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BILLS AND NOTES - HOLDER IN DUE COURSE -ANTECEDENT OBLIGATION AS VALUE

BILLS AND NOTES — HOLDER IN DUE COURSE — ANTECEDENT OBLIGATION AS VALUE — *X*, entrusted with the safekeeping of negotiable bearer bonds of *A* and *B*, stole *A's* bonds. On *A's* [1] request for his securities, *X*, purporting to deliver what was requested, delivered *B's* bonds. The wrongdoing was not discovered for over a year. *B* then sued *A* to recover the bonds. *Held*, *B* may recover, for *A* is not a purchaser for value. *State ex rel. Sorenson v. Nebraska State Sav. Bank*, (Neb. 1934) 255 N. W. 52.

Subject to the exception of antecedent debt,[2] value, as required by the NIL, purports to equal common law consideration.[3] And in the orthodox theory of consideration the benefit and detriment must be the contemplated exchange.[4] Accordingly, since *X's* wrongdoing was not disclosed, *B's* bonds could not conceivably have been received in discharge of *X's* obligation to account for the wrongdoing. This analysis, ignored by the courts, justifies the rejection in the principal case of the artificial doctrine, advanced in a leading English case,[5] that the acceptance should be presumed, subject to disaffirmance, to be in satisfaction of the conversion liability otherwise existing.[6] Another approach is that as between *A* and *B* the equities are equal, and therefore the legal title should prevail.[7]

[1] Under the facts of the case the request was made by *A's* executrix. But, since the same problem is involved, the label *A* will be used for the sake of brevity.

[2] NIL, sec. 25, preferred the demands of business convenience reflected in Swift v. Tyson, 16 Pet. (41 U. S.) 1, 10 L. ed. 865 (1842), to the orthodox consideration leanings of Bay v. Coddington, 5 Johns. Ch. (N. Y.) 54, 9 Am. Dec. 268 (1821). For the application of the above in the holder for value concept (NIL, sec. 26) see Hunter, "Holders for Value of Negotiable Paper," 22 ILL. L. REV. 287 (1927).

[3] NIL, sec. 25 provides, "Value is any consideration sufficient to support a simple contract."

[4] Wisconsin and Michigan Ry. v. Powers, 191 U. S. 379, 124 Sup. Ct. 107 (1903); McGovern v. City of New York, 234 N. Y. 377, 138 N. E. 26 (1923).

[5] London and County Banking Co. v. London and River Plate Bank, 21 Q. B. D. 535 (1888).

[6] The analogy in the London Bank case (supra, n. 5) of a gift to an unwitting donee is inapplicable, for *X* had nothing to give. Moreover, to presume the acceptance in discharge of the conversion obligation would only be stating in terms of a fiction what may otherwise be unjustifiable. Perhaps some of the English case law is distinguishable on an undiscussed factor of detrimental reliance resulting from an accounting intervening between the transfer and the discovery of the wrongdoing. *Cf.* Thorndike v. Hunt, 3 DeG. & J. 563, 44 Eng. Rep. 1386 (1859), and Taylor v. Blakelock, 32 Ch. Div. 560 (1885), with Colonial Bank v. Hepworth, 36 Ch. Div. 36 (1887). The cool reception given the London Bank case in Nash v. De Freville, [1900] 2 Q. B. 72, suggests that the fiction is being discarded. While the case is distinguishable on its facts (note was taken after maturity), little reliance was placed on this differentiating factor. For a discussion of American cases see note 14, infra.

[7] This is the approach sponsored by Ames, "The Doctrine of Price v. Neal," 4

Assuming that legal title is in the mere possessor of a bearer bond,[8] *A's* equity would arise from the possible detrimental reliance resulting from the delayed discovery of *X's* theft and the consequential diminished probability of realizing on the conversion claim.[9] But it does not seem that anything so conjectural should even approach the status of the beneficial owner's equity.[10] And this leads to the conclusion that this case conflicts with the cases of commingling by a trustee exemplified by *Newell v. Hadley*.[11] The cases may perhaps be reconciled by doubtful distinctions as to the nature of the transferor's title,[12] and, more likely, by the extent of the transferee's misreliance. Still another possibility is to distribute the loss on the theory that *A's* detrimental reliance leads to an equity as appealing as that of the beneficial owner.[13] And while this intermediate course is not to be found in the conflicting cases,[14] it is submitted as an equitable solution particularly fitting where the transferee's change of position has been substantial.

M. L.

HARV. L. REV. 297 (1891) and by BRANNON, NEGOTIABLE INSTRUMENTS LAW, 5th ed., sec. 59, p. 678 (1932).

[8] This assumes with Chafee ["Rights in Overdue Paper," 31 HARV. L. REV. 1104, 1112 (1918)] that a possessor of a bearer bond has legal title. This assumption obviates a distinction which might perhaps otherwise be drawn between the nature of a trustee's and a bailee's title. While such a differentiation would be important in the application of the formula, it seems altogether too mechanical to be reliable.

[9] There may be other possible injuries, but *A* in fact has no equity unless an earlier discovery of *X's* wrongdoing would have found *X* more collectible. And the problem would really become acute if the wrongdoing were not discovered until after *A* had spent the proceeds received and *B* then sought a personal judgment.

[10] For the general tendency to ignore conjectural damages, see 1 SEDGWICK, DAMAGES, secs. 170 *et seq.*, 9th ed. (1912).

[11] 206 Mass. 335, 92 N. E. 507 (1910).

[12] See note 8, supra.

[13] This is suggested by the excellent comment in 36 HARV. L. REV. 858 at 861, n. 12 (1923).

[14] The same problem, in another form, is presented where *X* steals *A's* negotiable bond, sells it to *B*, a holder in due course, and then wrongfully obtains the same (or another) bond from *B*, and surreptitiously replaces *A's* bond with it. This is the fact picture in both, and apparently, the only two American cases in accord with the principal case. Voss v. Chamberlain, 139 Iowa 569, 117 N. W. 269 (1908); Brown v. Southwestern Farm Mortgage Co., 112 Kan. 192, 210 Pac. 658 (1922). The other American cases usually cited as *contra* to the above are, State Bank v. United States, 114 U. S. 401, 5 Sup. Ct. 888 (1885), and Bank of Charleston v. Bank of the State, 13 Rich. L. (S. C.) 291 (1866). The first case is distinguishable on its facts (existence of conversion liability was known to transferee and acceptance was for purpose of discharge). The other case fails to answer the objection that the transferee did not know of the existence of the obligation, and can be justified, if at all, on unexpressed notions of change of position.