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SOME ANOMALIES IN THE KENTUCKY NEGOTIABLE INSTRUMENTS LAW

For nearly four decades¹ the National Conference of Commissioners on Uniform State Laws has worked upon the general program of making uniform the state laws upon "all subjects where uniformity is deemed desirable and practicable."² One of the first branches of the law to receive the attention of this body was that of negotiable paper. It is easy to perceive the reason why this body should begin its labors by drafting the Uniform Negotiable Instruments Act. It has always been the policy of the law to make uniform and certain those rules regulating commerce and trade. Upon the adoption of the Federal Constitution those matters pertaining to bankruptcies,³ and trade between the states⁴ were delegated to the Federal Congress to regulate. The framers of the Constitution perceived then as it is recongnized today by those engaged in foreign trade,⁵ that different jurisdictions have different rules of procedure, different rules of stubstantive law. This condition of the law can

¹ In 1889 the American Bar Association appointed a committee on uniform state laws. The legislature of New York followed in 1890, this initial move by the adoption of an act authorizing the appointment of "Commissioners for the promotion of Uniformity of Legislation in the United States." In the same year the American Bar Association reported a resolution that the Association recommended the passage by each state of an act authorizing the appointment of commissioners to confer with those of other states upon the promotion of uniformity in state laws. In 1892 the first conference convened with nine jurisdictions represented; in 1912 fifty-three jurisdictions were represented. *Address to the Conference in 1924, by its President, Nathan William MacChesney.*

² Article I, Section 2, of the Constitution and By-Laws of National Conference on Uniform State Laws.

³ United States Constitution, Article I, Section 8, Sub-section 4.

⁴ United States Constitution, Article I, Section 8, Sub-section 3.

⁵ In treating of the matter of commercial risks in foreign trade, it has been stated that, "suits in a foreign court are not likely to be productive of the most satisfactory results." *Credits and Collections, Ettinger and Golieb, page 457.*

only result in a lack of confidence upon the part of the prospective seller and creditor in the remedies afforded him by the law and government in the jurisdiction of the buyer. As a consequence of this lack of confidence upon the part of the seller he refuses to engage in trade, to his own and the community's detriment. By reason of the close relationship between the use of negotiable paper and the extension of credit, the need of a uniform practice in the law of bills and notes cannot be questioned. As a result of the efforts of this body, the Uniform Negotiable Instruments Act has been adopted in the fifty-three jurisdictions represented by the Conference.⁶ Although it would be a very difficult and practically impossible task to ascertain the exact success attained by the enactment of this legislation, it is possible to point out some phases of the law in which it has proved a failure, in that the final results of the litigated cases remain in irreconcilable conflict.

AUTHORITY TO EXECUTE AND INDORSE PAPER

Some of the most far reaching and astounding conflicts, however, to be noticed between the law of Kentucky and other jurisdictions, cannot be charged to the inefficiency of uniform legislation, as it results directly from a variation in the statutory enactment from that which usually prevails. This is true in the provisions regulating the authority of an agent to execute and indorse negotiable paper for his principal. Although the courts do apply a strict rule of construction⁷ to the authority of an agent to bind his principal either by the execution or the indorsement of commercial paper, it is generally held that the authority need not be evidenced by a writing but may be conferred by parol. This was the rule at the common law long be-

⁶ The Conference is at the present composed of three Commissioners from the forty-eight states, the District of Columbia, Alaska, Hawaii, Porto Rico, and the Philippine Islands.

⁷ The courts have been unwilling to infer that power from a general authority "to manage a business," *Golinsky v. Allison*, 114 Cal. 458, 46 Pac. 295; or "to collect for the principal," *McFadden v. Folgrath*, 114 Minn. 85, 130 N. W. 542. In fact this rule is usually adhered to unless the failure of the court to recognize the authority would defeat the main object of the agency. In *National Bank of the Republic v. The Old Town Bank*, 112 Fed. 726, 50 C. C. A. 443, the authority of an attorney to indorse checks received by him was sustained when he had been retained to make collections for several legatees and distributees residing in distant states.

fore the enactment of the Uniform Negotiable Instruments Act. In the case of *Miller v. Moore*⁸ an action on a note was brought by an indorsee against the maker. The defendant set up the defense that the plaintiff had no title to the note.⁹ The court held however that parol, *viva voce*, evidence was admissible to establish that the party signing the defendant's name was his attorney in fact, and that he had been accustomed to sign the name of the defendant upon notes. Likewise in the case of *The Bank of North America v. Embury*,¹⁰ one member of a partnership gave authority to an attorney to execute notes for the firm. Upon the trial of the case parol evidence was admitted to establish the authority of the attorney. The court declared that the counsel for the defendant did not even argue that authority to execute and indorse commercial paper could not be given by parol, but that in this case the authority was in fact given by a written power, and that under the better evidence rule that instrument should have been introduced rather than the parol evidence. The court denied the contention, however, upon a showing that the power could not be located after a diligent search had been made. Again in the case of *Rice v. Gove*¹¹ depositions of an agent were admitted to prove that the note in question was executed as agent under parol authority. Again the objection was not of the parol authority to the agent, but that the evidence was that of an interested witness. The court held that the deponent was disinterested and indifferent as a witness. If he received the money on the note as an agent he would be bound to account to the alleged principal maker for the amount; if he were acting as principal he would be bound to the payee. The rule announced by the foregoing cases has been codified in the Uniform Negotiable Instruments Law, as it was recommended by the Conference, and adopted by a majority of

⁸ 17 Fed. Cases 341, 1 Cranch C. C. 471, (1807).

⁹ The indorsement on the note was as follows, "Pay to Richard and Stephen Winchester, or order, 'signed' William T. Alexander, by his attorney in fact, John T. Wellford." The note was then indorsed to the plaintiff.

¹⁰ 21 Howard Practice Reports 14, (1861).

¹¹ 22 Pickering (Mass.) 158, (1839).

jurisdictions.¹² The provision of the act as thus adopted has been upheld by the construction of the courts.¹³

Neither the legislature nor the Court of Appeals of Kentucky have sanctioned the rule as thus announced, however. There would seem to be little room for doubt as to the intention of the legislature, from the language used, of requiring the authority to execute and indorse negotiable paper to be evidenced by a writing.¹⁴ The Court of Appeals construed the statute strictly and literally. In the case of *Finley v. Smith*¹⁵ the question was raised for the first time. There it appeared that a note was executed to a bank as payee. Upon its insolvency the receivers instituted this suit in an attempt to realize upon the note as one of the assets of the bankrupt. The maker asserted the defense that the note was executed by his brother, as his agent, without any written authority from him as maker. This defense immediately raised two questions before the court: Was the instrument negotiable?¹⁶ If so was it necessary to prove the agent's authority to execute it by an instrument in writing? The court answered both questions in the affirmative, finding the instrument was negotiable in character, hence the necessity of written evidence of the authority to the brother as an agent of the defendant. The holding and rule thus announced was af-

¹² Section 19 of the Uniform Negotiable Instruments Act, as commonly adopted, provides, "The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency."

¹³ It has been argued in some jurisdictions that have the statutes requiring that the evidence of an agent's authority must be of equal dignity as the act to be performed that since an indorsement can only be in writing, evidence of an agent's authority to make it must also be in writing. The contention has been refused, however, by asserting that such a holding would completely nullify the Negotiable Instruments Law, section 49, which provides that when a transfer of a note payable to order is made without written indorsement, the transfer vests in the transferee "such title as the transferer had therein. The transferee acquires in addition the right to have the indorsement of the transferee." *McLeod State Bank v. Vandemark*, 51 N. D. 573, 200 N. W. 42, (1924).

¹⁴ Kentucky Statutes, section 3720b-19, "The signature of any party may be made by an agent duly authorized in writing."

¹⁵ 165 Ky. 445, 177 S. W. 262, L. R. A. 1915F 777, (1915).

¹⁶ The Negotiable Instruments Law does not apply to non-negotiable paper. "If a note is not a negotiable instrument within the meaning of this act, then the rights and liabilities of the parties on it are to be determined by the law as administered with reference to non-negotiable instruments." *Wetlaufer v. Baxter*, 137 Ky. 362, 125 S. W. 741, 26 L. R. A. (N. S.) 804.

firmed two years later in the case of *The Inter-Southern Life Insurance Co. v. First National Bank of Hazard*.¹⁷ There it appeared that the agent of the defendant sold treasury stock of the defendant and received therefor a promissory note made payable to the maker and indorsed by him. The agent also indorsed the note over to the plaintiff and received therefor a certificate of deposit. This the agent mailed to the defendant. The certificate of deposit was then negotiated by the defendant, for which it received cash. Upon the maturity of the note the maker refused to pay; and demand being made upon the defendant as an indorser it also refused. The contention was that the agent only had authority to accept cash for the sale of the treasury stock, therefore the acceptance of the note and its indorsement by him was not within the scope of his authority. The court sustained the contention and stated that a verdict should have been directed for the defendant. It stated that the Negotiable Instruments Law places the indorser under primary liability,¹⁸ and under the Statute as here adopted an agent must be authorized in writing before the principal would be bound. Granting the necessity of written authority to an agent in this jurisdiction the question as to the sufficiency of the written instrument, once that it is executed, still remains. It would seem that the general rule announced above¹⁹ would apply. In the case of *Clinton v. Hibb's Executrix*,²⁰ it appeared that the husband of the defendant, being in infirm health, executed a power of attorney²¹ to her, authorizing her to transact his business. The defendant later signed the note, upon which this action was instituted, as surety for the maker, in her representative capacity. The court held that the estate of the deceased should not be liable. It most reasonably observed that signing a note as an

¹⁷ 178 Ky. 95, 198 S. W. 563, (1917).

¹⁸Section 66 of the Negotiable Instruments Act provides that, "Every indorser . . . engages that on due presentment it shall be accepted or paid or both, as the case may be according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it."

¹⁹Note 7.

²⁰ 202 Ky. 304, 259 S. W. 356, (1924).

²¹The power of attorney provided that, the wife should have power "to attend to all my affairs, to sign checks, and also execute any notes she may deem necessary in the conducting of my affairs."

accommodation surety could not be considered as essential in conducting the business of the principal by the agent.

The state of North Dakota has been cited²² as one of the few jurisdictions adopting the anomalous doctrine prevailing in Kentucky, illustrated above. Upon examining the cases upon the subject, however, one finds that the North Dakota court does not follow the doctrine. The case of *McLeod State Bank v. Vandemark, supra*,²³ holds that the authority of an agent to indorse a note might be conferred by parol. This was an action by an indorsee against the maker. The defense was the lack of title in the plaintiff. To establish this the defendant argued that the authority of the agent of the indorser, a corporation, should have been evidenced by a writing. It appears that the theory²⁴ of counsel was that of the learned author.²⁵ The court, however, overruled the contention. It appears that the rule upon the authority of an agent to execute negotiable paper in this jurisdiction is even more liberal than the rule to indorse the same. In the case of *Grant County Bank v. Northwestern Land Co.*²⁶ the court not only dispensed with the necessity of written evidence of an agent's authority, but held that apparent authority was sufficient in the absence of actual authority. There it appeared that the former treasurer of the defendant company was also the cashier of a bank. In his capacity of treasurer of the defendant, the individual had authority to and did act in the capacity of a general manager of the business. The offices of the defendant, a trading corporation organized for the purpose of dealing in land, were located in the same building as the bank of which its treasurer was the cashier. This individual serving in the two capacities unauthorizedly executed the note, which was the subject of the suit, to the bank. The latter negotiated it to the plaintiff. It appeared that the note was renewed upon its maturity upon two different occasions. Shortly after the note had been executed, and before its renewal, and its transfer to the plaintiff, a group of eastern stockholders, becoming suspicious of the activities of the treasurer, voted that position to another. The individual formerly serving in the capacity of

²² Mechem on Agency, section 225, citing Civil Code, section 4314.

²³ Note 13.

²⁴ *Supra*, note 13.

²⁵ *Supra*, note 22.

²⁶ 28 N. D. 479, 150 N. W. 736, (1915).

treasurer was then elected to the position of vice-president of the trading corporation. By-laws were also passed purporting to restrict the authority of the individual. It seemed, however, that he was the only resident director of the trading corporation and for that reason retained much of the actual control of the business. The renewals of the note were negotiated thru him. He at that time agreed to and did pay the accrued interest upon the note to the plaintiff. The amount, however, was never charged to the defendant upon the books of the bank. The plaintiff had no knowledge of the by-laws purporting to restrict the authority of this officer. The court held, as stated above, that the defendant should be liable for the execution of this note by one clothed with ostensible authority.

It appears that South Dakota, like Kentucky, has a statute of peculiar provision²⁷ which necessitates written evidence of an agent's authority to bind his principle. This statute has also been construed strictly. In the case of *State Bank of Alcester v. Weeks*,²⁸ its provisions were brought before the court, when an action was instituted by a "holder in due course" against the maker. Three defenses were asserted by the latter: (1) fraud in the inducement; (2) failure of consideration; (3) failure to prove title. Of these it is clear that only the last of the three is available to the maker as against a *bona fide* holder.²⁹ The defendant proposed to establish the last defense by showing that the indorsement³⁰ on the note was not authorized by a writing and for that reason invalid. The court sustained the contention despite the fact that the plaintiff introduced a letter from the defendant which assured them that the agent making the indorsement had the authority to do so. This

²⁷ "The signature of a party may be made by an agent duly authorized in writing. No particular form of written appointment is necessary for this purpose." Section 1723 of Revised Code of South Dakota, 1919.

²⁸ 45 S. D. 639, 189 N. W. 941, (1922).

²⁹ Fraud is not a defense against a "holder in due course." *David v. Merchant's National Bank of Cincinnati*, 103 Ky. 586, 45 S. W. 878, (1898). Neither is the defense of failure of consideration available to the maker against a *bona fide* holder. *Beattyville Bank v. Roberts & Co.*, 117 Ky. 689, 78 S. W. 901, (1904); *Grey and Powers v. The Bank of Kentucky*, 2 Littell (Ky.) 378, (1822).

³⁰The indorsement appearing on the note was as follows, "Midland Packing Co., without recourse on us, per Wm. M. Colby, Ag't."

they found amounted to neither a ratification of the act of the agent, nor an act from which an estoppel could be raised.

None of the jurisdictions which have this unusual doctrine has ever offered any explanation of its existence, nor reason why the legislature adopted it in the first instance. The Kentucky Court of Appeals³¹ dismissed the matter by simply finding that it was the intent of the legislature that the authority of an agent to execute and indorse commercial paper should be evidenced by a writing. Such a finding could not be seriously criticised in view of the language used by the legislators. In view of the very scanty history of the act³² in the official record of the assembly that is responsible for its enactment, the conservative brevity of the court might indeed seem wise. Whatever might have been the purpose of the legislature in changing the act from that which usually prevails, it is consistent with the provision of the Kentucky Statutes³³ which requires the authority of an agent to sign the name of one as surety to be evidenced by a writing. This statute has been brought to the attention of the court many times and in all it received a literal construction. It follows that we should not be surprised that its kindred provision³⁴ in the Negotiable Instruments Act should receive a like construction. The first of these statutes came before the Court of Appeals in the case of *Ragan v. Chenault*.³⁵ It was then stated by Pryor, J., that, "The mischief intended to be provided against by this statute was to prevent the use of one's name as surety in obligations so as to fix upon him a liabil-

³¹ *Finley v. Smith, supra*, note 15.

³² It appears that the Negotiable Instruments Law originated in the Kentucky Senate in 1904 as Senate Bill number 35. Upon January 18, 1904 it was placed upon the calendar of the Senate and referred to the committee of the judiciary. Senate Journal p. 123. Upon January 21, Carroll, Chairman of the Committee on Judiciary, reported the bill favorably, and submitted that further consideration by the Senate be postponed to a day certain. It was made a special order of the day for January 27, 1904, at 12:10 p. m. and from day to day until disposed of. The bill passed the Senate by unanimous vote. Senate Journal p. 262, Section 19 appeared in the original draft as adopted, no amendment being offered to change it, nor official record of a discussion of it upon the floor.

³³ Kentucky Statutes, section 482, provides, "No person shall be bound as the surety of another by the act of an agent unless the authority of the agent is in writing, signed by the principal; or if the principal do not write his name, then by his sign or mark made in the presence of at least one creditable attesting witness."

³⁴ Carroll's Statutes, section 3720b-19.

³⁵ 78 Ky. 545, (1880).

ity with no other evidence than the alleged parol authority given the principal, or some other person to sign the surety's name." It was an action by the payee of a note against the surety. The defense asserted was that the name of the surety was written by the maker under parol authority. The plaintiff relied upon a subsequent admission by the surety of the maker's authority to sign his name. The court held, however, that this was not sufficient; that at the most it could amount to only a parol ratification to an oral authorization. It gave the original authorization, which was insufficient, no additional force. It appears, however, if the ratification had been in writing it would have been sufficient.³⁶ Professor Mechem³⁷ cites this statute as an example of the few statutory requirements that the agent's authority be evidenced by an instrument in writing. In this connection he notes the conflict in the statutory requirements of an agent's authority to execute a contract falling within the provisions of the Statute of Frauds.³⁸ By way of explanation of this situation a remote inference might be drawn from the fact that in the original Statute of Frauds³⁹ there is a conflict in the requirements for the appointment of an agent. By an inference even more remote, the explanation might be offered to the question here under consideration that some jurisdictions follow one section of the English Statute, while others follow another.

³⁶ The Kentucky Court subsequently held that an oral authorization for this purpose, which was later ratified by a written instrument was sufficient. The decision was rendered in an action against the sureties upon an injunction bond. The injunction restrained the plaintiff from the collection of an execution in the hands of a sheriff, issued in another action between the plaintiff and a third party. The court required the execution of the bond upon decreeing the temporary injunction. The principal had then represented to the clerk that the defendants had authorized the signing of their names to the bond. When the clerk ascertained that the security was valueless he demanded additional. Defendants then ratified the authorization in writing. *Riggan v. Crane*, 86 Ky. 249 (1887).

³⁷ Note 22.

³⁸ Mechem on Agency, section 223.

³⁹ Sections I and III of 29 Charles II provide that leases, estates, etc., shall have the force and effect of estates at will only; and that they shall not be assigned and conveyed, etc., unless by a deed in writing, signed by the parties so making the same, "or their agents thereunto lawfully authorized *by writing.*" Sections IV and XVII on the other hand did not require that the agent should be authorized by a writing but simply that the note or memorandum should be "signed by the party to be charged therewith, or some other person thereunto by him *lawfully authorized.*" (Italics are those of the writer.)

But whatever our private opinions might be, the fact remains that the rule exists, without official explanation or justification.

NEGOTIABILITY WITH COLLATERAL UNDERTAKINGS

The rule upon the first question raised by *Finley v. Smith*⁴⁰, as to whether the instrument was negotiable or not, presents another situation in which the aims of uniform legislation have not been realized. The reasons for questioning the negotiability of the note in this case was the fact that it contained a provision⁴¹ for the deposit of collateral security to assure the payment of the note. The important thing to be observed is the right of the holder to demand additional security, if in his opinion⁴² that which has been deposited depreciated in value. It is interesting to note that the failure of the courts to agree upon the consequences of that provision arises as a matter of judicial construction, the statutory provisions applicable in the several jurisdictions being the same. It was urged before the Kentucky court that by reason of this provision in the note it was a promise to do an act other than the payment of money.⁴³ The court recognized that the provision of this note did not fall within the exception recited by the Negotiable Instruments Law⁴⁴ pertaining to the sale of collateral security, but held that the note was negotiable anyway. The court reasoned that the provision did

⁴⁰ *Supra*, note 15.

⁴¹ This provision is commonly found in promissory notes used by banks. It follows the main body of the note, containing the date, payee, place of payment and the recital of consideration. Following the recital that collateral has been deposited with the bank, there is a space for its enumeration, and appraised value. There is the further stipulation that the maker shall deposit additional security if in the opinion of the holder that which has already been deposited depreciates in value. It is usually provided that if he fails then the note shall become due and payable as if by the expiration of time.

⁴² Some make the right to demand additional security depend upon the decline of the market value of the whole amount deposited.

⁴³ Kentucky Statutes 3720b-5, "An instrument which contains an order or promises to do any act in addition to the payment of money is not negotiable."

⁴⁴ Kentucky Statutes. 3720b-5. "But the negotiable character of an instrument otherwise negotiable is not affected by a provision which (1) authorizes the sale of collateral securities *in case the instrument be not paid at maturity.*" (Italics those of the writer.) In the principal case additional securities could be demanded upon the depreciation of that originally deposited.

not contravene any positive provision of the act⁴⁵ and at the same time it was consistent with that provision⁴⁶ of the act which provided for the acceleration of the note upon the default in the payment of any installment of either interest or principal.

The Supreme Court of Kansas had reached exactly the opposite result four years previous to the decision of the Kentucky case. In *Hollaway State Bank v. Hoffman*,⁴⁷ suit was instituted against the maker by an indorsee. The defendant relied upon the defenses of failure of consideration, and fraudulent representations inducing the execution of the note. The pleas were sustained by evidence which tended to prove that the notes were given in payment of the purchase price of certain capital shares of stock of a manufacturing company; that there was a total failure of consideration as the stock was in fact worthless; and that the sale of the stock was induced by the false and fraudulent representations of the president of the company. At the close of the testimony the trial court ruled that the instrument was negotiable, that the evidence of the defendant was not admissible,⁴⁸ and directed a verdict for the plaintiff. Upon appeal, however, the ruling was reversed, because in the opinion of the appellate court, the instrument was non-negotiable in character and plaintiff here stood merely as an assignee, subject to the personal defenses⁴⁹ which were asserted by the defendant. The decision of the Kansas court was based upon the very reasons which the Kentucky court refused to recognize. In the first place it was decided that the instrument called for the doing of an act other than the payment of money;⁵⁰ and secondly the date of its maturity was uncertain. It was urged upon appeal, as

⁴⁵ The court recognized the requirements of a negotiable instrument to be (1) that the promise be expressed by an instrument in writing; (2) that it must be an unconditional promise to pay a sum certain in money; (3) that it must be payable upon demand or at some fixed future time; (4) that it must be payable to the order of a specified person or to bearer.

⁴⁶ Kentucky Statutes section 3720b-2, "The sum payable is a sum certain within the meaning of this act, although it is to be paid,"—"(3) by stated installments with a provision that upon default in payment of any installment or of interest the whole shall become due."

⁴⁷ 85 Kan. 71, 116 Pac. 239, 35 L. R. A. (N. S.) 90, (1911).

⁴⁸ *Supra*, note 29.

⁴⁹ The assignee of a non-negotiable note takes it subject to the personal defenses of "fraud in the inducement," and failure of consideration, provided those defenses exist at the time of the assignment. *Carlton v. Smith*, 33 Ky. Law Rep. 647, 110 S. W. 873, (1908).

⁵⁰ The Kansas Statute is the same as that quoted *supra*, note 43.

the Kentucky court held,⁵¹ that merely accelerating the due date should not render the note non-negotiable. The provision of the Negotiable Instruments Act⁵² for the acceleration of the maturity date upon the failure to pay an installment or interest was distinguished from the provision here under consideration, however. The acceleration in the former would be due entirely to the delinquency of the maker; the attempted acceleration under the provision of the note here under consideration would be left entirely to the caprice of the holder. Here it would depend upon whether in the opinion of the holder the securities had so depreciated in value as would justify demanding the deposit of additional securities. Upon that basis the date of its maturity should be considered so uncertain as to render the note non-negotiable.

When the question was raised in Tennessee, the court followed the rule announced by the Kentucky court. In the case of *West Point Banking Co. v. Gaunt et al.*,⁵³ suit was instituted upon two notes with the provision⁵⁴ mentioned above. The plaintiff alleged the depreciation of the security, and the failure of the defendant to advance more upon demand. The defendant admitted the execution of the notes but asserted that the consideration for which they had been given failed. The question of whether the notes were negotiable in form was thus put in issue. The court after reviewing *Holladay State Bank v. Hoffman*⁵⁵ followed *Finley v. Smith*.⁵⁶ In so doing it cited with approval the criticism by one of the leading encyclopedias of law.⁵⁷ It is interesting to note that one learned writer⁵⁸ has found that the majority rule⁵⁹ is that announced by the Kansas case, though he finds that "there is good authority in favor of

⁵¹*Supra*, note 46.

⁵² Kansas General Statutes, sections 5255, 5257; Kentucky Statutes, 3720b-2.

⁵³ 150 Tenn. 74, 262 S. W. 38, 34 A. L. R. 862, (1924).

⁵⁴*Supra*, note 41.

⁵⁵*Supra*, note 47.

⁵⁶*Supra* notes 15, 40.

⁵⁷ "The Kentucky court presents a very clear analysis of the Negotiable Instruments Act." 1 Ruling Case Law Supplement, p. 917.

⁵⁸ Zechariah Chafee, Jr., "Acceleration Provisions in Time Paper." 32 Harvard Law Review 747.

⁵⁹*Supra*, at p. 778, citing *Lincoln v. Perry*, 66 Fed. 887, (1895); *Commercial National Bank v. Consumer's Brewing Co.*, 16 App. D. C. 186, (1900); *Strickland v. National Salt Co.*, 79 N. J. Eq. 182, 81 Atl. 828, (1911); *Holladay v. Hoffman*, 85 Kan. 71, 116 Pac. 239.

the negotiability of the note."⁶⁰ After quoting Judge Carroll at length in the Kentucky case the same writer reaches the conclusion that the rule announced therein is the correct rule.⁶¹

NOTICE OF DISHONOR

Still further anomalous variations may be found in the Kentucky law from the usual rules pertaining to notice of dishonor, either for non-acceptance or non-payment. Those rules are simply stated by the Negotiable Instruments Law⁶² to the effect that notice may be either written or oral; and if written that an insufficient notice may be supplemented by an oral communication. The Act has been enforced by the courts both according to the letter and the spirit of the law. In the case of *De La Vergne v. Globe Printing Co.*⁶³ the action was brought by an indorsee against the indorser. The note had been indorsed in blank by the defendant and delivered to the plaintiff. It became due upon February 5, 1913. Upon February 6, the bank, at which the note was made payable, notified the plaintiff that the same was unpaid. About 9 a. m. the plaintiff gave the defendant oral notice to the same effect, and informed him that the plaintiff was looking to him for payment. The court held the oral notice was sufficient. It was also given within the time required: the day after the day he received notice of dishonor from his agent for collection.⁶⁴ The Federal rule is also in ac-

⁶⁰*Supra*, note 58 citing, *National Salt Co. v. Ingraham*, 143 Fed. 805, (1906); *Kennedy v. Broderick*, 216 Fed. 137, (1914); *Finley v. Smith*, 165 Ky. 445, 177 S. W. 262, (1915); *Mumford v. Tolman*, 54 Ill. App. 471, 157 Ill. 258, 41 N. E. 617, (1894); *Empire National Bank v. High Grade Oil Refining Co.*, 260 Pa. 255, 103 Atl. 602, (1913).

⁶¹*Supra*, note 58 at p. 785.

⁶²Negotiable Instruments Law, section 95, provides, "A written notice need not be signed, and an insufficient written notice may be supplemented and validated by a verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby." Section 96, provides, "The notice may be in writing or merely oral, and may be given in any terms which sufficiently identify the instrument and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or thru the mails."

⁶³27 Colo. App. 308, 148 Pac. 723, (1915).

⁶⁴"Where the instrument has been dishonored in the hands of an agent he may either himself give notice to the parties liable thereon or he may give notice to his principal. If he gives notice to his principal, he must do so within the same time as if he were the holder, and the principal upon the receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder." Mills

cord. In the case of *Piedmont Carolina Ry. Co. v. Shaw*,⁶⁵ the action was instituted by an indorsee against the maker and the indorsers. The note was given by the maker to a construction company in consideration of the preparation of certain estimates and specifications for the construction of an electric railway from Spencer to Concord, North Carolina. The financial arrangements for the road collapsed. Upon the maturity of the note the bank, which was the holder of the same, gave notice, orally, to the defendant indorsers, who were also the directors of the corporation making the note. The indorsers discussed the matter and finally decided not to pay the note. The court held that the verbal notice was sufficient.

Before the enactment of the Negotiable Instruments Law in Kentucky this also appeared to be the rule prevailing in this jurisdiction. In the case of *Bank of Kentucky v. Brokking & Clarke*⁶⁶ the action was instituted by a purchaser of a bill of exchange against the indorsers. The evidence was conflicting as to whether the notice upon the dishonor was given in writing. The trial court instructed the jury that if they believed that the notice was not given in writing then the plaintiff could not recover. Upon appeal the court held that this was error. It then said, "Notice is sufficient if it apprises one of his liability. We have been able to discover no authority against verbal notice, and when the parties are so situated, that it can be given with certainty, there is no reason why it should not be held valid." The court in reaching the conclusion quoted above recognized the fact that it was the practice to speak of a "notice in writing" upon foreign bills. They explained the matter by saying that as a matter of necessity the parties to such an instrument had to live at a distance. It naturally followed that they could communicate with each other more easily by a writing. Though a written notice would be the more convenient form, the court were not willing to say that it was necessary. In so doing they very sensibly looked to the reason for requiring any notice. Being only for the purpose of enabling those secondarily liable to hold or to acquire an indemnity from the principal debtor, it

Ann. St., section 5154 (2), Colo. Revised St. 1903, section 4567; N. I. L. section 94.

⁶⁵ 223 Fed. 973, (1915).

⁶⁶ 2 Littell (Ky.) 41, (1882).

is difficult to see why a verbal notice would not serve the purpose. The rule was changed, however, by the legislature upon the adoption of the Negotiable Instruments Law.⁶⁷ Again we find that the court by a literal construction of the Act has made it operative. In the case of *Grayson County Bank v. Elzert et al.*,⁶⁸ the payee brought an action against the indorsers. The maker was a corporation and the indorsers were stockholders of the corporation. The original petition recited that each and all of the defendants were anxious that the maker receive the credit asked upon behalf of the corporation. To this a demurrer was sustained because of a failure to allege any notice of dishonor. The plaintiffs thereupon filed an amended petition in which they set forth the facts that the defendants were the stockholders of the corporation and that they had actual notice of the dishonor of the note. The trial court again sustained a demurrer to the amended petition. This ruling was affirmed upon appeal, with a brief finding by the court that it was the intention of the legislature to exclude parol evidence of notice of dishonor.⁶⁹ The same observation might be made with this ruling that was made previously, upon the construction of the change made by the legislature in the requirements of the authority of an agent to execute or indorse commercial paper.⁷⁰ The rule, though requiring a written notice, is satisfied without further formality. In the case of *Doherty v. First National Bank of Louisville*⁷¹ an informal letter⁷² was held sufficient as notice of dishonor.

⁶⁷ Kentucky Statutes, section 3720b-95 provides, "Written notice need be signed and an insufficient written notice may be supplemented and validated by a written communication." Section 96 provides, "The notice may be in writing and may be given in any terms which sufficiently identify the instrument and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mail."

⁶⁸ 143 Ky. 750, 137 S. W. 782, (1911).

⁶⁹ Hobson, J. said, "The purpose of the legislature in striking out the word 'not' in the first line of section 95 and in substituting 'written' for 'verbal' in the third line was to exclude parol testimony as to the notice and require it to be in writing; and so the words 'or merely oral' were omitted from section 96. For if an oral notice was good there is no reason why an insufficient written notice should not be validated by a verbal communication."

⁷⁰ *Supra*, note 32. It appears that the original draft of this section was not changed. An amendment was made before adoption. Senate Journal, 1904, p. 261.

⁷¹ 170 Ky. 810, 186 S. W. 937, (1916).

⁷² The letter, however, contained all the essentials to describe the instrument. It embodied the amount of the notes, the date of their maturity, the names of the maker and indorsers, and a statement that

CONCLUSION

With the proposed amendment of the Uniform Negotiable Instruments Law by the National Conference at Denver in 1926, many are inclined to despair of attaining the dream of uniformity in legislation and certainty in the law. There is much to justify such a position. From that proposal, it appears that the courts have succeeded in so emasculating the work of their respective legislatures, that a new demand for uniformity is felt immediately following the adoption of the old. The program of adopting the present Uniform Negotiable Instruments Law was only completed in 1924 when Georgia fell into line and made the Negotiable Instruments Law nationwide in its application. It would be a presumptuous criticism that would attempt to lay the general failure of the program of the National Conference either at the door of the legislative or judicial branch of the government. Both must share in the failure. The legislatures have been guilty of using some very uncertain and abstruse language in the act. The courts have reached the very opposite conclusions in construing identical words. It is submitted that in our jurisdiction, however, that our own particular contribution to the establishment of uniformity and certainty in the law should be through the legislature. Though the court has varied in its construction of notes containing collateral undertakings, from the results reached in other jurisdictions it appears that such sound logic lies back of its view that its interpretation is virtually embodied in a proposed amendment.⁷³ The other variations in the law pertaining to the appointment of agents, and the method of giving notice of dishonor, and of supplementing defective notices, exist as a matter of strict construction of legislative changes. Should a uniform amendment be submitted, it is to be hoped that Kentucky enlarges upon it to the extent of making the whole act uniform.

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they had not been paid and demanding payment.

⁷³The proposed amendment was as follows: "An instrument is not negotiable which contains an order or promise to do any act in addition to the payment of money, unless such additional act is apparently intended to render more secure and certain the payment of the sum to which the order or promise relates." For a discussion of the whole problem see "Proposed Amendments to the Uniform Negotiable Instruments Law," by William E. Britton, 22 Ill. Law Review, 815.