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Bills and Notes — Constructive Acceptance of a Check by Retention

A check was drawn on the defendant bank and made payable to the plaintiff. The check was deposited with the X bank for collection and forwarded by X bank to the Y bank. Y bank forwarded the check to the Federal Reserve Bank which sent it by mail to the defendant bank. The defendant bank, upon receipt of the check, marked it "return" because of insufficient funds. The following day Federal bank examiners seized control of the cash items of the bank, and as a consequence the defendant bank was unable to trace and return the check for more than forty-eight hours. Plaintiff, payee, brought suit contending that the defendant bank had accepted the check by its silent holding for more than twenty-four hours. Held, that the failure of the defendant bank to return the check within twenty-four hours after its receipt did not constitute acceptance.¹

The only problem considered by the court in the instant case was whether a check presented for payment fell within the purview of the controversial section 137² of the Uniform Negotiable Instruments Law. The court unequivocally distinguishes presentment for payment from section 137 in stating that "Payment extinguishes the debt and puts an end to the paper evidencing the same, while acceptance has the very opposite effect in creating a new liability upon the part of the acceptor and gives new life to the instrument".³ The implicit reasoning of the court seems to be that in the case of most negotiable instruments presentment for payment cannot be made until the instrument is due, while presentment for acceptance under section 137 should be made before maturity. Thus, when a check is presented for payment, section 137 does not apply unless there is an affirmative demand by the holder coupled with an affirmative refusal by the drawee, since the mere retention of a demand item cannot constitute acceptance.⁴

¹ *Urwiller v. Platte Valley Bank*, 164 Neb. 630, 83 N.W.2d 88 (1957).

² Neb. Rev. Stat. § 62-1,137 (Reissue 1958), which provides: "Where a drawee to whom a bill is delivered for acceptance destroys the same or refuses within twenty-four hours after such deliver. . . to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same." Hereinafter cited as the N. I. L.

³ *supra* note 1, at 635.

⁴ See *First Nat. Bank of Omaha v. Whitmore*, 177 F. 397 (8th Cir. 1910).

Indeed the court's reasoning, requiring demand and refusal to constitute liability on the drawee bank, would apply to a face-to-face transaction since the holder has presented the instrument and is in a position to demand the money or the return of the instrument.⁵ However such reasoning is totally inapplicable to existing commercial mail transactions where the drawee bank is the agent for collection⁶ of the holder and is under a contract duty to pay or charge back the check.

The N.I.L. is silent on the question of how long a drawee bank may have to pay a check received through the mail as distinguished from over the counter transactions. The court in *Wisner v. First Nat. Bank*⁷ recognized this, and section 137⁸ of the N.I.L. was judicially expanded to fill the existing "gap"; thus making the drawee bank, who held a check too long, liable as an implied acceptor for the face value of the check. The *Wisner* holding represents the weight of authority⁹ and the proper interpretation of the N.I.L., namely, to reach a convenient and workable result which insures uniformity in all cases involving presentment of instruments.¹⁰

The court, in the instant case, not only rejects the *Wisner* holding but completely overlooks additional applicable Nebraska

⁵ *Jeune v. Ward*, 1 Arn. & Ald. 653, 106 Reprint 240, (1818); *Mason v. Barff*, 2 Barn. & Ald. 26, 106 Reprint 240 (1818); *Westberg v. Chicago Lumber Co.*, 117 Wis. 589, 94 N.W. 572 (1903); *Holbrook v. Payne*, 151 Mass. 383, 24 N.E. 210 (1890).

⁶ *Neb. Rev. Stat. § 62-307* (Reissue 1958); *Placek v. Edstrom*, 148 Neb. 79, 26 N.W.2d 489 (1947).

⁷ 220 Pa. 21, 68 Atl. 995 (1908). The legislature amended § 137 shortly after the *Wisner* decision and abrogated the doctrine for which the case stands. However the Pennsylvania legislature unanimously passed the Uniform Commercial Code in 1953 which adopts the *Wisner* holding. See Pa. Stat. Anno. Tit. 12A, § 4-303 (1954). See also *State Bank v. Weiss*, 46 Misc. 93, 91 N.Y.S. 276 (1904).

⁸ The draftsman of the N.I.L. took § 137 from a New York statute [1 Rev. Stat. 769 § 11 (N.Y. 1829)], which had been in force many years. In construing this early statute the court of appeals of that state held that the refusal spoken of meant an affirmative act and that a mere omission to return where there was no demand was not a refusal within the statute. *Mattison v. Moulton*, 79 N.Y. 627 (1880).

⁹ Cases are cited in BEUTEL'S BRANNAN, NEGOTIABLE INSTRUMENTS LAW 1249 (7th ed. 1948).

¹⁰ Although th N.I.L. does not contain a section, found in so many uniform acts, which provides that it shall be uniformly interpreted, it is clear from its title, history, and intent that such is the purpose of the Act. *Clem. v. Chapman*, 262 S. W. 168, 171 (Tex. Civ. App.

statutory provisions. Section 62-213¹¹ gives the collecting bank the right to treat an instrument as dishonored if not paid in due course, and section 62-308¹² provides that the bank may have until midnight of its next business day after receipt in which to honor or refuse payment of such item.¹³ It should be noted that neither statute or regulation expressly state the effect of a drawee bank retaining a check more than twenty-four hours, and thus the hiatus as under the N.I.L. would still exist. However, it would seem that a standard of conduct is established for a drawee bank; namely, if notice of dishonor by non-payment is not dispatched by midnight of its next business day, prior parties would be relieved from liability on the check,¹⁴ and the holder is thereby damaged to that extent. Indeed commercial custom would dictate the drawee bank giving notice of dishonor for non-payment¹⁵ and reverse any charge made by midnight of the next business day. This conforms to the terms of collection under the Federal Reserve System, which are applicable to the instant case,¹⁶ and to the Clearing House practices. The recently proposed Uniform Commercial Code¹⁷ adopts the *Wisner* rule,¹⁸ and makes the drawee bank "accountable" for the

1942), aff'd, 114 Tex. 583, 278 S. W. 1114 (1924). For other cases on the well established rule of construction that the Act should be so interpreted as to reach uniformly, see BEUTEL'S BRANNAN, NEGOTIABLE INSTRUMENTS LAW 103 (7th ed. 1948).

¹¹ Neb. Rev. Stat. § 62-213 (Reissue 1958).

¹² Neb. Rev. Stat. § 62-308 (Reissue 1958).

¹³ This fact is also evidenced by the Federal Reserve regulations, see Check Clearing and Collection, Regulation J. Sec. 5, (Jan. 1959), providing: "Any check which a Federal Reserve bank or an agent thereof presents to the drawee bank for payment or sends to the drawee bank for collection . . . may be returned for credit or refund at any time prior to midnight of the drawee's next business day following such day of receipt . . . such paragraph shall not apply to checks presented over the counter." Operating Letter #3, April 15, 1957, provides: "Wire advice of non-payment of all items of \$1,000 or over . . ."

¹⁴ UNIFORM NEGOTIABLE INSTRUMENTS LAW § 89; Neb. Rev. Stat. § 62-189 (Reissue 1958); *Bacigalupo v. Parrilli*, 112 N.Y. Supp. 1040 (1908).

¹⁵ See *Hollenbeck Receiver v. Leimert Receiver*, 295 U.S. 116 (1935), holding the indorser is not liable and the check is paid when the drawee fails to comply with a clearing house rule requiring it to notify the member bank within a specified time in case of dishonor for non-payment.

¹⁶ *Supra* note 13.

¹⁷ UNIFORM COMMERCIAL CODE, §§ 4-301, 4-302 (1957).

¹⁸ *supra* note 7; U.L.A., UNIFORM COMMERCIAL CODE, (Amendments 1954), Sub-committee Report, 142.

check, and establishes a precise time when an item must be returned.

The apparent paradoxical reasoning that a check could be both impliedly accepted and dishonored at the same time¹⁹ under section 62-308 is unconsequential.²⁰ The central point is that there is no definite standard or precise time in which a drawee bank must act under the N.I.L. or section 62-308. Either of the above positions would dictate adoption of the retention rule in the mail presentment situations, and whether the rule is based on duty to dishonor or implied acceptance is immaterial because they both afford the needed remedial relief, particularly in view of the drawee bank being in possession of the facts surrounding the transaction and the impossible burden of proof placed on the holder under the common law remedies.²¹ Policy would support such a result on the following reasons: (1) Where checks are mailed directly to the payor bank there should be some sanction compelling it to act on them with commercial diligence. (2) The interest of the depositor initiating bank collection, who is usually a seller, requires that he receive prompt notice that his buyer's attempted payment for the goods or services has not resulted in bank credit available for the seller's use. (3) Depository banks often permit their depositors to withdraw the credit after a fixed lapse of time calculated by computing the time for the check to reach the payor bank and for notice of dishonor to return if forwarded by the payor bank on the day of its receipt of the item. (4) It is the common practice of all drawee banks to dispatch notice of dishonor for non-payment prior to midnight of its next business day,²² and in the absence of such notice prior parties will assume that the check has been paid.

¹⁹ Feezer, *Acceptance of Bills of Exchange by Conduct*, 12 Minn. L. Rev. 129 (1927).

²⁰ The considerations seem to be the same when instruments are presented for acceptance or for payment. The other sections of the N.I.L. provide that upon presentment immediate action must be taken, the drawee has twenty-four hours in which to accept, §§ 136, 137, and his failure to do so may be treated by the holder as dishonor, or the drawer and indorsers are relieved, § 150; notice of protest and dishonor must be given within one business day, §§ 155, 103, and 104.

²¹ *Moulton v. Mattison*, 79 N.Y. 627 (1880); *Short v. Blount*, 99 N.C. 49, 5 S.E. 190 (1888); *First Nat. Bank v. McMichael*, 106 Pa. 460, 51 Am. Rep. 529 (1884). For acts that would constitute conversion of the bill, see *Westberg v. Chicago Lbr. Co.* 117 Wis. 589, 94 N.W. 572 (1903); *Hibbard v. Parciak*, 94 Conn. 562, 109 Atl. 725 (1920).

²² *Supra* note 13.

The most interesting aspect of the instant case is that the result on its particular facts seems to be correct under either of the above positions, but on a point not considered by the court. The delay in return of the check by the defendant bank was caused by the federal bank examiners assuming control of all the records of the bank. It would appear that had the court adopted the dictates of commercial custom and accepted either of the above positions,²³ the defendant bank would still be absolved from liability under section 62-1,113²⁴ (section 113, N.I.L.)²⁵ which excuses notice of dishonor when caused by circumstances beyond one's control.

In conclusion it is submitted that the court reached the correct result only to further confuse the incomplete statutory pattern applicable to checks presented for payment. The expansion of section 137 of the N.I.L. to encompass presentment of checks for payment through the mail reaches a workable result under existing commercial custom, and in turn insures uniformity in all cases. Notwithstanding the court's contrary dictum, it would seem that section 62-308 establishes an additional effective standard of conduct for drawee banks in ordinary mail collection cases and should determine "when" delay will constitute liability even though section 137 is confined to presentment for acceptance.

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²³ In *Rock Finance Co. v. Central Nat. Bank*, 339 Ill. App. 319, 89 N.E.2d 828 (1950), construing the phrase "business day" under Ill. Rev. Stat. ch. 98, § 207a (1954), (similar to § 62-308 above), see the court's dictum to the effect that a drawee bank who failed to return a check prior to midnight of the next business day would be an implied acceptance and a basis for liability.

²⁴ Neb. Rev. Stat. § 62-1,113 (Reissue 1958).

²⁵ BILL OF EXCHANGE ACT § 50(1) uses "party giving notice" instead of "holder."