Identification of the Holder and Tender of Receipt on the Counter-Presentation of Checks

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THE reader of this article will find it concerned with this question: with what measure of impunity may a commercial bank on which a customer has drawn a check refuse to pay the check unless the holder is identified and receipt of payment offered? The reader will note that this question thus put excludes consideration of presentment by methods other than over the counter. Consideration, then, is limited to a relatively small number of transactions taken in the aggregate, by far most checks drawn on banks in this country are presented either through the clearing house or by mail. In clearing house and mail presentations the paying bank has the assurance of moral responsibility and, usually, the solvency of a presenting bank that is known, that is easily reached and that cannot afford—under pain of reciprocation—to evade indemnification, payment is often solely by book transfers, and when the presenting bank is not a holder, it usually expressly guarantees indorsements, and it always gives a receipt necessarily, because for its own good it indicates on the check that it is the presenter to whom payment is to be made and often to whom

*Of the Bar of New York City.

No figures or estimates appear to be available. An official of the New York Clearing House has hazarded the guess to the writer that no less than 99% of checks presented are presented through the clearing house in New York City. This may be, perhaps, rather figurative than an attempt at accuracy. Of course, it is highly probable that in a particular bank the ratio between counter presentations and mail or clearing house presentations may be different from that in another bank. Mere preponderance in number does not indicate preponderance of practical importance. Nevertheless it must be an uncommon community, taken by and large, in which counter presentations are at least nearly as frequent as presentation in the other modes. It will be noted that even in communities where banks are few a very large proportion of checks would be deposited by customers for credit; to a considerable extent problems of identification and receipt are fewer.
pavement has been made (by way of anticipation). Moreover it seems to be true that as a practical matter drawee banks do require identification and execution of a receipt, and they do manage to receive both in the particular forms in which they, the banks, desire to receive them.\(^2\) The reader of this article may thus conclude that, speaking practically, the question with which it is concerned is of an importance far from tremendous. Such a conclusion is proper. Yet the question has given no small amount of trouble to theoretically minded persons.\(^3\) Is not this a sufficient reason for an article?

In limine, let it be said that the relevance of the data which will be gathered together for examination will be determined and the data selected will be arranged in accordance with their significance in aiding us to fix or prognosticate their potency in the regulation of the conduct of banks and customers to each other by the force of judicial decision. For this reason, it must be admitted, the approach is essentially non-normal since litigation is apt to be non-normal and the occasion for litigation is almost always a non-normal one. Human inter-relations are in the largest part necessarily self-regulating and differences are settled by self-adjustment. To repeat a point not infrequently made, it may be that for litigational purposes not the requirements of the normal but precisely those of the non-normal situation should be considered as most persuasive. Concretely, the judicial rules as to identification and receipt should be determined according to the requirements of times of panic, when counter-presentations are most frequent, or according to the requirements of country banks rather than city banks. The precise circumstances of the case at bar, whatever they be, should for administrative reasons be ignored. But it is conceived that there does not seem to be any sufficient ground for making a distinction here between the normal and the non-normal situations.\(^4\)

\(^2\)As will be demonstrated later.


The problem may be less important in the identification aspect in England and elsewhere where there is a legal sanction to crossed cheques and payments on forged indorsements. See infra, note 77.

\(^4\)Another approach would be to study comparatively the content of all the existing controls—the control exercised by the courts of
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Of course, as is obvious, we shall deal in reality with two distinct questions— one, of identification; two, of receipt. But the sequel will show that these questions are bound to each other by common considerations. And also, they have a dramatic kinship. For when a check is presented over the counter, the teller will want to know whether the person demanding payment is the person who, by the terms of the check, is entitled to receive payment, and then he will want a sufficient memorial of the fact that payment was made to this person. It is likewise obvious that in dealing with the questions raised, two decisions have to be made. The first is, what standard pattern of conduct on the part of banks do we desire to set up. The second is, what are the sanctions, legal or non-legal, direct or indirect, which under all the circumstances it is best to impose in order to enforce the standard chosen.

Now, the layman (legalistically unsophisticated) would probably reason in this wise. If, as is the fact, the bank will not be privileged to debit the customer's account (that is, acquire a claim against the customer for reimbursement or reduce the scope of its obligation to him) in case it should turn out that the person to whom the bank makes payment is not the person designated by the customer to receive payment, is it not only common decency to permit the bank to make payment conditional on identification? And is it not but fair that the bank shall have some sort of written evidence that the holder has received payment? For, conceding that the bank need not pay unless the holder surrenders the check, the bank still does not prove, prima facie, payment to the holder in an action by the bank against the holder merely by profert of the check. Whether such common decency and such fairness have been or may be expected to be motivating factors in legal decisions, is the subject to which we turn.

It would not be infrequent for the problems discussed to be called problems in the performance of conditions. In that sense, the word "condition" would be a symbol, in addition, for the necessity that a check be exhibited to the drawee, that payment be demanded, that the exhibition and demand be at a proper time and at a proper place. The use of the word "condition" is then merely a convenient and rather crude manifestation of an attempt to classify events subsequent to delivery of the check and precedent to payment. In an accurate sense it would be difficult to distinguish other contingencies, as, for example, that the check be drawn, that it be drawn in proper form, that it be drawn by a customer, that the customer provide a sufficient credit balance and so on.
At the outset we must—as is usual—consider the relevance of the Negotiable Instruments Law or the so-called law of bills and notes. Strictly, that statute and that law would seem of no relevance. For there is no question here as to claims “on the instrument” between parties to it, the Negotiable Instruments Law does not purport to regulate any other relations. In a broad sense, however, it may be that the statute and that law have application. The argument in favor of such application must be that when the holder presents for payment the bank has to decide whether or not it will pay. The drawee’s order, it would be argued, is as it purports to be, unconditional, it is not pay John Jones if he gives you a receipt and if he identifies himself. At the utmost, this argument includes a concession that the bank might be permitted sufficient time to examine the check for genuineness and formal propriety and to examine the state of the drawer’s account, and that during this time it might investigate the holder’s title. But the concession would include no more. If, then, (the argument would proceed) the bank demands and the holder refuses performance of other conditions than presentment as described by the Negotiable Instruments Law or the rules of bills and notes, the check is dishonored in the sense that recourse against prior parties.

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6This must be true of the statute as a whole, although undiscriminating persons seem often to think that if a check is involved in a transaction the Negotiable Instruments Law must govern. Occasionally there may be a section which, because of phraseology, appears to be applicable. Section 87, for instance, says that “where the 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.” An examination of the cases before and after the drafting of the statute will show that almost all the cases in which this section might have been applicable involved parties to the instrument and did not involve either the duty of the bank to pay or its privilege to debit on payment an acceptance or note domiciled with it. We simply have another example of the sort of draftsmanship which states rules in the form of exhortation rather than of consequence. The advocate, nevertheless, will always rely on such draftsmanship for suggestive material to add weight to an argument.

7Logically, the order as the bank receives it need not be the same as the order as the holder supposes it to be. The relations between the bank and the drawer might make the order conditional on all sorts of events not stated in the check. The rules as to formal requisites in the law of bills and notes apply, it would seem, solely to the literal wording of the written order.

8That is to say since the bank might take the time to do the one, nobody is harmed if it also does the other, so long as no more time is expended. See infra, p. 288.
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among them the drawer, accrues. In fine, if the drawer may be charged it must be that the drawee has defaulted.

This argument may be said to be based on the fallacy of four terms. That is to say, it does not follow that the "dishonor" which conditions recourse is the same "dishonor" which imposes a duty on the bank to respond in damages to the drawer-customer for breach of duty to honor. In short, it may be said that to the extent that the liability of bank to customer is under examination we must look to the contract between the bank and the customer. True, advancing such a counter-argument is merely answering formalism by formalism, but it does prove the absence of a logical barrier. And since traditional logic does not bar us from further investigation, desire for a more adequate treatment compels us to consider whether in fact the drawer would be charged by failure of the drawee to pay. If he would, then we have a cogent reason, though not a conclusive or a convincing one, for charging the drawee with default to the drawer. At the present juncture, however, all that need be said is that whatever considerations of convenience or of policy justify the imposition of conditions of identification and receipt as between bank and customer will be applicable mutatis mutandis between holder and prior parties. Garments of words in which to clothe the result are easily found.

We may likewise dispose of the argument made by a reputable authority that a banker refuses to honor at his peril, though

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9This would follow in situations suggested in note 7 supra. For example, in addition, see the discussion in Whitaker v. Bank of England, (1835) 1 C. M. & R. 744, where the court distinguishes between a formal presentment by a notary necessary to charge the drawer, though made after banking hours, and presentment which is not sufficient to charge the bank because made after banking hours.

10Our traditional intention of the parties formula purports to require evidence of a prior consensual arrangement which is merely effectuated by the forces of political government. But in banker-customer relations the traditionalist grows uneasy in attempting to fix the contract; the hoary formula tends to compel the fixation of a historical point at which the "contract was made," and this seems most difficult. Is it when the account was opened? Is it when the first check was presented? Is it when the check in suit was presented? Such a logic would not be an insurmountable barrier, but it would be a serious one. It remains true, the writer thinks, that there is justification for a non-particularistic disposition of legal situations: systematization without direct reference to the effect of each rule in society has its value, although much less value than lawyers have in the immediate past been willing to give it, if the point has at all occurred to them.

12See infra, p. 318.
the holder refuse to make identification. This authority is none other than the draftsman of the Bills of Exchange Act of 1882. In the last edition of Chalmers, Bills of Exchange, there appears the following:

"Holder's Identity.—Under some continental codes, when a bill is payable specially, and the holder is unknown to the payer, he is bound to give some proof of identity. Nouguier, sec. 896, and this appears to be the law in the United States. In England, it is conceived that possession is prima facie evidence of identity, and that if the payer doubts the identity of the person presenting, or the genuineness of the instrument, he must pay or refuse payment at his own risk. There is a dictum by Maule, J., that in such case the payer would be allowed a reasonable time to make inquiry but having regard to the duties of the holder this seems very questionable. The usual practice is to offer to pay under an indemnity."

In spite of the fact that this quotation is from an annotation to sec. 59 of the Bills of Exchange Act which provides that a bill is discharged by payment in due course, Chalmers could hardly in seriousness make a distinction in this respect between bills and checks. Taking his argument, therefore, as applicable to checks, the gist of it seems to be the product of a confusion in the use of the phrase "prima facie." Undoubtedly, at a trial of an action a plaintiff can make out his case as a holder by showing possession, but it far from follows that this rule of procedure is also a rule of substantive law in the sense that it governs conduct other than forensic. Here again, then, we must face considerations of convenience and policy, for here again there is no rule of law which binds us.

But we must turn to the decisions. That is to say, to what extent is further discussion foreclosed by judicial opinion?

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13Citing: "Daniel, Negotiable Instruments, sec. 1618. It certainly is the practice."
15Italics the author's [Ed.].
17Chalmers, Bills of Exchange, 9th ed., 237
18He would have to make a distinction based on other considerations than those of statutory construction, that is. On the merits, there may be room for a distinction between bills and checks—the writer being sufficiently ignorant of the practice as to bills, will take the word of Chalmers and Paget as to English practice, but will not commit himself otherwise. See infra note 77.
So far as concerns the problem of identification, discussion is far from foreclosed. Examination has revealed no decision to the effect either that a bank is or that it is not in default in its obligation to its customer if it refuses to pay the customer's check on the ground that the holder is not sufficiently identified. Except for scattered indications of opinion, little even of dictum has been found expressly in point. The clearest statement seems to be that by a lower court in Indiana in a case where the question was whether the bank had paid a check to the payee designated in the check. The court said:

"Where a check is presented for payment by a person who is unknown to the bank, it becomes the imperative duty of the bank to require him properly to identify himself as the payee named in the check."

And then it added,

"For its own protection the bank may go further. It may refuse payment until the stranger brings in a person whom the bank knows to be financially responsible and who is willing to become an indorser."

The last quoted sentence relates to the postliminary problem of method of identification we may therefore postpone comment upon it. It is the first sentence that requires comment at this juncture. And as to this first sentence, it is to be noted that the court's language is vague. When the court says that the bank is under a duty to require an identification, does it mean merely that the bank had better require one in order to make sure that it will be privileged to debit the drawer's account? In a legal sense, such a procedure would be practically without consequence. For

\[19\] Chalmers does not offer any other argument than the prima facie one, and he offers that, it seems in fatalistic resignation; we therefore need not consider the argument further. But Chalmers' statement may be less fallacious than it seems when one considers sec. 60 of the bills of exchange act, 1882. See infra, note 77.

The dictum of Maule, J., referred to, it must be remembered, was made before the passage of the section which is the ancestor of sec. 60 of the bills of exchange act, 1882. Robarts v. Tucker was decided in 1851, 16 Q. B. 560.

\[20\] See infra, p. 73.


\[23\] Apart from its admissibility in evidence—as to which nothing is here said—or its effect in being otherwise persuasive without being, to use Hohfeld's apt though by no means accurate expression, operative.
as a rule it would be unimportant how much care was exercised by the bank in investigating the title of the person paid if he was not the person designated by the terms of the customer's order, debit is unavailable. Then does the court mean that the bank is under a legal duty to the customer to require an identification on the pain of an action for damages? If it does, the statement is manifestly absurd. On the other hand, if the court means that the bank is under a necessity to require an identification on pain of being legally powerless to debit the customer's account, then the statement is not only absurd but is opposed by considerable authority that any payment in the course of business at request is debitable. The statement must be taken to mean, in the light of the succeeding sentence, that the bank may with impunity refuse to pay unless the holder gives satisfactory identification. It may also mean that recourse against prior parties would not be available to the holder on his refusal to submit such identification. In any event, the inference is fair that the bank would be privileged to conduct its own investigation into the holder's title, if the conduct of the investigation be reasonable.

**THE JUDICIAL DECISIONS RECEIPT**

When we come to the problem of receipt we find judicial authority somewhat more abundant. This authority may be divided into actions by customer against bank for dishonor and statements made ratione decidendi in actions by holder against drawer.

The cases involving actions by customer against bank for dishonor are unsatisfactory in the sense that they offer little help as a basis for statement either of an existing rule in the jurisdictions in which they were decided or of prophecy as to the decision of future cases in those jurisdictions or elsewhere. *Eichner v Bowery Bank,* a case decided by the first department of the appellate division of New York, was an action for wrongful dishonor of the plaintiff's check presented for pay-

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24 This does not mean that the exceptions to the rule are important. Indeed, so far as actual litigation goes, the reported cases on the question of the customer's care in discovering forgeries, in notifying the bank and so forth, far outnumber the cases deciding merely the simple proposition stated in the rule.


26 See infra, p. 318.

ment by the payee. In rendering judgment for the bank, on the bank's demurrer to the complaint, the court made this statement: 28

"There was no allegation in the complaint that the check was ever indorsed by the payee either before or at the time or times it was presented to the bank for payment. So far as the action may be regarded as one for damages caused by the non-payment of the check, this latter allegation was a necessary one in the complaint, and in the absence of such allegation the complaint was defective and the demurrer properly sustained at Special Term. This precise question was passed upon in the case of Rowley v. National Bank of Deposits 29 by the general term in this department."

If this case be taken to make the tender of a receipt by the holder a condition to the bank's duty to pay, it must also be taken to require this receipt to be in the form of the holder's name written in the form of an indorsement. But such an interpretation is dubious, as is indicated by the court's reliance on the Rowley Case. Rowley v. National Bank of Deposits did not pass upon this precise question. The report indicates a decision only that where in an action by a drawer of a check against the bank the complaint alleges that presentment was made by a bank in which the payee deposited the check and which credited the amount of the check to the payee's account, the complaint is demurrable if it does not also allege that the payee had indorsed the check. In fact there was likewise no allegation that the presenting bank had indorsed or offered any sort of receipt, and no mention was made of this fact by the court. 30 Furthermore, and more important, the court in the Eichner Case seems to think of the holder's name written on the check not merely as a memorial of the receipt of payment made on the surrender of the check, but as an integration of warranties made as if on a transfer of the check. Yet there is hardly any statement that is more trite in discussions of Bills and Notes than that in a surrender to the drawee there do not attach the warranties that attach on a transfer. The point, however, need not be labored here. It will receive later notice. It suffices that the court, it seems, was merely again in that con-

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29 (1892) 63 Hun 550, 18 N. Y. S. 545.
fusion which Brannan and his editor so frequently tell us is so frequently made.31

Another case, decided by a lower Alabama court32 seems even more clearly to have indulged in the same error, still another, in a lower court of New York, does not state whether the presentment was by payee or indorsee and merely states, citing both the Eichner Case and the Rowley Case, that the complaint should have alleged that the payee had indorsed.

It is in the few reported opinions rendered in actions by holder against drawer that the receipt problem is at least seen as existent. Here there appear to be altogether three cases citable. One,33 decided in Tennessee, holds (perhaps some people would say, "says") at the most, that where a check is in the hands of the drawee bank and it is disputed whether the amount of the check has been paid the holder, the presumption of payment which arises on proof that the bank holds the check is rebutted by proof that the holder's indorsement does not appear on the instrument. The court seems to consider the indorsement to be the common form of memorial of receipt of payment. On the other hand, two cases may be cited as refusing to sanction the demand for a receipt. Indeed, McCurdy v. The Society of Savings;34 decided in 1882 by a lower court of Ohio, was—so the reporter tells us—a test case. Osborn v Gheen,35 decided barely four years later in the District of Columbia, has been more frequently cited.

In the McCurdy Case the plaintiff was an indorsee under a blank indorsement from the payee of a check payable to the payee or order. The defendant was the drawer.

"This check," the court says,36 "was duly presented by an agent of the holder for payment to said City Bank [the drawee], which then and there had funds of the drawer in its hands, and the bank refused to pay the same unless the person who presented it for payment would endorse it. This the holder refused to do and at once caused the check to be protested for non-payment, and therefore the plaintiff brought this suit against the Savings Bank as drawer of the check to test the question."

The court ordered judgment for the plaintiff.

33Pickle v. People's Nat'l Bank (also sub nom. Pickle v. Muse), (1890) 88 Tenn. 380, 12 S. W. 919.
35(1886) 19 D. C. 189.
36(1882) 6 Ohio Dec. 1169, 1170, 11 Am. L. Rec. 156.
The reasons professed by the court are important for our purpose. The court limited its discussion to the case in hand. All that the bank could require would be proof of the genuineness of the payee’s indorsement, and for this purpose a reasonable time for investigation might be allowed the bank (although as to the genuineness of the drawer’s signature the bank would have to satisfy itself without the holder’s aid). The court suggested that the bank might be justified in demanding from the holder proof that the payee’s signature was genuine. But as to the holder’s indorsement the court said—

"it is an attempt to limit the negotiability of such paper, and to fix terms and conditions for its payment not warranted by the law or by the drawer of the check, and to which neither he nor the holder is obliged to submit."

Yet if the court desires to obviate impediments to negotiability that would arise from the imposition of conditions, it is difficult to see why proof of custom of banks to require and to receive such receipt-indorsement would not be relevant as indicating actual practice. In any event, the court says that the usage is not reasonable and for the following reasons.

"It [the indorsement] does not make the person’s endorsement genuine, if it was in fact forged, it does not increase his liability to the bank in such a case, it may cause the holder who is frequently a person who has no actual interest in the paper, to wit: an agent’s attorney, trustee, etc., to run the risk of a liability by a fraudulent or improper reissue of the note and bill with his endorsement on it; neither can it be fairly justified on the ground that the signature is in effect a receipt of the holder, that he has received money. First, for the reason that the possession of the bill or check is evidence of its payment, Second, because a party having the obligation of paying money cannot insist on a receipt as a condition precedent to payment; Third, if it were reasonable to call for a receipt in all instances, it would not follow that there was a right to call for a blank endorsement."

We must postpone until later comment on the use of the blank indorsement as a receipt device. The important question at this point is raised by the court’s statement that "a party having the

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37(1882) 6 Ohio Dec. 1169, 1171, 11 Am. L. Rec. 156.
38The accepted notion of laissez-faire, in other words, would seem to teach that the policy of the courts should be to let good enough alone. If the “business world” gets along with such a practice in fact, and such a practice is not merely not exceptional but is the ordinarily expected thing, then the courts are merely impertinent in interfering.
39(1882) 6 Ohio Dec. 1169, 1172, 11 Am. L. Rec. 156.
40Citing: Longworth v. Hardy, (1858) 2 Disney (Ohio) 75, 13 Ohio Dec. 47.
obligation of paying money cannot insist on a receipt as a condition precedent to payment.” What basis either in prior decision or in policy is there for such a statement?

In *Osborn v. Gheen*, the question before the court was whether the auditor in a partnership accounting might properly reject, as improper proof of a payment made by one of the partners, a check to that partner’s order, stamped paid by the bank, found among the other partner’s vouchers, but never indorsed by the payee or anyone else. Obviously, then, the question was perhaps more one of evidence than of the substantive liability of the drawer.  

It was in that respect similar to the question involved in the Tennessee decision discussed earlier. The court said (unnecessarily, it is obvious)

“The bank upon whom the note or bill of exchange is drawn is authorized and required to pay the money to the payee, knowing him to be the identical man indicated, without any indorsement and without any receipt. Beyond that, a prudent man might well hesitate to indorse a paper which was given to him to be paid at the bank for this reason that if he indorsed it in blank and without qualification, if the bank pleased, it could, as we know banks sometimes do, put that paper into circulation again, and if it should get into the hands of a bona fide holder, he might hold the payee responsible upon his blank indorsement. Therefore a prudent man might properly decline to indorse, in the legal sense of the term, a paper when it was paid to him.”

In substance though not with entire coherence, nothing different was said in the *McCurdy Case*. We therefore make the same disposition.  

We must, then, make investigation into the foundation in precedent of the notion, apparently general and quoted unqualifiedly, that “a party having the obligation of paying

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41 Cf. supra, note 23.
42 19 D. C. 189, 194.
43 In South Africa we have authority to the effect that a receipt is demandable, and, indeed, in the form of a signature in blank, so long at least as there is no objection to the form of the receipt demanded. Price v. Natal Bank, (1887) 8 Natal L. R. 153 was an action by a payee against the bank on a cashier’s check. The payee had indorsed the check in blank and had it sent by a clerk (apparently, of his attorney) to the bank for payment. The clerk was asked to write his name on the back as a condition of payment, and on his refusal to do so, the bank refused to pay. The court granted costs against the plaintiff on the ground that it was proper for the bank to require a receipt. But it should be likewise noted that this result may have been affected by Roman-Dutch law, which was said to be, in *Van Noorden v. De Jongh and Hofmeyer*, (1892) 9 S. C. (Cape of Good Hope) 296, 298, that a debtor is not bound to pay unless the creditor is ready and willing to give a receipt.

money cannot insist on a receipt as a condition precedent to payment.” This is in a sense a collateral investigation, but it is a necessary one.

**Effect of Demand for a Receipt as a Condition of Payment in Non-Banking Situations**

The threshold yields the discovery that the situations in which the statement about which we are concerned has been made have involved the sufficiency of a tender by debtor to creditor to stop interest and shift costs. This discovery, however, should not make further investigation irrelevant. In order that an action by customer against bank be maintainable, it is the long settled rule in this country that a proper demand by customer upon bank and an improper refusal by bank to customer be proved. It seems most probable that the considerations which move a court to refuse to impose the penalty of loss of interest and costs upon a creditor to whom a debtor has not made a tender which is considered proper will likewise move the court to refuse to a customer an action against his bank brought on the allegation of a proper demand for payment and an improper refusal by the bank to pay For this purpose it would be immaterial whether the customer’s action be for the sum demanded or for injury to his credit. If, moreover, the action is for the sum demanded, clearly there can at least be no recovery of interest as damages nor, incidentally, of costs.

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43See, e.g., 1 Morse, Banks & Banking, 5th ed., sec. 289e, 322 (there are many other cases than those cited). In England this was not settled until Joachimson v. Swiss Banking Corp., [1921] 3 K. B. 110.

44The very fact that the tender rule is stated as a proposition without the addition of the penalty indicates this. In the ordinary debt, for whatever reason, a debtor may be put to defend an action though he is entirely willing to pay.

45The customer may sue, in classical terms, either in indebitats assumpsit for his balance or in special assumpsit for breach of contract; in the first case he can probably add a count for injury to his credit and must allege a demand and refusal. In the second case he recovers the balance as an item of damage. The practice from Martetti v. Williams, (1830) 1 B. & Ald. 415, and later cases, was to count on the bank’s undertaking. It seems clear that the customer is not barred from suing twice: once for the amount of the check, plus interest from dishonor, and again for injury to his credit.

As another example of other sanctions for tenders, there is the rule, codified in N. I. L. sec. 20 (4), that a valid tender of payment by a prior party will discharge a person secondarily liable. Indeed, in such a case the tender need not be kept good until the trial, whereas it would if the question were solely of interest and costs.

It is to be noted that in the case of the action against the bank,
Of greater importance is our next discovery. We find that
the statement in question, though glibly repeated by some otherwise reputable writers, has been broadly made in purest obiter, without discussion and without amplification. The statement, for the most part, has been made in cases holding, with citation of cases likewise holding, that where a debtor demands of his creditor as a condition of payment a receipt in full, the tender will not be sufficient to stop interest and shift costs. In this holding these cases have the unvarying support of much authority, and it will be hardly denied that their holding is thoroughly justifiable.

On the other hand, there are dicta and statements by some the possibility of any recovery at all is conditional on a proper demand, and if a demand for a receipt have not the effect of not invalidating the tender, no action at all is maintainable. But in the ordinary debtor-creditor situation where no demand is necessary to condition an action, the debtor may in fact never receive a receipt for his money if it happens to be the fact in the particular jurisdiction that the creditor need not enter a satisfaction piece or sign some other instrument showing final payment of the obligation as a condition to payment. Here, then, the sanction is solely in the incidence of interest and costs.

See 3 Williston, Contracts sec. 1814, Hunt, Tender sec. 253, Leake, Contracts 7th ed., p. 651, 2 Greenleaf, Evidence (Lewis's ed.) p. 706; Story, Contracts 5th ed., p. 587, is ambiguous: he says a tender is bad, if made "on condition that the creditor will give a receipt or a release in full."


As see 45 Cent. Dig. Tender sec. 58; 19 Dec. Dig. Tender secs. 64 (2), (5); 21 Second Dec. Dig. Tender secs. 64 (2), (5), 12 Brit. & Emp. Dig. Contracts, p. 330.


Richardson v. Jackson probably overrules the dictum in Cole v. Blake, (1743) 1 Peake, N. P 179. Lord Kenyon had said, in Cole v. Blake, "that it had been determined that a party tendering money could not in general demand a receipt for the money. There had been one case indeed in the Exchequer, in which Sir Wm. Watkins was a party, where it was determined that the King's receiver was obligated to give a receipt, but that was an exception to the general rule." In Richardson v. Jackson, Rolfe, B., according to 9 Dowl. 715, said: "In the present state of the law I should wish to encourage every prudent person to have some evidence of his payments." 8 M. & W 298, adds: "for if they do not, in case of death the representatives may be deprived of all evidence of the payment."

See the nisi prius case of Jones v. Arthur, (1840) 8 Dowl, 442, in which Coleridge, J., vacillates.
somewhat fewer but nevertheless more respectable since they are at least accompanied by argument, to the effect that the demand of a receipt will not per se invalidate a tender. And what is more, there are statutes in a number of jurisdictions, chiefly inspired by a section in Field's Draft of the New York Civil Code, and a section in his Code of Civil Procedure, which expressly provide that a tender shall not be invalidated by the demand of a receipt.

The Code of Civil Procedure section, adopted and still in force verbatim in a few jurisdictions, states that "whoever pays money is entitled to a receipt therefor, from the person to whom payment is made." The Civil Code section, adopted and still in force verbatim in other jurisdictions (California, however, having both sections), is somewhat narrower: "A debtor has a right to require from his creditor a written receipt for any

There appear to be divers statutes in various jurisdictions providing for receipts for payments of taxes, fees to public officers, etc.

Parsons, Contracts, (8th ed.) *644 says: "The tender must be unconditional; so, at least, it is sometimes said: but the reasonable, and, we think the true rule is, that no condition must be annexed to the tender which the creditor can have any good reason whatever for objecting to: as, for instance, that he should give a receipt in full of all demands. It may not perhaps be quite settled that if the debtor demands a receipt for the sum which he pays, and if this be refused, retains the money, he will thereby (though always ready to pay it on those terms) lose the benefit of his tender. But the authorities seem to go in this direction." In the footnote he adds: "It is believed that no case has gone so far as to hold that a tender would be bad because a receipt for the *sum tendered* was requested."

Wharton, Comment. on the Law of Contracts 328, says "it has been held" that a demand for a receipt in *full* vitiates a tender. Chitty, Contracts, 17th ed., 890, is to the same effect.

Calif. Code Civ. Proced. 1923 sec. 2075, Mont. Rev. Codes 1921, sec. 10681, Oreg. L. 1920, sec. 876; Utah Comp. L. 1917, sec. 7216; Alaska Comp. L. 1913, ch. 67, sec. 1512. The section in Field's final draft, submitted to the New York legislature in 1850, was sec. 1860 (Final Report of the Commissioners on Practice and Pleadings [1850] 782). No such section, however, is to be found in Field's 1889 draft of the Code of Evidence (Final Report of the Commissioners to report a Code of Evidence [1889]).

Calif. Civ. Code 1923, sec. 1499; N. Dak. Comp. L. 1913, Civ. Code sec. 5814; S. Dak. Rev. Code 1919 sec 772; Idaho, Comp. Stat. 1919, tit. 45, ch. 224 sec. 5671. This was sec. 720 of Field's Civil Code of 1865 (The Civil Code of the State of New York, reported complete by the commissioners of the Code [1865] 213). This report was the ninth. The annotation is as follows: "This provision is new Its propriety should seem scarcely to admit of doubt." Sec. 715 is: "An offer of performance must be free from any conditions which the creditor is not bound on his part to perform." The annotation states: "It is proposed, however, to sanction a demand for a receipt." But no reference is made to the Code of Civil Procedure of 1850.
property delivered in performance of his obligation." In three other states, the provisions deal in terms with tender.\textsuperscript{44}

Insofar as the argument is made that a tender must, as it were in the nature of things, be unconditional to be effective, the answer is two-fold. First, the question is begged, second, it is at least true that there are conditions in all tenders, as, for instance, that the creditor shall not evade the debtor when the debtor makes a tender, that the creditor shall take the payment offered and not require the debtor to place it in the creditor's pockets or in his hands, and so on. As it has sometimes been said,\textsuperscript{55} a tender "may be surrounded by reasonable conditions."

Insofar as the argument invokes pragmatism, it must be to the effect that having to give a receipt would be burdensome on

\textsuperscript{44}So far as has been found, Iowa Code 1924 sec. 9450 represents the oldest statutory provision in this country. The section first appeared in the Iowa Code of 1851, one of whose draftsmen was Charles Mason (the others being William G. Woodward and Stephen Hempstead). Charles Mason had practiced law in New York. Time enough had passed from the appearance of Field's Code of Civil Procedure for the Iowa commissioners to have seen it. Possibly the commissioners had been in correspondence with Field. On the other hand, of course, so far as the evidence available to the present writer shows, it is possible that the idea was original with the Iowa commissioners. The Iowa commissioners might have left us some commentary if it were not for the Iowa Senate which defeated a resolution that Mason and Woodward should explain the new code. See Powell, History of the Codes of Iowa Law, (1912) 10 Iowa Journ. of Hist. & Polit. 20. In any event, the Iowa section is clearly phrased differently from the Field section. The Iowa section reads: "The person making a tender may demand a receipt in writing for the money or article tendered, as a condition precedent to the delivery thereof." The Field section reads: "Whoever pays money, or delivers an instrument or property, is entitled to a receipt therefor from the person to whom the payment or delivery is made and may demand a proper signature to such receipt as a condition to the payment or delivery."

Connecticut and Rhode Island have statutes showing a common origin but which appear to be wholly unconnected with either the Iowa or Field provisions. Apparently Connecticut was the first. Now found in Conn. Gen. Stat. 1918, sec. 5772, it was originally adopted in 1879 (Laws 1879 ch. 26.) A marginal note merely contains a reference to 30 Conn. 344, as to which see supra, note 48. Since the case in 30 Connecticut was decided in 1862, we may perhaps attribute the new section to long-slumbering anger at a dictum or an unfortunate experience of somebody whose adversary cited 30 Connecticut about 1879. The statute reads: "The requirement or demand for a receipt for such amount of lawful money as may be offered or tendered on account, or in payment or part payment of any indebtedness, shall not prevent such offer or tender from being regarded or held to be a legal tender." R. I. Gen. L. 1923, Act. xxi, ch. 338 (4921) sec. 8 merely substitutes "of a receipt" for "for a receipt" and omits from the words "tendered" until "shall." It appears to have been enacted in 1904 (Pub. Laws, 1904, 1151).

As to the successive sections in the English stamp acts see intra, note 102.

\textsuperscript{55}See notes 51 and 52, supra.
an illiterate creditor, or a blind one, or a disabled one. Such an argument might have been listened to without merriment if advanced some centuries ago in regard to non-business transactions, but even then not if advanced in regard to business transactions, and certainly not today. At most, one might admit, if the debtor wishes a receipt, he should provide the writing material and prepare the receipt itself, leaving for the creditor merely the labor of signing his name. It seems clear that a rule that a creditor may with impunity refuse to give a receipt of payment runs counter to the expectations of men because it runs counter to their practice. Where such a rule is proposed, its proponents bear the burden of justifying its adoption.

**Reasons of Convenience or Fairness Justifying Demand of a Receipt**

But what are the reasons of convenience or fairness which should justify a payer—and more particularly a drawee bank—in demanding a receipt as a condition of payment? In the first place, of course, in case of dispute between drawer and bank as to the question of whether payment has been made to the proper person, the receipt of that person properly authenticated would establish a prima facie case and avoid the treachery of lapsing memories and failure of witnesses. The mere possession by the bank of the check would not be of equal strength. Moreover, should it turn out that the bank may recover from the holder the amount paid

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56This argument has been in effect made by Hunt, Tender sec. 253. That author says: "If a debtor for any reason wants to have evidence of a payment other than his own testimony, he should take witnesses with him at the time he goes to pay the money." Yet the same author says (sec. 246) that the condition of identification is "lawful" and "such requirement is a prudent precautionary measure."

57Cf. Lang v. Meader, (1824) 1 C. & P. 257 (decided under English Stamp Act referred to infra, note 110). The same qualification is suggested by the terms of Field's Code of Civil Procedure provision (see supra, note 53). The payer of money, it says, "may demand a proper signature to such receipt as a condition of the payment or delivery."

58That is to say, a signed receipt is, as Wigmore says, 5 Wigmore, Evid. 2d ed., sec. 2518, "the strongest evidence, and some courts seem to give it the force of a real presumption." The possession of the check would be effective both as against the drawer and as against the holder, perhaps, if the holder's name appeared on the instrument, but it would seem that, especially when invoked against the holder, not much evidence would be necessary to rebut an inference of payment from mere possession, though such an inference might be allowable. Wigmore, ibid. See 2 Daniel, Negotiable Instruments 5th ed., sec. 1647. By sec. 74 of the N. I. L., it should be noted, "the instrument when it is paid must be delivered up to the party paying it"—see note 67 infra.
(as it may if the check was altered or a prior indorsement forged) the bank may establish prima facie the fact of payment by proof of the execution of the receipt. In view of the importance of the role of the commercial bank in our society and the usual difficulty of securing truthful witnesses able to recall the facts of payment, the execution of a receipt seems a most reasonable desideratum. Lastly, it is important at least for bookkeeping purposes that the drawer should have immediately available evidence that payment was received by the holder. If it is a reasonable condition of payment that the holder shall surrender the check, it is no less reasonable that he shall execute a receipt. Indeed, it seems almost beyond argument that a bank should be privileged to refuse payment on a check unless the holder signs a receipt of payment—as well on the ground of benefit to the bank as on the ground of benefit to the customer-drawer who, the bank may reasonably assume, will expect that the bank will produce the receipt of the person to whom payment was made.

The Forms of Identification and Receipt Which Should be Sanctioned

Having, then, arrived at the point where it seems justifiable that a bank's demand for some form of identification and of receipt of payment should be sanctioned and is sanctioned, it is sub-

59 The case is much stronger against the holder when the receipt is offered as an admission against interest. See authorities in note 51, supra.

60 One should add that the receipt may become very important under the Dead Men's statutes in case the person who, it is alleged, received payment, is now dead and it is sought to give the details of a transaction with him. 1 Wigmore, Evid. 2d ed., secs. 488, 578. At least, the question might be arguable. In New York, however, the following sentence in the statute (Civ. Prac. Act 347) dispels doubt. "A person shall not be deemed interested for the purposes of this section by reason of being a stockholder or officer of any banking corporation which is a party to the action or proceeding, or interested in the event thereof."

61 As one banker put it, the bank is under a duty to the drawer not only to return vouchers but to secure the holder's receipt. In the actual working of business, this aspect of the problem is most interesting. It suggests that the bank may not be privileged to reduce the scope of its obligation to the drawer by the amount of the check because the customer is not given a convenient means—indeed, the convenient means—of proving payment as between him and the holder.

62 Sec. 74 seems to make it so. See note 58, supra. The language is that "when it is paid" "it must be delivered up." This might suggest a condition subsequent. But when one considers the inconvenience of a rule placing on the drawer the necessity of pursuing a recalcitrant or evilly disposed recipient of payment in order to secure the check, it seems clear that the section must be interpreted as laying down a
mitted, by the force of law, the problem becomes, what form or forms of identification and receipt shall we sanction and what not? To solve this problem requires, it would seem, a consideration first of the forms which banks in fact demand, receive, and consider satisfactory, and second whether the use of such forms may be unnecessarily burdensome or unfair to customers who draw checks or to holders who receive them. That is to say, assuming the function of law to be the regulation of banking as a smoothly operating institution in a society tolerably satisfied, what conduct, if sanctioned by the force of law, would be most conducive to the efficient performance of that function.

To discover the relevant practices of banks (and, by inference, the customary practice of the people dealing with the banks) all over the United States, a questionnaire was sent to a selected list of representative bankers in every federal reserve district. The bankers chosen in each district, so far as possible, represented small, medium-sized and large banks, covering both urban and rural populations. In addition, personal conversations were had with the New York commercial bankers, personally acquainted with the practice in large, medium-sized and small banks in different parts of New York City. The results of this investigation, generally, may be set down here. It should, however, be noted that it is not impossible that some of the answers received represent to some extent what the banker answering would like rule of conditions concurrent at most. That is, the surrender of the check is required, as regards the drawer, to prevent the possibility of a holder’s in due course charging the drawer after payment by the drawee.

This is the force of the present discussion. It is usually possible to leave desirable standards of conduct to enforcement by non-legal sanctions, and often it is most useful to do so. An example is to be found in the case of the demand note given the bank when it is assumed, in practice, that the extension of credit given in return will be indefinite in term; the reason for making the note demand instead of time is very often precisely this. If a bank exercises its legal power of making demand or bringing suit or dishonoring the customer’s orders (which seems clear, though it is not quite so clear that notice is not a condition to the bank’s power—authority is rare; the consequence may be the more drastic one of loss of business. The legal sanction, in other words, will operate, in practice, as a safety valve in unusual contingencies.

4140 questionnaires were sent out, 79 answers were received. The total percentage of answers is a fair indication of the percentage in each district except that in the sixth district (federal reserve city being Atlanta), the eighth district (St. Louis), the tenth (Kansas City) and the eleventh (Dallas), the percentage of answers was less than 50 per cent. The questionnaires were sent out as part of the study of commercial bank credit, being made under the general direction of Professor Underhill Moore of the Columbia Law School.
to be the manner of doing business rather than the manner in which business is actually done. But such a possibility in a few cases can not affect the accuracy of the results here described.

**Composite of Banking Practice Forms of Identification**

Let us take first the matter of identification. Most banks do not require any identification where the item presented is payable to bearer and is small. What a small item is varies, in some banks it is up to $25, in others $50, in others—apparently—$100. In case the amounts are larger, it is not infrequent to reach the drawer or seek to ascertain by other means that the holder is entitled to payment. There is, of course, no legal necessity for banks to seek any identification in case of bearer checks, but the bank's solicitude may be induced by motives other than legal necessity. Where a check payable to order is presented indorsed in blank, the holder will not only be asked to identify himself, but will be asked to bring proof of the genuineness of the indorsement of the payee. Indeed—and this may be some measure of the frequency of transfers from payees to other persons not bankers—shrewd tellers will frequently refuse to pay such checks except on the most convincing proof of valid title.

As a general rule it may be stated that where a check is payable to order it is the practice of banks in this country to require an identification. It is true, however, that in some banks if the check be for a small sum no identification will be demanded of the holder unless the teller's suspicions are in some manner aroused. There are a number of reasons for this, and these reasons hold good for any laxness in identification. The bank may be, or thinks it is, insured against improper payments. The amount may be so small that one would suppose that no thief would risk discovery for so small a prize the volume of business

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65 Occasionally such an admission was made. This is one of the psychological factors that must always be taken into account.
66 See note 63 supra.
67 A paying teller in one of the world's largest banks stated to the writer that he would not pay a check indorsed in blank by a person not the payee. In that bank, situated in the New York financial district, counter presentations are comparatively rare and persons receiving checks do not pay bills by means of them or otherwise negotiate them. Yet if the teller's statement is any indication of his actual conduct, here is further proof that actions against banks for dishonor under such circumstances are practically inconsequential.
68 Such laxness may be immoral and possibly a basis for defense by the insurer against the bank; but it is nevertheless, as one banker writes, a real factor.
IDENTIFICATION AND RECEIPT

is too large to pay serious attention to such cases—the loss is bound to be, comparatively speaking, only slight. The methods of identification, however, vary depending on the circumstances surrounding the payment, the size of the item and other considerations. In a few banks—obviously not large banks—there may even be a rule that in certain instances the decision of whether or not the identification is sufficient must be made by a bank officer. We may note as we pass that it is less frequent for the banks to take the initiative in making the investigation, rather the rule is that it is for the holder to satisfy the passive bank. Often the drawer is communicated with by telephone and asked to describe the payee-holder; or a messenger may even be sent to the drawer personally, where the telephone seems of dubious reliability.

When the item is comparatively small—the definition of smallness being frequently the same as that described in the previous paragraph—nearly all banks will usually be satisfied with identification made by the holder himself: production of letters, initials or clothing or jewelry, passport, automobile license, and the like, till the teller is satisfied. But in larger items, third persons must be asked to identify or the bank will not pay. It may certify, perhaps, but it will not pay. It is in this case, as will hereafter appear, that existent practice becomes important for our purposes.

In some small banks, usually situated—in districts of relatively stable population, identification as a rule is oral. The holder secures a person known to the bank to be respectable and honest, which very often means financially responsible, if

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69 In particular localities or instances, however, it may be far from slight. A general laxness may tend to encourage more and more thievery by the use of checks for small amounts.

70 This is a device which is resorted to, for instance, in the 42nd Street district of New York City. The frequency, in that vicinity, of blackmail, swindling and similar practices giving rise to defenses on the part of the drawer is so great that bank tellers will be more often suspicious of irregularity than they might in other vicinities. Of course, the irregularity may not be in the identity of the holder but still it may be, and a telephone conversation with a person purporting to be the drawer is not safe. Whether or under what circumstances a bank will not be privileged to debit the drawer if he has defenses against the holder but has not stopped payment, is a subject which can not be discussed here.

71 This suggests the different meanings which "payment" may have in different contexts.

72 Such, for instance, appear to be the banks in the South and in the far North West. It merely means that experience has not shown extra precautions to be necessary.
This person, more often a customer of the bank, appears at the teller’s window and states that he knows the person in possession of the check, and that his name is so-and-so (which is the name of the payee on the check). He may add how he came to know him and that he is a reliable person, and so forth. The teller then may merely make a notation on the check in pencil that so-and-so identified the payee, and perhaps take the holder’s address (as is, in fact, done in any case). There is thus no assumption in terms by the identifier of the risk of the payee intended not being the person receiving payment but being simply a person of the same name.

In the larger number of cases, however (taking the country as a whole), the identifier will be asked to write his name on the check in some manner. He may write it away from the banking house under the indorsement of the holder, and the bank teller at his window may thereafter observe the holder repeat the indorsement and may then compare both indorsements. The identifier may or may not, in this case, qualify his own signature with words to the effect of “for identification.” In a number of banks, it seems to be the practice for the signature by the identifier to be accompanied by the words “for identification only.” On the other hand, many banks demand a blank indorsement. The evidence indicates that the identifier in many banks is told that by indorsing in blank he guarantees the identity of the holder with the payee. Other answers tend to show that the identifier is told he is assuming the full liability of an indorser, much as though he were transferring to this bank a check drawn on a third bank. In other banks, nothing—apparently—is told the identifier by way of explanation, while in others still the legend customarily given, received and requested seems to be “indorsement guaranteed” or something of like import. But it is assumed in almost every case where there is a signature unqualified that the signature operates to impose on the identifier liabilities much greater than those imposed by a mere oral identification. Whether or not these signatures may be said in fact to impose such liabilities in general.

With this compare the statement from Citizens Nat’l Bank v. Reynolds, (1919) 72 Ind. App. 611, 126 N. E. 234. Solvency, in other words, is a convenient index to reliability. A bank teller or officer can not make a prolonged and intimate investigation into the character of the identifier. Experience shows that in most cases a man with a going business and a business reputation will not lightly give assurance or make representations leading to pecuniary reliance by others.
whatever they may be conceived to be in particular, is a knot which must be untied but which will be untied later.

In payroll checks, we have a special situation. Industrial or trade workers are frequently not able to deposit checks with banks. Such checks are therefore either cashed with tradesmen or paid over the counter. Here we have a variety of practice. Not infrequently, special agreements to govern payment of such checks are made with the employer-drawer. Under some agreements the bank will have on file a specimen copy of the signature of each employee paid by check, and when the check is presented the holder is asked to sign his name for comparison with the signature on file. Under other agreements, the drawer or a duly delegated officer of the drawer countersigns a specimen signature of the payee on the check and when presented the holder repeats his signature. In other cases, apparently, the payees have identification cards which they exhibit. Finally, it is quite common that payroll checks, if presented by the payee within such a period after delivery that the chances of loss or theft are few and slight, are honored without any identification. It should be noted, however, that in the last case and indeed in any of the cases that have been discussed, special agreements may be made with the drawer that the bank shall be privileged to debit the drawer if it pays in the exercise of due care. The risk, if any, of having to pay the payee a second time is one which the employer-drawer assumes. In this respect, the situation of the bank is similar to that in which it is placed where the drawer writes on the check "waive identification"—a not uncommon occurrence.

Many payroll checks may have such notations on them. Another manifestation of the same experimental notion is to be found in the hortatory notation on payroll checks: "Not good if not presented within — days."

Although assumed by the drawer-customer as between it and the bank, nevertheless the risk may, perhaps, be in actuality shifted by the drawer-employer to the employee-payee. This solution may be socially inequitable, but it is not, it seems clear, legally unsanctioned. The most common uses of the "waive identification" device are in telegraphic orders and bank drafts. If John Stiles of St. Louis is going to New York and wants to be able to secure funds in New York, he will get his local bank to draw in his favor a check on a New York correspondent. The check is delivered to John Stiles. The drawer bank will notify the drawer that the check, described, has been drawn; and the drawer will at the same time describe the payee. Often a specimen of the payee's signature is included in the advice. When the signature is not included, the payee will have to go through the usual procedure of identification. This procedure may be embarrassing. In such an event, the drawer will add, "waive identification." The same
Thus the devices by which the commercial bank seeks to minimize the risk it assumes of paying without the privilege of reimbursement from the drawer are many. The devices by which the bank secures from the holder a memorial of receipt of payment are, per contra, few. Inquiries yield the following results.

Composite of Banking Practice. Forms of Receipt

First. The answers are unanimous to the effect that the usual practice is to demand and to receive from the person presenting for payment a signature in blank on the back of the check.

Second. Many bank officers would pay without any such receipt-indorsement if the check be in terms on its face payable to bearer. Most of these would still demand an indorsement of receipt of payment if the check had been indorsed in blank by the payee.7

Third. With a very few exceptions, receipts “received payment” subscribed with the signature of the holder would be accepted. Those banks that refuse to accept such a legend, either at all or without a further blank indorsement, apparently suppose that the blank indorsement imposes on the recipient of payment the substantive liabilities consequent to a transfer made by blank indorsement. It further appears that “received payment” is true if John Stiles, in New York, asks his St. Louis bank to send a telegraphic order to its New York correspondent. Specimen signatures are not, in the present state of science, conveniently transmissible in such a case. Clearly “waive identification” will not be added where the risk of loss seems more than usually probable: the payee will have to take the trouble of identification.

77 There is of course adequate legal reason for distinguishing between a check payable to bearer on its face and one indorsed in blank. Where the check is payable to bearer on its face, the bank assumes the risk of forgery of the drawer’s signature, insufficiency of the drawer’s account, and alteration. These contingencies can be in most cases well taken care of by the paying bank. But in the case of forged indorsements, the bank is in a helpless position, under the general rule in this country. It has been otherwise in England since 1853. Bills of Exchange Act, 1882, sec. 60, reenacting in substance the provision in the Stamp Act, 1853 (16 & 17 Vict. c. 59). This section substantially appears likewise in statutes elsewhere in the British Empire. See, e.g., Australian Bills of Exchange Act. 1909 sec. 65 (1), South African Bills of Exchange Act, sec. 58; Negotiable Instruments Act of British India, 1881, sec. 85. Similar provisions are found on the continent. See Lorenzen, Conflict of Laws Relating to Bills and Notes 47 Canada rejected the section. See Maclaren, Bills, Notes and Cheques, 5th ed., 146. But the legal sanctions to the use of crossed cheques have a most important relevance. See Bouteron, Le Cheque 82-96. As to the question of whether the bank even in England is protected by payment to one who does not purport to be other than the payee, see infra, note 95.
Indorsements are most common when the holder is a bank, that it is not infrequently printed on checks given as expense vouchers or it is written by the drawer as a memorial of the transaction between him and the holder (e.g., “received in full payment when endorsed”). A rubber stamp indorsement “Pay to” the drawee bank often occurs when the holder is a customer depositing for credit.

Fourth. It appears to be almost universally true that the bank will refuse to accept a receipt written on a separate sheet of paper.78

Finally, there is common among bankers (though it is far from universal) the notion that the receipt-indorsement operates as does a transfer-indorsement, at least in the respect that the holder is obligated to reimburse if the drawer’s account prove insufficient. Some bankers go even further. Such notions may be an indication of what is actually and successfully done to non-litigious persons. On the other hand, there is evidence that bank officers will sometimes explain to holders that the indorsement operates only as a receipt.79

The Considerations Determining the Forms to be Sanctioned

These things, then, being what banks actually do, why not sanction the doing? To be enabled to answer this question with intelligence, however, we must yet explore the consequences that may possibly beset the person who identifies and the person who gives his receipt. More specifically, we have to ascertain what obligations the identifier assumes by identifying in the various ways mentioned and the recipient of payment by executing in the various ways mentioned a memorial of receipt. If these obligations seem unnecessarily forced by drawee banks, the courts may—because they have the power and the prerogative—give the customer his action against the bank if it refuses payment on any conditions other than these.

Memorials of Identification and Receipt Other Than Signature in Blank

So far as both identification and receipt are concerned, we need not devote much consideration to any device other than the

78This is not to be understood as meaning that banks in practice refuse; rather, that bankers have not been confronted with such meticulous holders; bankers merely say they would refuse such receipts.

79This evidence is not considerable. Most bank officers, rather, do not appear to have given the matter much thought.
signature in blank. As to self-identification by the holder, no discussion is necessary. As to oral identification by a third person, waiving the applicability of the statute of frauds, it would seem that in the ordinary case the identifier would assume solely the obligation of responding in damages if the identification should turn out to have been false and either negligently made or made with knowledge of the falsity. If it merely appeared that the person claiming to be the holder and the person designated by the terms of the check were different persons with the same name, the identifier would not be subject to an action by the bank. It might, in addition, be that under special circumstances a court might spell out a representation by the identifier that in his opinion the person purporting to be the holder was honest and probably rightfully entitled to payment. A clear case of assumption of liability as a guarantor of identity would, it is submitted, be held necessary in order to impose a liability of such guarantee on the identifier. The same would be true of an indorsement "for identification only" or the like.

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80 It may be that a bank will ask a holder to assume obligations other than those which would be imposed on him without express assumption. This contingency need not be gone into here.

81 The question whether the statute of frauds may not be applicable is by no means an unimportant point. First, logically, there is the problem of interpretation of language and second, the problem of whether the statute applies. Whether, except in the case of an undertaking so express that it would be almost impossible not to say that the statute did not apply, the conduct of the identifier would be spelled out as a promise to answer for the default of the recipient of payment might depend on all sorts of formalistics. A distinction would perhaps be drawn between a promise to make whole if the recipient, being obligated to repay, should not repay and a promise to pay if there should be a loss, regardless of the existence of any obligation on the part of the recipient. If there were a serious misrepresentation, liability could be predicated on deceit. Lahay v. City Nat'l Bank of Denver, (1890) 15 Colo. 339, 25 Pac. 704. If there were negligence, there could be the old problem of Derry v. Peek or its more recent development in the form of plain liability for negligence.

Even where a blank signature is used to memorialize, the problem arises again if it is assumed that the N. I. L. is not per se applicable. It is worth noting that some answers received indicate a practice of making payment to the identifier that may be primarily "to have money pass," but in the respect of the statute of frauds it may have a magic effect. In any event, this discussion may assume, as is most probable, that the statute will be no defense.

82 Some answers from bankers indicate that such a representation would not be satisfactory; probably most banks would refuse it—certainly if an indorsement were asked for. See Commercial Press v. Crescent City Nat'l Bank, (1874) 26 La. Ann. 744.

83 "Signature O. K." presents a question of interpretation. Probably it would be held to include a representation that the person purporting to sign that name was known to the identifier by that
Similarly, in receiving payment by giving a receipt on a separate sheet of paper, or writing above his name a legend like "received payment," the signatory, it would be held, assumes no substantive obligations to which he would not otherwise be subject- ed. In short, the two-fold mystery is whether and when the obligations of warranty which attach to the transferor by blank indorsement attach. first, where identification, next, where receipt of payment, is integrated by a signature in blank pictorially identical with an unqualified transfer indorsement.

**Signature in Blank for Identification Decided Cases**

Of decided cases on the effect of blank indorsements for identification there are but few, and they are inconclusive. On the one hand, we have a Louisiana decision of 1874 which admitted parol evidence of a conversation between the identifier and the teller of the drawee bank tending to show that the only liability assumed by the identifier was that of the identity of the person to whom payment was made by the bank there being no dispute on this score, judgment was given for the plaintiff. On the other hand, we have a lower court decision in New York decided after the adoption of the Negotiable Instruments Law. The payee had raised the check. Without discussion or adequate detail to indicate whether the admission of parol evidence was in issue, the court held the identifier liable to the bank for the amount by which the check had been raised. The reason for liability was tersely stated by denominating the identifier an accommodation indorser within the meaning of the Negotiable Instruments Law; i.e., it would not mean merely that this was the signature of the person who bore the check. Any other result would be, in practice, absurd. But whether a warranty of authenticity of indorsement would also be added seems more difficult. The same, indeed, might be said to be true of "identification guaranteed" or similar legends which do not in terms limit representation to belief.

Cf. Faulkner v. Bank of Italy, (1924) 69 Cal. App. 370, 231 Pac. 380, in which the plaintiff, a customer of the defendant bank, was charged with the amount of a forged check drawn on another bank deposited by X and against which X had drawn. X, a fellow employee of the plaintiff, asked the plaintiff to introduce him to his, the plaintiff's bank. The plaintiff did so and X then opened an account in the names of himself and the plaintiff, jointly, depositing the check in suit and drawing before collection. It was held that the plaintiff's private account could not be charged, the court saying that the plaintiff's statement to the bank was true. The court noted that the check had not been indorsed by the plaintiff.  


Law In between these decisions, we have the decision of a lower Pennsylvania court. The bank had paid on a forged drawer's signature. The court argued that the identifier was liable to the bank within the meaning of the Pennsylvania statute which abolished the rule of *Price v. Neal* in Pennsylvania. The parts of the statute relied on were

"That whenever any value or amount shall be received in payment of any check by the holder thereof, from the endorsee or payer of the same such endorsee as well as such payer shall be legally entitled to recover back from the person previously holding or negotiating the same."

It was immaterial, the court said, that the payment had been made to the party identified and not to the identifier. But the court further said that under the negotiable instruments law the bank was a holder in due course and the plaintiff liable as an indorser within section 66. So far as concerned the evidence offered by the identifier in respect to the conversation surrounding the writing of his name on the check, the court said.

"Nowhere in the evidence is there any definite agreement that the plaintiff's endorsement should not have its full legal effect. The proof of the agreement must be clear, precise and indubitable."

Therefore judgment against the bank on a directed verdict was reversed and judgment ordered entered for the bank.

If the identification were incident to a purchase of the check, that is, a transfer for value to a bank other than the drawee bank, it would seem clear that under sections 63 and 64 of the Negotiable Instruments Law (which, respectively, provide that anyone who without qualification places his name on an instrument other than as maker, drawer or acceptor, shall be liable as an indorser and that any person placing his name on an instrument before delivery shall, roughly, be liable to subsequent parties as an indorser) parol evidence would be inadmissible to show that a person who had placed his name on a check did so under an agreement that his signature was to serve merely as a memorial of identification. The cases squarely on the point before the Neg-
IDENTIFICATION AND RECEIPT

Table Instruments Law so held; and in any event the liability of the identifier would be that particular form which was imposed on irregular indorsers in the particular jurisdiction. May the prognostication be with assurance made that the liability of the identifier for payment, as distinguished from purchase, will be the same? If not, which if any of the divergent results reached in the three cases discussed may be said to represent what most courts, after adequate presentation of argument, would decide?

SIGNATURE IN BLANK FOR RECEIPT: DECIDED CASES

Before passing to that interesting inquiry, we should dispose of the cases on receipt-indorsement. The disposition is short. Stated in general terms, there is practically no dissent and by this time it is indeed trite learning that neither within the provisions of the negotiable instruments law nor without them is


The first two cases cited, and the last, involve bank checks and, perhaps, it may be said that in them the parol evidence would not be convincing if admitted. In the Rossi Case, the evidence was simply that the bank teller told the identifier "he would have to indorse it [the check], and put his name there, indicating under hers [the impostor's]" and the identifier said: "Don't pay her until you send it east and see if it is good." It happened that the person intended as payee and the impostor had the same names. The appellate court affirmed a judgment of the trial court for the bank. In the Cochran Case, the draft was payable to Owens. The identifier said to the bank teller: "I know this man: his name is Will Owen" and added that he had known him for two years and always as William Owen. The cashier told the purported payee to indorse "and then pushed the draft to Cochran [the identifier] and he wrote his name just below that of Owen." The Susquehanna Case, where the payee's name had been altered by the impostor, held that to charge the identifier he must be charged as indorser. In Geneser v. Wissner the action was on a promissory note and the court refused to allow parol evidence to show there was "no contract" though it would allow evidence, it said, to show a different contract. The remaining cases are clear, apparently, for the point though they involve bills of exchange. Cf. Amer. Bk. v. Macdray & Co., (1905) 4 Phillip. 695 where "the signature is O. K." was altered by the addition of "payment guaranteed," and the court held that the identifier was thereby discharged.

90The variety of rules may be found set out in Norton, Handbook of the Law of Bills and Notes, 4th ed., 183-193; 1 Ames, Cases on Bills and Notes 269 note. The extreme case from which one starts is that the signature is devoid of any meaning and hence is subject to any kind of parol evidence to explain what it was intended to memorialize.
there a rule which imposes on the holder of a check who surrenders the instrument to the drawee for payment the obligation of a transferor. Of course, this is not a proposition of logical necessity but a description of doctrine and results actually reached. Nor is this rule, it seems clear, affected by the fact that the person presenting for payment—holder or no holder—writes his name on the back as a condition of payment. The long line of cases, for instance, that once the drawee has paid it cannot recover back from the recipient-holder when it turns out the drawer's account is insufficient illustrates that, regardless of whether the holder or recipient had written his name on the check before payment, there exists perforce no warranty of solvency. The same holds true of the other warranties.

On both these points see note 31, supra. In Keene v. Beard, (1860) 8 C. B. (N.S.) 372, 382, Erle, C. J., said: "It is true that a man's name may be and very often is written on the back of a cheque or bill without any idea of rendering himself liable as an indorser. Indeed, one of the best receipts is the placing on the back of the instrument of the name of the person who has received payment of it. Such an entry of the name on the instrument is not an indorsement. So a man frequently writes his name on the back of a bank note. In all these cases, the act of writing may or may not be an indorsement according to circumstances." See also Grant, Banking, 7th ed., 19 Chalmers, Bills of Exchange 9th ed., 219, note 5 to sec. 56 of the B. E. A. ("If a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liability of an indorser to a holder in due course.") "It is clear that an indorsement by way of receipt does not come within this rule." The rule is often stated to be one of whether the signature was written "animo indorsandi" as see 1 Morse, Banks and Banking, 5th ed., 701, Pagen, Banking 3rd ed., 120. See also Brannan's Review of Daniel on Negot. Instr., 17 Harv. L. Rev. 580.

Brannan, Neg. Instruments, 4th ed., 556 et seq. Cf. Levy v. Bank of U. S., (1802) 4 Dall. (Pa.) 234; McLendon v. Bank of Advance, (1915) 188 Mo. App. 417 In these two cases the drawer's signature was forged, but it is not stated whether the customer wrote his name on the back:—if invariable practice is an indication of what may have been the fact in these cases, especially in the last, it seems safe to say the customer wrote his name on the back.

In Ark. Nat'l Bank v. Gunther, (1917) 127 Ark. 149, 191 S. W 901 the court put the risk of insufficiency of the drawer's account on the recipient who was not even the holder. The customer had written his name on the back but this ought to be immaterial. The agreed statement of facts had the following: "It is appellant's custom to
are some cases which, in suggesting an exception to the rule of *Price v. Neal* if the person whom the bank has paid dealt with the forger or, as it is said, was in a better position than the drawee to discover the forgery, say that the indorsement of the recipient-holder operated to lull the drawee into security, or even as a warranty of payment. But it is clear that—however sustainable the purported exception—the "indorsement" per se has no operative effect.

The rule then should be so stated. not only is parol evidence

require persons who present a check for payment to indorse the same for the purpose of holding them for the draft or check. There was likewise evidence of a previous requirement in similar situations that the customer-plaintiff "guarantee" the bank against loss. The decision must be justified if at all only on the court's statement that "under the peculiar facts in this case the indorsement amounted to a contract to indemnify the bank in case Greene [the drawer] failed to pay the check."

94*First Nat'l Bank of Crawfordsville v. First Nat'l Bank of Lafayette*, (1891) 4 Ind. App. 355; *Ellis & Morton v. Ohio Life Ins. Co.*, (1855) 4 Ohio 628; *Williamsburgh Trust Co. v. Tum Suden*, (1907), 120 App. Div. 518, 105 N. Y. S. 335; *Danvers Bank v. Salem Bank*, (1890) 151 Mass. 280, 24 N. E. 44. In the last case the court said (284) that the holder bank having written "for deposit to credit" above its own name, "the indorsement, which was not necessary to the transfer of the check, was a guaranty of the signature of the drawer, and the plaintiff had a right to believe that the indorser was known to the defendant by proper inquiry."


95One must note some cases under sec. 60 of the English Bills of Exchange Act, 1882, or its antecedent, 16 & 17 Vict. ch. 59, sec. 19, and the replicas in the other British acts. That section provides: "When a bill payable to order or demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority." The cases involve actions by holders against drawee banks in trover for conversion. It appears that if the person presenting for payment purporting to be an indorsee under an indorsement in fact forged, then the bank is protected, but the mere receipt-indorsement is not such as will protect the bank. *Hare v. Copland*, (1862) 13 Ir. C. L. 426; *Nat'l Bank of S. Africa v. Paterson*, (1909) T. S. S. Afr. 322; *Smith v. Comm'l Bkng Co.*, (1910) 11 C. L. R. (Austr.) 667. But see the confused opinion in *Charles v. Blackwell*, (1877) L. R. 2 C. P. D. 151 and *Cookson v. Bank of England*, (1900) 1 Paget, Legal Decisions affecting Bankers 2. Still, *Hare v. Copland*, (1862) 13 Ir. C. L. 426 may actually be interpreting the statute to cover any case where the holder "indorses" though only by way of receipt. See also Russell & Edwards, Australian Bills of Exchange Act 177-185. Cf. Paget, Banking, 3rd ed., 134-135.
admissible to show that no liability as an indorser was contemplated, but there is not even a presumption of liability similar to that arising upon a transfer indorsement.

**Possible Rules of Identifier's Liability on Signature in Blank**

But how distinguish the case of the blank receipt-indorsement from the case of the blank identification indorsement? Better, will courts, generally, distinguish between these two cases, and if they will, how? The possibilities are chiefly three. Each of them was presented in turn by the three decided cases which were referred to a few paragraphs back. One, it may be said that to avoid the confusion that existed before the Negotiable Instruments Law in regard to the liability of the irregular indorser, the liability of the identifier shall be that of an indorser and parol evidence shall not be admitted to vary that liability. Two, as another echo of the pre-negotiable instruments law age, the signature may be made substantially nugatory the existence vel non and the scope of liability shall be wholly a matter of proof. Three, there shall be indulged a rebuttable presumption of liability. To predict with confidence which of these possibilities will be chosen, it is more important to explore the considerations which may justify, in the minds of the judicial lawmakers, the rule finally definitely determined upon.

That rule will no doubt be conceived in beliefs as to convenience of administration, coincidence with the expectations of the largest portion of individual human beings affected, and conformity to standards of decency and justice. Waiving again the important question of the applicability of the statute of frauds we may say that if the evidence of which judges sitting in judgment were aware, by suggestion of counsel, by proof at trial or by personal knowledge, showed that in the greatest number of cases the liability which was expected both by identifier and by bank was that of an indorser in the sense that the liability imposed was to be in all relevant aspects the same as that imposed in con-

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96 See supra, p. 299.
97 It would probably be no defense. The argument for its applicability would particularly be insufficiency of memorandum since it would need parol evidence to explain the meaning of this blank signature which clearly does not have the meaning attached to a regular or irregular indorsement. If the liability attached be that of an indorser, there would be no question. For the general argument for the applicability see supra, note 81.
sequence of a sale with warranties, then it might be expected that that conviction would be cast into a mold of arbitrariness (i.e., a rule of substantive law) or into a mold of presumption. Whether the rule were one of arbitrariness or presumption would in turn depend on the ratio of frequency of the bargain and the difficulties of administration of a rule of presumption merely. On the other hand, if the evidence showed a considerable diversity of expectations, then the signature would be held substantially nugatory 98

The legalistics in which to express either result would not be unconvincing. In favor of substantive liability would be the analogy of the irregular indorser and sections 63 and 64. Admitting that section 64 does not apply in terms, it would be held to apply "in spirit;" less emotionally, section 64 indicates, it would be said, the policy of the legislature. The argument would perhaps be settled with a citation of section 29, defining the liability of an accommodation indorser. In favor of the rule of presumption it would be pointed out that the pictorial use of a signature in blank gives rise to an inference of fact that liability was envisaged and intended and that the relevant aspects of this liability were expected and intended to be those of an indorser, in the absence of rebutting circumstances the frequency of the use of such a device and therefore the need for predictability ought to induce the courts to prevent juries from speculating. As before, sections 63 and 64 and 29 would be cited, and as convincing analogies. Thus also, some deference would be shown for the argument that the signature should be nugatory. This argument, in turn, would be that, in any dramatic sense, the signature was clearly not an indorsement, irregular or otherwise, but was merely a notation of some sort to which no substantial legal consequence should be given. If the identification "indorsement" appeared in position and time after the receipt "indorsement," the argument would be especially convincing. In any other event, position and

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98 Expediency requires that transactions be governed by legal rules as certain as possible; the more frequent the transaction the more certain should the legal consequence be. Hence, substantive or arbitrary rules are wise where a transaction is almost stereotyped and allowance of parol evidence would create administrative confusion. In less frequently recurring situations, or in situations where parol evidence would create less confusion, presumptions are wisely indulged in. But in other situations the matter is always one of proof. Compare the Negotiable Instruments Law, sec. 63 with Bills of Exchange Act, 1882, sec. 56.
time would be said to be immaterial and the whole called by the familiar phrase, "a single transaction."

PROPHESY OF RULES TO BE ADOPTED GENERALLY IN SIGNATURE IN BLANK FOR IDENTIFICATION

The present writer will be permitted, as he is no doubt expected, to become oracular in response to the excitation of data no more before him than before the reader. It would seem that the evidence yielded by the inquiry among bankers and the existing legal devices of motivation and expression together indicate at the furthest a probability of the prevalence of a presumption. This presumption, to state it more definitely, would not be of a grant to the bank of a privilege of recourse if the drawer's account be insufficient or the drawer's signature forged. That would be an extreme at which courts would not, generally, wish to arrive, too weighty are the considerations which appear to them to justify the continuance of the rule of Oddie v. National City Bank and Price v. Neal. The presumption would, however, be of an assumption by the identifier of absolute liability if the party identified should turn out for any reason not to have been the party entitled to payment, or if the check be altered, or if it be otherwise not debitable to the amount, at least, in which payment was made by the bank. If parol evidence were offered, indicating that the signatory was made to understand by words or conduct that his signature was merely a memorial of the fact that he was to assume a different or lesser liability, such evidence would be admissible. If no other evidence were offered, the presumption would operate in the usual way, in favor of the bank. Laymen would not be startled, for their experience would indicate rough coincidence with general understanding.

The fact that it was not always clear just what liability was assumed would not be disconcerting. The fact that the identifier is usually required to be a customer or a person of some financial responsibility and the fact that the signature is required and oral identification not regarded as sufficient would, to mention a few considerations, be called to mind as indicating circumstances which would put the identifier on notice that those consequences might ensue which did, in the event, ensue.

99 Supra, note 84.
100 In analogy to sec. 124 of the Negotiable Instruments Law.
Yet it is not at all improbable that no presumption whatever would be indulged in. The liability of the identifier would be simply what the evidence disclosed. The inference would then be one of an assurance by the identifier that the person identified was of the same name as the person designated by the terms of the order in the check. Indeed, under the circumstances present there might even be discerned a representation of belief in the honesty and integrity of this stranger; and, at that, a belief based on substantial foundation. If that be so, then a fortiori the similarity to blank indorsement need be no obstacle to sanctioning its employment to memorialize identification.\textsuperscript{101}

Certainly, it is submitted—and at the risk of repetition—the Negotiable Instruments Law compels no single result. The argument may be made that sec. 63 and sec. 64 are not interdependent but coordinate and 63 relates precisely to a case such as the one in hand. But it seems clear to the writer that internal grammatical refutation is complete in any event. If sec. 63 imposes liability, sec. 66 defines that liability. Sec. 66 says that “every indorser warrants to all subsequent holders in due course” the things enumerated. A drawee bank is not a holder in due course. Not that the language of the whole section is so far encased in steel as to be hopelessly immalleable, but to say the least it simply requires no emotion or confusing rhetoric to see that as a matter of grammar and in the sense taught us by the history of judicial statutory construction the section is not inexorable. Besides, the writer does not believe that in every case where a name appears on a check otherwise than as drawer sec. 63 would be construed literally to charge the signatory as indorser. Cases may be imagined where, pictorially speaking, no reasonable man would assume a name on a check indicated an assumption of any liability. It may be relevant to add that even the pictorial order of indorsements does not necessarily determine the order of liability. Furthermore, we get into the whole problem of recovery back of payments made, the same problem in which we became entangled when commentators sought to inject \textit{Price v. Neal} into the Act. The theory of recovery back is often said to be that of unjust enrichment. If the signatory in our case has not been enriched

\textsuperscript{101}There is no need in this article to go further into the question of which of these two results most courts would (i.e., should) reach. If, as appears to be frequently the case, there is little special conversation and the identifier is merely told to write his name under the name of the person receiving payment, there ought to be no case for the jury and consequences should be imposed by the court.
(and he has not), on what basis allow recovery? If allowed at all, recovery must be on contract notions, or it must be on a notion bearing only some resemblance to the unjust enrichment born in equity, in effect, it must be based on the understanding of the lay world which is by some called at times the uncodified portion of the law of bills and notes, or even the law merchant. In other words, the courts have law to make, not to apply.

Effect of Signature in Blank for Identification or Receipt in Case of Reissue

We seem, then, to have considered and disposed of the problems of the scope of liability imposed on the identifier and the recipient of payment who memorialize their role by signature in blank. One problem we have not in fact disposed of. The problem is raised by the argument that the form of the blank indorsement subjects the signatory, whether in the first instance for identification or for receipt, to liability to a holder in due course in case of subsequent reissue. The argument has little to support it. The evidence at hand, it may be said, indicates that reissue, whether the reissue be wilful or accidental, is an occurrence of almost negligible frequency. Yet, if it be a risk, there would be no reason for giving sanction unnecessarily to a requirement that the signature be in blank. But the fact is that the existing legal authority—however strong the practical arguments to the contrary may be—is definitely to the effect that the check becomes functus officio by payment, subject to no possibility of resurrection as against any person whose name appears thereon without his assent to that resurrection.

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102 All this serves likewise to indicate that the word "identifier" may describe in the practice of laymen and in the meaning of the judicial opinions any, some, or all of a number of things: to wit, a representative of acquaintance under the name indicated on the instrument or otherwise, a promisor of a promise to make whole in case of loss incurred through payment to a person in fact not designated by the terms of the instrument or otherwise, or a promisor of a promise to make whole in case of loss incurred for any reason—alteration, insolvency or what not.

103 Only ten answers were received to the effect that such cases had occurred in the experience of the bank. It may, however, be that cases occur but are not brought to the attention of superior officers. One Boston bank officer, for instance, answers that it occurs once or twice a year, while an officer of another Boston bank can recall no instance in forty years. A few say "rarely" or "very seldom." Definite instances stated do not go beyond one or two cases in very many years.

Reissue in the case at hand, one should take care to note, involves important aspects considerations different from reissue in other cases. The case at hand supposes actual payment in whatever form agreed upon and a reissue subsequent to the surrender of the check to the drawee.\(^{105}\)


In the Gerlach Case the plaintiff attempted to sue as a holder in due course of a bill of exchange, the defendant being the drawer. In the other cases, which involved checks, the plaintiff was not a holder in due course. But the notion underlying all is that payment “extinguishes” the instrument.

Cases not at hand would be, chiefly, mail and clearing house presentations in which payment and surrender of the instrument are not in fact conditions concurrent. As for the case at hand, it is at least foreclosed by negotiable instruments law, sec. 119 (1) which provides that “a negotiable instrument is discharged by payment in due course by or on behalf of the principal debtor.” Nevertheless, it must be admitted that the problem still exists if the holder in counter-presentation allows the teller to hold the check before the payment is actually made. Indeed, this is probably the usual practice, though it may not be strictly a legal necessity, for sufficient reasons. Suppose in this interval the check is blown out of the window or pilfered or stolen and then comes into the hands of a bona fide purchaser for value? If the holder has placed his signature on the check beforehand the check is lost or stolen before delivery to the designated official of the bank, one might say that the contingency is of no concern to us because proper care by the holder might prevent such loss. But when the check has been safely delivered over, payment has in fact not been made. It is submitted that still the result reached by a court faced with the case would be in favor of the receipt-indorser. The reason given would no doubt be that immediately on delivery to the drawee the instrument became a voucher, the bank probably being under a duty to the holder to pay the amount of the check. This duty would be called, for relevant purposes, the equivalent of payment. The weaker argument would, of course, be that in no case could liability be imposed on the receipt-indorser because the signature was not made “amino indorsandi;” as to sec. 63, that is plainly to be understood as applicable to situations where the dramatic context indicates a transaction of credit of some sort. the only purpose of the section being to avoid the difficulties of the irregular indorser. Not much of a reason perhaps, but it is still a manifestation of an attitude that it is most improbable in any event that reissue will be made; most checks are in fact eventually cancelled; the holder can hardly be expected to cancel the check himself or to supervise its cancellation, and a rule of law which compelled such conduct would be purest legislation. Far better to put the occasional loss on the holder in due course.

The evidence indicates that there is room enough for reissue. In case of counter presentation, in many banks the paying teller stamps the check “cashed” or “paid” and likewise his identifying number. In others, however, the teller may put merely his number, while in others still no mark whatever is placed on the check. In a large number—probably most—banks, apparently, the check is placed on a spindle so that in any event a later purchaser would have some notice of payment (but see Ingraham v. Primrose, (1899) 7 C. B. (N.S.) 82. In case of other presentation in most banks no notation whatever is made on checks till after all entries are completed. Finally, all checks
THE THESIS OF THIS ARTICLE STATED

We have now really walked around the walls of Jericho seven times. The sum of our inquiry and our thesis, we may safely state, it seems, in the form of conclusions (knowing full well that they are of course only predictions) It is as good a way as any We note in anticipation that there seems to be no sufficient reason for supposing a different rule as between holder and drawer than between drawer and bank. Therefore our conclusions may be taken as applicable to both, though primarily to the latter.

The Premises.—The thesis as it touches identification radiates from a central proposition. That proposition is that a bank is under a duty to pay the holder if he is sufficiently identified. Where the holder is known to the bank it is immaterial that he be a pauper or a thief—the bank must pay the order. It would be immaterial that recourse for payment on a possible but not probable alteration or insufficiency of account of the drawer or any other reason (assuming recourse to be at all possible by virtue of stipulation, statute or otherwise) might be unavailing against him. If the bank demands from the holder a security of reimbursement, it acts at its peril. Therefore, it follows, the drawer is barred from suit for dishonor only where the holder's identity is not sufficiently established. If holders had to satisfy such conditions, they might never get payment or only at the expense however presented after having been entered are cancelled, usually today—by perforations. This cancellation may occur the same day (in most of the larger banks) or the next day, so that a considerable time elapses between receipt by the bank and cancellation. In addition, a considerable number of persons have access to the place where the checks are kept, pending cancellation. In the larger bank today, however, there is some minimization of risk by the division of bookkeeping labor and therefore facility in detecting at what point in the process of transmission of the check in question it was lost or abstracted. In any case, policy dictates that the loss if any, should be on the bank. But the solution is either a fiction or an action for tort. The drawer—with whom we do not deal—is not to be charged; nor the receipt-indorser. If there is no remedy, the new holder must shoulder the loss. It should be noted that in the process before "payment" numerous notations and so forth may put a subsequent purchaser on notice however the check is presented.

See 1 Morse, Banks and Banking, 5th ed., 7011, 2 Paton, Digest 1923.

There are in effect two sanctions: the drawer's action against the bank and the holder's against the drawer. If the holder sues the drawer and recovers, the drawer will retaliate by suing the bank and recovering damages or will, in any event, discontinue business or use other non-legal devices of revenge. So that ultimately the bank will be forced to rue in some way the conduct which the courts frown upon.
of a bond or a fee. This proposition, however, is not undeniable. the greater the liability imposed on the identifier, the more circumspectly the identification will be made. The rule which compels the bank to pay paupers and thieves is a harsh one on banks and should be limited, in any event, paupers and thieves known to the bank may be more easily pursued when necessary than paupers and thieves who are strangers. Nevertheless, it is submitted that the courts of this country, faced with the necessity of making a decision, would begin with the proposition with which this paragraph begins. 107

As the thesis touches receipt, the contention is that in the jurisdictions having either of the Field provisions it would be held that the case in hand falls within the express terms of the statute. 108 In those jurisdictions in which the statutes are in terms limited to tender it would be held that in effect the situation which it was intended to cover is no different from that of either of the Field provisions. 109 Where no statutory provision is to be found—that is, in most jurisdictions—the force of these statutes, common decency and the absence of any formidable legal barrier in precedent would compel the same decision. 110

107 Hunt, Tender, sec. 246, says the same. In England and the Empire, however, in spite of Chalmers' obscurity, the effect of the Bills of Exchange Act section referred to supra, note 95, may be to compel the bank to pay a check at least when presented by someone not purporting to be the payee, simply because of the protection given the bank, should the recipient turn out not to have been entitled to payment. Even this, however, seems doubtful: if a banker has enough of the milk of human kindness, for the interest of the drawer or a prior party, to make him hesitate to pay, one would imagine it immoral to cast up the privilege to pay and debit. Practically speaking, however, the drawer who will sue for dishonor will probably often have ground, or will think he has ground, for believing the identification demand to have been a device on the bank's part to avoid payment.

108 See Supra, p. 295. Under the Civil Code section it would be said that the "debtor" entitled to a receipt should be taken to include the bank, while the "creditor" means also the creditor's "agent," namely, the holder whom the drawer-creditor has sent to receive part payment of the bank's debt. In collateral complications, the language may be faulty, but the statute will bear the construction. The Code of Civil Procedure section is clearly applicable: "Whoever pays money is entitled to a receipt therefor, from the person to whom payment is made." Under the Civil Code section, it would be interesting to see what disposition would be made if the bank had promised to allow overdrawing, as is the custom in England and some of the British colonies.

109 These statutes, it will be recalled (supra note 54), do not limit the sanction to the incidence of interest and costs.

110 Brannan, in his review of Daniel referred to supra, note 91, indicates by citation of early authors that it was long the practice for bills of exchange to have a receipt form printed on the back. He states that the modern blank indorsement is merely an abbreviation
Where a check is presented for payment over the counter at the drawee bank, the bank may demand as a condition of payment that the person making presentment identify himself as the person entitled to receive payment by the terms of the drawer's order\textsuperscript{111} and that he tender a receipt of payment.

As To Receipt.—A receipt may be demanded either by blank indorsement or, if the holder objects, by a form "received payment" or the like written on the check. A separate sheet of paper, unless necessary because of absence of room on the check, is not acceptable. The possibility of loss by separation from the check is not inconsiderable and there is really no sufficient reason why the holder should insist on a separate sheet of paper\textsuperscript{112} In any event—and here there is a divergence from what may seem to be the notion expressed in some of the cases discussed earlier—it is not incumbent on the holder to present a receipt as a condition precedent to payment, it is the bank which must demand it to save itself from liability to the drawer. The reason for this is of the older form. These authorities should prove of some value in argument, especially since they usually state besides that the payer is entitled to the receipt. See Swift, Digest of Evidence and Treatise on Bills of Exchange 323; Maxwell, Bills 171, Glen, Treatise on Bills of Exchange 163. In 59 Irish L. T. 46, it is said that there is a growing custom for checks to be printed with a receipt form on the back. See also Paget, Banking, 3rd ed., 120, 150-151, Sykes, Cheques with Receipt Forms Attached, 40 Journ. Inst. of Bankers 310. But this raises the question of the effect in England of the Stamp Act; for under the English acts dating from 43 Geo. III (126) (see Benjamin, Sales 3d ed., 713 for history), the present act being the Stamp Act of 1891, 54 & 55 Vict. c. 39 secs. 101-103 (and amended Fin. Act 1920, 11 & 11 Geo. V ch. 18 pt. III sec. 34 and Fin. Act 1924, 14 Geo. V, c. 2 pt. III sec. 36) a debtor might demand of his creditor a stamped receipt. See sec. 103 (2) "If any person in any case where a receipt would be liable to duty refuses to give a receipt duly stamped he shall incur a fine of ten pounds." The provision, however, is limited to amounts over £2. See Benjamin, Sales 6th ed., 896. But by Finance Act 1895 (58 & 59 Vict. ch. 16) an exemption is made so that "the name of the payee written upon a draft or order, if payable to order shall [not] constitute a receipt chargeable with stamp duty." Formerly a "receipt written upon a bill of exchange duly stamped" did not require a stamp. See Alpe, Law of Stamp Duties, 18th ed., 226. Under these acts, to speak with circumspection, so far as a stamp is required a receipt seems to be demandable as of right, while if the stamp is not required, the "common law rule" of England—which is not yet made known—applies.

\textsuperscript{111}See infra, notes 113 and 118.

\textsuperscript{112}Of course with care such receipts would not be detached, but the matter is of an importance too slight and the difference to the holder in any event precisely nothing but subjective, to warrant meddling by a court—assuming the case to come before a court. If, however, the bank is willing to accept a detached receipt, the holder is a fortiori under a necessity to give it and on his refusal the drawer cannot allege a default by the bank.
to be found in the lesser judicial insistence on a receipt as a mat-
ter of highest desirability; it is merely a matter of a mild desira-
bility but sufficient to be judicially sanctioned.\textsuperscript{113}

\textit{As To Identification.}—The identification may be undertaken by the bank. If so undertaken, the bank may not take an unrea-
sonable time for the identification. This seems clear on prag-
matic grounds—and it has, as has before appeared, some judicial recognition.

The identification may be required to be offered by the person presenting. If such a requirement be made it is ordinarily immaterial what amount the check calls for or what the practice of the bank be ordinarily Short of express agreement, contract notions cannot be used to spell out of evidence of past perform-
ance (such as that brought out earlier in this inquiry) that banks distinguish large checks from small, unless the bank be shown to be unreasonable in its requirement.\textsuperscript{114}

The identification may be demanded to be made orally by a third person known to the bank to be honest. The identification may be in terms that the identifier has known the person present-
ing for payment by the name he purports to bear. It may be in terms that the identifier further has no reason to suspect that the name by which the person was known to him merely happens to be that by which the person entitled to payment is designated by the terms of the check. The honesty of the identifier may be required to be in actual reputation or as an inference from finan-
cial position. If the identifier be a customer of the bank, that will obviously be sufficient. Again it is submitted that satis-
factory identification suffices, therefore it is not necessary that the identifier be a customer—to say the least, a customer may not be numbered among the holder’s acquaintances.\textsuperscript{115}

\textsuperscript{113}This would seem to be the line of demarcation between condi-
tions where performance is waived by failure to make affirmative in-
sistence that they be performed and conditions which are not waived unless their performance is affirmatively dispensed with. Both identi-
fication and receipt, it is submitted, belong to the first class.

To the effect that a receipt need not be made in any event till surrender for payment, see \textit{Neale v. Balinski}, [1910] 1 C. P.D. (S. Afr.) 350.

\textsuperscript{114}The mere fact that banks do not ask for identification is, it is submitted, no ground for refusing a privilege to decline payment when the penalty may be inability to debit. Not all expectations, though they be based on most reasonable grounds, are to be enforced by the courts, current over-generalization to the contrary notwithstanding.

\textsuperscript{115}It would be an undue burden on liquidation processes if holders of checks had perforce to be limited either to customers of the drawee
the bank may require that the identifier make his identification in writing. The argument for the writing is founded on considerations of convenience of proof and record. But the bank may not insist that the identifier also represent that the holder is an honest person or solvent. If, to repeat once again, the bank knew the drawer to have designated or a transfer of the check to have been made to a dishonest or insolvent person, it must be none the less under a duty to honor.

Similarly, if the identifier or the presenter for him offers, and the bank refuses, a written identification in terms instead of a signature in blank; or if he refuses the bank's demand that the blank indorsement be understood as a memorial of guarantee in the sense of assumption of risk of contingencies other than deliberate falsehood or, perhaps, negligent representation of belief in the identity of the presenter—the bank will be considered in breach of its obligation to the drawer. The mere fact that the holder may not be known to the drawer is no reason for demanding the performance of conditions to the payment which the bank as an institution is obligated to make. Therefore if the bank demands an identification in blank and nothing is said as to liability and the identifier demurs, it is for the bank to ask for a qualified form restricting liability merely to identification. The possibility that a court might reach a rule of presumption of liability as an indorser and therefore the justifiable fear of the identifier or of the holder who may have to give the identifier a bond or pay him a fee to secure the identification, is too great a burden to impose on the drawer who seeks to liquidate his debts by a proper use of the banking institution. At least, since the chiefly available legal device of imposing direct sanctions on the commercial bank is

banks or to persons having friends who are customers of the drawee banks and at the same time gracious, or to persons able and willing to postpone payment till clearance could be effected through a bank. When one considers the privilege of the drawer to stop payment to disable the bank from debiting on payment and the disability of the holder from suing the bank for the amount of the check, little doubt seems to remain of the probability that the proposition in the text will receive general approbation. Add to this the possibility suggested that holders would be compelled to pay persons fees for identification—unless they had had the foresight or bargaining power to secure from the drawer some notification to the bank waiving identification. The notification would have to be separate since otherwise the check might in substance become payable to bearer.

In this case there is no absolute necessity that this be written on the check, but the identifier would have no valid reason for refusing to write on the check.
the drawer's action, the drawer should be allowed the action.\textsuperscript{117} In fact, the same should be true even where the bank demands the legend: "identification guaranteed," if what is forthcoming is "for identification only," or a legend of similar import. In any event, identification is neither procedurally nor substantively an absolute condition precedent to the bank's liability for dishonor; it is a condition only when the bank demands its performance.\textsuperscript{118} Of course, if prior decision has already defined the content of the identifier-indorser's liability to be larger than mere identification, the consequence as between drawer and bank follows a fortiori.

**THE SUM AND SUBSTANCE**

But suppose, says the reader, these rules are in fact applied by the courts—how effectively will the conduct be enforced which is set up as a standard? The allowing of an action by the drawer for the amount of the check as upon a sufficient demand, the award of interest, perhaps, and costs—these are picayune sanctions. Whether the heavy penalty for injury to credit will be awarded is at least doubtful,\textsuperscript{119} he will add. If only nominal damages be recovered, under state statutes perhaps even costs will not be awarded the customer.\textsuperscript{120} Legally right or legally wrong, the fact is that

\textsuperscript{117}This is not the place for examining de novo the considerations which justify denying the holder of a check an action against the bank. The writer believes, if his belief is worth communicating, that such an action ought to be allowed. But our economic organization dovetails smoothly enough with the present rule.

\textsuperscript{118}This was the holding in Levy v. Commercial T. Co., (1915) 156 N. Y. S. 295, which is the only case found involving in some way the necessity of identification so far as concerns the drawer's claims against the bank. The plaintiff, it may seem worth noting, did not ask for damages for injury to credit but merely counted as on a demand sufficient to allow an action for the amount of the check and incidentally interest and costs.

\textsuperscript{119}The cases on the measure of damages for dishonor give no clear answer to this crucial and highly interesting question. There seems, however, to be sufficient indication in the approach of some courts that damages for injury to credit are not imposed for defamation but for failure to perform the function which the commercial bank assumes to perform for its customers. See, e.g., McFall v. First Nat'l Bank, (1919) 138 Ark. 370, 211 S. W. 919, and First Nat'l Bank v. McFall, (1920) 144 Ark. 149, 222 S. W. 40; J. M. James & Co. v. Bank, (1900) 105 Tenn. 1, 58 S. W. 261, Weiner v. N. Penn. Bank, (1916) 65 Pa. Super. 290.

\textsuperscript{120}See e.g., N. Y. Mun. Ct. Code secs. 164, 170; 27 Col. L. Rev. 974.

\textsuperscript{121}In addition to checks, notes and acceptances payable at a bank are also transfer devices of deposit currency; and, of course, it is possible to have oral orders on a bank as transfer devices. These other devices, however, have not been discussed here: first, because they are practically of much less importance, and secondly, because the duty
banks do succeed in securing blank indorsements or guarantees far beyond what they seem to be entitled to receive. To tell the truth, the present writer is constrained to agree.\(^{121}\)

of a commercial bank to honor any of these other devices without express assumption is, in the case of the note and acceptance, an unsettled point, and in the case of the oral order, decided in favor of the bank. Oral orders are properly freaks and wholly pathological; that there is no duty to honor them consult: First Nat'l Bank v. Stapf, (1905) 165 Md. 162, 74 N. E. 987 Wasserstrom v. Pub. Bank. (1910) 123 N. Y. S. 55; Aurora Nat'l Bank v. Dils, (1897) 18 Ind. App. 319; 48 N. E. 19; Harding v. Pen Argyle Nat'l Bank, (1917) 67 Pa. Super. 68, McEwen v. Davis, (1872) 39 Ind. 109; see Watts v. Christie, (1849) 11 Beav. 546, 551. The N. I. L. sec. 87 says that an instrument made payable at a bank is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon, assuming the section has any proper application to relations between bank and maker or acceptor (as to which see supra note 6), the effect of it is simply to privilege the bank to debit if it pays, as on a payment at request, non constat that the bank was under a duty to pay. A duty was assumed in Dirnfeld v. 14th St. Savings Bk., (1911) 37 App. D. C. 11, and in Clark Co. v. Mt. Morris Bk., (1903) 85 App Div. 362, 83 N. Y. S. 447, aff'd 181 N. Y. 533, 73 N. E. 1133, and in Brooke v. Tradesmen's Nat'l Bank, (1893) 69 Hun 202, 23 N. Y. S. 802 (before N. I. L.). In Australia, where there is no statutory equivalent to N. I. L. sec. 87, it is assumed there is a duty growing out of practice. See, e.g., Russell & Edwards, Banker and Customer in Australia 207 In this country however, not only is sec. 87 of the N. I. L. deleted or modified or even reversed in terms in some states (see annotation in Brannan's N. I. L. under sec. 87) but even in those states where the section is in force the returns to questionnaires indicate that banks will refuse to pay a note or acceptance made payable at the respective banking houses by customers unless expressly requested by the customer to pay. Even where the bank calls up and asks whether payment should be made, the customer is requested to pay by check first. In any event, in spite or regardless of the more extensive use of the trade acceptance today, in very few parts of the country are notes or acceptances made payable at a bank presented over the counter. If the bank is not the holder at maturity, it receives it for collection through the mails or through the clearing house. In those rare instances, however, when counter presentation is made, the same procedure is followed as in checks; indeed, the procedure will probably be distinguished by greater circumspectness since amounts involved are greater and defenses more apt to exist than in checks—defenses even as between maker or acceptor and payee.