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BILLS AND NOTES-HOLDERS IN DUE COURSE-EFFECT OF KNOWLEDGE OF EXECUTORY CHARACTER OF CONSIDERATION

BILLS AND NOTES—HOLDERS IN DUE COURSE—EFFECT OF KNOWLEDGE OF EXECUTORY CHARACTER OF CONSIDERATION—In an action on a promissory note the plaintiff claimed, as a holder in due course, to be free from the defense of failure of consideration. When the plaintiff acquired the note it was physically attached to a conditional sales contract by the terms of which the payee was to furnish the maker with an oil burner which in truth was never furnished, this being the claimed failure of consideration. Breach of the sales contract apparently took place after the plaintiff acquired the note. *Held*, plaintiff, having knowledge

of the terms of the contract, was not a holder in due course and took subject to the defense. *Van Nordheim v. Cornelius,* (Neb. 1935) 262 N. W. 832.

The fact that the consideration for the promissory note is executory may conceivably lead to the conclusion that the promise to pay is therefore conditional and the instrument thus a mere simple contract. This has been held, mistakenly, it is believed, in a line of cases involving title retention provisions.[1] Another line of authorities applies the view that contemporaneously executed documents, all a part of the same transaction, must be read together, even though one is in form a negotiable instrument, thus destroying the negotiable character of the latter.[2] Though the language of the court in the principal case is obscure, it seems that the conclusion was reached not on either of these grounds, but on the theory that since the plaintiff took the note with knowledge of the executory character of the consideration he could not be a good faith purchaser, hence he was subject to the defense as fully as if the instrument had not been negotiable under one or both of the grounds above mentioned. A party, to be a holder in due course, must take without notice of an infirmity in the instrument or defect in the title of the person negotiating it; and notice thereof is constituted by actual knowledge of the infirmity or knowledge of such facts that his action in taking the instrument amounts to bad faith.[3] Mere suspicion of defect of title or knowledge of circumstances which would excite suspicion in the mind of a prudent man, or even gross negligence on the part of the taker of the instrument at the time of the transfer, will not of itself prevent the holder from being a holder in due course.[4] By the weight of authority knowledge of an executory consideration is not enough either to put the purchaser on inquiry as to whether breach has actually occurred, or to charge him with notice of facts which if investigated would lead to discovery of the breach.[5] Two early cases that have been frequently cited held, respectively, that breach of an executory contract to repair a vessel, which formed a part of the consideration for the acceptance of a bill of exchange,[6] and breach of a warranty that mares were with foal[7] were not defenses against an indorsee who took for value with notice of the contract but without notice of breach. However, there is some dissent from this view.[8] Undoubtedly a possibility exists that an executory consideration will fail, but it would seem that failure is not sufficiently com-

[1] See the cases collected and the problem discussed in Aigler, "Conditions in Bills and Notes," 26 MICH. L. REV. 471 at 477 and 499 (1928).

[2] See ibid., 26 MICH. L. REV. 471 at 491 (1928).

[3] N. I. L., §§ 52 and 56. See generally 2 DANIEL, NEGOTIABLE INSTRUMENTS, 7th ed., 932-945 (1933).

[4] For a discussion of the relation between bad faith and notice under the N. I. L., see 81 UNIV. PA. L. REV. 617 (1933). See also, 9 TULANE L. REV. 128 (1934).

[5] Jennings v. Todd, 118 Mo. 296, 24 S. W. 148 (1893); Siegel v. Chicago Trust Bank, 131 Ill. 569, 23 N. E. 417 (1890). For a collection of cases, see 29 L. R. A. (N. S.) 380 (1911) and 46 L. R. A. (N. S.) 862 (1913). See also BRANNAN, NEGOTIABLE INSTRUMENTS LAW, 5th ed., 589 (1932).

[6] Davis v. McCready, 17 N. Y. 230 (1858).

[7] Miller v. Ottaway, 81 Mich. 196, 45 N. W. 665 (1890).

[8] Todd v. State Bank of Edgewood, 182 Iowa 276, 165 N. W. 593 (1917); Thrall v. Horton, 44 Vt. 386 (1867); Garnett v. Meyers, 65 Neb. 280, 94 N. W. 803 (1903).

mon to warrant the conclusion that a party who takes with knowledge of such consideration takes in bad faith.[9]

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[9] In fact, some courts have gone so far as to say that there is a presumption of law that the executory consideration will not fail. See Merchants' Nat. Bank v. Voudouris, (Tex. Civ. App. 1923) 248 S. W. 810. In Dobbins v. Oberman, 17 Neb. 163, 22 N. W. 356 (1885) [applied in Rublee v. Davies, 33 Neb. 779, 51 N. W. 135 (1892), and First Nat. Bank v. Pennington, 57 Neb. 404, 77 N. W. 1084 (1899)], the Nebraska court declared that in order to deny a claimant the status of a holder in due course, it does not suffice to prove that purchase was with knowledge of circumstances which should have excited suspicion in the mind of a prudent person; the proof must go to the extent that the purchase was with the knowledge of such circumstances or facts as show want of honesty or bad faith on his part. The court in the principal case, however, makes no reference to this line of cases.