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Negotiable Instruments -- Payment -- Cashier's Check

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Logically, and considering the similarity between park maintenance and the maintenance of health and schools, which are practically unanimously held to be governmental functions, the governmental classification seems to be the sounder of the two views if the distinction between governmental and proprietary function is to be strictly followed. However, as the immunity doctrine is apparently inequitable, as shown by the tendency of the courts to impose liability wherever possible, the imposition of liability by statutory enactment, and the opinions of writers on the subject, it appears that substantial justice will be more satisfactorily served if the Supreme Court of North Carolina rules the maintenance of a park a proprietary function.

S. J. Stern, Jr.

Negotiable Instruments—Payment—Cashier's Check.

Defendant, manufacturer of motor cars, notified plaintiff-distributor that "driveaways" must be settled for by cashier's check before the cars would be delivered. Dealer, ordering through plaintiff, procured cashier's check payable to defendant and delivered same to defendant coincident with delivery of cars. The account of distributor was credited with the amount of the check which was deposited with promptness in a Wisconsin bank for collection; thence it was sent to a Federal Reserve Bank and then to drawee bank. Drawee stamped check paid, charged the amount on its own books against its deposit with the Reserve Bank, and sent a credit memorandum to the latter bank which failed to credit same to drawee's account. Drawee became insolvent, and after successive charges back by the banks to its account, defendant charged the amount of the cashier's check back to plaintiff. Held, the check constituted payment.¹

With the exception of a few jurisdictions² the authorities are unanimous in support of the rule that the giving of a bank check by a debtor for the payment of his indebtedness to the payee is not, in the absence of an express or implied agreement to that effect, a payment or discharge of the debt. There is a presumption that the check is accepted on condition that it be paid, and the debt is not discharged until the check is paid or until it is accepted at the bank at which it is made payable.³ The reason sometimes assigned is that the paper is given and

² Dille v. White, 132 Iowa, 327, 109 N. W. 909 (1906) (a contrary rule has been announced in Massachusetts, Maine, and Indiana where the giving of a check, note, or draft for a debt or obligation to pay money is held to operate as a payment or extinguishment of the obligation).
³ Ketcham v. Hines, 29 Ga. App. 627, 116 S. E. 225 (1923) (bank checks are not payment until themselves paid, without an express agreement that they are to be accepted as such); Dille v. White, 132 Iowa 327, 109 N. W. 909 (1906);
received upon the mutual understanding of the parties that it represents actual value to its full nominal amount and that on due presentation to the drawee it will be honored. It is only upon its being thus honored that the payment become effective and absolute.\(^4\) Even in the jurisdictions first referred to above it is held to be a rule of presumption only, and the intention of the parties when expressly declared or when shown by collateral facts and circumstances will be allowed to prevail.\(^5\) Whether there is such an agreement is to be determined by the intent of the parties,\(^6\) and it is a question of fact for the jury\(^7\) to ascertain from the circumstances.\(^8\) Thus the majority of courts seem to be in accord with the general rule, but a divergence occurs when they attempt to ascertain, in the light of the facts of each individual case, whether there is an express or implied agreement to accept a negotiable instrument as payment. Some courts follow the view that the mere expression of a preference or request for a certain medium of payment and compliance with such request or preference does not of itself constitute payment\(^9\) because the creditor is said to have elected to take a security instead of cash, and when the check is dishonored the vendor may resort to his

Andrews-Cooper Lumber Co. v. Hayworth, 205 N. C. 585, 172 S. E. 183 (1934); South v. Sisk, 205 N. C. 655, 172 S. E. 193 (1934) (delivery and acceptance of check not payment in absence of agreement to that effect); Lloyd Mortgage Co. v. Davis, 51 N. D. 336, 199 N. W. 869 (1924); Baker v. State Highway Dept., 166 S. C. 481, 165 S. E. 197 (1932); 3 \textsc{Daniel}, \textsc{Negotiable Instruments} (7th ed. 1933) \S 1448.

\(^4\) Dille v. White, 132 Iowa 327, 109 N. W. 909 (1906).


\(^6\) Kinard v. First National Bank of Sylvester, 125 Ga. 228, 53 S. E. 1018 (1906) (whether there is payment depends upon intention of parties).

\(^7\) Downey v. Hicks, 55 U. S. 240, 14 L. ed. 404 (1852); Cochran v. Zahos, 286 Mass. 173, 189 N. E. 831 (1934).

\(^8\) Kinard v. First National Bank of Sylvester, 125 Ga. 228, 53 S. E. 1018 (1906).

\(^9\) Dille v. White, 132 Iowa 327, 109 N. W. 909 (1906) (general rule applied even where the person entitled to receive the money expresses a preference for its payment by check, but does not agree to assume the risk of its being honored); Weddington v. Boston Elastic Fabric Co., 100 Mass. 422 (1868) (as part of original contract of sale seller was to receive bills of exchange and on failure of drawee, seller was permitted to recover price of goods from purchaser); Baumgardner v. Henry, 131 Mich. 240, 91 N. W. 169 (1902) (see cases cited in opinion); National Life Ins. Co. v. Goble, 51 Neb. 5, 70 N. W. 503 (1897) (insurance company notified insured that premium due and requested remittance by bank draft, registered letter or post office money order. \textit{Held}, sending and accepting of draft and giving of receipt did not constitute payment when draft not paid); Syracuse, B. & N. Ry. Co. v. Collins, 1 Abb. N. C. 47 (N. Y. 1874), aff'd, 57 N. Y. 641 (1874) (Agent of carrier expressed preference for check. \textit{Held}, no agreement being shown that the check was intended to be received as absolute payment, the carrier was entitled to recover on the original consideration). A statement on the bill to "Please remit by check at once," should not be construed to mean that a check is necessarily desired. This is merely a matter of form and both parties probably understand it as such. The statement means that some form of payment is wanted at once.
original claim on the ground that there has been a defeasance on which it was taken.\textsuperscript{10} Other courts take the position that it is payment when the creditor's proposal to use a particular medium is accepted\textsuperscript{11} since debtor, accepting such proposal, puts himself to the inconvenience, and, perhaps adds expense, of affirmatively procuring a cashier's check.\textsuperscript{12} An unreasonably delay in presenting the check will operate as an absolute payment,\textsuperscript{13} but this question was not presented in the principal case.

The court in the principal case placed little weight upon the fact that the check was stamped "paid" and the bank's books debited with the amount of the check. It has been held that marking a check paid and making an entry on books is not conclusive but is only evidence of payment for debts and obligations are not discharged by mere entries upon books.\textsuperscript{14} At least one court, however, has said that a check is paid when the drawee bank has merely marked it paid,\textsuperscript{15} and if the court in the principal case had followed such rule then the check might well have been considered paid.

At first sight, it would seem to be a harsh rule that places the burden

\textsuperscript{10}Hodgson v. Barrett, 33 Ohio St. 63, 68 (1877).
\textsuperscript{11}Corbit v. Bank of Smyra, 2 Harr. 235, 30 Am. Dec. 635 (Del. 1837) (in case of contemporaneous debts the notes operate as payment, and are held to be the same as money, and the risk of the solvency of the maker of the note is upon the person receiving, for no debt strictly is created; no credit is given to the person, but it is given to the note accepted; it is a sale or exchange); Cowen v. Indianapolis Life Ins. Co., 116 Fla. 814, 157 So. 180 (1934) (request for medium of payment followed by acceptance constitutes payment); Martin v. N. Y. Life Ins. Co., 30 N. M. 400, 234 Pac. 673 (1923) (insurance company notifying debtor that premium due and requesting payment by draft or check is held to have agreed to accept such commercial paper as payment and settlement of the premium due); Federal Land Bank of Columbia v. Barrow, 189 N. C. 303, 127 S. E. 3 (1925) (jury found upon competent evidence that plaintiff instructed defendants to send cashier's check in payment of debt and defendants having complied with the instructions are no longer liable).
\textsuperscript{13}Kraetsch v. City of Chicago, 198 Ill. App. 395 (1916) (a reasonable time or due diligence requires presentment of cashier's check for payment on the same day, or at the fullest, within banking hours on the next day after the check is delivered to it); Federal Land Bank of Columbia v. Barrow, 189 N. C. 303, 127 S. E. 3 (1925); Lloyd Mortgage Co. v. Davis, 51 N. D. 336, 199 N. W. 869 (1924) (acceptance of check implies understanding to present it for payment within a reasonable time, which depends upon the circumstances of each case, in determining which the time, mode, and place of receiving the check and the relation of the parties should be considered); Notes (1928) 26 Mich. L. Rev. 930; (1930) 29 Mich. L. Rev. 244; (1930) 8 N. C. L. Rev. 444.
\textsuperscript{14}Kinard v. First National Bank of Sylvester, 125 Ga. 228, 53 S. E. 1018 (1906) (marking of not paid is not sufficient; whether there is payment depends upon intention of parties); Interstate Nat. Bank v. Ringo, 72 Kan. 116, 83 Pac. 119 (1905) (credits given on account do not show absolute payment); Graham v. Procterville Warehouse, 189 N. C. 533, 127 S. E. 540 (1925); Dewey Bros. v. Margolis & Brooks, 195 N. C. 307, 142 S. E. 22 (1928); Raines v. Grantham, 205 N. C. 340, 171 S. E. 360 (1933).
\textsuperscript{15}Nineteenth Ward Bank v. First National Bank of So. Weymouth, 184 Mass. 49, 69 N. E. 670 (1903); (1932) 30 Mich. L. Rev. 962 (see on problem of payment generally).
of risk on creditor requesting a certain form of payment; especially so, when it is certainly not his intent to accept such medium as absolute payment but only as payment conditional upon actual payment of the check or other medium of payment. This is even more true when in most cases the trend of the law governing checks and bank collections is found to be in the direction of giving adequate protection to payees, either by continuing the drawer's liability or allowing a preference in the insolvent's assets. It may well be said, however, that by such a request the creditor imposes the risk upon himself and is estopped to deny that drawer is discharged by compliance with the request. Where a way of payment is prescribed it must be followed, and since this may cause the debtor to go to added trouble and expense he should not be further liable. In the present case the reason given for holding that payment was intended was the fact that defendant-manufacturer stated that every "driveaway" must be settled for by cashier's check before cars would be delivered, this language seeming to state more than a mere request.

In view of the uncertainty of a jury finding the creditor should stipulate in his contract that check or other requested medium of payment is taken subject to collection as is done by banks in their deposit slips and by some insurance companies in their policies and notification forms.

J. D. MALLONEE, JR.

Practice and Procedure—Raising Affirmative Defenses by Demurrer.

In an action to recover damages sustained by plaintiff when he entered defendant's store as an invitee and fell down an elevator shaft at the rear entrance of defendant's building, plaintiff alleged that defendant had maintained an elevator to the right of the entrance, and that without knowledge of plaintiff moved the entrance so as to place it in front of the elevator and that plaintiff upon entering pulled open and

35 N. C. CODE ANN. (Michie, 1935) §218 (c) (14) (order and preference in distribution of insolvent bank's assets: (4) certified checks and cashier's checks in the hands of a third party as a holder for value). Old Company's Lehigh, Inc. v. Meeker et al., 294 U. S. 227, 55 Sup. Ct. 392, 79 L. ed. 876 (1935) (statute allowing preferred claim does not apply to National banks); (1930) 8 N. C. L. REV. 197, 198; (1933) 19 IOWA L. REV. 90 (preference given).


38 Quarles v. Taylor and Co., 193 N. C. 313, 142 S. E. 25 (1928) (stipulation read all items accepted at depositor's risk, until we have received final actual payment).