TAYLOR *v.* DEESE.

Opinion delivered February 25, 1929.

1. EVIDENCE—PAROL EVIDENCE OF CONDITIONAL SIGNATURE OF NOTE.—In an action on a note, parol evidence *held* admissible to show that defendant signed the note as surety under agreement with a bank cashier that the note would not become effective until the bank took a mortgage from the principal.
2. BILLS AND NOTES—HOLDER IN DUE COURSE.—A bank accepting a note from a surety with notice that it was not to become effective until the bank took a mortgage from the principal, which condition was not fulfilled, did not, as to such surety, become a holder in due course.
3. BILLS AND NOTES—PAROL EVIDENCE OF CONDITION.—In suit on a note, evidence was admissible, under Crawford & Moses' Dig., §§ 7817, 7824, to show that at the time of delivery of the note to it the bank had notice that defendant's liability thereon was conditional on the bank's taking a mortgage from the principal debtor.

Appeal from Lonoke Circuit Court; *O. E. Williams,* Special Judge; affirmed.

STATEMENT OF FACTS.

Appellant sued appellees to recover the amount of $3,459.80, alleged to be due upon a promissory note. Appellees admitted signing the note sued on, but denied any liability on the ground that they had signed the note as sureties on certain conditions on the part of the payee of the note which had not been fulfilled. The note was introduced in evidence, and it was also shown that the Bank of Central Arkansas, which was the payee of the note, had become insolvent, and that W. E. Taylor, State Bank Commissioner, was in charge of its affairs.

W. H. Holloway, one of the appellees, was the first witness for them. According to his testimony, he signed the note as surety for Charles F. Deese, in the presence of W. T. Couch, who was the cashier of the Bank of Central Arkansas, the payee in the note. The note was for $3,000, and was a loan to enable Deese to purchase 80 acres of land in Lonoke County, Arkansas. In response to a question as to what conditions and circum-

stances he signed the note, the witness answered as follows:

"I signed the note. I went to Couch and told him that Charlie had come to me and wanted me to sign the note for him to buy 80 acres of land out there, and I told him that he agreed to put that up as security, and his home place, and I told him I would sign the note under those conditions, for him to take a mortgage on that land to secure him; that I couldn't pay it, but for him to take that security so as to take care of me in case I was called on to pay."

The witness was the first to sign the note, and Couch understood that the note was to be signed by W. J. Corpier, Luther Hester and J. R. Deese, under the same conditions. These parties testified that they signed the note under practically the same conditions as testified to by W. H. Holloway. All of the appellees are related in some way to C. F. Deese. Couch did not take a mortgage on the land from C. F. Deese, and appellees never received any notice that the mortgage had not been given until they were notified by the attorney for the State Bank Commissioner, in January, 1927. They never received any notice from the bank for payment of the note that they had signed.

W. T. Couch was a witness for appellant. According to his testimony, appellees signed the note as sureties for C. F. Deese without any conditions whatever. They became absolutely bound as sureties on the note, and there were no promises or conditions of any kind made by him to them to induce them to sign the note.

There was a verdict and judgment in favor of appellees, and the case is here on appeal.

Trimble & Trimble, for appellant.

C. V. Holloway and *Reed & Beard*, for appellee.

HART, C. J., (after stating the facts). It is earnestly insisted by counsel for appellant that the judgment must be reversed because the circuit court erred in admitting parol evidence to show that appellees signed the note to

the bank under the promises of its cashier that the note would not become effective until the bank took a mortgage from C. F. Deese, the principal in the note, upon a certain tract of land, and that this condition was never performed by the bank. It is contended that the admission of this testimony violated the well-known rule that parol evidence is not admissible when it tends to vary or contradict the legal effect of a written instrument. According to the parol testimony, the note sued on was not to become effective until the bank took a mortgage on 80 acres of land from C. F. Deese, the principal in the note. In other words, the note was not effective until this alleged condition was complied with. This made it a condition precedent to the final completion of the contract between the parties. The testimony of appellees brings the case squarely within the principles of law announced in *Halliburton* v. *Cannon,* 160 Ark. 428, 254 S. W. 687, where the principles of law governing cases of this sort are stated in the second syllabus. In that case, after reiterating the well-settled rule that the verdict of a jury, or the finding of a court sitting as a jury, will not be disturbed on appeal if the evidence is legally sufficient to support it, the court held that, where a promissory note, made payable to plaintiff, was signed by defendant as an accommodation maker, upon express condition that two other persons should sign the note before it should become binding on defendant, and defendant notified plaintiff of such condition before the note was delivered to him, it was not error to permit defendant to prove the condition on which he signed the note, though plaintiff was not present when the note was signed. The holding of the court in that case was based upon the rule in *Graham* v. *Remmel,* 76 Ark. 140, 88 S. W. 899, to the effect that, in a suit on a note executed in payment of the first premium of a policy of insurance, it is competent in defense to prove by parol evidence that the note was executed on condition that it should not be binding unless the policy, when it arrived, was satisfactory. In that

case the court also had in mind that the payee of the note might be a holder in due course under the rule announced in *Cagle* v. *Lane*, 49 Ark. 465, 5 S. W. 790.

This court is committed to the rule that the parties to the instrument may introduce parol evidence to show that the contract should not become effective unless certain conditions are first complied with. The reason is that such testimony does not contradict or vary the terms of the writing itself, but simply provides that the written instrument or contract is never to become binding upon the parties unless and until the condition is complied with.

This principle was recognized and applied in *American National Bank* v. *Kerly*, 109 Ore. 155, 220 Pac. 116, 32 A. L. R. 262, and *Caudle* v. *Ford* (Ky.), 72 S. W. 270.

In the case first cited the Supreme Court of Oregon held that the payee of a note which does not accept it until after notice of conditions upon which some of the makers sign, and which had not been complied with, is not a holder in due course. Parol evidence was admitted in that case to show the conditions upon which the note was signed and that the bank had notice of before the note was delivered to it.

In the case last cited the Court of Appeals of Kentucky held that it was competent to show by parol evidence that, at the time the payees of an accommodation note indorsed the same, it was agreed that, before the maker should sell it, he should obtain the name of another party as payee, and that the latter should also indorse it, and the maker should execute a mortgage to indemnify the payees against loss. The court also held that, in an action by an indorsee against the indorsers of an accommodation note, where defendants all testified to an agreement whereby their indorsement was not to take effect until certain conditions were complied with, and that the plaintiff had notice thereof, a verdict for defendants could not be disturbed on appeal, though plaintiff testified that he purchased without notice of the agreement.

This principle is not in conflict with our negotiable instrument statute. Subdivision 5 of chapter 130 of Crawford & Moses' Digest deals with the subject of the rights of holders of negotiable instruments to sue. Section 7817 defines a holder in due course. He must be one who has no notice of any infirmity in the instrument at the time he takes it. Under § 7824 a negotiable instrument is subject to the same defenses as if it were non-negotiable in the hands of any other holder in due course.

In the case at bar, if the note was delivered to Couch as cashier of the bank upon condition that it was not to become effective until the bank took the mortgage of C. F. Deese, the principal in the note, on the tract of land testified to, then the bank was not a holder in due course, and the court did not err in admitting parol evidence to show the condition upon which the note was signed and that the bank had notice of the condition at the time the note was delivered to it. The evidence on this point was conflicting, and, under our well-settled rules of practice, the verdict of the jury is binding upon us on appeal.

Therefore the judgment will be affirmed.