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BILLS AND NOTES - CONSIDERATION - BURDEN OF PROOF WHEN HOLDER NOT A HOLDER IN DUE COURSE

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RECENT DECISIONS

BILLS AND NOTES — CONSIDERATION — BURDEN OF PROOF WHEN HOLDER NOT A HOLDER IN DUE COURSE — Plaintiff, a maid and housekeeper for the decedent, sued the decedent's estate as payee of two checks signed by the decedent and dishonored by the drawee bank. In support of the defense of lack of consideration, the estate introduced evidence that plaintiff had been paid by the estate for her services to the decedent, and that plaintiff's daughter had told the bank's cashier that the checks had been given to her mother by decedent to be cashed when it became certain that decedent would not live. There was no other evidence. *Held*, the trial court properly directed a verdict for plaintiff; the defendant did not overcome the presumption that the check was given for a consideration. *In re Hubbard's Estate*, 286 Mich. 444, 282 N. W. 209 (1938).

Before the enactment of the Uniform Negotiable Instruments Law by the states, there was a conflict of authority on the question whether the defendant, when sued on the instrument, had the ultimate burden of proof to show lack of consideration.[1] Although the N. I. L. seems to indicate that the burden of proof is upon the defendant,[2] several states where the uniform statute is in force hold that the burden is upon the plaintiff.[3] In Michigan, both before and after the adoption of the N. I. L.,[4] it has been held that a negotiable instrument imports consideration, putting the burden of going forward with the evidence upon the defendant; but if the defendant meets that burden, then the ultimate burden of proof of consideration is upon the plaintiff, in the sense that he must show consideration by a preponderance of evidence.[5] In the instant case, the court specifically stated that the evidence of the defendant did not bear on the issue of consideration.[6] Thus the case is consistent with the rule of the previous

[1] Cases are collected in 1 DANIEL, NEGOTIABLE INSTRUMENTS, 7th ed., § 180 (1933). See also 35 A. L. R. 1370 (1925); 1 UNIV. CIN. L. REV. 200 (1927); 23 MICH. L. REV. 793 (1925). Note that the term "burden of proof" refers to the burden of persuading the jury by a preponderance of evidence, not to the burden of going forward with the evidence.

[2] "Absence or failure of consideration is matter of defence as against any person not a holder in due course. . . ." Uniform Negotiable Instruments Law, § 28. Sec. 24 is also applicable.

[3] The cases are collected in 35 A. L. R. 1370 (1925); 65 A. L. R. 904 (1930); BRANNAN, NEGOTIABLE INSTRUMENTS LAW ANNOTATED, 6th ed., 364-365 (1938). See also 26 ILL. B. J. 71 (1937).

[4] The provisions of the Uniform Negotiable Instruments Law were adopted in 1905. Secs. 24 and 28 of the N. I. L. are embodied in Mich. Comp. Laws (1929), §§ 9273, 9277, 14 Mich. Stat. Ann. (1937), §§ 19.66, 19.70.

[5] Manistee Nat. Bank v. Seymour, 64 Mich. 59, 31 N. W. 140 (1887); Cawthorpe v. Clark, 173 Mich. 267, 138 N. W. 1075 (1912); Steep v. Harpham, 241 Mich. 652, 217 N. W. 787 (1928). The Michigan cases are reviewed in 26 MICH. L. REV. 928 (1928).

[6] Referring to the testimony of the bank cashier the court said, "This testimony did not bear upon the question of consideration but, at most, it tended to show a delivery, conditional. . . ." Concerning the allowance of plaintiff's claim for services the court stated, "Nor does the unappealed allowance of Mrs. Wood's claim for services

Michigan cases, for it can be said here that the defendant did not meet his burden of going forward with the evidence. The court did not state that the defendant bore the burden of proving lack of consideration by a preponderance of evidence. If the court had intended to change its rule that the plaintiff has the burden of proof, it certainly would have discussed this question in the opinion, for it must have been apprised of the conflict of authority[7] and the criticism concerning the rule that the plaintiff has the burden of proof.[8] Section 28 of the N. I. L.,[9] which seems to place the burden on the defendant, was not mentioned. Considering the statutory language and the desirability of uniformity of interpretation in the various states, it is unfortunate that the court has not seen fit to bring the Michigan rule into line with the prevalent opinion elsewhere.[10]

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have any bearing upon the matter of consideration for the checks. . . ." In re Hubbard's Estate, 286 Mich. 444 at 448-449, 282 N. W. 209 (1938).

[7] See notes 1 and 3, supra.

[8] Wickhem, "Consideration and Value in Negotiable Instruments," 3 WIS. L. REV. 321 (1926); 4 ORE. L. REV. 148 (1925). See First State Bank of Hazen v. Radke, 51 N. D. 246, 199 N. W. 930 (1924).

[9] Note 2, supra.

[10] Hickman-Lunbeck Grocery Co. v. Hager, 75 Colo. 554, 227 P. 829 (1924); Kemppainen v. Suomi Temperance Society, 128 Ore. 643, 275 P. 680 (1929); First Nat. Bank of Blackfoot v. Doschades, 47 Idaho 661, 279 P. 416 (1929); First State Bank of Hazen v. Radke, 51 N. D. 246, 199 N. W. 930 (1924); Harponola Co. v. Wilson, 96 Vt. 427, 120 A. 895 (1923); Piner v. Brittain, 165 N. C. 401, 81 S. E. 462 (1914).