

**DIGEST OF LEGAL OPINIONS OF THOMAS B.
PATON, GENERAL COUNSEL OF THE
AMERICAN BANKERS ASSOCIATION, WHICH
HAVE BEEN
PUBLISHED IN THE ISSUES OF THE JOURNAL OF
THE AMERICAN BANKERS ASSOCIATION
FROM JULY, 1908, TO JUNE, 1919, INCLUSIVE**

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Second Edition

With an Index and Legal Citations

Digested by

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PREFACE

FROM July, 1908, to June, 1919, there have been published in the Journal of the American Bankers Association the legal opinions of its General Counsel. Inasmuch as there have accumulated during the past eleven years as many as 1,350 of these opinions, it was thought advisable by the Executive Council in the interests of all the members that a digest of them be made and published. Accordingly this Digest has been prepared and an attempt has been made in each case to write, in concise form, a statement of the facts, followed by the opinion. It seemed best from the busy banker's point of view, not to deal too much in detail in a book of this kind but rather to state in a terse way the conclusions which a banker or other business man may wish to know, without taking the time to read through the citations of legal decisions or the discussion of underlying principles or reasons upon which the opinions are based. A fuller treatment of the subject quoting the basic legal authorities or discussion can always be had by referring to the full text from which the digest was made.

For the variety of subjects treated and their practical bearing upon banking operations, the bankers are solely responsible as it is they who have voluntarily submitted questions on the problems confronting them in every day business. It would then seem to follow that the book has the advantage of containing a selection of subjects confined to those matters only which have been troubling bankers most and which have already proved of sufficient interest to cause them to request legal advice.

It is, of course, understood that the opinion of a lawyer, even though based on decisions of the courts of last resort or, in the absence of legal precedent, reasoned out upon sound legal principles, still remains an opinion. At most the reader can choose to use it and to depend upon it as a possible guide and source of information, and for these objects this book is published.

All of the legal authorities quoted, cited or referred to in the full text of the opinions are herewith collected and grouped under the proper headings. Where an opinion was rendered on a subject upon which no case had ever been decided, the writer has cited legal authorities that are analogous to and in support of the principle involved. It is important, therefore, for the reader to note that those citations which are not directly in point are useful as supporting authority and collateral reading.

THOMAS B. PATON, Jr.

New York, N. Y., January 12, 1920.

EXPLANATORY NOTE. The name of the state which precedes each digest indicates the state from which the inquiry came. The volume referred to at the end of each digest indicates the volume of the JOURNAL of the AMERICAN BANKERS ASSOCIATION

ACCEPTANCE AND CERTIFICATION

Certification after banking hours

1. (Ala.) A bank certifies or pays a customer's check after banking hours and the customer, before banking hours of the next day seeks to stop payment. The question was raised whether the payment or certification was binding on the customer. *Opinion*: Such payment or certification is probably valid, although the point has never been directly passed upon by the courts in a case between the customer and the bank. Vol. 5, p. 19, July, 1912.

Acceptance must be written

2. (Ark.) A livestock company instructed its bank to honor a draft drawn in its name by C and D, who were buying stock for it, and the bank agreed to such instruction, telephoning a prospective seller of live stock that the check for \$4,000 was good. Relying on this oral promise to pay the amount, the cattle are turned over to C and D. Later, the live stock company stopped payment on the check, claiming that C and D had no authority to draw it or to buy so large an amount of stock. The holder seeks to hold the bank liable on its statement. *Opinion*: While a bank which promises over the telephone to pay a check cannot be held on such promise, the acceptance not being in writing, the bank may be held liable to the holder where, by agreement between the bank and depositor, the deposit is appropriated for the payment of such check. If there are special circumstances from which it would appear that the depositor assigned a certain amount of his deposit with the consent of the bank, the latter, although it could not be held liable as acceptor of the check, might be held as trustee of a specific deposit or as a debtor to the assignee for the amount so assigned. Vol. 9, p. 827, April, 1917.

3. (Ill.) A bank was requested to certify check by wire. It refused on the alleged ground that the check did not transfer the funds until it reached the bank and that the depositor could revoke the payment after it was certified. *Opinion*: A bank can certify by wire and after such certification the drawer has no right to stop payment. While an acceptance, to be valid, must be in writing, there is no requirement that the acceptance

in all cases must be written on the bill. Vol. 10, p. 466, Dec., 1917.

4. (Ind.) In all states where the Negotiable Instruments Law is in force and in other states where the statutes require acceptance to be in writing, a promise over the telephone to pay a check, not being in writing, does not bind the drawee; but in Indiana where the common law rule prevails that verbal acceptances are valid, such telephone promise would probably bind the drawee in favor of one who in reliance thereon cashed the check. Where, however, the drawee simply answers that the check is "good" or "all right" without coupling with such answer any specific promise to pay, such answer is insufficient to bind the bank as an acceptor. Vol. 3, p. 337, December, 1910.

Note: The Negotiable Instruments Law requiring acceptances to be in writing was passed in Indiana in April, 1913.

5. (Ohio) The indorser of a check attempted to cash it at Bank A, which bank as a precaution telephoned Bank P, the drawee. In reply to the question whether or not the check was good, Bank P said "yes," and when asked if it would protect Bank A on the check, it replied over the telephone, "We will." Bank A cashed the check on these representations and upon dishonor wishes to hold the drawee liable, because the indorser proved worthless. *Opinion*: Bank A cannot hold Bank P on the latter's oral promise to pay the check, because the Negotiable Instruments Act requires acceptance to be in writing; nor is Bank P bound to Bank A, the holder, who has cashed the check on faith of such promise, on the principle of estoppel, as this principle is inapplicable in the face of positive statutory requirement of written acceptance. Bank A, however, would have a right of recovery against the drawer of the check. Vol. 7, p. 165, Sept., 1914.

6. (Okla.) A bank purchased a check from the payee after receiving a statement over the telephone by the drawee that the check was good. Payment was stopped. *Opinion*: Under the leading case construing the Negotiable Instruments Law of Colorado, the bank had no recourse upon non-payment against the drawee, as certification over the telephone is invalid, not being in writing. The bank's sole recourse is against the drawer and payee. Vol. 5, p. 104, Aug., 1912.

7. (Tex.) An acceptance of a check or draft by telephone in Texas is valid, because there is no Negotiable Instruments Act; or any other statute in force requiring acceptances to be in writing. Vol. 6, p. 33, July, 1913.

Norms: The Negotiable Instruments Law requiring acceptances to be in writing was passed in Texas in March, 1914.

Acceptance on note

8. (Pa.) A regular form of a negotiable promissory note, made by A payable to his own order forty-five days after date at the X bank, was indorsed in blank by A. Across the face the following acceptance was written by a third party: "Accepted payable at the X bank, signed B." The question is asked what is the liability of the acceptor. *Opinion:* Where a third person writes an acceptance across the face of a promissory note, the holder has the option of treating the instrument as either a bill or note and the person so signing can be held liable as acceptor of a bill of exchange. Vol. 10, p. 528, Jan., 1918.

Bank's obligation to pay, not to certify

See 24

9. (Iowa) A check was presented at the drawee bank at a time when there were sufficient funds. The drawee returned it for proper indorsement and inquires if it was under obligation to first certify the check in case of subsequent depletion of the maker's account. *Opinion:* The certification is optional not obligatory, and the bank would not be liable for refusal to certify, if the check in this case thereafter became "not good." Vol. 2, p. 538, June, 1910.

10. (Mass.) A customer gave instructions to his bank not to certify any of his checks and the bank desires to know if there is any ruling which makes it compulsory for the bank to certify upon demand if the funds are sufficient. *Opinion:* The bank is not obliged to certify a check when requested. Its only obligation is to pay. The customer's instruction is sufficient reason for the bank's refusal. Vol. 5, p. 28, July, 1912.

11. (Pa.) A check made payable to a firm was brought to the bank by the firm's agent with the request that it be certified. The bank doubted the authority of the agent and refused to certify. *Opinion:* Certification is a matter of favor on the bank's part and cannot be claimed as a right. Vol. 4, p. 681, May, 1912.

Certified checks post-dated

12. (Nev.) A bank certified a post-dated check before its date at the request of the holder. The bank questions its responsibility should it refuse another check not post-dated, which would have been good but for the certification of the post-dated check. *Opinion:* The bank has no right to pay or certify a post-dated check at the request of the holder, before its date and so acts at its peril. Such certification at the request of the drawer is also held irregular, although in Idaho, it is held proper, if the funds are sufficient, when the amount becomes immediately chargeable to his account and payable to the holder irrespective of the date. Vol. 5, p. 750, May, 1913.

13. (Ark.) A check payable to A was post-dated December 1, 1912, and was certified June 1, 1912, before its date. It was delivered to a trustee in escrow. The trustee in breach of the trust delivered it to A, who negotiated it to a purchaser for value four months after its date. *Opinion:* It might be held by the courts (1) that the irregular certification put the purchaser on inquiry, or (2) that the check was overdue when negotiated, so as to deprive the purchaser of the status of a bona fide holder. If such were held, the check in the hands of the purchaser would be subject to the same defenses as if held by the payee. Vol. 6, p. 210, Sept., 1913.

14. (Okla.) A gave B a check post-dated. B wrote to the bank on which it was drawn, asking that payment be guaranteed. The cashier sent B a written guaranty that the check will be paid when due. *Opinion:* The cashier has no authority to certify a post-dated check before the due date and a holder taking with notice, cannot recover thereon from the bank. In this case B could not hold the bank upon its cashier's letter. Vol. 8, p. 322, Oct., 1915. See 180.

Certification equivalent to acceptance

15. (N. H.) The Negotiable Instruments Law of New Hampshire requires that "an acceptance must be in writing" and further provides that "certification is equivalent to an acceptance." Vol. 4, p. 375, Dec., 1911.

Certifying bank's liability to fraudulent holder

16. (Conn.) According to a New Jersey decision, a certifying bank can refuse

payment to a fraudulent holder where a check has been certified for the drawer, but cannot so refuse where the certification is for the holder. If this decision is sound law, there might be a desirability for separate certification stamps to indicate for whom the check was certified. An Ohio decision ignores this distinction and holds that a bank must pay fraudulent holder whether the check is certified for the drawer or for the holder. Vol. 5, p. 749, May, 1913.

Drawer's liability on accepted draft

17. (Tex.) A draft was drawn by Smith and Company on Jones & Company at sixty days' sight and accepted by Jones & Company. *Opinion:* The effect of the acceptance is not to discharge the drawer but to constitute the acceptor the principal debtor. In Texas, the liability of the drawer of an accepted draft is fixed by due protest and notice, or without protest, by suit against the acceptor as provided for by statute. Vol. 8, p. 326, Oct., 1915.

Certification of forged checks

See 21, 47

18. (Ill.) A bank certified checks bearing forgery of the payee's indorsement. The checks were purchased by another bank which received payment therefor. *Opinion:* The certifying bank does not warrant the genuineness of the payee's indorsement and is not responsible to the purchaser. If money is paid by the certifying bank thereon, it may be recovered. Vol. 5, p. 590, March, 1913.

19. (Kan.) A forged check was given in payment of a diamond ring. Before accepting the check, the seller required a responsible indorser, and the latter before indorsing the check telephoned the bank which promised to pay the check. The bank did not pay the forged check. *Opinion:* The bank's promise to pay was not binding where the check was a forgery, as its promise related to a valid check; even in case of a valid check, the bank would not be bound because its promise was not in writing. Vol. 2, p. 153, Oct., 1909.

20. (Pa.) A bank certified its customer's check, which remained outstanding and which was doubted by the drawer to be forged. The bank doubted the fact of forgery and refused to reimburse its customer's account. *Opinion:* If the check remains outstanding the bank in a suit by the customer would be

held liable for the amount of the deposit, for his positive testimony of the forgery would probably outweigh the presumption of genuineness arising from the fact of certification. Vol. 6, p. 576, Feb., 1914.

Certification guarantees signature and sufficiency of funds

21. (N. J.) A bank certified a check payable to a specified person for a stranger who was not entitled to the instrument. The holder negotiated the check under a forged indorsement to an innocent purchaser for value. *Opinion:* The certifying bank binds itself that there are sufficient funds to pay the check and guarantees the genuineness of the drawer's signature. The bank is not responsible to the innocent purchaser because (1) it does not guarantee the genuineness of the payee's indorsement, and (2) it is not negligent in certifying a check for an unidentified person. Vol. 9, p. 582, Jan., 1917.

Holder in due course

22. (Okla.) A check to drawer's order was certified for the drawer, who indorsed it to B. B cashed the item at the D bank. The drawer upon learning that B was guilty of fraud, stopped payment, and the certifying bank refused to pay the D bank. *Opinion:* D bank paid value to B for the certified check without notice of the fraud and as a holder in due course can recover from the certifying bank. Had B presented the check to the drawee some (but not all) authorities hold that the certifying bank could refuse payment and plead in defense the fraud upon its depositor. Vol. 6, p. 820, June, 1914. See 21, 55.

Indorsement must be properly made

See 42, 386

23. (Cal.) A check for \$5,000 was presented at the drawee bank and payment was refused because the check was not indorsed. The presenting bank then indorsed the payee's name for the payee and again presented the check which was again refused. The holder demanded that the bank certify the check. *Opinion:* The drawee bank was under no obligation to the holder to certify the check. Its only obligation was to pay when duly presented. Vol. 5, p. 311, Nov., 1913.

24. (N. Y.) A bank although in funds refused payment of a check because it lacked

the payee's indorsement. Later, when the check properly indorsed was presented, there were no funds to meet it. The holder claimed that drawee was liable for failure to certify the check in the first instance. *Opinion*: The bank was not obliged to certify, but only to pay. Banks frequently certify such checks "good when properly indorsed," but do so purely out of accommodation. Vol. 2, p. 188, Nov., 1909.

25. (Pa.) A bank received through the mail a check drawn on one of its customers, but which was improperly indorsed. The bank returned the check for correction and in the meantime the customer reduced his account so that check was not good. *Opinion*: The drawee bank is not liable to the holder for failure to certify the check before returning it for proper indorsement. Many banks do certify "good when properly indorsed" but the bank is under no obligation to certify a check. Vol. 7, p. 165, Sept., 1914.

Immediately charging customer's account

26. (D. C.) A bank certified a check payable to a distant firm at the request of the holder who was its traveling salesman. Of this fact the depositor was ignorant. The depositor believing that the check could not be presented for several days, drew a second check, which overdrew the account because of the certification. He threatened suit for damages because of the bank's refusal to pay. *Opinion*: The bank had the right to certify the first check when presented by the holder and immediately charge same to the customer's account. Vol. 5, p. 170, Sept., 1912. See 55.

Language expressing certification construed

See 4, 35, 36

27. (Cal.) A bank in which A. Brown is a depositor sent the following telegram, "Check of A. Brown for five hundred dollars now good." *Opinion*: This telegram would not constitute a sufficient acceptance to bind the bank. It is not an absolute promise to pay, and there is an implication that the bank would not answer for Brown's check after sending the wire. Vol. 9, p. 147, Aug., 1916.

28. (Ind.) The drawee of a check in answer to an inquiry by the holder replied over the telephone simply that the check was good. Notwithstanding a subsequent stop payment order, the check was paid. *Opinion*:

In Indiana, where the Negotiable Instruments Law has not been enacted, oral acceptances are valid. But it is doubtful if the mere oral answer that a check is good, so clearly indicates an absolute promise to pay as to be binding as an acceptance. Vol. 3, p. 675, May, 1911.

Note: The Negotiable Instruments Law which requires acceptances to be in writing was passed in Indiana in April, 1913.

29. (Mo.) A bank received a wire: "Will you pay check signed A, \$335?" and replied by wire, "A's check good for amount." *Opinion*: The reply will be held an acceptance binding the bank to pay check to a bona fide holder who has purchased same on faith thereof. Vol. 6, p. 33, July, 1913.

30. (N. M.) A check may be accepted by telegram which is a sufficient compliance with the statutory requirement that acceptance must be in writing, but to be binding the telegram must clearly import an absolute promise to pay. Where a bank wired, "Will you pay A's check on you \$100?" and the drawee wired reply, "A's check on us good for \$100." *Opinion*: That the reply wire sufficiently imports an absolute promise to pay and is binding as an acceptance. Vol. 10, p. 527, Jan., 1918.

31. (N. Y.) In reply to a telegram asking "Is John Smith good on your books for \$50?" A bank answered by wire and confirmed by letter as follows: "John Smith good on our books for \$50 today." When the check reached the bank it was refused because the funds had been withdrawn. *Opinion*: The bank's wire confirmed by letter was not binding on the bank as an acceptance. It was not a promise but merely a statement of fact as to the condition of the customer's account on a given day. Vol. 4, p. 680, May, 1912.

32. (Okla.) A bank before advancing value in reliance upon a telegram concerning some particular check should see that the answer by wire contains or imports an absolute and unequivocal promise to pay. For the wording of telegrams illustrating this point, see Vol. 3, p. 338, Dec., 1910.

33. (Okla.) A drew two checks of \$303.40 and \$75 respectively and had his bank wire the purchasing bank as follows: "We will honor Mr. A's draft for \$400 this attached." Later A stopped payment and A's bank refused to pay the amount claiming that its acceptance was of a single draft of \$400 and did not accept the particular checks of