

February 1931

Stopping Payment of Interest Coupons

Edward M. Bullard

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>

 Part of the [Law Commons](#)

Recommended Citation

Edward M. Bullard, *Stopping Payment of Interest Coupons*, 9 Chi.-Kent L. Rev. 1 (1931).
Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol9/iss5/4>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.

STOPPING PAYMENT OF
INTEREST COUPONS

*Edward M. Bullard**

A CORPORATION issuing negotiable coupon bonds or other interest bearing securities customarily appoints an investment house, bank or trust company to act as agent for the payment of the interest on the obligations upon the presentment of the coupons as they mature. The coupons in the ordinary case are payable to bearer and are in all respects negotiable. Not infrequently the owner of such a coupon loses it or it is stolen from him or he is in some other manner deprived of the possession of it against his will. Thereupon he notifies the paying agent of the circumstances and requests that payment of the coupon when presented be refused. The paying agent on receipt of this stop payment order takes such steps as it may to insure the detection of the coupon upon its presentment for payment. A paying agent, for the purpose being considered, is usually selected from the larger banking institutions of our principal cities and very likely will be found to be acting at one time as fiscal agent for a great many corporations having securities outstanding. On any interest payment date an institution so situated may be called upon to pay out on account of coupons many thousands of dollars. The volume of the business is so great that with the equipment and facilities of the modern banking house it becomes impractical, if not impossible, to inspect each coupon as it passes over the counter to determine whether or not it is subject to a stop payment notice. Consequently payments in disregard of requests that payment be refused are common occurrences in business and banking circles today. Obviously the chances

*Professor of Law at Chicago-Kent College of Law.

for a successful execution of the stop order increase as the amount of business of the kind on the day of presentment is diminished. Also detection is easier if the coupon when presented is long overdue. That fact in itself suggests that something may be wrong.

The immediate inquiry concerns the liability of the paying agent to the sender of the stop payment order for failure of the agent to decline payment of the coupon. It goes without saying that the paying agent has a complete defense if it can be shown that the one receiving payment was a holder of the coupon in due course or that he derived his title through a holder in due course and in that event the omission of the paying agent to make any investigation of the facts whatever does not alter the case. We are proceeding on the assumption that the person presenting the coupon was not himself entitled to payment.

Section 119-1 of the Uniform Negotiable Instruments Law provides: "A negotiable instrument is discharged:—by payment in due course by or on behalf of the principal debtor," and by Section 88 payment in due course is defined,—"when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective." Whatever may be the applicability of certain other provisions of the Negotiable Instruments Law to corporate securities, the applicability of these sections of the Act, properly construed, to negotiable bearer coupons is hardly open to question. Under these sections the status of the payer in due course is acquired, with respect to the element of good faith, in substantially the same manner as that in which one becomes a holder or purchaser in due course. Section 52 of the Uniform Law declares in part: "A holder in due course is a holder who has taken the instrument under the following conditions: 3. That he took it in good faith and for value; 4. That at the time it was negotiated to him he had no notice of any infirm-

ity in the instrument or defect in the title of the person negotiating it." In fact it is immaterial to the rightful owner of the coupon whether the one making the alleged wrongful payment be treated as a payer or a purchaser. The equities are the same in either case. If a payment, the former owner wants the money; if a purchase, he wants the coupon so that he may himself cash it for his own use.

Section 59 of the Negotiable Instruments Law states that every holder is deemed *prima facie* to be a holder in due course and there is abundant authority for the proposition that payment to the holder of a bearer instrument who is himself a finder, a defrauder or a thief effects a valid discharge of the instrument, provided, that the payer at the time of payment had no notice of the former holder's equities.¹ The rule is the same if the payer has but a mere suspicion of the true state of things;² but if the payer is definitely informed of the facts by virtue of the receipt of a stop payment order payment thereafter without investigation into the holder's title is considered to have been made in bad faith. The instrument under the circumstances is not discharged and the rightful owner can demand a second payment.³

In the case of *Bainbridge v. City of Louisville*,³ the City under legislative authority had issued its bonds payable to bearer with interest coupons attached. The bonds were placed upon the market and Bainbridge, the father of the appellant, purchased some of the bonds and deposited them for safekeeping in the vaults of the

¹ *Yates v. Valentine*, 71 Ill., 643; *Alexander v. Horner*, 1 Fed. Cases, 366; *No. American Neu-chatel Rock Paving Co. v. Dist. of Col.*, 16 Ct. of Appls. 593; *Alexander v. Robbins*, 84 Mo. 657; *American Agricultural Chemical Co. v. Graham*, 9 Ga. Appls. 479; 71 S. E. 761; *Drinkall v. Movius State Bank*, 11 N. D. 10; 88 N. W. 724.

² *Stoddard v. Burton*, 41 Ia. 582; *Cothran, Agent, Sarah A. Collins*, 29 Howard's Prac. 113.

³ *Bainbridge v. City of Louisville*, 83 Ky. 285; *Hinckley v. Union Pac. R. R. Co.*, 129 Mass. 52; *Wheeler v. Guild*, 37 Mass. 545; *Page Woven Wire Fence Co. v. Pool*, 133 Mich. 323; *Drinkall v. Movius State Bank*, supra; *Ainsworth v. Ainsworth*, 24 Miss. 145; *Burke v. Moore*, 10 Ind. 160.

First National Bank of Baltimore. Thereafter the bank was entered by burglars and all the bonds so deposited, together with many other securities, were stolen. A list of the bonds, with a full description of their character, in the form of a circular, was sent to all the principal cities in the country, as well as the leading banking institutions, and every possible step was taken to prevent the purchase of the bonds from the thieves. Notice was also given to the City of Louisville and to the Bank of America, its fiscal agent in New York. They were notified not to pay the bonds or coupons to any one but the appellant. The City proceeded to pay these coupons to the parties presenting them, some before they were due and others after maturity. This action was instituted to recover payment against the City, and in holding the City liable the court said:

“It is a reasonable rule we think, and one that may be regarded as settled, that when the theft has been shown, the presumption is that the paper is still in the possession of the thief, and a subsequent holder, other than the original owner, when he demands payment, should be required by the maker, before payment, to show that he is in good faith entitled to the money. This rule, of course, applies where the maker of the paper has actual notice of the loss.

“The universal doctrine of the text-books on the subject is, that the maker is liable to the owner of the paper after notice of the loss, if he pays the money on the paper to another without requiring the latter to establish a clear title in the event it subsequently appears that he was without title.

“While the rule requiring such inquiry may work some inconvenience to the maker of the paper, still it is better that he should suffer this temporary annoyance than to deny the real owner all remedy when he has lost the evidence of the indebtedness, and for no other reason than that the paper lost is a negotiable instrument. * * *

“It was incumbent on the city of Louisville in this case, having had undoubted evidence or notice of the loss of this paper, to show, when payment had been made after the loss and notice

thereof, that the holders were purchasers in good faith before maturity and for value.

"The mere belief that the party presenting the paper was an innocent holder is not sufficient. The notice of the loss placed the city upon inquiry, and as to those coupons paid, a perfect title in the holder must be shown. The fact that the law may presume the holder of such paper to be a transferee for value, affords the maker no protection when the paper has been lost by the original owner, and notice brought home to the maker before payment."

Hinckley v. Union Pacific R. R. Co., supra,³ is a similar case. There the Railroad Company had issued its Sinking Fund Mortgage Bonds dated September 1, 1873. The plaintiff purchased a number of these bonds and placed them in his box at the Northampton National Bank in Massachusetts. On January 26, 1876, the bank was robbed and the plaintiff's bonds, among other securities, taken. In February the plaintiff notified the Treasurer of the Railroad Company as follows:

"Northampton, Mass., Feb. 26, 1876.

"E. H. Rollins, Esq.,

"Treasurer Union Pacific Railroad Co.,

"Boston.

"My dear Sir:

"I lost by the recent robbery of the Northampton National Bank, 42,000 Union Pacific Railroad Sinking Fund bonds, Nos. 5113 to 5154, inclusive. The bonds were originally issued to me, and have never been on the market. If you could stop payment of the coupons due on the 1st of March, or notify me by whom any of such coupons are presented, I should be exceedingly obliged to you. The Ohio and Mississippi Railroad Company have promised Mr. Edwards, president of the Bank, to stop payment of any of the stolen coupons of their bonds whose numbers have been given them. I shall be very thankful for any protection you can offer me in the matter.

"Respectfully yours,

"Henry R. Hinckley."

This request was communicated by the Railroad Company to the Union Trust Company, its fiscal agent in

New York. On April 21, 1879, Kidder, Peabody & Co., Bankers, presented to the Union Trust Company certain of the coupons detached from plaintiff's bonds and the coupons were paid. Plaintiff in this action based his declaration upon the two coupons bearing the earliest maturity, viz., March 1, 1876. The court gave judgment for the plaintiff, saying in part:

"As to the time of the notice, there can be no question that, if at the very moment of payment the payer were reminded that the note which he was about to pay had been lost or stolen, it would be his duty to delay payment till the *de facto* holder had established a title to the instrument. The question before us is whether notice previously given of the loss of a negotiable instrument distinguishable by number or other ear-mark is sufficient to fix upon the party liable to pay a duty of inquiry, and of refusal to pay to a holder who cannot substantiate his title. We think that such previous notice is sufficient. * * *

"The only payment which can be a discharge to the party paying is a payment to a *bona fide* holder, whose title was acquired before maturity, for value, and without notice. It may often happen that upon inquiry the title of the *de facto* holder will appear so plainly that the party paying will take very little risk in making the payment; but the payment of a lost negotiable instrument, after notice, overdue, and without inquiry, is a payment wholly at the payer's own risk."

The Attorney General of the United States in an opinion dated December 8, 1919,⁴ advised the Secretary of the Treasury that a United States Government coupon of the First Liberty Loan, which had been found in the post office building in Denver by an employe and forwarded to the Treasury Department, should be held by the Treasury Department until claimed by the true owner and should not be returned to the finder on his request. The Attorney General based his opinion upon the rule of law that the maker of a negotiable instrument is not protected if he makes payment with knowledge of the fact that some one else is the rightful owner of the instrument.

⁴ 32 Opinions Atty. Gen. 80.

Certain of the coupons paid in *Bainbridge v. City of Louisville* and also those involved in *Hinckley v. Union Pacific R. R. Co.* were long overdue. This fact was noticed by the court in each case, in the latter it being said with reference to one of the coupons:

“There is another circumstance in this case which tends to fix more clearly upon the defendant the duty of inquiry, and that is that the coupon was long overdue. The maker of a coupon cannot be exempt from the liabilities which attach to all negotiable instruments when overdue. It is an elementary principle of commercial law that negotiable paper overdue carries with it, on its very face, notice of defective title sufficient to put the transferee on inquiry.”

Conceding as a matter of law the liability of the payer with notice who fails to inquire into the title of the holder presenting the coupon, what kind and amount of investigation is required of the payer to afford him protection? The language of the courts in the decided cases indicates that the payer having notice of equities acts at his peril and is under a duty to establish conclusively the title of the holder requesting payment. It is submitted that this is too harsh and is opposed to sound principle. The payer is entitled to be shielded under the presumption given the holder or purchaser by Section 59 of the Negotiable Instruments Law. The legal position of the payer, therefore, must be determined in a measure by considering the nature of that presumption. *Prima facie* the holder is deemed to be a holder in due course; “but,” in the language of Section 59, “when it is shown that the title of any person who has negotiated the instrument was defective the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course.”⁵ Should this be read as meaning that the party desiring to establish the holder’s title then has the ultimate burden of proving that title? Probably not. The

⁵ This section of the Act applies to negotiable corporate bonds. *Irwin v. Bedford*, 151 Tenn. 402; 270 S. W. 81.

real burden of proof should rather be on the contestant to establish the defective title. In other words, the presumption although expressed to be *prima facie* merely should be allowed a persisting effect and should not be regarded as devitalized completely by a *prima facie* rebuttal. The term "burden" then must be interpreted as burden of going forward and not burden of proof. This construction of the presumption is supported by the Supreme Court of Missouri in the interesting case of *Downs v. Horton*,⁶ and conforms to the policy of the law favoring the free circulation of bearer paper.⁷ It is believed therefore that on principle if the paying agent after receiving a stop payment notice delays payment of the coupon for a reasonable time and makes a fair investigation of the facts which fails affirmatively to disclose want of good title in the holder the agent should be protected in paying the bearer in accordance with the terms of the coupon. Beyond this the duty should rest on the former holder to place before the paying agent clear evidence of the alleged defective title of the bearer.

It will be observed that the position of a paying agent for corporate securities upon the receipt of a stop payment order is far more precarious than that of a bank directed by one of its depositors to stop payment of a check. The bank, except in the single case of certification procured by the holder, should refuse to honor the check no matter what the circumstances. The bank is under no contractual or other obligation to the holder to pay the check and consequently incurs no liability to the holder for its refusal to pay. The paying agent on the other hand, acting for the maker of the coupon, proceeds, under the strict view, at its peril. Refusal

⁶ 287 Mo. 414; 230 S. W. 103.

⁷ See also *Shaffer v. Bond*, 129 Md., 648, 99 Atl. 973 and the authorities there cited, where it is held that under Section 24 of the Negotiable Instruments Law the ultimate burden is on the maker of the note to prove want of consideration, even though the *prima facie* case given the plaintiff by this section of the Act has been negated.

to pay or unreasonable delay in paying the holder will give rise to a contractual liability on the instrument itself if the holder proves to be the one entitled to payment, whereas neglect to observe the stop payment request may subject the payer to a liability in the nature of tort for conversion to the original holder if the holder requesting payment proves not to be the one entitled to payment.⁸

Negotiable bearer coupons issued in connection with a series of corporate bonds circulate much more readily and are dealt in far more extensively in any metropolitan business center than the individual obligations of private persons. In this respect coupons are more nearly assimilate to bank drafts, negotiable certificates of deposit and even bank notes than to the class of security represented by a merchant's individual note or bill. Yet whenever the question has been raised the courts have not been disposed to make any exception, based on the nature of the instrument paid, to the general rule of law regarding the liability of the maker with notice who pays the instrument without examining the holder's title. Lord Mansfield, in the year 1758, sitting on the Court of King's Bench, gave his now famous opinion in the case of *Miller v. Race*,⁹ in which he considered certain of the rights of owners and payers of bank notes. He pointed out that the negotiable characteristics of money were not attributable to the absence of "ear marks," but to "the currency of it," and that by commercial and business use, bank notes had become

⁸ In *Hinckley v. Union Pacific R. R. Co.*, it was stated:

"It has been argued for the defence that the duty of the promisor in case of the loss of a coupon is a gratuitous duty, analogous to the liability of a gratuitous bailee. We cannot take such a view of this duty. It is true, as the counsel for the defendant maintains, that the liability does not arise from the contract, but from the law outside of the contract; but whatever that liability may be, it is part of the law which governs the issue and circulation of negotiable instruments, to which the maker of such instrument subjects himself by the very act of making, and from which he derives the advantage which the negotiability of his promise affords him."

⁹ 1 Burrows 452.

currency or money notwithstanding their supposed earmarks; nevertheless, he said, even regarding bank notes as money "it may be both reasonable and customary to stay the payment till inquiry can be made whether the bearer of the note came by it fairly or not."

Fifty years later, in *Solomons v. Bank of England*,²⁰ counsel for plaintiff, while not contending that the maker of ordinary negotiable paper was not bound by notice of loss, endeavored to establish a distinction in favor of bank bills, saying: "If once the Bank were permitted to withhold payment upon the same grounds as would warrant it in the case of bills of exchange, the confidence of foreigners would be very much shaken, and the circulation of these notes greatly diminished." Lord Kenyon, C. J., speaking for the court replied:

"It is very certain that both policy and convenience require that Bank notes should have the freest currency, and no other impediment ought to be put in the way of it than such as mere justice requires. This is doing no more than would be the case even upon payment of money itself. * * * There is no doubt but the holder of a Bank note is entitled *prima facie* to prompt payment; but if another party has been plundered of it before, and has applied to the Bank, can any impropriety be imputed to them for suspending the payments till it is ascertained that the party tendering it for payment is not contaminated with the guilt?"

The Massachusetts Court in *Hinckley v. Union Pacific R. R. Co.* cited and discussed the foregoing case with approval.

In the *Hinckley* case, defendant's counsel also argued that the volume of business done by the Union Trust Company, the Railroad Company's paying agent in that case, was so large that the usual rules of liability should not apply. To this end the following statement of the Treasurer of the Union Trust Company was offered in evidence:

²⁰ 13 East 135, Court of K. B.

"It happens once a week, on an average, that a person will present for payment the coupons of a bond or of several bonds, which coupons are overdue for one or more years, with or without those of intervening dates. Coupons presented after maturity are often presented at dates concurrent with the payment of coupons from other classes of the Company's bonds, which last are just due or just past due. The Company pays coupons from first mortgage bonds, \$27,231,000; land grant bonds, \$6,670,000; sinking fund bonds, \$12,455,000; Omaha Bridge bonds, \$2,104,000."

The court was of the opinion that these were not ex-tenuating circumstances:

"For a party engaged in mercantile pursuits to keep a list of notes signed by himself which he has been notified have been lost or stolen, is neither impracticable nor burdensome, and is no more a hardship than any other precaution which the law merchant imposes upon those who make use of the benefits of negotiable paper, for the discouragement of fraud and the protection of the public. And the fact that an individual or a corporation does business on a very large scale is far from being a reason why such individual or corporation should be allowed to disregard any of the obligations laid upon those who issue only small amounts of negotiable paper. Ordinarily opportunities for fraud upon the public will increase with the increase of the business of a great corporation, and it is the duty of such a corporation to provide proportionately greater means of guarding against such fraud. If it be necessary to engage special clerks, or to devote extra time to applying the precautions imposed by the law merchant, it is no hardship, but only the natural and reasonable increase of a duty proportionate to the magnitude of the obligations of such a corporation."

In the case of *Vermilye & Company v. Adams Express Co.*,¹¹ Vermilye & Company, Bankers of New York, had presented to the treasury of the United States for payment, certain treasury notes issued under the act of March 5, 1865. They were informed by the Department that the Adams Express Company asserted ownership of the notes and that they could not be paid until

¹¹ 21 Wall. 138.

the question of the rightful ownership was settled. The matter resulted in a bill of interpleader filed by the United States. The Express Company suffered the loss of the notes through a train robbery and as soon thereafter as it could obtain the numbers and other description of the stolen notes advertised the loss extensively in the newspapers, gave notice at the Treasury Department and also notified the principal bankers and brokers of the City of New York, including Vermilye & Company. Subsequently Vermilye & Company purchased the notes then overdue at fair prices in the regular course of business and forwarded them to the Treasury Department for redemption. On the hearing Vermilye & Company introduced several bankers and brokers as witnesses to show that notes of this kind continued to be bought and sold after they had become due; that it was not customary for dealers in government securities to keep records or lists of the numbers or description of bonds alleged to have been lost, stolen or altered, or to refer to such lists before purchasing such securities; that in their judgment it would be impracticable to carry on the business of dealing in government securities if it were necessary to resort to such lists and make such examination previous to purchase, and that the purchase of the notes in controversy was made in the ordinary and usual mode in which such transactions were conducted. The court affirmed the decree in favor of the Express Company saying:

“We cannot agree with counsel for the appellants that the simple fact they were the obligations of the government takes them out of the rule which subjects the purchaser of overdue paper to an inquiry into the circumstances under which it was made, as regards the rights of antecedent holders. * *

“Bankers, brokers and others cannot, as was attempted in this case, establish by proof a usage or custom in dealing in such paper, which, in their own interest, contravenes the established commercial law. If they have been in the habit of disregarding that law, this does not relieve them from the consequences nor

establish a different law. Nor sitting here as chancellors can we say that the testimony offered of the impossibility of men in that business bearing in mind the notices of loss or theft of bonds or notes well described, with which they have been served, satisfies us of the soundness of the proposition. *By the well-established law of the case they may purchase such paper before due without cumbering their minds or their offices with the memoranda of such notices.* But we apprehend that the amount of overdue paper presented for negotiation is not so large as that bankers receiving notice of loss cannot make or keep a book or other form of reference which will enable them with a very little trouble to ascertain, when overdue paper is presented, whether they have been served with notice of a claim adverse to the party presenting it.

“The fact that the notes were at once recognized at the treasury by reason of the notices served there, proves that no unreasonable amount of care and prudence was necessary to enable bankers and brokers to do the same.

“There are other rights in cases of overdue paper besides the right to purchase it, which require that care should be exercised, especially by parties who have fair notice of these rights.

“Bankers and brokers cannot, more than others, when warned of possible or probable danger in their business, shut their eyes and plead a want of knowledge which is willful. In this matter, also, the appellants were in fault.” (Italics the writer’s.)

Judging from the italicized portion of the above quotation, the court decided the case against Vermilye & Company, not because they had received notice of the loss from the Express Company, but mainly because the purchase was after the notes had become due. In other words, notice of the kind there given was not such as would have prevented the Bankers from becoming holders in due course had they purchased the notes before they were overdue. If this is what the court really intended, what would it have said if there had been involved the rights of a payer instead of a purchaser? Payment in due course, unlike purchase, results expressly by payment “at or after maturity,” and if banking houses acting as paying agents “may,” to paraphrase the

language of the court, "pay such paper after due without cumbering their minds or their offices with the memoranda of such notices," the makers of corporate securities and their fiscal agents are in a position to enjoy a very welcome immunity from the claims of those whose coupons have been inadvertently paid. Unfortunately, a rather diligent search of the authorities, both before and after the decision of this case, has failed to reveal "the well settled law" to which the Court refers.

In the Vermilye case and also in the Bainbridge and Hinckley cases it appears that the loss of securities occurred through no fault of the owner. Frequently, however, the loss or theft of coupons results from the owner's own carelessness. When his conduct or fault can be said to be proximately responsible for the loss his right of recovery against the payer should, on principle, be less clear. If the payer is liable on principles of negligence in a capacity analagous to a tort-feasor, as before suggested, is there not ample warrant for introducing in a proper case the doctrine of contributory negligence? The owner of the coupons should not be able to rid himself entirely of the consequences of a loss occasioned through his own blameworthiness simply by notifying the payer of the facts, even though, in one sense, the payer does have the "last clear chance" of apprehending the coupons. Thus far this phase of the subject seems not to have been directly considered by the authorities.

Under date of April 27, 1867, H. McCulloch, then Secretary of the Treasury of the United States, published the following circular:

"Treasury Department, April 27, 1867. In consequence of the increasing trouble, wholly without practical benefit, arising from notices which are constantly received at the department respecting the loss of coupon bonds which are payable to bearer, and of treasury-notes issued and remaining in blank at the time of loss, it becomes necessary to give this public notice, that the

government cannot protect, and will not undertake to protect the owners of such bonds and notes against the consequences of their own fault or misfortune. Hereafter all bonds, notes and coupons, payable to bearer, and treasury-notes issued and remaining in blank, will be paid to the party presenting them in pursuance of the regulations of the department, in the course of regular business; and no attention will be paid to caveats which may be filed for the purpose of preventing such payment."

In the same manner paying agents, in response to stop payment requests, sometimes write the owners of the lost or stolen coupons stating that while reasonable efforts will be used to prevent the payment of the coupons on presentment, still if the coupons should be paid, no liability therefor will be recognized. It is perfectly clear that the mere forwarding of statements of this character cannot affect the legal rights or liabilities of the parties. If an obligation exists not to pay after being apprised of the equities of the case, it cannot be avoided in advance by a bare disclaimer. If, however, the owner of the coupons signs a form of agreement, as is often done, furnished by the paying agent, containing a request that payment be stopped and an express provision for exoneration from responsibility in the event of neglect to observe the request, different questions arise. There a contract has been made, the terms of which are broad enough on their face to protect the paying agent in the event of a payment made either unavoidably or through negligence. What of the validity and enforceability of such a contract? In the absence of decisions passing on the exact question reference perhaps is warranted to the general rules governing similar contracts entered into between the depositor and his bank in regard to stopping payment of the depositor's checks. For the most part, the larger banks of the country do not attempt to limit their liability by contract for failure to stop payment of checks when ordered, treating their liability in such cases as one of the risks incident to the carrying on of a general banking

business. Smaller institutions, unwilling to assume this risk, frequently do attempt to limit their liability by stipulation or contract. The following is a typical form of card which the depositor is asked to sign when he desires to stop payment on a check which he has drawn:

“Please stop payment on check No..... for \$..... dated drawn by me to the order of..... and I hereby agree to indemnify the..... bank against all loss resulting from nonpayment of said check. Should you pay this check through neglect, inadvertence, or oversight, it is expressly understood that you will not be held responsible or liable therefor.”

Outside of special agreement the law, with substantial uniformity, has held the bank to an unconditional obligation to stop payment on checks when so ordered by the depositor. Contracts modifying this absolute undertaking have been upheld insofar as they purposed to relieve the bank from liability in case of payment notwithstanding the exercise of due care, but have generally been held invalid on grounds of public policy where the intent was to discharge the bank from liability for negligent disregard of the stop order. In the latest decision on the subject, however, *Tremont Trust Company v. Burbank*.¹² a contract exempting the bank from liability for negligence is clearly sustained. In that case the depositor, desiring to stop payment on a check drawn by him upon his account with the defendant Trust Company signed and delivered to the Trust Company a card requesting that payment of the check when presented be refused and expressly agreeing not to hold the Trust Company liable on account of payment contrary to the request if payment should occur through “inadvertence or accident.” On the reverse side of the card it was stated that the Trust Company received the request upon the express condition that it would use the best methods known to it to prevent “oversight and accident” but that

¹² 126 N. E. 782, Supreme Judicial Court of Mass.

it should not be in any way liable for its act should the check be paid in the course of its business. The book-keeper of the Trust Company testified that he made a notation of the stop order on his book but in a manner which he could not explain, it being the last day of the month, and he being busy with making up accounts, the check got through and was debited against the defendant's account. The Court, in sustaining defendant's exceptions taken in the lower court said:

"The word inadvertence in the printed agreement embraces the effect of inattention, the result of carelessness, oversight, mistake, or fault of negligence and the condition or character of being inadvertent, inattentive, or heedless. The word 'accident' is used in the sense of a happening of an event without the concurrence of the will of the person by whose agency it was caused. It is manifest the quoted words were intended to exonerate the bank from the kind of negligence shown by the record, and we are unable to see anything illegal, or anything opposed to public policy, in a stipulation or agreement which relieves a bank so circumstanced from the results of the mere inattention, carelessness, oversightedness, or mistakes of its employes."

No reason is apparent why the law of this case should not apply as well to a contract made between a paying agent for corporate securities and the owner of lost or stolen coupons, provided such a contract is valid at all. The difficulty lies in finding a sufficient consideration to support the promise of the owner of the coupons. This difficulty is not present in the case of depositor and bank. The relationship is there essentially contractual and is subject to modification at the will of the parties. In fact, the bank can refuse to take the depositor's account in the first instance or to continue it, as the case may be, unless the depositor agrees to hold the bank free from liability for payment of checks, the payment of which is ordered stopped. Not so with the paying agent whose duty it is to stop payment after notice, a duty existing in law and not by virtue of any agreement between the parties interested. The paying agent cannot require as

a condition to its acceptance of the stop payment order a promise from the owner of the coupons not to hold the agent liable for an inadvertent payment. Therefore, the question might be asked whether such a promise when voluntarily made is founded on a sufficient consideration. The objection is a rather technical one and perhaps should not prevail where the agreement between the paying agent and the owner of the coupons is freely entered into. After all, there is fair exchange of promises.

In the present state of the law, where the duty of the paying agent remains unaffected by contract, the liability for payment after the receipt of a stop order and without any investigation into the holder's title seems to be tantamount to absolute liability. If the courts should at any time in the future see fit to supplant this standard of absolute liability with the time-honored though less exact "due care under the circumstances," their action, from the business standpoint at any rate, should not be too readily condemned as arbitrary.