1928
*Nov. 30.
*Dec. 3.
1929
*Feb. 5.

ZIBA GALLAGHER (PLAINTIFF).....APPELLANT;

AND

J. E. MURPHY AND F. T. GILROY (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Promissory note—Consideration for note—Consideration alleged to be purchase money for interest in patent right—Bills of Exchange Act, R.S.C., 1927, c. 16, s. 14—Endorsement operating as an "aval"—Bills of Exchange Act, s. 131.

G. owed T. Co. $2,000 for royalties accrued under an agreement by which T. Co. had granted G. certain rights to manufacture under a tube patent owned by T. Co. Being pressed for payment, G. got M. to sign and hand to him a promissory note for $2,000 payable to T. Co., which G. endorsed and delivered to T. Co., which accepted it, reserving its rights for payment of the royalties if the note was not paid. After maturity T. Co. transferred the note for value to plaintiff who sued M. and G. upon it. Defendants, among other things, pleaded s. 14 of the *Bills of Exchange Act*. At the trial it was dis-

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Lamont JJ.

closed (neither T. Co. nor plaintiff having had any previous knowledge thereof) that M. had purchased from G. an interest in a certain tire patent (in which T. Co. had no interest). It was held by the Appellate Division, Ont., that the money owing by M. to G. on said purchase was the consideration for which the note was given, and, as the words "Given for a patent right" were not written across it, the note was void under s. 14 of said Act.

Held (Lamont J. dissenting): The note was not void. The consideration was not purchase money for a patent right or interest therein. Consideration must move from the payee (*Forsyth* v. *Forsyth,* 13 N.S. Rep. 380; *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.* [1915] A.C. 847); the consideration for M.'s promise by the note to pay T. Co. could not be a debt due by M. to G., although that debt might have been the motive inducing M. to hand it to G. Nor, in the circumstances, could it be said that the consideration consisted in the royalties due by G. to T. Co.; the note was not taken in satisfaction of that claim; there was no novation. The real consideration given by the payee was the extension of time to G. for payment of the royalties due by him. The fact that M., who owed nothing to T. Co., made the note to it, must have conveyed to him that, at G.'s request, he was undertaking to pay T. Co. for some consideration moving from it (even if unknown to him) in which G. was interested, and to enable G. to obtain which he was accommodating G., and implied a request from M. to T. Co. to accord such consideration. (*Craig* v. *M. & L. Samuel, Benjamin & Co.,* 24 Can. S.C.R. 278, dist.)

Royalties for a license to manufacture under a patent are not purchase money of a patent right. (*Johnson* v. *Martin,* 19 Ont. A.R. 593, explained).

Held also (as to G.'s contention, invoking s. 131 of said Act, that he was not really an endorser of the note because he was not the holder when he signed it and did not sign it for the purpose of negotiation, and that plaintiff could recover against him only if he was a holder in due course) that G.'s endorsement on the note before T. Co. took it had the effect of an "aval", and made G. liable to T. Co. and its assignee, the plaintiff—*Robinson* v. *Mann,* 31 Can. S.C.R. 484; *Grant* v. *Scott,* 59 Can. S.C.R. 227. (Moreover, as pointed out in *Steele* v. *McKinley,* 5 A.C. 754, "it is not a collateral engagement, but one on the bill," this disposing of any contention of G. under the *Statute of Frauds*). *R. E. Jones Ltd.* v. *Waring & Gillow Ltd.,* [1926] A.C., 670, which laid down the general proposition that "holder in due course" does not include a payee, had not the effect of overruling *Robinson* v. *Mann.* It cannot be said that, by force of s. 131 of the *Bills of Exchange Act,* one who signs a bill otherwise than as drawer or acceptor incurs liability only towards a holder in due course. The concluding words of s. 131, "and is subject to all the provisions of this Act respecting endorsers," distinguish it from the corresponding English section, and make clear the intention to introduce into our law the principle of the "aval."

Judgment of the Appellate Division, Ont., (34 O.W.N. 204) reversed (Lamont J. dissenting).

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APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Ontario (1) which allowed the defendants' appeal from the judgment of Riddell J. at trial (2), who held that the plaintiff was entitled to recover against the defendants upon a certain promissory note. The material facts of the case, and the questions in issue, are sufficiently stated in the judgments now reported, and are indicated in the above head-note. The plaintiff's appeal was allowed with costs in this Court and the Appellate Division and the judgment of the trial Court was restored. Lamont J., dissented.

R. S. Robertson K.C. for the appellant.

J. M. Bullen for the respondent Murphy.

T. Delany for the respondent Gilroy.

The judgment of the majority of the court (Anglin C.J.C. and Mignault, Newcombe and Rinfret JJ.) was delivered by

RINFRET J.—The action is upon a promissory note for $2,000, dated June 28, 1926, made by Murphy and payable to the order of Travellers Rubber Company, Limited, six months after date. The note was endorsed by Gilroy before its delivery to the Travellers Company. It was transferred for value, but after maturity, to Gallagher, who does not claim to stand in any higher position than the company.

Murphy and Gilroy filed separate statements of defence, each containing a variety of reasons why the action should not be maintained. At the trial, none of these reasons prevailed. The Appellate Division, however, held that the consideration for the note consisted of the purchase money of an interest in a patent right, within the meaning of section 14 of the *Bills of Exchange Act*, and that the note was void because the words "Given for a patent right" were not "written or printed * * * across the face thereof."

We adopt as correct the following statement of the circumstances under which the note was given:

In June, 1926, Gilroy owed the Travellers Company $2,000 for royalties accrued under an agreement by which the company had granted Gilroy certain rights to manufacture under a patent owned by the company upon an

(1) (1928) 34 Ont. W.N. 204. (2) (1927) 32 Ont. W.N. 357.

inner tube for an automobile tire. Gilroy was pressed for payment, but was unable to pay. He stated, however, that he had a "friend," Murphy, from whom he could get a note. He accordingly got Murphy to make the note in question payable to the company. He then put his own signature as endorser on the back of the note and delivered it to the company. The company accepted it, reserving its rights for the payment of the royalties due under the agreement, if the note was not paid; and both Murphy and Gilroy were so notified by letter. Murphy replied on July 16, 1926, that he would take up the note before maturity, on the last day of November, and that the company could depend upon this.

The note was dishonoured at maturity and the company sued Murphy upon it. Murphy filed an affidavit of merits. Gallagher, who was acting as the company's solicitor, finding that there was some dispute about his retainer, discontinued the action; but, as the company was indebted to him, he secured an assignment to himself of the note and of the company's claim in respect thereof. The present action was thereupon brought against Murphy and Gilroy. At the trial, it was unexpectedly disclosed that Murphy had acquired an interest in a patent owned by Gilroy, not the tube patent in respect of which royalties were owing by Gilroy, but a tire patent in which the company was not interested.

Neither the company nor Gallagher had any knowledge of this transaction between Gilroy and Murphy. They never heard of it until the evidence was given at the trial. Up to that time Murphy had always been put forward as maker of the note for Gilroy's accommodation. In the affidavit of merits filed in answer to the action brought by the company, he swore that "the promissory note upon which the plaintiff has entered action herein was given by (him) for accommodation only." No mention was there made of his having purchased from Gilroy an interest in a patent right.

In the statements of defence, the note was referred to by both Gilroy and Murphy as having been given "for accommodation only; or, if for consideration, then such consideration was an interest in a patent right"; but the "interest in a patent right" to which it was intended to refer

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in these pleadings was not Murphy's purchase of a half interest in Gilroy's tire patent (which, as already stated, was brought out fortuitously at the trial) but the overdue royalties in respect of the license to manufacture granted by the company to Gilroy under the tube patent. Nevertheless, the purchase money owing by Murphy to Gilroy for this half interest in Gilroy's tire patent right was, in the opinion of the Appellate Division, the consideration for which the note in question was given. For that reason, as the words "*Given for a patent right*" were not written across it, the note was held void and the action was dismissed.

With respect, we are unable to agree with this view.

Consideration must move from the payee. (*Forsyth* v. *Forsyth* (1); *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge* (2)).

The note was a promise by Murphy to pay $2,000 to the Travellers Rubber Company, Limited. The consideration for such a promise could not be a debt due by Murphy to Gilroy; that would afford no reason why Murphy should promise to pay the Travellers Company.

Then if Gilroy, as endorser, paid the note at maturity, Murphy's debt to him would not be extinguished. If Murphy paid it, this debt would be extinguished *pro tanto,* only through the process of set off and not directly because he paid the note. Murphy's debt to Gilroy may have been the motive inducing Murphy to hand over the note to Gilroy; but it was not the consideration for the note between Murphy and the company.

If we should say that the consideration consisted in the royalties due by Gilroy to the company in respect of the license to manufacture under the tube patent, that statement would be more plausible. But the note was not taken in satisfaction of that claim. There was no novation. The company expressly stated in its letter of July 6 that the note was taken "towards payment of the royalties due" but that it "reserved its rights under the agreement in case the note is not paid at maturity." *Currie* v. *Misa* (3).

In final analysis, the real consideration given for the note by the company (the payee) was the extension of time

(1) (1880) 13 N.S. Rep. 380. (2) [1915] A.C. 847.
(3) (1875) L.R. 10 Exch. 153; (1876) 1 A.C. 554.

which it thereby gave to Gilroy for the payment of the royalties due by him. (Chalmers—Bills of Exchange, 9th ed., p. 96, note n.). The company was pressing him. He replied that he had no money but could get a note from a friend. He got the note, endorsed it, and gave it to the company. Having that note, the company agreed to grant a further delay of six months for the payment of the royalties but did not give up its claim for them and did not release Gilroy. The real consideration moving from the company when it accepted the note was, therefore, the extension of time granted to Gilroy.

The following passage from Byles on Bills (18th ed., p. 127) well expresses our views on the point just discussed:

> A subsisting debt due from a third person is a good consideration for a bill or note, at least if the instrument be payable at a future day, for then it amounts to an agreement to give time to the original debtor, and that indulgence to him is a consideration to the maker.

True it is that Murphy professes not to have known at the time that he was accommodating Gilroy, although he has since treated the note as one given for accommodation in an affidavit of merits and in his statement of defence. But the form of the note, in the light of the facts, speaks for itself. Murphy owed nothing to the Travellers Company; yet he was making this note to the order of that company. This fact must have conveyed to him that, at the request of Gilroy, he was undertaking to pay the company for some consideration moving from the latter (even if unknown to him) in which Gilroy was interested and to enable him to obtain which he was accommodating Gilroy, and implied a request from him to the company to accord such consideration.

This case must be distinguished from *Craig* v. *M. & L. Samuel, Benjamin & Co.* (1). There, the makers were not sued as accommodation parties and the payees were cognizant of all the circumstances. In fact, the note had been made payable to their order by their own "contrivance." Further, Mr. Justice Gwynne, speaking for the majority of the court (page 281), says:

> The plaintiffs gave no consideration whatever to Fairgrieve and Craig, or to Craig, or to Fairgrieve, which can support their claim to recover against Craig upon the notes sued upon, and that is the sole question on this appeal.

(1) (1895) 24 Can. S.C.R. 278.

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In *Johnson* v. *Martin* (1), the court was not called upon to decide whether the case was within the statute. The judgment was predicated upon the fact, assumed by court and counsel, that the notes had been given for the purchase money of a patent right. Osler J.A., begins his judgment thus: "The consideration given for the notes in question admittedly was a patent right sold," etc. This judgment, therefore, did not decide that royalties for a license to manufacture were the purchase money of a patent right. If it did, it would have to be overruled, for royalties are not purchase money. They are rather in the nature of rents. Nor is a license to manufacture an interest in a patent. The licensee has no property in the patent. (Fletcher Moulton on Patents, page 240.)

We think, for these reasons, that "the consideration" for the note given by Murphy was not wholly or in part purchase money for an interest in a patent right. The note was not void; the action was rightly maintained against him and the judgment of the trial court should be restored.

In the case of Gilroy, however, a further point remains to be considered, which was raised for the first time at the argument before this court. It was claimed that Gilroy was not really an endorser of the note because he was not the holder when he signed it and he did not sign it for the purpose of negotiation. Section 131 of the *Bills of Exchange Act* was invoked, and it was urged that under it Gallagher could recover against Gilroy only if he was a holder in due course.

Section 131 reads as follows:

131. No person is liable as drawer, endorser or acceptor of a bill who has not signed it as such: provided that when a person signs a bill otherwise than as a drawer or accepter he thereby incurs the liabilities of an endorser to a holder in due course, and is subject to all the provisions of this Act respecting endorsers.

It will be remembered that Gilroy endorsed the note before he delivered it to the Travellers Rubber Company. He did so for the evident purpose of becoming liable on the note to the company; in fact, no other purpose has been suggested. Moreover, under the proviso to s. 131, the case is concluded against him by the judgment of this court in

(1) (1892) 19 Ont. A.R. 592.

Robinson v. *Mann* (1). Gilroy contended that the recent decision of the House of Lords in *R. E. Jones Ltd.* v. *Waring & Gillow Ltd.* (2) had the effect of overruling *Robinson* v. *Mann* (1). We do not think so. *R. E. Jones Ltd.* v. *Waring & Gillow Ltd.* (2) lays down the general proposition, already contained in the judgment of Lord Russell in *Lewis* v. *Clay* (3), that the expression "holder in due course" does not include a payee. And it is argued that, as a result, the Travellers Rubber Company, not being a holder in due course, neither it nor its assignee Gallagher can recover against Gilroy.

We do not accept the proposition that, by force of s. 131, one who signs a bill otherwise than as drawer or acceptor incurs liability only towards a holder in due course, nor do we understand the decision in *Robinson* v. *Mann* (1), to have depended upon the ground (although that view is no doubt expressed) that the payee was looked upon as a holder in due course. The decision was this:

George T. Mann, the respondent, endorsed a note signed by W. Mann & Co., and payable to the Molsons Bank. It was contended that he was an endorser and as such liable to the Bank to which the note so endorsed was delivered. Sir Henry Strong C.J., delivering the judgment of the court, said that "by force of the statute, the endorsement operated as what has long been known in the French Commercial Law as an 'aval'", and that the statute had adopted that "form of liability." (See the explanation of Lord Blackburn in *Steele* v. *M'Kinlay* (4)).

The corresponding section in the English Act does not contain the words "and is subject to all the provisions of this Act respecting endorsers." Ever since *Robinson* v. *Mann* (1) was decided, it has been considered that this addition was made in our Canadian statute with the "intention of adopting the principle of the 'aval', as already in force in the province of Quebec." (Byles on Bills, 18th ed., pp. 163 and 164.)

There is no doubt that, in the light of that decision, the endorsement of Gilroy on the note before the Travellers Rubber Company took it had the effect of an "aval," and made Gilroy liable towards the company and its assignee,

(1) (1901) 31 Can. S.C.R. 484.
(2) [1926] A.C. 670.
(3) [1897] 67 L.J.Q.B. 224.
(4) (1880) 5 A.C. 754, at p. 772.

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Gallagher. Moreover, as was pointed out by Lord Blackburn in the case of *Steele* v. *M'Kinlay* (1) already referred to: "It is not a collateral engagement, but one on the bill"; and this disposes of any argument of Gilroy under the *Statute of Frauds*.

The principle in *Robinson* v. *Mann* (2) was unanimously reasserted in *Grant* v. *Scott*, a later decision of this Court (3), where it was referred to in this way by Sir Louis Davies, the then Chief Justice:—

> It has remained now for many years unquestioned and been accepted throughout Canada as law. I see no reason for raising any doubt now upon its correctness.

To which the present Chief Justice added:—

> That decision has been uniformly accepted as the law of Canada in the provincial courts and by text writers of repute.

And the late Mr. Justice Brodeur said, at p. 229:—

> This section [s. 131] contains an important addition to the corresponding section of the Imperial Act and it would not be advisable then to follow the British decisions.

It is the addition of the concluding words of s. 131 which distinguishes the Dominion from the corresponding English section and makes clear the intention to introduce into our law the principle of the "aval." That we understand to have been the view taken in this court both in *Robinson* v. *Mann* (2) and *Grant* v. *Scott* (3); and, notwithstanding the suggestion made by the distinguished author of "Falconbridge on Banking and Bills of Exchange" (4th ed.), at p. 753, we do not regard those decisions as open for reconsideration here merely because of the holding by the House of Lords in *R. E. Jones Ltd.* v. *Waring & Gillow Ltd.* (4), that the payee of a note is not a holder of it in due course.

The consequence is that the appeal should be allowed, the judgment of the trial judge restored and the action maintained against both respondents with costs throughout.

LAMONT J. (dissenting).—As I am differing with the other members of the court in this case I naturally advance my own views with great hesitation, but I cannot escape the conviction that on the evidence before us the

(1) (1880) 5 A.C. 754, at pp. 772-3.
(2) (1901) 31 Can. S.C.R. 484.
(3) (1919) 59 Can. S.C.R. 227
(4) [1926] A.C. 670.

conclusion arrived at by the Court of Appeal was right. The important question here is one of fact: Did the defendant, Murphy, give the note in question to the defendant, Gilroy, as a payment on account of an indebtedness which arose from the purchase by Murphy of a half interest in a patent owned by Gilroy?

The circumstances under which the note was given are as follows:—

John Schwab was the original owner of patent no. 230027, which was an invention for improving automobile tubes. In December, 1923, he agreed to assign the patent to Gilroy who was to form a company with a capital stock of $300,000 divided into 10,000 preference shares and 20,000 ordinary shares, all of $10 each. Gilroy covenanted that upon the company being organized he would cause 2,500 fully paid up ordinary shares to be allotted to Schwab, and that he would sell 5,000 preference shares as soon as possible, out of which Schwab was to be paid $25,000. Gilroy also covenanted that the company would employ Schwab as superintendent of the manufacturing of tubes under the patent at a salary of $250 a month. A company called the Travellers' Rubber Company was formed and to it Gilroy transferred the patent, and was to receive therefor $25,000 and 20,000 ordinary shares (fully paid up and non-assessable) of the company's capital stock.

On April 24, 1924, Gilroy, Schwab and the company entered into an agreement by which the company agreed to pay to Schwab the $25,000 due him from Gilroy, and Schwab released Gilroy from any liability in reference thereto. The shares of the company would not sell. Only 7 ten-dollar preference shares were ever subscribed for, and $65 was all the money ever received by the company from the sale of its shares (Ex. 7). The company, having no money to manufacture tubes, on January 2, 1925, granted to Gilroy and one Macdonald the exclusive license to manufacture tubes under the patent subject to payment of a royalty of $1,000 for the first year and $2,000 for the second year, and after that 50 cents a tube. At that time Gilroy owned another patent for an improvement in automobile tires.

Some time prior to giving the note in question in this action, Gilroy sold a half interest in the tire patent to

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Murphy for $7,500, and received $3,000 of the purchase money. On June 28, 1926, Gilroy, being indebted to the company for royalties in the sum of $2,000, went to see Murphy (who was an old man seventy-seven years of age) and the note in question, which was made payable to the company, was signed by Murphy. Gilroy endorsed his name on this note and then handed it to the plaintiff on behalf of the company of which he was manager de facto as well as solicitor. At the trial Gilroy gave the following evidence:—

Mr. TOOGOOD: What arrangement was made with Murphy whereby he gave this note?—A. The arrangement with Murphy was that he was to have an interest in my tire patents.

Q. Was that the consideration between yourself and Murphy?—A. Was an interest in my tire patents.

* * * * *

CROSS-EXAMINED BY MR. BULLEN:

Q. You sold Mr. Murphy an interest in a patent?—A. Absolutely.

Q. And he paid you some money on that interest?—A. Yes.

Q. I have a cheque here from Mr. Murphy to Mr. Gilroy for $3,000, endorsed by you?—A. Quite right.

Q. And then subsequently he gave you this note sued on in this action as a further payment?—A. As a further payment.

Q. In connection with the same patent?—A. Yes, and when it came due I was to renew it if he could not pay it.

* * * * *

CROSS-EXAMINED BY MR. ROBERTSON:

Q. On your examination you did say that you never discussed with Murphy the question of an interest in the patents?—A. I did not on the tube patents.

Q. Here is what you say, question 17 * * * "Now what interest in the patent right was he to receive?—A. Never discussed." Is that correct?—A. Quite correct it has never been discussed with Murphy and I, anything in connection with the tube patents.

Q. That is this patent here that this company is interested in?—A. No, this company is not interested.

Q. It was some other patent, was it?—A. Yes, my tire patent.

Q. And you had some dealings with him. As a matter of fact he was going to take an interest in your business?—A. No, in my tire.

Q. Well, in your tire business?—A. Yes.

Q. And question 113 you were asked: "When you were getting Murphy to sign the note did you tell him it was for an interest in a patent right?—A. No." And it was not, was it?—A. An interest in the patent right certainly, it was my tire patent.

Q. Why did you make that answer?—A. It is not in the tube, Murphy is not in the tube patent, in the tire patent.

Q. Some other patent you had. You have not any other agreement in writing with him?—A. No.

Q. And he was to get something and he gave you a note on account?—A. Yes.

HIS LORDSHIP: Mr. Gilroy has given a perfectly straightforward and apparently honest account of the transaction. He owed the company some money, Gallagher wanted to get that money, Gilroy had a deal with Murphy, Murphy gave him this note on account and Gilroy endorsed it over to Gallagher for the company.

* * * * *

BY MR. BULLEN:

I see the note is made payable to the Travellers' Rubber Company, Limited, by Mr. Murphy.—A. Yes.

Q. Why was that done?—A. To give it to the company as royalties.

Q. Mr. Murphy was not in any way indebted to the Travellers' Rubber Company?—A. No.

Q. There was no consideration passing from the Travellers' Rubber Company to Murphy?—A. No.

Q. And the sole consideration was the interest in the patents to you?—A. Yes.

And Murphy testified as follows:—

Q. Who did you give that note to (Exhibit No. 1) It says pay to the order of Travellers' Rubber Company, Limited, $2,000. Who did you give the note to?—A. I presume to Mr. Gilroy, I am not sure.

Q. Now try and think, and don't presume. You gave it to whom?—A. Mr. Gilroy.

Q. Why?—A. For a half interest in his—what is it?

HIS LORDSHIP: For a half interest in what?—A. Tire wasn't it?

MR. BULLEN: For a half interest in a patent to make a tire was it?—A. A tire, yes.

Q. How much was it, how much did you pay for it?—A. $7,500.

Q. And you paid how much in cash at the time you made the agreement?—A. It was $3,000.

* * * * *

CROSS-EXAMINED BY MR. ROBERTSON:

Q. You gave the note to Mr. Gilroy made payable to the Travellers' Rubber Company in order that Gilroy should pay the debt he owed that company, you knew that?—A. I did not know anything about it.

In answer to a question by His Lordship, Gilroy admitted that the body of the note was in his handwriting.

In his judgment, the learned trial judge said:—

The defendant Gilroy owed the T. R. Co. a considerable sum for the right to use a certain patent—he was owed by the defendant Murphy a considerable sum as balance of purchase price of a share in his venture.

* * * * *

When this note was given, the purchase by Murphy of a share in Gilroy's venture had been completed, but Murphy owed a certain part of the purchase money as an ordinary debt—nevertheless the original consideration was the interest in Gilroy's venture. I do not think that the right to manufacture under a patent is an interest in a patent, and *a fortiori* a right to share in the exercise by another of a right to manufacture under the patent cannot fairly be said to be an interest in the patent itself—within the meaning of the statute.

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This, in my opinion, is a clear finding that Murphy gave the note in part payment of the interest which he had purchased from Gilroy. That interest the learned trial judge thought was a share in Gilroy's "venture," meaning, as I understand his language, in the manufacture of tubes under patent no. 230,027. This, I think, was a misconception, as Murphy had purchased no interest in the manufacturing venture, his purchase was a half interest in the tire patent. On the evidence of Gilroy and Murphy, which the learned trial judge accepted, and on the finding, it seems to me impossible to reach any other conclusion than that Murphy gave the note sued on to Gilroy in part payment of the purchase price of a half interest in the tire patent.

Section 14 of the *Bills of Exchange Act* reads as follows:—

14. Every bill or note the consideration of which consists, in whole or in part, of the purchase money of a patent right, or of a partial interest, limited geographically or otherwise, in a patent right, shall have written or printed prominently and legibly across the face thereof, before the same is issued, the words *Given for a patent right.*

2. Without such words thereon, such instrument and any renewal thereof shall be void, except in the hands of a holder in due course without notice of such consideration.

The plaintiff was not a holder in due course, as he took the note after maturity and with knowledge that Murphy claimed that it was given for an interest in a patent right. The note not having the words "given for a patent right" written or printed thereon, is therefore void. *Craig* v. *M. & L. Samuel, Benjamin & Co.* (1).

It was, however, argued that as the note was made payable to the company to whom Murphy was not indebted it must be deemed to be an accommodation note and Murphy must be deemed to be an accommodation party within the meaning of s. 55 of the Act. That section reads as follows:—

55. An accommodation party to a bill is a person who has signed a bill as drawer, acceptor or endorser, without receiving value therefor, and for the purpose of lending his name to some other person.

It was admitted by counsel for the appellant that it was only as an accommodation maker that Murphy could be held liable on the note. To be an accommodation maker Murphy must not have received any consideration therefor

(1) (1895) 24 Can. S.C.R. 278.

and he must have signed it for the purpose of lending his name to Gilroy. Now it may well be said that Murphy received no consideration from the company, but can it be said that he gave the note for the purpose of lending his name to Gilroy? In my opinion it can not. Both he and Gilroy have sworn to the contrary and their evidence has not been contradicted. The only ground upon which the contention that the note was made for Gilroy's accommodation can be based is that the company's name appears therein as payee. This fact, it is said, supports an inference that Murphy in giving the note was lending his name to Gilroy. The probative force to be given to this inference is not, in my opinion, sufficient to override the positive testimony of Murphy and Gilroy that the note was given as a payment on account of an interest in the patent right. The cross-examination of these witnesses as to why the company's name was inserted as payee was most meagre. Practically all the information we have is that Gilroy drew up the note in that form and that Murphy signed it; but Murphy has testified that when he signed it he did not know that Gilroy intended to use it to pay a debt of his own to the company. Counsel for the appellant urged that Murphy had been put forward to the appellant and to the company as maker of a note for Gilroy's accommodation, and reference was made to the evidence of Gilroy in which he testified to a conversation he had with the appellant in which he told the appellant, who was pressing him for payment of the royalties, that he had a friend from whom he might get a note. In answer to this contention it is sufficient to point out that in his testimony the appellant swore positively that no such conversation had ever taken place and that he had never suggested the obtaining of a note by Gilroy. Whether the appellant or the company thought they were getting an accommodation note is, in my opinion, immaterial. They are presumed to know the law and to know that if the note handed to the appellant by Gilroy was in fact given as part payment of an interest in a patent right, the same was void under s. 14, above quoted.

It was argued that Murphy in his pleadings set up that the note was an accommodation note. It does so appear, but whoever drafted his statement of defence evidently set up every defence he could think of. The plea, however, on

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which Murphy relies is clearly set out in paragraph 9, and reads as follows:—

> 9. The defendant, J. E. Murphy, claims that the note sued upon is void, because to the knowledge of the plaintiff it was given for an interest in a patent right without having endorsed thereon the words "given for a patent right."

Then it is said that the testimony of Gilroy and Murphy should not be believed because, on his examination for discovery, Gilroy stated that he had never discussed with Murphy the question of an interest in the patent right. This Gilroy explains, and I think reasonably, by pointing out that his answer was absolutely true as regards the tube patent, which was the patent under discussion in the examination.

It was also pointed out that Gilroy had stated that at the time he obtained the note in question no mention was made of its being for an interest in a patent right. Why should such mention be made? The patent right had been discussed at the time Murphy bought his half interest. When the note was taken there was no occasion for discussing it, the interest had been purchased and the note was merely payment on account.

Our attention was also called to the fact that in a former proceeding Murphy had made an affidavit that the note had been given by him for accommodation only. This affidavit was not in evidence at the trial and it comes before us only by the consent of Murphy's counsel that it might be filed and read. I am at a loss to understand why such consent should be given in the absence of any explanation by Murphy as to how he came to make the affidavit or as to what he understood by making a note for accommodation only. The affidavit not being before the trial court, Murphy, of course, was not asked to explain how he came to make it or what he understood by it. As the trial judge found Murphy's evidence given in court to be credible, I do not think the affidavit can be held to be conclusive against him in the absence of any opportunity on his part to explain it.

I would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Fasken, Robertson, Atchison, Pickup & Calvin.*

Solicitors for the respondent Murphy: *Clark & Brant.*

Solicitor for the respondent Gilroy: *W. A. Toogood.*