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BILLS AND NOTES - INDORSER - LANGUAGE SHOWING OTHER INTENT

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BILLS AND NOTES — INDORSER — LANGUAGE SHOWING OTHER INTENT — Defendants were accommodation parties on a note, signing in the following manner: "For value received we hereby guarantee the payment of the within note at maturity or at any time thereafter with interest at the rate of seven per cent per annum until paid, and agree to pay all cost or expenses paid or incurred in collecting the same, waiving demand of payment, protest and notice of protest." *Held*, the signers, having written out their contract in some detail, expressed a sufficient intention to be bound as guarantors and not an indorsers, notwithstanding the additional words "waiving demand of payment, protest, and notice of protest." *Zuehlke v. Engel*, (Wis. 1938) 282 N. W. 579.

Not uncommon is the situation where a third party's signature, perhaps qualified, appears on the back of a note before that of the payee. Such signatures are not regular indorsements, for there is no indication, by indorsement or assignment, that they are in the actual or apparent chain of title.[1] The question

[1] In approaching the problem of the accommodation party's obligation, one must bear in mind the distinction between a person in the chain of title and a stranger. This was particularly stressed by way of dictum in Bank of Italy National Trust & Sav. Assn. v. Symmes, 118 Cal. App. 716 at 719, 5 P. (2d) 956 (1931), where the court said: "On the other hand it has been held that a stranger to the instrument who wrote thereon, 'For value received I hereby guarantee the payment of the within note at maturity, and hereby waive demand, protest and notice of nonpayment . . .' was not an 'indorser,' having indicated by the appropriate word 'guarantee' his intention to be bound in that capacity and not as an indorser."

then is in what capacity the party has signed. Prior to the general adoption of the Negotiable Instruments Law the decisions were in confusion as to the liability of a stranger to the instrument who indorsed before the payee. Some courts argued that the accommodation party could not have the status of an indorser for he had never been a holder of the note and his mere signature could not perform the primary function of indorsement.[2] As a result they concluded that he was a maker, reasoning that a maker's signature can be placed anywhere on the instrument.[3] Other courts, agreeing that he could not be an indorser, further argued that he could not be a maker, for the very position of his signature was prima facie evidence that he did not intend to become bound as a maker, and there was generally no evidence to the contrary. His position then fitted none of the categories known to the law merchant; yet his signature evidenced an intention to pay the note. Such courts therefore concluded he was liable as a guarantor,[4] bound by a simple contract, as distinguished from a mercantile speciality. Still other courts, however, ignoring the rather obvious difficulty that he was not in the chain of title, but a stranger, held he was an indorser[5] despite the irregularities in his signature. The Negotiable Instruments Law, particularly section 63,[6] was framed to abrogate[7] these contradictory rules of the commercial law. Section 63 sets out a twofold process. First it must be decided that the person has placed his signature upon the instrument otherwise than as a maker, drawer, or acceptor. Once this is ascertained, he is then deemed to be an indorser, unless the court decides, and this is the second question, that he has clearly indicated by appropriate words his intention to be bound in some other capacity.[8] As to the first question, the courts have experienced little difficulty; but as to the second question, the courts have encountered in the phrase "appropriate words" a stumbling block. Although the drafters of the Negotiable

[2] A regular indorsement is both a title transaction and a contract, hence regular indorsements are made only by persons in the chain of title. It was said in Wallrich Land & Lumber Co. v. Ebenreiter, 216 Wis. 140, 256 N. W. 773 (1934), that "A simple indorsement by the payee of his name upon a note serves the double purpose both of transferring the title to the holder and of charging the payee with the obligation to pay it in event the maker upon presentation declines to honor it." See also note 14, infra.

[3] See generally, 2 DANIEL, NEGOTIABLE INSTRUMENTS, 7th ed., § 803 (1933). The common-law rule was that he was presumed to be a maker. Good v. Martin, 95 U. S. 90 (1877); Ryan v. Security Savings & Commercial Bank, 50 App. D. C. 292, 271 F. 366 (1921).

[4] See generally, 2 DANIEL, NEGOTIABLE INSTRUMENTS, 7th ed., § 804 (1933); De Clerque v. Campbell, 231 Ill. 442, 83 N. E. 224 (1907).

[5] See generally, 2 DANIEL, NEGOTIABLE INSTRUMENTS, 7th ed., §§ 805, 806 (1933).

[6] Section 63, N. I. L., reads, "A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity." Sec. 17 (6) reads, "Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser."

[7] Portland Sav. Bank v. Schwartz, (Me. 1938) 196 A. 405.

[8] Murray v. Third Nat. Bank, (C. C. A. 6th, 1916) 234 F. 481 at 485.

Instruments Law eliminated the pre-existing conflict of authority,[9] they inadvertently created a new field of inquiry. In examining the decisions the results are as variant as the possibilities in expression.[10] Perhaps least troublesome is the case where the defendant wrote his name on the back of the note followed by the word, "surety." [11] The court interpreted the added word as showing an intent to be bound in some other capacity than as an indorser. Likewise, where an officer of the payee bank wrote on the instrument over his signature "credit the drawer," it was held that he was not liable as an indorser.[12] Also where defendant wrote on the back of a note "for value received I hereby guarantee the payment of the within note," it was held that this was not an indorsement, but a guaranty of payment.[13] But the decisions are in confusion where the language is ambiguous. For example, the signature of the transferor of a note is often accompanied by the words, "Payment guaranteed. Protest waived." The former phrase, taken independently, properly expresses words of guaranty, whereas the latter phrase sets forth an intent to indorse.[14] Generally in face of such ambiguity the courts have held the statute applies and provides that such a person shall be deemed an indorser.[15] But as a matter of construction, the court was justified in distinguishing the case at bar from the above situation. In the immediate case the more detailed form of the contract and the increased interest rate, in contrast to the ambiguous nature of the terms in the *M. J. Wallrich Land & Lumber* case, sufficiently demonstrated to the court the intent of the signers to be bound in some other capacity, namely guarantors.[16] However, lying between these two cases there as yet remains fertile field for controversy, resulting from the vagueness of the phrase "appropriate words."

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[9] 2 DANIEL, NEGOTIABLE INSTRUMENTS, 7th ed., § 807 (1933).

[10] Arant, "The Written Aspect of Indorsement," 34 YALE L. J. 144 (1924).

[11] Stephens v. Bowles, 202 Mo. App. 599, 206 S. W. 589 (1918). But see also Roberts, "Defenses of an Accommodation Maker," 23 IOWA L. REV. 335 (1938).

[12] Merchants' Nat. Bank of Bangor v. Raesly, 288 Pa. 374, 136 A. 238 (1927).

[13] Roberts v. Hawkins, 70 Mich. 566, 38 N. W. 575 (1888).

[14] Morley v. Dula, 31 Ariz. 386, 253 P. 899 (1927); Winkle v. Scott, (C. C. A. 8th, 1938) 99 F. (2d) 299. See also 36 MICH. L. REV. 483 (1938).

[15] Wallrich Land & Lumber Co. v. Ebenreiter, 216 Wis. 140, 256 N. W. 773 (1934), noted 10 WIS. L. REV. 294 (1934); Mangold & Glandt Bank v. Utterback, 54 Okla. 655, 160 P. 713, L. R. A. 1917B 364 (1916); Nordin v. First Trust & Sav. Bank of Pasadena, 118 Cal. App. 697, 6 P. (2d) 92 (1931). Contra, Cady v. Bay City Land Co., 102 Ore. 5, 201 P. 179, 21 A. L. R. 1367 (1921); Adolph Ramish Inc. v. Woodruff, 2 Cal. (2d) 190, 28 P. (2d) 360, 91 A. L. R. 684 (1934); Carre v. Seaman, (Del. Super. 1937) 190 A. 564. See other cases cited in BRANNAN, NEGOTIABLE INSTRUMENTS LAW, 6th ed., § 31, p. 475 (1938). The rule is in accord with the policy of free circulation of commercial paper and the spirit and purposes of the uniform act. See Wallrich Land & Lumber Co. v. Ebenreiter, supra.

[16] See also Farmers' State Bank v. Hansen, 174 Wis. 100, 182 N. W. 944 (1921), where the words used in the indorsement were substantially the same as found in the case at bar. But see Chance v. Hudson, 233 Ill. App. 542 (1924), where the words "for value received, we guarantee the payment of the within note at maturity" were held to make the signers indorsers.