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## Negotiable Instruments—Conditional Delivery—Admissibility of Parol Evidence to Show Condition Subsequent under Section 16 of N.I.L.—Admissibility of Parol Evidence to Show Collateral Agreement

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**NEGOTIABLE INSTRUMENTS—CONDITIONAL DELIVERY—  
ADMISSIBILITY OF PAROL EVIDENCE TO SHOW CONDITION  
SUBSEQUENT UNDER SECTION 16 OF N.I.L.—ADMISSI-  
BILITY OF PAROL EVIDENCE TO SHOW COLLATERAL  
AGREEMENT**

An itinerant carnival worker gave a note to a used car dealer for the balance of the price of a house trailer. The dealer indorsed the note to plaintiff who sued the dealer as indorser upon default of the carnival worker. The dealer offered evidence that before taking the note he made an oral agreement with the manager of plaintiff's branch office to indorse the note with recourse on condition that plaintiff would return the trailer to his car lot before requiring him to pay the note. This agreement was made to facilitate acceptance of the note by plaintiff's home office. Plaintiff did not return the trailer. *Held*: the oral agreement to return the trailer was a condition subsequent and inadmissible under the parol evidence rule.<sup>1</sup>

Section 16 of the Negotiable Instruments Law provides that "every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties . . . the delivery may be shown to have been conditional or for a special purpose only,

<sup>1</sup> Securities Acceptance Corp. v. Blake, 157 Neb. 848, 62 N.W.2d 132 (1954).

and not for the purpose of transferring the property of the instrument."<sup>2</sup>

It is generally held that parol evidence is admissible to show delivery on a condition precedent, i.e., one which must be performed before the manually delivered instrument is a legally enforceable obligation.<sup>3</sup> Also, it is a widely stated rule that a condition subsequent, i.e., one whose occurrence or failure to occur will relieve the parties from an agreement which they intended to be legally binding, may not be shown.<sup>4</sup>

Although the distinction between these two principles is clear as a matter of theory, their factual application has been confused. Evidence which would clearly appear to be admissible to show a condition precedent has been excluded.<sup>5</sup> Conversely, evidence has been admitted which seemingly should not have been on the basis of the distinction between the two principles.<sup>6</sup> The anomalies shown by these cases indicate that the distinction is more alive in theory than in fact. Further, a change in the language in which the condition is stated is all that is needed to turn one type of condition into the other.<sup>7</sup>

<sup>2</sup> Neb. Rev. Stat. § 62-116 (Reissue 1950).

<sup>3</sup> 3 Williston, Contracts § 666A (1936); 3 Corbin, Contracts § 628 (1951); *Elson v. Jones*, 42 Idaho 349, 245 Pac. 95 (1926); Restatement, Contracts § 250(a) (1932).

<sup>4</sup> 3 Williston, Contracts § 667 (1936); Restatement, Contracts §§ 250 (b), 254 (1932); *Lowe v. Copeland*, 125 Cal. App. 315, 13 P.2d 522 (1932).

<sup>5</sup> *Hurt v. Ford*, 142 Mo. 283, 44 S.W. 228 (1897) (condition that others sign was not admitted). But compare *Towle-Jamieson Investment Co. v. Brannan*, 165 Minn. 82, 205 N.W. 699 (1925) (such evidence was admitted). Difficulty in many cases arises through failure to distinguish between conditional delivery and conditions precedent to the performance of a contract already made. For a discussion of the relational nature of these definitions see 3 Corbin, Contracts §§ 589, 739 (1951); 3 Williston, Contracts § 667A (1936). *Barret v. Clarke*, 226 Ky. 109, 9 S.W.2d 1091 (1928), involved a condition which was precedent to payment and should have been admissible in evidence but was held a condition subsequent and inadmissible because subsequent to the execution of the contract.

<sup>6</sup> In *Paulson v. Boyd*, 137 Wis. 241, 118 N.W. 841 (1908), the maker gave the note to payee for purchase of stock. If the stock did not return the maker the amount of the note in 18 months, he had the right to return the stock and have the note cancelled. The majority held this a condition subsequent; three dissenting judges called it a condition subsequent—which it would appear to be by the commonly used though questioned definition, *supra* note 5. See also *Kuhn v. Simmons*, 126 Me. 434, 139 Atl. 474 (1927); 9 Wigmore, Evidence § 2444 n.6 (3d ed. 1940) for an extensive collection of these cases.

<sup>7</sup> Note, 13 Rocky Mt. L. Rev. 248, 251 (1941).

Cases decided since the adoption of the Negotiable Instruments Law have differed on the question of whether Section 16 recognizes the distinction between conditions precedent and subsequent, some courts declaring that it merely embodies the common law rule.<sup>8</sup> In view of the narrow academic distinction between the conditions, the preferable holding has been that Section 16 permits evidence of either type to be shown.<sup>9</sup> When, as in the instant case, the instrument has not been unreservedly delivered, the construction placed on Section 16 by these latter cases should be followed.

By its definition a condition subsequent arises when the parties agree to be legally bound until the duty is relieved by occurrence or nonoccurrence of a specified event. It is difficult to see how a party can intend his engagement to be legally binding in the sense that it is an absolute, unconditional and unqualified commitment to liability when he orally conditions his engagement at the time. Even though the condition be labeled "subsequent," it would ordinarily be the intention of the parties to the instrument that delivery be provisional with no thought to the manner in which the condition was stated.<sup>10</sup>

Although in the instant case the court held the evidence showed a conditional delivery based upon a condition subsequent and disallowed it for that reason, it would appear that the case should have been decided not on the basis of a conditional delivery under Section 16 but rather on the basis of a showing by the parties of their complete agreement under the parol evidence rule. A strong position has been taken by treatise writers that a proper application of the parol evidence rule would alleviate such academic arguments as that found in the instant case. By this test neither a condition precedent nor a condition subsequent would gain precedence for admissibility into evidence solely on the basis of its label.<sup>11</sup> These writers take the position that the

<sup>8</sup> Skogberg v. Hjelm, 211 Minn. 392, 1 N.W.2d 599 (1941); J.B. Colt Co. v. Gregor, 328 Mo. 1216, 44 S.W.2d 2 (1931); Continental Trust Co. v. Witt, 139 Va. 458, 124 S.E. 265 (1924).

<sup>9</sup> Goldsmith v. Parsons, 182 La. 122, 161 So. 175 (1935); Rule v. Connealy, 61 N.D. 57, 237 N.W. 197 (1931); Beutel's Brannan, Negotiable Instruments Law 378 (7th ed. 1948) and cases collected. It is suggested that the ambiguity in Section 16 of the N.I.L. should be resolved to reach this result by construing "not for the purpose of transferring property therein" to modify only "for a special purpose" so that "conditional" would remain unmodified and inclusive of both types of condition. It is to be noted that there is a variation in the Nebraska statute since there is no comma between "conditional" and "or."

<sup>10</sup> Beutel's Brannan, Negotiable Instruments Law 377 (7th ed. 1948).

<sup>11</sup> 3 Corbin, Contracts §§ 589, 576, 746, 739 (1951).

courts have made deep inroads upon the parol evidence rule, and that *stare decisis* has compounded misinterpretation.<sup>12</sup> Thousands of cases have declared parol evidence inadmissible to vary or contradict the terms of a written contract. This is stated in the form of a rule of evidence excluding certain testimony. There is no rule of evidence that excludes testimony of what happened in the past until the new agreement of the parties is established. And even after it is established, there is still no such rule excluding evidence except in so far as it is immaterial even if true.<sup>13</sup> The parol evidence rule merely states the obvious, i.e., that after the parties have integrated their whole agreement on a subject, any evidence, either parol or written, is immaterial.<sup>14</sup> It is a rule of substantive contract law and not of evidence.<sup>15</sup>

In many cases it is obvious that the court has in fact considered the testimony, weighed it, found a complete integration in writing and then justified its position by repeating the parol evidence rule to the effect that such testimony is inadmissible to vary or contradict the writing.<sup>16</sup> Such an oral agreement must nearly always have some effect on the interpretation of a part of the contract that is in writing, and it is unsatisfactory to state that it is not to be shown only because it varies the writing. Such evidence may clearly show that there was no agreement to substitute the written instrument for the particular oral agreement.

Courts have furthered the improper use of the parol evidence rule by holding the writing to be the only competent evidence of the parties' agreement.<sup>17</sup> The writing cannot prove its own completeness and accuracy.<sup>18</sup> Thus the very testimony that the rule is supposed to exclude is frequently, if not always, necessary before the court can determine that the parties have agreed upon the writing as a complete and accurate statement of their agreement.

Such usage of the parol evidence rule has led to decisions

<sup>12</sup> 3 *id.* § 582; 9 Wigmore, Evidence § 2430(3) (3d ed. 1940).

<sup>13</sup> 3 Corbin, Contracts § 576 (1951).

<sup>14</sup> 3 *id.* §§ 573, 576, 582; 9 Wigmore, Evidence §§ 2443, 2445 (3d ed. 1940). It is of course always competent to supplant a contract with a subsequent agreement. See 3 Corbin Contracts § 574 (1951).

<sup>15</sup> 3 Corbin, Contracts § 573 (1951).

<sup>16</sup> 3 *id.* § 582. See also § 573 for a discussion of the different bases on which a court may reach its decision in applying the parol evidence rule.

<sup>17</sup> The principal case is decidedly in accord.

<sup>18</sup> 3 Corbin, Contracts § 582 (1951); 9 Wigmore, Evidence §§ 2431, 2400(5) (1940).

which are virtually useless as precedents, has deterred counsel from offering testimony that was admissible for many purposes, and more important, has caused courts to refuse to hear testimony that should have been heard.<sup>19</sup> Although one of the factors behind this application of the parol evidence rule as a rule of evidence is the prevention of fraud, there would appear to be no reason why this consideration should bar the admission of evidence, its plainly stated consideration as a matter of law by the court, and its ultimate submission to the jury if it is of sufficient weight as a matter of law.<sup>20</sup>

In the case of negotiable paper, especially between indorsers, the indorsement alone is seldom a complete integration,<sup>21</sup> and it was not in this case.<sup>22</sup> The character of the writing, the surrounding circumstances, and the testimony of other witnesses should have been admitted and weighed by the court.

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<sup>19</sup> 3 Corbin, Contracts § 582 (1951).

<sup>20</sup> Ibid. See also 9 Wigmore, Evidence § 2430(2) (3d ed. 1940).

<sup>21</sup> 3 Corbin, Contracts § 587 (1951); 9 Wigmore, Evidence §§ 2443, 2445 (3d ed. 1940).

<sup>22</sup> The indorsement in the instant case contained a waiver of demand and presentment. It then stated "payment guaranteed." Brief for Appellees No. 33430, p. 4, Securities Acceptance Corp. v. Blake, 157 Neb. 848, 62 N.W.2d 132 (1954); cf. Randles v. Gully, 128 Okla. 220, 262 Pac. 201 (1927).

\* Currently serving in the armed forces.