SUPREME COURT OF APPEALS OF VIRGINIA.

TRUSTEES OF AMERICAN BANK OF ORANGE v. McCOMB.

June 14, 1906.

[54 S. E. 14.]

1. Bills and Notes—Bona Fide Purchasers—Due Course of Business—Trustee in Deed of Trust.—Acts 1897-98, pp. 896, 910, c. 866, § 124 [Va. Code 1904, p. 1455, § 2841a], provides in subsection 52 that a holder in due course is one who takes the instrument when it is complete and regular on its face, before maturity, for value, and without notice of any infirmity; and subsection 53 expressly provides that the holder of an instrument payable on demand, negotiated an unreasonable length of time after maturity, shall not be regarded as a holder in due course. Held that, as only one class is excepted from the class of bona fide holders under subsection 53, a trustee under a deed of trust for creditors is a holder in due course.

2. Same—Matter Apparent from Instrument.—In an action on a note, defendant claimed a material alteration consisting of the insertion of the words "Payable with interest." The note was partly printed and partly written, and the words "Payable with interest" were in the same handwriting as other written portions, and were not interlined, but written on a blank space after the words "Value received." Held, that the note was "complete and regular" on its face, within Acts 1897-98, pp. 896, 910, c. 866, § 124 [Va. Code, 1904, p. 1455, § 2841a], defining a holder in due course.

Error to Circuit Court, Orange County.

Action by the trustees of the American Bank of Orange against Lelia M. McComb. Judgment in favor of defendant, and plaintiffs bring error. Reversed and rendered.

Duke & Duke and *Morton & Shackleford,* for plaintiffs in error.

Grimsley & Miller and *Hay & Browning,* for defendant in error.

BUCHANAN, J. The principal question involved in this case is whether or not the plaintiffs in error, who were the plaintiffs in the court below, are holders in due course of the negotiable note sued on, of which the following is a copy:

"$123.50 Int.

"$4,020. Orange, Va., Feby. 29th, 1904.

"Six months after date I promise to pay to the order of myself

four thousand and twenty dollars. Negotiable and payable at the American Bank of Orange, Orange, Va.

"Homestead and all other exemptions waived by the maker and each endorser.

"Value received. Payable with interest.

"Lelia Moore McComb."

The note was indorsed in blank by the maker to the American Bank of Orange. That bank, which was in a failing condition, on the 12th day of March, 1904, executed a deed of trust, by which it conveyed, assigned, and transferred all of its property of every kind, including the note sued on, to the plaintiffs, for the purpose of securing all the creditors of the bank.

The defense relied on was that since the execution of the note it was, without the knowledge or consent of the defendant, the maker, materially altered by the insertion of the words "Payable with interest."

The plaintiffs' replication in effect confessed that the note had been altered, as averred in the defendant's plea, but denied that they had any knowledge of it at the time they became holders of the note, and averred that they were purchasers for value and without notice of the alteration, and are holders thereof in due course.

The plaintiffs introduced in evidence the note and the deed of trust. To that evidence the defendant demurred, which demurrer was sustained by the court, and judgment rendered in favor of the defendant. To that judgment this writ of error was awarded.

By section 124 of an act known as the "Negotiable Instruments Law," approved March 3, 1898 (Acts 1897-98, pp. 896, 910, c. 866), which act is found in Va. Code 1904 as section 2841a, it is provided that where an instrument has been materially altered, and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

The contention of the defendant is that such trustees are not holders in due course under the law merchant, because they did not acquire the paper by indorsement and delivery as is usual and customary in business circles, and that the negotiable instruments law has not changed the rule of the law merchant.

A deed of trust is the most usual method of securing creditors in this state, or, at least, a very usual method of doing so; and it is not at all clear that, under the principles established by our decisions, such a trustee ought not to be held to be a holder in due course. It is settled law in this state that a pre-existing debt is of itself a valuable consideration for a deed of trust executed for its security, and that such deed, if it be duly recorded, and was not executed with a fraudulent intent, known to the trustees or

the beneficiaries, will be valid against all prior secret liens and equities. See Wickham *v.* Lewis Martin & Co., 13 Grat. 427, 436, 437; Davis *v.* Miller, 14 Grat. 1, 14-17; Evans *v.* Greenhow, 15 Grat. 153, 156, 157; Shurtz *v.* Johnson, 28 Grat. 657, 667; Cammack *v.* Soran, 30 Grat. 292, 294-297; Williams *v.* Lord, etc., 75 Va. 390, 404; Chapman *v.* Chapman, 91 Va. 397, 400, 21 S. E. 813; 50 Am. St. Rep. 846.

All the authorities cited by the defendant to sustain her contention that such a trustee it not a holder in due course, are based upon the case of Roberts *v.* Hall, 37 Conn. 205, 9 Am. Rep. 308. The opinion of the court in that case shows that such deeds of trust do not occupy the same high position in that jurisdiction as they do in this state as a method of securing creditors, and that reasoning of the court by which it reached its conclusion is not at all satisfactory or convincing in the light of our own decisions above cited.

But, whether such a trustee was a holder in due course prior to the enactment of the negotiable instruments law, there can be, it seems to us, no room for doubt since it went into effect.

The object of that act, as stated in its title, was "to revise, arrange and consolidate into one act the laws relating to negotiable instruments (being an act to establish a law uniform with the laws of other states on the subject)." The history of that legislation, as well as the act itself, shows that it was the intention of the Legislature to embody in one act, not merely the statute law of the state with reference to negotiable instruments, but also the rules of the law merchant—to codify generally the law on the subject. All acts and parts of acts in conflict with it are to that extent expressly repealed by subsection 197, and the rules of the law merchant impliedly repealed, except in such cases as are not provided for by the act. Subsection 196.

Subsection 52 declares what constitutes a holder in due course. It defines such a holder to be one who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face; (2) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it for value and without notice; and (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it. Every holder of a negotiable instrument under the conditions named is a holder in due course, unless excluded by some other provision of the act.

Subsection 53 expressly provides that the holder of an instrument payable on demand, negotiated an unreasonable length of time after its issue, shall not be regarded as a holder in due

course, and who but for this express provision excluding him would have been a holder in due course under subsection 52.

When the act defines generally who shall be holders in due course, and make an express exception of a certain class, who would otherwise be embraced, the exception negatives the idea that any other class was to be excepted, in accordance with the maxim, "Expressio unius est exclusio alterius." Black on Interpretation of Laws, § 64; Sutherland on Stat. Constr. § 325; Somers' Case, 97 Va. 759, 761, 33 S. E. 381.

Where a statute is intended to embody in a code a particular branch of the law, and has specifically dealt with any point, the law on that point should be ascertained by interpreting the language used, instead of doing as before the statute was passed—roaming over a vast number of authorities in order to discover what the law is by extracting it by a minute, critical examination of prior decisions. Lord Bramwell in Bank, etc., *v.* Vogleano, Appeal Cases, 107, 144.

If such a statute is to be treated as the defendant insists should be done, and have read into it the law, prior to its enactment, the value of codifying the law on the subject of negotiable instruments will be greatly impaired, if not destroyed, and the very object for which it was enacted will be frustrated.

Where the language of such an act is clear, it must control, whatever may have been the prior statutes and decisions on the subject. Where there is a substantial doubt as to the meaning of the language used, the old law is a valuable source of information. U. S. *v.* Bowen, 100 U. S. 508, 25 L. Ed. 631; Bank *v.* Vogleano, supra.

The language of subsection 52 is free from doubt. The plaintiff trustees are clearly embraced within its provisions, if they satisfy the four conditions named. The only one of these conditions which it is claimed they do not satisfy is the first, viz., that the note is not complete and regular upon its face.

An examination of the original note, which was produced before this court, shows that it was partly printed and partly written; that the words "Payable with interest" are in the same handwriting as are the other written portions of the note, except the maker's name; that they were not interlined, but written on a blank space after the words "Value received," at the most appropriate place on the note at which they could be written without interlining them. There was nothing on the face of the note to show that it had been altered, or to awaken suspicion. It must, we think, be regarded as complete and regular on its face. This being so, the plaintiffs were holders in due course, and the trial court erred in not so holding.

Whether or not the court erred in permitting the defendant to file her special plea without making affidavit to it, and in requir-

ing the special replication to it to conclude with a verification, instead of to the country, need not be considered, since a decision of these questions could not affect the result, as the conclusion reached by this court upon the merits is as favorable to the plaintiffs as it could have been if the plea had been sworn to and the replication had concluded to the country.

The judgment of the circuit court must be reversed, and this court will enter such judgment as the circuit court ought to have rendered, for the amount of the note, with interest from the date of its maturity.

Note.

Construction of Statutes.—This case, the importance of which cannot well be overestimated, should mark an epoch in statute construction; its value cannot be restricted to its bearing alone on the "Negotiable Instruments Law" of this state. Courts are too often unmindful of that cardinal rule of construction that it is their province to decide what the law is or has been, and to determine its application to particular facts in the decision of causes. They must declare the law as it is, and not under the pretense of construction encroach upon the legislative functions of making laws for the future.

And in Sutherland *v.* Mead, 80 N. Y. Supp. 509, the court, in deciding that the Negotiable Instruments Law of that state did not change the pre-existing rules as to when a pre-existing debt is a good consideration, announced a rule of construction peculiarly applicable to the case at bar, and one which must have been in the mind of the court in deciding this case. This rule is that "settled principles ought not to be overturned by imputing a legislative intent where the language upon which it is based is equivocal in expression, and when the language used, which it is claimed changes the rule, may be naturally harmonized with the decisions of the courts, which have settled the law plainly and conclusively, and with respect to which commercial dealings have been governed in this state for over eighty years. But even though we should be wrong in our construction of this statute, nevertheless it does not change the rule of law to be applied in the particular case."

Meaning of "Holder in Due Course."—It may be instructive to consider here a few cases in which the terms "holder," and "holder in due course" have been defined by the courts.

As defined by the law dictionaries, the word "holder" means one who is legally in possession of a negotiable instrument. State *v.* Wheeler, 23 Nev. 143, 44 Pac. 430.

The term "holder," says Mr. Justice Grier, is properly applied to the person having possession of the paper and making the demand, whether in his own right or as agent for another, and the notary who may hold the note as agent of the owner for the purpose of making demand and protest, may properly be considered as the "holder" within the meaning of this rule. Bowling *v.* Harrison, 47 U. S. (6 How.) 248, 12 L. Ed. 420.

In a South Carolina case, the court decided that "holder" is a word of the same import as "bearer;" therefore, a note payable to a particular person or "holder" is negotiable. Putnam *v.* Crymes, 1 M'Mullan's Law 9, 36 Am. Dec. 250, cited with approval in Crocker-Woolworth Bank *v.* Nevada Bank, 139 Cal. 564, 73 Pac. 456, 96 Am. St. Rep. 180.

In a late case it was said: "The plaintiff does not even plead that

the defendant was the 'owner' of the check, but pleads merely that he was the 'holder.' The distinction is, or may be, important. One may be the holder of a check, and not the owner, and under the rule which construes a pleading most strongly against the pleader, it might well be held upon the very averment of the complaint that plaintiff knew that defendant was not the owner. 'The term "holder" is properly applied to the person having possession of the paper and making the demand, whether in his own right or as an agent for another.' Bowling *v.* Harrison, 6 How. 258. '"Holder" is a word of the same import as "bearer:"' Putman *v.* Crymes, 1 McMull, 9, 36 Am. Dec. 250. '"Holder" is a general word applied to anyone in actual or constructive possession of the bill, and entitled at law to recover or receive its contents from the parties to it.' Byles on Bills, 2." Crocker-Woolworth Bank *v.* Nevada Bank, 139 Cal. 564, 73 Pac. 456, 96 Am. St. Rep. 169.

Holder of Check.—"Under the negotiable instruments law of New York four elements must concur to constitute a person a holder in due course: 1. The instrument must be complete and regular on its face; 2. The holder must receive it before it is overdue and without notice that it has been previously dishonored, if that is the fact; 3. It must have been taken in good faith and for value; 4. It must have been taken without notice of any infirmity in the instrument or defect in the title of the person negotiating it. Negotiable Instruments Law, § 91. If the plaintiff had not actually parted with value before it received notice of the dishonor of this check, it is apparent that at least one of these elements is lacking in the plaintiff's title. The authorities hold that the mere crediting to a depositor's account, on the books of a bank, of the amount of a check drawn upon another bank, where the depositor's account continues to be sufficient to pay the check in case it is dishonored, does not constitute the bank a holder in due course. Albany County Bank *v.* People's, etc., Ice Co., 92 App. Div. 47, 86 N. Y. Supp. 773; Thompson *v.* Sioux Falls Nat. Bank, 150 U. S. 231, 244, 14 Sup. Ct. Rep. 94, 37 L. Ed. 1063; Dykman *v.* Northbridge, 80 Hun, 258, 30 N. Y. Supp. 164; Central Nat. Bank *v.* Valentine, 18 Hun, 417;" Citizens' State Bank *v.* Cowles, 180 N. Y. 346, 73 N. E. 33, 105 Am. St. Rep. 765.

Holder of Notes as Collateral Security for Antecedent Debt.—"The rule in the federal courts as well as in those of England and Canada is that the holder of a negotiable note, taken as collateral security for a pre-existing debt, is a holder for value in due course of business, and as such is protected against all latent equities of third parties. The state courts that have passed upon the question are in irreconcilable conflict. The cases are collected in volume 4 of the American and English Encyclopedia of Law, second edition, pages 290 to 293, and in volume 7 of the Cyclopedia of Law and Procedure, pages 932 to 935. The lists there given indicate with substantial, but not absolute, correctness the line of cleavage. It is to be noted that in each of them Kansas is wrongly placed among the states that are committed to the rule stated, upon the strength, respectively of the cases of National Bank *v.* Dakin, 54 Kan. 656, 45 Am. St. Rep. 299, 39 Pac. 180, and Best *v.* Crall, 23 Kan. 482, 33 Am. Rep. 185. While these cases have a tendency in that direction they do not go the full length indicated. In National Bank *v.* Dakin the note involved was transferred as collateral security for a debt created at the time of, and in reliance upon, such transfer, which was therefore supported by a new consideration sufficient upon any theory of the law. In the opinion a number of cases are cited as supporting the proposition that even a pre-existing debt would afford a sufficient consideration

for the purpose, and among them was included Best *v.* Crall, 23 Kan. 482, 33 Am. Rep. 185. In that case the collateral note was in fact transferred as security for a debt that already existed, but this was done pursuant to a promise made when such original debt was created, so that the effect was the same as though the transfer had actually been made at that time. A careful examination of the cases cited in the lists referred to discloses that in the following states the rule of the federal courts has been adopted, although in California and Nevada the matter is affected by statutory provisions that the acceptance of the security forfeits a right to attach: California, Colorado, Connecticut, Georgia, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, Rhode Island, South Carolina, Texas, Vermont, and West Virginia. Nebraska also is now committed to this doctrine. Lashmett *v.* Prall, 2 Neb. (Unofficial) 284, 96 N. W. 152. Such citations further show that in the following states the rule has been denied: Alabama, Arkansas, Iowa, Kentucky, Maine, Michigan, Mississippi, Missouri, New Hampshire, New York, North Dakota, Ohio, Pennsylvania, Tennessee, Virginia and Wisconsin. North Carolina, also, should now be placed in this list, but there, as well as in Tennessee and in Virginia, the recent adoption of the legislature of a complete Code relating to negotiable instruments is held to have changed the rule: Brooks *v.* Sullivan, 129 N. C. 190, 39 S. E. 822; Bank of Charleston *v.* Johnston, 105 Tenn. 521, 59 S. W. 131; Payne *v.* Zell, 98 Va. 294, 36 S. E. 379. The same Code was adopted in New York in 1897. Upon the strength of its provisions that "value is any consideration sufficient to support a simple contract," and that "an antecedent or pre-existing debt constitutes value," it was held, in Brewster *v.* Shrader, 26 Misc. Rep. 480, 57 N. Y. Supp. 606, that the law in this respect, as formerly administered in that state, had been changed, and that now "an indorsee of a note taken as collateral to a pre-existing indebtedness is a holder for value, unaffected by equities between the original parties." But in Sutherland *v.* Mead, 80 App. Div. 103, 80 N. Y. Supp. 504, this was denied, and it was said that this part of the new statute is purely declaratory. We do not discover that the New York court of appeals has passed on the effect of this legislation on the matter under consideration." Birket *v.* Elward, 68 Kan. 295, 74 Pac. 1100, 104 Am. St. Rep. 405.

Prior to the Negotiable Instruments Law it was the rule in New York that one who receives accommodation paper where the same has been fraudulently diverted from the purpose for which it was made, or the indorsement given, and the holder has received it solely as collateral security for an antecedent debt, is not a holder in due course as against accommodation makers and indorsers. It was contended that the negotiable instruments law has changed this rule. But the court, in a learned and exhaustive opinion, in which the history of this legislation was reviewed at some length, decided that there was nothing in this law changing the pre-existing rules as to what constitutes consideration for a promissory note. In conclusion, the court said: "It is evident from these provisions that the Legislature did not intend to wipe out the defenses to a promissory note where the same had been procured from the maker by fraud, or where the indorsement has been given for a specific purpose, and a fraudulent diversion of the paper has been had. If the holder took the same with notice of such facts or circumstances as charged him with notice, or if he parted with no value, it constitutes a good defense to such note. As the definition of value for a promissory note has not added anything to the law upon that subject beyond such as was previously

recognized, we ought not to conclude that the legislature intended to change the rule with respect thereto, nor to permit frauds to be perpetrated thereunder." "We may take judicial notice that the commission appointed to revise and codify the statutes was created, in the main, to codify existing laws, and not make new rules; and certainly it was never intended that settled usages in respect of commercial paper, founded upon decisions covering a period of eighty years, and uniform in application, should be overthrown in the construction of ambiguous and obscure expressions used by such body. The harmony of these provisions of the statute is in no measure disturbed by a construction which causes them to read that an antecedent and pre-existing debt must be paid and discharged, in order to constitute the holder of commercial paper, which has been fraudulently diverted, a bona fide holder, and, as such, capable of enforcing the same as against the accommodation maker or indorser. Merely taking such paper as collateral security for the payment of a pre-existing or antecedent debt does not constitute such debt value, within the meaning of this statute." Sutherland *v.* Mead, 80 N. Y. Supp. 504.

In Kansas, one who acquires a negotiable instrument as security for pre-existing indebtedness, is a holder for value and in due course of business. Birket *v.* Elward, 68 Kan. 295, 74 Pac. 1100, 104 Am. St. Rep. 405.

Trustee for Creditors.—If a chattel mortgage be made and delivered to a trustee for creditors, he is the holder within the meaning of the chattel mortgage act of New Jersey, providing that the affidavit is to be annexed by the "holder or holders of said mortgage." Fletcher *v.* Bonnet, 51 N. J. Eq. 615, 28 Atl. 601.

Pledgee of Mortgagee.—And in a late Kentucky case it was said that a pledgee of mortgagee of a note is a holder for value. 22 Ky. Law Rep. 258, 56 S. E. 988.

Burden of Proof.—Under Negotiable Instruments Law of New York, providing that, when it appears that the title of any one person who has negotiated a note was defective, the holder has the burden of proving that he, or some one under whom he claims, acquired title as a holder in due course, accommodation indorsees having shown that the note was diverted from the purpose for which it was given, the holder has such burden of proof. Sutherland *v.* Mead, 80 N. Y. Supp. 504.