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Bills and Notes

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Gerlach v. Donnelly[1] involved an action by the alleged maker of two promissory notes to cancel the same. The suit was brought against the estate of the payee, an attorney, who evidently committed suicide the day following his arrest for conspiring to murder his client, the present plaintiff! The notes were found in a search of the attorney's office after the arrest. In his complaint the plaintiff alleged that he had no knowledge or recollection of having executed the notes, but admitted that he had signed, without reading them, numerous papers prepared by his lawyer, whom he trusted implicitly.

The trial before the circuit judge resulted in a decree holding that the plaintiff had failed to sustain his burden of proving either lack of consideration or that the signatures on the notes were forged. The supreme court reversed, holding the prima facie case for the validity, or the "presumptive validity," of the notes was overcome by the testimony for the plaintiff including an admission in a letter from the deceased, shortly before his death, that plaintiff was not indebted "for any current legal services." There was no evidence of any unpaid charges remotely approximating the amount involved, over $32,000. The court also emphasized the special fiduciary relationship existing between attorney and client. A number of Florida cases were cited to illustrate the care with which the court has always felt contracts between attorney and client should be scrutinized, and how the burden should be placed on the attorney to establish their fairness.

In contrast to the rule of simple contracts, sections 24 and 28 of the Negotiable Instruments Law[2] raise a presumption of valid consideration and put the burden of proving absence or failure thereof upon the person alleging it, usually the defendant.[3] In the instant case, where the maker of the promissory note was the plaintiff, there would appear to be a double reason for placing on him the burden of proving absence of consideration.[4] Despite this, it is submitted that the supreme court's finding of "overwhelming evidence" rebutting the presumption of consideration should not be criticized. It is hard to ignore the cloak and dagger background in reviewing the case. The greater difficulty involved in recovering over $32,000 on promissory notes, procured by the fraud alleged, from a live maker than from his solvent estate *would* constitute a motive for murder.

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1. 98 So.2d 493 (Fla. 1957).
2. FLA. STAT. §§ 674.27, 674.31 (1957).
3. BRITTON, HANDBOOK ON THE LAW OF BILLS & NOTES 403 (1943).
4. Hickman Lunbeck Grocery Co. v. Hager, 75 Colo. 554, 227 Pac. 829 (1924).

The fact that with knowledge of his pending arrest decedent practically denied the existence of the notes does, by inference, substantiate plaintiff's story as to how they were obtained.

The emphasis placed by the court upon the high standard of conduct required of an attorney in his contractual relations with his client seems pertinent and well taken. The case could be cited as a dictum to the effect that when a negotiable note is signed by a client to pay for legal services, an *attorney* payee does not get the benefit of sections 24 and 28 of the Negotiable Instruments Law with regard to the burden of proving absence or failure of consideration.

Whitehall Realty Corp. v. Manufacturers Trust Co.[5] was an action on promissory notes executed by the maker in payment for goods to be supplied to the maker by the payee some two or three months before the due date of the notes. Defendant contended that since the plaintiff knew, at the time it discounted the notes for the payee, that the consideration for them was executory, the defense of failure of consideration would be good. The court, in upholding a directed verdict for the plaintiff, stated that this knowledge would not prevent the plaintiff from being a holder in due course.

Under section 52 of the Negotiable Instruments Law,[6] a holder in order to be a holder in due course must take the instrument in good faith. Under section 28,[7] failure of consideration is not a good defense as against a holder in due course. The question then is simply whether the taking of an instrument with knowledge that it was issued for an executory consideration, but without knowledge that the payee had broken his contract constitutes a good faith taking. It is almost uniformly held that it does.[8] Knowledge that the consideration was executory does not impose a duty to inquire if the consideration had failed.[9] The holding, then, is clearly in accord with well established principles.

In *Land v. Hart*[10] the executor of the payee's estate brought an action on five checks executed by the defendant drawer. Lack of consideration was pleaded as a defense and the defendant was permitted to testify thereto over plaintiff's objection. On this appeal from a judgment for the defendant it was admitted that the testimony should have been excluded, but defendant claimed plaintiff had waived the protection of the "Dead Man's Statute"[11] by cross-examining the witness. The court

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5. 100 So.2d 617 (Fla. 1958).
6. FLA. STAT. § 674.54 (1957).
7. FLA. STAT. § 674.31 (1957).
8. BRITTON, HANDBOOK ON THE LAW OF BILLS & NOTES 450 (1943).
9. Robertson v. Northern Motor Sec. Co., 105 Fla. 644, 142 So. 226 (1932); Grinnel Sav. Bank v. Gordon, 195 Iowa 208, 191 N.W. 852 (1923).
10. 109 So.2d 589 (Fla. App. 1959).
11. FLA. STAT. § 90.05 (1957).

held there was no waiver, and since there was no other evidence of want of consideration, plaintiff was entitled to a directed verdict.[12]

Since under the Negotiable Instrument Law the burden is placed upon the defendant to prove absence of consideration,[13] the holding was clearly correct.

Wester v. Rigdon[14] reaffirmed the rule that the only distinction between sealed and unsealed negotiable notes is with regard to the application of the statute of limitations; 20 years in the former and 5 years in the latter.[15] Payment tolls the running of the statute, and this action being brought on sealed notes within 20 years of such payment was held not barred.

Section 6(4) of the Negotiable Instruments Law,[16] provides that "The validity and negotiable character of an instrument are not affected by the fact that it bears a seal." The common law rule was generally *contra*. A sealed instrument was a very formal contract including all the terms and all the parties; hence the seal destroyed negotiability.[17] A number of courts hold that on negotiable instruments the seal is still operative not only with regard to the statute of limitations, but also that the jurisdictional rule as to the effect of the seal importing consideration will be applied.[18] Thus, in some states absence of consideration would not be a good personal defense on a sealed negotiable instrument. The Florida rule limiting the effect of the seal to the applicable statute of limitations would appear the better one.[19]

Mayflower v. Suskind[20] was decided principally upon a procedural pleading issue. It was held that the affirmative defense of want of consideration, though not sworn to, was available to the defendant in an action on a note. The court then stated, in accordance with the principles already discussed in this survey, that defendant would have the burden of establishing want of consideration by a preponderance of the evidence.

In *Machetei v. Campbell*,[21] the guardian brought a bill to cancel a note and mortgage executed by the ward during incompetency. The decree of cancellation was affirmed, but the supreme court held that the defendant could recover, on his counterclaim, the consideration which was, in legal contemplation, received by the maker.

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12. In Gerlach v. Donnelly, 98 So.2d 493 (Fla. 1957) the "Dead Man's Statute" was held not to prevent testimony as to how the notes were procured. The decision did, however, adequately distinguish between allegations denying intentional execution of the instrument which would be admissable, and allegations denying consideration for a note intentionally executed and delivered, which would be excluded.
13. See statutes cited note 2 *supra*.
14. 110 So.2d 470 (Fla. App. 1959).
15. FLA. STAT. § 95.11(1)(3) (1957).
16. FLA. STAT. § 674.07(4) (1957).
17. BRITTON, HANDBOOK ON THE LAW OF BILLS & NOTES 28 (1943).
18. Balliet v. Fetter, 314 Pa. 284, 171 Atl. 466 (1934); Kennedy v. Collins, 30 Del. 426, 108 Atl. 48 (1919) (disapproved in 29 YALE L.J. 345 (1919)).
19. See case notes 27 COLUM. L. REV. 870 (1927), 26 Mich. L. Rev. 208 (1927).
20. 112 So.2d 394 (Fla. App. 1959).
21. 102 So.2d 722 (Fla. 1958).

The holding indicates that the insanity of the maker is a real defense in Florida available even as against a holder in due course of a promissory note. The defendant was referred to as a holder in due course and it was assumed he had no knowledge of the incompetency of the maker when he received the note. Only quasi-contractual recovery for services performed was permitted; the note itself was cancelled.

There exists a conflict with regard to the defense of insanity, some jurisdictions holding it unavailable as against a holder in due course.[22] The opposing view,[23] adopted in this case, would seem better. Under section 60 of the Negotiable Instruments Law,[24] the maker of a promissory note "engages that he will pay it according to its tenor." An engagement necessarily involves an assent to be bound. An incompetent, incapable of such assent, cannot bind himself.[25]

In *Chemical Corn Exch. Bank & Trust Co. v. Frankel*,[26] the defendant set forth that the note had been filled in, and her signature as maker written by her husband. The note was then mailed to her and her husband instructed her by telephone to send the note to the bank to be applied on an existing indebtedness. Defendant followed instructions though she was aware she had not signed the note herself. In reversing the circuit court judgment for the defendant the district court of appeal (Third District) held that even though her signature was a forgery, defendant would be liable if she knowingly ratified the signature as her own either prior or subsequent to delivery of the note. Since the instructions of the trial court to the jury on this question of ratification were considered wholly inadequate, the case was remanded for a new trial.

Authorities are in conflict with regard to whether a forged instrument may be ratified.[27] In this case the district court seems to assume that it may be in Florida. However, the case could not be accurately cited as authority for this proposition, as the facts do not actually involve a true ratification situation. This term, in negotiable instrument law, refers to ratification after the note has been negotiated and not to the approval or adoption of the signature prior to delivery to the payee as claimed here.[28] If the latter is proved, all courts would probably agree that the effect would be just as though the signature were genuine.[29] In any event, the decision remanding the case for a new trial would appear clearly correct in that the jury was not given adequate instructions with regard to the question.

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22. In Rath's Committee v. Smith, 180 Ky. 326, 327, 202 S.W. 501, 502 (1918) the court stated, "The contract of a lunatic, in the hands of an innocent purchaser for value, accepted in good faith, must be upheld."
23. Hillsdale Nat'l Bank v. Sansanse, 11 N.J. Super. 390, 78 A.2d 441 (1951).
24. FLA. STAT. § 674.62 (1957).
25. BRITTON, *op. cit. supra* note 17, at 550, 586.
26. 111 So.2d 99 (Fla. App. 1959).
27. 10 C.J.S. *Bills & Notes* § 495 (1938).
28. First Nat'l Bank v. Albright, 111 Pa. Super. 392, 397, 170 Atl. 370, 373 (1934).
29. UNIFORM NEGOTIABLE INSTRUMENTS LAW § 19; FLA. STAT. § 674.21 (1957).