

operation of the statute of Missouri the account or certificate must be made "in form" payable to either or survivor; if a case is within this requirement the statute creates a presumption that the depositor intended to create a joint interest. As to those cases not affected by the statute, the Missouri Courts of Appeals have in the past wavered between the joint-tenancy basis and the gift basis. See *Craig v. Bradley* (1910) 153 Mo. App. 586, 134 S. W. 1081; *Commonwealth Trust Co. v. Du Montimer, supra*; *Martin v. First Nat. Bank* (1921) 206 Mo. App. 629, 227 S. W. 656. The Supreme Court of Missouri seems to have settled the matter by its statement that the burden which the survivor must sustain at the trial to establish the gift of a joint interest in a deposit with the resultant right of survivorship is that of proving merely the depositor's "intention of creating a joint tenancy . . . with the right of survivorship." The fact that the depositor's main purpose in changing the account to a joint one was that the other party should receive it directly on her death without its passing through administration will not prevent the survivor from receiving it on the death of the depositor. *Murphy v. Wolfe, above*.

J. D. F., '32.

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NEGOTIABLE INSTRUMENTS—CONDITIONAL DELIVERY—PAROL EVIDENCE—"MERGENCE" CLAUSE.—In the case of *J. E. Colt Co. v. Gregor* (Mo. 1931) 44 S. W. (2d) 2 the defendant had purchased a carbide plant from the plaintiff under a contract which declared expressly that the contract covered all agreements. When the Company had accepted the contract, the defendant executed a note for the purchase price, in accordance with the terms of the contract, and delivered the note to the Company's agent upon an oral understanding that the defendant was to keep the machine a year and that, if it proved unsatisfactory, he could reject it and have his note back. The machine proved entirely unsuitable. In this suit on the note, the defendant sets up a three-fold defense based upon failure of consideration, breach of warranty, and conditional delivery. The case was actually litigated upon the third defense alone. The trial court admitted over plaintiff's objection parol evidence of the conditional delivery. *Held*: Since the contract was complete on its face and provided that it covered all agreements, it was error to admit parol evidence of the condition.

As the Supreme Court of Missouri admits the proposition that as between the original parties parol evidence is admissible to show a conditional delivery of the instrument and a failure of the condition is too well established to be doubted. This has been codified by the Negotiable Instruments Act, section 16. See R. S. Mo. (1929) sec. 2645. The decision is hardly more than an arbitrary determination that this principle is inapplicable where the negotiable instrument arises out of a contract which has a so-called "mergence" clause.

It is doubtful whether the process of judicial legislation ought to be exercised to attain such a result. It has been repeatedly said by the courts that,

where a contract and a note are executed contemporaneously and relate to the same subject-matter and transaction, they must be construed together. *Spotton v. Dyer* (1919) 42 Cal. App. 485, 184 Pac. 23; *National Bank of Watervliet v. Martin* (1923) 203 App. Div. 390, 196 N. Y. S. 714, *aff'd* (1923) 235 N. Y. 611, 139 N. E. 755; *Collins v. Schaffer* (1916) 66 Colo. 84, 179 Pac. 154; *Jennings v. Todd* (1893) 118 Mo. 296, 24 S. W. 148; *Williams v. Kessler* (Mo. App. 1927) 298 S. W. 242. In applying this rule of construction, the Missouri Supreme Court has imported into the note the stipulation that the written documents "cover all agreements" and therefore prevent the defendant from proving the conditional nature of the delivery by evidence of a separate parol agreement.

Many cases reiterate the well-known formula that "all prior and contemporaneous agreements are merged into the written contract." *Brown v. Johanson* (1921) 69 Colo. 400, 194 Pac. 943; *Barbarett v. Meyers* (1912) 248 Mo. 58, 144 S. W. 824. The doctrine of "mergence" and the "mergence" clauses merely restate the parol evidence rule in a different form. 13 C. J. 598. If the contract is silent on some term or in some way does not purport to express the full agreement of the parties, the courts will admit parol evidence to explain or complete it. *Phoenix Publishing Co. v. Riverside Clothing Co.* (1893) 54 Minn. 205, 55 N. W. 912; *Peabody v. Bement* (1890) 79 Mich. 47, 44 N. W. 416. However, the opposite is true if the contract purports on its face to be complete. *Samuel Chute Co. v. Latta* (1913) 123 Minn. 69, 142 N. W. 1048; *Wheaton Roller Mill Co. v. Noye Manufacturing Co.* (1896) 66 Minn. 156, 68 N. W. 854. This is the only effect of the mergence clause and it in reality adds nothing to the parol evidence rule. Therefore, the question in the principal case turns upon a consideration of what type of contemporaneous oral agreements come within the prohibition of the parol evidence rule. This principle excludes statements which contradict, vary, or modify the terms of a written agreement. *Spelman v. Delano* (1915) 187 Mo. App. 119, 172 S. W. 1163; *Coloin v. Post Mortgage Co.* (1916) 173 App. Div. 85, 159 N. Y. S. 361. But a written instrument, though purporting to be a definite simple contract, may be shown by parol evidence to have been delivered conditionally. *Bowser & Co. v. Tarry* (1911) 156 N. C. 35, 72 S. E. 74; *Bartholomew v. Fell* (1914) 92 Kan. 64, 139 Pac. 1016; *Gamble v. Riley* (1913) 39 Okla. 363, 135 Pac. 390. This is particularly true in the case of bills and notes. *Smith v. Dottering* (1911) 200 N. Y. 299, 93 N. E. 985; *Adams v. Thurmond* (1915) 48 Okla. 189, 149 Pac. 1141. Furthermore by codifying this principle into section 16 of the Negotiable Instruments Act a profound policy has been indicated to permit proof of conditional delivery by parol. Thus it would seem that if the Missouri Supreme Court disagreed with the above authorities and felt that the "mergence" clause coupled with the parol evidence rule should operate to exclude parol evidence of conditional delivery, the Court should have recognized the specific applicability of section 16 of the Negotiable Instruments Act to the doubtful general application of the parol evidence rule and a "mergence" clause which really adds nothing to the rule.

A. W. P., '33.