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Requirement of Certainty in Negotiable Instructions: Effect of Interpretation of N.I.L. by State Courts on Federal Courts

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NOTES

REQUIREMENT OF CERTAINTY IN NEGOTIABLE INSTRUMENTS; EFFECT OF INTERPRETATION OF N. I. L. BY STATE COURTS ON FEDERAL COURTS

First National Bank of Miami v. Bosler, 297 Pa. 353, 147 Atl. 74, decided that a note is not negotiable under the provisions of sections 1 and 2 of the Negotiable Instruments Law where it contains the words, "with interest at the rate of 8% per annum until fully paid", and also the provision, "Deferred payments are to bear interest from maturity at 10% semi-annually". The note was drawn and made payable in Florida. Suit was begun in Pennsylvania, and there having been no proof of the law of Florida, the question of negotiability was determined in the light of the Negotiable Instruments Law as adopted in Pennsylvania.[1] As a matter of fact the same act has been in force in Florida since 1897. The court found the above provisions irreconcilable as to the rate of interest payable after maturity, thus rendering the amount payable uncertain.

Long before the adoption of the Negotiable Instruments Law it was a well established rule that a negotiable instrument had to contain "an unconditional promise or order to pay a sum certain in money".[2] As to what constituted a "sum certain" was a matter of frequent dispute.[3] By section 2 of the N. I. L., it was sought to clarify the meaning of "sum certain" by making definite provision as regards the usual cases in which dispute arose and about

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[1]Act of May 16, 1901, P. L. 194.

[2]Smith v. Nightingale, 2 Stark, N. P. 375, (Eng. 1818); Ayrey v. Feamsides, 4 M. & W. 168 (Ex. 1838); Lowe v. Bliss (1860) 24 Ill. 168.

[3]National Bank v. Feeney, 12 S. D. 156, 80 N. W. 186, 46 L. R. A. 732; Farmers Loan & Trust Co. v. McCow, 32 Okla. 277, 40 L. R. A. (N S.) 177; Woods v. North, 84 Pa. 407; Johnson v. Speer, 92 Pa. 227.

which there was a split of authority. This section did not provide for the problem of uncertainty raised by this case, nor was it directly ruled upon by the courts of Pennsylvania before the adoption of the N. I. L.

The question which appears to have been left unsettled is the time when certainty of amount must appear. Is it essential that such certainty appear *after* as well as *at* or before maturity? It might be argued that certainty after maturity is immaterial; that dishonor renders the note non-negotiable to the extent that one cannot become a holder in due course after maturity; and that if the amount due on the note at any time before or at maturity is fixed and certain, its negotiability is not affected by a provision which may render the amount uncertain after it has been dishonored. There are several decisions of the Federal courts which support this proposition.[4] But this would seem to ignore the express provision of section 47 of the N. I. L.: "An instrument negotiable in its origin *continues to be negotiable* until it has been restrictively endorsed or *discharged by payment or otherwise.*" There are cases construing this section which hold a bill or note negotiable after maturity.[5] If this section of the act contemplated notes that are negotiable after maturity, surely the provision requiring a promise to pay a "sum certain" must be held equally to apply after maturity in all those cases which do not fall within the express provisions of section 2 of the act.

In Merill v. Hurley, (1895) 6 S. D. 592, 62 N. W. 958, the court said:

> "According to one theory, a note is certain when there is *no date* at which the exact amount then due cannot be ascertained by inspection and computation. According to other authorities, such a degree of certainty is required that the amount to become due and payable at any future date must be clearly ascertain-

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[4]Farmers National Bank v. Sutton Mfg. Co. 52 Fed. 191; Capital City Bank v. Swift, 290 Fed. 505.

[5]Williston on Contracts, vol. 2, p. 2138; Pensacola State Bank v. Melton, 210 Fed. 57; Barnes v. Carr, 65 Fla. 87, 61 So. 184; Lane v. Hyder, 163 Mo. App. 688, 147 S. W. 514.

> able at the *date of the note,* uninfluenced by any condition not certain of fulfilment".

Applying the first test suggested here to the note in question, we find that there is a date at which the exact amount then due cannot be ascertained by inspection or computation. What interest is to be paid subsequent to maturity, 8% or 10%? If we apply the second test we find that at the date of the note the amount to become due after maturity is not ascertainable.

In Davis v. Bradey, 17 S. D. 511, 97 N. W. 719 suit was brought by an endorsee of a note containing the same conflicting provisions as appeared in the Bosler case. The provisions follow: "with interest until *fully paid* at the rate of 10% per annum" and "If said interest is not paid when due, it becomes a part of the principal and draws interest at the rate of 12% per annum until paid". The court said,

> "It is doubtful whether the amount for which the note was given and unpaid interest draws interest annually at 10% or whether the principal augmented by the first and subsequent installments of overdue and unpaid interest draws interest at 12% until the entire amount is paid. Such uncertainty destroys the negotiability of the instrument".

That this case should have some weight in support of the decision of the court in the Bosler case is shown by reference to section 196 of the N. I. L. which provides, "In any case not provided for in this act the rules of the *law merchant* shall govern". But what is the "law merchant"? As pointed out by Dean Trickett,[6] "This expression reveals that the Commissioners were subject to the hallucination that there was such a thing as the 'law merchant'. There is no more a law about bills and notes detached from any particular sovereignty than there is a law about real property or torts". This section merely adopts the rules of the common law when the particular case is not provided for by the act. There are analogous cases, decided in Penn-

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[6]Trickett. "Some Observations on the Negotiable Instruments Act", 21 Dickinson Law Review 35.

sylvania before the adoption of the N. I. L., which hold that uncertainty as to the amount payable after maturity, as in the case of a provision for the payment of reasonable attorney's fees, renders the note nonnegotiable.[7]

It has been argued that the note here can be construed in two different ways, and that under either construction it can be held negotiable.[8] First, by allowing the 8% interest provision to prevail after maturity, the sum payable becomes definite enough and is expressly provided for in Section 2 (1) of the N. I. L. as being within the meaning of "sum certain"; or second, allow the 10% interest provision to prevail after maturity, and the case will fall in line with those holding a note providing for a higher rate of interest after maturity negotiable.[9] But, does not the very fact that the note is possible of two constructions render it nonnegotiable? Let us suppose that this note is offered to two prospective purchasers,—the one might construe the 8% interest provision to prevail after maturity, while the other might construe the 10% interest provision to prevail. The necessary result of such a situation would tend to restrict and limit the free saleability of the note, the very purpose of negotiability. The offer of this note, containing the conflicting interest provisions, to the average layman, would be to raise a doubt as to the certainty of the amount payable after maturity.

Because of the common law rule in Pennsylvania which holds notes in analogous cases nonnegotiable, and because the burden placed on the prospective buyer of construing the conflicting provisions of such a note would impair its saleability, it would seem that the decision of First National Bank of Miami, Fla. v. Bosler, 297 Pa. 353 was proper.

The decision of this case raises a second interesting problem. As already stated, the Pennsylvania court decided the case under its interpretation of the N. I. L. After

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[7]Woods v. North, 84 Pa. 407 (1877); Johnson v. Speer, 92 Pa. 227 (1879).

[8]Herbert F. Goodrich, Penna. Bar Quarterly, December 1929.

[9]51 A. L. R. 294; Hutson v. Rankin (1922) 36 Idaho 169, 213 Pac. 345; Kuhn v. National City Bank (1918) 187 Ind. 726, 119 N. E. 145.

the decision of this case, a lower court in Florida held a similiar note negotiable.[10] It is not known to the writer, whether this case was decided on the same point as was raised in the Bosler case. Subsequently suits involving similar notes were brought in the Federal courts and the question now arises whether the Federal courts are bound to follow (1) the Pennsylvania decision; (2) the decision of the lower court in Florida; (3) or ignore both on the ground that such a case presents a matter of general commercial law, about which the Federal courts are at liberty to exercise their own independent judgment?

As a general rule, the question of the negotiability of a note is one of general commercial law which, at one time, was determined by the Federal courts without reference to decisions of state courts.[11] Before the universal adoption of the Negotiable Instruments Law, when an action was brought in a Federal court on what purported to be a negotiable note, the court was not concerned about the state decisions which might govern the matter. This freedom which the Federal courts exercised before the adoption of the N. I. L. by all the states was not an attempt to establish a common law of the United States, but was merely an assertion of a right to interpret the common law of a state so as to bring about uniformity of the law of negotiable instruments as among the states. As expressed by the court in Hudson Furniture Co. v. Harding, 70 Fed. 468, "There is no common law of the United States except possibly as the common law of England has been adopted with reference to the construction of powers granted to the Federal Union". In this case the court announced the rule that state legislation with respect to the law merchant must be enforced by the Federal courts, and that the Federal courts are bound by decisions of the State courts construing the same. Since the purpose sought by the Federal

[10]New Miami Shores Corp. v. J. D. Edley, No. 11450, Civil Court of Record of Dade County of Florida. Opinion by Judge A. J. Small.

[11]Capital City State Bank v. Swift, supra; Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865; Burgess v. Seligman, 107 U. S. 20; Pana v. Bowler, 107 U. S. 529.

courts in exercising their independent judgment in matters of commercial law was accomplished with the general adoption of the N. I. L. by the states, it would seem that the Federal courts are bound by decisions of state courts construing such statutes.

In view of what has been said, it is interesting to note what was said in the recent case of Marion Wood v. Thomas R. Heyward:[12]

> "While it is true that the Federal courts will ordinarily accept decisions of appellate courts of a state in respect to the statutes of that state, they are not required to do so upon a question of general law such as raised in the instant case, and accepting fully, as we do, the conclusions of the court of Pennsylvania in the Bosler case, we should not feel bound by a contrary decision even though it were that of an appellate court and not, as it is, that of a lower court".

More in line with the view of the writer is the recent case of Wood v. Formad,[13] in which Judge Kilpatrick, in determining the negotiability of a note similar to the note in the Bosler case, both the Pennsylvania decision and the decision of the lower court of Florida being before the court, said:

> "The terms of the Negotiable Instruments Law, in force in Florida govern. There is no interpretation of that statute by the Florida court of last resort. Since the adoption of the Uniform Negotiable Instruments Act, *the provisions of that act must be followed, wherever in force.*"

The purpose of the N. I. L. was to make uniform the law of negotiable instruments and eliminate the conflict in doctrines which tended to hinder commercial transactions. It sought to codify the law so as to relieve the courts of the burden of choosing between conflicting cases and discordant views, and to render certain the matter of

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[12]United States District Court, Western Dist. of Pennsylvania. Opinion by Justice Gibson, October 31, 1932.

[13]United States District Court, Eastern Dist. of Pennsylvania, No. 16924, March Term. Decided Oct. 25, 1932.

negotiability, so that the business of the commercial world could be conducted in conformity to a law that was itself certain. That the states were desirous of accomplishing this purpose is shown by the general and speedy adoption of the act. If we are to follow the decision in Marion Wood v. Thomas R. Heyward, supra, allowing the Federal courts to exercise their independent judgment whenever a matter of commercial law arises, thus establishing a common law of the United States separate from the state law, then the purpose of the N. I. L. fails.

In Savings Bank of Richmond v. National Bank of Goldsboro, 3 Fed. (2nd) 970, 39 A. L. R. 1374, the court said:

> "The interpretation placed by a state's highest court upon its statutes will be accepted and followed by the Federal courts though questions of commercial law and general jurisprudence may be involved or incidentally arise, and especially where the statute is one enacted in the interest of uniformity in commercial law as a Uniform Negotiable Instruments Act".

In light of the considerations above, it would seem that the Federal courts are bound to follow the interpretation of the act as pronounced by the appellate courts of Florida. But, since there has been no interpretation of the act by an appellate court of Florida, the Federal courts are bound to follow the interpretation of the act as laid down in First National Bank of Miami v. Bosler, 297 Pa. 353.

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LIABILITY OF A MASTER FOR A LOANED SERVANT

It is a well established principle that one having a servant in his general employ may lend or hire the servant to another person for a particular piece of work.[1] When a

[1]Milwaukee Loco. Mfg. Co. v. Point Marion Coal Co., 294 Pa. 238 (1928); Tarr v. Hecla Coal & Coke Co., 265 Pa. 519 (1920); Standard Oil Co. v. Anderson, 212 U. S. 215.