Michigan Law Review

Volume 39 | Issue 3

1941

BILLS AND NOTES - EFFECT ON NEGOTIABILITY OF RECITAL OF TRANSACTION GIVING RISE TO NOTE

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BILLS AND NOTES — EFFECT ON NEGOTIABILITY OF RECITAL OF TRANSACTION GIVING RISE TO NOTE — "For Mighty King #14468 Saddle Horse" was inscribed on the face of the note upon which the plaintiff, the holder of the note, brought suit against the maker. At the trial it was discovered that the payee of the note still held title to the horse, and the sale for which the note was given was a conditional one depending on whether or not one hoof of Mighty King healed. The plaintiff had been given no notice of this condition. *Held*, the mere statement of the consideration giving rise to the note did not serve as notice of the conditional sale nor have the effect of destroying its negotiability. *Anderson National Bank of Lawrenceburg, Ky. v. Jacobson*, 305 Ill. App. 169, 27 N. E. (2d) 296 (1940).

Mere statement of the transaction giving rise to the note or a recital of the consideration for which it was given does not make the promise conditional nor the note nonnegotiable.[1] The Negotiable Instruments Law has not changed this rule.[2] The courts seem to base their reasoning on the fact that such recitals are often inserted when the maker has no intention of destroying the negotiability of the note but simply desires to identify it.[3] If the courts were to hold such notes

[1] Aigler, "Conditions in Bills and Notes," 26 MICH. L. REV. 471 (1928); 1 DANIEL, NEGOTIABLE INSTRUMENTS, 7th ed., § 52 (1933).

[2] Art. I, § 3 of the Negotiable Instruments Law reads as follows: "An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with: (1) An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or (2) A statement of the transaction which gives rise to the instrument." See 10 C. J. S. 525 (1938) and cases cited.

[3] First Bank of Marianna v. Havana Canning Co., (Fla. 1940) 195 So. 188.

[4] Thus when a note recited "For berries to be delvd. June 8th," it was held negotiable, First Bank of Marianna v. Havana Canning Co., (Fla. 1940) 195 So. 188; where the note recited it was given for the purchase of a stallion which the seller warrants, negotiability was upheld, Welch v. Owenby, 73 Okla. 212, 175 P. 746

nonnegotiable, business would be handicapped, and so they prefer to treat such statements as if they simply read "value received." [4] However, a slightly different problem is presented when there appears on the note both a recital of the consideration and a clause by which the title to the chattel given is reserved in the payee until the chattel is paid for. Here there is not the uniformity among the courts that exists when only a simple recital of consideration is involved. The great weight of authority holds that mere recital of retention of title to the chattel in the vendor-payee is not enough to destroy the negotiability of the note.[5] In the leading case on this subject before the United States Supreme Court, the Court said the notes were the absolute property of the payee, that there was an unconditional promise to pay them at all events and that the retention of title with the right to repossess would not destroy the negotiability of the note.[6] The Massachusetts rule holds, on the contrary, that a statement of the consideration with the title reserved in the payee does destroy the negotiability of the instrument.[7] In the case laying the foundation of the doctrine, the inscription on the face of the note read "Received of T. S. Sloan, this day, roan horse known as A. M. Brown horse for which I promise to pay T. S. Sloan . . . said horse to be and remain the entire and absolute property of the said Sloan until paid for in full by me." The court held that the promise to pay was conditional, basing its decision on the ground that the death of the horse would result in a complete failure of consideration.[8] This doctrine, however, is based on a mistaken conception of legal consideration, for in a conditional sale where the title is reserved in the vendor and the vendee takes possession of the chattel, the risk of loss is on the vendee and he is obligated to pay regardless of whether or not the chattel is subsequently destroyed.[9] Practical business reasons as well as sound legal principles require that the recital of consideration, and a reservation of title should not destroy the negotiability of a note. Such verbiage is often placed on notes to

(1918); the words "for unfinished work on bldg." were held not to destroy the negotiability of the note, Cincinnati Brush & Mop Mfg. Co. v. Weber, 35 Ohio App. 506, 172 N. E. 568 (1929).

[5] Aigler, "Conditions in Bills and Notes," 26 MICH. L. REV. 471 (1928). In Murrell v. Exchange Bank, 168 Ark. 645, 271 S. W. 21 (1925), the note said, "It is expressly understood that this note is given for the purchase money of pump, well and appurtenances thereto, title and right of possession to which is reserved in the payee until this note be fully paid. If at any time the payee shall deem the said property . . . unsafe, he may take possession thereof at once. . . ." Held, mere retention of title in the payee is not enough to make a note nonnegotiable.

[6] Chicago Ry. Equipment Co. v. Merchants' Bank, 136 U. S. 268, 10 S. Ct. 999 (1890); in this case the payee-vendor was given the right to repossess certain railway freight cars to which he kept title.

[7] Sloan v. McCarty, 134 Mass. 245 (1883). Accord: Worden Grocer Co. v. Blanding, 161 Mich. 254, 126 N. W. 212 (1910); Polk County State Bank of Crookston v. Walters, 145 Minn. 149, 176 N. W. 496 (1920). Kansas and North Dakota also seem to follow this minority doctrine: South Bend Iron-Works v. Paddock, 37 Kan. 510, 15 P. 574 (1887); Fleming v. Sherwood, 24 N. D. 144, 139 N. W. 101 (1912).

[8] Sloan v. McCarty, 134 Mass. 245 (1883).

[9] WILLISTON, SALES, 2d ed., §§ 304, 334 (1924).

give the vendor-payee needed security where there is no intention to impair the negotiability of the instrument; in fact, negotiability is often required where the vendor is expecting to discount the note so as to obviate the necessity of a great amount of working capital.[10] Some courts realize thoroughly these legal and practical principles and uphold negotiability even when there has been a subsequent destruction of the chattel given in consideration.[11] And most courts uphold the negotiability of notes based on executory consideration, where the actual consideration is to be performed after the maturity of the note.[12]

[10] The payee discounts the note in order to buy new materials. If this source of immediate cash were not available, his investment would be doubled because of money tied up in the note and also in the purchase of new materials. The alternative, waiting until the note was paid before buying new materials, would involve a delay which might force him out of business.

[11] Whitlock v. Auburn Lumber Co., 145 N. C. 120, 58 S. E. 909 (1907).

[12] 10 ORE L. REV. 176 (1931). The leading case in this field is Siegel v. Chicago Trust & Savings Bank, 131 Ill. 569, 23 N. E. 417 (1890), where the note stated it was given for the privilege of having advertisements placed in street cars for a period extending beyond the date of maturity of the note.