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The City Clearing House: Problems Concerning Nonmembers

Fletcher R. Andrews

It is assumed that the reader of this article is familiar with the operations of the city clearing house. A previous article deals with that subject in detail.¹

In addition to its use by member banks, the facilities of the clearing house are regularly used by nonmembers. In describing this nonmember use and discussing the problems arising therefrom, two main topics will be considered. The first concerns the effect of clearing house rules on nonmembers; the second deals with check clearing by members for nonmember banks.

Effect of Clearing House Rules on Nonmembers

There have been many general statements among the authorities to the effect that bank customers and depositors, being nonmembers of the clearing house, are not bound by and may not take advantage of its rules.² Like many other general statements in the law, this one is inaccurate and misleading. Of course it is obvious that the statement is correct with regard to many situations covered by the rules. For example, a customer of one of the member banks is not affected by a regulation requiring members to pay a share of the expense of operating the clearing house, nor is he entitled to collect a fine levied under the rules against an erring member. But there are instances in which the applica-

¹See Andrews, The Operation of the City Clearing House, 51 Yale L. J. 582 (1942).
²See, for example, Louisiana Ice Co. v. State National Bank of New Orleans, 1 McGloin 181, 187 (La. 1881); Merchants’ National Bank v. National Bank of the Commonwealth, 139 Mass. 513, 518, 2 N. E. 89, 90 (1885); Overman v. The Hoboken City Bank, 30 N. J. L. 61, 63 (Sup. Ct. 1862); Columbia-Knickerbocker Trust Co. v. Miller, 215 N. Y. 191, 196, 109 N. E. 179, 180 (1915); Peo. v. St. Nicholas Bank, 77 Hun 159, 171, 174, 28 N. Y. Supp. 407, 413, 415 (1894); Brady, Bank Checks (2d ed. 1926) 503; 6 Zollman, Banks and Banking (Perm. ed. 1936) Sec. 3943 (recognizing, however, that the rules may have a bearing on rights of third persons).
tion of a clearing house regulation may and should affect the rights and liabilities of customers.

This proposition may be rationalized by a consideration of the effect of banking customs upon depositors; for after all, clearing house rules are merely banking customs put into writing.

If a person contracts to be bound by certain customs, no argument need be advanced for the conclusion that he is bound by them. It is usually upon this basis that nonmember or "associate" member banks using the services of member banks as clearing agents become subjected to the regulations of the association. However, even though the nonmember bank does not expressly agree to be bound, the very fact that it asks and receives permission to utilize the services of the clearing house through the agency of a member bank constitutes a tacit assent to the rules.

If a person dealing with a bank is aware of the existence of a custom applicable to the transaction involved, he should be presumed to have contracted with reference to it. Furthermore, regardless of knowledge, a person making use of the bank collection system should be held to consent by implication to its reasonable customs and usages, whether informal or adopted in the shape of clearing house regulations. An excellent state-

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3 No attempt will be made to canvass this field outside of the clearing house cases.
4 As examples, see CLEVELAND CLEARING HOUSE ASSOCIATION CONST. ART. III, Sec. 8 (1948) (must agree to comply with constitution, rules and regulations); MILWAUKEE CLEARING HOUSE ASSOCIATION ARTICLES OF ASSOCIATION Secs. 12, 13 (1947) (must file board resolution agreeing to abide by articles, by-laws, and rules); NEW YORK CLEARING HOUSE ASSOCIATION CONST. ART. IX, Sec. 3 (1948) (must agree to be bound by all provisions of constitution and all rules and regulations affecting clearing nonmembers); Davenport v. National Bank of Commerce in New York, 127 App. Div. 391, 112 N. Y. Supp. 291 (2d Dep't 1908), aff'd without opinion, 194 N. Y. 568, 88 N. E. 1117 (1909); Stuyvesant Bank v. National Mechanics' Banking Ass'n, 7 Lans. 197 (N. Y. 1872) (subjecting non-member to action of clearing member in accepting late return); Moore v. American Savings Bank and Trust Co., 111 Wash. 148, 189 Pac. 1010 (1920).

In Mount Morris Bank v. Twenty-Third Ward Bank, 172 N. Y. 244, 64 N. E. 810 (1902), an action between two nonmembers each of which cleared through a member, the parties admitted that they were bound by the clearing house rules.

5 German National Bank v. Farmers' Deposit National Bank, 118 Pa. 294, 12 Atl. 303 (1888) (point apparently considered so obvious that not even discussed). No contrary authority has been found. A statement in Geibe v. Chicago Lake State Bank, 160 Minn. 89, 199 N. W. 514 (1924), that the nonmember becomes bound by the rules of which it has knowledge, should not be taken as implying that the nonmember is not bound by all the rules. In the particular case the drawee bank argued that presentation of a check to its clearing agent was not a valid presentation to the drawee. The argument obviously was without merit, for the appointment of the clearing agent was for the very purpose of authorizing such presentation.

ment of this view is presented in the following excerpt from *Spokane Valley State Bank v. Lutes:*

“... When a person hands over a negotiable instrument to a bank for collection without remark as to the course to be pursued, the bank is not bound to thrust upon him a statement of its intended course. Either he knows and approves of the ordinary and customary way that collections are handled by banks, or he voluntarily trusts to the wisdom of the bank in handling the matter. He impliedly consents to its collection in the usual and ordinary way.”

It is possible, then, to bring customers within the purview of the clearing house rules by invoking the implied consent doctrine. However, as will be discovered from a study of several situations directly or indirectly involving the applicability of clearing house rules and customs to nonmembers, the courts have usually succeeded in reaching a decision on some ground entirely independent of the implied consent doctrine.

Take, for example, the validity of a presentment for payment made through the clearing house. In a previous article the conclusion was reached that such a presentment complies with the law. In a sense this result may be said to subject the drawer or indorser, who are nonmembers of the clearing house, to the banking custom of presentment through the clearing house and to the rules of the Association with respect thereto. Likewise, a nonmember payee is benefited by the custom and rules, for direct presentment is dispensed with. Yet the decisions do not consider the question of express or implied consent. Indeed, they do not even discuss the applicability of clearing rules and customs to nonmembers. They are based simply on the theory that under the law of negotiable instruments certain requirements are necessary to a valid presentment for payment, and those requirements are met by a presentment through the clearing house. Since the presentment is valid, the drawer and indorsers are liable in case the check is dishonored and the required proceedings on dishonor are taken.

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7 Mills v. Bank of United States, 11 Wheat. 431 (U. S. 1826) (custom to present for payment on fourth day after due; bank at which payable designated in note); Bank of Washington v. Triplett and Neale, 1 Pet. 25 (U. S. 1828) (same, but bank not designated; city where payable designated); Townley v. Exchange National Bank, 108 Okla. 144, 234 Pac. 574 (1925) (making test whether depositor should have known of custom; revoking credit in passbook); Spokane Valley State Bank v. Lutes, 133 Wash. 66, 233 Pac. 308 (1925) (transit item, sending check direct to drawee, etc.). But cf. National Bank v. Burkhardt, 100 U. S. 686 (1879), which, upon careful scrutiny, is not opposed to the view advocated.

The *Spokane Valley State Bank* case recognizes a division of authority but claims to be in accord with the majority view. See also Note, 61 A. L. R. 739, 756 (1929). 8 133 Wash. 66, 70, 233 Pac. 308, 310 (1925), cited supra note 7.


10 Even in Columbia-Knickerbocker Trust Co. v. Miller, 215 N. Y. 191, 109 N. E. 179 (1915), which, in connection with another issue, held that clearing house rules cannot be invoked by an outsider for his benefit, the court upheld presentment
Similarly, in deciding whether the instrument has been presented for payment within the time required to charge the drawer and indorsers, there is no reason whatever to inject into the deliberations the issue of the applicability of the clearing house rules to nonmembers. If presentment is made within a reasonable time, it is effective; otherwise it is not. This is the mandate of the law of negotiable instruments, by which all parties, whether members of a clearing house or not, are bound. If the presentment is timely, the drawer and indorsers are obligated—not because they come within the scope of the clearing house regulations, but because the presentment is timely! If the presentment is not timely, the parties are discharged for that reason, and not upon the basis that the clearing house rules do not encompass them.

In view of the above it is natural that most of the cases dealing with time of presentment for payment omit any mention of the effect of clearing house rules and customs on nonmembers. Indeed, the surprising thing is that the subject has been mentioned at all. And even the cases raising the point were decided or could have been decided on other grounds.

Thus, in *Pom and Home Savings and Loan Association v. Stubbs,* the court decided merely that the "one-day rule" applied in Missouri, and that the plaintiff's failure to abide by it discharged the drawer to the extent of his loss. But for good measure, the court threw in the remark that the clearing house rules did not govern the rights of the drawer or payee, who were nonmembers and did not contract with reference thereto.

Likewise, *Dorchester v. Merchants' National Bank of Houston* really turned upon the violation of the one-day rule. The suit was by the depositor against the presenting bank, the plaintiff contending that, by reason of the defendant's late presentment, the drawer had been discharged. The presenting bank sent the item through the clearing house on the proper day, but it reached the drawee bank after business hours due to the fact that the clearing did not take place until 2:45 p.m. Had the court stopped with through the clearing house. Of course the drawer's liability is modified by Section 186 of the Negotiable Instruments Law.

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13 See Andrews, *supra* note 9, at 101 et seq.

14 *Ibid.* Section 193 of the Negotiable Instruments Law includes the usage of trade or business with respect to such instruments as one of the criteria for determining reasonable time.

15 231 Mo. App. 87, 98 S. W. 2d 320 (1936).

16 Speaking generally, the "one-day rule" requires presentment of a local check the day after its receipt by the payee. See Andrews, *supra* note 9, at 102. Obviously, most checks presented through the clearing house are too late for compliance with the "one-day rule."

17 It is interesting to consider what rule of the clearing house the courts have in mind in raising this issue. Is it the rule that clearings are held only at stipulated hours? Or, perhaps, that items received in the morning will not be cleared until the next day?

18 106 Tex. 201, 163 S. W. 5 (1914).
the proposition that the defendant failed to comply with the one-day rule, no complications would have arisen, but the opinion went on to state that the rights of a nonmember depositor remain unaffected by clearing house rules.

In *Bank of British North America v. Haslip*, it was contended that a clearing house rule allowed an extra day for the drawee to take the check to the branch on which it was drawn. In holding that the indorser was discharged because of late presentment, the court stressed several points:

1. The evidence fell short of proving that the rule had become a usage of trade.
2. The evidence did not show that the defendant knew of the clearing house or of the plaintiff's membership in it, and the defendant could not be presumed to have contracted with reference to the rule.
3. The rule was of no effect, as not approved by the proper board.
4. A clearing house rule cannot change the law relating to time of presentment, this being the prerogative of Parliament.

In all three of the cases referred to, it seems reasonable to conclude that the remarks concerning the relationship of nonmembers to the clearing house rules played little, if any, part in the actual decision.

Most of the cases dealing with the effect of clearing house rules upon outsiders relate to the question of payment. Rather than swallow the problem whole, I will separate it into categories, based upon the various factual situations which have arisen. Consideration will be given first to cases in which the clearing house rule may be said to operate to the disadvantage of the nonmember. These in turn will be subdivided into suits between the payee and drawee and suits between the presenting bank and its indorser.

**Payee-drawee.** The typical case is a suit by the payee against the drawee bank, claiming that the latter has performed acts constituting payment, thus obligating itself to the payee. The drawee, of course, contends that no payment has occurred. Since by hypothesis the check went through the clearing house, a holding that there has been no payment may in some instances be regarded as foisting the clearing house customs and rules upon the

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28 One or two other grounds for the decision are not given here.
29 In *Marrett v. Brackett*, 60 Me. 524 (1872), the court, in upholding a presentment made through the clearing house on the second business day after receipt of the check, called attention to the drawer's knowledge of the customary method of check collection. Nothing in Negotiable Instruments Law Sec. 193 requires such knowledge.
30 The term "payee" is used to designate the holder who transferred the check to the presenting bank. Usually this is the payee, although it may be a subsequent holder.

No cases of suits between the payee and *drawer* were found.
payee. For example, it is well settled that the procedure connected with the exchange of items at the clearing house does not of itself amount to payment. In a sense this results in an extension of the clearing house rules and customs so as to include the nonmember payee. Yet the point actually decided is not that customers are bound by the clearing house regulations, but rather that the drawee's acts have not proceeded far enough to evidence an intention to transfer the credit definitively from drawer to holder. The omission from the cases of any comment on the relationship of the clearing house rules to the nonmember payee is significant, although it must be admitted that in most of the cases the court remarks that no payment occurs until the expiration of the time permitted by clearing house rules for the return of dishonored items. Considered by itself, such a proposition would seem to impose the "return time" rule on the payee, but taken in connection with the factual situation referred to above, it becomes relegated to a position of comparative unimportance.

The cases in which the drawee, after receiving the items from the clearing house, has performed acts which would fall short of payment even in a non-clearing house transaction come within the same category. Since the acts do not amount to payment in any event, the clearing house rules and their effect on outsiders are irrelevant. Nevertheless, the point has been injected into some of the opinions. In First National Bank of Philadelphia, Pennsylvania, v. National Park Bank of New York, the court agreed with the payee's contention that it was not bound by the constitution and rules of the association. But in view of the fact that the payee was denied recovery because the drawee's acts did not amount to payment, the victory


It should be noted that if a check has been paid by credit, the plaintiff's action is not upon the check, but upon the debt arising from the debtor-creditor relationship. See Aigler, Rights of Holder of Bill of Exchange Against the Drawee, 38 HARV. L. REV. 857, 873 (1925); 80 U. OF PA. L. REV. 740, 741 (1932).

23 If a statute provides for a "return time," a different situation exists, which is beyond the scope of this article. For an excellent discussion of recent legislation on delayed returns, see Leary, Deferred Posting and Delayed Returns, 62 HARV. L. REV. 905 (1949).

was rather hollow, and the court's pronouncement on the point loses most, if not all of, its significance.\textsuperscript{25}

The Ohio Supreme Court, in holding that certain acts did not amount to payment, added that the payee impliedly agreed to the Cleveland Clearing House rules and customs by depositing a Cleveland check in an Akron bank.\textsuperscript{26} The decision on the clearing house point is preferable to that rendered in the \textit{National Park Bank} case.\textsuperscript{27}

If the drawee's acts are sufficient to amount to payment in a non-clearing house transaction, but are held to fall short of payment by reason of the clearing house "return time" rule, the effect is to subject the payee to the operation of the rule. In this instance it is not so easy to find an independent ground for refusing recovery, although it might be proper to base such a judgment upon the point that since the drawee never made an \textit{unconditional} transfer of the credit from the drawer to the presenting bank, no payment occurred. Under this theory, the court would not be deciding specifically upon the applicability of the clearing house regulations to outsiders, but rather upon the independent ground that, taking all the circumstances into consideration, there was no payment. If this be too close to hair-splitting, the same result may be reached by holding that the payee impliedly consented to the clearing house rules.\textsuperscript{28}

\textsuperscript{25} The decision on the point is further weakened by the court's reliance on Columbia-Knickerbocker Trust Co. \textit{v.} Miller, 215 N. Y. 191, 109 N. E. 179 (1915), which, despite some language indicating that clearing house rules have no effect on outsiders, actually held that the exchanges at the clearing house do not constitute payment.

In \textit{Liberty National Bank of Kansas City v. Vanderslice-Lynds Co.}, 388 Mo. 932, 95 S. W. 2d 324 (1936), the court, in effect, subjected the payee to a clearing house rule permitting late returns, while, in the same breath, asserting that a nonmember cannot claim the benefit of the clearing house rules.

\textsuperscript{26} \textit{Akron Scrap Iron Co. v. Guardian Savings and Trust Co.}, 120 Ohio St. 120, 165 N. E. 715 (1929).

\textsuperscript{27} \textit{Supra}, note 24. In \textit{Lipten v. Columbia Trust Co.}, 194 App. Div. 384, 185 N. Y. Supp. 198 (1st Dep't 1920), the drawee returned a check because of an omitted endorsement. In accordance with a clearing house rule, the check was certified. The certification amounted to a promise to pay if the endorsement should be obtained. The check and a slip indicating the reason for the return were delivered to the payee by the presenting bank. The payee was unable to obtain the missing endorsement, but sued the bank upon the theory that the check had been certified. In holding that the certification was conditional, the court does not make clear whether the plaintiff was on notice of the condition from the check plus the slip, or whether he was also on notice of the clearing house rule.

\textsuperscript{28} See \textit{Akron Scrap Iron Co. v. Guardian Savings and Trust Co.}, 120 Ohio St. 120, 165 N. E. 715 (1929) (in which, however, as already noted, the acts did not constitute payment anyhow).

In \textit{German National Bank v. Farmers' Deposit National Bank}, 118 Pa. 294, 12 Atl. 303 (1888), the payee bank had a clearing agent, and therefore was bound by the clearing house regulations.

Whether the presenting bank takes as owner or agent should make no difference. In either event the payee impliedly consents to the collection routine.
Presenting bank-indorser. The cases between the presenting bank and the depositor-payee or other indorser are identical in principle with the payee-drawee cases. The presenting bank sues the depositor-payee as indorser, and the latter claims payment by the drawee, thereby relieving the indorser from liability. In holding that the check has not been paid, the court may be subjecting the payee to the clearing house “return time” rule, although, as we have seen, this is not really so where no acts ordinarily amounting to payment have occurred. Unless such an act has taken place, there is no reason for the court to discuss the applicability of the clearing house regulations to strangers.29

A Canadian court took the position that the payee-indorser’s liability to the presenting bank was discharged by an act of the drawee constituting payment independently of the clearing house. The court refused to impose the clearing house usages upon a nonmember in the absence of evidence of submission thereto.30 In my opinion the decision is wrong.

In addition to the implied consent theory, the relationship between the depositor and the presenting bank is affected in a Bank Collection Code state by Section 2 of the Code. That section authorizes the bank to revoke the credit “until such time as the proceeds are received in money or an unconditional credit given on the books of another bank, which such agent has requested or accepted.” In view of the drawee’s right to return “not good” checks, no “unconditional credit” has been given until the termination of the return period.31

When we turn to the authorities dealing with the right of a stranger to benefit by the rules of the clearing house, we encounter an immoderate amount of dicta denying the right.32 But an examination of the few decisions wherein the point was at all closely related to the issues of the lawsuit demonstrates the inaccuracy of the dicta. In fact, in two of those cases the outsider won. Hallenbeck v. Leimert33 concerned a suit by the drawee against the payee for the amount of a check which went through the clearing house and was honored by the drawee. After the “return time” the

29 Hooker v. Franklin, 2 Bos. 500 (N. Y. Super. Ct. 1858), is a typical case omitting any mention of the payee’s position as a nonmember.
31 The relationship may be determined also by recitals on deposit slips and the like.
30 No cases have been found involving a suit by the presenting bank against an endorser prior to the depositor.
31 In addition to the cases cited supra note 2, see National Union Bank v. Earle, 93 Fed. 330, 331 (E. D. Pa. 1899); Sneider v. Bank of Italy, 184 Cal. 595, 599, 194 Pac. 1021, 1022 (1920); National Exchange Bank v. Ginn and Co., 114 Md. 181, 184, 78 Atl. 1026, 1027 (1910); Manufacturers’ National Bank v. Thompson, 129 Mass. 438, 439 (1880). In the Sneider and National Exchange Bank cases the nonmember won, which more than counteracts the dicta.
drawee discovered the inadequacy of the drawer's account. On the following day the drawee unsuccessfully endeavored to induce the payee to take back the check and refund the amount. Plaintiff advanced the argument that the payment resulting from the operation of the "return time" rule applied only between members of the clearing house. In holding against the plaintiff, the Supreme Court stated that the defendant did not seek to enforce the clearing house rules, but merely asked that proper effect be given to a payment made in compliance with those rules.

The other case resulting in a victory for the outsider is In re Smith, Lockhart and Company, a suit by the drawer's trustee in bankruptcy against the drawee. The latter returned the checks to the presenting bank after the hour stipulated in the clearing house rule, but, as is often done, the presenting bank took them back and refunded. Subsequently, with knowledge of the drawer's receivership, the drawee repaid the amount of the checks to the presenting bank, upon the theory that it was legally liable to do so because it had failed to return the checks on time. The court held that the presenting bank had a perfect right to waive the return time rule. As a result of the waiver, the checks remained unpaid, and the later payment, with knowledge of the receivership, was unauthorized. With reference to the supposed rule that clearing house regulations are not binding upon nonmembers, the court said:

"The latter doctrine, however, does not imply that such rules or the practice under them may not have a bearing even where other parties are involved. In many such cases the result depends upon the time at which the check was paid, and that in its turn is often fixed by the mutual understanding of the bank which is said to have made the payment and the bank to which it has been made. To find out what that understanding was, it is frequently necessary to look to the established usage of business between them of which the rules for the government of their conduct, which they had united to make, will usually be persuasive evidence, though they will not always be conclusive. So far as concerns outsiders, at least, the decisive thing is what the members do, rather than what they say they expect to do."35

It should be noted that in each of the above cases the vital question was whether the check had been paid. This the court decided from all the circumstances, including the clearing house rules, and acts constituting a waiver thereof. That the effect might be to benefit an outsider was deemed immaterial. The check was either paid or not paid.

Even the cases purporting to uphold the alleged principle that a nonmember may not benefit from the clearing house rules depend fundamentally upon other factors. In Liberty National Bank of Kansas City v. Vanderslice-Lynds Company, for instance, the return time was 3 p. m.

24 3 F. 2d 444 (D. Md. 1924).
25 Id. at 447.
36 388 Mo. 932, 95 S. W. 2d 324 (1936).
but the rule permitted later returns if agreed to by the banks concerned. In holding that the check was not paid, and that, as a consequence, the payee could not maintain an action against the drawee, the court rattled off the stereotyped remarks about benefits and nonmembers, yet based its decision upon the late return feature of the rule. In other words, the court subjected the payee to the "late return" rule, and the question of whether he had a right to take advantage of the 3 p.m. provision was entirely irrelevant.

*Overman v. Hoboken City Bank*, which has played a large part in the creation and development of the alleged rule prohibiting nonmembers from benefiting by clearing house customs and regulations, is also a bit "off-center" when carefully analyzed. The payee, in a suit by him against the drawee bank, contended that the drawee’s failure to return the check before a certain time designated by clearing house custom constituted payment. The drawee had returned the check the day after clearance, and the presenting bank had acceded to the late return and made reimbursement. Although the court did state the proposition that a nonmember cannot avail himself of an obligation created by the members among themselves through their own usages, it held that the usage was defectively pleaded, and, as pleaded, did not embrace the facts of the case.

It seems to me that the late return problem can be solved without resort to the question of whether the nonmember may take advantage of the clearing house regulations. We have already seen that the depositor, by delivering his check to the presenting bank, impliedly consents to banking customs. Accepting late returns is one of those customs. Furthermore, in deciding whether as a matter of fact payment has been made, there is no reason for courts to ignore arrangements between banks relating to late returns. The depositor is not misled, for, as a practical matter, he has probably never heard of the rule stipulating a time limit for returns.

*Columbia-Knickerbocker Trust Company v. Miller*, another frequently cited authority, also collapses when closely examined. The drawee returned the check on time, as a result of which it could not be argued logically that payment had occurred. The depositor, sued as indorser by the presenting bank, contended that the clearing house rules did not permit the dishonor and return of an item for the reason given, i.e., suspension of business by the drawer, and that consequently the check was paid. Although the court descanted upon the "stranger-no benefits" theme, the fact was that the drawee had dishonored the instrument.

Looking at the authorities as a whole, then, it becomes apparent that the oft-reiterated doctrine denying to nonmembers the benefits of clearing

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30 N. J. L. 61 (Sup. Ct. 1862).

A number of bankers have so informed me.

house rules and customs should be taken with a large dose of salt. In some instances nonmembers have actually received the benefit of such rules and customs; and in cases where they have not been allowed to take advantage thereof, the decisions have really been reached upon other grounds.

**Clearing for Nonmember Banks**

Most clearing house associations have an arrangement whereby nonmember banks approved by the association or its clearing house committee may clear their items through a member bank.\(^4\) This plan is helpful to banks whose size or volume of business is too small to justify their joining the association, for although a fee is ordinarily charged, the expenditure is much less than that incurred by the regular members.\(^4\)

The operation of the plan is simple. Checks held by the nonmember against member banks are delivered to the clearing member and sent through the clearing house along with its other items. Conversely, checks drawn on the nonmember are presented through the clearing house to the clearing member and charged against it on the clearing house sheets. Most associations stipulate in their regulations that the member bank shall be regarded as the agent of the nonmember and shall be responsible for the latter's obligations.\(^4\)

To secure the clearing agent against possible loss resulting from the nonmember's insolvency and consequent inability to reimburse the member

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\(^4\) Sometimes the non-clearing banks are designated by some such name as associate member or participating member.

\(^4\) See 2 CONANT, PRINCIPLES OF MONEY AND BANKING 244 (1905) (stating that in 1901 there were 79 nonmember banks and trust companies in New York and vicinity clearing through members); SPAHR, THE CLEARING AND COLLECTION OF CHECKS 390 (1926).

For example of nonmembers' fees, see BUFFALO CLEARING HOUSE ASSOCIATION CONST. Art. II, Sec. 3 (4) (1945) ($100 annually); CLEVELAND CLEARING HOUSE ASSOCIATION CONST. Art. III, Sec. 4 (1948) ($50 annually); DALLAS CLEARING HOUSE ASSOCIATION CONST. AND BY-LAWS Art. X, Sec. 3 (1949) ($100 annually); MILWAUKEE CLEARING HOUSE ASSOCIATION BY-LAWS Sec. 6 (1947) ($25 annually); MINNEAPOLIS CLEARING HOUSE ASSOCIATION CLEARING RULES Sec. 11 (1941) ($50 annually); NEW YORK CLEARING HOUSE ASSOCIATION CONST. Art. IX, Sec. 3 (1948) ($1500 annually).

\(^4\) For instances of a provision that the clearing bank is the agent of the nonmember, see MILWAUKEE CLEARING HOUSE ASSOCIATION ARTICLES OF ASSOCIATION Sec. 12 (1947); MINNEAPOLIS CLEARING HOUSE ASSOCIATION CLEARING RULES Sec. 10 (1941); NEW YORK CLEARING HOUSE ASSOCIATION CONST. Art. IX, Sec. 5 (1948). Voltz v. National Bank of Illinois, 158 Ill. 532, 42 N. E. 69 (1895), is among the cases recognizing the agency relationship.

For examples of the common provision imposing liability on the member for the exchanges and settlements of the nonmember, see DALLAS CLEARING HOUSE ASSOCIATION CONST. AND BY-LAWS Art. XI, Sec. 3 (1949); DETROIT CLEARING HOUSE ASSOCIATION CONST. Sec. 20 (1948); LOS ANGELES CLEARING HOUSE ASSOCIATION REGULATION 3, Sec. 3.05 (1947); MILWAUKEE CLEARING HOUSE ASSOCIATION ARTICLES OF ASSOCIATION Sec. 12 (1947); NEW YORK CLEARING
for amounts advanced in connection with the nonmember's checks, the latter often pledges certain of its assets with the agent. The validity of such a pledge has been upheld against the contention that it constituted an illegal preference—a contention without merit in view of the particular facts and the nature of the statute, which forbade transfers of property with intent to create a preference, by an insolvent corporation or one whose insolvency was imminent. The banks in question did not fall within the proscribed classes at the time the pledges took place.43

In Moore v. American Savings Bank and Trust Company,44 a statute provided that no bank should have a lien against any assets of the closed bank for any payment advanced, clearance made, or liability incurred after knowledge of the bank examiner's assumption of possession. Checks drawn upon the nonmember bank were cashed by several member banks on January 30th. On January 31st the bank examiner took over the nonmember bank. The latter's clearing agent knew this. Later in the day the banks which held the checks presented them through the clearing house, and they were honored. The court held that since the clearing agent's liability to pay the checks arose as soon as they were in the hands of the presenting banks, which occurred the day before the insolvency, the lien became fixed at that moment. As a result, the statute did not apply.45

Provisions for the termination of the clearing agent's liability are generally included in the regulations of the clearing house association. In the majority of the clearing houses investigated, the liability continues until the completion of the clearings on the day after receipt of the notice of

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44 The question of ultra vires was raised in Moore v. American Savings Bank and Trust Co., 111 Wash. 148, 189 Pac. 1010 (1920), but because the parties could not be put in statu quo, the court refused to pass upon it.
45 The assets are pledged to secure the clearing member, not to benefit depositors in the failed bank. People v. Bank of Staten Island, 70 Misc. 633, 127 N. Y. Supp. 908 (Sup. Ct. 1911).
discontinuance of the agency. Since the liability and its termination are the subject of a contract, to which the nonmember assents, and since the contract is legal, the agent bank is acting properly in honoring the nonmember's checks which clear on the day after notice. Payment of the checks being lawful, the member has a right to reimburse itself from the assets previously pledged to it by the nonmember.

Some associations cut off liability on the day the notice is received. In the Moore case the clearing house rule provided that the liability should continue until the delivery to each member of a written notice of discontinuance. Nevertheless, the court interpreted the rule as imposing liability on the clearing agent for checks held by the other member banks at the time of the receipt of notice, but not cleared until the next day.

If the clearing agent is unable to reimburse itself from the pledged assets, it will naturally search for other possible victims, and, with the help of its attorney, will find authority upholding the right to recover against the drawer of the check.

In the Voltz case the clearing member dishonored the check by reason of the insolvency of the nonmember for whom it cleared. The member then paid the presenting bank on its guarantee of the items drawn on the nonmember. The presenting bank indorsed the check to the clearing member. In permitting the latter to recover against the drawer, the court stressed the point that the plaintiff had not paid the check as the drawee's agent, which would have amounted to a discharge; but rather had fulfilled its obligation as guarantor, which kept the check alive and permitted the

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48 See, for example, DETROIT CLEARING HOUSE ASSOCIATION CONST. Sec. 20 (1948); LOS ANGELES CLEARING HOUSE ASSOCIATION REGULATION 3, Sec. 3.05 (1947); NEW YORK CLEARING HOUSE ASSOCIATION CONST. Art. IX, Sec. 5 (1948) (until completion of 10 a.m. exchanges next day); SYRACUSE CLEARING HOUSE ASSOCIATION BY-LAWS Sec. IX (1918).

The regulations usually designate the person to whom notice must be given. Some require that it be given to each member bank, but the more usual provision is that it must be given to the manager of the clearing house. See DETROIT CLEARING HOUSE ASSOCIATION CONST. Sec. 20 (1948) (all members); LOS ANGELES CLEARING HOUSE ASSOCIATION REGULATION 3, Sec. 3.05 (1947) (manager); MINNEAPOLIS CLEARING HOUSE ASSOCIATION CLEARING RULES Sec. 10 (1941) (manager).


49 See MILWAUKEE CLEARING HOUSE ASSOCIATION ARTICLES OF ASSOCIATION Sec. 12 (1947).


52 Supra, note 50.
plaintiff to take as holder. The decision seems perfectly sound. Whether plaintiff took the check as payor or purchaser was a proper subject for determination, and from the evidence adduced, it is clear that the taking was in the latter capacity.

It is apparent from the foregoing that the relationship between the nonmember bank and its clearing agent has not given rise to extensive litigation. Doubtless this is due mainly to the rather definite provisions in the clearing house rules, to which, as previously noted, the parties bind themselves. The situation does not give rise to the problems connected with the effect of clearing house rules on strangers, as discussed in the first part of this article. The nonmember bank, clearing through a member bank, is aware of the rules and customs of clearing houses and banks. Unlike the uninitiated payee, drawer, and indorser, uninitiated in the labyrinthine maneuverings of their banker brethren, the nonmember bank—a member of the fraternity though not of the clearing house—suffers no surprise or shock when confronted with a regulation or custom operating in its favor or against it.

For the most part, then, clearing house associations have solved their own problems in connection with clearing for nonmembers, and only infrequently do they find themselves in need of the services of the courts.