13/150. Distgd. in Winship Mer. Natl. Bk. 42/24. v.

BERTRAND ET AL. *vs.* BARKMAN.

It is a general rule of law, in reference to commercial notes, that where it is shown in an action against the maker of a note, by the holder, that it was without consideration, or that the consideration has failed, wholly or in part, or that it was fraudulently put in circulation, the holder, to protect himself against the equities of the maker, must show that he acquired the paper *before it matured,* and that he is a bona fide holder, for a valuable consideration—in other words, that he received it in due course of trade for value.

To constitute one a bona fide holder, for a valuable consideration, within the meaning of this rule, he must not only have had no notice, express or implied of the equities of the maker, but he must also have given either money or property in exchange for the note, or have received it absolutely and unconditionally in payment of a pre-existing debt, and relinquished some available security, or some valuable right on the sole strength of the identical paper so innocently received in due course of trade.

When, however, the note is transferred only by way of indemnity against probable future loss, or from an existing liability, or of collateral security for a pre-existing debt, it is not such a holding for value as comes within the rule.

Appeal from Chancery side of Clark Circuit Court.

THE facts of this case are substantially as follows: On the 12th April, 1844, co-partnership articles were entered into at New Orleans, in Louisiana, by notarial act, between Jacob Barkman, of Arkansas, and John G. Pratt and Seth E. Belknap, of New Orleans, by which the parties associated themselves as Cotton and Commission Merchants, to carry on business in New Orleans. The partnership to commence from June 1st, 1844, and continue for five years; and it was stated that Barkman had that day delivered in as stock $10,000, and each of the others $5,000. Pratt and Belknap were to be the managing partners, and all charges and expenses were to be paid, and all profits and losses shared, equally by each. It was provided that no acceptances, endorsements or advances should be made, except with the consent of all the partners, unless required for supplies of necessaries for customers, or when produce was on hand: that the funds so originally advanced by each should not be withdrawn except by consent of all the partners, until the expiration of the five years, and that in the case of the death of one partner, the survivors should carry on the business.

Barkman, as part of the $10,000 mentioned in these articles, executed his note to the firm of J. G. Pratt & Co., dated 15th of June, 1844, and payable eight months after date, which he delivered to Pratt, and took his receipt the 24th October, 1844.

On the 26th April, 1845, Bertrand received this note from Townsend Dickinson, to whom J. G. Pratt & Co. had endorsed and delivered it; and who endorsed it to him; and receipted for it, stipulating that, when collected, $3,720 was to be paid to Mrs. A. J. Clarke, with interest, and, deducting collection fee, the residue was to be paid to Dickinson.

On this note, Bertrand sued, in debt, in Clark circuit court, to September Term, 1845.

Barkman appeared; and pleaded: 1st, *nil debet;* 2d, that the note was endorsed and assigned by Pratt & Co., to Dickinson

for the purpose of enabling him as their agent to negotiate a sale of it, to raise money for the firm, and for no other purpose: that while Dickinson held the note, and before he endorsed it, the firm became indebted to Barkman $8,000, for so much money, &c., and offered to set off:

To this 2d plea, four replications were filed:

1st. That the note was made and negotiated in Louisiana, and that by the law of that State the effect of such making and endorsement, and the liabilities arising under them, were governed by the Law Merchant, by which the maker could not set off against the endorsee any demand against the payee.

2d. That Barkman was one of the firm, and so was one of the payees and endorsers, as well as maker.

3d. Denial of the indebtedness pleaded in set off.

4th. Averment that the endorsement to Dickinson was for consideration: traversing that it was assigned to him as agent for collection.

To the 1st replication, Barkman rejoined that by the law of Louisiana, the liabilities under the making and endorsement, were not governed by the Law Merchant.

To the 2d, he demurred, on the ground that the fact of Barkman being partner did not preclude him from pleading the set off.

To the 3d and 4th, he took issue.

The demurrer to the 2d replication was overruled, and Barkman rejoined, denying the partnership.

Barkman then filed a new plea, which was ordered to be taken from the files. He then offered to withdraw his second plea, and file the new plea in lieu of it, and the court refused to allow it. He reserved the point, but filed no Bill of Exceptions.

On the 10th September, 1846, it was entered of record that the parties appeared and desired no jury, but desired the court to sit as a jury: that the cause was submitted, the testimony heard, "and the defendant moved the court to withdraw the issue joined in this cause, and let judgment go for the plaintiff." Judgment, therefore for $5,000 debt, with interest at 6 per cent from 16th February, 1845, till paid; and costs.

At a subsequent term, a further order was entered, to this effect: That the parties appeared by their attorneys, and Barkman showed the court that the judgment entered 10th September, 1846, was not entered in accordance *with the minutes of the clerk and the facts of the case;* and the court being sufficiently advised of the truth of the case, did order that the record be amended, and a new judgment be entered *nunc pro tunc,* according to the facts of the case. The new judgment then follows, in the same terms as before, except that it states that the testimony being heard, it was on motion of plaintiff *excluded* "on the ground that it constituted a defence in chancery;" whereupon the defendant moved for leave to withdraw, and did withdraw all the pleas and issues in the case. *To this, Bertrand objected.*

In February, 1847, Barkman filed his Bill in Chancery, against Bertrand, Mrs. A. J. Strong, Pratt, Belknap, Dickinson and Jas. D. Carr.

It set out the making of the partnership, the execution of the articles, the execution of the note as part of the capital; and went on to aver:

That in the spring of 1845, Pratt & Belknap, wishing to raise funds, without Barkman's knowledge or consent, sent Dickinson to Memphis to negotiate the note for cash, and for that purpose alone endorsed it to him. That, Dickinson failing to raise the money on it, went to the east, and while in Baltimore, Lorenzo N. Clarke, Mrs. Strong's first husband, on his death-bed confided to Dickinson the money he had with him, amounting to several thousand dollars, which he improperly made use of. That on hearing this, Bertrand, Mrs. Clarke's brother, (she being her husband's executrix,) went to the east, overtook Dickinson, and not getting the money, went with him to New Orleans, on his promise that there he would give him satisfactory security; Dickinson all the time having the Barkman note, which he made known to Bertrand, and told him that, if he could obtain the consent of J. G. Pratt & Co., he would transfer it to him: that he apprised him of the object for which it was put in his hands: that in New Orleans, Bertrand threatened him with exposure and pro-

secution, and prevailed on him to deliver him the note, endorsed in blank, without the knowledge or consent of John G. Pratt & Co., and receipted for it as above stated; and immediately left New Orleans. That Dickinson was notoriously insolvent, and Bertrand knew it; and as soon as he got Bertrand's receipt, he assigned it to Jas. D. Carr, who, when he received it, knew how Dickinson came by it, and that he had no real interest in it.

It then states the suit at law, and exhibits the proceedings, and avers *that at the time the action at law was pending, he was not apprised of the facts before stated, and could not have had the benefit of them at the time.*

It averred that, when the note was assigned, he had advanced and paid for the firm $8,297.15; and Pratt & Belknap had promised to give up the note: that the note was fully paid when transferred, and by the law of Louisiana was extinguished: Pratt and Belknap having paid nothing into the firm.

The bill exhibited special interrogatories; and prayed injunction, which was granted.

It appeared from the exhibits that, at September term, 1845, in the suit at law, Barkman swore that he could prove by two living witnesses that the firm was indebted to him, as alleged in his plea of off-set, and that Dickinson had possession of the note only as agent of the firm: And it also appears from the same exhibits, that the new plea which he wished to file, set up the fact that he was a partner in the firm. In March, 1846, he again applied for and obtained a continuance to get testimony to prove that, before assignment of the note, he had paid it, it was to be given up, and he demanded it.

Order of publication was made against Pratt, Belknap, Carr and Dickinson, as non-residents. Subpœna was executed on John H. Strong and Arabella his wife, and Bertrand.

Bertrand answered. So far as his answer is material to be stated, it is, that he knows nothing about Barkman having paid in his share of the capital, except that in the spring of 1845, Pratt complained that he had not done so: that he knows nothing

about Pratt's receipt for Barkman's note, nor about its being delivered to Dickinson to negotiate at Memphis.

He states that Clarke died in Baltimore, and Dickinson received his money, and he (Bertrand) went on after it, as the bill states: that Dickinson told him he had remitted it to New Orleans, for safe keeping, and if B. would go to New Orleans with him, he would pay it over: that he did so, and on the day after their arrival, D. paid him $500, and told him the residue was used; but he had a note on Barkman which was good, and he would turn it over, it being for $5,000: that he (B.) asked to see the note, and D. said he would go and bring it, which he did, and transferred it. That no threats were used: that whether the transfer was with the knowledge and approval of Pratt & Co., respondent does not *know,* but believes and then believed that Pratt & Co. got Clarke's money or the greater portion of it, and transferred the note to Dickinson, that he might settle the matter.

He denies leaving the city in haste; and avers his belief that Dickinson made the transfer in good faith, and had the consent of the firm. Denies knowing that D. was insolvent.

He absolutely denies any knowledge that Dickinson held the note as agent, or did not own it, and avers that D. told him it was his: that he never knew of the existence of the note at all, until after he reached New Orleans: that he went to New Orleans, expecting the money was there, and he should get it, and so expected, until, on examining Clarke's belt, it was discovered that it had been "*used.*"

John H. Strong's answer, as far as it need be stated, is—that when it was learned in Arkansas that Clarke was dead, he too proceeded to Baltimore, met Dickinson as he crossed the Alleghany Mountains, turned back, and overtook him at Louisville, and found Bertrand there also—demanded the money, and was told by D. that he had remitted it to New Orleans. That, on getting to New Orleans, the belt of Clarke was examined, and the money found to have been used, to the amount, according to D's admissions, of $3,720. That D. said that he had not the money, but could give, in place of it, Barkman's note, endorsed

by Pratt & Co., and B. and Strong told him that if such a note could be obtained, and there was no objection to be made to it, they would take it. He said he could get it, by going to the house of Pratt & Co., went, and in a few minutes returned with it, and solemnly declared it to be every way good, and subject to no defalcation or discount, and they received and receipted for it. That respondent never heard of the note, until within an hour of its transfer: that no threats were used at all, and Dickinson voluntarily offered the note to them. Avers that he believes Pratt & Co. got Clarke's money, and turned over the note to Dickinson, knowing and approving the disposition he was about to make of it. Denies that Barkman did not know all the facts when the suit at law was pending, and avers that he did know all. Denies that Barkman had paid off the note, and avers that that question was actually tried in the suit at law.

Strong died, and by consent his answer was taken as the answer of his widow.

Carr answered. He denied taking an assignment of the receipt with any knowledge or suspicion that Dickinson was not entitled to it, and alleged that on the 21st December, 1844, he advanced D. $142, and on the 25th January, 1845, $475, and afterwards, to secure himself, purchased the residue appearing to be coming to D. on the receipt of Bertrand, and paid him the money for it: fully believing that he owned it, and was entitled to assign it.

The case was heard on bill, answers, replications, exhibits and testimony. The testimony was as follows:

J. E. M. Barkman testified that, about the 15th of March, 1845, Barkman paid in New Orleans, for the firm of Pratt & Co., $4,100, and had previously paid $2,000.

H. K. Hardy testified that, in December, 1845, he went to New Orleans to settle up the affairs of Pratt & Co., and found, from the books of certain other firms there, and their statements, that Barkman had paid for the firm, about March, 1845, over $5,000.

Henry F. Olmstead was book-keeper for Pratt & Co. He proves that the note was given to Dickinson for the purpose of

raising money on it in Memphis, and money was furnished him to pay his traveling expenses: that the firm never owed Dickinson anything, nor never received of him value for the note, and that he passed it away without the authority, knowledge or consent of the firm: that Dickinson was indebted to the firm, and considered notoriously insolvent.

Wm. W. Woods repeats a conversation between himself and Bertrand, in which there is nothing of any importance, except that B. told him that, when in New Orleans, he told Dickinson that unless he paid over the money, one of them should not leave the room alive, and that he left the city the same evening.

The deposition of John G. Pratt, one of the firm, was suppressed, and the complainant excepted. The ground of its suppression was his being a member of the firm. The deposition proved that the note was given to Dickinson to raise money on in Memphis, and for no other purpose, and that the firm received nothing from him for the note.

Woods testified that, in the spring of 1846, he delivered to Pratt & Belknap a release and discharge from Barkman, for all claims against them in his favor on account of the firm.

The court made the injunction perpetual: and the defendants appealed.

PIKE & CUMMINS, for the appellants, contended that the holder of negotiable paper transferred by an agent will be protected, though the agent transferred it fraudulently, if the holder was ignorant of the fraud and paid value for it, or received it in the usual course of trade; and that the payment of a pre-existing debt was value, and a good consideration for the transfer. *Grant v. Vaughn,* 3 *Burr.* 1516. *Bay v. Coddington,* 5 *J. C. R.* 56. *Collins v. Martin,* 1 *Bos. & Pul.* 648. *Jarvis v. Rogers,* 15 *Mass.* 373. *Peacock v. Rhodes,* 1 *Doug.* 613. *Swift v. Tyson,* 16 *Peters* 1. *Bank of Salina v. Babcock,* 21 *Wend.* 499. *Bk. Sandusky v. Scoville,* 24 *Wend.* 115. *Stalker v. McDonald,* 6 *Hill* 93. *Holmes v. Smyth,* 4 *Shep.* 117. *Brush v. Scribnor,* 11 *Conn.* 388. *Lewis v. Hodgson,* 5 *Shep.* 267. *Dudley v. Littlefield,* 8. *id.* 418. *Smith*

v. Hiscock, 2 *ib.* 449. *Bush v. Peckard,* 3 *Harring.* 385. *Riley v. Anderson,* 2 *McL.* 589. *Nichol v. Bate,* 10 *Yerg.* 429. *Carlisle v. Wishart,* 11 *Ohio* 172. *Story on Bills, sec.* 192. *Story on Prom. Notes, secs.* 186, 195. *Williamson v. Little,* 11 *N. Hamp.* 66. *Jenners v. Bean,* 10 *id.* 266. *Clements v. Leveritt,* 12 *N. Hamp.* 317; and in such case the assignment has the same effect as if made by the principal, who enables the agent to hold himself out, and actually makes a transfer, as if he was the owner.

That, although the holder of a note endorsed after it is due, takes it subject to all the equities between the parties, yet, in the case at bar, the appellee was the endorser, being one of the firm of Pratt & Co.; and the endorsement by the firm, was the same, in legal effect, as a new note by Barkman; that Barkman himself, as one of the endorsers, put the note in circulation, and this endorsement was a direct promise to pay.

F. W. & P. TRAPNALL, for the appellee. That the note was placed in the hands of Dickinson for a particular purpose, and the endorsement to Bertrand was a fraud upon Pratt & Co.: that Bertrand did not buy the note nor receive it in the usual course of trade, nor pay a valuable consideration for it: that it was placed in his hands as security for a pre-existing debt, not as a satisfaction or in extinguishment of the debt, and therefore, taking it after due, he held it subject to the equities of the original parties. *Bay v. Coddington,* 5 *J. C. R.* 20 *John.* 646. *Colt v. Lignier,* 9 *Cow.* 320. *Wainer v. Brearly,* 8 *Wend.* 194. *Id.* 423. *Rosa v. Brotherton,* 10 *id.* 85. *Ontario Bank v. Worthington,* 12 *id.* 598. *Payne v. Cutler,* 13 *Wend.* 606. *Stalker v. McDonald,* 6 *Hill* 93. *Kenny's Law Comp. for* 1845, *page* 41. *Brush v. Scribner,* 11 *Conn.* 388. *Holmes v. Smith,* 4 *Shepley* 117. *Petrie v. Clark,* 11 *Serg. & Rawle* 377; and the receipt in this case, clearly shows that the endorsement was not made for the purpose of paying the debt due from Dickinson, but to enable Bertrand, as attorney, to collect the note, for which he was to account to Dickinson.

Mr. Justice SCOTT delivered the opinion of the Court.

Barkman filed his bill for relief by injunction against a judgment at law, obtained by Bertrand, as endorsee against him upon a commercial note made payable by himself, at eight months, to a mercantile firm in New Orleans, of which he was a member; which note was by that firm endorsed in blank, and placed in the hands of Dickinson, their agent, for a particular purpose, who, after its maturity, passed it to Bertrand in that city as his own, who afterwards filled up the blank endorsement to himself, and obtained the judgment in question.

There can be no doubt of the general proposition of law in reference to commercial notes, that when it is shown in an action against the maker, by the holder, that it was without consideration, or that the consideration has failed wholly or in part, or that it was fraudulently put in circulation, that the holder, to protect himself against the equities of the maker, must show that he acquired the paper before it matured, and that he is a *bona fide* holder for a valuable consideration, or, to speak more technically, it must have been received in "due course of trade," for value. This proposition is so indisputably fixed, that it is unnecessary to resort to reasoning or to cite authority to sustain it. It may not be amiss, however, to remark that this rule is not founded on the maxim of the equity courts, that "that where the equities are equal, the law shall prevail," although in many cases of its application, the doctrine of the maxim would be co-incident, because, in many other cases where the rule has just application, the spirit of that maxim will be outraged. Nor is the rule founded upon any notion that the assignment itself of the chose in action so changes the subject of the negotiation as to make it the evidence of a debt in the hands of an assignee, when in truth and in fact no debt existed; because no man can, by mere act of assignment, transfer a greater interest than he has, nor make that good and valid which is vicious and void. The assignment, whether by endorsement or delivery, but conveys the legal title and gives the right of action, and does not itself bar the equities.

But the equities are cut off by the rule in question, which is an arbitrary rule of commercial policy, to facilitate trade and sustain commercial credit, because of the quality of such paper "as a currency, and from the necessity of adopting such a principle for the convenience of trade and commerce with respect to such currency," (per SPENCER ROANE, Judge, in the case of *Norton v. Rose,* 2 *Wash. R.* 249.)

In view of this rule, stated thus generally, it is manifest that Barkman, as maker of the note in question, cannot be barred of his equities against Bertrand as holder, under the facts as alleged and proved in this case, because it is not pretended that Bertrand acquired the paper before its maturity, to say nothing of the other indispensable ingredient of being at the same time a *bona fide* holder, for valuable consideration, within the meaning of the rule. And in order to constitute him such, he must not only have had no notice express or implied of Barkman's equity, but he must also have given either money or property in exchange for the note, or have received it absolutely and unconditionally in payment of a pre-existing debt, and relinquished some available security or some valuable right on the sole strength of the identical paper so innocently received in due course of trade.

This we lay down to be the law, after having carefully examined all the numerous authorities throwing light on this subject that are cited in the briefs, except the case cited from 11 *Conn. R.* which we have not been enabled to obtain. But we find that the Alabama decisions not cited sustain what is represented by counsel of this Connecticut case.

Some of these authorities, by courts of the highest respectability, fall short of this position, and hold that even the absolute extinguishment of a pre-existing debt, is not a holding for value within the rule, and that nothing is such beyond a present transfer of property or money in exchange for the note, and that when such transfer is partial only and not to the full value of the note, then such holder is to be considered as a *bona fide* holder for value *pro tanto.* But this question, as to the extinguishment of a pre-existing debt, came up directly before the Supreme

Court of the United States in the case of *Swift v. Tyson,* (16 *Peter R.* 1,) and it was held by the whole court as sufficient to satisfy the rule, and this is in accordance with what we think is the overwhelming current of decisions. Judge STORY, however, who delivered the opinion of the court in that case, went out of the record and asserted beyond this, that a negotiable note or bill pledged as collateral security would stand on the same footing as one purchased in market for money, or taken in extinguishment of a previous debt. Judge CATRON, however, in that case dissented from all that was beyond the record, and subsequently Chancellor WALWORTH, in the case of *Stalker v. McDonald et al.,* (6 *Hill R.* 93,) examined in detail all the authorities referred to by Judge STORY to sustain his views, and shows very satisfactorily that they were, in a great degree, misconceived.

When, however, the note is transferred only by way of indemnity against probable future loss, or from an existing liability, or of collateral security for a pre-existng debt, it is not such a holding for value as comes within the rule. Besides the New York authorities, this qualification of the rule in question is directly sustained by the cases of *Cullam v. The Br. Bk. at Mobile,* (4 *Ala. R.* 21,) and *Andrews & Brothers v. McCay,* (8 *Ala. R.* 920,) and is supported by other cases in that State, besides the support it receives from Pennsylvania, (*Petrie v. Clark,* 11 *Serg. & R.* 388,) *Maine,* (*Holmes v. Smith,* 4 *Shep. R.* 177,) *Connecticut,* (*Brush v. Scribnor,* 11 *Conn.* 388,) where we learn from the report of the case of *Carlisle v. Wishant,* 11 *Ohio R. at page* 176, that the Connecticut court say, "Negotiable notes, bills of exchange and bank notes, are all placed on the same footing and for the same reason."

But, above all, this qualification of the rule in question, is sustained by the very reason of the rule itself, because as we have seen in the outset, the rule obtains because of the "quality" of such paper as a "currency." So long, therefore, as such paper may be exchanged for money or for property, or may be used to extinguish a debt, or may evidence the surrender of an available security, or of some valuable right upon the sole strength of the

transfer of such paper, it does the office of a currency; but when it merely serves as indemnity against future probable loss or an existing liability, or of collateral security for a pre-existing debt, it does not perform that office in the sense of currency representing value, and as such, the medium of the transfer of rights and the extinguishment of obligations, and the facilitator and expander of trade and commerce.

If, then, as a matter of fact in the case at bar, it be true that the note in question was not transferred to Bertrand in exchange for money or property, or in payment absolutely and unconditionally of some pre-existing debt, or upon the relinquishment of some available security, or of some valuable right in the sole strength of the identical note, so immediately received by him in due course of trade, it will not be exempt in his hands under the rule in question from all the latent equities of Barkman as maker. On the contrary, it will be open to every defence he could make as such, if the note in question was still held and owned by the payees; because, in the language of Chief Justice EYRE, in the case of *Collins v. Martin,* (1 *Bos. & Pull. R.* 651,) "If it can be proved that the holder gave no value for the bill, then, indeed, he is in privity with the first holder, and will be affected by every thing which would affect the first holder."

But, although upon finding such fact in this case, the way will be opened to Barkman, as maker, to bring forward his equity, as we have already seen he could do upon the other ground, that is, because Bertrand did acquire the note before it matured—nevertheless it will be unnecessary for us to consider his equity as maker, because it is insisted that, although he may be entitled to relief in that character, still, Bertrand can recover of him in his character of endorser, either as such technically, or because the legal effect of his endorsement under the circumstances, was a direct undertaking to Bertrand.

In any view, however, we have to determine whether Bertrand is a holder for value within the rule in question as expounded; because, whether Barkman proceeds for relief as maker or endorser, it will be equally availing so long as Bertrand defends

himself upon the doctrines of the law merchant as contradistinguished from a mere equitable defence. And waiving in this inquiry all question, whether or not any one can be such holder within the rule, who holds the bare legal title to the bill or note for the use of another who has paid the value, and whether or not, under the circumstances, the party whose interest is sought to be set up in the name of the nominal holder, would stand only on the footing of an assignee, we shall proceed to determine this point in the case at bar without any reference to that quēstion.

Although, in general, commercial paper in the hands of the holder imports a consideration, and the law will *prima facie* presume that it is held for value, yet, where it is shown that the note or bill was put in circulation by fraud, it then rests upon the holder in such case to avoid the consequences of that proof by showing that the note or bill came to his hands for value paid for it before it was due. (*Marslin v. Forward,* 5 *Ala. R.* 349. *Woodhull v. Holmes,* 10 *John R.* 231. *Wallace v. Br. Bk. at Mobile,* 1 *Ala. R.* 569. *Thompson v. Armstrong,* 7 *Ala. R.* 256.) Bertrand introduced no witness on this point, and it has to be determined on the bill, answers and receipt executed by Bertrand to Dickinson, when he received the note in question, which receipt he admits as alleged in the bill. And we think it clear enough from this data, that he has failed to make out this point in his case, and under the proofs it rested upon him to do so.

It is not pretended that any money or any property was given in exchange for the note, or that any available security was delivered up, and so far from its having been shown clearly and distinctly that it was taken absolutely and unconditionally in payment of a pre-existing debt, or that some valuable right of his own, or of those in whose behalf he acted as agent, was relinquished on the sole foundation of the transfer of the note, the express terms of the receipt present very strong grounds for an inference at once probable and directly the contrary of both. That instrument is in the following words, *to wit*: "Rec'd of Townsend Dickinson, a note drawn by Barkman, payable to

John G. Pratt & Co., and endorsed over to said Dickinson for $5,000, dated June 12, '44; when collected the sum of $3,720 to be paid to Mrs. A. J. Clarke with interest, and after deducting the usual collecting fee, the balance I agree to pay over to the said Dickinson.

Apl. 26, '45. C. P. BERTRAND."

When all the circumstances of the transaction as shown by the evidence, are considered together—the origin of the indebtedness of Dickinson, its character in reference to its origin, its pursuit by Bertrand, the probable motives by the respective parties, the improbability that Dickinson would exact a discharge from responsibility, or that Bertrand would accord it upon the transfer of any paper in lieu of such a debt is, itself, not inconsiderable. There is no intimation of such a discharge upon the face of the receipt, or that any other paper was executed between the parties. Mrs. Clarke is to be paid $3,750 out of the proceeds of the note when collected, and she is also to have interest. Bertrand is to have the usual collecting fee, and then the balance is to be paid over by him to Dickinson. It is true, that by a strained construction, all this might be consistent with a contract for the extinguishment of the debt against Dickinson, but it does seem improbable that if such had been the stipulation of the contract of transfer, that the terms of the receipt would have been such as it is. Upon the hypothesis, however, that the note was merely transferred as collateral security for the debt, the language of the receipt is natural, intelligible, and needs no interpretation. And so far from its being established that any valuable right was relinquished on the sole foundation of the transfer, it does not even appear that time was given to Dickinson. Nor does there seem to have beeen any effort on the part of Bertrand to take the deposition of Dickinson in his behalf, under any order of court. (2 *Mad.* 316.) If he had, in fact, thus paid the pre-existing debt, and been discharged from all responsibility on account of it, (see *Bank of Mobile v. Hull,* 6 *Ala. R.* 761,) where nothing short of an absolute and unconditional receipt of the note as payment, coupled with a relinquishment of the security paid off, was held sufficient; also 8

Ala. R. 972,) he could at least have proven this fact by Dickinson, although there might never have been any written discharge; and in a proper case the court would doubtless have made an order allowing the deposition to be taken, subject to just exceptions.

Upon the whole, the conclusion is almost irresistible to our minds, that the transfer was only by way of collateral security, and consequently, not for value within the rule as we have expounded it. And therefore, we hold that, whether Barkman seeks relief as maker or endorser, technically, or in any other character in which he may be *prima facie* held liable on the note in question, the way is open to him to make any equitable defence that the nature of his case will admit of on its intrinsic merits, against Bertrand, the holder without value. And we venture the remark, that a respectable authority cannot be found, whether decided under the rule of the law merchant in favor of the circulation of commercial paper as a currency, or under the rules of the equity courts, beyond the influence of the law merchant, where the fraudulent transfer of negotiable paper, or the fraudulent transfer of a chose in action, or of property, was ever held to divest the true owner of his title, or bar the maker or endorser of effectual relief, unless where the receiver was not only innocent, but was also affirmatively prejudiced by the faith and credit given by him to the paper, or to the apparent ownership of the chose in action or property. It is not the mere transfer of paper or property to an innocent person, ignorant of the fraud that divests the title of ownership or bars relief—if so, a mere gift, under the circumstances would suffice; but it is the sufficient consideration given therefor or the legitimate prejudice received, that works this legal effect.

And under the facts in this case, as shown in evidence, not only was no value given by Bertrand, or by those in whose behalf he acted, but it has not been shown that any of them have been prejudiced, even negatively, by reason of any reliance upon the transfer of the note in question. On the contrary, any suggestion that payment might otherwise have been procured, or

other security or indemnity obtained from Dickinson, is rebutted by proof that at that time he was in fact notoriously insolvent, although his insolvency was unknown to Bertrand. Nor has this been repelled by any evidence introduced by Bertrand. And indeed it would not be easy to presume that Dickinson would have committed such a flagrant breach of faith, and thus demeaned himself so disreputably, if he had any other available means in reach. Nor can any equity grow up to Bertrand, or to those in behalf of whom he cited, upon the foundation that he believed the law was in his favor and could make the note available whether there were equities against it or not; and therefore, that he made no further effort to collect the debt from Dickinson, because, if he was mistaken as to this, it was his own fault, and the consequences ought not to be visited upon Barkman.

If, then, this judgment is perpetually enjoined, the situation of Bertrand, and of those for whom he acted, is, in legal contemplation, exactly as it would have been had the note not been transferred by Dickinson; they having merely had the good fortune to get the note without any new consideration in paying value for it, or the renunciation of any valuable right, on the sole foundation of the transfer of the note. Under this state of facts, Bertrand can be in no way benefited by applying to the undoubted principles of the law of agency, which his counsel has discussed and illustrated by the cases cited with great ability. For, whether we take up the class of cases relating to the fraudulent transfer of mercantile paper, or of choses in action, or of property, the result is the same. If he is not a *bona fide* holder or possessor for value in the sense of the mercantile rule, he cannot hold, defend, or recover under the mercantile law, either at law or in equity. And if he turns to equity, and asks its administration in its broader basis and in its greater scope, irrespective of, and beyond the confines of the influence of the commercial law, the want on his part of a parting directly with value, or the relinquishment of a valuable right as equivalent, still sticks to him as the poison shirt of Nessus, and he has no case for the Chancellor's favor.

It is, therefore, in vain that he may assimilate his case, as a

case of confidence reposed, to that of a case where one trusts another with his blank endorsement to fill up for a particular amount, (which, in the language of Lord MANSFIELD, in the case of *Russell v. Sangstoff,* "is a letter of credit for an indefinite sum,") and that individual abuses the confidence thus reposed in him, and fills it up for a larger amount, and puts it into circulation even for a different purpose. For, in such a case, if it was commercial paper, and in the hands of a *bona fide* innocent holder, for value in the technical sense of the term, it may be recovered; if not for such value, it could not be. And so, if it was not commercial paper, it could be recovered on purely equitable grounds, either *pro tanto,* or wholly, according as the innocent holder parted with partial or full value, either in money, property, in the extinguishment of a pre-existing debt, or in the renunciation of some valuable right, upon the sole foundation of the transfer. And this, not only upon the principles of commercial policy, which, in such cases, is co-incident with equity, but upon the obvious principles of equity, that if by misplaced confidence one enables another to commit a fraud, it is but just that he pay the penalty of his own indiscretion, and that the loss should not be visited upon another who has vested his money or parted with his property or relinquished his valuable right on the faith of the genuineness of the signature, without any means of ascertaining the fraud. (8 *Porter* 297. 1 *Ala. R.* 18. 3 *Ala.* 188. 5 *Ala. R.* 370. 11 *New H. R.* 66. 1 *Hill R.* 513.)

But in the case at bar, no money was paid or property given in exchange, nor debt extinguished, nor valuable right relinquished on the sole foundation of the transfer of the note in question. And, as before remarked, the same will be the result of the analogies to cases of the fraudulent transfer of property under peculiar circumstances of confidence reposed, accompanied by indiciæ of ownership.

In every view, then, in which we have considered this case, and we have looked at it in all the various aspects in which it has been so ably presented by counsel, as well as examined the numerous authorities cited, we feel clear that the decree of the court below, in perpetuating the injunction, is correct. Affirmed.