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Indorsements After Maturity and the "New Bill" Doctrine

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INDORSEMENTS AFTER MATURITY AND THE "NEW BILL" DOCTRINE

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Should subsequent presentment for payment and notice of dishonor be required in order to charge one who indorses a negotiable instrument after maturity? It will be assumed that the instrument by its terms is a time and not a demand instrument,[1] and that the indorsement is by the one holding the instrument at maturity.[2]

When a negotiable instrument is indorsed after maturity, there is an assignment of the chose in action possessed by the one holding the instrument when it became due. The character of that chose in action is affected by the presence or absence of presentment and notice of dishonor at maturity, and other facts. The discussion to follow will consider the relations among themselves of those who participate in such transfers. As pointed out, they have been parties to an assignment. Their relations could be governed entirely by the law of assignments. This has not, however, been the viewpoint of the law or of the merchants whose customs gave rise to this branch of the law. It has been felt that the bill or note should continue to be governed by the principles relating to negotiable paper.[3] This would seem to be a natural way for those dealing with such instruments to regard the situation. It is the viewpoint of the Uniform Negotiable Instruments Law. The act provides in Section 47 that an instrument negotiable in its origin continues to be such until discharged or restrictively indorsed, and in Section 7

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[1]This is the only form in which the problem has been passed upon judicially, and the assumption will make the problem more clean-cut for purposes of discussion. The reasoning to be presented is applicable to demand instruments, in that it is believed that, if such an instrument is negotiated more than a reasonable time after issuance, presentment and notice should not be required in order to hold the indorser. McKinney v. Crawford, 8 S. & R. 347, 351, 357 (Pa. 1822), reaching an opposite result, is such a case. The demand note was there held to have been past due when negotiated.

[2]The existence of successive transfers would be immaterial in connection with nearly all the discussion to be presented. It would be material if the indorsement after maturity were to be considered the creation of a "new note" instead of a "new bill." This contingency will be considered briefly.

[3]Occasional statements to the effect that a past-due instrument is no longer negotiable are discussed in Chafee, *Rights in Overdue Paper* (1918) 31 Harv. L. Rev. 1104, 1105, 1123, 1129.

that an instrument issued, accepted, or indorsed when overdue is payable on demand.[4]

In general the position that negotiability continues after maturity is undoubtedly sound. For example, the indorser after maturity should be held to make the warranties which ordinarily accompany the indorsement of negotiable instruments. He should also be held to assume liability for payment, whatever may be the rule of the particular jurisdiction in regard to implying such an undertaking in connection with assignments generally. The point to which the following discussion will be directed is whether such an indorser should be given the benefit of the usual requirement of presentment for payment and notice of dishonor as a prerequisite to liability. If these steps are to be required, the rules relating to such action upon demand instruments will apply, that is, the holder must so act within a reasonable time. A past-due instrument, having no fixed future date for payment, necessarily has always been regarded as payable upon demand, as set forth in the provision of the Negotiable Instruments Law referred to.

If the requirement of subsequent presentment and notice is to be made, it is an apt illustration of a "trap for the unwary." Normally these steps are taken at maturity. As to parties already upon the instrument, such action can have no effect if taken later. It is altogether unlikely that a taker after maturity will have the knowledge, or that it will occur to him, that there is a possibility of producing any legal effect as to any person through such action at a later date. Knowledge of the requirement of such action at maturity tends to exclude the other possibility from his mind. There is nothing about the circumstances to suggest it to him. The inference to be drawn from the facts are all the other way. The instrument already has failed to result in payment at the contemplated time. Already it "comes to the taker disgraced." The indorser knows that the instrument has failed to operate as intended. If he himself has already made presentment at maturity, notice to him of subsequent dishonor is useless. If the instrument is accompanied by a certificate of protest, or there is other evidence that presentment has been made, the uselessness of a repetition of such action is made apparent to the indorsee. If no specific indication in that regard is made to him, at least he knows that the instrument has been in the hands of his transferor at maturity, and the transferee may reasonably conclude that an attempt has been made to

[4]Section 7 states that this is true "as regards the person so issuing, accepting, or indorsing it."

secure payment, or that there has been knowledge that such action would be unavailing. If he assumes that the indorser has been diligent, he will make the further assumption stated. It would seem that he should not be required to act upon an assumption that the one dealing with him has not been diligent. Certainly the indorser is not in a position to insist that his transferee must assume that no presentment has been made. He would thus be taking advantage of his own neglect. If information in regard to dishonor is important to the indorser, as indeed it may be, he has possessed the means to secure it. The indorser may assert that the fact that the instrument is past due makes it especially important to him that the indorsee take prompt steps to secure collection, and notify him in the event of failure, but the indorser's own want of action belies the contention, and has tended to mislead the taker, the more so the farther removed the transfer is from maturity. Here again the indorser is seeking to take advantage of his own default. The most weighty consideration, however, against imposition of the requirement of demand and notice upon the indorsee, is the great likelihood, under the circumstances justifiable, that its existence will not occur to him. It is an ancient fundamental criterion by which to judge legal principles that they should, in so far as possible, conform to the ordinary practices of mankind. Strangely, in the consideration of the problem, the seemingly obvious objection that the requirement constitutes a "trap for the unwary" apparently has not been noticed.

The story of the early difficulties experienced in permitting actions by indorsees of bills and notes is familiar.[5] In striving to overcome the obstacles felt to lie in the way of such actions, it was reasoned that every indorsement is "as a new bill," and that, therefore, the indorsee should be permitted to proceed upon it. The earliest reported case on a bill of exchange having appeared in 1602,[6] the words quoted are spoken in 1686 by Lord Holt,[7] who very likely acquired the idea from the merchants with whom he consulted in laying the foundations of the law in such matters.[8] It

[5]See 8 Holdsworth, *History of the English Law* (3rd ed. 1926) pp. 113-176. The development of the conception of negotiability upon the Continent is treated at pp. 140 *et seq.*

[6]Martin v. Bourse, Cro. Jac. 6, 79 Eng. Rep. 6 (K. B. 1617).

[7]Claxton v. Swift, 2 Show. 494, 89 Eng. Rep. 1062; Skinn. 255, 90 Eng. Rep. 116; Comb. 32, 90 Eng. Rep. 325 (K. B. 1687). The question involved was whether an indorsee who had recovered judgment against the drawer, but had not taken out execution against him, could later sue an indorser. The same form of statement is found in Hill v. Lewis, Skinn. 410, 90 Eng. Rep. 182 (K. B. 1694), and Tassell & Lee v. Lewis, 1 Ld. Raym. 743, 91 Eng. Rep. 1397 (K. B. 1695).

[8]In the reports of other cases of the period the following forms of expression are used to describe the resemblance of an indorsement to a new bill:

was an easy ellipsis to state without qualification that an indorsement "is" a new bill, and this form of expression is found as early as 1693.[9] Discussing the period, Holdsworth says: "The rights of the indorsees depended upon the principle that each indorsement amounted in substance to the drawing of a new bill."[10] In 1758, Lord Mansfield, after discussing the legal situation arising out of the indorsement of a note, said: "This is the very definition of a bill of exchange."[11] In 1803, Lord Ellenborough said: "There is no distinguishing the case of an indorser from that of a drawer. . . ."[12]

The "new bill" conception first appears in connection with a transfer after maturity in 1691. In the report of one of Lord Holt's cases in that year it is stated that all the merchants were agreed "that a bill negotiated after day of payment was like a bill payable at sight."[13] This case marks the entrance into the courts of law of the doctrine of continuance of negotiability after maturity. A few years later, after consulting with the merchants, Lord Holt held that a bill could be declared upon as such when negotiated after maturity.[14] No reported English case seems to have presented the question of the necessity of subsequent presentment for payment and notice of dishonor in connection with a negotiation after maturity.[15]

"like," Dehers v. Harriot, 1 Show. 163, 89 Eng. Rep. 513 (K. B. 1691); "in nature of," Hodges v. Steward, 12 Mod. 37, 88 Eng. Rep. 1148; 1 Salk. 125, 91 Eng. Rep. 117 (K. B. 1693); Bomley v. Frazier, 1 Strange 441, 93 Eng. Rep. 622 (K. B. 1721); "quasi-," Anonymous, Skinn. 344, 90 Eng. Rep. 153 (K. B. 1693); and "tantamount to," Buller v. Cripps, 6 Mod. 29, 87 Eng. Rep. 793 (K. B. 1703).

The thought was applied to indorsements upon notes as well as bills. "A goldsmith's note indorsed is as a bill of exchange against the indorsor (sic)." Tassell & Lee v. Lewis, *supra* note 7. Because of the practices of goldsmiths, their notes were regarded as particularly like bills. Buller v. Cripps, *supra* note 8, involved a note which was not a goldsmith's.

[9]". . . The last indorsee may bring an action against any of the in dorsers, because every indorsement is a new bill, and implies a warranty by the indorser, that the money shall be paid." Williams v. Field, 3 Salk. 68, 91 Eng. Rep. 696 (K. B. 1693).

[10]8 Holdsworth, *op. cit. supra* note 5, at 163.

[11]Heylyn v. Adamson, 2 Burr. 669, 97 Eng. Rep. 503 (K. B. 1758). The point involved was whether demand upon the drawer of a bill was necessary in order that an indorsee might hold an indorser.

[12]Also, ". . . When it has been laid down that an indorser stands in all respects in the same situation as a drawer, all the consequences follow which are attached to the situation of the latter." Ballingalls v. Gloster, 3 East 481, 102 Eng. Rep. 681 (K. B. 1803). The question involved was whether an indorsee might bring suit against an indorser of a bill immediately upon non-acceptance prior to maturity.

[13]Note to Dehers v. Harriot, *supra* note 8.

[14]Mutford v. Walcot, 1 Ld. Raym. 574, 91 Eng. Rep. 1283 (K. B. 1700).

[15]Other English cases referring to the "new bill" doctrine are: Lake v. Hales, 1 Atk. 281, 25 Eng. Rep. 791 (Ch. 1736); Gibson v. Minet, 1 H. Bla. 569, 126 Eng. Rep. 326 (C. P. 1791); Penny v. Innes, 1 C. M. R. 439, 149 Eng. Rep. 1152 (Ex. 1834) (holding that a new stamp is not required); Allen v. Walker, 2 M. & W. 317, 150 Eng. Rep. 778 (Ex. 1837); Burmester v. Hogarth, 11 M. & W. 97,

The first American expression of the "new bill" doctrine which has been found appears in 1794, in a case passing upon the question whether one signing after maturity assumed the liability of an indorser.[16] In 1807, apparently for the first time in either country, the question whether, in order to hold an indorser after maturity, presentment and notice should be required, is considered. The judges of the highest Tennessee court of the period,[17] while deciding the case upon the basis of an exception to the rule, said, in a brief *per curiam* opinion, without mentioning the "new bill" doctrine, that "there is the same necessity for demand of the drawer [*sic*—maker of note] and notice of non-payment, if assigned after being due as before."[18] Only a short interval elapsed until, in 1812, a decision squarely in point was rendered, discharging an indorser after maturity because he had not been held through demand and notice.[19] The short opinion, *per curiam*, again without mentioning the "new bill" doctrine, proceeds upon the ground that such is the nature of the indorser's conditional contract, and states that "the books make no distinction on this point, whether a note be indorsed before or after it is due."[20]

The numerous later cases to the same effect,[21] with the exception of the few to be discussed, either simply state the requirement of presentment and notice within a reasonable time, or merely restate the "new bill" doctrine. The best considered decision, *Bishop v. Dexter*, appears in 1817, in the Supreme Court of Connecticut.[22] The decision is a very strong one, on the facts, in its requirement of presentment and notice. The note in question was first negotiated

152 Eng. Rep. 730 (Ex. 1843); Matthews v. Bloxsome, 4 New Rep. 139 (C. P. 1864). The doctrine is set forth in the following early English texts: Bayley, *Bills of Exchange, Cash Bills and Promissory Notes* (1797) p. 31; Cunningham, *Bills of Exchange, Promissory Notes, Bank Notes, and Insurances* (3rd ed. 1766) p. 45; Kyd, *Bills of Exchange and Promissory Notes* (3rd ed. 1795); Roscoe, *Bills of Exchange, Promissory Notes, and Bankers' Checks* (1829) p. 2.

16Bank of North America v. Barriere, 1 Yeates 360, 362 (Pa. 1794). Mr. Chief Justice McKean said: "Every indorsement of a bill of exchange is considered as a new bill. After the day of payment in a note is expired, the indorser cannot be looked on otherwise than as a new drawer." While the absence of presentment and notice was referred to in the argument, it is not touched upon in the opinion, and the facts would seem to negative requirement of such action, as the note had been indorsed while in the hands of the plaintiff, apparently to gain time. The case is limited in this regard to the particular facts in McKinney v. Crawford, *supra* note 1, at 356.

17The District, or Superior, Court.

18Stothart and Bell v. Parker, 1 Over. 260 (Tenn. 1807). The case involved a note. Insolvency of the maker at the time of indorsement was held to constitute an exception to the requirement of presentment and notice.

19Berry v. Robinson, 9 Johns. 121, 6 Am. Dec. 267 (N. Y. 1812).

20*Id.* at 122, 126.

21Some upon the ground that the presentment and notice were not within a reasonable time.

222 Conn. 419 (1817).

by the payee, the defendant, after maturity, and after the maker had been sued and placed in jail.[23] It was held that the indorsee under a second subsequent indorsement, who upon taking did not know that the note had been overdue when negotiated by the payee-defendant, could not recover because of the absence of presentment and notice. Mr. Justice Gould, in one of the several opinions, said:

"It may be observed, in the first place, that the understanding of the several indorsers and indorsees as inferable from the nature of the transaction, must have been, that, to create a right of action, upon either of the indorsements, such demand should be made, and notice given, by the indorsee. For otherwise, the liability of each indorser would be *primary, unconditional;* and an action would lie against him, upon his indorsement, instantly upon its being made, without any act whatever, to be done by the indorsee, to consummate his right of recovery. And the defendant's liability would, upon this supposition, be precisely the same as if, instead of indorsing another's note, he had given his own, payable on demand.[24]

"Now, such a result, as this, would be evidently inconsistent with the views and intentions of all parties; and equally so with the nature, and legal effect, of the transaction. The indorsing of a note, is, in substance, the same thing, as the drawing of a bill of exchange: and there is nothing to take this case out of the general rule; which, as the note had already become payable, required the plaintiff to make demand of the maker, within a reasonable time. . . . Besides, the manifest inexpedience of multiplying exceptions to established general rules, in the mercantile law, furnishes, in my judgment, a distinct, and strong objection to the motion. Such exceptions should be admitted only for the clearest and most decisive reasons: in as much, as they tend to complicate a class of transactions, in which all practicable simplicity is eminently important; and to create uncertainty, in a branch of the law, in which it would be more mischievous, than in almost any other."[25]

In another case of the period,[26] Mr. Justice Richardson of South Carolina contended that the indorser after maturity should be protected by the usual requirements because if he failed to receive

[23]It was pointed out that the negotiation had ended the suit, and that the indorsee technically was required to proceed as though the instrument had never been sued upon. *Id.* at 422.

[24]In another early case this thought was expressed in the form of a question, which was later considered hard to answer—if an indorsement after maturity "was a contract of absolute and immediate liability, why indorse, for what purpose draw, why not give his own note?" Mr. Justice Duncan, in McKinney v. Crawford, *supra* note 1, at 351, 355.

[25]Bishop v. Dexter, *supra* note 22, at 424. The last thought was expressed in another early case by saying that to relax the requirement of presentment and notice would "introduce uncertainty and confusion in a subject where it is highly advantageous to the public there should be neither"—as a necessity of public policy placing the taker of the past due instrument upon a procrustean bed of legal rigidity. Hill v. Martin, 12 Mart. 177, 183, 13 Am. Dec. 372, 375 (La. 1822).

[26]Poole v. Tolleson, 12 S. C. Law 199, 10 Am. Dec. 663 (1821).

notice of non-payment he would, like any other drawer, conclude that payment had been made, in accordance with his order, and be "lulled into the same security."[27] The learned justice felt that the indorser after maturity had assured the indorsee that the money was still to be had upon demand, notwithstanding the inferences to be drawn from passage of the time originally set for payment.[28]

Again, the requirement of presentment and notice was justified upon the ground that, as the instrument was already overdue when negotiated, the indorsement amounted to an authority to endeavor to collect through the use of reasonable diligence.[29] It was felt that "the indorser, in effect, says to the indorsee, this note was not paid to me when demanded, and I now give you the right and authority to collect it for the payment of your debt."[30] As applied to the strict requirement of presentment and notice, this logic seems to be inverted, for if it is to be presumed that payment had been demanded and refused, the indorser also must have known that in all probability further demand would be useless.

In 1859, Mr. Justice Baldwin of California stated that it was "the universal understanding of business men" that such an indorsement amounted "to no more than a guaranty of the solvency of the maker; and that the indorsee may, if he makes demand upon the maker and fails to get the money, have recourse upon the indorser."[31] It is to be doubted whether, in connection with an overdue instrument, such an assumption, to include the requirement of technical presentment and notice, ever was justified. In any event it is believed that it would not be today, particularly in cases where it was known that presentment already had been made at maturity.

Hardly a voice of protest against application of the "new bill" doctrine in the present connection has been raised. In a South Carolina case in 1845, *Chadwick & Co. v. Jeffers*,[32] though expressly refusing to dispense with the requirement of presentment and notice, it was held that "the duty of the holder, in these particulars, is limited to the use of such diligence, according to the circumstances of the case, that the indorser suffer no injury through his remissness

[27]*Id.* at 202.

[28]*Ibid.* It was once suggested that the circumstance that a note was overdue when indorsed almost called for greater diligence in making presentment and giving notice. It was reasoned that the passage of maturity "goes to lessen the credit of the drawer from supposed inability to pay," so that the indorser "ought not to be lulled by the laches of the holder into a false security that the note has been paid." Stockman v. Riley, 13 S. C. Law 398, 399 (1823).

[29]Gray v. Bell, 31 S. C. 67, 44 Am. Dec. 277 (1845). The same case appears upon a second appeal in 37 S. C. Law 71 (1846).

[30]*Id.* at 71.

[31]Beebe v. Brooks, 12 Cal. 308, 310 (1859).

[32]30 S. C. Law 397, 44 Am. Dec. 260 (1845).

or neglect."[33] Application of this limitation upon the doctrine would prevent discharge of the indorser in most cases. In the opinion Mr. Justice Frost presents cogent reasoning which logically would lead to denial of the requirement entirely. He points out that the rules requiring diligence in connection with negotiable instruments are designed for the protection of the secondary parties, and cites instances in the law where notice is not necessary for that purpose, and is therefore not required.[34] He concludes that "the same principle would dispense with notice of non-payment to the indorser of a note past due." He feels that it is not just to impose a loss upon the indorsee after maturity upon the ground that he has deprived the indorser of the opportunity "of taking prompt measures for recovery against the maker, which, while the note was in his possession, he had already neglected to pursue, or had pursued ineffectually."[35]

A Pennsylvania case, *Jordan v. Hurst*,[36] quickly overruled,[37] involving a non-negotiable note, contains much generally applicable reasoning opposed to the doctrine. Mr. Justice Coulter said:

". . . Where the note on its face carries the evidence of dishonor, when the day of demand is passed, there is every reason existing in the nature of commercial transactions, why the endorser should distrust the credit of the maker, for he has not redeemed his engagement; his 'word will not pass on "Change". ' There is every reason, therefore, to believe that the endorsee takes the note upon the sole credit of the endorser. The class of cases, however, which I am considering, assert that the blank endorsement of an over-due note amounts to an order to pay on sight, or on demand, and they thus make a new contract for the parties subject to different responsibilities. But the whole tenor of the arrangement forbids this interpretation. It would be equivalent to writing over the endorsement. You have refused to pay the note to me when it was due, therefore pay it to A. B. at sight. The endorsee could draw no such conclusion as that the terms of the note were to be altered; and if he was told that such was the arrangement, he would be apt to reply, You have been unable to compel payment in three months, it is of course out of the question that he would pay me instantly at sight. No, I take this on your credit, *I trust you,* give me your name in blank

[33] *Id.* at 400.

[34] "If an indorser take an assignment, mortgage, or confession of judgment from the maker to protect his liability; or when the drawer has no funds in the hands of the drawee, and it is known to the holder; or the drawer informs the holder that the bill will not be paid at maturity, no notice of demand is necessary." *Id.* at 399. For the present law see sections 114 and 115 of the Negotiable Instruments Law.

[35] *Id.* at 400.

[36] 12 Pa. St. 269 (1849).

[37] Patterson v. Todd, 18 Pa. St. 426, 433, 57 Am. Dec. 622, 626 (1852). This case limits the earlier decision to a holding that insolvency of the maker dispenses with the necessity of notice.

and I will advance the money. Such would be the natural course of things among men of common sense, versed in business affairs."[38]

In an early case, Mr. Justice Cheves of South Carolina, speaking for the three non-prevailing members of an equally divided court, said:

". . . When the bill or note has been already dishonored—the drawer or endorser already has all the notice which in other cases is required. His case is then exactly like that of a drawer or endorser, after a demand duly made and notice of default duly given; after which, nothing will discharge him but payment of the note or bill, unless the holder give time to those on whom the drawer or endorser is entitled to have recourse. No delay or indulgence, which is merely passive, will discharge him."[39]

It has been held under special circumstances that where an instrument is reissued when past due without further indorsement by one who indorsed prior to maturity, and whose liability was fixed by presentment and notice at the due date, there is an estoppel against assertion that liability does not continue.[40]

In a few cases where a note, as distinguished from a bill, has been indorsed after maturity, it has been said that the negotiation constituted the making of a "new note," the maker of the original instrument being regarded as also the maker of the new one.[41] In

[38]Jordan v. Hurst, *supra* note 36, at 271.

[39]Rugeley v. Davidson, 2 Mill Const. 33, 48 (S. C. 1818).

[40]Libbey v. Pierce, 47 N. H. 309 (1867) (the plaintiffs took up the note at the defendants' request from a bank which had discounted it for the defendants); St. John v. Roberts, 31 N. Y. 441, 88 Am. Dec. 287 (1865) (the protested note was sold at auction, without any statement as to in whose behalf it was being sold); Coleman v. Dunlap, 18 S. C. 591 (1882) (*semble* as to estoppel as the basis). In Hunt v. Wadleigh, 26 Me. 271 (1846), an opposite result was reached, without noticing estoppel. This decision is criticized in 2 Theophilus Parsons, *Notes and Bills* (1863) p. 14. And see 3 R. C. L. (perm. ed. 1929) 1179. In Montgomery & Eufaula R. Co. v. Trebles, 44 Ala. 255 (1881), where there was a second indorsement, it was held to be a question of intention upon which the defendant was to be bound.

[41]The "new note" reasoning first appears in 1721, in a case involving a point of pleading in a suit against an indorser of a note, the report not showing whether the indorsement was before or after maturity. It was said, ". . . Every indorsement is the same as making a new note. . . ." Smallwood v. Vernon, 1 Strange 478, 93 Eng. Rep. 646 (K. B. 1721). Other "new note" cases, arranged chronologically, are: Brown v. Davies, 3 T. R. 80, 100 Eng. Rep. 466 (K. B. 1789) (held that maker could show payment as against one taking from payee after maturity); Hall v. Smith, 1 S. C. Law 330 (1793) (held, that when a note is indorsed after due "it is not subject to such strict rules as a note indorsed before due," and that, as against defense of laches in endeavoring to recover from the maker before he became insolvent, the jury was justified in finding that due diligence in bringing suit had been exercised—while it is stated that the instrument is to be considered "as a new drawn note, by the indorser," the indorser is treated as such, and not as a maker); Goodwin v. Davenport, 47 Me. 116 (1860) (held that the required demand and notice occurred within a reasonable time—"as between indorser and indorsee, such note is to be treated as a

no case that has arisen has the substitution of the conception of a "new note" for that of a "new bill" affected the result. In connection with a single transfer after maturity of either type of instrument, presentment and notice must be made within a reasonable time. No case has involved such action after a succession of post-maturity transfers. Prior to the Negotiable Instruments Law, even with a number of transfers the difference was immaterial, since, in order to hold an indorser upon either a note or bill, as still under the Bills of Exchange Act,[42] it was necessary that presentment be made within a reasonable time after the particular indorsement. Under the mistaken provision of the Uniform Act that, in connection with a bill, presentment is sufficient if made within a reasonable time after the last negotiation,[43] the difference is material. It is to be doubted whether any court would apply the "new note" doctrine in such a case. Every "new note" case was decided prior to the Uniform Act. Support of the "new note" doctrine, as contrasted with that of the "new bill," has been negligible, and it will not be further considered.

Every semblance of opposition to the "new bill" doctrine in the present connection which has been discovered has been presented. The doctrine remains under the Negotiable Instruments Law. As the act does not expressly negative the doctrine, it is impliedly carried forward by the provisions, already referred to, that an instrument negotiable in its origin continues to be such until discharged or restrictively indorsed,[44] and that an instrument indorsed when overdue is payable upon demand,[45] coupled with the provisions requiring presentment and notice in connection with demand instruments.[46] The "new bill" theory is set forth in the annotated edition

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note on demand, dated at the time of the transfer, so far as demand and notice are concerned"); Frech v. Yawger, 47 N. J. Law 157, 54 Am. Rep. 123 (1885) (question whether liability of indorser assumed). In the following cases, arranged chronologically, "new note" and "new bill" reasoning is used interchangeably: Colt v. Bernard, 35 Mass. 260, 29 Am. Dec. 584 (1836); Leidy v. Tammany, 9 W. & S. 353 (Pa. 1840); McKewer v. Kirtland, 33 Iowa 348 (1871); Brown v. Hull, 33 Gratt. 23 (Va. 1880); Furgerson v. Staples, 82 Me. 159, 19 Atl. 158 (1889).

42Secs. 45(2), 86(1).

43Sec. 71, criticized in Brannan, *Negotiable Instruments Law, Annotated* (Beutel's 5th ed. 1932) p. 784; Williston, *Negotiable Instruments* (1931) p. 142. Obviously, in holding an earlier indorser it ought to be immaterial that presentment and notice occur within a reasonable time after a subsequent negotiation, possibly years later.

44Sec. 47.

45Sec. 7. The inference is strengthened by the statement that this is true, in connection with issuance, acceptance, or indorsement after maturity, "as regards the person so issuing, accepting, or indorsing it." *Ibid.*

46Sec. 71. While sections 79 and 114(4) dispense with presentment and notice when the drawer "has no right to expect or require" payment by the drawee or acceptor, it cannot be said that the post-maturity indorser is in this position, and of the act prepared by its author.[47] Numerous cases have applied the doctrine in the present connection since the passage of the act,[48] and the doctrine must be regarded as firmly established.

On the other hand, the numerous cases applying or stating the doctrine which have not been discussed,[49] including all the cases since 1859, contribute no additional thought in regard to the reason or justification for its existence. Neither has any such text discussion, other than a criticism of "new bill" terminology as applied to

although sections 82(3) and 109 provide for implied waiver of presentment and notice, if the indorsement must be regarded as a new bill, there is nothing upon which to base such an implication. The "new bill" doctrine prevents such an implication from the circumstances. It would seem that the courts would have been justified originally in making such an implication, but it is now too late to hope for judicial repudiation of the application of the doctrine in the present connection upon that basis.

[47]Crawford, *Negotiable Instruments Law* (4th ed. 1916) p. 143.

[48]See citations of cases before and after act, arranged chronologically, in the following footnote.

[49]The arrangement is chronological. The following cases apply the doctrine, not all *eo nomine*, and discharge the indorser because of the absence of presentment and notice within a reasonable time: Ecfert v. Des Coudres, 1 Mill Const. 69, 12 Am. Dec. 609 (S. C., 1817); Dwight v. Emerson, 2 N. H. 159 (1819); Course & M'Farlane v. Shackleford, 11 S. C. Law 283 (1820); Stewart v. French, Fed. Cas. No. 13,427 (C. C. D. C. 1822); Cox v. Jones, Fed. Cas. No. 3303 (C. C. D. C. 1823); Nash v. Harrington, 2 Aikens 9, 16 Am. Dec. 672 (Va. 1826); Allwood v. Haseldon, 18 S. C. Law 457 (1831); Benton v. Gibson, 19 S. C. Law 56 (1833); Colt v. Bernard, *supra* note 41; Kennon v. McRae, 7 Port. 175 (Ala. 1838); Greely v. Hunt, 21 Me. 455 (1842); Adams Adm'r v. Torbert, 6 Ala. 865 (1844); Corwith v. Morrison, 1 Pinn. 489 (Wis. 1845); Sanborn v. Southard, 25 Me. 409 (1845); Branch Bank of State v. Gaffney, 9 Ala. 153 (1846); Hunt v. Wadleigh, *supra* note 40; Jones v. Robinson, 11 Ark. 504, 54 Am. Dec. 212 (1851); Mudd v. Harper, 1 Md. 110, 54 Am. Dec. 644 (1851); Patterson v. Todd & Lemon, *supra* note 37; Levy v. Drew, 14 Ark. 334 (1854); Tyler v. Young, 30 Pa. St. 143 (1858); Guild v. Goldsmith, Haber & Co., 9 Fla. 212 (1860); McCall v. Witkowski, 16 La. Ann. 179 (1861); Hart & Munson v. Eastman & Gibson, 7 Minn. 74 (1862); Armstrong v. Armstrong, 36 Mo. 225 (1865); Chandler v. Westfall, 30 Tex. 476 (1867) (this is a "carpetbagger" decision, which would not be cited in Texas); Roquest & Gilkinson v. Pickett, 20 La. Ann. 546 (1868); Winston v. Kelly, 33 Tex. 354 (1870); Bemis v. McKenzie, 13 Fla. 553 (1870); Jones v. Middleton, 29 Iowa 188 (1870); McKewer v. Kirtland, 33 Iowa 348 (1871); Light v. Kingsbury, 50 Mo. 331 (1872); Pryor v. Bowman, 38 Iowa 92 (1874); Swartz v. Redfield, 13 Kan. 550 (1874); Crooks v. Tulley & Durkin, 50 Cal. 255 (1875); Dixon v. Clayville, 44 Md. 573 (1875); Beeler v. Frost, 70 Mo. 185 (1879); Eisenlord v. Dillenback, 79 N. Y. 617 (1879); Graul v. Strutzel, 53 Iowa 712 (1880); Shelby v. Judd, 24 Kan. 161 (1880); Smith v. Caro & Baum, 9 Ore. 278 (1881); Bassenhorst v. Wilby, 45 Ohio St. 333, 13 N. E. 75 (1887); Lank v. Morrison, 44 Kan. 594, 24 Pac. 1106 (1890); Rosson v. Carroll, 90 Tenn. 90, 16 S. W. 66 (1891); Beer v. Clifton, 98 Cal. 323, 33 Pac. 204, 35 Am. St. Rep. 172, 20 L. R. A. 580 (1893); Landon v. Bryant, 69 Vt. 203, 37 Atl. 297 (1896); German-Am. Bank of Rochester v. Atwater, 165 N. Y. 36, 58 N. E. 763 (1900); Moore v. Alexander, 63 App. Div. 100, 71 N. Y. S. 420 (1901); Wells v. Booth, 6 Cal. App. 197 (1907); Gate City Nat. Bank v. Schmidt, 168 Mo. App. 153, 152 S. W. 103 (1912); Hawkins v. Shields, 100 Miss. 739, 57 So. 4 (1912); Torgerson v. Ohnstad, 149 Minn. 46, 182 N. W. 724 (1921); Foundry Mfg. Co. v. Farr, 96 Vt. 382, 119 Atl. 885 (1923); Carter v. Jennings, 134 Miss. 263, 98 So. 687 (1924); Baker v. Valentine, 216 Ky. 801, 288 S. W. 771 (1926); Morgan v. Huffman, 76 Mont. 396, 247 Pac. 326 (1926); Sledge & Norfleet v. Dye, 151 Miss. 693, 118 So. 414 (1928).

indorsements generally,[50] been found.[51] After reading the many thousands of words in these opinions, one is impressed with the unreasoning force of historic precedent, particularly in the field of negotiable instruments, and with the futility of much of the reported case material. From generation to generation there is recreated thus the need for scholarly comprehensive surveys of the various fields.

The "new bill" doctrine, as applied to the present problem, is the outgrowth of a mode of thought and expression which was valuable, and possibly indispensable, in the historical development of the law of negotiable instruments. It furnished a rationale for the assimilation of the position of the indorser to that of the drawer, and made possible the great advantages to be derived from the liability of a number of secondary parties, coming in at different times, upon the same negotiable instrument. It possibly still has value as establishing the principle that one taking after maturity may acquire the position of a holder in due course in relation to those indorsing after maturity. Possibly it was inevitable that the doctrine should be applied as it has been in connection with the present problem. The strongest argument which has been advanced for a continuance of this application of it is the necessity for simplicity

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[50]Professor Lile, in the last edition of Bigelow, presents a discriminating analysis: "In the language of the law books, indorsement is frequently referred to as the equivalent of the drawing of a bill of exchange. Such statements, however, should be taken only as a free expression of a general truth. There are many points of resemblance between the two acts, and therefore the liability of the drawer and indorser of a bill, as already shown, is in most respects similar, and hence is so treated in the present chapter. But material points of difference exist, as noted in the preceding chapter—as for example in the matter of reasonable ground to draw in the case of a bill, and the necessity of drawing on funds in the case of a check. With these the indorser has no concern, and hence his indorsement is not always the equivalent of the drawing of a bill. So indorsement of a *check*, or of a promissory *note*, cannot be said to be the equivalent of drawing a *bill*. Again, indorsement requires no negotiable words, while it is otherwise in the drawing of a bill. Indeed, the statement that indorsement is equivalent to drawing a bill is misleading in many cases, and necessary in none. It would be better to say that indorsement is an order on the drawee, acceptor or maker, to pay to the holder according to the tenor of the instrument. But to say this, adds little or nothing of value to the explanation of the indorser's contract." Bigelow, *Bills, Notes and Checks* (Lile's 3rd ed. 1928) p. 166.

[51]The "new bill' doctrine is presented, *eo nomine* unless noted otherwise, in the following texts, arranged chronologically: Zephaniah Swift, *A Digest of the Law of Evidence, in Civil and Criminal Cases, and a Treatise on Bills of Exchange, and Promissory Notes* (1810) pp. 301, 309; Chitty, *Bills of Exchange* (6th ed. 1826) pp. 126, 141; 2 Theophilus Parsons, *op. cit. supra* note 40, at 13; 2 Theophilus Parsons, *Contracts* (7th ed. 1883) p. 256 (not *eo nomine*); Tiedeman, *Commercial Paper* (1889) p. 336 (not *eo nomine*); 2 Randolph, *Commercial Paper* (2d ed. 1899) p. 671; 1 Daniel, *Negotiable Instruments* (6th ed. 1914) p. 611; 2 *id.* at 996; 8 C. J. 639 (1916); 1 Paton's Digest (1926) §§2689-2690, 3965; 2 *id.* §§2689a, 3965a; Redfield, *Commercial Paper* (1929) pp. 161, 194; 3 R. C. L. (perm. ed. 1929) 1178 (not *eo nomine*); Williston, *op. cit. supra* note 43, at 217 (not *eo nomine*); Ogden, *Negotiable Instruments* (3rd ed. 1931) p. 324 (not *eo nomine*).

and certainty in the law relating to mercantile matters. It is not believed that this principle offers a sufficient answer to the hitherto unnoticed objection to the doctrine, that as here applied it operates as a "trap for the unwary."

Only in rare instances will subsequent presentment and notice be the means of affording any genuine added protection to the one who indorses after maturity, and then he should have secured it for himself. By indorsing he should be held to make the warranties of an indorser, and to assume liability for payment. These considerations, coupled with the convenience of the indorsement as a means of giving written evidence of the transfer of the chose in action held at maturity, offer sufficient answer to the inquiry, why indorse, why not give his own note, if there is to be no required presentment for payment.

As has been suggested judicially, it would be possible to consider the undertaking of the indorser after maturity as that of a guarantor of collection, requiring reasonable efforts to collect first from the primary party. It is believed that even this is not a reasonable interpretation to be placed upon the conduct of the parties. The position of the guarantor of collection, as compared with that of secondary parties generally, is a privileged one. To give a secondary party that position, express words or special circumstances clearly indicating that the parties had such an intention are required. It is not believed that this is such a situation. From the standpoint of the objection now being urged, this solution is objectionable only in lesser degree. The position of the indorsee should not be jeopardized by such a requirement.

Only at the original maturity date of a negotiable instrument should presentment and notice be required. As to any later necessity for such action, resort should be had to the maxim commencing, "when the reason for the rule ceases." In view of the want of any sufficient reason for requiring in his behalf subsequent presentment and notice, the position of the indorser after maturity should be the same as that of an indorser whose liability has been fixed by such action duly taken at maturity. As to the indorser after maturity, as in connection with proceedings against secondary parties generally, no steps to collect first from the primary party should be required. In future legislation the requirement of presentment for payment and notice of dishonor in order to charge an indorser after maturity should be eliminated.