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# BILLS AND NOTES-WARRANTY OF QUALIFIED INDORSER -WHEN INSTRUMENT "VALUELESS"

BILLS AND NOTES — WARRANTY OF QUALIFIED INDORSER — WHEN INSTRUMENT "VALUELESS" — In an action based upon the vendor's warranty in the sale of a note as set forth in the N. I. L., sec. 65(4), it being alleged that the maker was insolvent and the mortgaged property worth much less than the debt at the time of the transfer of the note and that both such facts were known to the transferor, *held*, a ruling sustaining a demurrer should be affirmed. *Leekley v. Short*, (Iowa 1933) 249 N. W. 363.

By indorsing "without recourse" the indorser divests himself of ownership of the instrument[1] but disclaims thereon an assumption of liability as an indorser for its ultimate payment.[2] This qualified indorser is not, however, wholly free from liability. He has, in a sense, acted as the vendor of a piece of property, and having so acted the common law was that he had assumed liabilities similar to those of any vendor.[3] These liabilities, in general,[4] were codified in section 65 of the N. I. L.[5] The instant case is grounded upon violation of subsection 4, and the denial of liability results from the court's construction of the word

[1] Hudson v. Shepard and Andrews, 90 Ill. App. 626 (1900).

[2] Stover Bank v. Welpman, 323 Mo. 234, 19 S. W. (2d) 740 (1929).

[3] Brewer, J., in Challiss v. McCrum, 22 Kan. 157 (1879).

[4] As to whether the warranties enumerated in section 65 are to be regarded as exclusive, see Hoge v. Ward, 109 W. Va. 515, 155 S. E. 644 (1930), and notes in 9 N. C. L. REV. 306 (1931), 37 W. VA. L. Q. 219 (1931).

[5] BIGELOW ON BILLS, NOTES, AND CHECKS, 3d ed., 215 (1928). Sec. 65 of the Negotiable Instruments Law:

"valueless" as meaning exclusively a legal insufficiency, which in turn would render the instrument entirely without value, thereby excluding from the warranty the below-par instrument here involved. This construction of the word is doubtless in accord with popular[6] and judicial[7] usage but it is not so clear that the result reached by using this construction in the statute is in harmony with the common law on the subject. It will be noted that lack of knowledge, in subsection 4, is warranted in two situations: first, as bearing on the validity, and second, as bearing on the value, of the instrument. Aside from the question as to whether or not subsection 4 in codifying the rule of the *Littauer* case[8] correctly expressed the common law relating to the requirement of knowledge of invalidity by a transferor, there seems but little doubt that at the common law, while the transferor did not warrant the solvency of the maker,[9] he did warrant ignorance of insolvency.[10] Of course, in the usual situation insolvency of the maker does render the note worthless, hence the statute and most of the writings on the subject have loosely expressed the knowledge in the warranty in terms of the usual result, worthlessness, rather than the factual situation warranted against, insolvency. It would seem that if, due to insolvency combined with partial failure of security, the vendee should suffer only a partial loss, the warranty of the seller should protect him *pro tanto*, as the difference between a total loss and a partial loss is one of degree, not of substance. It may be noted in passing that the difficulty in the principal case, arising from the inept wording of the statute, was foreseen by Dean Ames over thirty years ago, he proposing to obviate it by substituting in place of "render it valueless" the words "impairs its collectibility," saying, "The warranty should attach, if the instrument is worth fifty cents on the dollar. But such an instrument is not valueless." [11]

T. S.

"Every person negotiating an instrument by delivery or by a qualified indorsement, warrants,—

(1) That the instrument is genuine and in all respects what it purports to be;

(2) That he has a good title to it;

(3) That all prior parties had capacity to contract;

(4) That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless."

[6] 10 CENTURY DICTIONARY 6691 (1911).

[7] Central of Georgia Ry. v. Cooper, 14 Ga. App. 738, 82 S. E. 310 at 311 (1914).

[8] Littauer v. Goldman, 72 N. Y. 506 (1878).

[9] Milliken v. Chapman, 75 Me. 306 (1883).

[10] STORY ON PROMISSORY NOTES, 1st ed., 123 (1845); Ames, "The Negotiable Instruments Law — Necessary Amendments," 16 HARV. L. REV. 255 at 258 (1903); Britton, "The Liability of a Transferor by Delivery and of a Qualified Indorser," 42 YALE L. J. 25 (1932); Fenn v. Harrison, 3 T. R. 757 at 759, 100 Eng. Repr. 842 at 844 (1790); Winter v. Bullock, 6 Ga. 230 (1849).

[11] Ames, "Necessary Amendments," 16 HARV. L. REV. 255, n. 4 (1903).