

1960

## Negotiable Instruments--Application of Section 137 N.I.L. to Checks Presented for Payment

Marvin Dronzek

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>

 Part of the [Law Commons](#)

---

### Recommended Citation

Marvin Dronzek, *Negotiable Instruments--Application of Section 137 N.I.L. to Checks Presented for Payment*, 11 Wes. Rsrv. L. Rev. 502 (1960)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol11/iss3/38>

This Recent Decisions is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

Is this tribunal a representative example of the federal district courts in the South, or is it merely an atypical, isolated case? Disturbingly, the answer is not readily available, for few district courts would be so forthright as to record permanently such hostility. Because it is difficult truly to appraise the situation among all the district courts of the South, the *Henry* case can be used only to observe the way in which the civil rights problem is being met in one particular jurisdiction. It is hoped that such an approach is not employed elsewhere.

LAWRENCE M. BELL

**NEGOTIABLE INSTRUMENTS — APPLICATION OF SECTION  
137 N.I.L. TO CHECKS PRESENTED FOR PAYMENT**

Checks drawn on defendant bank were deposited in Casper National Bank to the payee's credit. The checks were mailed to defendant for collection, and after retaining them for a period exceeding twenty-four hours it refused to make payment. During this period Casper suffered losses on these checks through check-kiting operations.<sup>1</sup> Plaintiff, as Casper's subrogee, sought recovery under section 137 of the Negotiable Instruments Law.<sup>2</sup>

Section 137 provides:

Where a drawee to whom a *bill is delivered for acceptance . . . refuses within twenty-four hours after such delivery . . . to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.* (Emphasis added.)

Since the interpretation of this section has resulted in a great deal of conflict among the courts, this court was confronted with two important issues: (1) does this section extend to checks presented for payment or collection, and (2) if the answer to (1) is in the affirmative, does the mere retention of the instrument for a period exceeding twenty-four hours constitute a refusal to return, *i.e.*, constructive acceptance? The court declared itself in accord with those courts which refuse to apply section 137 to checks and other demand bills unless the presentment is for acceptance, and not for payment.<sup>3</sup> Nonetheless, the court did discuss the second issue, stating that there could not be acceptance until the drawer's account was charged and the account of the remitting bank credited. Mere retention, in and of itself, was not constructive acceptance.<sup>4</sup>

1. Check-kiting is a method used to cover the theft of cash. Here, the payee had no deposits or insufficient deposits in defendant bank and deposited the amounts in Casper National Bank. Later, he withdrew the amounts deposited before the checks had cleared the defendant bank.

2. *Fidelity & Deposit Co. v. Idaho Bank & Trust Co.*, 173 F. Supp. 70 (E.D. Idaho 1959).

3. *Id.* at 71.

4. *Id.* at 72.

The court's view on the first issue has been sustained by a number of courts on the following theories:

(1) The section speaks of acceptance, not payment, and these words have different meanings. Payment extinguishes the debt and puts an end to the paper evidencing the same. Acceptance, on the other hand, creates a new liability upon the acceptor and gives new life to the instrument.<sup>5</sup>

(2) Checks are invariably presented for payment, and presentment for payment cannot be made until the instrument is due. Instruments delivered for acceptance, however, must be delivered before maturity.<sup>6</sup>

(3) When a check is presented to the drawee, he must accept it or refuse it. In the ordinary sense of the word "accept," this means that the drawee must take or receive the check before he makes payment.<sup>7</sup> However, in the legal sense, the *acceptance* referred to in section 137 is that *acceptance* described in section 132 of the N.I.L.,<sup>8</sup> and it has no applicability to checks presented for payment.<sup>9</sup>

In addition to the above views, a few states have amended section 137, excluding its application to checks under any circumstances.<sup>10</sup> Since the above courts refuse to include checks presented for payment within the meaning of section 137, they do not consider the second issue. Instead, these courts leave to the holder only his common-law remedy for breach of contract or conversion.

*Wisner v. First National Bank of Gallitzin*<sup>11</sup> is the leading case propounding the opposite view on these two issues. Here, the drawee bank retained the checks for two days before refusing payment. The court held that section 137 was applicable to checks since there was nothing in the N.I.L. which expressly excluded checks from the meaning of that section. In fact, section 185 of the N.I.L.<sup>12</sup> would indicate that checks are subject to the provisions of section 137.<sup>13</sup> In considering the second issue, the court held that there was a conclusive presumption that the holder made a demand for the return of the check after the twenty-four hour period had elapsed; therefore, the drawee's mere retention of the check after that period

5. *Urwiller v. Platte Valley State Bank*, 164 Neb. 630, 83 N.W.2d 88 (1957); *First Nat'l Bank v. Talley*, 115 Tex. 591, 285 S.W. 612 (1926).

6. *First Nat'l Bank v. Whitman*, 94 U.S. 343 (1876); *First Nat'l Bank v. Whitmore*, 177 Fed. 397 (8th Cir. 1910).

7. *Kentucky Title Sav. Bank & Trust Co. v. Dunavan*, 205 Ky. 801, 266 S.W. 667 (1924).

8. "The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. . . ."

9. *First Nat'l Bank v. First Nat'l Bank*, 299 S.W. 856 (Tex. Comm'n App. 1927).

10. KAN. GEN. STAT. ch. 52, § 1106 (1949); MO. STAT. ANN. tit. 26, § 401.137 (1952).  
11. 220 Pa. 21, 68 Atl. 955 (1908).

12. "A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check."

13. *Wisner v. First Nat'l Bank*, 220 Pa. 21, 68 Atl. 955, 957 (1908). The court did not consider the fact that checks are usually presented for payment, whereas bills must be presented for acceptance.

constituted a refusal to return, *i.e.*, constructive acceptance.<sup>14</sup> Shortly after this holding, however, the Pennsylvania legislature overruled this decision with an amendment to section 137.<sup>15</sup> Nevertheless, *Wisner* has been followed by a number of courts, with little or no discussion of the problems involved.<sup>16</sup>

At common law, the mere retention of the instrument by the drawee, unaccompanied by other circumstances, did not constitute an acceptance. If the drawee refused to return the instrument upon a request by the holder, he might be liable for breach of contract or tortious breach of duty.<sup>17</sup> Of course, the drawee could also be liable for an implied acceptance of the instrument.<sup>18</sup> However, since acceptance imported the assumption of an undertaking, the mere physical possession of the instrument was not enough.<sup>19</sup> Acceptance could only be implied from such conduct, custom, promise, or notification which warranted the holder to understand that the drawee's retention was an acceptance.<sup>20</sup> In their interpretation of section 137, a number of courts recognize these common-law principles. Therefore, the drawee may be deemed to have accepted the instrument when he is estopped to deny an acceptance,<sup>21</sup> when he has retained the instrument for a period exceeding twenty-four hours against the holder's demand that it be returned,<sup>22</sup> or when his refusal to return is a willful refusal.<sup>23</sup> It is evident, however, that mere retention by the drawee, unaccompanied by the above affirmative acts, would not amount to a constructive acceptance.

Although it appears that the courts are split on their interpretation of section 137, the instant case is supported by better reasoning. It recognizes that section 137 provides for constructive acceptance, a remedy unknown at common law. Therefore, a strict interpretation of this section precludes its applicability to checks presented for

14. *Id.* at 29, 68 Atl. at 958.

15. PA. STAT. 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. . . ."

16. *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 (1927); *Dawson v. National Bank*, 196 N.C. 134, 144 S.E. 833 (1928); *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 (1929).

17. *Jeune v. Ward*, 1 B. & A. 653, 2 Star. 289 (1818), where the court said that acceptance is the engagement of the one party acceding to the proposition of the other; and that a refusal by the drawee could not be deemed as acceding to the proposition.

18. *Colorado Nat'l Bank v. Boettcher*, 5 Colo. 185 (1879); *Holbrook v. Payne*, 151 Mass. 383, 24 N.E. 210 (1890); *Overman v. Hoboken Bank*, 31 N.J.L. 563 (Sup. Ct. 1864).

19. *Hibbard v. Parciak*, 94 Conn. 562, 109 Atl. 725 (1920); *Mitchell Livestock Auction Co. v. Bryant State Bank*, 65 S.D. 488, 275 N.W. 262 (1937).

20. *Westberg v. Chicago Lumber & Coal Co.*, 117 Wis. 589, 94 N.W. 572 (1903).

21. *People's Nat'l Bank v. Swift*, 134 Tenn. 175, 183 S.W. 725 (1915).

22. *St. Louis Southwestern R.R. v. James*, 78 Ark. 490, 95 S.W. 804 (1900).

23. *Safety Motors, Inc. v. Elk Horn Bank & Trust Co.*, 118 F. Supp. 872 (W.D. Ark. 1954), *aff'd*, 217 F.2d 517 (8th Cir. 1954).

payment or collection. The court also recognizes that the N.I.L. has adopted the customs and rules of the law merchant, and where the common-law rules have not been expressly abrogated by the N.I.L., the customs of the law merchant govern. Therefore, in those cases where section 137 is applicable, the drawee is charged with a constructive acceptance only when his actions would have subjected him to an action at common law for breach of contract, conversion, or implied acceptance. Again, in considering policy factors, the court realizes that a broader interpretation of the section would subject our banking institutions to an undue hardship.

MARVIN DRONZEK



# WESTERN RESERVE LAW REVIEW

Volume 11, Pages 507 to 692

# WESTERN RESERVE LAW REVIEW

---

*Member, National Conference of Law Reviews*

---

## EDITORIAL STAFF

JAMES A. YOUNG, *Editor-in-Chief*

### *Associate Editors*

SHELDON I. BERNS

ROBERT A. GOODMAN

MICHAEL T. HONOHAN

GEORGE M. WHITE, *Managing Editor*

---

## BOARD MEMBERS

JAMES A. AMDUR

JOSHUA J. KANCELBAUM

LAWRENCE M. BELL

WILLIAM J. SLIVKA

WILLIAM P. JARAS

WILLIAM J. TELZROW

---

## APPRENTICES

Harvey M. Adelstein

Fred L. Kurlander

Alan I. Arnold

John O. Martin

Don P. Brown

Gerald A. Messerman

Charles J. Consiglio

Bruce L. Newman

Thomas P. Cutran

Phillip A. Ranney

George Downing

Lawrence R. Schneider

Marvin Dronzek

Reese Taylor, Jr.

Myron L. Joseph

John R. Werren

---

LAWRENCE HERMAN, *Faculty Adviser*

---

*Published quarterly by the students at THE SCHOOL OF LAW OF WESTERN RESERVE UNIVERSITY, Cleveland 6, Ohio. Copyright 1960 by Western Reserve University. Subscription: \$5.00 per annum payable in advance, \$1.50 a number; back numbers, \$1.50 each. If subscription is to be discontinued at expiration, notice to that effect should be sent to the Managing Editor; otherwise it will be renewed as usual.*