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Negotiable Instruments Law--Distinction Between Release and Renunciation

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STUDENT NOTES

NEGOTIABLE INSTRUMENTS LAW—DISTINCTION BETWEEN RELEASE AND RENUNCIATION.—In the very recent case arising in Kentucky, *Gannon v. Bronston*, 246 Ky. 612 (1933), the appellant sued appellee on a note executed to him by appellee and appellee's two partners in business. Appellee in his answer sets up the fact that appellant talked about the note to him, which covered a debt due the appellant by the partnership, and said that he, appellant, had come to the conclusion that appellee was causing the financial difficulties in which the partnership was involved, and agreed that if the appellee would surrender his interest in the business and let the other partners run it, the appellant would release the appellee from all obligation on the note. The other partners assented to this agreement and appellee withdrew from the firm. The firm, however, later became bankrupt and appellant now seeks to hold appellee. The answer of appellee concludes that he is not liable on the note since the above facts show a valid release, under K. S. 3720 B-119 (4): "A negotiable instrument is discharged . . . (4) By any other act which will discharge a simple contract for the payment of money." Appellant, in his reply, asserts that the release is invalid since it was not in writing, as required by K. S. 3720 B-122, which states "The holder may expressly renounce his rights against any party to the instrument before, at or after the time of maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the time of maturity of the instrument will discharge the instrument. But a renunciation does not affect the rights of the holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon." *Held*, For appellee. The court said that the transaction was covered by K. S. 3720 B-119 in that it was a release, as distinguished from a renunciation to which K. S. 3720 B-122 applies.

This case leads us to consider the significance of the terms "release" and "renunciation" in respect to the provisions of the Negotiable Instruments Act. It is believed that the decision in the above case is correct, but in view of the fact that the problem is a novel one in this state, that there is a conflicting line of authority on the point, and that this is a very important phase of the law of Negotiable Instruments, perhaps it might be well to look into some of the authorities cited by Commissioner Drury in his able opinion.

It would seem that the view pressed by the appellant that N. I. L. Sec. 122 applies to all methods of discharge, is the view that first found favor in this country, and has been the majority rule until

comparatively recently. *Whitcomb v. National Exchange Bank of Baltimore*, 123 Md. 612, 91 Atl. 689 (1914); *Baldwin v. Daly*, 41 Wash. 416, 108 Pac. 724-B (1906); *Engle v. Brown*, (Mo.) 216 S. W. 541 (1919); *Pitt v. Little*, 58 Wash. 355, 108 Pac. 944 (1910), etc. These cases support the theory that the N. I. L. Sec. 122 is a sort of Statute of Frauds to be applied to all forms of release.

The leading case of this group is *Whitcomb v. Nat'l Exchange Bank of Baltimore*, supra, which expressly holds that a discharge for consideration by a holder of a note is invalid unless in writing. The reasoning of this case resolves itself into the following propositions: (1) The word "renunciation" may mean surrendering a right or claim with or without consideration, if the dictionary meaning of the word is used; and (2) "Sec. 119 is confined to a designation of acts which discharge the instrument, and does not purport to prescribe the character of proof by which they must be established. Sec. 122 deals specifically with the subject of discharge by renunciation, and provides in effect that an extinguishment of liability to be thus accomplished must be evidenced in writing, unless the instrument is delivered up to the party primarily liable. The earlier section relates generally to causes of discharge, while the later section refers in part to the mode of proof as to a particular method of producing such a result."

The obvious purpose of the requirement that a renunciation be in writing is to secure a desirable mode of proof as to one of the methods of discharging a negotiable instrument. Sec. 122 requires every discharge to be in writing. Now, if the purpose of the rule is to secure a satisfactory mode of proof, there is, as a practical matter, no less reason to require a renunciation for a consideration to be evidenced by a writing, than to require that a gratuitous renunciation should be so evidenced.

This argument is very logical in its analysis, and leads to this inevitable conclusion, once the major premise is granted; but it is not so readily admitted by all that this major premise, that the word "renunciation" applies to all forms of discharges, releases, etc., is true. In fact, the present tendency is to interpret this word as meaning "gratuitous abandonment." This view, as taken by the courts in recent years, has become so popular that it is now the majority rule on the problem: See extensive list of authorities cited in the principal case.

This view is that the term "renunciation" means the giving up of a right without transferring it to another, gratuitously. The only conclusion which can be taken by states adhering to this doctrine is that Sec. 122, dealing with renunciation, applies only to cases involving renunciation in the strict sense; so a discharge given for a valid consideration is without the meaning of that section: consequently, such a discharge may be granted orally. As may be seen in

the opinion, this view was adopted after intensive study of the history of the N. I. L., and the terms used in it.

The historical aspect might be summarized as follows:

"The French law permits discharge of obligation without consideration. The English courts copied this French rule in respect to bills and notes, that is, they could be discharged without satisfaction. When the Bills of Exchange Act was adopted in 1842, the term "renunciation" was used in a technical sense, and was applied only to a gratuitous waiver of a claim. Though such renunciation could, previous to the enactment of the Bills of Exchange Act, be made by parol, it was thought best to modify the rule, by making it conform to the Scotch law, that is, require such gratuitous waiver to be shown in writing, unless the note or bill was delivered up." 4 Tulane Law Review, 119.

No one denies that the N. I. L. should be construed in the light of the Bills of Exchange Act; *Campbell v. Cincinnati Fourth Nat'l Bank*, 137 Ky. 555, 126 S. W. 114 (1910).

In view of these facts, it is difficult to perceive how the word "renunciation" can be construed in any other but its technical sense, the interpretation which was placed upon it by the Law Merchant and the Bills of Exchange Act, of which the N. I. L. is largely a codification. Can it be presumed that the learned authors of the N. I. L., and the legislature of this state waded blindly through the various parts of the Common Law picking out sections at random, without any consideration or thought as to their legal import? No! Rather, it is to be thought that before undertaking the drafting of a law of such intricacy and importance as this, the framers would devote a great deal of time to learning the history of the subject and the terminology thereof, so that when courts had occasion to construe the N. I. L. they might do so legally and according to precedent, and not be put to the difficulty and embarrassment of placing an unnatural and strained construction upon the terms in order to reach a result in harmony with previous decisions.

The N. I. L. deals with a subject highly technical and complex in its nature, and as such requires highly technical terms to cover the situations to be met. Likewise, this law was at its inception intended as a Uniform Act to be enacted in all the states, in order that modern commercial transactions might not be hindered by petty differences as to the law of bills and notes in the various jurisdictions. It is submitted that the best means of gaining this end, thus accomplishing the obvious intent of the framers of the Act, is to place a strict and definite interpretation upon the terms, so that there can be no chance of different interpretations of "loose" phrases in the different courts.

It would seem that to let in oral proof of a gratuitous discharge would open the door to a vast amount of fraud due to the fact that anyone could swear that the payee had gratuitously abandoned the claim. On the other hand, the matter of proof would entail more dif-

faculty in the case of a discharge for consideration since a definite consideration would have to be clearly established; and as Commissioner Drury very aptly states, "We do not deny that an obligor in a note may be released by parol evidence, but such evidence should be clear, satisfactory and to the point." Finally, let it be said that the result in the principal case is the one most compatible with the intent of the drafters of the N. I. L., and the one which in the vast majority of situations is most just from the point of view of the business man.

In conclusion, it might be said that 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. It sets out an exhaustive list of authorities bearing on the subject, and gives the reader an opportunity of viewing the problem from all angles; thus, it does not force one to accept the conclusion of the judge through lack of information. Rather, it sets out the different rules adopted by the various courts applicable to this set of facts, and then by close study and comparison, attempts to arrive at the most logical solution. An analysis such as this is certainly more conducive to an acceptance of the opinion as a proper statement of the law than a one-sided opinion in which the opposite view is not set out or considered at all.

KIRK B. MOBERLEY.

PLEADING—STATUTE OF FRAUDS MAY BE RAISED BY DEMURRER.—Deceased and wife, plaintiff, agreed to make mutual wills, each leaving his or her property to the other. This was done but subsequently deceased made another will leaving his property to his heirs. After probate of the first will, this second will was produced and the order probating the first will was set aside and another order entered admitting this second will to probate. The plaintiff then sued to set aside this second probate, to reinstate the first will and to have the property distributed thereunder. She claimed that this agreement to make mutual wills gave her a lien upon the property of her husband and that from the date of execution her husband held the land in trust for her benefit. Defendants demurred and on hearing of the demurrer it was held that this contract was within the Statute of Frauds and being oral was unenforceable. Plaintiffs contended that defendants, if they wished to rely upon the Statute of Frauds, must have pleaded it affirmatively. *Held*: "The question as to whether a contract is within the Statutes of Frauds may be raised by demurrer." *Gibson v. Crawford*, 247 Ky. 228, 56 S. W. (2d) 985 (1932).

The question as to whether the Statute of Frauds may be raised by demurrer, for ease of discussion, is divided into two groups of factual situations: (1) where the pleading alleges an oral contract within the purview of the Statutes of Frauds and alleges no circumstances to take the transaction out of the operation of the statute;