Thus there seem to be two definite rules for the determination of the value of condemned land. When it appears certain that the land will be included in the improvement, no increment is allowed. Where it appears with reasonable certainty that the land will not be taken, increment will be allowed. The principal case falls in the middle ground between the two rules. Whether it would be taken or not depended from the first upon which of two alternative routes should be chosen, and no one could have known whether it would or would not be taken. The Supreme Court solved the dilemma by denying any increment of value where it appears possible that the land will be taken. E. M. C.

NEGOTIABLE INSTRUMENTS—FAILURE TO PRESENT CHECK—PAYMENT OF TAXES BY CHECK—[Missouri].—On November 4, 1932 the plaintiff gave defendant, the state Collector of Revenue, as payee, a check in payment of state and county taxes. About an hour and a half later defendant deposited it in the bank which was his regular depository. The drawee bank, which was in the same town, was open on November 4 and on November 5, 1932, until 3:00 P. M.; but it was closed for liquidation before the beginning of the next business day and before the check was presented for payment. After the drawee bank closed, the defendant charged back on the tax records the taxes for which he had given the plaintiff a receipt on November 4, 1932. In October, 1937, the plaintiff paid the taxes to the then Collector of Revenue, and brought this action to recover the amount of his loss caused by the alleged negligence of the defendant in failing to present the check before the drawee bank closed. At the close of the plaintiff's evidence, the trial court directed a verdict for the defendant. *Held,* affirmed. The defendant was not negligent; and the negotiable instruments' rule discharging the drawer pro tanto for the payee's delay in presenting a check for payment does not apply when the check is given in payment of taxes and when suit is by the drawer instead of by the payee. *Beckman v. Kinder.*[1]

In a suit by the payee against the drawer of a check given for a private debt instead of for taxes, but otherwise involving facts similar to those of the principal case, the loss due to delay in presentment must be borne by the payee-plaintiff.[2] The rules governing such a situation are those of the

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1. (Mo. 1942) 165 S. W. (2d) 311.

2. "A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay." R. S. Mo. 1939 §3201, Negotiable Instruments Law, §186. When the bank and the payee are in the same town, it is generally recognized that a "reasonable time" means before the end of the next business day after the payee has received the check. St. John v. Homans (1844) 8 Mo. 382; Wear v. Lee (1885) 87 Mo. 358; Rosenblatt v. Haberman (1880) 8 Mo. App. 486; Koch v. Sanford Loan & Realty Company (1926) 220 Mo. App. 396, 286 S. W. 732; Missouri Pacific Railroad Company v. H. M. Brown Coal Company (1932) 226 Mo. App. 1038, 48 S. W. (2d) 86; Farm and Home Savings and Loan Association v. Stubbs (1936) 231 Mo. App. 87, 98 S. W. (2d) 320. Accord: Maxwell v. Dunham (1927) 222 Mo. App. 193, 297 S. W. 94. Brady, *Bank Checks* (2d ed. 1926) 135, §87; 8 Am. Jur., Bills and Notes, §670, and cases there cited. The Missouri courts hold that the custom of banks in doing business through a

law merchant and have no application as such in tort,[3] although this distinction is not always clearly indicated by the decisions.[4]

While a seemingly similar factual situation is encountered when a check is given in payment of taxes, the legal questions involved differ. Statutes in many states, including Missouri, provide that taxes shall be paid only in "gold or silver coin or legal tender notes of the United States, or in national bank notes."[5] There are no Missouri decisions directly in point, but cases in other states uniformly hold that in *no event* is a check for taxes itself more than conditional payment, even where a receipt is given the taxpayer.[6] Nor would long condoned custom override the express instruction of the "principal-state" to the "agent-collector," since by reason of the statute and the presumption that everyone knows the law, the "third party-taxpayer"

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clearing house does not extend the time in which presentment may be made. Rosenblatt v. Haberman (1880) 8 Mo. App. 486; Farm and Home Savings and Loan Association v. Stubbs (1936) 231 Mo. App. 87, 98 S. W. (2d) 320. But some other states follow a more liberal rule. Brady, *Bank Checks*, (2d ed. 1926) 143, §90; 8 Am. Jur., Bills and Notes, §670, and cases there cited. The drawer is discharged both on the check and on the original consideration. Bigelow, *Bills, Notes, and Checks* (3d ed. 1928) 160, note 2. It is immaterial that some of these rules were announced in cases decided before the adoption of the Negotiable Instruments Law, since, in Missouri at least, this section has not changed the previously existing law on the subject. Farm and Home Savings and Loan Association v. Stubbs (1936) 231 Mo. App. 87, 98 S. W. (2d) 320; Bigelow, *Bills, Notes, and Checks* (3d ed. 1928) 163, §230.

3. Smith, *Compendium of Mercantile Law* (3d ed. 1865) 318.

4. "Could it be said that in such case he was not *negligent?* * * * by his own forgetfulness, his own *negligence* delayed presentation." [Italics added] Koch v. Sanford Loan & Realty Company (1926) 220 Mo. App. 396, 400, 286 S. W. 732, 733.

"It is also generally recognized that when the holder of a check and the bank on which it is drawn are in the same city or town, the check must be presented on the day it is received or the next day thereafter, and if not so presented the holder *will be guilty of negligence as a matter of law.*" [Italics added] Missouri Pacific Railroad Company v. H. M. Brown Coal Company (1932) 226 Mo. App. 1038, 1040, 48 S. W. (2d) 86, 87. The plaintiff in the principal case relied heavily upon the language of the latter case in his briefs.

5. R. S. Mo. 1939 §11082.

6. Koones v. The District of Columbia (1886) 4 Mackey (15 D. C.) 339, 54 Am. Rep. 278; Gray v. Boundary County (1930) 49 Idaho 589, 290 Pac. 399; Morgan v. Gilbert (1929) 207 Iowa 725, 223 N. W. 483; Beloit Building Company v. Staley (1925) 118 Kan. 141, 234 Pac. 57; Houghton v. City of Boston (1893) 159 Mass. 138, 34 N. E. 93; Moore v. Auditor General (1900) 122 Mich. 599, 81 N. W. 561; Moritz v. Nicholson (1926) 141 Miss. 531, 106 So. 762; McLanahan v. City of Syracuse (N. Y. Sup. 1879) 18 Hun. 259; Eggleston v. Plowman (1926) 49 S. D. 609, 207 N. W. 981, 44 A. L. R. 1231.

Any contrary agreement, express or implied, between the tax collector and the taxpayer will not affect the rights of the state. Houghton v. City of Boston (1893) 159 Mass. 138, 34 N. E. 93; McLanahan v. City of Syracuse (N. Y. Sup. 1879) 18 Hun. 259; Beloit Building Company v. Staley (1925) 118 Kan. 141, 234 Pac. 57.

But the taxes for which a check was given will be paid when the money is actually received on the check. Richards v. Hatfield (1894) 40 Neb. 879, 59 N. W. 777.

has notice of the principal's "instructions." The result is that where a loss is caused by the collector's delay in presenting a check given him for taxes, the ordinary law of negotiable instruments does not apply; and the drawer will have no *pro tanto* defense against subsequent proceedings by the state to collect the taxes.

When the drawer of a check given in payment of a private debt is entitled to be discharged from liability thereon to the extent of his loss by the holder's failure to make due presentment, and he nevertheless pays the amount of the debt on demand by the holder, the drawer's ability to recover the payment will depend on whether the payment was made under a mistake of fact or law.[7] Under the American decisions, it would seem that when with full knowledge of the *facts* relieving him of liability, the drawer pays the holder under a misapprehension of the *law*, his payment is voluntary, even though made under protest, and cannot be recovered.[8] But, on the other hand, if the money is paid under a mistaken supposition that proper presentment has been made,[9] the drawer may recover.[10]

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7. The quasi-contract rules governing the recovery of money erroneously paid generally allow recovery when the mistake is one of fact, but deny recovery where the mistake is one of law. See Woodward, The Law of Quasi Contracts (1st ed. 1913) 54-72, §§35-71. Most of the cases involving checks appear to follow this distinction. However, at least one early case seems to hold that a misapprehension of his legal liability will prevent a drawer's subsequent promise to pay from being enforceable, and even that money paid might be recovered. Chatfield v. Paxton (1798) 2 East 471 n, 102 Eng. Rep. 449 n. But such a view evidently gained no following. See Chitty, *Bills* (10th Am. ed. 1842) 502 n. And Chitty stated as settled law that "money paid by one knowing (or having the means of such knowledge in his power) all the circumstances, cannot, unless there has been deceit or fraud on the part of the holder be recovered back again on account of such payment having been made under an ignorance of the law." Chitty, *Bills* (10th Am. ed. 1842) 502. Apparently only one American decision follows the earlier English case, and this is not a clear holding. Ray & Thornton v. The Bank of Kentucky (1843) 3 B. Mon. (42 Ky.) 510. The court in this case said, "When money has been paid under a clear and palpable mistake of either law or fact, essentially bearing upon and affecting the contract, without cause or consideration, and which in law, honor, or conscience was not due and payable, it may be recovered back." But there was evidence from which the jury might on the new trial find mistake of fact on the part of the plaintiff, so that the part of the above statement relating to mistake of law would in such event be dictum.

8. Harvey v. Girard National Bank (1888) 119 Pa. St. 212, 13 Atl. 202; Oil-Well Supply Co., Ltd. v. Exchange National Bank (1890) 131 Pa. St. 100, 18 Atl. 935 (payment after failure to make due presentment). Weil v. Corn Exchange Bank (1909) 63 Misc. 300, 116 N. Y. S. 665, Aff'd 135 App. Div. 915, 119 N. Y. S. 1149; Keazer v. Colebrook National Bank (1909) 75 N. H. 278, 73 Atl. 170 (payment after inadequate notice of dishonor); Coburn v. Neal (1901) 94 Me. 541, 48 Atl. 178 (payment of part of forged check).

9. Since under §186 of the Negotiable Instruments Law "a check must be presented within a reasonable time after its issue," when the payee and the drawee bank are in the same town, it might well be contended that any given time the drawer ought to know whether the payee is at fault, that is, whether it is before or after the end of the next business day. But cf. Bigelow, *Bills, Notes, and Checks* (3d ed. 1928) 267-270, §§353-355, where

But inasmuch as the taxpayer is bound to pay his taxes regardless of the collector's delay or negligence, the foregoing rules cannot properly be applied to bar any action the taxpayer-drawer may have against the collector-payee for personal negligence in presenting the check. Such an action should be brought against the collector as a private individual rather than as an official of the state, since acceptance of checks as final payment is not within the power of a tax collector.[11] When the collector does accept a check, he personally becomes at least the gratuitous agent of the drawer,[12] and the taxpayer's action for his failure to exercise reasonable care and diligence is based upon negligence rather than upon mere failure to make presentment as required by the Negotiable Instruments Law.[13]

While some dicta are found,[14] there appear to be but three prior decisions on the precise point involved in the principal case. One of these,[15] a Missouri case, was dismissed for failure of proof, but contains a dictum

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he raises the question of a possible conflict between §71 and §186 of the Negotiable Instruments Law.

10. Martin v. Home Bank (1898) 30 App. Div. 498, 52 N. Y. S. 464, 54 N. E. 717. When, however, the drawer only promises to pay the check, or pays only a part thereof, the payee cannot recover the remainder or the amount promised, whether the agreement be founded on mistake of fact or mistake of law. Neal v. Coburn (1898) 92 Me. 139, 42 Atl. 348. This is perhaps contrary to the earlier rule, for according to Chitty, "In some of the cases * * * the effect of such partial payment, or promise to pay, (by the indorser or drawer) * * * has been considered not merely as a *waiver* of the right to object to the laches, but even *as an admission that the bill or note had in fact been regularly presented and protested, and that due notice of dishonor had been given;* and this even in cases where the party who paid or promised, *afterwards* stated that in fact he had not had due notice, &c.; because it is to be *inferred,* that the part-payment or promise to pay would not have been made, unless all the circumstances had concurred to subject the party to liability and induce him to make such payment or promise." Chitty, *Bills* (10th Am. ed. 1842) 501. Insofar as the court bases its decision in the principal case upon the fact that suit was brought by the drawer instead of by the payee, it is saying that because the drawer subsequently paid the check (whether under mistake of fact or law), he was not in the first instance, before he paid the check, entitled to be discharged by the operation of a negotiable instruments rule, but only by the payee's negligence. On principle, and in the light of the Martin v. Home Bank case and the cases cited in footnote 8, *supra,* this does not appear to be a sound basis for the decision.

11. Weidler v. Arizona Power Co. (1932) 39 Ariz. 390, 7 Pac. (2d) 241; Sunflower Compress Co. v. Clark (1933) 165 Miss. 219, 145 So. 617. But cf. Kansas Amusement Co. v. Eddy (1936) 143 Kan. 988, 57 P. (2d) 458, 105 A. L. R. 702.

12. Sunflower Compress Co. v. Clark (1933) 165 Miss. 219, 145 So. 617. Accord: Morgan v. Gilbert (1929) 207 Iowa 725, 223 N. W. 483.

13. Banfield v. Addington (1932) 104 Fla. 661, 140 So. 893; 2 Am. Jur., Agency, §§274, 276. The plaintiff in the principal cases apparently recognized the necessity of proving negligence on the part of the defendant, but relied upon the defendant's failure to make due presentment to prove negligence. Cf. footnote 4, *supra.*

14. Houghton v. City of Boston (1893) 159 Mass. 138, 34 N. E. 93.

15. Chouteau v. Rowse (1874) 56 Mo. 65.

that the collector is liable for failure to make due presentment.[16] The other two cases[17] hold the collector liable on the ground of negligence, irrespective of the rules of the Negotiable Instruments Law; and one of these[18] expressly denies that liability of the collector is founded on the statute embodying the requirement of due presentment.

Thus the theory of the action and the proof required of a drawer when he is attempting to recover from a tax collector differs considerably from the theory and the proof required to successfully defend himself in an action brought by a private payee against the drawer. In the latter case it is necessary to prove only that presentment was not made within the prescribed time. But in the former situation, the drawer must prove lack of ordinary care on the part of the payee, and this will vary with the circumstances of the particular situation, and will not necessarily coincide with due presentment under statute.

In the principal case, it was clear that the collector had not made due presentment; but under the particular facts involved, the plaintiff could not show that the defendant had not exercised at least ordinary care. The collector deposited the check within an hour and a half after he received it, a practice which had theretofore proved satisfactory; and he had no knowledge from which he should have known that it would not be satisfactory in this one instance. As the court pointed out,[19] to require the defendant to do more than he did would be to require extraordinary care. While no point was made of this in the opinion, neither would the defendant collector appear to have been negligent in his selection of the depository bank as the channel for presenting the plaintiff's check for payment.

Any negligence in the case would seem to have been on the part of the depository bank. The defendant deposited the check on November 4, and although the drawee bank, located in the same town, was open until 3:00 P. M. the next day, the depository bank failed to present the check before the drawee bank closed. The plaintiff would seem to have had a better cause of action founded on negligence against the bank than against the collector.

F. D. S.

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16. However, the defendant delayed nearly a month in presenting the check, and it might well have been found that he was negligent.

17. Palm Court Corporation v. Smith (1931) 103 Fla. 233, 137 So. 234 (defendant had not presented check when bank closed five days after he received it); Sunflower Compress Co. v. Clark (1933) 165 Miss. 219, 145 So. 617 (defendant had not presented check when bank closed four days after he received it).

18. Sunflower Compress Co. v. Clark (1933) 165 Miss. 219, 232, 145 So. 617, 618.

19. Beckman v. Kinder (Mo. 1942) 165 S. W. (2d) 311, 315.