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ACCEPTANCE AND DISHONOR: "PAYABLE THROUGH" DRAFTS AND PERSONAL MONEY ORDERS

Arthur G. Murphey, Jr.*

I. INTRODUCTION

A basic rule concerning a negotiable instrument is that no person is liable on such an instrument "unless his signature appears thereon." The Uniform Commercial Code does not define "signature" in a way to distinguish it from "name." Logically, a signature must be signed, but the Code in defining "signed" provides only that it "includes any symbol executed ... with present intention to authenticate a writing." From that definition, however, there is at least a reasonable implication that a person's name must be put on an instrument with an "intention to authenticate it" if the effect is to cause the person to be liable on the instrument.

On an ordinary draft or check, the signature of the drawee does not appear. Thus, the drawee is not liable on the instrument to the holder. Since no Code provision otherwise requires that he pay the holder, he incurs no liability to the holder if he refuses to pay the instrument. If the drawee does put his signature on the draft, this act is known as "acceptance" and the drawee then becomes liable on the draft. Unfortunately since the word "acceptance" has other and better-known meanings, it is easily used incorrectly. The acceptance of a check is a "certification," a word less likely to be used incorrectly.

Two recent Arkansas cases, one decided by the Supreme Court and the other by the Court of Appeals, dealt with the acceptance of

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2. Id. § 85-1-201 (39) (Supp. 1981).
5. Id. § 85-3-410(1).
6. Id. § 85-3-411(1).
instruments by drawees. The cases involved successful claims by persons who were holders in due course against drawees who had dishonored the instruments. Both involved issues which were also decided by courts of other jurisdictions. One case had to decide whether the instrument was negotiable; the drawee admittedly had signed it. The other had to decide whether the drawee had accepted it; it was admittedly negotiable. Also, one case involved a draft, one of the oldest of the negotiable instruments, while the other involved a personal money order, an instrument of recent origin. Both cases had some errors in them which will be discussed here.

The purpose of this article is to explain some practices and rules concerning certain negotiable instruments, along with special language used. Then using that explanation as a background, this article will examine the errors made in the two cases and in other cases like them.

II. THE CASES

The first case, *Canal Insurance Co. v. First National Bank of Fort Smith*, was decided by the Arkansas Court of Appeals; and the decision was affirmed by the supreme court. The insurance company issued a so-called "payable through" draft, drawn on itself, and containing the words "Upon acceptance pay . . . ." It was mistakenly issued to one Jim Marlar, payable to him only. It should have been payable jointly to him and another. Marlar in turn quickly deposited it in his bank and withdrew the amount of the draft. This made the depositary bank a holder in due course. The insurance company's defense of erroneously issuing the draft was a "personal" defense, one which could not be used to avoid paying a holder in due course. The bank, however, would not have been a holder in due course if the instrument had not been negotiable; and a draft is not negotiable if its order to pay is conditional. The insurance company contended that "Upon acceptance pay . . . ." made the order conditional and that therefore the instrument was not negotiable. The court disagreed, finding the promise was unconditional. It referred to cases which had held that a draft drawn by a drawee was accepted by being issued (or drawn). The court concluded that the insurance company could not countermand the draft.

The holding was correct; the promise was unconditional. It is

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submitted, however, first, that the court misconstrued the meaning of the word "acceptance" and, second, that when it said that the drawee "could not" countermand (stop payment on) the draft it did not properly describe the insurance company's rights in such a situation. These two points will be discussed more fully.

The second case, *Sequoyah State Bank v. Union National Bank*, was decided by the Arkansas Supreme Court. In *Sequoyah* the defendant bank sold a personal money order to a woman for a check which (unknown to the bank) was drawn on insufficient funds. The money order was later deposited in the plaintiff bank; and by allowing a withdrawal, the bank became a holder in due course. Meanwhile, the purchaser's check was dishonored; thus when the money order was presented to the defendant bank, payment was refused. The plaintiff bank brought suit, and the defendant bank contended the personal money order was similar to a personal check and therefore it could dishonor it without liability to the holder. The court, however, held it could not. It referred to a New York trial court case in which it was stated that it is "the custom and practice of the business community to accept personal money orders as a pledge of the issuing bank's credit." The Arkansas court elected to "consider this custom and practice" in regulating the handling of the money order. The court then cited the same case in holding that issuing "the money order with the bank's printed name evidences an intent to be bound." Thus, the bank owed the same obligation to the holder as on a certified check (or accepted draft). The court concluded, "Banks are not allowed to stop payment on their depositor's checks and certainly should not be allowed to stop payment on personal money orders."

It is submitted, that in following what was apparently only the personal opinion of a New York trial court judge to determine custom in Arkansas, the court departed from its own precedents. The dissenting opinion pointed out that there "is not one single word in the transcript or abstract about business custom." The decision, therefore, introduces some confusion into the requirements of the court for proving custom.

8. 274 Ark. 1, 621 S.W.2d 683 (1981).
10. 274 Ark. at 3, 621 S.W.2d at 683 (citing Mirabile v. Udoh, 92 Misc. 2d 168, 168, 399 N.Y.S.2d 869, 870-71 (1977)).
11. Id. at 4, 621 S.W.2d at 684.
12. Id.
13. Id. at 7, 621 S.W.2d at 686.
Furthermore, the theory of liability adds a new rule to Arkansas commercial law that need not be there. To find liability because the “bank’s printed name” “evidences an intent” (to be bound) is to put emphasis in the wrong place and to use an approach that the Uniform Commercial Code has rendered obsolete. It adopts a theory of recovery that could cause unnecessary problems.

Finally, the court’s statement that drawees are not allowed to stop payment is as misleading as the similar statement was in the Canal case. These three points will also be discussed later.

III. THE BACKGROUND

A. Introduction

A generation ago, law students studied a course called “Bills and Notes.” Bills were bills of exchange—the term the English used for drafts. Notes were promissory notes. All negotiable instruments were of one type or the other. Now, the commonly used negotiable instruments are governed by Article Three of the Uniform Commercial Code and are called “Commercial Paper.” A “maker” expressly promises to pay a “note-type” instrument, and if he does not pay on time he can be sued on the instrument. A drawer, however, expressly orders a drawee to pay a “draft-type” instrument. If the drawee does not pay and, after notification of nonpayment, the drawer does not pay, the drawer can be sued on the instrument—not because of an express promise by the drawer on the instrument but because the law requires him to pay. Even

15. Id. § 184.
A writing which complies with the requirements of this section is
(a) a “draft” (“bill of exchange”) if it is an order;
(b) a “check” if it is a draft drawn on a bank and payable on demand;
(c) a “certificate of deposit” if it is an acknowledgment by a bank of receipt of money with an engagement to repay it;
(d) a “note” if it is a promise other than a certificate of deposit.
17. Id. § 85-3-413 provides in pertinent part:
(1) The maker or acceptor engages that he will pay the instrument according to its tenor at the time of his engagement or as completed pursuant to Section 3-115 [§ 85-3-115] on incomplete instruments.
The terms “engage” and “engagement” are equivalent to “promise.”
18. Id. § 85-3-104(2)(a).
19. Id. § 85-3-413 further provides:
(2) The drawer engages that upon dishonor of the draft and any necessary notice
though the drawee *refuses on his own* to pay the instrument, he cannot be sued by (that is, he is not liable to) anybody but the drawer—*and then only when the refusal to pay is wrongful*—except under certain circumstances which will be explained later. The drawee does not, on the instrument, expressly promise to pay; nor does the law require him to pay a holder, and although the law and a special contract make him liable to the drawer for wrongful dishonor, this liability was not involved in the cases analyzed here.

**B. Drafts and Checks**

One type of draft is the check. It is a draft drawn on a bank and payable on demand (meaning "immediately"). There are also drafts not drawn on banks, which may be drawn on persons or corporations. Those payable on demand are usually called "sight" drafts; a "time draft" is one not payable on demand.

There is a difference in the way in which a check and a draft may be used to purchase goods. If A, in Little Rock, wishes to buy $1,000 worth of goods from B, in Fort Smith, A can use a check. A, the buyer, will be the *drawer*, his drawee must be a bank, and B must be able to get his money as quickly as he can get to A's bank ("immediately" or "on demand"). Of course, B will probably not go straight to A's bank. He will probably take it to his own bank and deposit it. The bank will in turn send it to Little Rock for A's bank to pay it. This will mean in actuality that B may not get any money for several days. In some cases B's bank may let him withdraw part or all of the amount of the check immediately or very soon thereafter. The Fort Smith bank in the *Canal* case followed this practice even though a draft and not a check was involved. Furthermore, when A writes his check, it is expected that A has $1,000 on deposit in his bank. Under certain circumstances it is a criminal offense if he writes the check and the money is not on deposit.

Suppose, however, the parties agree to use a draft. In this

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20. Liability to the drawer is based on *Ark. Stat. Ann.* § 85-4-401 and (sometimes) on an express contract that the bank will honor properly payable checks. This could appear on a "signature card" the drawer signs when opening an account.


22. *See infra* text between notes 80 and 85.


25. The description here is intentionally kept as simple as possible. Usually a bill of
situation \( B \), not \( A \), will be the drawer and will draw the draft on \( A \) who will then be the drawee. \( B \) will probably also take the draft to his bank which might send it directly to \( A \) for payment. \( A \) should then pay it, that is transfer $1,000 to \( B \)'s bank. \( A \), however, may not pay the draft; instead he may dishonor it. Several things could go wrong with the sale. The goods, for instance, may be worthless so that \( A \) does not owe the money, or \( A \) may just decide to break his contract. Since this action by \( A \) is possible, a draft, unlike a check, is not a representation that \( B \) (the drawer) has deposited money with \( A \) which should be paid. When \( A \) claims he owes \( B \) no money, and dishonors the draft, \( B \)'s bank does not have \( B \) arrested for writing a “hot draft,” even if \( B \) has withdrawn part of the amount.

A company may wish to use a draft on which it is both the drawer and the drawee. This was the situation in the Canal case. This is accomplished with a “payable through” draft—meaning it is payable through a bank named on the face of the draft. Suppose \( A \), in Little Rock, makes such a draft payable to \( B \), who then deposits it in \( B \)'s bank in Fort Smith. If the draft is “payable through” \( A \)'s bank, \( B \)'s bank in Fort Smith will not send it directly to \( A \) but will probably send it to the same place it would send \( A \)'s check.\(^{26}\) However, what happens in this case is different.\(^{27}\) When the check is used, since \( A \) has signed it, his bank takes the money out of his deposit account. When the draft is used, however, since it is drawn on \( A \), not the bank, the instrument confers no authority for money to be taken out of any account in the bank. Instead, the bank is rendering \( A \) a different service. It will probably call him on the telephone and tell him the draft has arrived. He will then come to the bank and give the bank cash or write a check to cover the draft. Thus it is said that \( A \)'s bank “pays” the check but “collects” the draft. \( A \) “pays” the draft. (This description of the process is deliberately kept simple to compare the two instruments. When busi-

\(^{26}\) This assumes that one of two things is true. First, \( B \)'s Fort Smith bank may have a correspondent bank in Little Rock, to which it will send all drafts and checks for collection. Second, \( A \) may make his drafts “payable through” the same bank at which he maintains his checking account (or all accounts if he has more than one). For a case involving a sale of goods and showing the route of a “payable through” draft see \textit{Berman v. United States Nat'l Bank}, 197 Neb. 268, 249 N.W.2d 187 (1976).

\(^{27}\) For further reading on the “payable through” draft, see \textit{Murray, Drafts 'Payable Through' Banks}, 77 COMM. L.J. 389 (1972); \textit{Katskee, The Perils and Pitfalls of 'Payable Through' Drafts} 94 BANKING L.J. 333 (1977).
nesses issue large masses of drafts, the banks will have more
sophisticated methods of handling the drafts, communicating with
the drawee, and arranging for payment. In some instances, perhaps,
money may have been advanced by the bank which the draft is
"payable through,"28 but basically the collection of the two types of
instruments is such that the check is always "payable by" a bank
while the draft is [sometimes] "payable through" a bank. Despite a
suggestion that the rule should be otherwise,29 the latter is not paya-
ble by the bank.30

C. Acceptance and Certification

If A has money available to pay the draft, B may use a "sight"
draft. The draft may have the words "At sight pay to the order of—
———." It could omit "At sight" and simply order "Pay to the
order of ————" as a check does. The word "Pay" with no
time stated means "Pay now" or "On demand pay." Suppose A,
however, does not have the $1,000 but wishes to borrow the money.
One method open to A is to use what is called the "Time Bill of
Exchange" or the "Time Draft."31 B will take a blank draft and
date it the day he draws it, say September 29, 1982, as he would a
sight draft. Then, instead of writing "At sight" in the blank before
the word "Pay" he will insert the time that A needs the credit ex-
tended. It could begin "Ninety days after date pay . . . ." This
instrument then goes through the bank collection process until it
reaches A, but this time A does not pay it. Instead he "accepts" it
(and thereby makes a contract which can serve as a basis for ex-
tending him credit for ninety days). This means that he writes
across the instrument a promise to pay it when due (in ninety
days).32 This promise may be manifested by just his signature,33 or
it may consist of the words "Accepted, payable at X Bank by A."34

arguing that the instrument involved was not a payable through draft, though it was sup-
posed to have been one, see Bermon v. United States Nat'l Bank, 197 Neb. 268, 249 N.W.2d
187 (1976).
1973).
this section to the effect that it may even be on the back of the instrument.
33. Id.
34. Id.
This is an "acceptance" as defined by Uniform Commercial Code section 3-410. This meaning is consistent with that contained in section 3-413 which sets out the contract of an acceptor. It is this and only this that is meant by section 3-409 which provides that a "drawee is not liable on the instrument until he accepts it." After such an acceptance the drawee is liable on the instrument by virtue of a written promise to pay. This meaning of "accept", however, is not the same as a mere decision to pay even if one employee of the drawee agrees verbally with another employee that the draft should be paid. There must be a writing. This fits in with the requirement of section 3-401(1) that "no person is liable on an instrument unless his signature appears thereon."

When a bank "accepts" a check this is known as "certification." Acceptance of a time draft and certification of a check, however, serve different purposes. Since the time draft, above, would not be due for ninety days, A did not have to pay it when it was presented to him. He did have to put on the draft his written promise to pay and return it to B, because refusal to accept a time draft when presented is a "dishonor." After acceptance, if B wanted money immediately he would try to sell the instrument (probably to a bank which would later collect the money from A when the instrument was due). First, however, A must have accepted the draft so that A would be liable on the instrument. This transaction would be similar to selling a promissory note signed by A. If B were willing to be the lender, he would keep the draft and collect it when due.

   (1) Acceptance is the drawee's signed engagement to honor the draft as presented. It must be written on the draft, and may consist of his signature alone. It becomes operative when completed by delivery or notification.

   (1) The maker or acceptor engages that he will pay the instrument according to its tenor at the time of his engagement or as completed pursuant to Section 3-115 on incomplete instruments.

   (1) A check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it.


41. Note that the contract (or engagement) of the maker of a promissory note is the same as that of the acceptor of a draft, under § 85-3-413(1), supra note 36.
Since all checks are demand instruments, however, they are due to be paid immediately. And the debtors, as drawers, are liable on them. If the drawee bank is requested to certify a check, the bank can refuse, because refusal to certify is not a dishonor (unless the bank has agreed otherwise). If the person who is refused is the payee (or his representative—the bank presenting the check), he is no worse off. Unlike the creditor (or the creditor's representative—the presenting bank) using the time draft, he can demand to be paid now and thus does not need the written promise to pay (the acceptance). The bank may choose to certify the check, however, and would more likely do so for its customer, the drawer, than for a holder. A drawer will want it certified to make it more readily acceptable. Although the drawer is liable since he signed the instrument, if it is certified the one to be paid is assured that the bank's worth is behind the check. An uncertified check might be drawn against funds that will not be there (because the drawer has withdrawn them previously) by the time that collection is attempted. The certified check, however, contains a written promise of the drawee bank to pay, written across the face (that is binding even if the drawer [through the bank's error] withdraws his own funds). A similar promise is found in the signature of the drawee as drawer on a cashier's check and on a bank money order. These three instruments—the certified check, cashier's check and bank money order—are used in similar situations in which third parties are leery of ordinary checks.

At this point recall that (a) the draft in the Canal Insurance Company case was a sight draft, (b) the drawer and the drawee were the same party, and (c) nothing was said about using the draft in the way a certified check would be used—to pay a third party. A time draft is useful in the sale of goods to a buyer who needs time and credit to pay for the purchase. It is not needed where an insurance company has the money to pay its claims. Nor will an insurance draft be drawn by the claimant (whose situation is similar to that of the seller B, above, who signed the draft). It will be drawn by an adjuster or agent who is acting for the company (whose situation is similar to that of A, above, who signed the check). The company could just as well use a check. Nor will it be sent back by the

43. H. Bailey, Brady on Bank Checks, § 10.7 (5th ed. 1979).
44. Id. at §§ 1.11, 1.13, and 1.16.
45. For some of the reasons that drafts are used instead of checks see Murray, supra
drawee to be circulated like a certified check.

D. **Remitters and the Sale of Credit**

When an ordinary check is used by a bank's customer, the customer signs the check as its "drawer." The bank owes the customer a debt by virtue of the customer's deposits, and as a drawer he orders the bank to pay part of the debt to the holder of the instrument. If a cashier's check or bank money order is used, however, a different relationship is involved. The purchaser is not the drawer but rather is usually called the "remitter." When the holder presents one of these instruments for payment, the amount is not to be subtracted from the purchaser's deposit account. Such an instrument has been paid for by the purchaser at the time of issue, and the amount of it now must be paid from the funds of the drawee.

A common expression is that a depositor has "money in the bank." Although this is not a true description of the relationship, it may be of help here. If someone is comfortable with that expression in regard to ordinary checking accounts, he will no doubt say that holders are paid "depositors' money." If so, by analogy, holders of cashier's checks and bank money orders are paid "the bank's money."

A remitter purchases the credit of the drawee. A customer who is a drawer has a right to instruct a bank what to do with his credit (or his "money in the bank"). So after a customer draws an ordinary check (ordering a bank to pay) he has a right to stop payment (and thereby countermand or cancel the order). The bank obeys

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(20) "Holder" means a person who is in possession of a document of title or an instrument or an investment security drawn, issued or indorsed to him or to his order or to bearer or in blank. As used in the above sentence the holder is often a bank because the person to whom the instrument was issued indorses the instrument and deposits it in a bank.


48. *H. Bailey*, * supra* note 43, at § 1.16; *F. Beutel & M. Schroeder*, * supra* note 29, at § 25-20; *B. Clark*, * supra* note 31, at ¶ 2.6[3][d][i].

49. *H. Bailey*, * supra* note 43, at § 1.11 (cashier's check) and at § 20.15 (bank money orders).


because it is not free to do as it pleases with the customer's account (his "money"). On the other hand a remitter purchases the credit of the drawee; and since it is the bank's credit (the "bank's money") which is involved, the customer (now a remitter, not a drawer) is not free to do as he pleases with that. Thus, a remitter has no right to stop payment on a cashier's check\(^52\) or a bank money order. The bank is free to do as it pleases with its own credit (its "money").

Even though the remitter writes his name on a cashier's check or bank money order, it is still only his name, not his signature. It is put there for information purposes, to identify him. He may need to use the information later to show that he bought it and transferred it to pay a debt. It is not put there with an intention to authenticate the writing. Thus, a remitter has not signed and is not liable on the instrument,\(^54\) but he may be liable under warranty theory.\(^55\)

It should be pointed out, also, that even though a drawee is directly liable on an instrument, it does not always follow that the person to whom it is payable is being transferred credit which has been sold to a remitter by the drawee. A bank selling cashier's checks and bank money orders (on which it is directly liable) can be cheated out of its credit when selling to a remitter, and the cheater can sell the credit to innocent payees who will then be able to collect on it.\(^56\) Since they did not deal directly with the bank, they have done nothing to give the bank a defense against paying. In the case of insurance company drafts, however, as used in the Canal case (and on which the drawee is directly liable), the payees and not remitters have dealt directly with the drawer-drawee. Therefore, the insurance company drawee has a defense against a payee who has

\(^{52}\) Id. at 685.

\(^{53}\) H. BAILEY, supra note 43, at § 20.15.

\(^{54}\) F. BEUTEL & M. SCHROEDER, supra note 29, at § 25-70.

\(^{55}\) Id. This is because Ark. Stat. Ann. § 85-3-417(2) provides:

(2) Any person who transfers an instrument and receives consideration warrants to his transferee and if the transfer is by indorsement to any subsequent holder who takes the instrument in good faith that

(a) he has a good title to the instrument or is authorized to obtain payment or acceptance on behalf of one who has a good title and the transfer is otherwise rightful; and

(b) all signatures are genuine or authorized; and

(c) the instrument has not been materially altered; and

(d) no defense of any party is good against him; and

(e) he has no knowledge of any insolvency proceeding instituted with respect to the maker or acceptor or the drawer of an unaccepted instrument.

\(^{56}\) Fox, supra note 51, at 686 (cashier's check); Thompson Poultry v. First National Bank of York, 199 Neb. 8, 255 N.W.2d 856 (1977) (bank money order).
cheated it into issuing the draft.\textsuperscript{57} In other words, it has a defense against a payee with whom it deals directly and gets nothing in return. In most jurisdictions the same would be true on a cashier’s check\textsuperscript{58} or bank money order,\textsuperscript{59} if the dishonest purchaser made himself the payee.\textsuperscript{60}

E. Stopping Payment

The Uniform Commercial Code expressly gives to the drawer of a check the right to order his bank to stop payment on that check.\textsuperscript{61} A New York court has said, “Nowhere in the Negotiable Instruments Law is there any provision that a drawee may ‘Stop Payment’ of a check unless ordered to do so by the drawer.”\textsuperscript{62} This statement is misleading and can lead to the conclusion that a bank lacks the power which it in fact has. The reason for the absence of a provision needs explaining, since there is no provision in the Code either.

The process by which a drawer acts to prevent a check from being paid is referred to in the Uniform Commercial Code as “stopping payment” or “issuing a stop order.” Courts sometimes refer to it as “countermanding” (the order to pay, which the check is). The Code gives the power only to the drawer;\textsuperscript{63} if the payee, for instance, issues a stop payment order, the drawee may ignore it.\textsuperscript{64} But it should be kept in mind that it is an order given to a drawee bank.\textsuperscript{65} Thus, the Code cannot be expected to contain a provision that a bank may “stop payment” on its customer’s checks, because if it did so it would be providing for the bank to order itself to do something

\textsuperscript{58.} Mid Central Towing Co. v. National Bank of Tulsa, 348 P.2d 327 (Okla., 1959); Travi Const. v. First Bristol County Nat'l Bank, 10 Mass. App. 32, 405 N.E.2d 666 (1980); For cases on both sides see Fox, supra note 51, 686-690.
\textsuperscript{59.} State Bank of Brooten v. American Nat'l Bank, 266 N.W.2d 496 (Minn. 1978).
\textsuperscript{60.} This will occur if the purchaser at the time of issue does not know the name of the person to whom the funds are to be transmitted, does not wish to leave the payee’s name blank, and knows enough about commercial paper to know that this is a solution to the problem.
\textsuperscript{61.} ARK. STAT. ANN. § 85-4-403(1) (1961). This section does not use the word “drawer,” but this clearly the meaning of “A customer may . . . . stop payment of any item payable for his account . . . .” [emphasis supplied].
\textsuperscript{63.} See supra note 61.
\textsuperscript{64.} This is also pointed out in Comment 3 to ARK. STAT. ANN. § 85-4-403 (1961).
\textsuperscript{65.} See supra note 61. The subsection begins: “A customer may by order to his bank stop payment . . . .” [emphasis supplied].
and in turn it would be providing that a bank must obey an order from itself. Nor should anyone expect the Code to contain a provision that a bank could not "stop payment" on a drawer's check. The Code does concern itself with the next step, however, that of the bank's dishonoring the check (whether in reliance to the stop order or not).

When the drawee obeys the order and the check is not paid, the Code refers to this as a "dishonor." It is this act (which affects others than the bank) which the Code regulates. The reader may then ask: What if the court had said, "Nowhere in the Code is there a provision that a drawee may dishonor a check unless ordered to do so by the drawer?" Whether such statement serves as a useful guide for anything will be discussed later with "Dishonor." It is well to remember that the success of a search through the Code's provisions depends upon accepting its language. Since the term "stopping payment" refers to a drawer's order, the sections governing the order (e.g., when it is too late or if it must be in writing) refer to "stopping payment" and not to "dishonor." Likewise, the sections governing the bank's response, the act of dishonor (e.g., what it is or is not, and what must be done about it) refer to "dishonor" and not "stopping payment."

F. The Consequences of Stopping Payment

If an instrument is still in the hands of the person to whom it was issued, the payee, and against whom the drawer has a defense, stopping payment prevents a loss. Stopping payment to this payee would avoid having to sue him for the money, as a drawer would have to do if the instrument were paid. If the instrument is in the hands of someone who bought it from that payee knowing he was

67. Text with notes 91 through 103, infra.
68. Ark. Stat. Ann. § 85-4-303 (1961) provides as follows:
   (1) Any knowledge, notice or stop-order received by, legal process served upon or stop-order received by, legal process served upon or setoff exercised by a payor bank, whether or not effective under other rules of law to terminate, suspend or modify the bank's right or duty to pay an item or to charge its customer's account for the item, comes too late to so terminate, suspend or modify such right or duty if the knowledge, notice, stop-order or legal process is received or served and a reasonable time for the bank to act thereon expires or the setoff is exercised after the bank has done any of the following:

(a) accepted or certified the item.
69. Id. at § 85-4-403(2).
70. Id. at § 85-3-507(1) and (3).
71. Id. at §§ 85-3-508 and 85-3-511.
not entitled to be paid, stopping payment would cause that person, and not the drawer, to seek payment from the payee.\textsuperscript{72}

If the person presenting an instrument for payment is a holder in due course, the rules are different. A holder in due course is a holder of a negotiable instrument who meets the additional requirements of having purchased the instrument for value and having done so in good faith and without notice that there were any defenses to its payment.\textsuperscript{73} In each of the two Arkansas cases, these requirements were met by the bank into which the instrument was deposited and out of which the depositor drew its amount.\textsuperscript{74}

As to a holder in due course, stopping payment only delays payment if the defense is what is known as a “personal” one. Issuing an instrument either to the wrong person or to someone who does not pay for it is a personal defense.\textsuperscript{75} The drawer must eventually pay a holder in due course on such an instrument. If the holder in due course does not collect his money from the drawee when he presents the instrument for payment, he collects from the drawer later\textsuperscript{76} by means of a trial if necessary.

The drawer is also liable on the instrument to a holder who is not a holder in due course (because he fails in one or more of the requirements) if the drawer has no defense. Again, stopping payment only delays payment. The drawer may get some advantages from stalling payment and forcing the other party to sue as plaintiff,\textsuperscript{77} and because of this may stop payment even when he knows he owes the money. In addition, he is ordinarily liable for no more than breach of contract because he did not pay after the drawee’s dishonor.\textsuperscript{78} A recent Missouri case indicated that a drawer could be liable to the holder in tort as a consequence of stopping payment

\textsuperscript{72} Notice of the defense would keep the holder from being a holder in due course. \textit{Ark. Stat. Ann.} § 85-3-302(1)(c) (1961). Not being a holder in due course, the holder would take subject to the defense against the payee. \textit{Id.} at § 85-3-306. Thus, he would acquire no right to collect from the drawer.

\textsuperscript{73} \textit{Id.} at § 85-3-302.

\textsuperscript{74} Purchasing for value occurs at the time of withdrawal. \textit{Id.} at §§ 85-4-208(1)(a) and 85-4-209.

\textsuperscript{75} This follows from its not being included in any of the exceptions found in \textit{Ark. Stat. Ann.} § 85-3-305(2), although it is a defense.

\textsuperscript{76} \textit{Id.} at § 85-3-413(2).

\textsuperscript{77} Murray, \textit{The Stop Payment of Checks and the Holder in Due Course: A Conflicts and Comparative Law View}, 8 B.C. Indus. & Com. L. Rev. 225, 225-26 (1967).

\textsuperscript{78} \textit{See supra} note 19. Also the section caption is “Contract of maker, drawer and acceptor” and another section provides that “Section captions are parts of this Act.” \textit{Ark. Stat. Ann.} § 85-1-110 (Supp. 1981).
under certain circumstances. However, there is nothing to indicate that either defendant in the Arkansas cases would have been subject to such liability.

G. Dishonor

When a check is duly presented to the drawee bank for payment and it is not paid, this is known as "dishonor." The same term is used for nonpayment of a sight draft duly presented for payment to a drawee. The term applies whether the nonpayment is following the drawer's order to have payment stopped or on the drawee's own initiative. When a time draft is duly presented to the drawee (A in the example) for acceptance and the drawee does not accept it, this is also a dishonor.80

When an instrument is presented to the drawee for acceptance or payment, the drawee is given a limited time in which to act.81 He must either pay it (or accept it if a time draft) or refuse to do so. If he refuses to return a time draft or refuses to pay or return a check or sight draft on demand,82 he is liable to pay the holder the amount of the instrument.83 He will also have to pay this amount if he pays the instrument, and it turns out that an indorsement was forged.84 He must pay the amount to the person whose indorsement was forged. However, suits for either of these acts are brought in tort. The action is for conversion, and the drawee is liable even though he has not certified or accepted the instrument. Thus he will have to pay the amount of an instrument even though his signature does not appear on the instrument. These are not "exceptions" to the rule requiring signatures, however, because the suit is not "on the instrument." That would be a contract rather than a tort action, but the amount of money recovered should be the same. Under the Negotiable Instruments Law, the refusal to return the checks or drafts (conversion under the Uniform Commercial Code) was referred to

81. Where a letter of credit is not involved, if the instrument is a draft, and is to be paid, the drawee must act before the close of business on the day of presentment. Id. at § 85-3-506(2). If it is a draft presented for acceptance he has until the close of business on the day following presentment. Id. at § 85-3-506(1). If the instrument is a check, the drawee bank has until midnight of the day following presentment. Id. at § 85-4-301(1). (There is a condition that settlement be made before midnight of the day of receipt unless it is the depositary bank, but the settlement may be revoked. Id. at § 85-4-301 and Comments 2 and 3 thereto).
82. Id. at § 85-3-419(1)(a) and (b).
83. Id. at § 85-3-419(2).
84. Id. at § 85-3-419(1)(c) and (2).
as "constructive acceptance." Some courts used the same term for payment over a forged indorsement. The Arkansas court in 1911, however, refused to do so. There seemed to be a determination on the part of those who did so to adhere to the rule that no drawee could be liable to a holder unless the drawee "accepted" the instrument. The Code, however, rejected the concept.

If the drawee decides to dishonor the instrument, it must notify the party who presented it within a certain time and in a certain manner, or be "accountable for the amount" of it due to a Code imposed liability.

H. The Consequences of Dishonor

What are the consequences to a drawee of honoring a drawer's stop payment order? If a personal check is the instrument and the bank dishonors the check, the bank avoids being involved in any suit brought by the holder against the drawer. The holder brings a claim against the drawer and either wins because the money is owed or loses because it is not owed. But the bank stands aside (meaning it is not a proper party defendant in the lawsuit). The dishonor was correct because it followed the customer's order. Whether the stop order was justified is not the bank's concern.

What if the drawer does not issue a stop order, but the drawee bank dishonors the instrument anyway? In some instances its action is not only allowed but desirable because a drawee owes a duty to pay only properly payable instruments. Thus, if a check is written for more than the drawer has on deposit, and no provision has been made for paying overdrafts, the bank may dishonor it. Furthermore, even if it is properly payable otherwise, the bank may dis-

86. Pickle v. People's Nat'l Bank, 88 Tenn. 381, 12 S.W. 919 (1890); Dawson v. National Bank of Greenville, 196 N.C. 134, 144 S.E. 833 (1928); See W. Britton, supra note 85, at 419-20.
89. Id. at § 85-4-302.
90. Note, Blocking Payment on a Certified, Cashier's or Bank Check, 73 Mich. L. Rev. 424 at n.7 (1974). This follows from the fact that the bank's signature does not appear on the instrument and assumes that the bank has not waited beyond the time limit of its "midnight deadline" referred to in note 81 supra, or been guilty of conversion as in note 82, supra.
honor an ordinary check if it is over six months old.\textsuperscript{93} In these two examples the bank is not liable to \textit{anybody} for its actions. The Code, therefore, does allow dishonor without an order by the drawer.

To go a step further, suppose the check is presented by a holder the day it is drawn and the account has adequate funds, but the drawee without a request from the drawer dishonors it. In such a case the bank is not liable \textit{to the holder}.\textsuperscript{94} It has not accepted (or certified) the instrument; its signature does not appear on it. It is immaterial that the drawee may be liable to the drawer.\textsuperscript{95}

Even a drawee who is liable on an instrument (because his signature appears on it) may dishonor it on his own initiative when he has a defense of his own, good against the holder.\textsuperscript{96} His position is similar to that of a drawer of a draft or the maker of a note, and he can assert personal defenses against holders not in due course. Thus, in the \textit{Canal} case, if Marlar had presented the draft, and the drawee had dishonored it, Marlar could not have won in a subsequent suit.

If a bank money order or a cashier's check purchased by a remitter is involved, different rules apply and the rules are by no means agreed upon today.\textsuperscript{97} There is little dispute, however, that the bank may still avoid liability for the dishonor in some cases. The bank, because of the nature of the instrument, has bound itself \textit{to holders} to make \textit{proper} payment. Thus, if it dishonors the instrument, it may not stand aside. As a party liable on the instrument, the bank will be subject to suit when the instrument is dishonored. Nevertheless, there are situations in which the bank may refuse to pay the instrument and not be liable to the person presenting the instrument for payment. One obvious example is that involving theft of the instrument. Suppose the payee claims that the instrument has been stolen from him and his endorsement has been forged; he notifies the drawee not to pay anyone who presents it for payment. What should the drawee do when the instrument is

\textsuperscript{93} Id. at § 85-4-404.

\textsuperscript{94} See \textit{supra} notes 4 and 20.

\textsuperscript{95} The holder is not a third party beneficiary of the contract between the drawee and the drawer, unless there are very unusual facts establishing such a contract. Ballard v. Home Nat'l Bank of Arkansas City, 91 Kan. 91, 136 P. 935 (1913). See \textit{W. Britton}, \textit{supra} note 85, at 501.

\textsuperscript{96} See \textit{supra} text accompanying notes 57-60.

\textsuperscript{97} Some cases allow the bank to dishonor cashier's checks when they have defenses of their own and the checks are not in the hands of holders in due course. Others do not. See Fox, \textit{supra} note 51, at 686-90.
presented for payment? If a drawee could never refuse to pay instruments of these types, it would have to pay the persons presenting them, even in this case. Yet as pointed out above, if the drawee does pay, it will be liable in conversion to the payee.\textsuperscript{98} Surely the Uniform Commercial Code does not intend for drawees to be subject to such double liability. If it did, such instruments would disappear from use. Therefore, the drawee may and should refuse to pay the instrument. The person presenting it is not the holder.\textsuperscript{99} The instrument is not "properly payable" as one belonging to the person presenting it.\textsuperscript{100}

There are, of course, times when a bank will be liable to a holder for breach of contract for the dishonor of a cashier's check or a bank money order. One example of this is when the instrument is in the hands of a holder in due course and the bank has only a personal defense to payment.\textsuperscript{101} In both of the Arkansas cases the holders were holders in due course\textsuperscript{102} and the defenses were personal defenses.\textsuperscript{103}

I. The Personal Money Order

The personal money order is a new instrument. It has been referred to as a maverick,\textsuperscript{104} but on its face it complies with the requirements of a check. It is a writing which is an order, drawn on a bank, and payable on demand.\textsuperscript{105} It is often used by people who cannot afford to maintain a checking account at a bank. The purchaser pays the amount of the instrument to the drawee bank and uses the money order for the same purpose others use a personal

\textsuperscript{98} See supra text at note 84.
\textsuperscript{99} J. White and R. Summers, Uniform Commercial Code 583 (2d ed. 1980).
\textsuperscript{100} Kosic v. Marine Midland Bank, 76 A.D.2d 89, 430 N.Y.S.2d 175 (1980) aff'd, 55 N.Y.2d 621, 446 N.Y.S.2d 264, 430 N.E.2d 1317 (1981); H. Bailey, supra note 43, at § 23.3(23.5). A contrary rule would be absurd so long as Ark. Stat. Ann. § 85-3-417(1)(a) gives the drawee an action for breach of warranty of title so as to be able to recover money paid a person holding after a forged indorsement. Must the drawee pay and then immediately ask for his money back? Strictly speaking, this is not a dishonor but a rightful refusal to pay.
\textsuperscript{101} Thompson Poultry, Inc., v. First Nat'l Bank of York, 199 Neb. 8, 255 N.W.2d 856 (1977); Fox, supra note 51, at 687 (Cashier's check).
\textsuperscript{102} See supra note 74.
\textsuperscript{103} See supra note 75.
\textsuperscript{104} Note, Personal Money Orders and Teller's Checks: Mavericks Under the U.C.C., 67 Colum. L. Rev. 524 (1967).
\textsuperscript{105} Id. at 531. See, in general, H. Bailey, supra note 43, at § 1.16; F. Beutel & M. Schroeder, supra note 29, at § 25-29; B. Clark, supra note 31, at ¶ 2.6[3][d]. And see the analysis of Justice Dudley in the dissent to the Sequoyah case, 274 Ark. at 5, 621 S.W.2d at 685.
check. The purchaser signs it and is the “drawer.” The purchaser may order payment stopped and the drawee must honor the stop order in the same way it must on an ordinary check. The payment that is made to the bank is, in effect, a deposit. The bank money order, on the other hand, is also a new instrument, and is used for the same purpose as a cashier’s check. A person who buys one is ordinarily a “remitter.” A payee takes it with the understanding that payment will not be stopped if his debtor (the remitter) changes his mind about a purchase or payment. He takes it assuming that since the bank is liable on the instrument, the money order will not be dishonored for insufficient funds.

There is a place for both types of money orders. People who cannot afford to maintain checking accounts are able to occupy a position similar to that of those with more money by being able to stop payment on their personal money orders. There is room for this “poor man’s check,” and cases from other states hold that the drawee bank on such an instrument is no more liable than on a personal check. The Arkansas Supreme Court, however, has held otherwise. This makes its utility questionable. People who need an instrument on which a bank is liable can, in either jurisdiction, use a bank money order.

J. Custom

The dissent in the Canal case referred to a custom, common to the insurance industry, of not treating the instruments as negotiable “until accepted.” The majority in the Sequoyah case referred to a “custom and practice of the business community to accept personal money orders as a pledge of the issuing bank’s credit.” In a fairly recent case, the Arkansas Supreme Court held that evidence of the custom was not admissible when there was no evidence that the opposing party had knowledge of it, and there was no connection be-

106. Thompson v. Lake County Nat’l Bank, 47 Ohio App. 2d 249, 353 N.E.2d 895 (1975). One authority refers to the purchaser as a “remitter,” however. B. CLARK, supra note 31, at ¶ 2.6[3][d][i].
107. See infra notes 141 & 154.
109. He can have himself named as payee instead. In either case the bank is the drawer by virtue of its officer’s signature.
110. See infra notes 141 & 154.
111. 266 Ark. at 1054, 596 S.W.2d at 715.
112. 274 Ark. at 3, 621 S.W.2d at 683.
tween that party and other transactions (which should have made him aware of the custom and usage). More particularly, the court in an earlier case had held that evidence of a custom in New York City was inadmissible in the absence of a showing that the defendant in Arkansas had knowledge or notice of such custom.

The use of custom in legal disputes has been well discussed elsewhere. Any attempt to go into the matter in depth here would distract from the attention that is intended to be paid to "acceptance," so it will not be done. A more thorough analysis of the court's use of custom in the Sequoyah case or the use to which it might have been put in the Canal case could be the subject of another study. However, a brief mention of the matter is included here because the Arkansas Supreme Court used custom to adopt a rule that found an "acceptance" in the Sequoyah case.

IV. USING THE BACKGROUND

A. Acceptance and the Draft Case

Using the background material above, consider now the two cases. In the Canal case the insurance company argued that the draft was not negotiable because payment was conditioned "Upon acceptance," that it had "no affirmative obligation under the instrument" until it had accepted the draft, and that until acceptance the company could "stop payment." It then referred to the Code definition of acceptance in Section 3-410(1). The court in reply cited an earlier Arkansas case and a Pennsylvania case to the effect that the very act of drawing the draft upon itself as drawee was acceptance of the draft. Other cases referring to a similar use of the words "Upon acceptance" have made similar arguments.

It is submitted that the company's argument, the court's reply,
and the cited cases misconstrued the meaning of the word "acceptance." As pointed out above, acceptance, in the sense of the written obligation on the front of an instrument, is used on time drafts or on instruments where the drawee's credit is needed (as certified checks). The draft in Canal and the other cases was a sight draft. It was not meant to be sent back to Marlar to be used as a certified check would be. It was not designed therefore to be accepted upon presentation, but rather to be paid. What could be more absurd than adding on the front of an instrument a written promise to pay it immediately and then paying it immediately? It is a waste of time and ink. What holder, having been sent his money, would ever know that the acceptance had been put on the instrument just before it was filed away?

Remember also that in the sale of goods example one party drew the draft on another party and the other later accepted it. This added the liability of the other, and up until that was done the other was not liable. But Canal, contrary to its argument, was liable on the draft (as the drawer surely, under even Canal's meaning of "acceptance") from the minute that it drew the draft. Granted that the liability of a drawer is ordinarily different from that of an acceptor, it was the same here since Canal was the drawee also. The liability was the same as a bank's liability on a cashier's check. Therefore no greater obligation would be assumed by Canal if it later accepted the draft by writing an acceptance on the face. Such an action would be as useless as certifying a cashier's check.

Thus, the word had no reference to the contract defined in section 85-3-410 and referred to in sections 85-3-413 and 85-3-409. The courts worked to find such an acceptance needlessly.

What, then, did the phrase mean? It must have meant, "Unless notified that this draft has not been drawn for a proper claim, pay . . . ." In other words "acceptance" must have been used as a layman would understand it, not as a technical word of the Uniform Commercial Code. Why are the words there? Probably because in the offices of many companies at the location where drafts are paid, two employees will be involved in the payment procedures. One will have a job in the nature of claims supervision. The other will be in the department which pays the drafts; call it the "paying de-

121. See supra text accompanying notes 31-41.
122. See supra text accompanying notes 42-44.
123. See supra text accompanying notes 31-35.
partment.” Between the time the draft is drawn and it is presented, something may be discovered to be wrong. The person in claims supervision will then be notified by the company’s employee or an independent adjuster who drew the draft. He will in turn notify the person in the “paying department” to dishonor the draft when the bank presents it for collection. The words amount to a courteous warning or reminder to the person in the “paying department” to be sure that payment of the draft is proper before he authorizes payment, or at least to follow the orders of the claims supervision department.

Looking at the words in this light, we still see that they are superfluous, no more than a formality. Surely the employee already knows not to pay drafts when something wrong is discovered, and he acts the way he does not because of the words on the draft but because of his duty. Take the words off the draft and his conduct should not change a bit. With or without the words (and with or without notice from a fellow employee), drawees (and their employees) are not supposed to pay drafts or checks not properly payable. Thus, the words do not make the payment conditional. The final result in the case was correct.125

Perhaps the court worded the statement the way it did because Canal had argued that “until acceptance, Canal had every right to stop payment on the draft.”126 The answer is that, while the statement may be true if one views Canal solely as the drawer, nevertheless since there was no real defense to the instrument (as where an indorsement is forged), the holder in due course had a rightful claim to payment.127

125. These observations are based on experiences of the author, who was at one time an employee of the claims department of a major insurance company. For a discussion of pre-code law on the negotiability of “upon acceptance pay” instruments, see W. Britton, supra note 85 at 33-34 & n.8 which indicates that a statement which merely states a condition of fact or law necessarily present should not destroy negotiability. For an argument that the word “acceptance” is used in the layman’s sense but refers to the payee’s acceptance of the draft as settlement of its claim against the insurance company, see Standard Fed. Sav. & Loan v. Citizens Ins. Co., 99 Mich. App. 338, 297 N.W.2d 656 (1980).

126. Supra note 116.

127. Canal also argued that “Payable Through . . . [a South Carolina bank]” destroyed negotiability, but its reasoning was not fully set out in the opinion. It argued that the bank was not a drawee and could not pay. But the case does not indicate that the bank had paid or was being sued for failure to pay. Clearly it was Canal who had the duty to pay, either as drawer, or as drawee of a draft drawn on itself. Now, if Canal meant that the words “payable through . . .” made payment conditional because it would not be paid if not sent through that bank, this would not be true either. Those words are put on for the benefit of collecting banks to tell them how to route the drafts. If the holder of such a draft walks up to the front door of the insurance company’s office and presents the draft directly to the
B. Acceptance and the Personal Money Order Case

In the *Sequoyah* case, the issue, according to the opinion, was whether or not Union Bank, the seller of the personal money order, could "stop payment" on the personal money order on its own initiative. The Arkansas Supreme Court held that it could not. In *Mirabile v. Udoh*, the Small Claims Part of the Civil Court of New York, Kings County, had ruled that a bank which had sold a personal money order and had dishonored it, following a stop payment order by the drawer, nevertheless had to pay the holder. It reasoned that there is a "common belief and usage among merchants that the party entitled to sign and deliver a money order issued by a bank is authorized to bind that bank's credit." The Arkansas court said that it could consider "this custom and practice in construing the legal effect of such instruments." The dissent, as stated above, pointed out that there was not one single word in the transcript or abstract about business custom, and that it had not been proven.

The Arkansas court also cited and followed the *Mirabile* case to hold that the "issuance of the money order with the bank's printed name evidences [Union's] intent to be bound thereby." It later replied to an argument that the instrument had not been accepted, "In our opinion, however, the appellee accepted the instrument in advance by the act of its issuance." The dissent pointed out that the statement was not supported by authority and "create[d] an unnecessary legal quagmire."

Before examining the argument that the instrument was accepted, consider as an aside the reception of the "custom" as a justification for doing so. It is submitted that the dissent's protestations were justified. Three points may be made.

First, as pointed out above, custom is a matter of fact to be proved. Did the majority of the Arkansas court conclude it had

drawee, completely ignoring the bank that it is "payable through," he is entitled to be paid. Since this instrument may be treated as a note, presentation may be made directly to the drawee.

128. 274 Ark. at 2, 621 S.W.2d at 683.
130. *Id.*
131. 274 Ark. at 3, 621 S.W.2d at 683.
132. 274 Ark. at 7, 621 S.W.2d at 685-86.
133. 274 Ark. at 4, 621 S.W.2d at 684.
134. *Id.*
135. 274 Ark. at 6, 621 S.W.2d at 685.
been proved in *Mirabile* and therefore did not need to be proved again? Was there in fact such a custom? The plaintiff, Vincent Mirabile d/b/a Ridge Auto Collision, represented himself according to the report of the case. The trial judge referred to no evidence which proved a custom. It is rather difficult to expect that a garage mechanic in small claims court presented numerous witnesses to testify to business custom. It is questionable that there is such a custom. Consider the statement of the trial court in *Garden Check Cashing Service, Inc. v. First National City Bank* (the appellate decision of which is the controlling authority in New York) which said, "[P]laintiff's contention that a business man would accept and assume that such check as at bar would be the equivalent of a cashier's check is untenable." Did the New York Court of Appeals not accept this in affirming the case? Nowhere is it refuted in the appellate opinions.

Second, even if the *Mirabile* case is evidence of a custom in New York, the Arkansas Court had previously held that such a custom cannot bind an Arkansan (Union) without any showing that the Arkansan had knowledge of it. No such knowledge by Union was shown.

Third, even if it was a custom in New York and even if Union knew of its existence in New York, that is not evidence that it was a custom in Arkansas (where the money order was issued) or in Oklahoma (where the Sequoyah bank was located).

There was no mention in the *Canal* case, in either the majority opinion or the dissent, concerning evidence of the custom or lack of it. Because of the result of the case, however, it was not affected by the custom argument.

Now, to return to the matter of acceptance, it will be well to see how other states have viewed the acceptance or liability of drawees on personal money orders. Beginning in 1963, three cases arose out of which New York developed its law concerning personal money orders. The first case was *Garden Check Cashing Service, Inc. v. First National City Bank*. The purchaser lost a "Register Check-
Personal Money Order," before signing it as the drawer, and stopped payment on it. The second case was *Rose Check Cashing Service, Inc. v. Chemical Bank New York Trust Co.* 142 In this case, as in *Sequoyah*, the purchaser bought the money order with a check drawn on insufficient funds. Since the bank discovered this before the money order was presented for payment, it dishonored it. There was no stop payment order. The third case was *Garden Check Cashing Service, Inc. v. Chase Manhattan Bank.* 143 This case involved two personal money orders which, as in the first case, were lost. The case does not say whether or not the purchasers had yet signed the instruments as drawers. The purchasers stopped payment on them. In all three cases the holders sued the drawee banks claiming the instruments were subject to the same rules as cashier's checks.

In the first case the drawee bank won at the trial level. 144 In the next two the drawees lost at the trial level. 145 The first case was reversed on the first appeal. 146 The second had already been affirmed by the same three judges who decided the appeal of the first one. 147 There is no appellate decision for the third. After three years, the first case had reached the Supreme Court of New York, Appellate Division, which granted leave to appeal because of the diverse results in the three cases. That court decided in favor of the drawee bank and set down its law as to the nature of this new instrument to determine the propriety of stopping payment. 148

The court specifically stated that no officer of the drawee signed the instrument, and that "[a]ny attempt to analogize the instrument here with a cashier's... check fails." 149 It further said, "Defendant was not primarily liable thereon... and such liability did not arise until there was certification or acceptance of the instrument." 150 It further noted the difference between the personal money order and the bank money order. 151 The New York Court of Appeals affirmed...
this decision.\textsuperscript{152} That decision governs the other two cases. Thus, New York considers the personal money order to be like an ordinary check and not an instrument on which the drawee is liable. The drawee has to honor a drawer's stop payment order. In a trial court decision in New York the seller of a personal money order was held liable to the purchaser for failure to honor the purchaser's stop order.\textsuperscript{153}

Subsequently, in New York and other states, purchasers of personal money orders were held to have the right to stop payment on them.\textsuperscript{154} Appellate courts in those states held them to be like ordinary checks. One stated, "The mere fact that the printed name of the bank appeared on the face of the money order was not sufficient to constitute its signature and therefore was not an acceptance of the instrument for payment within the purview of [U.C.C. § 3-401 (1)]."\textsuperscript{155}

In 1972, in \textit{Krom v. Chemical Bank New York Trust Co.},\textsuperscript{156} a New York trial court again tried to treat a personal money order as if it were one of which the drawee was liable and held that payment could not be stopped "except for circumstances such as would apply to certified checks." On appeal this was reversed, the court citing the \textit{Garden-First National} case.

\textit{Mirabile v. Udoh},\textsuperscript{157} the 1977 trial case which the Arkansas Supreme Court cited and followed, involved a personal money order used to pay for towing and storing an automobile. \textit{The purchaser} drove off with the automobile and \textit{stopped payment on the check}. The bank complied with the order and dishonored the money order. The holder sued the drawee bank and recovered; the court used the reasoning mentioned in the \textit{Sequoyah} case concerning custom.\textsuperscript{158} It also suggested that estoppel could have been the basis of its decision\textsuperscript{159} but this does not appear in the Arkansas opin-

\textsuperscript{153} McLaughlin v. Franklin Society Federal Savings & Loan Ass'n, 6 U.C.C. Rep. 1183 (N.Y. Civ. Ct., 1969), involving a federal savings and loan association which was the seller but not the drawee.
\textsuperscript{155} Newman v. First Nat'l State Bank, 173 N.J. Super. at —, 414 A.2d at 1370.
\textsuperscript{157} 92 Misc. 2d 168, 399 N.Y.S. 2d 869 (1977).
\textsuperscript{158} \textit{Id}.
\textsuperscript{159} 92 Misc. 2d at 170, 399 N.Y.S.2d at 871.
ion. There was no appeal from the *Mirabile* decision.

In 1981, a New York appellate court reaffirmed the *Garden-First National* rule.\(^1\) The drawer had stopped payment on two money orders even though she had no defense to payment (the same situation as in *Mirabile*). The court ruled in favor of the drawee in a suit by the holder. The opinion reaffirmed the rule that "a personal money order sold by a bank to a purchaser is no different from a personal check furnished by the bank for use by its checking account customers. The instruments are the same. Neither is an obligation of the bank inasmuch as no signature of any bank official appears anywhere thereon . . . . [T]he maker of the instrument . . . has an absolute right to order the drawee (or issuing) bank to stop payment."\(^1\)

From the above cases it is evident that the Arkansas court is alone as an appellate court in its reasoning that the personal money order had been accepted. The *signature* of Union Bank did not appear on the personal money order. The name was not put on with an intention to authenticate it.\(^1\) The dissenting opinion was correct in saying there was no "express 'undertaking' to pay by the bank."\(^1\) It was also made a telling point in reminding the majority that the "name of the drawee bank is on every ordinary check in circulation."\(^1\) The problem with the instrument was that even if in fact anyone was misled into believing that the drawee was directly liable, the words which misled were not "Union National Bank" but "Personal Money Order."\(^1\) Ordinary checks bear "Union National Bank." They do not bear "Personal Money Order." Nobody expects the bank to be liable on them.

To hold that the issuance of the personal money order "with the bank's printed name" "evidenced" an intent to be bound and that the bank "accepted the instrument in advance" creates problems. To begin with, since there was no express undertaking, no express intent to accept, what the court has come up with is a "constructive acceptance"\(^1\) or "constructive certification."\(^1\)

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2. See supra note 3.
3. 274 Ark. at 5, 621 S.W.2d at 685.
4. 163. 274 Ark. at 6, 621 S.W.2d at 685.
5. This would result from believing that all money orders are alike and that therefore personal money orders are the same as bank money orders.
6. Compare the statement that the issuance "evidences the appellee's intent" with Uniform Negotiable Instruments Law § 137: "Where a drawee to whom a bill is delivered for
term “certification” is preferred over “acceptance” since this is a demand instrument drawn on a bank. Since it is a quasi contract (or constructive contract) the intent of Union is immaterial, but the Uniform Commercial Code has rejected the constructive acceptance and envisions only express acceptance or certification.\textsuperscript{167}

A comment to the Code section which adopted conversion-in-place of constructive acceptance points out that it did so to avoid difficulties. The specific one mentioned results from the fact that an instrument, by being accepted, is ipso facto not dishonored. Thus, under the Uniform Negotiable Instruments law the holder — because of the “acceptance” — was without recourse against the drawer and indorsers.\textsuperscript{168} This recourse cannot be found by claiming that the buyer can be held liable for breach of warranty the same as a remitter (in this case for breach of the warranty that “no defense of any party is good against him”).\textsuperscript{169} The purchaser of a personal money order does not “transfer” it when he “issues” it. Subsequent people “transfer” his obligation. Surely the payee should have had recourse against the drawer here. Had the drawer in this case been in Oklahoma and been solvent, it would have been easier for the bank to collect there than to have to come to Little Rock. We are not told what the situation of the drawer was in Oklahoma in this case, but surely there will be solvent local drawers in future cases involving personal money orders. Nonpayment of a personal money order is a dishonor and the drawer should be liable on the instrument.

Another problem has to do with stopping payment. The Uniform Commercial Code provides that a stop order comes too late if it is received after the bank has “accepted or certified the item.”\textsuperscript{170} Surely “item” includes the money order,\textsuperscript{171} and arguably this rule will apply to it. Thus, logically, drawers cannot stop payment on

\begin{itemize}
\item acceptance destroys the same, or refuses \ldots to return the bill \ldots he will be deemed to have accepted the same.”
\item \textsuperscript{167} \textit{Ark. Stat. Ann.} § 85-3-419, Comment 1 (1961).
\item \textsuperscript{168} \textit{Id.}
\item \textsuperscript{169} \textit{See supra} note 55.
\item \textsuperscript{170} \textit{Ark. Stat. Ann.} § 85-4-303 (1961). \textit{And see} the dissent in the Sequoyah case, 274 Ark. at 6, 621 S.W.2d at 685.
\item \textsuperscript{171} \textit{Ark. Stat. Ann.} § 85-4-104. “Definitions and Index of Definitions
\begin{enumerate}
\item In this Article unless the context otherwise requires \ldots
\item “Item” means any instrument for the payment of money even though it is not negotiable but does not include money.”
\end{enumerate}
Still another problem concerns the rights of one who holds through a thief (or finder) of an unsigned personal money order which has been signed by the thief (or finder). This was the fact situation in *Garden—First National*. The thief (or finder) in one criminal case, rather than signing his own name or making up a fictitious one, forged the purchaser’s name. Under the Uniform Commercial Code, the so-called rule of *Price v. Neal* holds that if a bank pays a holder in due course of a personal check bearing a forged drawer’s signature or pays a person who has in good faith changed his position in reliance on the payment of such a check, it cannot recover the money. In the case of personal money orders, the right to stop payment gives the money order purchaser some protection against loss. If he discovers the loss of the instrument and orders the drawee to stop payment before the holder in due course presents it for payment, the holder in due course, not the purchaser loses. However, if the rule of *Price v. Neal* applies to personal money orders, it is arguable that the bank will not be able even to refuse to pay such holders in due course in Arkansas. Under the rule, acceptance as well as payment is final. Since acceptance occurs at the time of issue it will be too late to try to avoid paying those not rightfully entitled to the money. Will the bank then be able to refuse to reimburse the purchasers who ordered payment stopped? If so, people who use the “poor man’s check” will need to be re-educated on how to complete them.

Perhaps a bank should have to pay a personal money order which has been issued for a hot check. This argument was made elsewhere but the nature of the suit was not suggested. A better basis of recovery would have been in tort. The Code suggests this is a proper theory in certain cases. A New York court suggested

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172. And from the *Mirabile* case, *supra*, n.129, one must conclude either this or that banks must pay twice.
175. 3 Burr. 1354 (1762).
177. *Id.* This also conforms with § 85-4-303(1)(a), *supra* note 68.
178. *See supra* note 104, at 532.
179. *Ark. Stat. Ann.* § 85-3-409 (1961): * * *

(2) Nothing in this section shall affect any liability in contract, tort or otherwise arising from any letter of credit or other obligation or representation which is not an acceptance.
that it would hold a bank liable for failing to "observe the proper caution in issuing money orders" in return for a hot check. Such a theory confines recovery to this fact situation and would not affect the purchaser's right to stop payment. If a negligence (or any tort) theory was used at the trial level of *Sequoyah*, it is not apparent from the opinion. If it was, however, the verdict in favor of Union indicates the judge found no negligence. The Supreme Court still might have found negligence as a matter of law, and established thereby a duty on the part of the bank to collect funds for payment of the instrument. Surely, however, some evidence is necessary to show that the instrument "represents" that it will be paid.

The negligence theory, in the future, could avoid what the dissent in *Sequoyah* described as a "legal quagmire." It could be used to regulate the creation and use of other methods of payment, whether involving commercial paper or not. Recovery could also be based on estoppel once it is established by proper evidence that the business community has been led to believe that the instrument will not be dishonored because of insufficient funds.

C. Both Cases and "Stopping Payment"

A New York court was quoted above as saying that the Uniform Negotiable Instruments Law did not provide that a drawee could "stop payment" on a check unless ordered to do so by the drawer. In the *Sequoyah* case, the Arkansas court also quoted that case and in its concluding paragraph added that "[banks are not allowed to stop payment on their depositor's checks . . . ."] In the *Canal* case the court said, "As maker and drawee of the instrument, Canal could not countermand the draft." From the above material, it can be seen that these statements are misleading. Since the countermand or the stop payment order is an order given to the drawee, the drawee (as the one giving and receiving the order) may tell itself what it pleases and may obey orders from itself as it pleases. We need to go further, however.

Since it was the dishonor of the instruments that caused the drawee's problems to arise in these cases, the two statements to be

181. 274 Ark. at 6, 621 S.W.2d at 685.
183. 278 Ark. at 4, 621 S.W.2d at 684.
184. 266 Ark. at 1052, 596 S.W.2d at 714.
185. *See supra* note 65.
properly examined, need to be reworded to state the rule in that light. As was pointed out above, the rules concerning stopping payment on and dishonor of cashier's checks are in dispute.\(^{186}\) By analogy the same can be said of rules concerning bank money orders. Yet some rules are clear. Taking the statement of the Court of Appeals in the *Canal* case and substituting “dishonor” (or “refuse to pay”) for “countermand,” the statement becomes: “As maker and drawee of the instrument, Canal could not dishonor (or refuse to pay) the draft.” This, as a broad general statement, is incorrect as shown above.\(^{187}\)

The error may be further illustrated by considering the reason in the *Canal* case for the argument against negotiability. Had the First National Bank of Fort Smith not been a holder in due course, the proper result of the case would have been that not only *could* Canal dishonor, it *should have*. The bank would not have had an enforceable claim to the money.\(^{188}\) To return to an earlier illustration, even if the bank had fulfilled the other requirements of being a holder in due course, it could not have won if the payee’s indorsement had been forged since it would not have been a holder.\(^{189}\) This is because the rule mentioned there applies to a bank money order or cashier’s check. Thus, the statement was so broad it was misleading. A narrow one would have been better.

Direct liability of the drawer alone did not forbid dishonor. However, once the court determined that the instrument was negotiable, the depository bank’s position as a holder in due course (which the court noted)\(^{190}\) allowed it to win, since the insurance company’s defense was only a personal one.\(^{191}\) A correct statement could have been made that was narrow enough to cover this. It could have been, “Since a drawee must pay the holder in due course of an instrument on which it is directly liable and on which there is no real defense, it is liable in this case even though it dishonored the draft.”\(^{192}\)

\(^{186}\) See *supra* note 97.

\(^{187}\) See *supra* text accompanying notes 95 and 100.

\(^{188}\) Ark. Stat. Ann. § 85-3-306(b) (1961). And the insurance company had a defense good against Marlar. See *supra* text accompanying notes 95 and 97.

\(^{189}\) See *supra* text accompanying notes 98 and 100.

\(^{190}\) 266 Ark. at 1052, 596 S.W.2d at 714.

\(^{191}\) See *supra* note 75.

\(^{192}\) The knowledgeable ones may object that this does not take into account *jus tertii* claims where e.g. a claimant has supplied indemnity under Ark. Stat. Ann. § 85-3-603 (1961). But it is not clear how the Arkansas court would rule on this in the case of an instrument on which the drawee is directly liable to holders.
Now consider the statement of the Arkansas Supreme Court in the *Sequoyah* case. 193 Change that statement by substituting “dishonor” (or “refuse to pay”) for “stop payment.” Then acknowledge that banks are required by the Uniform Commercial Code to dishonor checks when the drawer issues a stop order. 194 The resulting statement is: “Banks are not allowed to dishonor or refuse to pay their depositor’s checks in the absence of a stop payment order.” This may be what the court meant. Yet this statement is in error too. To repeat, banks may dishonor or refuse to pay checks without prior stop orders in the instances illustrated above. 195

A better statement would have taken into account two prior conclusions of the court: (1) that Sequoyah Bank was a holder in due course 196 and (2) that Union Bank was liable on the instrument because it had accepted it. 197 That statement would have been almost the same as the one recommended for the *Canal* case: “Since a drawee must pay the holder in due course of an instrument on which it is directly liable and on which there is no real defense, it is liable in this case even though it dishonored the personal money order.”

V. PREVENTING NEGOTIABILITY

If the insurance industry wants “payable through” drafts not to be negotiable, the Code provides an easy way to accomplish this. The last section of Article 3 provides that if the instrument is not payable to order or to bearer, the Article still applies to it but there can be no holder in due course of the instrument. 198 Had such an instrument been involved in the *Canal* case, the bank would not have had a right to recover. 199

VI. SUMMARY AND CONCLUSION

As applied to the drawee of commercial paper, the rule that no person is liable on an instrument unless his signature appears on it, means that without an acceptance (or certification) the drawee is not liable. As a consequence, unless there has been an acceptance or

193. *See supra* text accompanying n. 183.
195. *See supra* text accompanying notes 91 and 95.
196. 274 Ark. at 2, 621 S.W.2d at 683.
197. 274 Ark. at 4, 621 S.W.2d at 684.
certification, the drawee is not liable to a holder for dishonoring the instrument, even if the dishonor is wrongful. Some courts hold that when the drawee is also the drawer, the signature as drawer is equivalent to an acceptance at the time of issue of the instrument. Thus, cashier’s checks and bank money orders are considered as accepted or certified instruments.

Not everyone uses the word “acceptance” in the sense of the Uniform Commercial Code. It may appear on an instrument under conditions indicating that it is used with the layman’s meaning of “approval” (although oral or even “tacit”). The Arkansas Court of Appeals, in *Canal Insurance Co. v. First Nat’l Bank of Fort Smith*,200 interpreted the word as being used in its Code sense although the circumstances indicated that it was being used in its layman’s sense. It reached the correct result in the case, however.

Regrettably, the Arkansas Supreme Court in *Sequoyah State Bank v. Union Nat’l Bank*201 found a drawee liable on a personal money order even though the drawee’s signature did not appear on it. This was constructive acceptance, a concept the Uniform Commercial Code has rejected. Although a drawee who does not sign it cannot be liable on the instrument, he may be liable to a holder in tort. However, since there was no finding of tortious conduct in this case, the decision cannot be justified. It based its decision to employ constructive acceptance on a so-called custom, but there was no evidence of such a custom in the two jurisdictions where the personal money order was used. The decision opened the door to potential problems and hopefully will not serve as a guide to future cases. Both cases contained misleading statements concerning stopping payment. A good guide on this point is found elsewhere in the statement that “it would be well for the courts to eschew the phraseology of ‘stopping payment’ when considering the question of a bank’s right to decline to pay.”202

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200. 266 Ark. 1044, 596 S.W.2d 710 (Ark. Ct. App. 1979); aff’d 268 Ark. 356, 596 S.W.2d 709 (1980).
201. 274 Ark. 1, 621 S.W.2d 683 (1981).
202. Fox, supra note 51, at 697.