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*Feb. 1, 2.
Feb. 24.

F. V. KILLORAN (DEFENDANT).....APPELLANT;

AND

THE MONTICELLO STATE BANK (PLAINTIFF). } RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Bills and notes—Conditional sale agreement—Promissory notes—Notes on same sheet as agreement—Negotiability—Holder in due course—"The Sale of Goods Ordinance" (N.W.T.) C.O. 1915, c. 39.

The appellant bought a horse from one Dygert for $1,700, paid $300 cash and gave two notes of $700 each. Below each note was written an agreement providing that the property in the horse would not pass until the balance of the purchase price was paid; and stipulating that "no holder of said notes by or to whom * * * said notes * * * have been discounted * * * shall be affected by the state of accounts between the subscriber and the promisee or by any equities existing between the subscriber and the promisee, but shall be deemed to be a holder in due course and for value of the notes held by him." Dygert indorsed the notes to the respondent bank for value. The horse died before the notes were paid and the sale was then avoided between the appellant and Dygert under "The Sale of Goods Ordinance."

Held, that the respondent bank was entitled to recover on the notes from the appellant.

Per Idington, Anglin, Brodeur and Mignault JJ.—Under the agreement, the respondent bank was a holder in due course, though it had notice of the contract between the appellant and Dygert.

Per Idington, Duff and Mignault JJ.—These notes were severable from the agreement and constituted in law promissory notes.

Judgment of the Appellate Division ([1920] 3 W.W.R. 542) affirmed.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of Walsh J. at the trial (2) and maintaining the respondent's action.

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*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) [1920] 3 W.W.R. 542. (2) [1920] 3 W.W.R. 17.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

W. L. Scott for the appellant.

A. B. Hogg for the respondent.

IDINGTON J.—The appellant signed what are in due form two ordinary promissory notes for $700 each That was followed on each of the same sheets of paper at the respective heads of which each of said promissory notes had been written and signed by appellant, by an agreement purporting to be made between said appellant and Dygert, the payee of each of the said promissory notes.

Each of these agreements was signed by appellant but not by Dygert.

Each of the same has indorsed on it an affidavit, purporting to have been sworn to by Dygert; first stating that he is the owner or bailor of the goods mentioned in the written agreement; that said copy of agreement is a true and correct copy of the agreement of which it purports to be a copy, and that

> 3. The said agreement truly sets forth the agreement between myself and the said F. V. Killoran the parties thereto, and that the said agreement therein set forth is *bona fide* and not to protect the goods in question mentioned therein against the creditors of the buyer or bailee.

These promissory notes were indorsed to another party who re-indorsed to respondent who sued to recover same.

The learned trial judge treated each of these promissory notes, and what followed, as one document, and together as an ordinary lien note.

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He then applied or sought to apply sections 9 and 22 of the "Sales of Goods Ordinance" of Alberta thereto and found that the effect thereof, in the event of the death of the stallion, (which was the property agreed to be sold) and which event took place before payment of the said promissory notes, was that the obligation to pay ceased, and dismissed the action.

In the Appellate Division this judgment was reversed and judgment given for the respondent for the amount of the said promissory notes and interest with costs.

Against that judgment this appeal is taken.

The said alleged promissory notes I must hold to be in law promissory notes, and the respective agreements following each, a merely collateral agreement which may or may not have some operative effect between the parties thereto, but cannot effect, even with notice thereof to the respondent taking them in due course, its rights to recover.

In each of these agreements was a clause designed to stop the appellant from denying that indorsees in due course could be otherwise than such.

In my view it is not necessary to follow up all the manifold views that may be taken of the curiously worded agreement.

The respondent was not a party thereto. There was no proof of failure of consideration, nor could there be under such very peculiar circumstances.

The whole contrivance of each of the said supplementary documents and all that followed each, may, if persisted in as a mode of doing business, lead to much litigation, and may result in disappointment to those using it when that has run its course, but for the present case all that has to be determined is that each of the documents first signed is a promissory note, to the suit upon which no effectual answer has been set up.

Of the curiosities I have found in my search for what might be an answer, I may refer to the cases cited in Byles on Bills, 17th ed., page 251. And of these the case of *Salmon* v. *Webb* (1), in its essential features, including the non-execution of the agreement by the promisee, alike to this, determines in principle how a mere collateral agreement may fail to operate against those holding in due course.

I need not enlarge but may, in deference to the argument presented by counsel for appellant, say that I doubt if his contention for the narrow meaning he claimed for the phrase

any equities existing between the subscriber and the promisee

used in the said agreements, so called, is tenable.

I think the appeal should be dismissed with costs.

DUFF J.—I have no difficulty in concurring with the view of the Appellate Division that the instruments sued upon are promissory notes. In each case there is, it is true, on the same piece of paper one of these instruments and a collateral agreement, but the collateral agreement is no part of the instrument sued upon. By its express terms, indeed, it is not to qualify the absolute obligation of the promissor or to affect the contractual rights of the parties in such a way as to impair the negotiability of the note.

The appeal should be dismissed with costs.

ANGLIN J.—Assuming in the appellant's favour, but without so deciding, that although there is much in the terms of the documents to support the contrary view, the instruments sued upon were not promissory notes, the agreements in my opinion make it clear

(1) [1852] 3 H.L. Cas. 510.

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that the respondent, as a holder with whom the notes had been discounted, is entitled to all the rights which would have attached to its position were the instruments promissory notes of which it was the holder in due course. I cannot understand for what other purposes it was stipulated that

> no holder of said notes by or to whom * * * said notes * * * have been discounted * * * shall be affected by the state of accounts between the subscriber and the promisee or by any equities existing between the subscriber and the promisee, but shall be and shall be deemed to be a holder in due course and for value of the notes held by him.

As "a holder in due course," the respondent is, in my opinion, entitled to recover, whatever might have been the rights of R. F. Dygert had the notes remained in his hands.

On this ground I would dismiss the appeal with costs.

BRODEUR J.—Killoran agreed to purchase from a man named Dygert a horse for $1,700 on which he made a part payment of $300 and signed for the balance of the purchase price two instruments which I might, for the sake of this decision, call lien notes. There is a difference of opinion in the courts below as to whether these instruments should not be considered as promissory notes. But I do not feel obliged in view of the conclusion I have reached to decide this point.

These instruments stipulate that the property of the horse would not pass until the balance of the purchase price would be paid and they contain the following clause:

> These notes * * * may be discontinued, pledged or hypothecated by the promisee and in every such case payment thereof is to be made to the holder of the notes instead of the promisee, and *no holder* of the said notes * * * shall be affected by * * * any equities existing between the subscriber and the promisee, *but shall be, and shall be deemed to be a holder in due course* and for value of the notes held by him.

Dygert indorsed these instruments and besides made a written assignment of them to the plaintiff who now sues Killoran, who signed them.

Killoran contends that the sale of the horse has been avoided under the provisions of the "Sale of Goods Ordinance Act," which declares, in section 9, that

> where there is an agreement to sell specific goods and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided.
>
> Unless otherwise agreed the goods remain at the seller's risk until the property therein is transferred to the buyer; but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not.

In the present case, the goods were delivered, but the property thereof remained with the vendor, they are at his risk and between the vendor and the purchaser the sale should be considered as avoided since the horse sold died before it became the absolute property of the purchaser. *Res perit domino.*

But as far as the transferee is concerned, the situation is different, in view of the provisions of the contract made by the appellant. The latter has agreed that the notes could be transferred and that the holder should be considered as a holder in due course in spite of the notice he might have of the contract between the vendor and purchaser. He contracted himself out of the right of resorting as against the assignee of the creditor to his equities against the creditor himself. (Leake on Contracts, 6th ed., page 865).

This holder should then be considered in the light of this agreement as if he were a holder in due course without notice under the provisions of the Bills of

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Exchange Act. He can recover the payment thereof, though the sale of goods which has brought the signature of these instruments is avoided.

I am of the opinion that the plaintiff is entitled to recover.

The appeal fails and should be dismissed with costs.

MIGNAULT J.—I have duly considered all that Mr. Scott said in his very able argument for the appellant and in the memorandum which he has since filed. Nevertheless, in my opinion, the appeal cannot be sustained.

The promissory notes sued on, although printed on the same sheet of paper as the agreement for the sale of the stallion, are, I think, severable from this agreement, and constitute perfectly valid promissory notes which could be transferred, as was done here, by indorsement. Consequently even if the contract was terminated between the parties by the death of the stallion, the rights of the respondent as holder in due course of these notes are unaffected thereby.

I also concur in the reasons for judgment of my brother Anglin, as a further ground for the dismissal of this appeal.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *McDonald, Martin & Mackenzie.*

Solicitor for the respondent: *A. B. Hogg.*