

UNINTENTIONAL ACCEPTANCE BY RETENTION OF NEGOTIABLE INSTRUMENTS

Nearly fifty years ago the commissioners entrusted with the formulation of uniform laws for states completed what they considered to be a solution of all the problems of the Law Merchant. The touchstone of the ensuing Uniform Negotiable Instruments Law was certainty. Little did the commissioners realize that they were sowing the seeds of one of the knottiest problems of the present day.¹

Section 132 of the N. I. L. provides that an acceptance of a bill of exchange must be in writing.² The only exception to this appears in the highly controversial Section 137 which provides:

“Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.”

Is retention of the instrument by the drawee for more than twenty-four hours a refusal to return and thus an acceptance within the meaning of this section? Are checks and sight drafts excluded from the operation of this section and its compliment, Section 136, because presented for payment and not accept-

1. 5 MICHIE, BANKS AND BANKING (1st ed. 1932) 395; BRANNEN, NEGOTIABLE INSTRUMENTS LAW (4th ed. 1926), sec. 137; (1940) 14 SO. CALIF. L. REV. 67, abstracted in (1941) 7 Curr. Legal Thought 259.

2. The N.I.L. adopted in New Jersey in 1902 is contained in Title 7, Chapters 1-3 of the Revised Statutes.

ance?³ Is an inadvertent destruction or refusal an acceptance? Assuming the twenty-four hour period to govern, how is it to be computed in case a half holiday intervenes? These are the issues that have been bitterly fought.⁴

HISTORICAL DEVELOPMENT

At common law numerous cases had established that a drawee could retain a bill of exchange for twenty-four hours and that he could retain it thereafter without liability unless a demand for its return was made.⁵ One of the leading cases to this effect

3. Section 136 of the N.I.L. (N.J.R.S. 7:3-11) provides: "The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill; and the acceptance, if given, dates as of the day of presentation."

The English act telescopes sections 136 and 137 of the N.I.L. and does not contain the debatable portion of the latter. It provides, "where a bill is duly presented for acceptance and is not accepted within the customary time, the person presenting it must treat it as dishonored by non-acceptance. If he do not, the holder shall lose his right of recourse against the drawer and indorsers." *BILLS OF EXCHANGE ACT, 1882, sec. 42.* Twenty-four hours is considered the customary period. *Jeune v. Ward, 1 Barn & Ald. 653, 106 Eng. Rep. R. 240 (K.B. 1818).*

4. *McKusick, Uniformity and the Negotiable Instruments Act (1924) 9 MARQ. L. REV. 217; (1926) 10 MINN L. REV. 529; ANNOTATION (1929) 63 A.L.R. 1138; 8 Am. Jur. 878; 10 C.J.S. 176; 8 Am. Cas. 612; 4 Eng. Rul. Cas. 242.*

There has been a continued attempt to make implied acceptances valid. As recently as January, 1942, the Supreme Court of Errors of Connecticut was forced to hold that acceptance could not be implied from the mere fact that the drawee had sufficient of the drawer's funds to pay a check on its presentment. *Leary v. Citizens & Mfgs. Nat. Bank, 23 A. 2d 863 (Conn. 1942).* In some cases, where the drawee indicated an instrument would be paid, the drawee has been estopped to deny acceptance. *Feezer, Acceptance of Bills of Exchange by Conduct (1928) 12 MINN. L. REV. 729; (1937) 46 YALE L. J. 483.*

5. *Harvey v. Martin, 1 Campb. 425; Bellasis v. Hester, 1 Ld. Raym. 281, 91 Eng. Rep. R. 1084 (K.B.); Mason v. Barff, 2 Barn. & Ald 26, 106 Eng. Rep. R. 277 (K.B. 1818); Jeune v. Ward, 1 Barn. & Ald. 653, 106 Eng. Rep. R. 240 (K.B. 1818); Williams v. Gallyan, 107 Ala. 439, 18 So. 162 (1895); Colorado Nat. Bank v. Boettcher, 5 Colo. 185 (1879); Hall*

was *Overman v. The Hoboken City Bank*,⁶ decided by the Court of Errors and Appeals of New Jersey in 1864. Thereafter a statute was passed by the legislatures of New York, Missouri and Arkansas, in substance the same as Section 137 of the N. I. L. In 1880, the New York Court of Appeals in *Matteson v. Moulton*,⁷ held this act exemplary of the common law, and construed the phrase "refuses to return" as requiring a conversion. This decision was followed in the other two states.⁸ When the draftsmen of the N. I. L. inserted Section 137 it may be assumed that many of them considered the same construction would be given to it. They must have known of the presumption that a state enacting a statute adopted by the legislature and construed by the courts of another state intends it to have the same construction as that given in the state of original passage.⁹

Unfortunately the presumption was not applied. There was immediate criticism on the ground that the act had made an action on contract out of an action in tort for conversion and had extended the common law liability of the drawee. Furthermore, the section was considered to have been badly drafted. It speaks of refusal *within* twenty-four hours whereas Section 136 allows twenty-four hours for consideration. It says "such

v. Steel, 68 Ill. 231 (1873); *Briggs v. Sizer*, 30 N.Y. 647 (1864); *Holbrook v. Payne*, 151 Mass. 383, 24 N.E. 210 (1890); *McEowen v. Scott*, 49 Vt. 376 (1877), ANNOTATION (1909) 17 L.R.A. (N.S.) 1266.

See CHITTY, *BILLS AND NOTES* (8th Am. ed. 1839) 324; 2 RANDOLPH, *COMMERCIAL PAPER* (1st ed. 1888) sec. 620; ZANE, *BANKS AND BANKING* (1st ed. 1900) sec. 214; MORSE, *BANKS AND BANKING* (4th ed. 1903) sec. 409.

The early Civil Law recognized acceptance by retention. SCACCIA DE COMMERCIES ET CAMBIO, folio 383, num. 335. This was changed by ordinance. POTHIER, *CONTRAT DE CHANGE*, part 1, chap. 3, p. 39.

6. 31 N.J.L. 563 (E.&A. 1864), *aff'g*, 30 N.J.L. 61 (Sup. Ct. 1862).

7. 79 N.Y. 627 (1880).

8. *St. Louis and Southwestern R.R. Co. v. James*, 79 Ark. 490, 95 S.W. 804 (1906); *Dickinson v. Marsh*, 57 Mo. App. 566 (1894).

9. 59 C. J. STATUTES, sec. 627.

other period as the holder may allow" and it was certainly not the intention to allow the drawee less than twenty-four hours.¹⁰

As a result, the Wisconsin legislature in adopting the N. I. L. in 1904 added to Section 137 "mere retention of the bill is not acceptance."¹¹ In 1907 the legislature of the State of Illinois omitted Section 137 in passing the N. I. L.¹² and in 1908 the dam holding back the troubled waters broke—the Pennsylvania Supreme Court decided the case of *Wisner v. First National Bank of Gillitzen*.¹³ The court in a lengthy opinion held that retention alone for more than twenty-four hours was sufficient to constitute acceptance under Section 137. The court considered that the purpose of the N. I. L. had been to instill certainty in the Law Merchant and that the act of presentment implied a demand for return, express demand being unnecessary and foolish. The opinion has been the basis for all the cases that have since adopted this view. The court in each instance citing it blindly without discussion and with only a brief statement that the rule appeared preferable.

The *Wisner* case was revolutionary in another respect. It held that Section 137 applied equally to negotiable instruments presented for payment as to those presented for acceptance. Its reason was that Section 185 of the N. I. L.¹⁴ made the rules applicable to a demand bill applicable to a check and that the

10. Ames, *The Negotiable Instrument Law* (1900), 14 HARV. L. REV. 241, 245; Brewster, *Defense of the Negotiable Instruments Act* (1901), 10 YALE L. J. 88; Ames, *The Negotiable Instruments Act—A Word More* (1901), 14 HARV. L. REV. 442; Brewster, *The Negotiable Instruments Law—A Rejoinder to Dean Ames* (1901), 15 HARV. L. REV. 28, 29, 38, Brannan, *Some Necessary Amendments to the Negotiable Instruments Law* (1913), 26 HARV. L. REV. 588, 596.

11. Wisc. Laws 1899, c. 356, sec. 137.

12. Ill. Laws 1907, p. 403.

13. 220 Pa. 21, 68 A. 955 (1908).

14. Section 185 of the N.I.L. (N.J.R.S. 7:4-2) provides: "A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check."

holder of a check would otherwise have no remedy for retention. But such argument begs the question of whether Section 137 covers demand bills and it does not take into account Section 196 of the N. I. L.¹⁵ which would give the holder his rights at the Law Merchant to make express demand and to sue in conversion for a refusal to return.¹⁶

The court in the *Wisner* case was sufficiently honest to note the prior construction of similar statutes but it declined to follow these precedents. It noted a New York case, also involving a check, which was decided by the Supreme Court of New York in Appellate Term in 1904, *State Bank v. Weiss*.¹⁷ It considered this case to have reversed the New York rule embodied in *Matteson v. Moulton*¹⁸ prior to the passage of the N. I. L. But the court in the *Weiss* case did not discuss the issue or refer to the *Matteson* case. It did state that retention was sufficient but it cited several inapplicable sections of the N. I. L. in support of this statement. Weak as this case seems to be it has been cited in numerous cases following *Wisner v. First Nat. Bk. of Gillitzen*.¹⁹

It is interesting to note that the leading case for the retentionists was decided by a court that had previously refused to follow the clear weight of authority prior to the passage of the N. I. L. In 1884 the Supreme Court of Pennsylvania had held in *First Nat. Bk. of Northumberland v. McMichael*²⁰ that by the

15. Section 196 of the N.I.L. (N.J.R.S. 7:1-6) provides: "In any case not provided for in this act the rules of law and equity including the law merchant shall govern."

16. *Jeune v. Ward*, 1 Barn. & Ald. 653, 106 Eng. Rep. R. 240 (K.B. 1818).

17. 91 N.Y.S. 276 (1904).

18. 79 N.Y. 627 (1880).

19. *Miller v. Farmer's State Bank of Arco*, 165 Minn. 359, 206 N.W. 930 (1925); *Clark v. Nat. Bank of Montana*, 78 Mont. 48, 252 Pac. 373 (1926); *American Nat. Bank of Ardmore v. Nat. Bank of Claremore*, 119 Okla. 149, 249 Pac. 424 (1926).

20. 106 Pa. 460 (1884).

Law Merchant retention was sufficient and that this rule was applicable to checks as well as time bills.

The reaction to the *Wisner* decision by the non-retentionists was immediate.²¹ The following year the Pennsylvania legislature added a clause to Section 137 similar to that in the Wisconsin Act.²² In 1913 the legislature of South Dakota omitted Section 137 in adopting the N. I. L.²³ and in the same year Justices Lehman, Seabury and Page in the appellate term of the New York Supreme Court in the case of *Foley v. New York Savings Bank*²⁴ held that retention of a negotiable demand order for several days was insufficient to constitute acceptance. No mention of the conflicting cases was made, however. In 1914 the Supreme Court of North Carolina expressly left this question open in a decision which was subsequently cited as approving the doctrine of the *Wisner* case.²⁵

The backwash against the *Wisner* decision continued for six more years during which the highest courts of Tennessee, Missouri and Connecticut indicated their approval of the doctrine that retention was insufficient.²⁶ During this period the Illinois Appellate Court twice adhered to that view, first construing the N. I. L. of the State of Washington which contained Section 137 and later in holding that the Illinois legislature intentionally omitted Section 137 and that retention in Illinois was

21. SELOVER, NEGOTIABLE INSTRUMENTS (2nd ed. 1910) sec. 94, states at p. 138: "In apparent contradiction to the plain import of the words of the statute, some courts have held that, under the statute, a mere retention is sufficient to constitute acceptance." See NORTON, BILLS AND NOTES (4th ed. 1914), sec. 50, 55.

22. Pa. Laws 1909, No. 169.

23. S.D. Laws 1913, c. 279.

24. 139 N.Y.S. 915 (1913).

25. *Standard Trust Co. v. Commercial Nat. Bank*, 166 N.C. 112, 81 S.E. 1074 (1914).

26. *Peoples Nat. Bank v. Swift*, 134 Tenn. 175, 183 S.W. 725 (1916); *Southern Creosoting Co. v. Chicago & A. R.R. Co.*, 205 S.W. 716 (Mo. Sup. 1918); *Hibbard v. Parciak*, 94 Conn. 562, 109 A. 725 (1920).

therefore insufficient.²⁷ The former case is perhaps the best for opponents of the *Wisner* decision even though it merely outlines the conflict and states what the court considers to be the preferable rule. It was during this period that the Supreme Court of Arkansas, construing Section 137 in *Bailey & Co. v. Southwestern Veneer Co.*,²⁸ reaffirmed its common law view that mere retention was insufficient and held further that an inadvertent destruction of the instrument would not constitute acceptance.²⁹ This decision opened the possibility that the retentionists might make an exception to their rule in the event of an inadvertent retention—a possibility that has so far lain dormant.

In 1923 the strength of the backwash against the *Wisner* case was broken. Several years before, the Supreme Court of Kansas had stated its approval of the Pennsylvania rule.³⁰ Thereafter a Texas court of civil appeals, in a strong opinion citing pages from the *Wisner* case, followed it.³¹ Then in rapid succession from 1925 to 1930 courts in Minnesota, Montana, Oklahoma, Louisiana, North Dakota, Oregon and Idaho without discussion held that retention for more than 24 hours was sufficient to constitute acceptance.³² Of course, the Supreme Court of Mon-

27. *Illinois Trust & Sav. Bank v. Northern Bank & Trust Co.*, 214 Ill. App. 440 (1919); *Whitewater Comm. & Sav. Bank v. U. S. Bank*, 224 Ill. App. 26 (1922).

28. 126 Ark. 257, 190 S.W. 430 (1916).

29. See *Jeune v. Ward*, 1 Barn. & Ald. 653, 106 Eng. Rep. R. 240 (K.B. 1818).

30. *Chamberlain Metal Weather-Strip Co. v. Bank of Pleasanton*, 98 Kan. 611, 160 Pac. 1138 (1916).

31. *Bull v. Novice St. Bank*, 250 S.W. 232 (Tex. Civ. App. 1923); *Accord, Commercial St. Bank v. Harkrider Keith Looke Co.*, 250 S.W. 1069 (Tex. Civ. App. 1923).

32. *Miller v. Farmer's State Bank of Arco* (1925); *Clarke v. Nat. Bank of Montana* (1926); *American Nat. Bank of Ardmore v. Nat. Bank of Claremore* (1926), all *supra*, note 19; *First Nat. Bank v. Citizens Bank of Compti*, 163 La. 919, 113 So. 147 (1927); *Clark v. Northern Pac. Ry. Co.*, 55 N.D. 454, 214 N.W. 33 (1927); *Mt. Vernon Nat. Bank*

tana did observe in passing "although this construction of the statute has been criticized by text writers, we are of the opinion that relief therefrom, if it is not desirable that it continue in force, is a matter for legislative action rather than judicial construction."³³

Before judging the present strength of the Pennsylvania rule that retention is sufficient, it is well to note the corresponding development of the rule that Section 137 covers checks. It was generally true at the Law Merchant and is true today that a holder has no rights against the drawee in contract in the absence of acceptance or certification.³⁴ Where the drawee paid a person claiming through a forged or unauthorized endorsement the question arose as to how to give the true holder a direct right of action against the drawee. In New Jersey it has recently been held that the act of payment is a conversion. *Teas v. Third Nat. Bk. & Trust Company*.³⁵ But it has taken most jurisdictions sometime to reach this conclusion and in some cases it is not admitted today.³⁶

One early suggestion was that payment constituted acceptance.³⁷ This view was promptly repudiated in 1876 by the Supreme Court of the United States in *First National Bank v. Whitman*.³⁸ Following this decision, courts in Georgia and Missouri held payment was not an acceptance prior to the passage

v. Canby State Bank, 129 Ore. 36, 276 Pac. 262, 63 A.L.R. 1133, 1138 (1929); *McLaughlin's Store v. Copeman*, 50 Idaho 214, 294 Pac. 523 (1930).

33. *Clarke v. Nat. Bank of Montana*, 78 Mont. 48, 252 Pac. 373, 375 (1926).

34. *First Nat. Bank v. Whitman*, 94 U.S. 343 (1876); *Creveling v. Bloomesbury Nat. Bank*, 46 N.J.L. 255, 50 Am. Rep. 417 (Sup. Ct. 1884); See, N.J.L. sections 127 and 189.

35. 125 N.J.Eq. 224, 4 A. 2d 64 (E. & A. 1939).

36. *Aigler, Rights of Holder Against Drawee* (1925), 38 HARV. L. REV. 880, 886.

37. See *Pickle v. Muse*, 88 Tenn. 380, 12 S.W. 919, 920 (1890).

38. 94 U.S. 343 (1876).

of the N. I. L.³⁹ and in 1904 the high court of Virginia reached the same conclusion under the N. I. L.⁴⁰

There would seem to be two questions involved in these cases. An instrument presented for payment may be said not also presented for acceptance. If it is presented for acceptance as well as payment, the act of payment may be considered insufficient to constitute acceptance. Since we are here considering the effect of retention as acceptance the latter point is not helpful. But to the extent that these cases deny that a check or sight draft presented for payment is also presented for acceptance they are authorities for the position that such checks or sight drafts are not to be considered as accepted by retention for more than twenty-four hours. Thus the cases involving an action by the holder against the drawee for payment on a forged or unauthorized endorsement have been cited by the cases involving the effect of the retention of checks more than twenty-four hours.⁴¹

With this in mind it is difficult to understand the bold statement in the *Weiss* case and the conclusions of the *Wisner* decision. Of course, the Pennsylvania courts at common law differed from the majority, not only on retention,⁴² but also in holding that payment on a forged endorsement constituted acceptance.⁴³ However, after the passage of the N. I. L. in Pennsylvania, the courts at least repudiated the latter rule⁴⁴ so it is not surprising that the Pennsylvania legislature promptly changed the

39. *Freeman v. Savannah Bank & Trust Co.*, 88 Ga. 252, 14 S.E. 577 (1892); *Houston Grocery Co. v. Bank*, 71 Mo. App. 132 (1897).

40. *Baltimore & Ohio R.R. Co. v. First Nat. Bank of Alexandria*, 102 Va. 753, 47 S.E. 837 (1904).

41. *Title Sav. Bank and Trust Co. v. Donovan*, 205 Ky. 801, 266 S.W. 667 (1924) holding that payment on an unauthorized indorsement constitutes acceptance is cited in the *American Nat. Bank* case, *supra*, note 19. Cf. ANNOTATIONS (1921), 14 A.L.R. 764 and (1930) 69 A.L.R. 1076.

42. *First Nat. Bank v. McMichael*, cited *supra*, note 20.

43. *Seventh Nat. Bank v. Cook*, 73 Pa. 483, 13 Am. Rep. 751 (1873).

44. *Clark & Co. v. Savings Bank*, 31 Pa. Super. 647 (1906); see *Tibby Bros. v. Farmers & Mechanics Bank*, 220 Pa. 1, 69 A. 280 (1908).

Wisner doctrine that mere retention was enough and provided further that Section 137 "shall not apply to checks."⁴⁵

Despite the *Wisner* case, the Illinois Court of Appeals held in 1908 that payment on a forged endorsement did not constitute acceptance.⁴⁶ Shortly afterwards, the Circuit Court of Appeals for the Eighth Circuit construing the law of Nebraska in a bankruptcy case, *First Nat. Bk. of Omaha v. Whitmore*, held that, whatever the construction of Section 137, it did not apply to checks.⁴⁷

Paton in his digest on banking opinions wrote strongly that the *Whitmore* case was the only possible rule and that it would be universally followed.⁴⁸ So in 1911 it was held in Arkansas that payment on a forged endorsement was not acceptance.⁴⁹ But it must have been a shock to Paton when the Supreme Court of Minnesota stated in 1911 that payment on a forged endorsement was acceptance⁵⁰ and the Supreme Court of Tennessee stated in 1913 that checks were covered by Section 136 thus giving the holder twenty-four hours before he could be required to pay,⁵¹ and the Supreme Court of Kansas stated in 1916 that payment was an acceptance under Section 137.⁵²

At this time the backwash against the *Wisner* case on the issue of retention was ebbing. But valiant attempts to strengthen it were made by courts in seven states holding that the drawee paying on a forged endorsement had not accepted the

45. Pa. Laws 1909, No. 169.

46. *Ranch v. Banker's Nat. Bank*, 143 Ill. App. 625 (1908).

47. 177 Fed. 397 (1910).

48. 2 PATON'S DIGEST (1st ed. 1926) 1030 *et seq.* containing his opinions written in 1910 and 1913.

49. *Sims v. American Nat. Bank*, 98 Ark. 1, 135 S.W. 356 (1911).

50. *McFadden v. Follrath*, 114 Minn. 85, 130 N.W. 542 (1911).

51. *First Nat. Bank of Murfreesboro v. First Nat. Bank of Nashville*, 127 Tenn. 205, 154 S.W. 965 (1913). If checks are not covered by section 136 they would not seem to be covered by the corresponding language of section 137.

52. *Chamberlain Metal Weather-Strip Co. v. Bank of Pleasanton*, 98 Kan. 611, 160 Pac. 1138 (1916).

check.⁵³ Then when these attempts failed the backwash was broken. Without discussion courts in Minnesota, Montana, Louisiana, North Dakota, Oregon and Idaho held not only that retention was sufficient to constitute acceptance but also that this construction of Section 137 applied to checks and sight drafts as well.⁵⁴ The Supreme Court of North Carolina even held that payment on an unauthorized endorsement was acceptance.⁵⁵

However, surprising strength was left in the current against holding a check presented for payment to be presented for acceptance. In 1926 the Supreme Court of Texas when faced with the retention of a check in *First Nat. Bk. of Goree v. Tally*⁵⁶ adopted the original view of a court of civil appeals that presentment for payment was not presentment for acceptance.⁵⁷ It thus followed a case involving payment on a forged endorsement⁵⁸ and disregarded the holding of other civil appeal cases that checks retained for more than twenty-four hours were accepted.⁵⁹ At the same time the Supreme Court of Texas admitted that had the check been a time bill of exchange its retention for several days would have constituted acceptance.

53. *Elyria Sav. & Bank. Co. v. Walker Bin Co.*, 92 Ohio St. 406, 111 N.E. 147 (1915); *Lone Star Trucking Co. v. City Nat. Bank of Commerce*, 240 S.W. 1000 (1922); *Gasper v. Security State Bank*, 109 Neb. 495, 191 N.W. 654 (1922); *Title Sav. Bank & Trust Co. v. Dunavan*, 205 Ky. 801, 266 S.W. 667 (1924); *M. Feitel House Wrecking Co. v. Citizens Bank & Trust Co.*, 159 La. 752, 106 So. 292 (1925). Cf. *Cohen v. First Nat. Bank*, 22 Ariz. 394, 198 Pac. 122 (1921); see *South Boston Trust Co. v. Levin*, 249 Mass. 45, 143 N.E. 816, 817 (1924).

54. See cases cited *supra*, notes 19 and 32.

55. *Dawson v. Nat. Bank of Greenville*, 196 N.C. 134, 144 S.E. 833 (1928); cf. *Bell Weyland Co. v. Bank of Sugdon*, 95 Okla. 67, 218 Pac. 705 (1923).

56. 115 Tex. 591, 235 S.W. 612 (1926).

57. *Lone Star Trucking Co. v. City Nat. Bank of Commerce*, 240 S.W. 1000 (1922).

58. *Ibid.*

59. *Bull v. Novice State Bank; Commercial State Bank v. Harkrider Keith Looke Co.*, both *supra*, note 31.

As late as 1931 the Appellate Court of Indiana sitting in banc on the case of *Guardian Nat. Bk. v. Huntington County St. Bk.*⁶⁰ stated that Section 136 did not apply to checks and that the drawee did not have twenty-four hours in which to consider acceptance. The court said:

“Any other rule would necessarily result in embarrassment and intolerable confusion in the operation of banks and in the carrying out and consummation of business transactions.”⁶¹

In this period three courts held that payment on a forged or unauthorized endorsement did not constitute acceptance.⁶²

With this last vestige of strength the current against the *Wisner* case seemingly died. In 1932 the Louisiana court of appeals stated that Section 136 covered checks.⁶³ In 1937 the Supreme Court of South Dakota held that the legislature had intentionally omitted Section 137 and that consequently the retention of a check for seven days did not constitute acceptance. However, the court added that Section 136 allowed the drawee of a check to retain it for twenty-four hours and that thereafter demand could be made for its return.⁶⁴ Finally in 1940 the Supreme Court of Oklahoma in *First Nat. Bank of Tahihina v. Black Bros.*⁶⁵ held that the question of whether

60. 178 N.E. 575 (Ind. 1931), *rev'd on other grounds*, 206 Ind. 185, 187 N.E. 388 (1933).

61. *Id.* at 579.

62. *Fed. Land Bank v. Collins*, 156 Miss. 893, 127 So. 570, 69 A.L.R. 1068, 1076 (1930); see *Bank of Pulaski v. Bloomfield State Bank*, 226 N.W. 119, 122 (Iowa 1929); *Anderson v. Tacoma Nat. Bank*, 146 Wash. 520, 526, 264 Pac. 8, 10 (1928).

63. *Joffrion Woods v. Hibernia Bank & Trust Co.*, 19 La. App. 419, 139 So. 22 (1932).

64. *Mitchell Livestock Auction Co., Inc. v. Bryant State Bank*, 65 S.D. 488, 275 N.W. 262 (1937).

65. 187 Okla. 124, 101 Pac. (2) 802 (1940).

checks were covered by Section 137 "was debatable on reason as well as authority" but that in their opinion a check was presented for acceptance as well as payment and so its retention constituted acceptance.⁶⁶

THE RULE TODAY

What then is the present state of the law? We have seen two doctrines arise that repudiated the great body of prior decisions and conflicted with settled canons of law, that were immediately criticized by text writers and overthrown by many state legislatures.⁶⁷ True, these doctrines have been blindly followed in western states without discussion by courts that had not taken a previous stand on the same issue at the Law Merchant. But these two doctrines were considered and not adopted by many states and the great decisions of the common law have not been changed.⁶⁸ It is significant that courts in England, Alabama, Colorado, New Jersey, Massachusetts and Vermont, which early held that retention alone was insufficient to constitute acceptance, have not been called upon to construe Section 137.⁶⁹ It is also significant that California and Connecticut, after the passage of the N. I. L. in those states, adopted the English rule in cases not governed by the N. I. L.⁷⁰ It would

66. *Id.* at 126, 101 Pac. (2) at 803.

67. Feezer, *Acceptance of Bills of Exchange by Conduct* (1928), 12 MINN. L. REV. 729.

68. The strength of the common law cases can be gauged from the fact that the same courts holding silence to be insufficient held oral, telegraphic and written acceptance on separate papers to be good. 1 DANIELS, *NEGOTIABLE INSTRUMENTS* 496. Furthermore, the early statute passed for the express purpose of requiring written acceptance (3 & 4 Ann. c. 9) was made ineffective by judicial construction. McCLAREN, *BILLS, NOTES AND CHECKS* (5th ed.) 110. This required the passage of 1 & 2 George IV c. 78.

69. See cases cited *supra*, notes 5 and 6.

70. Bert E. Anderson Co. v. Hasha, 124 Cal. App. 23, 12 Pac. (2) 90 (1932); Hibbard v. Parciak, 94 Conn. 562, 109 A. 725 (1920).

not seem too late to argue against *Wisner v. First National Bank of Gillitzen*.

It may be suggested that the improvement in banking methods and records requires that the rule of the *Wisner* case should be adopted today by those jurisdictions not already committed to a construction of Sections 136 and 137, but this is not necessarily true. In many cases it would seem that a bank should not be able to retain a check for twenty-four hours but should be able to retain a time bill for more than twenty-four hours in the absence of demand for its return.⁷¹ If Sections 136 and 137 do not apply to checks presented for payment, a demand for payment or return of the check may be made on presentment and a refusal to return the check unpaid in a reasonable time would constitute a conversion. If no demand were made, the check would not be accepted by continued retention.⁷² Such a result would seem consonant with the best banking practices of today.

So too with time bills, if Section 137 is construed to require an express demand and refusal, no undue hardship is imposed on the holder. A demand for return after twenty-four hours may be stamped on the bill when presented for acceptance. If no demand is stamped on the bill, the holder may at any time demand that the bill be returned after twenty-four hours.

Suppose a check is presented over the counter for payment. The holder should at least be able to require that the check be paid as soon as the bank has adjusted the drawer's account at the close of business. But with time bills and demand items not received over the counter it is to the best interests of the holder as well as the bank to allow a period after adjustment of the drawer's account for communication with the drawer. He may be able to cover any shortage which would result from payment,

71. 1 PATON'S DIGEST (2nd ed. 1940) 14 *et seq.*

72. Section 196 of the N.I.L. (N.J.R.S. 7:1-6) provides: "In any case not provided for in this act the rules of law and equity including the law merchant shall govern."

or he may have deposited collectibles on which clearance is expected. Should the holder not wish to allow more than twenty-four hours, he may so indicate. These are practical considerations applicable not only to drawee banks but to other drawees as well.

Apart from banking practice, the other sections of the N. I. L. would seem to require holding that checks are not covered by Sections 136 and 137 and that in any event mere retention of the bill should not constitute acceptance. Thus a check may be presented for acceptance, as where presented to a place other than that specified in the check, but it is not necessarily so presented.⁷³ Other sections of the act speak of both types of presentment whereas only presentment for acceptance need have been mentioned if a demand bill or check were presented for acceptance in all cases.⁷⁴

As to retention, Section 191 defines acceptance as requiring "delivery or notification."⁷⁵ The latter would seem to call for actual communication. Again Section 150 provides that the holder must treat as dishonored a bill not accepted within the prescribed time.⁷⁶ Thus, a holder fearing loss of his rights against insolvent secondary parties by delay has adequate protection without holding the drawee liable for "refusing to return" through mere inaction.

Furthermore, Section 136 allows twenty-four hours for consideration. If retention thereafter constitutes acceptance, the drawee has had no time in which to return the bill. So too it is

73. N.I.L. Section 143 (N.J.R.S. 7:3-18).

74. N.I.L. Sections 89, 143 and 152 (N.J.R.S. 7:2-89; 7:3-18; and 7:3-27) and cf. N.J.R.S. 36:1-1.

75. Section 191 of the N.I.L. (N.J.R.S. 7:1-2) provides: "'Acceptance' means an acceptance completed by delivery or notification."

76. Section 150 of the N.I.L. (N.J.R.S. 7:3-25) provides: "Where a bill is duly presented for acceptance and is now accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers."

a well settled rule of law that one person cannot deliberately force upon another a duty to return unless willing to defray the cost and furnish the means for such return.⁷⁷

The essence of the problem may be whether in fact a demand can be implied from the relationship of the parties. Yet evidence of custom has been ruled inadmissible in these cases,⁷⁸ and clearing house rules have been limited in operation to members.⁷⁹ The act itself provides only that in estimating reasonable time regard is to be had for the nature of the instruments, the usage of the trade and the facts of the case.⁸⁰

It has been suggested that Section 7 of the Bank Collection Code expresses the common law nonliability of the drawee for retention of items presented for payment.⁸¹ This section provides that such items received by mail by a solvent drawee or payor bank shall be deemed paid when the amount is finally charged to the account of the maker or drawer.⁸² As under Section 150 of the N. I. L. protection is given against loss by delay since the collecting bank may treat the item as dishonored if not returned on the same day. If this suggestion is followed, a consistent rule should govern items not mailed and perhaps other bills not governed by the code.

RETENTION OVER HALF HOLIDAY

Assuming that retention for more than twenty-four hours

77. 65 C. J. TROVER AND CONVERSION, sec. 69.

78. Mt. Vernon Nat. Bank v. Canby State Bank, 129 Ore. 36, 276 Pac. 262, 63 A.L.R. 1133, 1138 (1929).

79. Overman v. The Hoboken City Bank, 30 N.J.L. 61, *aff'd*, 31 N.J.L. 563 (1864).

80. N.I.L. Section 193 (N.J.R.S. 7:1-4).

81. 1 PATON'S DIGEST OF LEGAL OPINIONS (2nd ed. 1940) 14.

82. Section 7 of the Bank Collection Code (N.J.R.S. 7:6-11) provides, "where the item is received by mail by a solvent drawee or payor bank, it shall be deemed paid when the amount is finally charged to the account of the maker or drawer."

constitutes acceptance, an interesting question arises as to the expiration of this period, in those jurisdictions in which Saturday is a half holiday. Many banks receiving bills of exchange presented for payment or acceptance on Saturday retain such bills until Monday afternoon to give the drawer an opportunity to cover the amount of the draft. Section 194 of the N. I. L.⁸³ would seem determinative but it is not without ambiguity when it provides:

“Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day.”

The “last day for doing any act” may cover a duty to return under Section 137, but it is not clear whether the holiday hours are to be excluded in computing the twenty-four hour period or whether the period expires on the business day at the same time it would have expired on a holiday. No difficulty arises with full holidays but the issue is squarely raised with half holidays. In the latter case, the bank would have only three business hours on Monday to consider a bill presented for acceptance on Saturday noon. With full holidays, the bank would have six business hours regardless of the time for presentment or the theory of computation. It would seem that the same would be true where half holidays are involved. Thus in the case of a bill presented on Saturday noon it would seem that the twenty-four hour period should begin to run at midnight Sunday giving the full business hours on Monday for examination of the bank’s records and decision as to acceptance.⁸⁴

83. N.J.R.S. 7:1-5.

84. In Massachusetts and Rhode Island prior to the adoption of the N.I.L. the drawee had until 2 p.m. of the following business day to accept a bill. Mass. Gen. Stat. 1873, p. 35; Mass. Pub. Stat. 1882, p. 428, sec. 17; R. I. Pub. Laws, 1876, c. 551; R. I. Pub. Stat. 1882, c. 142, sec. 5.

Of course, even on this theory the drawee bank would have only three business hours in which to consider acceptance of a bill presented on Friday just before closing. But this three hour period would expire on Saturday noon when the bank closes its books and makes the necessary charges and credits. On the other hand, if only three hours are allowed on Monday the bank must interrupt its usual routine to adjust the drawer's account to include items presented that morning. In the interest of expediting banking transactions and preventing errors in adjustment of accounts it would seem that Section 194 should be construed to allow the bank to retain bills presented on Saturday until Monday afternoon closing.⁸⁵

But Section 194 may not apply to the calculation of the twenty-four hour period at all. In that event, it might be argued that no part of the holiday would be excluded. This is the method of computation used during the week when the hours after the close of business are included. *Clark v. First Nat. Bk., Montana*.⁸⁶ But such a situation would be manifestly unjust since the period might expire before the drawee had had any business hours in which to consider whether to accept or not. In such a case the reason for including Section 136 in the N. I. L. would be defeated. It was certainly the intention of the draftsmen in giving the drawee twenty-four hours to consider whether to accept or not to give him some business hours. Generally, under Section 25 of the N. I. L., a holder may not even present a bill for payment after banking hours even though the bank is still open.⁸⁷

85. The English act achieves this result. Section 92 of the BILLS AND EXCHANGE ACT OF 1882 provides, "Where by this act the time limited for doing any act or thing is less than three days, in reckoning time, non-business days are excluded." And see section 42 of the English act quoted *supra*, note 3.

86. Cited *supra*, note 13. Sections 36:1-1 and 36:1-4 of the New Jersey Revised Statutes governing holidays do not appear helpful on this point.

87. N.J.R.S. 7:2-75.

No cases have been found of any material value on the method of computing the twenty-four hour period assuming that such period is to govern. The only cases involving retention of a bill of exchange from Saturday until Monday do not touch upon this point and the issue is not raised by their factual situation.⁸⁸

CONCLUSION

It is not too late to repudiate an anomalous doctrine that has been criticized and condemned from its beginning. Where the drawee, to whom a negotiable bill of exchange has been presented for acceptance, retains it for more than twenty-four hours, he should not thereby be held to have accepted the instrument in the absence of an express demand for its return.⁸⁹ In jurisdictions that have followed *Wisner v. First Nat. Bank of Gillitzen* statutory amendment may be necessary, but in the great majority of cases it is sufficient for the courts to reaffirm prior decisions rendered under the Law Merchant or after the passage of the N. I. L.⁹⁰

In any event an inadvertent destruction or retention should not be deemed an acceptance. And checks and demand bills pre-

88. *Standard Trust Co. v. Commercial Nat. Bank*, 166 N.C. 112, 81 S.E. 1074 (1914); *Sands v. Mathews*, 27 Ala. 399 (1855). In the former case it was not clear to the court whether the check had been presented on Saturday but in any event it was retained slightly more than twenty-four hours, even excluding all of Sunday. In the *Sands* case the holder consented to retention from Saturday to Monday.

89. The drawee may be considered as an agent of the holder, in which event the drawee would be liable for any negligence in presenting a bill to itself. *Standard Trust Co. v. Commercial Nat. Bank*, *supra*.

90. The following amendment has been suggested: Section 137. Where a drawee to whom a bill is delivered for acceptance destroys the same, or *refuses after the expiration* of twenty-four hours after such delivery or such longer period as the holder shall allow, to return the bill, accepted or non-accepted, to the holder, he will be deemed to have converted the same and shall be liable in damages for the amount of the bill." BRANNEN'S NEGOTIABLE INSTRUMENT LAW (4th ed. 1926) 843.

sented for payment but not for acceptance should not be subject to the *Wisner Doctrine* or Section 136 of the N. I. L. Often return of these instruments on demand should be required before twenty-four hours, but the effect of retaining them in the absence of demand should be controlled by the Common Law rule of non-liability. If any bill of exchange must be returned within twenty-four hours, holidays should be excluded in computing the period so that an instrument presented before noon on a half holiday could be retained until closing on the following business day. No other rule insures the drawee having sufficient time to consider acceptance.

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