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Effect of Indorsement in Form of Assignment

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evidence was sufficient to overcome the presumption of permission. Defendant and his wife testified that the car was being used without their permission and therefore it was unlawfully in operation. This testimony was not contradicted. The chauffeur corroborated this testimony. Surrounding this evidence were circumstances which tended to bolster up defendant's statement, *i.e.*, the car was being used after hours and also contained a party of the chauffeur's friends. The trial Judge submitted the testimony to the jury to decide upon its credibility, and they found for plaintiff.

On appeal the respondent maintained that this evidence was interested and discredited. But the Court of Appeals held that even though interested the fact still remained that it was not discredited. The only conclusion, said the Court, that could be reasonably drawn from the uncontradicted evidence was that the chauffeur at the time of the accident operated the car unlawfully and without permission. The judgment was accordingly reversed and the complaint dismissed.

Summing up, the rule may be stated that a presumption is overcome by substantial and credible evidence.[34] And when a party does not come forward to discredit such evidence it is apparent that there is no question for the jury.

JOHN BENNETT.

EFFECT OF INDORSEMENT IN FORM OF ASSIGNMENT.

By the adoption of the Negotiable Instruments Law in 1897,[1] New York aligned itself with its sister states in the interests of commerce and for the purpose of bringing into the law of commercial paper a uniformity which heretofore had been lacking. In the main, the statute codified the common law, although some of the old rules were changed. It might be supposed that with a common basis for adjudication, the courts of the several states would find it easy to agree on basic principles. But often a question of construction of the same section of the statute will arise in two separate states and be answered differently. It is possible, therefore, for states with the same Negotiable Instruments Law to adopt different constructions of the statute.

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[34] In criminal cases the rule is different. Presumption of sanity and evidence are all to be considered by the jury. Brotherton v. People, 75 N. Y. 159 (1878); People v. Tobin, 176 N. Y. 278, 68 N. E. 359 (1903). "This presumption [of innocence] on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence can be drawn." It must be charged to the jury. Coffin v. United States, 156 U. S. 432, 15 Sup. Ct. 394 (1894).

[1] N. Y. Laws 1897, c. 612; Cons. Laws 1909, c. 38.

A striking example of this divergence of authority was brought out in the case of *Fay* v. *Witte*.[2] Defendant had delivered to plaintiff, before maturity and for a good and valuable consideration, a negotiable promissory note which was indorsed in the following manner:

> "I hereby assign all my right and interest in this note to Richard Fay in full.
>
> Harry C. Witte."

The note was protested for non-payment and due notice given defendant. Fay brought this action on the note against Witte as an unqualified or general indorser.[3] Defendant contended that his indorsement was a qualified one and as such did not make him liable on non-payment and notice of protest.

The Appellate Division favored the defendant and, by a three to two count, dismissed the complaint.[4] They predicated their judgment on the maxim, *"Expressio unius est exclusio alterius."* [5] In other words, since an indorsement implies both a transfer of the note and a promise to pay if the maker fails to do so, by assigning the note, Witte expressly transferred the title and thereby excluded the second implication—the promise to pay on default. This decision was in accordance with one line of authority.

In a brief opinion, the reasons for which the two judges dissented are ably set forth by Hill, *J.* The dissenting opinion represents the other widely divergent line of authority which interprets, in the light of the statute, words of assignment written on the back of a note, as in *Fay* v. *Witte,* to constitute an unqualified indorsement. To quote:

> "Uniform treatment of negotiable instruments is desirable among the states, and courts have suggested that if authority as to any question does not exist at home, especial regard should be given the decisions of other jurisdictions.[6] The reported decisions in New York do not furnish a precedent as to the issues here presented. In the states where the question

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[2] 262 N. Y. 215, 186 N. E. 678 (1933).

[3] N. Y. NEGOTIABLE INSTRUMENTS LAW (1897) §116, which states, in part:

> "He [general indorser] engages that on due presentment it [the instrument] 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."

[4] Fay v. Witte, 236 App. Div. 567, 260 N. Y. Supp. 683 (3rd Dept. 1932).

[5] The expression of one thing is the exclusion of another.

[6] Century Bank v. Breithart, 89 Misc. 308, 151 N. Y. Supp. 588 (1915).

has been passed upon, *the decisions are in conflict.*" [7] (Italics writer's.)

He then goes on to state substantially, as in the majority opinion, the reasons why some states hold that indorsements similar to the one in quesion are qualified. But in terse language he states that "the plain language of the statute leaves no room for this reasoning. The enactment of the Negotiable Instruments Law was designed to simplify, clarify and make definite so much of the law merchant as governs the exchange, among business men, of documents which are treated as money. The statute says, 'A qualified endorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import.' [8] This indorsement does not comply with the requirements of the statute. * * * The indorsement is unqualified."

The Court of Appeals reversed the Appellate Division's judgment. To them the line of reasoning adopted by Judge Hill seemed to express the law as they saw it. The theory of the authorities endorsed by the Court is based on another maxim, *"Expressio eorum quae tacitae insunt nihil operatur."* [9] According to the maxim, it avails nothing to the indorser to use words in his indorsement expressly assigning the note, because the transfer of the note is tacitly understood in an indorsement, just as the indorser's liability is implied without words expressly creating it. The Court said: [10]

> "We find no words in the indorsement which state expressly that the payee or indorser assigns or transfers the note, but is not to be held over in case of default. We have a clear expression of an assignment and transfer. This is what the word used means. The note and title to the note were passed to Richard Fay, the plaintiff. However, we find nothing else. The words 'without recourse' are not used, nor any words of similar import. We may imply by the use of the word 'assign,' as did the Appellate Division, that the payee considered himself no longer liable, but implication is not permitted by the statute. The denial of recourse to a prior indorser must be found in the express words, 'without recourse,' or words of similar import. This indorsement contains no such words. Witte, the defendant, became an unqualified indorser, liable as such upon non-payment and notice of protest."

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[7] *Supra* note 4, at 568.

[8] *Supra* note 3, §68. A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.

[9] The expression of those things which are tacitly understood avails nothing.

[10] *Supra* note 2, at 218, 186 N. E. at 679.

The Court, though it mentioned in passing the fact that the words in question, if used on a separate piece of paper not attached to the note, would constitute a mere assignment, followed the rule that the writing of such words on the back of the instrument itself constitutes an indorsement.[11] In fact, all the cases cited in this article in support of either construction of the words of assignment—that they constitute a qualified or an unqualified indorsement—are *a fortiori* authority for the proposition that such an "assignment" is effective as an indorsement so as to keep alive the negotiability of the instrument. There is some authority to the effect that an assignment on the back of a promissory note destroys its negotiability.[12] But even in the states where the decisions of the courts have so held, there will be found decisions to the contrary.[13] The rule can be taken to be Burdick, *supra* note 11; Markey v. Corey, 108 Mich. 184, 66 N. W. 493 (1895). well settled that such words as "I hereby assign, transfer," etc., written on the back of a note, will be deemed an indorsement and the negotiability of the instrument will remain unimpaired.

But in *Fay* v. *Witte,* the Court found no rule as clearly defined and well settled as this to fall back on when it had to answer the question, "Are the words in the indorsement to be construed as intending to make it a qualified or an unqualified indorsement?" As one Court said,[14]

> "Indorsements of similar wording and the legal effect of them have been before the courts in a number of cases both before and after the adoption of the Negotiable Instruments Law. The cases are in irreconcilable conflict."

One author says,[15]

> "The words most frequently involved are 'all my right, title and interest,' or like words, as where the indorsement is 'I hereby assign all my right, title,' etc. As to the effect of using such words, the decisions are in conflict."

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[11] *Supra* note 3, §36, subd. 6 (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 deemed to be an indorser.); §113 (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.); Farnsworth v. Burdick, 94 Kan. 749, 147 Pac. 863 (1915), where the words on the back of the note were: "I here by assine this note over to," etc., the Court said: "The weight of authority was [before the passage of the Negotiable Instruments Law], and is, that this is a commercial indorsement." See also Howard v. Kincaid, 54 Okla. 271, 156 Pac. 628 (1915) and cases cited therein.

[12] Hatch v. Barrett, 34 Kan. 223, 8 Pac. 129 (1885); Nelson v. Southworth, 93 Kan. 532, 144 Pac. 835 (1914); Aniba v. Yoemans, 39 Mich. 171 (1878); Gale v. Mayhew, 161 Mich. 96, 125 N. W. 781 (1910).

[13] Walker v. Sims, 9 Kan. App. 890, 64 Pac. 81 (1899); Farnsworth v.

[14] Prichard v. Strike, 66 Utah 394, 243 Pac. 114 (1926).

[15] 8 C. J. 371.

Consequently, the court found itself forced to join one of the two groups, either that which was grouped under the maxim, *"Expressio unius, etc."* and considered such words of assignment written on the back of a note to be a qualified indorsement, or that grouped under the maxim, *"Expressio eorum, etc."* and which considered such words to be an unqualified indorsement. The views of the first group are clearly expressed in *Spencer* v. *Halpern.*[16] There the note was indorsed, "For value received, I hereby transfer my interest in the within note, etc." The Court held that by expressly stating that the indorsement was a "transfer of interest," the indorser excluded the other implication of law following an indorsement in blank, or in full, namely, indorser's liability on non-payment. It adopted the first maxim and rejected the other. Many other cases in different jurisdictions hold, similarly, that such words constitute a qualified indorsement.[17] Certainly, the argument of this line of authorities is very well considered. Where an indorsement implies two things, why should not the express writing of one of these implications exclude the other?

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[16] 62 Ark. 595, 37 S. W. 711 (1896).

[17] Hailey v. Falconer, 32 Ala. 536 (1858), in which it is held that an indorsement in these words: "For value received the 20th day of February, 1850, I transfer unto John B. Hailey all my right and title to the within note, to be enjoyed in the same manner as may have been enjoyed by me," exempts the indorser from personal liability on the note.

Hammond Lumber Co. v. Kearsley, 36 Cal. App. 431, 172 Pac. 404 (1918), where an indorsement in these words: "For value received we hereby assign all of our interest in this promissory note, etc.," was held to be a qualified indorsement, under a statute similar to that in New York.

Ellsworth v. Varney, 83 Ill. App. 94 (1898), where an indorsement, "For value received I hereby convey all right, title and interest in the within note to E.," was held to express no further intention than to pass title and interest which the "assignor" had in the note and, consequently, was a qualified indorsement.

Evans v. Freeman, 142 N. C. 61, 54 S. E. 847 (1906). In this case the action was on a note indorsed as follows: "For value received, I herewith transfer and assign all my right, title and interest in and to the within note, etc." Under a statute similar to that of New York, the Court held this writing to be a qualified indorsement, constituting the indorser a mere assignor of title, though not impairing the negotiability of the instrument. The Court said:

> "A qualified indorsement may, by the express terms of that section [one equivalent to §68 of the N. Y. Negotiable Instruments Law], be made by adding to the indorser's signature the words 'without recourse,' or any 'words of similar import.' It has been settled in commercial law that a transfer by indorsement of the 'right and title' of the payee or an indorser to a negotiable note is equivalent to an indorsement 'without recourse' and words such as were used in this case are therefore in their meaning or 'import' similar to such an indorsement and this is their reasonable interpretation."

Marion Nat. Bank v. Harden, 83 W. Va. 119, 97 S. E. 600 (1918), where these words, "we hereby assign, transfer and set over, etc.," were held to be a qualified indorsement.

Sound as this argument may appear, the divergent line of authorities just as ably supports its stand. The argument set forth by this group is soundly propounded in the case of *Maine Trust and Banking Co.* v. *Butler:* [18]

> "It would seem obvious that, when writing out upon the back of the paper just what would have been inferred from his signature, the indorser has incurred no greater liability—has done no more than he would—had he simply placed his signature there. How can it be said, then, that he has done less, in the absence of that clear declaration of his intent to exempt himself, mentioned in all the authorities as necessary in the case of a qualified indorsement?" [19]

This is their argument, based on the maxim, *"Expressio eorum, etc."* The cases in favor of this proposition are more numerous than those favoring the other.[20] Many of them [21] quote Mr. Daniel as stating the rule best. He says: [22]

> "The question is: Does the writing over a signature of an express assignment which the law imports from the signature *per se* exclude and negative the idea of conditional liability which the law also imports if such assignment were not expressed in full? We think not. It is from the fact that a payee assigns a bill or negotiable note by indorsement of his name on the back of it, that the law implies his liability as an indorser. His relation to the instrument creates the implication, and the circumstance that he sets forth that relation in express terms does not change it, for the maxim applies, *'Expressio eorum quae tacitae insunt nihil operatur.'* [23] Did

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[18] 45 Minn. 506, 48 N. W. 333 (1891). The note here was indorsed, "For value received, I hereby assign and transfer the within note, etc."

[19] Compare with quotation from Fay v. Witte, *supra* note 10.

[20] Fay v. Witte, *supra* note 2; Sears v. Lantz and Bates, 47 Iowa 658 (1871); Jones County Trust and Savings Bank v. Kurt, 192 Iowa 965, 182 N. W. 409 (1921); Adams v. Blethen, 66 Me. 19, 22 Am. Rep. 547 (1877); Markey v. Corey, *supra* note 13; Maine Trust & Banking Co. v. Butler, *supra* note 18; Davidson v. Powell, 114 N. C. 575, 19 S. E. 601 (1894); Copeland v. Burke, 59 Okla. 219, 158 Pac. 1162 (1916); Behrens v. Kirkgard (Tex. Civ. App.) 143 S. W. 698 (1912); Prichard v. Strike, *supra* note 14; Citizen's Nat. Bank v. Walton, 96 Va. 435, 31 S. E. 890 (1898). In Behrens v. Kirkgard, where the several indorsements read, "For value received I hereby sell, transfer and assign, etc.," the Court said, "The indorsements herein do not, in our opinion, contain any restrictive language which limits the liability of the indorsers to a mere warranty of the title to the notes, and exonerate them from personal liability for the payment thereof."

[21] Fay v. Witte, *supra* note 2; Markey v. Corey; Davidson v. Powell; Copeland v. Burke, all *supra* note 20; Prichard v. Strike, *supra* note 14.

[22] 1 DANIEL, NEG. INST. (6th ed.) §688c. Cited in Maine Trust & Banking Co. v. Butler, *supra* note 18; Behrens v. Kirkgard, *supra* note 20.

[23] *Supra* note 9.

> the payee intend merely to pass title he should use the words 'without recourse' or some phrase of equal import. His liability is implied without words expressly creating it. To be negatived, words should be used which negate the implication."

And this must be taken to be the meaning of our Negotiable Instruments Law.[24] A qualified indorsement will not be implied.

The writer believes that the Court in *Fay* v. *Witte,* faced with the duty of choosing one of the two constructions, chose the better rule, for three reasons. Since this choice was in accordance with the numerical weight of authority, it will make for conformity, as far as possible. In the light of the statute, this rule is the better construction of the words of assignment. Lastly, and this is most important, it is the more practical construction from the standpoint of the needs of commerce. The Court in *Copeland* v. *Burke* [25] adopted the majority rule, indeed felt constrained to do so, because it was "supported by the better reasoning and more in consonance with the commercial needs of the day. In these modern times commercial paper has come to play a very large part in the business life of the country. * * * The effect of and the liability incurred by an indorsement is a matter of common knowledge. The phrase 'without recourse' as employed in such business is in everyday use. * * * If the defendant did not intend to be bound by his indorsement on the note in question, he should have used some words that would clearly indicate he was not an ordinary indorser."

Commercial paper has become of the utmost importance. Its negotiability must be unimpaired as far as possible if the business of the world is to go on unhampered. The Negotiable Instruments Law recognizes this and so does the Court in *Fay* v. *Witte* and so hold the other cases under the majority rule. To them a writing on the back of a note is an indorsement, and an unqualified one, at that. This is the best of the several types of indorsements, carrying with it the greatest advantages to the subsequent holder. In the interests of commerce, any ambiguous writing on the back of a note must be construed as being an unqualified indorsement. Only by clearly expressing his intention by the use of the phrase "without recourse" or "words of similar import" can the indorser hope to escape his conditional liability.

ANTHONY CURRERI.

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[24] N. Y. NEGOTIABLE INSTRUMENTS LAW (1897) §36, subds. 6, 68, 113, *supra* notes 8 and 11.

[25] *Supra* note 20. The note was indorsed, "I transfer my right, title and interest in same, etc."