

# SOME ASPECTS OF PAYMENT BY NEGOTIABLE INSTRUMENT: A COMPARATIVE STUDY

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## I

THE scenes are laid in London, New York, Berlin, and Paris. The plot begins with a debtor's giving his creditor a negotiable instrument in "payment" of the debt. Complications are introduced when the creditor fails to perfect his rights on the instrument, and yet, naturally enough, wishes to collect his debt. Initially both debtor and creditor are satisfied when the negotiable instrument is given in "payment." If it is a time instrument, the debtor has obtained an extension of credit.<sup>1</sup> The creditor, on the other hand, has placed his claim in liquid form; he may realize upon it by discounting the instrument. The Anglo-American, German, and French legal systems, in their own way, attempt to safeguard both the interests of the debtor and the creditor. The creditor will not be allowed to sue the debtor until the maturity of the instrument;<sup>2</sup> otherwise the debtor would be deprived of his credit. The creditor may not bring action without producing the instrument or at least showing that it has been destroyed;<sup>3</sup> otherwise the debtor might be compelled to

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1. The bill of exchange, in its origin, mainly performed a payment function; it was the means of avoiding cash transfers particularly to foreign countries. Today this payment function is performed by the check for inland transactions, and by the bill and the cable transfer for foreign payments. The bill of exchange is used mainly for the extension of credit.

2. *Anglo-American law*: Walton v. Maskell, 14 L. J. 54 (Ex. 1844); Cohen v. Hales, 47 L. J. 496 (Q. B. 1878); 3 DANIEL, NEGOTIABLE INSTRUMENTS (7th ed. 1933) § 1463.

*French law*: Lescot, *De l'influence de l'émission ou de l'endossement d'une lettre de change sur l'obligation préexistente du débiteur cambière* (1932) 41 ANNALES DE DROIT COMMERCIAL 105, 116.

*German law*: Oberlandesgericht Stuttgart, Dec. 5, 1916, 17 DAS RECHT (1917) No. 534; STAUB-STRANZ, KOMMENTAR ZUM WECHSELGESETZ (13th ed. 1934) Art. 89 Anm. 25; 2 GRUENHUT, HANDBUCH DES WECHSELRECHTS (1897) 302. It must, however, not be forgotten that if the creditor presents the unaccepted instrument to the drawee for acceptance, and the latter refuses to accept, or when the drawee before acceptance, goes into bankruptcy, or becomes insolvent, the holder acquires an immediate right of recourse against the debtor-drawer or debtor-indorser. Wechselgesetz June 21, 1933, Art. 43 (2). Such a provision qualifies the suspension effect. 2 GRUENHUT, op. cit. *supra* at 305.

3. *Anglo-American law*: Looney v. District of Columbia, 113 U. S. 258 (1885); Donnelly v. District of Columbia, 119 U. S. 339 (1886); Bill v. Porter, 9 Conn. 23 (1831); Nichols v. Michael, 23 N. Y. 264 (1861); Davis v. Reilly, 66 L. J. 844 (Q. B. 1898). See

pay his debt again to a third person who had bought the instrument.<sup>4</sup> On the other hand, the creditor may prove his claim merely by introducing the instrument in evidence and thereby gain certain procedural advantages.<sup>5</sup> The creditor and the debtor, being ignorant even of their own law, have spoken of this transaction as a "payment." But the Anglo-American, German, and French systems of law agree that the transaction was merely a "conditional payment," unless the debtor and creditor clearly indicated that they intended the instrument to be absolute payment, a situation which is, however, seldom found.<sup>6</sup> "Conditional payment" is, of

*Crowe v. Clay*, 9 Ex. 604 (1854). A voluntary destruction of the instrument will bar the right on the underlying obligation. *Vanauken v. Hornbeck*, 14 N. J. L. 178 (Sup. Ct. 1883).

*German law*: Reichsgericht, Sept. 16, 1903, 32 JURISTISCHE WOCHENSCHRIFT (1903) 375; Oberlandesgericht Dresden, February 13, 1918, 19 LEIPZIGER ZEITSCHRIFT (1918) 1195; for further details see 1 BREIT, KOMMENTAR ZUM DEUTSCHEN SCHECKGESETZ (1929) 303, 304. See further GERMAN WECHSELGESETZ Artt. 39, 90; GERMAN ZIVILPROZESSORDNUNG §§ 947 et seq.

*French law*: THALLER-PERCEROU, TRAITÉ ÉLÉMENTAIRE DE DROIT COMMERCIAL (7th ed. 1925) §§ 1504, 1518 et seq.; CODE DE COMMERCE art. 140-146 (new).

4. Payment is merely a personal defense in all legal systems here considered. BIGELOW, BILLS, NOTES AND CHECKS, (3rd ed. 1928) § 554; NORTON, BILLS AND NOTES (4th ed. 1914) 353; BYLES, BILLS (19th ed. 1931) 223; STAUB-STRANZ, op. cit. *supra* note 2, at Art. 17 Anm. 57g; THALLER-PERCEROU, op. cit. *supra* note 3, at § 1469 et seq.

5. See N. I. L. §§ 11, 17, 24; BYLES, op. cit. *supra* note 4, at 125. The German law, but not the French, provides for a summary bills of exchange procedure available to holders of bills, notes and checks. ZIVILPROZESSORDNUNG §§ 592 et seq., §§ 445, 708 (4), 713 (2); Reichsgericht April 22, 1932, 136 Entscheidungen des Reichsgerichts in Zivilsachen 137.

6. *Ward v. Evans*, 2 Ld. Raym. 928 (K. B. 1702); *Standard Investment Co. v. Town of Snow Hill*, 78 F. (2d) 33 (C. C. A. 4th, 1935); *Farmers Exchange Bank v. Grell Bros. Co.*, 17 Ala. App. 287, 84 So. 427 (1919); *Rice Growers Credit Corp. v. Walker*, 185 Ark. 896, 50 S. W. (2d) 619 (1932); *Swan v. Smith*, 102 Cal. App. 541, 283 Pac. 829 (1930); *Bassett v. Merchants' Trust Co.*, 118 Conn. 586, 173 Atl. 777 (1934); *Sulter v. Citizens' Bank and Trust Co.*, 51 Ga. App. 798, 181 S. E. 694 (1935); *Shuman v. Arshat*, 249 Ill. App. 562 (1928); *Hirleman v. Nickels*, 193 Minn. 139, 258 N. W. 13 (1934); *Raines v. Grantham*, 205 N. C. 340, 171 S. E. 360 (1933); *Baker v. State Highway Dep't.*, 166 S. C. 481, 165 S. E. 197 (1932); see also BYLES, BILLS (19th ed. 1931) 303; DANIEL, NEGOTIABLE INSTRUMENTS (7th ed. 1933) § 1458.

In a few states, there is a presumption of absolute payment: *Duvall v. Ranson and Randolph Co.*, 90 Ind. App. 605, 169 N. E. 537 (1930); *Dow v. Poore*, 272 Mass. 223, 172 N. E. 82 (1930); *Rutland Ry. Light and Power Co. v. Williams*, 90 Vt. 276, 98 Atl. 85 (1916). But it does not obtain where the creditor possesses other security: *Splitz v. Morse*, 104 Me. 447, 72 Atl. 178 (1908); *Rosenberg v. Robbins*, 208 Mass. 45, 194 N. E. 291 (1935). Nor where the instrument is a check: *Gordon v. Keene*, 118 Me. 269, 107 Atl. 849 (1920); *Dutton v. Bennett*, 262 Mass. 39, 159 N. E. 524 (1928). See cases collected in Note (1912) 35 L. R. A. (N. S.) 1-113 for a comprehensive perspective of payment by commercial paper, particularly in regard to presumptions of conditional and absolute payment.

The presumption of absolute payment is sometimes raised if a third party's instrument is transferred for a present debt. *Partee v. Bedford*, 51 Miss. 84 (1875); *Hall v. Stevens*, 116 N. Y. 201, 22 N. E. 374 (1889); *Blum v. Sadofsky*, 86 N. Y. Supp. 22 (App. Div. 1904);

course, a tag phrase. It means that even though the creditor has taken the negotiable instrument, the original debt still exists, and under some circumstances, the creditor may resort to it.<sup>7</sup> Since the underlying obligation survives the "payment" by negotiable instrument, it will not be necessary to incorporate its terms into the instrument, thus, perhaps, destroying its negotiability.<sup>8</sup> It means further that any collateral secu-

*Challoner v. Boyington*, 91 Wis. 27, 64 N. W. 422 (1895). In England the presumption of absolute payment obtains in the cases of transfer by delivery only of a bill of exchange or note for goods, other instruments or money; such transfer is considered a sale unless a contrary intent is found. *Emly v. Lye*, 15 East. 7 (K. B. 1812); *Camidge v. Allenby*, 6 B. & C. 373 (K. B. 1827); BYLES, *BILLS* (19th ed. 1931) 172. Similarly, in the case of a precedent debt, if the creditor has the option to take cash or a third party's bill, the original debtor is discharged upon the creditor's taking the bill. *Strong v. Hart*, 6 B. & C. 160 (K. B. 1827); *Rogers v. Calgary*, 56 Can. S. C. R. 165 (1917); see *Marsh v. Peddar*, 3 East. 257 (K. B. 1815).

For the German rules as to conditional payment, see *Reichsoberhandelsgericht*, January 13, 1872, 4 *ENTSCHEIDUNGEN DES REICHSOBERHANDELSGERICHTS* 365, 371; *Reichsoberhandelsgericht*, November 25, 1875, 13 *Entscheidungen des Reichsoberhandelsgerichts* 390; *Reichsgericht*, November 3, 1925, 112 *Entscheidungen des Reichsgerichts in Zivilsachen* 61; STAUB-STRANZ, *KOMMENTAR ZUM WECHSELGESETZ* (13th ed. 1934) Art. 89 Anmerkung 24 b; BREIT, 1 *KOMMENTAR ZUM DEUTSCHEN SCHECKGESETZ* (1929) Anhang zu § 4 Anmerkung 6; Lipschitz, *Welchen Einfluss hat die Praejudizierung eines zahlungs—halber gegebenen Wechsels oder Schecks auf die zugrundeliegende Kausalforderung* (1924) 70 *GRUCHOTS BEITRÄGE* 482. Even if the debtor pays with a check certified by the Reichsbank which gives the creditor a direct cause of action against the Reichsbank, the result is the same. BREIT, *op. cit. supra*, at Anhang zu § 4 Anmerkung 14.

For the French rules see: *Cour de Cassation*, May 8, 1850, *DALLOZ JURISPRUDENCE* (1850) 1, 158; *Cour de Cassation*, April 28, 1900, *DALLOZ JURISPRUDENCE* (1901) 1, 17. See further: Aubin, *De l'Influence de la Creation et de la Transmission de Billets à Ordre ou de Lettres de Change sur les Rapports Juridiques Interieurs Existents entre les Parties* (1899) 13 *ANNALES DE DROIT COMMERCIAL* 294 et seq.; Perrau, *De la non Application de la Prescription Quinquennale a l'Action du Contract Originnaire en Matiere de Lettres de Change* (1924) 33 *ANNALES DE DROIT COMMERCIAL* 1; Lescot, *De l'Influence de l'Emmission ou de l'Endossement d'une Lettre de Change sur l'Obligation Preexistente du Débiteur Cambiaire* (1932) 41 *id.* 105.

The problem whether or not an instrument is taken as payment is distinct from the problem whether or not it later becomes payment. For instance, an instrument not taken as payment may become such if the collecting bank, acting as agent for the holder, should take the drawee's personal check without previous authorization by the drawer of the bill. Likewise, it is sometimes held that an instrument which originally was not payment becomes such when the holder is negligent in performing his duties on the instrument. The latter case directly affects our problem; the former, arbitrarily or otherwise, is excluded.

7. *Hughes v. Wheeler*, 8 Cowen 77 (N. Y. 1827); *Wooden v. Frazee*, 6 Jones & Spen. 190 (N. Y. Super. 1874); *Taylor v. Wilson*, 52 Mass. 44 (1846).

8. See BYLES, *op. cit. supra* note 4, at 97 et seq.

This is particularly true under the Continental laws which do not allow to the parties the same leeway in framing the instrument as the Anglo-American law. The incorporation of an acceleration clause, for instance, would make the instrument non-negotiable. On the Continental law see: STAUB-STRANZ, *op. cit. supra* note 2, at Art. 33 Anm. 8, 9; KESSLER, *WECHSELGESETZ* (1933) 15 et seq.; THALLER-PERCEROU, *op. cit. supra* note 3, at § 1300.

urity for the original debt is not released when the instrument is given.<sup>9</sup> And it may mean that even if the statute of limitations has barred action on the instrument, the creditor may still sue on the underlying obligation, if the statute of limitations has not run as to it.<sup>10</sup> The phrase "conditional payment" further implies that when payment becomes "absolute" the underlying obligation will be gone.<sup>11</sup>

To the American Realist, it may sound allegorical and unfunctional to speak of "conditional payment" and the "continued subsistence of the underlying obligation." It may seem even stranger to find people worrying about whether the creditor has, after taking the instrument, two rights against his debtor, one on the instrument and another on the underlying obligation, or whether he has only one right on a claim which is a merger of rights on the debt and on the instrument. The lawyer has learned from the Realists that such theories are useful merely as chants or symbols to make decisions look respectably rational, and he knows that they must be watched with deep suspicion, as abstractions designed to wean him from his proper diet of cases and facts.

Indeed, the Anglo-American law during recent years has not worried much about the nature of this creditor's right, and in fact has never been particularly explicit about the matter at any time in its history. Ames did contend that "a bill is a merger, absolute or temporary, of a pre-existing claim," but he was quick to point out that if the merger theory is taken seriously then many cases have been wrongly decided.<sup>12</sup> Story concluded that the instrument was "at most . . . only prima facie evidence of satisfaction, rendering it necessary that the party receiving the substituted note should account for it, before he will be entitled to recover upon the original debt or note."<sup>13</sup> According to Byles, "the original debt

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A few French decisions have tried to reach a result similar to incorporation of the acceleration clause in the instrument by deciding that the rights of the original creditor run with the instrument. Paris, January 4, 1899, DALLOZ, JURISPRUDENCE (1900) 2.121 with the interesting note of Percerou.

9. *French law*: THALLER-PERCEROU, op. cit. *supra* note 3, at § 1300. Personal sureties are, however, discharged. CODE CIVIL art. 2038.

*German law*: 2 GRUENHUT, op. cit. *supra* note 2, at 297.

10. Lacey v. Hall, 6 La. Ann. 1 (1851). Cf. Lupkin v. Story, 63 Tex. Civ. App. 605, 134 S. W. 398 (1911); Stuart v. Westerheide, 144 Okla. 150, 289 Pac. 721 (1930). But see Farrand v. Yates, 249 Ill. App. 180 (1928).

*French law*: Cour de Cassation, May 8, 1850, DALLOZ JURISPRUDENCE (1850) 1, 58; April 28, 1900, id. (1901) 1, 17. See CARITANT, DE LA CAUSE DES OBLIGATIONS (2nd ed. 1924) § 189. But cf. Thaller (1901) DALLOZ JURISPRUDENCE 1, 17.

*German law*: Reichsgericht, September 26, 1899, 44 Entscheidungen des Reichsgerichts in Zivilsachen 80.

11. See cases in which there is a presumption of absolute payment, cited note 6 *supra*.

12. 2 AMES, CASES ON BILLS AND NOTES (1894) 874-875. Cf. NORTON, op. cit. *supra* note 4, at 426, where it is said that "a simple executory contract is not extinguished by the acceptance of another."

13. STORY, PROMISSORY NOTES (2nd ed. 1847) 520-521.

still remains, but the remedy for it is suspended till maturity of the instrument in the hands of the creditors."<sup>14</sup> With such conflicts among the sages as to the nature of the creditor's right, it would be hard to convince our Realistic lawyer that present theories of its legal import were anything more than scholastic vagaries not soundly rooted in the facts of cases, and therefore not even useful as magic with which to bemuse judges in the ceremonial of a trial.

One feels sure, however, that this skepticism of the American legal Realist would appear heretical to a German scholar-lawyer, who enjoys theories without worrying too much about their reality, and takes them very seriously. To him it would be clear that the creditor had two causes of action against the debtor, one on the instrument and one on the original debt.<sup>15</sup> A French lawyer might be somewhat embarrassed if he were asked whether in France the creditor had two causes of action or only one on a merger of the former claim on the debt with the claim on the instrument,<sup>16</sup> though with the practical logic of his legal system he would know that other devices could be found to supply any deficiency inherent in either theory, and, with an inconsistency which may or may not be characteristic of his country, he would be more or less content to reach results incompatible with either theory.

But in London, New York, Berlin, and Paris, the creditor who has taken the negotiable instrument has much the same rights. For a moment we can agree that the legal doctrine is irrelevant. But only for a moment. As soon as we add the complicating factor that the creditor has failed to perfect his rights on the instrument and yet wishes to collect his debt, legal doctrine becomes important. The words and the wind of the doctrine, and its inner logic as a fragment of distinct legal systems, now begin to control the result. For the same facts are somewhat differently adjudicated in the four countries, and a comparative study of the legal variations on this simple theme may illuminate a dark corner in the law of negotiable instruments.

Thus, the plot has developed in this form: the creditor has taken a negotiable instrument from his debtor in "payment" of the debt, but he has failed to perfect his rights on the instrument. He may not have presented the instrument for payment, or for acceptance, within a reasonable

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14. BYLES, *supra* note 4, at 303. See also 2 PARSONS, NOTES AND BILLS (1873) 154; CHITTY, BILLS OF EXCHANGE (11th ed. 1878) 127.

15. See 2 GRUENHUT, *op. cit. supra* note 2, at 302; KESSLER, WECHSELGESETZ (1933) 66; MUELLER-ERZBACH, DEUTSCHES HANDELSRECHT (3rd ed. 1928) 507, 508. But see WIELAND, DER WECHSEL UND SEINE ZIVILRECHTLICHEN GRUNDLAGEN (1901) 91, 124, 182.

16. The two decisions of the Cour de Cassation referred to note 10 *supra* have been often interpreted and criticized as being based on a two causes of action theory. THALLER, *loc. cit. supra* note 10. According to most textwriters, the creditor has only one cause of action, the original claim being merged with that arising out of the instrument. THALLER-PERCEROU, *op. cit. supra* note 3, at § 1562.

time; or, a dishonor having occurred, he may have failed to obtain a protest of the instrument or to give due notice to the proper parties on the instrument.<sup>17</sup> May a creditor thus guilty of laches get a court and a policeman to force his debtor to pay him notwithstanding the laches?<sup>18</sup> The answer to the question varies from country to country, with the nature of the instrument used for "payment," and the capacity, if any, in which the debtor became a party thereto.

## II

We shall be concerned with five factual variations upon the basic plot: (1) the debtor gives his own promissory note or acceptance to the creditor; (2) the debtor draws or indorses a bill or check which is accepted or certified, or indorses a promissory note, and gives it to the creditor; (3) the debtor is the drawer of an unaccepted bill or an uncertified check; (4) the debtor indorses an unaccepted bill or uncertified check to the creditor; (5) the creditor takes a third party's instrument on which the debtor's signature does not appear.

The systems of doctrine in terms of which these cases must be elaborated and solved are simple and distinct. The background of the Anglo-American theory lies in the reasoning of *Clerke v. Mundall*.<sup>19</sup> The creditor had taken a bill of exchange from his debtor who had indorsed the bill, but the creditor had apparently failed to make due presentment. Chief Justice Holt held that the creditor could recover on the underlying obligation, for, "A bill without payment of money, shall never go in satisfaction of a precedent debt or contract, if 'tis not part of the contract." Inherent in the decision is a distinction between cases in which the creditor takes the instrument for a precedent debt, and those in which he takes it for a present debt. If the instrument is taken for a present debt, according to Holt, laches on the instrument will prohibit a suit on the earlier

17. See N. I. L. §§ 70, 89, 144; BILLS OF EXCHANGE ACT, 45 and 46 VICT. c. 61 §§ 40 (1), 42, 45, 48, 86 (1), 87 (2), 89 (1882); GERMAN WECHSELGESETZ Artt. 42 (1), 23, 34, 43, 44, 45, 53; GERMAN SCHECKGESETZ Artt. 29, 31, 40, 41, 42. FRENCH CODE DE COMMERCE artt. 147-149, 156, 124(6), 132; Décret unifiant le droit en matière de chèques (30 octobre 1935) artt. 29, 31, 40-42. The German and French statutes are based on the Geneva Uniform Codes on Bills, Notes, and Checks. Neither such statutes nor the codes deal with rights on the underlying obligation. As to the uniform rules adopted by such codes and the amendatory powers reserved to the signatory nations, see Hudson and Feller, *The International Unification of Laws Concerning Bills of Exchange* (1930) 44 HARV. L. REV. 333; Feller, *The International Unification of Laws Concerning Checks* (1932) 45 HARV. L. REV. 668.

On the necessity for protest see N. I. L. § 152; BILLS OF EXCHANGE ACT § 51 (2); GERMAN WECHSELGESETZ Art. 44; FRENCH CODE DE COMMERCE Art. 148A.

18. For the purposes of this paper, laches may be defined as failure to make due presentment for acceptance (if necessary) or for payment, or to give due notice of dishonor, or to make proper protest (when necessary).

19. 3 Salk. 68 (1694).

underlying obligation. Indeed Holt did not limit his statement to cases in which the creditor had been guilty of laches, but stated broadly that "in such case *B* (the debtor) is discharged tho' the money should never be paid, for the bill itself is payment." One may gather that Lord Holt was thinking in terms of a dichotomy between absolute and conditional payment. He apparently thought that if an instrument is taken for a present debt, then the presumption was that it was given in absolute payment, and that, therefore, discharge on the underlying obligation results. But on the other hand, where the instrument was taken for a precedent debt it was intended merely as conditional payment, and the creditor's right on the underlying obligation is preserved.

Lord Holt's decision, however, has long been forgotten.<sup>20</sup> Since his time it has usually been assumed that discharge on the underlying obligation results in all cases, where the creditor has been guilty of laches,<sup>21</sup> whether the debt be present or precedent. Kyd blames the Statute of Anne, which was passed chiefly to give some of the attributes of negotiability to promissory notes, for this change of heart towards the creditor who has failed to perfect his right on the instrument and now desires to recover on the debt.<sup>22</sup> The Statute of Anne contained a section providing that "if any person accept a Bill of Exchange for and in satisfaction of any former debt, or sum of money formerly due to him, this shall be accounted and esteemed a full and complete payment of such debt, if such person accepting of any such bill for his debt do not take his due course to obtain payment of it, by endeavoring to get the same accepted and paid, and make his protest according to the directions of the Act, either for non-acceptance or non-payment."<sup>23</sup> But the section was on its face confined to bills given for antecedent debts, and by construction could have been limited to time bills;<sup>24</sup> and as a matter of fact, the section seems to have had little effect.<sup>25</sup>

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20. See CHITTY, *BILLS OF EXCHANGE* (1799) 131.

21. CHITTY, *BILLS OF EXCHANGE* (11th ed. 1878) 248-249.

22. KYD, *BILLS OF EXCHANGE* (1791) 110, 111.

23. 3 & 4 ANNE, c. 9, § 7 (1704).

24. See CHITTY, *BILLS OF EXCHANGE* (1799) 131, note c. But see the defendant's plea in *Kearslake v. Morgan*, 5 D. & E. 513, 517 (K. B. 1794), where it was argued that the Statute of Anne puts promissory notes on an equal footing with inland bills and that § 7 was therefore applicable to a note. The plea was sustained, but whether on this ground or on others does not appear.

25. The few cases found cite it in mere dictum discussion. *Gallagher v. Roberts*, 9 Fed. Cas. No. 5195 (C. C. D. Pa. 1808); *Hamilton v. Cunningham*, 11 Fed. Cas. No. 5978 (E. D. Va. 1828); *Jennison v. Parker*, 7 Mich. 355 (1859) (concurring opinion). Or in pointing out that its rule is not applicable. *Swinyard v. Bowes*, 5 M. & S. 62 (K. B. 1816) (where the debtor was not a party to the instrument); *Coleman v. Lewis*, 183 MASS. 485, 67 N. E. 603 (1903) (where the instrument was given as collateral). See *Riedman v. Macht*, 98 Ind. App. 124, 183 N. E. 807 (1932) and cases cited therein to the effect that

In Germany a "two causes of action" theory is accepted, which holds that notwithstanding the "payment," the creditor may always bring action on the underlying obligation as well as on the instrument. Thus it is well settled that the creditor may still sue the debtor-drawer of the instrument used in "payment" on the underlying obligation even if because of his laches he has lost his right to sue on the instrument. In such a case, if any injury was caused the debtor-drawer by the laches, his sole remedy is by a counterclaim for damages suffered.<sup>26</sup> However, where the debtor is the indorser of the instrument, it as yet remains uncertain whether the creditor who has been guilty of laches may bring action on the underlying obligation, possibly because the unaccepted bill does not play an important role in modern German business practice.<sup>27</sup> In France the courts have not dealt with the subject of whether the creditor guilty of laches may have recourse to the underlying obligation. Only a few legal writers mention it. The famous treatise of Lyon-Caen et Renault apparently deals with the problem only with respect to checks, and states briefly that the creditor who is guilty of laches is deemed to have received payment.<sup>28</sup> A recent article in a leading commercial law journal takes issue with this opinion and invokes the two causes of action theory.<sup>29</sup> The writer contends that the creditor does not necessarily lose his original claim, although, because of his neglect, he may have lost his right of recourse on the instrument, and would be merely subject to a counterclaim for damages if his failure to present caused any injury to his debtor.<sup>30</sup> Perhaps the reason for the absence of an exhaustive French discussion of the problem may lie in the fact that under French Law the creditor guilty of laches nevertheless may have a right of action against the drawer or drawee.<sup>31</sup>

*First and Second Variations:* The first two situations can be dealt

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notes were not negotiable at the common law. This view precludes the idea of the adoption of the Statute of Anne as part of the law merchant. In any event, the Statute of Anne was repealed in 1882. *BILLS OF EXCHANGE ACT, 45 & 46 VICT., c. 61, Schedule II (1882).*

26. *STAUB-STRANZ*, op. cit. *supra* note 2, at Art. 89 Anm. 26a.

Emphasis upon the rights arising out of the underlying obligation may be due to the fact that the holder's duties with respect to the instrument are absolute, and not merely to use reasonable diligence. See *CHALMERS, BILLS OF EXCHANGE (10th ed. 1932) 369-370.*

27. *FEIBELMAN, DAS RECHT AUF DIE DECKUNG BEIM GEZOGENEN WECHSEL (1932) 67.*

28. *4 LYON-CAEN ET RENAULT, DROIT COMMERCIAL (5th ed. 1925) § 585.*

29. This may be traced to the two decisions of the Cour de Cassation, cited note 10, *supra*.

30. *Lescot, supra* note 2, at 112 et seq. But see *2 LACOUR ET BOUTERON, PRÉCIS DE DROIT COMMERCIAL (3rd ed. 1925) § 1234.*

31. See p. 1394 *infra*. France has recently enacted the uniform codes on bills and checks as drafted by the Geneva conventions. Adoption of such codes has not, however, affected the rights of the holder as they existed under the former French law, for France has retained her peculiar rules regarding them. *HUPKA, DAS EINHEITLICHE WECHSELRECHT DER GENÈVE VERTRÄGE (1934) 145 et seq.*



with briefly. If the debtor is the maker of a note<sup>32</sup> or the acceptor of the creditor's bill, the debtor is not discharged by the creditor's laches, but remains liable as primary obligor on the instrument as well as on the original debt, until the period of prescription has run.<sup>33</sup> If, however, the note or acceptance is domiciled, the legal result corresponds closely to the solution of cases in which the debtor is drawer and may therefore be more adequately treated later. If the debtor draws or indorses a bill or check which is accepted or certified, or indorses a promissory note of a third party, the creditor, even if he has lost his right of recourse against the debtor-indorser on the instrument and on his original claim,<sup>33a</sup> will have a right on the instrument against the maker, acceptor, or certifier who remain liable despite laches (at least under the American law).<sup>34</sup> Hence except in cases where the statute of limitations has run on the instrument, or where the maker or acceptor has become insolvent,

32. Promissory notes are used but seldom in Germany. STAUB-STRANZ, *op. cit. supra* note 2, at 598; FEIBELMANN, *DAS RECHT AUF DIE DECKUNG BEIM GAZOGENEN WECHSEL* (1932) 67, note 2.

33. N. I. L. § 70; BILLS OF EXCHANGE ACT §§ 52, 87; *Lacey v. Hall, supra* note 10; GERMAN WECHSELGESETZ Artt. 53, 70 (1), 78; FRENCH CODE DE COMMERCE artt. 170 (2), 187, 189.

33a. Laches will discharge the drawer or indorser of an accepted bill on the underlying debt. *Allen v. King*, 1 Fed. Cas. No. 226 (C. C. D. Mich. 1846); *Gracie v. Sandford*, 9 Ark. 233 (1848); *Marburg v. Canfield*, 4 Mart. N. S. 539 (La. 1826); *Stam v. Kerr*, 31 Miss. 199 (1856); *Cochran v. Wheeler*, 7 N. H. 202 (1834); *Hawley, Dodd & Co. v. Jette and Clark*, 10 Ore. 31 (1881); *Bridges v. Berry*, 3 Taunt. 130 (C. P. 1810). And the indorser of a note. *Orange Screen Co. v. Holmes*, 103 N. J. L. 560, 138 Atl. 105 (Sup. Ct. 1927); *Harris v. Shipway*, Bull. N. P. 182 (1744); *Camidge v. Allenby*, 6 B. & C. 373 (K. B. 1827). But not if the indorser of the note has not been injured: *Kane v. Eastman*, 288 Pac. 819 (Cal. 1930); *Kephart v. Butcher*, 17 Iowa 240 (1864); *Shipman v. Cook*, 16 N. J. Eq. 251 (Ch. 1863); *Heyward v. Empire State Sugar Co.*, 105 App. Div. 21, 93 N. Y. Supp. 449 (1905). Cf. *Long v. Taplin-Rice-Clerkin Co.*, 38 Ohio App. 546, 177 N. E. 55 (1931). Laches will discharge the drawer or indorser of a bill or note on the instrument. *Supra* note 17. If a check is certified by the holder, the drawer and indorsers are discharged regardless of laches. N. I. L. § 188. And it would seem that laches would discharge the indorser of a check certified at the drawer's request before delivery, if the fact that the indorser of an accepted bill is discharged by reason of laches, is borne in mind. But whether the drawer is absolutely discharged will depend on whether he is to be treated as a drawer under § 186, or as an indorser. Apparently, however, the point has not been dealt with.

34. N. I. L. § 187. See also note 33 *supra*.

Both the English and the French law do not recognize certification. See THALLER-PERCEROU, *op. cit. supra* note 3 at §§ 1652 bis, 1646 (note). The "visa" used to some extent in French banking practice is not a real certification, for the bank assumes no obligation to pay the check. BOUTERON, *LE CHÈQUE* (1924) 331 et seq., 344. Certification and the rights arising therefrom are much restricted in German law. Only the Reichsbank has the power to certify. This certification moreover is not an acceptance for the Reichsbank is discharged if the check is not duly presented for payment. See KESSLER, *KOMMENTAR ZUM SCHECKGESETZ* (1934) 47 et seq., 180. See also Steffen and Starr, *A Blueprint for the Certified Check* (1935) 13 N. C. L. REV. 450.

the problem of whether the creditor may still collect from his debtor, despite his laches, does not have the practical significance it has when the instrument given in payment is an unaccepted bill or an uncertified check, and there is no one primarily and unconditionally liable on the instrument. But in those two cases, where recovery against the acceptor is impossible, especially when the underlying debt is independently secured by collateral, the creditor's claim against the drawer or indorser has more than academic interest.<sup>34a</sup>

In the two cases thus far considered, the creditor always has a cause of action on the instrument, despite his laches, against the party primarily liable, whether or not that party is the debtor. The two following deal with the situation in which there is no primary obligor because the debtor has drawn or indorsed an unaccepted bill or an uncertified check, and delivered it to the creditor, who does not procure acceptance or certification. What rights, if any, may the negligent creditor claim on such instruments and on the debts underlying them?

*Third Variation:* In the third case, where the debtor is drawer of an unaccepted bill or check, the rights of a creditor-holder guilty of laches on the instrument are more troublesome. In England and in America, the debtor-drawer is discharged on the instrument by the laches of the creditor who has received a bill as payment. Failure to present for acceptance (where acceptance is required), or for payment, and failure to give due notice of dishonor discharges the drawer from his obligation on the bill both at common law,<sup>35</sup> and under the Bills of Exchange Act and the Negotiable Instruments Law.<sup>17</sup> This is said to be true even though the holder is prepared to show that the drawer suffered no injury from the holder's laches. In the leading case of *Dennis v. Morrice*,<sup>36</sup> evidence to show that the drawer was uninjured, was held inadmissible. But in *Dennis v. Morrice*, Lord Kenyon was dealing with an accepted bill of exchange, and to allow discharge of parties secondarily liable for laches on that instrument is not unnecessarily harsh because, as we have seen, the holder would still have his right of action against the acceptor. The problem in the case of the unaccepted bill where the creditor's laches as holder discharges his debtor as drawer, is the continuing liability of the debtor on the underlying obligation. The question is typically presented in *Allen v. Eldred*.<sup>37</sup> The answer given there was that the creditor's neglect of his remedies on the instrument would discharge the debtor on the underlying obligation as well as on the bill whether or not injury resulted from the creditor's laches. The creditor was said to have made

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34a. Recovery against the debtor on the underlying obligation presents the same problems in these two situations as in the others.

35. CHITTY, BILLS OF EXCHANGE (1799) 86, 130; BYLES, BILLS (19th ed. 1931) 18, 266.

36. 3 Esp. 158 (N. P. 1800).

37. 50 Wis. 132, 6 N. W. 565 (1880).

the instrument his own because of his own laches: that is, he had abandoned his right of conditional recourse to the underlying obligation, and, therefore, the underlying obligation was considered paid. The answer of the Wisconsin court is also that of the English courts,<sup>38</sup> and the rule in most American jurisdictions.<sup>39</sup> In a few states a more lenient rule applies: the debtor is to be discharged on the underlying obligation only if he has been injured by the creditor's laches in prosecuting his rights on the instrument, although in the absence of other facts the court will presume that such injury exists.<sup>40</sup> And in some jurisdictions there is verbal support for the rule that the debtor will be discharged only to the amount of his injury;<sup>41</sup> but whenever any injury to the debtor is shown, complete discharge on the debt seems to result.<sup>42</sup> The failure of the courts to apportion the loss in these cases may be understood only in view of the

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38. *Darrach v. Savage*, 1 Show. K. B. 156 (1691); *Chamberlyn v. Delarive*, 2 Wils. K. B. 353 (1767). Chitty speaks of a presumption of total damage to the drawer or indorsers of a bill. CHITTY, *BILLS OF EXCHANGE* (1799) 130-131. Chalmers on the other hand recognizes that the drawer of an unaccepted bill should not be discharged where he is not damaged, despite the general rule. CHALMERS, *BILLS OF EXCHANGE* (10th ed. 1932) 370.

39. *Adams v. Boyd*, 33 Ark. 33 (1878); *Minehart v. Handlin*, 37 Ark. 276 (1881); *Phoenix Ins. Co. v. Allen*, 11 Mich. 501 (1863); *Adams v. Darby and Barksdale*, 28 Mo. 162 (1859); *Dayton v. Trull*, 23 Wend. 345 (N. Y. Sup. Ct. 1840); *Henry v. Donnaghy*, 1 Addison 39 (Pa. County Ct. 1792); *Mehlberg v. Tisher*, 24 Wis. 607 (1869); *Schierl v. Baumel*, 75 Wis. 69, 43 N. W. 724 (1889). Cf. *International Trust Co. v. City of Rexburg*, 48 Idaho 279, 281 Pac. 472 (1929); *Commercial Investment Trust Co. v. Lundgren-Wittenstein Co.*, 173 Minn. 83, 216 N. W. 531 (1927); *Pohl v. Johnson*, 179 Minn. 393, 229 N. W. 555 (1930); *Smith v. Miller*, 43 N. Y. 171 (1870). With few exceptions, the possibility that the holder's laches may have caused the drawer-debtor no actual monetary damage is not even considered. In *Henry v. Donnaghy*, *supra*, the court refused to heed an argument to that effect, and ruled that the holder, by giving further time, made a new contract and discharged the drawer. And in *Minehart v. Handlin*, *supra*, the court discharged the drawer on the debt, saying "want of injury is no excuse for non-presentment, or failure to give notice."

The courts do not seem to distinguish between accepted and unaccepted bills in laying down rules as to the discharge of the drawer on the underlying obligation. Thus, the same general rule discharging the drawer on an accepted bill (see cases cited note 33a *supra*) is applied to the above cases involving unaccepted bills.

40. *Dow v. Cowan*, 23 F. (2d) 646 (C. C. A. 8th, 1927); *McCrary v. Carrington*, 35 Ala. 698 (1860) (burden on the plaintiff to show no injury); *Stewart v. Millard*, 7 Lans. 373 (N. Y. Sup. Ct. 1872) (damage presumed from want of notice); *Smith v. Miller*, 52 N. Y. 545 (1873) (mere proof that the drawee was insolvent is not enough to show that the laches caused no damage). See *Gallagher v. Roberts*, 9 Fed. Cas. No. 5195 (C. C. D. Pa. 1808); *Welch v. Taylor Mfg. Co.*, 82 Ill. 579, 580 (1876). It may be noted that the only cases found supporting an injury rule, are those above, which deal with unaccepted bills.

41. See *Hamilton v. Cunningham*, 11 Fed. Cas. No. 5978 (E. D. Va. 1828); *Commercial Investment Trust Co. v. Lundgren-Wittenstein Co.*, 173 Minn. 83, 216 N. W. 531 (1927); *Shipman v. Cook*, 16 N. J. Eq. 251 (Ch. 1863); cf. *Citizens Bank & Trust Co. v. Knox*, 187 N. C. 565, 122 S. E. 304 (1924); 5 PAGE, *CONTRACTS* (2nd ed. 1920) § 2814.

42. See cases cited notes 38, 39, *supra*.

usual judicial reluctance to resolve difficult questions of damages. Where, on the other hand, the creditor has received a check drawn by his debtor in payment, and failed to make due presentment, the debtor will not be automatically discharged either as drawer of the check or as obligor on the underlying obligation, either in England or in this country.<sup>43</sup> It is difficult to see why the holder of a check should in this respect be placed in a more advantageous position.<sup>44</sup>

This distinction between the treatment of bills and checks first appeared in the United States and not in England. Neither Chitty nor Byles, writing before 1840, recognized any such distinctions. Chancellor Kent and Mr. Justice Story, must take a major part of the responsibility for this more generous treatment of creditors who have taken checks in payment. In *Conroy v. Warren* Chancellor Kent seized upon an occasion to make law.<sup>45</sup> The holder of a check had presented it for payment, in what might be considered an unreasonably long time after date. The drawer set up the holder's laches as discharging the instrument, but Kent ruled that the drawer would have to show damages before he could avail himself of this excuse. When writing his Commentaries in 1826, Kent had the further opportunity to declare that the law was as he had made it. He was satisfied to trace the "liberal" check rule no further back than to *Conroy v. Warren*.<sup>46</sup> It remained for Mr. Justice Story to establish the

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43. BILLS OF EXCHANGE ACT, 45 & 46 VICT., c. 61, § 74 (1882): "Subject to the provisions of this Act—(1) Where a cheque is not presented within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid. (2) In determining what is a reasonable time regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case. (3) The holder of such cheque as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge, and entitled to recover the amount from him." N. I. L. § 186: "A check must be presented for payment 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."

That the drawer is not automatically discharged on the underlying obligation: *Campbell v. Shark*, 46 Idaho 278, 267 Pac. 458 (1928); *Manitoba Mortgage and Investment Co., Ltd. v. Weiss*, 18 S. E. 459, 101 N. W. 37 (1904); *Mars, Inc. v. Chubriilo*, 216 Wis. 313, 257 N. W. 157 (1934). Laches does not defeat or modify the right on the underlying obligation where the check is given in payment of taxes. See *County Board of Education v. Slaughter*, 160 So. 758 (Ala. 1935); Note (1926) 44 A. L. R. 1234. The situation is undoubtedly indigenous, but indicates that the provisions of the N. I. L. do not always affect the underlying claim.

44. Edwards states the difference as though it were only one of evidence, rather than one of principle. Such reasoning may have allowed the difference to develop without close scrutiny. EDWARDS, BILLS OF EXCHANGE AND PROMISSORY NOTES (1863) \*396, \*397.

45. 3 Johns. 259 (N. Y. Sup. Ct. 1802). 46. 3 KENT, COMMENTARIES (1826) 58.

"check rule" as "law." In 1843, *The Matter of Brown* came before Story.<sup>47</sup> The accommodation maker of a note had been forced to pay, and he now turned to the accommodated payee for reimbursement. The payee had drawn a check to secure his creditor, the accommodation maker, and the check was subsequently dishonored. In the suit which followed, the debtor raised the defense that his creditor (the accommodation maker) had neither presented the check in due time nor given proper notice of dishonor. Justice Story greeted this defense in the following classic words: "A more inequitable defense against a just debt can scarcely be imagined. It is precisely what a Court of Equity would feel itself bound to redress by the fullest exercise of its powers . . ." <sup>48</sup> He did not indicate any reason, perhaps he did not believe that any existed, why this defense would be less inequitable in the case of a bill.

Meanwhile this check rule had made its appearance in England. Two years before *The Matter of Brown*, Lord Abinger in *Serle v. Norton*,<sup>49</sup> made the rather innocent remark that "It is reasonable to allow some little space of time in the case of cheques on county bankers beyond what is usual in the case of London bankers. If, indeed, any loss had been sustained by the defendant through the non-presentment at any earlier period, that might have made a difference." One year later, Chief Justice Tindal, in the case of *Alexander v. Burchfield*, enlarged upon the dictum. "In the case of a cheque," he said, "the holder does not lose his remedy against the drawer, by reason of non-presentment within any prescribed time after taking it, unless the insolvency of the party on whom it is drawn has taken place on the interval. . . ." <sup>50</sup> It remained, however, for Mr. Justice Patterson, in *Robinson v. Hawksford*, to establish the check rule as controlling in England, by announcing, with considerable braggadocio (for the statement was not necessary to the case before him) that he could not "see that there is anything unreasonable in keeping a cheque for any time short of six years."<sup>51</sup> After such a pronouncement, it was only natural that subsequent editions of Chitty and Byles should declare that a drawer would not be discharged on the check through the laches of the creditor if there was no injury; and they did so as though it had always been the law.<sup>52</sup>

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47. 4 Fed. Cas. No. 1,985, at 342 (C. C. Mass. 1843).

48. Id. at 524. For the further development of this check rule see *Daniels v. Kyle*, 1 Ga. 304 (1847); *Morrison v. McCartney*, 30 Mo. 183 (1860); *Freeholders of Middlesex v. Thomas*, 20 N. J. Eq. 39 (Ch. 1869) (basing the result on an implied contract assumed by the holder); *Kinyon v. Stanton*, 44 Wis. 479 (1878).

49. 2 M. & Rob. 402 (N. P. 1841).      50. 7 Man. & G. 1061 (C. P. 1842).

51. 15 L. J. Q. B. (N. S.) 377 (1846). It was subsequently held that the claim on the cheque against the drawer was barred by the six year prescription period. Judge Patterson's dictum was the basis of the decision in the later case of *In re Bethell*, 34 Ch. D. 561 (1887).

52. CHITTY, *BILLS OF EXCHANGE* (11th ed. 1878) 361; BYLES, *BILLS* (10th ed. 1870)

Although we can trace the development of this distinction between bills and checks, we can only conjecture as to the reason for it. It should not be forgotten that there was some feeling that the drawer of a check, like the maker of a note, is the primary debtor, not to be discharged by the laches of the holder.<sup>53</sup> There is, of course, a clear functional difference between bills and checks in that bills are regarded, perhaps erroneously, merely as a means of liquidating a claim against the drawee which has arisen through a prior business transaction, while the check is used chiefly as a device to transfer deposit currency. In most cases the bank honors checks only if the drawer has adequate funds in its hands. This view of the check is reflected in the conviction that a check, unlike a bill, was a definite appropriation of a fund in the hands of the bank to the benefit of the creditor.<sup>54</sup> If a fund had been definitely appropriated, even though only conceptually, it might have seemed more unfair to bar the creditor from access to this fund because of his laches. It is also possible that the check rule grew up as a result of the use of banks as collecting agents for checks. This made the question of determining what was a reasonable time for the presentment of checks more difficult. Should, for instance, the banks in the provinces have more time than those in the City of London? Would it be necessary to abandon the strict rule of one day's time and make a new rule based on the particular custom of each locality? There is some evidence that in order to avoid this difficulty a broader rule was made; there was to be no question as to the reasonable time for presentment of a check in all those cases where the drawer had suffered no injury due to the laches of the holder. It was hoped that the injury cases would be so few in number that litigation to determine what constituted a reasonable time as applied to them would be scarce and therefore occasion no difficulty.<sup>55</sup>

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19-20. For further development of the English rule see *Laws v. Rand*, 3 C. B. N. S. 441 (1857); *Hopkins v. Ware*, 20 L. T. R. (N. S.) 668 (Ex. 1869); *Heywood v. Pickering*, L. R. 9 Q. B. 428 (1874).

53. See *Ramchurn Mullick v. Luchmeechund Radakissen*, 9 Moo. P. C. 46, 70 (1854); *Morrison v. McCartney*, 30 Mo. 183, 187 (1860). See also 4 KENT, COMMENTARIES (4th ed. 1840) 549. The idea that the drawer of a check is a principal debtor persists. See *Jones v. Board of Education*, 242 App. Div. 17, 272 N. Y. Supp. 5 (1934); FALCONBRIDGE, BANKING AND BILLS OF EXCHANGE (5th ed. 1935) 774.

54. See *Keene v. Beard*, 8 C. B. N. S. 372, 379 (1860); *King v. Porter* [1925] N. I. 107, 119; *Daniels v. Kyle*, 1 Ga. 304 (1846). But see *Hopkinson v. Forster*, L. R. 19 Eq. 74 (1873).

It has been suggested that one reason why the drawer is not discharged in the absence of injury is that "the drawer may protect himself by withdrawing them (the funds) or withholding the further accumulation of effects in the drawee's hands." *Commercial Bank of Albany v. Hughes*, 17 Wend. 94, 97 (N. Y. 1837). The argument, however, goes too far since it denies the obligation not to withdraw which is often stated to exist, and it would also put the risk of loss on the drawer.

55. See *Rickford v. Ridge*, 2 Camp. 537 (N. P. 1810); *Alexander v. Burchfield*, 7 Man. & G. 1061, 1067 (Com. Pl. 1842) (the court refused to extend the "reasonable time,"

When injury to the debtor-drawer does result from the creditor's laches, the debtor is totally discharged under the English common law rule, irrespective of the size of the injury.<sup>56</sup> In this country, for a time a similar result obtained.<sup>57</sup> The rationalization of the result probably was similar to that suggested by some recent cases, that the creditor has "made the check his own" under such circumstances.<sup>58</sup> This notion of the creditor as a converter of the instrument, could easily have caused the rule affording total discharge to the injured debtor, to become firmly established in this country. But the majority rule as it is today stated, and this may be due in part to an over-enthusiastic interpretation of Kent by Story,<sup>59</sup> discharges the injured debtor-drawer only pro tanto on the instrument and on the underlying obligation. Yet a study of the cases applying this pro tanto rule will show that actual apportionment of the loss is rarely made,<sup>60</sup> possibly for the reason that it generally is extremely difficult to prove less than total loss. In any event it is almost correct to say, for practical purposes, that total discharge follows any injury to the drawer of a check.<sup>61</sup> It may be, however, that out-of-court assignments of the

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stating that the holder still had his remedy against the drawer despite delay in presentment, unless the drawee's insolvency intervened). There was an early suggestion that what is a reasonable time for the presentment of a check may differ radically from that of a bill, despite the usual statement that checks have a shorter period for presentment. See *Rothschild v. Corry*, 9 Barn. & Cress. 388 (K. B. 1829); *Story, Promissory Notes* (2nd ed. 1847) 648.

56. See *Laws v. Rand*, 3 C. B. N. S. 442 (1857) and cases therein cited; *King v. Porter* [1925] N. I. 107.

57. See 3 *Kent, Commentaries* (5th ed. 1844) 104-105.

58. *Watt v. Gans*, 114 Ala. 264, 21 So. 1011 (1896); *Lowell Co-operative Bank v. Sheridan*, 284 Mass. 594, 188 N. E. 636 (1934); *Kilpatrick v. Home B. & L. Ass'n.*, 119 Pa. 30, 12 Atl. 754 (1888); *Wessel v. Montgomery*, 106 Pa. Super. 341, 163 Atl. 347 (1932); *Manitoba Mortgage and Investment Co., Ltd. v. Weiss*, 18 S. D. 459, 101 N. W. 37 (1904). See *Kraetsch v. City of Chicago*, 198 Ill. App. 395 (1916).

This assumption of risk would arise where the payee had notice that any delay in presentment would be dangerous; if upon such notice he took the check he could not be allowed even the usual time, if injury should result. *Sinclair Refining Co. v. Keith*, 97 Okla. 55, 221 Pac. 1003 (1923).

59. *Story, Promissory Notes* (2nd ed. 1847) 655. Neither the note referred to in *Kent* (*supra* note 57) nor the cases cited in *Story* can be said to be authority for a pro tanto rule: if there was injury, the drawer was totally discharged.

60. See *Ostrander v. Sauer*, 208 Iowa 77, 224 N. W. 581 (1929); *Graham v. Morstadt*, 40 Mo. App. 333 (1890); *Sulsberger & Sons Co. v. Cramer*, 170 App. Div. 114, 155 N. Y. S. 775 (1915); *Mars, Inc. v. Chubrilov*, 216 Wis. 313, 257 N. W. 157 (1934). The lower court in *Kling Bros. & Co. v. Whipps*, 132 Okla. 253, 270 Pac. 79 (1928) apportioned the loss. And the court wished to employ the pro tanto rule in *Sugnet v. Board of Education*, 241 App. Div. 883, 272 N. Y. Supp. 21 (2nd Dep't. 1934) and in *Hawks v. Board of Education*, 241 App. Div. 880, 272 N. Y. Supp. 24 (2nd Dep't, 1934), but it was not informed as to what the loss would be.

61. *Daniels v. Kyle*, 5 Ga. 245 (1848); *Campbell v. Shark*, 46 Idaho 278, 267 Pac. 458 (1928) (the creditor may not introduce evidence that a depositor of the same class as

drawer's rights against the bank have somewhat protected the holder,<sup>62</sup> although there seems to be little reason why a drawer should make such an assignment in those states where the holder has the burden of proving the absence of injury.<sup>63</sup>

Back of the court's failure to apportion the loss, and of the growth of the common law rule, at least in England, that discharge on both the instrument and the underlying obligation is total when any injury is shown, may be something analogous to the traditional treatment of contributory negligence. It is undoubtedly harsh to bar a creditor who has been guilty of contributory negligence from all relief against the tort-feasor.<sup>64</sup> Thus, in the case of a check, the creditor recovers if it is shown that no loss has resulted from his laches; but if loss is shown, he may not recover at all. The court again is attempting to avoid what may be a difficult question of damages. In the case of a bill,

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the drawer received a dividend when the drawee bank's insolvency was the injury of which the drawer complains); *Hamlin v. Simpson*, 105 Iowa 125, 74 N. W. 906 (1898); *Northern Lumber Co. v. Clausen*, 201 Iowa 701, 208 N. W. 72 (1926); *Anderson v. Rodgers*, 53 Kan. 542, 36 Pac. 1067 (1894); *Henderson Chevrolet Co. v. Ingle*, 202 N. C. 158, 162 S. E. 219 (1932). See *Gordon v. Levine*, 194 Mass. 418, 80 N. E. 505 (1907). Cf. *Stark v. Public Nat. Bank*, 123 Misc. 647, 649, 206 N. Y. Supp. 8, 11 (1924). See (1930) 8 N. C. L. REV. 444, 449.

62. See *Gregg v. George*, 16 Kan. 546 (1876).

63. In the application of the so-called pro tanto rule, considerable difference has arisen as to the burden of proof. The majority rule seems to be that the drawer will have the burden of showing that he has been injured. *Empire-Arizona Copper Co. v. Shaw*, 20 Ariz. 471, 181 Pac. 464 (1919); *Newell Contracting Co. v. Lacy*, 229 Ala. 208, 155 So. 379 (1934); *McDaniel v. Mackey*, 40 Ga. App. 517, 10 S. E. 439 (1929); *Sims v. Hunter*, 44 Idaho 505, 258 Pac. 550 (1927); *Cox v. Citizens State Bank*, 73 Kan. 789, 85 Pac. 702 (1906); *Spink, etc., Drug Co. v. Ryan Drug Co.*, 72 Minn. 178, 75 N. W. 18 (1898); *Dehous v. Lewis*, 128 App. Div. 131, 112 N. Y. Supp. 559 (1908); *Rosenbaum v. Hazard*, 233 Pa. 206, 82 Atl. 62 (1911); *Mars, Inc. v. Chubriilo*, 216 Wis. 313, 257 N. W. 157 (1934). See *Nuzum v. Sheppard*, 87 W. Va. 243, 104 S. E. 587 (1920). That the holder, however, has the burden of proving no injury: *National Plumbing Co. v. Stevenson*, 213 Ill. App. 49 (1918); *Nelson v. Kastle*, 105 Mo. App. 187, 79 S. W. 730 (1904); cf. *Kirkpatrick v. Puryear*, 93 Tenn. 409, 24 S. W. 1130 (1894) (the burden of proof of loss to an indorser, if there is laches, shifts to the holder, namely, to prove there was no injury, but recognizes the majority rule in regard to a drawer, by dictum).

In some of the states applying the majority rule, the burden is satisfied if the drawer shows that the drawee bank is insolvent, and it remains for the holder to show that there is no causal relation between his laches and the damage caused by the insolvency. *Watt v. Gans*, 114 Ala. 264, 21 So. 1011 (1896); *Sanders v. Lifsey*, 41 Ga. App. 395, 153 S. E. 104 (1930); *Hamlin v. Simpson*, 105 Iowa 125, 74 N. W. 906 (1898); *Martin Lumber Co. v. Rice*, 136 Okla. 172, 276 Pac. 733 (1929); see *Spink, etc., Drug Co. v. Ryan Drug Co.*, 72 Minn. 178, 180, 75 N. W. 18, 19 (1898). It has been held, however, that the drawer will have this burden only if the holder sues on the original claim. *Bradford v. Fox*, 38 N. Y. 289 (1868). But see *Hamlin v. Simpson*, *supra*, where it seems that the holder will have the burden whether the suit is on the instrument or on the underlying obligation.

64. See GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS (1936); Bohlen, Book Review (1936) 45 YALE L. J. 1528.



because of an anomalous presumption that the creditor's negligence causes total damage in every case, he may not recover from the debtor even though no damage has in fact been suffered. If, however, presentment and notice of dishonor are excused, the creditor is not guilty of laches on a bill, or on a check if injury is shown (although this may be modified by a pro tanto rule).<sup>65</sup> But a declaration by the acceptor that he will not pay, or the bankruptcy of the acceptor, will not excuse the necessity for presentment.<sup>66</sup> If the drawer had no effects in the drawee's hands, however, and no reasonable expectation that the drawee would pay, both presentment and notice of dishonor are excused.<sup>67</sup> Such a holding seems almost equivalent to a conclusive presumption that the drawer had not been injured by the holder's "laches" in failing to present. Indeed, Lord Kenyon, in *Dennis v. Morrice*,<sup>30</sup> alluded to the fact that if the drawee held no funds of the drawer, notice was dispensed with, but, he said, to allow proof that the drawer had suffered no injury in every case "would be extending the rule still further than ever has been done, and opening new sources of litigation in investigating whether in fact the drawer did receive prejudice for the want of notice or not." That the basis for excusing presentment and notice is in effect a presumption of

65. Where the drawer had no funds in the bank at the time of drawing or subsequently withdrew them, presentment is not required. *Carson & Co. v. Fincher*, 133 Mich. 666, 101 N. W. 844 (1904); *First National Bank v. Linn County National Bank*, 30 Ore. 296, 47 Pac. 614 (1897); see *Westphal v. Ludlow*, 6 Fed. 348 (C. C. D. Minn. 1881); *Briggs v. Parson*, 39 Mich. 400, 405 (1878); *Jones v. Heiliger*, 36 Wis. 149 (1874); cf. *Whitten v. Wright*, 34 Mich. 92 (1872); *American Nat. Bank v. Bank of Bandon*, 240 Fed. 624 (C. C. A. 9th, 1917). Similarly, where there is a partial deficiency of deposit, presentment is excused. *Grant v. MacNutt*, 12 Misc. 20, 33 N. Y. Supp. 62 (Com. Pl. 1895). But in either case, there must be a demand to hold an indorser. *Mohawk Bank v. Broderick*, 10 Wend. 304 (N. Y. Sup. Ct. 1839). No notice of dishonor is required where the drawer had no funds with the drawee, at least on general demurrer. *Kemble v. Mills*, 1 Man. & G. 75 (C. P. 1840). Where presentment or notice of dishonor is thus excused, and the bill or check was taken in payment for a chattel, the creditor if the check remains unpaid may rescind the transaction and recover the chattel from the buyer and those who stand in no better position than he. *South San Francisco Packing Co. v. Jacobsen*, 183 Cal. 131, 190 Pac. 628 (1920); *Peoples State Bank v. Brown*, 80 Kan. 520, 103 Pac. 102 (1909); *Globe Milling Co. v. Minneapolis Elevator Co.*, 44 Minn. 153, 46 N. W. 306 (1890); *Ballard v. First National Bank*, 195 S. W. 559 (Mo. App. 1917); *Mott v. Nelson*, 96 Okla. 117, 220 Pac. 617 (1923). See WILLISTON, SALES (2nd ed. 1924) § 346a. Where there is a stop payment order, presentment is not required to hold the drawer. *Sebree v. Thomas*, 166 Ill. App. 427 (1911); *Patterson v. Oakes*, 191 Iowa 78, 181 N. W. 787 (1926); *Usher v. Tucker*, 217 Mass. 441, 105 N. W. 360 (1914); *Worden v. Frazee*, 6 Jones & Span. 190 (N. Y. Super. Ct. 1874). But see *Brown v. Cow Creek Sheep Co.*, 121 Wyo. 1, 126 Pac. 886 (1912). And in England, proof that the drawer has countermanded payment does not excuse presentment. *Hill v. Heap, Dowl. & Ry.* N. P. 57 (1822).

66. *Baker v. Birch*, 3 Camp. 107 (N. P. 1811); *Esdaille v. Sowerby*, 11 East. 114, 117 (K. B. 1809); *Purcell v. Allemong*, 22 Grat. 739 (Va. 1872).

67. *Terry v. Parker*, 6 Ad. & E. 502 (K. B. 1837); N. I. L. §§ 79, 114 (4); BILLS OR EXCHANGE ACT, §§ 46 (2) (c), 50 (2) (c). And see cases cited note 65 *supra*.

no damage, is further indicated by *Cory v. Scott*.<sup>68</sup> Here the creditor had failed to give notice of dishonor. The drawer had no effects with the drawee, but the bill had been drawn for the accommodation of an indorsee. It was pointed out that if the drawer received no notice of dishonor, his right against the accommodated indorsee might be impaired. The drawer was therefore totally discharged, although normally notice would have been excused. The mechanism of these presumptions provides the courts with a device for shifting loss, analogous to the last clear chance doctrine, and similarly inadequate as a means of apportioning loss.

The British Bills of Exchange Act contains a more successful device for apportioning loss resulting from the laches of a creditor who holds a check drawn by his debtor. The holder's rights against the drawer remain intact unless the drawer has suffered injury. Where there is injury, however, it is presumed to be to the full amount of the check, but the holder gains an assignment of the drawer's right to that amount against the bank.<sup>43</sup> The result is equitable where the injury is the insolvency of the drawee bank, but it is possible that the injury to the drawer may be caused by something other than the drawee's insolvency. And in such a case, the problem will arise whether the statute is applicable. It is at least arguable that the only type of injury for which the holder must account, is the drawee's insolvency, because all other injuries are too remote.<sup>69</sup> But the English courts prior to the Bills of Exchange Act indicated, in two cases dealing with analogous problems, that other types of injury may not be too remote. In *Hopkins v. Warc*,<sup>70</sup> the debtor was discharged when the creditor failed to present a check drawn by the debtor's attorney in due time, and the attorney absconded during the period of laches. In *Cory v. Scott*,<sup>68</sup> one ground for holding that a creditor must give notice of dishonor of a bill of exchange despite the absence of effects in the drawee's hands, was the possibility that by the delay the drawer might lose his right of reimbursement against an accommodated indorsee. Assuming that the injury is not too remote, it may be held that the Act covers only cases in which the drawee becomes insolvent. If the Act is so interpreted, will the debtor then be totally discharged as he was at common law in England? Or, will it be held that the "spirit" of the provision establishes a pro tanto rule for all injury cases?

In this country the Negotiable Instruments Law codifies the pro tanto rule.<sup>71</sup> In most cases, however, courts have either allowed total dis-

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68. 3 Barn. & Ald. 619 (K. B. 1828).

69. See *King v. Porter* [1925] N. I. 107, and Comment (1925) 160 L. T. 67.

70. 20 L. T. R. (N. S.) 668 (Ex. 1869)

71. N. I. L. § 186.

charge or total recovery. The amount to be received from an insolvent bank is in most cases difficult to estimate, and although it theoretically is possible to keep the judgment open pending final liquidation,<sup>72</sup> the courts have not often done so. But, notwithstanding the codification of the pro tanto rule, some courts continue to hold that total discharge results wherever there has been any injury to the drawer.<sup>73</sup> The theory offered in justification, especially by Chief Justice Rugg of the Massachusetts Supreme Judicial Court, is that by his conduct the creditor has made the check his own. His views may be justified when the check has been certified, for the holder would still have a right of action against the bank despite his laches. Such was the case in *Seager v. Dauphinee*.<sup>74</sup> But in *Lowell Co-Operative Bank v. Sheridan*,<sup>75</sup> where there appears to have been no certification, Chief Justice Rugg gave the defendant his complete discharge, stating that "the plaintiff made the check its own, not having presented it for payment within the time permitted by law." The decision is all the more interesting in that it quotes the pro tanto statutory provision as a prelude to granting total discharge.

Even under the pro tanto rule of the statute it is still, of course, necessary to determine whether the injury of which the debtor complains was in fact caused by the holder's laches.<sup>76</sup> The rule has often been stated, though some authority to the contrary may be found, as if the only injury of which the holder must take account, is the drawee's insolvency.<sup>77</sup> Thus in *Andrus v. Bradley*,<sup>78</sup> the drawer of a check made

72. See (1930) 8 N. C. L. REV. 444, 449.

73. *Lowell Co-operative Bank v. Sheridan*; *Wessel v. Montgomery*; *Manitoba Mortgage and Investment Co., Ltd., v. Weiss*, all *supra* note 58.

74. 284 Mass. 96, 187 N. E. 94 (1933). See Steffen and Starr, *A Blue Print for the Certified Check* (1935) 13 N. C. L. REV. 450, 471, commenting on this case.

75. 284 Mass. 594, 188 N. E. 636 (1934).

76. Of course, in certain cases the delay apparently has no causal relation to the injury, as where the check was incorrectly signed by the drawer and would not have been honored anyway. *School District v. Eager*, 19 Okla. 235, 91 Pac. 847 (1907). Or where the drawer's error itself caused the delay, such as the situation in which the check was drawn on a bank which no longer existed. *Joerns Bros. Mfg. Co. v. Burns*, 173 Minn. 389, 217 N. W. 506 (1928). See *Bradbury Fertilizer Co. v. Lathrop*, 2 N. Y. City Ct. Rep. 289 (1886).

77. *Andrus v. Bradley*, 102 Fed. 54 (C. C. E. D. Pa. 1900); *Heralds of Liberty v. Hurd*, 44 Pa. Super. 478 (1910). See *Morrison v. McCartney*, 30 Mo. 183 (1860). But see *Oldridge v. Sutton*, 157 Mo. App. 485, 137 S. W. 994 (1911). In a number of cases in which the drawer was discharged on the underlying debt because of the holder's laches, the only damage apparent was in the settlement of accounts with the drawee. *Adams v. Boyd*, 33 Ark. 33 (1878); *Stam v. Kerr*, 31 Miss. 199 (1856); *Schierl v. Baumel*, 75 Wis. 69, 43 N. W. 724 (1889).

The writer of the Note in (1912) 38 L. R. A. (N. S.) 255, argues that any kind of injury proximately caused by the delay is sufficient. But *Moskowitz v. Deutch*, 46 Misc. 603, 92 N. Y. Supp. 721 (Sup. Ct. 1905) may be construed as *contra*. It is suggested that under § 186 of the N. I. L., as amended in the Illinois Act (*infra* note 83), there may

a settlement of his accounts with the payee on the basis that the check was still in the payee's possession and would not be presented. But the payee had passed the check onto the holder who had failed to present the check within a reasonable time. It is fair to assume that if due presentment had taken place the drawer would not have been defrauded. Nevertheless, the court held the drawer liable on the ground that only the insolvency of the drawee will discharge the drawer where the holder has been guilty of laches. In *Heralds of Liberty v. Hurd*,<sup>79</sup> the court refused to allow the drawer to set up as injury, the settlement of a partnership account in the belief that the check had been paid. The check was still outstanding because the holder had failed to present it for payment. On the other hand, the New York court, in an action based on breach of a contract to establish a line of credit, held that the insolvency of the agent of the drawer (with whom the drawer had deposited funds) during the period of the holder's laches, would be sufficient to discharge the drawer.<sup>80</sup>

Neither the Bills of Exchange Act nor the Negotiable Instruments Law defines the effect of a holder's failure to give notice of dishonor on the liability of the drawer of a check. Ames suggested that the result of the omission would be the drawer's total discharge;<sup>81</sup> Brannan concluded that under the Act the drawer was discharged.<sup>82</sup> In practice, however, the "pro tanto" injury rule seems to have been applied in this country.<sup>83</sup>

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be no requirement either to present or give notice save where the loss is caused by the failure of the drawee bank. Turner, *Revision of the Negotiable Instruments Law* (1928) 38 YALE L. J. 25, 54.

78. 102 Fed. 54 (C. C. E. D. Pa. 1900).

79. 44 Pa. Super. 478 (1910).

80. *Ferrari v. First National Bank of Conhellsville, Pa.*, 246 N. Y. 382, 159 N. E. 178 (1927). See Note (1926) 40 HARV. L. REV. 128, commenting on the lower court's decision which was here reversed.

It should be noted that where the check used in "payment" has been drawn for the accommodation of the debtor, the courts are less inclined to hold the drawer discharged because of the creditor's laches. See *Stewart v. Smith*, 17 Ohio St. 82, 86 (1866); *Deener v. Brown*, 1 McArthur 350 (D. C. (1874)). But cf. *Griffin v. Riblet*, 6 N. Y. Leg. Obs. 421 (1848). See also Note (1902) 53 L. R. A. 433.

81. Ames, *The Negotiable Instruments Law* (1900) 14 HARV. L. REV. 241, 256; Ames, *The Negotiable Instruments Law—Necessary Amendments* (1903) 16 HARV. L. REV. 255, 261.

82. Brannan, *Some Necessary Amendments of the Negotiable Instruments Law* (1913) 26 HARV. L. REV. 588, 599-600. He suggests an amendment to § 186 to include failure to give due notice of dishonor. An amendment of similar nature is proposed in HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS (1933) 204.

83. *Deal v. Atlantic Coast Line Rr.*, 225 Ala. 533, 144 So. 81 (1932); *Williams v. Braun*, 14 Cal. App. 396, 112 Pac. 465 (1910); *Industrial Bank of Chicago v. Bowes*, 165 Ill. 70, 46 N. E. 10 (1897); *Cellars v. Dwinnell*, 87 Mont. 73, 285 Pac. 181 (1930); *Morris-Miller Co. v. Von Pressentin*, 63 Wash. 74, 114 Pac. 912 (1911). See *Gregg v. George*, 16 Kan. 546 (1876); *Lowell Co-operative Bank v. Sheridan*, 284 Mass. 594, 188

No difficulty has been occasioned as yet upon the point in England.<sup>84</sup>

Under German law, the debtor-drawer of a bill or a check is discharged on the instrument by the creditor's failure to make due presentment, or by his failure to obtain a proper protest when the drawee refuses to pay; but incongruously, failure to give due notice of dishonor does not discharge the debtor on the instrument, although the creditor is liable in damages.<sup>85</sup>

In order to preserve his right on the underlying obligation, the creditor is usually under a duty to present the instrument for payment, and, if it is dishonored, to notify his debtor so that the latter can safeguard his rights against the drawee.<sup>86</sup> Since the debtor is the drawer, however, the creditor need not obtain a protest since such action is only necessary in order to preserve rights of recourse against prior parties, and the drawer, of course, never has any right of recourse on the instrument to preserve.<sup>87</sup> But the creditor may nevertheless recover in toto on the underlying obligation notwithstanding his failure to make due presentment or to give notice of dishonor, unless he or his agent, for instance the collecting bank, has been negligent in the performance of his duties,<sup>88</sup> and such negligence has injured the debtor.<sup>89</sup> No damages, however,

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N. E. 636 (1934); *Jones v. Board of Education*, 242 App. Div. 17, 29, 272 N. Y. Supp. 5, 19 (1934); (1933) 46 HARV. L. REV. 845. But see *Bacigalupo v. Parilli*, 112 N. Y. Supp. 1040 (App. Div. 1908). *Contra*: *Ewald v. Faulhaber Stable Co.*, 55 Misc. 275, 105 N. Y. Supp. 114 (Sup. Ct. 1907); *Kuffick v. Glasser*, 114 N. Y. Supp. 870 (App. Div. 1909). A few states have amended § 186 to include the case of notice of dishonor. ILL. REV. STAT. (Cahill 1935) c. 98, § 207; S. D. COMP. LAW (1929) § 1888; W. VA. CODE (Michie 1932) § 4497.

Generally, however, the drawer will not be entitled to notice of dishonor, for in most instances the reason for dishonor is either insufficient funds or a stop payment order. See N. I. L. § 114. Falconbridge says "it is anomalous that the drawer of a cheque should ever be entitled to notice of dishonour, he being the principal debtor on the instrument and having recourse against no one," but concludes that he is under § 96 of the Canadian Bills of Exchange Act and therefore entitled to notice. FALCONBRIDGE, *BANKING AND BILLS OF EXCHANGE* (5th ed. 1935) 774.

84. In *Heywood v. Pickering*, L. R. 9 Q. B. 428 (1874) the court expressly refused to deal with this point. But see *In re British and American Steam Navigation Co.*, L. R. 8 Eq. 506 (1869).

85. GERMAN WECHSELGESETZ (1933) Art. 43, 44, 53, 45; GERMAN SCHECKGESETZ Art. 40-42 (1934).

86. STAUB-STRANZ, *op. cit. supra* note 2, at Art. 89 Anm. 26a. The creditor is, however, under no duty to sue prior parties, but may sue the debtor immediately. Reichsgericht, October 10, 1896 (1896) 26 JURISITSCHE WOCHENSCHRIFT 640.

87. GERMAN WECHSELGESETZ (1933) Art. 53.

88. LANGEN, ZUM SCHECKRECHT (1910) 31 n. 119; 1 BREIT, *op. cit. supra* note 3, at 30f; STAUB-STRANZ, *op. cit. supra* note 2, at Art. 89 Anm. 26a; *contra*: MUELLER-ERZBACH, *op. cit. supra* note 2, at 508. The requirement of diligence results from the theory that the creditor who is guilty of laches breaches a contract implied in fact. Such a breach presupposes that the creditor was in fault (BUERGERLICHES GESETZBUCH § 276). MUELLER-ERZBACH *ibid.*

89. 2 GRUENHUT, *op. cit. supra* note 2, at 308; but see Reichsgericht, January 4, 1899, 10 SAECHSISCHES ARCHIV 239.

are said to result if the drawer had no funds with the drawee at maturity or if the drawee was already insolvent at maturity or if the drawee is still solvent.<sup>90</sup> But if the drawee has become insolvent after the maturity of the instrument and would have paid had it been duly presented, the debtor has been damaged and the creditor will be liable to that amount. In effect, therefore, the debtor who has been injured by the creditor's negligence is discharged pro tanto on the underlying obligation. But, where such discharge is allowed, it is not apparent whether the creditor will be given an assignment of the debtor's right to dividends from the insolvent drawee; or whether the court will merely estimate the amount of these dividends and allow the creditor to recover from the debtor the full claim less the amount of damage.

Under French law, if the debtor has paid by drawing a bill or check, and the creditor-payee has not exercised due diligence, the latter nevertheless has a cause of action against the drawer on the instrument, if there were no funds with the drawee at maturity. This situation arises from the fact that since the Ordonnance de Commerce of 1673,<sup>91</sup> the liability of the drawer of a bill, in contrast to that of an indorser,<sup>92</sup> subsists despite the holder's laches, unless he proves that at the time of maturity he had on deposit with the drawee funds sufficient to meet the instrument.<sup>93</sup> If he does not come within this exception, he is still liable, because he would otherwise be unjustly enriched at the holder's expense.<sup>94</sup>

Moreover, if the debtor-drawer did have an enforceable claim against the drawee, the holder has a right of action directly against the drawee, even though the latter has not accepted. This is effected through the application of the *provision* doctrine.<sup>95</sup> *Provision* is the claim which a drawer has or is supposed to have against the drawee, at the maturity of the instrument if it is a bill of exchange,<sup>96</sup> or if the instrument is a

90. 2 GRUENHUT, op. cit. *supra* note 2, at 308 n. 30.

91. Titre 5 art. 16; 1 GRUENHUT, op. cit. *supra* note 2, at 199.

92. CODE DE COMMERCE art. 156 (5); 4 LYON-CAEN ET RENAULT, op. cit. *supra* note 28, at § 413.

93. CODE DE COMMERCE art. 156 (6).

94. 2 LACOUR ET BOUTERON, op. cit. *supra* note 30, at § 1368. WIELAND, op. cit. *supra* note 15, at 45.

95. LYON-CAEN ET RENAULT, op. cit. *supra* note 28, at §§ 159 et seq.; HIRSCH, DIE FRANZOESISCHE WECHSELPROVISIONSLEHRE (1930); WAHL, Die Franzoesische Wechselprovisionslehre, (1930) 4 ZEITSCHRIFT FUER AUSLAENDISCHES UND INTERNATIONALES PRIVATRECHT 405.

96. CODE DE COMMERCE art. 116. However, the drawer, although he has negotiated the instrument, may nevertheless withdraw the funds. WAHL, *supra* note 95 at 408. But the holder can destroy this power of withdrawal by informing the drawee of the drawing and negotiation of the bill of exchange and forbidding him to pay his debtor, the drawer. 4 LYON-CAEN ET RENAULT, op. cit. *supra* note 28 at § 178 bis. At maturity, the mere

check at the time of its issuance.<sup>97</sup> This claim, the presence of which justifies the drawing of the instrument, may arise out of any transaction, for instance a sale, a factor's contract, or a line of credit.<sup>98</sup> The peculiarity of the doctrine lies in the rule that the *provision* travels with the instrument.<sup>99</sup> Therefore, the holder has a direct cause of action against the drawee based upon the drawer's claim against the drawee.<sup>100</sup> The application of the rule is of particular importance where the drawer has become insolvent, for in such a case the *provision* belongs to the holder and not to the drawer's receiver.<sup>101</sup>

Intermediate between the situation where the debtor gives his own note or accepts a bill, and where the debtor draws a bill or check, is the case in which the debtor makes a note or accepts a bill payable at a certain place. When the drawer or acceptor has on deposit a fund at the place of payment, this domiciled instrument in some respects resembles a check. And in England and America, the check rule, if applied, would, of course, discharge the debtor when the creditor was guilty of laches, at least to the extent to which any part of this fund was lost through the insolvency of the agent. The majority rule, however, holds the debtor liable, even though the creditor has been negligent and the debtor injured through the failure of the bank in which the funds to meet the instrument were deposited.<sup>102</sup> The anomaly of this result may be demonstrated by the fact that, if the holder forwarded the note

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presentment of the instrument is apparently sufficient to hinder a payment to the drawer which would discharge the drawee. Cour de Cassation, July 2, 1883, *DALLOZ JURISPRUDENCE* (1884) 1272.

97. Décret unifiant le droit en matière de chèques (30 octobre 1935) art. 3(3); 1 *BOUTERON*, op. cit. *supra* note 34 at 224 et seq.

98. *WAHL*, *supra* note 95 at 406. However, the drawer who is sued on the instrument by the creditor cannot escape liability by pleading that the drawee was bound to honor the instrument because of a line of credit agreement. He must show that he had actual funds with the drawee. 4 *LYON-CAEN ET RENAULT*, op. cit. *supra* note 28 at §§ 106, 406, 409; 2 *LACOUR ET BOUTERON*, op. cit. *supra* note 30 at § 1238.

99. *CODE DE COMMERCE*, art. 116 (3).

100. It would be erroneous to believe that this theory makes an acceptance superfluous. If the drawee has accepted, a bona fide indorsee is protected against all personal defenses which the drawee might have against the drawer. If the holder has to sue on the *provision* those defenses are available because he is in effect only an assignee. *WAHL*, *supra* note 95, at 409.

101. Since the creditor-holder who is guilty of laches could apparently demand to be subrogated to the drawer's claim against the drawee, the *provision* theory is of real practical importance only where the drawer is bankrupt. It further prohibits the creditors of the drawer from garnishing the drawer's claim against the drawee after the negotiation of the instrument. *WAHL*, *PRECIS DE DROIT COMMERCIAL* (1922) § 1947.

102. *Moore v. Altom*, 196 Ala. 158, 71 So. 681 (1916); *Federal Intermediate Credit Bank v. Epstin*, 151 S. C. 67, 148, S. E. 713 (1929); *Binghamton Pharmacy v. First National Bank*, 131 Tenn. 711, 176 S. W. 1038 (1915); *BYLES*, op. cit. *supra* note 4 (19th ed. 1931) 211, 219.

or accepted bill for collection to the bank of payment, and delay had occurred on the part of the bank and it subsequently became insolvent, the maker or acceptor would be discharged.<sup>103</sup> In Germany, under a provision of the former German Wechselordnung in effect until 1908,<sup>104</sup> the holder of a domiciled acceptance had to make presentment, and, if he received no payment, to obtain a protest in order to preserve his rights against the acceptor. The latter was in this respect treated like a drawer. And a much cited decision of the German Reichsgericht held that the creditor's laches would not discharge the debtor on the underlying obligation if he was not damaged.<sup>105</sup> If injury to the debtor did result from the insolvency of the bank, the acceptor would be discharged pro tanto on the underlying obligation. But under the German Wechselordnung since 1908, and under the present German Wechselgesetz (statute governing bills of exchange and promissory notes), the holder of a domiciled acceptance need no longer present it at maturity in order to preserve his rights on the instrument. However, when the creditor fails to make due presentment it is very doubtful whether the acceptor must now bear the risk of the insolvency of the payor-bank after maturity. It may be argued<sup>106</sup> that the creditor by taking the domiciled acceptance assumes the duty to collect on the instrument at maturity, and if he fails to perform this duty, he is liable in damages. Thus the creditor's claim on the instrument against the acceptor would be subject to the debtor's counterclaim for damages.<sup>107</sup>

*Fourth Variation:* The fourth situation presents a debtor who has indorsed a bill or uncertified check to his creditor. In both England and this country the indorser is generally discharged on the instrument and on the underlying obligation, if the creditor has been guilty of laches.<sup>108</sup> In a few states, it has been suggested that the indorser will

103. *Scott County Milling Co. v. Weems*, 179 Ark. 935, 19 S. W. (2d) 1027 (1929); *Baldwin's Bank of Penn Yan v. Smith*, 215 N. Y. 76, 109 N. E. 138 (1915).

104. *Wechselordnung* Art. 43.

105. Reichsgericht, February 20, 1891, 27 *Entscheidungen des Reichsgerichts in Zivilsachen* 88.

106. I. VON STAUDINGERS, *KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH UND DEM EINFÜHRUNGSGESETZ* (9th ed. 1930) 678.

107. No mention is apparently made by the French courts or textwriters as to the domiciled note or acceptance.

108. On the instrument: *BILLS OF EXCHANGE ACT*, 45 & 46 Vict., c. 61 (1882), §§ 40, 42, 45, 48, 86, 87 (2) (3); N. I. L. §§ 70, 89, 144; *First National Bank v. Mackey*, 157 Ill. App. 408 (1910); *Miller v. Moseley*, 26 La. Ann. 667 (1874); *Veazie Bank v. Winn.*, 40 Me. 60 (1855); *Parker v. Reddick*, 65 Miss. 242, 3 So. 575 (1888); *Moody v. Mack*, 43 Mo. 210 (1869); *First National Bank v. Miller*, 37 Neb. 500, 55 N. W. 1061 (1893), 43 Neb. 791, 62 N. W. 195 (1895); *Start v. Tupper*, 81 Vt. 19, 69 Atl. 151 (1908); *Gifford v. Hardell*, 88 Wis. 538, 60 N. W. 1064 (1894).

On the underlying obligation: *Denniston v. Imbrie*, 7 Fed. Cas. No. 3802 (C. C. D. Pa. 1818); *Brown v. Schintz*, 202 Ill. 509, 67 N. E. 172 (1903); *Wood Bros. Corp. v.*



be treated in the same manner as a drawer and that he will be discharged only if injured.<sup>109</sup> Discharge on the instrument is granted both at common law and under the Negotiable Instruments Law and the Bills of Exchange Act, for the reason that the holder's laches has deprived the indorser of his right of recourse on the instrument.<sup>110</sup> The discharge on the underlying obligation follows because if the indorser is held liable, his opportunity for reimbursement against a prior party would be limited to cases in which he had an enforceable claim against the prior party other than the one on the instrument, which has been lost because of the creditor's laches. In addition, it would involve difficult questions of damage if the prior party's solvency were in doubt.

In Germany, when the debtor is the indorser of the unaccepted bill or check used in "payment," the creditor is under an obligation to make due presentment, give due notice of dishonor, and in addition to obtain a proper protest if the instrument is dishonored, in order to preserve rights on the instrument.<sup>111</sup> Otherwise, he not only deprives himself of rights on the instrument, but his debtor-indorser loses any right of recourse against prior parties. However, German courts and textwriters agree that, despite his laches, the creditor has some remedy, although they disagree as to its form.

A majority of the textwriters maintain that the creditor who is guilty of laches may bring action against the debtor-indorser on the underlying obligation, subject, however, to the debtor's right to set-off any damages suffered.<sup>112</sup> But they base their argument in support of this thesis upon a hypothetical case in which no damages have been caused, that is, where all prior parties are solvent and have subsisting underlying obligations on which to fall back. But if any of the prior parties is insolvent, or, if an underlying obligation does not subsist between any prior parties except for the right of an accommodation party to reimbursement, difficult questions as to causation and ascertainment of damage arise, which writers of this persuasion overlook.<sup>113</sup>

Aware that these problems cannot be solved under the majority

Francke, 122 Neb. 672, 241 N. W. 88 (1932); Jones v. Savage, 6 Wend. 658 (N. Y. Sup. Ct. 1831); Betterton v. Roope, 71 Tenn. 215 (1876).

109. Carroll v. Sweet, 128 N. Y. 19, 27 N. E. 763 (1891); American National Bank v. National Fertilizer Co., 125 Tenn. 328, 143 S. W. 597 (1911). See State Bank v. Carroll, 81 Neb. 484, 116 N. W. 276 (1908); Flieg v. Sleet, 43 Ohio St. 53, 56, 1 N. E. 24, 26 (1885); Jones v. Board of Education, 242 App. Div. 17, 29, 272 N. Y. Supp. 5, 19 (1934); cf. Small v. Franklin Mining Co., 99 Mass. 277 (1868).

110. See provisions of the BILLS OF EXCHANGE ACT and the NEGOTIABLE INSTRUMENTS LAW, *supra* note 108; BYLES, *op. cit. supra* note 6, at 266.

111. GERMAN WECHSELGESETZ Art. 43, 44, 53; Scheckgesetz Art. 40-42.

112. STAUB-STRANZ, *op. cit. supra* note 2, at Art. 89 Anm. 26a.

113. Ditscher, *Die Rechtliche Natur der Wechselbereicherungsklage* (1909) 65 ZEITSCHRIFT FÜR HANDELSRECHT 352, 357.

theory, a minority of the writers on the other hand say that even in the absence of damage, the creditor thus guilty of laches may in no case sue a debtor-indorser on the underlying obligation.<sup>114</sup> Instead, they would allow the creditor a right of action against the drawer (not the debtor-indorser) if the drawer would be unjustly enriched by a discharge from liability on the instrument.<sup>115</sup> This unjust enrichment action, based on the instrument, is subsidiary in character, and allowed only if the creditor has no other means of satisfying his claim.<sup>116</sup>

It is impossible to state definitely which view is supported by the German courts. In two famous decisions, the former Reichs-Oberhandelsgericht took the minority view,<sup>117</sup> but the higher German courts have, in two recent cases, apparently adopted the damage theory, and allowed the negligent creditor to recover from the debtor-indorser on the underlying obligation. In one of the recent cases, the indorser had not been damaged by failure to make due presentment because the drawee (who had accepted the instrument) was insolvent at the maturity of the instrument.<sup>118</sup> In the second case, the creditor sued his debtor-indorser (who was this time not the drawer) on the original claim because the check had been dishonored by the drawee when presented, two months after its receipt by the creditor. The Oberlandesgericht of Hamburg held that the creditor could not recover on the underlying obligation, but the decision was apparently based on the assumption that the damages caused the debtor equaled the amount of the underlying claim, and on the ground that the debtor here would in fact have had no underlying obligation in turn to fall back upon, since the instrument had been purchased from the drawer. The court left the plaintiff to seek his recovery from the drawer upon the unjust enrichment action.<sup>119</sup> It may accordingly be

114. LANGEN, *op. cit. supra* note 88, at 33.

115. WECHSELGESETZ Art. 89; SCHECKGESETZ Art. 58.

116. Reichsgericht, September 26, 1899, 44 Entscheidungen des Reichsgerichts in Zivilsachen 78; MUELLER-ERZBACH, *op. cit. supra* note 7, at 510.

Therefore under the majority rule, the creditor cannot immediately sue the drawer for unjust enrichment. Reichsgericht, May 4, 1918, 93 Entscheidungen des Reichsgerichts in Zivilsachen, 23; WAHL, *supra* note 95 at 410; LANGEN, DIE WECHSELVERBIDLICHKEIT (1934) 181.

Unlike the French law, however, a direct cause of action against the drawee who has not accepted the bill but is still in possession of the funds has always been denied the creditor on the theory that the drawing of a bill or check is not of itself an assignment of the drawer's claim against the drawee. KESSLER, *op. cit. supra* note 15, at 65, 66; STAUB-STRANZ, *op. cit. supra* note 2, at art. 14 Anmerkung 6.

117. Reichsoberhandelsgericht, May 11, 1875, 17 ENTSCHEIDUNGEN DES REICHSOBERHANDELSGERICHTS 269; Reichsoberhandelsgericht, January 28, 1876, 19 ENTSCHEIDUNGEN DES REICHSOBERHANDELSGERICHTS 170. Both decisions are influenced by Chitty and § 7 of the Statute of Anne. See further Reichsgericht January 4, 1899, 10 SAECHSISCHES ARCHIV 239.

118. Oberlandesgericht Dresden, February 29, 1916, 72 SEUFFERTS ARCHIV 333.

argued that these decisions indicate nothing more than a tendency to allow the creditor to sue the debtor-indorser on the underlying obligation provided the indorser in turn has an underlying obligation on which he can recover.<sup>120</sup>

In France, if the debtor has indorsed a draft or check in payment and the creditor is guilty of laches, the debtor is discharged on the instrument and probably on the underlying obligation. The creditor has the same election of remedies, one against the drawer for unjust enrichment in certain cases and the other against the drawee, if a *provision* may be found. In any event, whether the creditor is payee or indorsee, he is amply protected and has no need to resort to his underlying claim.

*Fifth Variation:* The fifth typical payment problem appears in cases when the debtor does not negotiate the instrument to his creditor by indorsement but merely delivers a third party's instrument to the creditor. In England and America, the result is somewhat anomalous.<sup>121</sup> It is held in such cases that since the debtor is not a party to the instrument, he may not require of his creditor the strict diligence necessary in order to perfect a holder's right against an indorser or drawer.<sup>122</sup> But discharge follows (whether or not pro tanto is in doubt)

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119. Oberlandesgericht Hamburg, April 4, 1924, 45 RECHTSPRECHUNG DER OBERLANDESGERICHE 83. This is one of the rare cases in which payment was made by indorsing a check on a New York bank. The main purpose of the transaction which was made during the darkest period of the German inflation was to give the indorsee access to a stable currency. Lyon, *Folgen Verspaeteter Scheckvorlegung* (1925) 3 HANSEATISCHE RECHTSZEITSCHRIFT 154. The rarity of payments made by indorsing a check is reflected in the often criticized obiter dictum of Kammergericht, November 9, 1914, 35 RECHTSPRECHUNG DER OBERLANDESGERICHE 7, which said that a payee who indorses a check instead of collecting it, acts negligently.

120. See Amtsgericht Dresden, February 15, 1927, 56 JURISTISCHE WOCHENSCHRIFT 1144. *Contra:* Landgericht Wuerzburg, February 27, 1925, 55 JURISTISCHE WOCHENSCHRIFT 72.

The German law, on this point, will not be clearly settled until the Reichsgericht has again passed on the problem. It has not done so during the last thirty years. Neither Neumanns Jahrbuecher, nor textbooks, nor the recent dissertation of WAND, *DAS ERLOESCHEN DES SCHULDVERHAELTNISSES DURCH WECHSELBEGEBUNG* (1922) give recent decisions of the German Reichsgericht.

121. Where the instrument is given for a present debt, there may be a presumption of absolute payment. Note 6 *supra*. The question was not raised in any of the cases supporting the text following.

122. Foote v. Brown, 9 Fed. Cas. No. 4909 (C. C. D. Ind. 1841); Hunter v. Moul, 98 Pa. 13 (1881); Holmes & Sons v. Briggs and Drum, 131 Pa. 233, 18 Atl. 928 (1890); Curtis v. Douglas, 79 Tex. 167, 15 S. W. 154 (1890). In England, the cases prior to Smith v. Mercer, L. R. 3 Ex. 51 (1867) held that the debtor, not being a party, was not entitled to notice of dishonor. Bishop v. Rowe, 3 M. & S. 362 (K. B. 1815); Swinyard v. Bowes, 5 M. & S. 62 (K. B. 1816); Holbrow v. Wilkins, 1 Barn. & C. 10 (K. B. 1822); Van Wart v. Wooley, 3 Barn. & C. 439 (K. B. 1824). Nor to a demand on the primary party. Goodwin v. Coates, 1 M. & Rob. 221 (N. P. 1832).

when the debtor has been injured by the laches of the creditor.<sup>123</sup> However, such injury to the debtor seldom results because he is generally possessed of a right of action against the third party. In these cases, however, it may be as difficult to measure damages as in the cases where the debtor is an indorser. It is somewhat paradoxical moreover, as was indicated by Baron Bramwell in *Smith v. Mercer*,<sup>124</sup> to hold a debtor who has merely delivered an instrument to greater liability than one who has indorsed it, and accordingly he held that the debtor who delivers a third party's instrument will be totally discharged if the creditor is guilty of laches. The doctrine of *Smith v. Mercer*, however, was short-lived. Sir John Stuart, two years later in *Re British and American Steam Navigation Co.*, professed himself unable to follow Baron Bramwell's reasoning, and refused to discharge the debtor when no injury was apparent.<sup>125</sup>

### III

It should now be obvious that payment by negotiable instrument has its complications, especially where the creditor who has taken an instrument has been guilty of laches. The time has come to resolve the plot and draw what moral lessons, if any, are implicit in it.

In the Anglo-American, German, and French law, payment by bill, note, or check is presumptively conditional. The underlying obligation subsists, but its enforcement is in effect suspended until the maturity of the instrument. The three systems, however, present different solutions for the problems raised by a creditor's laches. In Germany, the creditor may fall back on the underlying obligation, subject to the debtor's counterclaim for damages. Where the debtor is an indorser, this damage theory necessitates a string of successive suits back to the drawee, and the difficulties are further increased if one of the prior parties has been damaged by the laches. The French law permits the holder to recover against the drawer to the extent that the drawer has been unjustly enriched, unless the drawer can show that he had sufficient

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123. *Anderson v. Timberlake*, 114 Ala. 377, 22 So. 431 (1897); *Kennedy v. Jones*, 140 Ga. 302, 78 S. E. 1069 (1913); *Fritz v. Kennedy*, 119 Iowa 628, 93 N. W. 603 (1903); *Grubbe v. Stille*, 61 Mo. 473 (1875); *Williams v. Brown*, 53 App. Div. 486, 65 N. Y. Supp. 1049 (1900); *Hunter v. Moul*, 98 Pa. 13 (1881); *Kilpatrick v. Home B. & L. Ass'n.*, 119 Pa. 30, 12 Atl. 754 (1888); *Holmes & Sons v. Briggs and Drum*, 131 Pa. 233, 18 Atl. 928 (1890); *Wessel v. Montgomery*, 106 Pa. Super. 341, 163 Atl. 347 (1932); *Manitoba Mortgage and Investment Co. v. Weiss*, 18 S. D. 459, 101 N. W. 37 (1904). Cf. *Boardman v. Steele*, 13 Conn. 547 (1840); *Camidge v. Allenby*, 5 L. J. 95 (K. B. 1827); *Hopkins v. Ware*, L. R. 4 Ex. 268 (1869).

124. L. R. 3 Ex. 51 (1867), discussed note 122 *supra*.

125. L. R. 8 Eq. 506 (1869).

Neither the court decisions nor the textwriters in either Germany or France deal with the fourth variation. If a case should arise in Germany there is reason to believe that a court would follow the damage theory.

funds with the drawee at maturity. And where the drawer did have sufficient funds, the holder acquires an additional right of action directly against the drawee, under the *provision* doctrine. In Anglo-American law, the drawer of a check is discharged on the check and on the underlying obligation, although, theoretically, only to the extent that the debtor has been injured by the creditor's laches; the indorser of a check is probably completely discharged. The drawer and indorsers of a bill, and the indorsers of a promissory note are generally held completely discharged on the instrument and on the debt, irrespective of damage.

The Anglo-American law deals too harshly with the creditor. The German solution of the problem, on the other hand, is practicable only where the debtor is drawer; otherwise it may lead into great practical difficulties, as when there are many indorsements, and the debtor is the last indorser. At best, it forces the creditor-indorsee to fall back on his debtor-indorser and the latter on his debtor and so forth until the parties ultimately liable (either the drawer or the drawee) are reached. To avoid this result, the creditor should be denied any right of recovery against an indorser.

The French law which allows the creditor, whether he be indorsee or payee, (by means of an action for unjust enrichment) to cut through and reach the drawer who has no funds with the drawee at maturity is sound principle. But since this unjust enrichment action is needed only when the instrument is unaccepted, because in such a case, the creditor, who has been guilty of laches, has no other means of satisfying his claim, the French rule which allows the action for unjust enrichment even against the drawer of an accepted bill, should not be followed. Similarly, the rule which appropriates to the holder the claim which the debtor-drawer had against the drawee, for funds on deposit, for example, should not be followed, because the holder would thereby be given an unmerited preference over the other creditors of the drawer in the event of the latter's insolvency.

An unjust enrichment action thus limited could be fitted into the Anglo-American system. But, before we proceed further, we must discover whether or not the creditor who is guilty of laches may be already sufficiently protected, for in such a case, it would not be necessary to improve his position by developing an action based on unjust enrichment.

The creditor, even if he has been guilty of laches, will be protected if it can be said that the drawer of the bill or check has assigned to the holder his claim against the drawee. The assignment need not be effective between the holder and the drawee, but there should be an effective assignment between the holder and the drawer.<sup>126</sup> Where such

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126. *Merchants National Bank v. State Bank*, 172 Minn. 24, 214 N. W. 750 (1927); *Hawes v. Blackwell*, 107 N. E. 196, 12 S. E. 245 (1890); *Central Trust Co. v. Bank of Mullens*, 108 W. Va. 12, 150 S. E. 137 (1929).

an assignment is found to exist, the holder's laches on the instrument does not affect his right against the drawee. But according to the majority view at common law, and now under the Bills of Exchange Act and the Negotiable Instruments Law, neither a bill nor a check is in itself such an assignment.<sup>127</sup> It is possible to show facts extrinsic to the instrument which will raise an implied in fact assignment. The fiction is applied when a check is drawn for the full amount of the drawer's claim against the bank,<sup>128</sup> or if the court finds that "the parties must have and did intend to create a particular appropriation, charge or lien on the property upon the faith of which they both dealt." In *Fourth Street Bank v. Yardley*, Mr. Justice White found there was such a particular appropriation, when a bank, which had been loaned money on the strength of its assertion that it had a credit of \$27,000 in a New York bank, drew a draft on the latter bank for \$25,000 to repay the holder. The reliance of the holder on this particular credit was said to give him a right to the fund prior to that of the drawer's receiver. The result, it seems, would have been the same even if the holder had been guilty of laches.<sup>129</sup>

The creditor may in addition gain a direct right against the drawee on the theory of an implied acceptance. If the drawee retains the bill or check for twenty-four hours notwithstanding a demand for its return,<sup>130</sup> and possibly even without demand,<sup>131</sup> he is deemed to have impliedly accepted the instrument. When a bank knows that it is being drawn upon for the purpose of paying an unpaid seller, and the funds from the resale of the chattel later come into its possession, the bank is held directly liable to the seller.<sup>132</sup> In such cases, the drawee is said

127. Bills of Exchange Act, *supra* note 67, § 53 (1); N. I. L. § 127, 189; *Hopkinson v. Forster*, L. R. 19 Eq. 74 (1873); *Schroeder v. Central Bank of London*, 34 L. T. R. 735 (C. P. 1876); *Kaesmeyer v. Smith*, 22 Idaho 1, 123 Pac. 943 (1912); *Leach v. Mechanics Savings Bank*, 202 Iowa 899, 211 N. E. 506 (1926); *Love v. Ardmore Stock Exchange*, 67 L. R. A. 617 (Ind. Terr. C. A. 1904); *Jones v. Crumpler*, 119 Va. 143, 89 S. E. 232 (1916); *Bowker v. Haight*, 146 Fed. 257 (C. C. S. D. N. Y. 1906). The dissenting opinion in *Leach v. Mechanics Savings Bank*, *supra*, points out the incongruity, in that the holder must suffer loss when he is guilty of laches on a check, and yet, where the drawer becomes insolvent, the holder loses the benefit of the drawee's solvency.

128. *Dunlop v. Commercial National Bank*, 50 Cal. App. 476, 195 Pac. 688 (1921); *First National Bank v. O'Byrne*, 177 Ill. App. 473 (1913).

129. *Fourth Street Bank v. Yardley*, 165 U. S. 634, 651 (1897).

130. N. I. L. § 137.

131. *Miller v. Farmers State Bank of Arco*, 165 Minn. 339, 206 N. W. 930 (1925); *State Bank v. Weiss*, 46 Misc. 93, 91 N. Y. Supp. 276 (Sup. Ct. 1904); *Dawson & White v. National Bank of Greenville*, 196 N. C. 135, 144 S. E. 833 (1928); *Wisner v. First Nat. Bank*, 220 Pa. 21, 68 Atl. 955 (1908); *Peoples Nat. Bank v. Swift*, 134 Tenn. 175, 183 S. W. 725 (1916). See Feezer, *Acceptance of Bills of Exchange by Conduct* (1927) 12 MINN. L. REV. 129.

132. *State v. Trimble*, 316 Mo. 354, 289 S. W. 796 (1926); *First National Bank v. Griffin*, 31 Okla. 382, 120 Pac. 595 (1912). The result follows even though the seller was

impliedly to accept "not because he has in fact done so but because justice requires that he be presumed to have accepted it and because there are present the elements of estoppel."<sup>133</sup>

In the absence of a finding of assignment or acceptance, the Anglo-American law leaves the holder in a disadvantageous position, and if he is to be protected, it becomes necessary to return to the unjust enrichment concept. Mr. Justice Story, it may be remembered, in *The Matter of Brown*, felt that it would be inequitable to allow the drawer of a check to be discharged when there had been no injury. In speaking of the drawer who had claimed his discharge, Story asked this question: "In such a case can it be said with truth or justice, that he is to be enriched at the expense of the holder of the check? Or, that he shall not be deemed to hold the money, as money had and received for the use of the holder, either because he had not funds in the bank, or because he still retains those funds, appropriated to the use of another, for his own use?"<sup>134</sup> It would seem that the drawer of a bill, as well as of a check, might be deemed to hold the money he had received, or claim which he still has against the drawee, for the benefit of the holder, and that an unjust enrichment action should lie against the drawer to the extent that such funds or claim is in excess over the damage caused by the holder's laches.

If one may attempt to prophesy how the law may develop, it may be suggested that an unjust enrichment action will be established in the negligent creditor's favor first against a debtor-drawer who has collected from, or who has a claim against, a solvent drawee. It will probably be less difficult for the court to allow this action if the drawer has collected from the drawee than to require the drawer who has not collected to hold his claim against an insolvent drawee in trust for the holder. It may be suggested that such development will originate in cases where the facts are obscure or peculiar, and sufficiently different from the ordinary case to encourage the court to inspect the problem in a new light. Two such cases may have already arisen.

In *Fisher v. Farmers' Co-op. Irr. Co., Ltd.*,<sup>135</sup> the Farmers' Co-operative Irrigation Company borrowed \$500 from the Farmers' State Bank of New Plymouth, giving in return a negotiable promissory note. The

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perhaps guilty of laches. *Thomas v. Farmers National Bank*, 217 S. W. 860 (Mo. App. 1920). It would seem that the same reasoning would give the holder seller a right against a drawer who received dividends from the drawee bank. See *York v. Farmers Bank of Garden City*, 105 Mo. App. 127, 79 S. W. 968 (1904); cf. *Oldridge v. Sutton*, 157 Mo. App. 485, 137 S. W. 994 (1911).

133. Feezer, *supra* note 131, at 143.

134. 2 Story Rep. 502, 517 (C. C. Mass. 1843). The same reasoning was used in *Hoyt v. Seeley*, 18 Conn. 352, 356 (1847). See (1926) 40 *HARV. L. REV.* 128.

135. 49 Idaho 343, 288 Pac. 164 (1930).

treasurer of the Irrigation Company was also president of the bank. The Irrigation Company paid its debts by issuing a "warrant" addressed to the treasurer. Such warrants were accepted and treated by the bank as checks. When the note in issue was presented for payment, the Irrigation Company gave the Farmers' State Bank a warrant according to its usual practice. If the warrant was treated as a check, the Irrigation Company was, in effect, giving the bank a check drawn upon the same bank. Meanwhile one Fisher had sent \$500 to the Farmers' State Bank for the purpose either of loaning this money to the Irrigation Company or buying one of the Irrigation Company's obligations. And the note when presented by the bank had the name of the bank as payee crossed out and the name of Fisher substituted. The bank in taking the warrant or check, drawn upon itself, therefore, may have been acting as the agent for Fisher. In any event, the bank received the warrant on January 3rd, at which time the Irrigation Company had sufficient deposits with the bank to have paid the warrant. The bank, however, did not cash the warrant, that is, it failed to debit the Irrigation Company's account. On January 7th, the bank closed and was taken over by the state liquidator who sent the warrant to Fisher. Fisher demanded payment of the Irrigation Company, and upon refusal, brought an action against it on the warrant. The court held that the bank was negligent in not collecting, and that this negligence (or laches) was chargeable to Fisher; but since the Irrigation Company had been paid a liquidating dividend of forty per cent on its account with the insolvent bank, judgment should be given against the Irrigation Company for forty per cent of the face value of the warrant together with interest from the date of payment.

The court in deciding the case did assume that the warrant was a check; that the bank was the collecting agent for Fisher; and that the bank was negligent. But the fact remains that it appeared to have no difficulty in giving judgment against the Irrigation Company for the amount actually received by it from the bank. Furthermore, the court gave no theory for its decision and if the result is not based on the pro tanto rule in Section 186 of the Negotiable Instruments Law, (and the dubious nature of a warrant as a check makes it extremely likely that the court could not have applied Section 186) the decisive element of the case appears to be unjust enrichment.

In *Hawes v. Blackwell*,<sup>136</sup> a check drawn on November 10th, reached the plaintiff on November 12th, and was not presented until November 16th. On November 13th, however, the drawee had made an assignment for the benefit of creditors. Whether there was laches in presentment of the check is not found. But the holder of the check was allowed to

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136. 107 N. C. 196, 12 S. E. 245 (1890).



sue the trustees of the drawer and the trustees of the drawee together, and to get an order that dividends paid out of the insolvent drawee bank were to be applied pro rata to the holder's judgment against the drawer. The effect of the decision was that the drawer held his cause of action against the drawee in trust for the holder.

Neither *Fisher v. Farmers' Co-Op. Irr. Co. Ltd.*, nor *Hawes v. Blackwell*, is particularly convincing. Yet they may have in them the first stirrings of a general action founded on elements of unjust enrichment. The unjust enrichment action, it must be noted, would lie against the drawer in every case, whether or not he is the debtor on the underlying obligation. It would not lie, therefore, against the indorser even though he is the debtor, but directly against the drawer who has been unjustly enriched. It would not solve the difficulty of determining the amount of unjust enrichment where the drawer complains that he has been injured because someone against whom he had a right of reimbursement has become insolvent during the laches period. The court could, of course, avoid the difficulty by requiring the drawer to hold his claim against the insolvent for the benefit of the holder, and in that way, escape the necessity of liquidating damages based on future dividends. Even so, it might be unwise to declare such a constructive trust in any case save where the insolvent is the drawee.

Several amendments have been proposed to the Negotiable Instruments Law to remedy some of the obvious defects in the Anglo-American system which have been pointed out. These amendments, however, deal only with checks despite the fact that the rule for discharge as regards checks has been developed to a more sensible stage than the corresponding rule with respect to bills.<sup>137</sup> It is suggested, therefore, that the unjust enrichment action be codified to cover both bills and checks and to cover the situation in which the drawee becomes insolvent during the period of laches. The following amendment is accordingly proposed:

"The holder of an unaccepted bill of exchange or of an uncertified check who fails to make due presentment or give due notice of dishonor as required, acquires a claim against the drawer to the extent the drawer would be unjustly enriched if discharged, with the exception that if the drawer has suffered injury through the insolvency of the drawee after presentment should have been made or notice of dishonor given, the holder will acquire instead the drawer's rights against the drawee to the amount of the bill or check."

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137. See e. g. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS (1933) 204; (1930) 8 N. C. L. REV. 444, 450, n. 28.