

IRREVOCABILITY OF BANK DRAFTS, CERTIFIED CHEQUES AND MONEY ORDERS

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This article deals with three types of negotiable instruments payable on demand which are issued, stamped or signed by banks prior to their collection and payment, and used as mechanisms for the transmission of funds. These instruments are the bank draft, including the bank money order, the certified cheque, and the personal money order. The article is concerned with the binding effect, or the irrevocability, of the bank's obligation on these instruments under the law of bills and notes. It concludes that (1) the issuer of the bank draft is liable as a drawer, and under some circumstances, also as a maker or acceptor, that (2) cheque certification amounts to the acceptance of the cheque, and that (3) imprinting the amount on a personal money order ought to be treated like cheque certification. As to all three species, the bank's obligation is thus irrevocable.

Cet article traite de trois sortes de valeurs négociables payables à vue qui sont émises, timbrées et signées par la banque avant d'être perçues et payées et qui servent au transfert de fonds. Il s'agit de la lettre de change bancaire, y compris le mandat bancaire, du chèque certifié et du mandat personnel. L'auteur s'intéresse à la force exécutoire, ou irrévocabilité, de l'obligation de la banque en vertu du droit des lettres de change. Il en conclut (1) que l'émetteur de la lettre de change bancaire est responsable en tant que tireur et dans certaines circonstances aussi en tant qu'émetteur ou accepteur, (2) que la certification d'un chèque signifie son acceptation et (3) que l'impression du montant sur un mandat personnel devrait être équivalente à la certification d'un chèque. De toute façon, dans les trois cas, l'obligation de la banque est irrévocable.

Introduction

The practice of paying a creditor with a negotiable instrument issued by a banker or another person of reputable credit¹ (hereafter: "banker's instru-

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¹ Unless indicated otherwise, terms like "banker", "bank", "depository financial institution", or "financial institution", are used interchangeably. See also footnotes 9 and 11, *infra*.

ment'') is by no means a twentieth century innovation. In fact, an early bill of exchange known to us was a banker's instrument used in payment of debts arising in international commerce. Such an instrument was typically drawn by an exchanger on his correspondent in a foreign country. It was payable to a creditor of the drawer's customer, and was sent by that customer (who had remitted funds to the drawer) to his creditor in the foreign country.² Likewise, the forefather of the promissory note is the goldsmith's note, given to a depositor of metallic money, and used by him in payment of his debt.³

To this day, banker's instruments are used in payment of debts as a substitute for cash. They are mechanisms for the transmission of funds which facilitate the avoidance of the risk of physical carriage of money. They further give the creditor the assurance of payment in the form of the bank's credit attached to them.⁴

Inasmuch as they are bills, notes or cheques, banker's instruments are governed by the Bills of Exchange Act,⁵ or more generally, by the law of negotiable instruments.⁶ (Hereafter, "Act" refers to the Bills of Exchange Act, and a reference to a section is to a section of that Act, unless there is an indication to the contrary). Nevertheless, notwithstanding their old origin, banker's instruments are not dealt with by the Act as a separate category. The Act governs three types of negotiable instruments: bills of exchange (or bills),⁷ promissory notes (or notes),⁸ and cheques.⁹ A bank-

² See in general, W. Holdsworth, *A History of English Law*, Vol. VIII (2nd ed., 1937, rep. 1966), pp. 126-146.

³ See in general, J.M. Holden, *The History of Negotiable Instruments in English Law* (1955), pp. 70-73.

⁴ Upon the insolvency of a financial institution, first certified cheques drawn upon it, and then its bank drafts and money orders (the two latter categories are lumped up as "priority payment instruments") are accorded priority (subject to the right of secured parties) under section 85 of the Canadian Payments Association Act, Part IV of the Banks and Banking Law Revision Act, S.C. 1980-81-82-83, c. 40. See discussion in Bradley Crawford, *The Law of Bills and Notes*, paper presented in Insight Program on The Law of Bills and Notes (October 18, 1985, Toronto), Tab. VI, pp. 24-28.

⁵ R.S.C. 1970, c. B-5 (as amended).

⁶ For general comments recently made on the law of negotiable instruments, being broader than the law of bills, notes and cheques, see, e.g.: D.V. Cowen and L. Gering, Cowen on the Law of Negotiable Instruments in South Africa (5th ed., 1985), Vol. I, General Principles, pp. 1-2, 153-155. Bills, notes and cheques "are the most common examples of . . . negotiable instruments"; *ibid.*, p. 2.

⁷ A bill of exchange (or "bill"; see s. 2) is defined in s. 17(1) as:

an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay, on demand or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer.

⁸ A promissory note (or "note"; see s. 2) is defined in s. 176(1) as:

an unconditional promise in writing made by one person to another, signed by the

er's instrument may fall into any of these categories. In general, it must be issued, stamped or signed¹⁰ by a bank or another financial institution¹¹ and used by its customer¹² in discharge of his debt or, indeed, by way of gift. In practice, it is payable on demand¹³ and collectible through the clearing system.¹⁴ When presented for payment by its holder,¹⁵ whether over the counter or through the clearing system, its amount must have been previously either prepaid or charged to the customer's account. A domestic banker's instrument may be presented for payment during a period of ten years after the bank's credit has attached to it.¹⁶ In Canada the instrument is universally made payable to order and not bearer.¹⁷

maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person, or to bearer.

⁹ Under s. 165(1):

A cheque is a bill of exchange drawn on a bank, payable on demand.

"Bank" is currently broadly defined in s. 164.1 to include, generally speaking, all depository institution members of the Canadian Payments Association (CPA). Besides chartered banks, this includes trust companies and credit unions.

¹⁰ Thus, a bank draft is issued and signed by a banker, a certified cheque is stamped and often signed but not originally issued by a banker, and a personal money order is issued and stamped, but not signed by a banker. See discussion below. Inasmuch as a banker's instrument is issued to the customer and not to the "holder", "issue" is not used here in the technical sense of the definition in s. 2.

¹¹ Not necessarily a chartered bank. See footnotes 1 and 9, *supra*. In theory, except for cheque certification, even CPA membership is not a limiting factor. Creditworthiness, or financial reputation and standing are the determining elements.

¹² The "customer" can be either a regular customer, having an account with the bank, or an ad hoc customer, only for the purpose of the banker's instrument transaction.

¹³ A bill payable on demand is defined in s. 23(1). In general, bills and notes may be payable on demand. Cheques must be payable on demand; see footnotes 7-9, *supra*. Provisions governing bills, generally speaking, apply to cheques and notes as well; see ss. 165(2) and 186(1) respectively.

¹⁴ So as to constitute an effective machinery for the transmission of funds facilitating the avoidance of the risk of carrying money in specie. *Cf. Karak Rubber Co. Ltd. v. Burden (No. 2)*, [1972] 1 All E.R. 1210, at p. 1220c (Ch. D.) (as to element of collectibility in the clearing system).

¹⁵ Under s. 2, "holder" is "the payee or endorsee of a bill or note who is in possession of it . . .". Stated otherwise, the "holder" is not necessarily the customer's creditor. It could also be his endorsee. "Holder" is further defined in s. 2 to encompass the bearer of the instrument. But *cf.* footnote 17 and accompanying text, *infra*.

¹⁶ See s. 209(1)(b) of the Bank Act, Part I of the Banks and Banking Law Revision Act, S.C. 1980-81-82-83, c. 40. Thereunder funds representing "a cheque, draft or bill . . . payable in Canada in Canadian currency [which] has been issued, certified or accepted by a bank at a branch of the bank in Canada", and has not been paid "for a period of ten years" thereafter, shall be paid to the Bank of Canada. Such a payment "discharges the bank from all liability in respect of the debt or instrument"; *ibid*.

¹⁷ Banker's instruments made out payable to bearer may be taken to violate the prohibition to issue, reissue, make, draw or endorse "any bill, bond, note, cheque or other instrument, intended to circulate as money, or to be used as a substitute for money"

Neither the term "banker's instrument" nor any of its various categories has been authoritatively defined. The above definition as well as the categories discussed in this article are based on prevailing banking practices. Nevertheless, such practices are not entirely uniform. In the absence of authoritative definitions, there is room for variations. As a result some confusion is inevitable.

The scope of this article is limited to those instruments which are not denominated in advance by the financial institution. It deals only with those instruments made out in sums corresponding to the specific instructions of the respective customer. Due to space limitation, travellers' cheques are thus excluded.¹⁸

The article is designed to examine the irrevocability or the binding effect of the banker's engagement on the banker's instrument under the law of negotiable instruments. It does not purport to be a comprehensive study of all aspects of the banker's instrument. For example, questions relating to the autonomy or absolute nature of the banker's obligation, that is to the bank's ability to set up defences to its irrevocable obligation, are excluded from the scope of the article. Likewise, questions relating to banker's instruments issued either without authority or by mistake, or fraudulently misused, whether by theft, forgery of a signature, alteration, or otherwise, are not to be discussed here. Also, the effect of payment by banker's instrument as a conditional or absolute payment of the customer's obligation for which it is given is outside the present inquiry. The scope of this article is limited to the irrevocability of the banker's obligation, or its binding effect towards the holder of the instrument.

Three premises underlined my investigation. First of all, the irrevocability of the banker's obligation facilitates the acceptability of banker's instruments as cash substitutes. Secondly, prevailing mercantile perceptions as to irrevocability attached to any type of instrument should be reflected in existing law. Thirdly, it is preferable to explain the irrevocability of the banker's obligation in the framework of the law of negotiable instruments rather than under general principles of law. Indeed, fitting irrevocability into a known category of statutory engagement under the

under s. 311(1) of the Bank Act, *ibid.* Prior to 1980, the prohibition was more explicit. S. 75(2)(a) of the old Bank Act (R.S.C. 1970, c. B-1) prohibited the issuance of "notes of the bank payable to bearer on demand and intended for circulation". For the different Australian position, see footnote 32, *infra*.

In general, bills, notes and cheques may be made payable to bearer. See definitions in footnotes 7-9, *supra*. Bearer instrument is defined in s. 21(3). In theory, a banker's instrument made payable to order, may be subsequently converted to a bearer instrument by the holder's endorsement in blank. See ss. 21(3) and 67. In practice, such a conversion is unusual as it defeats the security of the holder compared to that of a holder of cash.

¹⁸ In general, for travellers' cheques see, *e.g.*, Cowen and Gering, *op. cit.*, footnote 6, pp. 295-313; E.P. Ellinger, *Travellers' Cheques and the Law* (1969), 19 U.T.L.J. 132.

Act is bound to produce a greater certainty than the application of broad and often open-ended general principles.

I. Bank Drafts

The bank draft takes the form of an order to pay a sum of money, addressed by a banker either to himself or to another banker. A bank draft drawn on the drawer is usually drawn by a bank branch on its head office or on another department or branch. In general, bank drafts are signed by two authorized officers of the bank. One of the two signatures is often described on the instrument as "counter signature". Where an instrument is for a small sum, internal regulations may be satisfied with merely one signature. Inasmuch as a bank draft is "signed" by the bank,¹⁹ it embodies a statutory engagement of the signing bank on the instrument.²⁰ Bank drafts may be purchased from the issuing bank in any amount, subject to no ceiling, and generally speaking, in any currency.

All particulars of a bank draft (that is date, amount payable, payee's name) are typed on the instrument prior to its delivery to the customer. The customer, who as a purchaser of the draft either prepaid its amount in cash or had his bank account charged with that sum, either gets a complete instrument, ready to be delivered to his creditor, the payee of the instrument, on which he (the customer), does not have to sign at all; or, alternatively, the instrument may be made payable to the customer who will negotiate it to his creditor. Under the first alternative, as a purchaser from the issuing bank of an instrument payable to his creditor, the customer is not a "holder" of the instrument.²¹ He is rather known as a "remitter".²²

Upon the sale of the bank draft to the customer, the amount payable is placed in a special reserve account. Upon presentment for payment, funds will be withdrawn or collected from that account. The instrument is usually collected through the clearing system.

In practice, Canadian funds bank drafts issued by the chartered banks are invariably drawn on the drawer itself. The same applies to

¹⁹ For the liability of a corporation on an instrument on the basis of one or more authorized signatures on its behalf, and for the exoneration from personal liability of those who personally sign in a representative character, see ss. 4, 5, 51 and 52.

²⁰ Bills, notes and cheques must be "signed"; see ss. 17(1), 176(1) and 165(1), reproduced in footnotes 7, 8, and 9 respectively. For the nature and scope of the statutory liability triggered by the bank's signature on a bank draft, see text and footnotes 51-87, *infra*.

²¹ Being neither the payee nor endorsee. See definition of "holder" in s. 2. See also footnote 15, *supra*.

²² See in general, F.K. Beutel, *Rights of Remitters and Other Owners Not Within the Tenor of Negotiable Instruments* (1928), 12 Minn. L. Rev. 584; J.E. Tobin, *The Rights of a Remitter of a Negotiable Instrument* (1967), 8 B.C. Indus. & Com. L. Rev. 260.

major trust companies.²³ The credit union movement in Ontario has recently fallen into the same mould.²⁴ Some trust companies draw Canadian funds bank drafts on their respective correspondent chartered banks. Foreign currency bank drafts are drawn, as a rule, by all types of Canadian financial institutions, either on a correspondent foreign bank, or on a foreign subsidiary or agency of a Canadian bank.²⁵

In the United States, bank drafts constitute only one class of what we call bank drafts in Canada. Thus, in the United States, an instrument drawn by a bank on itself is called either a cashier's cheque²⁶ or a bank money order.²⁷ An instrument drawn by a savings bank or a savings and loan association on a commercial bank is called a teller's cheque.²⁸ A bank draft in American terminology is an instrument drawn by one commercial bank on another.²⁹

Similar distinctions exist in England, Australia, New Zealand and South Africa. In England, a distinction is said to exist between a banker's draft, drawn by one banker on another, and a banker's cheque, drawn by a banker on himself.³⁰ The distinction is nevertheless not universally pursued in England, and "bank drafts" or "banker's draft" is frequently used to cover both categories.³¹ In Australia, New Zealand and South

²³ When issued by institutions other than chartered banks, the instrument is unlikely to bear the title "bank draft". Widespread alternatives are "official cheque", "corporate cheque account", or "credit union draft". Not infrequently, the instrument (even when issued by a chartered bank) bears no title. The legal nature of the instrument as "bank draft" is not affected by any of the above.

²⁴ The previous forms were drawings of each member credit union on the Ontario central. This was modeled on the practice of branches of chartered banks which draw domestic drafts on their head offices. Nevertheless, unlike a bank head office, a central is a distinct legal entity. For business reasons, the standard forms were changed to omit reference to the central, notwithstanding the fact that the account on which a credit union draft is drawn is still with the central.

²⁵ For such a bank draft, see, e.g., *Young v. Cashion* (1909), 19 O.L.R. 491, at p. 494 (Ont. Div. Ct.).

²⁶ See, e.g., *Laurel Bank and Trust Co. v. The City National Bank of Connecticut*, 365 A. 2d 1222 (Conn., 1976); *Missouri ex rel. Chan Siew Lai v. Powell*, 536 S.W. 2d 14, at p. 16 (Mo., 1976).

²⁷ See, e.g., *Thompson Poultry, Inc. v. First National Bank of York*, 255 N.W. 2d 856, at p. 857 (Neb., 1977): "A bank money order is essentially the same as a cashier's check."

²⁸ See, e.g., *Malphrus v. Home Savings Bank of City of Albany*, 254 N.Y.S. 2d 980 (Co. Ct., 1965).

²⁹ See, e.g., *Banco Ganadero y Agrícola v. Society National Bank of Cleveland*, 418 F. Supp. 520, at p. 523 (N.D. Ohio, 1976). A bank draft is "sometimes loosely referred to as a cashier's check".

³⁰ For this distinction, see *Karak Rubber Co. Ltd. v. Burden (No. 2)*, *supra*, footnote 14, at p. 1220c.

³¹ See, e.g., Cowen and Gering, *op. cit.*, footnote 6, p. 220 and n. 156; Halsbury's Laws of England (4th ed., 1973), Vol. 3, para. 115.

Africa the distinction between bank drafts and bank cheques is quite firm.³² One Australian authority suggested that "banker's cheque" may cover both the bank cheque and the bank draft.³³ In all these jurisdictions, that is England, Australia, New Zealand and South Africa, the bank cheque is the more widely used instrument in domestic transactions.

Canadian banking practice recognizes the money order as a species of the bank draft.³⁴ The money order, unlike the ordinary bank draft, bears one facsimile signature of a high ranking officer of the issuing bank. A handwritten signature on behalf of the bank must normally be added upon the issuance of the money order.

Liability on a bill or note on the basis of a facsimile signature placed on it requires further analysis. Chalmers defines "signature" as "the writing of a person's name on a bill or note in order to authenticate and give effect to some contract thereon".³⁵ Falconbridge³⁶ adopts this definition, but nevertheless refers to the statutory definition of "writing" in section 28 of the Interpretation Act.³⁷ Thereunder, "writing" includes printing, typewriting or any other intentional reduction to tangible form. Falconbridge's conclusion is that, inasmuch as "writing" is not necessarily handwriting or subscription, a lithographed or stamped signature is sufficient.³⁸

However, the question is not free from doubt. *Goodman v. J. Eban Ltd.*³⁹ dealt with a statute requiring a solicitor to "sign" a document.

³² Cowen and Gering, *ibid.*, pp. 220 and 232. The Australian banking practice of issuing bank cheques is referred to, e.g., in *Union Bank of Australia, Ltd. v. McClintock*, [1922] 1 A.C. 240, at p. 245 (P.C.), and *Australian Bank of Commerce, Ltd. v. Perel*, [1926] A.C. 737, at p. 740 (P.C.). The practice in Australia is to issue such instruments not only in favour of a named payee but also to bearer; *ibid.* Compare text and footnote 17, *supra*.

³³ *Fabre v. Ley* (1972), 46 A.L.J.R. 718, at p. 720 (Aust. H.C.), in connection with a statute requiring payment "in legal tender or in a banker's cheque". It was specifically held there that "personal cheque" was not a "banker's cheque".

³⁴ The "money order" is to be distinguished from the "personal money order" discussed below in Part III. The "money order" corresponds to the U.S. "bank money order". See text and footnote 27, *supra*.

³⁵ Chalmers on Bills of Exchange (13th ed., by D.A.L. Smout, 1964), p. 285.

³⁶ Falconbridge on Banking and Bills of Exchange (7th ed., by A.W. Rogers, 1969), pp. 440-441, 443 and 444.

³⁷ R.S.C. 1970, c. I-23. Section 28 defines writing as follows:

"writing", or any term of like import, includes words printed, typewritten, painted, engraved, lithographed, photographed, or represented or reproduced by any mode of representing or reproducing words in visible form.

³⁸ Falconbridge, *op. cit.*, footnote 36, p. 444, n. (g), citing *Re London and Mediterranean Bank, Ex. Parte Birmingham Banking Co.* (1868), L.R. 3 Ch. App. 651, at pp. 653-654.

³⁹ [1954] 1 Q.B. 550 (C.A.).

Acknowledging inconsistency with "common sense and . . . ordinary use of language",⁴⁰ as well as with "[t]he first reaction of many people",⁴¹ the majority of the Court of Appeal held that "where an Act of Parliament requires that any particular document be 'signed' by a person, then, *prima facie*, the requirement of the Act is satisfied if the person *himself* places upon the document an engraved representation of *his* signature by means of a rubber stamp".⁴² The general rule was said to be "that the essential requirement of signing is the affixing in some way, whether by writing with a pen or pencil or by otherwise impressing upon the document, one's name or 'signature' so as *personally to authenticate the document*".⁴³

Denning L.J. dissented. In his view, unlike a rubber stamp which "can be affixed by anyone", a personal signature "carries on the face of it a guarantee that the person who signs has given his personal attention to the document"; at the same time, being dependent "on the internal office arrangements", the affixing of a rubber stamp "is contemptuously used to denote the thoughtless impress of an automaton, in contrast to the reasoned attention of a sensible person".⁴⁴

Perhaps a distinction ought to be made on the basis of the objective of the signature requirement under the applicable statute. Where a signature is required to authenticate facts, "personal attention" may be necessary.⁴⁵ Nonetheless, where a signature is required to authenticate liability, as it is under the Act, "the thoughtless impress of an automaton" may suffice, provided the person to be bound either authorized it, or is estopped from denying the giving of authority.

However, in *Lazarus Estates Ltd. v. Beasley*,⁴⁶ Denning L.J. understood the majority in *Goodman* as holding that "a *private person* can sign a document by impressing a rubber stamp with his own facsimile signature on it". Nevertheless, he added, "it has not yet been held that a *company* can sign by its printed name affixed with a rubber stamp".⁴⁷

Inasmuch as the Bills of Exchange Act specifically provides in section 5 that an instrument duly sealed with the corporate seal satisfies "signature" requirements, it is hard to see why a rubber stamp of a corporation or its signing officer will not have the same function. The question is always whether a given "signature" placed on an instrument

⁴⁰ *Ibid.*, at p. 555, per Evershed M.R.

⁴¹ *Ibid.*, at p. 563, per Romer L.J.

⁴² *Ibid.*, at p. 557, per Evershed M.R. (emphasis added); cited with approval in *Re Botiuk and Collison* (1979), 97 D.L.R. (3d) 356, at p. 360 (Ont. H.C.).

⁴³ *Ibid.*, at p. 557. (Emphasis added).

⁴⁴ *Ibid.*, at p. 561.

⁴⁵ *Cf. R. v. Siemens* (1983), 9 W.C.B. 211 (Man. Prov. Ct.).

⁴⁶ [1956] 1 Q.B. 702, at p. 710 (C.A.). (Emphasis added).

⁴⁷ *Ibid.* (Emphasis added).

sufficiently manifests the party's intent to be liable thereon. A corporation resolving or representing that it is bound by documents bearing a facsimile signature of its officer ought to be seen as having "signed" such documents. Indeed, under section 4, a signature may be "written" on an instrument on behalf of a principal by an agent acting under the principal's authority. Corporate authority must therefore link the agent's signature, whether handwritten or impressed, to the corporation's liability. In the final analysis, neither the separate entity of the corporation, nor the nature of, and statutory provisions applicable to, bills and notes preclude the possibility of an authorized signature on a bill or note by way of impressing a facsimile signature of a signing officer. Inasmuch as they bear a facsimile signature of a bank officer as required, money orders are thus bank drafts "signed" by the bank.⁴⁸

Unless otherwise indicated, the ensuing discussion adopts the Canadian classification and terminology. "Bank draft" is thus broadly used to encompass the money order, and to cover drawings on the issuing bank itself as well as on another bank. The basis for the binding effect of the drawer bank's engagement towards the holder is now considered.

In general, a holder is a person who "may sue . . . in his own name" parties liable on an instrument (section 74(a)). In connection with an instrument payable to order, the "holder" is "the payee or endorsee" in possession of it (section 2). Outside the provisions of the Act, a payee or any other holder may encounter difficulties in enforcing the engagement of the issuing bank. Thus, in *Dominion Express Co. v. Krigbaum*⁴⁹ an "express money order" which failed to comply with the statutory

⁴⁸ Cf. *Bank of Canada v. Bank of Montreal* (1977), 76 D.L.R. (3d) 385 (S.C.C.), considering whether bearer notes issued by Bank of Canada are "promissory notes" governed by the Act. Such an instrument was "signed" by the Governor and Deputy Governor of the Bank (*ibid.*, at p. 396). One could safely assume that in fact it bore their facsimile signatures. It was not even argued that consequently the note was not adequately "signed". However, to the contrary see: *Raymond v. Mervin* (1925), 63 C.S. 434, at p. 435 (Que. S.C.).

Customer's liability on cheques on which a facsimile signature was affixed without authority is discussed under the American U.C.C., e.g., in *Perini Corp. v. First National Bank of Habersham County*, 533 F. 2d 398 (5th Cir., 1977); *First National Bank & Trust Co. v. Cutright*, 205 N.W. 2d 542 (Neb., 1973); *Wilmington Trust Co. v. Phoenix Steel Corp.*, 273 A. 2d 266 (Del., 1971); and *Wall v. Hamilton County Bank of Jasper*, 276 So. 2d 182 (Fla. App., 1973). In general, corporate resolutions authorizing the use of facsimile signatures are given full effect.

For foreign jurisdictions where it was held that a stamped signature on a negotiable instrument does not satisfy the statutory "signature" requirement, see Chalmers, *op. cit.*, footnote 35, p. 285, n. 11 (with regard to Ceylon, now Sri Lanka); and Byles on Bills of Exchange (25th ed., by M. Megrah and F.R. Ryder, 1983), p. 12, n. 25 (with regard to France).

⁴⁹ (1909), 18 O.L.R. 533, at p. 539 (Ont. Div. Ct.). As to the definition of "bill" see *supra*, footnote 7; and as to "remitter" see *supra*, footnote 22 and accompanying text.

definition of "bill" was held to be "an agreement [of the express company] with the 'remitter' to transmit and pay to the order of the payee of it the sum mentioned in it". The case nonetheless decided that the payee, having no privity with the issuing express company, would not be entitled to sue it upon the instrument. No such difficulty would have arisen had the instrument been governed by the Act⁵⁰ under which a holder is given a right of action. The liability towards him on the bank draft derives from the signing party's statutory contract. The nature of the contract may vary according to the form of the bank draft and the resulting classification of the instrument under the provisions of the Act.

A bank draft drawn on another bank is a bill of exchange as well as a cheque.⁵¹ The issuing bank is thus liable thereon to the holder⁵² as a drawer. As the drawer, the issuing bank "engages that on due presentment [the instrument] shall be . . . paid according to its tenor, and that if it is dishonoured [the bank] will compensate the holder . . . if the requisite proceedings on dishonour are duly taken" (section 130(a)). Formalities of presentment, and giving notice of dishonour, are thus required to charge the drawer bank with liability.⁵³

A bill which "is, or on the face of it purports to be" neither "both drawn and payable within Canada", nor "drawn within Canada upon some person resident therein", is a "foreign bill".⁵⁴ Foreign currency bank drafts are normally drawn on a foreign entity and are payable outside Canada.⁵⁵ As such they fall into this category. Where a foreign bill is dishonoured, it must be protested. Otherwise, the drawer bank is discharged (section 112). Protest is a solemn declaration of the dishonour of the bill. It must be made by a notary. This formality supersedes notice of

⁵⁰ *Quaere* whether the difficulty could not be overcome, even in the absence of the provisions of the Act, on the basis of viewing the delivery of the instrument by the remitter to the payee as an assignment to the payee, by the remitter, of the debt owed to the remitter by the express company.

⁵¹ As defined in ss. 17(1) and 165(1) respectively, as quoted *supra*, footnotes 8 and 9. See Cowen and Gering, *op. cit.*, footnote 6, p. 232, where it is said that such an instrument "qualifies in all respects as a cheque"; see also p. 164.

⁵² See paragraph in text preceding that containing footnotes 49 and 50, *supra*.

⁵³ Presentment for payment is required to charge the drawer and endorsers of a bill; see s. 85(2), and in general, ss. 85-95. Notice of dishonour must be given to the drawer and each endorser; see s. 96(1), and, in general, ss. 96-126. For possible excuses and defences, see ss. 92, 107 and 166.

⁵⁴ See s. 25 of the Act which reads as follows:

- (1) An inland bill is a bill that is, or on the face of it purports to be,
 - (a) both drawn and payable within Canada; or
 - (b) drawn within Canada upon some person resident therein.
- (2) Any other bill is a foreign bill.
- (3) Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.

⁵⁵ See text and footnote 25, *supra*.

dishonour.⁵⁶ Protest is governed by sections 109 to 126. Nevertheless, under section 162, the holder's duties with respect to presentment for payment, "and the necessity for or sufficiency of a protest or notice of dishonour", are resolved "by the law of the place where the act is done or the bill is dishonoured". In connection with foreign bills, this law may not be the Canadian Act.

The drawee bank of a bank draft drawn by one bank on another, whether it is an inland or foreign bill,⁵⁷ incurs no liability to the holder. Under section 131, no person is liable as a party on an instrument "who has not signed it as such", and under section 127 "the drawee of a bill who does not accept . . . is not liable on the instrument". The drawee of the bank draft not drawn on the drawer does not normally accept or otherwise sign the instrument.⁵⁸ Accordingly, it is not liable thereon to the holder.

A bank draft drawn by a bank on itself is in the form of a bill of exchange or cheque.⁵⁹ Such an instrument is governed by section 26, which provides that "[w]here in a bill drawer and drawee are the same person . . . the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note". It has been held that an instrument falling under section 26 is neither a bill nor a note.⁶⁰ It is not a bill or cheque, there being no separate drawer and drawee as required by the statutory definition of "bill".⁶¹ Nor is it a "note" since it does not contain a "promise".⁶² Under this view, section 26 provides in effect that

⁵⁶ See, in general, Falconbridge, *op. cit.*, footnote 36, p. 736.

⁵⁷ As defined in s. 25, reproduced *supra*, footnote 54.

⁵⁸ Acceptance is governed by ss. 35-38. Generally speaking, it requires the drawee's signature; see ss. 35(1) and 36(2). For the acceptor's liability under the Act, see paragraph containing footnotes 79-82, *infra*.

⁵⁹ See statutory definitions in footnotes 7 and 9, *supra*.

⁶⁰ The position is summarized (with respect to the British corresponding provision) in *Re British Trade Corporation, Limited*, [1932] 2 Ch. 1 (C.A.).

⁶¹ *London City and Midland Bank, Ltd. v. Gordon*, [1903] A.C. 240, at p. 250 (H.L.). See also *Miller v. Thomson* (1841), 3 Man & G. 576, 133 E.R. 1271 (C.P.); *Brown, Brough and Co. v. National Bank of India (Limited)* (1902), 18 T.L.R. 669, at p. 670 (K.B.D.), reluctantly following the Court of Appeal's decision in *Gordon v. London, City and Midland Bank, Ltd.*, [1902] 1 K.B. 242, as subsequently affirmed on that point by the House of Lords.

S. 17(1) defines a bill of exchange partially as a written order "by one person to another". (See full definition in footnote 7, *supra*). Such a requirement does not appear in the definition of "draft" ("bill of exchange") under s. 3-104 of the American U.C.C. Thus, while the U.C.C. contains a provision corresponding to that of s. 26 in the Act (U.C.C. s. 3-118(a)), there are no similar doubts thereunder as to the initial classification of the bank draft drawn by a bank on itself as a bill.

⁶² *Re British Trade Corporation, Limited*, *supra*, footnote 60, explicitly distinguishing the majority position in *Miller v. Thomson*, *supra*, footnote 61. Pre-Act cases treated an instrument in the form of a bill drawn by the drawer on himself as being "in the nature

where there is a document in the form of a bill of exchange which is neither a bill of exchange nor a promissory note, the holder may treat it "as being what it is not",⁶³ namely either a bill or note. This does not transform the nature of the instrument to either a bill or note, but merely gives solely to the *holder* an option of treating the instrument either way.⁶⁴ The difficulty with this widely accepted interpretation⁶⁵ is that if the instrument is neither a bill nor a note in the first place, its "payee or endorsee . . . in possession of it" cannot be the "holder" as defined in section 2 so as to be in a position even to exercise this option.⁶⁶ Furthermore, section 26 itself calls the instrument a "bill".⁶⁷ It is submitted that the better view is to read section 26 to mean that a bank draft drawn by a bank on itself, being in the form of a bill, is indeed a "bill",⁶⁸ notwithstanding the apparent requirement of a separate drawer and drawee in the statutory definition of "bill of exchange" in section 17(1).⁶⁹ Section 26 must further be read as premised on the assumption that an order of one person to himself sounds as a promise of that person. This assumption may be founded on the legal implication attached by the Act to the drawer's order as an engagement to pay.⁷⁰ Accordingly, the section goes

of a promissory-note". Nevertheless, having drawn the instrument as a bill, the party liable thereon was estopped from denying its classification as a bill of exchange. See *Willans v. Ayers* (1877), 3 App. Cas. 133, at pp. 142-143 (P.C.), followed in *Re Commercial Bank of South Australia* (1887), 36 Ch. D. 522, at p. 525 (Ch. D.).

Under s. 176(1) of the Act, a promissory note (or "note" per s. 176(2)) is partly defined as "an unconditional promise in writing" of its maker. For a full definition see footnote 8, *supra*.

⁶³ *Re British Trade Corporation, Limited, ibid.*, at p. 14, per Romer L.J.

⁶⁴ To remedy some aspects of this anomaly it was enacted in the U.K. in 1932 that the cross cheque sections shall apply to a bank draft drawn by the drawer on itself "as if the draft were a cheque"; see Falconbridge, *op. cit.*, footnote 36, p. 876. See now the Cheques Act, 1957, 5 & 6 Eliz. 2, c. 36. As crossed cheques are not widespread in Canada (Falconbridge, *ibid.*), no corresponding amendment has been introduced here.

⁶⁵ See, e.g., Holden, *op. cit.*, footnote 3, pp. 244, 276; Paget's Law of Banking (9th ed., by M. Megrah and F.R. Ryder, 1982), p. 216.

⁶⁶ "Holder" is defined in s. 2 as "the payee or endorsee of a bill or note who is in possession of it . . ."; (emphasis added). The option under s. 26 is given solely to the "holder".

⁶⁷ See the text following footnote 59, *supra*.

⁶⁸ As well as a cheque, as was in fact held (albeit without any discussion) in *Ross v. London County Westminster and Parr's Bank, Ltd.*, [1919] 1 K.B. 678, at p. 687 (K.B.D.). According to Paget, *op. cit.*, footnote 65, p. 216, on the basis of *Gordon, supra*, footnote 61, this judgment must now be regarded as wrong.

⁶⁹ *Supra*, footnote 60. This interpretation of s. 26 may be reinforced by s. 17(2) which provides, in part, that an instrument that does not comply with the requirements of s. 17(1) "is not, except as hereinafter provided, a bill of exchange"; (emphasis added). S. 26 may be viewed as such an exception.

⁷⁰ See s. 130(a), as quoted in the text, following footnote 52, *supra*. As applied to a bill drawn on the drawer, the section provides in substance that the drawer engages to pay upon his own failure (as the drawee) to pay the instrument.

on to provide the holder with the option of treating such a "bill" at his discretion as a note.

If a bank draft drawn on the drawer is a "bill"; there is no difficulty in treating it as a cheque as well. This is so since the cheque is a species of the bill of exchange.⁷¹ Indeed, the view that a bank draft drawn on the drawer is not a cheque⁷² is premised on the assumption that such an instrument is not a bill.

Support for the interpretation of section 26 as either providing for, or at least accommodating, the case of a true bill drawn on the drawer, may be found in section 107. Thereunder, notice of dishonour is dispensed with as regards the drawer of a bill where "(a) the drawer and drawee are the same person". The provision thus explicitly contemplates a bill of exchange drawn by the drawer on himself.

Where a bank draft drawn on the drawer is treated as a promissory note, the liability of the issuing bank is that of a maker. Under section 185(a), the maker's engagement is that "he will pay [the note] according to its tenor". In general, neither presentment nor notice of dishonour is required as regards the maker of a promissory note.⁷³ Nevertheless, a bank draft drawn on the drawer normally bears an address of the issuing bank. Inasmuch as the inclusion of this information may be viewed as making the note "in the body of it" payable at a particular place,⁷⁴ the instrument is governed by section 183.⁷⁵ There is some controversy, based on the ambiguous language of that provision, as to whether presentment for payment is required to render the maker liable where the note is

But see *Re British Trade Corporation, Ltd.*, *supra*, footnote 60, at p. 11, where Greer L.J. regarded a document drawn by a branch on its head office as "a request by the branch . . . to the head office to undertake a liability . . .".

⁷¹ See definition in s. 165(1), as reproduced in footnote 9, *supra*.

⁷² For this view, see, e.g., Halsbury, *op. cit.*, footnote 31.

⁷³ As to presentment, see s. 183(3); as to dishonour, see s. 96(4), as applied to the note by virtue of s. 186(2).

⁷⁴ But see for the contrary view *Re British Trade Corporation, Ltd.*, *supra*, footnote 60 and *cf.* footnote 82 and surrounding text, *infra*.

⁷⁵ S. 183 reads as follows:

- (1) Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place.
- (2) In such case the maker is not discharged by the omission to present the note for payment. . . but if any . . . action is instituted thereon against him before presentation, the costs thereof are in the discretion of the court.
- (3) Where no place of payment is specified in the body of the note, presentment for payment is not necessary . . . to render the maker liable.

Case law dealing with whether a location indicated on the note is "in the body of it" (though for the purposes of s. 184(2) dealing with presentment as regards an endorser) is discussed by David J. Kee, *Holders' Duties*, paper presented in Insight's program on *The Law of Bills and Notes* (October 18, 1985, Toronto), Tab. II, p. 25.

made payable at a particular place. Thus, subsections (1) and (3) of section 183 imply that presentment is required. On the other hand, subsection (2) seems to suggest that presentment is not required to charge the maker, but in the absence of such a step the costs of an action against him are "in the discretion of the court". The prevailing view in Canada is that no presentment is required to render the maker liable, even where the note is payable at a particular place.⁷⁶

When the instrument is treated as a bill of exchange, the issuing bank's liability is that of a drawer.⁷⁷ Presentment is thus required to render the drawer liable. At the same time, under section 107(a), notice of dishonour is dispensed with as regards the drawer of a bill drawn on himself.⁷⁸

Alternatively, a bill drawn on the drawer is often viewed in the United States as "accepted by the mere act of its issuance".⁷⁹ An acceptor is a party primarily liable on the bill who "engages that he will pay it according to the tenor of his acceptance". Neither presentment nor the giving of a notice of dishonour is required as regards the acceptor.⁸⁰ Section 93 explicitly provides that when a place of payment is specified on the bill, the failure to present does not discharge the acceptor, though costs of an action brought against him prior to presentment are at the court's discretion. The ambiguity of section 183⁸¹ is not restated. In any event, section 88 may suggest that the mere giving of an address on an instrument falls short of specifying a place of payment.⁸² This interpretation means that the mere inclusion of the bank's address on the bank draft drawn on the drawer does not bring the instrument into the ambit of section 93. Irrespective of whether an accepted bank draft is covered by section 93, it is nevertheless unequivocally clear that no presentment is required to render the acceptor liable thereon.

⁷⁶ See discussion in Kee, *ibid.*, pp. 21-23. The recent leading case is *Liska v. Bank of British Columbia*, [1981] 4 W.W.R. 223, at pp. 233-235 (Alta. Q.B.). For the minority view see, e.g., *Zinck v. Dunlop* (1956), 4 D.L.R. (2d) 58 (N.S.S.C.). The U.K. corresponding section (s. 87(1)) explicitly requires presentment as regards the maker of such a note; see Kee, *ibid.*, at p. 22.

⁷⁷ S. 130(a). See text between footnotes 52 and 53, *supra*.

⁷⁸ See paragraph which follows that containing footnote 72, *supra*.

⁷⁹ *Missouri ex rel. Chan Siew Lai v. Powell*, *supra*, footnote 26, at p. 16.

⁸⁰ Presentment: under s. 85(2), only the drawer and endorsers are discharged upon the failure to present a bill; dishonour: s. 96(4).

⁸¹ See text and footnotes 75 and 76, *supra*.

⁸² S. 88 reads in part as follows:

A bill is presented at the proper place

(a) where a place of payment is specified in the bill . . . ;

(b) where no place of payment is specified, but the address of the drawee or acceptor is given in the bill . . .

This may mean that circumstances falling into clause (b) fall outside clause (a) which is the case governed by s. 93.

In sum, irrespective of the classification of the instrument, no notice of dishonour ought to be given to the drawer of a bank draft drawn on itself. Presentment ought to be made only if the instrument is treated as an unaccepted bill. Nevertheless, the elimination of the presentment requirement under the other interpretations of the instrument, namely as regards the maker of the note or the acceptor of the bill, is of a limited significance. In theory, it may release the holder from the time restrictions,⁸³ but in practice not from the act of physical presentment. Indeed, in the absence of such an act, "holder" status cannot be proved,⁸⁴ nor can the item be collected in the clearing system.⁸⁵

The proper place of presentment is determined by section 88. As it is unusual for a bank draft to specify a place of payment, presentment ought to be made at the drawee's address as specified on the instrument.⁸⁶ In the absence of such address being specified, the instrument is to be presented at the drawee's place of business, namely at any branch thereof.⁸⁷

In the United States, the issue of liability on a bank draft is often dealt with as a question relating to the issuing bank's right to stop payment on the instrument. The general rule is thus said to be that a bank may not stop payment on a draft drawn on itself,⁸⁸ though it may stop payment on a draft drawn on another bank.⁸⁹ This seems to be an erroneous perspective on the issue of a bank's liability on a bank draft. Countermand of payment is a matter between the drawer and the drawee⁹⁰ which

⁸³ An instrument payable on demand, "is duly presented for payment" when it is presented "within a reasonable time after its issue"; see s. 86(1)(b). Under s. 86(2), in "determining what is a reasonable time . . . regard shall be had to the nature of the bill, the usage of trade. . . and the facts of the particular case". This is undoubtedly a broad standard. Arguably, in connection with a banker's instrument, such a "reasonable time" is the entire ten years after issue during which the instrument is collectible; cf., footnote 16 and text, *supra*.

⁸⁴ A holder must be in possession of the instrument; see definition in s. 2, reproduced *supra*, footnote 15.

⁸⁵ The point was recently pursued to its utmost logic in *Barclays Bank v. Bank of England*, [1985] 1 All E.R. 385 (arbitration), where it was held that a collecting bank must physically present the cheque at the drawee branch and does not discharge its statutory obligations under the Act by passing a cheque through the clearing system.

⁸⁶ For relevant statutory language, see footnote 82, *supra*. Even when the draft is drawn on the drawer, the address of the drawing branch may not be viewed as the drawee's address. This indeed is a question of construing the language of the instrument.

⁸⁷ S. 88(c); and cf. footnote 95 and text, *infra*.

⁸⁸ See in general: S.R. Shapiro, Uniform Commercial Code: Bank's Right to Stop Payment on Its Own Uncertified Check or Money Order (1980), 97 A.L.R. (3d) 714.

⁸⁹ See, e.g., *Bank of New York v. Welz*, 35 U.C.C. Rep. 1600 (N.Y.S.C. Sp. T., 1983).

⁹⁰ S. 167 provides: "The duty and authority of a bank to pay a cheque drawn on it by its customer, are determined by (a) countermand of payment . . .". U.C.C. s. 4-403 is to a similar effect.

does not discharge the drawer's liability on the instrument to the holder. A drawee of a bank draft is obliged to comply with the drawer bank's countermand and refuse payment to the holder. Nevertheless, the drawer bank is not discharged thereby and remains subject to the holder's action to enforce its statutory contract.⁹¹

Inasmuch as they embody a banker's statutory contract under the Act, bank drafts are looked upon as substitutes for cash.⁹² Nevertheless, this does not necessarily mean that they can always be converted to cash immediately upon deposit at any holder's bank. A collecting bank may not be certain that such instruments bear genuine and authorized signatures on behalf of the issuing bank,⁹³ and may not therefore allow the depositor funds upon the deposit of a bank draft until actual collection. Such a scenario is more likely to happen as the amount of the draft, the geographical distance between the points of issue and deposit, or both, increase. Needless to say, the creditworthiness of the banker liable on the instrument may also play a role in determining the acceptability of its instruments as substitutes for cash.⁹⁴ But in general, within Canada, bank drafts issued by Canadian banks may be converted to cash immediately upon presentment or deposit. This is particularly true in connection with bank drafts drawn on the drawer. Those can be turned to immediate funds at any of the drawer's branches,⁹⁵ subject only to proper identification of the holder where he is not a customer of the branch or bank.⁹⁶

⁹¹ Whether the drawer bank may defend the holder's action on the basis of either the drawer bank's defences against the remitter, or the remitter's defences against the payee, is an entirely different question and outside the scope of the present article.

⁹² Payment by bank draft avoids the need to carry cash *in specie*. On its part, a bank giving a customer a secured purchase money loan, may prefer to give the proceeds of the loan in the form of a bank draft payable to the seller, so as to ensure use of the loan proceeds for the designated purchase, as well as a "purchase money security interest" under s. 1(s)(ii) of the Ontario Personal Property Security Act, R.S.O. 1980, c. 375 as am., or similar provincial legislation elsewhere.

⁹³ Various devices exist for discovering counterfeit bank notes (namely paper money). No corresponding devices exist for the discovery of forged or unauthorized signatures on a bank draft. Liability of a bank for an unauthorized signature on its bank draft form is outside the scope of this article.

⁹⁴ For the insolvency risk see footnote 4, *supra*. Generally speaking, the statutory priority is not equal to payment on demand.

⁹⁵ One bank addresses its order on the standard bank draft form to "any branch" of that bank. This does not seem to violate s. 20 which requires that the drawee be named or indicated in the bill "with reasonable certainty". In general, this seems to be a marketing device designed to emphasize the convertibility of the draft to immediate funds at any branch of that bank. Where the drawee's address is specified on the instrument, and the draft is cashed at a branch with another address, technically speaking, the instrument is not "paid" at that point (*cf.* text around footnotes 86 and 87, *supra*) but is rather "purchased" or deposited for collection (though against immediate credit available for withdrawal).

⁹⁶ Some financial institutions will not even cash bank drafts drawn on themselves

II. Certified Cheques

"Certification" is the name given to the marking of a cheque by the drawee bank to show that it is drawn by the person purporting to draw it, that it is drawn upon an existing account with the drawee, and that there are funds sufficient to meet it. Certification is demonstrated by some physical marking on the cheque, normally stamping on its face the word "certified".⁹⁷

Certification may be procured by a drawer who either wishes, or is required by his creditor, to add the credit of the drawee bank to his own engagement. Certification may also be procured by the holder, who prior to the collection of the proceeds of the cheque through the clearing system, wishes to secure payment.⁹⁸

Whether procured by the drawer or the holder, certification includes the withdrawal of the amount of the cheque by the drawee bank from the customer-drawer's account. This amount is then set aside into a special suspense (or "outstanding items") account. The drawer's encoded account number must be obliterated from the instrument so that the cheque will not be routed again to his own bank account. Instead, a sticker, indicating the new suspense account number to which the item is to be charged, is affixed on the instrument.⁹⁹ The cheque is collected and charged to that suspense account on the subsequent presentment for payment of the certified cheque by its holder. Such representment is likely to be made through the clearing system. In practice, only completed cheques are certified in Canada.¹⁰⁰

over the counter to non-customers. *Quaere* whether this does not amount to dishonour of the bank draft.

⁹⁷ For Canadian perspectives on certification, see, e.g., P. Thomas, *The Status of Certified Cheques* (1973), 80 *The Canadian Banker* 6:20; Crawford, *op. cit.*, footnote 4, pp. 1-9; M.H. Ogilvie, *Banking—The Law in Canada* (1985), pp. 315-318.

⁹⁸ Canadian banks are reluctant to pay cheques over the counter to holders who are not their own customers. The reason is the absence of effective recourse in the case of a holder lacking title to the instrument. Practically speaking, a holder who is anxious to obtain prompt payment may be required to have the cheque certified instead. *Quaere* whether the drawee's refusal to pay over the counter may not amount to the dishonour of the cheque (s. 95) so as to entitle the holder to sue the drawer and prior endorsers (but not the drawee bank itself). See text and footnote 101, *infra*. Since certification is a reasonable solution from the holder's as well as the drawee bank's respective viewpoints, the question will rarely arise.

⁹⁹ Such stickers often peel off in the automated sorting machines. Where it happens, the cheque is routed to the drawer's account. In anticipation of such a risk, the drawee bank may punch a hole in the drawer's account number encoded on the cheque. The whole process may thus be cumbersome in the context of electronic banking. American banks are phasing out certified cheques. Bank drafts payable to the payee (or holder) will be issued directly by the drawee bank upon presentment and debiting the account of the drawer of the cheque.

¹⁰⁰ For a completely different certification practice in South Africa, see Cowen and Gering, *op. cit.*, footnote 6, pp. 213-219. Under that practice, a blank cheque is certified at the drawer's request by setting on its back an upper limit as to amount.

A certified cheque is thus originally drawn on the customer's regular chequing account. It is completed by the drawer (drawee bank's customer) himself prior to its certification. The practice ought to be understood in light of the general rule under which a drawee of a cheque is not liable thereon.¹⁰¹ Conversely, the mercantile expectation is that a certified cheque ought to be honoured by the drawee bank, irrespective of either the drawer's state of account or, notwithstanding section 167, termination of the drawee's authority to pay by virtue of the drawer's countermand of payment or death.

The current practice of cheque certification originated in North America.¹⁰² Indeed, old English authorities recognized a practice existing among bankers of marking cheques presented by a collecting bank after four o'clock p.m. The marking was designed to bind the drawee bank in the next day clearing.¹⁰³ The practice was however discontinued,¹⁰⁴ and is not regarded as forming the foundations of certification.¹⁰⁵

Neither the practice of cheque certification nor its effect is provided for explicitly by the Act. There is no provision corresponding to section 3-411 of the American Uniform Commercial Code, under which "[c]ertification of a check is acceptance". Furthermore, the orthodox position expressed by Falconbridge is that in the case of a cheque, "the drawer does not engage that it will be accepted and paid, but that it will be paid, the holder's right being to presentment for payment only".¹⁰⁶ Indeed, referring to the early practice of marking, Lord Mansfield expressed his view that its effect "is similar to the accepting of a bill".¹⁰⁷ This view was nevertheless specifically rejected by the Privy Council in *Bank of Baroda, Ltd. v. Punjab National Bank, Ltd.*¹⁰⁸ Lord Wright explicitly held that certification did not amount to an acceptance, observing that "[i]t would certainly require strong and unmistakeable words to amount

¹⁰¹ See s. 127 (providing that by itself a bill is not an assignment of funds and that a drawee who does not accept is not liable on the instrument), and s. 131 (providing that a signature is required to fasten liability on an instrument).

¹⁰² See in general W.H. Bryant, *Certification of Bank Checks* (1888), 36 (O.S.) *American Law Register* 141; W.F. Elliott, *Certified Checks* (1889), 31 *Central L.J.* 373; F.R. Jones, *The Liability of the Maker of a Check After Certification* (1892), 6 *Harv. L. Rev.* 138; L.J. Tompkins, *The Certification of Checks* (1902), 50 (O.S.) *American Law Register* 127.

¹⁰³ The leading authority is *Robson v. Bennett* (1810), 2 Taunt 388, 127 E.R. 1128 (C.P.). See also *Goodwin v. Roberts* (1875), L.R. 10 Ex. 337, at pp. 351-352.

¹⁰⁴ See text at footnote 135, *infra*.

¹⁰⁵ See the comprehensive account of Tompkins, *loc. cit.*, footnote 102, at pp. 128-131.

¹⁰⁶ J.D. Falconbridge, *The Law of Negotiable Instruments in Canada* (1967), p. 67.

¹⁰⁷ *Robson v. Bennett*, *supra*, footnote 103, at pp. 396 (Taunt), 1131 (E.R.).

¹⁰⁸ [1944] A.C. 176 (P.C.).

to the acceptance of a cheque".¹⁰⁹ All this appears to suggest that in Anglo-Canadian law cheque certification is not an acceptance.

It is nonetheless universally agreed in Canada that certification is a binding obligation of the drawee bank enforceable by the holder.¹¹⁰ Indeed, the appropriation of funds designed to meet the cheque, which forms part of the practice of certification, supports such a treatment. There is, however, less uniformity and clarity as to the juridical nature, or as to the underlying theory, of the drawee bank's engagement on the certification.

Gaden v. Newfoundland Savings Bank,¹¹¹ dealt with a cheque certified before its delivery to the payee as its first holder, that is where certification was procured by the drawer. The case stands for the proposition that the effect of certification is "to give the cheque additional currency by shewing on the face that it is drawn in good faith on funds sufficient to meet its payment, and by adding to the credit of the drawer that of the bank on which it is drawn". This tends to suggest that the drawee bank is liable to the holder after certification, but fails altogether to explain why.¹¹² In *Boyd v. Nasmith*¹¹³ certification was procured by the holder. In his judgment, MacMahon J. relied heavily on American authorities which treated the certification of a cheque as an equivalent to an acceptance.¹¹⁴ He nonetheless did not state whether this line of American cases had formed the basis of his conclusion as to the bank's liability. At trial, Street J. was quite explicit in regarding the bank's liability on the certification as based on an agreement with the holder. This agreement is a "promise to pay [given by] the bankers which the [holder] had procured to be substituted for [the drawer's original contract]".¹¹⁵ Where the payee took the uncertified cheque from the drawer, Street J. explained the position as follows:¹¹⁶

¹⁰⁹ *Ibid.*, at p. 188.

¹¹⁰ See, e.g., *Ogilvie, op. cit.*, footnote 97, p. 315 and n. 51, relying on *The Manitoba Mortgage Company v. The Bank of Montreal* (1890), 17 S.C.R. 692; *Union Bank of Canada v. Nettleton* (1924), 55 O.L.R. 643 (Ont. H.C.). Nevertheless, both cases are not explicit in referring to certification. They rather speak of the drawee's direct liability upon the "acceptance" of a cheque: at pp. 695-696 (S.C.R.), and at p. 645 (O.L.R.). For a modern authority truly supporting *Ogilvie's* statement, see *Commercial Automation Ltd. v. Banque Provinciale du Canada* (1962), 39 D.L.R. (2d) 316, at p. 321 (Que. S.C.). For the same view, that certification in North America "adds a new party, the bank, as primary debtor", see also *Bank of Baroda, supra*, footnote 108, at p. 187.

¹¹¹ [1899] A.C. 281, at pp. 285-286 (P.C.).

¹¹² The concluding words of the quoted passage were subsequently characterized by Lord Wright as being "not very precise"; *Bank of Baroda, supra*, footnote 108, at p. 187.

¹¹³ (1889), 17 O.R. 40 (Ont. C.P.D.).

¹¹⁴ *Ibid.*, at pp. 46-49. Quebec authorities are cited in *Commercial Automation, supra*, footnote 110.

¹¹⁵ *Ibid.*, at p. 41.

¹¹⁶ *Ibid.*

It was the duty of the payee to present it for payment The duty of the bankers, as between themselves and the drawer, was to pay the amount of the cheque upon presentation, because they had in their hands funds to meet it. The payee had no right, as between himself and the drawer, to present the cheque for any other purpose than payment . . . but he chose to . . . take the bankers' undertaking to pay upon a further presentation. By doing so he has discharged the drawer . . .

In the United States, such a separate and substituting agreement between the drawee bank and the holder was viewed either as a novation, or a new instrument, possibly a certificate of deposit payable on demand or a promissory note, issued by the drawee bank to the holder.¹¹⁷ The separate and substituting agreement was premised on treating the cheque itself as being discharged¹¹⁸ upon the debiting of the drawer's account in the process of certification. The certified instrument could thus not be regarded as the original cheque. Hence it constituted the source of a new species of engagement.

It is submitted that, as an engagement on the instrument, certification is better viewed as deriving from the acceptor's contract and not as premised on a "substituting agreement" outside the cheque. To begin with, as a matter of its form, a certified cheque remains a "bill of exchange drawn on a bank, payable on demand" so as to constitute a "cheque" within the meaning of section 165(1). The doubts whether a certified cheque is a "cheque" are thus unfounded from a formal point of view.¹¹⁹ Secondly, the historical controversy as to whether a cheque is a species of "bill" so as to be capable of "acceptance"¹²⁰ is conclusively resolved by the definition of "cheque" in section 165(1) expressly defining a cheque as a form of a bill. Furthermore, section 165(2) explicitly provides that, unless otherwise provided in Part III, "the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque". Hence, from a formal standpoint, there is no valid objection to the acceptance of a cheque. Indeed, while being hostile to the whole idea of an acceptance of a cheque as well as to cheque certification, the Privy Council in *Bank of Baroda*¹²¹ found itself unable to "categorically . . . hold that a cheque can *never* be accepted". While being of the opinion

¹¹⁷ By way of example see (1) novation: Bryant, *loc. cit.*, footnote 102, at p. 148; (2) new instrument: Tompkins, *loc. cit.*, footnote 102, at p. 134; (3) certificate of deposit: Bryant, *ibid.*, at p. 151; (4) promissory note: Jones, *loc. cit.*, footnote 102, at p. 143. For the alternative acceptance theory see Elliott, *loc. cit.*, footnote 102, at p. 374.

¹¹⁸ But see paragraphs containing footnotes 142-149, *infra*.

¹¹⁹ It does not follow that the duty and authority of a bank to pay a certified cheque drawn on it by its customer are determined by countermand of payment or notice of death under s. 167. As a matter of statutory interpretation, s. 167 should be held as inapplicable to certified cheques.

¹²⁰ As to this controversy, see, *e.g.*, Jones, *loc. cit.*, footnote 102, at pp. 138-142, and Tompkins, *loc. cit.*, footnote 102, at pp. 131-132.

¹²¹ *Supra*, footnote 108, at p. 187. (Emphasis added).

that "it is only done in very unusual and special circumstances", Lord Wright fully acknowledged the legal possibility.¹²²

According to Bradley Crawford, neither usage nor case law requires certification to be signed.¹²³ Nevertheless, inasmuch as it is universally agreed in Canada that certification is a binding engagement of the drawee bank,¹²⁴ the marks or stamps forming the certification should be viewed as adopted by the bank as its own "signature".¹²⁵ Signature is required for liability on an instrument in general (section 131), and for the acceptor's liability in particular (section 36(1)(a)).¹²⁶ The drawee's liability on a bill is linked to acceptance (section 12).¹²⁷ The certifying bank's payment obligation is consistent with the acceptor's statutory contract under section 128.¹²⁸ Certification ought to be treated as a signature by the bank so as to establish its statutory liability as an acceptor.¹²⁹ Finally, the prevailing view is that "any words which indicate that the drawee means to pay is a sufficient acceptance".¹³⁰ Words and symbols recognized as certification meet this standard.¹³¹ For all these reasons, certification by the drawee bank appears to constitute an acceptance.

Nevertheless, it should be noted that existing Anglo-Canadian authorities fall short of recognizing the sufficiency of "signing" by impressing

¹²² *Ibid.* For an explicit statutory reference to "the non-acceptance or non-payment of a cheque" see s. 6(3). See also *Keene v. Beard* (1860), 8 C.B. (N.S.) 372, 141 E.R. 1210 (C.P.). In his judgment, Erle C.J. stated, at pp. 380 (C.B.), 1213 (E.R.): "A cheque is strongly analogous to a bill of exchange in many respects. It is drawn upon a banker; and, though in practice the banker does not accept the draft, he might for ought I know do so."

¹²³ *Op. cit.*, footnote 4, p. 3.

¹²⁴ See text and footnote 110, *supra*.

¹²⁵ Notwithstanding *Meteor Equipment Rentals Ltd. v. MacMillan* (1970), 75 W.W.R. 660 (B.C. Co. Ct.), and authorities cited there.

¹²⁶ Under s. 131, "No person is liable as drawer, endorser or acceptor of a bill who has not signed it as such . . ."; under s. 36(1)(a) an acceptance "must . . . be signed by the drawee".

¹²⁷ S. 127 provides:

A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument.

¹²⁸ S. 128 provides:

The acceptor of a bill, by accepting it, engages that he will pay it according to the tenor of his acceptance.

¹²⁹ See preceding paragraph. The only other type of liability on an instrument which may be considered, at least in theory, is that of the anomalous endorser under the concluding clause of s. 131: "... when a person signs a bill otherwise than as a drawer or acceptor he thereby incurs the liabilities of an endorser . . ." It is nevertheless more plausible to treat the drawee's signature as an acceptance.

¹³⁰ Falconbridge, *op. cit.*, footnote 36, p. 514.

¹³¹ This is so inasmuch as they express the drawee bank's undertaking; see text at footnote 125, *supra*.

a stamp which is not a facsimile of the person's signature.¹³² The doubts seem to be unfounded. The controlling general test is that of an intention to authenticate a writing.¹³³ In connection with practices employed in cheque certification, where no handwritten signature is required to bind the bank, the impressing of the certification stamp is thus adequate.¹³⁴

There is a threefold explanation to the doctrinal hostility to the view that certification amounts to an acceptance. The first explanation is the unfamiliarity of English judges with certification. Summarizing the English position, the editors of the current edition of Byles observed that "bankers only rarely allowed customers to have their cheques marked", and that "[n]o usage in favour of the holder of a marked cheque had ever been established in [England]". They categorically concluded that "[t]oday, no cheque may be marked for any purpose".¹³⁵ Needless to say, this is not the case in Canada.

The second explanation is the failure of the Privy Council in *Bank of Baroda* to appreciate the function of certification as generating a banker's liability. According to Lord Wright:¹³⁶

As between the drawer and his bank, acceptance of a cheque is superfluous. It would be merely a confirmation of the contractual liability of the bank to honour the customer's orders to pay.

This however overlooks the fact that substantial benefits accrue to the holder who obtains a right to recover from the drawee, a right which the holder does not have except for certification or acceptance.¹³⁷ This right enables the holder to view the certified cheque as a reliable machinery for funds transfer which avoids the need either to obtain a prompt payment of the cheque over the counter or to insist on a cash payment in the first place.

¹³² The divergent views are summarized in *Re Botiuk and Collison*, *supra*, footnote 42, at p. 360.

¹³³ See text and footnote 43, *supra*. The U.C.C. position is fundamentally the same; see sections 1-201(39) and 3-401(2).

¹³⁴ For the relevance of bank practices in viewing certification as an acceptance, see, e.g., A. Perrault, *Traité de Droit Commercial* (1940), Vol. III, p. 1036. But Perrault may be understood as insisting on a "signature" added to "certification"; *ibid.*, p. 1037.

Cf. Menke v. Board of Education, 13 U.C.C. Rep. 675 (Iowa S.C., 1973), where the certification stamp contained a signature line. When no signature was placed on the stamped cheque, the court held that the cheque was not accepted.

¹³⁵ Byles, *op. cit.*, footnote 48, p. 288. See also Paget, *op. cit.*, footnote 65, p. 248, quoting a 1920 resolution of the Committee of London Clearing Bankers, providing "[t]hat the practice of marking or certifying at the request of a customer his cheques or drafts upon a clearing bank be discontinued . . .".

¹³⁶ *Supra*, footnote 108, at pp. 184-185.

¹³⁷ See s. 127, reproduced, *supra*, footnote 127. This point was subsequently acknowledged by Lord Wright in *Bank of Baroda*, *supra*, footnote 108, at p. 187. See *supra*, footnote 110.

Thirdly, there is some confusion as to the impact of the funds appropriation by the drawee bank which is an integral part of the certification machinery. Perhaps this element convinced Lord Wright to conclude in *Bank of Baroda*¹³⁸ that in the United States as well as in Canada "certification is different both in its history and its effects from acceptance", and at the most it can be regarded as an "equivalent" to an acceptance, but not as a mode of acceptance. It seems to me that this observation is quite misguided. It fails to appreciate the rationale for the segregation of funds, as well as to take into account additional facets of cheque certification. In fact, funds segregation is consistent with the acceptance of the cheque. Nor does it modify the nature of the banker's engagement. Indeed, Lord Wright himself acknowledged in *Bank of Baroda*¹³⁹ that "if the bank . . . accepts the cheque, it should be entitled to protect itself . . . by setting aside the appropriate funds standing to the customer's credit". Funds appropriation is thus a step taken by the drawee bank to protect itself from the consequences of its own engagement on the instrument. Indeed, where the cheque is postdated, the drawee bank is not authorized to debit the drawer's account prior to the date of the cheque. Hence, a post-dated cheque cannot be certified.¹⁴⁰ The drawee bank may nevertheless decide to accept such a cheque. This practice is unusual, though theoretically quite possible. But whether the drawee bank merely accepts a cheque, or, in the case of a current cheque, certifies it, the legal nature of its liability on the instrument is quite the same. Debiting the drawer's account may create an added dimension to certification.¹⁴¹ It nevertheless falls short of affecting the nature of the drawee bank's undertaking. Certification is thus an acceptance plus something else. Nonetheless, it is still an acceptance.

In light of the preceding analysis, the "substituting contract"¹⁴² theory should be rejected. To begin with, it can hardly accommodate the case where certification is procured by the drawer. In addition, it is founded on false premises. It is based either on an outdated view as to the legal nature of "cheque", or on a misconception as to what constitutes a

¹³⁸ *Supra*, footnote 108, at p. 187. In so holding, Lord Wright was assisted by the language of s. 187 of the American Uniform Negotiable Instruments Acts (known as N.I.L.), under which "the certification is *equivalent* to an acceptance"; *ibid.*, at p. 186. It is noteworthy that the successor of this provision, U.C.C. s. 3-411, eliminated the ambiguity by providing that "[c]ertification of a check is acceptance"; see paragraph containing footnote 106, *supra*. Emphasis (in both statutory provisions) is added.

¹³⁹ *Supra*, footnote 108, at p. 185.

¹⁴⁰ See, e.g., *Keyes v. Royal Bank of Canada*, [1947] S.C.R. 377; *Canadian Imperial Bank of Commerce v. Perrault*, [1969] Que. Q.B. 958 (Que. C.A.). While the cheques dealt with in *Bank of Baroda* were postdated, Lord Wright's analysis was not limited at all to this situation.

¹⁴¹ See footnote 147 and text, *infra*.

¹⁴² See text at footnotes 115-119, *supra*.

discharge of a cheque.¹⁴³ Indeed, a cheque is discharged by payment in due course by the drawee to the holder (section 139).¹⁴⁴ Prior to collection by the holder, though subsequent to the appropriation of funds and debiting the drawer's account, no payment has been made. This is so since neither cash nor absolute control over the segregated funds, except through the representment of the same instrument, is transferred to the holder.¹⁴⁵ He does not earn interest on the money,¹⁴⁶ and may further negotiate the instrument itself, and thereby transfer his right to the funds, to a subsequent holder. True, it is possible to view the segregation of funds specifically earmarked to meet the instrument as an act discharging the drawer.¹⁴⁷ Nevertheless, it does not follow that the instrument itself has been discharged.¹⁴⁸ It is extremely artificial and unnecessary to view the drawee's undertaking as terminating the life of the cheque and creating something new of unknown quality, rather than as merely adding, or even substituting, liability on the cheque. Funds segregation is designed to protect the drawee. It should not be taken to affect the juridical nature of its engagement on the instrument. In the final analysis, the view that this engagement is an acceptance¹⁴⁹ is consistent with the provisions of the Act as well as with the mercantile understanding of certification.

III. Personal Money Orders

A personal money order¹⁵⁰ is an instrument sold by the bank over the counter for its face value plus a small fee.¹⁵¹ The face value is in a sum

¹⁴³ See text at footnotes 120-123, *supra*; and at footnotes 99-100, *supra*.

¹⁴⁴ For the discharge of an instrument, and that of a party, see footnote 148, *infra*.

¹⁴⁵ Whether the drawer is discharged upon the certification of the cheque, is an entirely different question, merely referred to in footnote 147, *infra*.

¹⁴⁶ *Cf.* Crawford, *op. cit.*, footnote 4, p. 8, citing *Wilson v. Banque Ville Marie* (1880), 3 L.N. 71 (Que. S.C.) (a drawer who procured the certification of a cheque which has not been presented to the drawee by the payee or any other holder, is entitled to the funds, but not to interest thereon).

¹⁴⁷ This is the rule where certification was procured by the holder. For this point see the detailed discussion in Crawford, *ibid.*, pp. 4-8. The drawer is not discharged if certification was procured by himself. The same distinction also exists under U.C.C. s. 3-411(1). The distinction, or more specifically the rule that a drawer procuring certification is not discharged, is criticized by both Jones and Tompkins, in their respective articles, *loc. cit.*, footnote 102. By now, the point is nevertheless quite settled. A detailed discussion as to the drawer's liability is outside the scope of this article.

¹⁴⁸ For the distinction between a discharge of a bill, and that of a party thereto, see Falconbridge, *op. cit.*, footnote 106, p. 150 (commentary to s. 139). In general, "[a]n instrument is discharged by payment in due course by the party primarily liable to pay, that is, by the drawee or acceptor of a bill . . .". Conversely, "payment by the drawer or by an endorser does not discharge the instrument . . ."; *ibid.*

¹⁴⁹ For the statutory contract of the acceptor, see Part I, paragraph containing footnotes 79-82, *supra*.

¹⁵⁰ In the U.S., the instrument is often called "register check"; see, e.g., *Garden Check Cashing Service, Inc. v. First National City Bank*, 3 U.C.C. Rep. 355, at p. 356 (N.Y. S.C. App. Div., 1966).

specified by the purchaser, up to a certain ceiling. Upon the conclusion of the purchase of the instrument and prior to its delivery by the bank to the purchaser, the bank imprints the sum on the instrument with its imprinting machine. Except for the sum, the instrument is sold by the bank in a blank form. Its purchaser (often designated thereon either as "sender" or "remitter") fills in all other particulars, namely, date, his own name and address, and a payee of his choice. The instrument is completed by the sender at his own discretion, not necessarily on the bank's premises, and not as part of the purchase process.

Further common characteristics of the typical personal money order¹⁵² are that it contains a signature line for the sender, and that the name of the issuing bank is printed on it in bold letters. The sender ought to sign the instrument prior to its delivery to the payee. No signature of an authorized officer, or any other signature on behalf of the bank, appears on the instrument. Except for the imprinted amount, the instrument is very much in the form of a personal cheque.

Upon the sale of the personal money order to the remitter, its amount, whether paid in cash or debited to the remitter's bank account, is deposited to the credit of a special reserve account of the issuing branch. In this respect, the practice used in connection with the personal money order is quite similar to that associated with the issuance of bank drafts as well as cheque certification.¹⁵³

In some respects, the personal money order resembles the bank draft. Both are sold by the issuing bank over the counter in an amount specified on the instrument (whether typed, in the case of the bank draft, or imprinted, in the case of the personal money order). Nevertheless, the bank draft is issued in a complete form and is signed by authorized officers of the issuing bank.¹⁵⁴ On the other hand, the personal money order is sold in a blank form (except for the amount) and is not signed by an authorized officer. The bank record copy discloses no information about the sender or payee.¹⁵⁵ Having bought the personal money order, the sender has full discretion as to filling in the payee's name. He may

¹⁵¹ Certain types of bank accounts may entitle their holders to obtain such instruments free of charge, in which case the cost to the customer is equal to the face value of each instrument.

¹⁵² For variations, see text at footnotes 168-174, *infra*.

¹⁵³ Bank drafts: see in general, Part I, two paragraphs following that containing footnote 20; certification: see in general, Part II, paragraph containing footnotes 99-100.

¹⁵⁴ See Part I, text at footnotes 19-22, *supra*.

¹⁵⁵ Credit unions may issue personal money orders only to members, in which case they are likely to keep a record copy with the sender's name. In addition, an issuing branch of any financial institution may occasionally type the particulars on the instrument as instructed by the sender. Such a service, which may produce a filled-in bank record copy, is not inherent in the standard procedure for issuing personal money orders.

even fill in his own name and cash the instrument. Furthermore, while the sender is instructed on the sender's record copy to complete the instrument promptly, and is often cautioned there to do so for his own protection, he may, practically speaking, never fill in a payee's name. Instead, the sender may deliver the blank (save for the imprinted amount) instrument, either for value or by way of gift, to another, who in turn may either do the same, or fill in a payee's name and use the instrument in payment of his own debt.¹⁵⁶

Inasmuch as it is filled in by the sender, the personal money order resembles a personal cheque. Nevertheless, unlike the case of the personal cheque, the amount is imprinted on the personal money order in advance. This advance imprinting may be seen as quite similar to cheque certification.¹⁵⁷ Yet, as a matter of form, a personal money order is distinguishable from a certified cheque. The latter is originally drawn on the drawer's chequing account. Thus, *all* particulars, including the amount, are first written by the drawer. It is only the complete instrument which is certified.¹⁵⁸ In contrast, a personal money order is not drawn on the sender's running account. The imprinted amount inserted on the otherwise blank instrument is not a certification of a prewritten amount. The word "certification" does not appear on a personal money order.

In fact, the personal money order bears the closest resemblance to the Canadian postal money order. The latter is sold over the counter by any post office¹⁵⁹ in a blank form, except for the amount which is imprinted by the issuing post office with an imprinting machine. The purchaser (designated on the instrument as "sender") fills in all other particulars, namely the payee's name and his own name and address. The date of issuance is imprinted on the instrument together with other information identifying the particular postal money order. On the copy to be retained in his records, the sender is warned "for [his] protection", to "Enter IMMEDIATELY name of payee and sender on Money order".¹⁶⁰ The copy kept at the post office records information only as to amount, date

¹⁵⁶ Such a practice may raise a few complex legal issues as to rights respecting the blank instrument. Such questions are outside the scope of this article. But *cf.* text containing footnotes 231 and 232, *infra*.

¹⁵⁷ For more on this aspect, see text at footnotes 193-198, *infra*.

¹⁵⁸ See Part II, text and footnote 100, *supra*.

¹⁵⁹ The current authority for the postal money order services stems from section 5(1)(a) of the Canada Post Corporation Act, S.C. 1980-81-82-83, c. 54, allowing the Corporation:

. . . to establish and operate a postal service for the collection, transmission and delivery of messages, information, funds and goods . . .

Canadian postal money orders were first issued in 1855 by the Province of Canada (information provided to me by R. Pouliotte, Manager of Money Order Services, in a letter dated September 24, 1984).

¹⁶⁰ Capital letters in the original.

and place of issue, and serial number of the particular postal money order. No information is recorded as to the sender's (not to mention the payee's) identity.

Unlike the typical personal money order, the postal money order is payable to a payee and not his order. Furthermore, the sender of a postal money order is required neither to sign nor to fill in a date. These characteristics should not be taken to impede the negotiability of the postal money order as a bill of exchange. To begin with, having written his name, the sender must be taken to authenticate his payment order, namely to "sign" the instrument.¹⁶¹ Secondly, as for the absence of a written date, neither a bill nor a note requires a "date" as a constitutive element of the respective definition.¹⁶² In any event, the date of the purchase (though not of use or payment to a payee) is imprinted on the instrument. Thirdly, so far as negotiability is concerned, the fact that a postal money order is not expressed to be payable to the payee's order is immaterial. Under section 22(1), an instrument¹⁶³ payable to order may be "expressed to be payable to a particular person" and need not specifically recite the word "order".¹⁶⁴ Objections to the negotiability of the postal money order, existing in the United States, United Kingdom and elsewhere,¹⁶⁵ are based on particular statutory provisions, as well as on the form of the instrument. They do not apply to the Canadian postal money order. Not being drawn on a bank, the latter is not a "cheque".¹⁶⁶ Nevertheless, inasmuch as it is an "order", the instrument appears to be a bill.¹⁶⁷

There are some variations of the standard personal money order form. One bank calls the instrument a "money order", apparently to

¹⁶¹ Cf. Part I, text and footnote 43, *supra*. A typed name was held to satisfy statutory "signature" requirements in *Re Botiuk and Collison*, *supra*, footnote 42, at pp. 360-361. See also *Benedict v. Lebowitz*, 346 F. 2d 120 (2nd Cir., 1965).

¹⁶² Cf. s. 27:

A bill is not invalid by reason only that it (a) is not dated . . .

¹⁶³ The provision speaks of a "bill" only. Nevertheless, under s. 186(1), the general rule is that provisions relating to bills, "apply, with the necessary modifications, to promissory notes".

¹⁶⁴ This is in contrast to the position under the American U.C.C., where an instrument expressed to be payable to a particular person is not an instrument payable to order; see s. 3-110.

¹⁶⁵ U.S.: for a comprehensive discussion, see J.D. O'Malley, *Legal Aspects of Postal Money Orders* (1967), 52 Corn. L.Q. 357, at pp. 358-362; U.K.: *Fine Art Society v. Union Bank of London* (1886), 17 Q.B.D. 705, at pp. 710, 712-713 (C.A.). See also Byles, *op. cit.*, footnote 48, p. 326; Chalmers, *op. cit.*, footnote 35, p. 354; Paget, *op. cit.*, footnote 65, p. 220; South Africa: Cowen and Gering, *op. cit.*, footnote 6, p. 279.

¹⁶⁶ As defined in s. 165(1) of the Act, reproduced in footnote 9, *supra*.

¹⁶⁷ As defined in s. 17(1). The position of Canada Post Corporation, as conveyed to me by Daniel Paul, Counsel, in a letter dated December 7, 1984, is that "[t]he Canadian postal money order is classified as a negotiable instrument".

emphasize two points. The first is that not only individuals, but also corporations, partnerships and other artificial entities may purchase and use the instrument. The second point is that those who sign on behalf of such bodies do not incur thereby "personal" liability. These points are well taken; nevertheless, the terminology selected is quite unfortunate. The "money order" is typically an instrument signed by authorized officers of the bank.¹⁶⁸ The term "personal money order" was originally coined so as to distinguish such an instrument from the bank money order. Characterizing an instrument not bearing an authorized signature on behalf of the bank as a "money order" is thus quite confusing.¹⁶⁹

Another bank inserts on the personal money order a facsimile signature of its authorized signing officer. Apparently, the purpose is to avoid altogether the controversy and confusion as to the issuing bank's liability on the instrument.¹⁷⁰ The sender himself is not required to sign such an instrument. There are blanks required to be filled in by him as to his name and address. But there is no signature line.¹⁷¹ In effect, this modified "personal money order" is not a personal money order in the usual sense. Inasmuch as it bears the signature of an authorized officer on behalf of the bank, it is a species of the bank money order, or a bank draft.¹⁷²

Credit unions in Ontario sell personal money orders bearing the printed name of the Ontario central rather than the name of the individual credit union member. The issuer may imprint its name or initials on the instrument side by side with the amount. The reference to the central rather than to the individual member reflects the fact that the instrument is drawn on an account which the credit union member has at the central. In fact, personal money orders issued by all financial institutions may be drawn on an account of the issuing branch at a central department of the issuing bank. Nevertheless, individual member credit unions are distinct entities, separate from their central. Consequently, it is only in their case that the identity of the central body is reflected on the instrument itself.¹⁷³

¹⁶⁸ See Part I, text and footnote 34 and thereafter, *supra*.

¹⁶⁹ Unfortunately, this confusion is also shared by the courts. See, e.g., *Emerick v. Long Island Trust Co.*, 20 U.C.C. Rep. 424 (N.Y. Sup. Ct. App. T., 1976), where "personal money order" and "bank money order" are used interchangeably. From the report, it appears that the case was actually concerned with the former.

¹⁷⁰ For a detailed discussion, see text at footnotes 187-237, *infra*.

¹⁷¹ Occasionally, the sender may nevertheless sign on the line over which he is instructed to write his name. *Quaere* as to the legal implication of such a signature. As to the sender's written or typed name as signature, see text and footnote 161, *supra*.

¹⁷² See text at footnote 34, *supra*. For a facsimile signature as "signature", see Part I, text and footnotes 35-48, *supra*.

¹⁷³ In fact, there is no statutory requirement to put the central's name on the instrument. The personal money order may be drawn on the issuing credit union, as credit union's drafts are. See Part I, text and footnote 23, *supra*.

Some personal money orders do not require the sender to sign. He is only required to fill in his name and address. No signature line is provided in the form. Such an instrument has no signature line whatsoever, and compared to other forms of personal money orders, is even closer in its form to the postal money order.¹⁷⁴ Having filled in his name, the sender must be taken to "sign" it.¹⁷⁵

As a rule, personal, as well as postal money orders, are issued only for relatively small sums of money. Ceilings are typically printed on the instrument itself. Currently, ceilings used by various financial institutions seem to range from \$250 to \$1,000.¹⁷⁶ Postal money orders may not exceed \$200.¹⁷⁷ Nevertheless, where a larger payment is required, a sender may acquire several instruments, in the total amount of his debt, and use them in payment to his creditor of the entire debt.¹⁷⁸

Personal money orders originated in the United States in the late thirties. They proliferated during the post war era as instruments designed "for persons who cannot afford or have little need to maintain checking accounts"; "[t]hey are in greatest use primarily among the poor, but are also employed by housewives, minors and other persons whose noncash transactions are too few to warrant the upkeep of a chequing account".¹⁷⁹ Their attraction, including in particular the reason for their post war increased use, has been described as follows:

Personal money orders . . . have grown steadily in popularity since 1944, when the price of the competing Post Office Money Order was raised. Personal money orders are attractive to people who have no ordinary checking accounts, for they offer a safe, inexpensive, and readily acceptable means of transferring funds, in a form that has the prestigious appearance of a personal check. Moreover, banks favor the instruments because they are simpler, faster, and less expensive to issue than cashier's checks and bank money orders; because they attract potential customers for other bank services; and because they can create a substantial deposit balance for the bank's use.¹⁸⁰

¹⁷⁴ The remaining principal differences: such a personal money order is expressed to be payable to order and contains a blank for a date.

¹⁷⁵ See text and footnote 161, *supra*.

¹⁷⁶ This is my general impression from instruments seen by me, as well as from discussions with bankers. I did not contact *all* Canadian financial institutions. Nor did I physically examine *all* forms of personal money order currently issued in Canada.

¹⁷⁷ The back of the instrument bears the following legend: "Instructions to Cashing Agent [—] DO NOT CASH; . . . if the amount exceeds: \$200.00 . . .".

¹⁷⁸ See, e.g., *Graybar Electric Co. Inc. v. Brookline Trust Co.*, 39 U.C.C. Rep. 1721, 1722 (Mass. Mun. Ct. App. Div., 1984), where the sender used 5 personal money orders, each in the sum of \$500, to pay a \$2,500 debt.

¹⁷⁹ Comment, Personal Money Orders and Teller's Checks: Mavericks Under the U.C.C. (1967), 67 Colum. L. Rev. 524, at p. 524, text and n. 2.

¹⁸⁰ *Ibid.*, at pp. 525-526.

Because of their use by the poor without checking accounts they were often regarded as providing a "poor man's checking account".¹⁸¹ Nevertheless, a few American cases indicate that a personal money order may be paid for by the sender's cheque.¹⁸² Hence, the instrument is used also by customers having chequing accounts. It seems that the current widespread use of personal money orders is largely attributed to the common belief, discussed below, that they represent a method of guaranteed payment. On his part, a debtor using earmarked funds to pay a debt may prefer to buy with those funds a personal money order and make it payable to the creditor, rather than deposit the funds in his general chequing account and withdraw them therefrom by cheque payable to the creditor.¹⁸³

Finally, compared to other payment instruments, except for the postal money order, the personal money order reflects a more discrete payment machinery. Upon a purchase of the personal money order, the sender is not required to disclose his name or give any identifying information.¹⁸⁴ No statement or cancelled instrument is sent to his address subsequent to collection. He may purchase as well as sign the instrument using a pseudonym,¹⁸⁵ or even transfer it in a blank form to his creditor.¹⁸⁶ Nevertheless, confidentiality is not absolute. It does not apply to the holder presenting the instrument for payment. For its own protection, the collecting bank is likely to require the holder to identify himself to its satisfaction.

Judicial opinion varies as to the juridical nature of the personal money order and the existence, nature and scope of the issuing bank's liability. In Quebec, *Goberdhan v. Banque Canadienne Nationale*¹⁸⁷ held that the sender's countermand of payment may not determine the issuing bank's duty and authority to pay a personal money order pursuant to section 167(a) of the Act.¹⁸⁸ The instrument was treated as embodying a

¹⁸¹ H.J. Bailey, *Bank Personal Money Orders as Bank Obligations* (1964), 81 *Banking L.J.* 669, at p. 671.

¹⁸² See *Rose Check Cashing Service, Inc. v. Chemical Bank New York Trust Co.*, 252 N.Y.S. 2d 100 (N.Y.S.C. App. T., 1964), aff'ng 244 N.Y.S. 2d 474 (City Civ. Ct. Trial T., 1963); *Sequoyah State Bank v. Union National Bank of Little Rock*, 621 S.W. 2d 683 (Ark. S.C., 1981).

¹⁸³ In doing so, a debtor may have diverse motives. First, where his account is already overdrawn, he may prefer to take a course which will not allow the bank to apply the funds towards the satisfaction of the debtor's debt to the bank. Secondly, tax reasons, fiduciary capacity, or bookkeeping considerations may all weigh against mixing the earmarked funds in the general account.

¹⁸⁴ But cf. footnote 155, *supra*.

¹⁸⁵ As were the facts in *Goberdhan v. Banque Canadienne Nationale*, [1978] C.P. 340.

¹⁸⁶ See text and footnote 156, *supra*.

¹⁸⁷ *Supra*, footnote 185.

¹⁸⁸ Under s. 167, "[t]he duty and authority of a bank to pay a cheque drawn on it by its customer, are determined by (a) countermand of payment . . .".

primary obligation on the part of the issuing bank. As to the nature of that instrument and the bank's resulting liability thereon, the court stated that "this [personal] money order issued in blank is simply a note payable to bearer, in the same way as a Bank note issued by the Bank of Canada".¹⁸⁹ Perhaps this was a mere characterization of the function of the personal money order as paper money, rather than judicial determination as to the jurisprudential nature of the instrument. Indeed, the court went on to say:¹⁹⁰

The juridical nature of this personal money order places it in the same category as a cheque In this case Bank is drawee. *This is like a certified cheque because the Bank in inserting the amount in the instrument by its protectograph machine undertakes to pay any holder who presents this for payment the amount indicated on its face.*

Specifically indicating that, as in the case of the certified cheque, "the money is held in reserve to pay the obligation assumed by the Bank", the court concluded that "the Bank as acceptor cannot refuse to pay a holder of the . . . [personal] money order".¹⁹¹

Hence, the personal money order was classified as a cheque, the imprinting of the amount was treated as certification, and the bank's liability on the instrument was regarded as acceptance.

American jurisprudence is substantially richer, though more equivocal. In the final analysis, the pendulum currently swings in the opposite direction, namely towards viewing the personal money order as a personal cheque, on which payment can be countermanded; and not as a guaranteed payment machinery. The prevailing view as to the personal money order is that the drawee bank is not liable to the holder.

The leading authority is *Garden Check Cashing Service Inc. v. First National City Bank*.¹⁹² A personal money order, in the usual blank form save for the imprinted amount, was lost by the sender. A finder signed it, completed it in his own favour, and cashed it with the plaintiff, a licensed cashing service. Purporting to comply with the sender's stop payment order, given after the loss of the instrument, the defendant issuing bank

¹⁸⁹ *Supra*, footnote 185, at p. 341.

¹⁹⁰ *Ibid.* (Emphasis added).

¹⁹¹ *Ibid.* In drawing the analogy, the court purported to follow Perrault, *op. cit.*, footnote 134, pp. 1035-1039, nos. 772-774. Nevertheless, it seems that Perrault speaks only of certified cheques and not of personal money orders. Moreover, the court's terminology lacked precision. Thus, the court spoke of the holder of the "note" or "money order". Nevertheless, the overall context is quite clear in indicating that the court was concerned with the personal money order.

¹⁹² 3 U.C.C. Rep. 355 (N.Y. Sup. Ct. App. Div., 1966), *aff'd* mem. 4 U.C.C. Rep. 322 (N.Y. C.A., 1966). The trial court had held for the defendant: 238 N.Y.S. 2d 751 (City Civ. Ct., 1963), and the Appellate term had reversed: 260 N.Y.S. 2d 718 (N.Y.S.C. App. T., 1965).

refused payment to the plaintiff, a bona fide purchaser for value of the personal money order.

Initial judicial inconclusiveness was ultimately brought to an end by the New York Appellate Division. Dismissing the plaintiff's action, the court reasoned that the personal money order was a species of uncertified personal cheque, on which the drawee bank was not liable to the holder. Elaborating on this characterization, the court explained as follows:¹⁹³

We see small difference between the present transaction [the purchase of a personal money order] and one where a person deposits with a bank a sum of money and receives a quantity of blank checks. *The obvious difference is that here a single deposit was made and a single blank check received with the amount of the deposit inserted therein.* Thereafter the procedure followed the normal and customary pattern—the purchaser filled in the name of a payee, signed his name and address and delivered the instrument . . .

Hence, the sender could lawfully countermand payment. Not being liable to the plaintiff-holder on the instrument, the defendant drawee bank was obliged to comply with the stop payment order, refuse payment, and refund the sender.

In *Garden*, the sender's right to stop payment was premised on treating the personal money order as a species of uncertified personal cheque on which the drawee bank, which had not signed it, was not liable.¹⁹⁴ On this basis, the sender was allowed to stop payment in cases involving the theft of a personal money order.¹⁹⁵ *Garden* was also followed in situations where a sender, who paid with a personal money order, countermanded payment so as to subvert payment to his creditor. The claim of the creditor-holder against the issuing bank was dismissed, on the theory that the issuing bank was a drawee which had not signed the instrument.¹⁹⁶

¹⁹³ 3 U.C.C. Rep. 355, at p. 358 (Emphasis added).

¹⁹⁴ See also *Lupowitz v. New York Bank for Savings*, 5 U.C.C. Rep. 851 (N.Y. Civ. Ct., 1968); *Melco Products Corp. v. Public Relations Enterprises Inc.*, 35 U.C.C. Rep. 1600 (N.Y. Sup. Ct. Special T., 1983). The former explicitly followed *Garden*. The latter report reproduces only the head note. *Garden* was also cited with approval in *State v. LaRue*, 487 P. 2d 255 (Wash. App., 1971). For treating the issuer of a personal money order as a drawee of a cheque, see also *Sony Corp. of America v. American Express Co.*, 35 U.C.C. Rep. 558, at pp. 560-561 (N.Y. Co. Civ. Ct., 1982).

¹⁹⁵ *Thompson v. Lake County National Bank*, 20 U.C.C. Rep. 142 (Ohio App., 1975); *American Bank & Trust Co. of Pennsylvania v. Commonwealth National Bank*, 20 U.C.C. Rep. 425 (Pa. C.P., 1976). The former explicitly followed *Garden*. Its fact situation involved also forgery of payee's endorsement and was thus distinguishable from *Garden*.

¹⁹⁶ *Newman v. First National State Bank of Toms River N.J.*, 29 U.C.C. Rep. 182 (N.J. Superior App. Div., 1980); *Berler v. Barclays Bank of New York*, 32 U.C.C. Rep. 210 (N.Y. Sup. Ct. App. Div., 1981); *Krom v. Chemical Bank New York Trust Co.*, 10 U.C.C. Rep. 837 (N.Y. Sup. Ct. App. Div., 1972); *United Apparel Distributors, Inc. v. Chase Manhattan Bank, N.A.*, 35 U.C.C. Rep. 577 (U.S. DC SD NY, 1982). The reports in the latter two cases do not reveal whether a genuine sender-payee dispute was involved.

Two reported cases falling into the latter category involve straight-forward fraud of the sender on the creditor.¹⁹⁷ One case explicitly held that an acceptance of an instrument must contain the signature of the drawee. "The mere fact that the printed name of the Bank appeared on the face of the [personal] money order was not sufficient to constitute its signature and therefore was not an acceptance of the instrument Consequently, [the sender] had the right to stop payment."¹⁹⁸

It was also held that the personal money order "did not of itself operate as an assignment of any funds in the hands of the [drawee bank] available for its payment".¹⁹⁹ Nor did the issue of the personal money order constitute a representation of the issuing bank to the holder as to availability of funds to meet the instrument when presented. Such an argument "presupposes the bank has actually issued the [personal] money order",²⁰⁰ while in fact it only imprinted the amount thereon.

Several American cases reached the opposite conclusion. The landmark case is *Rose Check Cashing Service, Inc. v. Chemical Bank New York Trust Co.*²⁰¹ There, a New York court explicitly rejected the classification of the personal money order as "a check drawn on a regular or special . . . account, where continuity is a factor and an account designated to the depositor is opened . . .". While acknowledging differences "in detail", it held that the personal money order "is akin to a cashier's check or a traveler's check drawn by the issuing bank upon itself".²⁰² As a species of a bank draft²⁰³ the instrument carries with it the liability of the issuing bank. The court characterized the purchase of the personal money order by the sender as a purchase of the bank's credit and concluded that "in legal effect", as a vehicle for transmitting that credit, the instrument was "the same as a certificate of deposit or certified check".²⁰⁴ As for the signature requirement, the court opined that "the printed name of the

¹⁹⁷ *Newman v. First National State Bank of Toms River N.J.*, *ibid.*; *Berler v. Barclays Bank of New York*, *ibid.*

¹⁹⁸ *Newman*, *ibid.*, at pp. 186-187.

¹⁹⁹ *Ibid.*, at p. 187.

²⁰⁰ *American Bank & Trust Co. of Pennsylvania v. Commonwealth National Bank*, *supra*, footnote 195, at p. 427. The criticism reflects a formalistic (or strictly legal) definition of "issue". Compare footnote 10, *supra*.

²⁰¹ *Supra*, footnote 182. Perhaps there were two earlier cases: *Cross v. Exchange Bank Co.*, 168 N.E. 2d 910 (Ohio App., 1958); and *First State Bank of Booker v. First National Bank of Beaver*, 319 F. 2d 338 (10th Cir., 1963). It is nonetheless far from certain whether these cases actually dealt with personal (as opposed to bank) money orders. Nor did both courts explicitly deal with the nature of the instrument and the banker's obligation thereon. See *Bailey*, *loc. cit.*, footnote 181, at pp. 672-675.

²⁰² *Supra*, footnote 182, at p. 102 (252 N.Y.S. 2d).

²⁰³ Under the Canadian terminology. See Part I, text at footnote 34, *supra*.

²⁰⁴ *Supra*, footnote 182, at p. 103 (252 N.Y.S. 2d).

bank verified by its seal impressed at the time of the sale [of the instrument to the sender] is sufficient to evidence the bank's intent to be bound thereunder".²⁰⁵ The impression of the amount on an instrument bearing the bank's printed name was thus regarded as tantamount to the authenticating of the writing as an obligation on behalf of the bank.²⁰⁶

Rose was followed by the majority of the court in the Arkansas decision, *Sequoyah State Bank v. Union National Bank of Little Rock*.²⁰⁷ Along similar lines, *Interfirst Bank Carrollton v. Northpark National Bank of Dallas*²⁰⁸ was of the opinion that "the personal money order is analogous to a bank money order", (in Canadian terminology the bank draft). Conceding "lack of signature" on the personal money order, the court did not find this fact to be "controlling", "for the bank elected to sell the money order in the form which it did, and it selected in lieu of a signature the checkwriting imprint of [its name and amount]".²⁰⁹ This indeed is quite close to the Quebec certification theory.²¹⁰ Another judgment raised the possibility of viewing the sender's signature as binding the issuing bank.²¹¹ Issuing the blank personal money order, save for the amount, amounted to an authority given by the bank to the sender to bind the issuing bank for that amount by signing and delivering the instrument to the holder.

Other courts fastened liability upon the issuing bank on the basis of estoppel or representation. Estoppel could be linked to negligence, either in issuing blank instruments (save for the amount), or in failing to obtain cash payment from the sender purchasing the instrument. The liability of the issuing bank to a good faith purchaser for value of an instrument lost by its sender in a blank form was accordingly rationalized on the basis that the bank "knowingly and deliberately issues and delivers its personal money orders to purchasers with the name of the payee and purchaser in blank".²¹² Similarly, an issuing bank's defence based on the failure of

²⁰⁵ *Ibid.*, U.C.C. s. 3-401(1) provides: "No person is liable on an instrument unless his signature appears thereon." The provision corresponds to s. 131 of the Canadian Act, reproduced in its relevant part in the text which follows footnote 57, *supra*.

²⁰⁶ Compare with the discussion on "signature" respecting cheque certification, Part II, text at footnotes 132-134, *supra*.

²⁰⁷ *Supra*, footnote 182. See also footnote 212, *infra*.

²⁰⁸ 38 U.C.C. Rep. 1684, at p. 1687 (Tex. C.A., 1984).

²⁰⁹ *Ibid.*, at p. 1687.

²¹⁰ See text at footnotes 187-191, *supra*. For the practice of imprinting the bank's name, see also text at footnote 173, *supra*.

²¹¹ *Mirabile v. Udoh*, 399 N.Y.S. 2d 869, at pp. 870, 871 (City Civ. Ct., 1977).

²¹² *Garden Check Cashing Service, Inc. v. Chase Manhattan Bank*, 258 N.Y.S. 2d 918, at p. 922 (City Civ. Ct., 1965). This was a different case from, but involved the same type of fact pattern, as the *Garden* case discussed in the text commencing at footnote 192. The instant *Garden* case cited *Rose Check Cashing Service*, *supra*, footnote 182, with

consideration between itself and the sender was successfully met by an argument based on the bank's own negligence; "the . . . bank here failed to observe the proper caution in issuing the money orders . . . and it, rather than the . . . holder, must bear the loss arising from the fraud perpetrated by the original purchaser".²¹³

Estoppel could also be made out on the basis of representation. Explicitly citing estoppel, one court remarked that "[t]he [issuing] bank has catered to the belief among merchants that [personal] money orders carry different connotations from checks".²¹⁴ Likewise, another court rested its decision on the basis of the reasonable expectations of those involved in a personal money order transaction:

. . . by issuing each money order in blank, except for the amount, in exchange for cash, the Bank impliedly represented that it would honor—that is, that it intended to accept—each draft when and if duly presented. *Its liability [to the holder] thus is founded not on the instruments themselves, but upon its failure to honor the duly presented items in accordance with this implied representation.*²¹⁵

The issuing bank's liability to the holder was thus derived neither from statutory engagement on the instrument nor from an express representation or any other explicit contract outside the instrument. The representation was, rather, "implied from the circumstances" or "from the facts [of] the . . . case".²¹⁶

It is thus evident that two views exist in relation to the issuing bank's liability to the holder on a personal money order. *Garden Check Cashing Service* and cases which followed it held against the existence of liability. *Rosé Check Cashing Service, Sequoyah State Bank* and others found the bank to be liable under one theory or another. Indeed, observing the existence of two lines of cases "construing personal money orders", one court believed that the division is "between the New York holdings and the Arkansas holdings".²¹⁷ Nevertheless, New York case law is not con-

approval. It expressly disagreed with the trial court in the other *Garden* case, but was decided before the appellate decisions in that case.

²¹³ *Emerick v. Long Island Trust Co.*, 20 U.C.C. Rep. 424, at p. 425 (N.Y.S.C. App. T., 1976). For more details on this class of cases, see text around footnote 220, *infra*.

²¹⁴ *Mirabile v. Udoh*, *supra*, footnote 211, at p. 871. But *cf.* V. Countryman, A.L. Kaufman and Z.B. Wiseman, *Commercial Law* (2nd ed., 1982), p. 427, where the "very clear" opinion of the Bank Management Commission of the American Bankers Association as stated in 1956 "[b]efore there was any case law on the subject" is quoted to be that the personal money order, unlike the bank money order, "is considered in the same status as a personal check . . . of the signer". Banks are nevertheless cautioned not to create contrary expectations in advertising the service; *ibid.*

²¹⁵ *Graybar Electric Co. Inc. v. Brookline Trust Co.*, 39 U.C.C. Rep. 1721, at p. 1725 (Mass. Mun. Ct. App. Div., 1984). (Emphasis added).

²¹⁶ *Ibid.*, at p. 1724.

²¹⁷ *Interfirst Bank Carrollton v. Northpark National Bank of Dallas*, *supra*, footnote 208, at p. 1686.

sistent in relieving the issuing bank from liability.²¹⁸ Furthermore, *Sequoyah State Bank*²¹⁹ which is the leading Arkansas decision, explicitly followed *Rose Check Cashing Service*, a New York judgment. The dividing line between those charging the issuing bank with liability, and those relieving it, is thus not geographical.

A majority of cases holding against the issuing bank were concerned with the bank attempting to escape liability on the basis of its own defences against the sender (purchaser of the personal money order). Those defences were based on the failure of consideration for which the personal money order was sold to the sender.²²⁰ Such was the case where the personal money order was paid for by the sender with a cheque drawn on insufficient funds, a forged cheque, or a withdrawal from an overdrawn account.²²¹

Attempts have been made to reconcile cases rejecting these defences with *Garden Check Cashing Service*. For example, the majority in *Sequoyah State Bank*²²² defined the issue in terms of whether the issuing bank can "by its own initiative . . . stop payment on a personal money order it had issued in exchange for a hot check", and regarded it as distinguishable from the question discussed in *Garden Check Cashing Service*, namely whether the sender himself may stop payment. Nevertheless, in the final analysis, such a distinction is neither correct nor feasible. To begin with, it does not take into account the fact that the issuing bank has also been held liable in circumstances not involving its own defences. Indeed, one case finding against the bank was concerned with a fact situation similar to that in *Garden Check Cashing Service*.²²³ Another decision effectively prevented the sender from frustrating payment to the payee, to whom he had paid with the instrument, by not allowing him to countermand payment.²²⁴

Secondly, the Appellate Division in *Garden Check Cashing Service*²²⁵ viewed itself as called upon to choose between the "diverse results"

²¹⁸ See, e.g., *Mirabile v. Udoh*, *supra*, footnote 211.

²¹⁹ *Supra*, footnote 182, at p. 684.

²²⁰ It seems that all cases dealing with this fact situation held against the bank. But cf. text at footnotes 222-227, *infra*.

²²¹ Insufficient funds: *Rose Check Cashing Service*, *supra*, footnote 182; *Sequoyah State Bank*, *ibid.*; forged cheque: *Interfirst Bank Carrollton*, *supra*, footnote 208; *Emerick*, *supra*, footnote 213; *Graybar Electric Co. Inc.*, *supra*,³ footnote 215.

²²² *Supra*, footnote 182, at p. 683. See also *Emerick*, *supra*, footnote 213.

²²³ See text around footnote 212, *supra*.

²²⁴ *Mirabile v. Udoh*, *supra*, footnote 211. *Garden Check Cashing Service* was sought to be distinguished as a case concerned with a person who cashes an instrument to which he has no title (see text in paragraph containing footnote 192, *supra*) and so was unauthorized to bind the bank; *ibid.*, at p. 870. Cf. text at footnote 211, *supra*. An opposite result was reached in cases cited in footnote 196, *supra*.

²²⁵ *Supra*, footnote 192, at p. 356 (3 U.C.C. Rep.).

reached by the trial court in that case and *Rose Check Cashing Service*. By reinstating the trial court's judgment, it thus purported to overrule *Rose*. A few subsequent cases²²⁶ expressly regarded the final *Garden* judgments as overruling *Rose*. Hence, it is inaccurate to present existing legal doctrine as purporting to accommodate both *Garden* and *Rose*.

Last but not least, as a matter of legal analysis, both lines of cases, *Garden* and *Rose*, are irreconcilable. An explanation for the inability of the issuing bank to raise defences against the holder presupposes that, in the absence of those defences, the bank is liable. But this assumption goes directly against *Garden* which held against the existence of this liability. Stated otherwise, the question of the bank's defences against the holder, or its ability "by its own initiative [to] stop payment on a personal money order",²²⁷ does not arise at all unless it is assumed *ab initio* that the bank is liable in the first place, the very point rejected by *Garden*.

Personal money orders are easily cashable by Canadian financial institutions. It seems that they are generally accepted by creditors as a good substitute for cash. In the final analysis, the personal money order should be treated as a banker's engagement. Indeed, as a matter of statutory interpretation, *Garden* could allow the sender to countermand payment only because the right to stop payment is given by statute to the "customer" and not to the "drawer".²²⁸ Nevertheless, inasmuch as the sale of the personal money order is the equivalent of providing a customer with a single blank cheque bearing the amount of a single deposit, as suggested in *Garden*, the issuing bank is bound to pay only by complying with the "customer's" order.²²⁹ Stated otherwise, had the bank paid in *Garden*, even in the absence of a stop payment order, it would have been subject to the customer's action to recover the amount of payment, as if it were a drawee bank which had paid a cheque bearing an unauthorized or forged signature of its customer. But unlike the running chequing account situation, the bank issuing a personal money order has neither a signature card, nor necessarily an ongoing relationship with the sender-customer, to protect itself. It is at this point that the personal cheque analogy breaks

²²⁶ *Lupowitz v. New York Bank for Savings*, *supra*, footnote 194; *State v. La Rue*, *ibid.*, at p. 258.

²²⁷ *Sequoyah State Bank v. Union National Bank of Little Rock*, *supra*, footnote 182, at p. 683. See text and footnote 222, *supra*.

²²⁸ U.C.C. s. 4-403(1); see also s. 167(a) of the Canadian Act to the same effect. *Quaere* whether stop payment order should have been given to the branch which issued the instrument, or to the department on which it is drawn. For the possibility that both departments may not be identical and even form two separate institutions, see, e.g., text at footnote 173, *supra*. The general point was specifically discussed in *Newman v. First National State Bank of Toms River N.J.*, *supra*, footnote 196, at p. 187.

²²⁹ See in general, B. Geva, Reflections on the Need to Revise the Bills of Exchange Act—Some Doctrinal Aspects (1981-82), 6 Can. Bus. L.J. 269, at p. 302.

down.²³⁰ The personal money order cannot be made mechanically subject to a wholesale application of rules concerning uncertified cheques.

Commercial expediency requires that by taking a blank instrument, save for the amount imprinted by the bank, the sender incurs all risks involved due to his failure to fill in promptly all blanks.²³¹ The blank (save for the amount) personal money order should be treated as a bearer instrument, on the same footing as an instrument endorsed in blank is so considered.²³² Notwithstanding *Garden*, a bona fide purchaser for value should prevail over the sender. By the same token, assuming no forged endorsements are involved, payment in good faith to the holder should discharge the bank.

In general, the use of payment instruments as substitutes for cash should be equated as far as possible with payment *in specie*. It must be remembered that in connection with payment by cheque, the right to countermand payment, as well as the creditor's indefinite lack of assurance as to sufficiency of funds, are merely incidents of the imperfection of the cheque system where no funds are irrevocably set aside by the drawee prior to actual payment. This is not the case in the personal money order situation. Cheque analogies should therefore not be pursued with the utmost zeal.

At the same time, *Rose*²³³ is oversimplistic and technically erroneous. Bearing neither a handwritten nor a facsimile signature of an authorized bank officer, the personal money order cannot be viewed as a species of bank draft.²³⁴ It is more consistent with legal doctrine to treat the personal money order as a certified cheque.²³⁵ In Canada, section 37(1)(a) allows for the acceptance of a bill "before it has been signed by the drawer, or while otherwise incomplete". The impression of the amount by the bank can be seen as certifying the amount as well as authenticating the writing, namely "signing" it.²³⁶ Indeed, as a concept rather than as a mere description of the current practice, "certification" can be viewed as sufficiently broad to accommodate the relatively new practice of imprinting the amount on a personal money order to be issued, so as to "certify"

²³⁰ Cf. Bailey, *loc. cit.*, footnote 181, at pp. 676-677. His proposed solution is nonetheless to fasten liability on the bank "apart from the instrument", a view which was subsequently echoed in cases discussed in the text at footnotes 211-216, *supra*.

²³¹ Perhaps some kind of an insurance scheme should compensate senders against robberies occurring on the issuing bank's premises.

²³² Compare the text at footnote 189, *supra*; and see ss. 21(3) and 67(2) of the Act.

²³³ See text and footnotes 201-206.

²³⁴ Compare Part I, text at footnotes 19-20, 34-48, *supra*.

²³⁵ Compare with text at footnotes 187-191, *supra* (*Goberdhan*).

²³⁶ Compare Part II, text and footnotes 123-134, *supra*.

to the holder the availability of sufficient funds.²³⁷ By certifying the "cheque" the issuing bank incurs acceptor's liability to the holder.²³⁸

Upon signing the personal money order, the sender becomes liable thereon as its drawer. Where he merely fills in his particulars, he must be taken to "sign" the instrument as well.²³⁹ It is only in this way that the personal, as well as the postal²⁴⁰ money order, can be made to fit into a recognized category under the Act.

Conclusion

Banker's instruments can broadly be described as payment instruments governed by the Bills of Exchange Act payable on demand, on which a bank or another financial institution is liable to the holder. They are mechanisms for the transmission of funds between individual as well as corporate debtors and creditors, which facilitate the avoidance of the risk of physical carriage of money as well as giving the creditor the assurance of payment in the form of the banker's credit attached to them.

Bank drafts, including bank money orders, certified cheques, and personal money orders, are banker's instruments. Bank drafts are bills of exchange as well as cheques. The issuing bank's liability thereon is that of a drawer. Where the bank draft is drawn on the drawer, the holder may treat the instrument as a promissory note on which the issuing bank is liable as a maker. Bank drafts drawn on the drawer are often viewed as accepted bills of exchange on which the issuing bank is liable as an acceptor.

The binding effect of cheque certification is well established. The precise legal impact of certification is nevertheless quite controversial. The better view is to treat the certification of the cheque as an acceptance.

The juridical nature of the personal money order has not been settled. Likewise, the question of the issuing bank's liability on that instrument has not been conclusively determined. The better view is to treat the personal money order as a banker's instrument on which the issuing bank is liable. The instrument ought to be treated as a certified cheque on

²³⁷ Notwithstanding text in paragraph containing footnotes 157, 158, *supra*. Credit unions should be taken to certify on behalf of the central on which the instrument is drawn; cf. text at footnote 173, *supra*. For the description of the current practice, see Part II, text at footnotes 97-101, *supra*.

²³⁸ For the statutory contract of the acceptor, see Part I, paragraph containing notes 79-82, *supra*. For certification as an acceptance, see Part II, *supra*.

²³⁹ See text at footnote 174, *supra*; text and footnotes 161, 175, *supra*.

²⁴⁰ See text at footnotes 159, 160, *supra*. Needless to say, the postal money order is not a cheque; *ibid*. Hence, it must be viewed as an accepted bill.

which the issuing bank is liable as an acceptor. By the same token, a postal money order is to be treated as an accepted bill of exchange.

The banker's obligation on the bank draft, certified cheque, or personal money order is binding towards the holder. As such it is irrevocable. Whether it is also absolute and autonomous, namely free from the bank's defences against the customer, as well as from defences of the customer against his creditor, is an entirely different matter, outside the scope of this article.