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THE EFFECT OF A STOP PAYMENT ORDER ON A CERTIFIED CHECK

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In recent years, it has become common practice for business men, and others, to request that checks be certified for use in various business transactions. When such a check is received, the average business man feels secure in that he believes that he has removed any danger of loss because he now has the near equivalent of legal tender. Seldom, if ever, does the possibility occur to him that payment may be stopped by order of the drawer and that a law suit may thereby follow. The possibility of an effective stop payment order by the drawer, and the consequences thereof, provides the material for the discussion in this article.

An ordinary check, drawn by a depositor on his account in his depository bank, offers no security to a holder of such a check so far as the drawee bank is concerned. In event the drawee bank refuses to cash a check when it is presented by a holder for payment, he possesses no cause of action against the drawee bank. This is elementary law; the reasons for the rule are the familiar ones that the drawee bank has no privity of contract with the holder of the check and that the Negotiable Instruments Law specifically provides that check is not an assignment of the drawer's funds.[1] Thus on neither theory can the holder recover directly from the drawee bank.[2] The holder does have a cause of action for the face value

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1. Uniform Negotiable Instruments Act sec. 189. A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check.
2. Cincinnati Hamilton and Dayton Railroad Company v. Metropolitan National Bank, 54 Ohio St. 60, 42 N.E. 700 (1896). The relation of bank and general depositor is simply the ordinary one of debtor and creditor. . . . The bank agrees with its depositor to receive his deposits, to account with him for the amount, to repay to him on demand and to honor his checks to the amount of his credit when the checks are presented; and for any breach of the agreement the bank is liable to an action by him. . . . The bank's agreement with the depositor involves or implies no agreement with the holder of a check. The giving of a check is not an assignment of so much of the creditor's claim. . . . It is simply an order which may be countermanded and payment forbidden by the drawer any time before it is actually cashed or accepted.

   First National Bank of Washington v. Whitman, 94 U.S. 343, 24 L. Ed. 229 (1877). The payee before acceptance has no action on a check against the drawee bank, there being no privity.

   National Plumbing and Heating Supply Company v. First National Bank of Chicago, 260 Ill. App. 431 (1931). When a check has been certified by mistake and the rights of third parties have not intervened, the certification may be revoked, if no holder in due course is involved.

   McIntire v. Raskin, 173 Ga. 746, 161 S.E. 363, (1931). A check of itself does not operate as an assignment of funds . . . , and the bank is not liable to a holder unless and until it accepts or certifies. This necessarily means that the acceptance of a check operates as an assignment of funds. The fact that the check was certified at the instance of the drawer and before delivery does not alter the

of the check against the drawer and any preceding unqualified indorsers, in the event of dishonor, assuming due presentment and proper notice of dishonor by the holder.[3] The drawer has an action for damages against the drawee bank for breach of contract of deposit for failure to follow the drawer's order to pay, assuming the credit balance of the depositor is adequate to cover the amount of the check.[4]

This legal situation may present no obstacle to the acceptance and further negotiation of a check by a payee or other purchaser. If the holder knows the drawer or the indorsers on the instrument, he is usually willing to rely upon their ability to pay the amount of the check whether or not the drawee bank is willing to pay the check. There are many situations, however, in which a payee or other holder would not feel secure in relying

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principle just announced. . . . As this check was certified at the request of the drawers, the effect was to assure the persons afterward receiving it that it was genuine and would be paid. In such case the bank and the drawer both would be bound, the bank being primarily liable and the drawer secondarily liable. The drawers would only be liable on the failure of the bank to pay the check. The fact that the check was certified at the instance of the drawers and before delivery would not operate to defeat the assignment of so much of the funds of the drawers in the bank as would be necessary to pay the check. When such a check was delivered, it amounted to an assignment of so much of the funds of the drawers as were necessary to pay the same..

At 752: When the certified check was delivered to the payee by posting a letter containing it, the drawers had no right to withdraw it. The check had become by delivery the property of the payee. . . . The drawers were under no legal duty to countermand the payment of the certified check, if it had been certified at their instance in good faith and had been delivered. Besides, the drawers could not countermand the payment of the check without incurring liability to the payee or a bona fide holder thereof.

At 752: A certifed check . . . in a legal contemplation results in the drawer's funds being withdrawn from his credit and appropriated to the payment of the check, and the bank becomes the debtor of the holder as for money had and received.

At 753: It is true that the drawer of a check which has been certified at his request, before delivery, may recall and countermand the same and require the certifying bank to refuse payment to the payee named therein, if the payee obtains the check by fraud perpetrated on the maker, or if there be some other good reason to do so to protect the rights of the drawer, before delivery, the drawer may protect his interest.

Here no fraud or wrong was perpetrated upon the drawer; no countermand allowed.

The right to countermand does not exist after delivery to the payee in this case.

3. Columbian Banking Company v. Bowen, 134 Wis. 218, 114 N.W. 451 (1908); Gordon v. Levine, 194 Mass. 418, 80 N.E. 505 (1907).

Negotiable Instruments Law, sec. 61. The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse; and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser, who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder.

Negotiable Instruments Law, sec. 66. Every indorser who indorses without qualification . . . engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.

Negotiable Instruments Law, sec. 186. A check 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.

4. Cincinnati Hamilton and Dayton Railroad Company v. Metropolitan National Bank, 54 Ohio St. 60, 42 N.E. 700 (1896).

solely upon the credit of the drawer and the indorsers, and would want to procure the drawee bank's acceptance of liability on the check. This may be done by acquiring the certification or the acceptance of the drawee bank by virtue of which the drawee bank assumes primary liability on the check.[5]

The certification of a check by the drawee bank results from one of two factual situations. In one case, the payee or some subsequent holder may present the check to the drawee bank and ask that the bank certify it. In the other case the drawer, because of his own desire to add acceptability to his instrument or because the prospective payee has asked that the drawer obtain the bank's certification, presents the check to the bank for certification.

The resulting legal effects of these two situations are quite different. The law is well established as to such effects and may be briefly stated as follows. When a holder of a check procured its certification by the drawee bank, the legal effect is the same as though the check had been presented for payment and payment made by the bank in accordance with the terms of the check. The drawer and all indorsers who indorsed prior to the certification are discharged from liability, as they would have been had the check in fact been paid. The drawee bank becomes solely liable on the paper.[6]

When the drawer obtains the certification of the drawee bank, the

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5. Minot v. Russ, 156 Mass. 458, 31 N.E. 489 (1892); Edwards v. National City Bank of New York, 269 N.Y.S. 637 (1934); Borne v. First National Bank, 123 Ind. 78, 24 N.E. 173 (1890); State Bank of Chicago v. The Mid-City Trust and Savings Bank, 295 Ill. 599, 129 N.E. 498 (1921); Jones v. National Bank of North Hudson, 95 N. J. Law 376, 113 A. 702 (1921); Schmitt v. Mellon National Bank, 67 Pa. Sup. 453.

   Negotiable Instruments Law, sec. 187. Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance.

   Negotiable Instruments Law, sec. 62. The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits . . . (1) the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and (2) the existence of the payee and his then capacity to indorse.

   Merchant's Bank v. State Bank, 77 U.S. (10 Wallace) 604, 19 L. Ed. 1008 (1871) "By the law merchant of this country the certificate of the bank that a check is good is equivalent to acceptance. It implies that the check is drawn upon sufficent funds in the hands of the drawer; that they have been set apart for its satisfaction, and that they should be so applied whenever the check is presented for payment. It is an undertaking that the check is good then and shall continue good, and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume. The object of certifying a check, as regards both parties, is to enable the holder to use it for money. The transferee takes it with the same readiness and sense of security that he would take the notes of the bank. It is available also to him for all the purposes of money."

6. Negotiable Instruments Law, sec. 188. Where the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon.

   State Bank of Chicago v. The Mid-City Trust and Savings Bank, 295 Ill. 599, 129 N.E. 498 (1921); Anglo-South American Bank Lt'd. v. National City Bank of N. Y., 146 N.Y. Supp. 457 (1914); Central Hanover Bank and Trust Company v. The Mirror, 279 N.Y. Supp. 671 (1935); 52 A. L. R. 1001-1002 (note); also see footnote 7 infra.

bank assumes primary responsibility on the paper, but the drawer and all indorsers remain liable as secondary parties in event the bank dishonors the check.[7]

In either case of certification, the holder now has a cause of action against the certifying bank as primary debtor, a liability which is not present in the case of an uncertified check. When this liability has been obtained, many prospective purchasers of checks feel amply protected and will receive a certified check under circumstances in which they would refuse an uncertified check.

The principal problem to be considered is what protection does the holder of a certified check actually receive by virtue of the certification. Is the protection received by the holder of a certified check as broad as he may believe or desire? In discussing this problem, the ability of the drawer to stop payment must first be considered.

When a bank opens a checking account with a depositor by accepting deposits of funds, it contracts to repay those funds upon the order of the depositor. Generally, the method used by the drawer in giving such an order to the bank is by the drawing of a check against the account. The depositor receives the right to countermand his order by due notice to the bank as a corollary to his right to give the order to the bank to pay. If a countermand or "stop payment order" is received seasonable by the bank, the bank then owes the depositor the duty to refuse to cash the check just as, in absence of such countermand, the bank owes the duty to the depositor

7. Joyce, Defenses to Commercial Paper, Vol I, Page 297, Sec. 228. "The certification of a check on application of the drawer does not operate to discharge him from liability thereon, and so long as he remains undischarged, the defense of fraud is open, both to him and the bank. But where certification is made at the request of the holder, the effect is different, and discharges the drawer from further liability on the check, and substitutes a new contract between the holder and the bank, by which the money called for by the check is transferred from the account of the drawer to the account of the holder; so that in contemplation of law, the obligation of the bank to the holder in such case is the same as if the funds had been actually paid out by the bank to him, by him redeposited to his own credit and a certificate of deposit issued to him therefore."

5 R. C. L. 524. "When drawer of a check procured its certification before delivering it to the payee, this does not discharge him. He remains the creditor of the bank and still liable to the holder of the check for the amount thereof. The bank by certifying the check becomes liable to the amount thereof but the drawer may nevertheless be held in case the holder exercises due diligence in presenting the check to the bank for payment and giving notice of dishonor."

Born v. Bank, 123 Ind. 78, 24 N.E. 173 (1890). If a certification of a check is at the drawer's request, the drawer is still liable.

Cincinnati Oyster and Fish Company v. Bank, 51 Ohio St. 106, 36 N.E. 833 (1894); and Metropolitan National Bank v. Jones, 137 Ill. 634, 27 N.E. 533 (1891). If a certification of a check is at the holder's request, the drawer is discharged and the obligation is now solely that of the bank.

Heartt v. Rhodes 66 Ill. 351 (1872). A drawer is discharged to the amount of the loss suffered if the holder does not present a certified check (certified at the drawer's request) for payment in due course.

City of Brunswick v. People's Savings Bank, 194 Mo. App. 360, 190 S.W. 60 (1917); Blake v. Hamilton Dime Savings Bank, 79 Ohio St. 189, 87 N.E. 73 (1909); see also footnote 6 supra.

to cash the check.[8]

The problem now raised is whether the drawer's right to stop payment on an uncertified check extends so far as to allow him to stop payment on a certified check. If the drawer can effectively order payment stopped on a certified check, the holder does not necessarily have the protection which he had contemplated when he purchased the check. Clearly, the problem must be analyzed and answered, if possible, as it is presented in two separate factual situations: (a) where the payee or holder has procured the bank's certification; (b) where the drawer has procured the bank's certification.

Certification at the Holder's Request

One of the cases most often cited on the holder's obtaining certification is *Times Square Automobile Company v. Rutherford National Bank.*[9] The defendant bank had certified a check representing the purchase price of a car at the request of the holder. It refused to pay the check to the holder claiming by way of defense that the drawer had instructed the bank not to pay the check. Payment had been ordered stopped because the holder (plaintiff) had committed fraud in selling the automobile to the drawer. The bank contended that the drawer's defense was available to it. The court refused to allow the bank to avail itself of the drawer's defense of fraud. The court stated that when a check is certified at the holder's request the drawer is discharged, a new contract between the bank and the holder is entered into, and the money called for by the check is transferred from the account of the drawer. By certifying the check, the bank has

8. Kellogg v. Citizens' Bank of Ava, 162 S.W. 643, 176 Mo. App. 288 (1914). The court held that the drawer may countermand a check, it being only an order by depositor, before the bank honors the check or accepts it in writing. (The rule was not qualified on the basis of which party had the check accepted.)
Cincinnati Hamilton and Dayton Railroad Company v. Metropolitan National Bank, 54 Ohio St. 60, 42 N.E. 700 (1896); Kahn Jr. v. Walton, 46 Ohio St. 195, 20 N.E. 203 (1889); Edwards v. National City Bank of New York, 269 N.Y. Supp. 637 (1934); see also footnotes 6 and 7 supra.

9. Times Square Automobile Company v. Rutherford National Bank, 77 N. J. Law 649, 73 A. 479 (1909). The bank certified a check at the request of the holder . . . payment was refused when the check was presented on the ground that Purdy (drawer of check) had instructed the bank not to pay it. The bank sought to justify its refusal on the ground that Purdy had been induced to buy a car by fraud of the manager of the plaintiff company as to the condition and value of the car which furnished the consideration for the check. The lower court admitted the defense and gave a verdict for the defendant. A check presented for certification by the drawer tells the bank that the check has not been negotiated and the drawer wishes the obligation of the bank to pay the holder in addition to his own obligation. A certification under such circumstances does not discharge the drawer and so long as the drawer remains undischarged, such a defense as that set up in the present cause (fraud) is open both to him and to the bank. When certification is at the request of a holder . . . the drawer is discharged and a new contract between the bank and the holder is set up, and the money called for by the check is transferred from the account of the drawer to the account of the holder. On appeal, the court held that the bank's contract required it to pay the amount of the deposit (check) to the plaintiff, or its order, and it could not avoid its obligation to do so by showing that plaintiff had fraudulently obtained the money which it had deposited with the defendant. Reversed for the plaintiff.

entered into a contract with the holder and assumed the obligation to pay the check. The bank could not avoid its obligation to pay the check by showing that the holder had fraudulently obtained the money which he had, in effect, deposited with the bank.

In *Jones v. National Bank of North Hudson,*[10] the *Rutherford* case was cited and followed. The holder had procured the bank's certification of a check, the consideration for which was the illegal sale of liquor. The bank refused to pay and the court held that the defense of the drawer was not available to the bank. The court stated that the holder had in effect requested the bank to retain his money for him until he asked for it, and that the bank had so agreed.

These cases have been cited because they are often referred to as authority for the rule that certification at the request of the holder removes the right of the drawer to stop payment. The reasons advanced for the rule in these cases are adopted as the usual basis upon which other courts rest their decisions.[11] It follows logically that whether or not the drawer had a defense on the check, such defense would not be available to the certifying bank. Thus the rule seems well established that when the holder has obtained the bank's certification of a check, the drawer may not stop payment. The result could hardly be otherwise in view of the fact that certification at the instance of the holder nearly approaches the legal equivalent of obtaining payment of the check. The drawer has no further interest in the check; it is now entirely a matter between the bank and the holder of the check.

CERTIFICATION AT THE REQUEST OF THE DRAWER

The situation is much different when the drawer has his check certified. It has heretofore been stated[12] that the drawer is not relieved of

10. Jones v. National Bank of North Hudson, 95 N. J. Law 376, 113 A.702 (1921).
11. Carnegie Trust Company v. First National Bank of New York City, 213 N.Y. 301, 107 N.E. 693 (1915). In this case, a check was certified by the drawee bank at the request of the holder. The drawer attempted to stop payment on the ground of set-off. The drawee bank refused payment. The court held for the plaintiff, saying in addition to the usual reasons, "If the holder of a check, after procuring it to be certified by a bank, may be required to litigate the question whether the maker of the check had a right of counterclaim or set-off, the transaction has not been safely closed until the cash is collected, . . . If the bank may resist payment whenever the drawer has omitted to take advantage of his right of set-off, the holder's safety is illusory."
7 C. J. 705, Section 432. When a certified check has been delivered, the maker's power over it is gone;[61] but a direction to the bank not to pay after certification but before delivery to the payee, would be effectual.[62] (61, 62 cases cited in the text.)
Lipton v. Columbia Trust Company, 194 App. Div. (N.Y.) 384, 185 N.Y. Supp. 198 (1921); Greenberg v. World Exchange Bank, 237 N.Y. Supp. 200 (1929); Keleher v. Manufacturer's Trust Company, 260 N.Y. Supp. 899 (1932); Kahn Jr. v. Walton, 46 Ohio St. 195, 20 N.E. 203 (1889); Bulliet, Trustee v. Allegheny Trust Company, 284 Pa. 561, 131 A.471 (1925); Joyce, Defenses to Commercial Paper, Vol. 1, p. 297; Corn Exchange Bank v. Farmers National Bank, 118 N.Y. 443, 23 N.E. 923 (1890); See footnote 7 supra.
12. See footnotes 6 and 7 supra .

liability on the check even though the bank is now primarily liable. The question now raised is whether or not the drawer can still control the payment or nonpayment of the instrument by ordering the bank to stop payment.

In view of the fact that the drawer is not relieved of liability when the check is certified at his request, it would seem to follow that he should be in a position to control the check by directing the bank to stop payment. There are many decisions to that effect.

One of the cases frequently cited involving the certification of a check by the drawee bank at the instance of the drawer, and an attempt to stop payment by the drawer later, is *Sutter v. Security Trust Company*.[13] Dan Sutter drew a check for $1,000.00 on his account in the Security Trust Company in favor of his wife. He procured the certification of the check by the Trust Company, and delivered it to the payee on the same day that the check was certified. Two days later, the drawer instructed the Trust Company not to pay the check, stating that the payee had fraudulently failed to carry out an agreement which offered the consideration for the check. On that same day, the payee presented the check and payment was refused. The payee, later on the same day, indorsed the check to her brother who deposited it in his bank receiving credit when the check was deposited. The drawee Trust Company refused to pay the check because payment had been ordered stopped, but subsequently paid the check upon the holder's representation that he was a holder in due course. The drawer sued the Tust Company for the face amount of the check. The court refused the plaintiff any recovery. The decision was based upon the fact that the plaintiff had failed to establish any defense to the check in that Mrs. Sutter had not been proven to have committed fraud in the transaction. She could have recovered on the check, and, therefore, so could the holder, her brother, who had at least as good, if not a better, right than she had. In its opinion, the court held: "When the certification is made at the request of the maker, the obligation of the certifying bank is to make payment to the payee named therein, if such payee is a bona fide holder for value, or to a holder in due course, and such is the contract which the bank, in certifying, undertakes to perform for the maker and toward and in favor of such payee, or a holder in due course. . . . We hold, therefore, that a drawer of a check which has been certified at his request before delivery, may recall the same and require the certifying bank to refuse payment to the payee named therein if such payee is not a bona fide holder for value but has obtained the check by fraud perpetrated by him on the maker. And further, that upon suit by the payee named in the check against the certifying bank, upon its refusal to pay, after notice from the drawer to stop payment, for reasons showing the payee not to be a bona fide holder thereof, for value, the bank can urge and have the benefit of any defense

13. Sutter v. Security Trust Company, 95 N.J. Eq. 44, 122 A.381 (1923), appealed and affirmed at 96 N.J. Eq. 644, 126 A.435 (1924).

that the drawer could have had against such payee establishing that such payee obtained the instrument, or any signature thereto, by fraud, durees or force or fear, or other unlawful means or for an illegal consideration; and, also, that the right of the maker of a check, certified at his request before delivery, is the same against the indorsee holder who is not a holder in due course, as in his right to stop payment against the payee who is not a bona fide holder for value. Such rule, however, has no application to a certified check held by a payee who is a bona fide holder for value, nor to a holder in due course, although certified at the request of the drawer before delivery, nor where the check after delivery, is certified at the request of the payee or holder."[14]

The rule and reasoning in the *Sutter* case seems to represent the view that many courts advance in cases wherein the drawer has procured the certification of the drawee bank.[15] However, there are several cases that cast some doubt on the rule set forth in the *Sutter* case.

In *Florida Power and Light Company v. Tomasello, Liquidator,*[16] a check was drawn, certified by the drawee bank at the request of the drawer, and delivered to the payee. The payee indorsed and delivered the check to a holder (bank). The check was dishonored by the drawee bank because the drawer had ordered payment stopped. The action was brought by the liquidator of the now insolvent holder bank. The court in allowing the plaintiff to recover held, that after certification, the drawer had no right to stop payment, and that the drawee bank was not relieved of its primary liability by the direction of the drawer to stop payment. The court stated further that if the drawer should pay the check he would be subrogated to the rights of the holder against the bank.[17] The case failed to state whether the plaintiff was, or was not, a holder in due course. Nor was any defense mentioned as a reason for the drawer to stop payment. It is possible to draw the conclusion from the court's language that the act of certification, even at the drawer's request, removed all control of the check from the drawer. If this is a proper conclusion, the case runs contrary to the view of the *Sutter* case which permits the drawer the right to stop payment only when the holder is not one in due course, and when the drawer has a defense. Since the decision in the *Tomasello* case did not expressly turn on either point, this conclusion may be open to some doubt.

14. Sutter v. Security Trust Company, 96 N.J. Eq. 644 at pp. 647 and 648.
15. This court cites with approval Times Square Automobile Company v. Rutherford National Bank, 77 N.J. Law 649, 73 A.479 (1909).
16. 103 Florida 1076, 139 So. 140 (1932).
17. The court's statements as to subrogation of the drawer to the rights of the holder raises some interesting questions. If the drawer paid the check, either the plaintiff would be a holder in due course, free of the drawer's defense, or the drawer would have no defense. In either case the drawer could hold the drawee bank on the certification. If the first alternative, *i.e.* the holder was one in due course, were present, it would have been an easy matter for the court to have turned its decision on this point. That would be consistent with the usual rule. If the drawer paid because he had no defense and then was permitted to recover from the drawee bank, the result is the same. The rule announced by the court is consistent if either factual situation were present.

In *McAdoo v. Farmer's State Bank of Zenda and F. M. Smith,*[18] Smith had drawn a check on the defendant bank and had it certified by the bank. The plaintiff's agent had required certification and delivery of the check as a condition precedent to allowing Smith the right to examine a carload of corn consigned to him. The agent agreed to return the check if the corn was unsatisfactory. The corn was unsatisfactory but the check was retained. Smith stopped payment on the check and the bank refused payment. This suit was against the drawee bank to recover the amount of the check. At the bank's request, Smith was joined as a party defendant. The court stated that if certified checks are to be circulated as money to perform the useful purpose in trade they have heretofore performed, the deposit of them in a bank to the credit of the holder must, so far as the rights of the indorsers are concerned, be treated as a deposit of money.[19] And further, "when it certified the check, the latter ceases to possess the character of a check and represented so much money on deposit payable on demand to the holder. In effect, the certification operated as though the bank had actually paid the money to the Railroad Company (McAdoo) and the latter had immediately deposited it to its own credit."[20] The court refused to allow the bank the benefit of the drawer's defense of lack of consideration even though the plaintiff was not a holder in due course.

On facts almost identical with the *McAdoo* case, the court in *Welch v. Bank of Manhattan Company,*[21] reached the opposite conclusion. The drawer drew a check as part payment for the purchase of real estate, obtained the certification of the drawee bank, and delivered the check to Welch. The drawer ordered payment stopped alleging a breach of contract and the bank refused to pay. Welch sued the drawee bank which asked that the drawer be allowed to interplead as party defendant. The court, in granting the interpleader, held that the drawee should be allowed to interplead the drawer so that he could interpose his defense, that the holder and drawer should litigate which was entitled to the money held by the bank, and that it is only in the case where a check is certified at the request of the payee or the holder that a bank may not resist the enforcement of its contract of certification in order to make a set-off or counterclaim available to its depositor. This case holds that the bank would be protected if the court found that the drawer had a defense. In other words, the court would allow the validity of the drawer's stop order, assuming he had a successful defense. This is consistent with the rule of

18. 106 Kansas 662, 189 Pac. 155 (1920).
19. The court quoted Blake v. Hamilton Dime Savings Bank Company, 79 Ohio St. 189, 87 N.E. 73 (1908), "The drawer or indorser of a certified check cannot, after its delivery, revoke it or stop payment upon it by notice to the drawee not to pay." However, the check was certified at the payee's request in the Blake case.
20. The court also quoted Carnegie Trust Company v. First National Bank of the City of New York, 213 N.Y. 301, 107 N.E. 693 (1915). The check in this case, however, was certified at the holder's request.
21. Welch v. Bank of Manhattan Company, 264 App. Div. 906, 35 N.Y. Supp. (2d) 894 (1942).

the *Sutter* case.[22]

IN SUMMARY

It would appear from most of the cases examined that the courts reason that, since a certification at the drawer's request does not relieve him of liability on the check, he, therefore, has not lost control of the instrument and can stop payment on the check. However, this rule applies only when the drawer has a defense and the payee or holder is not a holder in due course.

The bank will not be required to follow a stop payment order, should one be given, if the drawer has a defense and the holder is a holder in due course, or if the drawer has no defense, regardless of whether the holder is, or is not, a holder in due course. The courts will usually protect the bank if it is sued by the holder, allowing it to use the drawer's defense. At least, this is true when the drawer has only a personal defense. No case has been found in which the drawer had a real defense and ordered payment stopped. It is suggested that parallel reasoning leads to the conclusion that the drawer would have the right to stop payment. If the rule is designed to protect a holder in due course when the defense is personal, it would seem that since a real defense is generally available to defeat a holder in due course, the drawer and the bank would be protected against a holder in due course if the drawer's defense were real.

The *McAdoo* case[23] seems to contradict the rule advanced in most of the other none too numerous cases on the point. Perhaps the case can be explained on the basis that the court did not consider the different results which follow when a check has been certified at the instance of the drawer and when it is certified at the holder's request, or that the court did not intend to draw a distinction.

In some instances the courts employ rather broad language.[24] When

22. In Merchants and Planters Bank of Camden v. The New First National Bank of Columbus, Ohio, 116 Ark. 1, 170 S.W. 852 (1914), the court refused to allow a stop order where a check, certified at the drawer's request, was in the hands of a holder in due course and fraud was claimed as a defense to the check. The court said that the drawer or indorser of a certified check can not, after its delivery, revoke it or stop payment upon it by notice to the drawee not to pay.

23. See footnoes 18, 19, and 20 supra.

24. Kellog v. Citizens Bank of Ava, 176 Mo. App. 212, 162 S.W. 643 (1914). The statement is made that the drawer may countermand a check, before the bank honors or accepts the check, no distinction being made as to whether the drawer or the holder procured the cerification.

National Mechanics Bank v. Schmeltz National Bank, 116 S.E. 380, 136 Va. 33 (1923). The Virginia Saloon Company contracted with the plaintiff to purchase firewood for the company. The plaintiff requested a certified check, and the check was certified by the defendant bank (at the request of the drawer) and delivered. Thereafter, the defendant (drawee bank) sought to plead the drawer's debt to it (the bank) as a set-off. The court, in denying the defense of the bank and giving judgment for the plaintiff, held that the bank upon certifying the check becomes the primary debtor. The court further stated that, at the moment a check is certified, money to meet it is, by operation of law, assigned and placed

the courts' opinions are analysed, the rules are much narrower than the wording of their opinions would seem to suggest.

It would seem somewhat unjust to permit the drawer to put the certifying bank in a position where, if it made the wrong decision, it might invite litigation. If the bank, having certified the check, refused payment, it could be sued by the holder on the basis of its acceptance. If the bank were to refuse to follow the stop payment order of the drawer, it might be subjecting itself to liability to the drawer. In any event, the bank must decide at its peril if the drawer had the right to order payment stopped and if he would have a good defense against the holder.

The legislatures of the various states intended to encourage the reliance on, and the stability of, commercial paper, when they adopted the Negotiable Instruments Act. The public policy of this reliance having been determined by the legislatures, such reliance would be strengthened by denying the right to stop payment on checks which have been certified, irrespective of the person who procured that certification. It is suggested that such a general rule would agree with the understanding of most users of certified checks as to the operative effect of certification. These persons are seeking an assurance of security by use of a certified check and they are not concerned with, or interested in, the legal subtleties involved in a distinction between certification at the drawer's or holder's request.

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to the credit of the holder of the check and . . . is beyond control of the drawer and the drawer's creditors, and no equities between the bank and the drawer could be set off against said drawer; and, a fortiori, they could not be set off against the plaintiff in this case. (The court quoted David on Negotiable Iustruments, 2 D. N. I. Section 1603, but the section quoted seems to deal with certification at the request of the holder.)