I. INTRODUCTION

Prior to 1891 travelers usually provided themselves with funds by carrying cash or using individual bank drafts or letters of credit. None of these methods proved completely satisfactory. Cash is marketable and convenient but lacks safety: money lost or stolen is usually gone forever. Bank drafts and letters of credit are safe but lack marketability and involve inconvenience. One holding such instruments often suffers delays occasioned by verification and acceptance, and these items usually cannot be spent for merchandise or services but must be "cashed" at some financial institution or special place.

Early in 1891 the President of the American Express Company made a trip to Europe and learned first hand about the inconveniences involved in the use of letters of credit and bank drafts. At the same time he knew that carrying cash was not the answer to the traveler's financial problems. He came home convinced that a new instrument was needed; one that would have the convenience and marketability of cash and the safety of the letter of credit and bank draft. The travelers check was created to satisfy this need.¹

Although the travelers check has been used for three-quarters of a century, it is still regarded in American legal circles as something of an anomaly and its precise legal characteristics have not yet been determined. This surprising situation is due in large part to the fact that cases involving these instruments rarely come before the courts, because their issuers consistently have pursued a policy of promoting saleability and marketability by sustaining losses in doubtful cases.² When litigation has occurred, the courts have had difficulty determining the applicable law, largely because the Uniform Negotiable Instruments Law (hereinafter N.I.L.), the only general legislation covering commercial paper prior to the recent promulgation of the Uniform Commercial Code (hereinafter U.C.C.), fit the travelers check so uneasily that it was not even clear that coverage was intended for it. Paucity of litigation and uncertainty as to the applicability of the N.I.L. forced many American courts to decide travelers check cases without the benefit of common law or statutory rules. This area of

¹ The substance of this article will be presented at the VII Congress of Comparative Law, Uppsala, Sweden in August, 1966.
the law, therefore, has been characterized by *ad hoc* decisions usually sufficient for the matter at hand but too narrow or too ill-conceived to provide general guidance.

It is believed that the U.C.C., now enacted in more than forty of the fifty American states, provides a satisfactory body of law to resolve cases of travelers checks and that its provisions are applicable to these cases.³ This paper will review the legal problems which have arisen in connection with travelers checks, state how the courts and the industry have handled these problems, and indicate how they will be handled under the U.C.C.

Before launching into the legal problems which have arisen in connection with travelers checks, it is only fair to observe that problems are the exception and not the rule. That is to say, the percentage of travelers checks that run into legal difficulties is almost infinitesimal. But even this minute percentage when applied to the huge volume of travelers checks now being written⁴ results in a sufficient number of troublesome cases for the law to take serious note of these exceptions. Proper perspective, however, is achieved only by considering the normal, non-problem situation before investigating areas of trouble.

### II. THE NORMAL TRAVELERS CHECK TRANSACTION

The travelers check is an instrument signed by a designated officer of the issuing company ordering the company to pay on demand at any office or banking correspondent of the company the amount in dollars or foreign currency equivalent indicated by the denomination of the check. It contains a serial number and four blank spaces: one for the signature of the purchaser; a second for the counter-signature of the purchaser; a third for the cashing date; and a fourth for the name of the payee.

The American Express Travelers Cheque follows this form:

**U.S. Dollar Travelers Cheque**

J000-000-000

When Countersigned Below with
This Signature

_________________________  19

Before cashing write here
City and date

**AMERICAN EXPRESS COMPANY**

At Its Paying Agencies

Pay this Cheque from our
Balance to the order of $20.00

In United States
TWENTY DOLLARS –At Current Buying Rate–
For Bankers’ Cheques on New York

In All Other Countries

Countersign here in Presence of Person Cashing

_________________________  Olaf Ravndal
Treasurer
The check is printed on special safety paper which bears a watermarked design and is impregnated with small disks of varying shades called "planchettes." The paper is sensitive and difficult to duplicate, thereby reducing the chances of counterfeiting or altering a check.

After the checks are prepared by the issuer, they are sent to agents throughout the world for sale. Selling agents consist of banks, express offices and establishments connected with finance and travel. They are numerous. For example, in 1964 American Express Cheques were sold by 38,643 bank selling outlets alone.5

The supply of travelers checks sent to a selling agent is accompanied by a "trust receipt." Different issuers have developed different trust receipts, but basically the trust receipt describes the covered checks by serial number and denomination, obligates the selling agent to hold them and their proceeds in trust for the issuer, and prescribes a standard of care to which the agent must conform in dealing with the checks. The Mellon National Bank uses the following form of trust receipt:

**Trust Receipt**

Received in trust from the Mellon National Bank its Travelers Cheques executed in blank, as follows:

- Nos. to inclusive for $10.00 each
- Nos. to inclusive for $20.00 each
- Nos. to inclusive for $50.00 each
- Nos. to inclusive for $100.00 each
- Nos. to inclusive for $200.00 each

say, in all .... Dollars, $......... for which we accept the responsibility of due issue at a price not to exceed 100 ¾% of their face value and agree to account for same to said Mellon National Bank, as issued at 99 ¾% of said face value, the proceeds to remain as a trust fund until payment has been made in cash to the Mellon National Bank, when called upon so to do, any of these cheques remaining in our hands, and should any of them be lost, stolen or surreptitiously put into circulation while in our possession, we agree to account for them in the

---

3. There is no doubt that the draftsmen of the U.C.C. intended Article 3 on Commercial Paper to encompass travelers checks. The broad language of Article 3 makes this plain, and, additionally, travelers checks are specifically mentioned in one official comment. See official comment 4 to § 3-104 ("Travelers checks in the usual form, for instance, are negotiable instruments under this Article when they have been completed by the identifying signature.") (Emphasis added.)

4. Total travelers check sales in 1964 amounted to $4,060,000,000. Of this amount, the American Express Company issued checks in the amount of $2,680,000,000, or 66% of industry sales. See Dominick & Dominick, Research Letter concerning the American Express Co., dated February 4, 1965, at page 4.

same manner as if they had been regularly issued by us; and notice to said bank of such loss or theft, or notice to stop payment of such cheques, shall not be a bar or prevent said bank from paying same when presented.

......................................................
(Signature of Officer of Selling Agent)

Date...........................................

The trust receipt used by the American Express Company, after describing the checks, is as follows:

The Selling Agency Hereby Agrees and Undertakes:

(1) To hold the said forms until sold and the proceeds thereof when sold in trust for the American Express Company, it being understood that the same shall at all times remain the property of American Express Company;

(2) To observe the same care and protection in the custody of the said forms as should be given to a like amount of currency belonging to the Selling Agency;

(3) To be fully responsible for the due issue of said forms;

(4) To account to American Express Company promptly for said forms and for the proceeds received from the sale thereof; and

(5) To notify American Express Company promptly in case of theft or loss of any said forms.

......................................................

The principal difference between trust receipts employed by the various issuers relates to the standard of care imposed on the agent. Some issuers impose absolute liability on the agent by providing that if any of the checks are lost, stolen or surreptitiously put into circulation while in the possession of the agent, the latter must account for them in the same manner as if they had been sold by him. Other issuers require the agent only "to observe the same care and protection in the custody of the said forms as should be given to a like amount of currency belonging to the Selling Agency."  

Immediately upon receiving the supply of travelers checks and the trust receipt, the selling agent usually counts the instruments and reconciles them with the description contained in the trust receipt. If satisfied, it usually will sign the trust receipt and return it to the issuer. The checks are then locked up or safeguarded in the same manner as cash or negotiable paper.

The next step in the transaction is the sale of checks to a purchaser. After

6. See, for example, the trust receipt used by the Mellon National Bank set out above. This trust receipt was involved in Mellon Nat'l Bank v. Citizens Bank & Trust Co., 88 F.2d 128, 130 (8th Cir. 1937).
7. See, for example, the trust receipt used by the American Express Company set out in text above.
AMERICAN TRAVELERS CHECKS

the purchaser has determined the denominations and the amount of the checks to be furnished, he fills out in duplicate a "Purchaser’s Application Form." This form is prepared by the issuer. A purchaser who signs it promises (1) to sign each check at the time of purchase; (2) to countersign each check only in the presence of the person cashing the check; and (3) to notify the issuer immediately if any check is lost or stolen and the circumstances thereof. The application provides that if the purchaser fails to perform any of these three promises or parts with the check in connection with a wager or an illegal transaction that the issuer shall not be obligated to refund or pay to the purchaser or to any holder the value of the check. The application form also states that the issuer shall not be required to stop payment on any check and that, in case of death, the checks may be redeemed only by a duly qualified legal representative of the purchaser on surrender of the checks.

The Purchaser’s Application Form used by the American Express Company is set out below.

Purchaser’s Application for AMERICAN EXPRESS TRAVELERS CHEQUES

__
S
O
L
D

B
Y

CONTRACT: Purchaser agrees: (1) to sign each Cheque (in the upper left-hand corner) at the time of purchase; (2) to countersign each Cheque (in the lower left-hand corner) only in the presence of the person cashing such Cheque; (3) to notify American Express Company immediately, at any of its offices of the serial number of any Cheque lost or stolen and the circumstances thereof; (4) if Purchaser fails to perform the above obligations, or parts with any Cheques in connection with any game of chance, wager or the like, or in any illegal transaction, the American Express Company shall not be required to refund or pay to Purchaser or to any holder or other person any value on account of such Cheques; (5) American Express Company shall not be required to "stop payment" on any Cheques for any reason, but may pay the same when signed and countersigned with the same signature whether such signature is that of the Purchaser or any other person; (6) American Express Company shall not be required to refund or pay any value to Purchaser on account of any Cheques after such Cheques have been countersigned by Purchaser and lost, stolen, negotiated, used or otherwise disposed of, or taken from Purchaser; (7) in case of the death or disability of Purchaser any unused Cheques may be redeemed at face value, without interest, but only by the duly qualified legal representative of Purchaser on surrender of such Cheques and delivery
of the necessary documents to American Express Company at its office, 65 Broadway, New York, New York 10006.

Purchaser's
Signature ...................................................
Purchaser's
Home Address .............................................

City..............................State or County..........

After getting the purchaser to sign the application form, the selling agent collects from him the face amount of the checks plus a charge of one per cent of this amount. It is understood, though not usually expressed in the trust receipt, that selling agents who accept personal checks from purchasers in payment for travelers checks do so entirely on their own responsibility and at their own risk:

The selling agent, of course, retains as his commission a portion of the one per cent charge the purchaser pays for the checks. Some issuers allow their agents to retain nine-tenths of this charge, but others limit the retention to two-thirds.\(^8\) In either case, it is clear that one of the principal financial gains which inure to issuers is the "float." That is to say, since the selling agent is usually required to account promptly for all checks sold, and since checks are frequently outstanding for a considerable period of time, the issuer has available a large amount of money on an interest free basis, and this fact, as much as the small commission earned, is what makes the issuance of travelers checks attractive.\(^9\)

The next step in the transaction is the spending of the check by the purchaser. If he acts prudently, he will countersign and fill in the date of the check in the presence of the payee and then record the transaction in his travelers check "record" which is kept separated from his remaining checks. Usually the purchaser will leave the payee space blank. If the payee is satisfied that the countersignature matches the signature, he will treat the check as if it were cash.

After receiving the check, the payee usually appends his own name to the payee space and indorses the instrument over to his depositary bank for collection and deposit. The depositary bank treats the check as it would any item it had taken from a customer for collection and deposit. This means that it will usually enter a provisional credit in the customer's (payee's) favor in the amount of the check, forward it through bank channels for collection, and enter a final credit in the customer's favor when the check is finally paid by the issuer.

The issuer keeps close records of checks sold and redeemed. This enables it


\(^9\) See Dominick & Dominick, February 4, 1965, at 4. This report indicates that the year-end float of the American Express Company in 1964 amounted to $550,000,000.
to forward promptly a new supply of checks to any selling agent whose supply has become low, thus starting the cycle over again.

III. ABNORMAL, PROBLEM SITUATIONS

The smooth working machinery of the travelers check industry occasionally is disrupted by the rascality of counterfeiters, forgers and thieves. Additionally, difficulties sometimes are caused by the insolvency of a selling agent or by the fact that a significant number of purchasers have not redeemed their checks. This part of the paper will consider these abnormal, problem situations.

A. Rascality

1. Counterfeiting and Altering Travelers Checks

Travelers checks, although printed on special paper bearing a distinctive water-mark and impregnated with planchettes, are more easily counterfeited than paper money. As a result, counterfeiters are fairly active in this area of business and pose a serious problem for the industry. The alteration of genuine checks is less of a problem, because it is difficult to change a travelers check without discoloring it or in some manner clearly indicating an irregularity.

The practice of the industry is to dishonor counterfeit checks and to pay altered checks only according to their original tenor on proof that they were acquired by the payee in good faith.

No cases have reached the courts testing the validity of this practice, but it seems unassailable. A counterfeit check is not executed by the issuer and does not bear its authorized signature. It is a forgery, and as such is completely void with regard to the purported issuer. Section 3-404(1) of the U.C.C. states this rule by providing that, "Any unauthorized signature is wholly inoperative as that of the person whose name is signed unless he ratifies it or is precluded from denying it; but it operates as the signature of the unauthorized signer in favor of any person who in good faith pays the instrument or takes it for value."

The latter portion of section 3-404(1) apparently gives the victim some relief by making it clear that the counterfeiter is liable on the instrument, but this concession will be of little practical aid in most cases.

With respect to materially altered items, section 3-407(3) of the U.C.C. states that a subsequent holder in due course may enforce the instrument according to its original tenor. But, to be a holder in due course, one must acquire the paper in good faith and without notice of adverse claims or defenses. According to section 3-304(1) of the U.C.C. a purchaser has notice of a claim or defense if the instrument bears such visible evidence of forgery or alteration or is otherwise so irregular "as to call into question its validity. . ." Thus, if a payee were to accept an obviously altered travelers check, he would not qualify

---

10. Uniform Commercial Code § 3-302(1).
as a holder in due course and would not be entitled to enforce the check against a reluctant issuer. On the other hand, if the alteration were accomplished with such skill that the paper did not call into question its own validity or regularity, the payee could qualify for the status of holder in due course and enforce the instrument according to its original tenor.

In those cases in which the payee does not qualify as a holder in due course because the alteration is apparent, the issuer does not attempt to unjustly enrich itself by retaining the money earmarked for the redemption of the altered check. Rather, he "unwinds the transaction" on a step-by-step basis in an effort to discover who committed the alteration and who was victimized by it. He does justice by paying the money over to the person most entitled to receive it. This person usually is the original purchaser who has had the check stolen from him under blameless circumstances. While no cases have been found concerning this practice or the principles which are applicable to determine "the most entitled person," the custom of paying the funds over to the person with the strongest equitable claim to them accords with the basic principles of quasi-contract law\(^1\) and seems irreproachable.

2. Checks Stolen From the Issuer

Occasionally checks, genuinely printed and ready to be sent to selling agents, are stolen from the issuer, usually by an embezzling employee. In this case, the thief is in a good position to negotiate the stolen checks because he has the power to append both the signature and the countersignature. He does not have the problem which faces most thieves of travelers checks, namely that of matching the countersignature with the signature.

There are no cases on the matter, but the practice of the industry is to honor these stolen checks, unless there is some reason to believe that the payee has colluded with the thief. This practice is in accord with the agency principles of respondeat superior and the law of commercial paper set forth in the U.C.C. These U.C.C. rules will be discussed in the next section of this paper.

3. Checks Stolen From the Selling Agent

Curiously, most American case law on the subject of travelers checks has arisen out of the situation in which these instruments have been stolen from selling agents. The early practice of the industry was to dishonor these stolen checks. In the event that liability was imposed on the issuer, it tried to recoup its losses by holding the selling agent liable. Thus, two problems have come before the courts in this situation: \(a\) the liability of the issuer on checks stolen from the selling agent; \(b\) the ability of the issuer to shift the loss to the selling agent.

\(^1\) See generally, Restatement, Restitution § 1 (1936).
(a) The Liability of the Issuer

Under section 15 of the N.I.L., the non-delivery of an incomplete instrument created a "real defense," that is, a defense good against holders in due course as well as holders not in due course. Some courts have found this section applicable to the case where blank travelers checks are stolen from the selling agent. Under this view, the check is not "delivered" when it is sent by the issuer to the selling agent. "Delivery" occurs when the selling agent sells and physically transfers the checks to the purchaser. And, the check is incomplete in the hands of the selling agent because it does not contain the signature and countersignature of a purchaser.

A different view was expressed in the famous case of American Express Co. v. Anadarko Bank. This case held that the instrument was not incomplete in the hands of the selling agent, because at this time nothing remained to be done either by the issuer or the selling agent. The court observed that the payee should be safe if the signature and the countersignature match. In this connection it observed that "if the cheques are to take the place of money and pass current as money they should be subjected to the same rules and immunities which rest upon money under like circumstances. The great weight of authority supports the rule that when one comes into possession of stolen money bona fide and for valuable consideration his title thereto is superior to that of the true owner."

Of course suspicious circumstances could alter the rule laid down in the Anadarko case. Thus, in Venable v. American Express Co., the court refused to follow Anadarko in a situation in which the stolen travelers checks had not been signed or countersigned at the time the claimant acquired them. The court held that the instruments were not negotiable until countersigned. It distinguished the Anadarko case on the ground that the checks had been signed and countersigned by the thief when the bona fide purchaser bought them, whereas in the instant case they were not signed or countersigned when they were acquired by Venable.

U.C.C. sections 3-115 and 3-407 reverse section 15 of the N.I.L. by providing that the non-delivery of an incomplete instrument does not create a real defense but only a personal defense which may be cut off by a holder in due course. Under this law, the issuer would be required to pay a travelers check stolen in blank from the selling agent which is subsequently signed and countersigned and sold to a holder in due course. The U.C.C., therefore, accepts the result of the Anadarko case. It also accepts the Venable result, because one taking a travelers check as yet unsigned and countersigned could not be a holder in due course under the rule of section 3-304(1) discussed above.

14. Id. at 608, 67 P.2d at 58.
15. 217 N.C. 548, 8 S.E.2d 804 (1940).
It should be noted that the issuer cannot escape liability to a holder in due course in the situation at hand by undertaking to honor a stop order directed by the selling agent. Under the U.C.C. it appears that a travelers check cannot be countermanded.\(^\text{16}\) Section 4-303(1)(a) provides that it is too late to stop an item which has been “accepted or certified.” Section 3-410(1) defines “acceptance” in terms of the “drawee’s signed engagement to honor the draft as presented. . . .” The signed engagement of the issuer to pay the travelers check “when countersigned below with this signature” would seem to operate as an “acceptance” within the meaning of these rules at least as of the time the check is signed and countersigned with the same signature. Additionally, under the provisions of section 3-118(a) “A draft drawn on the drawer is effective as a note.” This describes the form of the travelers check. Since the engagement to pay a note cannot be countermanded, it seems clear that payment cannot be stopped on a travelers check.

(b) Ability of Issuer To Shift Risk of Loss to Selling Agent

Issuers after honoring travelers checks stolen from selling agents frequently attempt to put the ultimate loss on the latter. Two theories have been used to shift this risk to the selling agent. The first is tort. If the issuer can establish that the selling agent’s lack of care contributed to the theft, it is entitled to shift the risk of loss to the latter.\(^\text{17}\) The second theory is contract. The courts will put the ultimate loss on the party who has assumed it under the trust receipt. The trust receipt used by the Mellon National Bank puts the risk of theft on the selling agent by providing that “should any of [the travelers cheques] be lost, stolen or surreptitiously put into circulation while in our possession, we [selling agent] agree to account for them in the same manner as if they had been regularly issued by us.” In Mellon Nat’l Bank v. Citizens Bank & Trust Co.,\(^\text{18}\) this provision was fully honored by the court and the loss was put on the selling agent. On the other hand, the trust receipt currently employed by American Express Company requires only that the selling agent “observe the same care and protection in the custody of the said forms as should be given to a like amount of currency belonging to the Selling Agent” and “To notify American Express Company promptly in case of theft or loss of any said forms.” Under this trust receipt it was held that the issuer could not shift the risk of theft to the selling agent where the latter had not been negligent and had given prompt notice of the loss.\(^\text{19}\) A variant of this trust receipt provides that the selling agent “shall take such measures to safeguard and protect all unsold financial paper . . . as a


\(^{17}\) Transcontinental & Western Air Inc. v. Bank of America, 46 Cal. App. 2d 872, 116 F.2d 791 (Dist. Ct. App. 2d Dist. 1941).

\(^{18}\) 88 F.2d 128 (8th Cir. 1937).

prudent person would take to safeguard and protect a like amount of his own cash... [and] shall also observe any express instructions which may be given by American Express from time to time with respect to such safeguarding and protection. A selling agent which had signed this trust receipt received instructions not to keep more than 1000 dollars worth of checks on the premises whenever its office was closed. In violation of this instruction, the selling agent had 4240 dollars worth of checks on hand the night its closed office was burglarized. All these checks were stolen and the issuer honored them even though it had received prompt notice of the theft from the selling agent. The court allowed the issuer to recover 3240 dollars from the selling agent, holding that under the trust receipt the issuer took the risk of loss only on the first 1000 dollars worth of checks.

Section 1-102(3) of the U.C.C. provides that freedom of contract shall be one of the guiding principles of the Code. Under this section "the effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed ..." Under this section, courts would fully honor the provisions of trust receipts regulating the allocation of loss between the issuer and selling agent of travelers cheques. The section, therefore, is consistent with the common law.

4. Checks Lost by, or Stolen From, the Purchaser

The most frequent problem which arises in connection with travelers cheques is loss by, or theft from, the purchaser. In this situation the purchaser usually applies for a refund. In making application, he is required by issuers to submit an affidavit which assumes the form of a questionnaire. The form used by the American Express Company is typical:

```
AMERICAN EXPRESS COMPANY
65 BROADWAY, NEW YORK 6, N.Y.
TRAVELERS CHEQUE REFUND DEPARTMENT

AFFIDAVIT FOR REFUND - AMERICAN EXPRESS TRAVELERS CHEQUES

STATE OF )
COUNTY OF )

Print complete Given and Family names.

1 being duly sworn deposes


511```
2 and says: I reside at
City of State of
3 For the next days
my address will be
4 My business or profession is
My business address is
5 On or about the day of
I purchased from
American Express Travelers Cheques of the total face value of $
6 The numbers of the Travelers Cheques purchased were
7 All of the Travelers Cheques above referred to
\{WERE \ \{WERE NOT\} \} signed by me at the time of
purchase in the upper left-hand corner.
8 Of the aforesaid Travelers Cheques I cashed Nos.
having a face value of $
9 I cashed the last Travelers Cheque-s No-s.
at date of encashment
10 The following Travelers Cheques are still in my possession
11 The balance of the said Travelers Cheques, No-s.
12 \{WERE \ \{WERE NOT\} \} signed by me a second time in the
lower left hand corner and they passed out of my possession at the time and place in the manner hereinafter stated.
13
(Reverse side must also be completed)

512
AMERICAN TRAVELERS CHECKS

14 When I discovered the loss I reported the same to

at

on as follows: (State nature of communication)

15 Personal Call [ ] Telegram [ ] Letter [ ]

If refund is to be made to a bank for your account or to a third party please so indicate.

16 I hereby request the American Express Company to refund to me the face value of the aforesaid lost Travelers Cheques, amounting to $

State definitely where they were.

17 While the Travelers Cheques were in my possession I kept them

Give exact hour, date and place.

18 The last time said Travelers Cheques were in my possession was on the
day of 19 at A.M.
P.M.

19 I hereby solemnly swear the above is a true statement of facts.

20 I hereby authorize American Express Company to recover the above numbered Travelers Cheques for me, wherever found.

Read this before your signature is placed on the line.

21 I hereby authorize the American Express Company to stop payment on these Travelers Cheques. Said Travelers Cheques bear my genuine signature only in the upper left hand corner, and if any of them are presented for payment with my name signed thereto, in any other place, on the front or back of any said Travelers Cheques I do solemnly swear that such latter signature is a forgery. I have not received any value whatsoever on account of the Travelers Cheques upon which claim is made herein and did not negotiate them, or transfer them to any person for value.

Check the correct block.

22 [ ] I am of legal age.

[ ] I am not of legal age.

Sign in the same manner as Travelers Cheques were signed at time of purchase.

23 ..................................................

513
Before a refund will be voluntarily made by the issuer, the purchaser must state that the checks were signed by him at the time of the purchase in the upper left hand corner and were not countersigned at the time of the loss or theft. In other words, the seventh and twelfth paragraphs of the above affidavit are the questions of critical importance. This is true because the issuer takes the position that it is legally obligated to make payment if the signature and the countersignature match. Therefore, it is argued, if the purchaser creates a situation in which an identical signature and countersignature are, or can be, appended, he should lose his right to a refund because he has put the issuer in a position whereby payment must be made when the check is presented. Under this theory, if the purchaser loses or has stolen a blank check (that is, one which is neither signed nor countersigned by him at the time of the loss or theft) or a check which has been signed and countersigned by him, he is not entitled to a refund, because his action or inaction has put the finder or thief in a position to negotiate an instrument on which the signature and countersignature will match. This theory has the support of the only case on the matter, one holding that a purchaser is not entitled to a refund where checks already signed and countersigned by him were stolen. In this case the purchaser notified the issuer of the theft and directed it to stop payment. Nevertheless, the issuer subsequently paid the checks when they were presented. The court held that the issuer was bound to honor these checks when presented by a holder in due course “and appellant’s (purchaser’s) attempt to countermand the checks after they were already in circulation was ineffectual as to holders in due course.” There was no discussion as to whether one accepting a travelers check without seeing the transferor countersign it qualifies as a holder in due course.

The Uniform Commercial Code seems to be consistent with the practices adopted by issuers regarding refunds on travelers checks lost by, or stolen from, a purchaser in blank form or bearing both his signature and countersignature.

A travelers check containing neither a signature nor countersignature would be classified under section 3-115 as an "incomplete instrument." By the rule of section 3-407(3) "A subsequent holder in due course may in all cases enforce the instrument according to its original tenor, and when an incomplete instrument has been completed, he may enforce it as completed." Under these sections, the payee taking the instrument from the finder or thief as a holder in due course would be free and clear of the victim's ownership claims and contractual defenses and could insist on payment from the issuer.

A travelers check which is signed and countersigned by the purchaser before its loss or theft should be regarded as bearer paper in the hands of the finder or thief. When the purchaser's signature is written on the instrument, it may be negotiated only by delivery and his countersignature. The signature, in effect, puts the check in "order" form. The countersignature converts it to bearer paper because it makes it negotiable by delivery alone. This is the clear understanding of the purchaser and his implied contractual engagement under the Purchase Application Form.\textsuperscript{22} As bearer paper, the purchaser's equities of ownership are destroyed when it is negotiated by the finder or thief to the payee, if he is a holder in due course. In this connection section 3-305(1) provides that a holder in due course "takes the instrument free from all claims to it on the part of any person."

But is the payee of a travelers check who buys it after it has been countersigned out of his presence a holder in due course? It first should be noted that section 3-302(2) of the U.C.C. permits a payee to be a holder in due course if he can meet the requirements of the concept. The fact that he accepts the check already countersigned would not necessarily prevent him meeting these requirements. True, section 3-302 requires the holder in due course to "take the instrument in good faith." But section 1-201(21) defines "good faith" as "honesty in fact in the conduct of the transaction concerned." One unaware of the fact that a travelers check is supposed to be countersigned in his presence easily could qualify as a holder in due course under these rules. Even one with more sophistication concerning these checks could qualify as a holder in due course, because the previously appended countersignature might indicate to him only that an incomplete instrument had been completed. It would not tell him that anything was wrong with the instrument or the person negotiating it. Consistently, section 3-304(4)(d) provides that "Knowledge of the following facts does not of itself give the purchaser notice of a defense of claim . . . (d) that an incomplete instrument has been completed, unless the purchaser has notice of improper completion. . . ."

As a corollary to the rule that the issuer is liable to a holder in due course who has acquired a travelers check which was stolen in blank and subsequently signed and countersigned with the same signature, or which was signed and

\textsuperscript{22} See American Express Co. Purchase Application Form set out in text, pp. 505-06 supra.
countersigned before the theft, it follows that payment by the issuer should discharge the check and absolve the issuer from any liability to make a refund to the victim (original purchaser).  

It might be noted, however, that the selling agent is contractually obligated to the issuer to see to it that the purchaser signs the travelers check at the time he buys it. If the selling agent performs this obligation, the situation will not arise in which a blank check is stolen from the purchaser. In the blank check cases, therefore, it is possible to argue that the selling agent at least has contributed to the loss. He could be made to assume this loss by requiring the issuer to make a refund to the purchaser and then allowing the issuer to recover this amount from the selling agent as damages for breach of the trust receipt contract. Conceivably the same result could be achieved by a tort action brought by the purchaser, but this action would face the devastating defense of contributory negligence in those situations in which the purchaser’s carelessness contributed to the loss or theft. No cases have been found in which either of these approaches have been attempted.

Where the travelers check is lost by, or stolen from, a purchaser who has signed, but not countersigned it, the early practice of the industry was to refund the purchaser only upon his procurement of an indemnity bond saving the issuer harmless from any loss it might incur as a result of the lost or stolen check being outstanding. The issuer’s right to indemnity was acquired by contract through a provision in the Purchaser’s Application Form. One court restrictively construed this provision to apply only to “lost” checks and not to stolen checks. But another made it applicable to checks which were either lost or stolen. Under this view, the purchaser bears the ultimate loss, because the surety has the right of reimbursement against him for any liability it incurs on the bond. Additionally, the purchaser bears the expense of procuring the bond. These points were brought out in the case of Fidelity & Casualty Co. v. Harrison. In that case, Harrison lost, or had stolen from him, some 930 dollars worth of travelers checks. He had signed and countersigned one 10 dollar check but had merely signed the others prior to their disappearance. He notified the issuer of the loss and asked for a refund. The issuer made a refund upon Harrison procuring a bond from Fidelity. This bond, saving the issuer harmless, cost Harrison a premium of $20.40. In applying for the bond, Harrison was required by Fidelity to promise to reimburse it for any loss it might suffer on its suretyship contract. Subsequently, the missing checks were presented to the issuer and paid by it. The issuer then required the surety to cover the loss, and the surety sued Harrison for reimbursement. The court held for the surety company.

23. See Uniform Commercial Code § 3-603(1).
26. Supra note 25.
AMERICAN TRAVELERS CHECKS

The practice of requiring an indemnity bond as a condition to making a refund for lost or stolen travelers checks militated against the use of these instruments to such an extent that it was abandoned prior to World War II. The present practice is to refund, without requiring an indemnity bond, if the stolen or lost check was signed, but not countersigned, by the purchaser at the time of its disappearance. It is also the practice of issuers to honor these stolen or lost checks if they are presented by one who took them in good faith and for value in the regular course of business. Issuers insist, however, that they are not legally required to redeem these checks but do so only for reasons of public relations and to encourage the acceptability of the checks. Two cases seem to support this view, one on the ground of negotiable instrument law and the other on the ground of contract law. In *Sullivan v. Knauth* 27 a New York court analyzed the travelers check and found that it is the countersignature which gives the paper its currency. Prior to the appending of the countersignature, the travelers check, said the court, "is in the precise situation of a check payable to the order of a designated payee unindorsed by said payee. That being so the countersigned signature must be treated as the ordinary indorsement of a payee upon an ordinary check, that is, the bank is responsible if it pays on a forgery. Treating it in this way those defendants have their remedy over against prior indorsers as in an ordinary case of forgery of payee's signature on any other negotiable instrument. Unless it be so held the whole scheme seems likely to fail." 28

Under this view, the issuer surely would be entitled to reject a travelers check containing a forged countersignature, because banks are entitled to refuse payment on checks containing forged indorsements.

Contract law, as well as negotiable instrument law, can be used by the issuer to justify its right to refuse payment on checks containing forged countersignatures. This point was made in *Samberg v. American Express Co.*, 29 in which the court stated simply that "the company (issuer) has the right to refuse to pay when the check does not bear the countersign agreed upon."

It can be contended, however, that the issuer is liable to one who takes a travelers check containing a forged countersignature in good faith on the ground that a travelers check is more analogous to money than to a negotiable instrument. The seeds of this theory are found in *American Express Co. v. Anadarko Bank & Trust Co.*, 30 where the court said:

> if the cheques are to take the place of money and pass current as money they should be subjected to the same rules and immunities which rest upon money under like circumstances. The great weight of authority supports the rule that when one comes into possession of stolen money

---

28. *Id.* at 152, 146 N.Y. Supp. at 586.
30. 179 Okla. 606, 67 P.2d 55 (1937); see also text, p. 509 *supra*. 

517
bona fide and for valuable consideration his title thereto is superior to that of the true owner.

The issuer also might be held liable in spite of a forged countersignature on the basis that its recurring practice of paying these instruments has ripened into a custom which now makes payment a legal requirement. This theory could be tied to the law merchant or it could be founded on the principles of estoppel or contract law. That is to say, the issuer’s practice of paying travelers checks in spite of a forged countersignature can be said to have created a new rule of the law merchant requiring issuers to pay these instruments, or the practice can be said to have so educated people as to the safety of taking travelers checks on which the signature and countersignature appear to be the same that it creates a contractual right in them to have these items honored, or, alternatively, estops the issuer from denying liability on them. No cases have yet adopted any of these theories.

The U.C.C. does not give a precise answer to the problem at hand. Its answer will depend on how the court characterizes the travelers check. If a travelers check is treated like any other negotiable instrument under the U.C.C., the issuer would not be liable to honor the check because the forged countersignature would break the chain or title. Consistently, this would obligate the issuer to make refund to the purchaser. These rules are elaborately stated by the U.C.C.\textsuperscript{31} But another section of the Code\textsuperscript{32} makes it clear that its general rules can be overridden by usage of the trade. This means that the U.C.C. gives the courts competence to make the practices of the industry legally binding on it. The exercise of this competence would make the issuer liable to the good faith possessor of a travelers check containing a forged countersignature and also obligate it to make a refund to the purchaser.

5. Checks Lost by, or Stolen From, the Payee

No cases have reached the courts with regard to the liability of the issuer to redeem a travelers check which has been lost by, or stolen from, the payee after he has received it with the signature and countersignature of the purchaser appended thereto. The practice of issuers is to honor such a check when presented by a party who took it in good faith and for value, if, at the time of its disappearance, the name of the payee did not appear on the instrument. In this case, of course, no refund is made to the payee. These practices are justified on the grounds that the check was in bearer form when it disappeared and that

\textsuperscript{31} Relevant U.C.C. provisions are §§ 3-507 (drawee may refuse payment without dishonor where instrument is not duly presented); 3-504 (only “holder” can make due presentment); 1-201(20) (one cannot be a “holder” of order paper unless it has been indorsed to him); 3-404 (a forged indorsement is wholly inoperative as that of the person whose name is signed).

\textsuperscript{32} U.C.C. § 1-102(3) gives the parties the competence to vary the provisions of the Code, “except as otherwise provided in this Act . . . .” There is nothing in the sections discussed in footnote 31 which prevents the parties from varying their effect by agreement. Additionally, § 1-205(5) provides that a “usage of trade” shall be used by the court in interpreting the agreement of the parties.
its countersignature matched its signature. In other words, issuers defend these practices on negotiable instrument and contract theories. These practices seem to be legally justified whether the travelers check is viewed as a mere contract, a negotiable instrument or money. Surely there is nothing in the U.C.C. which would invalidate any of these justifications. The Code does not cover the law of simple contracts, except to use it as supplementary general principles. This lack of coverage would permit a court to apply the converse of the rule stated in *Samberg v. American Express Co.*33 that the issuer has the right to make payment when the check bears the countersign agreed upon.

If, on the other hand, the travelers check is treated as a negotiable instrument, several Code rules would validate the issuer's practice of paying checks lost by, or stolen from, the payee after they have been signed and countersigned by the original purchaser. Section 3-603(1) provides that payment to a "holder" discharges the instrument. Section 1-201(20) defines "holder" so as to include a person in possession of bearer paper. Section 3-204(2) makes it clear that a blank indorsement creates bearer paper. If the countersignature is treated as an indorsement, it is in blank and thus creates a bearer instrument. The fact that a thief or finder fills in the payee's name does not create a real defense or prevent the purchaser from becoming a holder in due course, even if the latter knows that the instrument has been completed in this manner, unless he also knows that the completion was wrongful. This rule is stated in section 3-304(4)(d). Finally, under section 3-407(3) it is provided that "when an incomplete instrument has been completed, he, a subsequent holder in due course, may enforce it as completed."

If the travelers check is regarded as money, section 3-103(1) would make the Code's rules of commercial paper inapplicable to it. This state of affairs permits the application of the law merchant rule stated in the *Anadarko Bank* case, namely that "when one comes into possession of stolen money bona fide and for valuable consideration that his title thereto is superior to that of the true owner."34

A more difficult question arises where the check is lost or stolen after the payee's name has been written on it. This matter has arisen so infrequently that the practice of the industry is not settled with regard to it. The legal obligation of the issuer depends on how the courts characterize the travelers check. If it is treated as a simple contract, the issuer should be able to pay it and discharge his obligation to all parties, because the instrument bears the countersign agreed upon by all parties. Similarly, if it is treated as money, the bona fide purchaser of it divests the payee's rights and enables the issuer to honor the instrument and discharge his obligation. The only question here would concern the *bona fides* of the transferee who acquired the instrument from someone other than the payee. Normally travelers checks do not circulate after

---

the payee's name is put on them, and the circumstance of circulation (as con-
tradicted with "collection") might be enough to prevent a finding of a good faith
taking.

If the travelers check is treated as a negotiable instrument, the affixation
of the payee's name to it would make it order paper. This affixation could be
thought of as a special indorsement following the blank indorsement of the
countersignature. Under section 3-204(2) of the Uniform Commercial Code it
is clear that an instrument payable to bearer can be transformed into an order
instrument by a special indorsement. The effect of this rule is to prevent a
subsequent taker from being a holder in the absence of the indorsement of the
special indorsee. Applying this rule to the travelers check, it could be held that
the issuer could not discharge the obligation by paying a good faith possessor
of the instrument, because the latter is not a holder in due course inasmuch as
he is not a technical holder. Stated differently, the payee's right to the instru-
ment would remain unimpaired and he could enforce it against the issuer. The
Code rules bringing about these results are discussed above in connection with
the question of the issuer's right to pay and discharge a travelers check lost by,
or stolen from, a payee before the payee's name has been attached to it. These
rules, of course, are subject to variation by agreement or by the usage of the
trade. But, as we have seen, there is no established custom in the industry as
to how this situation is to be handled where the payee's name was affixed to
the instrument before its loss or theft. Therefore, the characterization of the
check will be the determinative factor in this situation.

B. Insolvency of the Selling Agent

The trust receipt which determines the relationship between the issuer
and the selling agent provides that the latter shall hold all checks and proceeds
thereof "in trust" for the issuer. A literal acceptance by the judiciary of this
provision would give the issuer a position of priority over the general creditors
of the selling agent upon the latter's insolvency. The one case on the question,
Squire v. American Express Co.,35 however, indicates the courts will not accept
the classification of "trust" merely because the "trust receipt" so provides, but
will look into the dealings of the issuer and selling agent in an effort to determine
their true relationship. The case involved two different arrangements with differ-
ent banks (selling agents). The issuer allowed one bank to deposit the proceeds
of the sale of travelers checks to an account in the name of the issuer and to
remit monthly by sending a draft in the amount of the account. During the
month, the bank could use the money as its own. But the second bank was
under an obligation to make immediate remittances and had no authority to
deposit the proceeds. The court held that the arrangement with the first bank
resulted in a simple debtor-creditor relationship between issuer and selling
agent and resulted in no priority for the issuer. In the case of the second bank,

35. 131 Ohio St. 239, 2 N.E.2d 766 (1936).
however, the court found a trust relationship and awarded a priority to the issuer. In this case, the money realized from the sale of checks had been commingled with the general funds of the bank and prompt remittance had not been made. The court held that in order to establish a trust it was not necessary to identify the particular money that was paid for the checks and that the failure of the bank to comply with its agreement respecting remittances did not extinguish the trust.

While American bank failures are now comparatively rare, the problem of the insolvency of the selling agent is still a real one for the travelers check industry because these agents are not confined exclusively to banks. The U.C.C. has no provisions which are useful to decide these insolvency cases, but it is believed that the Squire case, discussed above, presents a satisfactory base for the resolution of these problems outside of bankruptcy. Of course, where formal bankruptcy proceedings are initiated, the Bankruptcy Act governs. Under this act, a result consistent with the Squire case is likely.

C. Escheat

A small percentage of travelers checks are never presented for redemption. Because these checks are payable on demand, it can be argued that the statute of limitations starts to run in favor of the issuer at the time of their sale and bars the claims after its prescribed period has elapsed. But issuers advertise that travelers checks are "good until used" and they never assert the statute of limitations. This practice encourages purchasers to hold travelers checks for substantial periods of time and thereby increase the "float," one of the principal financial benefits of engaging in the business of issuing these checks. Because of the usage of the trade, it is probably fair to state that the statute of limitations is not available to issuers.

Most states have enacted "escheat" statutes which either specifically or generally provide that, after the lapse of a particular period of time, the funds represented by unredeemed travelers checks shall be turned over to the state. If the checks are subsequently presented and paid, procedures are outlined whereby the issuer can recover the escheated money.

Escheat statutes are usually drafted so as to give broadly inclusive coverage. As a result, issuers of travelers checks long have feared the possibility of double liability where the transaction involves several states, such as where the issuer is domiciled in one state, the selling agent in a second state, and the purchaser in a third state. These fears were allayed in 1961 when the United States Supreme Court ruled in the case of Western Union v. Pennsylvania that the holder of abandoned funds could not be required to escheat them more than once. But the decision did not provide an answer as to which of the com-

37. See generally, 4 Collier on Bankruptcy § 70.25 (14th ed. 1964).
peting states was entitled to the fund. Thus, while the fear of multiple liability was eliminated, issuers were left in a difficult administrative position where more than one state demanded the funds. This difficulty was recently resolved by the United States Supreme Court in the case of Texas v. New Jersey. This case held that the state entitled to escheat is the one of the last known address of the creditor (purchaser), as shown by the debtor's books. If the property is owed to a debtor as to whom there is no record of any address, or whose last known address is in a state which does not provide for escheat, the property is subject to escheat by the state of the corporate (debtor) domicile, provided that another state could later escheat it upon proof that the last known address of the creditor was within its borders, or, in the case of a state having no escheat law, if and when its law made provision for the escheat of such property.

IV. CONCLUSION

Now that the United States Supreme Court has resolved the problems surrounding escheat in a manner satisfactory to the travelers check industry, it remains only for the judiciary to work out a theory of travelers checks which is consistent with industry practices and the expectations of the public-at-large in order to provide this important commercial device with the proper climate in which to thrive.

Three theories have been used by the courts and the industry to account for the travelers check. The first is that this instrument is a mere contract obligating the issuer to pay only where the countersignature matches the signature. This theory overlooks the highly negotiable characteristics of this paper, and the expectation of the public-at-large that redemption will occur if the check is taken in good faith and for value from one who appends a countersignature which appears to match the signature.

The second theory that a travelers check is money overlooks the fact that one of the principal advantages claimed for the check is that it is safer than money. The public-at-large has surely been educated to believe that the loss of a travelers check does not carry the same consequences as the loss of money.

The third theory that a travelers check is a negotiable instrument is the most attractive one because it is consistent in all respects save one—the forged countersignature—with the practices of the industry and the expectation of the general public. This theory, at least as it is announced in the case of Sullivan v. Knauth, holds that a travelers check is a blank (bearer) cashier's check until the purchaser signs it, and thereafter it becomes a check payable to the order of the purchaser. After the purchaser has countersigned it, the check again becomes bearer paper and remains such until the payee's name is inserted. Thereafter it is order paper which cannot be negotiated until the payee indorses it.

40. 379 U.S. 674 (1965).
AMERICAN TRAVELERS CHECKS

Under this analysis, a genuine travelers check which is lost by, or stolen from, the issuer or selling agent, or by or from the purchaser after he has countersigned it, is bearer paper which must be honored by the issuer upon due presentment by a holder in due course. Being a cashier’s check, it cannot be countermanded, but redemption discharges the issuer and it is not thereafter obligated to make a refund. On the other hand, if the purchaser has signed, but not countersigned, the check, or if the payee’s name has been appended before the check is lost or stolen, the instrument is order paper which cannot be negotiated without the countersignature of the purchaser or the indorsement of the payee. Consequently, a possessor of this paper would not own it, the issuer would have no power to discharge it, and the item should be dishonored and the money refunded to the victim. This analysis is satisfactory where the check is stolen from, or lost by, the payee, but it is unsatisfactory where the purchaser’s countersignature is forged. The basic appeal of travelers checks is their world-wide acceptability and on-the-spot refund when lost or stolen. This appeal has been engendered not only by the fact that these matters constitute the major features of the heavy advertising program of the industry but by the actual practice of issuers of honoring checks containing forged countersignatures where they have been acquired in good faith and for value. The U.C.C. would allow this custom to override its normal provisions governing commercial paper and to legally implement current practices. In this regard it should be observed that the rule of the U.C.C. which permits custom to override general provisions does not require proof that the practices involved be “ancient, ““immemorial” or “universal.” It is enough that the usage involved be “currently observed by the great majority of decent dealers, even though dissidents ready to cut corners do not agree.”

42. Op. cit. supra note 8, p. 7, indicating that the industry spent $3,500,000 advertising travelers checks in 1963 and that acceptability and liberal refund practices were the major features of the program.
43. See Uniform Commercial Code § 1-205, official comment 5.