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BILLS AND NOTES - INDORSEMENT OF RENEWAL NOTE AS WAIVER OF NOTICE OF DISHONOR BY THE INDORSER

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RECENT DECISIONS

BILLS AND NOTES — INDORSEMENT OF RENEWAL NOTE AS WAIVER OF NOTICE OF DISHONOR BY THE INDORSER — In 1926, a promissory note representing money loaned was made, payable to the order of plaintiff. After various renewals, defendant, in 1929, became an additional accommodation indorser of the renewal notes and continued as such until February 4, 1932, when a renewal note, likewise indorsed by him, payable March 4, 1932, was accepted by plaintiff. On its due date, the maker presented another renewal note, again indorsed by defendant, but this plaintiff refused to accept until the maker paid the interest due on the debt. Plaintiff did, however, retain both notes but failed to give defendant notice of dishonor of the February note or notice of refusal of the renewal. Four years later, plaintiff sued defendant as indorser of the February note, claiming the indorsement of the proffered renewal note had operated as a waiver of notice of dishonor. *Held*, that upon maturity of the February note, since the renewal was not accepted, defendant was entitled to notice of dishonor, and in its absence was discharged from liability as indorser. *Lockport Exchange Trust Co. v. Hyde*, 274 N. Y. 1, 8 N. E. (2d) 38 (1937).

One who indorses without qualification a negotiable promissory note for the accommodation [1] of another engages that, upon its due presentment to the person primarily liable thereon, if it be dishonored, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it, but only if he is given due notice of dishonor.[2] He may, however, waive notice of dishonor, either before or after the time for giving notice has arrived,[3] and the waiver may be either express or implied.[4] It will always be implied where his words or acts respecting the note can reasonably be interpreted, by the one bound to give him notice, as a manifestation of an intention to dispense with the usual steps necessary to fix his liability.[5] The true test of waiver is objective intention.[6] So it has been uniformly held that, upon maturity of a note, an accommodation indorser thereon who indorses a renewal note which is accepted impliedly waives notice of dishonor of the original.[7] The ordinary effect of acceptance of a renewal note is the continuance of the contract evidenced by the original note,[8] for in the absence of an agreement

[1] Sec. 29 of the N. I. L. defines accommodation party. Sec. 63 defines those who shall be deemed indorsers. Sec. 64 fixes the liability of irregular indorsers.

[2] Sec. 66 of the N. I. L.

[3] Sec. 109 of the N. I. L.

[4] Sec. 109 of the N. I. L.

[5] Kelly v. Ford, 115 W. Va. 435, 176 S. E. 705 (1934); Boyce v. Toke Point Oyster Co., 145 Ore. 114, 25 P. (2d) 930 (1933); Linthicum v. Bagby, 131 Md. 644, 102 A. 997 (1917); Simonoff v. Granite City Nat. Bank, 279 Ill. 248, 116 N. E. 636 (1917).

[6] Farmers' & Mechanics' Nat. Bank v. Head, (Tex. Comm. App. 1928) 7 S. W. (2d) 61.

[7] Horner v. First Nat. Bank, 149 Va. 854, 141 S. E. 767 (1928); Leary v. Miller, 61 N. Y. 488 (1875); Clarke v. Stumpf, 190 App. Div. 538, 180 N. Y. S. 125 (1920).

[8] Kedey v. Petty, 153 Ind. 179, 54 N. E. 798 (1899).

to the contrary the renewal does not effect a discharge of the original,[9] though it does bar any action thereon before its own maturity.[10] Thus, when the accommodation indorser, by indorsement of the renewal, offers to continue his liability on the original, he does so on condition the holder refrain from taking advantage of the immediate right of recourse that arose against him upon dishonor of the original [11]—the holder could use that right only if he gave notice [12]—and in substance says he will remain liable [13] though notice is not given. Where the renewal note is not accepted, it is hard to see how, under the principles set out above, the holder would be warranted in believing the indorser intended to dispense with notice of dishonor, but some courts have so held.[14] But in no event should mere indorsement of a renewal note which is accepted be regarded as a waiver of notice of dishonor of *that* note, for on its dishonor, the indorser would be in the very position in which, presumably, he intended, and the statute provides, he should have notice.[15] The instant case

[9] Leary v. Miller, 61 N. Y. 488 (1875); Lumley v. Musgrave, 4 Bing. (N. C.) 9, 132 Eng. Rep. 691 (1837); Ex Parte Barclay, 7 Ves. Jun. 597, 32 Eng. Rep. 240 (1802); Sloman v. Cox, 1 C. M. & R. 471, 149 Eng. Rep. 1165 (1834). The recent cases are collected in the note in 52 A. L. R. 1416 (1928).

[10] Kendrick v. Lomax, 2 C. & J. 405, 149 Eng. Rep. 172 (1832).

[11] Sec. 84 of the N. I. L. Upon dishonor, if the proper steps are taken, the indorser becomes absolutely liable.

[12] Sec. 89 of the N. I. L.

[13] "The act of indorsing the renewal note can only be regarded as evidence that the indorser was satisfied to continue his liability as an indorser." James, J., in Allentown Nat. Bank v. Nallin, 122 Pa. Super. 459 at 461, 186 A. 207 (1936) (a case on all fours with the instant one). This view accords with the dissent in Clarke v. Stumpf, 190 App. Div. 538, 180 N. Y. S. 125 (1920), in which it was thought the indorser signified by the indorsement of the renewal note which was accepted no intention to become absolutely liable on the original, as the majority held, but only an intention to remain liable as indorser.

[14] Genesee County Sav. Bank v. Rosenthal, 265 Mich. 291, 251 N. W. 334 (1933); Martin v. Walker, 93 W. Va. 736, 117 S. E. 879 (1923); Farmers' & Merchants' Nat. Bank v. Brown, 131 S. C. 265, 127 S. E. 365 (1925); Mercer v. Hydrocarbon Co., 205 App. Div. 78, 199 N. Y. S. 75 (1923). But see Allentown Bank v. Nallin, 122 Pa. Super. 459, 186 A. 207 (1936), and Maynard Trust Co. v. Furbush, 243 Mass. 190, 137 N. E. 270 (1922), where there were renewal offers which were unaccepted which were held not to be waivers, holdings consistent with the instant case. The theory of the former courts seems to be that the offer to indorse a renewal note shows the indorser knows the note will not be paid, and so notice of its dishonor would be an idle thing. This seems to be a non sequitur, and a confusion of waiver of notice and sufficiency of notice. See Sec. 90 of the N. I. L. which provides by whom notice must be given.

[15] Sec. 89 of the N. I. L. Yet in the principal case, the lower court so held, in effect, "that ever since 1926, the expiring date of the original note, no indorser was entitled to notice of presentment and non-payment because the renewal notes constituted a waiver thereof. Such is not the law, and all reason is against it." Crane, J., in the instant case, 8 N. E. (2d) at 39. And see Clarke v. Stumpf, 190 App. Div. 538, 180 N. Y. S. 125 (1920), where recovery on the original note was allowed even though there had been no due presentment of the renewal, a result clearly contrary to the holding in the present case.

does much to clarify the oft repeated and loosely applied statement that "indorsement of a renewal note is a waiver of notice of dishonor," and the court expressly disapproves those statements, found in earlier New York cases,[16] upon which the plaintiff relied.

[16] National Hudson River Bank v. Reynolds, 57 Hun. 307, 10 N. Y. S. 669 (1890).