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difficult to justify holding a contractor liable absolutely when blasting results in injury, while at the same time granting him immunity from liability for damages resulting from dredging or other direct invasions of property. Certainly a contractor compelled to use explosives by his contract with the state is no more at fault for resulting injury than for that caused by the grading of roads, the movement of heavy equipment, or the changing of a river's course. The contractor has no choice as to the means or methods to be used, since they are set out in the terms of his agreement, and it certainly is a harsh rule which holds one liable for merely fulfilling his contractual obligations. If explosives cause damage, the government which designated their use should pay for the resulting injury, and not the contractor-agent who simply followed instructions. The federal government and many states, under acts similar to the Federal Tort Claims Act, have waived their immunity from suit in certain instances; it is suggested that this should be one such instance. If this were done, the contractor would be relieved of a questionable liability and the injured party guaranteed a fair recovery.

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INADVERTENCE AS A BASIS FOR DRAWEE BANK LIABILITY

When the Uniform Negotiable Instruments Law was passed, it was intended to serve a dual purpose: (1) to solve the problems arising from the Law Merchant and (2) to codify common law decisions affect-negotiable paper. While it did in fact solve many problems, it contained principles which have given rise to much additional litigation. One of the more crucial problems arising under the NIL is whether inadvertent drawees are included in Section 137, which provides:

> "Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same."[1]

In *General Finance Corp. v. Central Bank & Trust Co.*[2] the Court

[1]This is the exact wording of § 137 of the Uniform Negotiable Instruments Law as originally written by Crawford. Some states have accepted it in its entirety without changing any of the wording, whereas other states, as will be shown in this comment, have modified the wording.

[2]264 F.2d 869 (5th Cir. 1959).

of Appeals for the Fifth Circuit recently dealt with this problem. General Finance on July 17, 1957, deposited and received credit in its account at the First National Bank for a check drawn on the Central Bank and Trust Company. On July 18, First National presented the check to Central for payment, and Central paid the item conditionally by entering a bank credit in favor of First National. On July 22, the check was returned for insufficient funds, and First National charged the check back to its depositor. General Finance objected to the charging of this item against its account, claiming that under Florida law[3] the holding of a check by the payor bank beyond the time allotted by statute constituted final payment. The United States District Court for the Southern District of Florida rejected this contention and found for the defendant, stating that this was a deferred posting statute providing for conditional crediting.[4]

The Court of Appeals for the Fifth Circuit reversed this decision, stating that while this was in fact a deferred posting statute, appellee fell within the express exception to the statute, rather than within its ameliorating provisions.[5] The court held that under the express exception a check shall be deemed accepted by a drawee bank when it is *re-*

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[3]This case involved the interpretation of Fla. Stat. Ann. §§ 676.07, 676.08, 676.48, 676.55 (1945). This comment places special emphasis upon § 676.55 which is the Florida clarification to § 137 of the NIL.

[4]163 F. Supp. 372 (S.D. Fla. 1958). There was no privity between General Finance and Central, and the only rights that General Finance had against Central were those that First National would have had against Central. Thus, by holding that this was a deferred posting statute, the court barred recovery from Central by First National as well as by General Finance.

[5]"Appellees here contend that this statute is not at all what its title calls it, but is a deferred posting statute. We understand this argument to be that, without some statutory provision to the contrary, the payment of a check either by cash or entry of a credit to the amount of the depositor or collecting bank (here the credit to First National entered by Central on Thursday) would amount to irrevocable final payment by the drawee, and thus it would greatly interfere with prompt banking practices in today's commercial world if the state of the drawer's account must be carefully checked and a simultaneous charge be posted there when cash or credit was given to the depositor or collecting bank; that to prevent this as between a bank and its depositor the deposit contract was devised, thus making the deposit subject to final payment; and as between payor and the drawer a deferred posting statute made the transaction subject to reversal until an actual charge to the account of the drawer was posted on the books. It may well be that the legislature did intend to accomplish this objective in adopting Section 676.55; and undoubtedly it accomplished this result.... But the difficulty of Central's theory is that the act which gave the right to deferred posting also put a limit on the time during which the delay could be extended.... But on the facts of this record it [Central] did not come within its ameliorating terms, because it fit rather into the exception 'unless * * * such item is retained by the drawee or payor bank longer than the end of the business day following its receipt * * *.'" 264 F.2d at 874-75.

tained beyond the end of the business day following the day of receipt.[6] Thus Florida, by statute, has aligned itself with the present majority of states which through judicial interpretation have given this same meaning to state negotiable instrument statutes similar to the controversial Section 137 of the NIL.

Before considering the conflict which has arisen from the various interpretations of Section 137, it would be advisable to compare this section as originally written with the subsequent Florida clarification. A literal reading of Section 137 seemingly precludes holding a drawee bank liable for inadvertence, but this interpretation definitely contravenes the law today in most states. On the other hand, the Florida statute uses "retained" rather then "refuses" in order to show that negligence of the drawee is a basis for liability, and is worded in this manner:

> "A check or draft received for deposit or collection by a solvent payor or drawee bank shall not be deemed *paid or accepted* until the amount is charged to the account of the maker or drawer unless, though not so charged, such item is *retained* by the drawee or payor bank longer than the end of the business day following its receipt."[7]

Thus it is evident that a conflict exists between the majority interpretation of Section 137, adopted by statute in Florida, and the literal interpretation supported by the minority of jurisdictions.

According to the Law Merchant, an acceptance might be written or oral or implied from the conduct of the parties.[8] However, a drawee could retain a bill of exchange presented for acceptance indefinitely unless a demand for its return was made.[9] Retention of the instru-

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[6]Id. at 874. "We think, in effect, the legislature, recognizing the ambiguity existing under Sections 136 and 137, as shown by the conflicting decisions, determined to set the matter at rest by saying that a check received by a solvent drawee bank for deposit or collection (not for acceptance) has the option of charging it against the drawer's account, paying it and carrying it as an overdraft or returning it by the end of the business day following its receipt, in default of which it will be held liable as having paid it."

Earlier on page 874, the court stated that "under this section [676.55] there is no payment or acceptance without an actual charge to the account of the drawer until the end of the business day following receipt of the item, thus eliminating the 24 hour rule as to such an item, and settling by statute the dispute as to the proper construction of Section 137 by using the word 'retain' instead of 'refuse to return.'"

[7]Fla. Stat. Ann § 676.55 (1945), further clarifying Fla. Stat. Ann. § 676.08.

[8]Feezer, Acceptance Of Bills Of Exchange By Conduct, 12 Minn. L. Rev. 129, 130 (1927); Thulin, Form of the Acceptance, 14 Mich. L. Rev. 455 (1916).

[9]Williams v. Gallyon, 107 Ala. 439, 18 So. 162 (1895); Holbrook v. Payne, 151 Mass. 383, 24 N.E. 210 (1890); Jeune v. Ward, 1 Barn. & Ald. 653, 106 Eng. Rep. 240 (K.B. 1818); Mason v. Barff, 2 Barn. & Ald. 26, 106 Eng. Rep. 277 (K.B. 1818).

ment under certain circumstances constituted a conversion, but inadvertence alone was not enough.

Prior to the enactment of the NIL, the phrase "refuses to return" was interpreted in New York,[10] Missouri,[11] and Arkansas[12] to be a codification of the common law. This view, which at one time was the overwhelming majority but has now become a rather small minority, serves as a basis for the traditional solution to the problem of interpreting statutes of this type.[13]

The current majority view, adopted by statute in Florida, had its origin in the 1908 Pennsylvania case of *Wisner v. First Nat'l Bank*,[14] in which the Pennsylvania Supreme Court said that the purpose of Section 137 was to fix a definite time limit for accepting or refusing the bill, and held that inadvertence of the drawee bank was a sufficient basis for the imposition of liability.[15] This decision, held applicable to checks as well as other instruments,[16] was so novel that in 1909 the legislature amended the negotiable instruments law so as to provide that mere retention of the instrument would not be a sufficient basis for the imposition of liability.[17] Some states adopted the

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[10]In regard to the early New York statutes, see Matteson v. Moulton, 79 N.Y. 627 (1880). The court states that "the refusal mentioned in the statute ... refers to something of a tortious character, implying an unauthorized conversion of the bill by the drawee." Matteson v. Moulton, 11 Hun 268, 270 (N.Y. Sup. Ct. 1877).

[11]Dickinson v. Marsh, 57 Mo. App. 566 (1894).

[12]St. Louis & S.W. Ry. v. James, 79 Ark. 490, 95 S.W. 804 (1906).

[13]When Illinois and South Dakota adopted the NIL, Section 137 was omitted to preclude the general problem which this comment discusses.

[14]220 Pa. 21, 68 Atl. 955, 17 L.R.A. (N.S.) 1266 (1908).

[15]68 Atl. at 958. "It is apparent, we think, that in the enactment of this section of the statute the Legislature regarded the presentation for acceptance as a demand for an acceptance, which, when the bill is retained by the drawee, implies a demand for its return within the time specified, and that, therefore, the neglect or failure to return is a refusal to return the bill.... The Law Merchant discourages laches in parties to negotiable paper, and demands prompt action in the performance of the duties imposed upon them. It was not the intention of the Legislature in the enactment of the negotiable instruments law to abolish this rule, and to encourage delay or inaction in the holder or drawee of such paper. The intention of the section in question [§ 137] was to expedite action by the drawee in accepting or refusing a bill presented and retained by him, and to fix a definite time, which had previously been uncertain, in which he should act on the bill.... The drawee must, therefore, act within 24 hours from the date of the delivery of the bill...."

[16]Id at 597. "The contention of the defendant that Section 137 of the act does not apply to a check presented to the drawee bank for payment is answered adversely to its position by the act itself."

[17]Pa. State. Ann. tit. 56, § 326 (1930). "Provided, That the mere retention of such bill by the drawee, unless its return has been demanded, will not amount to an acceptance; And provided further, That the provisions of this section shall not apply to checks."

Wisner rule, notwithstanding its change by legislation,[18] while others continued to adhere to the more traditional view that retention alone was not an acceptance.

There were generally two lines of reasoning used by courts which reached decisions contrary to *Wisner*. The first was that as a matter of statutory interpretation mere retention is not sufficient to constitute acceptance, for the statute itself uses the word "refusal," which is synonymous with the idea that a conversion must take place.[19] The second reason was that presentment for acceptance was not the same as presentment for payment.[20] This distinction is based upon the fact that checks are presented only for payment, whereas time limits in most statutes apply to presentment for acceptance of a bill of exchange.

Numerous other criticisms are suggested by these courts declining to follow the *Wisner* interpretation. One such criticism is that although a conversion was not necessary, mere physical reception is not sufficient because additional acts are prerequisite to implying an acceptance.[21] Another criticism is that the *Wisner* view contravenes the intent of the drafters to make the NIL exemplative of the common law.[22] Those courts rejecting *Wisner* find additional support in Section 132,[23] which

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[18]Miller v. Farmer's State Bank, 165 Minn. 339, 206 N.W. 930 (1925); Blackwelder v. Fergus Motor Co., 80 Mont. 374, 260 Pac. 734, 740 (1927); First State Bank v. Black Bros. Co., 187 Okla. 224, 101 P.2d 802 (1940); American Nat'l Bank v. National Bank, 119 Okla. 149, 249 Pac. 424 (1926); Mt. Vernon Nat'l Bank v. Canby State Bank, 129 Ore. 36, 276 Pac. 262, 63 A.L.R. 1133 (1929). For a more complete listing of cases following Wisner see Brannan, Negotiable Instruments Law § 137 (7th ed. Beutel 1948).

[19]Matteson v. Moulton, 79 N.Y. 627 (1880); Peoples Nat'l Bank v. Swift, 134 Tenn. 175, 183 S.W. 725 (1916); Westberg v. Chicago Lum. & Coal Co., 117 Wis. 589, 94 N.W. 572 (1903). See notes 11 and 12 supra.

[20]Illinois Trust & Sav. Bank v. Northern Bank & Trust Co., 214 Ill. App. 440 (1919); Kentucky Title Sav. Bank & Trust Co. v. Duvanan, 205 Ky. 801, 266 S.W. 667 (1924); First Nat'l Bank v. Talley, 111 Tex. 291, 285 S.W. 612 (1926); Lone Star Trucking Co. v. City Nat'l Bank, 240 S.W. 1000 (Tex. Civ. App. 1922).

[21]Hibbard v. Parciak, 94 Conn. 562, 109 Atl. 725 (1920); Whitewater Comm. & Sav. Bank v. United States Bank, 224 Ill. App. 26 (1919) (did not allow an implied acceptance and required an affirmative act of acceptance in writing); Southern Creosoting Co. v. Chicago & A. R.R., 205 S.W. 716 (Mo. 1918); Foley v. New York Sav. Bank, 79 Misc. 220, 139 N.Y. Supp. 915 (Sup. Ct. 1913).

[22]Feezer, Acceptance Of Bills Of Exchange By Conduct, 12 Minn. L. Rev. 129, 133 (1927).

[23]Section 132 of the NIL provides: "The acceptance of a bill is the signification by the drawee of his assent to order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money." A complaint which fails to allege a written acceptance of a bill of exchange does not state a cause of action against the drawee. Wadhams v. Portland, V.&Y. Ry., 37 Wash. 86, 79 Pac. 597 (1905).

precludes any inference of acceptance by implication by providing that an acceptance must be signed by the drawee, and in Section 150,[24] which provides that upon non-acceptance of the bill within the prescribed time, one must treat the bill as dishonored. Thus it is maintained that since the overall statute is concerned only with tortious refusals and not inadvertence, the exception should also logically refer only to tortious refusals.

On the other hand, there are quite cogent reasons for the further promulgation of the *Wisner* ruling. One important reason stated in that case was that making the drawee bank act more expeditiously would accelerate the entire collection process. During the period that the drawee bank has possession of the check, but prior to its acceptance, the drawer might place a stop order against the payee or withdraw all his funds from the bank, or the bank might find it necessary to assert a banker's lien on the drawer's account. These reasons point up the fact that the collection process should be as rapid as possible in order to protect the payee.

The Uniform Commercial Code, which has been adopted by several states, has eliminated the controversial Section 137 of the NIL,[25] as well as other related sections.[26] Under the Uniform Code an acceptance must be in writing, but the drawee bank can be held liable if it is a converter.[27] Liability as a converter is imposed when the drawee bank

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[24]Section 150 of the NIL provides: "Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by nonacceptance or he loses the right of recourse against the drawer and endorsers." According to a law review note, "It would seem that not only by its own provisions does Section 137 fail to make mere retention operate as an acceptance but taken along with Section 150 it is intended to be understood as meaning that acceptance must be something more than mere inaction upon the part of the drawee." 12 Minn. L. Rev. 129, 133 (1927). Inadvertent destruction of the bill was not sufficient to impose liability. Bailey & Co. v. Southwestern Veneer Co., 126 Ark. 257, 190 S.W. 430 (1916).

[25]Uniform Commercial Code §§ 3-410, 3-419.

[26]Uniform Commercial Code § 3-410 provides:

> "(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.
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> (2) A draft may be accepted although it has not been signed by the drawer or is otherwise incomplete or is overdue or has been dishonored.
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> (3) Where the draft is payable at a fixed period after sight and the acceptor fails to date his acceptance the holder may complete it by supplying a date in good faith."

[27]Uniform Commercial Code § 3-410, comment, says that original § 137 has been eliminated, but the drawee may be liable for a conversion of the instrument under § 3-419.

refuses to return the instrument on demand, or pays on a forged instrument, or when the instrument is delivered to any person who, in turn, refuses either to pay or return the instrument upon demand.[28] The Uniform Code emphasizes that the purpose for eliminating Section 137 was to make it clear that no one is liable on an instrument unless and until he has signed it, a signature being prerequisite to the acceptance.[29]

The framers of the Uniform Code saw fit to adopt the older view that retention alone is not sufficient for acceptance, and this too could be advanced as an argument against adoption of the rule which Florida now has by statute. There is a good possibility that other states may adopt the Uniform Code and that this law may supplant the present majority rule within the next decade. It should be noted that since Pennsylvania had adopted the Code in its entirety,[30] the *Wisner* interpretation probably would not be law in that state today.[31]

Florida, by statute, has clearly expressed itself with regard to the problem. By the use of the word "retain" in its statute, Florida has expanded the basis of liability to include both misfeasance and nonfeasance by providing that negligent nonaction, as well as other tortious conduct, will be sufficient to hold the drawee bank liable in the event that there are insufficient funds in the drawer's account. Moreover, the Florida statute has eliminated the argument that the NIL, as adopted by many states, applies only to presentment for acceptance and not to presentment for payment by expressly providing in the statute that a check shall not be deemed "paid or accepted" until other requirements have been met.

Thus, since 1908 and the *Wisner* decision, the common law rule that inadvertence alone was not sufficient to hold a drawee liable when he fails to accept or refuse an instrument in the time allotted has steadily declined in acceptance to the extent that the present majority rule, adopted by statute in Florida, is that inadvertence alone is a sufficient basis for imposing liability. However, it should be noted

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[28]Uniform Commercial Code § 3-419(1).

[29]Id. at comment 1, 2.

[30]Pa. Stat. Ann. tit. 12A, §§ 3-410, 3-419 (1954), repealing Pa. Stat. Ann. tit. 56, § 326 (1930).

[31]"Since the enactment of the Amendment to Section 137 in 1909, no Pennsylvania case has been found which expressly adjudicated this controversy.... Although it is now clear in Pennsylvania that an acceptance must be in writing to fall within the statute... [the] holding does not preclude the finding of an acceptance... on the basis... of conduct." Sherman, Drawee's Liability for Retention of a Check versus the Pennsylvania NIL, 12 U. Pitt. L. Rev. 522, 524-25 (1951). However, this writing was prior to Pennsylvania's adoption of the Uniform Commercial Code.