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NEGOTIABLE INSTRUMENTS

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In this survey of recent Florida cases, several cases have been omitted which involved construction of the intention of the parties to a negotiable instrument, equitable jurisdiction in a suit brought by the holder of a note, and the burden of proving a forged indorsement. These cases presented no unusual interpretation of negotiable instruments law nor any substantial variation from prior Florida decisions.

The noteworthy cases include *Eisenman v. Vernell*,[1] an action for payment of promissory notes on which the signatures of the makers had been forged. The defendant had indorsed without recourse, and he also pleaded a separate written agreement whereby the plaintiff, at the time of the transfer of the notes to him, had agreed to "look solely to the maker and any subsequent endorsers"[2] for payment. The court in effect held that this writing negated the indorser's warranty of the genuineness of the obligations which he sold, and held for the defendant.

Under section 38 of the Negotiable Instruments Law[3] an indorser who signs without recourse becomes an assignor of the title to the instrument and makes no promise to pay it. However, under section 65[4] he warrants that the instrument is genuine and what it purports to be. Obviously a forged note is neither genuine nor the valid legal obligation of the maker which it purports to be. The warranties of an indorser are very similar to those impliedly made by a seller of chattels,[5] and, like them, can be expressly negated. In the principal case the court held this to be the effect of the separate written agreement not to look to the defendant for payment. This construction of the writing seems open to some doubt. In all probability it was intended simply to make certain that the indorsement would *not* be treated as an unqualified one whereby the indorser warrants the solvency of the obligor by agreeing to pay if the instrument is dishonored and proper notice given the indorser.[6] It would be interesting to know how much the defendant received for the worthless obligation he sold to the plaintiff.

Davis v. West[7] also involved a qualified indorsement, but the principal question was whether one taking a promissory note under the words of an

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1. 114 So.2d 16 (Fla. App. 1959).
2. *Id.* at 17.
3. FLA. STAT. § 674.41 (1961).
4. FLA. STAT. § 674.67(1) (1961).
5. BRITTON, HANDBOOK OF THE LAW OF BILLS AND NOTES § 246 (2d ed. 1961).
6. FLA. STAT. § 674.68 (1961).
7. 114 So.2d 703 (Fla. App. 1959).

assignment could be a holder in due course and hence take free of defenses available to the maker against the payee. The court stated that the form of the transfer used would not prevent the plaintiff from being a holder in due course, but, since he took after default and with notice thereof, the plaintiff failed to meet other prerequisites to the standing of a due course holder.

By section 52(4)(2) of the NIL[8] a holder in due course must take the instrument by negotiation and without notice of previous dishonor. If the instrument is payable to order it is negotiated by indorsement and delivery.[9] The first question, then, is whether the notation on the back of the note, "I hereby assign, transfer, sell and forever quitclaim all my . . . interest in the within note without recourse to . . . ,"[10] constitutes an indorsement. The court stated, in accordance with the great weight of authority,[11] that these words of assignment plus delivery constitute a proper negotiation and not a mere assignment of the holder's rights. It was also stated that though the use of the words "without recourse" made the indorsement a qualified one, this would not destroy the negotiable character of the instrument or prevent indorsees from taking as holders in due course.[12] However, this dicta did not help the plaintiff because the subsequent finding that the plaintiff took after maturity and with notice of default clearly prevented him from being a holder in due course under the statute.[13]

In *Knauer v. Levy*[14] and *Broward Nat'l Bank v. Bear*[15] a procedural advantage to the holder of a negotiable instrument was illustrated. In both cases payment was pleaded in defense and the courts stated that the note, when introduced in evidence, establishes a prima facie case of indebtedness, and that payment thereof is an affirmative defense which must be established by a preponderance of the evidence by the person claiming it. In the second case the obstacles to a successful assertion of this defense were practically insurmountable when the defendant's testimony as to payment was held inadmissible under the Florida dead man's statute.[16] Procedural advantages to the plaintiff in a suit brought on a negotiable instrument are substantial and have been commented upon in a prior *Survey of Florida Law*.[17]

Under suretyship law a binding agreement between the creditor and the debtor extending the time of payment discharges the surety.[18] However,

8. FLA. STAT. § 674.54 (1961).
9. FLA. STAT. § 674.33 (1961).
10. 114 So.2d at 704.
11. BRITTON, HANDBOOK OF THE LAW OF BILLS AND NOTES § 58 (2d ed. 1961).
12. FLA. STAT. §§ 674.34, .41, .54 (1961).
13. FLA. STAT. § 674.54(2) (1961).
14. 115 So.2d 776 (Fla. App. 1959).
15. 125 So.2d 760 (Fla. App. 1961).
16. FLA. STAT. § 90.05 (1961).
17. McKenna, *Bills and Notes, Survey of Florida Law*, 8 MIAMI L.Q. 293 (1953-54).
18. 4 WILLISTON, CONTRACTS § 1222 (rev. ed. 1936).

the surety will not be discharged if the creditor expressly reserves his rights against the surety or if the surety consents to the extension.[19] These principles of the law of suretyship are applied to discharge persons secondarily liable under section 120 of the NIL.[20] Thus, in *Card v. Commercial Bank*[21] it was held, in an action against an accommodation indorser of a note, that the issuance of a renewal note extending the time of payment without knowledge or consent of the defendant and the collection of interest in advance for the period of extension would discharge the defendant.

Miami Beach First Nat'l Bank v. Edgerly[22] affirmed the right of a depositor to force the drawee bank to recredit his account with the amount of a check paid by the drawee under a forged indorsement of the payee. The court stated that "if a bank pays a check with a forged indorsement, it pays out of its own funds, not those of the depositor."[23] This, of course, is the almost uniform rule when the bank fails to pay as directed by the drawer.[24] The court then proceeded to hold that a three year statute of limitations[25] was applicable, but that it did not start to run until the depositor knew or should have known of the forgery.

A much more controversial holding involving Florida law with regard to payment by the bank of a check on which the payee's indorsement was forged is *Bello v. Union Trust Co.*[26] The check was payable to the plaintiff-wife and her husband as co-payees. The husband forged his wife's signature on the check and ultimately converted the proceeds which he received from the collecting bank, which was in turn paid by the drawee. The plaintiff-wife brought an action against both banks for the amount of her interest in the check. The Fifth Circuit Court of Appeals held that under Florida law a tenancy by the entireties in the check was created, and since payment to the husband was in fact payment to the "unity" the wife was not entitled to recover.

In Florida, and by the weight of authority, a payee whose check has been paid by the drawee bank to another person under the payee's forged indorsement can recover from the bank on the theory of conversion.[27] Title does not pass under the forged indorsement and anyone dealing with the check

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19. *Id.* at §§ 1223, 1230. In Fort Pierce Bank & Trust Co. v. Sewall, 113 Fla. 811, 152 So. 617 (1934) the court indicated that liability of the surety cannot be retained by act of the creditor alone. This statement, however, appears to be dictum.

20. FLA. STAT. § 675.28(2)(f) (1961).

21. 119 So.2d 404 (Fla. App. 1960).

22. 121 So.2d 417 (Fla. 1960).

23. *Id.* at 419.

24. BRITTON, HANDBOOK OF THE LAW OF BILLS AND NOTES § 142 (2d ed. 1961).

25. FLA. STAT. § 95.11(5)(e) (1961).

26. 267 F.2d 190 (5th Cir. 1959).

27. Lewis State Bank v. Raker, 138 Fla. 227, 189 So. 227 (1939); Louisville & N.R.R. v. Citizens & Peoples Nat'l Bank, 74 Fla. 385, 77 So. 104 (1917); BRITTON, HANDBOOK OF THE LAW OF BILLS AND NOTES § 146 (2d ed. 1961).

thereafter is converting the payee's property. The federal court cited Florida statutes which provide that a forged signature is wholly inoperative, and that when an instrument is payable to joint payees who are not partners both must indorse unless one has authority to indorse for the other.[28] Why, then, should one tenant by the entireties of a negotiable check be able to convey good title thereto by a forgery? Certainly, if a husband should forge his wife's name to a deed for real property held by the entireties, and then abscond with the purchase price, the purchaser would not get good title. On the same theory, in the instant case, the collecting bank and the drawee bank converted the wife's property because her title did not pass to them.

If the holding of the court is supportable at all, it would be on the simple contract theory that payment to one of two joint obligees discharges the obligation. Some jurisdictions apply this contract rule to negotiable instruments, holding that section 41 of the NIL,[29] requiring indorsement by all payees or indorsees, applies only to negotiation and not to payment.[30] The weight of authority with regard to negotiable instruments, however, is to the contrary.[31] There would seem to be no valid reason why one joint payee should be able to discharge a negotiable instrument when he clearly cannot negotiate it under the statute. The fact that the co-payees were tenants by the entireties should make no difference unless one of them died. Then, admittedly, full ownership would be conferred upon the surviving spouse, who could discharge or negotiate the instrument free of any claim by the personal representative of the deceased.[32]

28. FLA. STAT. §§ 674.25, .44 (1961).
29. FLA. STAT. § 674.44 (1961).
30. Dewey v. Metropolitan Life Ins. Co., 256 Mass. 281, 152 N.E. 82 (1926).
31. Virginia-Carolina Joint Stock Land Bank v. First & Citizens Nat'l Bank, 197 N.C. 526, 150 S.E. 34 (1929); BRITTON, HANDBOOK OF THE LAW OF BILLS AND NOTES § 48 (2d ed. 1961).
32. Ehrlich v. Mulligan, 104 N.J.L. 375, 140 Atl. 463 (Ct. Err. & App. 1928).