## RECENT ENGLISH DECISIONS.

### *Court of Appeal.*

### STOTT v. FAIRLAMB.

Where a debtor at the time when he is entitled to make an immediate payment of an antecedent debt gives for the amount of the debt a promissory note payable on demand, which is intended to be a promissory note and is accepted by the creditor, the note is a payment conditional on its being met, and is founded on valuable consideration.

By a deed the defendant agreed to pay to S. the sum of 2000*l.* within three years of the date of the deed. Subsequently a promissory note payable on demand was given for the 2000*l.* by the defendant to S.

*Held*, on appeal, that there was valuable consideration for the promissory note.

APPEAL of the plaintiff from the judgment of DENMAN, J.

The action was brought by the plaintiff as executrix of one Stott on a promissory note, dated July 31st, 1881, whereby the defendant promised to pay Stott, or order, on demand, 2000*l.*, with interest at 5*l.* per cent.

It was proved at the trial that on the dissolution of a partnership which had existed between Stott and the defendant, a written agreement, dated August 8th, 1881, was entered into between the partners in pursuance of a previous arrangement come to on July 31st, 1881.

By the agreement, which recited that a sum of 2000*l.* was due to Stott, it was agreed (*inter alia*) that the defendant should pay to Stott 2000*l.* within three years of the date thereof, with interest at 5*l.* per cent. on the same, or the instalments thereof for the time being remaining unpaid, to be computed from July 31st, 1881, Stott to accept the 2000*l.* in full satisfaction of all his share in the stock, &c., of the partnership.

Evidence was admitted at the trial, subject to objection, that after the agreement was signed Stott called upon the defendant and told her that he wanted something to show to his own people; that they were not satisfied with the agreement, and wanted a promissory note; and, also, that Stott verbally promised to send a letter to the defendant to the effect that the note was not to be enforced until the expiration of the three years mentioned in the agreement. The note in question was then given, and dated back to July 31st, 1881.

The jury found that the note was given subject to the conditions contained in the agreement of August 8th.

On further consideration, DENMAN, J., was of opinion that the above evidence was not admissible to contradict the terms of the note, though it was admissible to prove that there was no consideration for the note as between the immediate parties. His lordship held that there was no consideration for the note, and entered judgment for the defendant.

The plaintiff appealed.

*A. Wills*, Q. C., and *Cyril Dodd*, for the plaintiff.

*Waddy*, Q. C., and *Wilberforce*, for the defendant.

BRETT, M. R.—In this case I am of opinion that the evidence shows that the promissory note was given as a promissory note, and not as an escrow. The case has been argued on two views of the first agreement. It was said that the agreement was to be taken to be one which, the moment it was executed, made a debt of 2000*l.* which was then existing, but was payable at a future time in the sense that it was to be only paid on a future fixed day. Therefore, on that view the question was whether, where there is a debt existing *in præsenti*, but naturally payable *in futuro* on a fixed day, a promissory note payable on demand, and given in respect of that liability, is founded on sufficient valuable consideration. On the other side, it was said that that is not the present case, which is, that the debt was existing *in præsenti*, but was to be paid at any time within a certain period, so that the debtor would have a power, at any time within that period, of relieving himself from the interest which was due until the debt was paid. It was said that, that being the effect of the agreement, the debtor was entitled to pay at any time within the three years, and that, when he gave the promissory note payable on demand, and the creditor accepted it, he had exercised the right given under the contract. Of course, such a payment would be conditional, and, if the note was not paid on demand, the right under the deed would revive. It was argued that neither view is within the authority of *Misa* v. *Currie*, 1 App. Cas. 554, and we must so hold if we are to decide for the defendant.

Suppose there is a debt existing *in præsenti*, but payable *in futuro* on a fixed day, whether the existence of that relation

between the parties will afford sufficient consideration for a promissory note which is payable on demand, and is intended to be a promissory note, and to have the ordinary effect of such, is a matter which is, at least, very doubtful in favor of the plaintiff. It is not necessary to decide that point, and we have not come to a conclusion upon it in this case. But, assuming that there would not be sufficient consideration in those circumstances, and that the case would not be within *Misa* v. *Currie*, we turn to the second view, which is that within which this case lies. The question is, whether the principle of *Misa* v. *Currie* applies in a case where there is a debt existing *in præsenti* which the debtor is entitled not to pay until a future fixed time, but is equally entitled to pay, and there are reasons why he might so do, at any time within that period, and a promissory note for the amount, payable on demand, is given at a time when the debtor has a right to pay, and to relieve himself from liability. The answer depends upon what we think to be the true principle of that decision. It is true that in that case there was an existing debt payable, and which might have been enforced at the moment when the note was given, so that there was an existing debt payable *in præsenti*. Therefore, the facts of that case do not decide this one. But we think that a principle is there laid down, that, where there is a state of things which entitles a person to make a payment, the giving in respect of that right a promissory note, which is intended to be a promissory note, is a payment conditional on the note being met, and there is a sufficient consideration to support the promise in the note, and to enable an action to be brought upon it. I think we ought, on a consideration of *Misa* v. *Currie*, to alter the proposition of the plaintiff, and to say that, where there is a state of things which entitles a debtor to pay at once, and he gives a promissory note payable on demand, the result in law is that that is a conditional payment, and there is sufficient consideration for the note which can legally be sued upon. It was suggested that we must come to that conclusion upon the interpretation of the Bills of Exchange Act, 1882; but this is a note given before the passing of that Act, the construction of which does not now arise for decision. Therefore, in a difficult case in which the decision is somewhat nice, and must not be taken to go further than is necessary in the case, we must differ from the Divisional Court, and the appeal must fail.

BAGGALLAY, L. J.—The conclusion at which I have arrived—

viz., that there was sufficient consideration for this note—depends upon the special circumstances of the case, and mainly on the fact that the obligation imposed by the deed of dissolution was not to pay the 2000*l.* with interest at the expiration of the three years, but at any time within that period. It was open to the defendant to have paid the amount and thus to have relieved herself from liability, and she also had a right to make such a conditional payment as she did make by giving the note in question, provided the creditor was willing to accept it. It appears to me that the case comes within the principle, though not within the facts of *Misa* v. *Currie*, that a debt payable at the time when a note payable on demand is given in respect of it is a sufficient consideration for the note.

BOWEN, L. J.—I am of the same opinion. I think that under the agreement the defendant had a right to pay at any time within three years, and that it was not certain that it might not become her interest to do so. Therefore, there existing a deed which specified the time for payment, subject to an option of paying earlier, the parties interested were not satisfied, and the plaintiff called upon the defendant and the note was then given. It seems to me to be clear that the note was intended to have some effect, and I think, a legal effect, and to be a note enforceable according to its tenor on demand; otherwise the object of the plaintiff would have been defeated and the interview useless. I think that the principle of the decision in *Misa* v. *Currie* applies to show that a note given in such circumstances is not without consideration. Here the debtor had a right to pay at once, and in lieu of cash he gives the creditor a promissory note payable on demand, intending it to have the effect of such a note. The note being intended to be an effectual and valid note, and being given by a person who had a right to pay at that time, was a conditional payment falling exactly within the principle of *Misa* v. *Currie*. As to the agreement alleged to have been made at the time the note was made, we cannot inquire into it in order to vary the legal effect of the note, though we can do so for the purpose of seeing whether there was any consideration for the note.

Appeal allowed.

The precise question involved in the principal case is, whether if a debtor gives a pre-existing creditor his promissory note on demand for the exact amount

of the debt, but before the same is absolutely payable, such note is wholly without consideration and void. We doubt whether any case exists in America where such a defence has been set up. The implied discharge and extinguishment of the original cause of action, or the forbearance to sue the same naturally implied from the acceptance of the new security, seems to furnish abundant consideration for the new promise. See *McClees* v. *Burt*, 5 Met. 198. Daniel on Neg. Inst. vol. 1, p. 184, says, "There is no doubt that a pre-existing debt of the maker is a valid consideration for his executing a note, and, indeed, is as frequently the consideration of negotiable paper as a debt contracted at the time." That the satisfaction or discharge of the original obligation is the real consideration of the note, necessary to its validity, see *Warren* v. *Durfee*, 126 Mass. 338.

The more serious question is as to the effect of an indorsement of some third person's promissory note to a pre-existing creditor of the indorser. Is that an indorsement "for value" so as to shut out (all other proper conditions existing), any equitable defence the maker might have against the payee. The established rule in America is that if such indorsement is taken in "actual payment" of such pre-existing debt, it is taken for value, and the equities are excluded. *Swift* v. *Tyson*, 16 Pet. 1, decided in 1842, is certainly the leading case on the subject. See also *Blanchard* v. *Stevens*, 3 Cush. 162, which has been uniformly followed in Massachusetts. See *Woodruff* v. *Hill*, 116 Mass. 310. And the same rule prevails elsewhere. *Holmes* v. *Smyth*, 16 Me. 177; *Norton* v. *Waite*, 20 Me. 175; *Williams* v. *Little*, 11 N. H. 66; *Brush* v. *Scribner*, 11 Conn. 388; *Carlisle* v. *Wishart*, 11 Ohio 173.

Even the New York courts have given such effect to the transfer where the proof was clear that it was given and received in full payment and complete discharge or extinguishment of the indorser's prior indebtedness, so as to leave no remedy thereon, whether the note so indorsed should or should not be paid by the maker. *Bank of St. Albans* v. *Gilliland*, 23 Wend. 311; *White* v. *Springfield Bank*, 3 Sandf. 222; *Bank of Sandusky* v. *Scoville*, 24 Wend. 115; *Gould* v. *Segee*, 5 Duer 260. Although they deny such a result, where such actual proof is wanting, or where clearly the note was taken as "conditional payment," so called; that is, payment, if such note be paid, otherwise not, and thus leaving the original cause of action still in existence; not apparently giving the same *prima facie* presumption of payment to such a transfer as some other tribunals do. See *Coddington* v. *Bay*, 20 Johns. 637; *Weaver* v. *Barden*, 49 N. Y. 286; *Turner* v. *Treadway*, 53 Id. 650; *Small* v. *Smith*, 1 Denio 583; *Comstock* v. *Hier*, 73 N. Y. 274.

What the rule is when the note is indorsed merely as "collateral security" for a prior indebtedness, is not well agreed. Many courts hold that the same result follows, as if the transfer was taken in actual payment, and consequently that the equities between maker and payee are completely shut out. *Atkinson* v. *Brooks*, 26 Vt. 569; *Bank of the Republic* v. *Carrington*, 5 R. I. 515; *Cobb* v. *Doyle*, 7 Id. 550; *Bridgeport City Bank* v. *Welch*, 29 Conn. 475; *Osgood* v. *Thompson Bank*, 30 Id. 27; *Roberts* v. *Hall*, 37 Id. 211.

On the other hand it is often held that the indorsee in such latter case does not take the note free from equities, unless he parts with some new consideration, such as making some new advances, extending the time of payment of his pre-existing debt, giving up some other collateral security he held for it, suspending or foregoing some power or rights to secure the same in some way. And much may be logically said for that view, as was very well stated by Chancellor