X-9231

June 7, 1935.

SUBJECT: Collection of liquor drafts in interstate shipments.

Dear Sir:

Referring to the Board's letter of April 26, 1935 (X-9188) relating to the collection of liquor drafts in interstate shipments, there is transmitted herewith for your information and that of your Counsel a copy of a letter which the Board is addressing to the Chairman of the Governors' Conference, together with copies of inclosures therewith, relating to this subject.

Very truly yours,

L. P. Bethea,
Assistant Secretary.

Inclosures.

TO GOVERNORS OF ALL FEDERAL RESERVE BANKS.

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COPY X-9231-a

June 7, 1935.

Mr. J. U. Calkins, Chairman,
Governors' Conference,
Federal Reserve Bank of San Francisco,
San Francisco, California.

Dear Mr. Calkins:

Under date of April 26, 1935, the Federal Reserve Board addressed a letter to the Governors of all Federal Reserve banks inviting their attention to the provisions of section 239 of the Criminal Code of the United States which makes it unlawful for a railroad company, express company, or other person, in connection with the transportation of intoxicating liquor in interstate commerce, to collect the purchase price thereof or act as the agent of the buyer or seller for the purpose of buying or selling or completing the sale thereof. A copy of the Board's letter is inclosed herewith. There are also inclosed copies of letters and inclosures received by the Board's General Counsel from Counsel for certain of the Federal Reserve banks relating to this matter.

As you will note, these inclosures suggest the question whether it would not be desirable for the Federal Reserve banks to follow a uniform practice with respect to the acceptance of drafts covering the purchase price of liquor. The subject appears to be one which might well be referred to the Standing Committee on Collections of the Governors' Conference for consideration and report to the Conference whether a uniform practice with regard to this matter is desirable and, if so, what such practice should be; and it is suggested

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that you give consideration to the advisability of this procedure. If this plan is adopted the Committee will probably find it desirable in its consideration of this matter to consult with Counsel for some of the Federal Reserve banks and of the Federal Reserve Board.

Kindly advise the Board whether it is determined to adopt the procedure suggested.

Very truly yours,

(Signed) L. P. Bethea

L. P. Bethea,
Assistant Secretary.

Inclosures.

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COPY X-9231-b

FEDERAL RESERVE BANK

of New York

May 10, 1935.

Walter Wyatt, Esq., General Counsel,
Federal Reserve Board,
Washington, D. C.

Dear Mr. Wyatt:

Mr. Logan has asked me to send you the enclosed copies of my two memoranda, dated May 9, 1935, to Mr. Coe, and a copy of the memorandum dated May 3, 1935 from Mr. J. C. Kimble of our Legal Department to me, relating to the Collection of Liquor Drafts in Interstate Shipments, which was the subject of the Board's letter of April 26, 1935 (X-9188). You will note that we feel that the memoranda should be treated as confidential.

We have been in communication with Mr. Carrick of the Federal Reserve Bank of Boston and with Mr. Dunn of the Federal Reserve Bank of Chicago in regard to this matter, and have also furnished them with copies of the enclosures herewith.

If you find that any of the other Federal Reserve Banks have taken a different position than we have in this matter, we should be pleased to have you bring it to our attention.

Very truly yours,

(Signed) T. G. Tiebout,

T. G. Tiebout,
Assistant Counsel.

Encs.

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COPY X-9231-c

CONFIDENTIAL

Federal Reserve Bank
of New York

OFFICE CORRESPONDENCE May 3, 1935.

To: Mr. Tiebout

From: J. C. Kimble

Subject: Board's letter of April 26, 1935 (X-9188) on the subject of "Collection of Liquor Drafts in Interstate Shipments".

In your memorandum to me of April 29, 1935 on the above mentioned subject, you have raised the question of whether Section 239 of the Criminal Code of the United States (Title 18 U.S.C.A. Section 389) would subject the Federal Reserve Bank of New York to the penalty provided for thereby, for acting as collecting agent or agent to procure the acceptance of a draft drawn in connection with the shipment of intoxicating liquor in interstate commerce, where the shipping documents are attached to the draft and are released only against payment or acceptance of the draft, and you have arrived at the tentative conclusion that the bank would be subject to such penalty for so acting. You have also raised the further question of whether there is a distinction between such cases and the collection of an item given in payment for intoxicating liquor, sold and shipped in interstate commerce, but where the collection is not connected with the transportation of the liquor.

Section 239 of the Criminal Code of the United States provides as follows:

> "Sec. 389 (Criminal Code, section 239.) Same: carrier collecting purchase price of interstate shipment. Any railroad company, express company, or other common carrier, or any other person who, in connection with the transportation of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, shall collect the purchase price or any part thereof, before, on, or after delivery, from the consignee, or from any other person, or shall in any manner act as the agent of the buyer or seller of any such liquor, for the purpose of buying or selling or completing the sale thereof, saving only in the actual transportation and delivery of the same, shall be fined not more than $5,000."

Apart from the aid of Federal legislation, the states which have laws designed to prevent the manufacture and sale of liquor within their respective territories are unable to prevent its introduction from other states through the channels of interstate commerce. Liquor dealers may thus avoid the effect of state legislative restrictions by adopting schemes which will connect the sale of their liquor with interstate transportation. Prior to

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the enactment of Section 239, the customary method employed by such dealers was to appoint interstate shippers as their agents to collect the amounts due from the customers at the point of destination within the "dry" states. The shippers would surrender bills of lading properly endorsed upon the acceptance by the customers of sight drafts. Often banks or individual agents were used to make collections upon these liquor drafts. The effect was, in all cases, the same; the state legislation was rendered inoperative.

The situation which confronted the "dry" states in this regard, was quite vividly explained by Mr. Justice Van Devanter in the case of Danciger v. Cooley, 248 U.S. 319 (1919), wherein he stated:

> "This interstate business generally was carried on by means of orders transmitted through the mails and of shipments made according to some plan whereby ultimate delivery was dependent on payment of the purchase price. <u>The plans varied in detail, but not in principle or result.</u> All included the collection of the purchase price at the point of destination before or on delivery. One made the carrier having the shipment the collecting agent; another committed the collections to a separate carrier, the liquor being forwarded as railroad freight and the bill of lading being sent to an express company with instructions to hand it to the buyer when the money was paid; <u>and still another made use of an agent, such as Cooley was here, the bill of lading being sent to him with a sight draft on the buyer for the purchase price.</u> In some instances the liquor was consigned to the buyer and in others to the shipper's order, the bill of lading then being suitably endorsed by the shipper.
>
> "Where the transactions were real and not merely colorable, the business so conducted was lawful interstate commerce and entitled to protection as such until the sale and transportation were consummated by the delivery of the liquor to the vendee at the point of destination. * * " (Underscoring mine)

In 1909, Section 239 was enacted by Congress, at the instance of the "dry" legislators, to prevent the flow of liquor into the "dry" states through the channels of interstate commerce. Unfortunately, the statute was so drawn that an ambiguity was created as to whether it was limited in its scope to interstate carriers or was broad enough to penalize the acts of other types of agents, such as banks and individuals, who were making the same type of collections. The ambiguity referred to arose from the use of the following underscored wording of the statute:

> "Any railroad company, express company, or other common carrier, <u>or any other person who, in connection with the transportation of any * * intoxicating liquor</u> * * from one State * * into any other State, * * shall collect the purchase price or any part thereof, before, on, or after delivery, from the consignee, or from any other person, or shall in any manner act as agent of the buyer or seller of any such liquor, for the purpose of buying or selling or completing the sale thereof, saving only in the actual transportation and delivery of the same, shall be fined * *."

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In the case of Danciger v. Cooley, supra, the contention was made that the words "or <u>any</u> other person" meant "or <u>any</u> other <u>carrier</u>", and could not be extended to include agents, other than carriers, who were making the same type of collections.

In this case Danciger Brothers, who were liquor dealers in the State of Missouri, sold liquor to customers in the "dry" state of Kansas, through their agent, Cooley, who was authorized to make the collections. In pursuance of this plan Cooley collected sight drafts drawn upon the customers and at the same time handed the bills of lading suitably endorsed to the customers to enable them to secure the liquor from the shippers. The litigation arose when Cooley refused to account for the moneys he had received from such collections.

The Court held that the statute was not restricted in its scope to interstate shippers who acted as agents, in connection with the transportation of intoxicating liquor, for the purpose of making collections upon liquor drafts, but was broad enough to include agents acting in such capacity who were not carriers. This result was based upon the construction that the words "or any other person" are intended to include all persons committing the described acts. To hold otherwise, would, as Mr. Justice Van Devanter explained, make it possible for the statute to "**be evaded so readily by having other collectors that it would accomplish nothing."

In the paragraphs below which have been quoted from the Danciger case, supra, the Court construes Section 239 and defines its scope. It is submitted that the Court, therein, clearly sets forth a rule of construction which is sufficiently broad in its scope to include within the provisions of Section 239 the acts of banks as agents in the collection of liquor drafts in interstate commerce.

The excerpts from this opinion, referred to above, appear as follows:

> "It (Section 239) consists of two parts, both relating to liquor transported from one State into another. The first deals with the collection of the purchase price, and the second with acts done 'for the purpose of buying or selling or completing the sale' of 'any such liquor'. * * "

> "The words 'any railroad company, express company, or other common carrier' comprehend all public carriers; <u>and the words 'or any other person' are equally broad.</u> When combined they perfectly express a purpose to include all common carriers <u>and all persons;</u> and it does not detract from this view that the inclusion of railroad companies and express companies is emphasized by specially naming them. <u>To hold that the words 'or any other person' have the same meaning as if they were 'or any agent of a common carrier' would be not merely to depart from the primary rule that words are to be taken in their ordinary sense, but to narrow the operation of the statute to an extent that would seriously imperil the accomplishment of its purpose."</u>

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The Court concluded that:

> "Without question the practice of collecting the purchase price at the point of destination as a condition to delivery is the thing at which the statute is aimed. Through that practice the sale of liquor in interstate commerce was rapidly increasing. <u>But, as before shown, such collections were not confined to carriers and their agents, but often were made by others. In principle and result there was no difference; the evil was the same in either event.</u> <u>Besides, if the statute were made applicable only to carriers and their agents, it could be evaded so readily by having other collectors that it would accomplish nothing.</u> The volume of the business and the attending mischief would be unaffected. Doubtless all this was in mind when the statute was drafted and accounts for its comprehensive terms. That the words 'or any other person' are intended to include all persons committing the acts described is, as we think, quite plain". (Underscoring and words within parenthesis mine.)

There are two earlier cases, dealing specifically with the question of bank liability, which arrived at a contrary result. While it is true that both of these cases arose under criminal proceedings and that the Supreme Court case referred to is a civil action pertaining to the civil liabilities of an individual agent making collections on drafts, it is submitted that they must be regarded as overruled by the Supreme Court.

In this connection it should be noted, before passing on to a consideration of the cases referred to, that the Supreme Court in the decision of Danciger v. Cooley, supra, mentioned the fact that before the arrangement was made between Danciger Brothers, the liquor dealers, and their agent, Cooley, for the collection of the drafts, the banks had refused to make the collections. It should be further noted that the cases discussed below were cited by counsel in <u>Danciger v. Cooley</u> and their principles were not approved by the Court.

In the case of <u>First National Bank v. U.S.</u>, 206 Fed. 374 (1913), it appeared that the Hamm Brewing Company of Minnesota sold a case of beer, in the "dry" State of North Dakota, to one Meyers through the First National Bank of Anamoose as its agent to complete the transaction of sale and delivery. Meyers paid to the bank the amount of the draft drawn upon him, and in return received from the bank the bill of lading, which was essential to enable him to receive the beer from the railroad company. The Circuit Court held that the bank was not criminally liable for any violation of Section 239. The basis of this decision may be gathered from the portion of Judge Sanborn's opinion set forth below:

> "The collection by banks of sight drafts and the delivery of bills of lading attached thereto was, and long had been, a common and universal method of collection of the purchase price of liquors and other articles throughout the entire nation. This is a general law applicable in every state of the Union, and it is incredible

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that the Congress intended, without mentioning or referring to it in the statute, to strike down this method of collection for the sale of liquors transported in interstate commerce in all the states, in the large majority of which the manufacture and sale of intoxicating liquors were not prohibited.

"To our minds the natural and manifest meaning of the declaration in this law that 'any railroad company, express company, or other common carrier, or any other person who, in connection with the transportation,' etc., shall collect the purchase price, or act as the agent of the buyer or seller, shall be fined, excludes banks, ordinary collectors, and all persons who are not members of the general class of carriers. This interpretation finds support in the fact that the contrary construction expunges the words 'railroad company, express company, or other common carrier, or any other,' and makes the statute read 'any person who,' etc., and in the rule, which is especially applicable to statutes defining crimes and regulating their punishment, that where general words follow the enumeration of particular classes of persons or acts the general words should be construed to apply to persons or acts of the same general nature or class as those enumerated." (See 206 Fed. at p. 378.)

The Court's construction of the words "or any other person", referred to above, as being used to modify the preceding words "any railroad company, express company" and excluding thereby "banks, ordinary collectors, and all other persons who are not members of the general class of carriers", is implicitly overruled in the Supreme Court case, supra, wherein, Mr. Justice Van Devanter expressed the following contrary point of view:

"But, as before shown, such collections were not confined to carriers and their agents, but often were made by others. In principle and result there was no difference; the evil was the same in either event. Besides, if the statute were made applicable only to carriers and their agents, it could be evaded so readily by having other collectors that it would accomplish nothing."

The Circuit Court in the case of Danciger v. Stone, 188 Fed. 510 (1910), upon an identical statement of facts, decided that a bank, which made collections upon drafts in interstate commerce, is not subject to Section 239, on the theory that the collections made by it as an agent independent of interstate shippers have no connection in any way with the interstate transportation of the liquor to which the statute relates. Judge Campbell was of the opinion that Section 239 did not make it unlawful for banks to act in the manner under consideration because, as he said:

"* * such acts are only condemned by this section when they are committed in connection with the interstate transportation of such liquor. It is true the bank, when it collects the draft, collects the purchase price of the liquor; but can such collection be said to be in any way in connection with the interstate

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transportation of the same? The transportation is effected by the railroad company, or other common carrier, entirely independent of the bank. The transportation of the liquor and the collection of the draft are two separate and distinct acts, performed by separate and distinct individuals or corporations, and the fact that the carrier, under its contract, cannot deliver the shipment until the consignee first goes to the bank and pays the draft, to secure the bill of lading, and then presents it to the carrier, cannot be said to in any way connect the bank with the transportation. Its act cannot therefore be said to be in violation of the terms of the statute." (188 Fed. 513) (Underscoring mine).

But the Supreme Court in the other Danciger case took a different view of the matter wherein it said:

"The statute does not say 'in the transportation,' but 'in connection with it.' Transportation as this court often has said, is not completed until the shipment arrives at the point of destination and is there delivered. * * What Cooley did, while not part of the transportation, was closely connected with it. He was at the point of destination and held the bill of lading, which carried with it control over the delivery. Conforming to his principal's instructions he required that the purchase price be paid before the bill of lading was passed to the vendee. The money was paid under that requirement and he then turned over the bill of lading. A delivery of the shipment followed and that completed the transportation. Had the carrier done what he did all would agree that the requisite connection was present. As the true test of its presence is the relation of the collection, rather than the collector, to the transportation, it would seem to be equally present here."

If we may safely assume that the bank is subject to Section 239, we must further decide whether Section 239 was affected by either the enactment or the repeal of the Federal liquor prohibition legislation. It is submitted that the statute under consideration is still in effect.

The Volstead Act contained the following provisions which defined its effect upon prior liquor legislation:

"All provisions of law that are inconsistent with this chapter are repealed to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. * * (Title 27, U.S.C.A. Sec. 52.)

"All laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force on October 28, 1919, shall be and continue in force, as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provision of this title; but if any act is a violation of any of such laws and also of

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this title, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other." (Title 27, U.S.C.A. Sec. 3).

I have been unable to locate any provisions within the Volstead Act which may be regarded as either expressly or impliedly repealing Section 239. The above provisions did not expressly repeal all prior liquor legislation, but, in effect, were no more than declaratory of the general law concerning repeals by implication, as was held in the case of United States v. Stafoff, 268 Fed. 417 (1920) Aff'd 260 U.S. 477 (1923).

Moreover, there is an affirmative indication in the case of McCormick & Co. v. Brown, 286 U.S. 131 (1932), that the Volstead Act was not intended to affect prior liquor legislation which had been enacted to aid state prohibitory laws.

In the McCormick & Co. case, supra, the Supreme Court refused to restrain the state officers of West Virginia from requiring the complainant, McCormick & Co., a non-resident liquor dealer, to obtain permits from the State Commissioner of Prohibition, and to pay an annual license fee of $50. before shipping certain products into the State to purchasers there for resale.

The complainant established that it held federal permits issued under the National Prohibition Act and contended that the requirements of the law of West Virginia constituted an interference with interstate commerce. It further appeared that the liquors were regarded as constituting medicine within the Federal Prohibition Law and under such classification were non-intoxicating. The liquors were deemed to be intoxicating according to the definition of the state law of West Virginia and were thus subject to its provisions. The Webb-Kenyon Act (Title 27, U.S.C.A. Section 122) prohibits the movement in interstate commerce into any State of intoxicating liquors for purposes prohibited by the state law. The complainant contended that, since the liquors were not intoxicating within the meaning of the National Prohibition Act, there was no restriction against their shipment by means of interstate commerce into the "dry" state of West Virginia. In response to this argument the Supreme Court decided that, since the Webb-Kenyon Act had been enacted prior to the National Prohibition Act for the purpose of preventing the flow of liquor into "dry" states whose laws were supplementary to the Federal laws - the determination of whether a liquor is intoxicating is necessarily dependent upon the definition given thereto by State law. To hold that the definition of the word "intoxicating" is to be determined by Federal law would render nugatory the effect of the State law.

By way of dictum, Mr. Chief Justice Hughes remarked that:

"The appellants do not urge, and there would be no ground for such a contention, that either the Eighteenth Amendment or the National Prohibition Act had the effect of

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"repealing the Webb-Kenyon Act. The Congress has not expressly repealed that Act, and there is no basis for an implication of repeal." (266 U.S. 141).

The Court then proceeded to state that neither the Eighteenth Amendment nor the National Prohibition Act superseded "state prohibitory laws which do not authorize or sanction what the constitutional amendment prohibits", and further went on to say in effect that there is no reason to hold that the National Prohibition Act should limit the Webb-Kenyon Act of its intended application whereby such a result would impede the enforcement of the State's valid prohibitions. My interpretation of the Court's holding on this issue is taken from the following quotation of Mr. Chief Justice Hughes' opinion:

"As the prohibitory legislation of the States may thus continue to have effective operation, there is no reason for denying to the Webb-Kenyon Act its intended application to prevent the immunity of transactions in interstate commerce from being used to impede the enforcement of the States' valid prohibitions." (266 U.S. 141).

It is submitted that the reasoning of the Supreme Court in the McCormick & Co. case supra, is equally applicable to Section 239, since this provision was made a part of the Federal laws for the purpose of supporting state prohibitory legislation.

The repeal of the Eighteenth Amendment and of the Volstead Act by the Twenty-first Amendment can have no effect upon prior liquor laws which have an independent existence.

However, in view of the fact that the Webb-Kenyon Act and Section 2 of Amendment XXI relate to the same evil and are more restricted in their scope, it might be contended that Section 239 has been impliedly repealed to the extent that it penalizes acts done in connection with the transportation of intoxicating liquor into non-prohibition states. The Webb-Kenyon Act (Title 27 U.S.C.A. Section 122) provides as follows:

"Sec. 122. Shipments into states having dry laws: prohibition The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or

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other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontinguous to but subject to the jurisdiction thereof, is hereby prohibited."

Section 2 of Amendment XXI provides as follows:

"The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is prohibited."

Section 239, by its terms, relates to acts done in connection with the transportation of liquor in interstate commerce into any state, whereas the constitutional provision limits the prohibition to liquors transported into dry states.

In the case of Danciger v. Cooley, supra, the Supreme Court declined to consider the effect of the Webb-Kenyon Act upon Section 239 of the Criminal Code because the transactions there involved occurred before the passage of such act.

From the foregoing, and assuming that there is no question but that Section 239 of the Criminal Code is still in effect, the conclusion that the Federal Reserve Bank of New York would be subject to the penalty provided for by such section for acting as collecting agent or agent to procure the acceptance of a draft drawn in connection with the shipment of intoxicating liquor in interstate commerce, where the shipping documents are attached to the draft and are released only against payment or acceptance of the draft, would seem to be correct.

There is the further question of whether Section 239 of the Criminal Code applies so as to subject the Federal Reserve Bank of New York to a penalty for acting as the agent of the seller of intoxicating liquor, where the sale involves an interstate shipment, and the bank acts "before, on, or after delivery" of the liquor for the purpose of collecting a check, note or acceptance given by the buyer to the seller, prior or subsequent to the delivery of the liquor, in payment of the purchase price, but where the acts of the bank as collecting agent are not directly connected with the transaction, except, as stated, to effect payment for the goods. In other words, the sale might be a sale on credit, or it might be a sale where the purchase price is paid in advance, and the item given in payment for the goods is or becomes due and payable "before, on, or after delivery".

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As stated above, Section 239 imposes a penalty upon any type of agent to make collection of the purchase price of the goods when such collection is connected with the interstate transportation of the goods.

It would seem that where the collection is not connected with the transaction except to effect payment of the purchase price, there would be no connection between the acts of the collecting agent and the transportation of the goods in interstate commerce. Furthermore, at the time that Section 239 of the Criminal Code was enacted, Congress had no power to prohibit or penalize acts done in connection with the sale of liquor apart from its power to regulate interstate commerce. The Eighteenth Amendment, now repealed, was not then a part of the Constitution. While the collection of commercial paper may itself involve interstate commerce, Section 239 penalizes only certain acts done "in connection with the transportation of * * intoxicating liquor" in interstate commerce.

The words "after delivery" contained in the statute undoubtedly relate to the time of the passage of title and not to the actual physical receipt of the goods by the purchaser. In this connection, the time of "delivery" of the goods sold through the use of a carrier is defined in 55 Corpus Juris Sec. 565, as follows:

> "It is a general rule that delivery by the seller to a common carrier for transmission or transportation to the buyer is a sufficient delivery to the buyer to pass the title to him, subject to the seller's right of stoppage in transitu, and, according to some authorities, subject to the seller's lien. However, the rule presupposes that: There is no agreement, usage of trade, or intention to the contrary; the goods are of the kind, quality, and amount ordered, and are in a deliverable condition; they are shipped according to the directions contained in the contract or given by the buyer; the contract does not require delivery at a place other than the point of shipment; the delivery is timely and complete; nothing remains to be done by the seller, or, if something is to be done, it is to be done after title has passed; and the goods are consigned in the name of the buyer, or the bill of lading is indorsed or delivered to him, without reservation, or, if this is not done, there is, nevertheless, an agreement or intention to pass title on delivery to the carrier. * * *

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If delivery has been effected when the goods have been put on board the carrier, the words of the statute "after delivery" would be pertinent to the ordinary case of the release by the collecting agent of the shipping documents against payment of the drafts to which such documents are attached.

The Uniform Sales Act and Section 82 of Article V (entitled "Sales of Goods") of the Personal Property Law of New York defines a sale as follows:

> "Sec. 82. Contracts to Sell and Sales. * *
> 2. A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price."

In Section 2 of Williston on Sales (1909) it is stated as follows:

> "The most fundamental distinction in the law of sales is between a contract to sell in the future and a present sale. The distinction is often expressed by the terms 'executory' and 'executed' sales. Whether a bargain between parties is a contract to sell or an actual sale depends upon whether the property in the goods is transferred. If it is transferred there is a sale, an executed sale, even though the price be not paid. Conversely, though the price be paid there is but a contract to sell (not very happily called an executory sale) if the property in the goods has not passed. * * "

Accordingly, it would appear that an act done in connection with the collection of the purchase price would not necessarily constitute an act "for the purpose of buying or selling or completing the sale".

It would seem that the Federal Reserve Bank of New York may make collections of drafts, checks, notes, acceptances and other types of commercial paper given in payment of the purchase price of intoxicating liquor, sold and shipped in interstate commerce, without thereby subjecting itself to the penalty provided for by Section 239 of the Criminal Code, unless ultimate delivery of the liquor is dependent upon the collection of the item.

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COPY X-9231-d

Federal Reserve Bank

of New York

OFFICE CORRESPONDENCE CONFIDENTIAL Date May 9, 1935.

To Mr. Coe

From T. G. Tiebout

Subject: Board's letter of April 26, 1935 (X-9188) on the subject of "Collection of Liquor Drafts in Interstate Shipments".

Referring to my confidential memorandum to you of today's date on the above mentioned subject, there is attached hereto a copy of a memorandum dated May 3, 1935 from Mr. J. C. Kimble of the Legal Department to me also relating to such subject. It consists of an analysis of cases in which Section 239 of the Criminal Code of the United States (Title 18 U.S.C.A. Section 389) was involved, and supports the views set forth in my confidential memorandum to you of today's date above mentioned. I have covered the matter in separate memoranda with the thought that you may wish to circulate, to some extent, through your department, my confidential memorandum above mentioned, but not the more detailed memorandum attached hereto.

This and my other memorandum referred to above have been marked confidential, and should be treated as such because they are self-convicting, to the extent that we may have acted in the past in violation of the statute.

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X-9231-e

CONFIDENTIAL

FEDERAL RESERVE BANK
OF NEW YORK

OFFICE CORRESPONDENCE May 9, 1935.

To Mr. Coe
From T. G. Tiebout

Subject: Board's letter of April 26, 1935 (X-9188) on the subject of "Collection of Liquor Drafts in Interstate Shipments".

This will confirm my views on the above mentioned subject expressed to you orally a few days ago, as follows:

1. That the Federal Reserve Bank of New York might be held to be subject to the penalty provided for by Section 239 of the Criminal Code of the United States (Title 18 U.S.C.A. Section 389) for acting as collecting agent of a bill of exchange drawn to effect payment for intoxicating liquor sold and shipped in interstate commerce, where the shipping documents are attached to the bill and are released against payment of the bill, and should therefore not act as such collecting agent.

2. That the Federal Reserve Bank of New York might be held to be subject to the penalty provided for by Section 239 of the Criminal Code of the United States for acting as the agent of the seller of intoxicating liquor, sold and shipped in interstate commerce, to "accept and return" or "accept and hold" a bill of exchange drawn in connection with the sale, where the shipping documents are attached to the bill and are to be released against acceptance, and should therefore not act as such agent.

3. That the Federal Reserve Bank of New York would not, in my opinion, be subject to the penalty provided for by Section 239 of the Criminal Code of the United States for acting as collecting agent of a bill of exchange, check, or note given in payment for intoxicating liquor sold and shipped in interstate commerce where the acts of the bank as such collecting agent are not connected with the delivery of the liquor to the purchaser thereof, or, to be more accurate (in the language of the statute), where the acts of the bank are not done "in connection with the transportation of" the liquor and accordingly, the bank may act as such collecting agent under such circumstances.

From my conversations with you, I understand that the transactions referred to in paragraphs 1, 2 and 3 above cover all the types of transactions which this bank handles and which might come within Section 239 of the Criminal Code.

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When we discussed this matter a few days ago we agreed that in cases such as those referred to in paragraphs 1 and 2 above, we would communicate with our forwarding bank, call its attention to the provisions of Section 239 of the Criminal Code and inquire whether it did not wish to request that the item be returned. I understand that when such cases have arisen, our forwarding bank has, in each instance, requested that the item be returned. We also agreed that in such a case, if our forwarding bank should decline to request that the item be returned, we would, nevertheless, return the item, citing as our reason for so doing, Section 239 of the Criminal Code. This will confirm that such procedure for handling cases of the kind referred to in paragraphs numbered 1 and 2 above meets with the approval of the Legal Department.

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COPY
FEDERAL RESERVE BANK
OF RICHMOND

X-9231-f

May 10, 1935.

Mr. Walter Wyatt, General Counsel
Federal Reserve Board,
Washington, D. C.

Dear Mr. Wyatt:

I know that your time is much occupied but I am enclosing you herewith certain correspondence with reference to the Board's letter X-9188 dated April 26, 1935. This correspondence is as follows:

1. Copy of my opinion of May 3rd to Mr. Keesee, Cashier of this bank.
2. Copy of an opinion dated May 1st to Mr. R. R. Gilbert of the Federal Reserve Bank of Dallas;
3. Copy of Mr. Stroud's letter of May 6th to me, and
4. Copy of my reply dated May 10th, 1935.

You will notice that aside from the rather interesting question of law involved the correspondence suggests two points, first, whether or not the Board by its letter X-9198 intended to suggest that the Federal Reserve banks would desist from handling all drafts apparently drawn for the purchase price of liquor; second, whether or not uniform collection circular should be amended or notice in other form given to all member banks that this policy would be adopted.

After discussing the matter with Mr. Walden, who as you know is on the collection committee, he says, and I think very rightly, that the collection committee which reports to the conference of governors could not properly advise all Federal Reserve Banks to amend their circulars unless counsel advise that the policies followed at present were unlawful. As you know, in several divisions of this District commerce in liquor is now lawful, and I feel that to refuse to handle drafts drawn as incidents to such transactions would be rather unreasonable unless we were compelled to do so by requirement of law. As you will see from my opinion, I do not think that the collection of bill of lading draft in the ordinary way is prohibited by the statute. It is of course unnecessary to say that if your office, or the Federal Reserve Board considered that the banks should not collect such drafts this bank would be entirely willing to comply with the views of the Board.

Knowing what demands there are upon your time at present, I did not adopt Mr. Stroud's suggestion of endeavoring to secure an engagement with you, as it occurred to me that you could more conveniently

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X-9231-f

Mr. Walter Wyatt. #2. 5-10-35.

read the correspondence at leisure and afterwards we could, if you thought necessary, discuss it.

I will call you by telephone in a few days and of course, if you wish it, make an engagement to come to Washington to see you or the Board.

We have heard nothing from counsel for other Federal Reserve Banks on the subject.

Very truly yours,

(Singed) M. G. Wallace,

M. G. Wallace,
Counsel.

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COPY X-9231-g

To Mr. George H. Keesee, Cashier.

From M. G. Wallace, Counsel.

May 3, 1935.
Re: Collection of Liquor Drafts in interstate shipments.

Dear Mr. Keesee:

I have before me a letter dated April 26th, X-9188, from Mr. Chester Morrill, Secretary of the Federal Reserve Board, to Mr. George J. Seay, Governor of this bank, upon the above subject, and understand you desire my opinion as to whether or not in view of the statute and the decision of the Supreme Court cited in this letter we should examine bills of lading attached to all drafts handled by us for collection and refuse to handle those which appear to have attached to them bills of lading showing the transportation of liquor.

A review of the legislative history of the statute mentioned indicates that it was passed primarily to prevent what are commonly referred to as C.O.D. shipments of liquor in interstate commerce. It was enacted in 1909 and was, of course, a part of a system of legislature designed to restrict and limit traffic in intoxicating liquors or to reenforce the efforts of the several states to prohibit such traffic within their borders.

An opinion of the Attorney General rendered in 1913 construing this statute (29 Opinions of the Attorney General, Page 58) reads in part as follows:

> "The act does not apply to banks, collecting drafts with bill of lading attached, where the shipment is made to a real consignee upon an order sent by him and filled by shipment from the dealer's place of business. The collection of a draft for the purchase price of a commodity in that manner is the usual and ordinary method of carrying on business and is not connected with the transportation of the property within the meaning of the statute under consideration."

In a former portion of his ipinion the Attorney General had stated that collection of the draft would be connected with the transportation when it appeared that the bank received the draft with the bill of lading attached with instructions to deliver it to any person who would pay the draft regardless of whether or not such person was the consignee.

Following this opinion a Circuit Court of Appeals in the case of First National Bank v. United States, 206 Fed. 374, 46 L.R.A. (N.S.) 1139, held that a bank collecting a draft drawn for the purchase price of liquor with bill of lading attached was not guilty of a violation of the statute. The court in that case went much further than the Attorney

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To Mr. George H. Keesee, Cashier May 3, 1935.

General, and in effect said that the statute would apply only to some person who was connected with the carrier or other person transporting the liquor.

In the case of Danciger v. Cooley, 248 U.S. 319, decided in 1919, the Supreme Court of the United States held that the collection of a draft might be connected with the transportation of liquor, even though the person who collected it did not actually transport it and was not an agent of the carrier. In the particular case under consideration, however, the person who collected the draft was the local representative or regular agent of the consignor. The court did not, however, go so far as to say that a bank which handled a draft in the ordinary course of its business would be regarded as acting in connection with the transportation of liquor, and the court did say: "To be within the statute it is essential that the act of collecting the purchase price be done in connection with the transportation of the liquor". It therefore appears that the court considered that the mere act of collecting the draft for the purchase price was not of itself a violation of the statute, but the collection agent must have some further connection with the transportation. There is, therefore, nothing in the opinion of the Supreme Court which would be considered as contrary to the opinion expressed by the Attorney General to the effect that the collection of a draft for the purchase price of a commodity in the usual course of business is not connected with the transportation of the property within the meaning of the statute under consideration, even though a bill of lading is attached to the draft.

The opinion of the Attorney General is not conclusive upon a question of the construction of a penal statute, but since all prosecutions for violation of the laws of the United States are under the direction and control of the Attorney General, it seems to me that there is no reason at this time to assume that the Attorney General would adopt a view radically different from that formerly expressed by his office and seek to extend the force of this statute to a transaction which his office had formerly held was not within the intent of the statute.

I do not believe, therefore, that there is any reason for us to make any special investigation or examination of bills of lading attached to drafts which we received in the ordinary manner, unless there are some peculiar circumstances indicating that these drafts are not drawn in the ordinary and usual course of business; as, for example, the circumstances mentioned by the Attorney General in which the drafts were drawn and delivered with instructions to surrender the bill of lading to any person who might pay the draft.

Very truly yours,

(Signed) W. G. Wallace,
Counsel.

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May 1, 1935.

To Mr. F. R. Gilbert

From Locke, Locke, Stroud & Randolph

We have your memorandum of April 30, 1935, to which is attached copy of the Federal Reserve Board's letter X9188 dated April 26, 1935, relative to the collection of liquor drafts in interstate shipments.

The statute in question is as follows:

"Section 389, (Criminal Code, section 239). Same; carrier collecting purchase price of interstate shipment. Any railroad company, express company, or other common carrier, or any other person who, in connection with the transportation of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory or District of the United States, or place noncontiguous to but subject to the jurisdiction therof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, shall collect the purchase price or any part thereof, before, on, or after delivery, from the consignee, or from any other person, or shall in any manner act as the agent of the buyer or seller of any such liquor, for the purpose of buying or selling or completing the sale thereof, saving only in the actual transportation and delivery of the same, shall be fined not more than $5,000. (Mar. 4, 1909, c. 321, sec. 239, 35 Stat. 1136)".

We note the following language in letter X9188 of the Federal Reserve Board:

"It was held in a decision of the Supreme Court of the United States in 1919 (Danciger v. Cooley, 248 U. S. 319) that this statute was applicable not only to railroad and express companies but to all persons commiting the acts described therein. Accordingly, it would appear to be unlawful for banks, in connection with the transportation of liquor in interstate commerce, to 'collect the purchase price' thereof or to 'act as the agent of the buyer or seller' for the purpose of completing the sale of such liquor."

"This matter is brought to your attention for the information and guidance of your bank in accepting for collection drafts covering the purchase price of liquors.

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While there are early decisions construing the statute in question which hold that it is not applicable to banks collecting drafts with bills of lading attached (First National Bank v. United States, 206 Fed. 374; Danciger v. Stone, 138 Fed. 510) and an opinion of the Attorney General of the United States to the same effect (29 Op. Atty. Gen. 58), we believe that the case of Danciger v. Cooley 248 U. S. 319, referred to by the Federal Reserve Board in this letter is broad enough to construe the statute in question as applicable to banks. The effect of this decision by the Supreme Court of the United States is, in our opinion, to overrule the previous decisions of the lower Federal courts and the opinion expressed by the Attorney General of the United States.

While it is clear that the mischief contemplated and that sought to be prohibited by the statute in question was the shipment of liquor from a wet state into a dry one, nevertheless the statute in question is so broad in its phraseology that it would appear to apply to shipments from any state into any other state regardless of whether or not the state of origin and the state of destination were dry or wet. Accordingly, it is our view that the safest policy for you to follow is to decline to handle collection of drafts with bills of lading attached covering all shipments of liquor whether the shipments be legal or illegal.

We would suggest, therefore, the advisability of circularizing your member banks, as well as other Federal reserve banks, advising that in view of the above mentioned statute you do not feel at liberty to handle bill of lading drafts involving shipments of liquor.

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If after further consideration of the matter in the light of this opinion you deem the suggested action proper, we will be glad to assist you in preparing such circulars.

LOCKE, LOCKE, STROUD & RANDOLPH.

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COPY LOCKE, LOCKE, STROUD & RANDOLPH X-9231-i

First National Bank Bldg.,
Dallas, Texas.

May 6, 1935.

Mr. M. G. Wallace, General Counsel,
Federal Reserve Bank of Richmond,
Richmond, Va.

Dear Wallace:

Upon receipt of the Board's letter X-9188 dated April 26, 1935, the Federal Reserve Bank of Dallas referred to me the question of the collection of drafts with bills of lading attached representing collections for shipments of liquor. Texas as you know, is still a dry state but Louisiana is wet. A good deal of beer and whiskey is shipped from Louisiana into Texas. In addition, we have a good many shipments of whiskey to drug stores in this state from out-of-state points and a good many drafts are drawn upon the consignee of the shipment and forwarded to us for collection.

When the matter was first referred to me I found an opinion of the Attorney General, reported 29 Op. Atty. Gen. 58, and also several lower Federal court cases (First National Bank v. United States, 206 Fed. 374; Danciger v. Stone, 188 Fed. 510) holding that it was not illegal for a bank to collect such drafts. However, the case of Danciger v. Cooley, 248 U.S. 219, was decided many years after the Attorney General rendered his decision and the lower Federal courts decided the cases referred to. It is obvious from the reported decision of the Supreme Court that the Attorney General's opinion and the cases referred to were brought to the attention of the Supreme Court of the United States at the time it decided the case of Danciger v. Cooley, supra, although these cases and this opinion are not mentioned in the Supreme Court's opinion. Because of this status of the law, I wrote a memorandum to the bank, a copy of which I am enclosing for your information.

Subsequently, feeling that the matter was of system importance, Mr. Gilbert wired Mr. Walden requesting information as to what the Committee intended to do in view of the Board's letter. In reply Mr. Walden advised him that after consulting with counsel that in view of the Attorney General's opinion and the present attitude of the Federal Government, the Committee was disposed to take no action but to leave the matter entirely to the several Federal Reserve banks.

It is our judgment that the question should be handled as a system matter so that the same service is accorded all the banks, and also because a difference in policy between the several Federal reserve banks might tend to emphasize this statute.

It seems to us that inasmuch as the Federal Reserve Board has taken official cognizance of the statute and written the letter above referred to that this supervising authority has taken the same action as that requested of the Comptroller of the Currency just prior to the delivery of the opinion of the Attorney General. In other words, it seems to us that the Board's letter is practically a direction that the Federal Reserve banks discontinue handling these drafts.

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We have absolutely no objection to handling the drafts provided we can do so lawfully and our sole interest in the matter is to avoid any complications. While we realize the force, from a practical viewpoint, of the suggested Federal attitude toward this matter, nevertheless the Board's attitude as expressed in its letter seems to offset this argument to some extent.

If you have not already done so, do you not think it would be a good idea for you to go over to Washington, and discuss this matter informally with Wyatt, with a view of ascertaining informally just what the Board's position is and what prompted the writing of the letter X-9188?

Until we hear further from you we do not expect to take any independent action but we are, in the meantime, very much concerned over what we should do.

Very truly yours,

(Signed) E. B. Stroud, Jr.

EBS:b

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FEDERAL RESERVE BANK

of Richmond

May 10, 1935.

Mr. E. B. Stroud, Jr.,
Locke, Locke, Stroud & Randolph,
Attorneys at Law,
First National Bank Bldg.,
Dallas, Texas.

My dear Mr. Stroud:

I received your letter of May 6th with reference to the Board's letter X-9188 dated April 26, 1935.

I know that Mr. Wyatt has very little time to spare at present and the industrial loans are keeping me fairly busy, so I thought instead of going to Washington I would send him copies of the correspondence so that he could consider the question. After he has had an opportunity to do this I will call you by telephone and if he wishes to discuss the matter go to Washington.

I, of course, realize the force of your point that the Federal Reserve Bank should adopt if possible a uniform course, and of course if the Federal Reserve Board wishes us to refuse to handle all collections which appear to be drawn for the purchase price of liquor I know that this bank would desire to comply. I did not construe the letter X-9188 as intended to do more than call our attention to a possible danger in order that the situation might be investigated, and as I say after investigating it I came to the conclusion that there was nothing in the opinion of the Supreme Court in Danciger vs. Cooley, 248 U.S. 319, which would amount to a reversal of the opinions expressed by the attorney general.

The statute applies to collections before, on or after delivery. This language would include all possible times, hence if the statute applies to all persons who collect the purchase price of liquor which had been shipped in interstate commerce it would in effect prohibit all collection, except possibly a collection made by the seller in person and would thereby prohibit all payment except a case in which the buyer sent actual money or currency to the seller. It seems to me it would prohibit a bank from collecting a check which the buyer had sent to the seller in payment. For this, like a draft by the seller on the buyer, is merely an instrumentality of collection. There was nothing in the situation existing when the Act was passed which indicated that Congress then intended to make such a sweeping restriction. The debates in Congress quoted by the

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Attorney General showed that the primary object of the statute was to restrict what were commonly known as C.O.D. shipments. It seemed to me, therefore, that Attorney General Wickersham was entirely correct in the view which he took that the person who collected the purchase price must have some connection with the transportation. You doubtless noticed from the full text of his opinion that he went at great length into the question as to the passage of title by delivery of the bill of lading and pointed out that ordinarily a bank collecting a draft with bill of lading attached was not regarded as the agent of the buyer or seller in completing the sale. I, of course, pointed out that a bank might easily be within the prohibition of the statute or subject to the penal laws of the state if it accepted drafts drawn on fictitious persons and delivered these drafts to persons who desired to buy liquor.

The lower court in Danciger vs. Stone, 188 Fed. 510 went much further than the Attorney General, and in effect held that the statute could apply to no one except a carrier or the agent of the carrier. This decision of course amounted almost to ignoring the words "or any other person" in the statute.

I quite agree with you that this decision was overruled by the decision of the Supreme Court of the United States in Danciger vs. Cooley, 248 U.S. 319 in so far as the earlier decision had held that the statute was applicable only to a carrier or its agents. The facts in Danciger vs. Cooley showed a very flagrant evasion of the law. The collector in that case was evidently to all intents and purposes the local salesman of the seller and did everything necessary to complete the sale and transportation, except the actual manual delivery of the liquor, and the court held that he had therefore collected the purchase price in connection with the transportation. The court, however, was very careful to state that some connection with the transportation was essential, for the court said: "To be within the statute it is essential that the act of collecting the purchase price be done in connection with the transportation of the liquor". It seemed to me that this language was so far from overruling the opinion of the Attorney General that it amounted to an express statement that the court did not intend to reverse his conclusion that the person who did the collection must have a connection with the transportation amounting to something more than that which arose from the mere fact that a bill of lading was attached to a draft which was collected.

As you know, in view of the above it seemed to me that there was no reason to expect that the Department of Justice would adopt a policy at variance with that which the Attorney General Wickersham had adopted, especially as it seemed to me that the logic of Attorney General Wickersham's opinion was irresistible.

Very truly yours,

M. G. Wallace,
Counsel.

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