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NOTES

BILLS AND NOTES—INCORPORATING COLLATERAL SECURITY—EFFECT ON NEGOTIABILITY.—One of the most confusing and obscure doctrines in the law of Bills and Notes is the rule governing collateral agreements, more specifically, those instruments, such as mortgages and deeds of trust, given as security for a note. An investigation into some decisions rendered within the last decade or so bears out the significance of the problem. It is held quite generally that a mere reference to the collateral security will not be sufficient to incorporate the terms of the agreement into the note.[1] Thus where a note recites that it is "secured by a mortgage," this is a mere reference not sufficient to incorporate the mortgage into the negotiable instrument.[2] In *Magee v. First Nat. Bank of Ellworth*[3] the court said: "The appellant contends that the recital that the note is secured by a mortgage destroys its negotia-

1 Ashland Building & Loan v. Kerman, 155 N. E. 245 (Ohio, 1926); Walter v. Kilpatrick, 132 S. E. 148 (N. C. 1926); Christian Community of Universal Brotherhood v. Graf, 1 Pac. (2d) 596 (Ore. 1931); Cook v. Parks, 169 S. E. 208 (Ga. 1933).

2 Magee v. First Nat. Bank of Ellworth, 232 N. W. 336 (Minn. 1930); Williamson v. Craig, 215 N. W. 664 (Iowa, 1927).

3 *Op. cit. supra* note 2.

bility. This recital in no way incorporates into the note the provisions of the mortgage, or any part thereof. Nothing is thereby added to the contract."

The question then arises as to what is necessary to incorporate a collateral agreement into a note. It has been held that even though the note and the collateral agreement be written on the same paper, the note will not incorporate the agreement.[4] In *Williams v. Silverstein* [5] the court said: "But even though the agreement be written upon the same paper that the note is written on, where it is evident that it was not intended to incorporate the terms of the agreement within the note itself, the transferability and negotiability of the note will not be affected by the agreement." Likewise, it has been held that even though the conditional sales agreement and the note referred to each other the note remains unaffected.[6]

On the other hand, it was held in *Von Nordheim v. Cornelius* [7] that where the conditional sales contract and note were on the same paper that the two constituted one instrument; therefore, the plaintiff, cutting the note from the agreement, was not a holder without knowledge and that as to him the note was non-negotiable. The court said: "It has long been the rule in this jurisdiction that, although a note otherwise negotiable is not rendered non-negotiable merely by reference to collateral security, a note and a mortgage executed at the same time as part of one transaction are to be construed as one instrument, and terms in the mortgage may render the note non-negotiable as to all with notice thereof." Did not the court here confuse negotiability with holding in due course?

The courts have differed somewhat upon what words will be sufficient to incorporate the instrument into the note. Generally, the courts have held that if the note merely recites that it is "subject to the terms of the mortgage" the note remains unimpaired.[8] In order then to incorporate an instrument into the note it is necessary that the words expressly state that it is subject to all the terms of the collateral instrument, just as though the provisions were expressly recited therein. This is best illustrated by the decision in the *Merchants' National Bank v. Detroit Trust Co.*,[9] in which the court dealt with both types of negotiable instruments. It held that the bonds were negotiable where the provision stated: "This bond is entitled to the benefits and subject to the provisions of an indenture of mortgage . . . to which mort-

4 Williams v. Silverstein, 2 Pac. (2d) 165 (Cal. 1931).

5 *Op. cit. supra* note 4.

6 Commercial Credit Co. v. Parks, 112 So. 237 (Ala. 1927).

7 262 N. W. 832 (Neb. 1935).

8 Merchants' National Bank v. Detroit Trust Co., 242 N. W. 739 (Mich. 1932); Ferring v. Verwey, 229 N. W. 46 (Wis. 1930).

9 *Op. cit. supra* note 8.

gage reference is hereby made. . . ." But the Court held another set of bonds nonnegotiable because of the following provisions: "This bond and the coupons thereto attached are expressly made subject to and shall be bound by all of the provisions in the said mortgage or deed of trust contained, the same as though all of said provisions were herein expressly set forth and the holder hereof expressly acknowledges notice of all such provisions."

The next point to be considered is, What effect does the incorporation have upon the negotiability? It has been held that negotiability is not destroyed by the incorporation of the collateral security in the note, unless the provisions of that security are contrary to the Negotiable Instruments Law.[10] The law is well-stated in *Old Colony Trust Co. v. Stumpel,*[11] where the court said: "The note thus being made expressly subject to the terms of the conditional sales agreement, that agreement, incorporated therein, must be examined to ascertain if any of its provisions impair negotiability."

In other cases it has been held that incorporation is immaterial, unless the words of incorporation are such as to indicate that payment of the instrument is to be burdened with provisions or conditions of the extrinsic agreement.[12]

The weight of authority seems to hold, however, that, if the reference is such that it incorporates all the terms of the collateral security, the negotiability is destroyed regardless of what the provisions in the extrinsic instrument are.[13] In *Enoch v. Brandon* [14] the court explained: "If in the bond or note, anything appears requiring reference to another document to determine whether in fact the unconditional promise to pay a fixed sum at a future date is modified or subject to some contingency, then the promise is no longer unconditional. What that document may provide is immaterial. Reference to the paper itself said to be negotiable determines its character."

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10 Old Colony Trust Co. v. Stumpel, 213 N. Y. S. 536 (1926), *affirmed,* 220 N. Y. S. 893, 161 N. E. 173 (1928); Pollard v. Tobin, 247 N. W. 453 (Wis. 1933); Marine National Exchange Bank of Milwaukee v. Kalt-Zimmers' Mfg. Co., 79 L. ed. 427 (1936).

11 *Op. cit. supra* note 10.

12 Gerrish v. Atlantic Ice & Coal Co., 80 Fed. (2d) 648 (D. C., N. D. Ga. 1935).

13 Pflueger v. Broadway Trust & Savings Bank, 184 N. E. 318 (Ill. 1933); Sturgis National Bank v. Harris Trust & Savings Bank, 184 N. E. 589 (Ill. 1933); Enoch v. Brandon, 164 N. E. 45 (N. Y. 1928); Shushan v. Trepagneir, 175 So. 651 (La. 1937); Musto v. Grosjian, 281 Pac. 1022 (Cal. 1929).

14 *Op. cit. supra* note 13.

DAMAGES—RECOVERY FOR WORDS NEGLIGENTLY OR INTENTIONALLY SAID IN REGARD TO THIRD PERSON CAUSING THE PLAINTIFF EMOTIONAL DISTURBANCE—FEAR OF PERSONAL INJURY TO THIRD PERSON. —The general rule is that every negligent act that results in damage to someone is not actionable.[1] In the recent case of *Curry v. Journal Publishing Co.*[2] the court held that a reader, the reader's wife, and their subsequently born child, could not recover in damages because of injuries caused by shock and grief at reading in the defendant's paper of the death of the reader's father. The newspaper owed no duty to the reader where the injuries alleged were so serious and unusual as not to be foreseeable by the publisher. The decision in the case of *Herrick v. Evening Express Publishing Co.*[3] is in accord with the decision in the *Curry* case. The court in the latter case held that the mother of a boy in the army could not recover for injuries caused by grief and shock from reading in the newspaper of his supposed death. In these cases we see that there was no injury to the third person, and the words in each case were not spoken and written negligently. In the case of *Bielitski v. Obadiak* [4] the words spoken were spoken intentionally. The plaintiff, in this case, was allowed to recover damages by the reason of the fact that the defendant had told the story that the husband of the plaintiff had committed suicide by hanging himself. The majority of the court held that the defendant was liable upon the theory that the injury was the proximate result of the wilful, false report originated and circulated by him with the intent that it should be communicated to her.

Generally the rule has been that there can be no recovery for the physical consequences of fright caused by another's peril, which is the result of the negligence of a third person. The law seems to be that there can be no recovery for injuries resulting wholly from mental shock or fright not accompanied by any physical injury. Even the courts that hold that a physical impact isn't necessary to the recovery for fright have held that recovery is denied in the case of fear at another's peril.

The Wisconsin Supreme Court has held that recovery may be had in a proper case solely for the physical consequences of the fright, without physical injury from impact; but that there can be no recovery for the consequences of physical shock caused by fright at the peril of another person, resulting from the negligence of a third person. In *Waube v. Warrington* [5] the authorities are reviewed and the Wisconsin court concludes that where a mother witnesses the negligent killing

1 Palsgraf v. Long Island R. Co., 248 N. Y. 339, 162 N. E. 99, 59 A. L. R. 1253 (1928).

2 68 Pac. (2d) 168 (1937).

3 120 Me. 138, 113 Atl. 16, 23 A. L. R. 358 (1921).

4 15 Sask. Law Rep. 156, 65 D. L. R. 627, 23 A. L. R. 351 (1922).

5 216 Wis. 603, 258 N. W. 497, 98 A. L. R. 394 (1935).

of her child she cannot recover for the physical injuries caused by the shock. The court held that the problem must be approached from the viewpoint of duty of the defendant and the right of the plaintiff and not from the viewpoint of proximate cause, saying: "That the right of the mother to recover must be based, first, upon the establishment of a duty on the part of the defendant so as to conduct herself with respect to the child as not to subject the mother to an unreasonable risk of shock or fright, and, second, upon the recognition of a legally protected right or interest on the part of the mother to be free from shock or fright occasioned by the peril of her child." The Court said that it was not enough to find a breach of duty to the child, and allow the consequence of such a breach to go as far as the law of proximate cause will permit them to go, and then sustain a recovery by the mother, if a physical injury to her by reason of shock or fright is held not too remote.

The two leading cases that uphold recovery in the case of fear of the peril of another are *Hambrook v. Stokes* [6] and *Spearman v. McCrary.*[7] In the latter case the mother recovered damages for fright when she saw her two children placed in peril by the negligence of the defendant. The court in adopting the view that recovery could be had for shock or fright culminating in physical injury although there was no physical impact, approached the case from the standpoint of proximate cause. The *Hambrook* case was one where recovery was had although there was no physical impact; fright and fear for the safety caused the injuries to the mother in the case. The trial court directed the jury that if the nervous shock was caused by fear of her child's safety, as distinguished from her own, plaintiff could not recover. From a verdict for the defendants, the plaintiff appealed and the trial court was reversed and recovery was had. Viewing the matter from the standpoint of proximate cause, the court held that there could be no distinction between the shock suffered as a result of fear for her own safety and the fear for the safety of her children. While the majority of the court took this view of the case, the dissenting opinion of Sargant, L. J., approached it from the standpoint of duty. The dissenting opinion concedes that since it was the duty of the driver to use due care in the management of the vehicle to avoid injury to those on or near the highway, the duty cannot be limited to physical injuries caused by actual physical impact; but the dissenting opinion further states that there is a difference where the shock to the plaintiff is due, not to fear for the plaintiff's safety but for the safety of another. The dissenting opinion states that "it would be a considerable and unwarranted extension of the duty of owners of vehicles towards others in or near the highway, if it were held to include an obligation not to do

[6] [1925] 1 K. B. 141.
[7] 4 Ala. App. 473, 58 So. 927 (1912).