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SOME PROBLEMS IN THE COLLECTION OF CHECKS

ROBERT T. DONLEY*

The welter of conflicting decisions, banking practices and local customs has given rise to legislation dealing with the subject, both actual and contemplated. In 1931 West Virginia enacted the Bank Collection Code (hereinafter called the "Code"), sponsored by the American Bankers' Association. The National Conference of Commissioners on Uniform State Laws has also prepared a more comprehensive act dealing with the subject (hereinafter called the "Uniform Act"). It is the purpose of this article to discuss some of the problems attempted to be solved by such legislation.

As To Parties Other Than Banks

"A check is a bill of exchange drawn on a bank payable on demand." It must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay. Indorsers are discharged under such circumstances although loss did not result from the delay. The holder must present the check, or place it in the course of collection during banking hours of the next business day after receipt of the same. It has been held that notwithstanding the provision of the Negotiable Instruments Law that presentment of a bill of exchange is sufficient if made "within a reasonable time of the last negotiation thereof," this does not alter the rule that "so far as the drawer of a check is concerned it must be presented within a reasonable time after

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1 W. Va. Acts 1931, c. 15, Senate Bill No. 66, passed March 11, 1931, in effect 90 days from passage.


3 W. Va. REV. CODE (1931) c. 46, art. 16, § 2.

4 Ibid, c. 46, art. 16, § 3.

5 Swift & Co. v. Miller, 62 Ind. App. 312, 113 N. E. 447 (1916) and the many cases cited in the opinion.

6 Ibid. The court said: "Under the rules of the law merchant, a check must be presented within a reasonable time after it is received."

"Under ordinary conditions when the holder resides at the place the check is made payable, such reasonable time for presentment includes all of the banking hours of the day immediately following the day on which the check is received."
its issue, regardless of the time of the last negotiation thereof."

But one who acquires an unpresented check a "considerable time" after it was issued may nevertheless be a holder in due course as to defenses existing between the drawer and payee. Where the facts are undisputed, the question of what is a reasonable time is one of law for the court, but if the evidence is conflicting, it is to be determined from the evidence." If the owner of the check has notice that the drawee is on the verge of insolvency, he must make presentment at the earliest opportunity. 8

7Cellars v. Dwinnell, 285 Pac. 181 (Mont. 1930). But in this case the loss was caused by the wrongful refusal of the drawee to honor checks unless presented over the counter.

8Anderson v. Elem, 111 Kan. 713, 208 Pac. 573 (1922). In this case the defendant drew a check Oct. 20, 1919, at night, on a Wichita bank, and stopped payment the next morning before the bank opened, claiming failure of consideration. The payee did not present the check. Defendant made no effort to secure its return to him. The check was cashed at Salina on November 14, by plaintiff, an innocent purchaser, who presented it, and the bank refused payment. The court said that the N. I. L. provision of presentment within a reasonable time was the law before its passage; that "Stopping payment is equivalent to withdrawing the deposit." . . . . Negotiation of a check as a bill of exchange is one of the privileges of the payee, and the drawer does not suffer loss, within the meaning of the Negotiable Instruments Act, by the fact that the payee chooses to transfer the paper, instead of presenting it for payment himself."

"If a check be negotiated to an innocent purchaser, it stands on the same footing as other negotiable paper with respect to defenses the drawer may interpose when sued on the instrument."

See also in accord, Bull v. First National Bank, 123 U. S. 105, 8 S. Ct. 62 (1881) holding that a bona fide purchaser of a check from an indorsee, although such purchase was long after the date of the check, is protected against set-offs acquired in the meantime by the drawer against such indorser.

9Colwell v. Colwell, 92 Ore. 103, 179 Pac. 916 (1919). In Lloyd Mortgage Co. v. Davis, 51 N. D. 336, 199 N. W. 869 (1914) the court said that "What is a reasonable time depends on the circumstances of each case. In determining that question, the time, mode, and place of receiving the check, and the relations of the parties should be considered."

10Empire-Arizona Copper Co. v. Shaw, 20 Ariz. 471, 181 Pac. 464 (1919). There defendant company drew check on Commercial Bank, payable to plaintiff, on May 31, 1917. On June 1st plaintiff presented it to drawee bank for payment, the company then having sufficient funds to cover same. The bank did not pay the check; the company offering evidence that plaintiff demanded bills of larger denomination than the bank had, and upon being refused same, refused to cash the check in smaller bills; the plaintiff offering evidence that the bank teller stated that the bank was short of cash and asked him to return the next day. Plaintiff did not do so, but went to Los Angeles and there deposited the check for collection, on June 9th. The drawee bank became insolvent on June 10th. The trial court, in lieu of a jury, upheld plaintiff's version. The court held that under the negotiable instruments law, a check must be presented within a reasonable time after its issue; that where the evidence is conflicting, this was a question of fact to be determined from the evidence. A recovery was upheld.

11First Nat. Bank of Kewanee v. Wine, 255 Ill. App. 578 (1930); Sinclair Refining Co. v. Keith, 97 Okla. 55, 221 Pac. 1003 (1924); Blackwelder
may deposit the check in his own bank, although the drawee bank is in the same city. And, where the payee deposits the check to his own account in the drawee bank and the latter closes on the same day, the loss falls on the drawer if the payee had no notice of the bank's insolvent condition. If the payee, after accepting the check, negligently decides that it should be for a larger amount and returns it, but later again accepts it, and as a result of the delay in presentment a loss occurs, the payee must suffer. But if he refuses to accept the check because tendered in full settlement of a disputed account, then later accepts it, and thereafter exercises due diligence in its collection, the drawer must bear the loss. In Lewis, Hubbard & Company v. Supply Co. the court held that the drawer, in delivering a check to an agent of the payee having no authority to indorse, at the place of business of the drawer, impliedly agrees to allow such additional time for presentment as may be necessary for transmission to the agent's principal. It has been commonly held, and is now the rule by statute, that when a bank certifies a check at the request of the drawer, before delivery to the payee, the drawer is not discharged if the check is not paid on due presentment; but if the payee, after receiving the check, procures the certification, he then accepts the bank as his sole debtor to the same effect as if he had drawn out the funds, redeposited them and taken a certificate of deposit. This inadequate summary of elementary principles serves merely as an introduction to the more complicated problems of collection.


19 First Nat. Bank v. Currie, 147 Mich. 72, 110 N. W. 499 (1907), where it was contended that the usual rule should not obtain because the indorsers suffered no loss by reason of the certification since the check was duly presented and protested. The court overruled this contention on the ground that the plaintiff had parted with value not on the strength of the indorsement, but on the strength of the certification.
Title to a Check in the Process of Collection

It has been said that "there is nothing, apparently, more elusive or difficult to locate than the title to a bank check in the process of collection." The structure of collections is erected around the framework of the relations between the depositor of the check, the bank of deposit, and subsequent banks in the collection chain. Unfortunately, but perhaps necessarily, these relations hinge largely upon questions of title as determined by the form of indorsement.

Of the possible relations (exclusive of trust) that may exist between a depositor and his bank of deposit, only two are of importance here: (1) that of principal and agent, and (2) that of seller and purchaser. There has been little agreement among the courts. The Code rather blandly assumes that the distinction between restrictive and non-restrictive indorsements is well-settled, but, as between the depositor and the bank of deposit provides that the endorsement "for deposit" shall be deemed restrictive. The Uniform Act takes the opposite position, and in addition includes in non-restrictive indorsements those "for credit," "for account" of the indorser, or words having a similar import. The Code provides that the indorsement "pay any bank or banker" shall be deemed restrictive, creating an agency relationship in any subsequent bank to which the paper is forwarded. The Uniform Act as drafted in 1930 provided that the indorsement "pay any bank, banker or trust company" should be restrictive (not limiting its effect to subsequent banks), but the 1931 draft reverses this position and makes the indorsement non-restrictive. It is hardly necessary to state that the indorsements "for collection," "for collection and credit" and "for collection and remittance" are restrictive.

In addition to the form of indorsement other considerations have entered into the determination of the passage of title, such as permitting the depositor to draw against the deposit immediately; or passbook or deposit-slip stipulations that all items are credited subject to final payment; or reserving the right to charge back. The Code is silent as to these matters, but the Uniform

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**Footnotes:**

5. *Supra n. 21.
7. The cases dealing with the questions here involved are collected and
Act provides as to items on others than the bank of deposit, offered "for immediate credit" (as defined therein), they shall be deemed purchased notwithstanding, among other special facts, that an agreement was had deferring the depositor's right to draw against the credit, or that the bank was authorized to charge back the amount." It is, however, provided that credit will be deemed given provisionally in the case of checks." The result, therefore, of the Uniform Act is to make the bank of deposit a purchaser of the check." But it is indicative of an agency relationship to show:
(a) a prior course of dealing on an agency basis, (b) special instructions for handling the items, (c) a charge usually or actually made for the service, (d) and, prima facie, indorsements "for collections," "for collection and credit," "for collection and remittance.""The Code, on the contrary, seeks to make the bank of deposit not a purchaser but an agent for collection. Under its provisions," this agency relation exists both as to the bank of deposit and as to any subsequent bank except (1) as otherwise provided by agreement, and (2) as to subsequent holders of a negotiable instrument:


"Supra n. 2, § 21.
"Ibid. § 22.
"Ibid. § 23.
"Ibid. The Committee's note to the section states that "the plan here adopted is to codify the majority decisions that such items are purchased and to qualify the bank's responsibility in the collection aspects of the case."

"Ibid. § 26. The Committee's note to this section criticizes the provision of the Code to the effect that where any revocable credit for an item has been withdrawn the bank shall have all the rights of an owner thereof against prior and subsequent parties to the extent of the amount withdrawn, as an attempt to make the bank both an agent and an owner, as to one item.

"The text of § 2 is as follows:
""Except as otherwise provided by agreement and except as to subsequent holders of a negotiable instrument payable to bearer or indorsed specially or in blank, where an item is deposited or received for collection, the bank of deposit shall be agent of the depositor for its collection and each subsequent collecting bank shall be sub-agent of the depositor but shall be authorized to follow the instructions of its immediate forwarding bank and any credit given by any such agent or sub-agent bank therefor shall be revocable until such time as the proceeds are received in actual money or an unconditional credit given on the books of another bank, which such agent has requested or accepted. Where any such bank allows any revocable credit for an item to be withdrawn, such agency relation shall nevertheless continue except the bank shall have all the rights of an owner.
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(a) payable to bearer, (b) indorsed specially, or (c) indorsed in blank. The Section is particularly unsatisfactory in stating that "where an item is deposited or received for collection . . . ." and so on, because it fails to state how it shall, in point of fact, be determined that the item is "deposited or received for collection" as distinguished from a sale and purchase. One might, with equal definition in terms of itself, state that when an item is offered for sale the bank shall become its purchaser.

Since it is common banking practice to permit withdrawals against deposits of checks before their collection, the Code provides that as to such items the agency relation shall continue but the bank shall have the rights of an owner to the extent of the amount withdrawn.\footnote{Ibid.} The Uniform Act has substantially the same provision with the addition that "To determine which credits should be charged with drawings for this purpose, it will be assumed that first deposits are first paid out.\footnote{\S 29.}"

If an item is drawn on or payable at the bank of deposit the credit is provisional, subject to revocation at or before the end of the day on which the item is deposited in the event it is found not payable for any reason.\footnote{Code, supra n. 1, \S 3. The final sentence of the section is "Whenever a credit is given for an item deposited after banking hours such right of revocation may be exercised during the following business day."}

From the foregoing analysis it will be seen, under the provisions of the Code, that as to items drawn on banks other than the bank of deposit, the latter is the depositor's agent for collection, in the absence of agreement to the contrary, although the indorsement be in blank, or special, or the item payable to bearer. Each subsequent bank to which the item is forwarded becomes the sub-agent of the depositor, and in addition if the item is indorsed

\footnote{Ibid.}

\footnote{\S 29.}
in blank, or specially, or is payable to bearer, the sub-agent may rely upon the presumption that its predecessor is the owner.\textsuperscript{22}

The Uniform Act does not thus baldly state that subsequent banks shall be sub-agents of the depositor. It provides that "All items deposited over the counter or by mail with a bank for credit or remittance, which are not drawn on, issued by or made or accepted payable at such bank, and which are not purchased by it, will be deemed held by it, upon receipt, as agent."\textsuperscript{23} The net result, therefore, is to make the bank of deposit the owner of the check (but giving credit therefor provisionally), and to make subsequent banks, sub-agents of the depositor.\textsuperscript{24}

Apparently the main objects to be accomplished by making the bank of deposit the purchaser of the check rather than the depositor’s agent are (1) to prevent the depositor from asserting title to the instrument and reclaiming it in the course of collection or from asserting a preferred claim, upon insolvency of the bank of deposit;\textsuperscript{25} (2) to prevent attachment by the creditors of the depositor, and to permit the continuance of the collection process, in the meantime permitting drawings against the credit.\textsuperscript{26}

Some Rights and Duties of the Parties

A, the payee of a check drawn by B, on Bank 2 in another place, indorses it in blank and deposits it to his account in Bank 1. The latter must forward it not later than the next business day.\textsuperscript{27} It may forward it to a correspondent in a third place or in

\textsuperscript{22}Code, supra n. 1, § 4, par. 3, the applicable part of which provides:

"Where a deposited item is payable to bearer or indorsed by the depositor in blank or by special indorsement, the fact that such item is so payable or indorsed shall not change the relation of agent of the bank of deposit to the depositor, but subsequent holders shall have the right to rely on the presumption that the bank of deposit is the owner of the item. The indorsement of an item by the bank of deposit or by any subsequent holder in blank or by special indorsement or its delivery when payable to bearer, shall carry the presumption that the indorsee or transferee is owner provided there is nothing upon the face of the paper or in any prior indorsement to indicate an agency or trustee relation of any prior party."

\textsuperscript{23}Uniform Act, supra n. 2, § 26.

\textsuperscript{24}One of the objects, of course, in making subsequent banks sub-agents of the depositor is to throw the risks of collection on the owner of the item. This involves the adoption of the "Massachusetts rule" relieving the forwarding bank from responsibility for any neglect, misconduct, mistake or default of its immediate correspondent, or any subsequent bank, subject, of course, to the exercise of due care in the selection of such correspondent. These rules are codified in the Code, supra n. 1, § 5, and in the Uniform Act, supra n. 2, § 42.

\textsuperscript{25}Uniform Act, n. 2, § 24 and comment.

\textsuperscript{26}Ibid., § 25 and comment.

\textsuperscript{27}Code, supra n. 1, § 6 (a); Uniform Act, supra n. 2, § 40.
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the same place, or it may send it to the drawee," Bank 2. In the
former case the correspondent is under the same duty to forward
not later than the next business day." Upon receipt of the check
by the drawee it is, in contemplation of law, both an agent of the
depositor to present the check to itself for payment, and an agent
of the drawer to make payment by honoring the check." The Code
is defective in failing specifically to impose upon the drawee the
duty either to give credit or make remittance (if the check is
properly payable) not later than the next succeeding business
day." Neither the Code nor the Uniform Act expressly changes
the rule in cases like Clarke v. National Bank of Montana." In
that case the statute provided that "where a drawee to whom a
bill is delivered for acceptance destroys the same, or refuses with-
in 24 hours after such delivery, or within such other period as the
holder may allow, to return the bill accepted or nonaccepted to
the holder, he will be deemed to have accepted the same." It was
held that the failure of the drawee to return the check to the col-
lecting bank within 24 hours amounted to an acceptance, render-
ing the drawee liable, either for mere neglect or for tortious re-

Assuming that B's check is in all respects "properly pay-
able" the drawee, Bank 2, depending upon instructions, either
credits Bank 1 with the amount of the check, instructs Bank 1 to
charge Bank 2's account with Bank 1, or remits the proceeds.
Credit may be given either on the books of the drawee or of any

"Ibid. These sections reverse the great weight of authority to the ef-
fect that it is negligence to forward the item directly to the drawee, on the
ground that it is not a proper party to make presentment to itself. See
Pinkney v. Kanawha Valley Bank, 68 W. Va. 254, 69 S. E. 1012 (1910)
(although the drawee is the only bank in that place).

"Supra n. 40.

"This situation has been characterized as anomalous. Cf. German Na-
tional Bank v. Burns, 12 Colo. 539, 21 Pac. 714 (1889), (certificate of de-
posit).

"The Uniform Act, supra n. 2, § 16 has a similar provision. It further pro-
vides that "Items refused payment because of missing endorsement or other
informality may, without liability for so doing, be certified before being
returned for correction."

"78 Mont. 48, 252 Pac. 373 (1926), which states that a similar holding
in Pennsylvania in the case of Wisner v. First National Bank of Gallitzin,
220 Pa. 31, 68 Atl. 955, was later changed by legislation to the effect that
said provision of the Negotiable Instruments Law should not apply to checks.
See annotation in (1929) 63 A. L. R. 1140, for cases on this point. The plain
inference from the provision of the Uniform Act is that liability is to attach
to the drawee for failure to give credit or make remittance. See the Com-
mittee's comment following § 16, supra n. 44.

A statute, in effect the same as the Montana statute, is in force in West
Virginia, W. VA. REV. CODE (1931) c. 46, art. 10, § 6. See also Blackwelder
v. Fergus Motor Company, supra n. 11.
other bank," and may be the result of previous request by Bank 1, or subsequent acceptance of an unrequested credit." In either case, when such credit is "unconditional," Bank 1 becomes debtor for the item to the same effect as if it had actually received the same in money. Remittance, under the common-law, could only be made in cash. As recently as 1924 the Supreme Court of the United States held, in Federal Reserve Bank v. Malloy" that unless specially authorized, a collecting bank has no authority to accept anything other than money. The North Carolina court went, perhaps, even further in the case of Morris v. Cleve," holding that when the drawee remits by draft which is subsequently dishonored, the drawer of the original item is discharged from liability on the check and on the debt for which the check was given in payment. This decision was reached notwithstanding that the statute" permitted remittance by draft on Federal Re-

"Code, supra n. 1, § 9; Uniform Act, supra n. 2, § 30. The latter provides: "Credit, other than provisional credit, given pursuant to authorization, express or implied, will constitute a receipt of proceeds and a redeposit of a similar amount with the crediting bank, and in the case of provisional credit will constitute a receipt of proceeds with like effect when the crediting bank, if itself the payor, shall have paid the item, or, if any other bank, shall have itself received the proceeds thereof."

"Ibid.

"264 U. S. 160, 44 S. Ct. 296 (1924). The facts were as follows: Defendant drew check on A bank, in North Carolina, payable to Plaintiffs. They received it in Georgia, deposited it in B bank in Florida, for collection and credit. B bank sent Plaintiffs a credit card stating that "Checks, drafts, etc., received for collection or deposit, are taken at the risk of the indorser until actual payment it received." B bank endorsed the check, sent it to C bank, which sent it to D bank. D stamped the check with the double indorsement of itself and of the Federal Reserve Bank of Atlanta, and sent it to the Federal Reserve Bank of Richmond for collection and credit. The latter mailed the check, with others, in a letter to A bank, drawee. Upon receipt thereof, defendant's check was stamped "paid" and charged to his account. A bank then sent to the Richmond bank its check on X bank as remittance. Richmond Bank sent the same to X bank, which, on receipt, wired that there were not sufficient funds. After some delay, A bank was closed. Each bank in the collection chain charged the check against its forwarder, and the Richmond bank retained the check on X bank. This action was based on alleged negligence of the Richmond bank in forwarding the check directly to the drawee and in negligently accepting its check in payment. For opinions of the lower courts see: 281 Fed. 997 (1922), and 291 Fed. 763 (C. C. A. 4th 1923). The case has been adversely criticized in Transcontinental Oil Co. v. Federal Reserve Bank, 172 Minn. 56, 214 N. W. 918 (1927) and by Turner, Bank Collections—The Direct Routing Practice (1930) 39 Yale L. J. 468, at 483.


"This statute provided that all checks shall "unless specified on the face thereof to the contrary by the maker or makers thereof, be payable at the option of the drawer bank in exchange drawn on the reserve deposits of said drawer bank when any such check is presented by or through any Federal Reserve Bank . . . ."
serve deposits, on the ground that the statute was enacted for the convenience of banks and was not intended to deal with the rights or liabilities of depositors. To eliminate the unfortunate result of such decisions it is provided that remittance may be made by the drawee’s check or draft on any other bank, or of "any other bank upon any bank other than the drawee or payor," or by customary local clearing-house settlement.

Insolvency of the Bank of Deposit

As we have seen, under the Code the bank of deposit is the agent of the depositor, and under the Uniform Act the purchaser of the check, credit for which is given provisionally. Suppose A is the payee of a check drawn by B on Bank 3, in another place. He indorses it in blank and deposits it to his account in Bank 1, the bank of deposit. Bank 1, if it is not a correspondent of Bank 3, will probably send the check to Bank 2, located either in a third place, or in the same place where Bank 3 conducts business. If Bank 2 is a correspondent of Bank 1, the latter will send the check with instructions to collect and credit Bank 1’s account with Bank 2, or Bank 1’s account with some other Bank. Bank 2 will thereupon credit Bank 1 provisionally with the proceeds of the check, and forward the same to Bank 3. If Bank 3 is a correspondent of Bank 2 the latter will also instruct Bank 3 to collect and credit Bank 2’s account with Bank 3, or Bank 2’s account with some other Bank. Bank 3, the drawee, upon receipt of the check, charges it against B’s account and enters the credit to the account of Bank 2. The act of so doing constitutes a receipt by Bank 2 of the proceeds, without further ado, and also a receipt by Bank 1 of the proceeds, to the same effect. Thus, should Bank 1 become insolvent thereafter, the depositor, A, suffers the loss. Under the Code, this result obtains on the theory that the bank of deposit, having received the proceeds, its function as agent is terminated and it becomes the debtor of A. Under the Uniform Act the bank of deposit, having received the proceeds, the credit which it gave as purchaser becomes non-provisional, and it therefore is the debtor of A.

If the bank of deposit, after forwarding the check under the

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22 Code, supra n. 1, § 9; Uniform Act, supra n. 2, § 41, which adds: “A forwarding bank shall have authority in the absence of instructions to the contrary to accept remittance in the form specified in this section or in any other form, provided, that, if it accepts remittance in any form not here specified, it shall be responsible upon receipt thereof as for money.”
circumstances stated above, should become insolvent before the check is charged to the drawer's account, or credited by the drawee to the forwarder, the question arises as to whether or not A may stop the collection process or reclaim the proceeds of the check in the hands of either Bank 2 or Bank 3.

Upon principle, A should have the right to revoke the authority of the sub-agent and reclaim his property, if the relation is that of agency. In the absence of a provision in the Code, a court would have to determine whether the bank of deposit was an agent or a purchaser. This was the task of the court in Equitable Trust Company v. Rochling, wherein a cashier's check was involved, and in Latzko v. Equitable Trust Company, not involving a cashier's check. It was held in both cases that the bank of deposit was a purchaser and, therefore, that the depositors could not reclaim the proceeds from the receiver of the bank of deposit. The Uniform Act expressly adopts this rule, as one of the objects to be attained by treating the bank of deposit as a purchaser. Under the Code, the depositor might protect himself by procuring the drawer to stop payment on the check before it was charged against his account. Under the Uniform Act, the drawer could stop payment so long as the check was in the hands of Bank 2, the correspondent, but not after it was received by the drawee. It is submitted that the line drawn is arbitrary and

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275 U. S. 248, 48 S. Ct. 58 (1927), where the facts were these: Rochling, plaintiff, maintained an account with X, private bankers. On P's request, N bank delivered to X its (N's) cashier's check for $30,000.00 payable to X, "for the account" of plaintiff. Also on instruction B bank made a similar transaction. Both checks were credited by X to plaintiff's account. Before the checks were collected, X became bankrupt, but the proceeds came into the hands of defendant, the trustee in bankruptcy. The question was whether X received the two checks as owners, or as agents to collect for plaintiff. If the latter, plaintiff was entitled to reclaim the proceeds.

275 U. S. 254, 48 S. Ct. 60 (1927). In Fourth National Bank v. Bragg, 127 Va. 47, 102 S. E. 649 (1920) it was held that a draft deposited as cash and placed to the credit of the depositor is not affected by the bank's indorsement solely for collection, and negative guarantees of title, etc.

Uniform Act, supra n. 2, § 24: "Where an item has been purchased by a bank, whether credit was given therefor provisionally or not, the depositor thereof shall not be entitled to a preferred claim upon the insolvency of the bank, or to reclaim the item, in the absence of additional circumstances giving rise to a trust."

This conclusion inevitably results from the absence of provision to the contrary.

Uniform Act, supra n. 2, § 17: "An item presented by a customer to a bank, over the counter for credit, through the clearing house for payment or by mail for credit or for remittance, which is otherwise in order for payment, shall be deemed properly payable, and payment thereof shall constitute a discharge, notwithstanding that subsequent to its receipt: . . . (2) A stop-payment order may have been received." (Italics writer's).
artificial, and of doubtful practical value, since even after receipt of the check by the drawee, the drawer could withdraw his funds over the counter and in that manner protect the original depositor of the check. It is further submitted that the Code should be clarified as to the rights of the owner of the check to reclaim the proceeds.

Suppose each bank in the collection chain, beginning with the bank of deposit, forwards with instructions to remit the proceeds, rather than credit them. Such a situation is unlikely to arise for the reason that each bank will forward to a correspondent with which it customarily has credit transactions, or reciprocal accounts. However, if the last correspondent has no account with the drawee, the check will be sent "for remittance." When the drawee honors the check and each bank remits by draft or otherwise, no change in the rights of the depositor occurs. He suffers the loss upon insolvency of the bank of deposit. Suppose the bank next to the bank of deposit received the item with instructions to remit, but, after having received the proceeds and before remitting the bank of deposit becomes insolvent. The collecting bank may apply the proceeds to the payment of any indebtedness owing to it by the bank of deposit unless the original item was restrictively indorsed. In the latter case the collecting bank has notice that the bank of deposit is not the owner of the check, and, therefore, could not be the owner of its proceeds. In such case it would seem that the collecting bank cannot apply the proceeds as above stated. Neither the Code nor the Uniform Act expressly covers the situation. Does the collecting bank have authority, after notice of such insolvency, to proceed with remittance, as to restrictively indorsed items? No provision of the law forbids such action, but the proceeds coming into the hand of the receiver of the bank of deposit would be the proceeds of the depositor, and he would suffer no loss.

The item may be restrictively indorsed by the depositor, but the bank of deposit may forward to its correspondent with instructions to collect and credit. The correspondent may then enter a provisional credit and may also permit the bank of deposit to draw against the uncollected proceeds. In such a situation the depositor has no claim against the correspondent, upon

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insolvency of the bank of deposit, before receipt of the proceeds, because to the extent of such drawings the bank of deposit is deemed to have received the proceeds. The depositor, if he has not himself withdrawn the proceeds or permitted them to be credited to his account so as to become a mere creditor, would then assert a preferred claim against his bank of deposit.

The rights of the depositor upon failure of his bank of deposit may, then, be summarized as largely dependent upon whether his indorsement is restrictive or non-restrictive. He may protect himself to some extent by the former, but in the ordinary case upon receipt of the proceeds by the bank of deposit they are credited to his drawing account, and he assumes the status of a simple creditor. He may, however, by such restrictive indorsement protect himself against the consequences of insolvency while

\textsuperscript{20} Uniform Act, supra n. 2, § 30 provides, in part: "A bank which has drawn against a provisional credit, which drawings have been paid, will be deemed in receipt of the proceeds of the item to the extent of such drawings." There is nothing in the context of this provision to indicate that it is limited to purchased items only.

The Code, supra n. 1, § 2, has a somewhat different phraseology. Cf. the final sentence in n. 31, supra.

\textsuperscript{21} The Uniform Act, supra n. 2, § 24, denies the depositor a preferred claim against his bank of deposit only in the case of purchased items, whether credit was given therefor provisionally or not. Cf. the text above n. 54, supra.

Cf. Alleman v. Sayre, 79 W. Va. 763, 91 S. E. 805 (1917), where, before collection, the bank of deposit failed; afterwards the proceeds came into the hands of the receiver. Held: the owner of the item could recover the proceeds; the relation between the owner and the bank of deposit was that of principal and agent until actual collection.

See the interesting case of Arnold v. Wachovia Bank & Trust Company, 195 N. C. 345, 142 S. E. 217 (1928), where the facts were as follows: Plaintiff deposited with the Jonesboro bank a draft payable to her order and indorsed it in blank, and was given credit therefor subject to final payment by the drawee. On the same day the Jonesboro bank forwarded the draft to defendant for collection and credit, which credited the Jonesboro bank with the amount thereof on December 31st. The defendant forwarded the draft to its New York correspondent and the drawee paid the draft on January 4th. The Jonesboro bank closed on January 8th.

The court said: "The liability of the trust company (Jonesboro bank) to plaintiff, and of defendant to the trust company, after the payment of the draft, became absolute. . . . Conceding that, until the payment of the draft by the drawee and its collection by the defendant, the relation between the trust company and the defendant, with respect to the draft, was that of principal and agent, for collection, it is clear, we think, that after the payment and collection of the draft, and after its proceeds had been absolutely credited to the trust company by the defendant, this relation ceased to exist. . . . The draft having been paid by the drawee and its proceeds collected by the defendant, its liability to the trust company, by reason of its contract became that of a debtor, and not a collecting bank." (Italics writer's).

\textsuperscript{22} The Uniform Act, supra n. 2, § 26, provides in part: "A bank which has received an item as agent for collection for a customer having a drawing account shall in the absence of instructions to the contrary credit the proceeds when received to such account."
the item is in the course of collection. It has been held that when the indorsement shows that the item was deposited for collection the correspondent is liable to the owner on the insolvency of the forwarding bank unless the correspondent has remitted the proceeds before knowledge thereof. No provision of the Code covers the point. It is submitted that it should be expressly provided that the correspondent may remit to the receiver of the insolvent whose duty should be to pay over the proceeds immediately to the depositor. Otherwise the latter will be forced to deal or litigate with an out-of-town bank with which he has had no prior relations. It is further submitted that some provision should expressly cover the termination of authority to collect restrictively indorsed items, upon insolvency of the forwarder before collection from the drawer."

**Insolvency of the Drawee Bank**

The insolvency of the drawee may occur either before or after it has charged the item to the drawer's account. In the latter case vital distinctions depend upon the method of payment to its forwarder, i.e., whether by credit or by remittance.

When the drawee becomes insolvent before having charged the item to the drawer's account, it is clear that it should have no authority to honor the item since its powers as a going concern have been terminated. The loss, therefore, should fall on the drawer, who has chosen his banking connections and should incur the risk of its solvency. The Code is quite clear as to this matter. In many cases, however, the drawee retains the item and neither returns it nor charges the drawer's account, and in the meantime continues to pay checks over the counter. This is plainly unfair to the drawer of the mail item. The Code provides that where the drawee retains an item without remitting therefor on the day of receipt, the forwarder may treat it as dis-

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**Notes and Citations**


**Code, supra n. 1, § 13, First.** The Uniform Act, *supra* n. 2, § 50, may be broad enough to cover the point: "Where a collecting bank holds a dishonored item it shall be the duty of the bank, in the absence of instructions to the contrary, to return the item to its customer not later than the next business day; . . . . . ."

**Code, supra n. 1, § 11, Fourth.**
honored. The Uniform Act places a duty on the drawee to give credit or make remittance promptly, but in no event later than the next succeeding business day. And, should the drawee fail to take action as to the item, it is regarded as dishonored. The writer submits that such a disposition of the rights of the drawer is open to question. On principle it would seem clear that the drawer could recover damages for breach of the contract to honor his checks properly drawn, indorsed and presented. But, whatever his theoretical rights may be, he is virtually deprived of a remedy for the reason that the facts essential to his case are not known to him, are unobtainable without circuitous litigation, and a judgment recovered would have no preference. The Code apparently recognizes a right in the drawee to make payment only at its own counter, but no mention of it is made in the Uniform Act. On the whole, it is believed that there is much to be said for the view that the drawee should be deemed to have charged the drawer’s account on the day that the item is received, when it is otherwise properly payable. He is then placed on an equality with other drawers whose checks may have been received on the same day, under identical circumstances, but which have in fact been charged to their accounts.

In any event, the drawer should be discharged when the item is actually, visibly charged to his account on the bank’s records. The Uniform Act selects this point, rather than others which might conceivably have been selected. On the contrary, the Code

\[\text{Uniform Act, supra n. 2, } \S \text{ 16, which also provides: } \text{“Items refused payment because of missing endorsement or other informality may, without liability for so doing, be certified before being returned for correction.”} \]

\[\text{Uniform Act, supra n. 2, } \S \text{ 15, the pertinent part of which is: } \text{“... should the payor close without taking action the item shall be regarded as dishonored by non-payment and any ensuing delay in taking measures to charge secondary parties shall be excused.”} \]

\[\text{For a general, brief discussion of the liability of a bank for refusing to honor checks drawn by a depositor see Brady, op. cit. supra n. 19.} \]

\[\text{Code, supra n. 1, } \S \text{ 11: } \text{“Provided, however, That in any case where the drawee or payor bank shall return any such item unpaid not later than the day of receipt or of maturity as aforesaid in the exercise of its right to make payment only at its own counter, such item cannot be treated as dishonored by non-payment and the delay caused thereby shall not relieve prior parties from liability.”} \]

\[\text{See comment, n. 45, supra.} \]

\[\text{Uniform Act, supra n. 2, } \S \text{ 15. In addition, the item is treated as paid, although not charged to the drawer’s account, upon: } \text{“(1) Receipt by the payor of any agreed equivalent as payment of the item; ... (3) Credit being given or remittance being made for the item according to authority.”} \]

\[\text{Cf. Hirning v. Federal Reserve Bank, 42 F. (2d) 925 (1930).} \]

\[\text{See the exhaustive article by Prof. Roscoe B. Turner, op. cit. supra n. 48, hereinafter more fully mentioned.} \]
unreasonably and arbitrarily, it would seem, permits the forwarding bank to treat the item as dishonored notwithstanding that the drawer's account has been charged, or the item returned to him, in the cases therein enumerated." This provision seems especially ill-conceived when it is considered that whether or not the drawer is discharged depends purely upon the arbitrary election of the forwarder. The only limit fixed is that its election must be exercised with reasonable diligence. One can imagine two drawers in similar situations at the same time, one of whom is discharged at the election of the forwarder of his item, and the other of whom finds his checks dishonored. There appears to be very little of justice or of common-sense in this treatment.

In the case where the drawee receives the item with instructions to collect and credit, no preferred claim is or should be allowed after the item is charged to the account of the drawer and credited to the forwarder pursuant to instructions. The forwarding bank, having voluntarily entered into the relation of creditor of the drawee has received payment of the proceeds as effectually as if it had received the actual currency and redeposited it with the drawee, and should, therefore, incur the risk of its insolvency.

When, however, the drawee receives the item with instructions to collect and remit the proceeds, the question is whether or not, after having charged the drawer's account, such proceeds constitute a trust fund which can be reclaimed from the drawee as a preference in the distribution of its assets. The problem is, per-

"Code, supra n. 1, § 11, the applicable part of which provides:

"Where an item is duly presented by mail to the drawee or payor, whether or not the same has been charged to the account of the maker or drawer thereof or returned to such maker or drawer, the agent collecting bank so presenting may, at its election, exercised with reasonable diligence, treat such item as dishonored by non-payment and recourse may be had upon prior parties thereto in any of the following cases:

First: Where the check or draft of the drawee or payor bank upon another bank received in payment thereof shall not be paid in due course;

Second: Where the drawee or payor bank shall without request or authority tender as payment its own check or draft upon itself or other instrument upon which it is primarily liable;

Third: Where the drawee or payor bank shall give an unrequested or unauthorized credit therefor on its books or the books of another bank; or

Fourth: Where the drawee or payor shall retain such item without remitting thereof on the day of receipt or on the day of maturity if payable otherwise than on demand and received by it prior to or on such day of maturity."

The report of the Commissioners characterizes this section as going to an 'unwarranted extreme.' See comment to Uniform Act, supra n. 2, § 15.

See Note 12 Corn. L. Q. 364 (1927) for a discussion of the conflicting cases dealing with dishonor of the drawee's remittance draft.

"Code, supra n. 1, § 13, Second. See the full text, infra n. 80, noted in (1930) 36 W. Va. L. Q. 297.
haps, most frequently presented by dishonor of the drawee’s remittance draft. The modern trend seems to favor the allowance of the preferred claim, without the aid of statute, on the ground that the drawee is agent of the forwarder for transmission of specific funds collected, rather than its debtor. Thus, in *Central Trust Company v. Bank of Mullens,* the defendant was on the par list of the plaintiff, Federal Reserve Bank of Richmond, and by agreement the former received for collection checks drawn upon itself, sent by the plaintiff, and agreed to remit forthwith by draft on certain designated banks, one of which was the Roanoke bank. On April 14, 1927, plaintiff sent several checks to defendant, which, on April 16th, remitted for part of them by draft on the Roanoke bank. A similar transaction was also handled by a like remittance on April 18th. The checks were charged to the accounts of the drawers.

The remittance drafts were presented for payment on April 19th, and refused on April 20th because of the temporary closing of defendant. There were sufficient funds to defendant’s credit in the Roanoke Bank to pay the exchange drafts at all times. Later, the Roanoke bank applied the defendant’s deposit with it to the satisfaction of certain notes, and released to the receiver the collateral security therefor.

As an additional supporting ground the court relied on the theory that the drafts constituted an equitable assignment *pro tanto* of the funds in the Roanoke bank, as against the drawer of

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*108 W. Va. 12, 150 S. E. 137 (1929).* See also *Central Trust Company v. Bank of Mullens, 109 W. Va. 119, 153 S. E. 145 (1930),* where the facts were as follows:

C had a savings account in the defendant bank. On April 9, 1927 he delivered to plaintiff, in Williamson, his pass-book and a check for the full amount of his savings. Plaintiff immediately sent both to the defendant, requesting collection and remittance. The check and pass-book were received by the defendant on April 12th, and on the same day it issued a cashier’s check and forwarded the same to the plaintiff. C’s account was then charged and closed. Plaintiff credited C with the proceeds (who withdrew $230.00) and sent the cashier’s check through the Federal Reserve. It reached defendant on the same day it closed. The defendant at all times had on hand cash enough to pay the check.

*Held:* Defendant was agent of the plaintiff, and held the proceeds in trust and not as debtor; and that the drawing and delivery of the cashier’s check was an assignment *pro tanto* of that sum from the defendant’s funds. Therefore, plaintiff was entitled to a preference. The case is commented upon in *Note (1930) 37 W. Va. L. Quar. 88.*

See *Federal Reserve Bank v. Peters, 139 Va. 45, 123 S. E. 379 (1924)*

*Accord.*

the check. It was argued by counsel for the appellee that there had been no augmentation of the defendant’s assets, and that the trust res had not been traced into the assets coming into the hands of the receiver. As to the latter contention, the court said: “... there was on hand in the Bank of Mullens and its Roanoke depository sufficient cash to pay the plaintiff’s drafts. Therefore, under the trust fund theory, as above described, the plaintiff was entitled to a preference . . . .”

The essence of any trust consists in the continued existence of a specific, traceable res legal title to which is in the trustee but which is equitably owned by the cestui que trust. In the case of the proceeds of a collected check these requirements do not, of course, call for the ear-marking of specific currency. But, on principle, it must appear that the cash in the vaults of the drawee was not at any time less than the amount of the item collected. A subsequent increase in such cash, after having once been depleted, is plainly of no consequence. It is elementary that if A is trustee of $1000.00 and wrongfully spends it for an automobile, a trust can be asserted against the latter; but the fact that the next day A is bequeathed $1000.00 by his grandmother cannot transfer the trust to the bequest as against A’s general creditors. The difficulty cannot be overcome by substituting for the trust res consisting of assets actually in the bank, the obligation of a third party to the trustee. It is submitted that the Central Trust Company case is erroneous in overruling this contention.”

Professor Turner reaches the conclusion that “In the last analysis the issue is between the owner of the collection item and the general creditors of the failed drawee, including its depositors. . . . To allow the holder a preferred claim in a large measure compensates him for the many increased risks forced upon him by the direct routing practice.” On the other hand, Professor Townsend states that upon principle the better view is that the drawee is not the forwarder’s agent, but simply its debtor whether the item was sent for collection and credit or for collection and remittance, for the reason that the drawee is not expected to remit by anything but draft or credit unless specifically instructed to the contrary. Thus, once remittance has been made in the usual

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77 For an excellent and exhaustive treatment of the whole trust theory see Townsend, Constructive Trusts and Bank Collections (1930) 39 Yale L. J. 980 (1930). See also Bryan, Trust Nature of Collection Items, 13 Va. L. Rev. (N. S.) 1.

78 Turner, op. cit. supra n. 48.

79 Townsend, op. cit. supra n. 77.
or the authorized manner there is no longer any basis for a trust except in cases where the bank, by receiving the item when its officers knew of the insolvency, becomes a trustee *ex maleficio*.

Since there is no possibility of reconciling the cases, the legislature was free to choose between the two lines of precedents. Accordingly the Code allows a preference in the assets of the failed drawee, when the drawer's account has been charged, except in those cases where the forwarder elects to treat the original item as dishonored. The Uniform Act also allows a preference (without such exception), but eliminates from the assets of the drawee subject to the preference "previously acquired bank buildings and other real estate and its fixtures and equipment."

Without the aid of such statutes it is possible that the payee of the original item may suffer the loss without any remedy whatsoever, much less a preferred claim. It was so held in *City of Douglas v. Federal Reserve Bank of Dallas*. There, the payee attempted to recover from an intermediate correspondent upon dishonor of the drawee's remittance draft, on the ground of negligence in sending the item directly to the drawee and in accepting its draft in payment. The drawer having been discharged, plaintiff was left with no remedy, the New York collection rule being followed by the federal courts.

Although the drawer is released when his account is charged, the payee of the check quite often expects him to "make it good," especially when such payee has been diligent in depositing the

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10 Code, supra n. 1, § 13: "Second: Except in cases where an item or items is treated as dishonored by non-payment as provided in section eleven, when a drawee or payor bank has presented to it for payment an item or items drawn upon or payable by or at such bank and at the time has on deposit to the credit of the maker or drawer an amount equal to such item or items and such drawee or payor shall fail or close for business as above, after having charged such item or items to the account of the maker or drawer thereof or otherwise discharged his liability thereon but without such item or items having been paid or settled for by the drawee or payor either in money or by an unconditional credit given on its books or on the books of any other bank, which has been requested or accepted so as to constitute such drawee or payor or other bank debtor therefor, the assets of such drawee or payor shall be impressed with a trust in favor of the owner or owners of such item or items for the amount thereof, or for the balance payable upon a number of items which have been exchanged, and such owner or owners shall be entitled to a preferred claim upon such assets, irrespective of whether the fund representing such item or items can be traced and identified as part of such assets or has been intermingled with or converted into other assets of such failed bank;"

11 Uniform Act, supra n. 2, § 31.

check for collection. He quite reasonably takes the attitude that he did everything possible to collect the check, and that the resulting loss or inconvenience in asserting a preferred claim should be borne by the drawer, who after all, voluntarily chose to deal with the failed bank and was in a better position to judge of its solvency. It is no answer to say that the payee was not compelled to accept a check in payment, but could have insisted upon currency. Business is simply not conducted on any such basis. These considerations naturally suggest the possibility of placing upon the drawer, notwithstanding that he has been discharged, the burden of proving the preferred claim. Of course, if the drawer himself is on the verge of insolvency, the payee may be in a better position by asserting a preferred claim against the bank. In the absence of that fact there is something to be said for a view which would permit the payee to treat the item as dishonored. He could then demand full payment from the drawer, who, in turn, would be entitled to an assignment from the payee of his right to a preferred claim. No mention is made in either the Code or the Uniform Act of the possibility of such assignments.

The courts would probably have some difficulty in devising a rationale to justify such an assignment, especially if it were to depend upon the election of the payee. If practical considerations must be made subservient to formulae, some amiable fictions might be pressed into service. Of course, any such suggestion plays havoc with logic, doctrine and the true facts. On the whole, if the payee is to be given such rights, it should be done by statute providing for an assignment. The latter would constitute tangible evidence of the rights of the parties, something which both the Code and the Uniform Act do not seem to regard as important.

As to the latter point, it is one thing that statutes glibly confer certain rights, and quite another that the original parties have no accessible, tangible evidence of them. Amid the confusion incident to a bank's closing substantially all that the parties have is the returned check. They cannot get into the bank, and if they could the records would be unintelligible. The chief constructive criticism of importance which this writer would make in relation to the foregoing statutes is this: they should expressly provide that the bank of deposit and the receiver of the closed bank, whether the drawee or an intermediate correspondent, should be under the duty of providing the owner and the drawer respectively with a clear, concise statement of the true facts as shown by
the records and correspondence, indicating when, where and against what party, the preferred claim is to be asserted.

*Insolvency of Correspondent Banks*

The term "correspondent" is used in this connection to indicate any bank in the collection chain other than the initial bank of deposit and the drawee. As we have seen, correspondents are sub-agents of the depositor, except as otherwise provided by agreement, and except as to items payable to bearer, or indorsed specially or in blank. In the latter instances they are entitled to rely upon the presumption that the bank of deposit is owner of the item, and this presumption is available to each bank in the collection chain provided there is nothing upon the face of the paper or in any prior indorsement to indicate an agency or trustee relation of any prior party. The correspondent may convert any blank or special indorsement into a restrictive indorsement by writing over the indorsement the words "for deposit" or "for collection" or words of like import; and, as to bearer items, by the words "received for deposit" or "received for collection," or words of like import.

The indorsement "pay any bank or banker" is also restrictive under the Code, but non-restrictive under the Uniform Act. In the former, it carries certain guaranties to subsequent holders. In the latter, the specified warranties are binding upon every person, whether an agent or not.

In the ordinary collection case, where the collecting bank has given its forwarder provisional credit for the item, and each bank in the chain likewise gives such credit, payment by charging the account of the drawer automatically constitutes payment to each

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62 Code, supra n. 1, § 2.
63 Code, supra n. 1, § 4.
64 Ibid.
65 Ibid.
66 Uniform Act, supra n. 2, § 2.
67 Ibid.
68 Code, supra n. 1, § 4.
69 Uniform Act, supra n. 2, § 5: "Every person, whether an agent or not, who without express stipulation to the contrary, indorses in his own name an item issued by or drawn on or payable at a bank warrants to subsequent holders and to such bank: (1) that he has a good title to the item; (2) that the item has not been raised or otherwise materially altered; and (3) that he has no knowledge that the drawer's signature is forged or unauthorized."
correspondent, and to the bank of deposit. Should the correspondent thereafter become insolvent, its immediate forwarder would bear the loss, and the owner of the original item is, of course, protected.

A second situation is presented when the correspondent, having received payment of the item, remits by draft to its forwarder and becomes insolvent before such remittance draft is honored. Since the latter could not constitute payment to the forwarder, the proceeds are still in the hands of the collecting bank and the owner must resort to a preferred claim. The original item is, in such cases, charged back to its depositor, and there is no possibility of holding the drawer. Thus, the distinction is to be noted that in the case where each bank in the collection chain gives provisional credit, the loss arising out of the insolvency of the correspondent will be borne by its immediate forwarder, without a preferred claim; whereas, in the remittance case, the risk is thrown on the depositor, who in compensation therefor is given a preference.

A third situation arises when one correspondent, after receiving payment from its correspondent in the form of a remittance instrument, itself remits, and thereafter said remittance draft which it received in payment is dishonored. In that event the loss falls neither on the depositor of the original item nor on the bank of deposit, but on the correspondent receiving the dishonored remittance instrument. It, likewise, then asserts a preferred claim.

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\[\text{Code, supra n. 1, § 10; Uniform Act, supra n. 2, § 30, quoted supra n. 46.} \]

\[\text{See n. 46, supra.} \]

\[\text{Code, supra n. 1, § 13, Third; Uniform Act, supra n. 2, § 31.} \]

\[\text{Ibid.} \]

\[\text{Code, supra n. 1, § 2, by the provisions of which the credit for the original item is "revocable until such time as the proceeds are received in actual money."} \]

\[\text{Uniform Act, supra n. 2, § 33, providing that "A provisional credit given for a purchased item may be charged back at any time, although the item has been paid and whether or not it can be returned, provided the bank has not received the proceeds of the item, or provided, if received, the same were in the form of a draft or other remittance instrument which upon due presentation was dishonored . . . ."} \]

\[\text{The correspondent is the "owner" of the item, in such case, within the terms of the Code, supra n. 1, § 13, Third; but, as pointed out in the Committee's note to § 33 of the Uniform Act, the Code fails to provide the means whereby the correspondent may obtain reimbursement.} \]

\[\text{The latter section provides that "The dishonored remittance item, if obtainable, shall be returned to the forwarder, or if in purported settlement for more than one collection item, be held in trust for prior parties as their interests may appear."} \]
A fourth situation arises when the correspondent, after having given provisional credit to its forwarder, fails before the item is charged to the drawer's account by the drawee, and credited to the correspondent. If, after such failure and before notice thereof, the drawee does enter the credit, the correspondent is in the position of having failed before receiving the proceeds of the original item. No preferred claim can then be asserted by its forwarder.

If, however, in the situation just supposed, the collecting bank received the original item with instructions to remit, a different result takes place under the Uniform Act. The Code, in such a case, denies a preferred claim as it does in the credit case, for the reason that the collecting bank has not closed after having received the proceeds, which is one of the essentials of the preference under Section 13, Third. The Uniform Act makes no distinction as to when the collecting bank received payment, whether before or after its closing. The preference is dependent upon failure to make remittance before closing, regardless of when it received payment of the original item. In other words, a preference is allowed upon failure to remit although payment of the original item was not received until after the bank closed. This is plainly correct, on principle, for the reason that the proceeds although received after insolvency, are not assets of the bank, but are received only as agent for transmission to its forwarder according to remittance instructions. It is, therefore, submitted that the Code is defective in making the preference dependent upon an entirely irrelevant matter, viz., the time of receiving payment. The item is then charged back to the original depositor under the provisions of both laws, and, under the Code, he apparently has no more than a common claim against the failed correspondent.

59 The Code, supra n. 1, § 13, Third, allows a preference only "Where an agent collecting bank other than the drawee or payor shall fail or be closed for business as above, after having received in any form the proceeds of an item or items entrusted to it for collection, but without such item or items having been paid or remitted for by it ...." (Italics writer's).

The Uniform Act, supra n. 2, § 31, does not provide for a preference in the credit cases, but only where the collecting bank has "received an item for remittance ...." 60

60 Ibid.

Ibid., which provides in part: "Where a collecting bank having received an item for remittance shall close for any reason before making remittance in proper form, which upon due presentment is not dishonored, a debtor creditor relation shall not arise, but .... in the case of any .... collecting bank, if it shall have received the proceeds of the item, the payment or proceeds shall be deemed held in trust ...."
CONCLUSIONS

It must be apparent that both acts (the Uniform Act to a lesser extent), tend to favor banks rather than their depositors. It would seem that the original depositor of the item should incur no risk as a common creditor beyond the insolvency of his bank of deposit. As between the original depositor and the drawer this writer submits that it is in accordance with their intention to insist upon unconditional, undelivered payment. This result could be obtained by requiring the drawer to assert the preferred claim against the drawee by assignment from the depositor.

The drawer as a common creditor, should incur the risk of insolvency of the drawee only until the item is received by it for payment. If it fails to charge his account, the law should deem to have been done that which ought to have been done. Then, in the credit case, the loss should fall on the immediate forwarder. In the remittance case, as above stated, a preferred claim should be allowed, but asserted by the drawer.

As to insolvency of intermediate collecting banks, in the credit case the loss should fall on the immediate forwarder, which chose to rely upon its solvency. In the remittance case, the risk can logically and fairly be placed only on the original depositor, but he should have the protection of a preferred claim.

The rationale of these conclusions rests upon the broad principle that he who voluntarily chooses his debtor should incur the risks of a creditor. And, he who willy-nilly becomes a creditor should have the protection of a preference in the debtor's assets.