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Bills and Notes

Robert A. McKenna

BILLS AND NOTES

ROBERT A. McKENNA*

Consideration and burden of proof.—*Maloney v. McBrides*[1] involved an action by the executrix of the deceased payee of a promissory note against the corporation maker of the note. Defendant denied consideration. Evidence consisting of prior payment on the note of almost $7,000, conveyance of lands by deceased to the defendant corporation, admissions, etc., were held sufficient to establish consideration, and the decision of the circuit court for the defendant was reversed.

Since, by the weight of authority, lack of consideration and failure of consideration are construed to be affirmative defenses under the Uniform Negotiable Instruments Law Sections 24 and 28,[2] it appears surprising that the circuit court should have reached a conclusion adverse to the plaintiff. Jury trial was waived. The reason seems to be that the law of negotiable instruments, with regard to the burden of proof, is not definitely settled in Florida. In *Wilson v. Maddox*,[3] the plea of failure of consideration was said to place the burden on the plaintiff of establishing no failure. On the other hand, where the instrument was in the hands of an indorsee the burden was imposed upon the maker to prove the failure of consideration and also the indorsee's knowledge thereof.[4]

In the recent case of *Rapp v. Demmerle*,[5] the court stated that the "payee is a holder for value unless the contrary is asserted and shown." Despite this recent statement, it would appear in Florida that where consideration has been denied by a proper plea, the plaintiff should present evidence thereof. In *Sarasota Kennel Club v. Shea*,[6] the court struck defendant's plea of no consideration as "sham," only after defendant had failed to answer plaintiff's affidavit evidencing consideration. Certainly Florida has *not* gone as far as Colorado, where the Supreme Court stated:

> Sections 24 and 28 [of the Negotiable Instruments Law] impose on the defendant who affimatively pleads absence or failure of consideration the burden of establishing his defense by a fair preponderance of the evidence and that burden does not shift to the plaintiff when the defendant has produced some evidence in support of his defense, but it remains on the defendant throughout the trial.[7]

*Professor, University of Miami School of Law.

1. 54 So.2d 678 (Fla. 1951).
2. FLA. STAT. §§ 674.27 and 674.31; BRITTON, BILLS AND NOTES 403 *et seq.* (1943).
3. 97 Fla. 489, 121 So. 805 (1929).
4. Atlantic and Gulf Fertilizer Co. v. Coats, 105 Fla. 324, 141 So. 149(1932).
5. 61 So.2d 481 (Fla. 1952).
6. 56 So.2d 505 (Fla. 1952).
7. Hickman-Lumbeck Grocery Co. v. Hager, 75 Colo. 554, 227 Pac. 829 (1924).

Seal.—The word "seal," typewritten after the names of the corporation and president, co-makers of promissory notes, constituted proper seals though no impression seal adopted by the corporation was used.[8] Hence, action on the note as a sealed instrument was not barred by the five year statute of limitations.

Under the Negotiable Instruments Law Section 6(4)[9], the validity and negotiable character of an instrument are not affected by a seal.[10] This changed the general common law rule that the negotiability of an instrument was destroyed by the presence of a seal thereon.[11] This change is not construed, however, as rendering a seal on a negotiable instrument a nullity. The seal is still operative in that the statute of limitations with regard to sealed instruments is applicable. This affirms a 1920 decision.[12]

Liability of parties.—Deceased and his wife, the beneficiary of life insurance policies, had assigned the policies to the defendant bank "as collateral security for all liabilities—either now existing or that may hereafter arise" between the deceased and the assignee. In an action by the widow to recover the proceeds of the policies the decision was for the defendant. It was held that defendant bank had properly applied the proceeds to deceased's obligations to the bank as co-maker, indorser before delivery and indorser for discount of certain promissory notes.[13] The court said the liability of such parties was the same and the holder of the notes might sue the one he chooses.

The decision would appear to be correct, if the last statement of the court is not construed to mean that the liabilities of primary and secondary parties are the same. Of course, indorsers are secondary parties and conditions precedent to their liability are, ordinarily, due presentment and notice of dishonor. At an early date it was decided that an indorser, before delivery to the payee, was liable as an indorser under the Negotiable Instruments Act and not as maker as was formerly the law in Florida.[14]

Non-delivery, conditional delivery and delivery for a special purpose.—In *Shapiro v. Hackel*[15] it was held in an action on a promissory note that the defendant's pleas alleged sufficient facts to show that delivery of the note had been conditional or for a special purpose only, and not for the purpose of transferring the property in the instrument. Hence, defendant would win out against anyone who was not a holder in due course.[16]

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8. Sarasota Kennel Club v. Shea, 56 So.2d 505 (Fla. 1952).
9. FLA. STAT. § 674.07 (1951).
10. Williams v. Peninsular Grocery Co., 73 Fla. 937, 75 So. 517 (1917).
11. BRITTON, BILLS AND NOTES 28 (1943).
12. Grand Lodge K. of P. of Florida v. State Bank of Florida, 79 Fla. 471, 84 So. 528 (1920).
13. Sylva v. Exchange Nat. Bank of Tampa, 56 So.2d 332 (Fla. 1951).
14. Baumeister v. Kuntz, 53 Fla. 340, 42 So. 886 (1907).
15. 56 So.2d 132 (Fla. 1951).
16. FLA. STAT. § 674.18 (1951), N.I.L. § 16.

When the Negotiable Instruments Law, Section 16[17] states that a conditional delivery or a delivery for a special purpose may be shown as between immediate parties it is construed to mean that this can be done if it does not violate the parol evidence rule. An instrument to be negotiable must contain an unconditional promise or order.[18] A showing, then, of a prior or contemporaneous oral condition to the promise necessarily is in contradiction of the written instrument and would, therefore, seem inadmissable. Courts have, therefore, in order to prevent the unfortunate results attendant upon a too strict application of the parol evidence rule, distinguished between a condition precedent and a condition subsequent. A showing of a parol condition precedent, it is held, does not contradict the writing, but merely goes to show that the writing has not yet come into force and effect as an obligation to pay money.[19] The *Shapiro* case, then, is in accord with the almost uniform rule and with prior Florida decisions.[20]

Negotiability.—The court in invalidating certain bonds pronounced them non-negotiable though they expressly stated on their faces that they "shall be and constitute negotiable instruments for all purposes under the law merchant and the Negotiable Instrument Law of the State of Florida."[21] A Mississippi court answered the question very succinctly by stating that such a recital does not render the instruments negotiable "any more than does a label on a cow reading 'This is a horse' change the character of the animal."[22]

Right of the holder of a check against the drawee bank.—The indorsee of a check sued the bank on which the check was drawn for losses sustained by the plaintiff in cashing checks for the payee in reliance upon alleged misrepresentations by defendant's employees and officers that the drawer's account and checks were good.[23] The court found no fraud, as at the time of the representations the drawer always had made his checks good, and affirmed a summary judgment for the bank under the Negotiable Instruments Law Section 189[24] which provides that a bank is not liable to a holder unless and until it accepts or certifies a check.

Ordinarily, of course, the drawee of a bill of exchange is not even a contracting party until he becomes such by accepting or certifying

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17. *Ibid.*
18. FLA. STAT. § 674.02 (1951), N.I.L. § 1.
19. Smith v. Botterweich, 200 N.Y. 299, 93 N.E. 985 (1911). The action was by the payee against the maker of a promissory note and the defendant was permitted to show non-performance of a parol condition precedent to the existence of the contract to pay money. The case distinguishes a prior case in which the condition was a condition subsequent, evidence of which was excluded.
20. Cockrell v. Taylor, 122 Fla. 798, 165 So. 887 (1936); Anderson v. Ax, 104 Fla. 294, 139 So. 798 (1932).
21. Chase v. City of Sanford, 54 So.2d 370 (Fla. 1951).
22. Moore v. Vaughn, 167 Miss. 758, 150 So. 372 (1933).
23. Gartner v. American Nat. Bank of Jacksonville, 58 So.2d 705 (Fla. 1952).
24. FLA. STAT. § 676.52 (1951).

the instrument. This rule is codified in the case of checks by the above cited section of the Negotiable Instruments Law. However, by the weight of authority, a holder whose check has been paid by the drawee bank to another person under the holder's forged indorsement can recover from the bank on the theory of conversion.[25] Florida so holds.[26]

Holder in due course.—The plaintiff company sued on a promissory note signed by defendant purchasers of a deep freeze and a meat saw.[27] The conditional sales agreement and the note were assigned and indorsed to the plaintiff by the payee seller the day following the transaction. The defendant claims failure of consideration in that the freezer was valueless for the purposes for which it was sold. It is the contention of the plaintiff that he is a holder in due course and, therefore, this personal defense is not available against him. In holding for the defendant, the court said, the plaintiff was so closely connected with the entire transaction as to be to all intents and purposes a party to the agreement, and not an innocent purchaser in good faith under Sections 52, 56 and 57.[28]

In practically all case or text books concerned with bills and notes there is a section devoted to the consideration of the payee as a holder in due course. The great weight of authority holds that a payee *can* be a holder in due course in those situations where he is in fact insulated from the maker or drawer by a third party such as an agent of the maker or drawer; *i.e.*, where he is not really an immediate party though he looks to be so on the face of the instrument.[29] In the principal case, *supra*,[30] we are dealing with the converse of this situation. The plaintiff indorsee would appear from the instrument to be a remote party, but is treated by the court as an immediate one, in privity with the maker. The decision, which is based largely on an Arkansas holding[31] involving much the same set of facts, would seem sound. In this day and age when a finance company, instead of the seller, takes the credit risk for a large percentage of the sellers of expensive articles, it should be subjected to any defenses which the purchaser may have as against the seller. Otherwise the buyer is deprived of his right under sales law to repudiate the transaction for cause and get his money and notes back. His right to damages from the seller is not satisfactory, particularly where the seller is insolvent.

Fraud in the inception or execution of negotiable instruments and negligence.—The defendant, a secretary and receptionist, claims she was induced to indorse two promissory notes by the fraudulent act of her

25. BRITTON, BILLS AND NOTES 681 (1943).
26. Lewis State Bank v. Raker, 138 Fla. 227, 189 So. 227 (1939); Louisville & N. R. R. v. Citizens & Peoples Nat. Bank of Pensacola, 74 Fla. 385, 77 So. 104 (1917).
27. Mutual Finance Co. v. Martin, 63 So.2d 649 (Fla. 1953).
28. FLA. STAT. §§ 674.54, 674.58 and 674.59 (1951).
29. BRITTON, BILLS AND NOTES 508 (1943).
30. See note 27 *supra*.
31. Commercial Credit Co. v. Childs, 199 Ark. 1073, 137 S.W.2d 260 (1940).

employer in asking her to sign two blank pieces of paper which, unknown to her, were the backs of two promissory notes payable to her. It was conceded that the plaintiff, a holder in due course, could not recover if the defendant was free from negligence, but the court held that the evidence was not sufficient to indicate lack of negligence. The court assumed that negligence in this situation practically speaks for itself as far as the "intelligent, informed and literate" are concerned; therefore, the judgment was for the plaintiff.[32]

At common law, a clear distinction existed, by the weight of authority, between fraud "in the inducement" and fraud "in the inception or execution." The former covered the case where the contracting party knew he was signing a negotiable instrument, but was fraudulently induced to do so. This type of fraud was generally held to give rise to a *personal* defense available as between immediate parties, but not good as against a bona fide purchaser of the instrument for value and before maturity, a holder in due course. However, if the fraud practiced was of such kind that the signer of a negotiable instrument did not know that he was entering into a contract to pay money, but thought he was merely signing a receipt or some other instrument of entirely different character, he was, by the weight of authority, held to have a *real* defense good even as against a holder in due course, if the signer was not negligent.[33] The theory, of course, was that there can be no contract without any intent to enter into one, unless the signer's negligence should preclude him from denying such intent. Under the Negotiable Instruments Law Sections 55 and 57,[34] the "obtaining" of a negotiable instrument by fraud constitutes a personal defense not available as against a holder in due course. The statute, however, makes no distinction between the two types of fraud, and there is no Florida case either before or since the Negotiable Instruments Law directly on point. It can easily be argued that the legislative intent was to abolish the distinction if it existed at common law[35] or to avoid it if not already established in Florida. Evidently, in the principal case, *supra*[36], the attorney for the plaintiff was so confident (and justifiably so) that the facts established negligence, he considered it unnecessary to contend that the defendant would have only a personal defense even though not negligent. The result is that there is no case in Florida directly holding that "fraud in the inception or execution" *is* a real defense *in the absence of negligence.* It would appear, however, that Florida probably would so hold, in accordance with the weight of authority both now and before the Negotiable Instrument Law.[37]

32. Levinson v. Frunkes, 64 So.2d 321 (Fla. 1953).
33. BRITTON, BILLS AND NOTES 566 (1943).
34. FLA. STAT. §§ 674.57 and 674.59 (1951).
35. C.I.T. Corp. v. Panac, 149 P.2d 901, *rev'd*, 25 Cal.2d 547, 154 P.2d 710 (1944).
36. See note 32 *supra*.
37. See note 33 *supra*.