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## Bills and Notes - Failure of Consideration

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BILLS AND NOTES—FAILURE OF CONSIDERATION—Defendant executed a promissory note as consideration for an undertaking by La Salle Extension University to furnish him instruction by correspondence. Upon defendant's refusal to pay the note at maturity, suit was brought thereon.<sup>1</sup> *Held*, that the defenses of failure or nontender of performance could not be set up even though the holder was a party to the contract from which the note arose.<sup>2</sup> *Boelte v. West*, 185 So. 471 (La. App. 1939).

At common law, in contracts containing mutual promises to perform, full performance or tender thereof on the part of a plaintiff is generally required as a condition precedent to his right to enforce performance of the counter promise.<sup>3</sup> This rigid rule is qualified by the doctrine of substantial performance, which permits recovery in spite of default by the plaintiff on some minor particular.<sup>4</sup> The rule as thus qualified is followed in Louisiana.<sup>5</sup>

These views flow necessarily from the fact that the performance promised by one party is recognized as the equivalent<sup>6</sup> of the performance promised in return—the “bargained-for exchange.”<sup>7</sup> This being so, there results a failure of consideration where there is a failure of performance on either side.<sup>8</sup> This doctrine is consecrated in the Louisiana Civil Code by articles

1. Suit was brought by an assignee, Boelte. “It is admitted that Boelte, the nominal plaintiff, is not in reality the owner of the note, but is named as assignee of the note merely for the purpose of bringing this suit. . . .” *Boelte v. West*, 185 So. 471, 472 (La. App. 1939).

In the opinion the case is treated as if the original holder was suing in his own name.

2. The court also held that a “putting in default” is not required before a suit on a promissory note can be brought; but this point is not within the scope of the present discussion.

3. *Swift & Co. v. Aydlett*, 192 N.C. 330, 135 S.E. 141 (1926). See also 3 Williston, *Contracts* (1936) §§ 813, 832; *Restatement, Contracts* (1932) §§ 266, 267, 268.

4. *Omaha Water Co. v. Omaha*, 156 Fed. 922 (C.C.A. 8th, 1907); *Desmond-Dunne Co. v. Friedman-Doscher Co.*, 162 N.Y. 486, 56 N.E. 995 (1900).

5. *Dugue v. Levy*, 114 La. 21, 37 So. 995 (1904); *Pratt v. McCoy*, 128 La. 570, 54 So. 1012 (1911); *Peterson v. Peralta*, 3 La. App. 516 (1926). See also Art. 2769, *La. Civil Code of 1870*; *Cairy v. Randolph*, 6 La. Ann. 202 (1851); *Reimann Constr. Co. v. Upton*, 178 So. 528 (La. App. 1938).

6. Art. 1768, *La. Civil Code of 1870*: “Commutative contracts are those in which what is done, given or promised by one party, is considered as *equivalent* to, or a consideration for what is done, given, or promised by the other.” (Italics supplied.)

Art. 1770, *La. Civil Code of 1870*: “A contract containing mutual covenants shall be presumed to be commutative, unless the contrary be expressed.”

7. Consideration has been defined as that which is “bargained for and given in exchange for the promise.” *Restatement, Contracts* (1932) § 75.

8. *National Surety Co. v. Long*, 125 Fed. 887 (C.C.A. 8th, 1903); *Leonard v. Dyer*, 26 Conn. 172, 68 Am. Dec. 382 (1857); *Dauchey v. Drake*, 85 N.Y. 407 (1881).

which require the presence of *causa* or consideration<sup>9</sup> as a necessary element in the contract, and provide the resolutive condition<sup>10</sup> if there is a failure thereof.

The instant case involved an ordinary commutative contract. In return for a promise to furnish the defendant a certain course of instruction over a period of time, the defendant gave his promise, represented by a promissory note, to pay the price thereof. The furnishing of the course of instruction was then the agreed equivalent of the payment of the price. As a defense to an action on the note the defendant alleges a failure of performance by the plaintiff. If suit had been brought by one of the parties to the contract to enforce the promise to pay (as it might properly have been), there seems little doubt that the defense alleged would have been valid. Is a different result required because suit is brought on the note?

Following the common law authorities the same result would be reached, for a negotiable instrument is no different from *any other* contract in so far as the requirement of consideration is concerned.<sup>11</sup> Where promissory notes are given in consideration of an agreement whereby the payee is to perform certain acts which he does not thereafter perform, this failure of consideration is a defense to an action on the note.<sup>12</sup> The same conclusion should be reached in Louisiana. It has been held that the defenses that may be set up on ordinary contracts are available to the maker against original parties thereto and against any other person not a holder in due course.<sup>13</sup> Furthermore, Section 28 of the Uniform Negotiable Instruments Law<sup>14</sup> provides that "Absence or failure

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9. Art. 1893, La. Civil Code of 1870: "An obligation without a cause or with a false or unlawful cause can have no effect."

10. Art. 2046, La. Civil Code of 1870: "A resolutive condition is implied in all commutative contracts, to take effect, in case either of the parties do [sic] not comply with his engagements. . . ." Art. 2047, La. Civil Code of 1870, states that the resolutive condition is available "In all cases . . . by suit or by exception." See also Arts. 1912, 1913, La. Civil Code of 1870.

11. *Hammond v. Tate*, 83 F. (2d) 69, 105 A.L.R. 433 (C.C.A. 10th, 1936); *Irwin v. State National Bank of Ft. Worth*, 224 S.W. 246 (Tex. Civ. App. 1920).

12. *Russ Lumber & Mill Co. v. Muscupiabe Land & Water Co.*, 120 Cal. 521, 52 Pac. 995 (1898); *Shephard v. Hawley*, 1 Conn. 367, 6 Am. Dec. 244 (1815).

13. *B. Olinde & Sons Co. v. Istrouma Mercantile Co.*, 172 So. 793 (La. App. 1937). The defenses are available, *a fortiori*, if the note is non-negotiable.

14. The Uniform Negotiable Instruments Law was adopted in Louisiana by Act 64 of 1904 [Dart's Stats. (1939) §§ 790-986]. Section 28 codifies prior Louisiana jurisprudence—*LeBlanc v. Sanglair*, 12 Mart. (O.S.) 402, 13 Am. Dec. 377 (1822); *Byrd v. Craig*, 1 Mart. (N.S.) 625 (1823); *Phillips v. W. T. Adams Mach. Co.*, 52 La. Ann. 442, 27 So. 65 (1899).

of consideration is a matter of defense as against any person not a holder in due course."<sup>15</sup>

In the instant case, it was stated that, if the University had failed to fulfill its contractual obligations, it might be liable in a subsequent suit for damages. Denial of the defense of failure of consideration, then, results in complete circuity of action and additional court costs. In view of the express provisions of the Negotiable Instruments Law, the general contract principles embodied in the Code,<sup>16</sup> and the previous decisions in analagous cases,<sup>17</sup> the holding of the court in the instant case seems unsound. When, as in the present case, the action is brought by one who is not a holder in due course, a more satisfactory result would be reached by sustaining the defense of failure of consideration. In this way, the entire controversy would be settled in a single action, whether brought on the note or the contract, and justice could be attained for the maker without violating any of the provisions enacted for the protection of the sanctity and integrity of negotiable instruments.

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CONSTITUTIONAL LAW—WELL-SPACING LEGISLATION—Plaintiff, the owner of six and one-quarter acres of a ten acre "drilling unit," sought to recover the entire royalty from a producing well located on his property. He contended that the Oklahoma "well-spacing" act,<sup>1</sup> providing for a proportionate distribution of the royalty among the owners of royalty interests in each "drilling unit,"<sup>2</sup> was unconstitutional as a violation of "due process" and "separation of powers." *Held*, (1) the act is a reasonable exercise of the police power; (2) the Corporations Commission, which administers it, is excepted by the Oklahoma constitution itself from the operation of the "separation of powers" clause. *Patter-*

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15. Therefore, the failure of the payee of a note to fulfill the obligation which constitutes the consideration for which it was given extinguishes the obligation of the maker of the note to pay it. *Bonnet-Brown Sales Service v. The Bunkie Record*, 3 La. App. 410 (1926); *Parks v. Cilluffa*, 7 La. App. 749 (1928); *Hick's v. Levett*, 19 La. App. 836, 140 So. 276 (1932); *Stamm Scheele, Inc. v. Loewer*, 149 So. 908 (La. App. 1933).

16. See notes 6, 9 and 10, supra.

17. See notes 14 and 15, supra.

1. Okla. Laws 1935, c. 59, art. 1 [Okla. Stats. Ann. (1937) tit. 52, §§ 85-87].

2. Okla. Laws 1935, c. 59, art. 1, § 3 [Okla. Stats. Ann. (1937) tit. 52, § 87].