Volume 94
Issue 3 *Dickinson Law Review - Volume 94, 1989-1990*

3-1-1990

Book Review

BOOK REVIEW

An Essay Review: The Payment System Cases, Materials and Issues

THE PAYMENT SYSTEM CASES, MATERIALS AND ISSUES, By Edward L. Rubin & Robert Cooter. St. Paul, Minn.: West Publishing Co., 1989.

Reviewed by Professor Jerry Sloan*

This is a very good book.

Ever since the ancient Sumerians began to tinker with the metallic content of their coinage, we've had money problems. But the Sumerians also discovered the "in box" and the "out box." It is this mix of the metallic content of money and office routines, with the addition of messengers (agents, some folks call them) and messages, that has brought us into a computerized, cashless society in which we push money into a terminal or pull money out of the same or a different terminal, sometimes with the aid of messengers, but always with the aid of pieces of paper, plastic, or electronic or emotional impulses. The product of this evolution is now "the game."

The middle ages of payment systems lasted into the 1970's, which ushered in the contemporary or advanced stages of what might be called the payment system or "the game." Throughout this long history some verities have endured. Impulses, messengers, and lawyers (originally called high priests) have always been prominent.

In modern times, coincident with both the middle (Philistinean) and advanced stages, the impulses have achieved labels such as for-

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gery, fraud, error, mistake, and provisional settlement; while the senders and receivers of messages have been left to battle it out since the shaft case[1] gave the messengers their heyday.

This continuing war between senders and receivers of messages has evolved into a struggle between people and institutions (primarily banks), which now involves both a basic law of the middle period, the UCC, and the basic law of modern times, the Federal Reserve's law.

Since we are, in this essay, concerned with modern payment systems of Anglo American times, we shall exclude such oddities as the French *acte abstrait*[2] and limit our discussion to the period beginning long after the great discoveries by our Sumerian progenitors—the period from the innkeeper's case[3]—to the period in which the Federal Reserve System got into "the game" in an attempt to readjust the flow of money through streamlining the check collection system devised by the banks and their lawyers.

There is a rich tapestry in this overlap period between ages involving both people and institutions. In today's time when the institutions have taken control, there have been and still are many problems. Banks and the corporations that banks have come to represent contain people who, like their containers, often appear to be quite wooden. Other people, called customers, quite frequently play the senders-receivers game with the institutions. "The game" is played with money, checks, credit cards, and electronic transfers (a new kind of impulse) of funds. Still other people, called scholars or students (or professors and their apprentices or old lawyers and young lawyers) spend much of their time worrying about how the payment system works today and will work in the future. Many, for example, wonder now about whether intervention by the Federal Reserve, through something called the supremacy clause of the highest

1. Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854).

2. The best technical definition of the abstract act I have seen is contained in HARRIS & TALLON, CONTRACT LAW TODAY 110, ¶ 68, ¶ 120, ¶ 17 (1989) (an Anglo American study). A nontechnical and ideational explanation might be something like the following: An abstract act conveys legal meaning by its existence to third parties not directly participating in its creation. *Vis*, my lost unmarked ten dollar bill found by you will, in your hands, buy goods and services from the provider of your choice. Again, the parking ticket the cop gave you when you had the permissive use of my car, binds me, absent a defense, to pay the ticket (because the judge will have me presumptively guilty because the cop wrote the ticket and put it on my car or gave it to you) and I am in the judge's court. Again, your bank must pay the holder in due course of the check for $10 you wrote to Mary who endorsed it to me. Now, since you owe me $10 for the ticket, you should pay (forgetting my lost ten dollar bill) on the check. The point is that the bill, ticket, and check are abstractions. They each, in their own way, convey a legal conclusion to the receivers be they from Paris, France or Paris, Kentucky.

3. Miller v. Race, 1 Burr. 452, 97 Eng. Rep. 398 (K.B. 1758).

and most basic of laws, has modernized the system or merely defanged Articles III and IV of the Uniform Commercial Code (UCC).

Many American scholars have written about the problems of Articles III and IV (negotiable instruments and bank's rights) and a few have suggested that the Fed's regulations have tentacles extending well beyond those articles. No one, to this reviewer's persuasion, has described our total payment system until Rubin and Cooter's *The Payment System Cases, Materials and Issues* came along.

Although the focus of *The Payment System* seems limited to describing "the system" as it now reflects upon Articles III and IV, this is done magnificently. If it comes short of describing the possible affect that federal regulation will have upon the rest of the UCC, it does hint in that direction while nicely integrating our past and our future to money and payment law.

Any treatment of a payment system should describe and prescribe how its host legal system deals with forms of wealth transfer created or affected by "the system" it describes. Students and teachers, sometimes called scholars, of a payment system also need to come to learn how their own payment system works. This book does that for both groups and represents a fine reminder for practitioners as well.

Yet, with the law as it is, there are still some very real problems in dealing with the Articles III-IV part of "the system." Teachers have nightmares about teaching in the Articles III-IV area because "the game" seems uncertain and in need of new definition. These teachers worry about how, within our payment system, to teach "the game." Let's think for a moment of some of the implications of these problems and of the encomia I have just suggested are deserved by Rubin and Cooter.

How is "the game" played in this country? How does one explain Articles III and IV or, for that matter, the Code to students? *Au fond*, one tries to insure that they understand, after a nearly codeless or a completely codeless year, the transaction they are to study. Then one tries to get the students to frame an issue in an advisory, mediational, adversarial, or negotiating context not so as to mouth the quintescence of the quintescence of a rule that has been applied, but to look critically at "the system" being formed in their minds in order to solve problems or, in advancing stages, to find the appropriate policy.

These policy notions are more difficult. In negotiable instruments law, more properly called check payment law, there is a system established for the benefit of its users. Who are the users? Banks, people, and the government located in Washington, D.C. or elsewhere. Since every system that creates institutions will attempt to survive, all students know that the primary goal of any institution within the system is the preservation of the system and the institutions it has created. But how does this system preservation work? Rubin and Cooter's tome explains this, and the important secondary policies as well.

The authors show us how banks in any modern payment system will be preserved in their delicious solvency, and why losses which inevitably occur in the system will be allocated, apportioned, shared, or passed on. We see that policies sounding sensible enough to the *cognoscienti* who work the system will inspire the system's continuance. The courts in this context will initiate and then follow some old themes such as "good guys should win and bad guys should lose," some newer themes such as "the penalties should fall on least cost avoiders" or, in another least cost avoidance tac, "the most negligent party should pay the price." All of this has been spoken of before. Yet this review is designed to give the reviewer's impression of what *The Payment System* is and does.

There are at least three outlines for *The Payment System Cases, Materials and Issues* by Rubin and Cooter: one provided by the authors, another followed by the student from time to time during the first reading of the book, and the one discovered by the teacher-lawyer when the book is finished. This reviewer has read *The Payment System* twice, and the last reading has produced yet another view. Since the final outline differs so little from the real outline, this review discusses the *lex ferenda* as the reviewer thinks Rubin and Cooter meant it to be, after brief reference is made to the other outlines in order to show the progress of one's thinking about *The Payment System*. Accordingly, this reviewer attempts to capture the payment system's intertwined parts while proclaiming the potency of the Rubin and Cooter approach in three layers: a brief student's layer, a slightly more detailed lawyer's layer, and a teacher's layer. This methodology will, it is hoped, replicate the discovery that tyro and pro alike should experience in forming the best outline—her own.

I. A Student's Layer—A Student's First View of Articles III and IV Pre-Rubin and Cooter

There are people, individuals and corporations. These people get called customers or depositors, drawers, and payees. Some of these people write things on instruments (called items) so as to become something called an endorser. There are also institutions, primarily banks. These get titled as depository banks, collecting banks (both sometimes confusingly styled intermediary banks), or payor or drawee banks. Sometimes bank titles get changed or combined: it's all very confusing. A single bank may wear two or three different hats alternatively or simultaneously. Banks have customers (usually people). Occasionally a bank looks like a customer. A customer never looks like a bank. Any bank may represent a customer, another bank, or both as agent. The banks can take the paper (instruments) they handle in the item processing part of "the game" as principle or agent as it suits them. When the bank acts as agent for a customer, the customer is frequently stuck because these banks give warranties to other banks playing "the game" with their own customers. Some of the banks, as indicated before, seem to change agency or principle hats in midstream. Usually, in terms of results, banks can design situations to convenience the banking fraternity rather than the customer community.

The pieces of paper (items) that the banks send around to each other as buyer, seller, or agent are called checks or sometimes drafts. The check is both an authorization and an instruction (message?). If a bank pays such a thing in error or by mistake (payment, error, and mistake are tricky words)[4] or pays it against an original or subsequent instruction (message) of its customer, or keeps the money from a check that should have gone to its customer, or keeps the money from a check deposited by the customer that she thought was hers,[5] the customer is in a bind. What is the customer to do? To which bank? When? That's easy!

When a customer tries to do something to one of the banks (usually her own personal bank, the depository bank or the payor,

4. Error is or was a justification for revoking a provisional settlement, and error and mistake are perhaps two sides of the same coin in the old bank lexicon. *See* the related West Side Bank case at 37 Wis. 2d 661, 155 N.W.2d 587 (1968).

5. The bank's right of set off is another peculiar creature of the common law, left virtually without restraint by the UCC. It makes a very strong creditor of a bank which, just before set off, was the depositor's debtor. *See infra* note 7 and accompanying text; Jensen v. State Bank of Allison, 518 F.2d 1 (8th Cir. 1975). *See also* the excellent note at 283-86 of RUBIN & COOTER, THE PAYMENT SYSTEM CASES, MATERIALS AND ISSUES (1989).

sometimes called drawee bank) and does it successfully what will the banks do *inter se*? Easy again! Under the scheme devised by the Code in Articles III and IV (don't forget Article I)[6] banks almost always win lawsuits with their customers, and when it comes to bank v. bank, the playing field is slanted against the bank (depository bank) whose customer started the whole deal by making a deposit or against the bank (an intermediary or collecting bank, or perhaps a drawee bank) that missed some kind of a deadline at midnight. Occasionally, a bank fails to obey a "stop that check" order or fails to pay a check it should have paid for its customer or creates an unwanted overdraft against its customer.[7] In a few of these cases, the bank loses, but rarely, since the losing bank has its own customer who can lose conveniently to the losing bank. This is because the pattern throughout the UCC seems to be that if a financial institution dots its Is and crosses its Ts properly and says, "I'm sorry, we couldn't help it in the ordinary course of business," the bank wins.

It seems like magic. You see a bank and its customer that has an account with the bank have the dubious relationship of debtor (bank) and creditor (depositor). Yet the bank, through reversing entries called chargebacks or by playing "king of the mountain" (called set offs), can also change almost instantly from being a debtor (loser) to a creditor (winner). It's all done with a hat trick called the law merchant and its *acte abstrait*[8] or, in the current vernacular, negotiability and its companion, the holder in due course concept—once useful, but now fading away. After all, the banks are pros and policies about professionals abound throughout the Code as indicated in extensive notes following such sections as 1-205 and 2-104.

Scholars complain about such things, and threaten to do some-

6. Sections 1-103, 1-203, and 1-205 are provisions that a student must always bear in mind when reading Articles III and IV.

7. What is properly payable under § 4-401 is discussed in Lincoln Nat'l Bank & Trust Co. of Fort Wayne v. Peoples Trust Bank, 177 Ind. App. 312, 379 N.E.2d 527 (1978). Banks, it seems, can properly pay stale checks, ones they should have stopped, or those that create overdrafts. *Id.* at 315-16, 379 N.E.2d at 529-30. There are, however, exceptions to the bank's untrammelled rights to pay over valid stop orders. *See* FJS Electronics, Inc. v. Fidelity Bank, 288 Pa. Super. 138, 431 A.2d 326 (1981).

8. The abstract act, *see supra* note 2, does not translate directly into negotiability. However, the check and the concept of negotiability arose from the law merchant. *See* RUBIN & COOTER, THE PAYMENT SYSTEM CASES, MATERIALS AND ISSUES 3-9 (1989).

Gilmore, in *The Death of Contract* expressed such a view of the concept of negotiability and later championed its fading away. Gilmore, *Formalism of the Law of Negotiable Instruments*, 13 CREIGHTON L. REV. 441 (1979). It is well known now that most checks are not endorsed to anyone except a depository bank unless the payee tries to collect directly from the drawee.

thing about it once in a while. The Federal Reserve Bank (an intermediary bank for the most part) has changed a bit of this. But don't take any wooden checks or checks made out on toilet paper because the checks won't have a MICR.[9]

II. A Lawyer's Layer

Rubin and Cooter's view of payments law speaks mechanistically from their table of contents, and synthetically, in the best sense of that word, in their material and case selection. The outline being formed in my mind now is implicit and explicit in their outline. As one moves through *The Payment System* there are constant *supra* and *infra* references to remind the reader of where she is. Now one part of "the system" relates to one or more of the others to illustrate a guiding parallel here or a nerve-wrenching assimilarity there in the way our law handles money, checks, credit cards, and electronic transfers of funds. One begins to perceive that her own synthesis was only dimly perceived during this reading because the true outline is so reticulated as to be Mozartian. This book has a life of its own. Perhaps several. It does not contain the trap of a zillion error and fraud cases (just 200 pages or so) usually found in most negotiable instruments offerings; it keeps its sense of humor about good guys and bad guys, analyzes "the system," and does a remarkable job of synthesizing the important themes of "the system." The book's implications go well beyond Articles III and IV.

I'll let you in on a secret. A lawyer and her time are soon parted. This means—don't waste time. That, in turn, means that in writing a review the best tac is to say this is a good book, that is a bad one, employ a few tedious footnotes both to satisfy the law review editor and prove up the case, and be done with it.

This is because much of the pap ordinarily written about payments law is for the edification of the few and the ossification of the many. This book, however, has the punch of well-organized thinking about an idea of some moment. Although it is written in casebook form, *The Payment System* promises to be a great law book because it is an original and ingenious compendium of the common law and

9. Magnetic Ink Character Recognition. Frequently, it is learned that a check need not be written on a piece of paper supplied with printing by a bank and teachers cite the appropriate Code sections. *See* U.C.C. §§ 3-104 to 3-110. However, what the Code authorizes is not always, in the eyes of clerks or assistant managers around the world, borne out in practice. These people have, in my experience, demanded (where no counter checks were available) magnetic ink character recognition pieces of paper. Many merchants will not accept a check without a drawer's name and address printed on it for "insurance reasons."

statutory history of our payment system, and includes an apt description of how "the game" is played today. It is a welcome relief for students of "the game." Its minuscule flaws, which can scarcely be called errors, should not cause too much concern. I would suspect, if I were a teacher, that it is also a fine teaching device.

A. A Tentative Outline in Historical Setting

In the real world of 1758 it all began when the true owner of a banknote for an odd sum of money issued by the Bank of England requested that venerable institution to stop payment on his note, which then reposed in the hand of a thief who had stolen it from the mails. The Bank of England, sensing a potential *meum-teum* problem, requested an indemnity. When the true owner (T.O.) gave the indemnity, the Bank of England, having prudently hedged its bet, stopped the note. Meantime, an innkeeper turned up with the banknote at another bank to redeem it for cash.

The innkeeper was another good guy (man with money in hand) who had received the note from the thief or, as we shall see later in the course, more probably, the thief's successor in the ordinary course of his (innkeeper's) innkeeping affairs. The teller at the second bank to which the innkeeper had gone did not wish to give succor to the innkeeper, which made the latter quite choleric. So, it was innkeeper (seller of services) versus teller (ultimate lackey for the Bank of England) or, indirectly if you will, Innkeeper v. T.O.[10]

Lord Mansfield, who, along with some Germans, is said by some to have unabashedly converted Karl Llewellyn to the law merchant and other nefarious notions blew T.O. out of his majesty's waters by creating bearer paper or at least a specie out of what had been T.O.'s note.

No matter, the same crowd of merchant lawyers were to become responsible just four years later for hanging one John Lee because John had forged a drawer's name to a check which made the drawee bank (payor bank as Rubin and Cooter would have it) take the loss.[11] Thus, it can be seen that the true owner of money (not a check or a banknote) won because his banker gave out true owner's money on an order or instruction not really signed by the true owner and a check was, in effect, money. But a banknote was only an unidentifiable thing with which one paid one's bills. Oddly enough,

10. Miller v. Race, 1 Burr. 452, 97 Eng. Rep. 398 (K.B. 1758).
11. Price v. Neal, 3 Burr. 1355, 97 Eng. Rep. 871 (K.B. 1762). *See also* U.C.C. §§ 3-418, 4-213(1) (payor bank accountable for an item finally paid).

that is still the law today with some negligence thrown in to protect the banks in the forgery cases. Again, Federal Reserve banknotes have become money that, in most cases, is better than checks. Today, banks also manage to beat the rap in other kinds of fraud cases as well even though we no longer suspend the John Lees of this world nor call most checks money.

B. Later Historical Developments

In the middle or Philistinian Age of the development of our payment system, interesting tendencies began to emerge. For openers, colonial banknotes (issued by various state chartered banks in the Americas) and, later, personal checks began to be compared with each other, and we seemed to be looking admiringly at the English experience. After all, why shouldn't our law of the payment system take the same path as England's? Checking accounts were in vogue on both sides of the Atlantic for the well-healed and money was money.

Later still, the banks had invented new kinds of money or payments such as the letter of credit, the cashier's check, the certified check, and even the traveler's check (which looked strangely like a cross between a cashier's check and a letter of credit).

Later still, in the highest stage of our developed legal system, the banks were still inventing new games. First, came credit cards. Then, funny machines that could hand out money and serve as depositories were devised. However, the law (the UCC) developed in the meantime to accommodate such advances in banking practices hadn't changed that much since poor Mr. Lee had been left suspended from the practice of writing abstract acts.

These developments, in practice if not in law, did not go unnoticed by the high priests of the money game. Some began to get the impression that the ideas of pricing, transaction costs, indeed, the pricing of transaction costs (whose ox is being gored?), efficiency, and fairness (whose ox was being gored?) were important ideas to consider in dealing with any payment device or in maintaining a payment system. True, some of the high priests of the money game (styled payment law) accused some of their colleagues of having sold out to the banks 30 or 40 years before while attesting to the bank's law. True, in the later or high stage of development of the money system there were still many quarrels about this or that section of the UCC, but nothing seemed to change.

Then came the thunderbolt. The Federal Reserve Bank, to the plaudits of some and to the dismay of others, sent its own message by stepping into "the game" aggressively to change the bank's code, not directly, but by supremacy. The Fed made some regulations.[12] These regulations affected the "in box" procedures of deposit and collection from depository bank, intermediary, or collecting bank to payor bank and radically changed the "out box" routines back from payor banks by eliminating the intermediary banks that somehow seemed to be in the way of fairness in the game. The Fed's regulations also hinted at far more radical maneuvers. Things were in a flux, spelled "F" "L" "U" "X" over the "float."

III. The Teacher's Layer

I teach Advanced Kontracts[13] according to the gospel of St. Karl that is Articles I-IX. The elementary courses in our shop are styled contracts and contracts remedies. These little attempts to feel at commercial law may or may not teach of the sources of possibilities inherent in the wanderings of The Good Ship Peerless[14] or of the delightful metalegal ranges emanating from Rosie the Cow,[15] because they are too strictly concerned with remedies in a universal context. There isn't too much there about *the statute* of our commercial law.

Because of this normally tenuous exposure to the statute (the UCC) I formerly taught Advanced Kontracts with some initial trepidation each time out of the gate. The anxiety was there because I didn't always feel that my students were quite ready for the heady stuff. Until *The Payment System* happened, I always knew that when my charges were to be inflicted upon the unsuspecting public a few years after doing commercial paper, sales, or secured transactions with me that, try as I would, some of my charges would not completely understand the commercial transaction. They would not understand the transaction because they didn't understand money.

12. Community Bank v. Federal Reserve Bank of San Francisco, 500 F.2d 282 (9th Cir. 1974), explains the meaning of Regulation J respecting settlement and collection. Regulation CC looks backward (from payor to depository) to the dishonour and return of checks. Rubin and Cooter also discuss the tangential Regulations Y and Z and are prepared to discuss any other extant or proposed regulation from A to X as well.

13. K for contract is a reference to Mooney, *Old Kontract Principles and Karl's New Kode: An Essay on the Jurisprudence of our New Commercial Law*, 11 VILL. L.R. 213 (1966), and of course to the law merchant in Llewellyn's Kode. It seems, as suggested by Gilmore, "anything . . . good enough for Lord Mansfield was good enough for [Karl] Llewellyn." Gilmore, *Formalism of the Law of Negotiable Instruments*, 13 CREIGHTON L. REV. 441, 460-61 (1979). *See also supra* note 10 and accompanying text.

14. Raffles v. Wichelhaus, 2 Hur. & C 906, 159 Eng. Rep. 375 (Ex. 1864).

15. Sherwood v. Walker, 66 Mich. 568, 33 N.W. 919 (1887).

They wouldn't understand money because they could not understand payment systems and their modalities. Each year, some students of Advanced Kontracts were only vaguely conscious that there was such a thing out there as a payment system, perhaps several. They needed a money book. That anxiety is past now. Rubin and Cooter have discovered and described "the system." They are on the money in describing its efficiencies and its warts. They have shown how "the system" works and disclosed its relative fairness. They have projected, almost, solutions into the future.

A. A Taxonomy of the System and Evaluation

What is *The Payment System* to Rubin and Cooter? How does it work? How is the game played? A complicated set of questions deserving of a simple tightly knit introduction of 40 pages containing a glossary of terms and a framework for policy analysis which illustrates the criteria for judgment as well as the institutional framework used throughout the book. Serially, *The Payment System* deals with cash as symbolic money or as a payment instrument, checks from the perspectives of the game's major players, then describes how the players ranging from people to every variety of bank and nonbank (holding companies) play. Finally, credit cards (in several varieties) and electronic fund transfers in all shapes, sizes, and impulses are examined with a view, in each chapter, to the policy criteria already stressed, accompanied with significant texts concerning pricing, collection costs, and the kinds of credit losses that can be incurred with each form of payment. In every chapter there are further meaningful discussions of credit risks, loss allocations for error, and fraud that are thoroughly examined and compared. *The Payment System* is a *tour de force*, ending as it began with a series of questions. It is a prismatic *ouvre*, generating questions beyond commercial law into other much less imposing areas of the law. There is no high to this book, it's all high.

Of particular interest to this reviewer is the glossary of terms, and the Articles III-IV treatment of checks and the way in which both mesh with Federal Reserve Regulations CC, T, and Z. In the check part there is a "hands on" demonstration of the passage of a check from drawer through depository bank, back to drawer using an excerpt from Martin Mayer on how checks get collected. This opening of the Article III and Article IV part of the book highlights the book's treatment in reverse of the collection process by beginning with the drawee-payor bank while explaining quite simply, the "no news is good news" phenomenon of check collection. Here again, the background information given on interest rate restrictions, as such relate to checks, and the constant references back to how one should read or interpret a statute—*the statute*—are helpful to understanding the system and "the game" within the system. The book is very user friendly to anyone trying to glue together her impressions of how the float, N.O.W. accounts, and midnight deadlines fit into the system. These diverse themes plus *Hadley v. Baxendale*, *Price v. Neal* and yes, *Miller v. Race*, are all woven into the fabric in fine perspective with incredible erudition, good humor, and penetrating synthesis. It can be predicted that use of this book by tyro and pro alike will quickly orient them about contemporary realities concerning payment law which are not the stock and trade of every commercial law person. The user of *The Payment System* also receives much learning incidentally related to payments law, *e.g.*, why the S & L's are drying up; why discount rates affect the purchases of big ticket items and small consumer purchases; how real interest rates are affected by inflation; and how and why Federal Reserve regulations can or will affect such diverse concepts or creatures as: purchase for value, good faith purchase, or bank holding companies. In sum, Rubin and Cooter give meaning to concepts and structures that will be encountered not only in Articles III and IV but in Articles II, V, VII, VIII, IX and beyond.

B. In Detail

In learning how a payment system deals with symbolic cash or what is the price of any payment modality, students are inevitably confronted with rules about market overt, the Rule of 78, not to speak of the Rule of 72 that is, if their mentor is prepared to talk about such.[16] Further, real interest rates and indeed RICO are surely of importance in understanding a payment system such as our own. Again, side comparisons about the differentia between warehouse receipts, bills of lading, cashiers checks, and promissory notes, whether discussed in the context of symbolic money, in terms of pricing, or in terms of security, are also meaningful to one trying to grasp or regrasp the keys to the system and, of course, to "the game."

16. I have never understood how banks used the Rule of 78. The Rule of 72 is prettier. Pick a number and call it the interest rate at say 8% per period. 8 x 9 = 72, meaning that your money at 8% will double in 9 periods. With 15, it will double in less than 5 periods. 12% = 6, 10% = 7.2 periods, *etc.*

The cant of many casebooks tries to hint at gaudy first principles or brooding penumbra's emanating from or to a "good guy bad guy" scheme of reward and sanction. Frequently, such hints are not developed but left hanging in those books. Rubin and Cooter avoid this by excellent note discussion about the next case or a case two hundred pages further on or to a case or principle suggested a hundred pages ago. These discussions constantly examine the grey elements of "the system." In all, there is a strong doctrinal familiarity with the encompassing themes of Kontract and Advance Kontract which are important to the discussion. Thus, from *Miller v. Race* through Perini[17] and wherever relevant, there is opportunity to think about consent, reliance, the prevention of unjust enrichment, and institutional protection as well as about Articles III-IV of the UCC, the Fed, and how "the game" should be played.

As always, the criteria for judgment are used to show how "the game" is played as well as how it plays. Thus, the money and cash part of *The Payment System* connects beautifully to the other payment device treatments as well as to the check part that it precedes. Using the cash part of the casebook as a backdrop, the normal tedium of a negotiable instruments offering is concluded with a note on check truncation. The novice quickly realizes that later, in discussing point of sale transfers or debit cards, the same rules won't fit. The pro, employing the same criteria for judgment, has already realized or begun to realize what those rules might be. Further, standardization of check collection practices, truncation, and the main cases are woven together repeatedly so as to ask the inevitable questions: How much does it cost? Who pays the price? Does it work well? Is it fair? How can we discern and then correct flaws or bugs or inequities? Does this decision or that Federal Reserve posture accommodate this or that policy criterion?

Rubin and Cooter dance elegantly through the old stuff like the legal tender cases, while explaining, from time to time, money laundering and RICO, control of the newest payment devices, Articles III-IV, and the role of the Fed in all of this from 1913 to the Milenium. This makes the journey through credit cards and EFT's relatively safe and absolutely grand, and helps make these discussions some of the best I've seen.

There is some opaqueness, a sin of omission or two, and one interesting repetition about the politics of the UCC. Yet, the numer-

17. Perini Corp. v. First Nat'l Bank of Habersham County, Georgia, 553 F.2d 398 (5th Cir. 1977).

ous and pungent discussions of least cost avoidance, the "he who deals with a thief" strain, the constant reminders of both the criteria for judgment, and the reader's need to properly locate herself in the part of the system being studied makes this tome with its minuscule faults a genuine liberation from the cave.

Sure, Rubin and Cooter do not discuss letters of credit too extensively; nor do they belabor the big meaning or control of general clauses such as 1-103; nor talk quite enough of good faith as related to our payment system; nor do they explain why the cases almost invariably assume that bankers always tell the truth. Sure, they give short shrift to the still living negotiable promissory note, which will not help teachers show students how to make one, nor do they go into fine detail concerning how Federal Reserve Regulations J, CC, or T or yet unwritten regulations may or will affect the rest of the UCC. But they do carefully explain the function and effect of the operating circulars, The Expedited Funds Recovery Act, and the bank bias of Articles III and IV. Again, Rubin and Cooter's shifting of loss policy questions, emerging comfortably from striking discussions of provisional and final settlements, credits, set offs, and control of instruments is always "on the money."

One hesitates to suggest that any of the tiny sins just referred to breach any kind of warranty because Rubin and Cooter have more than substantially performed their appointed task. There is, however, one sin of omission that should be noted. Even though the authors could easily proclaim that the items about to be mentioned were outside of their intended scope, it should be said.

They write nothing of commodity exchanges, nor about the three things which, in addition to letters of credit (Article V), sales people, who are secure (Articles II and IX), must understand to get the whole picture. Rubin and Cooter should have discussed the short sale and perhaps the put and the call.

The put and call concepts (relating obviously to Article VIII and almost as certainly to variable output and requirements K's under 2-305) are not necessary, but are merely helpful to understand money and transactions in our payment system. I do insist, however, that the short sale should have been discussed if only in glossary form. This is because I view large parts of this work as necessary background for systematic delving into the rest of Advanced Kontracts (Articles II, V, VII, VIII and IX). After all, the book does go into extended treatment from glossary to conclusion about the Federal Reserve's implicit broad hints resonating upon the rest of the

UCC, while the book's text attempts to restrict coverage merely to Articles III-IV affect of the Fed regulations. Why not go for the brass ring? A try for that laurel might have been accomplished by some mention, somewhere, of the short sale. Because the short sale relates, in a curious way, to settlements, set offs, and to daylight overdrafts in the EFT System of the Federal Reserve, it is important here. The fact is that banks get short in the EFT System. So might nonbanks get dangerously short in the future when and if they get full access to the EFT apparatus. More precisely, at provisional settlement (which is noontime) in the EFT System one might find participants (banks) showing huge deficits running into billions each day stemming from overdrafts. These banks are simply "short" as they say in the trade. Consider a day like October 17, 1987 or indeed, October 13 and 16 of 1989 when the overdraft ("short") problem could be exacerbated by large brokerage houses or international corporations finding or sensing the need for quick infusions of funds. To repeat, the short sale is a very important ingredient in the modern mix of how and why money gets passed around with certain payment modalities by some of the players. That's it.

One glossary item might, as follows, have been added to this fine lawbook. A short sale of a commodity (here, including a security or by analogy, money) is the sale of a commodity that the seller does not own combined with the seller's underlying obligation to purchase the same at some future time or sooner, at the seller's option. "The future time" may be unspecified or seller's option to purchase may be defined by a limiting future time (*e.g.*, 3 months, 6 months, or one year). The seller's account shows a profit if his sale price is higher than the current market, *i.e.*, market down, seller wins. Short sales are regulated somewhat differently on stock exchanges or the OTC markets and by commodities exchanges where the Fed does not impose direct restraints on the practice of "being short."

Any person or institution having an account may be said to "be short" in a regulated or nonregulated context, *e.g.*, in customer or bank overdraft situations. Thus, when the account shows a deficit or a net debit position at any point in time, *e.g.*, settlement or provisional settlement time, the customer is "short."

This book is "long."