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RULE IN INDIANA AS TO PAYMENT BY NOTES OR CHECKS

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The Uuniform Negotiable Instruments Law has not provided for all matters which may arise in connection with commercial paper. The conditions relating to this paper are so numerous that it would be impossible to provide for all of them. One of the matters concerning which no provision has been made is as to whether or not the giving and taking of a promissory note is *prima facie* absolute or *prima facie* conditional payment.

PROMISSORY NOTES AS PAYMENT

There is much conflict in the different jurisdictions as to the above matters. The courts of Indiana are opposed to the general rule, which is that the taking of a promissory note is not *prima facie* an absolute and unconditional payment of the debt and a discharge of the original obligation.[1] It is well settled by the Indiana courts that the taking of a promissory note by a creditor is *prima facie* payment of the debt, the burden being on the creditor to show that the note was not so received.[2] It may be shown, however, that the parties did not intend

*See biographical note p. 202.

[1] "In the absence of the agreement between the parties that it is to be received as payment, the common law rule which prevails in England and has been adopted without question in nearly all of the states in this country, that a draft or bill of exchange, acceptance, order, or promissory note of the debtor, is not a payment or an extinguishment of the original demand. And the same rule applies to the bill, note, order, or acceptance of a third person given by the debtor to the creditor." 30 Cyc. 1194-1197. *Davidson v. Bridgeport Borough,* 8 Conn. 472. *Marrinette Iron Works v. Cody,* 108 Mich. 381, 66 N. W. 334. *Feldman v. Beier,* 78 N. Y. 293. *Bradford v. Neill, etc., Co.,* 76 Ill. App. 488.

"Where a negotiable instrument to which the debtor is a party as drawer, acceptor, maker or endorser is received for debt, whether precedent or contemporaneous, in the absence of agreement to the contrary a presumption arises in most jurisdictions that the instrument is received in conditional and not in absolute payment." Norton on bills and Notes, Third Edition, page 19.

[2] "In Indiana, Maine, Massachusetts and Vermont the rule as to the effect of giving a bill or note as constituting a payment is different from the common-law rule prevailing in England and in the other states of this country. The minority rule is that the taking of a bill of exchange or a promissory note governed by the law merchant, by the creditor from his

that it should have that effect.[3] The same presumption of payment arises whether the debt is a contemporaneous debt or a pre-existing debt.[4]

It should be understood that these are only presumptions which arise in Indiana and if the intention is expressed it always governs, so that the presumption may be rebutted by circumstances.[5]

But the Indiana decisions agree with the general rule, that the taking by a creditor of the negotiable promissory note of a third party is presumed to be conditional payment.[6]

There is an exception to the last stated rule, however, where the note of a third person, or a stranger's note, is payable to bearer, or has been endorsed in blank by a prior holder, so that it may be transferred without endorsement. In this case it is generally considered as absolute payment when given for a contemporaneous debt, but when it is payable to order and can be transferred only by endorsement, it is considered as conditional payment.[7]

In all jurisdictions a non-negotiable promissory note is presumed to be conditional payment.[8]

It is well stated in the *Bradway case* that "in this state it is firmly established that a debtor's giving to his creditor a promissory note, not governed by the law merchant, affords no evidence that it was offered and accepted as payment; and that the giving of a promissory note governed by the law merchant is *prima facie* evidence of payment, which must be accepted as conclusive in the absence of any evidence that such was not the intention of the parties".[9] The presumption as to payment may be rebutted in Indiana by proving an express agreement to the contrary, or may be rebutted by the circumstances of the transaction itself.

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debtor for an existing debt, is a payment of the debt, unless it is otherwise agreed by the parties, the presumption being that the debt is thereby paid and the burden of proving a contrary agreement being upon the creditor. On the other hand, if the note is not governed by the law merchant, that is, is not negotiable, it is not a payment of the debt unless it is so agreed by the parties, and the burden of proving such agreement is upon the debtor. This rule applies equally well where the bill or note is of a third person." 30 Cyc. 1197-1198. *Bradway v. Groenendyke*, 153 Ind. 508, 55 N. E. 434. *Amos v. Bennett*, 125 Mass. 120. *Hadley v. Bordo*, 62 Vt. 285, 19 Atl. 476.

[3] *Alford v. Baker*, 53 Ind., 279; *Keck v. State, ex rel*, 12 Ind. App., 119; *Hibben, etc., Co., v. Hicks, Assignee*, 26 Ind. App. 646; *Smith v. Bettger*, 68 Ind., 254; *Knight v. Kerfoot*, 184 Ind., 31, 110 N. E., 206; *State, ex rel, v. Traylor*, 77 Ind. App., 419, 132 N. E., 608.

[4] *Mason v. Douglass*, 6 Ind. App., 558.

[5] *Scott v. Edgar*, 159 Ind., 38. *Kelley v. York*, 183 Ind., 628.

[6] *Nipperman v. Hardy*, 17 Ind. App., 142; *Tyner v. Stoops*, 11 Ind., 22; *Maxwell v. Day*, 45 Ind., 509; *Dick v. Flanagan*, 122 Ind., 277; *State, ex rel, v. Traylor*, 77 Ind. App., 419.

[7] See *Smith v. Bettger*, 68 Ind., 254, 263.

[8] *Bradway v. Groenendyke*, 153 Ind., 508.

[9] *Bradway v. Groenendyke*, 153 Ind. 508 at 510.

It is important to know whether or not a negotiable promissory note is to be considered as payment. If it is so considered, the creditor must rely on the note and cannot proceed or rely on the original indebtedness, but must proceed upon the note; and cannot bring his action for goods sold and delivered, or whatever was the original consideration. It often becomes important in matters of insolvency or bankruptcy as will be pointed out in the *Baughman case* set out below.

CHECKS AS PAYMENT

The rule in Indiana as to whether or not a check is conditional or absolute payment follows the general rule in most jurisdictions. This rule is that the giving and taking of a check is considered *prima facie* only as a conditional payment; that is, that it will become absolute when paid. This is true of the giving and taking of the check of a third person, and the principle also applies to payment by an order on a third person, by a certificate of deposit, by a draft, or by a bill of exchange.[10]

There is a long line of cases in Indiana holding that the taking of a check is *prima facie* a conditional payment and not absolute.[11] It is understood, of course, that by agreement the check may be absolute payment.[12] The theory is that a check is only a means of payment, and the debt will not be extinguished unless and until the check is paid, or unless loss is sustained by the drawer in consequence of laches of the holder, in which case the debt will be discharged in proportion to the loss sustained.

In *Baughman v. Lowe,* A said to B: "You have waited a little too long to receive your payment. The curtain at the bank I see is down, and you cannot get any money tonight. We will just send you a draft for this, Monday morning, or I can give you my check." B said: "That is all right. You can send me a draft. It will be all right. Or you can just give me a check. I had just as lief have the check as the money. I have a bank account at Monticello, and it will not cost me anything for exchange. I had just as soon have the check as the money."[13] Thereupon a check was accepted by B which stated that it was in full for the Lowe-West settlement, and $10.00 on another account. As the bank was insolvent and did not open again, it was held that by the agreement of the parties the check was absolute payment, and B lost on account of the insolvency of the bank.

CHECK OR PROMISSORY NOTE TAKEN FOR LESS AMOUNT

Another matter which is not settled by the Uniform Negotiable Instruments Law is as to whether or not the giving and taking of a promissory note or check for a less amount than the indebtedness dis-

[10] See cases cited in 30 Cyc. 1195-1197, Notes 31, 32 and 33.

[11] *Cox v. Hayes,* 18 Ind. App., 220; *Sutton v. Baldwin,* 146 Ind., 361; *Boyd v. Olvey,* 82 Ind. 294.

[12] *Baughman, et al., v. Lowe,* 41 Ind. App., 1.

[13] *Baughman, et al., v. Lowe,* 49 Ind. App. 1 at page 3.

charges the indebtedness. The law, however, as to this matter is well settled by judicial decision. The Indiana courts are in accord with the settled rule. There are two classes of cases in which promissory notes or checks may be taken for a less amount. One is the case of a liquidated amount, and the other is the case of an unliquidated amount.

LIQUIDATED

Where a debtor sent to his creditor a check for a part of a liquidated sum due the creditor, reciting in the check that it is in full payment of all demands, the acceptance of the check by the creditor does not discharge the entire debt.[14] The theory is that the release of the debtor from the liability for the whole debt on payment of a part is a naked promise and void for want of consideration; and the receipt of a less sum in money is no legal defense to a suit for an unpaid balance. However, if accepted as payment under circumstances which amount to an accord and satisfaction it discharges the whole claim.[15]

It has been held that a new note given in renewal of a former note and for a less amount, will be considered as a satisfaction of the prior note, as all differences are presumed to have been adjusted when the new note was given. It has also been held that the acceptance by the holder of a promissory note of part of the amount due upon it in satisfaction and discharge of the whole note, and the surrender of the note by the holder to the maker to be canceled, is a full discharge of the note, and no action can be maintained for the unpaid portion.[16]

If part payment is made before maturity, or made by a stranger, or by a bill or note, with a surety or collateral security, or in any way more advantageous to the creditor, it will support an agreement to accept it in satisfaction. Any agreement by way of compromise or composition into which any new element entered will be sustained.

The same ancient authority which declares that the payment and acceptance of a less sum on the day the debt becomes due in satisfaction of a greater is no defense beyond the amount paid, also declares that the payment and acceptance of a less sum before the day of payment has arrived, in satisfaction of the whole, would be a good accord and satisfaction, for it is said peradventure parcel of the same before the day it fell due would be more beneficial to him than the whole at the day, and the value of the satisfaction is not material.

UNLIQUIDATED

If the amount due is unliquidated, a check or note in full payment and settlement, accepted and cashed by the creditor without objection, discharges the account in full, even though smaller than the amount claimed by him to be due.[17]

[14] *Hodges v. Truax*, 19 Ind. App., 651; *Meyer v. Green*, 21 Ind. App., 138; *Jennings v. Durflinger*, 23 Ind. App., 678.

[15] *American Seeding Machine Co. v. Baker*, 55 Ind. App., 625.

[16] *Draper v. Hitt*, 43 Vt. 439.

[17] 5 Amer. Rep. 292.

SUMMARY

Summarizing we find that in Indiana:

1. The giving and taking of a negotiable promissory note is presumed to be absolute payment.
   a. This is a presumption only.
   b. If intention is expressed it always governs.
   c. The presumption may be rebutted by circumstances.
   d. The same rule holds whether it is given and taken for contemporaneous or pre-existing debt.
   e. If the note is that of a third party it is presumed conditional payment.
   f. If the note is non-negotiable it is presumed to be conditional payment.
2. The giving and taking of a check is presumed to be conditional payment.
   a. It may be absolute by agreement.

Summarizing as to payment of a less amount than the entire indebtness we find the general rule to be:

1. The giving and taking of a promissory note or check for a less amount than the indebtedness does not discharge the indebtedness if the amount is liquidated.
   a. It may discharge it by an agreement on consideration.
   b. It may discharge it by an accord and satisfaction.
2. It does discharge the indebtedness if the amount is unliquidated.