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Negotiable Instruments

Fletcher R. Andrews

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NEGOTIABLE INSTRUMENTS

INTRODUCTORY

With the adoption of the Uniform Commercial Code by the Ohio legislature,¹ the cases reviewed in this article, decided under the now repealed Negotiable Instruments Law, serve chiefly as a means of referring to the new law.

PAYEE NOT SUBJECT TO MAKER'S DEFENSE AGAINST STRANGER

In *Ohio Loan & Discount Co. v. Tyarks*,² the maker of the note had entered into a contract with *K*, financed by the plaintiff; and the note was made out directly to the plaintiff as payee, rather than to *K*. There was a failure of the consideration promised by *K* to the maker, but the plaintiff was a bona fide purchaser and took before maturity. In a suit by plaintiff against the maker, the latter set up as a defense the failure of the consideration promised by *K*. The court held that in order for failure of consideration to be a defense, such failure must be attributable to the promisee and not to some third person operating independently of the promisee. The subject of payee as holder in due course was not mentioned in the opinion. Might the case have been decided upon that theory?³

DEFENSES: GAMBLING

In *Scolaro v. Bellitto*,⁴ the court noted that under Ohio law, even a holder in due course cannot recover upon a negotiable instrument issued by the maker to the payee in payment of a gambling debt.⁵ But in this particular case, the plaintiff payee merely loaned money which was used by the maker to bet on a horse race, and the plaintiff knew nothing about the use to which the money was to be put. Accordingly, held the court, this case does not come within Ohio Revised Code section 3763.01, making notes given for gambling transactions void, and the judgment for plaintiff was proper.⁶

1. OHIO REV. CODE §§ 1301.01-1309.50, effective July 1, 1962. The sections relating specifically to commercial paper are 1303.01 through 1303.78.

2. 173 Ohio St. 564, 184 N.E.2d 374 (1962).

3. See BRITTON, *BILLS AND NOTES* § 122 (2d ed. 1961); *Firestone Tire & Rubber Co. v. Central Nat'l Bank*, 159 Ohio St. 423, 112 N.E.2d 636 (1953). The Uniform Commercial Code permits a payee to be a holder in due course. OHIO REV. CODE § 1303.31(B).

4. 184 N.E.2d 604 (Ohio Ct. App. 1962).

5. See, in general, BRITTON, *op. cit. supra* note 3, § 127.

6. The Uniform Commercial Code leaves to the law of each state the question whether such a defense as gambling is a real or personal defense. See OHIO REV. CODE § 1303.34(B)(2). Section 3763.01 is not repealed.

BURDEN OF PROOF: WANT OF CONSIDERATION

During 1962, in *Ohio Loan & Discount Co. v. Tyarks*,⁷ the Supreme Court of Ohio finally had an opportunity to settle the Ohio law with reference to the burden of proof on the issue of want of consideration. The court held that want of consideration is an affirmative defense, placing the burden of proof upon the party who asserts it. Thus, for example, if the payee sues the maker, who defends on want of consideration, the maker has the burden of proving it. The Uniform Commercial Code is in accord.⁸

LIABILITY: SIGNATURE IN REPRESENTATIVE CAPACITY

*Sherber v. O'Grady*⁹ presented a problem under the former section 1301.22 of the Revised Code. This section, now repealed by the Uniform Commercial Code, provided, in substance, that when the instrument contains or a person adds to his signature words indicating that he signs for a principal or in a representative capacity, he is not liable on the instrument if he was authorized. However, the second sentence of the section states that the mere addition of words describing him as an agent or as filling a representative character without disclosing his principal does not exempt him from personal liability. In the *Sherber* case, a corporation of which defendant was president purchased various goods from the plaintiff. The order blank showed that the sale was to the corporation, and there was evidence to the same effect. Below the order blank was a printed form of cognovit note, which defendant signed, "J. R. O'Grady, Pres." The court held that the first sentence of the section, rather than the second, applied, since the principal was disclosed. Consequently, Mr. O'Grady was not liable.¹⁰

ALTERATION

Sherber v. O'Grady,¹¹ referred to above, was also decided on the ground of material alteration of the note by the plaintiff without the defendant's knowledge or consent. Under former section 1303.39, Ohio Revised Code, a part of the Negotiable Instruments Law, a material alteration avoided the instrument under such circumstances, where it was not in the hands of a holder in due course.¹²

FLETCHER R. ANDREWS

7. 173 Ohio St. 564, 184 N.E.2d 374 (1962).

8. OHIO REV. CODE §§ 1303.36(B), 1301.01(H).

9. 113 Ohio App. 547, 175 N.E.2d 864 (1961).

10. The new statute is OHIO REV. CODE § 1303.39. And see the valuable comment to the section.

11. 113 Ohio App. 547, 175 N.E.2d 864 (1961).

12. The new provision is OHIO REV. CODE § 1303.43.