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# Bills and Notes -- Renunciation of Rights by Holder Conditioned Upon Holder's Death -- Effect as Discharge of Parties Liable on Instrument

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evidence of such an intent.<sup>18</sup> Had the court chosen to follow this line of reasoning, there seems little doubt that the plaintiff would have recovered, for the court admits there was *no* intent present to forgive the debt itself. However, the court simply chooses to conclude that regardless of the holder's over-all intent, so long as he intentionally destroyed the instrument, the whole obligation is forgiven.

It would seem that under this strict interpretation of the statute, even where the parties agreed to destroy the instrument but also expressly agreed that the debt should remain in existence, a discharge of the obligation would nevertheless result because only the act of destruction is looked to, and if that be intentional, the debt is discharged. It would further seem that even if a clear mistake of law or fact were present, this rule would compel the discharge to be effective if the act of cancelling the note is intentional, flying directly in the face of the section of the statute that provides the discharge shall be inoperative if made through mistake.<sup>19</sup> Surely the court would not intend to sanction such a result.

It is seriously questioned whether such a narrow interpretation is desirable. The results indeed appear harsh. The maker has done nothing in reliance on the destruction—in fact he was even ignorant of the act. Therefore he would be done no harm had the court simply said he was still liable. Whereas, by saying his liability was at an end, the effect is to make a gift to him, while the holder certainly did not intend to make a gift. The holder simply thought he would be unable to collect the debt, and from this the court's conclusion in effect would say that because he knowingly destroyed the instrument, he no longer wanted to collect the debt. It is felt that justice would best be served if, in each case, we were to look behind the destruction to discover the true motive for it, rather than to apply the automatic rule of absolute discharge announced here.

DONALD R. ERB

### Bills and Notes—Renunciation of Rights by Holder Conditioned Upon Holder's Death—Effect as Discharge of Parties Liable on Instrument

"There is some obscurity in the provisions of our statute," said a New York court in its decision of a 1905 case<sup>1</sup> which hinged on the interpretation of a section of the statute on negotiable instruments then in force in that state<sup>2</sup>—a section virtually identical with the present Section 122 of the Negotiable Instruments Law.<sup>3</sup> A recent Virginia

<sup>18</sup> *Id.* at 922.

<sup>19</sup> See note 16 *supra*.

<sup>1</sup> *Leask et al. v. Dew*, 102 App. Div. 529, 92 N. Y. S. 891 (1st Dep't 1905).

<sup>2</sup> N. Y. Laws 1897, c. 612, § 203.

<sup>3</sup> "The holder may expressly renounce his rights against any party to the

case, *Farmer et al. v. Farmer*,<sup>4</sup> has called attention to the fact that a half-century of judicial interpretation of Section 122 has not brought forth much certainty as to what it does and does not allow the holder of negotiable paper to accomplish by an attempted renunciation of his rights against any party to the instrument. The problem before the court was this: the payee-holder of a promissory note made by a nephew and the nephew's wife, feeling that his death was relatively imminent and not desiring that any payments on the instrument (an installment note containing an acceleration clause) be made after his death, consulted his attorney and upon the latter's advice made this notation on the instrument itself: "At my death this note is to be cancelled and not to be collected. 5/1/48 [signed] P. W. Farmer." He subsequently made a similar notation on the mortgage deed of trust securing the note, and died about a year later. His ancillary administrator filed a bill in equity to have the note declared valid as against the makers, the entire amount then being due under the acceleration clause because one payment had not been made. The Supreme Court of Appeals, brushing aside the trial court's conclusions that the renunciation was ineffective because it was testamentary in character and because it did not meet the requirements of a valid gift inter vivos, reversed a decree that the obligation was still enforceable, and held (1) that the death of the payee-holder had consummated a valid discharge begun by the payee-holder's conditional renunciation, and (2) that Section 6-475 of the Virginia Code, the equivalent of N. I. L. § 122, does not deprive a renunciation of its effect merely because it is conditional, the condition having occurred.<sup>5</sup>

Obviously, the first problem posed by Section 122 is one of definition: what does the word "renounce" mean, as applied to a holder's rights on a negotiable instrument? At English common law, before the enactment of the Bills of Exchange Act of 1882,<sup>6</sup> it was quite well

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instrument, before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon."

<sup>4</sup> Va. —, 77 S.E. 2d 415 (1953).

<sup>5</sup> The court did not decide whether the payee-holder could have revoked his renunciation had he changed his mind prior to his death, or what the results might have been had he sued for the entire amount upon the default in payment which accelerated the maturity; it did indicate that, whatever its answers to those problems might be, they would not influence the result reached in a situation such as that presented by the *Farmer* case.

<sup>6</sup> 45 & 46 VICT., c. 61 (1882). Section 62, quite similar to N. I. L. § 122, reads as follows:

"Express Waiver.—(1) When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged.

settled that the holder of negotiable paper could discharge a party liable thereon even by an *oral* statement of his intention so to do, with or without consideration in return.<sup>7</sup> American courts, prior to the N. I. L., never went so far as to validate an oral discharge made by the holder without consideration.<sup>8</sup> Even attempts at gratuitous discharge evidenced by a writing were held to be of no effect, the common law of gifts being applied to find that there was no valid transfer of title if the instrument itself were not delivered up.<sup>9</sup> The single case allowing effect to a gratuitous renunciation arrived at its result only by treating what was actually "past" consideration as value sufficient to support the discharge.<sup>10</sup> Thus both Section 62 of the Bills of Exchange Act and Section 122 of the N. I. L. changed the law as it had existed previously. These enactments purported to allow a "renunciation" of the holder's rights against parties to negotiable instruments when that renunciation was evidenced by a writing or by a surrender of the instrument itself. In the light of the cases just considered, the result was a restriction of the previous English doctrine of renunciation, and an expansion of the American doctrine.

But did the "renunciation" referred to mean (1) a gratuitous abandonment of rights, (2) an abandonment of rights supported by a consideration, or (3) either type of abandonment? The first really thorough consideration of the question did not come until 1932, and the case then decided, *Gannon v. Bronston*,<sup>11</sup> is still the best available judicial discussion of the subject.<sup>12</sup> Bronston, one of three makers of a note, attempted, when sued by the holder, to set up as a defense an oral

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"The renunciation must be in writing, unless the bill is delivered up to the acceptor.

"(2) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity; but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation."

The use of the word "acceptor" rather than "holder" would seem at first glance to restrict the application of Section 62 to bills of exchange only, and to exclude promissory notes. Such is not the case, for Section 89(2) states: "In applying these provisions the maker of a note shall be deemed to correspond to the acceptor of a bill. . . ."

<sup>7</sup> *Foster v. Dawber*, 6 Exch. 839, 155 Eng. Rep. 785 (1851). In *Whatley v. Tricker*, 1 Camp. 35, 170 Eng. Rep. 867 (1807), the court held that, while the fact that the renunciation in issue was oral did not alone deprive it of effect as a discharge, the fact that it was not absolute and unconditional made it ineffective, thus foreshadowing one of the problems faced by the Virginia court in the *Farmer* case, one hundred and forty-six years later.

<sup>8</sup> *Bradley v. Long*, 33 S. C. Law (2 Strob.) 160, Book 14 S. C. Reports 161 (1847); *Griffin et al. v. Simmons et al.*, 61 Tenn. 19 (1872).

<sup>9</sup> *Hart et al. v. Strong et ux.*, 183 Ill. 349, 55 N.E. 629 (1899); *Bragg v. Danielson*, 141 Mass. 195, 4 N.E. 622 (1886).

<sup>10</sup> *Lowrey v. Danforth*, 95 Mo. App. 441, 69 S.W. 39 (1902).

<sup>11</sup> 246 Ky. 612, 55 S.W. 2d 358 (1932).

<sup>12</sup> "The most notable thing in the case is the learned and thorough way in which it was handled. It is believed that this is, perhaps, the most erudite opinion to be found in the Kentucky Reports." Note, 22 Ky. L. J. 445, 448 (1934).

discharge supported by consideration. The precise question facing the court, therefore, was whether the words "renounce" and "renunciation," as used in N. I. L. Section 122, referred to discharges for a valuable consideration and required such discharges to be in writing. Collecting all the cases on the problem that it could find, the court decided that the majority and preferable view was that "renunciation" meant only the *gratuitous* abandonment of a right.<sup>13</sup> Such is still the majority view today.<sup>14</sup> The minority view is that "renunciation" describes the abandonment of a right *with or without* consideration, and that even discharges for a valuable consideration—that is, a consideration other than that which the instrument itself promises to give—must be in writing or evidenced by a surrender of the instrument if they are to be effective.<sup>15</sup> The only North Carolina case passing on the point adopts the minority view.<sup>16</sup> No decisions handed down since *Gannon v. Bronston* have espoused the minority view,<sup>17</sup> and the predominant contemporary American view is that a "renunciation," under Section 122, is the gratuitous giving up of a right. The few law re-

<sup>13</sup> The rationale of the majority view seems to lean heavily on the history of the common law "release." Such a "release" was a discharge, under seal, of some existing obligation, the seal being used to import consideration and make possible a gratuitous but legally effective giving up of rights on negotiable paper or other contractual obligations. 6 WILLISTON, CONTRACTS § 1820 (1938). The English concept of gratuitously renouncing rights on negotiable paper seems, at least in part, to have developed from an imitation of the law of France, where the practice was known at a relatively early date and later codified. "Les obligations s'éteignent, par la paiement, par la novation, par la remise volontaire." ("Obligations are extinguished by payment, by novation, and by voluntary release.") FRENCH CIVIL CODE, Ann. by Blackwood Wright, c. 5, art. 1234. Such were the germs of the renunciation provisions of the Bills of Exchange and Negotiable Instruments Acts, runs the argument of the majority, and so the modern statutory renunciation is held to be the gratuitous surrender of a right. As we have seen, *supra* note 7, the English common law advanced to the point of giving effect to an oral renunciation; the statutory requirement of a writing seems to have been imported from the law of Scotland. 6 WILLISTON, CONTRACTS § 1832 (1938).

<sup>14</sup> *McCoun v. Shipman*, 75 Ind. App. 212, 128 N.E. 683 (1920); *Cardoza et al. v. Leveroni*, 233 Mass. 310, 123 N.E. 672 (1919); *McGlynn v. Granstrom*, 169 Minn. 164, 210 N.W. 892 (1926); *Hazlehurst Oil Mill and Fertilizer Co. v. Booze et al.*, 160 Miss. 136, 133 So. 120 (1931); *Barber v. Mallon et ux.*, 168 S.W. 2d 177 (Mo. App. 1943); *English et al. v. Evans*, 157 S.W. 2d 793 (Mo. App. 1942); *Nelson v. Hudson et al.*, 221 Mo. App. 211, 299 S.W. 1111 (1927); *Bank of Amsterdam v. Welliver et al.*, 215 Mo. App. 247, 256 S.W. 130 (1923); *Shaffer v. Akron Products Co.*, 91 Ohio App. 535, 109 N.E. 2d 24 (1952); *Johnston & Larimer Dry Goods Co. v. Helf et al.*, 178 Okla. 527, 63 P. 2d 681 (1936); *Soab v. Clawson*, 138 Okla. 126, 280 Pac. 598 (1929); *Beach v. Bello et al.*, 58 R. I. 445, 193 Atl. 526 (1937); *Kohn et al. v. Zaludek*, 38 S.W. 2d 110 (Tex. Civ. App. 1931).

<sup>15</sup> *Whitcomb v. National Exch. Bank of Baltimore*, 123 Md. 612, 91 Atl. 689 (1914); *Portland Iron Works v. Siemens et al.*, 135 Ore. 219, 295 Pac. 463 (1931); *Pitt et al. v. Little*, 58 Wash. 355, 108 Pac. 941 (1910); *Baldwin v. Daly et al.*, 41 Wash. 416, 83 Pac. 724 (1906).

<sup>16</sup> *Manly v. Beam*, 190 N. C. 659, 130 S.E. 633 (1925).

<sup>17</sup> See note 15 *supra*.

view notes dealing with the subject consider this the preferable definition.<sup>18</sup>

Whatever their view as to the proper definition of "renunciation," all of the cases decided under the N. I. L., save for two,<sup>19</sup> hold that a written, gratuitous, unconditional abandonment by a holder of his rights against a party to negotiable paper will, except under certain rather extraordinary circumstances,<sup>20</sup> discharge that party to the extent of the renunciation. Generally, the cases also hold that the renunciation *must* be in writing in order to be effective, although a few decisions have pointed out specific common-sense exceptions from this requirement.<sup>21</sup>

We have only three American cases dealing with *conditional* renunciation in general, as distinguished from renunciation conditioned upon death. In *Dickinson v. Vail*,<sup>22</sup> the defendant surety, Vail, had been discharged in writing (whether for or without a consideration is not clear) upon the express condition that he was to pay the full amount of the note if a suit were instituted against another surety and no recovery was had. Such an action was in fact begun, but the plaintiff holder recovered nothing, because of her own negligence in failing to give notice of appeal. An action was then brought against Vail, who pleaded the written discharge. In a brief opinion, the court held that Vail had been discharged despite the fact that the renunciation was conditional and, interpreting the meaning of the word "unconditional" in Section 122, said: "But this does not hinder such holder from conditionally releasing any of the parties to the note, including the principal debtor. The statute merely affirms the effect of an absolute and unconditional renunciation to the principal debtor, but it does not prevent a renunciation that is not absolute and unconditional."<sup>23</sup>

<sup>18</sup> Notes, 22 U. OF CIN. L. REV. 412 (1953), 9 U. OF CIN. L. REV. 90 (1935), 22 KY. L. J. 445 (1934), 25 MICH. L. REV. 782 (1927), 4 TULANE L. REV. 117 (1929).

<sup>19</sup> In *Arnold v. Darby*, 49 Ga. App. 629, 176 S.E. 914 (1934), the court held that no discharge was valid without consideration. In *Danis v. Angelo*, 283 Mass. 324, 186 N.E. 558 (1933), there is dictum to the effect that a written renunciation will not operate to discharge an instrument if the instrument itself is not delivered up. The N. I. L. has been in effect in Georgia since 1924, and in Massachusetts since 1898, and both states have the standard renunciation section. GA CODE ANN. § 14-904 (1933); MASS. LAWS ANN. c. 107, § 145 (1946). Clearly, both decisions were inadvertent.

<sup>20</sup> Renunciation made under a mistake of fact does not discharge the instrument. *Berryman v. Dore et al.*, 43 Idaho 327, 251 Pac. 757 (1926). To the same effect, although no negotiable instrument involved, see *United Fruit Co. v. United States*, 186 F. 2d 890 (1st Cir. 1951).

<sup>21</sup> Estoppel may operate to make an oral renunciation effective as a discharge. *Bullock v. First Nat. Bank of Galva*, 196 Iowa 522, 194 N.W. 930 (1923). Oral renunciation, if made in open court, constitutes a valid discharge. *Ginnet v. Greene*, 87 Wash. 40, 151 Pac. 99 (1915). A written renunciation which has been subsequently destroyed may be proved by competent evidence. *Roth v. Roth*, 142 S.W. 2d 818 (Mo. App. 1940).

<sup>22</sup> 199 Mo. App. 458, 203 S.W. 635 (1918). <sup>23</sup> *Id.* at 458, 203 S.W. at 636.

In *Bank of U. S. v. Manheim*,<sup>24</sup> a court dealing with an entirely different problem—an oral discharge supported by consideration—remarked in passing that “renunciation, unsupported by a consideration, can be effected only by such writing as demonstrates a present, absolute, and unconditional intention to renounce.”<sup>25</sup>

In 1950, the United States Court of Appeals for the Second Circuit, speaking through Judge Learned Hand, reached a decision on the “unconditional” issue which, squarely supported by *Dickinson v. Vail*,<sup>26</sup> and opposed only by the *dictum* in *Bank of U. S. v. Manheim*,<sup>27</sup> may well be considered reputable authority on the effect of the “unconditional” segment of Section 122. The case was *New York, N.H. & H. R. Co. v. Reconstruction Finance Corporation*.<sup>28</sup> The railroad sought to be allowed to discharge at four per cent certain of its obligations held by the finance corporation and calling for an interest of five per cent. A letter written several years previously to the railroad by the finance corporation, stating that four per cent would be accepted if all the notes were paid, was introduced by the railroad as the basis of its claim that only the lesser amount of interest was owed. *Dickinson v. Vail*<sup>29</sup> had given judicial approval to a partial renunciation. But the finance corporation contended that the conditional character of the renunciation, in view of Section 122 of the N. I. L., made it ineffective as a discharge of any part of the railroad’s obligation. The court thought otherwise:

The question . . . is whether the limitation upon a renunciation, contained in the second sentence, should be imputed to the first sentence, whenever the renunciation is at or after maturity. The result of this would be either to limit the first sentence to the period before maturity, or to make its words have one meaning before, and another after, maturity. Neither hypothesis is permissible. The sentence expressly applies after maturity; and the same words cannot change their meaning. Hence, *even though the result may be to make the second sentence redundant*, we must give the first sentence the unlimited scope to which the words are entitled, and hold that it covers a conditional renunciation after maturity, unless the authorities have construed it otherwise.<sup>30</sup> (Italics supplied.)

The only authorities the court found were *Dickinson v. Vail*,<sup>31</sup> which

<sup>24</sup> 264 N. Y. 45, 189 N.E. 776 (1934).

<sup>25</sup> *Id.* at 48, 49, 189 N.E. at 776, 777.

<sup>26</sup> 199 Mo. App. 458, 203 S.W. 635 (1918).

<sup>27</sup> 264 N. Y. 45, 189 N.E. 776 (1934).

<sup>28</sup> 180 F. 2d 241 (2d Cir. 1950).

<sup>29</sup> 199 Mo. App. 458, 203 S.W. 635 (1918).

<sup>30</sup> 180 F. 2d 241, 245 (2d Cir. 1950).

<sup>31</sup> 199 Mo. App. 458, 203 S.W. 635 (1918).

it noted as being consistent with its opinion, and *Bank of U. S. v. Mannheim*.<sup>32</sup> The court emphasized the fact that, in the latter case, there was really no problem involving a renunciation to be passed on, although "apparently the judge did suppose that all renunciations under § 122 had to be unconditional."<sup>33</sup> This holding was disapproved: "With deference," said Hand, "this was plainly inadvertent; and we cannot follow it."<sup>34</sup>

All in all, the *New Haven* case seems to embody a well-considered interpretation of the statute, although it is clear that Learned Hand's typically subtle use of pure logic in writing off the "unconditional" sentence of Section 122 as mere surplusage flies in the face of the reasonable assumption that the writers of statutes do not generally include entire sentences, and particularly sentences which partially contradict their own context, merely for decorative effect.<sup>35</sup> Unfortunately, an examination of three editions of the negotiable instruments statute as annotated by Mr. John J. Crawford, the draftsman of the Uniform Act, affords us scant information as to what Mr. Crawford had in mind when he created Section 122.<sup>36</sup>

In reaching its result in *Farmer v. Farmer*, the Virginia court gave great weight to Judge Learned Hand's decision.<sup>37</sup> But the result in the Virginia case represents a departure from the previous norm in American cases where the renunciation was conditioned upon the holder's death, assuming that the small number of cases we have in the subject can be said to have formulated any norm.<sup>38</sup> Only two such

<sup>32</sup> 264 N. Y. 45, 189 N.E. 776 (1934).

<sup>33</sup> 180 F. 2d 241, 245 (2d Cir. 1950).

<sup>34</sup> *Ibid.*

<sup>35</sup> One interpretation which seems sound and which at least partially explains the apparent conflict within Section 122 has been offered in a work now out of date but certainly worth quoting on this point: "The second sentence provides for discharge of the *entire instrument* where the renunciation is in favor of the 'principal debtor,' and made 'at or after maturity.' If made *before maturity* the effect would be to discharge the principal debtor under the first sentence; with the consequences provided in § 120(5), namely, that by release of the principal debtor all parties are discharged, but not so as to affect the rights of a holder in due course should the instrument thereafter be re-issued and circulated before maturity." BIGELOW, *THE LAW OF BILLS, NOTES, AND CHECKS* § 580 (3d ed. by Lile, 1928).

<sup>36</sup> CRAWFORD, *NEGOTIABLE INSTRUMENTS LAW ANNOTATED* § 203 (1897); CRAWFORD, *NEGOTIABLE INSTRUMENTS LAW ANNOTATED* § 203 (3d ed. 1908); CRAWFORD, *NEGOTIABLE INSTRUMENTS LAW ANNOTATED* § 122 (Rev. ed. 1916).

<sup>37</sup> — Va. —, 77 S.E. 2d 415, 418, 419 (1953).

<sup>38</sup> The *Farmer* case is, however, in accord with certain English cases decided before the adoption of the Bills of Exchange Act. In *Wekett v. Raby*, 2 Bro. P.C. 386, 1 Eng. Rep. 1014 (1724), the deceased holder had left the note in an envelope which also contained, on a separate paper, this written declaration of renunciation: "I have Raby's bond, which I keep; I don't deliver it up, for I may live to want it more than he; but when I die he shall have it, he shall not be asked or troubled for it." The court held that the debt was discharged. In *Aston v. Pye*, 5 Ves. 350, 31 Eng. Rep. 528 (1788), the renunciation was at least impliedly conditioned upon the holder's death. He had made an addition



cases, to which the N. I. L. could be applied, seem to have been reported prior to the Virginia decision, and both were decided by the same intermediate appellate court.

*Dimon v. Keery*<sup>39</sup> involved the writing on a note by the payee-holder, at the time of its making, of the words: "At my death the above note becomes null and void. Stephen C. Dimon." The court completely failed to consider the quite obvious possibility that the notation might have been an actual term of the contract represented by the instrument.<sup>40</sup> Nor was the then-prevailing New York statute on negotiable instruments<sup>41</sup> (in which the renunciation section,<sup>42</sup> but for two harmless extra commas, was identical with the present Section 122 of the N. I. L.) mentioned at all. Without admitting that the occurrence of the condition—the death of the holder—had operated to make the note null and void, the court stated that, even if this were so, the pre-existing obligation which the note had been issued to cover still existed. Applying the common law of gifts, it thought the renunciation ineffective because it indicated mere donative intent, not consummated by delivery. Clearly this decision ought not to be cogent precedent in any future conditional renunciation case, since (1) it cited no common law author-

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to his will, stating that the maker "pays no interest, nor shall I ever take the principal unless greatly distressed." The writing was held not valid as a disposition of property by will, apparently for lack of the requisite formality, but it was held effective as a discharge of the maker's obligation on the note, the holder having died. These results are not surprising when we remember the generally liberal English common law attitude toward the renunciation of contract rights. (See notes 7 and 13 *supra*.)

Under the Bills of Exchange Act, one English case has denied effect to a renunciation which was perhaps impliedly, but certainly not expressly, conditioned upon the holder's death. *Re George, Francis v. Bruce*, L.R. 44 Ch. D. 627 (1890). There the deceased holder had desired to destroy the instrument, but was not able to find it; he therefore had his nurse make a written memorandum of his desires: "It is by Mr. George's dying wish that the cheque for £2000 money lent to Mrs. Francis be destroyed as soon as found." Although this writing was signed only by the nurse, the court did not decide whether the signature of the holder himself was one of the requirements for a valid renunciation. The principal reason advanced for denying effect to the renunciation was that, as far as the court was concerned, it could have been revoked by the deceased at any time prior to his death—the precise point which the Virginia court, in the *Farmer* case, did not decide and thought unimportant. At any rate, as a New York court which later considered the English case was quick to note, the renunciation involved was actually unconditional. *Leask et al. v. Dew*, 102 App. Div. 529, 92 N. Y. S. 891 (1st Dep't 1905).

<sup>39</sup> 54 App. Div. 318, 66 N. Y. S. 817 (1st Dep't 1900).

<sup>40</sup> When the contract of making states that the note is to be discharged as against certain parties upon the death of some human being (usually the holder), the death will operate as a discharge. This is a matter of simple contract law. *Pyle v. East et al.*, 173 Iowa 165, 155 N.W. 283 (1915); *De Lapp et al. v. Anderson's Adm'r.*, 305 Ky. 336, 203 S.W. 2d 389 (1947); *Daugherty v. Preuitt*, 113 Okla. 66, 242 Pac. 529 (1925). Clearly the inclusion of such a condition in an instrument conditions the promise to pay and renders the instrument non-negotiable. N. I. L. § 1(2).

<sup>41</sup> N. Y. Laws 1897, c. 612. The Uniform Act was not adopted in New York until 1909. N. Y. Laws 1909, c. 43.

<sup>42</sup> N. Y. Laws 1897, c. 612, § 203.

ity for its conclusion, and (2) it did not even purport to be an interpretation of the negotiable instruments statute.

Five years later the same court, in *Leask et al. v. Dew*,<sup>43</sup> faced almost exactly the same problem, and reached the same result, using somewhat better reasoning in the process.<sup>44</sup> The deceased holder of a note had left it in an envelope, along with a dated, signed, and witnessed written notation on a separate piece of paper: "The enclosed note I wish to be cancelled in case of my death, and if the law does not allow it I wish you to notify my heirs that it is my wish and orders." The court recognized the common law holding in *Wekett v. Raby*<sup>45</sup> that such an attempt at discharge might be effective, and frankly admitted that the renunciation section of the applicable New York statute<sup>46</sup> was not clear in its terms. The fact that the deceased had used the precatory word "wish," rather than some more forceful expression, was seized upon in order to support the argument that there was really no "renunciation." But the major reason for the court's denying effect to the renunciation seems to have been its feeling that the note might have been enforced anyway by the holder before his death, if he had simply changed his mind. "Had it been delivered to the defendant during the lifetime of the testator, it would not have precluded the latter at any time upon maturity from enforcing the note."<sup>47</sup> The possibility that this might have happened seems to be a specter that rises before the courts in all of these cases. At any rate, this was the last reported decision, prior to the *Farmer* case, dealing with renunciation conditioned upon the holder's death.<sup>48</sup>

<sup>43</sup> 102 App. Div. 529, 92 N. Y. S. 891 (1st Dep't 1905).

<sup>44</sup> In both cases, the court was composed of five justices and handed down a unanimous decision. Justice Ingraham, who wrote the opinion in *Dimon v. Keery*, 54 App. Div. 318, 66 N. Y. S. 817 (1st Dep't 1900), sat on the court which decided *Leask et al. v. Dew*, 102 App. Div. 529, 92 N. Y. S. 891 (1st Dep't 1905), as did two other judges who had concurred in the decision of the former case. One of those two, Justice Hatch, wrote the opinion in the latter. Thus three-fifths of the court sitting on the 1905 case had a rather compelling reason—personal consistency—for deciding as they had in the earlier case. Hence, it would be quite inaccurate to say that two different courts have ruled against the effectiveness of the renunciation conditioned upon death.

<sup>45</sup> 2 Bro. P.C. 386, 1 Eng. Rep. 1014 (1724), discussed *supra* note 36.

<sup>46</sup> N. Y. Laws 1897, c. 612, § 203.

<sup>47</sup> 102 App. Div. 529, 92 N. Y. S. 891, 895 (1st Dep't 1905).

<sup>48</sup> Interesting cases dealing with closely related problems have arisen. One line of English cases reveals a method of effecting renunciations which an American attorney, when confronted with the proper fact situation, might at least want to test. The English courts have held that the naming of the maker of a negotiable instrument as executor of the holder will discharge the instrument in law at the holder's death, to avoid the possible anomaly of the maker's bringing an action against himself to enforce the obligation, and that the maker is then liable only in equity, there to account for the amount of the instrument in an administration proceeding. *In re Bourne*, [1906] 1 Ch. 697; *Freakley v. Fox*, 9 B. & C. 130, 109 Eng. Rep. 49 (1829); *Cheetham v. Ward*, 1 B. & P. 630, 126 Eng. Rep. 1102 (1797); *Wankford v. Wankford*, 1 Salk. 299, 91 Eng. Rep. 265 (1699?). Section 61 of the Bills of Exchange Act, providing that an

One North Carolina case, *Parker v. Mott*,<sup>49</sup> has dealt with a renunciation which, while not in the main conditioned upon death, was certainly made in contemplation of death. The payee-holder went to an attorney's office, related her intention to make a gift of the principal to the makers, and pursuant to the attorney's advice made a signed notation on the instrument: "This note is hereby assigned, the interest to be paid me during my life, and at my death the note is to be delivered." The Supreme Court held that the makers were discharged of their obligation to pay the principal as soon as the notation was made, and of their obligation to pay the interest, the holder having died. The immediate transfer of "title" to the principal was said to validate the transaction under the law of gifts, it not being necessary to transfer the note itself since such transfer would have been inconsistent with the holder's desire to take the interest for life.<sup>50</sup> Whether the notation meant to say that interest should be paid during the holder's entire life, even after the maturity date of the note if the holder had lived for such a length of time, was a point not raised; until we have a judicial answer to the question, makers of notes might do well to refuse the holder's "gift" made on such terms, where there is reason to suspect that the holder may live for a considerable period. At any rate, *Parker v. Mott* seems to give North Carolina attorneys an effective means of accomplishing what was achieved in the *Farmer* case, but with the rather severe limitation that the immediate assignment of principal used

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instrument may be discharged by the maker's coming into possession of it "in his own right"—language much like that of N. I. L. § 119(5)—has been held not to exclude discharge by his coming into possession "in a representative capacity." *Jenkins v. Jenkins*, [1928] 2 K.B. 501. (Here, the note in question was made by several parties, only one of whom had been named executor of the deceased holder. Nevertheless, the court held that all the makers were released at law, but indicated that the executor could probably bring them in for contribution when he accounted in equity to the holder's estate.)

One English case, not involving a negotiable instrument, has held that the executor debtor can avoid even the obligation to account in equity by introducing any competent evidence, including oral statements of the deceased, to show that the deceased testator-creditor did not intend that the obligation should be enforced after his death. *In re Applebee*, [1891] 3 Ch. 422. And it has been held immaterial whether the making of the will preceded or was subsequent to the incurrence of the debt. *Jenkins v. Jenkins*, [1928] 2 K.B. 501.

The application of these rules in a proper case might well allow discharge by methods far more flexible than even a liberal interpretation of the negotiable instruments statutes taken alone would seem to make possible. However, one American case has held that a party is not discharged under N. I. L. § 119(5) by acquiring an instrument "purely in a representative capacity." *Schwartzman v. Post et al.*, 84 N. Y. S. 922, 924 (Sup. Ct. 1903).

<sup>49</sup> 181 N. C. 435, 107 S.E. 500 (1921).

<sup>50</sup> To say that "title" passes when a creditor forgives a debtor his obligation leaves something to be desired insofar as accuracy in expressing what actually happens is concerned. Speaking of "title" as if the obligation were a material entity seems to involve an unnecessary venture into the realm of metaphysics. The point is a small one, but the court would have been more accurate if it had referred to what took place as an "immediate, absolute, unconditional renunciation of the holder's right to collect the principal from the maker."

in *Parker v. Mott* precludes the holder's subsequently changing his mind and enforcing the entire obligation. Whether a holder who had renounced conditionally could still enforce his note we do not know, but certainly he could *not* do so when he had already passed "title" to the principal. Therefore it would seem that the safest means of effecting a conditional renunciation revocable on change of mind before death would be for the holder to include in his will a provision leaving the note to the maker,<sup>51</sup> since a will is generally revocable at any time before the testator's death.<sup>52</sup>

It is submitted that the Virginia court's decision in the *Farmer* case is commendable. The *New Haven* case,<sup>53</sup> while it did not dispel all doubts about the meaning of Section 122, is certainly reputable authority for the proposition that conditional renunciations in general ought to be held effective when the condition has occurred. There is no good reason for drawing a distinction in cases where the renunciation is conditioned upon the holder's death, the only immediately obvious difference being that the introduction of the element of death into any sort of transfer traditionally raises the issue of "testamentary disposition." But this issue the Virginia court, probably wisely, did not consider material for the purposes of its decision.<sup>54</sup> True, the conditional renunciation, even if itself revoked, would, if written on the instrument or known to a prospective holder, probably destroy negotiability in fact, if not in law, but the destruction of negotiability is the holder's risk, and in any event is no detriment to a dead holder whose intention while he lived was that the note should not be paid after his death. The question of whether a conditional renunciation, once made, can be revoked before the occurrence of the condition, can be answered when and if it arises, but neither the answer nor its contemplation ought to block the giving of effect to the desires of a holder who has died without revoking.

So long as Section 122 of the N. I. L. retains its present wording, it will be a source of confusion in many of the cases to which it will be applied. A carefully phrased replacement section is called for, and the proposed Uniform Commercial Code discloses one possibility.<sup>55</sup>

<sup>51</sup> For an example of the use of this method of discharge, see *Feulner v. Gillam*, 211 Ill. App. 348 (1918).

<sup>52</sup> ATKINSON, WILLS § 152 (1937).

<sup>53</sup> 180 F. 2d 241 (2d Cir. 1950).

<sup>54</sup> "We are not concerned with whether the notations are 'testamentary in character,' or whether the transaction meets the requirements of a valid gift *inter vivos* to the makers of the balance due on the note at the holder's death. The single issue is whether the notations on the note and deed of trust, or either of them, satisfy the requirements of Code, § 6-475, so as to constitute a renunciation by the holder of his rights against the makers." — Va. —, 77 S.E. 2d 415, 417 (1953).

<sup>55</sup> "Cancellation and Renunciation.

The recent Virginia decision represents the broad and salutary general philosophy that the courts, absent some clear restriction of law or of public policy, ought not to block the attainment of human desires. For so long a time as we shall have to operate under the present Section 122, it is to be hoped that this philosophy will prevail in its interpretation.

J. V. HUNTER

### Criminal Law—Banishment

Recently a sentence of two years on the roads was suspended on condition that the defendant leave the State of North Carolina for two years. The Supreme Court of this State held that this was in all practical effect a sentence of banishment, and as such, was void.<sup>1</sup> What then is banishment, and how does it fit into our legal scheme of things?

In one form or another, banishment, or transportation,<sup>2</sup> has been known in Europe from ancient times as a punishment for crime. In one form, *deportatio*, it was introduced by Augustus into the Roman law of that age and, gradually superceding exile,<sup>3</sup> was by no means an uncommon punishment.<sup>4</sup> In another form, *abjuration*, it was known in the kingdoms founded upon the wreckage of Imperial Rome<sup>5</sup> and later appeared in the early Anglo-Saxon laws of Alfred.<sup>6</sup> The accused would flee to a sanctuary, which generally was holy ground, where he would confess his crime and swear to leave the realm, on no occasion to return without permission from the Crown. This, Blackstone points out, was not strictly a punishment, but rather was in the nature of a

"(1) The holder of an instrument may even without consideration discharge any party

(a) by intentionally cancelling the instrument or the party's signature by destruction or mutilation, or by writing 'cancelled' or equivalent words across the instrument or against the signature; or

(b) by renouncing his rights by a signed writing or by surrender of the instrument to the party to be discharged.

"(2) Neither cancellation nor renunciation without surrender of the instrument affects the title thereto." Uniform Commercial Code, § 3-605 (Official Draft 1952). Subsection (2) is difficult to comprehend and might well be clarified or omitted in future drafts.

<sup>1</sup> State v. Doughtie, 237 N. C. 368, 74 S. E. 2d 923 (1953).

<sup>2</sup> It is unnecessary to distinguish here between banishment and transportation since the result in each is the same. Technically, however, banishment "is inflicted principally upon political offenders, 'transportation' being the word used to express a similar punishment of ordinary criminals. Banishment, however, merely forbids the return of the person banished before the expiration of the sentence, while transportation involves the idea of deprivation of liberty after the convict arrives at the place to which he has been carried." BLACK'S LAW DICTIONARY, *Banishment* (4th ed. 1951).

<sup>3</sup> BUCKLAND, A TEXT-BOOK OF ROMAN LAW 98 (1921).

<sup>4</sup> 1 PIKE, A HISTORY OF CRIME IN ENGLAND 16 (1876).

<sup>5</sup> 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 303 (3rd ed. 1923).

<sup>6</sup> Laws of Alfred, c. 5, cited in 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 303 (3rd ed. 1923).