

Bills and Notes - Negotiability of Note Lacking Endorsement of Special Endorsee

A. L. Wright

Repository Citation

A. L. Wright, *Bills and Notes - Negotiability of Note Lacking Endorsement of Special Endorsee*, 25 La. L. Rev. (1965)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol25/iss4/7>

This Note is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

NOTES

BILLS AND NOTES — NEGOTIABILITY OF NOTE LACKING ENDORSEMENT OF SPECIAL ENDORSEE

Defendant and his son executed a promissory note made payable to "themselves," endorsed the note in blank and delivered it to plaintiff to represent the balance due on an automobile purchased by the son. Plaintiff negotiated the note to General Motors Acceptance Corporation by special endorsement. GMAC subsequently returned the note to plaintiff without endorsement, and plaintiff obtained judgment against the son.¹ Enforcement of the judgment left a deficiency remaining, and plaintiff sought to collect the deficiency from defendant. Defendant urged, among other defenses, that plaintiff had no interest in the note, since it had not been endorsed by GMAC when plaintiff reacquired it. The district court rendered judgment for the plaintiff, and defendant appealed. The First Circuit Court of Appeal affirmed. *Held*, endorsement in blank of a note made payable to the order of the maker converts the note to bearer paper, and if the note is later specially endorsed, endorsement by the special endorsee is not necessary for further negotiation, mere delivery being sufficient to constitute negotiation of bearer paper. *Polk Chevrolet, Inc. v. Vicaro*, 162 So. 2d 761 (La. App. 1st Cir. 1964).

At common law an instrument originally made payable to bearer could not be converted to order paper by special endorsement.² Despite the lack of endorsement by the special endorsee, such a note would be negotiable by delivery.³ *Smith v. Clarke*⁴ established the same rule for a note originally made payable to order but converted to bearer paper by the endorsement in blank and later specially endorsed. Thus, no matter how an instrument became bearer paper, it always remained bearer

1. While GMAC was still holding the note, the son executed another note, payable to GMAC, the primary purpose of which was to rearrange the payments under the first note. The defendant was not a party to the second note, but it contained a clause indicating that the first note, except the installment provision, was to remain in force. The court found that no novation was accomplished, and that defendant's obligation as a co-maker on the first note remained in force. 162 So. 2d at 765.

2. BRITTON, *BILLS AND NOTES* § 63 (2d ed. 1961).

3. *Ibid.*

4. Peake 295, 170 Eng. Rep. 162 (1794).

paper at common law. The Uniform Negotiable Instruments Law (NIL)⁵ clearly codified the common law rule concerning notes originally made payable to bearer. Under NIL section 40, such a note, even if specially endorsed, may be negotiated by mere delivery, despite the lack of an endorsement by the special endorsee.⁶ It is not clear, however, whether section 40 should be applied to notes originally made payable to order, converted to bearer paper by an endorsement in blank, and then specially endorsed.⁷ Under NIL section 9 (5), an instrument is payable to bearer "when the only or last endorsement is an endorsement in blank." Under NIL section 34, such an instrument is negotiable by delivery. However, section 34 also requires that an instrument which is specially endorsed be endorsed by the special endorsee before it can be negotiated. Under these sections it seems that the blank endorsement would control only if it is "the only or last endorsement," and it therefore appears that the rule of *Smith v. Clarke* has been changed by the NIL insofar as it affects notes originally made payable to order. There is, however, an apparent conflict in the provisions of the NIL, since section 40 states that "when an instrument, payable to bearer, is endorsed specially, it may nevertheless be further negotiated by delivery." If NIL section 40 is applied to all bearer paper, including notes which are bearer paper due to an endorsement in blank, it conflicts with NIL sections 9(5) and 34.⁸ It may be argued that section 40 should apply in all cases, since NIL section 48 provides that a holder may at any time strike out any endorsement not necessary to his title. It seems to follow that a person acquiring a note endorsed in blank and subsequently specially endorsed could simply strike out the special endorsement and negotiate the note by delivery. This argument avoids an essential issue, however, since it leaves unanswered the question whether a possessor of a note unendorsed by the special endorsee is actually a "holder" who

5. The Uniform Negotiable Instruments Law was adopted in Louisiana by Act 64 of 1904, and now appears in title 7 of the Revised Statutes. The section numbers of the Louisiana enactment correspond to the numbering of the uniform act, and this Note will refer only to the uniform enactment.

6. NIL § 40 provides: "Where an instrument, payable to bearer, is endorsed specially, it may nevertheless be further negotiated by delivery; but the person endorsing specially is liable as endorser to only such holders as make title through his endorsement." See also BRITTON, *BILLS AND NOTES* § 63 (2d ed. 1961).

7. Most authorities take the position that § 40 does not apply in this situation. See, e.g., BRITTON, *BILLS AND NOTES* § 64 (2d ed. 1961).

8. See *Parker v. Roberts*, 243 Mass. 174, 137 N.E. 295 (1922), in which the court relied upon NIL § 40, ignoring §§ 34 and 9(5).

could invoke the advantages of section 48.⁹ The conflict between section 40 and sections 34 and 9(5) is more apparent than real, however, if section 40 is applied only to paper originally bearer paper on its face, and sections 34 and 9(5) are applied only to paper which is originally made payable to order. If the scope of the sections is so limited, paper which was originally payable to bearer will always remain bearer paper, but the nature of paper originally made payable to order may be changed by endorsement, with the requirements for negotiation depending on the last endorsement. It should be noted that the possible conflict under the NIL is completely resolved by the Uniform Commercial Code,¹⁰ which provides that the last endorsement controls the character of all paper, whether it was originally made payable to order or to bearer. The more intricate problem of a specially endorsed note which is *reacquired* by the endorser can easily be solved by considering NIL sections 50 and 121. Under section 50, when an instrument is negotiated back to a prior party, the latter may reissue and further negotiate the note. Under section 121, an endorser who *pays* the instrument is entitled to possession of it and is "remitted to his former rights." This rule would apply even to an instrument originally made payable to order and specially endorsed by every holder. Endorsement by subsequent endorsees would not be necessary for negotiation by a holder who reacquires the note.

In determining that the plaintiff had an interest in the note in the instant case, the court based its decision on NIL sections 40 and 48, ignoring section 34. The court reasoned that endorsement in blank by the defendant made the note bearer paper, negotiable without the endorsement of the subsequent endorsee under section 40. It thus followed that mere delivery would be sufficient to constitute negotiation. Consequently, under section 48, plaintiff could strike out the special endorsement and sue

9. Prior to the adoption of the NIL one Louisiana court took the position that an endorser who regained possession of a note was a "holder." See *Squier v. Stockton*, 5 La. Ann. 120 (1850), in which a note made payable to the maker was specially endorsed and then reacquired by the maker without the endorsement of the special endorsee. The court held that the maker could strike out the special endorsement and negotiate the note.

See also NIL § 191, which defines "holder" as a payee or endorsee of a note in his possession, or the bearer of such a note, and "bearer" as the person in *possession* of a note payable to bearer. Reading these two definitions together would require that before a person could claim the advantage of § 48, he would have to show either that the instrument in his possession was bearer paper, or that it bore the required endorsements.

10. UNIFORM COMMERCIAL CODE § 3-204.

on the note. By basing its decision on section 40, the court kept the Louisiana rule in conformity with the Louisiana decisions prior to the adoption of the NIL,¹¹ but missed an opportunity to clarify the law. If the suggested solution to the conflict between NIL sections 40 and 34 is sound, and if the only issue had been the necessity of a special endorsee's endorsement, defendant was correct in arguing that GMAC's endorsement was necessary for plaintiff to be able to sue on the note since the note was originally order paper, converted into bearer paper by an endorsement in blank, and subsequently specially endorsed. It is submitted that sections 34 and 9(5) of the NIL should have been applied, rather than sections 40 and 48, with the result that GMAC's endorsement was necessary for negotiation of the note. The equitable result reached in the instant case could have been obtained by another method, however, and all conflict under the NIL could have been avoided. Since the plaintiff in the instant case *reacquired* the specially endorsed instrument, he would be "remitted to his former rights" under section 121 of the NIL. Thus, by applying section 48, he is entitled to strike out his endorsement and all subsequent ones, and sue on the note in his former right as one to whom the note was originally issued.¹²

A. L. Wright II

CIVIL PROCEDURE — COMPROMISE WITH JOINT TORTFEASOR —
EFFECT ON THIRD PARTY DEMAND

Plaintiff, a guest passenger, was injured in an automobile collision allegedly caused by the concurrent negligence of his host driver and the employee-driver of the other vehicle. Plaintiff sued his host's insurer and the owner of the other vehicle

11. *E.g.*, Wood v. Tyson, 13 La. Ann. 104 (1858); Squier v. Stockton, 5 La. Ann. 120 (1850). The court, however, did not purport to rely on these decisions. Query: is there any inference to be drawn from the fact that Louisiana adopted the NIL subsequent to these decisions? If anything, adoption would seem to indicate an intent to deviate from these decisions rather than intent to codify them.

12. Under the provisions of NIL § 184 and § 191, a note made payable to the order of the maker is not *issued* until it is endorsed by the maker and delivered to a party who takes it as a holder. NIL § 191 provides that "'Issue' means the first delivery of the instrument, complete in form, to a person who takes it as a holder," and under NIL § 184, "a note drawn to the maker's own order . . . is not complete until endorsed by him."