Supervening Impossibility of Performing Conditions Precedent

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SUPERVENING IMPOSSIBILITY OF PERFORMING CONDITIONS PRECEDENT IN THE LAW OF NEGOTIABLE PAPER*

To discuss conditions¹ with reference to negotiable paper is to involve the discussion in apparent self-contradiction at the outset, unless it is made clear at once that the only conditions to be considered are those incident to negotiable paper as negotiable paper, or, at the most, such additional conditions as, when they are expressed on the face of the paper, leave its negotiability unimpaired.

Conditions outside the paper must, it would seem, be omitted from treatment. The questions they present are questions not of negotiable paper, but of general contract law. The case will be one, not upon an obligation measured by a negotiable instrument, but upon a non-negotiable contract of which the negotiable instrument represents only a part, more often than not a relatively unessential part; in the case of conditional delivery, even an inoperative part.² Take, for instance, a suit on a note between maker and payee who have dealt directly with each other, where the maker can prove that the consideration for the note has failed. Disregarding the momentary procedural advantage given the payee by the presumption of consideration, the written promise to pay might as well be out of the case. Its negotiable character is immaterial. The question of supervening impossibility, and every other question, will be determined according to general contract principles. Such cases and such conditions are therefore omitted.

¹The term "condition" is intended to be used in this paper in the sense defined by Corbin in Supervening Impossibility of Performing Conditions Precedent (1922) 22 Columbia Law Rev. 421, 423: "... a fact the existence or future occurrence of which is uncertain, and in the absence of which certain contemplated legal relations will not exist." See also Corbin, op. cit., p. 421, as to the meaning of impossibility of occurrence of a condition: "Assuming that certain facts would operate as conditions of an obligor's duty as long as they are possible of occurrence, how is their operation affected by supervening impossibility?"

²Where the parol evidence rule operates, the attempted imposition of the condition is inoperative, and no question of supervening impossibility can arise.
In dealing with conditions truly specific to negotiable paper, we find one point calling for immediate attention. There seems here to be remarkably little difference as regards the effect of supervening impossibility, between express conditions, conditions implied in fact, and conditions imposed by law; indeed, in the present stage of the law on the subject, it is exceedingly difficult to tell into which of the last two categories any given condition falls, owing to the extreme of standardization toward which negotiable contracts have—at least until relatively recent times—been tending. Given the few requisites laid down in the first section of the N. I. L., and you have a negotiable instrument. Without them, without any one of them, you have no negotiable instrument. What you may have in addition is rather sharply limited. If the specified requisites, and nothing more, are present, the law of negotiable paper applies in its entirety. If anything further is present—such as an express condition—then the course of reasoning seems to run along wholly standardized lines: Does the particular addition or condition prevent the paper from being a negotiable instrument? To be concrete, does the fact that a certificate of deposit makes payment conditional “on return of this certificate properly endorsed” render the certificate non-negotiable? If not, then the relative

8 In other forms of contract there may at least be suspected the possibility in practice of such a difference. Where the case opens with a constructive condition the court in question has already proved its willingness to go outside the expressions of the parties to satisfy its sense of fairness. A fortiori may it be expected to put reasonable limitations on the condition of its own constructing. Cf. First Nat. Bk. v. McConnell (1908) 103 Minn. 340, 114 N. W. 1129. "... a person will be relieved from the performance of a duty imposed upon him by law, where the performance is rendered impossible by reason of causes for which he was not responsible, where he would not, for similar reasons, be relieved from expressed contract stipulations." Ibid., p. 343.

4 Cf. Schaub & Isaacs. Law in Business Problems (1921) 288, 550. There is not only the old distinction between checks and other pure exchange paper; modern conditions have led to the development of numbers of specialized exchange instruments: the check payable through the clearing house only; the travellers’ checks; the express money order; the insurance check carrying various receipt and release clauses above the endorsement; and often special counter signature requirements; the dividend check drawn on a local bank but payable at various banks in various financial centers. And as finance paper began to specialize out of the original simple unsecured note or acceptance, there developed the endless varieties of bankers’ collateral notes for short term finance, plus a ramification of bearer bond forms limited only by the ingenuity of underwriters in inventing means to tap the investment market. There is every reason to expect further differentiation.

Such, at least, is the theory. In the application of it, courts have not infrequently twisted the facts till they creaked in order to find all the requisites; and twisted them without much reference to the real problem involved, to wit: Is this kind of paper passing current in the community today? The sound and forward-looking view appears in the recent decision in President & Directors of Manhattan Co. v. Morgan (1922) 199 App. Div. 767, 192 N. Y. Supp. 239, where an investment banker’s interim certificate running to bearer was involved. It was not a negotiable instrument, said the court, because it promised not to pay money, but to deliver a bond; yet they approximate to them, and in some respects the same rules apply. The indication was that a bearer holding bona fide and for value would take title, though lacking any presumption of ownership if ownership was denied.

6 N. I. L., § 5.

7 Cf. the reasoning e. g., in Zander v. N. Y. Security & Tr. Co. (1904) 178 N. Y. 208, 70 N. E. 449; Hatch v. First Nat. Bk. (1900) 94 Me. 348, 47 Atl. 908. “If the certificates were negotiable, the plaintiff’s assignor, an association of individuals, were bona fide holders for value.” Nelson v. Citizens’ Bk. (1920) 191 App. Div. 19, 22, 180 N. Y. Supp. 747.
rules of negotiable paper will apply—will, apparently, all apply: the payee will be liable on his endorsement as an endorser, but will be discharged by failure to perform the conditions to an endorser's obligation; a transferee in due course will take free of defenses; the maker, the bank, will not be subject to garnishment against the depositor—so also the rules of negotiable paper covering the expressed conditions will apply, and practically as if the conditions had not been expressed.

When we come now to examine the specific conditions regularly or generally attendant on these "unconditional" promises or orders to pay, we find that they lend themselves to classification in three clearly distinct groups, to which a catch-all group of more or less anomalous cases may be added.

1. Standard conditions to the duty of any obligor on a negotiable instrument, whether maker, acceptor, drawer or endorser.

2. Additional standard conditions specific to the duty of a drawer or endorser.

3. Standard conditions to any real duty of one who has a "personal defense" to the instrument, i.e., of any person whose authorized signature appears on paper which until its transfer to a holder in due course is evidence only of an apparent obligation of the signer in question.

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8 First Nat. Bk. v. Stapf (1905) 165 Ind. 162, 74 N. E. 987.
9 Piner v. Clary (Ky. 1856) 17 B. Mon. 645, which even treats endorsement of a certificate payable in another state as in all respects the drawing of a foreign bill. The case is unsound commercially in requiring presentment as soon as it could be conveniently made.
12 "... the stipulation for the return of the certificate adds nothing to the instrument. It is merely the expression of a rule which applies to all negotiable paper. ..." See Kirkwood v. First Nat. Bk. (1894) 40 Neb. 484, 491, 58 N. W. 1016. "Nor is the promise a conditional one, for it requires nothing beyond the return of the paper, corresponding with presentation for payment of a formal promissory note." See Pomeroy Nat. Bk. v. Huntington Nat. Bk. (1913) 72 W. Va. 534, 536, 79 S. E. 662; and see Fells Point Savings Inst. of Baltimore v. Weedon (1862) 18 Md. 320, 327; N. I. L., § 74: "... when it is paid must be delivered up to the party paying it." "The language expresses no more than the law implies as the duty of the holder in the absence of any such stipulation." Hatch v. First Nat. Bk., supra, footnote 7. "The present certificate is in effect payable to Fallon or his order, for this is necessarily implied by the phrase 'properly endorsed.'" Forrest v. Safety Banking & Tr. Co. (C. C. 1909) 174 Fed. 345, 347. "A 'proper endorsement' is such an endorsement as the law merchant requires in order to authorize a payment to the holder. If presented by the original payee, no endorsement would be proper or at least necessary; if presented by another, 'proper endorsement' to show his title would be requisite." See Kirkwood v. First Nat. Bk., supra, footnote 12, p. 492. Even the question of when the statute of limitations begins to run on demand certificates, or of whether the certificate is so overdue as to bar a transferee from becoming a holder in due course, is frequently made to depend rather on the character of the paper as a bank obligation than on the expressed condition of return. So in National Bk. of Ft. Edw. v. Washington Co. Nat. Bk., supra, footnote 10; and see Wolf v. American Tr. (C. C. A. 1914) 214 Fed. 761. On the whole subject of certificates of deposit and their incidents, see 2 Daniel, Negotiable Instruments (6th ed. 1913) §§ 1968 et seq; and an excellent note in L. R. A. 1918 C 691.
4. Occasional express conditions, to the duty especially of an acceptor or endorser on paper negotiable in its origin, which after their imposition may render the instrument non-negotiable, and the mention of which here is justifiable only because of the original negotiability of the paper. So far as these conditions do not render the paper non-negotiable, their major aspects are discussed under the other headings; so far as they do render it non-negotiable, they fall outside the subject of this discussion. It should, however, be mentioned that since section 39 of the N. I. L. a paying obligor may disregard the condition on an endorsement, whether its fulfillment has become impossible or not.

I

STANDARD CONDITIONS TO THE DUTY OF ANY OBLIGOR

Of these standard conditions to the duty of any obligor to make payment there appear to be at most four, of which three will here be discussed:

(a) the surrender (or tender of surrender) of the instrument, against payment; 14
(b) That the instrument, in the hands of one not a holder in due course, shall not have been altered since the obligor in question signed; 15
(c) and, perhaps, although improbably, that the instrument, at least if it runs to order, shall have been endorsed to and by the holder;
(d) certain conditions directed primarily at fixing maturity, “at

14 Note that these not only are conditions of each obligation “on” the instrument to a holder, but appear to be conditions also of another obligation which the writer inclines to view as equally “on” the instrument: that of the drawer or maker or acceptor to a party paying the instrument at such obligor’s order, notably to a drawee or a bank at which the instrument is payable. To say that this obligation lies outside the instrument is to overlook a vital fact: the mere order to pay a negotiable instrument, in the absence of any other dealings, creates a relation of standardized and fairly definite content between orderer and orderee. That this relation can be and currently is modified by the parties, and is most commonly altered into the somewhat specialized relation of banker and general depositor, is a phenomenon not unlike what is currently enough found between maker and payee. It is to be hoped that this aspect of negotiable paper will find more systematic treatment in our law.

15 Presentment for payment to an obligor primarily liable is not, under N. I. L., § 70, a condition to the duty of such obligor; and in the case of paper payable at a fixed maturity, it seems that the only road open to such an obligor to avoid default is to make the instrument payable at a specified place and make tender there. Demand or sight paper stands on a curious footing in this regard, since suit will apparently lie without demand—save perhaps in the case of bank obligors, as to which, Cf. Brannan, Negotiable Instruments Law (3rd ed. 1919) 257—while interest will not start running without either express provision or demand. Cf. (1915) 25 Yale Law Journ. 150. Query as to whether presentment for payment to the drawer or endorser is a condition to his obligation. It is believed not. Cf. 2 Michie, Banks and Banking (1913) 1031 et seq.; 2 Ames, Cases on Bills and Notes (1894) 818. But in no event is actual payment required of an obligor without the normal condition of surrender. 2 Ames, loc. cit. Exhibition as a condition is implicit in surrender. N. I. L. § 74. So far as exhibition to the party of whom payment is demanded in the first instance is a condition to secondary obligations, it is a part of due presentment, discussed below.

16 A holder in due course taking after alteration falls under the third grouping of conditions. One in whose hands the instrument is subjected to spoliation is, as to his substantive rights, apparently unaffected by the spoliation. Brannan, op. cit., p. 344.
sight,” “on demand,” “after sight,” “after demand.” Although the law concerning these conditions bears directly on the subject, the writer has omitted discussion of them for lack of adequate background. It may be suggested that supervening permanent impossibility—save so far as concerns lost or destroyed paper—if it could occur at all, must leave the obligation unenforceable against any party of whom demand must be made; that the impossibility to be considered would be temporary impossibility, and would go primarily to questions involving the statute of limitations; that important differences might develop in this particular between “at” and “after” paper; that the peculiar rules as to immediate recourse on dishonor of a draft might make for dispensation with the condition as to the drawer of a draft after sight, when it would not be dispensed with as to the maker of a note payable after demand. The term “condition” would in this connection call for careful examination, because, e.g., in the case of demand paper, demand is not a condition in the ordinary case to bringing suit against a party primarily liable, even though it or something equivalent would seem to be a condition to the right to receive the money; as is also the case with the condition of surrender of paper, unless it be taken that surrender is tendered by suit on the paper.

(a) Surrender. Surrender of the instrument as a condition of the obligation to pay was well established before the N. I. L.; its continued existence seems a necessary implication of the language of section 74: that the instrument “. . . when it is paid must be delivered up to the party paying it.” The reason of the rule is obvious: that there is real protection to be had from possession. If the payor be a party with recourse, he normally needs the instrument in order effectively to take his recourse. If the paper be demand paper, the payor needs possession to protect himself against possible obligation to a subsequent transferee taking in due course. Even if the paper be time paper and overdue, possession is the normal means of protection against the possible annoyance and expense of defending a suit if a third party should later base one on possession of the instrument. And, in the absence of the paper—at least, of exhibition, whether surrender occur or not—the payor can have no assurance that he is paying “in due course” so as to work his discharge, in case before payment a transfer to a holder in due course has already taken place.”

16 See (1916) 8 C. J. 581; 2 Ames, op. cit., pp. 792, 818. Fales v. Russell (Mass. 1835) 16 Pick. 315, is not contra, but simply contains an accurate definition of what the condition really is, taking account of the abnormal case of loss or theft. See Corbin, op. cit.

17 “Payment is made in due course when it is made . . . to the holder . . .” N. I. L., § 88; and “‘Holder’ means the payee or endorsee . . . in possession . . . or the bearer. . . .” N. I. L., § 191. “. . . it is a right of an obligor on a negotiable instrument to have, on paying it, the protection afforded by possession. . . .” Butler v. Joyce (1891) 20 D. C. 191, 195; but see Price v. Murphy (1890) 39 Mo. App. 210, denying recovery of damages or of the money paid on the debt against a payee who has received money in payment of the note, but refuses to apply such payment thereon or to cancel the note; contra to which, see 2 Ames, op. cit., p. 41, n. 1. Even the Missouri court avoided denying that replevin for the note would lie, or proceedings in equity to cancel. It thus seems that there is not only a condition but a duty of surrender.
SUPPERVENCING IMPOSSIBILITY

Suppose, however, that delivery up of the instrument becomes impossible. The N. I. L. makes no provision for the case, unless it be in that willing and hard driven horse, section 196. The type cases will be loss or destruction of the paper. At common law the authorities seem to be unanimous that such impossibility dispenses with the condition. The controversy has gone chiefly to the point of whether and when there is substituted for the now dead condition of surrender, a new condition of tendering the obligor indemnity against possible demand in case the paper ever does turn up again. Such a substituted condition in case of lost instruments is provided for by the statutes of at least eleven states. There is a body of vagrant and curious authority to the effect that no condition of indemnity is substituted when the instrument is shown to have been destroyed, or lost unendorsed or after it had become stale; the theory being that such facts of themselves gave the obligor the requisite protection. But whether or no replaced by a new condition, the condition of surrender is everywhere held done away with by supervening impossibility, if only the terms of the absent instrument be shown; such has been the holding.

2 Daniel, op. cit., §§ 1475 et seq., 1693 et seq. 19 Ibid., p. 792, 818; (1892) 16 L. R. A. 205; (1908) 14 L. R. A. (n. s.) 616 (lost checks); (1910) 24 L. R. A. (n. s.) 644 (recovery against endorser); (1914) 48 L. R. A. (n. s.) 648 (jurisdiction as between law and equity; an elaborate and careful note); Fales v. Russell, supra, footnote 16. The question of jurisdiction as between law and equity has been the subject of much discussion, and not least in the authorities cited; the question is whether, in the absence of statute, the law court can provide adequate protection by imposing a condition of indemnity.

20 Cases cited in (1914) 48 L. R. A. (n. s.) 648, 654; to which add Weston v. Dahl (1916) 162 Wis. 32, 155 N. W. 949. 21 This seems indeed to be the general rule. See authorities cited, supra, footnote 19. So Parsons, quoted in 2 Daniel, op. cit., p. 1896, criticizing the requirement of indemnity in a suit on half a banknote: "... the payor will never be liable again, since the holder takes the missing half with notice of prior equities. ..." Through all the cases and discussion adopting this view runs a trust that the plaintiff is telling the truth; with an equally naive disregard for the fact that the present suit compelling the maker to pay will not be res judicata against a possible later plaintiff who claims that the present plaintiff is now lying. The answer to Parsons is that the present defendant pays with notice of prior equities. "Mercantile custom, in other words, the law of such transactions, constitutes a part of the contract just as much as does the obligation to pay at all; and according to that custom it is the right of an obligor on a negotiable instrument to have, on paying it, the protection afforded by possession or, in case possession cannot be given him, by an indemnity. If the instrument cannot be surrendered by reason of its loss, it is nothing to the purpose that the loss happened after maturity, and that the promisor can successfully defend himself against a new holder by proving payment. That is precisely what the promisee has no legal right, according to mercantile custom—the law of the contract—to call upon him to do at his own expense. It is immaterial whether the loss occurred by negligence of the promisee; as between him and the promisor the burden is on him, and he is not in a position to enforce payment unless he secures the promisor against risks which do not belong to him." So held in Butler v. Joyce, supra, footnote 17, p. 195. Sterne v. South Jersey Title & Finance Co. (1920) 91 N. J. Eq. 363, 110 Atl. 589, beautifully sums up the arguments on both sides, reaching a result in accord with the text. And see (1917) 17 R. C. L. 1192.

Where a bill is drawn in a set, it seems that the condition of an endorser's obligation is the surrender of the part dishonored and protested. Wells v. Whitehead (N. Y. 1836) 15 Wend. 527; with which contrast Kearney v. West Granada Mining Co. (1856) 1 H. & N. 412; but that case is unsatisfactory as not showing which, if any, parts had been accepted by the defendant; if only one, or none, had been accepted, the case may not be sound today. N. I. L., §§ 183, 179. The condition of the acceptor's obligation goes to the part accepted. N. I. L., § 182.
equally since the N. I. L. ; and there is every reason in its favor. The substitution of indemnity meets every reason for the existence of the original condition save that of aiding suit against a prior obligor; and the very adoption of the rule makes possible such suit. Even when, unsoundly, no indemnity is required, this is put on the ground that all requirements for the payor’s protection are adequately met without it.

(b) Non-alteration. There is the additional condition, as to any party who neither is nor holds under a holder in due course, that the instrument shall not have been altered in any material particular, without the assent of the obligor. The reason of this condition appears to lie in a declared policy against any person being permitted, unpunished, to tamper with an instrument evidencing an obligation in which he has an interest. Rule and policy are vigorously prophylactic; the temptation to monkey to one’s own advantage is too strong to expose men to. There is a further supposed procedural difficulty—that of declaring without variance on the altered instrument. What, then, is here the effect of supervening impossibility?

The case which immediately bobs up is that of spoliation, unauthorized alteration by a stranger, whether a benevolent benefactor of creditors or a psychopathic pervert. This case clearly falls outside the first reason just given; application to it of the second reason has been justly favored with ungracious names by many writers. It is, therefore, not surprising that under the American rule at common law spoliation was without effect on the holder’s substantive rights, if the original terms of the instrument could be proved; the supervening impossibility simply made fulfillment of

22 Campbell v. Meyers (1913) 72 W. Va. 428, 78 S. E. 671, does not refer to the N. I. L.; but that statute was not treated as affecting the situation in Hoyland v. Nat. Bk. of Middlesborough (1910) 137 Ky. 682, 126 S. W. 356 (suit under code provision regulating indemnity); or Sterne v. South Jersey Title & Finance Co., supra, footnote 21.

23 (1910) 24 L. R. A. (N. s.) 644. Tuttle v. Standish (Mass. 1862) 4 Allen 481, contra, is bad logic in any event and bad law, unless confined to its result in a technical action at law; it seems that equity will supply relief even in Massachusetts. Savannah Nat. Bk. v. Haskins (1869) 101 Mass. 370; see McCann v. Randall (1888) 147 Mass. 81, 95, 17 N. E. 75.

24 N. I. L., §§ 124, 58.

25 N. I. L., § 124; Brannan, op. cit., pp. 337 et seq. But observe that the obligation to a drawee-banker of a drawer-depositor who has negligently left easily alterable blanks, carries no such sweeping condition, where the doctrine of Young v. Grote is followed, but instead only a condition that any alteration of amount by filling the blanks left shall be so done as to leave the instrument regular in appearance, and that payment shall in other respects be made in due course under N. I. L., § 88. The conditions of payment in due course differ materially from those of negotiation; for instance, in that a mere transfer of book credits, notified to the presentor, constitutes an irrevocable parting with value, regardless of whether the credit has been drawn against. (1921) 21 Columbia Law Rev. 805. For the state of the authorities on such blank spaces, see (1917) 27 Yale Law Journ. 242; L. R. A. 1918 B 327; (1913) 41 L. R. A. (N. s.) 529; (1916) 5 B. R. C. 293, First Nat. Bk. of Newsome v. Walling (Tex. Civ. App. 1920) 218 S. W. 1080.

26 The formal and unsubstantial character of the rule appears most clearly when suit is allowed to a bona fide holder who meets the same obstacles of evidence. Re pleading on altered instruments, see 3 Williston, Contracts (1920) §§ 1915–1917.

the condition unnecessary. But under section 124 of the N. I. L. it seems that this rule has been limited to the protection of a holder in due course and thus made to conform, substantially, to the English rule. Even should the American courts give full effect to this change—which, now that the unfortunate wording is in the statute, is probably desirable, though far from certain to occur—the result will be to bar suit only on the particular obligation originally measured by the negotiable paper. It seems that suit "will still lie on the original consideration," and that any collateral security may still be enforced to the extent of such consideration. This may often force some, and occasionally a very substantial curtailment of the holder's rights, particularly in the speculative penumbra around the question of "continued existence" of the original consideration. So far as it does, it can only be accepted as an unfortunate anomaly.

Similar impossibility can also be caused by willful or innocent alteration by the holder himself; this can, however, hardly be fairly called a case of supervening impossibility, and so falls outside the present discussion. This is true equally where such altered paper is transferred to a holder in due course, who acquires rights against the original obligor as if the instrument never had been altered; for such a holder in due course takes from the start free of any condition that the paper shall not have been altered before transfer to him; there is no condition of non-alteration to become impossible of performance. In Hohfeld's terms, the holder's right-duty relation to the obligor began with the purchase of the instrument, and began free of the condition. If it be contended along the more venerable line of expression, that the maker's obligation existed, subject from the time of delivery to the condition, the answer is that the maker's obligation ceased with the alteration, and that the new holder takes a wholly new

29 N. I. L., § 124: "Where a negotiable instrument is materially altered . . . it is avoided. . . ." B. E. A., § 64 (1), is confined to stating the rights of the holder in due course of an altered instrument.
30 Doubly doubtful of occurrence where the code, as in Kentucky, reads to give an action to the holder of a spoliata instrument. See code section quoted in Hoyland v. Nat. Bk. of Middlesborough, supra, footnote 22; and see the suggestion in Jeffrey v. Rosenfeld (1901) 179 Mass. 506, 508, 61 N. E. 49.
31 Merrick v. Boursy & Sons (1854) 4 Ohio St. 60 (recovery allowed for the price of goods sold, where it did not appear that the note was taken in "payment"). And even in Massachusetts it seems that "... the presumption of payment is rebutted when the effect will be to deprive a party of security which he has taken for the payment of the debt for which the note was given." Jeffrey v. Rosenfeld, supra, footnote 30, p. 509; see also cases there cited; State Savings Bk. v. Shaffer (1879) 9 Neb. 1 (allowing such recovery to endorsee of altered note); and see Booth v. Powers (1874) 56 N. Y. 22, 31 (measuring damage to owner by conversion of innocently altered note by value of original consideration, if the original indebtedness "was independent of the note, and has not been discharged by the execution of it"). All these are cases of innocent alteration by the holder. A fortiori will the doctrine of the text hold.
32 Edington v. McLeod (1912) 87 Kan. 426, 124 Pac. 163 (mortgage); Clough v. Seay (1878) 49 Iowa 111 (mortgage)—both cases of innocent alteration by payee; an elaborate note in (1902) 86 Am. St. Rep. 122-3. Cases are also collected in (1913) 41 L. R. A. (n. s.) 230; (1912) 35 L. R. A. (n. s.) 76; L. R. A. 1916 F 293; (1920) 9 A. L. R. 1087.
title by virtue of the negotiation to him. These situations therefore call for no mention in our conclusions. 

(c) **Endorsement of an order instrument.** There remains in this group of conditions a possible third type: that an instrument—at least an order instrument—shall (1) be so endorsed as to constitute the possessor a “holder,” if such possessor be not the payee; and (2) be endorsed by the holder.

It does not appear that the first of these possible conditions exists, in the absence of express words to that effect. The transferee-possessor of an unendorsed order instrument seems at worst to lack the presumption of ownership and the presumption of holding in due course which a regular chain of endorsements would give him. Consequently, where he can establish his ownership, he can recover. Here lies a germ of possible hardship on the paying obligor: not having paid to a holder, he has not, even under judicial compulsion, paid in due course; and he is open to the possibility of recovery by one not a party to the action if such a one can later establish himself as the true owner of the paper. While this contingency is not, however, noticed in the cases, it is not uncommon in practice to find the purported obligee in possession tendering indemnity with his demand.

But there are classes of paper on which the express condition “when properly endorsed” appears almost regularly: notably on certificates of deposit, and increasingly on check certifications—in the latter case due to the not uncommon practice of certifying for a possessor who is not the holder. Whether or not these words were originally intended to call for such a receipt-endorsement of the holder as is discussed below, they have been almost uniformly interpreted as calling only for a regular title-chain; as

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In the case of a remitter, the condition probably never comes into existence, under any circumstances, until transfer to the payee; so a check certified for the drawer. 

(1919) 29 Yale Law Journ. 103n; Brannan, *op. cit.*, pp. 155 *et seq.*; see also *Digan v. Mandel* (1907) 167 Ind. 586, 79 N. E. 899, holding that mere possession by a third party of paper on which he claimed the payee’s name instead of the possessor’s, to have been inserted by mistake, does not create a presumption of delivery by the maker; and *Witt v. Campbell-Lakin Segar Co.* (1913) 66 Ore. 144, 134 Pac. 316, where, under a rule that endorsements were not self-proving, possession under unproved endorsements was said neither to support claim of ownership nor to import consideration; this last, as applied to consideration for the original making, seems hardly sound.

Subject, of course, to the proviso that his transferor had such right. N. I. L. § 49; Brannan, *op. cit.*, pp. 154 *et seq.*; so also if the possessor be the original deliveree. Moore, *The Right of a Remitter of a Bill or Note* (1920) 20 Columbia Law Rev. 749. In the case of a remitter, this is rather because the condition of the obligation has occurred; the obligation is to pay the remitter, if for any reason he cannot or elects not to transfer the paper to the payee.

* N. I. L., § 88; 1 Daniel, *op. cit.*, § 574.

So in New York since *Meyer v. Phenix Nat. Bk.* (1904) 94 App. Div. 331, 88 N. Y. Supp. 83; as to usage in Philadelphia, see *Lipten v. Columbia Tr. Co.* (1920) 194 App. Div. 384, 184 N. Y. Supp. 198. The writer has, however, some doubts as to how far rules laid down for these cases, if unusual, would be applied to non-banker obligors on similar facts. And certifications have so long been treated by the courts as representations that cases regarding them must be used with caution.

so interpreted, it seems that the condition can be insisted on by the obligor. 3
In the certificate of deposit cases, there is no indication that such a condition impairs negotiability; indeed, the language has been made the basis for holding the instrument to run to order. 4 It is, therefore, believed that the language of Lipten v. Columbia Trust Co. 5 would not be construed to render non-negotiable such a certification, though declared “conditional;” since the very condition insisted on is directed to the insurance of regular transfer.

Suppose, now, that transfer occurs or has occurred without endorsement, and that such endorsement becomes impossible. If this is due to loss of the instrument, it seems that the usual condition of indemnity will be substituted. 6 But suppose the transfer to have occurred just before the transferor’s death, and suppose it to be a gratuitous transfer conferring no specific right against the transferor under section 49. Or suppose a transfer just before the transferor set off on an Arctic exploration or for pressing reasons repaired incognito to regions unblessed with extradition treaties. To wait for seven years’ absence to create a presumption of death and enable the appointment of an administrator would be inconvenient, and might even raise questions involving limitations. It is believed that in any case where an action in equity, bringing in both transferor and obligor as defendants, would not lie, the condition would be dispensed with on proper proof being made; 7 for surely the possessor of an unendorsed instrument should be accorded protection equal to that accorded one who

3 Lipten v. Columbia Tr. Co., supra, footnote 37 (a case of a check presented through the clearing house for payment, and turned back for proper endorsement, having been certified as required in such case by clearing house rules; this was interpreted as certification conditional on proper endorsement; the court stressed the express provisions of the N. Y. L. for conditional acceptance. §§ 141, 187). Fultz v. Walters (1874) 2 Mont, 165, indicates the contrary as to a certificate of deposit, but it does not appear that the certificate there in suit carried the condition “when properly endorsed,” and the only words interpreted are “payable to order.” There is some authority indicating that the expression of the condition on a certification is unnecessary to bar suit by a transferee without endorsement, unless the certification was made “for” such transferee. Meuer v. Phenix Nat. BK., supra, footnote 37. A fortiori will this be the case where drawing and certification have been procured by an unauthorized person pretending to act on behalf of the payee. See Anglo-South American Bk., Ltd. v. National City Bk. (1914) 161 App. Div. 268, 146 N. Y. Supp. 457. But this last is true of any obligation on negotiable paper, N. Y. L., § 49, having no application. As in other cases of contracts with purported agents, a condition to the obligation (and to the power to charge the drawer’s account) is that the purported principal shall ratify; nor is this condition affected by supervening impossibility.

4 Kavanagh v. Bank of America, supra, footnote 10.

5 Supra, footnote 37. There is some tendency to construe conditions on acceptances quite narrowly, at least as against the acceptor. Cf. Washington Loan Co. v. Folly Beach Corp. (Ga. 1922) 114 S. E. 207, where the court either disregards or applies the principles of substantial performance to an acceptance expressly made payable only through the accepting bank, “when sent direct to them for collection.” Since the purpose of the condition was only to secure the collection profit, the decision may well be wise.

6 Welton v. Adams (1854) 4 Cal. 37 (“on return of this certificate with her endorsement herein”). But see supra, footnote 21 on cases where the condition is not expressed; and the California court treats the paper simply as a “negotiable security.”

7 So Fultz v. Walters, supra, footnote 39.
merely asserts that he did once possess—the transfer which conferred title being no more difficult to show in the one case than in the other. And this despite the fact that to allow the action would defeat the very purpose of imposing the condition; for the case is an exceptional one, and one in which it is reasonable for the court to defeat that purpose.

The second of these possible conditions—endorsement by the holder—seems as yet to be such stuff as legal dreams are made of; yet the banking custom of demanding such endorsement on paper paid by banks, and the sound reason underlying such demand, justify some discussion of the matter here. As long as the law permits the payor to recover money paid against a negotiable instrument to a party not entitled to the paper, and recovery of the surplus paid on altered paper, it will remain of real practical importance to secure the receipt-signature of the person receiving payment, and particularly where the payor did not draw the paper. The law should recognize that fact by permitting a payor to insist in the normal case on such signature as a condition. The contention that at common law a debtor cannot claim a receipt from his creditor has application only to a single case: payment by an obligor to his own direct obligee (such as payment of a note to the original payee)—a case which obviously falls outside the reason of the argument here advanced. It is much to be regretted that what little judicial authority there is on the point tends in the main away from the recognition of the condition. Thus it has been held in a lower court that suit will lie against the drawer of an order check for dishonor, where refusal of the drawee to pay was solely because the payee would not

44 On order paper, the practice is almost universal, and recognized as such in the cases. Customers sometimes object with varying results. Cf. the inquiries in Paton, Digest of Legal Opinions (1921) § 1966 et seq. On bearer paper the reason of asking receipt-endorsement seems to cover only possible alteration. Even here, the practical problem is less pressing; bonds seem rarely to be raised; larger bearer checks are ordinarily pay-roll instruments and would not normally be paid except to a messenger known to the bank.

45 For discussion, particularly with reference to possible qualification of the rule by N. I. L. § 62, where alteration occurs before certification, see (1922) 31 Yale Law Journ. 522, 548.


47 “The bank upon whom the note or bill of exchange is drawn is authorized and required to pay the money to the payee, knowing him to be the identical man indicated, without any endorsement and without any receipt.” Osborne v. Gheen (D. C. 1886) 5 Mackey 189, 194. Accord as to payee and endorsee, 2 Michie, op. cit., p. 1110. The reasoning of the case: that the bank might put the blank endorsed paper into circulation and thus render the receptor liable to a holder in due course, is unsound. N. I. L., § 119 (1): “A negotiable instrument is discharged:—by payment by or on behalf of the principal debtor;” and might in any case be met by writing “Received payment” above the signature. The case held only that the unendorsed but paid check was a good voucher to the drawer in an accounting with the payee. And the same case contains a contrary dictum that “all the drawee has to do... is to satisfy himself that when the order is presented the true and proper person is there on hand to receive the payment and receipt for it.” Osborne v. Gheen, supra, p. 194. “Such a check, returned to the drawer when paid, and debited to his account, with the endorsement of the payee, would be a voucher in favor of the drawer against the payee; but without such endorsement it would not be evidence, as between the drawer and the payee, of such payment.” Pickle v. Muse (1889) 88 Tenn. 380, 384, 12 S. W. 919; so 2 Daniel, op. cit., § 1648. This dictum would lead to imposing the condition on the drawee’s duty to his drawer; for surely the drawee will have to secure a valid voucher for his drawer, before paying.
SUPERVENCING IMPOSSIBILITY

sign before payment; and this, even though—despite occasional dicta to the contrary, despite even some cases where the decision is made, unnecessarily, to rest on contrary reasoning—such an endorsement by one receiving payment imposes on him no additional legal obligation; it constitutes no technical negotiation, it imposes no technical endorser's duty; it is a mere, though exceedingly convenient, evidence of who receives payment, and of who by asking and receiving payment of the paper came under certain duties of refund in the event of irregularity. Perhaps the tendency of the courts not to admit this condition is also evidenced by their interpretation, already mentioned, of the express words "properly endorsed" as calling only for a regular chain of title. The counter-tendency of the banks to seek, in paying, not only a receipt, and the receipt of a party known to them, but the receipt of a party of financial standing, is evidenced by the general requirement of clearing house rules that any collecting bank not an apparent owner of the paper stamp its "guaranty" of prior endorsements on the paper before presenting at the clearing house; and by the growing practice of metropolitan banks not only to draw any cashier's checks to unknown persons "payable only through the clearing house," but even to issue to their depositors check-forms carrying the same clause.

48 Anonymous (Ohio Com. Pl. 1882) 26 Albany Law Journ. 61. This appears at first sight purely a definition of the condition of presentment. But it follows almost of necessity from the holding, that such a receipt—signature is not a condition precedent to the drawee's duty to his drawer in relation to this check; nor to the drawer's reimbursement to the drawee; and so, too, of the drawer's obligation on the paper to a transferee, also a case to which the argument in the text would apply.

49 This is obvious, if only by reference to the similar situation of altered bearer paper. The modern theory expresses the situation in terms of implied warranty. For cases, see (1922) 31 Yale Law Journ. 522. It is clear that the endorser's liability sections of the N. J. L. have no legitimate application: § 65 ("Every person negotiating..."), § 66 ("warrants to all subsequent holders in due course..."), § 64 might by its language—"all subsequent parties"—be given application except for § 119 (1), under which the very payment in question discharges the instrument. Cf. Brannan, op. cit., p. 84. In sharp contrast, of course, are both "cashing" paper over endorsement with one not the drawee, and the question of the drawer's signature, where paper is presented to the drawee. Cf. Brannan, op. cit., pp. 230, 249.

51 This language was intended, and seems to be held, to impose the full responsibility of a purported owner asking and receiving payment. New York Produce Exch. Bk. v. Twelfth Ward Bk. (1909) 134 App. Div. 953, 119 N. Y. Supp. 988.

52 This practice seems to have begun during the panic of 1907, in an effort to get maximum use out of the scanty available supply of cash by forcing every possible payment to be cleared. Recurrence of that situation is, under the Federal Reserve System, almost impossible. But the clause continues on the checks, and its value to the drawee is obvious. It is strongly indicated in the Lipten case, supra, footnote 37, that the depositor, by drawing such a check, "assents" to the rules of the clearing house. Observe the bearing of this on the reasonable time allowed the holder to present, particularly where, as in New York, the clearing house rule provides against putting a check through on the day of its date, and the drawees (to gain the benefit of one day's use of the funds) make a practice of returning paper, certified, for representment, if put through on the day of its date. Is such presentment of such paper "due" presentment, so as to require or justify protest and notice when the paper is returned unpaid, though accepted? Of course, if the holder takes the certification, he will thereby discharge the drawer; but suppose he elects to treat as a dishonor? Further, if the drawer assents to this clause, does he thereby make the clearing house the exclusive method of collection? Can he lodge a stop, valid against the drawee, even though the drawee, on the day of the date, has certified or paid the
On the other hand, it is believed that an express condition calling for endorsement by the holder before payment would not be regarded as impairing negotiability, in view of the ease of accomplishing the condition, its reasonableness, its accordance with commercial practice, and its non-imposition of any additional burden. The writer has, however, found difficulty in imagining any case in which such condition could become impossible of performance. In the event of loss or destruction of the paper giving a receipt would be no substitute, but only the same condition.

II

STANDARD CONDITIONS SPECIFIC TO THE DUTY OF DRAWER OR INDORSER

The general tenor of these conditions is firmly established in our law; in the main they appear as almost or quite crystallized practice in our earliest clear records. Occasional sharp changes have occurred in this or that, putting our law at variance with the parent international law merchant stock; a number of details have been worked out more completely; fully as many more still await their certain answer—but the outlines are clear. The conditions are (a) due presentment for acceptance where required; (b) due presentment for payment, in any event; (c) dishonor by either non-acceptance or non-payment; (d) in the case of dishonor of a foreign bill, due noting for protest; and (e) in the event of any dishonor due dispatch of notice. Dishonor can in the main be omitted from consideration; it means only that when a required presentment is either made or excused, the instrument then remains unaccepted or unpaid as the case may be.

The presence of the word "due" in any even approximately accurate statement of these conditions—as, for instance, in the general descriptive sections of the N. I. L.—of itself indicates the trite learning that the conditions themselves are subject, under the bludgeoning of fate, to wide variation. And the body of sections dealing with them is mainly given to defining and validating this variation. Presentment for payment must normally check over the counter. The whole practice (together with that of the banking collection endorsement: "Pay any bank or banker") builds a striking parallel in economic and practical risk elimination, if not in legal risk-shifting, to the crossed check system in England.

Cf. Welton v. Adams, supra, footnote 42.
In reading Marius, one is struck with the relative fewness of the points on which he indicates conflict of opinion and the regularity with which the opinion he prefers tends to work into the later law.
Bright v. Purrier (1765) Buller's N. P. 269 (where Lord Mansfield refused to hear the evidence of merchants that a drawer was not liable immediately on the dishonor of a 120 days' sight bill—except, on the Continent, to put up security for payment when due); N. I. L., § 151, to the same effect.
N. I. L., § 143. Here is another of those rare conditions which may by express words be effectively imposed without impairing negotiability. There is, of course, no pretense to make these citations more than rough indications.
be made to the person required to pay." But suppose that person cannot be found. Then it is sufficient to present at a place; his (last known) place of business or residence, and to any person found at that place. But suppose no person is found there? Then mere possession of the instrument at the place will be enough." Finally, suppose not even the place of residence or business can be found; then no presentment is necessary at all. These doubts can be eliminated by making the instrument payable at a particular place. But suppose that place has ceased to exist; then again, presentment there is excused." And similarly with the other conditions of this group.

But not only is the condition of real presentment, or protest, or notice of dishonor—either at all, or in proper time—dispensed with by supervening impossibility according to expressed rule in the N. I. L., but the substituted condition even of due presentment (or notice or protest) as required by the Act is, in case of impossibility, expressly made unnecessary to the obligation." Neither presentment, then, nor due presentment, but merely due diligence to make presentment, is the true measure of the condition; or, perhaps more accurately, due diligence to achieve the result aimed at by the legal rule, and normally accomplished most effectively by presentment. So equally of protest and of notice; which within the meaning of the present topic, means that supervening impossibility dispenses with the conditions as currently described. It does not, however, appear that prospective certainty of failure to accomplish notice or presentment or protest will make due diligence to accomplish those results unnecessary." Due diligence itself is a condition which can never become impossible; circumstances merely serve to narrow its scope until it approaches zero as a limit, or to evidence the utter uselessness even of diligence incarnate. Perhaps lex neminem cogit ad inutilia; but it is believed that the law has so far crystallized in many cases in this field that the most convincing evidence of

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\[61\] Ibid., § 72 (4).
\[62\] Ibid., § 73 (3) (4).
\[63\] Ibid., § 72 (4).
\[64\] Citations in 2 Ames, op. cit., p. 861.
\[65\] Ibid., pp. 513–4.
\[66\] N. I. L., §§ 73 (1), 72 (4).
\[67\] 2 Ames, op. cit., pp. 510 et seq.
\[68\] "Presentment for acceptance is excused, ... 2. Where after the exercise of reasonable diligence, presentment cannot be made." N. I. L., § 148. "Presentment for payment is dispensed with:—1. Where, after the exercise of reasonable diligence presentment as required by this act cannot be made. Ibid., § 82. "Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given or does not reach the parties sought to be charged." Ibid., § 112. "Protest is dispensed with by any circumstances which would dispense with notice of dishonor." Ibid., § 159. The inevitability of the occurrence of doubts under such language is clear; why the differences in phrasing between §§ 148 and 82? The added "or does not reach" in § 112 colors the word notice in the meaning, at least as applied to those words, of "delivery of notice." whereas it certainly means in the rest of the sentence "notice as required by this act." And the circumstances under which noting for protest becomes impossible are not in all respects like those regarding notice. See infra. But the general intent of the sections is clear.
\[70\] Observe that in the language quoted in footnote 68, the words "after due diligence" are present in every case, either expressly or by incorporation.
prospective uselessness would not serve to dispense with what has come to be legally standardized as due diligence; where a particular situation has not as yet been passed on or codified, there is perhaps more room for question." Even in such a case, however, as will appear below, there is some reason for insisting that the holder actually go through what motions are available, as the one best and unequivocal evidence that no available motions could conjure up the result desired—just as due formal protest where possible, in the absence of waiver, is the one standardized permissible method of showing dishonor of a foreign bill, thus crossing from the field of evidence into that of substantive law.

Cases may be imagined or discovered in practice which illustrate the type of situation just discussed. Yet the question will be found in most cases to depend on whether in a given case there is impossibility such as to dispense with the condition concerned.

Suppose a bill drawn in New York on Berlin at sixty days’ sight, on April 5, 1917. Without presentment for acceptance—which must be made, or the instrument negotiated, within a reasonable time—it cannot normally mature. With the outbreak of war, or at least with the passage of a trading with the enemy act, such presentment becomes illegal, and so impossible; and the same effect develops from interruption of communication de facto. The question would appear to be whether the duration of the war is incorporated into the reasonable time for presentment; or whether “after the exercise of reasonable diligence, presentment cannot be made,” with the result of dishonoring the bill forthwith. If the latter, would reasonable diligence to present be dispensed with? Or would it be treated as a term having no content? Protest and notice not being interfered with, the further question would arise of when they must be made, in order to be effective; but that does not concern the present paper.

Or suppose a sixty days’ sight bill bought in New York, and sent to London, where it is payable; and suppose the carrying vessel never should

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156 COLUMBIA LAW REVIEW

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13 Ames presents cases regarding notice, where prospective uselessness of depositing notice in the mail, the mails being interrupted by war, was held to excuse delay in giving notice, but to excuse only delay until resumption of communication; and further to make nugatory the same immediate deposit of a notice-letter in the mail which normally would have been sufficient; 2 Ames, op. cit., pp. 278, 394; with which contrast diligent inquiry resulting in mailing to a wrong address. Ibid., pp. 407–8. On the other hand, even standardized diligence by presenting for payment at the maker’s house has been held excused for certainty of uselessness where maker and family had been drowned a few days previously, and the house was unoccupied. Ibid., p. 510 n.; cf. ibid., p. 513, n. 7. Curiously enough, presentment for payment is the one case in which the N. Y. L. seems to insist that presentment for payment “as required by this act” must be impossible before presentment is excused. But presentment for payment to a simple drawee may well stand on different footing from that to a maker or acceptor, in case of loss to the paper prior to presentment. Infra, footnote 76.

14 N. Y. L., §§ 143, 144.


16 N. Y. L., § 148 (2).

17 Excuse for delay in fulfillment of any condition, where the condition normally is required to occur at a specified time, falls within our subject, even if the non-fulfillment at the specified time has become impossible; in the case under discussion there is, at least in the first instance, no question of excuse for delay, but only one of determining what the specified time is.
be heard from again. Here is true impossibility of presentment. Is the reasonable time extended by the loss, or must substituted demand be made regardless, with or without a copy? *8 Probably the former. Perhaps the holder has an option.

Or suppose a check "payable only through the New York Clearing House;" as is almost certainly the case, assume, that this conditioning of the method of presentment (or perhaps, of the place of presentment) leaves the instrument negotiable; and suppose that for some reason the clearing house breaks up. Is there substituted a condition of presentment at the place where the clearing house once did business, or is the condition dispensed with? Or could the holder at his option make presentment, good against the drawer, either at the old place of business or at the drawee bank? 77

Or suppose a time bill drawn on Paris or Brussels in July, 1914, and accepted. In August, before maturity, the French or Belgian legislature passes an act forbidding protest of bills of exchange—or an act extending

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*8 See 2 Daniel, op. cit., §§ 1173, 1464–5. But (1) presentment for payment of an acceptance or a note (where the obligor should have record of his obligation); (2) presentment for acceptance (where the prospective obligor is not called upon to pay at once, and can both limit the terms of his agreement to a genuine instrument and investigate before maturity arrives); and (3) payment of an unaccepted sight draft, especially if the drawer has given the drawee no advice of drawing, may well stand on different footing in this regard. "No rule of law with which we are familiar would require a bank without consent of the depositor to pay out the money of its depositor [sic, but the expression is unnecessary to the argument] upon an alleged lost check; and a demand that it do so would be fruitless." First Nat. Bk. v. McCon nell, supra, footnote 3, p. 342. This amounts to excusing even diligence; and the case for such excuse is of course strongest with the unadvised sight order calling on the third party to pay. How is he to check the genuineness of the signature? How is he safely to charge the drawer's account? That the court reasons from impossibility rather than inutility, and treats presentment as a duty rather than as a condition, weakens its argument, but not its conclusion. Perhaps the court's limiting the rule to a check lost without fault is sound. One alternative view is indicated in Heinrich v. First Nat. Bk. (1916) 219 N. Y. 1, 113 N. E. 531, apparently substituting as against the endorser a condition that the holder procure and present with due diligence a substitute check; relying also on N. I. L., § 160, which provides methods for protest of lost paper; so Aebi v. Bank of Evansville (1905) 124 Wis. 73, 102 N. W. 329, which admits presentment by copy. But that section can be satisfied by the first two situations indicated above; and is it not sounder to excuse presentment of the check lost without fault, requiring reasonable notice to an endorser, and then throwing on the endorser the burden of procuring the new check? There is, of course, no reason why even excuse of presentment, due to loss, should excuse notice of dishonor. Cf. Brannan, op. cit., p. 268. But what of an endorser or drawer whose name has by the loss become temporarily unascertainable? On lost checks, see also (1908) 14 L. R. A., (N. S.) 616; and on lost instruments (1916) 8 C. J. 693; Norton, op. cit., p. 476 n.

*7 If the clause be construed as defining a place of payment, cf. 2 Ames, op. cit., p. 510. The question of alternative conditions, or alternative substituted conditions especially in this second group, is one of interest and difficulty. It seems never to have been thoroughly thought through and worked out in print. Ames is, as usual, suggestive in distinguishing in some cases what the holder may and what he must do. 2 Ames, op. cit., p. 845 (time of notice). But it is believed that much light would be shed on the whole subject by a discussion consistently proceeding along lines of alternative substitution. In this paper the emphasis is, perhaps unwisely, laid wholly upon the effect of supervening impossibility in dispensing with what is taken to be in the normal case a condition; and the exact extent and content of the substituted condition, if any, including exact definition of its possible alternative character has not been consistently attempted.
the maturity of all such acceptances for sixty days. In either case, protest has become impossible, and due diligence to present or protest has become useless. Is presentment for payment necessary? Is the bill, as against the drawer, dishonored when unpaid at the original maturity, despite the fact that it is not dishonored as against the party primarily liable? That is one question. Another is less difficult. Assuming dishonor, "due notice" of dishonor can obviously be given, and is therefore not excused. Under section 159 "protest is dispensed with by any circumstances which would dispense with notice of dishonor"—and so would seem here to be still necessary. The provision of that section on delay of protest or noting would, however, seem to be sufficient to protect the holder.

A situation of perhaps equal difficulty, not treated as yet even by the theoretical writers, was presented by the refusal of Cuban banks, under the original Cuban moratorium of October, 1920, to pay checks drawn on them in excess of ten per cent of the drawer's deposits. Unless protest was forbidden, however, which does not appear to have been the case, it may be strongly contended that that moratorium simply privileged the banks, as against their depositors, to dishonor checks; that non-payment was such dishonor, and remitted the holder to his regular conditional rights against prior parties. Even had protest been forbidden, the same argument would hold as to presentment and notice.

One more case may perhaps be put, in passing. Suppose an instrument made before the close of the Civil War, payable in Confederate currency; or one drawn a few years back payable in Siberian roubles; and that the specified currency thereafter becomes demonetized. What would be the effect on the conditions under consideration?

Before leaving these standard conditions, one interesting and important fact should be stressed. In determining whether such a condition is or is not dispensed with by impossibility, no regard appears to be had to the effect of fulfillment or non-fulfillment of the condition on the obligor, the drawer or endorser. That he has or has not suffered or been prejudiced by non-fulfillment appears immaterial. To this the sole exception is the bank check; and the exception, even there, is limited to the condition of presentment in due time. In each case, as to each condition, the sole test is applied from the standpoint of the holder, and the condition insisted on, altered, or dispensed with, solely according to his situation.

8 For the specific terms of the legislation, which seems to have applied only to acceptances, and an illuminating discussion of the problem, see Lorenzen, Moratory Legislation Relating to Bills and Notes and the Conflict of Laws (1919) 28 Yale Law Journ. 324.


80 This seems to be true of all questions arising out of supervening impossibility, or out of impossibility discovered after purchase. But there is some indication, not necessarily at variance with the suggestion made in the text, that where the holder at the time he takes the bill, knows of impossibility, he will not be excused. 2 Ames, op. cit., p. 800 (purchase too late to present to distant drawee at maturity). See, on the other hand, N. I. L., § 147, where the impossibility inheres in the original terms of the bill and of § 143 (3).
self-contradictory situation this: if the condition is impossible for the holder to fulfill, mercy seasons justice with a will: he need not fulfill it at all; but if the condition is possible for him to fulfill, he would seem to be held to the very letter of the law, regardless of the consequence of his non-fulfillment.

It is possible that study of the origin and growth in custom and law of exchange transactions would develop an explanation of this interesting inconsistency in viewpoint. It seems, indeed, probable that in the basic and original case the bill of exchange was used for true exchange transactions and only for such, and was drawn against actual credit or cover already provided with the drawee. In such a case the drawer had received from the payee his consideration; the paper was taken by the payee on the drawer's name and with the drawer's backing. There was no reason to apply strict rulings on conditions to discharge him absolutely; he was in the position substantially of the drawer of a check to-day: expected to have and keep a balance with the drawee ready to meet presentation of the instrument when made. The conditions of formal presentment and protest did not go to the condition of his obligation; they went merely to the establishment in good form of the dishonor of the bill. But the drawer had a financial interest in knowing with some speed whether his correspondent drawee was going to honor the bill. The condition of diligent presentment was intended to protect him against dissipation without his knowledge, of the funds or goods he had put or left with the drawee in cover of his drawing; the condition of diligent notice was intended to inform him, being at a distance, that he must take speedy steps to recover his cover. Such seems to be the situation as outlined in Marius; it is in full accord with such a situation that the conditions are all dispensed with as against a drawer who has no reason to believe that his bill will be honored; and many features of the various Continental systems fit in closely to such a situation; as, among others, that failure or delay of notice only gives the drawer a right against the holder to the extent of the damage suffered by the holder's fault; the remission of the holder in some countries to rights against the cover in the drawee's hands, even without acceptance, and despite the insolvency of the drawer; the practice in foreign banking of charging the

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80 Cf. 2 Ames, op. cit., p. 460, re notice; and the unqualified language of N. I. L., §§ 89 (notice), 152 (protest), 70 (presentment for payment), 144 (presentment for acceptance); but see (1916) 8 C. J. 694-5.

81 Where both collection draft, discounted before acceptance, and finance drafts are recognized; and the latter not regarded "as so commendable as the Reall Exchange." (p. 4).

82 N. I. L., §§ 79, 144 (4), 159; note the probably inadvertent omission of a similar express provision on presentment for acceptance in § 148. Cf. also ibid. §§ 80 and 115 re endorsers.

83 Lorenzen, Conflict of Laws Relating to Bills and Notes (1919) 43.

84 France: Ibid., p. 30; Scotland: B. E. A., § 53 (2); and cf. the old law, still vigorously influencing in some states the interpretation of the N. I. L. on assignment by check. L. R. A. 1916 C 184-5. And so, in France, discharge of the drawer by non-performance of the conditions remits the holder to the drawer's rights against the drawee. Fauvel, Des Cheques (1902) 163.
drawer’s account on receipt of advice of drawing regardless of when the draft may be presented; the relatively minor and slow development of promissory notes on the Continent. It seems further probable that the endorser’s obligation on a bill of exchange was modeled on the analogy of the drawer’s, taking into consideration, however, that the endorser does not purport himself to have seen to the cover of the bill. That the endorser’s obligation was normally (like the drawer’s) that of one backing up with his own name a transfer by himself for consideration, is strongly evidenced by the difficulty our courts have had in dealing with that endorser rightly named anomalous. And we have abundant evidence in judicial language that courts worked out the position of the endorser of a note on the analogy of the endorser, or even directly of the drawer of an accepted bill of exchange.” Here, then, would be a good reason for the liberal rules as to conditions indicated above: no holder could be expected, in order either formally to establish non-payment or to give protection-notice to his drawer, to do more than had become reasonably possible under the circumstances.” Here may be, too, the explanation of the otherwise strange rule that, even after total discharge, and even without new consideration, a drawer or endorser can waive any of the conditions”—surely a creation of the law merchant rather than of the common law. To the views of common law judges, on the other hand, it may prove that we owe the rigorous and absolute character of the conditions where they are held to exist at all, the reason of the condition being to this extent overlooked—save in that case of relatively recent development, the check; which was also the one case where the law outside the field of negotiable paper insisted on the presence of cover”

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87 Thus it is very possible that even under N. I. L., § 124, permitting a holder in due course to recover according to “the original tenor” of the instrument, a non-apparent alteration postponing maturity would suffice to excuse presentment, etc., until the apparent maturity; and this despite cases holding that, as against a maker, transfer after the original, but before the apparent maturity, does not constitute the taking a holder in due course, Arvett v. Barnhardt (1898) 86 Md. 595, 39 Atl. 532; or that no right against a prior obligor is created in a holder by the endorsement of the apparent payee after alteration, Brannan, op. cit., p. 348.

88 N. I. L., §§ 82, 109, 111; (1916) 8 C. J. 698; (1920) 29 Yale Law Journ. 793.

89 So the statutes of the various states on bad checks; and the banking laws forbidding overdrafts under some conditions. Query whether this whole state of the law on checks before the N. I. L., and to a great extent since, is not due primarily to the check being, and being currently recognized as, the instrument of pure exchange par excellence. Financing by checks—kiting—is regarded as unethical, as a vicious abuse of the slight delay in the exchange process inherent in conditions of space and volume of business. The only credit element normally present in the use of the check is faith that the drawer’s voucher is good at the time of delivery; the promise-to-make-good-at-a-future-time factor in credit, i. e., the factor of finance proper, is either absent, as where a note held by a bank for collection is paid by the maker with a check on the bank; or almost negligible, as in delivery of a check payable in the city of delivery; or a factor wholly incidental to furthering of the pure exchange process, as in a check payable through the clearing house; or a recognized, but still subsidiary factor, due only to limitations of space, as in a check drawn on a distant city. And the recognition by the courts of this pure exchange aim of the check is general; if anything, they have at times stressed it to the disregard of its dependence on the existing banking and business machinery for effecting the exchange, when determining the time within which presentment must be made as against the drawer. Cf. (1921) 31 Yale Law Journ. 187; Norton, op. cit., p. 507, n. 21, 506, n. 20.
—and the condition harshly and uncommercially construed. It is interesting to note the repugnance or anger with which a business man learns that failure to present a sight draft within a reasonable time after receiving it discharges a drawer absolutely; or to observe borrowers agreeing with their banks that for the drawer to insist on his discharge from a discounted bill because of failure to protest on the day would be an unbusinesslike and unethical technicality. There is the possibility, as yet wholly unverified by the writer, that this rigidity in interpreting the conditions may have been influenced by the rise of finance and accommodation paper modelled on the original true exchange paper, and by the same judicial attitude which worked out technical discharge for so many gratuitous sureties. It is at least obvious that finance paper and anomalous endorsements are relatively late adaptations of an existing standardized and well-known mechanism; more cannot yet be said with certainty.

III

Standard Conditions of Negotiation

These are, as has been indicated, true conditions precedent to the duty of one who has a "personal defense" to the instrument, and whose duty as expressed in the paper is therefore only apparent until the conditions have been fulfilled. The specific conditions are perhaps five: transfer (1) to a holder; (2) when the instrument was complete and regular on its face; (3) for value; (4) without notice of previous dishonor or defects or defenses; and (5) before the instrument was overdue, or in the case of demand paper, stale.

It is clear that impossibility may supervene in the case of at least three of these conditions. The paper may before transfer be made irregular on its face—it matters not by whom. Notice may be given to any prospective transferee—again, it would seem to matter not by whom or what. And mere lapse of time may, even without fault of the possessor, produce staleness of the paper. In no case will such supervening impossibility dispense with the condition.  

It may be noted that the growing practice of accepting or endorsing against a consideration, to give currency to paper, stands on the same footing with compensated suretyship generally, as to the social value of over-strict rules of discharge.

So also of the collection draft; which, if never discounted or advanced against by the collecting agency, never becomes a negotiable instrument at all unless accepted. The adoption and adaptation is obvious,—not only of the negotiable instrument form, but of the banking mechanism for collecting true commercial paper.

But this is not in all states true, as to the endorser, where the only current condition which has not occurred is transfer before maturity; and the same is true of a maker which is a bank. See Chafee's admirable discussion, Rights in Overdue Paper (1918) 31 Harvard Law Rev. 1104. In states where N. I. L., §§ 137 and 62 have not yet been perceived to change the old representation theory of certification, a certification made under mistake as to the state of the drawer's account or the non-presence of a stop, requires as a condition the parting with value in good faith. Supervening impossibility will not excuse.
In the main, then, we find Professor Corbin's generalization sustained in the field of negotiable paper. None of the conditions mentioned in the first two sections go to the essential consideration for the obligation—at least in the type cases about which the obligations on negotiable paper seem to have crystallized. With one possible anomalous exception, that of spoliation of an instrument never transferred to a holder in due course, supervening impossibility seems to dispense with each of the conditions in those two sections; and even with the anomaly, the holder's substantive rights are in some measure protected by rules outside the instrument. The case of the conditions of negotiation is more difficult to bring within Professor Corbin's distinction. There is here no true question of consideration, of expected equivalent; quite the opposite. The obligor is far from bargaining to become obligated if a taker, in reliance on his signature, parts with value. Yet a vital element—the vital element—in the obligation sought to be imposed under the law, is the one condition which nearly sums up all the others: even parting with value by a taker is to impose no obligation unless that taker takes in the usual course of business; and such a condition, within the spirit of Professor Corbin's distinction, supervening impossibility should not affect.

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*Supervening Impossibility of Performing Conditions Precedent (1922) 22 Columbia Law Rev. 421, 428: "If making the obligor perform in spite of the non-performance by the obligee of a condition of the obligation would require performance for a substantially less performance in exchange than was agreed upon by the parties, it should not be done even though the non-performance was due to impossibility. . . . If, on the other hand, the fact described by the parties as a condition does not form a substantial part of the expected equivalent, the courts are almost certain to nullify it as a condition in case its performance becomes impossible; they are very likely to nullify it if its performance becomes unreasonably difficult or expensive. . . ."

*No discussion of this question in its reasons and results approaches in insight that of Moore (1917) 17 Columbia Law Rev. 617; Moore, The Right of a Remitter of a Bill or Note (1920) 20 Columbia Law Rev. 749, 756 et seq. Exception may perhaps be taken in specific cases to the definition there made of what use and wont require and justify; it is the writer's experience, for instance, that a bank dealing with paper drawn by a correspondent to the first bank's order hesitates long or refuses to deal with an unnamed party holding himself out as a purchaser or transferee, and believes the business-like source of instruction to be the drawing bank. Such occasional details are unessential to the realism and vitality of a discussion which marks a new starting point for the theory of negotiable paper.