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NEGOTIABLE INSTRUMENTS

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In the last Survey of Florida Law,¹ I commented upon how few Florida Supreme Court cases were decided on the law of negotiable instruments during the two year period. In this survey there are three times as many — three, in fact — to be considered. At this rate of increase every two years it may not be too long before we can proudly proclaim that Florida note holders have become as litigious as those of Louisiana where, again, over twenty cases were reported in the same interval.

NON-DELIVERY OF NEGOTIABLE INSTRUMENT AS A DEFENSE

In *Johnson v. Smith,*² defendant and another executed a promissory note payable to plaintiff in the sum of $7,000 in payment for 726 shares of the capital stock of Southern Insurance, Inc. The note and the stock were delivered to an escrow agent under an arrangement whereby the makers of the note were to pay $200 per month for 35 months, at which time the stock was to be delivered to them. The stock which was being purchased was thus employed as collateral security for payment of the note (comparable to a purchase-money mortgage.)

The note provided that additional security would be furnished on demand and that on failure to comply with such demand the holder could immediately declare the entire balance due. The plaintiff accordingly exercised this right to accelerate, after making proper but ineffectual demand for additional security. The escrow agent then turned over the note and the stock to the plaintiff, though, as the court noted in its opinion, the escrow arrangement contained no provision for disposition of the note and stock in such an eventuality.

In this action on the note defendant’s plea of non-delivery was stricken and the trial judge entered a default judgment for the balance due on the note, some $1,300. The supreme court reversed on the ground that non-delivery constituted a good defense to the maker of the note as against the payee, with the burden of establishing this defense on the maker. The court then intimated that if defendant successfully sustained this burden, plaintiff’s only recourse would be an action for breach of contract to purchase stock, to which the defendant might or might not have a good defense.

The holding would appear to be correct so far as the rule of law announced by the court is concerned. Delivery is essential to the completion

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². *84 So.2d 722* (Fla. 1956).
of a contract and this contract rule is codified, with respect to an action between immediate parties, in section 16 of the Negotiable Instrument Law. A valid delivery as between prior parties to a negotiable instrument is conclusively presumed in favor of a holder in due course. The same section would place the burden on the maker to prove the defense of non-delivery to the payee when the payee brings the action.

The outcome in the present case would seem to depend upon whether the parties contemplated the escrow agent as an agent of the payee authorized to receive delivery for the payee, or as an agent of the maker of the note to complete delivery to the payee in the future. The facts would appear to indicate the former, as part of the agent's job was to collect the installment payments and turn them over to the payee of the note. The trial judge evidently thought this to be the logical interpretation when he entered judgment for the plaintiff, but the supreme court held that the escrow arrangement created a transaction tantamount only to an agreement by the appellee to sell and the appellant to buy the shares of stock.

The Law of Agency as Applied to Bills and Notes

In Betz v. Bank of Miami Beach\(^4\) two promissory notes containing the wording “. . . the undersigned jointly and severally promise to pay to the Bank of Miami Beach . . .” were signed on three separate lines,—“Corvette of Miami, Inc.” (typewritten)—then “Hal Kaye—(Seal)” and—“Howard Betz—(Seal).” On non-payment summary judgment was entered in favor of the bank against the three signers and Betz brought this appeal. The supreme court affirmed the judgment, in effect holding that section 20 of the Negotiable Instruments Law\(^5\) would prevent the introduction of parol evidence to prove that it was not the intention of the parties that Betz be individually liable. Betz had claimed that he had signed as maker only in his representative capacity as secretary-treasurer of the corporation and not individually, but his offer to prove this was disallowed. The court admitted the apparent harshness of the holding and suggested that Betz should have sought reformation of the contract,\(^6\) though this could not "assist Betz in his dilemma" now.

The parol evidence rule generally prohibits the introduction of evidence of prior or contemporaneous oral agreements which would "vary, alter or contradict" an unambiguous written contract. The theory is, of course, that the writing constitutes the best evidence of the true agreement and should be construed as having merged all previous or contemporary oral agreements. Like the “Statute for the Prevention of Frauds and Perjuries,” the parol evidence rule now and then appears to cause an injustice rather

\(^3\) Fla. Stat. § 674.18 (1957).
\(^4\) 95 So.2d 891 (Fla. 1957).
\(^6\) Valentine v. Hayes, 135 So. 538, 102 Fla. 157 (1931).
than to prevent it. Thus an authorized agent who inadvertently signed his own name to a written contract and intended to bind only his principal may find himself liable thereon if the name of the principal does not appear in the writing. Even the addition of the word "Agent" to his signature will not by the weight of authority permit him to avoid personal liability.\footnote{7}

Obviously, such an agent's remedy at law is inadequate and so equity will provide him some recourse. The usual procedure is for the agent against whom suit is brought to bring a bill in equity to simultaneously enjoin the action against him and to reform the written contract to accord with the true intent of the parties.\footnote{8} In this bill for reformation the plaintiff would have the burden of proving, ordinarily, either fraud or a mutual mistake of fact, a burden which may be most difficult to sustain.

The N.I.L. section 20\footnote{9} provides that: "Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent or as filling a representative character, without disclosing his principal, does not exempt him from personal liability."

In the case being considered the main question, answered in the negative by the Florida court, is whether the typewritten name "Corvette of Miami, Inc." constitutes, under the statute, "words indicating that he (appellant) signed for or on behalf of a principal, or in a representative capacity." The general rule under the N.I.L. is that where an authorized agent signs his own name and does not add to his signature any words indicating that he is signing in a representative capacity (e.g., "agent" or "as agent"), but the instrument does set forth the name of a third party, the signer is presumptively liable personally. However, parol evidence is admissible to show that such signer was the agent of the party whose name was set forth and to show that the signer did not intend to bind himself.\footnote{10} The Florida Supreme Court would thus seem to be adopting the minority rule in this decision.

It would be possible to distinguish this Florida case from most of those supporting the general rule by emphasizing the wording of the notes involved: "... the undersigned jointly and severally promise to pay..." To permit the defendant to show, in the face of this wording, that only Corvette of Miami, Inc. was intended to be bound would be equivalent to complete avoidance of the parol evidence rule.

\footnote{7}{Norfolk County Trust Co. v. Green, 304 Mass. 406, 24 N.E.2d 12 (1939); see contra Restatement, Agency § 156 (1933).}
\footnote{8}{Eustis Mfg. Co. v. Saco Brick Co., 198 Mass. 212, 84 N.E. 449 (1908).}
\footnote{9}{See note 5 supra}
It was assumed that the note in the instant case was negotiable, although its language as set forth by the court "... the undersigned jointly and severally promise to pay to the Bank of Miami Beach ..." omits words of negotiability. If the words "order" or "bearer" are not included on the face of the instrument, it ordinarily would not be negotiable under section 1 of the Negotiable Instruments Law. If the note were not negotiable the statute relied upon in the decision would not be pertinent, and a more liberal interpretation of the parol evidence rule might have been employed by the court.

**Effect of Intention of the Maker or Drawer as to the Payee**

*Florida National Bank at St. Petersburg v. Geer* was a suit by a depositor against the depository, drawee, bank to force the bank to re-credit the plaintiff's account with the amount of a check that, plaintiff alleged, was paid out under the forged indorsement of the payee. The record indicated plaintiff drew the check payable to the order of N. C. Baughman; this was then endorsed by C. N. Baughman, the son of N. C. Baughman, and cashed at a collecting bank. The defendant, drawee bank, later paid the collecting bank and charged plaintiff depositor's account. The money was used in an unauthorized manner and this action ensued. The defendant answered that the check was actually intended to go to C. N. Baughman, and that he was authorized to obtain the proceeds thereof. The bank also maintained that the plaintiff had erroneously made the check payable to the intended payee's father, and that since C. N. Baughman was entitled to the money, its subsequent misappropriation by him was of no concern to the defendant bank.

The lower court granted a motion to strike all of the answer, except that portion admitting the bank had cashed the check without the indorsement of the named payee, and entered a summary final decree against the bank. This holding was reversed with instructions to find for the bank if the bank could establish that the check was payable to bearer under Florida Statutes section 674.11 (3) which was interpreted to read: "The instrument is payable to bearer when it is payable to the order of a person whom the person making it so payable intended should have no interest in the instrument." The bank would also prevail if it could prove that "the intended person received the proceeds of the check"; the court furnished numerous citations in support of this rule. The plaintiff's case depends upon the establishment of his contention that the check was intentionally made to the order of the father because of mistrust of the son, and that only the father was entitled to receive payment.

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12. 96 So.2d 409 (Fla. 1957).
The question as between the depositor, drawer of the check, and the drawee, depository bank, is simply whether or not the bank paid according to the drawer's order. If, in legal effect, the bank is ordered to pay the bearer of the check the bank has fulfilled its obligation by doing so and a forged indorsement is of no consequence. If a bank pays out money on the forged indorsement of the payee's name on a check, the bank is not ordinarily paying out according to the depositor's order and hence may not debit the depositor's account. The bank may, however, recover back as money paid out under mistake of fact from the person to whom payment was made.¹⁴ If the case being discussed is ultimately decided for the plaintiff, the defendant will be able to recover back from the collecting bank to whom payment was made.

If the plaintiff intentionally made the check payable to N. C. Baughman but intended C. N. Baughman to indorse and cash it, then under the usual construction of N.I.L. section 9 (3)¹⁵ the instrument would, as the court said, be a bearer instrument and the bank would be justified in charging the drawer's account. This interpretation of the plaintiff's intent would, however, constitute rather strange and pointless conduct on his part.

The second ruling of the court, to the effect that if the intended person received the proceeds of the check the bank has performed its duty to the depositor, would seem to be better adapted to the facts of the case. It could also have been argued that if, as the bank claimed, the drawer of the check inadvertently attached the wrong initials to the payee's name the case would fall under N.I.L. section 43¹⁶ which reads: “Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he think fit, his proper signature.” Under this section it is generally held that an indorsement in the true name of the payee is a valid indorsement.¹⁷ Obviously, if the indorsement was valid the bank would be entitled to debit the depositor's account for the amount of the check.

¹⁴. Id. at 641.
¹⁵. Fla. Stat. § 674.11 (3) (1957); Johnston v. Exchange National Bank of Tampa, 9 So.2d 810, 152 Fla. 228 (1942); BRITTON, HANDBOOK ON THE LAW OF BILLS AND NOTES, 700 (1943).