Michigan Law Review

Volume 46 | Issue 4

1948

BILLS AND NOTES-CONSTRUCTION OF NEGOTIABLE INSTRUMENTS AND CONTEMPORANEOUS WRITTEN AGREEMENTS

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RECENT DECISIONS

BILLS AND NOTES—CONSTRUCTION OF NEGOTIABLE INSTRUMENTS AND CONTEMPORANEOUS WRITTEN AGREEMENTS—On April 12, 1938, *M* executed a demand promissory note, negotiable in form, payable to the order of his daughter, the plaintiff. Simultaneously *M* prepared and attached a written instrument to the note stating that the plaintiff agreed that she would not attempt to collect the note until *M* died. The attached instruments were delivered to plaintiff immediately after execution. *M* died May 23, 1945. Plaintiff, who held the instruments from the date of execution without making any demand for payment, filed the note with the defendant, *M's* administrator, as a claim against *M*'s estate. The defendant objected to paying the note, and the probate court disallowed plaintiff's claim. The district court reversed, and defendant appealed. *Held*, for the plaintiff. The note did not become due and payable until *M*'s death, since instruments executed at the same time as part of the same transaction become, in the eyes of the law, one instrument, and will be read and construed together. *In re Holtorf's Estate*, (Minn. 1947) 28 N.W. (2d) 155.

Courts generally follow the rule that where promissory notes and contemporaneous written agreements are executed as part of the same transaction they will be construed together as one instrument in a controversy between the original parties to the instruments,[1] or their legal representatives.[2] This is true even though the note makes no reference to the collateral agreement.[3] The Minnesota court emphatically declares the two instruments to be considered as one, but makes no indication that its ruling is confined only to actions between the original parties or others taking with notice.[4] Such an integration immediately causes one to believe that courts in so holding frequently overlook a fundamental difference in the doctrine of consideration in negotiable instruments as compared to simple contracts. If the payee sues on a negotiable instrument consideration is presumed, and the burden of proving want of consideration is on the maker.[5] However, in an action on a simple contract, the plaintiff must plead and prove consideration.[6] So, in a given case, an incorporation of the

[1] 1 DUNNELL, MINN. DIGEST, § 880 (1927); Myrick v. Purcell, 95 Minn. 133, 103 N.W. 902 (1905); 10 C.J.S., Bills and Notes, § 44 (b) (1938). This rule applies also to third parties taking with notice of the agreement. But see Aigler, "Conditions in Bills and Notes," 26 MICH. L. REV. 471 at 494 (1928).

[2] As a general rule, a contractual obligation survives the death of the obligor. The exception to the rule occurs when the promise which is made calls for performance in person by the obligor, and he dies before performance is due. See GRISMORE, CONTRACTS, § 173 (1947).

[3] 17 C.J.S., Contracts, § 298 (1939).

[4] "Instruments executed at the same time, for the same purpose, and in the course of the same transaction, are, in the eye of the law, one instrument, and will be read and construed together." Principal case at 157.

[5] N.I.L., §§ 24 and 27; 1 WILLISTON, CONTRACTS, § 221 (1936). Similarly, the presumption of consideration is frequently given to non-negotiable notes. See Goodrich, "Nonnegotiable Bills and Notes," 5 IOWA L. BULL. 65 at 70 (1920).

[6] 17 C.J.S., Contracts, 536 (1939); 1 WILLISTON, CONTRACTS, § 107 (1936).

two instruments into one contract may have the effect of placing the burden of proof on the plaintiff despite the fact that his action is on a negotiable instrument.[7] One may also wonder whether the court would similarly decide that the note and the contemporaneous agreement are one instrument, for the purpose of determining the negotiability of the note, if that question were raised by a holder [8] who had no notice of the existence of the agreement. If it would so hold, then it would seem that the note is non-negotiable in its inception, on the theory that resort must be had to the collateral agreement to determine the extent of the promissory language.[9] The Minnesota court has frequently held in cases involving negotiable notes containing references to a contemporaneous securing mortgage that the negotiability of the note is not destroyed unless the reference is of an express incorporating nature making the mortgage a part of the note.[10] It would follow that the court will probably limit its declaration in the principal case solely to those situations where the contestants are original parties or successors with notice, and where negotiability is not in issue.[11] To hold otherwise would certainly conflict with our commercial policy of promoting the negotiability of notes, so many of which are commonly issued with contemporaneously executed written instruments.

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[7] N.I.L., § 25 states "Value is any consideration sufficient to support a simple contract." However, that which may be sufficient to support a promise on a negotiable instrument may not be sufficient consideration for a simple contract. For example, a promise to pay a precedent debt is not usually sufficient consideration on an ordinary contract, but it is sufficient for a negotiable instrument given to discharge the debt. See 1 WILLISTON, CONTRACTS, § 108 (1936), and cases cited.

[8] The principal case raised no question of negotiability, nor were there third parties, taking without notice, involved.

[9] Enoch v. Brandon, 249 N.Y. 263, 164 N.E. 45 (1928), is one of many cases declaring a note to be non-negotiable if reference is required to another document to determine whether the promise is unconditional. But cf. Pollard v. Tobin, 211 Wis. 405, 247 N.W. 453 (1933). This case represents a line of authority which permits looking to the collateral document to see if the terms contained therein impose on the promise conditions repugnant to negotiability. This view permits an instrument which is not negotiable upon execution, because of words in the note subjecting the promise to pay to conditions expressed in the other document, to become negotiable, if, upon examination of the other document it is discovered that the conditions expressed therein are, in fact, really not repugnant to negotiability. See Aigler, "Conditions in Bills and Notes," 26 MICH. L. REV. 471 at 494 (1928). It should be noted that a promise to pay upon death, as expressed in the principal case, has long been held sufficiently certain to satisfy the time requirement for bills and notes. See Cooke v. Colehan, 2 Str. 1217, 93 Eng. Rep. 1140 (1795).

[10] King Cattle Co. v. Joseph, 158 Minn. 481 at 489, 198 N.W. 798 (1917). In White v. Miller, 52 Minn. 367 at 373 (1893) the court said: "The note is always regarded as a separate and distinct instrument, enforceable according to its terms, and independently of the mortgage." See also Thorpe v. Mindeman, 123 Wis. 149, 101 N.W. 417 (1904).

[11] For a general discussion of the problem, see Bailey, "Negotiable Instruments and Contemporaneously Executed Written Contracts," 13 TEX. L. REV. 278 (1935) and 14 TEX. L. REV. 307 (1935).