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BURDEN OF PROOF OF FRAUD IN THE INCEPTION OF NEGOTIABLE INSTRUMENTS

By FRANCIS E. DAILY

Ninety per cent of the payments made for exchange in inter-state commerce are made by means of commercial paper. Until the comparatively recent adoption of the Negotiable Instruments Laws, by the several states, the interpretations of the laws governing negotiable instruments were not uniform.

One of the most controverted matters of negotiable instruments was that of the burden of proof in case the instrument had been contaminated with fraud in its inception. For instance, if A made a promissory note to B, who obtained it through fraud, and B sold the same note to C, who had knowledge of the fraud, the question is asked: Upon whom does the burden of proving that the note was obtained through fraud rest? And upon whom does the burden of proving that the present holder had knowledge of the fraud rest? The Negotiable Instruments Laws, in section 59, recites, "Every holder is deemed *prima facie* to be a holder in due course; but, when it is shown that the title of any person who has negotiated the instrument was **defective, the burden is upon the holder to prove that he or someone else under whom he claims acquired the title in due course.**" In regard to a defective title,, a title is said to be defective within the meaning of this act when the person obtains the instrument, or any signature thereto, by fraud, duress, or force or fear, or other unlawful means, or for an illegal consideration, or when such person negotiates the instrument in breach of faith, or under such circumstances as amount to fraud.

The enactment of this law makes it incumbent upon the holder of the instrument, fraudulent from its inception, to prove that he has acquired title to the instrument, free from any knowledge of the original fraud, and in good faith. But, any holder of a negotiable instrument, which is valid on its face is presumed to be a holder in due course, as set out in the above cited, section 59, of the Negotiable Instruments Laws. The de-

defendant maker, however, may defend his case upon the affirmative defense of fraud. After having pleaded this defense, it is incumbent upon the defendant maker to come forward with the evidence of the fraud.

The minority view, upon the question of the burden of proof, in case the instrument has been secured through means of fraud, is that the defendant maker still assumes the burden of proving that the holder had knowledge of the fraud, after he has proved the original fraud. "If the endorsee of the note under the payee's fraud proves that he bought it before maturity, the maker has the burden of proving the notice." *Kenner v. Almon*, 202 Alabama 367, 80 Southwestern 449. *Engler v. Williams*, Missouri Appellate, reported in 23 Southwestern 671. Such holding, however, is in the small minority.

The defendant is entitled to have the evidence of fraud submitted to the jury. This is stipulated in *Johnson County Savings Bank v. Redfearn et al*, (Missouri) 125 South Western 224, "Where the defendant maker, of a note pleads fraud as a defense, the evidence tending to prove fraud is evidence that should be submitted to the jury." In *Rangley v. Harris, et ux*, reported in 81 Southeastern 346, it is held that, "a question whether the notes or checks were procured through a fraudulent conspiracy entered into between the plaintiff and another, the evidence should be submitted to a jury."

If the defendant maker offers satisfactory proof that the notes were procured through fraud, by the original payee, or one claiming under him, and the plaintiff offers no evidence that he secured the notes in good faith, the defendant is entitled to a verdict. 115 N. Y. Supplement, 1074. And, 109 Pacific 596. Also, 78 Atlantic, 1002. But, if the plaintiff proves satisfactorily that he purchased the instrument in good faith, and such proof is not refuted by the defendant maker, then the plaintiff is entitled to a verdict. In *Leavitt v. Thurston*, 38 Utah 351, 113 Pacific 77, this point is clearly discussed. The court recites that, "Upon proof of fraud by the payee, casts upon the holder not merely the duty of going forward, but the burden of proving that he or someone else under whom he claims, acquired title as a holder in due course." The burden of proof remains upon the holder and does not shift, though the burden of proceeding may

shift even though the defendant introduce evidence to contradict the plaintiff, since upon this point the defendant is entitled to have the case submitted to the jury."

This matter requiring the plaintiff to prove that he is a holder without knowledge of the fraud requires proof by a preponderance of the evidence, that is, by the weight of the evidence. *Hurley v. Wilby* 18 Arizona 45, 156 Pacific 83.

In federal courts the burden of proving fraud and that the plaintiff was apprised of it, is upon the defendant maker. This seems to be based upon the rules of evidence. *Young v. Lowry* 192 Federal Reporter 825. And, *Washington, etc., Ry. Co. v. Murray* 211 Federal Reporter 440.

If there is an apparent alteration of a negotiable instrument, by the payee, then a different question arises as to the burden of proof, yet, not very dissimilar. When an instrument is so altered as to create the suspicion of the person holding, the purchaser, is obligated to explain this. *Arnold v. Wood*, 127 Arkansas 234, 191 Northwestern 960. Also, *Peevey v. Buchanan*, 133 Tennessee 24, 173 Southwestern 447. But, if an instrument is apparently unaltered, and is valid upon its face, the holder is presumed to be a holder in due course, as is above stated, and it is then incumbent upon the defendant maker to prove that the instrument has been altered. *Wagar v. Tobin* 104 Kansas 211, 178 Pacific 751. *Kapp v. Levysen* 58 Oklahoma 651, 160 Pacific 457. The minority view upon this question, is, in effect, that such rule has no application in civil cases, but only in criminal cases. *Harvard Law Review* 202, 213.

Therefore, the plaintiff holding a negotiable instrument is presumed to be a holder in due course. The presumption obtains until the defendant maker proves by a preponderance of the evidence that there was fraud in the inception of the instrument. Thus, it becomes incumbent upon the plaintiff to prove that he is a purchaser in good faith, also by a preponderance of the evidence. And, in cases of alteration by fraud, the presumption still obtains, unless on the face of the instrument there is something to create suspicion, when, the plaintiff must immediately explain such apparent alteration, otherwise, the defendant must prove that there has been no alteration made.