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Commercial Law: Negotiable Instruments

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Commercial Law

INSURANCE

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In *Carlisle v. American Automobile Insurance Co.*[1] the action of an insurance agent having power to issue policies of fire insurance in advising the mortgagee under a loss payable clause that the policy would be continued for his protection notwithstanding a prior cancellation was held to constitute a complete reinstatement of the policy. The theory followed was that the coverage afforded by the policy was primarily in favor of the insured and that, by continuing it, the protection of the insured was necessarily reinstated.

The principal point at issue in *Ferguson v. Belcher & Son*[2] was whether the defendant was responsible for damaging the plaintiff's building in the course of demolition work. The findings was for the defendant. The court also held that defendant's liability insurer was not responsible for the payment of defendant's attorneys' fees because the policy relied upon did not afford coverage for the claim made by the plaintiff. It rejected, for lack of proof, a claim for the reformation of the policy on the basis of mutual error.

NEGOTIABLE INSTRUMENTS

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Under the negotiable instruments law every negotiable instrument is deemed prima facie to have been issued for a valuable consideration. Absence or failure of consideration is a matter of defense as against any person not a holder in due course and partial failure of consideration is a defense *pro tanto*, whether the failure is an ascertained and liquidated amount or otherwise.[1] These provisions have been interpreted to mean that when the

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1. 229 La. 717, 86 So.2d 683 (1956).
2. 230 La. 422, 88 So.2d 806 (1956).
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1. LA. R.S. 7:24, 28 (1950).

plaintiff introduces a note in evidence he has the benefit of a prima facie presumption of consideration and is not required in the first instance to produce any further proof of consideration even though the defendant has pleaded a want of consideration; but, if the defendant introduces evidence which rebuts the *prima facie case,* the ultimate burden of establishing the issue by proving consideration by a preponderance of the evidence is on the plaintiff.[2]

In *Redi-Spuds, Inc. v. Dickey*[3] the defendant was sued on a note given to the plaintiff representing the balance due on the purchase price of certain equipment for the processing of potato chips. The defense was a plea of lack and failure of consideration based upon alleged misrepresentation of the product sold, failure of the equipment to perform as represented, and failure of plaintiff to deliver certain items of equipment. On the facts it was held that the defendant had failed to bear the burden of overcoming the plaintiff's prima facie case except as to a small item representing minor equipment not delivered for which defendant was entitled to credit. The case as a whole is typically illustrative of a factual situation in which the burden does not shift back to the plaintiff to establish the validity of the consideration given for the note and is merely a reaffirmation of the recognized principles of the negotiable instruments law above referred to. A similar case at the same term was *Bernard Brothers v. Dugas.*[4] Here the plaintiffs sued on a $31,200.00 note and defendant introduced evidence which strongly tended to show that only $20,000.00 was paid over to the defendant at the time of making the loan in suit. There was further evidence which would have established, if believed, that there was no consideration supporting $11,200.00 of the face of the note as the items on which this part was based were never realized. Under these circumstances the court concluded that the burden of proof had shifted to the plaintiff to prove by a preponderance of evidence that full value was paid. In view of the conflicting evidence it

2. Moss v. Robinson, 216 La. 295, 43 So.2d 613 (1949); Bernard Brothers v. Dugas, 229 La. 181, 85 So.2d 257 (1956). In the latter case the court, through Justice Hawthorne, summarized these principles: "The burden is thus on the defendant of going forward with the evidence and rebutting the prima facie case in favor of plaintiff. However, if during the trial of the case the defendant offers evidence which casts doubt upon the reality of the amount of the consideration, the presumption that the note was given for value is rebutted, and the burden shifts to the plaintiff to prove consideration by a preponderance of the evidence." *Id.* at 185, 85 So.2d at 258.

3. 230 La. 406, 88 So.2d 801 (1956).

4. 229 La. 181, 85 So.2d 257 (1956).

was held that the plaintiff had not sustained the burden of proof. The holding was that not more than $20,000.00 of the face of the note could be collected in the foreclosure proceedings under executory process. The case is a typical application of the principles of Sections 24 and 28 of the Negotiable Instruments Law to the facts that were involved.

McClatchey v. Guaranty Bank & Trust Co.[5] involved an action by a depositor-drawer against the drawee bank and against the individual payees to whom payment had been made by the drawee. It was established that the plaintiff had given a check for $2,071.00 drawn on the First National Bank of Lafayette dated January 14, 1950, in payment of a gambling debt representing losses on horse race wagers. The defendant Walters altered the check by striking out "First National Bank of Lafayette" and writing in the name of defendant "Guaranty Bank & Trust Co." and by changing 1950 to "1951." The alterations were clearly established. Whether or not the alterations were authorized by the drawer-depositor (McClatchey) was the issue in dispute with the evidence on this point in hopeless conflict. The court made no mention of the applicability of Section 124 of the Negotiable Instruments Law to the facts,[6] but concluded that recovery was precluded by Article 2984 of the Civil Code[7] which denies an action to the loser to reclaim what he has voluntarily paid unless there has been on the part of the winner fraud, deceit, or swindling. The court reasoned that, because the evidence was in conflict as to whether the alteration was authorized, the plaintiff (drawer-depositor) had failed to establish fraud by clear and convincing proof to support the action for recovery of a gambling loss. The dismissal of plaintiff's action was accordingly affirmed.

It is to be noted that this was not an action on the instrument itself, but was an action for the recovery of money paid by the drawee bank to the payee receiving payment. The legal basis of the court's disposition of the matter is open to question. If the check was in fact altered without authority by inserting the name of a different drawee it might be cogently argued that the money so paid by a drawee other than the original drawee designated was not "voluntarily paid" within the meaning of Article

5. 228 La. 1103, 85 So.2d 6 (1956).
6. LA. R.S. 7:124, 125 (1950).
7. LA. CIVIL CODE art. 2984 (1870).

2984 of the Civil Code. Again it would seem that a more substantial legal basis for the non-liability of the drawee bank would be the one-year peremption statute.[8] Moreover, the case certainly involved a situation for resolution of the problem of burden of proof on the issue of consent to a material alteration.[9] These three substantial issues were not dealt with in the court's opinion though it appears to this reviewer that their pertinence merited careful treatment in the ultimate decision of the case.

Gladney v. Webre[10] involved a mere application of well-settled legal principles relating to the transfer of litigious rights resulting from the purchase of a note by an attorney. Following the dismissal of an action on a note as of non-suit, but within the time for appeal from such judgment, the plaintiff, an attorney, purchased the note. It was held that the transfer of the note was a transfer of a litigious right and a nullity under Article 2447 of the Civil Code.[11] The result was soundly based on the prior jurisprudence on this subject.[12]

Under Article 2924 of the Civil Code interest in excess of eight percent is usurious, but the limitation may be avoided as a practical matter by capitalizing interest and principal in the face of the note. In that event the interest even though usurious may be recovered.[13] In *Vosbein v. Leopold*[14] the court again applied the settled interpretation of this Code provision. Effort was made by the plaintiff to extend the doctrine of capitalization to permit recovery on a note which had been given for usurious interest and for $675.00 legal fees arising out of a different transaction. No part of the face of the note represented principal. The court refused to apply the protection of Article 2924 to

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8. LA. R.S. 6:53 (1950). See William M. Barret, Inc. v. First Nat. Bank of Shreveport, 191 La. 945, 186 So. 741 (1939).

9. The question of burden of proof in cases of material alteration under § 124 of the Negotiable Instruments Law gives risé to a considerable conflict in the cases. Does the plaintiff have the burden of proving the instrument to be genuine or is the burden on the defendant to prove the instrument has been materially altered without consent? For an excellent discussion see BRITTON, BILLS AND NOTES § 287 (1943). See Davis v. Jordan, 185 So. 545 (La. App. 1939); Interstate Trust & Banking Co. v. Womack, 179 La. 732, 155 So. 6 (1934); People's Bank and Trust Co. v. Thibodaux, 172 La. 306, 134 So. 100 (1931).

10. 230 La. 175, 88 So.2d 17 (1956).

11. LA. CIVIL CODE arts. 2447, 2653 (1870).

12. See State v. Nix, 135 La. 811, 66 So. 230 (1914).

13. It is well settled that the holder of a note may collect the face of the note notwithstanding the fact that such note includes a greater discount than eight percent per annum, provided the note does not have a greater rate of interest than eight percent after maturity. General Securities Co. v. Jumonville, 37 So.2d 469 (La. App. 1948).

14. 230 La. 21, 87 So.2d 715 (1956).

this situation. It was pointed out that to allow recovery by permitting capitalization of usurious interest with transactions foreign to the principal obligation would make it easy completely to circumvent the usury. The result is sound as a matter of interpretation. It is pertinent to observe, however, that through the process of renewing a note and capitalizing a portion of the principal with the usurious interest, the usury prohibition is also put at naught. That result, however, has the legislative sanction of Article 2924 and the decision was correct in not extending the doctrine further.