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BILLS AND NOTES - LIABILITY OF "IRREGULAR INDORSER" OF CHOSE IN ACTION

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BILLS AND NOTES — LIABILITY OF "IRREGULAR INDORSER" OF CHOSE IN ACTION — Trustee bank, for the purpose of refinancing a mortgage on trust property, executed a trust deed and instrument, designated as the "principal note," which disclaimed personal liability of trustee and beneficiaries, expressly providing that the sole remedy upon default of payment of "note" or interest installment should be by foreclosure of the trust deed. Before delivery, the beneficiaries of the trust indorsed the "note" though not parties thereto. Upon default the holder brought this action against one of the beneficiaries on his anomalous indorsement. *Held*, (1) that the "note" was a mere chose in action; (2) that an irregular indorser thereof was not liable ipso facto on such an indorsement; and (3) that extrinsic evidence of contract of guaranty or other relationship would be admissible to establish such liability. *Stewart v. McIntosh*, 291 Ill. App. 65, 9 N. E. (2d) 427 (1937).

The liability of an irregular or anomalous indorser [1] of a negotiable instrument is expressly provided for by the Illinois statute,[2] following the codification of the law relative to negotiable instruments,[3] which stipulates that a stranger signing in blank before delivery must sustain the secondary liability of the ordinary indorser.[4] Likewise, in the case of non-negotiable commercial paper, it is generally held that an irregular indorser in blank is liable.[5] However, upon

[1] See WILLISTON, NEGOTIABLE INSTRUMENTS 90-91 (1931). An irregular indorser is merely a stranger to the instrument who has inscribed his name on the back thereof.

[2] Ill. Rev. Stat. (1935), c. 98, ¶ 84.

[3] UNIFORM NEGOTIABLE INSTRUMENTS LAW, § 64.

[4] Far Rockaway Bank v. Norton, 186 N. Y. 484, 79 N. E. 709 (1906); Rockfield v. First Nat. Bank, 77 Ohio St. 311, 83 N. E. 392 (1907) (note that before the N. I. L. such an indorser was held as surety). See cases collected in BRANNAN, NEGOTIABLE INSTRUMENTS LAW ANNOTATED, 5th ed., 716-717 (1932).

Since the statute fixes the status of the indorser, parol evidence is not admissible to change the character of liability. Spencer v. Allerton, 60 Conn. 410, 22 A. 778 (1891); First Nat. Bank of Ava v. Yakey, 253 Ill. App. 128 (1929). This should be contrasted with the admissibility of parol evidence to *establish* liability and the *character* thereof, where merely a chose in action is being considered.

[5] Most of the courts agree that there is some liability in such a case. See 79 A. L. R. 719 at 754 et seq. (1932) for citation of authorities. But the courts conflict as to the nature and extent of such an indorser's liability: Spencer v. Allerton, 60 Conn. 410, 22 A. 778 (1891) (liability of indorser by statute); Nussear v. Hazard, 148 Md. 345, 129 A. 506 (1925) (maker); Jackson v. Slipper, 19 L. T. R. 640 (C. P. 1869) (expressly contra to the Maryland case); Hibernia Bank & Trust Co. v. Dresser, 132 La. 532, 61 So. 561 (1913) (surety); N. Y. Security & Trust Co. v. Storm, 81 Hun 33, 30 N. Y. S. 605 (1894) (co-maker or guarantor). See also 79 A. L. R. 719 at 758 et seq. (1932); L. R. A. 1916D 223.

examination of the instrument in the principal case,[6] it is apparent that none of these rules is applicable. The statute [7] does not control because the instrument is non-negotiable, there being no unconditional promise to pay in money; [8] nor does the law merchant, for the "principal note" does not conform with the essential requirements of commercial paper.[9] Consequently, the court was compelled to consider only the problem of the liability of an "irregular indorser" of a chose in action.[10] While such an indorser on negotiable paper must necessarily bear a prima facie liability [11] because of the business policy behind negotiability, no such policy attaches to choses in action.[12] Neither contract law nor reason require that the mere signature of a stranger on the back of a chose in action should inflict the secondary liability of an indorser or the primary liability of a surety, guarantor, or co-maker.[13] On the contrary, the only reasonable inference to be drawn in this case from the signature alone, that of the beneficiary of trust property, is that he thereby expressed his approval of the making of the mortgage. Further, since there can be no contract arising from a mere "indorsement," [14] the parol evidence rule is inapplicable.[15] Hence, the court properly held that extrinsic evidence of a contract to add personal credit to

[6] Stewart v. McIntosh, 291 Ill. App. 65 at 67, 9 N. E. (2d) 427 (1937). The instrument provided that the maker promised to pay to the bearer $30,000 five years after date with interest, that there should be no personal liability of the maker, trustee, or any beneficiary, and that " 'In case of default . . . the sole remedy of the holder hereof . . . shall be by foreclosure of the said trust deed.' "

[7] Ill. Rev. Stat. (1935), c. 98, ¶ 84 (N. I. L., § 64).

[8] Ill. Rev. Stat. (1935), c. 98, ¶ 21 (N. I. L., § 1), requires a negotiable promissory note to be an unconditional promise to pay in money. Since, in the principal case, recourse upon default of payment was expressly limited to foreclosure of the trust deed, the promise to pay in money was conditional. Chicago Trust & Savings Bank v. Chicago Title & Trust Co., 190 Ill. 404, 60 N. E. 586 (1901).

A promise is absolute only if the general credit of the maker is pledged by the instrument. Carlos v. Fancourt, 5 Term Rep. 482, 101 Eng. Rep. 272 (1794).

[9] See N. I. L., § 184, which defines a negotiable promissory note. A non-negotiable promissory note necessarily has the same requirements, except for words of negotiability.

[10] Stewart v. McIntosh, 291 Ill. App. 65 at 75-76, 9 N. E. (2d) 427 (1937).

[11] Ill. Rev. Stat. (1935), c. 98, ¶¶ 83-84 (N. I. L., §§ 63-64).

[12] In the following cases, involving non-negotiable, non-commercial paper (choses in action) purporting to be promissory notes, the "irregular indorser" was held not liable on the mere indorsement: Smith v. Myers, 207 Ill. 126, 69 N. E. 858 (1904); Fidelity & Deposit Co. v. Young, 159 Ill. App. 531 (1911); First Nat. Bank v. Lamoreaux, 255 Ill. App. 15 (1929).

[13] Fidelity & Deposit Co. v. Young, 159 Ill. App. 531 (1911).

[14] The term "indorsement" throughout this note is used in the literal rather than legal sense, except where applied to commercial paper.

See 1 WILLISTON, CONTRACTS, rev. ed., §§ 1-3, 12, 18, 21 (1936), in reference to the broad contract principles involved here, especially to the effect that there must be an intent to contract.

[15] 5 WIGMORE, EVIDENCE, 2d ed., § 2425 (1923); Barrows v. Lane, 5 Vt. 161, 26 Am. Dec. 293 (1832).

the chose in action, e.g., as guarantor or surety, would be admissible.[16] Had such extrinsic evidence appeared in this case, that the "indorser" agreed to be bound to pay the debt in *money* as surety, the query necessarily follows whether that could be enforced in face of the express provision disclaiming personal liability of the beneficiary. Here the "indorser" and the beneficiary would be the same individual.[17] This being the resulting anomaly, the court's refusal to infer a suretyship obligation from the mere "indorsement" is justified. A difficulty arises, however, that the court failed to consider, in holding that parol evidence would be admissible. It certainly cannot be said that the mere signature is a sufficient writing to satisfy the Statute of Frauds,[18] as the obligation to be enforced would necessarily be one to answer for the debt of another.[19]

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[16] The problem might be approached on the theory that the "anomalous indorser" of a chose in action is not a party to the document. Cf. 5 WIGMORE, EVIDENCE, 2d ed., § 2446 (1923).

[17] The subsequent contract established by parol must negative that express provision or such a surety contract would be independent of and constitute a waiver of the express provision against personal liability.

[18] 29 Charles 2, c. 3, § 4 (1677); Ill. Rev. Stat. (1935), c. 59, ¶ 1: "No action shall be brought . . . to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person . . . unless the promise or agreement upon which such action shall be brought . . . shall be in writing, and signed by the party to be charged therewith. . . ."

[19] A signature upon the back of an instrument not a promissory note, negotiable or non-negotiable, is not such a writing as will support a parol contract of guaranty. Fidelity & Deposit Co. v. Young, 159 Ill. App. 531 (1911).

Obligations on negotiable paper are not within the Statute of Frauds, § 4. 2 WILLISTON, CONTRACTS, rev. ed., § 458 (1936). However, since this case does not involve negotiable paper, it follows that the Statute of Frauds, § 4, *is* applicable. See 2 WILLISTON, CONTRACTS, 2d ed., §§ 449-450, 452-453 (1936).