



6-1-1930

# Bills and Notes -- Checks -- Burden and Manner of Proving Loss Caused Drawer by Delay in Presentment

Henry T. Powell

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

---

## Recommended Citation

Henry T. Powell, *Bills and Notes -- Checks -- Burden and Manner of Proving Loss Caused Drawer by Delay in Presentment*, 8 N.C. L. REV. 444 (1930).

Available at: <http://scholarship.law.unc.edu/nclr/vol8/iss4/12>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact [law\\_repository@unc.edu](mailto:law_repository@unc.edu).

### Bills and Notes—Checks—Burden and Manner of Proving Loss Caused Drawer by Delay in Presentment

In a recent case the defendant, drawer, gave his check to one McDaniel who had not presented the check for payment when the drawee bank closed its doors because of insolvency thirteen days later. The endorsee of the check brought action on it. The drawer demurred claiming the delay in presentment discharged him. The lower court sustained the demurrer. Reversed, on the ground that the defendant should not only show delay in order to be excused but also a loss.<sup>1</sup>

The frequent failures of banks at the present time make the question a very important one, since most of the causes of loss by unreasonable delay arises through failure of the drawee banks.<sup>2</sup>

Since the general rule applicable to bills of exchange, "that presentment is sufficient to charge the secondary parties, if made within a reasonable time from the last negotiation thereof"<sup>3</sup> has no application to the liability of the drawer of a check, to whom a special rule of liability is laid down,<sup>4</sup> no question concerning the liability of the drawer is raised, in the instant case, by the negotiation from the payee to Mrs. McDaniel.<sup>5</sup>

#### *Reasonable Time for Presentment*

In order to preserve his rights against the drawer of a check the holder must present it for payment to the drawee within a reasonable time, or in case of loss caused thereby the drawer is discharged to the

<sup>1</sup> McDaniel v. Mackey, 150 S. E. 439 (Ga. 1929).

<sup>2</sup> Carroll v. Sweet, 128 N. Y. 19, 27 N. E. 763 (1891); Gordon v. Levine, 194 Mass. 418, 80 N. E. 505, 10 L. R. A. (N. S.) 1153 (1907); Palmer v. Harris, 142 S. E. 276 (Ga. 1928). A rather unusual case is presented by Ferrari v. First Nat'l Bank of Connesville, Pa., 159 N. E. 178 (N. Y. 1927) where the drawer had no funds in the drawee, but the drawee bank agreed to cash the check and charge against the account of a bank in which the drawer did have funds, and the failure of this latter bank coupled with delay in presentment was held to excuse the drawer.

<sup>3</sup> N. I. L. §70; N. C. Cons. Stat. Ann. (1919) §3051.

<sup>4</sup> N. I. L. §186; N. C. Cons. Stat. Ann. (1919) §3168; A check must be presented for payment within a reasonable time after its issue or the drawer is discharged to the extent of his loss caused by the delay.

<sup>5</sup> The indorser is discharged by unreasonable delay in presenting the check regardless of the loss. And in this case the check must be presented for payment by the close of the business day following its delivery to the endorsee. Comer v. Dufour, 95 Ga. 376, 22 S. E. 543 (1895); Mauney v. Coit, 80 N. C. 300, 30 Am. Rep. 80 (1879); Kirkpatrick v. Puryear, 93 Tenn. 409, 24 S. W. 1130 (1894); Nuzum v. Sheppard, 87 W. Va. 243, 104 S. E. 587, 11 A. L. R. 1024 (1920).

extent of that loss.<sup>6</sup> Where the check is drawn on a local bank the check must be presented to the drawee bank for payment by the close of the next business day following receipt of it by the payee, in the absence of special circumstances.<sup>7</sup>

<sup>6</sup>N. I. L. §186; N. C. Cons. Stat. Ann. (1919) §3168, *supra* note 4; Carroll v. Sweet, *supra* note 2; Krauss v. Aleck, 209 N. W. 444 (Iowa 1926); Swift & Co. v. Miller, 62 Ind. App. 312, 113 N. E. 447 (1916); Hazard Bank and Trust Co. v. Morgan, 211 Ky. 137, 277 S. W. 307 (1925); Merritt v. Gate City Nat'l Bank, 100 Ga. 147, 27 S. E. 979 (1897); Koch v. Sandford Loan and Realty Co., 286 S. W. 732 (Mo. 1926).

<sup>7</sup>First Nat'l Bank of Charlotte v. Alexander, 84 N. C. 30 (1883); Lewis, Hubbard & Co. v. Montgomery Supply Co., 59 W. Va. 75, 52 S. E. 1017, 4 L. R. A. (N. S.) 132 (1906); Colwell v. Colwell, 92 Ore. 103, 179 Pac. 916, 4 A. L. R. 876 (1919); Gordon v. Levine, *supra* note 2.

However, when the holder has knowledge of the shaky condition of the drawee there are some jurisdictions which say the holder must present the check at the earliest time possible. Temple v. Carroll, 75 Neb. 61, 105 N. W. 989 (1905); First Nat'l Bank of Charlotte v. Alexander, *supra* note 7, approved in First Nat'l Bank of Kewanee v. Wine, 47 BANKERS LAW JOURNAL 220 (Ill. App. 1930).

If the drawee is located in another city or town from that in which the holder resides a different rule for presentment is laid down and the check must be sent by some usual means of communication on the day following its receipt for collection and the party who finally receives it for collection must present it to the drawee by the close of the business day following its receipt by him. Thus two days are allowed for each step in the chain of collection. Lewis, Hubbard & Co. v. Montgomery Supply Co., 59 W. Va. 75, 52 S. E. 1017 (1906). And no bank in the chain of collection is chargeable with negligence if it forwards the check on to the next bank by the close of the business day following its receipt. Wallace v. City Nat'l Bank, 202 Ala. 323, 80 So. 405 (1918); Douchester v. Merchant's Nat'l Bank of Houston, 106 Tex. 201, 163 S. W. 5 (1914); Plover Savings Bank v. Moodie, 135 Iowa 685, 110 N. W. 29 (1906). However, it seems that the next day rule should be straightened in one place. It seems only right that the intermediate banks in the chain of collection should mail the paper on to the next bank in the chain on the day of its receipt, unless it is received after the close of business hours. In fact some banks in Philadelphia, Chicago and Kansas City advertise that they maintain 24 hour transit departments. But it should not be supposed that sending the check on to another bank, no matter where it was, would satisfy the duty of the collecting bank. It has been considered unreasonable delay to send the check from, or across, the place of payment, instead of toward, or to it. Gifford v. Hardell, 88 Wis. 538, 60 N. W. 1064 (1894). This does not mean that the check must be sent in a line that a bird would fly, but merely by the usual commercial route. Sublette Exch. Bank v. Fitzgerald, 168 Ill. App. 240 (1912). This allows evidence as to the custom of banks to be put in to show the reasonableness of a route. But even custom will not justify the choosing of an absurd route. The Federal Reserve System has diminished the importance of this point and in all probability the routing of the Federal Reserve will be held free from negligence.

Two rather unusual cases of circuitous routing were: Where the payee sent a local check across Chicago to another bank which was not a member of the clearing house instead of presenting to the drawee as he might have reasonably done. And when the check was delayed in reaching the drawee, which had failed in the meantime, the drawer was discharged. National Plumbing and Heating Co. v. Stevenson, 213 Ill. App. 49 (1918). And where the local agent of a firm was given a check and instead of presenting the same for payment

Where the check is deposited in a local bank other than the drawee most jurisdictions refuse to allow extra time for collection through the clearing house, and hold that the check must still reach the drawee by the close of the next business day following receipt by the payee,<sup>8</sup> but some jurisdiction properly recognize the custom and demands of present day business and allow an extra day in such cases.<sup>9</sup> "Checks are not designed for circulation as mediums of exchange or credit but as cash items for immediate payment and so should be presented with all dispatch and diligence consistent with attendant circumstances."<sup>10</sup>

A failure to make presentment within the time stated is prima facie a case of failure to make presentment within a reasonable time.<sup>11</sup> And according to the majority view these facts coupled with the failure of the drawee will be prima facie a case of loss to the drawer, since he is presumed to draw his checks against sufficient funds to pay them. However, these facts will not preclude a finding, under facts peculiar to a particular case, that a longer delay was in fact reasonable.<sup>12</sup> In determining what is a reasonable time in a par-

he sent it on to headquarters and the check did not reach the drawee for nearly a week, it having failed before presentment, the drawer was discharged. *Republic Metalware Co. v. Smith*, 218 Ill. App. 130 (1920).

<sup>8</sup> *Grange v. Reigh*, 93 Wis. 552, 67 N. W. 1130 (1896); *Carroll v. Sweet*, *supra* note 2; *Kirkpatrick v. Puryear*, *supra* note 5; *Smith v. Miller*, 43 N. Y. 171 (1870); *Edminstein v. Herpolsheimer Co.*, 66 Neb. 94, 92 N. W. 138, 59 L. R. A. 934 (1901); *Alexander v. Burchfield*, 7 Man' & G 1061, 135 Eng. Rep. 431 (1842).

<sup>9</sup> *Loux v. Fox*, 171 Pa. 68, 33 Atl. 190 (1895); *Willis v. Finley*, 173 Pa. 28, 34 Atl. 213 (1895); *Bristline v. Bentling*, 39 Idaho 534, 228 Pac. 309 (1924).

<sup>10</sup> *Gordon v. Levine*, *supra* note 2; *Kennedy v. Jones*, 140 Ga. 302, 78 S. E. 1069 (1913); *First Nat'l Bank of Wymore v. Miller*, 37 Neb. 500, 55 N. W. 1064 (1893).

<sup>11</sup> *Pelt v. Marlar*, 95 Ark. 111, 128 S. W. 554 (1910).

<sup>12</sup> Such matters have been held to excuse a longer delay: Request by the drawer that the check not be presented immediately. *Pollard v. Bowen*, 57 Ind. 232 (1897); *Tarasek v. Koscuizsko Bldg. & L. Assn.*, 218 Ill. App. 487 (1920). Lack of funds in the drawer's account to meet the check. *Emory v. Hobson*, 63 Me. 32 (1873); *Bodner v. Rotman*, 95 N. J. Eq. 510, 123 Atl. 529 (1924). Even if the funds are withdrawn after a reasonable time for presentment has expired this will still prevent the drawer from being discharged. *Philadelphia Life Ins. Co. v. Hatworth*, 296 Fed. 339 (C. C. A. 4th, 1924). Sudden and severe illness of such severeness as to prevent the holder from securing an agent to present. *Wilson v. Senier*, 14 Wis. 380 (1861). Other cases excusing delay: *Joerns Bros. Mfg. Co. v. Burns*, 173 Minn. 389, 217 N. W. 506 (1928); *Coxe v. Boone*, 8 W. Va. 500 (1875).

By reason of the special statute concerning them it was held that a railroad was not forced to present a check received for hauling goods promptly to keep from discharging the drawer. *Fullerton v. Chicago M., St. P. & P. R. Co.*, 36 F. (2d) 180 (C. C. A. 8th, 1929).

ticular case regard must be had to the nature of the instrument, the usage or custom of trade or business (if any) both with respect to such instrument and also to the facts of the particular case.<sup>13</sup> Ordinarily this will be a question for the jury in each case.<sup>14</sup>

### *Burden of Proving Loss by Delay*

Assuming the unreasonable delay, the further question arises as to whether the drawer must sustain the burden of proof upon the issue of loss as a defense, and show loss to himself, or whether the holder must negative the loss in order to recover.

All courts agree that if the payee puts the check in evidence and proves the drawer's signature he is entitled to recover, if nothing else appears,<sup>15</sup> and force the drawer wishing to rely on delayed presentment as a defense to prove the unreasonable delay.<sup>16</sup> But on the next

In the case of accepting checks for taxes under somewhat similar statutes requiring cash for payment, *Palmer v. Harris*, *supra* note 2, said that delay in presentment made the check become final payment to the extent of the drawer's loss. But *Moritz v. Nicholson*, Tax Collector, 141 Miss. 531, 106 So. 762 (1926) held that unreasonable delay in such cases did not discharge the drawer as this could only be done by actual payment.

<sup>13</sup> N. I. L. §193; N. C. Cons. Stat. Ann. (1919) §2978; *McFadden v. Keese*, 16 S. W. (2d) 994 (Ark. 1929); *Federal Land Bank of St. Louis v. Goodman*, 292 S. W. 659 (Ark. 1927). *Yates v. Goodwin*, 96 Me. 90, 51 Atl. 804 (1901). When the drawer has a check certified and sent to the payee as a general rule it seems that this will not extend the time for presentment of the check, nor will it affect the rights of the parties. *Blake v. Hamilton Dime Savings Bank Co.*, 79 Ohio St. 189, 87 N. E. 73, 20 L. R. A. (N. S.) 290, 16 Ann. Cas. 210 (1908); *Blair & Hoge v. Wilson*, 69 Va. 165 (1877). *City of Brunswick v. Peoples Savings Bank*, 194 Mo. App. 360, 190 S. W. 60 (1916). *Contra*: in *Smith v. Hubbard*, 205 Mich. 44, 171 N. W. 546 (1919), it was held that certification of a check by the drawer extended the time of presentment as in this condition the check became more of the nature of currency. But certification by the holder discharges the drawer at once without delay or loss since the holder substitutes the banks credit for that of the drawer. *Met. Nat'l Bank v. Jones*, 137 Ill. 634, 27 N. E. 533, 12 L. R. A. 492 (1891). As to cashier's checks and drafts the time for presentment varies with the circumstances. *Lloyd Manufacturing Co. v. Davies*, 51 N. D. 336, 199 N. W. 869, 36 A. L. R. 465 (1924).

<sup>14</sup> *Tomlin v. Thorton*, 99 Ga. 585, 27 S. E. 147 (1896); *Empire Arizona Copper Co. v. Shaw*, 20 Ariz. 471, 181 Pac. 464 (1919); *Gordon v. Levine*, *supra* note 2; *Sinclair Refining Co. v. Keith*, 97 Okla. 55, 221 Pac. 1003 (1924). But if the facts are undisputed, or are such that no reasonable man could differ concerning them, it becomes a question of law for the court. *Bristline v. Bentling*, *supra* note 9; *Nuzum v. Shepard*, *supra* note 5.

<sup>15</sup> *Cook v. Moecher*, 217 Ill. App. 479 (1920); *Stull v. Daniel Machine Co.*, 207 Ala. 544, 93 So. 583 (1923); *Jones v. Bank of Powder Springs*, 31 Ga. App. 263, 120 S. E. 422 (1923). Of course in North Carolina since we do not have a directed verdict for the one sustaining the burden of proof the judge would merely charge the jury that if they believed the evidence that they might find for the plaintiff.

<sup>16</sup> *Hazard Bank and Trust Co. v. Morgan*, 211 Ky. 137, 277 S. W. 307 (1925); *Bodner v. Rodman*, *supra* note 12; *Coldwell v. Coldwell*, *supra* note 7; *Gordon v. Levine*, *supra* note 2.

issue we find a split of authority.<sup>17</sup> Georgia and other jurisdictions require the defendant to go further and prove that the delay caused him loss.<sup>18</sup> Another group place the burden upon the drawer to prove loss unless it is shown that the drawee bank has become insolvent, in which event they recognize a prima facie case of loss, thus forcing the holder to negative that loss in order to recover.<sup>19</sup> A third group merely require that the drawer prove unreasonable delay, and this being done the holder must come forward and negative the loss to the drawer or suffer an adverse verdict.<sup>20</sup>

But it seems in theory at least that the two latter groups are in error. The more equitable result would be reached by having the drawer sustain the burden of proving both the unreasonable delay and also the loss. Where no failure of the bank is shown the mere proof of non presentation of the check within a reasonable time does not raise any natural inference that a final loss has been or will be, suffered by the drawer.<sup>21</sup> And where we have the insolvency of the drawee bank shown, while this may cause a natural inference of some loss to the drawer, still it does not cause a natural inference of total loss.<sup>22</sup> And since the drawer is only discharged to the extent of his

<sup>17</sup> It is commonly stated that the weight of authority places the burden of disproving loss to the drawer on the holder in order for the holder to recover after delayed presentment and failure of the drawee bank is shown, but if such is the truth it exists by an exceedingly narrow margin.

However, all agree that loss to the drawer must be shown in some manner and it is no defense that there has been loss without delay, or delay without loss. It has been held that no delay short of the statute of limitations will discharge the drawer without loss. *Coldwell v. Coldwell*, *supra* note 7; *Harzard Bank and Trust Co. v. Morgan*, *supra* note 6.

<sup>18</sup> *Merritt v. Gate City Nat'l Bank*, *supra* note 6; *Rosenbaum v. Hazard*, 233 Pa. 206, 82 Atl. 62 (1911); *Sims v. Hunter*, 258 Pac. 550 (Idaho 1927); *Empire Arizona Copper Co. v. Shaw*, *supra* note 14; *Cox v. Citizens State Bank*, 73 Kan. 789, 85 Pac. 762 (1906). *Anchor Duck Mills v. Harp*, 150 S. E. 572 (Ga. App. 1929). For case where action is brought on the original consideration instead of the check see *McEwen v. Cobb*, 104 Misc. Rep. 477, 172 N. Y. S. 44 (1914).

<sup>19</sup> *Willets v. Paine*, 43 Ill. 433 (1867); *Watt v. Gans*, 114 Ala. 264; 21 So. 1011 (1897); *Hamlin v. Simpson*, 75 Iowa 125, 74 N. W. 906 (1898); *Little v. Phenix Bank*, 2 Hill 425 (N. Y. 1842); *Kirkpatrick v. Puryear*, *supra* note 5.

<sup>20</sup> *Griffin v. Kemp*, 46 Ind. 172; *McLain v. Lowther*, 35 W. Va. 297, 13 S. E. 1003 (1892).

<sup>21</sup> Indeed he may be financially benefited in case of an account which draws interest on average daily balances.

<sup>22</sup> In the case of 105 insolvent national banks whose affairs were wound up in the year ending October 31, 1929, dividends paid to the creditors ranged from only one per cent to 111.5 per cent (principal and interest). The receiverships lasted from one to seven years. REPORT OF THE COMPTROLLER OF THE CURRENCY (1929) 26-27.

loss, it seems more reasonable that one seeking to apply a statute favorable to his cause should sustain the burden of proving that loss.

### *Manner of Proving Loss by Delay*

But regardless of who sustains the burden of proof on the question of loss there still remains the problem as to the manner of determining its extent. At the date of the trial no one knows accurately what it will be, since these actions are usually brought just after the failure of the bank and it may not be known for several years what will be paid, though the receiver may give an opinion.<sup>23</sup> Most cases have ignored the question as to the extent of the loss entirely and seem to have assumed that if loss could be shown at all it would be presumed to be total.<sup>24</sup> In the few cases deciding the point the rule has been to leave the question to the jury to determine the loss, without any adequate evidence to aid them, and their verdicts seem to have been only a guess.<sup>25</sup> This is in part the fault of counsel but since the difficulty inheres in the nature of the case some other method of dealing with check-loss cases might be suggested.

1. The case might be tried only to the extent of determining whether the delay was or was not unreasonable, and if it was found that the delay was unreasonable, the case might then be continued until liquidation was complete, thus removing the necessity of a jury verdict on the question of loss.<sup>26</sup>

2. Judgment might be given for the holder for the whole amount of the check with a stay of execution allowing the drawer to satisfy the judgment by paying over to the holder whatever amount he should later receive on this portion of his deposit in the liquidation proceedings.<sup>27</sup>

<sup>23</sup> *Supra* note 22.

<sup>24</sup> *Hamlin v. Simpson*, *supra* note 19; *Campbell v. Shark*, 267 Pac. 458 (Idaho 1926); *Kling Bros. v. Whipps*, 123 Okla. 253, 270 Pac. 79 (1927); *Commercial Investment Co. v. Lundgren-Witternsten Co.*, 173 Minn. 83, 216 N. W. 531 (1928); *Northern Lumber Co. v. Clausen*, 201 Iowa 701, 208 N. W. 72 (1926).

<sup>25</sup> *Courtney v. McCartney*, 30 Mo. 183 (1865); *Fergus Motor Co. v. Blackweilder*, 260 Pac. 734 (Idaho 1926); see also *Merritt v. Gate City Nat'l Bank*, *supra* note 6; *Hamlin v. Simpson*, *supra* note 19.

<sup>26</sup> The objections to this plan lie in the fact that this will necessitate the drawer giving a bond to reimburse the holder at the later date and it would involve also the question of whether the holder could be constitutionally deprived of his right to have the jury assess the damages at once, if he so desired.

<sup>27</sup> This arrangement too would require a bond if the plaintiff were properly protected, and the premium on such bonds whether assessed on plaintiff or dependent would seem to be an undesirable expense of the adjustment between the parties.

3. The court might render judgment for the holder for the whole amount of the check with leave to the drawer to satisfy it by assigning to the holder a portion of his deposit claim against the drawee bank equal to the amount of the check which has been dishonored. By this plan the case would be finally disposed of at once, and the amount of the plaintiff's recovery would be determined with mathematical accuracy. The loss which the plaintiff stood to suffer would be the exact amount intended by the Negotiable Instruments Law. And as the rule would have all the merits of speed and simplicity, it would seem a desirable substitute for jury guesses. The innovation might be put in force by a statute.<sup>28</sup>

HENRY T. POWELL.

### Carriers—Allowance of Set-Off Against Freight Charges

A shipper, sued for freight charges, attempted to set off damages arising from negligence and delay in shipment. A federal District Court held that he was not entitled to plead set-off.<sup>1</sup>

Defendant shipped grapes over plaintiff's line. Plaintiff delivered without collecting freight and brought suit for the charges. Defendant set up loss due to delay and negligent handling and asked for a set-off which was allowed by the United States Supreme Court.<sup>2</sup>

<sup>28</sup> The problem might be solved by an amendment adding the following to §186 of the N. I. L.: "Provided, however, that when such check is found not to have been presented within a reasonable time, and the drawer had the right at the time of presentment, as between himself and the drawee, to have the check paid, the drawer shall be entitled to be fully discharged from liability thereon by assigning to the holder thereof the portion of his claim against the drawee equal to the amount of the check."

This is somewhat similar to §74 of the English Bills of Exchange Act, which after stating, in effect, §186 of the N. I. L., adds: "The holder of such check as to which such drawer or person is discharged, shall be a creditor, in lieu of such drawer or person, of such banker, to the extent of such discharge, and entitled to recover the amount from him."

This result may possibly be reached without an enabling statute by judicial decree at the time of trial. See *Hawes v. Blackwell*, 107 N. C. 196, 12 S. E. 245 (1890). However, constitutional objections might well be raised against such procedure.

There might be some ground for extending the language of the amendment above proposed to include also domiciled demand notes. See Note (1930) 8 N. C. L. REV. 184.

<sup>1</sup> *Michigan Cent. R. Co. v. Carl & W. J. Piowaty, Inc.*, 36 F. (2d) 604 (N. D. Ill. 1929).

<sup>2</sup> *Chicago & N. W. Ry. Co. v. Lindell*, 50 Sup. Ct. 200 (1930).