Acceptance of Bills of Exchange by Conduct

L.W. Feezer

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation
https://scholarship.law.umn.edu/mlr/1764

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
HISTORICALLY the theory of a bill of exchange in the very early days of its international use by merchants trading between England and the continent was that the drawer has funds in the hands of the drawee. That is, he has a right of action at common law against the drawee. This would be in form usually an action in assumpsit or perhaps sometimes in debt. The drawer at the same time owes and desires to pay an existing debt which he owes the payee or perhaps he wishes to execute a contract with the payee which will involve a money obligation on his part. At any rate the drawer for some reason desires to make a transfer of money or credit to the payee. This drawer may wish to make the transfer in this indirect way either because he has no ready money with which to make payment or for reasons of convenience he wishes to make payment by transferring to the payee a credit against the drawee.

The common law did not permit the assignment of choses in action. Trade could not prosper under such a restriction and the merchants devised their own rules for dealing with such transactions and the bill of exchange of the merchants at length found recognition in the common law courts. The common law courts

---

*Professor of Law, University of South Dakota, Vermillion, S. D.

18 Corpus Juris 810. "The most usual remedy at common law and indeed the only one which was formerly available against remote parties, is an action of assumpsit which lies in favor of an indorsee or transferee against the maker, the acceptor or drawer." See cases cited 8 C. J. 810, note 60.

"Suit was brought in assumpsit upon a foreign bill of exchange, alleging in effect, by a fiction of factorage or agency, that the defendant, acceptor of the bill, had, at the hands of his foreign factor, received money from the plaintiff, in consideration whereof he, now, in accepting the bill drawn by his factor for the purpose, promised to repay the same." Bigelow, Bills, Notes and Checks 3.

2It does not seem necessary to cite at length the early authorities for this point or the many modern cases referring to it obiter dictum. Suffice it to say that the foot notes, 5 C. J. 846 collect a large number of them.


But it was during the Chief Justiceship of Lord Mansfield 1756 et seq., that the principles of the law merchant came to be cordially and fully received into the jurisprudence of the common-law courts of England.
having undertaken to enforce the contracts embodied in a bill of exchange by the application to them of the law merchant, there resulted in effect the equivalent of an assignment of one class of choses in action which could be enforced by the assignee in courts of law. But before this form of assignment was complete so as to enable the payee of a bill of exchange to bring his action directly against the drawee in his own name even with the application of the law merchant it was necessary that the drawee should accept the draft or bill, or, in other words assent to the assignment. Of course the payee or other holder of the bill, if he held it bona fide for value, had his action against the drawer in case of non-acceptance. But the result contemplated by the drawing and negotiation of a bill of exchange was not liability of the drawer to the payee, but acceptance and later payment by the drawee and finally discharge of the drawer. The drawee might of course assent to the order by paying it outright as well as by accepting for future payment, subject of course to the terms of the bill.

Under what circumstances does it become possible for the holder of a bill of exchange to enforce liability upon the drawee thereof? It has just been stated that he must assent to the order which the bill contains. Whether or not he has in fact or at least in law assented may sometimes be a difficult question to answer. According to the law merchant an acceptance might be expressed in words or implied from the conduct of the drawee. It might be oral or written, it might be on the bill itself or on a separate paper. It might postdate the presentation of the bill or even antedate its drawing, and it was not long after the introduction of telegraphic communication before that means of indicating assent was recognized. However, in nearly if not quite all countries, the liberal rules developed under the theory of the law merchant have been restricted by statute. But there seems always to have been a reluctance on the part of the courts to accept and receive at their apparent or obvious face meaning in an ordinary and non-technical sense the restrictions of the statutes in this matter. This tendency, which appears in many recent cases decided under the

---

4 Such is of course the rule at present under N. I. L. section 61.
5 Here again it does not seem necessary to cite specific authority or cases as collected in the foot notes in the various encyclopedias and texts. But see Thulin, Form of the Acceptance, 14 Mich. L. Rev. 455.
6 Daniel, Negotiable Instruments 496.
7 McClaren, Bills, Notes and Checks, 5th ed., 110.
Uniform Negotiable Instruments Law, is not new. A statute passed in the time of Queen Anne, which was intended to require a written acceptance of inland bills of exchange, was held not to have that effect.\(^8\)

Prior to the Uniform Negotiable Instruments Law, statutes were in force in a considerable number of American states which provided for a written acceptance. In the absence of statute,\(^9\) however, a verbal acceptance was sufficient and the agreement which it constituted was not within the statute of frauds.\(^10\)

The Uniform Negotiable Instruments Law provides that an acceptance of a bill of exchange shall be in writing.\(^11\) It does not go to the more cautious extreme of the English Bills of Exchange Act which requires that the acceptance must be upon the bill of exchange itself\(^12\) (although it does authorize the holder to require this if he so desires),\(^13\) and it has left some leeway for at least one form of the implied or constructive acceptance formerly recognized by the law merchant.

Section 137 of the Negotiable Instruments Law specifically provides for one form of acceptance by conduct. "By reason of the unfortunate language in which it is couched and the unwillingness of many courts to abandon their pre-statutory rule on the point covered,"\(^14\) this section instead of promoting uniformity has produced greater confusion on the question of implied or constructive acceptance. The dispute as to the law under section 137 is as to whether the drawee to whom is presented a bill for acceptance may be charged as acceptor under that provision if he does nothing, or whether there must be a demand for a return of the bill and a refusal. In other words the question under this section of the statute is whether mere failure to return the bill is equivalent to a refusal to return it and so constitutes ac-

---

\(^8\) & 4 Anne c. 9. See McClaren, Bills, Notes and Checks, 5th ed., 110, citing Wilkinson v. Lutwidge, (1726) 1 Str. 648; Lumley v. Palmer, (1735) 2 Str. 1000; Pillans v. Van Mierop, (1765) 3 Burr. 1663. Later the Act 1 & 2 George IV c. 78 was passed to make written acceptances necessary.

\(^9\) Thulin, Form of the Acceptance, 14 Mich. L. Rev. 455.

\(^10\) Bigelow, Bills, Notes and Checks, 2nd ed. 58; 8 C. J. 302 and note 75.

\(^11\) Section 132 N. I. L.

\(^12\) B. E. F. section 17 (1). See on the history of this requirement in England, Brannan, Negotiable Instruments Law, 4th ed., p. 830.

\(^13\) N. I. L., section 133.

\(^14\) See McKusick, Uniformity and the Negotiable Instruments Act. 9 Marquette L. Rev. 217. "There are a number of obstacles to be met in securing uniformity of law; first the inexpert drafting of statutes."
The weight of authority seems to be that mere retention is not acceptance and a number of jurisdictions having earlier statutes similar or equivalent to section 137 have cases which hold that mere retention is not enough.\textsuperscript{16} °

The supreme court of Minnesota has dealt with this question in the case of \textit{Miller v. Farmers' State Bank of Arco}.\textsuperscript{17} In this case one Howe drew a check October 15th on the defendant bank, payable to the plaintiff. The plaintiff received it on October 17th or 18th and deposited it at once in another bank. It reached the defendant bank on October 20th through ordinary collection channels. It was not paid and on October 25th it was returned by the defendant bank to the plaintiff without protest. Howe, the drawer of the check, who was also the president of the defendant bank, after the check had thus been returned, sent his own note to the plaintiff for the amount involved. The plaintiff sued the defendant bank as drawee-acceptor and it was held that the retention of the check by the defendant in excess of twenty-four hours was an acceptance and that the plaintiff might recover from the defendant on that theory.

There was no showing of a demand for the return of the check or of a refusal by the defendant to return it. On the contrary, the defendant voluntarily returned it and the acceptance, if any, consisted wholly in the mere retention of the check more than twenty-four hours. The court refers to the conflict of authority on the question and says that it follows the Pennsylvania view citing \textit{Wisner v. First National Bank}.\textsuperscript{18} The opinion does not refer to the fact that Pennsylvania abandoned the rule of the \textit{Wisner Case} by statutory enactment some sixteen years before the instant case was decided in Minnesota.\textsuperscript{19} Moreover the Min-

\textsuperscript{15}This section of the N. I. L. reads: "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."

\textsuperscript{16}Brannan, Some Necessary Amendments to the Negotiable Instruments Law, 26 Harv. L. Rev. 588, 596. Brannan's Negotiable Instruments Law, 4th ed., 838-842; 8 C. J. 319. An adequate summary of the state of the authorities will be found in the note at 10 \textit{MINNESOTA LAW REVIEW} 529.

\textsuperscript{17}(1925) 165 Minn. 339, 206 N. W. 930. The case has been very recently followed and cited in Clark v. N. P. Ry., (N.D. 1927) 214 N. W. 33, in which case no reference is made to the existence of any contrary authority whatsoever.

\textsuperscript{18}(1908) 220 Pa. 21, 68 Atl. 955, 17 L. R. A. (N.S.) 1266.

\textsuperscript{19}Penn. Laws 1909, Act 169, adds to section 137 of the Negotiable Instruments Law the following, "Provided, That the mere reten-
nesota case takes no notice of the fact that the instrument in *Miller v. Farmers' State Bank of Arco* was a check and not a private inland bill of exchange. This distinction has been made and it has been held that even though mere retention by the drawee of a private bill of exchange might amount to an acceptance, this would not be the rule in the case of a bank check. Nor does the instant case make any reference to section 150 of the Negotiable Instruments Law which states that where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance. It would seem that not only by its own provisions does section 137 fail to make mere retention operate as an acceptance but that taken along with section 150 it is intended to be understood as meaning that acceptance must be something more than mere inaction upon the part of the drawee. Furthermore the Minnesota interpretation involves adopting a position contrary to what was the prevailing rule in this country prior to the uniform statute. It is of course well recognized that it was not the intention of the draftsmen of the Negotiable Instruments Law to change but rather to codify the law of bills and notes as it existed, except where the language of the statute left no room for doubt on that point.

> But in Com. State Bank of Fort Worth v. Harkrider-Keith-Cook Co., (Tex. Civ. App. 1923) 250 S. W. 1069 it was held that under section 185 N. I. L. defining a check as a bill of exchange drawn on a bank, and which makes applicable thereto the provisions applicable to a bill of exchange drawn on demand, except as otherwise provided, section 137 N. I. L. does apply to checks, so that a bank on which the check was drawn, is liable to the payee if it fails to pay the check for lack of funds and then does not return it within 24 hours after it was presented to the bank.

> The case of Wisner v. First National Bank, (1908) 220 Pa. 21, 68 Atl. 955, 17 L. R. A. (N.S.) 1266, was also followed in Peoples National Bank v. Swift, (1916) 134 Tenn. 175, 183 S. W. 725.

> It should be noted that "destruction" of a bill as referred to in section 137 N. I. L., means a wilful and not a mere accidental one. Bailey v. Southwestern Veneer Co., (1916) 126 Ark. 257, 190 S. W. 430.
So much for acceptance in Minnesota by the drawee's retention of the bill. The Minnesota courts, having "gone the limit" in the matter of implied acceptance under section 137 might be expected consistently to be generous in other respects in protecting the interests of the bona fide holder of a bill of exchange as against the drawee who had not actually accepted it formally in writing but whose conduct was subject to construction as amounting to acceptance. Indeed such has been the result in one class of cases in Minnesota.

The type of case which it is proposed to consider as an instance of liability in the nature of an implied acceptance is well illustrated by First National Bank of McClusky v. Rogers-Amundsen-Flynn Co.22 There was an understanding between a stock buyer and the plaintiff bank where he was a regular customer that funds to pay checks issued to farmers for livestock purchased would be provided out of the proceeds of drafts drawn by the stock buyer on the defendant, a live-stock commission firm in South St. Paul. In spite of notice of this arrangement, the defendant drawee after receiving a certain shipment of livestock and after selling it and receiving the proceeds with notice of the outstanding draft, did not accept or pay the draft drawn upon it but credited the proceeds of the shipment to apply upon a formerly existing debt due from the shipper. It was held that the defendant was liable to the plaintiff.

There are not a great many cases involving the precise question raised in the McClusky Bank Case and the few are not all in accord. However, as the question therein presented relates to a type of business transaction which is very common both here and in other jurisdictions, the fact that Minnesota seems to have settled upon the position taken in the McClusky Bank Case as indicated by subsequent decisions following it, may have some weight in establishing the rule more widely.

Contra to the McClusky Case and practically on all fours with it is Johnson v. Clarke decided in Indiana in 1898.23 In this case a livestock dealer named Vestal bought a lot of cattle, sent them to a commission merchant for sale and drew a sight draft on the commission merchant, as he had been in the habit of doing, being at the time indebted to the commission merchant for overdrafts previously made. The bank receiving the draft for collection gave the commission merchant notice thereof and the commission mer-

22(1922) 151 Minn. 243, 186 N. W. 575.
23(1898) 20 Ind. App. 247, 50 N. E. 762.
chant in turn agreed to inform the bank in the afternoon whether he would accept the draft. In the meantime the commission merchant sold the cattle and after reimbursing himself from the proceeds for the amount due him for the overdraft of the drawer, paid the balance to the holder of the draft and notified the bank that he would not accept the draft. It was held that the sale of the cattle, even with the knowledge of the draft, under the circumstances did not amount to an acceptance of the draft and that the commission merchant was not liable to the holder for the payment of the draft.24

The more recent case of Carlson v. Stafford (Gillis Bros. Garnishee)25 would seem to indicate that the Minnesota court is satisfied with the result in the McClusky Bank Case. In this recent case, one Stafford sold certain forest products to Gillis Bros., and he bought a team from Jameson to be used in hauling out his logs. Stafford then gave to Jameson an order, negotiable in form, upon Gillis Bros., for the price of the team. A copy of this was sent to Gillis Bros., but they did not accept in writing.

Subsequently the plaintiff as a creditor of Stafford served a garnishee summons on Gillis Bros., but they nevertheless thereafter paid to Jameson the balance due Stafford under the apparently negotiable order previously referred to. The trial court held that this payment would not protect the Gillis Bros., in the garnishment because the order held by Jameson was an unaccepted bill of exchange. The report of the case brings out that Jameson

24The Indiana court says: "It must be remembered that the cattle were delivered to the defendants by Vestal before they had knowledge of the draft." In the Minnesota case the draft arrived and was brought to the defendant for acceptance before he received the cattle. In both cases the parties contemplated a draft against a consignment of cattle in accordance with an established custom of dealing, which was known also to the bank which bought the draft from the shipper. And what is really significant is that the defendant in both cases took possession of the shipment and sold it and received the proceeds. Now he either did this because he had a right to do so under a contract of factorage, as suggested by the Indiana court, or because he had a right to help himself to the payment of an antecedent debt owing to him by the shipper or he converted them, or, lastly, he took them as a purchase which he intended to pay for by the acceptance of the draft, which he knew from his course of dealing with the shipper to be outstanding.

The Indiana court says: "When a debtor has delivered to his creditor the amount due him, or has placed in his hands the means by which it may be realized without condition, the debtor loses the right of preference." But query, was there a condition in these cases, established by the practice between the consignor and consignee which gave the creditor notice of its existence, namely the condition of acceptance of the draft. It is submitted that the cases are contradictory.

25(1926) 166 Minn. 481, 208 N. W. 413.
sold the team in reliance on this order²⁶ and upon Gillis Bros., oral assurance that they would pay it out of any balance due Stafford.

The Minnesota supreme court says that as between Jameson and the defendant Stafford, Jameson would prevail in recovering from the Gillis Bros., and that the plaintiff as creditor of Stafford stands in his shoes and therefore cannot recover from Gillis Bros., in the garnishment. The opinion also states that if Gillis Bros., had refused to pay Jameson on the ground of this being an unaccepted bill of exchange, Jameson could have invoked the doctrine of estoppel and, moreover, that even if no written order had been given to Jameson the agreement involving the three parties would have operated as an equitable assignment. The court further says of equitable assignment that the rule, that a draft (not drawn on a particular fund and accepted) is not an assignment, has exceptions, where there is proof of facts which show that the parties intended that the draft should operate as an assignment and the drawee had notice thereof and assented, and that in such cases the law will give effect to the intent of the parties.

The next case to be noted is Ballard v. Home National Bank of Arkansas City²⁷ in which one Stewart was buying live stock and was accustomed to give checks on the defendant bank, later giving the bank his notes to cover the amounts paid out by the bank on such checks. The bank finally refused to continue this arrangement, but its president agreed to let Stewart go on drawing checks in this way if the proceeds of the sale of livestock so purchased should be deposited before the checks were paid. Stewart thereafter bought mules of the plaintiff and gave his checks therefor, marked, "for mules," sold the mules and deposited the proceeds which were sufficient to cover the checks. However the bank instead of paying these checks credited the amount of the proceeds of the mules upon Stewart’s old debt to it. It was held that the bank was liable to the check holders.

In Nebraska there are at least two cases which deserve notice. In Gruenther v. Bank of Monroe²⁸ the plaintiff, as payee of a check upon the defendant bank, telephoned to the drawee and asked if it was good and was told that it was. Subsequently the drawer took out all of his deposit except the exact amount sufficient to cover this check. The bank however refused to pay the check on the ground of having made a mistake in its oral state-

²⁶See reference to this point, page 135.
²⁷(1913) 91 Kan. 91, 136 Pac. 935, L. R. A. 1916C 161.
²⁸(1911) 90 Neb. 280, 133 N. W. 402.
ACCEPTANCE OF BILLS BY CONDUCT

ment that the check was good. Now of course an oral telephone statement alone is not an acceptance under the Negotiable Instruments Law, but it was held that under the circumstances of this case the bank was liable to the payee of the check. In another Nebraska case, Farmer's State Bank of Kramer v. Aksamit, hay was shipped to one of the defendants and a bill of lading and draft sent to the plaintiff bank. The consignee gave his check to the plaintiff collecting bank and got possession of the draft and bill of lading. Then within an hour he stopped payment on his check on the ground that the hay was not in good condition. He was held liable to honor the draft. The court says:

"None of this (the defective quality of the hay) excused the defendant from the performance of his legal duty to honor the sight draft which became a valid and subsisting obligation against him when he obtained it and the bill of lading from the plaintiff and retained possession of both instruments."

There is a recent Missouri case where liability must be rested upon the same grounds as in these other cases notwithstanding that the instrument in the Missouri case was not negotiable. This is Southern Creosoting Co. v. Chicago & Alton Railway, in which the plaintiff sold material to a railroad contractor who gave a draft on the defendant, upon whose job he was using the material. In several letters the defendant agreed (so the court finds) to pay the draft and did make a partial payment. The defendant was held liable for the balance due on the draft. In commenting upon this case, Professor Chafee points out: 1. that the draft was not negotiable although the court overlooks that fact; 2. that on the assumption that the draft was negotiable the decision violated section 132 of the Negotiable Instruments Law in that there was not acceptance in writing; 3. that there was no acceptance under section 134 of the Negotiable Instrument Law defining when an acceptance may be made on a paper other than the draft itself, since the payee did not take it in reliance on the drawee's promise. The case would seem to be of legitimate interest in the present discussion because the court, having treated the

---

29Prof. Chafee says in his fourth edition of Brannan's Negotiable Instruments Law, 825: "The opinion of the dissenting judges is to be preferred."

30(1924) 112 Neb. 465, 199 N. W. 733.


32(Mo. 1918) 205 S. W. 716.

instrument as though it were negotiable and subject to the Negotiable Instruments Law, proceeds to the statement that:

"An implied acceptance is any act which clearly indicates an intention to comply with the request of the drawer, or any conduct of the drawee from which the holder is justified in drawing the conclusion that the drawee intended to accept the instrument and intended to be so understood."

The court also indicates its point of view by citing cases bearing upon the problem of constructive acceptance by retention of a draft and to the effect that the general concept of constructive acceptance was not affected by the Negotiable Instruments Law.3

Was the doctrine of constructive acceptance affected by the Negotiable Instruments Law? That would seem to be precisely the point upon which all these cases must turn. And what does the doctrine of constructive acceptance include (if anything) besides the matter of retention or destruction of the draft by the drawee as referred to in Section 137 of the Negotiable Instruments Law? In the cases just presented it will be noticed that it is not the retention of the draft by the drawee that annoys the plaintiff. It is the retention of goods, credit, money or something of value previously belonging to or controlled by the plaintiff and later put into the hands of the drawee, and against which transfer of value the draft has been drawn. These cases are not covered by Section 137 of the Negotiable Instruments Law. If they are correctly decided there is in the law another kind of constructive acceptance than that defined in Section 137 or for some other reason they are not covered by Sections 132, 134 and 135.

There is another recent case which seems worth noticing at this point. There are two states which have (wisely, it seems to the writer) omitted Section 137 from their statute relating to negotiable instruments, viz, Illinois and South Dakota. Now is it to be taken that in these states, which, instead of providing for one type of constructive acceptance, have omitted all statutory

---

3 The court says in the course of its opinion, "The order is treated by the parties as a bill of exchange, mere retention would not be acceptance," but (quoting Ogden on Negotiable Instruments) "an implied acceptance is any act which clearly indicates an intention to comply with the request of the drawer or any conduct of the drawee from which the holder is justified in drawing the conclusion that the drawee intended to accept the bill and intended to be so understood." It also affirms the idea that the doctrine of constructive acceptance was not affected by the Negotiable Instruments Law.

Query, Is not this court after all thinking in terms of estoppel and would it be willing to extend this doctrine to a situation wherein it could not find what it would be satisfied to regard as furnishing the elements of an estoppel?
reference to it, the doctrine nevertheless exists? An interesting case has been decided in South Dakota, one of the two states mentioned. The case is further different from those in Minnesota and the other jurisdictions from which previous illustrations have been taken. In these cases we have been dealing with consignments of commodities sent by freight to be sold to or by the drawee of the draft. What about a case where the "goods" drawn against is money or credit, viz., a bank credit placed at the disposal of the drawee of the instrument upon which the suit is based, by the drawer, and with such drawee's knowledge that a draft has been or will be drawn for reimbursement of the drawer or other party who entered or transferred such funds or credit or performed some similar banking transaction, placing funds or credit at the disposal of the drawee. In the case of First State Bank of Lemmon v. Stockmen's State Bank of Faith, a draft had been drawn in Montana on a customer of the defendant bank. This customer, however, lived in Lemmon, the location of the plaintiff bank. The defendant's cashier went to Lemmon and had a conference with the customer and with officers of the plaintiff bank. It appeared that the customer had, to the plaintiff's knowledge, that day sent to the defendant bank items for deposit, sufficient to cover the Montana draft. So the customer made his check on the defendant for the amount of the Montana draft and gave it to the defendant's cashier. This cashier at once turned this check over to the plaintiff in payment for the plaintiff's draft on its correspondent in St. Paul which latter draft was sent to Montana as the defendant's remittance in payment of the draft issuing from there on the defendant's customer. Then the defendant dishonored the customer's check above mentioned and held the items deposited by the customer to cover his earlier indebtedness to it. It was held that the defendant bank was liable to the plaintiff bank for the amount of the check. The South Dakota court frankly says that there was not and could not be an acceptance in this case under the Negotiable Instruments Law because of the lack of writing but apparently has not hesitated in finding the defendant liable to the plaintiff on the theory of estoppel.

Now these cases seem to indicate the existence of a rule of law to the effect that one who has received from another a consignment or deposit of money, goods or credit, knowing that a draft has been drawn upon him against such deposit or consign-

\[35(1920) 42 S. D. 585, 176 N. W. 646.\]
ment or credit by the depositor or consignor thereof, and who deals with it in such terms as to repudiate the absolute right of the depositor or consignor to its disposal or control, is liable to the holder of the draft, who has acquired the same in due course. (Query, whether such holder of the draft must have parted with value or otherwise changed his position in reliance upon an actual or implied representation of the drawee that such draft would be paid?) It further appears to be necessary that the drawee of the draft should be aware of the existence of the draft at the time of his dealing with the proceeds in a manner inconsistent with the absolute right of the consignor.

In Minnesota, where the general doctrine has been most emphatically enunciated, the necessity of this notice is made the basis of the decision in *Live Stock State Bank v. Hise.* This was decided before the *McClusky Bank Case.* Here the drawee of the bill of exchange had shipped certain cattle to the drawee for sale to the credit of the shipper-drawer. They were sold by the drawee but he did not at the time have notice of the draft. He was garnished by a creditor of the drawer and the dispute is between this garnisher and the holder of the draft. The court decided that there was no implied acceptance of the draft as against the garnishing creditor and hence, as the drawee got notice of the garnishment before he learned of the draft, the garnishor is entitled to collect that the drawee holds as proceeds of the shipment and the drawee is not bound to pay the draft. Again in *Hoven v. Leedham* we have a cattle shipment case in which the same result is reached on the same reasoning. In this case the court pointed out the circumstance that the drawee "had no notice of the draft and had the right to act as though none had been issued."

---

36 It must be remembered that this has not been universally so held as indicated by Johnson v. Clark, (1898) 20 Ind. App. 247, 50 N. E. 762, stated at length in text and footnotes 23 and 24, and other cases; for example, see Kaesemeyer v. Smith, (1912) 2 Idaho 1, 123 Pac. 943, 43 L. R. A. (N.S.) 100.

37 (1921) 150 Minn. 301, 185 N. W. 498.

38 (1922) 153 Minn. 95, 189 N. W. 601, 31 A. L. R. 574.

39 It seems to be settled, therefore, in Minnesota at least, that the drawee of the draft in the class of cases under consideration must have actual knowledge of the draft or be chargeable with notice of its existence. Is he so charged with notice as to make him liable in the absence of actual knowledge? In the McClusky Bank Case, (1922) 151 Minn. 243, 186 N. W. 575; in Carlson v. Stafford, (1926) 166 Minn. 481, 208 N. W. 413, and in First State Bank of Lemon v. Stockmen's State Bank of Faith, (1920) 42 S. D. 585, 176 N. W. 646, there was actual knowledge of the draft on the part of the drawee before he dealt with the proceeds of the consignment or deposit as his own, or
ACCEPTANCE OF BILLS BY CONDUCT

Now to come down to the reasons for the rule which these cases seem to lay down. Is this good law? Is it better law and justice that where the drawee of a draft has been put in possession of the drawer's property, that the proceeds should go to the holder of the draft which draft was known by the drawee to exist or to some antecedent creditor of the drawer, either the drawee himself or some other?

Now on what theory of law is the drawee in fact held liable to the holder of the unaccepted draft? This raises several questions viz.,

1. Is the drawee liable as acceptor of the draft?
   a. At Common law.
   b. Under the Negotiable Instruments Law.

2. If he is not liable as acceptor, is he liable on any other principle?

3. If the Negotiable Instruments Law makes it impossible to treat the drawee as acceptor in such cases, does the statute also forbid that he should be held liable on other principles?

4. Does it make any practical difference whether the drawee in such a case is held liable as acceptor or on other premises of law, viz., would it for example make any difference in the measure of damages?

5. Should the Negotiable Instruments Law be amended?

The McClusky Bank Case seems to put the drawee's liability on two theories. It is rather hard to tell whether the court would have been ready to reach the decision it did in the particular case on one of them alone. The first theory suggested by the court was that this was an equitable assignment. Its other theory was that,

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

before other creditors' claims were presented to him. In the contrary Indiana case there was knowledge of the draft, perhaps not before the receipt of the cattle, but at least before their sale and before that dealing with the proceeds which repudiated the draft.

In Ballard v. Home National Bank, (1913) 91 Kan. 91, 136 Pac. 935, L. R. A. 1916C 161, which is in accord with the Minnesota cases, there was only the word "mules" written on the checks which were written by the mule buyer and upon which the defendant was held liable.
Later in the opinion the court says "Strictly speaking, the consignee is not charged with liability on the draft but on the contract implied from his acts."

After all then, we have an equitable assignment,\(^4\) or else the court is laying down a rule that the drawee is liable for the amount of the draft to the holder thereof because he has done those things which make him liable,—but why? It does not seem to have any practical effect upon the drawee's position to say that strictly speaking he is not liable on the draft. If we are to take this second theory as a workable rule of law it would seem to require further explanation. On its face the statement of the Minnesota court does in a sense seem to beg the question. On first blush it violates section 132 of the Negotiable Instruments Law which says that the acceptance must be in writing. And if we turn for help to the last sentence in the portion of the opinion dealing with this theory of the case, viz, "The acceptance of the goods is deemed the equivalent of a promise to accept," we are then confronted with section 134 of the Negotiable Instruments Law\(^5\) and with section 135, which deal with acceptances not on the paper and promises to accept but which refer to them as written and provide that the holder relying on this means of holding the drawee must have taken the instrument in reliance on such promise to accept "in writing."

Therefore, leaving aside for the moment, equitable assignment, these cases holding liable the drawee of a draft not formally accepted in writing must be explained by some reason outside the specific provisions of the statute, and, it would seem, by some reasons sufficiently cogent to overcome the at least apparently contrary provisions of the statute. It would seem to be necessary to show that there is some such concept of law which might be called "constructive acceptance" or "implied acceptance" applicable to such cases and that it exists quite independently of section 137 of the Negotiable Instruments Law which limits this concept to a particular act upon the part of the drawee.

\(^4\)For a discussion of this case and some others dealt with in this paper, from the standpoint of assignment, see Aigler, Rights of Holder of Bill of Exchange Against the Drawee, 38 Harv. L. Rev. 857, 862 et seq. A recent Minnesota case applying the theory of equitable assignment is Merchants' Nat. Bank v. State Bank, (Minn. 1927) 214 N. W. 750.

\(^5\)Section 134 reads: "Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value."
Apparently, constructive acceptance was a recognized thing in the law of bills and notes before the Negotiable Instruments Law as being of wider scope than section 137 now provides for and apparently still is recognized notwithstanding the Negotiable Instruments Law in some of the cases which have been stated in the last few pages.

In the South Dakota case of *First State Bank of Lemmon v. Stockmen's State Bank of Faith*, the court expresses the same conclusion reached in Minnesota but in slightly different terms. The South Dakota court says that there was no acceptance because an acceptance must be in writing under the Negotiable Instruments Law and that liability is not based on a true acceptance but on *estoppel*.\(^4\) It is suggested that in the other cases herein stated the courts were thinking in terms of estoppel but apparently hesitated to use the word. In other words, the drawee of a bill of exchange who has got goods, credits, etc., knowing that there is an outstanding draft which is intended to be met out of the proceeds of such goods or what not, will be treated as liable to the holder of the draft just as though he has accepted it. This is not because he has in fact done so but because justice requires that he be presumed to have accepted it and because there are present the elements of an estoppel. Thus we have what may be called an implied or constructive acceptance.\(^4\)

This theory of course makes it necessary to find the elements of estoppel in the case. The drawee must have made a representation; the payee or other holder of the draft must have changed his position relying on it. In the cases which have held the drawee liable there has been emphasis on the drawee's notice of the draft's existence. Where there has not been actual notice of the existence of the particular draft, there has been acquiescence in a custom by which the drawee is charged with notice and out of this he has been made responsible for the representation, arising out of the fact of the drawing and negotiation of the instrument by the drawer thereof, that the authority to do so existed.

---

\(^4\)The language of the Minnesota court to the effect that the liability of the defendant in the McClusky Bank Case while equivalent to that of an acceptor was on a different theory had already been referred to, and in Carlson v. Stafford, (Minn. 1927) 218 N. W. 413, stated in text at note 25, the court frankly talked in terms of estoppel.

\(^4\)See 2 Joyce, Defenses to Commercial Paper 1049 quoting from the case of Dumbeck v. Walsh, (1913) 179 Ill. App. 239. "So an oral acceptance may under certain conditions operate as an estoppel of the acceptor to deny such acceptance and render him liable for the payment of the bill or order."
of position by the plaintiff or one under whom he claims title, is of course necessary in an estoppel and this of course only exists where the paper was negotiated for value to one without notice of any facts which would limit the apparent authority of the drawer to make the draft.44

If situations like this may be accepted as sufficient to make out an estoppel, we may say as to the questions put on page 141.

1. The drawee is not liable as acceptor of the draft under the provisions of the Negotiable Instruments Law. It is to avoid the unfortunately strict wording of the Negotiable Instruments Law that this (perhaps too attenuated) reasoning of some of the cases comes to be used. At common law he could be held liable and there was no serious logical reason for not treating him frankly as an acceptor.

2. He is liable in some jurisdictions upon a sort of constructive acceptance explained by the courts by reference to the concepts either of equitable assignment or estoppel.

3. The question is whether the statute intends to limit or prevent the drawee of a bill of exchange from being held liable in such situations as we are here considering. Is it simply one of the many situations which were not specifically provided for in the Negotiable Instruments Law and are left to the saving language

44It has often been stated that "Authority to draw a bill is an implied agreement for acceptance on the part of the drawee who gives the authority." For collection of authorities see 8 C. J. 316 note 76 and again, "By the law merchant such authority amounts to an acceptance if definite and certain and known to and relied on by the holder in purchasing the draft." This statement from Corpus Juris refers to the necessity that the authority be definite and certain but elsewhere it adds that a promise to accept may be implied from the relationship of the parties and the usages of trade.

A recent federal case is important as suggesting a situation in which custom may be sufficient to charge the drawee of a draft with liability as acceptor. In Furness, Withy & Co. v. Rothe, (C.C.A. 4th Cir. 1923) 286 Fed. 870, 27 A. L. R. 1185 the master of a Norwegian vessel drew on the owners for the purchase of coal for fuel. The draft was deposited by the coal dealer in his local bank and sent through the usual channels for collection. It was dishonored by non-acceptance on the part of the drawee for reasons arising out of a misunderstanding as to the rate of exchange to be applied in the particular transaction. The drawee was held liable in the federal court in this country and in the opinion it was said, "When the drawer makes a draft on himself, or authorizes another to draw on him that is a virtual acceptance and he is liable as drawee without formal acceptance." The "authority to draw" in this case was established to the satisfaction of the court by evidence of a custom for ship-masters to draw upon their owners for necessary supplies, the court saying, "No contrary instructions being shown, the owner is liable to accept and pay the draft."
of section 196? (In any case not provided for in this act the rules of the law merchant shall govern).

4. By virtue of the nature of estoppel the measure of damages is the same in these cases where the drawer is held liable as if he were an actual acceptor, and such has been the measure of damages imposed in these cases.

5. If substantial justice has been achieved in a number of cases in several jurisdictions as illustrated, in view of the great difficulty in securing the passage of any suggested amendment in all the states at approximately the same time, it would seem unwise to attempt an amendment of the law in this respect. It should be remembered that it was over twenty-five years from the time the Uniform Negotiable Instruments Law was first proposed for adoption until it was finally enacted by the last of the states. There should be no attempts to tinker with the substantial statutory uniformity we now have, at least until they have been widely discussed and there is an articulate expression of the probability that proposed changes will be adopted by most of the state legislatures practically contemporaneously.

Notwithstanding what has been stated just above, the conclusion is submitted that for the most part cases of the sort here presented go too far in imposing liability on the drawee in the absence of a written acceptance. Substantial justice has doubtless been done in the majority of such cases, but they cannot in most instances be satisfactorily explained in the face of the statute by any such generalizations as the courts have made about the drawee being liable on a draft of which he knows or ought to know, simply because he has got the goods against which the draft was drawn (for after all that is the question to which we are seeking an answer and not an answer itself). Moreover these cases cannot all be explained on the basis of estoppel. It is too difficult to show that the representations acted upon by the plaintiff or his indorser can be imputed to the defendant drawee upon whom liability is sought to be imposed. The representation to the payee or other purchaser of the draft, if there is any such representation, must be that which is made by the drawer in executing and negotiating the instrument. But there is no privity by which the drawee can ordinarily be connected with this, until he has actually accepted the draft. On the other hand, where there is a true estoppel, there seems to be nothing in the Negotiable Instruments Law which would specifically enough indicate any intent on the part of its
authors so to change the previously existing rules of law, that the holder is prohibited from taking advantage of it. Probably, however, it is only in those cases where there is clearly shown an authority from the defendant to draw this particular draft and such authority is known to the person through whom the plaintiff claims title that we can properly impute the essential representation to the drawee. Without this of course it is impossible to work out a true estoppel.

Now it does seem that substantial justice demands that the drawee should pay in such cases as have been made prominent in these pages. But is it worth while to make the effort to secure modification of the Negotiable Instruments Law in all our many states, even in view of the non-uniformity on this point now existing?45

45At the 1927 meeting of the Commissioners on Uniform Law there were presented a number of proposed amendments to the Negotiable Instruments Law prepared by Professor Samuel Williston of the Harvard Law School and it is not improbable that the commissioners will proceed to bring in a proposed amended act at an early meeting.