

Chapter 73

Commercial Paper

Chapter 73

LAW REVIEW CITATIONS: 33 OLR 41; 34 OLR 33; 42 OLR 2.

73.1010 to 73.1220

LAW REVIEW CITATIONS: 32 OLR 97-155; 43 OLR 47-62.

73.1040

NOTES OF DECISIONS

1. Under former similar statute

- (1) In general
- (2) Unconditional promise
- (3) Time certainty
- (4) Words of negotiability
- (5) Draft or check

1. Under former similar statute

(1) **In general.** A negotiable promissory note was properly. *Fishburn v. Londershausen*, (1907) 50 Or 363, 92 P 1060, 15 Ann Cas 975, 14 LRA(NS) 1234.

An inland bill of exchange drawn on a particular fund with entire amount payable uncertain was not negotiable. *State Bank of Sheridan v. Heider*, (1932) 139 Or 185, 9 P2d 117.

A payee of a negotiable instrument was a holder, and could be a holder in due course if he brought himself within the statutory requirements. *First Nat. Bank v. Noble*, (1946) 179 Or 26, 168 P2d 354, 169 ALR 1426.

(2) **Unconditional promise.** A note subject to the terms of a mortgage giving the maker an option to cancel the note was not a negotiable instrument. *Hull v. Angus*, (1911) 60 Or 95, 101, 118 P 284.

A note providing that payee could declare it due if he considered it insecure was nonnegotiable. *Reynolds v. Vint*, (1914) 73 Or 528, 144 P 526.

A clause, "due if ranch is sold or mortgaged," in a note payable five years from date did not render the note nonnegotiable. *Nickell v. Bradshaw*, (1920) 94 Or 580, 183 P 12, 11 ALR 623.

(3) **Time certainty.** A postdated check could be negotiable. *Triphonoff v. Sweeney*, (1913) 65 Or 299, 302, 130 P 979.

(4) **Words of negotiability.** A note payable "to the order of the bearer" was not one to "bearer" but to "order." *American Nat. Bank v. Kerley*, (1923) 109 Or 155, 220 P 116.

If the word "order" or "bearer" was not used, some term or terms must be used which clearly indicated an intention to conform to the requirements of the chapter. *Id.*

An instrument was nonnegotiable that was not payable to order of payee or to bearer. *Security Fin. Co. v. Comini*, (1926) 119 Or 460, 249 P 1054.

Debenture payable to bearer was a negotiable instrument. *Mott v. Guardian Bldg. & Loan Assn.*, (1932) 140 Or 489, 14 P2d 447.

(5) **Draft or check.** A draft issued by a bank was a check and considered as such was a species of the genus bill of

exchange. *Gellert v. Bank of Calif. Nat. Assn.*, (1923) 107 Or 162, 214 P 377.

A depositor's draft was a negotiable instrument. *Bank of Calif. v. Young*, (1927) 123 Or 95, 260 P 227.

An instrument which purported to be a draft drawn by drawer on itself payable at a bank was a check. *Mt. Vernon Nat. Bank v. Canby State Bank*, (1929) 129 Or 36, 276 P 262.

Instruments issued by board of directors of a school district to a clerk requiring him to pay to order of designated payee a sum certain out of any money belonging to the district not otherwise appropriated were "warrants" not "checks," and were non-negotiable. *School Dist. 47 v. United States Nat. Bank*, (1949) 187 Or 360, 211 P2d 723.

FURTHER CITATIONS: *United States Nat. Bank v. First Trust & Sav. Bank*, (1911) 60 Or 266, 272, 119 P 343; *Hunt v. Sec. State Bank*, (1919) 91 Or 362, 179 P 248; *First Nat. Bank v. United States Nat. Bank*, (1921) 100 Or 264, 197 P 547, 14 ALR 479; *Albany State Bank v. Anthony*, (1927) 121 Or 277, 254 P 806; *First Nat. Bank v. Morgan*, (1930) 132 Or 515, 284 P 582, 286 P 558; *Gumm v. Heider*, (1960) 220 Or 5, 348 P2d 455; *Cornell v. Stimson Lbr. Co.*, (1970) 257 Or 215, 477 P2d 898.

ATTY. GEN. OPINIONS: Negotiability of identification certificate and certificate of time, 1924-26, p 169; definition of commercial or business paper as related to automobile conditional sales contract with note appended, 1928-30, p 10; negotiability of automatic premium loan agreement, 1960-62, p 464; duty of State Treasurer to examine indorsements on state drafts, 1966-68, p 564.

LAW REVIEW CITATIONS: 1 OLR 116; 6 OLR 160; 8 OLR 99, 272; 27 OLR 75.

73.1050

NOTES OF DECISIONS

1. Under former similar statute

Negotiability of an instrument was not impaired by recitals or statements of consideration provided it imposed no other liability. *First Nat. Bank v. Morgan*, (1930) 132 Or 515, 284 P 582, 286 P 558.

A note disclosing that it was given for stock not to be issued or delivered until the note was paid, and then only as set forth in a subscription contract was not negotiable. *Id.*

Parol evidence was not admissible to show oral agreement limiting note to payment out of a specific fund. *Dant & Russell v. Ostlind*, (1934) 148 Or 204, 35 P2d 668.

Negotiability of check was not impaired by memorandum on check stating transaction giving rise to instrument. *United Fin. Co. v. Anderson*, (1957) 212 Or 443, 319 P2d 571.

ATTY. GEN. OPINIONS: Duty of State Treasurer to examine indorsements on state drafts, 1966-68, p 564.

LAW REVIEW CITATIONS: 1 OLR 173; 10 OLR 176.

73.1060

NOTES OF DECISIONS

Under former similar statute, the amount of attorney's fees was governed by the laws of the state in which suit is brought. *Parks v. Smith*, (1920) 95 Or 300, 186 P 552.

Under former similar statute, interest was not a necessary requirement of a note. *Smith v. Portland Sav. & Loan*, (1956) 207 Or 546, 296 P2d 481, 298 P2d 185.

LAW REVIEW CITATIONS: 17 OLR 320.

73.1080

NOTES OF DECISIONS

Under former similar statute, when no time for payment was expressed in the note it was payable on demand. *Smith v. Portland Sav. & Loan*, (1956) 207 Or 546, 296 P2d 481, 298 P2d 185.

73.1090

NOTES OF DECISIONS

Under former similar statute, a valid acceleration was not self-executing, but it merely conferred an option upon the holder to treat the debt as due. *Nickell v. Bradshaw*, (1920) 94 Or 580, 183 P 12, 11 ALR 623.

FURTHER CITATIONS: *Mack v. Hendricks*, (1928) 126 Or 400, 270 P 476.

73.1100

NOTES OF DECISIONS

Under former similar statute, negotiable instrument alternatively indorsed, was negotiable. *Page v. Ford*, (1913) 65 Or 450, 456, 131 P 1013, Ann Cas 1915A, 1048, 45 LRA(NS) 247.

Under former similar statute, a note payable "to the order of the bearer" was negotiable as to "order"; the word "bearer" indicated the payee sufficiently. *American Nat. Bank v. Kerley*, (1923) 109 Or 155, 220 P 116, 32 ALR 262.

LAW REVIEW CITATIONS: 12 OLR 96.

73.1110

NOTES OF DECISIONS

Under former similar statute a note payable to the order of the bearer was not one to bearer. *American Nat. Bank v. Kerley*, (1923) 109 Or 155, 220 P 116, 32 ALR 262.

ATTY. GEN. OPINIONS: Liability for payment of an alleged stolen check with forged indorsement, 1922-24, p 510; liability of a bank for payment of checks made payable to a fictitious payee due to fraud of an employe, 1940-42, p 156.

LAW REVIEW CITATIONS: 28 OLR 403.

73.1120

NOTES OF DECISIONS

Under former similar statute, an instrument requiring a purchaser to keep property in good condition and insured, was not a negotiable instrument. *Albany State Bank v. Anthony*, (1927) 121 Or 277, 254 P 806.

Under former similar statute, a clause in debentures which provided for the disposition of proceeds according to law did not render them nonnegotiable. *Mott v. Guardian Bldg. & Loan Assn.*, (1932) 140 Or 489, 14 P2d 447.

ATTY. GEN. OPINIONS: Definition of commercial or business paper as related to automobile conditional sales contract with note appended, 1928-30, p 10.

73.1140

NOTES OF DECISIONS

Under former similar statute, a postdated check was negotiable and the indorsee was not put upon inquiry by reason of the negotiation prior to the day of its date. *Triphonoff v. Sweeney*, (1913) 65 Or 299, 130 P 979.

LAW REVIEW CITATIONS: 17 OLR 74.

73.1150

NOTES OF DECISIONS

Under former similar statute, where maker gave a bank authority to insert its own name in a note, the transferee was limited to inserting the name of the bank. *Simpson v. First Nat. Bank*, (1919) 94 Or 147, 185 P 913.

Under former similar statute, a reasonable time was allowed to fill in blanks; in this case 14 months was held too long. *Columbia R. Door Co. v. Timms*, (1928) 127 Or 227, 271 P 607.

LAW REVIEW CITATIONS: 43 OLR 163.

73.1160

NOTES OF DECISIONS

Under former similar statute, one of two payees could not assign the whole or his own interest. *Gardner v. Wiley*, (1905) 46 Or 96, 79 P 341.

ATTY. GEN. OPINIONS: Duty of State Treasurer to examine indorsements on state drafts, 1966-68, p 564.

LAW REVIEW CITATIONS: 14 OLR 213.

73.1170

NOTES OF DECISIONS

Under former similar statute, where a note was indorsed to an individual without adding the word "cashier," parol evidence was not admissible to show the bank was the party intended as indorsee. *First Nat. Bank v. McCullough*, (1908) 50 Or 508, 93 P 366, 126 Am St Rep 758, 17 LRA(NS) 1105.

Under former similar statute, a note made payable to "C.R. Higgins, Treasurer, Astoria New Hotel Building Fund," pending incorporation of plaintiff was payable to plaintiff. *Columbia Hotel Co. v. Rosenberg*, (1927) 122 Or 675, 260 P 235.

ATTY. GEN. OPINIONS: Duty of State Treasurer to examine indorsements on state drafts, 1966-68, p 564.

LAW REVIEW CITATIONS: 11 OLR 208; 13 OLR 169.

73.1180

NOTES OF DECISIONS

Under former similar statute, liability upon an instrument which reads "I promise to pay" and which was signed by two or more persons was both joint and several. *Accommodation maker and maker*, *Lumbermen's Nat. Bank v. Campbell*, (1912) 61 Or 123, 131, 121 P 427; *husband and wife*, *Stacey v. Fritzler*, (1938) 160 Or 231, 84 P2d 97, 499, 119 ALR 887; *First Nat. Bank v. Dodd*, (1926) 118 Or 1, 245 P 503; *partners*, *Anderson v. Stayton State Bank*, (1916) 82 Or 357, 369, 159 P 1033.

FURTHER CITATIONS: Temple v. Harrington, (1918) 90 Or 295, 176 P 430.

LAW REVIEW CITATIONS: 12 OLR 102; 12 OLR 201; 43 OLR 246, 256.

73.1200

CASE CITATIONS: Cornell v. Stimson Lbr. Co., (1970) 257 Or 215, 477 P2d 898.

73.1210

NOTES OF DECISIONS

Under former similar statute, a note payable at a bank was sufficiently presented if it was in the bank at maturity ready to be delivered by the bank to the proper person upon payment. Nickell v. Bradshaw, (1920) 94 Or 580, 183 P 12, 11 ALR 623.

Under former similar statute an instrument purporting to be a draft, drawn by the drawer on itself, payable at a bank, was equivalent to an order on the bank to pay it and charge the drawer's account. Mt. Vernon Nat. Bank v. Canby State Bank, (1929) 129 Or 36, 276 P 262, 63 ALR 1133.

FURTHER CITATIONS: Maddock v. McDonald, (1924) 111 Or 448, 227 P 463.

73.2010 to 73.2080

LAW REVIEW CITATIONS: 33 OLR 41-57; 43 OLR 62-70.

73.2010

NOTES OF DECISIONS

I. Under former similar statute

(1) **In general.** The holder of a negotiable instrument payable to his order could transfer it for value without indorsement, and the transferee had whatever title the transferor had therein. Beauchamp v. Jordan, (1945) 176 Or 320, 157 P2d 504.

A transferee was possessed of the title and had the sole right to receive the money due thereon. First Nat. Bank v. McCullough, (1908) 50 Or 508, 93 P 366, 126 Am St Rep 758, 17 LRA(NS) 1105.

Transferee could compel indorsement by a payee transferring note for value without indorsement, the indorsement to be unqualified unless the parties agreed otherwise. Simpson v. First Nat. Bank, (1919) 94 Or 147, 185 P 913.

Where plaintiff was in possession of a note it was presumed, by virtue of the statute, that he was the owner. Columbia Hotel Co. v. Rosenberg, (1927) 122 Or 675, 260 P 235.

Where a bank did not own the note but was merely acting as collecting agent, purchaser from bank did not acquire title by virtue of this section. Finney v. Stanfield Fraternal Assn., (1929) 131 Or 393, 283 P 415.

(2) **Equitable right.** A transferee was vested with both the equitable and legal title but he could not be treated as a holder in due course until indorsement. Simpson v. First Nat. Bank, (1919) 94 Or 147, 185 P 913.

A proceeding in equity was necessary to enforce the right to have indorsement. Cady v. Bay City Land Co., (1921) 102 Or 5, 201 P 179, 21 ALR 1367.

ATTY. GEN. OPINIONS: Applicability of usury laws to national bank's Bank Americard program, 1966-68, p 160.

LAW REVIEW CITATIONS: 10 OLR 198; 11 OLR 208; 13 OLR 169; 43 OLR 216, 220.

73.2020

NOTES OF DECISIONS

I. Under former similar statute

(1) **In general.** The payee of a note could be a holder in due course notwithstanding the section. American Nat. Bank v. Kerley, (1923) 109 Or 155, 220 P 116, 32 ALR 262.

(2) **"Delivery".** Where a cashier's check was retained by the bank, after indorsement in blank by an indorsee, there was no negotiation due to absence of delivery. Seawan v. Muir, (1914) 72 Or 583, 144 P 121.

Evidence of delivery for a special purpose only could be shown by the defendants in an action by the payee or his assignee with notice. Robinson v. Linn, (1937) 155 Or 591, 65 P2d 669.

(3) **"Indorsement".** When a holder signed his name on the back of a check and then received payment from the drawee his signature was not strictly speaking an "indorsement" but was merely a receipt. First Nat. Bank v. United States Nat. Bank, (1921) 100 Or 264, 197 P 547, 14 ALR 479.

A writing by the payee on the back of a note, "notice of protest waived and payment guaranteed," passed title to his assignee, same being equivalent to an indorsement. Cady v. Bay City Land Co., (1921) 102 Or 5, 201 P 179, 21 ALR 1367.

Where a note was indorsed to the cashier of a bank, who delivered it to the bank without indorsement, in a suit thereon by the bank the note was subject to all equities existing in favor of the makers. First Nat. Bank v. McCullough, (1908) 50 Or 508, 93 P 366, 126 Am St Rep 758, 17 LRA(NS) 1105.

Proof that defendant signed the instrument was admissible under an allegation that the defendant by indorsement, "Notice of protest waived and payment guaranteed," transferred and assigned the note to the plaintiff. Cady v. Bay City Land Co., (1921) 102 Or 5, 201 P 179, 21 ALR 1367.

Defendant's admission that he transferred a note did not relieve plaintiff from the burden of proving the genuineness of defendant's signature as indorser. Id.

FURTHER CITATIONS: Tillamook County Bank v. Intl. Lbr. Co., (1923) 106 Or 339, 211 P 183, 941; Dant & Russell v. Ostlind, (1934) 148 Or 204, 35 P2d 668; State v. Leaton, (1970), 3 Or App 475, 474 P2d 768.

ATTY. GEN. OPINIONS: Liability for payment of an alleged stolen check with forged indorsement, 1922-24, p 510; applicability of usury laws to national bank's BankAmericard program, 1966-68, p 160; duty of State Treasurer to examine indorsements on state drafts, 1966-68, p 564.

LAW REVIEW CITATIONS: 21 OLR 190.

73.2040

NOTES OF DECISIONS

I. Under former similar statute

(1) **Special indorsement.** The indorsee's indorsement was necessary to further negotiation of a note which had been specially indorsed. Finney v. Stanfield Fraternal Assn., (1929) 131 Or 393, 283 P 415.

(2) **Blank indorsement.** The most unrestricted form of indorsement was an indorsement in blank. Allen v. Hendrick, (1922) 104 Or 202, 206 P 733.

Where maker made note payable to himself and indorsed it in blank, the note was payable to bearer and was negotiated by delivery. Bank of Jordan Valley v. Duncan, (1922) 105 Or 105, 209 P 149.

A check was payable to bearer where it was indorsed "pay to the order of," with space for indorsee's name left blank. State v. Hinton, (1910) 56 Or 428, 433, 109 P 24.

(3) Evidence. Parol evidence could not be received to vary or contradict the contract which the law implied from a blank indorsement. *Smith v. Caro*, (1881) 9 Or 278; *Nickell v. Bradshaw*, (1920) 94 Or 580, 183 P 12, 11 ALR 623.

FURTHER CITATIONS: *Simpson v. First Nat. Bank*, (1919) 94 Or 147, 167, 185 P 193.

LAW REVIEW CITATIONS: 10 OLR 198.

73.2060

NOTES OF DECISIONS

1. Under former similar statute

A restrictive indorsee took subject to all equities that might have been asserted by the maker had it not been indorsed. *Smith v. Bayer*, (1905) 46 Or 143, 79 P 497, 114 Am St Rep 858.

A restrictive indorsement did not pass title to the indorsee; however, he was entitled to sue thereon in his own name as agent of the indorser. *Id.*

Evidence that a restrictive indorsee owned two-sevenths of the note was not admissible to vary the contract of indorsement. *Id.*

FURTHER CITATIONS: *McFarland v. Hueners*, (1920) 96 Or 579, 190 P 584; *Keeler Bros. v. Sch. Dist. 25*, (1921) 276 Fed 755.

73.2070

CASE CITATIONS: *Dean v. Felton*, (1928) 125 Or 122, 266 P 236.

73.2080

NOTES OF DECISIONS

Under former similar statute, seller was not an indispensable party to an action on a promissory note given to a real estate broker as an earnest money deposit. *Medaz v. DePrez*, (1963) 236 Or 31, 386 P2d 805.

FURTHER CITATIONS: *Investment Serv. Co. v. Martin Bros. Container & Tbr. Prod. Corp.*, (1970) 255 Or 192, 465 P2d 868.

73.3010 to 73.3070

LAW REVIEW CITATIONS: 34 OLR 33-54; 43 OLR 70-94.

73.3010

NOTES OF DECISIONS

1. In general

Payment to prior holder does not operate as a discharge of the instrument unless such former holder is authorized by the holder to receive payment on his behalf. (*dictum*) *Investment Serv. Co. v. Martin Bros. Container & Tbr. Prod. Corp.*, (1970) 255 Or 192, 465 P2d 868.

2. Under former similar statute

The holder of a note purchased under execution could sue in his own name, whether it was indorsed or not. *Fishburn v. Londershausen*, (1907) 50 Or 363, 92 P 1060, 15 Ann Cas 975, 14 LRA(NS) 1234.

A drawee bank, which paid a check and then received it as a canceled voucher, was not a "holder." *First Nat. Bank v. United States Nat. Bank*, (1921) 100 Or 264, 197 P 547, 14 ALR 479.

In an action upon a note plaintiff had to show he was the lawful owner or holder. *Tillamook County Bank v. International Lbr. Co.*, (1923) 106 Or 339, 211 P 183, 941.

Where a note was made payable to one of two creditors with consent of both, the payee could sue without joining the other creditor. *Beck v. David*, (1929) 128 Or 542, 274 P 914.

A pledgee of a promissory note for value and in due course was entitled to sue the indorsers thereon in his own name without foreclosing the lien of the pledge. *Cole v. Vinton*, (1933) 142 Or 313, 20 P2d 436.

FURTHER CITATIONS: *Wilson v. Wilson*, (1894) 26 Or 315, 319, 38 P 189; *Brown v. Feldwert*, (1905) 46 Or 363, 80 P 414.

ATTY. GEN. OPINIONS: Duty of State Treasurer to examine indorsements on state drafts, 1966-68, p 564.

LAW REVIEW CITATIONS: 37 OLR 79, 111.

73.3020

NOTES OF DECISIONS

1. Under former similar statute

- (1) In general
- (2) "Complete and regular upon its face"
- (3) Fraud or bad faith
- (4) Payee as holder in due course
- (5) Knowledge
- (6) "Value"
- (7) Evidence
- (8) Drawee as "holder"

1. Under former similar statute

(1) **In general.** One who acquired a note before maturity for value, and without notice of any facts not disclosed on face of note itself, was a holder in due course. *Bailey v. Inland Empire Co.*, (1915) 75 Or 309, 314, 146 P 991; *First Nat. Bank v. Morgan*, (1930) 132 Or 515, 284 P 582, 286 P 558; *Bank of Gresham v. Clarke*, (1932) 140 Or 57, 12 P2d 559.

The holder of a check on which the drawer's name had been forged, and who contributed in any way to the fraud, was not a holder in due course. *First Nat. Bank v. Bank of Cottage Grove*, (1911) 59 Or 388, 395, 117 P 293.

One who did not take a note in good faith or for value was not a holder in due course. *Hull v. Angus*, (1911) 60 Or 95, 102, 103, 118 P 284.

A person was not a holder in due course if he did not take a note in good faith without notice of any infirmity in the note or defect in the title of his transferor. *Everding & Farrell v. Toft*, (1916) 82 Or 1, 150 P 757, 160 P 1160.

One who took a bearer coupon bond before due for a valuable consideration, without knowledge of any defect of title, and in good faith, had good title. *Toon v. Wapinitia Irr. Co.*, (1926) 117 Or 374, 243 P 554.

(2) **"Complete and regular upon its face."** Whether or not an instrument was "complete and regular upon its face," where words had been scratched out, was a jury question. *Farmers' State Bank v. West*, (1915) 77 Or 602, 152 P 238.

One who accepted a note after it had been dishonored and when that circumstance was apparent upon the face of the instrument was not a holder in due course. *Stacey v. Fritzier*, (1939) 160 Or 231, 251, 84 P2d 97, 499, 119 ALR 887.

(3) **Fraud or bad faith.** A payee was not a holder in due course when its agents practiced fraud on the maker in procuring the instrument. *Bank of Gresham v. Walch*, (1915) 76 Or 272, 147 P 534.

Intentional ignorance of a person taking a note under suspicious circumstances could result in bad faith. *Starvaggi v. Ludden*, (1925) 116 Or 119, 240 P 432.

Where maker of note proved fraud on part of payee in

obtaining the note and negotiating it, an agreement which was a part of the same transaction was enforceable against a purchaser after maturity. *First State & Sav. Bank v. Denn*, (1928) 124 Or 468, 263 P 71.

(4) **Payee as holder in due course.** The payee of a note could be a holder in due course. *American Nat. Bank v. Kerley*, (1923) 109 Or 155, 220 P 116; *First Nat. Bank v. Noble*, (1946) 179 Or 26, 168 P2d 354, 32 ALR 262; *Amato v. Fullington*, (1958) 213 Or 71, 322 P2d 309.

(5) **Knowledge.** An indorsee who took a postdated check before its due date was not put on inquiry. *Triphonoff v. Sweeney*, (1913) 65 Or 299, 304, 305, 130 P 979.

The principal maker of a note, signed by others for his accommodation, was not the agent of the payee so as to charge him with knowledge of an agreement between the maker and accommodation parties. *American Nat. Bank v. Kerley*, (1923) 109 Or 155, 220 P 116, 32 ALR 262.

The payee was not a holder in due course where he had knowledge of an unperformed condition before he accepted. *Id.*

(6) **"Value".** A pre-existing debt, though not worth its face value, constituted valuable consideration. *American Nat. Bank v. Kerley*, (1923) 109 Or 155, 220 P 116, 32 ALR 262.

Defaulting purchaser of building and loan association debentures was not a "holder in due course." *Mott v. Guardian Bldg. & Loan Assn.*, (1932) 140 Or 489, 14 P2d 447.

One taking a note as collateral security for a loan could be a holder in due course. *Cole v. Vinton*, (1933) 142 Or 313, 20 P2d 436.

(7) **Evidence.** When any fraud or illegality was proven in connection with the execution of an instrument, the burden of proof was shifted to the holder to show he was an innocent purchaser for value. *Brown v. Feldwert*, (1905) 46 Or 363, 80 P 414.

Where it was admitted that a check was given for a gambling debt, the indorsee had the burden of proving he was a holder in due course. *Matlock v. Scheuerman*, (1908) 51 Or 49, 93 P 823, 17 LRA(NS) 747.

Possession of a coupon payable to bearer raised a presumption of ownership as a bona fide holder. *Toon v. Wapinitia Irr. Co.*, (1926) 117 Or 374, 243 P 554.

The holder had the burden of proving he was holder in due course when the maker produced evidence of the payee's fraud. *First State & Sav. Bank v. Denn*, (1928) 124 Or 468, 263 P 71.

(8) **Drawee as "holder".** A drawee who paid a check and then received it as a canceled voucher was not a "holder." *First Nat. Bank v. Bank of Cottage Grove*, (1911) 59 Or 388, 117 P 293; *First Nat. Bank v. United States Nat. Bank*, (1921) 100 Or 264, 197 P 547, 14 ALR 479.

FURTHER CITATIONS: *Bowman v. Metzger*, (1895) 27 Or 23, 39 P 3; *Hill v. McCrow*, (1918) 88 Or 299, 304, 305, 170 P 306; *Citizens' Bank v. Knudson*, (1927) 120 Or 493, 498, 252 P 969; *Bank of Calif., Nat. Assn. v. Portland Hide & Wool Co.*, (1929) 131 Or 123, 282 P 99; *Baker Loan & Trust Co. v. Portland Cattle Loan Co.*, (1933) 141 Or 524, 6 P2d 36, 18 P2d 599; *Hobgood v. Sylvester*, (1965) 242 Or 162, 408 P2d 925; *Swanson v. Fuline Corp.*, (1965) 248 F Supp 364.

ATTY. GEN. OPINIONS: Liability for payment of an alleged stolen check with forged indorsement, 1922-24 p 510; actions upon promissory notes acquired by escheat by the state, before statute of limitations has run, 1938-40 p 606.

LAW REVIEW CITATIONS: 10 OLR 198; 43 OLR 216, 222; 48 OLR 146.

NOTES OF DECISIONS

1. Under former similar statute

One who took a note as collateral to secure a pre-existing debt took for value as related to being a holder in due course. *American Nat. Bank v. Kerley*, (1923) 109 Or 155, 220 P 116, 32 ALR 262; *Cole v. Vinton*, (1933) 142 Or 313, 20 P2d 436.

Not having raised the question of collateral and of the amount of the note for which it was pledged, the defendant could not rely upon the statute. *Bailey v. Inland Empire Co.*, (1915) 75 Or 309, 314, 146 P 991.

If after accepting note but before giving credit a bank learned of infirmities, it was not a holder in due course. *American Nat. Bank v. Kerley*, (1923) 109 Or 155, 220 P 116, 32 ALR 262.

The statute was inapplicable to note received as collateral. *Id.*

A pledgee of a note for value and without notice as collateral security for an antecedent debt of the pledgor was deemed a holder for value as to the indorsers to the pledgor. *Cole v. Vinton*, (1933) 142 Or 313, 20 P2d 436.

FURTHER CITATIONS: *Bank of Calif. Nat. Assn., v. Portland Hide & Wool Co.*, (1929) 131 Or 123, 282 P 99; *Baker Loan & Trust Co. v. Portland Cattle Loan Co.*, (1933) 141 Or 524, 6 P2d 36, 18 P2d 599; *Bank of Gresham v. Clarke*, (1932) 140 Or 57, 12 P2d 559; *Medaz v. De Prez*, (1963) 236 Or 31, 386 P2d 805.

LAW REVIEW CITATIONS: 43 OLR 166.

NOTES OF DECISIONS

1. Under former similar statute

(1) **In general.** A check negotiated at noon, following the day of issue, was not overdue. *Matlock v. Scheuerman*, (1908) 51 Or 49, 93 P 823.

Defendant did not show a defective title merely by alleging facts constituting a breach of warranty. *River Bros. v. C.F.T. Co.*, (1928) 124 Or 157, 264 P 368.

Where the payee promised to reduce the amount of a note, but he negotiated same without making reduction, his title was defective. *First State & Sav. Bank v. Denn*, (1928) 124 Or 468, 263 P 71.

One who acquired a demand note three years after its issuance was not a holder in due course. *State v. Am. Sur. Co.*, (1934) 148 Or 1, 35 P2d 487.

When the security behind a bill was a nullity, the holder had to have knowledge of such fact or reason to believe that such fact existed, to be in bad faith. *Topco Associates, Inc. v. First Nat. Bank*, (1954) 202 Or 32, 273 P2d 420.

The general equity doctrine of constructive notice was not applicable to a purchaser for value before maturity; only knowledge of such defects as would constitute bad faith was sufficient to impeach his title. *Id.*

(2) **Fraud.** An indorser's title to a note taken as security for loans and under an agreement not to negotiate it was defective where he procured it with the intention to negotiate it and did negotiate it immediately. *Mills v. Keep*, (1912) 197 Fed 360.

The payee of a draft who obtained the same from the drawer by fraud and deceit got no title thereto. *Bank of Calif. Nat. Assn., v. Portland Hide & Wool Co.*, (1929) 131 Or 123, 282 P 99.

Title was defective where the indorsement was induced by fraudulent representations. *Devore v. Northern Banc Sec. Co.*, (1933) 142 Or 476, 20 P2d 801.

(3) **Pleading and proof.** Where one alleged "actual knowledge of the infirmity or defect" he had to prove such

allegation and not "knowledge of such facts that his action in taking the instrument amounted to bad faith." *Bank of Jordan Valley v. Duncan*, (1922) 105 Or 105, 209 P 149.

Both absence of knowledge and taking in good faith had to be shown by plaintiff where good faith was in issue under the pleadings, and evidence offered showed that the note originated in fraud. *American Nat. Bank v. Kerley*, (1923) 109 Or 155, 157, 220 P 116, 32 ALR 262.

Facts showing the defective title had to be alleged and proved by the maker to overcome prima facie case established by the holder. *Rivers Bros. v. C.F.T. Co.*, (1928) 124 Or 157, 264 P 368.

The burden of proving that an indorsee took a check in bad faith was upon the person alleging same, where no testimony was offered which shifted the burden. *Steele v. Bank of Calif.*, (1932) 140 Or 107, 9 P2d 1053.

(4) **Negligence.** Knowledge of circumstances that might excite suspicion in the mind of a cautious person, or even gross negligence would not defeat the title of the purchaser. *Mills v. Keep*, (1912) 197 Fed 360.

Plaintiff, as indorsee of a check, was not as a matter of law put upon inquiry as a result of the negotiation of the check prior to the day of its date. *Triphonoff v. Sweeney*, (1913) 65 Or 299, 305, 130 P 979.

A person to whom a note negotiable in form was offered did not need to inquire about infirmities unless there were suspicious circumstances. *Bank of Jordan Valley v. Duncan*, (1922) 105 Or 105, 209 P 149.

Negligence was not synonymous with bad faith, but where one took a note under suspicious circumstances and willfully abstained from making inquiries, then his intentional ignorance could result in bad faith. *Starvaggi v. Ludden*, (1925) 116 Or 119, 240 P 432.

FURTHER CITATIONS: *Siverson v. Clanton*, (1918) 88 Or 261, 170 P 933, 171 P 1051; *Hill v. McCrow*, (1918) 88 Or 299, 304, 170 P 306; *Coughlin v. State Bank of Portland*, (1926) 117 Or 83, 243 P 78; *Holt v. Guar. & Loan Co.*, (1931) 136 Or 272, 296 P 852; *United Fin. Co. v. Anderson*, (1957) 212 Or 443, 319 P2d 571; *Amato v. Fullington*, (1958) 213 Or 71, 322 P2d 309.

ATTY. GEN. OPINIONS: Liability for payment of an alleged stolen check with forged indorsement, 1922-24, p 510.

LAW REVIEW CITATIONS: 6 OLR 160; 34 OLR 264, 265; 43 OLR 222, 235, 318.

73.3050

NOTES OF DECISIONS

1. Under former similar statute

(1) **In general.** A holder in due course of a note was entitled to enforce collection against prior indorsers. *Oregon & W. Colonization Co. v. Willoughby*, (1927) 122 Or 170, 257 P 812; *Cole v. Vinton*, (1933) 142 Or 313, 20 P2d 436.

The defense of failure of consideration was not available against an innocent purchaser. *Brown v. Feldwert*, (1905) 46 Or 363, 80 P 414.

A holder in due course was entitled to enforce a note for the full amount due thereon, even though execution of same was induced by fraud and it was bought at a heavy discount. *Lassas v. McCarty*, (1906) 47 Or 474, 84 P 76.

Reformation of assigned note and mortgage could not be had where the assignee was a holder in due course. *Hallberg v. Harriet*, (1919) 93 Or 678, 184 P 549.

A holder in due course of an interest bearing coupon could maintain an action for the collection thereof. *Toon v. Wapinitia Irr. Co.*, (1926) 117 Or 374, 243 P 554.

A bank holding a negotiable draft in due course of a depositor in another bank could recover thereon, notwithstanding defense of agency between original depository and

depositor. *Bank of Calif. v. Young*, (1927) 123 Or 95, 260 P 227.

As against a purchaser after maturity, the maker was entitled to credit on a note, the payee agreeing to credit at the time of its execution. *First State & Sav. Bank v. Denn*, (1928) 124 Or 468, 263 P 71.

A district improvement company's bonds in the hands of a holder in due course were free from any defect of title of prior parties and from defenses which would be available to prior parties among themselves. *Nelson v. McAllister Dist. Imp. Co.*, (1936) 155 Or 95, 62 P2d 950.

(2) **Fraud in the execution.** Fraud in misleading the maker into believing he was signing a paper of an entirely different character was not available as against one claiming to be an innocent purchaser for value where the answer failed to show that the note was procured without negligence of the maker. *Brown v. Feldwert*, (1905) 46 Or 363, 80 P 414.

Fraud in obtaining maker's signature was not available as a defense against payee who was holder in due course. *Amato v. Fullington*, (1958) 213 Or 71, 322 P2d 309.

(3) **Pledgee's rights.** Where a holder in due course was a pledgee, he was allowed to recover the full amount of a note, the maker having failed to raise the question of the extent of the pledgee's lien. *Bailey v. Inland Empire Co.*, (1915) 75 Or 309, 146 P 991.

Fraud, misrepresentation, and lack of consideration were not defenses by the maker of a note against a holder in due course who took the instrument as collateral. *Bank of Gresham v. Clarke*, (1932) 140 Or 57, 12 P2d 559.

Where a bank was a holder in due course of a note pledged to it for value, it was not necessary to allege or prove foreclosure of pledge to recover on note. *Cole v. Vinton*, (1933) 142 Or 313, 20 P2d 436.

(4) **Reacquired note.** A payee of a note who repurchased it for value after he sold it to an innocent third person did not thereby get any better right as against the makers than he had in the first instance. *McCredie v. Elmer*, (1930) 132 Or 368, 284 P 573.

(5) **Postdated check.** One who was a holder in due course of a postdated check was not subject to defenses available to the maker against the payee. *Triphonoff v. Sweeney*, (1913) 65 Or 299, 130 P 979.

(6) **Equitable rights.** Equitable owners of a check were not entitled to follow the proceeds of the check into the hands of a holder in due course. *Steele v. Bank of Calif.*, (1932) 140 Or 107, 9 P2d 1053.

Defendants were precluded from setting up equitable defenses against a holder in due course. *Cole v. Vinton*, (1933) 142 Or 313, 20 P2d 436.

FURTHER CITATIONS: *Hill v. McCrow*, (1918) 88 Or 299, 305, 170 P 306; *Security Fin. Co. v. Comini*, (1926) 119 Or 460, 249 P 1054; *Bank of Calif. Nat. Assn., v. Portland Hide & Wool Co.*, (1929) 131 Or 123, 282 P 99; *Wright v. Hage*, (1958) 214 Or 400, 330 P2d 342; *Swanson v. Fuline Corp.*, (1965) 248 F Supp 364; *Investment Serv. Co. v. Martin Bros. Container & Tbr. Prod. Corp.*, (1970) 255 Or 192, 465 P2d 868.

ATTY. GEN. OPINIONS: Duty of State Treasurer to examine indorsements on state drafts, 1966-68, p 564.

LAW REVIEW CITATIONS: 6 OLR 160; 27 OLR 75; 49 OLR 432.

73.3060

NOTES OF DECISIONS

1. Under former similar statute

Absence or failure of consideration was a matter of defense against any person not a holder in due course. *Bank*

of Gresham v. Walch, (1915) 76 Or 272, 147 P 534; McCredie v. Elmer, (1930) 132 Or 368, 284 P 573.

Fraud was a defense available against one not a holder in due course. First State & Sav. Bank v. Denn, (1928) 124 Or 468, 263 P 71.

The knowledge of a corporate officer writing a note and usurious contract is imputed to a corporation so as to prevent it becoming a holder in due course. Fidelity Sec. Corp. v. Brugman, (1931) 137 Or 38, 1 P2d 131, 75 ALR 1333.

FURTHER CITATIONS: Hull v. Angus, (1911) 60 Or 95, 118 P 284; Hill v. McCrow, (1918) 88 Or 299, 300, 170 P 306; Coughlin v. State Bank of Portland, (1926) 117 Or 83, 106, 243 P 78; American Sur. Co. v. Multnomah County, (1943) 171 Or 287, 138 P2d 597; Medaz v. De Prez, (1963) 236 Or 31, 386 P2d 805; Swanson v. Fuline Corp., (1965) 248 F Supp 364.

LAW REVIEW CITATIONS: 11 OLR 208; 14 OLR 273; 17 OLR 83; 27 OLR 75; 43 OLR 320.

73.3070

NOTES OF DECISIONS

1. Under former similar statute

(1) **In general.** The holder of acceptances established a prima facie case by introducing the trade acceptances and proving ownership. Rivers Bros. v. C. F. T. Co., (1928) 124 Or 157, 264 P 368.

A holder could rely on the presumption, under the section, until a defect in the title of a person negotiating the instrument appeared, then the burden shifted to the holder. *Id.*

A general denial of allegations that plaintiff was a holder in due course did not overcome the presumption under the section. *Id.*

Evidence that a note originated in fraud placed the burden on the plaintiff to prove it was taken in good faith. Everding & Farrell v. Toft, (1916) 82 Or 1, 150 P 757, 160 P 1160; Hill v. McCrow, (1918) 88 Or 299, 170 P 306; Bank of Jordan Valley v. Duncan, (1922) 105 Or 105, 209 P 149; American Nat. Bank v. Kerley, (1923) 109 Or 155, 220 P 116, 32 ALR 262; Starvaggi v. Ludden, (1925) 116 Or 119, 240 P 432; First State & Sav. Bank v. Denn, (1938) 124 Or 468, 263 P 71.

Where it was admitted that one owned specific bonds negotiable in form, there was a presumption that he was a holder in due course. State v. Bishop, (1942) 169 Or 448, 127 P2d 736, 129 P2d 276.

A holder could rely on the presumption, under the section, until a defect in the title of a person negotiating the instrument appeared, then the burden shifted to the holder. United Fin. Co. v. Anderson, (1957) 212 Or 443, 319 P2d 571.

(2) **Beneficial owner.** Where a payee was fraudulently induced to negotiate a note to a corporation, and it was indorsed to a trustee for the benefit of the corporation's creditors, the trustee had to prove the beneficial owners were without knowledge of the fraud to maintain title as against the payee. Devore v. Northern Banc Sec. Co., (1933) 142 Or 476, 20 P2d 801.

(3) **Jury question.** Where the holder's denial of notice was contradicted by suspicious circumstances the question of good faith was for the jury though there was no direct evidence of notice. Parish v. Columbia Nat. Bank, (1932) 139 Or 126, 8 P2d 584.

Evidence was sufficient to sustain the burden of showing good faith in acquiring a note procured by fraud and negotiated in violation of an agreement not to do so. Mills v. Keep, (1912) 197 Fed 360.

FURTHER CITATIONS: Coughlin v. State Bank of Portland, (1926) 117 Or 83, 106, 243 P 78; Dean v. Felton, (1928) 125 Or 122, 266 P 236; Bank of Calif. Nat. Assn. v. Portland

Hide & Wool Co., (1929) 131 Or 123, 282 P 99; Holt v. Guar. & Loan Co., (1931) 136 Or 272, 296 P 852; Wright v. Hage, (1958) 214 Or 400, 330 P2d 342.

LAW REVIEW CITATIONS: 43 OLR 157.

73.4010 to 73.4190

LAW REVIEW CITATIONS: 43 OLR 144-170, 213-256.

73.4010

NOTES OF DECISIONS

1. Under former similar statute

A note signed, "The Oregon Locators, by F.L.G., member of the firm authorized to sign the firm name," rendered the firm and the other member liable. Frazier v. Cottrell, (1917) 82 Or 614, 162 P 834.

An allegation that the payee indorsed, transferred and assigned a note was sufficient to allow proof of payee's signature. Cady v. Bay City Land Co., (1921) 102 Or 5, 201 P 179, 21 ALR 1367.

Where defendant contracted to pay a note signed by another, and made payments thereon, he was liable for the debt and specified interest as well as attorney's fee as set out in the note. Rushing v. Saboe, (1929) 130 Or 522, 279 P 867.

Recovery was denied against a church conference, which controlled a charitable hospital corporation, where the only signature was that of its official. St. Louis Union Trust Co. v. Ore. Annual Conference, (1935) 14 F Supp 35.

FURTHER CITATIONS: Asplund v. Haralampus, (1951) 193 Or 438, 238 P2d 734.

ATTY. GEN. OPINIONS: Duty of State Treasurer to examine indorsements on state drafts, 1966-68, p 564.

73.4020

NOTES OF DECISIONS

1. Under former similar statute

(1) **In general.** One placing his name on the back of a note without any notation indicating his intention to be otherwise bound, was liable only as an indorser. First Nat. Bank v. Bach, (1920) 98 Or 332, 193 P 1041; Case v. McKinnis, (1923) 107 Or 223, 213 P 422, 32 ALR 167.

(2) **Qualifying words.** Signing "I hereby guarantee payment of the within note," on the back of a note did not make a party an "indorser." Noble v. Beeman-Spaulling-Woodward Co., (1913) 65 Or 93, 131 P 1006, 46 LRA(NS) 162.

Words varying the indorser's liability had to appear upon the instrument itself as part of the indorsement. First Nat. Bank v. Bach, (1920) 98 Or 332, 193 P 1041.

"Notice of protest waived and payment guaranteed" written on the back of a note were equivalent to an indorsement. Cady v. Bay City Land Co., (1921) 102 Or 5, 201 P 179, 21 ALR 1367.

(3) **Cosureties.** Where plaintiff signed a note as accommodation comaker and defendant as accommodation indorser it was admissible to show that plaintiff and defendant were cosureties. Hunter v. Harris, (1912) 63 Or 505, 127 P 786.

LAW REVIEW CITATIONS: 1 OLR 79.

73.4030

NOTES OF DECISIONS

1. Under former similar statute

One partner was a "duly authorized agent" for the other

partners. *Frazier v. Cottrell*, (1917) 82 Or 614, 162 P 834; *Smith v. Owen*, (1956) 208 Or 154, 300 P2d 423.

One who signed a note "as trustee of" another was personally liable. *Ogden City St. Ry. v. Wright*, (1897) 31 Or 150, 49 P 975.

One who added "trustee" to his name was personally liable. *McLeod v. Despain*, (1907) 49 Or 536, 90 P 492, 92 P 1088, 124 Am St Rep 1066, 19 LRA(NS) 276.

Where a negotiable note stating "we promise to pay" was signed by a corporation and two individuals with no indication as to representative capacity, parol evidence was not admissible to show intent to bind the corporation only. *Murphy v. Reimann Furn. Mfg. Co.*, (1948) 183 Or 474, 193 P2d 1000.

73.4040

NOTES OF DECISIONS

Under former similar statute, when a drawee bank paid a forged check it was precluded from setting up the forgery. *First Nat. Bank v. Bank of Cottage Grove*, (1911) 59 Or 388, 394, 117 P 293.

Under former similar statute, any person who by his negligence substantially contributed to the making of an unauthorized signature was precluded from asserting lack of authority against a holder in due course or against a drawer or other payor who paid the instrument in good faith and in accordance with reasonable commercial standards of the drawee's or payor's business. *Gresham State Bank v. O & K Constr. Co.*, (1962) 231 Or 106, 370 P2d 726, 372 P2d 187.

ATTY. GEN. OPINIONS: Right of action by State Highway Commission to recover from bank which cashed unauthorized checks, 1940-42, p 156.

LAW REVIEW CITATIONS: 19 OLR 56.

73.4050

NOTES OF DECISIONS

1. Under former similar statute

A finding that a note was executed to a fictitious person and delivered to plaintiff for value, who was the only one to hold it, sustained a judgment in his favor without further showing of lack of knowledge of fictitiousness by the defendant. *Weishaar v. Pendleton*, (1914) 73 Or 190, 199, 202, 144 P 401.

If payees named in checks were fictitious payees, the checks were payable to bearer. *First Nat. Bank v. United States Nat. Bank*, (1921) 100 Or 264, 197 P 547, 14 ALR 479.

Where payee's name on check was a misnomer or abbreviation, the rule as to fictitious payee did not apply. *Joseph Milling Co. v. First Bank of Joseph*, (1923) 109 Or 1, 216 P 560, 29 ALR 358.

Where a union officer was fraudulently induced to sign checks, and knew the named payees, the checks were not "payable to bearer." *Portland Postal Employees Credit Union v. United States Nat. Bank* (1943) 171 Or 40, 135 P2d 467, 136 P2d 259.

Where a note was made payable to a known existing person who proposed to sell specific stock to the maker, the note was not payable to a fictitious person merely because that person did not own the stock. *Hill v. McCrow*, (1918) 88 Or 299, 170 P 306.

73.4060

NOTES OF DECISIONS

Under former similar statute, any person who by his negligence substantially contributed to the making of an unauthorized signature was precluded from asserting lack

of authority against a holder in due course or against a drawer or other payor who paid the instrument in good faith and in accordance with reasonable commercial standards of the drawee's or payor's business. *Gresham State Bank v. O & K Constr. Co.*, (1962) 231 Or 106, 370 P2d 726, 372 P2d 187, 100 ALR2d 654.

73.4070

NOTES OF DECISIONS

1. Under former similar statute

(1) In general. Any changes made before signing an instrument were presumed to be authorized. *Temple v. Harrington*, (1918) 90 Or 295, 176 P 430.

If the legal effect of an instrument was not changed an alteration was not material. Id.

The legal effect of "8 per cent per annum from annum until paid" was not changed by changing it to "8 per cent per annum from date until paid." Id.

One who signed a note after it had been delivered could not avail himself of any defense available to the original signers resulting from his signature. *Stacey v. Fritzier*, (1938) 160 Or 231, 84 P2d 97, 499, 119 ALR 887.

The addition of an indorser, surety or guarantor on a note in no way affected or interfered with the relationship between the maker and the payee. Id.

The addition of a maker to a note after delivery of the note released all nonconsenting makers. Id.

(2) Pleading and proof. Under a general denial a defendant sued on a note could prove material alteration. *Kirchner v. Clostermann*, (1931) 136 Or 557, 299 P 995.

Where evidence showed apparent alteration in date of note, payee suing thereon was required to explain the alteration. Id.

An answer which denied all averments of the complaint except that the maker had executed and delivered note sufficiently presented issue of material alteration of note. *Stacey v. Fritzier*, (1938) 160 Or 231, 84 P2d 97, 499, 119 ALR 887.

FURTHER CITATIONS: *Wills v. Wilson*, (1871) 3 Or 308; *Whitlock v. Manciet & Bigne*, (1882) 10 Or 166; *Farmers' State Bank v. West*, (1915) 77 Or 602, 152 P 238.

ATTY. GEN. OPINIONS: Effect of a proposed guaranty contract designed to release a comaker, 1950-52, p 236.

LAW REVIEW CITATIONS: 19 OLR 56.

73.4080

NOTES OF DECISIONS

1. Under former similar statute

(1) Presumption of consideration. Every negotiable instrument was deemed prima facie to have been issued for a valuable consideration, and every person whose signature appeared thereon to have become a party thereto for value. *Ruby v. W. Coast Lbr. Co.*, (1932) 139 Or 388, 10 P2d 358; *Baker Loan & Trust Co. v. Portland Cattle Loan Co.*, (1933) 141 Or 524, 6 P2d 36, 18 P2d 599; *United States Nat. Bank v. Embody*, (1933) 144 Or 488, 25 P2d 149; *Beauchamp v. Jordan*, (1945) 176 Or 320, 157 P2d 504.

Sufficient consideration was presumed if a note was duly executed and delivered. *Wilson v. Wilson*, (1894) 26 Or 315, 38 P 189.

There was a presumption of valuable consideration where a guaranty was indorsed upon a note, notwithstanding the statute of frauds' requirement of expressed consideration. *First Nat. Bank v. Hawkins*, (1914) 73 Or 186, 144 P 131.

The giving of a note was prima facie evidence of an accounting and settlement up to the date of the note. *Gorsline v. Gore*, (1918) 90 Or 389, 176 P 603.

When execution of note was denied, until execution was shown, there was no presumption of consideration. *Kirchner v. Clostermann*, (1931) 136 Or 557, 299 P 995.

(2) **Failure of consideration.** As against an innocent purchaser, failure of consideration was no defense. *Brown v. Feldwert*, (1905) 46 Or 363, 80 P 414.

Want of consideration could be proved when questioned where plaintiff was the payee. *Fassett v. Boswell*, (1911) 59 Or 288, 117 P 302.

Where the plaintiff was not a holder in due course it was held that failure of consideration could be shown. *McCredie v. Elmer*, (1930) 132 Or 368, 284 P 573.

(3) **Accommodation party.** Where defendants signed a note for accommodation of payee they were not liable thereon to payee or his transferee after maturity. *Robinson v. Linn*, (1937) 155 Or 591, 65 P2d 669.

(4) **Evidence.** A promissory note or bill of exchange imported prima facie a consideration, and no proof of such consideration was required until it has been challenged in some proper manner. *State v. Hanscom*, (1896) 28 Or 427, 43 P 167; *Kenny v. Walker*, (1896) 29 Or 41, 44 P 501; *Owens v. Snell*, (1896) 29 Or 483, 44 P 827; *McManus v. Smith*, (1900) 37 Or 222, 61 P 844; *Boothe v. Farmers' & Traders' Nat. Bank*, (1909) 53 Or 576, 98 P 509, 101 P 390; *Reid v. Multnomah County*, (1921) 100 Or 310, 196 P 394.

The maker of a note had the burden of proving absence or failure of consideration and the burden remained so throughout the trial. *Kempainen v. Suomi Temperance Soc.* (1929) 128 Or 643, 275 P 680. *Overruling Bank of Gresham v. Walch*, (1915) 76 Or 272, 147 P 534.

The presumption justified the maxim that when one by his carelessness and undue confidence had enabled another to obtain the money of an innocent third person, he had to answer for the loss which he had caused. *Lassas v. McCarty*, (1906) 47 Or 474, 84 P 76.

Absence or failure of consideration was a matter of defense and the burden of proving it was on the maker of a note. *Beauchamp v. Jordan*, (1945) 176 Or 320, 157 P2d 504.

FURTHER CITATIONS: *Triphonoff v. Sweeney*, (1913) 65 Or 299, 304, 130 P 979; *American Nat. Bank v. Kerley*, (1923) 109 Or 155, 220 P 116, 32 ALR 262; *Starvaggi v. Ludden*, (1925) 116 Or 119, 240 P 432; *Cunning v. Locke*, (1927) 122 Or 225, 258 P 192; *Dean v. Felton*, (1928) 125 Or 122, 126, 266 P 236; *Brownell v. Heitman*, (1928) 125 Or 515, 266 P 1067; *Kempainen v. Suomi Temperance Socy.*, (1929) 128 Or 643, 275 P 680; *Wyckoff v. Mut. Life Ins. Co.*, (1944) 173 Or 592, 147 P2d 227; *Yost v. Morrow*, (1959) 262 F2d 826; *Medaz v. De Prez*, (1963) 236 Or 31, 386 P2d 805; *Citizens Valley Bank v. Mandrones Min. Co.*, (1970) 257 Or 260, 478 P2d 409.

LAW REVIEW CITATIONS: 4 OLR 148.

73.4090

NOTES OF DECISIONS

1. Under former similar statute

The liability of a drawee to a holder of a bill of exchange was dependent upon acceptance. *United States Nat. Bank v. First Trust & Sav. Bank*, (1911) 60 Or 266, 119 P 343; *Gellert v. Bank of Calif. Nat. Assn.*, (1923) 107 Or 162, 214 P 377; *State Bank of Sheridan v. Heider*, (1932) 139 Or 185, 9 P2d 117.

The sale of a draft by a bank was not an assignment of its funds deposited with drawee. *United States Nat. Bank v. First Trust & Sav. Bank*, (1911) 60 Or 266, 119 P 343; *Gellert v. Bank of Calif. Nat. Assn.*, (1923) 107 Or 162, 214 P 377.

A check was not an assignment of the deposit to the payee. *Marks v. First Nat. Bank*, (1917) 84 Or 601, 165 P

673; *Hunt v. Sec. State Bank*, (1919) 91 Or 362, 179 P 248; *Dahl & Penne Inc. v. State Bank of Portland*, (1924) 110 Or 68, 222 P 1090.

Where a check was countermanded before it was paid or accepted, the bank was not liable to the holder. *Hunt v. Sec. State Bank*, (1919) 91 Or 362, 179 P 248.

The sale of a draft by a bank was not an assignment of the funds in the hands of the drawee. *Gellert v. Bank of Calif. Nat. Assn.*, (1923) 107 Or 162, 214 P 377.

An order by a creditor to a debtor to pay a designated third person a specific fund operated as an assignment if it purported to transfer ownership of the entire fund. *State Bank of Sheridan v. Heider*, (1932) 139 Or 185, 9 P2d 117.

An order that did not purport to transfer the entire fund or ownership of the money mentioned was not an assignment. *Id.*

Where the action was not brought on a check alone, the check had the effect of an assignment due to circumstances existing at time it was executed. *Houck v. Bank of Newport*, (1935) 150 Or 295, 43 P2d 179.

Payee of check could not maintain action against bank on which check was drawn when payment was made by bank upon unauthorized indorsement. *Elwert v. Pac. First Fed. Sav. & Loan Assn.*, (1956) 138 F Supp 395.

LAW REVIEW CITATIONS: 8 OLR 197; 43 OLR 327.

73.4100

NOTES OF DECISIONS

1. Under former similar statute

The payment of a bill or check by the drawee amounted to more than an acceptance, the former included the latter. *First Nat. Bank v. Bank of Cottage Grove*, (1911) 59 Or 388, 117 P 293.

No particular form of words was required to constitute an acceptance. *Hunt v. Sec. State Bank*, (1919) 91 Or 362, 179 P 248.

Stamping a check "Paid," and placing it upon a spindle, did not constitute "acceptance" by a bank. *Id.*

A parol acceptance conferred no right upon the holder. *Id.*

"Acceptance" was completed by delivery or notification. *Id.*

The purpose of the section was to expedite action by the drawee in accepting or refusing a bill, and to fix a definite time in which he should act on the bill. *Mt. Vernon Nat. Bank v. Canby State Bank*, (1929) 129 Or 36, 276 P 262.

An exclusive method of proving an acceptance was not provided for. *Id.*

FURTHER CITATIONS: *Allen v. Leavens*, (1894) 26 Or 164, 37 P 488, 26 LRA 620; *Erickson v. Inman*, (1898) 34 Or 44, 54 P 949; *United States Nat. Bank v. First Trust & Sav. Bank*, (1911) 60 Or 266, 271, 119 P 343.

LAW REVIEW CITATIONS: 9 OLR 392, 444.

73.4110

NOTES OF DECISIONS.

Under former similar statute, whatever written words on a check would constitute a certification, constituted an acceptance. *Hunt v. Sec. State Bank*, (1919) 91 Or 362, 179 P 248.

Under former similar statute, the rule of *Price v. Neal* had been carried into the Negotiable Instruments Law of this state. *United States Nat. Bank v. Stonebrink*, (1954) 200 Or 176, 265 P2d 238.

FURTHER CITATIONS: *First Nat. Bank v. Bank of Cottage Grove*, (1911) 59 Or 388, 117 P 293; *First Nat. Bank v. United*

States Nat. Bank, (1921) 100 Or 264, 197 P 547, 14 ALR 479; First Nat. Bank v. Noble, (1946) 179 Or 26, 168 P2d 354, 169 ALR 1426.

LAW REVIEW CITATIONS: 8 OLR 272; 27 OLR 75.

73.4130

NOTES OF DECISIONS

1. Under former similar statute

Obtaining money by false pretenses resulted from merely giving a check, without other representations, where the drawer had no money or credit at the bank and it was given for the purpose of fraudulently obtaining another's property. *State v. Hammelsy*, (1908) 52 Or 156, 96 P 865, 132 Am St Rep 686, 17 LRA(NS) 244.

By engaging to pay to a particular payee the maker acknowledged his capacity to receive the money, and his capacity to order it to be paid to another. *Hill v. McCrow*, (1918) 88 Or 299, 170 P 306.

If the drawee bank was innocent of actual fault and the holder was chargeable with bad faith or negligence, the drawee could recover from the holder a payment made on a forged check. *First Nat. Bank v. United States Nat. Bank*, (1921) 100 Or 264, 197 P 547, 14 ALR 479.

Intent of drawer to defraud could be shown by the falsity of the check in a prosecution for uttering a check without sufficient funds. *State v. Robinson*, (1927) 120 Or 508, 252 P 951.

When a holder for value in due course presented a check on which the drawer's name had been forged and the drawee paid same, both being ignorant of the forgery, the drawee could not recover the payment upon discovering the forgery. *First Nat. Bank v. Noble*, (1946) 179 Or 26, 60, 168 P2d 354, 169 ALR 1426.

Although the word "accepting" and not the word "paying," was employed, the statute included payment as well as acceptance of a bill. *Id.*

The rule of *Price v. Neal* had been carried into the Negotiable Instruments Law of this state. *United States Nat. Bank v. Stonebrink*, (1954) 200 Or 176, 265 P2d 238.

ATTY. GEN. OPINIONS: Representations necessary to constitute false pretense in case of nonpayment of a check for want of funds, 1920-22, p 451.

LAW REVIEW CITATIONS: 8 OLR 272; 27 OLR 75.

73.4140

NOTES OF DECISIONS

1. Under former similar statute

(1) **In general.** The indorsement of a note without recourse to alternative indorsees did not render it nonnegotiable and an indorsement by either would pass title. *Page v. Ford*, (1913) 65 Or 450, 472, 131 P 1013, Ann Cas 1915A, 1048, 45 LRA(NS) 247.

The indorser was a mere assignor of the title to the instrument if the indorsement was qualified. *Simpson v. First Nat. Bank*, (1919) 94 Or 147, 185 P 913.

An allegation that "defendant transferred the said note without recourse" was not an admission that it was indorsed "without recourse." *Smith v. Barner*, (1920) 95 Or 486, 188 P 216.

The statute merely declared the common law liability of an indorser. *Kummer v. Lauman*, (1932) 138 Or 514, 7 P2d 556.

Unless the note had been previously paid or otherwise satisfied an indorser without qualification was liable thereon. *Peterson v. Thompson*, (1915) 78 Or 158, 163, 151 P 721, 152 P 497.

The essential difference between a qualified and an un-

qualified indorsement was found in the extent of the liability imposed by the contract created by the indorsement. *Simpson v. First Nat. Bank*, (1919) 94 Or 147, 185 P 913.

An indorser without qualification engaged that on due presentment of the instrument it would be accepted or paid or both; as the case may be, according to its tenor. *First Nat. Bank v. Bach*, (1920) 98 Or 332, 193 P 1041.

(2) **Indorser's liability.** The indorser's agreement to pay was conditioned on due presentment and notice of dishonor, unless waived. *Case v. McKinnis*, (1923) 107 Or 223, 213 P 422, 32 ALR 167.

Directors of a corporation who signed a note as indorsers before delivery, did not assume a contingent joint and several liability, but a secondary joint liability. *Case v. McKinnis*, (1923) 107 Or 223, 213 P 422, 32 ALR 167.

The holder in due course of a matured unpaid note may sue the indorsers. *Oregon & W. Colonization Co. v. Wiloughby*, (1927) 122 Or 170, 257 P 812.

(3) **Attorney's fees.** If a note contains a stipulation for reasonable attorney's fees, the indorser is liable for them as well as for the principal. *Kummer v. Lauman*, (1932) 138 Or 514, 7 P2d 556.

(4) **Rights of drawee bank.** Where a drawee bank paid a check, the drawer's name having been forged, the bank could not recover the money paid to the holder. *First Nat. Bank v. Bank of Cottage Grove*, (1911) 59 Or 388, 117 P 293; *First Nat. Bank v. United States Nat. Bank*, (1921) 100 Or 264, 197 P 547, 14 ALR 479.

The holder must refund where he has received payment from the drawee bank on a forged indorsement of a check if it bore the genuine signature of the drawer. *First Nat. Bank v. United States Nat. Bank*, (1921) 100 Or 264, 197 P 547, 14 ALR 479.

FURTHER CITATIONS: *Hunter v. Harris*, (1912) 63 Or 505, 127 P 786; *Gresham State Bank v. O & K Constr. Co.*, (1962) 231 Or 106, 370 P2d 726, 372 P2d 187, 100 ALR2d 654; *John v. Gardiner*, (1969) 253 Or 325, 454 P2d 648.

ATTY. GEN. OPINIONS: Right of indorser of notes to have the amount of his deposit in an insolvent bank set off against his liability on said notes, 1930-32 p 280.

LAW REVIEW CITATIONS: 10 OLR 198; 12 OLR 96; 43 OLR 245, 254.

73.4150

NOTES OF DECISIONS

1. In general

Defendant was not an accommodation maker. *Oregon Bank v. Baardson*, (1970) 256 Or 454, 473 P2d 1015.

2. Under former similar statute

(1) **In general.** Failure of a creditor to proceed against the principal debtor on request of the accommodation party did not release him from liability. *White v. Savage*, (1906) 48 Or 604, 87 P 1040.

An accommodation maker was held primarily liable, notwithstanding the payee had told him that he would be safe in signing the note. *State Bank of North Powder v. Forstrom*, (1918) 89 Or 97, 173 P 935.

A married woman who was an accommodation maker on a note, executed by her husband, was liable for payment. *Bramwell v. Hesseltine*, (1927) 122 Or 519, 259 P 1063.

Indorsers of note who signed for accommodation of payee were not liable thereon to payee or his transferee after maturity. *Robinson v. Linn*, (1937) 155 Or 591, 65 P2d 669.

An accommodation party was primarily liable. *Yost v. Morrow*, (1959) 262 F2d 826.

(2) **Character of parties.** When a person wrote his name on the back of a note or negotiable instrument at the time

it was issued, for the purpose of procuring credit for the maker, or if the person so signing received a part of the consideration, he was regarded as an original promisor. *Ruby v. West Coast Lbr. Co.*, (1932) 139 Or 388, 10 P2d 358.

One who guaranteed the payment of a note to accommodate the maker was not an accommodation party; accommodation parties were limited to four statutory classes. *Noble v. Beeman-Spalding Woodward Co.*, (1913) 65 Or 93, 101, 108 P 1006, 46 LRA(NS) 162.

Where defendant indorsed a note for the accommodation of his debtor, the note was not given for defendant's accommodation, even though the note was given for drafts drawn by defendant and accepted by the debtor. *First Nat. Bank v. Bach*, (1920) 98 Or 332, 193 P 1041.

(3) **Extension of time.** An extension of time for payment without the consent of the accommodation maker did not relieve him. *Cellers v. Meachem*, (1907) 49 Or 186, 89 P 426; *State Bank of North Powder v. Forsstrom*, (1918) 89 Or 97, 173 P 935, 13 Ann Cas 997, 10 LRA(NS) 133.

FURTHER CITATIONS: *Lumbermen's Nat. Bank v. Campbell*, (1912) 61 Or 123, 121 P 427; *Murphy v. Panter*, (1912) 62 Or 522, 125 P 292; *Hunter v. Harris*, (1912) 63 Or 505, 127 P 786; *Davis v. First Nat. Bank*, (1917) 86 Or 474, 161 P 93, 168 P 929; *Case v. McKinnis*, (1923) 107 Or 223, 246, 213 P 422, 32 ALR 167; *Citizens' Bank v. Knudson*, (1927) 120 Or 493, 252 P 969; *Bank of Freewater v. Hyett*, (1931) 137 Or 193, 1 P2d 113; *United States Nat. Bank v. Embody*, (1933) 144 Or 488, 25 P2d 149; *United States Rubber Co. v. Kimsey*, (1933) 145 Or 73, 26 P2d 565; *Jenks Hatchery, Inc. v. Elliott*, (1968) 252 Or 25, 448 P2d 370.

ATTY. GEN. OPINIONS: Inclusion of accommodation note in computation of maximum permissible interest charges, 1956-58, p 151.

LAW REVIEW CITATIONS: 14 OLR 273; 43 OLR 318.

73.4170

NOTES OF DECISIONS

1. Under former similar statute

(1) **In general.** The essential difference between a qualified and an unqualified indorsement was found in the extent of the liability imposed by the contract created by the indorsement. *Simpson v. First Nat. Bank*, (1919) 94 Or 147, 185 P 913.

There was no implied warranty where defendant admitted he "transferred the said note without recourse to himself," and the complaint did not show the note to have been a negotiable instrument or that it was indorsed "without recourse." *Smith v. Barner*, (1920) 95 Or 486, 188 P 216.

Fraudulent intent of the defendant's confederate negotiating a check could be established by the falsity of the check. *State v. Robinson*, (1927) 120 Or 508, 252 P 951.

(2) **Drawee bank.** A holder did not by writing his name on the back of a check and presenting it for payment warrant to the drawee the genuineness of the signature of the drawer. *First Nat. Bank v. United States Nat. Bank*, (1921) 100 Or 264, 197 P 547, 14 ALR 479.

(3) **Parol evidence.** Parol evidence was inadmissible to explain an indorsement without recourse, but where an instrument was transferred by delivery only, the transaction rested in parol, and parol evidence was admissible. *Smith v. Barner*, (1920) 95 Or 486, 188 P 216.

ATTY. GEN. OPINIONS: Duty of State Treasurer to examine indorsements on state drafts, 1966-68, p 564.

LAW REVIEW CITATIONS: 43 OLR 244.

73.4190

ATTY. GEN. OPINIONS: Duty of State Treasurer to examine indorsements on state drafts, 1966-68, p 564.

73.5010 to 73.5110

LAW REVIEW CITATIONS: 43 OLR 216, 227-256.

73.5010

NOTES OF DECISIONS

1. Under former similar statute

(1) **In general.** The liability of an indorser was conditioned upon giving proper notice of dishonor. *Nickell v. Bradshaw*, (1920) 94 Or 580, 183 P 12, 11 ALR 623; *First Nat. Bank v. Bach*, (1920) 98 Or 332, 193 P 1041; *Case v. McKinnis*, (1923) 107 Or 223, 213 P 422, 32 ALR 167.

Where plaintiff signed a note as accommodation maker and defendant signed as accommodation indorser, defendant was not entitled to notice of dishonor as far as plaintiff was concerned in an action for contribution. *Hunter v. Harris*, (1912) 63 Or 505, 127 P 786.

"Notice of protest waived and payment guaranteed," written on the back of a note by the payee, did not affect the rights of the parties, in view of the statute. *Cady v. Bay City Land Co.*, (1921) 102 Or 5, 201 P 179, 21 ALR 1367.

Presentment was the first essential step in order to hold an indorser liable. *Case v. McKinnis*, (1923) 107 Or 223, 213 P 422, 32 ALR 167.

Where plaintiff gave the defendant notice of dishonor the day after presentment, the defendant was not discharged. *Kummer v. Lauman*, (1932) 138 Or 514, 7 P2d 556.

(2) **Allegation and proof.** The complaint had to allege nonpayment and notice of dishonor, unless waived, in order to charge an indorser. *Robinson v. Holmes*, (1910) 57 Or 5, 109 P 754.

There being insufficient evidence to show notice of dishonor to indorsers, they were held not liable. *McMillan v. Montgomery*, (1927) 121 Or 28, 253 P 879.

(3) **"Person primarily liable".** A formal presentment was not necessary to put the maker in default where he failed to pay a demand note upon request by the holder. *Hodges v. Blaylock*, (1919) 82 Or 179, 161 P 396.

To accelerate maturity under an option in a note, presentment need not be made to the maker, a "person primarily liable." *Harrison v. Beals*, (1924) 111 Or 563, 222 P 728.

(4) **"Payable at a special place".** A note payable at a certain bank in a certain city was payable at "a special place." *Maddock v. McDonald*, (1924) 111 Or 448, 227 P 463.

Where the holder had failed to make presentment at the time and place fixed in a note, the maker, to defeat the right of the holder to recover costs and interest subsequently accruing, had to allege and prove that he was able and willing to pay the note at the time and place fixed and had to bring the money into court. *Id.*

A note payable at a certain city was not payable at a "special place." *Harrison v. Beals*, (1924) 111 Or 563, 222 P 728.

ATTY. GEN. OPINIONS: Default in payment of municipal bonds payable at a special place, 1932-34, p 369.

LAW REVIEW CITATIONS: 1 OLR 79.

73.5030

NOTES OF DECISIONS

1. Under former similar statute

(1) **In general.** The complaint had to show presentment as provided for in the statute or disclose an excuse. *Robinson v. Holmes*, (1910) 57 Or 5, 109 P 754; *First Nat. Bank v. Bach*, (1920) 98 Or 332, 193 P 1041.

Where a check was delivered and accepted in the city where the drawee bank was situated, a reasonable time expired at the close of the next business day. *Colwell v. Colwell*, (1919) 92 OR 103, 179 P 916, 4 ALR 876; *Loland v. Nelson*, (1932) 139 Or 581, 8 P2d 82.

Where the instrument was not payable on demand presentment had to be made on the day it fell due. *Nickell v. Bradshaw*, (1920) 94 Or 580, 183 P 12, 11 ALR 623.

Notice to maker before maturity, reminding him of due date of note, was not such a presentment as would be a basis for an indorser's liability. *Case v. McKinnis*, (1923) 107 Or 223, 213 P 422, 32 ALR 167.

Where a note fell due on Saturday, it was to be presented for payment on the next succeeding business day. *Id.*

If a check was drawn on a distant bank it did not need to be sent direct to its place of payment but the usual and accustomed channel of transmission was all that was required. *Joppa v. Clark Comm. Co.* (1929) 132 Or 21, 281 P 834.

The act of a transmitting bank in accepting a draft upon another bank instead of money from subsequently insolvent drawee bank was not chargeable to drawer. *Loland v. Nelson*, (1932) 139 Or 581, 8 P2d 82.

(2) **Statute of limitations.** Where a check was delivered and accepted in the city where the drawee bank was situated, the statute of limitations started to run at the close of the next business day. *Colwell v. Colwell*, (1919) 92 Or 103, 179 P 916, 4 ALR 876.

The provision that "the drawer will be discharged from liability thereon to the extent of the loss caused by the delay" did not prevent the drawer's complete discharge by operation of the statute of limitations. *Id.*

(3) **Question of law or fact.** Where the facts were admitted or conclusively established, the question of what was a "reasonable time" was one of law. *Colwell v. Colwell*, (1919) 92 Or 103, 179 P 916, 4 ALR 876.

Whether a check was presented within a reasonable time was a jury question. *Joppa v. Clark Comm. Co.*, (1930) 132 Or 21, 281 P 834.

In determining what was a reasonable time for presenting a check for payment, regard was to be had to the nature of instrument, the usage of trade or business, if any, and the facts of the particular case. *Id.*

ATTY. GEN. OPINIONS: Days of grace in computing the due date of a negotiable instrument, 1924-26, p 385; sheriff's liability to county for failure to present checks within a reasonable time, 1926-28, p 230; "reasonable time," 1932-34, p 148.

LAW REVIEW CITATIONS: 9 OLR 188; 43 OLR 329.

73.5040

NOTES OF DECISIONS

1. Under former similar statute

Any reasonable request to pay a demand note, containing a provision for the payment of attorney's fees, was sufficient to put the maker in default, if he failed to discharge his obligation. *Hodges v. Blaylock*, (1916) 82 Or 179, 183, 161 P 396.

When a note was payable at a bank, a sufficient presentment occurred if the instrument was actually in the bank at maturity and the bank was ready to deliver it to anyone

entitled to make payment. *Nickell v. Bradshaw*, (1920) 94 Or 580, 183 P 12, 11 ALR 623.

Possession at time and place of payment of a note properly indorsed was prima facie evidence of authority to receive payment. *Id.*

There was no waiver of presentment merely because the indorser knew the maker was unable to pay. *Case v. McKinnis*, (1923) 107 Or 223, 213 P 422.

73.5050

NOTES OF DECISIONS

1. Under former similar statute

The maker was entitled to have a note surrendered to him on payment. *Maddock v. McDonald*, (1924) 111 Or 448, 227 P 463.

The maker of a demand note waived its exhibition upon a demand for payment by not asking for it, and by refusing payment on the ground that he did not then have the money. *Hodges v. Blaylock*, (1916) 82 Or 179, 161 P 396.

Where defendant denied plaintiff's alleged ownership of notes, the plaintiff had to prove ownership by producing the notes or excusing their nonproduction. *Tillamook County Bank v. Intl. Lbr. Co.*, (1923) 106 Or 339, 211 P 183, 941.

FURTHER CITATIONS: *Case v. McKinnis*, (1923) 107 Or 223, 213 P 422, 32 ALR 167.

73.5070

NOTES OF DECISIONS

One cannot maintain an action upon the instrument if he is not a holder. *Investment Serv. Co. v. Martin Bros. Container & Tbr. Prod. Corp.*, (1970) 255 Or 192, 465 P2d 868.

If one is not in possession of the instrument at the commencement of the action, for some cause other than because the instrument is lost, he cannot be a "holder." *Id.*

FURTHER CITATIONS: *First Nat. Bank v. Bach*, (1920) 98 Or 332, 193 P2d 1041.

73.5080

NOTES OF DECISIONS

1. Under former similar statute

The word "may" in the statute was construed to mean "must," thus impossibility of giving oral notice did not excuse delay, notice by mail being practicable. *Price v. Warner*, (1911) 60 Or 7, 10 P 49, 118 P 173.

Where the parties lived in the same town and plaintiff could not give notice orally due to defendant's absence until six or seven days had elapsed after dishonor, defendant was discharged. *Id.*

The burden was upon the holder to prove that the notice was mailed within the time prescribed by the Act. *Nickell v. Bradshaw*, (1920) 94 Or 580, 183 P 12, 11 ALR 623.

Sending notice before maturity to all the parties to a note was not such notice as was required to make an indorser liable under the statute. *Case v. McKinnis*, (1923) 107 Or 223, 213 P 422, 32 ALR 167.

Failure to give notice of dishonor to one of two indorsers, liable under a secondary joint liability, discharged both. *Id.*

An antecedent indorser successively liable could be made liable in solido, on notice of subsequent indorser, who paid after presentation and notice. *Id.*

Assignee's notice to assignor of nonpayment of note on day after first instalment was due was held sufficient. *Kummer v. Lauman*, (1932) 138 Or 514, 7 P2d 556.

Where plaintiff alleged "have duly notified said defen-

dant, W.E. Shoemake, of said default in payment," testimony was admissible to show notice of dishonor. *Id.*

FURTHER CITATIONS: *McMillan v. Montgomery*, (1927) 121 Or 28, 253 P 879.

73.5110

NOTES OF DECISIONS

1. Under former similar statute

(1) **In general.** The contingent liability of an indorser of a note was changed into a fixed liability by waiver of demand and notice. *Moll v. Roth Co.*, (1915) 77 Or 593, 152 P 235; *Boyce v. Toke Point Oyster Co.*, (1933) 145 Or 114, 25 P2d 930.

Where an indorser was not the party accommodated it was essential that he be given notice of dishonor in order that he be held liable. *First Nat. Bank v. Bach*, (1920) 98 Or 332, 193 P 1041; *Case v. McKinnis*, (1923) 107 Or 223, 213 P 422.

The impossibility of giving oral notice did not excuse delay, notice by mail being practicable. *Price v. Warner*, (1911) 60 Or 7, 111 P 49, 118 P 173.

Where the maker of a note told the indorsee he could not pay and the latter secured the consent of the indorser to give further time to the maker, and the indorser had agreed to look after the note, the indorser thereby waived notice. *Moll v. Roth Co.*, (1915) 77 Or 593, 152 P 235.

Where an indorser agreed to look after collection of a note for the indorsee, and on its due date orally agreed with the indorsee to allow the maker more time, he waived presentment. *Id.*

Knowledge by an indorser, who was a stockholder and director, that the corporation could not pay the note, did not effect a waiver of notice. *Case v. McKinnis*, (1923) 107 Or 223, 213 P 422, 32 ALR 167.

Notice to the maker of a note before maturity reminding him of the date when the note was to fall due was not such a presentment as would furnish basis for an indorser's liability. *Id.*

Knowledge by an indorser that a corporation, of which he was a stockholder and director, is unable to pay the note did not effect a waiver of presentment. *Id.*

A letter from indorsee's attorney to indorsee's wife, stating that indorser suggested that indorsee send the note to the writer with authority to sue thereon if he found anything to attach and that the maker could take care of the note, was not a waiver. *McMillan v. Montgomery*, (1927) 121 Or 28, 253 P 879.

Where there was a waiver of protest and nonpayment, there was an absolute obligation on the part of the indorser to pay the note if the maker did not. *Fisher v. Collver*, (1927) 121 Or 173, 254 P 815.

(2) **Pleading and proof.** An indorsee alleging notice of dishonor could not recover under proof of a waiver thereof. *McMillan v. Montgomery*, (1927) 121 Or 28, 253 P 879.

The complaint had to aver presentment, or show that it had been waived or was not essential in consequence of the contract or acts of the parties. *Robinson v. Holmes*, (1910) 57 Or 5, 109 P 754.

(3) **Indorsers jointly liable.** Where plaintiff and defendant were indorsers before delivery on a note, and both had been discharged due to failure to demand payment and give notice, plaintiff could not render defendant liable for contribution by waiving demand and notice. *Case v. McKinnis*, (1923) 107 Or 223, 213 P 422.

Where plaintiff and defendant were secondarily and jointly liable, failure to present a note and give notice of dishonor to one operated as a discharge of both. *Id.*

One of two persons indorsing a note before delivery were not precluded from separately waiving presentment and

notice of dishonor. *Boyce v. Toke Point Oyster Co.*, (1933) 145 Or 114, 25 P2d 930.

LAW REVIEW CITATIONS: 1 OLR 79; 11 OLR 229.

73.6010 to 73.8050

LAW REVIEW CITATIONS: 43 OLR 315-332.

73.6010

NOTES OF DECISIONS

1. Under former similar statute

(1) **"Prior party"**. The statute was not applicable where the "prior party" was discharged by operation of law or by virtue of a judgment predicated upon fraud. *Everding & Farrell v. Toft*, (1916) 82 Or 1, 150 P 757, 160 P 1160.

(2) **Accommodation maker.** An accommodation party was not relieved from liability "by any agreement binding upon the holder to extend the time of payment." *Cellers v. Meachem*, (1907) 49 Or 186, 89 P 426, 13 Ann Cas 997, 10 LRA(NS) 133; *Murphy v. Panter*, (1912) 62 Or 522, 125 P 292; *Farmer's State Bank v. Forsstrom*, (1918) 89 Or 97, 173 P 935.

Extension of time of payment of a note for a valuable consideration without the consent of an accommodation maker did not relieve him from liability. *Cellers v. Meachem*, (1907) 49 Or 186, 89 P 426, 13 Ann Cas 997, 10 LRA(NS) 133; *Farmers' State Bank v. Forsstrom*, (1918) 89 Or 97, 173 P 935; *Citizens' Bank v. Knudsen*, (1927) 120 Or 493, 252 P 969.

An accommodation maker was primarily liable as a principal debtor, notwithstanding an indulgence given to the indorser or drawer. *Murphy v. Panter*, (1912) 62 Or 522, 125 P 292.

An accommodation maker of a note being primarily liable could claim discharge by an act which would discharge a simple contract for the payment of money. *Farmers' State Bank v. Forsstrom*, (1918) 89 Or 97, 173 P 935.

An accommodation maker was in no way affected by the provisions of the statute. *Ford v. Schall*, (1924) 110 Or 21, 221 P 1052, 222 P 1094. **But see** *Barber v. Hartley*, (1931) 136 Or 210, 298 P 226.

The intentional cancellation of a note discharges the indorsers. *Oregon & W. Colonization Co. v. Willoughby*, (1927) 122 Or 170, 257 P 812.

Where makers of note were discharged by merger resulting from conveyance of mortgaged premises to mortgagee's trustee, accommodation maker was also discharged. *Barber v. Hartley*, (1931) 136 Or 210, 298 P 226.

(3) **Parol Evidence.** Parol evidence of release of indorser based on valuable consideration was not admissible where the instrument was not surrendered to person primarily liable. *Portland Iron Works v. Siemens*, (1931) 135 Or 219, 295 P 463.

(4) **Burden of proof.** The maker of a note who pleads payment had the burden of proving it. *Murphy v. Panter*, (1912) 62 Or 522, 125 P 292.

FURTHER CITATIONS: *Bagley v. Kerr*, (1941) 166 Or 368, 112 P2d 459; *Investment Serv. Co. v. Martin Bros. Container & Tbr. Prod. Corp.*, (1970) 255 Or 192, 465 P2d 868.

ATTY. GEN. OPINIONS: Effect of a proposed guaranty contract designed to release a comaker, 1950-52, p 236.

LAW REVIEW CITATIONS: 10 OLR 399; 14 OLR 273, 274; 17 OLR 83; 27 OLR 75; 33 OLR 298.

73.6020

CASE CITATIONS: *Investment Serv. Co. v. Martin Bros.*

Container & Tbr. Prod. Corp., (1970) 255 Or 192, 465 P2d 868.

LAW REVIEW CITATIONS: 43 OLR 234.

73.6030

NOTES OF DECISIONS

Payment to prior holder does not operate as discharge of the instrument unless such former holder is authorized by the holder to receive payment on his behalf. Investment Serv. Co. v. Martin Bros. Container & Tbr. Prod. Corp. (dictum), (1970) 255 Or 192, 465 P2d 868.

FURTHER CITATIONS: Tillamook County Bank v. Intl. Lbr. Co., (1923) 106 Or 339, 211 P 183, 211 P 941.

ATTY. GEN. OPINIONS: Duty of State Treasurer to examine indorsements on state drafts, 1966-68, p 564.

73.6040

LAW REVIEW CITATIONS: 43 OLR 230.

73.6050

NOTES OF DECISIONS

1. Under former similar statute

A renunciation or release had to be in writing whether gratuitous or supported by consideration unless the instrument had been delivered up to the person primarily liable. Portland Iron Works v. Siemens, (1931) 135 Or 219, 295 P 463.

The payee could recover upon the instrument in an action at law where the cancellation was inoperative under the statute. Fitzgerald v. Nelson, (1938) 159 Or 264, 79 P2d 254.

A written renunciation was effective even though the negotiable instrument was not delivered to one primarily liable thereon. Bagley v. Kerr, (1941) 166 Or 368, 112 P2d 459.

No consideration was required for the renunciation of rights by the holder. Id.

FURTHER CITATIONS: Lothstein v. Fitzpatrick, (1943) 171 Or 648, 138 P2d 919.

LAW REVIEW CITATIONS: 10 OLR 399; 33 OLR 298.

73.6060

NOTES OF DECISIONS

Discharge of a party under paragraph (b) of subsection (1) is not absolute but only according to the value of the lost security. Christensen v. McAtee, (1970) 256 Or 333, 473 P2d 659.

FURTHER CITATIONS: Philco Fin. Co. v. Patton, (1967) 248 Or 310, 432 P2d 686; Oregon Bank v. Baardson, (1970) 256 Or 454, 473 P2d 1015; Blakely v. Schulz, (1971) 257 Or 527, 480 P2d 428.

LAW REVIEW CITATIONS: 43 OLR 243.

73.8020

ATTY. GEN. OPINIONS: Disposition of unclaimed telegraphic money order principal, 1964-66, p 242.

73.8040

CASE CITATIONS: Investment Serv. Co. v. Martin Bros. Container & Tbr. Prod. Corp., (1970) 255 Or 192, 465 P2d 868.

73.8050

ATTY. GEN. OPINIONS: Duty of State Treasurer to examine indorsements on state drafts, 1966-68, p 564.