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THE IMPORTANCE OF PROMPTLY PRESENTING CHECKS FOR PAYMENT

WILLIAM O. MORRIS*

THE importance of the use of checks in the commercial world may well be illustrated by comparison of the following statistics. As of December 31, 1957, there was in circulation in United States currency, outside of the Treasury, \$31,834,367,367,¹ or \$184.24 for every man, woman, and child in the United States.² As of the same date, the total bank deposits in the 14,088³ banks in this country totaled \$233,630,000,000,⁴ of which \$128,420,000,000 was represented by demand deposits.⁵ As staggering as these sums appear, the amount of outstanding currency at the end of 1957 was relatively small when we consider that the debits to demand deposits, except interbank and United States Government accounts, for 1957 was \$2,356,768,000,000⁶ representing debits for each of our estimated 160,000,000 population for the year of \$14,729, or almost seventy-five times the sum of all outstanding currency. When it is observed that many checks may well have passed through several transactions before being paid by the drawee, the amount of the debts discharged by checks would exceed an amount beyond the comprehension of most persons.

Considering the number of checks written each year and amount of money thereby represented, it is indeed the eighth wonder of the world that the courts have not found it necessary to devote a greater portion of their deliberation to the determination of controversies over the respective liabilities of parties thereto involved. Perhaps, the reasons for the relatively insignificant amount of litigation involving the liability of parties to checks may be attributed to the fact that in the past several years there have been few bank failures, and no little credit should be given to the drafters of the Uniform Negotiable Instruments Act for the clarity of the sections of the act applicable to checks. The scope of the following material will be limited to the probing of problems relating to the time allowed a holder of

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¹ CIRCULATION STATEMENT OF UNITED STATES MONEY, TREASURY DEPARTMENT — FISCAL SERVICE — OFFICE OF THE TREASURER OF THE UNITED STATES (1958).

² Based on Bureau of Census estimated population.

³ 44 ANN. REP. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM 103, table 16 (1958).

⁴ *Ibid.*

⁵ *Ibid.*

⁶ FED. RESERVE BULL. 1078 (Sept. 1958).

a check in which to make presentment for payment in order to establish the liability of the drawer and indorsers thereto.

Daniel in his work on *Negotiable Instruments* defines a check as: "A draft or order upon a bank or banking house, purporting to be drawn upon a deposit of funds, for the payment at all events of a certain sum of money to a certain person therein named, or to his order or bearer, and payable instantly on demand."⁷ A check is similarly defined by section 185 of the Uniform Negotiable Instruments Act⁸ as: ". . . A bill of exchange drawn on a bank payable on demand." The act further provides "except as herein otherwise provided, the provisions of this chapter applicable to a bill of exchange payable on demand apply to a check."

It is important in determining the rights of the respective parties to point to the distinctions between an ordinary bill of exchange and a check. By definition a check must be drawn upon a bank,⁹ while a bill of exchange need not have a bank as the named drawee. A check need not be accepted as it only calls for payment upon timely presentment.¹⁰ The execution of a check contemplates that the drawer has sufficient funds on deposit with the drawee to provide for the payment of the check when it is presented for payment.¹¹ Unlike the drawer of a bill of exchange, the drawer of a check is not relieved of liability by the failure of the holder to have made timely presentment for payment but, as will be later discussed, the drawer of a check is in such case relieved of liability to the amount of damages that he may show that resulted from the unexcused delay in making presentment of the check for payment.¹² A check is not due until payment has been demanded, the statute of limitations would then only begin to run.

It is not at all uncommon for one to deliver his draft drawn upon a bank to postdate the instrument. Is such an instrument, which we commonly refer to as a postdated check, in reality a check or is it a bill of exchange? Is such an instrument payable on demand when the holder is required to refrain from presenting the document for

⁷ 3 DANIEL, *NEGOTIABLE INSTRUMENTS* 1791 (7th ed. 1933); for other but similar definitions of a check see *Rogers v. Durant*, 140 U.S. 298 (1891); *Industrial Bank v. Bowes*, 165 Ill. 70, 75, 46 N.E. 10, 12 (1897).

⁸ W. VA. CODE ch. 46, art. 16, § 2 (Michie 1955).

⁹ *Hawley v. Jette*, 10 Ore. 31 (1881); *Gifford v. Hardell*, 88 Wis. 538, 60 N.W. 1064 (1894).

¹⁰ *Minot v. Russ*, 156 Mass. 458, 31 N.E. 489 (1892).

¹¹ *Gifford v. Hardell*, 88 Wis. 538, 60 N.W. 1064 (1894).

¹² UNIFORM NEGOTIABLE INSTRUMENTS ACT § 186; W. VA. CODE ch. 46, art. 16, § 3 (Michie 1955); *Exchange Bank v. Sutton Bank*, 78 Md. 577, 23 Atl. 563 (1894).

payment until the date of the instrument? In *Champion v. Gordon*,¹³ Judge Sharwood said in answer to these questions: "It is not denied that a post-dated check cannot be presented for acceptance. That is by implication payable on a future date . . . It is a check and not a bill of exchange. More than twenty years ago banks of Philadelphia under the advice of counsel adopted this rule, and it has been their uniform practice ever since. The usage of the banks in the commercial metropolis of the state ought to have great weight in determining a question of this character. It is perhaps quite as important that such usage should not be disturbed, as that the point should be decided abstractly or theoretically right." Obviously a postdated check, unlike a time bill of exchange, cannot be dishonored before its actual date.¹⁴ In holding such instrument to be a demand instrument, presentment for payment need not be made on the exact date of the postdated check as a condition to the establishment of the liabilities of the drawer and indorsers. Presentment within a reasonable time after its date is sufficient to charge the drawer.¹⁵ The fact that the check is postdated does not affect its negotiable character.¹⁶

Where, however, the instrument which purports to be a check shows on its face that it was drawn on one date and to be due at some subsequent designated date, the cases are in conflict whether one is then dealing with a check or a bill of exchange. The better reasoned cases have held such instruments to be bills of exchange, as distinguished from checks.¹⁷ These cases dealt with days of grace which were formerly allowed on a bill of exchange, but which were not permitted in the case of a check. As the days of grace have been abolished by section 85 of the Uniform Negotiable Instruments Act¹⁸ these cases lose much of their significance. The determination as to whether such an instrument be a check or a bill of exchange is still important in determining whether the drawer is released of liability as the result of the holder failing to make proper presentment thereof

¹³ 70 Pa. 474, 476 (1872).

¹⁴ *Wilson v. McEachern*, 9 Ga. App. 584, 71 S.E. 946 (1911).

¹⁵ *Philadelphia Life Ins. Co. v. Hayworth*, 296 Fed. 339 (4th Cir. 1924).

¹⁶ UNIFORM NEGOTIABLE INSTRUMENTS ACT § 12; W. VA. CODE ch. 46, art. 1, § 12 (*Michie 1955*); *Triphonoff v. Sweeney*, 65 Ore. 299, 130 Pac. 979 (1913).

¹⁷ In the case of *Harrison v. Nicollet Nat. Bank*, 41 Minn. 488, 43 N.W. 336 (1889), a draft for money drawn on a bank, payable at a day subsequent to its date, and subsequent to the date of its issue, was held not to be a "check" but a bill of exchange. While in *Way v. Towle*, 155 Mass. 374, 29 N.E. 506 (1898), an instrument in the form of a check which was dated August 31, 1899, ordering bank to pay on October 1, 1899, was treated as a check and not as a bill of exchange.

¹⁸ W. VA. CODE ch. 46, art. 6, § 16 (*Michie 1955*): "Every negotiable instrument is payable at the time fixed therein without grace . . ."

for payment. In the absence of showing of due presentment for payment the drawer of a bill of exchange is released of liability, while the drawer of a check would only be released to the amount of damages suffered by reason of the delay in making a timely demand of the drawee for payment.

In order for the holder to perfect his rights as a condition precedent to suit against the drawer or indorsers on a *bill of exchange* on their secondary liability, it is necessary for the holder to allege and prove that he had made proper presentment of the bill for acceptance or payment, or acceptance and payment, and to have had the instrument dishonored by nonacceptance or nonpayment, followed by timely notice of the dishonor. Otherwise the holder will be denied the right to seek payment of the instrument from the drawer or indorsers.¹⁹

The failure of the holder of a *check* to establish that the check was properly presented for payment and due notice of dishonor was given will bar the holder from proceeding against the indorsers on the basis of their secondary liability as set forth in section 66 of the Uniform Negotiable Instruments Act.²⁰ In comparison with the liability of the drawer of a bill of exchange, other than a check, the failure of the holder to prove that the check was timely presented for payment will not discharge the drawer of the check completely of liability, but will release him of liability only to the extent that the drawer has incurred a loss by reason of such delay in presenting the check to the drawee for payment.²¹ If the drawer has suffered no loss or damage by reason of the delay in making presentment for payment, as where he had no funds on deposit with the drawee to cover the check,²² or where the drawer had previously ordered the bank to stop payment,²³ he has no cause to complain of the holder's

¹⁹ UNIFORM NEGOTIABLE INSTRUMENTS ACT §§ 61, 66, 72, 73; W. VA. CODE ch. 46, art. 5, §§ 2, 7; ch. 46, art. 6, §§ 3, 4 (Michie 1955).

²⁰ W. VA. CODE ch. 46, art. 5, § 7 (Michie 1955). An indorser is discharged by unreasonable delay in presentation of a check though he suffered no loss therefrom. *Swift v. Miller*, 62 Ind. App. 312, 113 N.E. 447 (1916); *Nuzum v. Sheppard*, 87 W. Va. 243, 104 S.E. 487 (1920); *Cominsky v. Kleiner*, 34 Misc. 181, 68 N.Y. Supp. 776 (Sup. Ct. 1901). In an action by bank to recover from indorser whom it had credited with the amount of the check and had permitted to withdraw the money, the burden is on the bank to show a presentation of the check to the drawee within a reasonable time. *Knickerbocker Trust Co. v. Miller*, 149 App. Div. 685, 133 N.Y. Supp. 989 (Sup. Ct. 1912); *Millett v. Miller*, 135 Neb. 123, 280 N.W. 442 (1938).

²¹ *Nuzum v. Sheppard*, 87 W. Va. 243, 104 S.E. 587 (1920).

²² *Gilman v. F. O. Bailey Carriage Co.*, 127 Me. 91, 141 Atl. 321 (1928); Note, 24 MICH. L. REV. 498 (1925); UNIFORM NEGOTIABLE INSTRUMENTS ACT § 79; W. VA. CODE ch. 46, art. 6, § 10 (Michie 1955).

²³ UNIFORM NEGOTIABLE INSTRUMENTS ACT 79; W. VA. CODE ch. 46, art. 6, § 10 (Michie 1955); *Sabree v. Thomas*, 166 Ill. App. 427 (1911); *Usher v. A. I. Tucker Co.*, 217 Mass. 441, 105 N.E. 360 (1914).

delay in demanding payment from the drawee and his liability is therefore not affected.

When the drawee bank has ceased to operate in the interval between the time of issuance of the check and the date payment was demanded from the bank, upon showing undue delay in making presentation of the check for payment, and that the check would have been paid by the drawee had it been timely presented, a presumption arises that the drawer has suffered damages by reason of the delay in making presentment for payment and casts on the holder the burden of otherwise showing.²⁴ For example, if the check from A to B drawn upon C bank in the sum of \$100 is held an unreasonable time after issue before being presented for payment and the bank had during this interval ceased to operate, and the bank subsequently returns to the drawer only forty cents on each dollar which was on deposit at the time the bank closed its doors, the drawer has been damaged to the extent of sixty cents on each dollar by the holder's failure to have timely presented it for payment. The holder of the check is thus only entitled to recover \$40 from the drawer, and must suffer the balance of the loss himself.

When the drawer is released of liability on the check under the above facts, he is similarly released of liability on the underlying debt. That is, if the creditor drawer is sued on the debt instead of as drawer, he may plead payment of the underlying debt.²⁵ As goes the drawer's liability on the check, so goes his liability on the underlying debt.

In considering the period of time allowed the holder of a check to make due presentment for payment in order to fix the drawer's liability, see section 186 of the Uniform Negotiable Instruments Act. This section provides: "A check must be presented for payment

²⁴ *Watt v. Gans*, 114 Ala. 264, 21 So. 1011 (1897); *Stevens v. Park*, 73 Ill. 387 (1874). The presumption of loss arising out of want of diligence in presentation of a check, and the intervening failure of the drawee, may be rebutted by proof that the drawer had no funds with the drawee to meet the check, or that he had withdrawn them before the bank failure.

²⁵ In *Kirkpatrick v. Home Bldg. & Loan Ass'n*, 119 Pa. 20, 12 Atl. 754, 755 (1888), Judge Sterrett said: "It is well settled that, in the absence of an agreement to the contrary, a check or promissory note, of either the debtor or a third person, received for a debt, is merely conditional payment, that is, satisfaction of the debt if and when paid; but that acceptance of such check or note implies an undertaking of due diligence in presenting it for payment, etc., and if the party from whom it is received sustains loss by want of such diligence it will be held to operate as actual payment." In cases where the creditor has given his own check in payment of his indebtedness, the burden is upon the drawer to show both delay and loss. Such holding puts the burden upon him, not only to show delay in presentment, but loss to himself in consequence. *Kahn v. Walton*, 46 Ohio St. 195, 20 N.E. 203 (1889).

within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay."²⁶ This section by its language only applies to the liability of the drawer and makes no reference to that of an indorser.

In the determination of what is a "reasonable" or an "unreasonable time" in which to present the check for payment, consideration must be given to the nature of the instrument, any usage of trade and business with respect to such instruments, and the facts of the particular case.²⁷ As a check is not intended to be in circulation as a substitute for money, a reasonable time in this situation will necessarily be a relatively short period. Ordinarily when the check is drawn and is to be paid in the same town it should be presented to the drawee for payment on the day of its receipt or the next business day.²⁸ When, however, a check is received at a distant place it must be forwarded by the next secular day by some recognized method of transmission to some person or agency at the place of payment, who has until the next secular day to make presentment for payment.²⁹ It has been held that failure to forward a check for collection on the next business day is negligence where the bank is in another place.³⁰

²⁶ W. VA. CODE ch. 46, art. 16, § 3 (Michie 1955).

²⁷ Maryland Casualty Co. v. Dobin, 108 S.W.2d 166 (Mo. App. 1937).

²⁸ Lowell Co-operative Bank v. Sheridan, 284 Mass. 594, 188 N.E. 636 (1934). Reasonable time for presentment of a check on drawee in same place includes only banking hours of next business day after delivery. Maryland Title Guarantee Co. v. Alter, 167 Md. 244, 173 Atl. 200 (1934).

²⁹ Seager v. Dauphinee, 284 Mass. 96, 187 N.E. 94 (1933); Nuzum v. Sheppard, 87 W. Va. 243, 104 S.E. 587 (1920).

³⁰ Nuzum v. Sheppard, *supra* note 29. In Jett Bros. Stores v. McCullough, 188 Ark. 1108, 69 S.W.2d 863 (1934), the payee deposited check in home town bank two days after receipt, but only one banking day having intervened, the check being presented to the drawee in due course, held no unreasonable delay.

Three days' delay in presenting check for payment held not unreasonable where payee, a school teacher, had been engaged in teaching school on each of those days. Peterson v. School District, 162 Minn. 347, 203 N.W. 46 (1925). Three days' delay in presentment of check for payment held unreasonable delay where payee was cautioned by drawer that drawee bank was in precarious condition. Sinclair Refining Co. v. Keitch, 97 Okla. 55, 221 Pac. 1003 (1924).

Unexplained delay of four days in presenting check for payment held unreasonable. J. S. Martin Lumber Co. v. Rice, 133 Okla. 162, 276 Pac. 744 (1929). One engaged in farming lived eight miles from town and received a check on Tuesday, failed to present check for payment until Saturday, held not guilty of unreasonable delay so as to lose his rights against drawer where the bank failed, especially in view of the fact that the farmer had very little business training and seldom went to town except on Saturday. Barry v. Harris, 186 Ark. 481, 54 S.W.2d 289 (1932).

Five days unreasonable delay. Seager v. Dauphinee, 284 Mass. 96, 187 N.E. 94 (1933); seven days' delay and thirteen days' delay in making presentment held unreasonable delay in Swift v. Miller, 62 Ind. App. 312, 113 N.E. 447 (1916), and Plainsville v. Rooks County, 137 Kan. 61, 19 P.2d 911 (1933), respectively.

Whether or not in a given undisputed factual situation due diligence has been exercised in making presentment is a question of law to be determined by the court.³¹ Where the facts are in dispute and are capable of sustaining more than one conclusion, the question of reasonableness is for the jury.³²

As to Indorsers

Section 185 of the Uniform Negotiable Instruments Act states: "Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check."³³ As the act does not otherwise distinguish the liability of an indorser of a check from an indorser of a bill of exchange, it must therefore be taken that the liability of an indorser on either type of instrument will be the same.

One must examine section 66 of the Uniform Negotiable Instruments Act³⁴ to determine the liability of an unqualified indorser of either a check or a bill of exchange. The last paragraph of this section fixes the conditional liability of an indorser by stating: "And, in addition, he engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it." In the case of an indorser of a check we are only concerned with due presentment for payment, as a check may not be presented for acceptance as might a time bill of exchange.

The real issue and problems relating to indorser's liability springs from the unclear language of section 71 of the Uniform Negotiable Instruments Act which states: "... Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof."³⁵ The holder of a check is given the same period of time in which to make presentment for payment

³¹ Krauss v. Aleck, 202 Iowa 91, 209 N.W. 444 (1926); Grant City First National Bank v. Korn, 179 S.W. 721 (Mo. App. 1915); Nuzum v. Sheppard, 87 W. Va. 243, 104 S.E. 587 (1920). *Contra*, Citizens' Bank v. Pleasantville First Nat. Bank, 135 Iowa 605, 113 N.W. 481 (1907). The court stated that it is not the universal rule that even if the facts are not in dispute the question whether the presentment was within a reasonable time is for the court.

³² Empire-Arizona Copper Co. v. Shaw, 20 Ariz. 471, 181 Pac. 464 (1919); Slaymen v. Welch First National Bank, 104 W. Va. 265, 139 S.E. 750 (1927).

³³ W. VA. CODE ch. 46, art. 16, § 2 (Michie 1955).

³⁴ W. VA. CODE ch. 46, art. 5, § 7 (Michie 1955).

³⁵ W. VA. CODE ch. 46, art. 6, § 2 (Michie 1955).

as the holder of a bill of exchange is allotted in which to make presentment in order to establish the liability of the drawer or indorsers thereon. The reasonable time for presentment in order to fix the liability of an indorser of a bill of exchange or a check is measured from the last negotiation, while the reasonable time in the case of the drawer of a check or bill of exchange is measured from the issuance of the instrument. The yardstick of time is the same length in either of the cases, but the date from which the measurement starts presents some most troublesome problems.

The question might be asked, can the liability of the indorser on a check be preserved indefinitely, so long as each negotiation follows promptly after each indorser acquired title to the instrument? Mr. Britton in his work on *Bills and Notes* in partial answer to this question stated: “[I]f an indorsee holds the instrument for such a period of time that a negotiation by him would not be within a reasonable time after the last negotiation, it would seem that the liability of the antecedent secondary parties would be discharged as to him. The question as to whether the liability of such parties could be revived as regards an indorsee who acquired title after the lapse of a reasonable time from the immediately preceding negotiation and as regards subsequent holders would turn on the question whether such holders were holders in due course.”³⁶

In referring to the last paragraph of section 66 of the Uniform Negotiable Instruments Act,³⁷ it will be noted that the secondary liability of an indorser was said to extend to subsequent *holders* of the instrument. Does the liability of the indorser really extend to subsequent holders who are unable to qualify as holders in due course? The first paragraph of the section dealing with the warranties of an indorser indicates that such liability of an indorser for breach of warranty extends to subsequent *holders in due course*. It was surely not the intention of the drafters of the act to limit the liability of an indorser for breach of warranty to a holder in due course and permit the indorser's conditional liability to extend to one who is only a holder of the instrument. It seems more logical and desirable to hold that the term holder in due course as used in the first portion of section 66 should be interpreted as to include holders as well. This would extend the liability of an indorser on both the warranties and conditional liabilities to the same persons. No logical reasons can be given for the difference in the language.

³⁶ BRITTON, *BILLS AND NOTES* 867 (1943).

³⁷ W. VA. CODE ch. 46, art. 5, § 7 (Michie 1955).

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Quoting from section 53 of the Uniform Negotiable Instruments Act: "Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course."³⁸ It is suggested that close examination of sections 53, 66, and 71 of the act will show that it is possible for one who is unable to qualify as a holder in due course, (*i.e.*, having acquired the instrument an unreasonable time after issue) to find that he has nevertheless acquired the instrument within a reasonable time after the last negotiation, and therefore be entitled to proceed against prior indorsers on their conditional liability as set forth in section 66.

At least three important factual situations arise regarding the time allowed a holder in which to make timely presentment of a check or bill for payment in order to fix the indorser's liability thereon: first, where the check has been held an unreasonable length of time by the holder before making presentment for payment; secondly, where the check has been outstanding an unreasonable period before the first negotiation, the holder presents the check for payment within a reasonable time after acquiring the check; thirdly, the bill or check indorsed and delivered by several successive indorsers, the last of which was beyond a reasonable time after issue, the holder making demand of the drawee for payment within a reasonable time after its receipt.

In *Columbian Baking Co. v. Brown*,³⁹ involving a draft sold by a bank to defendant on June 10, indorsed and mailed to *T* on June 16, who received it on June 20, on July 14 sold it to plaintiff bank, which in turn sent it to a Chicago bank which presented it for payment on July 18, it then being dishonored. In a suit by the plaintiff bank against an indorser, recovery was allowed. The court stated "A bill of exchange payable on demand, regardless of its character, put in circulation, so long as its circulating character is preserved may be outstanding without impairing the liability of indorsers thereon. . . . only the time need be considered intervening between the last negotiation and the presentment." This language was clearly dicta since the court found that under the facts of the case an unreasonable time had not elapsed from the time of issue till time payment was demanded and denied.

After considering the several sections of the Uniform Negotiable Instruments Act and the dicta in the *Columbian Baking Co.* case, the following solutions to the three factual problems may be justified. As

³⁸ W. VA. CODE ch. 46, art. 4, § 3 (Michie 1955).

³⁹ 134 Wis. 218, 114 N.W. 451 (1908); *Plover Savings Bank v. Moodie*, 135 Iowa 685, 110 N.W. 29, 110 N.W. 476 (1907).

to the first, where the check was held an unreasonable time by the holder before making presentment, such holder would have the right to look to the drawer for payment to the extent that the drawer had not been damaged by the delay in demanding payment. As the holder had failed to present the check within a reasonable time after having received it, the holder would be denied the right to look to prior indorsers for payment.

In the second illustration, the check having been outstanding more than a reasonable time after issue before the first negotiation, we would not be concerned with a holder in due course being involved. Under the language of section 71 of the Uniform Negotiable Instruments Act and the dicta in the *Columbian Banking Co.* case, any prior indorser could be reached on the basis of his conditional liability, as the holder could show presentment for payment had been made within a reasonable time after the last negotiation. The holder would discover his rights against the drawer to be the same as in the above problems. In the third situation, certainly the last indorser should be held liable to the holder upon showing that presentment for payment was made promptly after the holder took the bill or check and followed with necessary proceedings of dishonor. As to the holder's rights against prior indorsers, the answer is not nearly so simple. Does each indorser only agree to be liable to a holder who makes presentment for payment promptly after his negotiation? That is, may the indorser be relieved of liability by the passage of a reasonable time and then have his liability revived by a new negotiation followed by immediate presentment for payment and due notice of dishonor? It is suggested that in answer to these questions it is possible for an indorser to find himself relieved of liability by showing that the check or bill had been held an unreasonable time by some holder, but discover that his liability has been revived by another negotiation followed by timely presentment and necessary steps of dishonor.

Some of the confusion and uncertainty regarding the rights of the holder in proceeding against indorsers on checks would be simplified if we were to follow the suggestion of Mr. Norton in his works on negotiable instruments when he said: ". . . [I]t would seem reasonable to construe section 71 of the act as laying down a rule applicable only to the liability of the indorser who was a party to the last negotiation, or as declaring the rule that presentment must be made within a reasonable time after the negotiation of the instrument by the person sought to be charged. . . . So construed, the

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statute declares the former rule of the law merchant as stated in the English Bills of Exchange Act. . . ."⁴⁰

As the indorser's contract is separate and distinct from that of any other persons to the instrument⁴¹ the indorser's obligation to pay does not accrue until after due presentment, and necessary proceedings of dishonor have been duly taken, the statute of limitations as to his liability would then only begin to run. It is not necessary that the holder exhaust his remedies against the drawer before proceeding against an indorser of a check.

Where the check of another is indorsed by the debtor in payment of his debt, the holder's failure to properly present such check and demand payment promptly will release the debtor as to his liability as an indorser and likewise as to his liability on the original indebtedness for which the check was negotiated⁴² irrespective of any loss or damage to the indorser.⁴³ Inquiry as to whether the indorser was or was not injured by the delay in failing to present the check for payment is immaterial as his release is based on failure to properly present the instrument and not on the basis of damages thereby suffered.⁴⁴

⁴⁰ NORTON, *BILLS AND NOTES* 500 n.2 (4th ed. 1914).

⁴¹ *Dougherty v. Shankland*, 217 Iowa 951, 251 N.W. 73 (1933).

⁴² *Smith v. Miller*, 48 N.Y. 171, 3 Am. Rep. 690 (1870).

⁴³ *Smith v. Janes*, 20 Wend. 192, 32 Am. Dec. 527 (N.Y. 1838). A check was not presented for nine days after receipt by the plaintiff. The indorser was held discharged irrespective of any question of loss. Proper presentment was a condition precedent to indorser's liability, and his delay was not excused even when the drawer was without funds on deposit, or because presentment would have been unavailable as a means of procuring payment.

⁴⁴ *Comer v. Dufour*, 95 Ga. 376, 22 S.E. 543 (1895).