

## Opinion No. 19-2445

December 6, 1919

**BY:** HARRY S. BOWMAN, Assistant Attorney General

**TO:** Mr. J. C. Miller, Deputy Bank Examiner, Santa Fe, New Mexico.

Effect of Indorsement of Interest Payment on Note in Advance.

### OPINION

In reply to your oral request for an opinion from this office regarding the question as to the effect of the indorsement upon a promissory note of an interest payment in advance in so far as the maturity date of the instrument is concerned, we desire to advise you as follows:

There are three separate and distinct lines of cases wherein this question has been passed upon by the courts. Some having taken the view that the payment of interest in advance is not of itself sufficient to establish an agreement to give further credit. Other courts have held that the taking of interest in advance on a note is, and in the absence of a contrary agreement, **prima facie** evidence of an agreement to forbear collection of the note. And according to still other courts, if a creditor without inadvertence or mistake receives a payment of interest in advance on a note of his debtor, and does not expressly reserve the right to sue before the expiration of the period for which interest is taken, there is a contract created to extend the time of payment during the period for which the interest is paid.

The question has in all of the cases arisen between the maker of the note and the payee and we therefore have no ruling regarding the manner in which notes upon which advance interest payments have been made, are to be treated by the bank examiner. The courts which have adopted the rule first above mentioned, do not go so far, however, as to hold that an interest payment in advance indorsed upon the note itself does not extend the time for payment. In the line of cases which have adopted the said rule, the indorsement of the payment has been made on a separate and distinct paper and it was held that such an indorsement would not create a new contract extending the time of payment of the note.

The other two rules are based upon the indorsement upon the note of the fact of a payment in advance and the reasoning in these cases would seem to be more logical than that in the cases adopting the first rule if, in fact, it can be argued that there is a difference between the holding in these cases.

In the case of Crosby vs. Wyatt, 10 N. H. 318, the court passed upon this very question using the following language:

"Where an individual pays interest upon a note in advance, he does so for the purpose of procuring delay; and it is believed that it is generally understood between the parties, unless there is some express reservation, that the creditor has no right to call for the principal, until the expiration of the time . . . The payment of the interest is the consideration of such an agreement, implied from the transaction itself, if not distinctly expressed. The sum received is a payment, not of a part of the principal, or generally, but, specially, of interest, for a certain period. And why is this payment made? Clearly to obtain the delay, and for nothing else. The very idea of a payment of interest in advance presupposes that delay of payment of the principal is to be given for the time. The interest thus paid is not expected to be applied afterward to the principal, or paid back on any contingency, unless there is some agreement of the parties to that effect. Nor are we aware of any principle upon which the maker, after such payment of interest in advance could before the expiration of the time, on offering to pay the balance, require the creditor to apply any portion of the interest so paid in discharge of the principal . . . . The general rule, of course, does not apply where, on the payment of interest in advance, liberty to sue is reserved."

In the case of *Bank of British Columbia vs. Jeffs*, 18 Wash. 135, 63 Amer. State Rep. 875, a large number of the cases considering the point are collected and discussed and from these it is evident that the weight of authority is to the effect that an advance payment of interest, indorsed upon the note constitutes a contract which prevents the payee or subsequent holder from filing suit upon the note prior to the period for which the interest is paid.

If, therefore, payment of the note cannot be enforced until the period for which interest has been paid has expired, then the maturity date of the note is extended and it cannot be said that the note is overdue.