 160, 177, 179

F.

Fabens v. Mercantile Bank.....101, 107, 118
Fahy v. Fargo..... 290
Failing v. Fargo.....290, 291
Farmer v. People's Bank..... 255
Farmers' Bank of Bridgeport v. Vail..... 103
Farmers' Bank & Trust Co. v. Newland....78, 83, 84, 171, 280, 281

Farmers' & Mechanics' Bank v. Baldwin..... 35
Farmers' & Mechanics' Nat. Bank v. King.....203, 227, 234
Farnsworth, In re..... 200
Farwell v. Curtis..... 136
v. Meyer 33
Fawsett v. National Life Ins. Co..... 31
Fay v. Strawn.....60, 61, 133, 167
Fifth Nat. Bank v. Armstrong.....20, 26, 220
v. Ashworth 80, 83
Finch v. Karste.....88, 95, 279, 280, 281, 283
First Nat. Bank v. Butler..... 143
First Nat. Bank of Abilene v. Naill..... 89
First Nat. Bank of Alexandria v. Payne's Assignees..... 186
First Nat. Bank of Arkansas Pass v. St. Charles Sav. Bank... 116
First Nat. Bank of Birmingham v. First Nat. Bank of Newport..
5, 15, 45, 60, 62, 64, 285, 289
First Nat. Bank of Carthage v. Yost..... 250
First Nat. Bank of Chattanooga v. Behan..... 193
First Nat. Bank of Chicago v. Citizens' Sav. Bank of Detroit..
134, 137
v. Northwestern Nat. Bank.....254, 260
First Nat. Bank of Cincinnati v. Moore..... 154
First Nat. Bank of Circleville v. Bank of Monroe.....185, 208, 223
First Nat. Bank of Clarion v. Gregg.....211, 216
First Nat. Bank of Corsicana v. City Nat. Bank of Dallas...134, 138
First Nat. Bank of Crown Point v. First Nat. Bank of Richmond
30, 31, 54, 141, 185, 220, 276
First Nat. Bank of Davenport v. Price.....104, 128
First Nat. Bank of Denver v. Devenish..... 194
First Nat. Bank of Evansville v. Fourth Nat. Bank of Louisville
50, 51, 134, 289
v. Fourth Nat. Bank of Richmond..... 56
First Nat. Bank of Ft. Collins v. Hughes.....36, 48
First Nat. Bank of Ft. Worth v. Payne.....19, 50
v. American Exchange Bank..... 256
First Nat. Bank of Girard v. Craig.....133, 147, 169
First Nat. Bank of Grafton v. Buckhannon Bank of West Virginia 113
First Nat. Bank of Lancaster v. Shreiner..... 74
First Nat. Bank of Lapeer v. Sanford.....234, 235, 240
First Nat. Bank of Leadville v. Leppel.....200, 206
First Nat. Bank of Los Angeles v. Dickson.....37, 38

First Nat. Bank of Lyons v. Ocean Nat. Bank..... 13
First Nat. Bank of Manning v. German Bank of Carroll County..
142, 144, 145
First Nat. Bank of Meadville v. Fourth Nat. Bank of New York
City.....122, 276, 288, 290, 291, 295
First Nat. Bank of Meridian v. Strauss.....54, 217, 224
First Nat. Bank of Montgomery v. Armstrong.....235, 237
First Nat. Bank of Nephi v. Brown..... 16
First Nat. Bank of Northumberland v. McMichael.....77, 119
First Nat. Bank of Omaha v. Chilson..... 9
v. First Nat. Bank of Moline..... 179
First Nat. Bank of Pawnee v. Sprague..... 170
First Nat. Bank of Richmond v. Davis.....26, 140, 183, 209
First Nat. Bank of Richmond v. Wilmington & W. R. Co...183, 192
First Nat. Bank of Texarkana v. Munzesheimer.....48, 75
First Nat. Bank of Trinidad v. First Nat. Bank of Denver...67, 290
First Nat. Bank of Union Mills v. Clark..... 76
First Nat. Bank of Wellsborough v. Bache..... 202
First Nat. Bank of Wellston v. Armstrong..... 242
First Nat. Bank of Wymore v. Miller.....113, 114
Firth v. Thrush..... 120
Fishwick's Adm'r v. Sewell..... 278
Fiske v. Witt..... 201
Fitzpatrick v. School Commissioners..... 272
Flannery v. Coates..... 55
Fleckner v. Bank of United States..... 35
Foley v. Smith..... 204
Folger v. Chase.....111, 112
Fonner v. Smith..... 77
Forster v. Clements..... 72
v. Fuller 14
Foster v. Rincker.....3, 5, 80, 231, 233
Fourth Nat. Bank of Cincinnati v. Mayer.....22, 32, 205
Fowler v. Bowery Sav. Bank..... 194
Fox v. Davenport Nat. Bank..... 125
Francis v. Evans.....77, 85, 234, 240
Frank v. Bingham..... 240
Freeman v. Citizens' Nat. Bank.....50, 89
v. Exchange Bank of Macon.....32, 205
Freeman's Bank v. Perkins.....103, 108
Freeman's Nat. Bank v. National Tube-Works Co.....
7, 17, 18, 29, 30, 35, 183, 222

Freiberg v. Stoddard.....230, 233, 234, 239
French v. Jarvis.....20, 49
Friberg v. Cox.....22, 23, 243
Frith v. Cartland..... 232
Fry v. Rousseau..... 80
Fuller v. Bennett.....20, 47
v. Jewett 38
Fullerton v. Bank of United States..... 112
Funkhouser v. Ingles..... 13
Furgerson v. Staples..... 93

G.

Gaar v. Louisville Banking Co..... 33
Gardner v. Adams..... 275
Garland v. Salem Bank..... 127
Gazette Printing Co. v. Morse..... 286
Georgia Nat. Bank v. Henderson.....109, 110, 283
Georgia Seed Co. v. Talmadge..... 76
Gerhardt v. Boatman's Sav. Institution.....14, 145, 146
German American Bank v. Third Nat. Bank.....80, 83, 242
German Fire Ins. Co. v. Kimble.....227, 236
German Nat. Bank of Denver v. Burns.....134, 135, 159
Gettysburg Nat. Bank v. Kuhns..... 25
Gibson v. City of Erie..... 21
Gibbons v. Hecox..... 40
Gilbert v. Guignon..... 68
Giles v. Perkins.....25, 40
Givan v. Bank of Alexandria.....26, 134, 288
Globe Furniture Co. v. School District No. 22..... 190
Gloucester Bank v. Salem Bank..... 252
Goddard v. Merchants' Bank..... 254
Goetz v. Bank of Kansas City..... 29
Goodell v. Buck..... 236
Goodloe v. Godley..... 111
Gordon v. Muchler..... 71
v. Rasines 183, 186
Goshen & Minisink Turnpike Road v. Hurtin..... 14
Gowan v. Jackson.....116, 119
Grammel v. Carmer..... 77
Graydon v. Patterson.....80, 81, 83
Gray's Harbor Commercial Co. v. Continental Bank...104, 291, 294

Green v. Purcell Nat. Bank.....252, 257, 258, 265, 266
Greenatine v. Borchard..... 48
Greene v. Jackson Bank..... 42
Greenfield Bank v. Crafts..... 271
Gregg v. Bi-Metallic Bank.....123, 183, 187, 196
Greneaux v. Wheeler..... 33
Griffin v. Chase..... 227
Grissom v. Commercial Nat. Bank.....9, 17, 71
Grosvenor v. Farmers' & Mechanics' Bank..... 39
Guelich v. National State Bank of Burlington..... 276
Guelick v. National State Bank of Burlington..... 90
Guignon v. First Nat. Bank of Helena.....215, 241, 295

H.

Hackett v. Reynolds.....211, 221
Haddock v. Citizens' Nat. Bank..... 114
Haines v. McFerren..... 71
Haire v. Miller..... 278
Hakman v. Schaaf..... 39
Hallam v. Tillinghast.....17, 183, 192, 230
Hallett, In re..... 241
Hallowell v. Curry.....111, 118, 281
Hamill v. German Nat. Bank.....82, 193
Hamilton v. Cunningham..... 101
Hancock v. Colyer.....38, 205
Hardy v. Pilcher..... 107
Harley v. Eleventh Ward Bank..... 187
Harris v. Clark..... 74
Harrison v. Nicollet Nat. Bank of Minneapolis..... 109
v. Smith 227, 234, 235, 240
Harrison Nat. Bank of Cadiz v. Ellicott 238
Hartford v. Jackson..... 38
Hatch v. Fourth Nat. Bank..... 267
Hawkins v. State Loan & Trust Co..... 278
Hawley v. Jette..... 109
Haynes v. Birks..... 120
Hazlett v. Commercial Nat. Bank.....81, 82
Heath v. Portsmouth Sav. Bank..... 62
Henderson v. O'Conor.....241, 243
v. Pope 110
v. United States Nat. Bank..... 78
Herrick v. Gallagher.....93, 195, 265
Heywood v. Pickering..... 139

Higgins v. Hayden.....22, 23, 228
Hills v. Place..... 9
Hobbs v. Chicago Packing & Provision Co..... 70
v. Straine 126
Hodges v. Clinton..... 80
Hoffman v. First Nat. Bank of Jersey City.....30, 220, 235
v. Miller 26, 215
Holm v. Bennett..... 98
Holmes v. First Nat. Bank of Lincoln..... 34
v. Gilman 233, 236
v. Roe 113
Home Nat. Bank v. Newton..... 72
Hoover v. Wise.....149, 168
Houghton v. Lynch..... 15
Howard v. Duncan..... 272
v. Ives 103
v. Walker 17, 188
Howland v. Spencer..... 38
Huff v. Hatch.....108, 293
Hughes v. Neal Loan & Banking Co..... 272
Hum v. Union Bank..... 174
Humphrey v. Havens..... 98
Hunt v. Townsend..... 245
Hutchinson v. Manhattan Co..... 211
Hyde v. First Nat. Bank of Lacon.....149, 200, 201
v. Planters' Bank of Mississippi.....142, 144
Hynes v. Patterson..... 294

I.

Ide v. Bremer County Bank..... 90
Illinois Trust & Sav. Bank of Chicago v. First Nat. Bank of Buffalo 228, 233, 236
Importers' & Traders' Nat. Bank v. Peters.....21, 202, 227, 245
Independent District of Boyer v. King..... 233
Indig v. National City Bank of Brooklyn....72, 135, 139, 188, 257, 281
Isbell v. Lewis..... 120
Ivory v. Bank of State.....102, 109

J.

Jackson v. Union Bank.....164, 177
Jacobsohn v. Belmont..... 66

Jagger v. National German Bank of St. Paul.....101, 116, 118, 284
Jefferson County Sav. Bank v. Commercial Nat. Bank....17, 83, 84
Jenks v. Doylestown Bank..... 111
Jockusch v. Towsey.....44, 54, 185, 241
John R. Davis Lumber Co. v. First Nat. Bank..... 38
Jones v. Hamlet..... 272
v. Kilbreth 7, 186, 226
v. Milliken 211
Joyce v. Auten..... 42
Justh v. National Bank of Commonwealth..... 267

K.

Kahnweiler v. Anderson..... 77
Kampmann v. Williams..... 49
Kansas State Bank v. First State Bank of Marion.....233, 241
Keene Five-Cents Sav. Bank v. Archer..... 9
Kent v. Bornstein..... 269
v. Dawson Bank 11, 13
Kershaw v. Ladd.....14, 123, 125, 139
Keyes v. Bank of Hardin.....44, 279
v. Fenstermaker 104
Kilgore v. Bulkley..... 93
Killmore v. Culver..... 53
Kilsby v. Williams..... 28
King v. Fleece.....49, 78
Kinney v. Paine.....229, 231
Kip v. Bank of New York..... 233
Kirkham v. Bank of America.....107, 123, 124, 128, 151, 187, 196
Kleinwort v. Le Comptoir Nationale d'Escompte de Paris...250, 257
Klindt v. Higgins..... 9
Knapp v. Crowell..... 39
Knatchbull v. Hallett.....225, 232

L.

La Banque Lacques-Cartier v. La Corporation de Limoilon...82, 112
La Cave & Co. v. Credit Lyonnais.....250, 257
Laclede Bank v. Schuler..... 216
La Farge v. Kneeland.....93, 265
Land Title & Trust Co. v Northwestern Nat. Bank..... 256
Lanfear v. Blossman..... 67
Lanier v. Nash.....50, 219

Laplin v. Sherman..... 49
Lawrence v. Stonington Bank.....34, 161, 214, 216, 221, 223
Lazier v. Horan.....9, 72
Leach v. Hale..... 46
Le Blanc, In re..... 233
Lee v. Chillicothe Branch Bank..... 32
Lehman v. Tallassee Mfg. Co..... 42
Leinau v. Dinsmore..... 290
Lester v. Given.....78, 104
Levi v. National Bank of Missouri.....25, 80, 83, 184, 186, 210, 242
Libbey v. Hopkins..... 80
Lindauer v. Fourth Nat. Bank..... 211
Lindley v. First Nat. Bank of Waterloo..... 106
Little v. Chadwick.....233, 236
v. O'Brien 50
Lloyd v. Osborne..... 113
v. Sigourney 30
v. West Branch Bank..... 15
Lochenmeyer v. Fogarty.....80
Locke v. Leonard Silk Co..... 30
v. Merchants' Nat. Bank..... 286
Louisiana Ice Co. v. State Nat. Bank of New Orleans..17, 55, 56, 226
Louisville & Nashville R. Co. v. Dies..... 60
v. Grant 60
Lowenstein v. Bressler.....79, 82, 134
Luff v. Pope..... 77

M.

McBride v. Farmers' Bank of Salem.....210, 211, 217
McCallum v. Driggs..... 49
McCarver v. Nealey.....80, 81, 85
McClure v. D. M. Osborne & Co.....66, 147
McCulloch v. McKee.....80, 83
McCullock v. Commercial Bank.....120, 121
McGill v. Ott..... 71
McLennan v. Bank of California.....63, 200
McLeod v. Evans.....77, 234, 240
McNeil v. Wyatt..... 120
Mackersy v. Ramsays..... 149
Magdeburg v. Wihlein..... 16
Manchester Bank v. Fellows.....103, 118
Mandeville v. Union Bank of Georgetown.....72, 76

Manhattan Co. v. Reynolds..... 55
Manufacturers' Nat. Bank v. Continental Bank.....
30, 54, 140, 183, 210, 220
v. Thompson..... 195
Marine Bank v. Fulton Bank.....80, 83, 91, 140, 183, 184
Marine Bank of Chicago v. Chandler.....85, 92
v. Rushmore 92
Marine Nat. Bank v. National City Bank..... 264
Marks v. Bodie Bank..... 207
Masich v. Citizens' Bank.....133, 174
Matthews v. Brown & Co..... 257
May v. Jones.....143, 144, 145, 146
Mayer v. City of New York.....193, 257
Mead v. Engs.....102, 118, 120
Meagher v. Campbell..... 38
Mechanics' Bank v. Earp.....26, 94, 163
v. Valley Packing Co.....29, 220
Mechanics' Bank at Baltimore v. Merchants' Bank at Boston...
14, 109, 114, 121
Megee v. Beirne..... 38
Meldrum v. Henderson..... 76
Merchants' Bank v. State Bank.....62, 271
v. Woodruff 109
Merchants' Bank of Baltimore v. Bank of Commerce of New
York 96, 180, 201, 275, 276
Merchants' Nat. Bank v. Goodman..... 83
v. McNulty 19
v. Ritzinger 40
Merchants' Nat. Bank of Philadelphia v. Goodman....80, 134, 139
Merchants' Nat. Bank of St. Paul v. Hanson.....29, 30, 220
Merchants' Nat. Bank of Savannah v. Guilmartin..... 14
Merchants' State Bank v. State Bank of Phillips.....117, 292
Merchants' & Manufacturers' Bank v. Stafford Nat. Bank.....
60, 101, 179, 289
Merchants' & Planters' Bank v. Meyer.....11, 39, 74
Merryman v. State..... 180
Messmore v. Morrison..... 104
Metropolitan Nat. Bank v. Loyd.....20, 33, 265
v. Merchants' Nat. Bank.....32, 216, 254, 269, 271
Midland Nat. Bank v. Roll..... 32
Midland Nat. Bank of Kansas City v. Brightwell..10, 233, 238, 239, 240
Miller v. Drake..... 14
v. Henry..... 33

Milliken v. Shapleigh.....210, 215
Minneapolis Sash & Door Co. v. Metropolitan Bank.....
61, 133, 136, 138, 139
Miranda v. City Bank of New Orleans.....127, 141
Mitchell v. Byrne..... 196
Montague v. Sandwich..... 278
Montgomery County Bank v. Albany City Bank....151, 152, 179, 293
Montillet v. Bank of United States.....141, 282
Moore v. Hall..... 49
v. Louisiana Nat. Bank..... 67
v. Meyer 8, 9, 189
Morgan v. Tener.....163, 277
Morris v. Eufaula Nat. Bank.....113, 129, 279
v. Union Nat. Bank of Sioux Falls..... 110
Morrison v. McCartney..... 78
Morton v. Rogers..... 53
Mott v. Havana Nat. Bank.....288, 295, 296
Mound City Paint & Color Co. v. Commercial Nat. Bank of Ogden 45, 87, 123, 124, 179
Mowatt v. McLelan.....93, 265
Muller v. Poudir..... 123
Murdock v. Mills..... 106

N.

Naser v. First Nat. Bank.....30, 151, 220
Nassau Bank v. National Bank of Newburgh.....266, 267
National Bank v. City Bank..... 96
National Bank of Commerce v. American Exchange Bank.....
18, 80, 83, 84, 196
v. Manufacturers' & Traders' Bank..... 268
v. National Mechanics' Banking Ass'n.....254, 264
National Bank of Commerce of Boston v. Merchants' Nat. Bank of Memphis.....67, 68
National Bank of Commerce of Seattle v. Johnson.....
17, 30, 80, 134, 183, 184, 220
National Bank of Newburgh v. Smith..... 74
National Bank of North America v. Bangs.....252, 258
National Butchers' & Drovers' Bank v. Hubbell....20, 25, 29, 30
National Citizens' Bank of New York v. Citizens' Nat. Bank.... 221
National Commercial Bank v. Miller.....32, 47
National Exchange Bank v. National Bank of North America... 71
National Exchange Bank of Dallas v. Beal.....208, 214

National Gold Bank & Trust Co. v. McDonald.....24, 28
National Life Ins. Co. v. Goble..... 85
National Pahquioqe Bank v. First Nat. Bank of Bethel..... 180
National Park Bank v. Seaboard Bank..20, 93, 184, 210, 220, 265, 266
National Park Bank of New York v. Eldred Bank..... 264
National Union Bank v. Earle..... 213
Nebraska Nat. Bank of Omaha v. Logan.....113, 134
Neely v. Rood 236
Newcomb v. Boston & Lowell R. Corp..... 68
New Orleans Canal & Banking Co. v. Escoffie..... 117
New York Fire Ins. Co. v. Ely..... 35
Niagara County Bank v. Baker..... 35
Nichols v. Gross..... 50
Nininger v. Knox 283, 285
Noe v. Gregory 106
Nonotuck Silk Co. v. Flanders.....76, 228, 234, 240
North v. Turner..... 275
Northwestern Nat. Bank of Chicago v. Bank of Commerce of Kansas City 220, 250, 262
Nunnemaker v. Lanier.....80, 83, 84, 122
Nurse v. Satterlee.....226, 227, 233, 245

O.

Oakey v. Bank of Louisiana.....141, 142
O'Brien v. Grant 212
O'Donnel v. Seybert..... 275
Ogden v. Blydenhurgh..... 93
v. Dobbin 103, 111
Omaha Nat. Bank v. Kiper.....79, 80, 288, 290
Onondaga County Sav. Bank v. United States..... 261
Ontario Bank v. Lightbody..... 81
Oppenheim v. West Side Bank.....250, 254, 258, 264
Overman v. Hoboken City Bank.....17, 212
Oxford Lake Line v. First Nat. Bank of Pensacola....48, 67, 70, 98

P.

Pacific Bank v. Mitchell.....22, 183, 185
Padfield v. Green 78, 80, 201
Palmer v. Holland 152, 153
Parker v. Harden 278
Patriotic Bank of Washington v. Farmers' Bank of Alexandria.. 114

Payne v. Albany City Nat. Bank..... 36
Peak v. Ellicott 227, 234
Pease v. Warren 9
Peck v. First Nat. Bank of New York..... 21
Pendleton v. Bank of Kentucky.....62, 63
Penn Bank v. Farmers' Deposit Nat. Bank..... 42
Pennell v. Deffell 232
People v. Bank of Danville.....7, 192, 231, 233
v. Bank of North America.....255, 294
v. City Bank of Rochester.....80, 234, 244
v. Gibbs 275
v. Merchants' Bank of Binghamton..... 239
v. Merchants' & Mechanics' Bank of Troy.....76, 135, 238, 239
v. Tioga Common Pleas 275
v. Utica Ins. Co. 35
Peoples' Bank of Lewisburg v. Jefferson County Saving Bank..
30, 55, 218, 220, 221, 223
Peoples' Bank of New York v. Citizens' Nat. Bank..... 221
Peoples' Bank of Wilkesbarre v. Legrand..... 74
Peoples' Nat. Bank v. Freeman's Nat. Bank..... 70
Peoples' State Bank v. St. Landry State Bank..... 37
Peters v. Bain 236
Peterson v. Union Nat. Bank.....28, 29, 63
Philadelphia Nat. Bank v. Dowd.....229, 233
Phipps v. Chase 112
v. Millbury 120, 121
Pickering v. Cameron 203, 204
Pickle v. Muse 255
Planters' & Farmers' Nat. Bank of Baltimore v. First Nat. Bank of Wilmington 140, 165
Porthouse v. Parker.....116, 119
Power v. First Nat. Bank of Fort Benton.....157, 177
Pratt v. Foote 196
Prescott v. Leonard.....7, 20, 34
Prescott Bank v. Caverly..... 93
Price v. Neal 250, 251, 254
Prideaux v. Criddle 149
Pritchard v. Louisiana State Bank.....141, 277, 293, 294

Q.

Quinn v. Gross 278

R.

Rahn v. Philadelphia Bank 111
Rapp v. National Security Bank.....263, 266
Rathbone v. Sanders 214
Reeves v. State Bank.....154, 179, 191, 201, 237
Reynes v. Dumont 41
Rhines' Adm'rs v. Evans..... 277
Richards v. Stephenson 205
Richardson v. Denegre 21, 54, 242
v. Louisville Banking Co. 210, 295
Richmond & Danville R. Co. v. Jones..... 60
Ridgely Nat. Bank v. Patton.....10, 71
Riverside Bank v. First Nat. Bank of Shenandoah.....72, 195
Roanoke Nat. Bank v. Hambrick.....98, 129, 279
Robarts v. Tucker 72
Robbins v. Bacon 77
Roberts v. Parrish 48
v. Snow 34, 48
Robinson v. Bank of Rochester..... 294
Rock County Nat. Bank of Janesville v. Hollister.....30, 52, 53
Rodgers v. Stophel 15
Romanski v. Thompson 232
Rosa v. Brotherson..... 217
Rosenthal v. Ehrichler 133
Rosson v. Carroll 120
Rouse v. Calvin..... 78
Ruidskoff v. Barrett 81
Runt v. Herring 60
Runyon v. Latham 15
Russell v. Drummond 47
v. Hadduck 40
Ryall v. Rolle 232
Ryan v. Manufacturers' & Merchants' Bank..... 50
v. Paine 229
v. Phillips 236, 237

S.

St. Joseph & G. I. R. Co. v. Palmer..... 60
St. Louis & San Francisco Ry. Co. v. Johnston...20, 21, 33, 227, 228
Saint Nicholas Bank v. State Nat. Bank.....11, 12, 13, 151, 179
St. Paul Nat. Bank v. Cannon.....9, 71

Sahlien v. Bank of Lonoke.....17, 18, 60, 96, 125, 281
Salomon v. State Bank.....255, 258, 294
Sayers, Ex parte..... 232
Sayles v. Cox 86, 228, 244
Schuler v. Laclede Bank..... 39
Schumacher v. Trent 160, 177, 178
Schurchardt v. Hall 67
Scott v. Gilkey.....79, 80, 82, 86, 185
v. Ocean Bank 7, 20, 25, 28, 33, 210, 215, 217
v. Shirk 71
Seaton v. Scovill 120
Sebag v. Abithol 71
Second Nat. Bank of Columbia v. Cummings....67, 69, 80, 83, 86
Second Nat. Bank of Lafayette v. Hill..... 39
Security Bank of Minnesota v. Luttgen..... 69
Security Bank of New York v. National Bank of Republic..... 264
Selz v. Collins 97, 290
Seven Corners Bank, In re.....228, 229, 233, 234, 240, 241
Shaffer v. McKee 255
Shaw v. Spencer 202
Sheldon v. Benham 103, 118
Shepard v. Harrison 68
Sheppard v. Steele 265
Sherman v. Commercial Printing Co..... 15
v. Port Huron Engine & Thresher Co.....159, 191, 201
Sherwood v. Milford State Bank.....233, 234, 236
v. Rays 50
Shipsey v. Bowery Nat. Bank..... 66
Sigourney v. Lloyd 30
Simmons v. Belt 49
Simpson v. Waldby.....155, 177, 179
Siner v. Stearne 163
Slack v. Longshaw 120
Slater v. Oriental Mills.....228, 240
Smedes v. Bank of Utica.....14, 101, 120, 133
Smith v. Essex County Bank.....7, 9, 201
v. Mercer 251
South Park Foundry & Machine Co. v. Chicago G. W. Ry. Co... 27
Stacy v. Dane County Bank.....142, 143, 144, 167
Stalker v. McDonald 217
Stark v. United States Nat. Bank..... 211
State v. Bank of Commerce of Grand Island.....226, 235

State v. Cochran 284
v. Southern Bank 241, 243
State Bank, In re 20, 25, 27
v. Napier 111
State Bank of Midland v. Byrne 85
State Bank of Troy v. Bank of Capitol 102, 120, 121
State Nat. Bank of Ft. Worth v. Thomas Mfg. Co 160
Steele v. Russell 107, 115
Steinhart v. National Bank of D. O. Mills & Co 82, 197
Stephens v. Brooklyn Board of Education 267
v. Thornton 15
Stephenson v. Mount 253
Sterling v. Marietta & Susquehanna Trading Co 50, 54
Stevenson v. Fidelity Bank of Durham 217, 218, 221
Stollenwerck v. Thatcher 68, 69
Stout v. Benoist 250
Stowe v. Bank of Cape Fear 296
Straughan v. Fairchild 204
Strauss v. Bloom & Co 81
Streeter v. Horlock 15
Streissguth v. National German-American Bank 157, 179
Studebaker Bros. Mfg. Co. v. First Nat. Bank of Sulphur Springs 39, 206
Sunderlin v. Mecosta County Sav. Bank 76
Susquehanna Valley Bank v. Loomis 265
Sussex Bank v. Baldwin 108
Sutherland v. First Nat. Bank of Ypsilanti 30, 189, 220
Sweeney v. Easter 183, 220
Sweet v. Swift 104
Swift v. Tyson 217

T.

Taber v. Perrott 179
Talbot v. First Nat. Bank of Rochester 255
Taylor v. Plumer 232
v. Young 116, 119
Tebbetts v. Dowd 126
Thatcher v. Bank of State of New York 75
Third Nat. Bank of New York City v. Merchants' Nat. Bank 260
Third Nat. Bank of Syracuse v. Clark 220
Thompson v. Gloucester City Savings Inst 184, 235
v. State Bank 115, 118, 141

Thompson's Appeal 236
Thuemmler v. Barth 228, 241
Tiernan v. Commercial Bank of Natchez.....102, 142, 144
Tinkham v. Heyworth 201
Titus v. Mechanics' Nat. Bank at Trenton.....14, 20, 41, 153, 179
Toole v. Durand 97, 282
Town of Madison v. Newsome..... 98
Township of Pine Grove v. Talcott 78
Townsley v. Sumrall 104
Tradesman's Nat. Bank of Pittsburgh v. Third Nat. Bank of New York 107, 118
Treuttel v. Barandon 30
Trinidad First Nat. Bank v. Denver First Nat. Bank..... 25
Trunkey v. Crosby 38
Truslow v. Putnam 38
Turnbull v. Bowyer 260
Turner v. Hayden 71
Tyson v. State Bank.....44, 45, 101, 166
v. Western Nat. Bank of Baltimore..... 30

U.

Union Nat. Bank v. Citizens' Bank of Union City.....183, 244
Union Nat. Bank of Chicago v. Goetz..... 236
Union Pac. Ry. Co. v. Rainey..... 60
Union Turnpike Road v. Jenkins..... 14
United States v. American Exchange Nat. Bank.....93, 261
v. Graff 38
United States Nat. Bank v. National Park Bank.....250, 254, 266
United States Nat. Bank of Omaha v. Geer.....20, 21, 23, 34
v. Westervelt 89

V.

Van Alen v. American Nat. Bank.....234, 236
Van Amee v. Bank of Troy.....214, 215, 217, 218
Van Leuven v. First Nat. Bank of Kingston..... 46
Vickery v. State Savings Ass'n.....33, 223
Voss v. German American Bank of Chicago..... 74

W.

Wagner v. Crook 134

Walker v. Bank of New York State..... 101
v. State Bank 106
Wallace v. Stone 85, 226, 236
Walters v. Munroe 272
Walton v. Henderson 71
Wanlers v. McCandless 48
Ward v. Smith 9, 10, 29, 81, 83
Warner v. Fourth Nat. Bank.....39, 41
v. Lee 215, 217
Warren v. Gilman 62, 103, 120, 132, 141
Warren Bank v. Suffolk Bank.....18, 115, 142, 161
Washington Bank, In re Receivership of.....27, 37
Waterbury, In re 233, 234
Waterhouse v. Citizens' Bank of Louisiana..... 81
Waterloo Milling Co. v. Kuenster..... 167
Watervliet Bank v. White.....55, 195
Webb v. Dickenson..... 265
Weedsport Bank v. Park Bank..... 202
Weinstock v. Bellwood..... 74
Wellington v. Jackson 271
West v. St. Paul Nat. Bank.....101, 280, 284, 296
West Branch Bank v. Fulmer.....102, 116, 119
Western Brass Mfg. Co. v. Maverick.....80, 83, 193
Western Wheeled Scraper Co. v. Sadilek.....112, 134, 136
Westfall v. Mullen 233, 234, 240, 241
West London Commercial Bank v. Kitson..... 106
Wetherill v. Bank of Pennsylvania.....50, 184
Wheeler v. Northwestern Sleigh Co..... 98
v. Train 38
Whipple v. Walker 80
Whitaker v. Bank of England..... 72
White v. Commercial & Farmers' Bank of Rockhill..... 234
v. Continental Nat. Bank 254, 265
v. Madison 106
v. National Bank 18, 31, 32, 35, 183
v. Skinner 106
v. Sweeny 258
v. Third Nat. Bank of Cincinnati..... 45
Whitecomb v. Jacob..... 232
Whiting v. City Bank of Rochester.....123, 196, 197
v. Independent Mutual Ins. Co..... 180
Whitney v. Eliot Nat. Bank..... 76

Whitney v. Merchants' Union Exp. Co.....123, 125
Whitworth v. Pelton 33
Wilkinson v. Johnson 259
Williams v. Cox 22, 241, 243
v. Jones 30, 214, 223
Williamsport Gas Co. v. Pinkerton.....9, 179
Willison v. Smith..... 46
Wilson v. Smith 210, 214, 215
v. Tolson 19, 31, 48, 49
Winfield Nat. Bank v. McWilliams..... 224
Wingate v. Mechanics' Bank.....62, 119, 163, 283, 284
Winstanley v. Second Nat. Bank of Louisville..... 235
Wisconsin Marine & Fire Ins. Co. v. Bank of British North America 68
Wood v. Merchants' Saving, Loan & Trust Co.....9, 10, 71
Wood River Bank v. First Nat. Bank of Omaha.....116, 119, 144
Woodruff v. Plant..... 113
Woolen v. New York & Erie Bank..... 67
Wyman v. Colorado Nat. Bank.....41, 218

Y.

Yerkes v. National Bank of Port Jervis....5, 14, 19, 44, 45, 46, 60
Young v. Noble's Ex'rs 5, 13, 14, 60, 154
Youngs v. Lee..... 217

Z.

Zelle v. German Sav. Inst..... 40

INDEX.

[REFERENCES ARE TO PAGES.]

A.

ABANDONMENT,

of particular custom prevents bank from relying thereon, 119, 120.

ACCEPTANCE,

of paper for collection, inception of relation, 15.

must follow tenor of bill, 106, 107.

implied from unreasonable retention of paper by bank, 119.

presentment for, duties and liabilities of collecting bank, 103-107.

not necessary in case of paper payable on demand, 104.

excuses for failure to present, 105, 106.

mitigation of damages for failure to present, 296.

notice of nonacceptance, duties of collecting bank, 117, 118.

of drawee bank taken in lieu of payment, collecting bank liable, 82.

mere crediting of amount of paper to owner not such a payment as will discharge accommodation acceptor, 185.

drawee on acceptance of time draft is entitled to possession of bills of lading, 67-71.

of draft of insolvent national bank, lien on proceeds of collections in its hands dates from acceptance, 216.

ACCOMMODATION PAPER,

mere crediting of paper to owner not such a payment as will discharge accommodation acceptor, 185.

ACCOUNT STATED,

between collecting bank and customer, effect as renunciation by bank of authority to collect, 55, 56.

ACTION,

by collecting bank, authority to sue on paper in its own name, 48-53.
on paper delivered for collection, bank as real party in interest, 52, 53.
for possession of paper, 51, 52.
against accommodation acceptor, 185.
against drawer, defense that bank sent check directly to drawee, 134, note.
against correspondent, 179, 180.
against collecting bank, right of action in general, 274.
for negligence of bank, assignability, 275.
for failure to charge indorsers, 121, 122.
surrender of paper not a condition precedent, 276.
return of forged or altered paper not a condition precedent to action for money paid thereon by mistake, 268, 269.
for noncompliance with instructions to apply deposit to payment of depositor's paper, 75.
by payee for collecting paper on forged indorsement of his name, 255.
by second indorser for failure of bank to notify prior indorser, 121.
for proceeds, 200, 209.
for misappropriation of proceeds, 200, note.
on draft given by bank in payment, mistake as to sufficiency of obligor's deposit is no defense, 194.
pleading, 278-280, 284.
presumption and burden of proof, 281.
evidence, 281-284.
verdict and judgment, 286.
to recover payments made by mistake, 192-197.
against correspondent for proceeds, who may sue, 209.

ACTION ON THE CASE,

for failure to turn over proceeds, 201, note.

ACTUAL NOTICE,

of dishonor does not dispense with formal notice, 118.

ADOPTION,

of forged signature, 271, note.

ADVANCES,
by correspondent to initial bank, lien on proceeds, 214.
collection not complete on mere credit in advance of collection, 184.
credit in advance of collection may be cancelled, 25-29.

AGENCY,
see "Principal and Agent."

AGREEMENT,
see "Contract."

ALABAMA,
rule as to liability of initial bank for defaults of correspondents, 172.

ALTERATIONS,
drawee bank not charged with knowledge of, 254.
diligence in notifying parties to paper, 258.
charging back amount of altered paper, 262.
certification of altered paper by drawee bank, 271.
recovery back of payments made on altered paper, 264.

AMBIGUITY,
in instructions to collecting bank, duty of bank, 48.

AMENDMENT,
of complaint in action against bank for negligence, 279.

ANSWER,
in action for negligence of bank, 280.
of collecting bank as garnishee held to show indebtedness to the defendant, 38, note.

ANTECEDENT DEBT,
of initial bank, correspondent as holder for value, 216-218.
indorsee for is bona fide holder as against collecting bank, 203, 204.

APPLICATION,
of deposits to payment of paper, authority of bank, 71.
effect as completion of collection, 189.
of payments, 265, note.

APPROPRIATION,
of specific fund to payment of collection, 86.
of deposits to payment of papers, completion of collection, 189.

ASSETS,
doctrine that proceeds of collection are not assets of bank, 226.
what portion impressed with trust for proceeds of collection, 245.

ASSIGNEE,
of insolvent bank cannot change relation of parties by entering or changing credits on books, 185.
enforcing trust in proceeds collected by, 241.

ASSIGNMENT,
check or draft not an assignment of fund, 76-78.
of cause of action for negligence of bank, 275.
of note to bank as condition precedent to execution on judgment against bank for negligence, 276, 277.

ASSIGNMENT FOR BENEFIT OF CREDITORS,
by depositor for collection does not affect lien of bank for balance of general account, 41, 42.

ATTACHMENT,
of paper in bank for collection, 37, 38.

ATTORNEYS,
authority of bank to employ attorneys to sue on paper, 50.
holding unpaid paper for collection, not subject to process by foreign attachment, 38, note.
liability for negligence in collecting, 165, note.
liability of collection agencies for defaults of their attorneys, 163.
limitation of action against collection agencies for negligence or fraud of their attorneys, 277.

AUTHORITY,
of bank to make collections, 44-47.
termination, 53-56.
revocation by owner of paper, 54, 55.
renunciation by bank, 55.
where paper is payable at bank, to act as agent of holder or obligor, 9-11.
to surrender bills of lading accompanying drafts, 67.
time and manner of receiving payment, 78-80.

AUTHORTIY—Cont'd.
to apply deposits to payment of depositor's paper, 71-76.
to receive its own checks or certificates of deposit in payment, 85, 86.
to receive payment for corporation, estoppel of company to deny agency, 202.
to sell or pledge paper indorsed in blank, 33.
to sue on paper in its own name, 48-53.

B.

BAILMENT,
collecting bank is a bailee, 3-6.
when relation of bailor and bailee ceases, and that of creditor and debtor begins, 182.
not created by indorsement for deposit and credit, 22.
bailee bank liable for defaults of its agents, 174.
special interest of collecting bank as bailee, 37-39.
attachable interest of bailee, 38, note.

BANK,
definition by negotiable instruments laws, 73, note.
relation when paper is payable at, 9-11.
paper payable at, authority to apply deposits of obligor in payment, 71-76.
presentment of paper for payment, 111, 112.
paper negotiable at, application of deposits to payment, 76.
has implied power to make collections, 44-46.
renunciation of authority to collect, 55, 56.
representation by cashier, 62, 63.
estoppel by acts of cashier, 16.
insolvency at time of acceptance of paper prevents passage of title to bank, 21.
banking partnership liable for act of one partner, 70, note.

BANK NOTES,
collecting bank cannot accept depreciated bank notes in payment, 81.

BANKRUPTCY,
effect on lien of bank of filing by customer of petition in bankruptcy, 200, note.

BENEFITS,
to bank form sufficient consideration for undertaking to collect, 14.

BILLS OF LADING,
surrender by bank on acceptance or payment of accompanying drafts, 67-71.
ratification of negligence of bank in prematurely surrendering, 98.

BLANK,
indorsement in, see "Indorsement."

BONA FIDE PURCHASER,
collecting bank not a bona fide purchaser, 30.
notice from possession of paper by an attorney that he holds for collection only, 33.
of forged paper, 250, 251.
bank paying value for forged draft not liable to drawee on indorsement "for collection," 261.
rights of correspondent bank as against owner, 216.
right to proceeds, 203.

BOND,
payable at collecting bank, relation of parties, 10.
special deposit for collection, title does not pass to bank, 21.

BOOKS,
entries in books of collecting bank not conclusive as to existence of general balance against owner of collection, 41.
of bank as evidence of balance against customer, 200, note.

BURDEN OF PROOF,
to show presentment for acceptance, 104.
in actions for negligence of collecting bank, 281.
is on bank to explain loss of paper, 64-66.
to establish trust in assets for amount of proceeds of collection, 226, 227.

C.

CANCELLATION,
of credit given in advance of collection, 25-29.
estoppel of bank by failure to cancel credit within reasonable time, 186, 187.
of credit given for forged or altered paper, 262.

CAPACITY,
of prior parties, warranty by general indorsement, 93, note.

CASE,
action on the case for failure to turn over proceeds, 201, note.

CASH,
title passes to bank where paper was treated as cash, 21-23.
certificates of deposit treated as cash, 85.
trust not enforceable for proceeds of paper deposited and received as cash, 243.
indorsement by bank on forged check payable to cash, not equivalent to indorsement by payee, 262.

CASHIER,
receipt given for paper, evidence of inception of relation, 15.
estoppel of bank by acts of cashier, to deny status as collecting medium, 16.
acts as to forged paper, 253.
liability of collecting bank for acts of, 62, 63.
employment of notary binds bank, 141.
fraud of, renders bank liable to sending bank, 180.

CERTIFICATE OF DEPOSIT,
recovery of possession by collecting bank from issuing bank on refusal of the latter to pay or surrender it, 51, 52.
collection of interest on, 90.
authority of collecting bank to accept its own certificates in payment, 85.

CERTIFICATION,
authority of collecting bank to obtain certification of check, 47.
by collecting bank, 195.
of altered paper by drawee bank, 271.
of drawee bank taken in lieu of payment, collecting bank liable, 82.

CESTUI QUE TRUST,
depositor for collection is not, 8.

CHARGING BACK,
amount of dishonored paper, 25-29.
amount of forged or altered paper, 262.

CHARTER,
implied power of banks to make collections, 44-46.

CHECK,
not an assignment of fund, 76-78.
deposited as check and not cash, title remains in depositor, 23.
on collecting bank, presumption that deposit was for collection, 23, 24.
payable to collecting bank, presumption that deposit was for cash and not for collection, 24, 25.
credit of checks drawn on collecting bank may be cancelled if drawer is without funds or insolvent, 28, 29.
authority of bank to take checks in payment, 81-84.
drawn on collecting bank, agency of bank for sender, 11.
acceptance in payment of collection, 86.
retention without efforts to collect renders bank liable, 102.
presentment for payment, 112-114.
of checks taken in payment, 122.
payable at future time are entitled to grace, 109.
notice of dishonor, 119.
sending directly to drawee does not extinguish or pay debt, 134, note.
remittance by, when trust arises on failure of drawer or drawee bank, 229.
refusal of bank to pay does not create preference or trust on its insolvency, 231.
reclaiming from receiver checks not collected at time of suspension of bank, 242, note.

CHOSE IN ACTION,
assignability of cause of action for negligence of bank, 275.

CLEARING HOUSES,
customs of, not binding on customers of banks, 17, note.
title to proceeds as affected by rules and usages of clearing house, 212.
proceeds used in settling balances, right to trust or preference, 241.

COLLATERAL SECURITIES,
lien on for advances, 214.
lien of bank as pledgee, 41.
bank in possession of note indorsed in blank may sell or pledge it, 33.

COLLECTION,
rule that bank undertakes to "collect," and not merely to transmit, 148-160.
when complete, 182.

COLLECTION AGENCY,
liability for default or misconduct of its attorney, 163.
limitation of actions for negligence of, 277.

COLLUSION,
between obligor and cashier of correspondent, recovery by initial bank, 180.

COLORADO,
rule as to liability of initial bank for defaults of correspondents, 159.

COMMERCIAL PAPER,
is payable in money only, 80.

COMMON CARRIER,
cannot stipulate against liability for negligence, 60.

COMMON LAW,
decisions in one state not evidence of common law in another state, 12.
jurisdiction negativing trust relation between bank and customer, 8.

COMPENSATION,
of collecting bank, 13-15.

COMPENSATORY DAMAGES,
see "Damages."

COMPLAINT,
in actions for negligence of bank, 278.

CONDITION,
withdrawal of conditional deposit to pay paper, 190.

CONDITION PRECEDENT,
surrender of paper not a condition precedent to action against bank for negligence, 276.

CONDITION PRECEDENT—Cont'd.
owner may sue bank before suing indorser discharged by its negligence, 121, 122.
return of paper not a condition precedent to suit by initial bank against correspondent, 180.
to action for money paid by mistake on forged or altered paper, 268, 269.

CONFEDERATE MONEY,
bank liable for taking in payment, 81.

CONFLICT OF LAWS,
governing relation between collecting bank and customer, 11-13.
as to operation of check or draft as assignment of fund, 78, note.
governing liability of collecting bank paying forged paper, 248.
as to liability of initial bank for defaults of correspondent, 11-13, 148-180.

CONNECTICUT,
rule as to liability of initial bank for defaults of correspondents, 161.

CONSIDERATION,
for undertaking to collect, 13-15.
antecedent debt constitutes value, 203, 204, 217.
want of, ground for recovery of payment made on altered paper, 271.
pleading, 279.

CONTRACT,
contractual limitation of bank's liability for negligence, 60, 177.
of express company to carry and not merely to forward, 152.
to "collect" or to "transmit," 174, 175.
of bank to pay excess over true amount of raised draft, 268.
by collecting bank to notify all indorsers, evidence of, 121.
between collecting banks, 140.
effect on title to proceeds of paper, 210.
cannot prejudice rights of owner who had indorsed "for collection," 220, 221.
pleading, 278.

CONVERSION,
limitation of action for, 278.
of goods by wrongful surrender of bills of lading, 70.

CONVERSION—Cont'd.
of proceeds as establishing trust, 227-229.
trust not enforceable in proceeds converted prior to insolvency, 241.
liability of collecting bank paying on forged indorsement of payee's name, 254, 255.
conflict of laws governing liability of collecting bank paying forged paper, 248-250.
liability of correspondent bank to owner, 208.
complaint need not allege consideration for undertaking to collect, 279, note.
measure of damages, 294.

CORPORATIONS,
payment of corporate paper to ostensible agent, 202.
bank liable for taking acceptance of company on bill drawn on officer personally, and for taking personal acceptance of officer on bill against company, 106, 107.

CORRESPONDENT,
duties of initial bank as to paper sent to a correspondent, 94.
care required in selection of, 132-140.
bank negligent if it selects drawee or obligor bank, 133-140.
liability of initial bank for defaults of, 147-179, 180.
initial bank may stipulate against liability for defaults of, 61, 62, 177.
insolvency of, does not relieve initial bank from liability, 178.
payment to, as payment to initial bank, 191.
liability to initial bank for proceeds, 209.
must give notice of dishonor to initial bank which had indorsed for collection, 120, 121.
recovery of possession of paper by initial bank from correspondent, 51.
correspondent banks not jointly liable to initial bank, 152.
lien of, for debt of initial bank, 213.
when a bona fide purchaser of paper as against original owner, 216.
contracts and mode of dealing with initial bank in general, 140.
title and rights as between initial and correspondent banks, 210.
liability to owner for proceeds, 207.
recovery from holder of money paid by mistake to initial bank, 193.
measure of damages for giving erroneous information to initial bank causing loss, 288.

COSTS,
of suits to establish land transfers lost by collecting bank, as element of damages, 289.
of suits against indorsers discharged by negligence of bank, as element of damage, 293.
of protest, when failure to deposit in advance will relieve bank, 63, 64.

CREDIT,
subject to payment, is provisional, 26.
in advance of collection may be cancelled on nonpayment, 25-29.
collection not complete, 184.
entry of, as factor in determining question of title, 22, 23.
settlement between banks by mutual credits and debits, 187, 188.
to initial bank after insolvency, effect on title to proceeds, 216.
between banks cannot prejudice rights of owner who had indorsed "for collection," 220-223.
dealings between banks as affecting right of correspondent to lien for debt of initial bank, 213-224.

CURRENCY,
bank must obtain payment in money, 80.

CUSTOM,
of banks as part of contract for collection, 17.
to be binding must be general, uniform and reasonable, 17, 18.
abandonment of, prevents bank from relying thereon, 119, 120.
compliance with, as evidence of use of reasonable care, 18.
abrogating or modifying instructions to agent, 48, note.
justifying application of proceeds of firm paper to payment of firm's debts, 206.
of bank to act only as collecting medium does not prevent discounting, 36.
not to disclose agency for collection is not notice of that fact to drawee paying on forged indorsement of payee's name, 270.
of receiving checks in payment, 83.
checks on collecting bank, 86.
of accepting certificates of deposit as cash in payment of collection, 85.
effect of particular course of dealing on right of bank to cancel credit given in advance of collection, 26, 27.
will not justify collecting bank in securing its own claim to prejudice of rights of owner of paper, 88.

CUSTOM—Cont'd.
of dealing controls entries in books of collecting bank, on question of existence of balance against depositor, 41.
as to presentment for payment, 114, 115.
of particular bank not to present for acceptance is no defense for failure to present, 105.
of employing notary, when not an excuse for want of proper presentment, 142.
as to giving of notice of dishonor, 119, 120.
retaining paper after dishonor, 125.
does not justify or excuse the sending of paper directly to drawee for collection, 138-140.
of remitting by check or draft, 192.
negatives right to trust or preference on failure of drawer or drawee bank, 230.
implied agreement between corresponding banks to comply with, 140.
between banks of crediting instead of remitting, does not affect title of depositor, 216, 220, 221.
of dealing between banks cannot prejudice rights of owner of paper originally indorsed "for collection," 220, 221.
between banks as to credit and debit of paper originally indorsed in blank, lien of correspondent on proceeds, 223, 224.
of settlement by mutual credits and debits between banks, effect as payment, 187, 188.
negativing liability of initial bank for defaults of correspondent, 177, 178.
pleading, 280.
evidence of, opinions of merchants not competent, 178.

D.

DAMAGES,
compensatory, 288.
nominal, 289.
interest as element of, 294.
for failure to charge indorsers, 292.
costs of unsuccessful suits against indorsers, 293.
complaint in action for negligence must show damage, 279.
on protest, not recoverable by bank as part of its compensation for collecting, 15.

DAMAGES—Cont'd.
liability of obligor of paper payable at a bank, but not lodged there for collection, 10.
mitigation, see "Mitigation of Damages."

DATE,
mistake, liabilities of collecting bank, 95.

DEATH,
of obligor, bank liable for failure to present for payment at late residence, 107, 108.

DEBTOR AND CREDITOR,
when collecting bank becomes debtor for the amount, 182.
relation created by entry of credit and drafts against credit, 22, 23.
relation exists as to proceeds of paper deposited and received as cash, 243.
right of creditors of depositor in proceeds of collection, 204.
that note was executed to defraud creditors of third person is no defense to suit against bank for proceeds, 205, 206.
initial bank becomes debtor to owner on payment of the paper to its correspondent, 191.

DECLARATION,
in actions for negligence of bank, 278.
of alleged agent, not proof of agency, 147.

DEFINITIONS,
bank, 73, note.
discounting, 35.
mandate, 3.
negligence, 96.

DEGREE OF CARE,
required of collecting bank in general, 59.
required in taking steps to charge parties to paper, 101, 102.
selection of agents and correspondents, 132.
giving notice of forgery or alteration, 258.

DELAY,
in returning dishonored paper, 123-125.
in taking steps necessary to charge parties to paper, 99-129.

DELIVERY,
of paper to bank, inception of relation, 15.
by placing paper in mails, 123.
posting draft in payment of collection is a delivery of the draft, which cannot be withdrawn, 196.
of papers accompanying drafts, what constitutes, 69, 70.
order to "deliver" proceeds equivalent to order to "pay," 201.
redelivery of paper to depositor, right to proceeds of subsequent collection, 203.

DEMAND,
draft not stating time of payment is payable on demand, 104.
of payment, 107-115.
necessary before bank chargeable with conversion of proceeds, 208.
starting running of limitations against actions for conversion, 278, note.

DEPOSIT,
indorsement "for deposit" passes title, 31, 32, 270.
by obligor to take up paper, bank as agent of obligor, 8.
to pay paper, withdrawal, 190.
authority of collecting bank to take its own certificates of deposit in payment, 85.
application to payment of depositor's paper, 71-76.
completion of collection, 189.
mistake by bank as to sufficiency, not ground for relief of bank, 194.

DEPOSITOR,
for collection retains title, 19-21.
negligence of, when bank not liable, 63, 64.

DEPRECIATION,
liability of collecting bank, 91, 92.
bank cannot take depreciated bank notes in payment, 81.
bank liable for taking Confederate money in payment, 81.

DILIGENCE,
degree of care required of collecting bank, 59, 60.
of plaintiff after return of paper by bank, 283.
in taking steps necessary to charge parties to paper, 101, 102.
in giving notice of forgery or alteration, 258.

DISCHARGE,
of indorsers, burden of proof, 281, 282.
by delay in presenting check for payment, 113, 114.
by failure to demand payment, 107, 108.
by failure of bank to protest, 116, 117.
by premature protest, 109, 110.
measure of damages, 292.
liability of correspondent to initial bank, 179.
ratification and waiver of negligence of bank, 126-129.
right not waived by giving extension in ignorance of discharge, 127.
presumption that indorsers will take advantage of discharge, 121, 122.
promise to pay made by indorser after his legal discharge is not binding, 126.
of drawee, measure of damages, 291.
of drawer by failure to present sight draft for acceptance, 118.
of liability of correspondent to initial bank, 180.

DISCOUNT,
of paper by bank transfers title, 35, 36.
election of bank to discount or collect, 36.
discounting bank may hold bills of lading until acceptance and payment of draft, 71.

DISHONOR,
return of dishonored paper, 123-125.
cancellation of premature credit on dishonor of paper, 25-29.
notice of, see "Notice."

DIVIDENDS,
acceptance of dividends as general creditor, effect on right to preference, 245.
possibility of, showing in mitigation of damages, 296.

DOMICILE,
of owner immaterial on question of what law governs relation between collecting bank and customer, 13.

DRAFT,
not an assignment of fund, 76-78.
not stating time of payment, is payable on demand, 104.
against credit entered on receipt of paper, effect on title, 22, 23.
bank cannot take drafts in payment, 81.

DRAFT—Cont'd.
taken in payment, failure to protest, 122.
remittance by, 191.
when trust arises on failure of drawer or drawee bank, 229.

DRAWEE,
on acceptance of time draft is entitled to possession of bills of lading, 67-71.
is not a suitable subagent or correspondent, 133-140.
insolvency of, no excuse for failure to present for acceptance, 105.
charged with knowledge of signature of drawer, 250.
bank not charged with knowledge of body of instrument, 254.
certification by drawee bank does not warrant genuineness of body of instrument, 271.
measure of damages for discharge of, 291.

DRAWER,
insolvent or without funds, ground for cancellation of credit given for paper, 28, 29.
name forged, liability of collecting bank paying paper, 250.

E.

ELECTION,
to give credit before actual collection, 25, note.
of bank to discount or collect, 36.
of drawee to sue bank or owner for money paid by mistake, 193, 194.

EMPLOYE,
see "Master and Servant."

ENGLAND,
rule in, as to liability of initial bank for defaults of correspondent bank, 149.

ENTRIES,
in books of collecting bank not conclusive as to existence of balance against depositor, 41.

EQUITABLE ASSIGNMENT,
check or draft does not operate as, 76-78.

EQUITY,
remedy at law for conversion, 229, note.
jurisdiction over trusts, 8.
doctrine as to following trust funds, 232.

ESTOPPEL,
of bank to deny relation as collecting medium, 16.
of bank to deny power to collect commercial paper, 45.
of initial bank to deny ownership of paper, 211.
of bank to deny receipt of proceeds, 122, 123, 186.
of bank by acts of cashier with respect to forged paper, 253.
bank not estopped by statement of collection teller that raised paper was all right, 263.
of corporation to deny authority of ostensible agent to receive payment for company, 202.

EVIDENCE,
judicial notice, see "Judicial Notice."
presumption, see "Presumption."
burden of proof, see "Burden of Proof."
parol, see "Parol Evidence."
receipt from cashier as evidence of acceptance of paper for collection, 15.
of instructions not to protest, 116.
of agreement by collecting bank to notify all prior indorsers, 121.
of agency, declarations of alleged agent not admissible, 147.
of custom, 178.
not admissible to charge drawee paying forged draft with knowledge that bank, ostensibly the owner, was acting as agent, 270.
books of bank as evidence of balance against customer, 200, note.
of forgery of signature of drawer, 250, note.
of ratification of negligence of bank, 97, 98, 128, 129.
admissibility in actions for negligence of bank, 283.
pleading and proof, variance, 284, 286.
sufficiency, as to payment in cash rather than certificates of deposit, 85, note.
declarations of assistant cashier held not sufficient to show mistake by other officer of bank, 197.

EXECUTION,
returned nulla bona as evidence of insolvency of maker, 284.
stay of, until note is assigned to bank, 276, 277.
on judgment on joint claims of bank and depositor, division of proceeds, 207.

EXECUTORS,
of deceased indorsee, failure of bank to give notice of dishonor, 121, note.

EXPRESS COMPANIES,
deposit of paper for collection with, is a bailment, 5, note.
custom as affecting liability of initial collecting company for defaults of connecting line, 178.
negligence in collecting, 166.
liability for default of company with connecting line, 152, 153.
duty to seasonably return dishonored paper, 124, 125.
holding note for collection without indorsement to itself must give indorsee notice of dishonor, 120, note.

EXTENSION,
of time of payment, bank no authority, 79.
given by indorser in ignorance of legal discharge, not a waiver of right to discharge, 127.

EXTINGUISHMENT,
of check not affected by sending it directly to drawee for collection, 134, note.

F.

FEDERAL COURTS,
rule as to liability of initial bank for defaults of correspondent bank, 149.
rule that collecting bank is not liable as general indorser, 93.

FIDUCIARY RELATIONS,
right to follow property left with fiduciary, whether agent, bailee, or trustee, 225, 226.
between collecting bank and customer, 8.

FOREIGN ATTACHMENT,
of uncollected paper, 38, note, 39.

FORGERY,
what law governs liability of collecting bank paying forged paper, 248.
name of maker or drawer forged, 250.
what constitutes forgery of signature of drawer, 250, note.
indorsement of payee forged, 254.
payee not disqualified by interest from testifying in suit by drawee against collecting bank, 269, note.
what constitutes forgery of name of payee, 255, 256.
diligence in notifying parties to paper, 258.

FORGERY—Cont'd.
charging back amount of forged paper, 262.
liability of collecting bank on its indorsement of forged paper, 260.
indorsement by bank on forged check payable to cash, not equivalent to indorsement by payee, 262.
ratification and waiver of acts of bank as to forged paper, 271.
recovery back of payments made on forged paper, 264.

FORM,
of indorsement, as affecting title, 29-35.
of notice of dishonor, 118.

FORWARDING,
consideration of agreement to forward and collect, 14.
whether bank undertakes to "forward" or to "collect," 174.

FRAUD,
of collecting bank, liability in general, 95.
of bank in receiving paper for collection when insolvent, effect on title to paper, 21.
in depositing for collection paper known to be worthless, 29, 63.
of president of collecting bank, when bank not liable, 50, note.
of cashier of correspondent, recovery by initial bank, 180.
of bank in obtaining preference for its own claim, to prejudice of owner of paper, 86-90.
receiving paper for collection with knowledge of insolvency, proceeds as trust fund, 227, 228.
fraudulent transfer of overdue paper, transferee not a bona fide holder, 204.
that note was executed to defraud creditors of a third person is no defense to suit against bank for proceeds, 205, 206.
effect on running of limitations against action for negligence, 277.
measure of damages is full value of paper, 291.

G.

GARNISHMENT,
of uncollected paper, 38, 39.
wrongful, who may sue, 203.
of proceeds, 204.

GENERAL DENIAL,
matters admissible under, 285.

GENERAL INDORSER,
liability of collecting bank, 92, 93.

GENUINENESS,
warranty of general indorser, 93, note.

GEORGIA,
rule as to liability of initial bank for defaults of correspondents, 154.

GRACE,
days of abolished in some states, 110.
checks payable at future time are entitled to, 109.
paper entitled to, negligence of bank in prematurely protesting, 108-110.

GRATUITOUS BAILMENT,
bailment for collection not gratuitous, 13-15.

H.

HANDWRITING,
drawee charged with knowledge of signature of drawer, 250.

HIRE,
delivery of paper for collection is bailment for hire, 4, 5, 13-15.

HOLDER,
at time of suit presumed to have been holder at maturity of paper, 283.
collecting bank as agent for, 7, 8.
collecting bank is a holder for purposes of collection, 102, 103, 108.
bona fide, see "Bona Fide Purchasers."

I.

IDENTIFICATION,
of drawer's signature, presumption of negligence from loss of paper sent to drawee bank for purpose of, 65.
not negligence to send paper to drawee bank to identify signature of drawer, 137.

IDENTITY,
proceeds may be followed as trust though their identity is lost if they can be traced, 232-234.

ILLINOIS,
rule as to liability of initial bank for defaults of correspondents, 166.

IMPLIED ACCEPTANCE,
from unreasonable retention of paper by bank, 119.

IMPLIED CONTRACT,
for compensation to bank, 13.
to take necessary steps for collection, 13.
of bank to follow instructions, 47, 48.
of depositor of paper that bank may follow general and lawful customs of banks, 17.
between banks, 140.
necessity of pleading, 279.

IMPLIED POWER,
of bank to make collections, 44-46.

INDEMNITY,
liability of correspondent bank to initial bank, 153, 179, 180.

INDEPENDENT CONTRACTOR,
status of initial collecting bank with reference to correspondent banks, 157.

INDIANA,
rule as to liability of initial bank for defaults of correspondents, 165.

INDORSEE,
entitled to notice of dishonor from collecting express company, though there was no indorsement to the company, 120, note.
of sight draft entitled to notice of nonacceptance, though drawer insolvent, 118.

INDORSEMENT,
title as affected by form of, 29-35.
for collection, is restrictive, 29.
destroys negotiability, 29.
prevents passage of title to bank, 29, 30.
prevents correspondent from obtaining lien on proceeds for debt of initial bank, 220.
creates trust in proceeds, 222, 223.

INDORSEMENT—Cont'd.
"for collection for account of" does not pass title, 31.
"for collection on account" does not pass title, 31.
"for collection and credit" does not pass title, 31.
effect of rules of bank on passage of title to paper, 27.
"for collection on account," or "for collection and credit," does not pass title, though credit is given in advance of collection, 26.
"pay to A, or order, for account of B," does not pass title, 31.
for "account of" held, with other facts, to pass title, 23.
"for deposit" passes title, 31, 32, 270.
for deposit and credit passes title, 22.
followed by draft against credit, passes title, 22.
garnishment of proceeds, 204, 205.
in blank, passes title, 32-34.
followed by draft against credit given, passes title to bank, 22.
to initial bank, title or lien of correspondent, 223.
right of transferee to sue on paper in his own name, 49.
trust not enforceable for proceeds of paper taken by bank on blank indorsement, 243.
possession of paper by bank with authority to collect confers right to indorse, 46.
striking out indorsement for collection, 55.
what indorsers entitled to notice of dishonor, 120, 121.
second indorser cannot recover for failure of bank to notify first indorser, 121.
by collecting bank, right of bank to notice of dishonor, 120, 121.
transfer without indorsement authorizes transferee to sue on paper in his own name, 50.
indorsee for collection as real party in interest in suit on the paper, 52, 53.
improper indorsement to bank no defense to action for securing its own claim to exclusion of rights of owner of paper, 88.
parol evidence to explain, 34, 35.
liability of collecting bank as general indorser, 92, 93.
to bank, followed by general indorsement of bank, renders bank a general indorser, 92.
warranty of genuineness of prior indorsements, 252, 257, 260.
negativing right to rely on rules and usages of clearing house affecting title to proceeds, 212.
of forged paper, liability of collecting bank, 260.

INDORSEMENT—Cont'd.
of bank on forged check payable to cash, not equivalent to indorsement by payee, 262.
of payee forged, liability of collecting bank, 254.
by payee of forged paper, precludes recovery by payee from drawee, 252.
recovery from prior indorser of payments made by mistake on forged paper, 266.

INDORSERS,
who entitled to notice of dishonor from bank, 120, 121.
measure of damages for discharge of, 292.
costs of suits against, as element of damage, 293.
see, also, "Indorsement."

INFORMATION,
forwarding by initial to correspondent bank, 94.
correspondent liable to initial bank for failure to disclose material facts, 179.

INJUNCTION,
against collection, revokes authority of bank, 55.

INQUIRY,
for lost paper, duty of collecting bank, 66, 67.

INSOLVENCY,
of bank terminates authority to collect, 54.
of bank before collecting does not divest it of title once vested in it, 37.
of bank before compliance with instructions to apply deposits in payment, 189.
suspicion of insolvency of obligor bank does not justify rescission of credit given for paper, 37.
of drawer of check on collecting bank, cancellation of premature credit, 28.
of sight draft, bank must give notice of nonacceptance to indorser, 118.
and indorsers, presumptions, and burden of proof, 282.
credit entered after, does not change relation of bank and customer, 185.
of drawee, no excuse for failure to present for acceptance, 105.
of obligor, effect of knowledge of fact by holder before deposit for collection, 63.

INSOLVENCY—Cont'd.
of initial bank before credit given by correspondent, title to proceeds, 216.
lien of correspondent on proceeds of collections, 213-224.
of correspondent, does not relieve initial bank from liability, 178.
of bank when paper was received prevents passage of title, 21.
renders proceeds a trust fund, 227, 228.
not a conversion, 209.
knowledge of a suspicion of insolvency of correspondent does not render bank negligent in selecting such correspondent, 133.
preference for amount of proceeds of collection, 224.
of collecting bank after remittance by check or draft, proceeds as a trust fund, 229.
tracing and following proceeds into estate of insolvent collecting bank, 232.
filing claim as general creditor does not waive right to preference, 245.
what portion of assets of bank is impressed with trust for amount of proceeds of collections, 245.
reclaiming from receiver uncollected checks taken when bank was known to be insolvent, 242, note.
showing in mitigation of damages, 295.
mistake as to solvency of obligor not ground for recovery of payment, 194.
pleading, 280.
evidence of, 282, 284.

INSTRUCTIONS,
bank must follow, 47, 48.
forwarding by initial bank to correspondent, 94.
to take particular steps in collecting not a limitation of liability to such steps, 61.
as to surrender or retention of bills of lading accompanying drafts, 69, 70.
as to application of deposits to payment of depositor's paper, 75.
as to extensions and renewals, 79, 80.
not to protest, 116.
for return of dishonored paper, 124, 125.
allowing paper to be sent directly to drawee bank for collection, 136, 137.
fraudulent disregard of, by cashier of correspondent, rights of initial bank, 180.

INSTRUCTIONS—Cont'd.
as to payment of proceeds, 201.
with paper indorsed "for collection," negativing title in correspondent, or a right to a lien, 223.
performance of, held to justify collecting bank in obtaining preference for its own claim against obligor, 89.
to remit in exchange negatives existence of trust where check is sent, and sending bank fails, 230.

INTENTION,
as factor in determining question of title to paper, 20, 21.

INTEREST,
collection of, 90.
payment of as factor in determining title to paper, 22, 23.
as element of damages, 294.

IOWA,
rule as to liability of initial bank for defaults of correspondents, 167.

IRREGULAR DEPOSIT,
Louisiana theory of relation between collecting bank and customer, 3, 4.

ISSUE,
matters not in issue need not be proved, 284.

J.

JOINT LIABILITY,
correspondent banks not jointly liable to initial bank, 152.

JUDGMENT,
in action for negligence, 286.
obtaining adjudication on claim as general creditor precludes enforcement of trust or preference, 245.

JUDICIAL NOTICE,
that banks have power to make collections, 45.
of custom to accept certificates of deposit as cash in payment of collection, 85.
to remit by check or draft, 192.

JURISDICTION,
of common law negatives trust relation between collecting bank and customer, 8.

JURY,
province of, whether bill was taken in payment of debt or for collection, 15, note.
title to paper, 20.
negligence of collecting bank, 95, 96.
negligence in failing to seasonably return dishonored paper, 125.
measure of damages, 290.

K.

KANSAS,
rule as to liability of initial bank for defaults of correspondents, 168.
KENTUCKY,
rule as to liability of initial bank for defaults of correspondents, 170.
KNOWLEDGE,
of custom not essential to binding effect, 17.
of material facts essential to ratification or waiver of negligence of bank, 98, 126-129.
of dishonor not equivalent to notice, 118.
drawee charged with knowledge of signature of drawer, 250.

L.

LACHES,
see "Negligence."
LADING, BILLS OF,
see "Bills of Lading."
LAW MERCHANT,
source of banker's lien, 39, 40.
waiver of rules of, may be shown under general denial, 285.
LETTERS,
as evidence, 283.
LIEN,
of collecting bank on paper, 39-42.
not affected by assignment by debtor for benefit of creditors, 41, 42.

LIEN—Cont'd.
of bank on corporate funds for debt of agent of company, 202, note.
of correspondent for debt of initial bank, 213.
of bank on proceeds collected after filing by customer of petition in bankruptcy, 200, note.
on proceeds of collections of national bank, by reason of acceptance of its paper, dates from acceptance, 216.

LIMITATION,
of authority of collecting bank, in general, 46, 47.

LIMITATION OF ACTIONS,
for negligence of bank, 277.
admissibility of statute of limitations, 284.

LIMITATION OF LIABILITY,
for negligence in collecting, 60, 61.
for negligence of correspondent, 177.

LOCATIO OPERIS FACIENDI,
nature of bailment for collection, 4, 5.

LOST PAPER,
liability of bank for loss, 64-67.
presence in bank does not amount to, or excuse, presentment for payment, 112.

LOUISIANA,
rule as to liability of initial bank for defaults of correspondents, 173.

M.

MAIL,
loss of paper in, liability of bank, 64-67.
effect of abandonment of custom of giving notice of dishonor by mail, 119, 120.
collecting bank cannot withdraw from mails its draft given in payment, 196.

MAKER,
collecting bank not agent of, 7.
without funds, bank not authorized to pay paper, 10, 11.
evidence of insolvency, 284.
name forged, liability of collecting bank, 250.

MALICE,
bank not liable for malicious publication of protest by its notary, 144.

MANDATE,
bank as mandatary, 3.

MARYLAND,
rule as to liability of initial bank for defaults of correspondents, 164.

MASSACHUSETTS,
rule as to liability of initial bank for defaults of correspondents, 160.

MASTER AND SERVANT,
stipulation limiting liability of master for negligence, void as against public policy, 60.
liability of bank for defaults of notary who is regular employe of bank, 143, 144.

MATURITY,
time of receiving payment, 78.
credit entered before, not a payment or collection, 186.
time of, negligence of collecting bank in determining, 108-110.
of depositor's debt to bank as affecting lien of bank on his paper deposited for collection, 40.
paper not matured not subject to garnishment or trustee process, 38, 39.
transfer after, transferee not a bona fide holder, 204.

MICHIGAN,
rule as to liability of initial bank for defaults of correspondents, 154.

MINGLING FUNDS,
depositor bound by general custom of banks, 17, 18.
implied agreements permitting, between collecting banks, 140.
effect on right to follow trust funds, 232.

MINNESOTA,
rule as to liability of initial bank for defaults of correspondents, 156.

MISSISSIPPI,
rule as to liability of initial bank for defaults of correspondents, 173.

MISSOURI,
rule as to liability of initial bank for defaults of correspondents, 170.

MISTAKE,
liability of collecting bank, 95.
certification of altered paper, 271.
ground for correction of bank account, 26, note.
payment by, 192-197.
payment by drawer does not relieve correspondent from liability to initial bank, 180.
bank cannot withdraw from mails its check or draft given in payment, 196, 197.
recovery of payments, 192-197.
recovery of payments made on forged or altered paper, 264.
payment by indorser in ignorance of discharge may be recovered back, 127.
evidence, 197.

MITIGATION OF DAMAGES,
evidence admissible under general denial, 285.
what may be shown, 295.

MONEY,
collecting bank as agent to receive payment, 6, 7.
the only proper medium of payment of collections, 80-82.
bank can take money only in payment, 80.

MONEY HAD AND RECEIVED,
recovery of money paid under mistake, 194.

MONTANA,
rule as to liability of initial bank for default of correspondents, 157.

MORTGAGE,
obtained by bank on property of obligor to prejudice of rights of owner of paper, 88.
bank as trustee for collection may sue to foreclose in its own name, 50.

MUNICIPAL BONDS,
title does not pass on special deposit for collection, 21.

N

NATIONAL BANKS,
have implied power to collect commercial paper, 45, 46.
lien on proceeds of collections in hands of insolvent national bank, on account of acceptance of its paper prior to insolvency, dates from time of acceptance, 216.

NEBRASKA,
rule as to liability of initial bank for defaults of correspondents, 169.

NEGLIGENCE,
degree of care required of collecting bank, 59, 60.
to charge parties to paper, 101, 102.
in selection of agents and correspondents, 132, 133.
where instructions were ambiguous, 48.
ground for revocation of bank's authority, 55.
contractual limitation of liability, 60-62.
as to medium of payment, 80.
as to time and manner of receiving payment, 78.
taking acceptance not according to tenor of bill, 106, 107.
premature surrender of bills of lading accompanying draft, 69.
premature protest of paper entitled to grace, 108-110.
failure to give notice of dishonor, 117-121.
enforcement of paper taken in payment, 122, 123.
failure to seasonably return dishonored paper, 123-125.
of correspondent bank, liability of initial bank, 147-179.
limitation of liability for negligence of correspondent, 177.
waiver, 180.
of notary, liability of employing bank, 141-146.
selecting drawee or obligor as subagent or correspondent, 133-140.
of collecting bank securing its own claim to exclusion of rights of owner of paper, 86-90.
of cashier, liability of bank, 62, 63.
of depositor of paper, when bank not liable, 63, 64.
giving notice of forgery or alteration, 258.
question for jury, 95.
cause of action in general, 274.
conditions precedent to actions for, 276.
limitation of action for, 277.
presumptions and burden of proof in general, 281.

NEGLIGENCE—Cont'd.
from loss of paper, 64-66.
instructions as to presumption from loss of paper, 65.
compensatory damages, 288.
nominal damages, 289.
face value of paper as measure of damages, 290.
waiver, 97, 98, 126-129, 180.

NEGOTIABILITY,
destroyed by indorsement for collection, 29.
promise to account for proceeds is not negotiable, 201, note.

NEGOTIABLE INSTRUMENTS LAWS,
check or draft not an assignment of fund, 77.
antecedent debt constitutes value, 217.
collecting bank indorsing generally is a general indorser, 92.
rule that indorsee under restrictive indorsement may transfer his rights as indorsee, 46, 47.
rule that restrictive indorsement confers on indorsee right to bring any action that indorser could bring, 49.
instrument payable at bank is order on bank to pay same for account of principal debtor, 73.
presentment for payment must be made by holder or his agent, 108.
days of grace abolished, 110.

NEW JERSEY,
rule as to liability of initial bank for defaults of correspondent banks, 153.

NEW YORK,
rule as to liability of initial bank for defaults of correspondent banks, 151.

NOMINAL DAMAGES,
see "Damages."

NORTH CAROLINA.
rule as to liability of initial bank for defaults of correspondents, 164.

NORTH DAKOTA,
rule as to liability of initial bank for defaults of correspondent banks, 157.

NOTARY PUBLIC,
bank must use due care in selecting notary, 132, 133.
liability of collecting bank for defaults of, 141-146.

NOTES,
bank cannot take payment in, 82.
credit on receiving notes in payment is not a payment, 185.
taking in payment does not make bank a trustee for amount of collection, 237, 238.
charging amount to account of customer before insolvency does not create a trust, 239.

NOTICE,
judicial notice, see "Judicial Notice."
of revocation of authority of collecting bank, 56, note.
indorsement "for collection" is notice that title is in indorser, 30, 220.
of ownership of paper, liability of bank paying in violation of notice, 202, 206.
that delivery of paper indorsed in blank was for collection, 33.
duty of bank on which check deposited for collection was drawn, to notify depositor of state of drawer's account, 28.
of loss of paper, duty and liability of collecting bank, 66, 67.
duty of correspondent bank to notify initial bank of material facts, 179.
when correspondent a bona fide holder, though notified of title in owner, 218.
correspondent bank with notice of title in depositor, not a bona fide purchaser from initial bank, 219-223.
of ownership of proceeds, 201.
from custom, 270.
not to protest, 116.
of dishonor, duties and liabilities of collecting bank, 117-121.
what indorsers entitled to notice, 120, 121.
when collecting bank entitled to notice as indorser, 120, 121.
bank liable for failure to give notice, without prior suit against discharged indorsers, 121, 122.
necessary showing in special verdict, 286.
of forgery or alteration, 258.
of facts putting customer on inquiry as to alteration, 262.

O.

OFFICERS,
representation of bank by cashier, 62, 63.

OFFICERS—Cont'd.
estoppel of bank by acts of cashier, 16.
when collecting bank not liable for fraud of president, 50, note.
bank not liable as trustee for money collected and deposited by its president in his own name, 238.
paying teller not authorized to receive deposit to take up paper held for collection, 75.
when bank not bound by statement of collection teller that raised paper was all right, 263.
liability of bank for defaults of notary who is also an officer of the bank, 143, 144.
notary public acting in official capacity, liability of bank for his defaults, 144.
presumption that some officer was present to receive payment of demand note payable at bank, 112.
knowledge of insolvency of bank when paper was received, effect on title to paper, 21.

OHIO,
rule as to liability of initial bank for defaults of correspondents, 153.

OPINIONS,
of merchants not competent evidence of custom, 178.

OPTION,
of bank to discount or collect, 36.
of drawee to sue bank or owner for money paid by mistake, 193, 194.

ORDER,
to "deliver" proceeds equivalent to order to "pay," 201.

OVERDRAFTS,
ground for cancellation of credit given in advance of collection, 28.
enforcing trust in debt of drawer as against other creditors of drawee bank, 231.

P.

PAROL EVIDENCE,
explaining indorsement, 34, 35.
of contents of placard posted in bank, 283.

PARTIES,
authority of bank to sue on paper in its own name, 48-53.
real party in interest in suit on paper left in bank for collection, 52, 53.
maker discharged by payment cannot sue bank for misappropriation of proceeds, 200, note.
to action against correspondent bank for proceeds, 209.
to action against bank for not applying deposits to payment of depositor's paper, 75.

PARTNERSHIP,
banking partnership liable for wrongful delivery of bills of lading by one partner, 70, note.
lien of collecting bank on firm paper for balance due on firm account, 39, note.
survivor of banking firm has no authority to credit checks received after dissolution, 186.
right to proceeds of paper belonging to firm or partner, 206.

PART PAYMENT,
collecting bank not authorized to receive, 79.
ratification of acts of bank, 128.
bank cannot apply deposits of obligor to part payment of paper, 74.

PAYEE,
collecting bank as agent of, 7, 8.
correspondent has lien as against owner for debt of initial bank, which had been made the payee of the paper, 218.
indorsing forged paper cannot recover from drawee, 252.
indorsement by bank on forged check payable to cash, not equivalent to indorsement by payee, 262.
indorsement of payee forged, liability of collecting bank, 254.
indorsing forged or raised paper to paying bank must repay, 264.
not disqualified by interest from testifying in suit by drawee against collecting bank for money paid on forged indorsement of payee's name, 269, note.
ratification of forged indorsement, 255.

PAYING TELLER,
not authorized to receive deposit to take up paper held for collection, 75.

PAYMENT,
relation when paper is payable at bank, 9-11.
collecting bank is agent to receive payment, 6, 7.
whether bill was taken in payment of debt or for collection as question for jury, 15, note.
what constitutes, in general, 182-191.
where creditor is ignorant of debt, 267.
to payee of order signed by owner, is payment to owner, 201, 202.
effect of credit in advance of collection, 184.
not effected by sending check to drawee, 134, note.
receipt merely prima facie evidence of, 193.
by draft not complete until draft is paid, 192.
to correspondent as payment to initial bank, 191.
to or through clearing house, 212.
to ostensible agent of corporation, 202.
time and manner of receiving, 78-80.
extensions and renewals, 79.
must be in money, 80.
authority of bank to take checks, 81-84.
on itself, 86.
to collecting bank by its own certificates of deposit, 85.
sufficiency of evidence as to payment in money rather than in certificates of deposit, 85, note.
right of collecting bank to retain bills of lading until payment of drafts, 67-71.
place of, negligence of holder in failing to properly inform collecting bank, 63.
authority of bank to receive payment after dishonor, 54.
application of deposits to payment of depositor's paper held for collection, 71-76.
presumption that paper would have been paid but for fraud of bank in first securing its own claim against obligor, 88.
draft not stating time of, is payable on demand, 104.
not a waiver of negligence of bank, 129.
maker discharged by, cannot maintain action for misappropriation of proceeds, 200, note.
enforcement of paper taken in payment, 122, 123.
by maker to indorsers, no defense to action against bank for failure to protest, 116, 117.
taking note or check does not make bank a trustee for amount of collection, 238.
presentment for, 107-115.

PAYMENT—Cont'd.
not necessary where paper is payable at bank, 111, 112.
premature, 109.
waiver of negligence of bank, 127, 128.
by collecting bank of paper on which name of maker or drawer was forged, 250.
on which indorsement of payee was forged, 254.
by mistake and recovery of payments, 192-197.
recovery back of payments made on forged or altered paper, 264.
action by collecting bank against drawers to recover back, defense that bank sent paper directly to drawee, 134, note.
mistaken payment by drawer does not relieve correspondent from liability to initial bank, 180.
indorser may recover back, 127.
payment by indorser in ignorance of legal discharge from liability, may be recovered back, 126, 127.
promise to pay made by indorser in ignorance of legal discharge not binding, 126.
voluntary payment cannot be recovered back, 197.
application of payments, 265, note.

PENNSYLVANIA,
rule as to liability of initial bank for defaults of correspondents, 162.

PETITION,
summary application to establish trust in proceeds in hands of receiver, 233, note.

PLACARD,
parol evidence of contents of placard posted in bank, 283.

PLACE,
of performance of undertaking determines what law governs relation between bank and customer, 11-13.
of payment, relation when paper is payable at bank, 9-11.

PLEADING,
in actions for negligence of bank, 278.
allegation of bailment for collection not inconsistent with allegation that bank obtained paper through fraudulent concealment of its insolvency, 227, 228.

PLEADING—Cont'd.
complaint held to negative plaintiff's right to sue on the paper in his own name, 49, note.
answer, 280.
variance, 284.

PLEDGE,
bank may pledge paper indorsed in blank, 33.
of paper to bank, interest of pledgor is subject to attachment before collection, 39.
lien of bank as pledgee of paper, 41.
deposit for collection by pledgee, pledgor proper party to sue bank for negligence, 275, note.

POSSESSION,
collecting bank entitled to possession as against all but owner, 37, 38.
collecting bank may sue for, 51, 52.
of paper indorsed in blank is prima facie evidence of ownership, 33.
of note indorsed in blank, holder may sue bank for negligence, 275.
by bank of dishonored note, right of bank to sue thereon in its own name, 50.

POWER,
of bank to make collections, 44-46.

PREFERENCE,
fraud of bank in obtaining preference for its own claim to prejudice of owner of paper, 86-90.
lien of bank accepting draft of insolvent national bank dates from time of acceptance, 216.
refual to pay check of customer does not create preference, 231
of claim for proceeds of collection, 224-246.
see, also, "Trust."

PRESENTMENT,
for acceptance, duties and liabilities of collecting bank, 103-107.
burden of proving, 104.
not necessary in case of paper payable on demand, 104.
excuses for failure to present, 105, 106.
measure of damages for failure to present, 296.
for payment, 107-115.

PRESENTMENT—Cont'd.
not necessary where paper is payable at bank, 111, 112.
effect of custom, 114, 115.
nominal damages for failure to present, 289.

PRESUMPTION,
as to title to paper deposited for collection, 23-25.
of knowledge of general and uniform customs of banks, 17.
of custom to take checks in payment, 83.
of negligence, in general, 281.
from loss of the paper, 64, 66.
from sending paper directly to drawee for collection, 133-140.
that regularly commissioned notary is a proper person to select for making protest, 143.
that indorsers will take advantage of their legal discharge, 121, 122.
that demand note payable at bank was in the bank, 112.
that deposit to take up accepted bill was made by acceptor, 75.
that paper would have been paid but for fraud of bank in first securing its own claim against obligor, 88.
that cash on hand at time of failure of collecting bank is proceeds of collection, 245.

PRINCIPAL AND AGENT,
collecting bank as agent, 6-8.
relation not provable by declarations of alleged agent, 147.
agency of collecting bank when paper is payable there, 9-11.
bank's agency undisclosed, liability for money received on forged paper, 269.
pleading the relation, 278.
termination of bank's authority to collect, 53-56.
revocation of authority of collecting bank, 54, 55.
agent for collection not real party in interest in suit on paper, 53.
custom and usage as abrogating instructions to agent, 48, note.
collecting or investing agents not chargeable in garnishment or trustee process, 38, note.
agent liable for securing his own claim to prejudice of principal, 86-90.
indorsement by collecting agent, warranty of genuineness of prior indorsements, 260, 261.
agent cannot delegate powers, 174, 175.
liability of correspondent bank to initial bank, 179.

PRINCIPAL AND AGENT—Cont'd.
rule that agent is liable for acts of subagents, 175.
employment by bank of agents other than notaries and other banks, 146, 147.
notary as agent of bank or owner, 141-146.
care required in selection of agents to assist in collection, 132-140.
drawee or obligor not a suitable subagent or correspondent, 133-140.
payment of corporate paper to ostensible agent of company, 202.
recovery of money paid by mistake to agent who has not turned it over to principal, 195.
bank liable for proceeds when collected by its agents, 201.

PRIORITY,
in distribution of assets of insolvent collecting bank, 224-246.

PRIVITY,
between owner and notary employed by collecting bank, 142-146.
between payee and bank collecting paper on forged indorsement of his name, 255.

PROCEEDS,
how remitted, 191.
estoppel of bank to deny receipt of, 122, 123.
authorization to apply proceeds on debt to bank does not pass title, 20.
depositor of paper bound by custom of mingling proceeds with funds of bank, 18, 19.
of paper originally indorsed in blank to initial bank, 223.
title as affected by rules and usages of clearing houses, 212.
who entitled in general, 201-203.
rights of creditors of owner of paper, 204.
of paper belonging to firm or partner, 206.
of judgment on joint claims of bank and customer, 207.
liability of correspondent to owner, 207.
to initial bank, 209.
promise to account for is not negotiable, 201, note.
order to "deliver" equivalent to order to "pay," 201.
interest on, 294, 295.
action for, held to be action for conversion within California statute of limitations, 278, note.
lien of correspondent for debt of initial bank, 213.

PROCEEDS—Cont'd.
enforcing preference or establishing trust, 224-246.
conversion as establishing trust, 227-229.
tracing and following into estate of insolvent collecting bank, 232-246.
of paper indorsed for collection form a trust, 222, 223.

PROFITS,
as sufficient consideration for undertaking to collect, 14.

PROMISSORY NOTE,
see "Notes."

PROPERTY,
right to follow trust funds is a right of property, 228.

PROTEST,
duties and liabilities of collecting bank, 115-117.
premature, before expiration of days of grace, 108-110.
costs of, when failure to deposit in advance will relieve bank from liability for negligence, 63, 64.
damages on protest not recoverable by bank as compensation for collecting, 15.
employment of notary public, bank must use due care in selecting notary, 132, 133.
presumption that regularly commissioned notary is a proper person to make, 143.
return of dishonored paper, 123-125.
bank liable for failure to protest, without prior suit against discharged indorsers, 121, 122.

PUBLIC POLICY,
customs of banks contrary to, not binding, 18.
validity of stipulation by bank against liability for its own negligence, 60.
custom of sending paper directly to drawee for collection is against public policy, 138, 139.

PURCHASER,
bank not a purchaser of paper deposited for collection, 19-21.
collecting bank not a bona fide purchaser, 30.
bona fide, rights to proceeds of paper, 203.

Q.

QUESTION OF FACT,
whether title passes to bank in particular case, 20.
negligence of collecting bank, 95-97.
in not seasonably returning dishonored paper, 125.
what is reasonable time for presentment of check, 113.
right to recover face value of paper, 290.

R.

RATIFICATION,
of negligence of collecting bank, 97, 98, 126-129.
of taking Confederate money in payment, 81, note.
of remittance by draft, negatives right to preference or trust on failure of remitting bank, 230.
of collection of forged paper, 271.
of forged indorsement, 255.
by payee of payment by maker of check with indorsement of payee forged, 257, 258.

REAL PARTY IN INTEREST,
right of collecting bank to sue on paper in its own name, 52, 53.
in suit against correspondent for failure to turn over proceeds, 209.

REASONABLE CARE,
degree of care required of collecting bank, 59, 102.
in selection of agents and correspondents, 132-140.
of notary relieves bank in some jurisdictions, 142, 143.
compliance with custom as evidence of, 18.

REBUTTAL,
of presumption of negligence from loss of paper, 66.

RECEIPT,
for paper, evidence of agreement to collect, 15.
merely prima facie evidence of payment, 193.

RECEIVER,
enforcing trust for proceeds collected by, 241.
reclaiming from receiver uncollected checks, taken when bank was known to be insolvent, 242, note.

RELATION,
between collecting bank and customer, 2.
when collecting bank becomes debtor for amount of paper, 182.
when paper is payable at bank, 9-11.
pleading the relation between collecting bank and customer, 278.

RELEASE,
see "Discharge."

REMEDY AT LAW,
for conversion, excludes remedy in equity on theory of trust, 229, note.

REMITTANCE,
by bank, how made, 191.
by draft or check, when trust arises on failure of drawer or drawee bank, 229.

RENEWALS,
authority of bank, 79.
acceptance of, as waiver of negligence of bank, 128, 129.

RENUNCIATION,
by bank of authority to collect, 55, 56.

REPUTATION,
as evidence of insolvency, 284.

RESCISSION,
of credit given in advance of collection, 25-29.
for forged or altered paper, 262.
of contract to pay excess over true amount of raised draft, 268.
draft of collecting bank given in payment, 196, 197.
of sale, effect on liability of bank collecting draft, for default of correspondent, 172.

RES JUDICATA,
judgment on general claim for proceeds bars enforcement of trust or preference, 245, 246.

RESTRICTIVE INDORSEMENT,
see "Indorsement."

RETURN,
of dishonored paper, 123-125.

RETURN—Cont'd.
renunciation of authority to collect, 56.
waiver of negligence, 128.
of paper, not a condition precedent to suit by initial bank against correspondent, 180.
wrongful return of draft sent in payment, 122, 123.

REVOCATION,
of authority of collecting bank, 54, 55.

REWARD,
delivery for collection a bailment for reward, 4, 5, 13-15.
consideration for undertaking to collect, 13-15.

RULES,
of bank, effect on passage of title to paper, 27.
of bank that it will act only as collecting medium, do not prevent discounting, 36.
requiring deposit of protest fees in advance, noncompliance as relieving bank, 63, 64.
of clearing houses, 17, note, 212.

S.

SALE,
bank not a purchaser of paper deposited for collection, 19-21.
collecting bank not a bona fide purchaser, 30.
bank has no implied authority to sell paper delivered for collection, 47.
bank in possession of note indorsed in blank may sell it, 33.
surrender by collecting bank of bills of lading, 67-71.

SATISFACTION,
see "Payment."

SCOPE,
of authority of collecting bank, in general, 46, 47.

SECOND INDORSER,
cannot sue bank for failure to notify prior indorser, 121.

SECURITY,
taken by collecting bank on property of obligor to prejudice of rights of owner of paper, 86-90.
taking security against forgery ratifies it, 272, note.

SET-OFF,
of dept to bank against paper deposited by debtor for collection, 39-42.
by correspondent of debt due from initial bank, 213.

SETTLEMENT,
between banks by mutual credits and debits, 187, 188.
of claim against forger, ratification of collection on forged indorsement, 272, note.

SIGHT DRAFTS,
presentment for acceptance, 104, 105.
indorsee entitled to notice of nonacceptance though drawer insolvent, 118.
bank must retain bills of lading until payment of, 69.

SIGNATURE,
of drawer, drawee charged with knowledge of handwriting, 250.

SILENCE,
not a ratification of forgery, 272, note.

SOLVENCY,
of drawers or indorsers, presumptions and burden of proof, 282.
pleading, 280.

SOUTH DAKOTA,
rule as to liability of initial bank for defaults of correspondents, 158.

SPECIAL DEPOSIT,
for collection, title does not pass, 21.
bank not liable for failing to protest a note left in private envelope of depositor, 117.

SPECIAL INSTRUCTIONS,
see "Instructions."

STATUTES,
admissibility to show bar of claim on note by limitations, 284.

STOPPAGE IN TRANSIT,
application of doctrine denied where collecting bank wrongfully returned draft given in payment, 123.

SUCCESSIVE INDORSEMENTS,
see "Indorsement."

SUCCESSIVE OBLIGORS,
time for notifying of dishonor, 120, note.

SUMMARY APPLICATION,
to enforce trust in proceeds in hands of receiver of bank, 233, note.

SUNDAY,
liability for mistake in time of protesting note payable on, 109, 110.
time of presentment of paper payable on, effect of custom, 114.

SURPLUSAGE,
allegations of matters implied by law, 284.

T.

TELEPHONE,
presentment for acceptance by, burden of proving, 104.

TENDER,
of paper not a condition precedent to action against bank receiving payment by mistake, 268, 269.
to action against bank for negligence, 276.

TENNESSEE,
rule as to liability of initial bank for defaults of correspondents, 171.

TEXAS,
rule as to liability of initial bank for defaults of correspondents, 159.

TIME,
of maturity, negligence of collecting bank in determining, 108-110.
for giving notice of dishonor, 117-121.
of receiving payment, 78-80.
for notifying successive obligors, 120, note.

TITLE,
as general rule remains in depositor of paper, 19-21.

TITLE—Cont'd.
does not pass unless bank has become absolutely liable for amount of the paper, 20.
if bank was insolvent when paper was received, 21.
passes to bank if paper received and treated as cash, 21-23.
effect of entry of credit and drafts against credit, 22, 23.
payment of interest as factor in determining title, 22, 23.
effect of credit in advance of collection, 25-29.
of bank divested on dishonor of paper for which advance credit was given, 27.
effect of form of indorsement, 29-35.
indorsement "for collection" prevents passage of title, 29.
passes under blank indorsement, 32-34.
passes where bank discounts paper, 35, 36.
option of bank to discount or collect, 36.
revesting in depositor after passage to bank, 37.
after title passes to bank, owner cannot revoke authority of bank, 55.
collecting bank has title only so far as necessary to effect collection, 31.
as between initial and correspondent banks in general, 210.
bank's agency undisclosed, liability for money received on forged or altered paper, 269.
warranty by general indorsement, 93, note.
parol evidence varying or explaining indorsement, 34, 35.
trust not enforceable for proceeds of paper if title had passed to bank, 243.
presumptions, 23-25.

TORTS,
wrongful sale by bank, bona fide holder entitled to proceeds of paper, 203.
wrongful garnishment, who may sue, 203.
bank not liable for malicious publication of protest by notary, 144.

TRANSFER,
for collection without indorsement does not pass title, 20.
of paper without indorsement, transferee may sue on the paper in his own name, 50.
bank has no implied authority to sell paper delivered for collection, 47.

TRANSMISSION,
of instructions and information to correspondent bank, 94.
rule that initial bank need only transmit to suitable correspondent, 160-174.

TRIAL,
objection that correspondent banks are not jointly liable to initial bank may be taken at the trial, 152, note.

TROVER,
see "Conversion."

TRUST,
relation between collecting bank and customer is not a trust, 8, 9.
proceeds as a trust fund, 224-246.
in proceeds of paper originally indorsed for collection, 222, 223.
not created by refusal to pay customer's check, 231.
where remittance was made by check or draft, and drawer or drawee bank failed, 229.
in proceeds disposed of before insolvency, 239.
charging amount of paper to account of customer before insolvency, 239.
does not arise where proceeds never came into possession of bank, 237-239.
in proceeds used to settle balance at clearing house, 241.
in proceeds collected by assignee or receiver of bank, 241.
limited to assets realized at time of failure of bank, 245.
what portion of assets is impressed with trust for proceeds of collection, 245.
right to follow trust funds is a right of property, 228.
right exists as against any fiduciary, whether agent, bailee or trustee, 225, 226.
tracing and following proceeds into insolvent estate of collecting bank, 232-246.
when trustee chargeable with interest, 295.
burden of proof to establish, 226, 227.
establishment on summary application, rather than by suit in equity, 233, note.
waiver of, 245.

TRUST COMPANIES,
collecting bank liable for taking uncertified check of, in lieu of payment, 84.

TRUSTEE PROCESS,
paper in bank for collection not subject to, 38, 39.
right to proceeds of collection, 204, 205.

U.

UNDERTAKING,
implied from delivery and receipt of paper for collection, 6

UNDISCLOSED AGENCY,
of bank renders it liable for money received on forged paper, 269.
custom not to disclose agency is not notice to drawee paying bank on forged indorsement of payee's name, 270.

UNLIQUIDATED CLAIMS,
do not give bank lien or right of set-off, 40.

USAGES,
see "Custom."

V.

VALUE,
consideration for undertaking to collect, 13-15.

VARIANCE,
pleading and proof, 284.

VERDICT,
in action for negligence, 286

VOLUNTARY PAYMENT,
cannot be recovered back, 197.

W.

WAIVER,
by bank of rule that it will act only as collecting medium, 36.
of irregularity of taking draft of other bank in payment, 81, 82.
bank does not waive lien on paper deposited for collection by accepting general assignment of depositor for benefit of creditors, 42.
of negligence of collecting bank, 97, 98, 126-129.
as to forged paper, 271.
of preference or trust, 245.

WARRANTY,
by general indorsement, 93, note.
certification not a warranty of genuineness of body of instrument, 271.

WISCONSIN,
rule as to liability of initial bank for defaults of correspondents, 167.

WITHDRAWAL,
from mails, of draft or check given by bank in payment of collection, 122, 123, 196.
of paper from bank not a waiver of prior negligence, 128.
of deposit made to take up paper, 190.

WITNESS,
payee not disqualified by interest from testifying in suit by drawee against collecting bank for money paid on forged indorsement of payee's name, 269, note.

WRONGFUL GARNISHMENT,
see "Garnishment."