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BUTLER *v.* RICHMOND AND DANVILLE R. R. CO.[1]

SUPREME COURT OF GEORGIA.

Liability of Illiterate Persons upon Written Contracts.

Where accord and satisfaction are embodied in a written instrument, which the plaintiff, who can neither read nor write, has signed with his mark, and he denies that he ever entered into such a contract, or that the same was read over to him, and claims that the amount paid him was not paid him upon such a contract, but upon his claim for wages, and that in signing he thought he thought he was subscribing to an ordinary pay roll only, and the circumstances of the signing are suggestive of misrepresentation, on the part of the agents of the other party to the alleged contract, although there is no direct testimony to that effect, it is not necessary for him to refund the amount received to entitle him to make the question of fraud in imposing upon him the written contract into which he did not enter, in lieu of the actual contract under which the money was paid to him. (Syllabus by the Court.)

The above case was an action by the appellant Butler against the appellee for damages for an injury incurred while in the employ of the appellee. The defendants pleaded *inter alia* payment of $18 in full settlement, and promised at the trial a written contract of settlement signed by the plaintiff with his mark. The trial judge charged the jury on this point as follows: "Before the plaintiff can attack the settlement on the ground of fraud in its execution he must show first that he tendered back the consideration, to wit, the $18 received under it, before the suit was brought, or, at least, that he promptly did so upon the discovery of the fraud." As there was no evi-

[1] 88 Georgia Rep., 594; 15 S. E. Rep., 668.

dence of any tender of this sum the jury found for the defendant on this point. The charge of the Court was assigned for error, and the Supreme Court reversed the judgment on the ground that the charge was erroneous. While the only point directly decided was the obligation to refund the consideration as a pre-requisite to the repudiation of the written paper, the Court in its opinion refers to the conflict of authorities upon the effect of a failure to read written documents before signing, and the case suggests two interesting questions, viz. :

(1) To what extent are illiterate persons liable on written contracts executed by them in the belief that the contents are other than they really are?

(2) To what extent is a man liable on a written contract which he has not read, and the contents of which have been misrepresented to him, or which he has been induced to sign by some trick in ignorance of its contents?

LIABILITY OF ILLITERATE PERSONS UPON WRITTEN CONTRACTS.

I. The extent and nature of the liability of illiterate persons upon written contracts executed by them in the belief that the contents are other than what they really are, is a question upon which there has been no little discussion and difference of opinion. In Thoroughgood's Case, 2 Coke, 9b, the plaintiff, who was an illiterate man and could neithor read nor write, had a deed tendered to him for execution which he was told was a release for arrears of rent, while in reality it was a release of all claims. The deed was not read to him, but the contents were falsely stated to him by some one other than the grantee. The plaintiff replied to the statement of the stranger, "If it be not otherwise, I am content," and executed and delivered the deed. Under these facts the Court held that the instrument was not the plaintiff's deed, and it was resolved generally that a deed executed by an illiterate person does not bind him if read falsely either by the grantee or a stranger, and the same was true if the deed was not read but the contents thereof were misrepresented. It was further resolved that an illiterate man was not bound to execute a deed until it was read to him in a language he could understand, but if he executed it without requiring it to be read or explained it was binding, although it might be penned against his meaning.

In Shulter's Case, 12 Coke, 90, the contents of a document were falsely declared to a blind man by the scrivener for the grantees, and it was held that the blind man was not bound by an instrument so executed: Manser's Case, 2 Coke, 3a; Anon. Skin., 159; Sheppards Touchstone, Sec. 56.

In Cole *v.* Williams, 12 Neb., 440, there was a verbal contract between plaintiff and defendant that

the latter should do certain work for the former at a cost not to exceed $100. A written order to go on with the work was afterwards presented to the plaintiff for his signature. He was unable to read without spectacles, and did not have them with him at the time. The defendant's agent therefore read the paper to him, omitting the price, which was greater than in the verbal contract. It was held that he was not guilty of such negligence as would entitle the defendant to use the full amount of the written contract by way of set-off.

In Schuylkill Co. *v.* Copley, 67 Pa. St., 390, the Court held, following Thoroughgood's Case, that a bond signed by an illiterate obligor under a misrepresentation of its contents, even if by a stranger, is not his deed, and may be avoided under a plea of *non est factum:* Stoever *v.* Weir, 10 S. & R. (Pa.), 25.

This question of the liability of illiterate persons on writings executed under mistake has arisen frequently in suits on negotiable paper so executed. This question will be considered at length under II (post), but it is appropriate to consider one or two of the cases in this connection, as illustrating more fully the principle of law enunciated in the principal case *supra.*

Thus in Webb *v.* Corbin, 78 Ind., 403, suit was brought on a promissory note by an endorsee against the maker. It was proved that the latter was an old man whose eyesight was much impaired by disease and age, who had no glasses, and who could not read without them. The note was falsely represented to him by the payee to be a contract of agency, and was read to him as such. The Supreme Court laid down the principle that "a party whose signature to a paper is obtained by fraud as to the character of the paper itself, who is ignorant of such character, and who has no intention of signing it, and who is guilty of no negligence in affixing his signature thereto, or in not ascertaining the character of the instrument, is no more bound by it than if it were a total forgery of the signature," and sustained a verdict for the defendant, although the plaintiff was a *bona fide* holder for value without notice, who took the note in the ordinary course of business before maturity.

Walker *v.* Ebert, 29 Wis., 194, where the maker was a foreigner who could not understand English, is to the same effect: Sims *v.* Bice, 67 Ill., 88.

It will be noted that in all the foregoing cases there was some active misrepresentation which induced the illiterate person to sign the contract, and the better view is that a man whether literate or illiterate who signs a document without inquiring its contents is bound by his signature: Thoroughgood's Case, *supra;* Hallenbeck *v.* Dewitt, 2 Johnson (N. Y.), 404; Bauer *v.* Roth, 4 Rawle (Pa.), 83; Weller's App., 103 Pa. St., 594; Roach *v.* Carr, 18 Kan., 530; Robinson *v.* Glass, 94 Ind., 211; Wald's Pollock on Contracts, p. 413, note (2) and authorities there cited; but in some of the States the courts so far favor the illiterate as to hold that the onus of proving that he understands any writing that he executes is cast upon the other party: Suffern *v.* Butler, 3 C. E. Green, 220.

In Trambly *v.* Ricard, 130 Mass., 259, a party to an oral agreement who was unable to read or write affixed his mark to a paper without its contents being read or explained to him. He supposed that it contained the terms of the oral agreement, but did not ask to have it explained or read. It was held that evidence was admissible to show that the terms of the written contract differed from those orally agreed upon, and that a finding that the writing was fraudulently obtained would be justified, COLT, J., saying: "Upon the question whether in this case there was evidence of fraud, which should have been submitted to the jury, the fact that the plaintiff was an unlettered person, who could not read nor write, is of controlling importance. In Selden *v.* Meyers, TANEY, C. J., laid down the principle that a person dealing with an illiterate man who could neither read nor write, and taking from him a promissory note for the payment of money and a deed of trust to secure the payment, was *bound to show that he fully understood the object and import of the writings sought to be enforced against him:* May's Ex'rs *v.* Seymour, 17 Fla., 725.

In O'Neil *v.* Lake Superior Iron Co., 63 Mich., 690, an iron company organized a "benefit club," the plan of which was printed in large posters, which were posted in conspicuous places about the mines. One of the conditions of membership was that the employees and employers were each to subscribe a certain amount each week to the club, and in case any employee was injured or killed a certain sum was to be paid to him or his personal representatives upon the execution of a release of all claims against the company for damages for injuries, whether occasioned by the negligence of the company or otherwise. The plaintiff, a member of the club, was injured, and signed such release. He could not read nor write, and had no knowledge of the terms and conditions of the printed notice, or the contents of the release, which he believed to be a simple receipt. The agents of the company, when the money was paid to him, handed him the paper, and said: "Sign this receipt." It was held by the Court above that the judge should have submitted to the jury the question whether the plaintiff was misled into signing, or whether he understood the contents, and the fact that the money received from the club was not tendered before suit was immaterial because the right to it existed independent of the claim in suit.

See also Wright *v.* McPike, 70 Mo., 179, where a similar rule was laid down, although the Supreme Court, in affirming the charge of the judge in the Court below, noted the fact that the jury had found as a fact that the contents of the bond had been misread or misconstrued to the plaintiff.

On the other hand, the California courts have gone to the other extreme. In Hawkins *v.* Hawkins, 50 Cal., 558, an action was brought for the price of certain wheat sold to the defendant. The plaintiff in his statement prayed that a certain written contract executed by him to the defendant be declared void, and set out in the statement that he was illiterate and did not ask to have the contents of the writing which he signed read to him because two of the defendants

told him that it was like the verbal agreement they had made, although they knew that these statements were false, and made them for the purpose of deceiving him. On demurrer, the Court sustained the demurrer on the ground that the statement set out no cause of action, saying that the plaintiff should have either examined the document himself or had it examined by some one in whom he had confidence.

Notwithstanding this conflict in the cases, the weight of authority seems to be in support of the law as laid down in Thoroughgood's Case, *supra* (to wit, that a written contract executed by a man who can neither read nor write under the belief that it is something other than it really is, is void and cannot be enforced by the other party to the contract, where such belief is induced by the false statements of such other party), and the decision in the principal case is in consonance with this view.

In the principal case the error into which the court below was led was in considering the case as one of fraud simply, and the charge of the Court therein shows how an inaccurate use of this word fraud may lead to confusion and error. The effect of fraud upon a contract is to render it voidable, and if this were a case of fraud alone the trial judge would have been correct in his charge that there must be a tender of the consideration before the contract could be attacked. That is, a man who attacks a contract to which he is a party on the ground of fraud admits the existence of the contract, but asserts that he was induced to enter into it under a false statement of facts by the other party, and the law requires that he shall put the other party in *statu quo* by returning any consideration he may have received thereunder before he can attack its validity. But the position of the plaintiff in the principal case is not simply that of a man induced by falsehood to execute an instrument the contents of which he knows, but of one who was mistaken in the very nature of the instrument he signed, and whose mind never accompanied the stroke of his pen. It is true that in nearly every case of mistake, the mistake is induced by fraudulent representations, but its effect upon the contract is to render it absolutely void because the minds of the parties to the writing never met, and the written words do not represent any contract at all. This is well illustrated in the case of Green *v.* North Buffalo Township, 56 Pa. St., 110, AGNEW, J., saying: "The argument of the plaintiff in error overlooks the palpable distinction between a defence resting upon facts which are misstated in order to induce a party to enter into a bond, the contents of which he knows, and one resting upon a misrepresentation of the contents of the instrument itself to an illiterate person. In the former case the bond is the obligation of the party who seals it, but it is avoided by the false inducement to enter into it, and in the latter the instrument is not his deed or bond at all."

Therefore the lower court was in error in holding that the consideration must be tendered before the written contract could be attacked, because the money so received by the plaintiff was not received as the consideration of the execution of the contract in

suit, but as that of an entirely distinct contract, which was not inconsistent with the enforcement of the one in suit: O'Neil *v.* Lake Superior Iron Co., 63 Mich., 690.

II. A question closely akin to that raised in the principal case, which may properly be considered in this connection, is as to the extent of the liability of a man of intelligence, who can read and write, on a written contract, executed by him without reading, in reliance on the false representations of the other party, or which he has been induced to sign by some trick in ignorance of its contents.

When this question is raised between the original parties to the contract, the authorities lay down the same rule as that in the principal case; but when the rights of innocent third parties are concerned, as in the case of negotiable paper, which has come into the hands of a *bona fide* purchaser for value without notice, different considerations are involved which will be considered later.

Thus, in an early case, it was said: "If I desire a man to enfeoff me of an acre of land in Dale, and he tell me to make a deed for one acre with letter of attorney, and I make the deed for two acres, and read and declare the deed to him as for only one acre, and he seal the deed, this deed is utterly void, whether the feoffor be lettered or not, because he gave credence to me and I deceived him:" Keilw., 70 b. pl. 6; Hirshfield *v.* L. B. & S. C. Rwy. Co., 2 Q. B. D., 1; Simons *v.* Great Western Rwy. Co., 2 C. B. N. S., 619.

So, in Edwards *v.* Brown, 1 Cr. and Jer., 307, BAYLEY, J., recognizes the rule that where the contents of a deed are misrepresented to the party executing it, the deed is void, and this defence can be proved under the plea of *non est factum*, while the defence of fraud can never be offered under the general issue.

The same principle applies to all classes of contracts, and where the question arises between the original parties, a contract of this kind is held void in toto: The Consols Ins. Assn. *v.* Newall, 3 F. & F., 130; Jones *v.* Austin, 17 Ark., 498; Laidlaw *v.* Loveless, 40 Ind., 211; Davis *v.* Snider, 70 Ala., 315; Resh *v.* Bank, 93 Pa. St., 397; Stacy *v.* Ross, 27 Texas, 3; VanValkenburg *v.* Rank, 12 Johnson, 337.

When, however, the question arises between the party who has been tricked by the false statement to sign a contract he never intended to, and an innocent third party, who has acquired rights under such contract by assignment, or who has altered his position on the faith of the existence of such contract, other considerations arise which have given rise to great diversity of opinion in the courts of our various States.

In England the courts have gone so far as to say that where a man executes a deed in blank, with instructions as to how the blanks are to be filled up, and the deed is fraudulently filled up, that this will not estopp the party so executing from denying that it is his deed, and the doctrine that an instrument signed in blank binds the signer in the hands of third parties, who are *bona fide* purchasers for value without notice, no matter how the blanks are filled up, is confined to negotiable paper: Swan *v.* North British Australasian Co., 7 H. & N., 603; 2 H. & C., 175; Taylor *v.* Rwy. Co., 6 DeG. &

J., 559; Halifax Union *v.* Wheelwright, L. R., 10 Ex., 192; *Ex parte* Swan 7 C. B. N. S., 440.

In Vorley *v.* Cook, 1 Giff., 250, a bill was filed to foreclose a mortgage, and a cross bill by the defendant praying that the mortgage be delivered up to be cancelled. The alleged mortgagor had executed the mortgage to his solicitor under the false representation that it was a deed of covenant to produce title deeds. The solicitor assigned the mortgage so procured to a *bona fide* purchaser for value without notice. It was, nevertheless, held that the mortgage deed was absolutely void, and should be delivered up to be cancelled. See also Ogilvie *v.* Jeaffreson, 2 Giff., 353; Kennedy *v.* Green, 3 M. & K., 699.

But in the later case of Hunter *v.* Walters, L. R., 7 Ch. Ap. 75, the three last cases are severely criticized, although not distinctly overruled, as the decision was based on the ground that there was no sufficient evidence of misrepresentation, but MELLISH, L. J., says: "In my opinion it is still a doubtful question of law on which I do not wish to give any decisive opinion, whether if there be a false representation respecting the contents of a deed, a person who is an educated person, and who might, by very simple means, have satisfied himself as to what the contents of the deed really were, may not, by executing it, negligently be estopped as between himself and a person who innocently acts upon the faith of the deed being valid and who accepts an estate under it."

But the most ordinary form in which this question arises, is in suits on negotiable paper, and it is in these cases that the greatest confusion exists. Indeed, it may be safely said, that there is no other branch of the law in which there are so many cases practically *identical* as to the facts where the conclusions reached by the courts are so varying. Throughout the Western States there seems to have been a systematic plan adopted by the agents of patented farm implements and kindred articles of tricking the unsophisticated farmers into signing promissory notes under the false statement that they were only executing contracts of agency, and then selling the notes so executed so that they would pass into the hands of a *bona fide* purchaser for value without notice; so that case after case may be found in the reports which differ from one another in name only, but in which the conclusions reached by the courts differ materially.

In Foster *v.* Mackinnon, L. R., 4 C. P., 704, one of the most carefully considered cases on this subject, the facts were as follows: The plaintiff was a *bona fide* purchaser for value without notice and before maturity of a bill of exchange on which the defendant was an endorser. The defendant was induced to put his name on the back of this bill by fraudulent representation on the part of the acceptor of the bill that the instrument was only a guaranty, and proved this fact at the trial by the acceptor himself. The defendant did not see the face of the bill at all, but it was of the usual shape and bore a bill stamp, the impress of which was visible at the back of the bill. The trial judge, BOVILL, C. J., instructed the jury that if the defendant's signature to the docu-

ment was obtained by fraudulent representation that it was a guarantee, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, and if he was not guilty of any negligence in so signing the paper, he was entitled to the verdict. On motion for new trial the Court in banc affirmed the charge of the trial judge, BYLES, J., holding that a signature so obtained was of no force, not merely on the ground of fraud, where fraud existed, but because the mind of the signer never accompanied his signature; that is, that he never intended to sign, and, therefore, in contemplation of law, never did sign the contract to which his name was appended; but the rule was made absolute on the other ground that the verdict was against the weight of the evidence on the question of negligence.

Putnam *v.* Sullivan, 4 Mass., 45, recognizes the same principle as that laid down in the last case.

In Missouri a number of cases of this kind have arisen where a *bona fide* holder, for value without notice and before maturity, has sued the maker of negotiable paper, who has been induced to sign such paper by the false statements of the payee or his agent as to its nature; and in Briggs *v.* Ewart, 51 Mo., 245, and Martin *v.* Snyder, 55 Mo., 577, the Court follow the rule laid down in Foster *v.* Mackinnon, which makes the defendant's negligence the test of his liability.

In Shirts *v.* Overjohn, 60 Mo., 305, the Court went a step further and laid down the rule as follows: "Where it appears that the party sought to be charged *intended to bind himself by some obligation in writing*, and voluntarily signed his name to what he supposed to be the obligation he intended to execute, having full and unrestricted means of ascertaining for himself the true character of such instrument before signing the same, but by his failure to inform himself of its contents, or *by relying upon the representations of another* as to the contents of the instrument presented for his signature, signed and delivered a negotiable note in lieu of the instrument intended to be signed, he cannot be heard to impeach its validity in the hands of a *bona fide* holder."

In Frederick *v.* Clemens, 60 Mo., 313, the rule laid down in the last case, though formally adopted, seems to be departed from, but it must be noted that the defendant in this latter case could neither read nor write.

In Wisconsin the decisions lean rather in favor of the defrauded maker and against the holder. Thus, in Griffiths *v.* Kellog, 39Wis., 390, the defendant, a woman, signed the note in suit upon the false representation of the payee that it was a different note for a smaller sum. She could not read the note because her glasses were at a neighbor's house, but two of her children were present at the time who could have read it had she asked them to. The plaintiff was a *bona fide* holder for value without notice. A verdict for the defendant was sustained in the upper court, the Court holding that the question of negligence was properly submitted to the jury; See also Kellog *v.* Steiner, 29 Wis., 626; Butler *v.* Carns, 37 Wis., 61; Chapman *v.* Tucker, 38 Wis., 43; Roberts *v.* McGrath, 38 Wis., 52; Roberts *v.* Wood, 38 Wis., 60; Roberts *v.* Thomas, 62 Wis. 484.

In Walker *v.* Ebert, 29 Wis., 194, DIXON, C. J., discusses this question at length, and advances a strong argument in favor of the view that as the mind of the maker did not accompany his act that act is void, no matter into whose hands the instrument passes. "The inquiry in such cases," says the judge, "goes back of all questions of negotiability . . . it challenges the origin or existence of the paper itself. . . . It is immaterial that the supposed instrument is negotiable in form or that it may have passed to the hands of a *bona fide* holder for value. Negotiability in such a case presupposes the existence of the instrument as having been made by the party whose name is subscribed, for until it has been so made and has such actual legal existence it is absurd to talk about negotiation or transfer or *bona fide* holder of it within the law. That which in contemplation of law never existed as a negotiable instrument cannot be held to be such, and to say that it is and has the qualities of negotiability because it assumes the form of that kind of paper, and thus to shut out all inquiry as to its existence, or whether it is really and truly what it purports to be, is *petitio principii* — begging the question altogether.

In Nebraska it has been held that a person who signs negotiable paper without any negligence in the belief that it is a contract of another kind, is protected even as against a *bona fide* holder for value without notice who buys before maturity, and to rely on the reading of the instrument by the other party thereto does not necessarily constitute negligence: Nat. Bank *v.* Lierman, 5 Neb., 247; Palmer *v.* Largent, 5 Neb., 223; Griffin *v.* Short, 14 Neb., 259.

In Dinsmore *v.* Stimbert, 12 Neb., 433, the plaintiff was a *bona fide* holder for value without notice, and the defence of the alleged maker was the same as in the preceding cases. The trial judge instructed the jury "if you find that the defendant before signing the note used the diligence and care that a man of ordinary prudence would have used under similar circumstances to ascertain its contents, and was without fault, you must find for the defendant." The Supreme Court held, reversing the decision in the court below, that the jury should have been instructed (as in the case of Foster *v.* Mackinnon) that to make such a defence available the defendant must show that he was not guilty of any neglect in signing the paper.

In Indiana the decisions seem to have wavered from one view to the other. Thus, in Cline *v.* Guthrie, 42 Ind., 227, the maker of a negotiable note was induced by the payee to sign it on the representation that it was a blank piece of paper and that he desired to see how the maker spelt his name. The maker discovered the fraud after execution, but the payee took the note and escaped. It was held that the maker was no more bound to a *bona fide* purchaser of the note than if it were a total forgery, not only because of mistake, but because of non-delivery.

In Nebeker *v.* Custinger, 48 Ind., 436, the rule was laid down that where a man who can without difficulty read, executes a negotiable promissory note without reading it and trusting to the party to whom it is executed for a statement of its

contents, he is guilty of such negligence as will estop him from setting up the defence of mistake against a *bona fide* holder thereof: Maxwell *v.* Morehart, 66 Ind., 301.

In Ruddell *v.* Dillman, 73 Ind., 518, the Court said the principle laid down in Nebeker *v.* Custinger, *supra*, was equally applicable whether the maker could read or not: Baldwin *v.* Barrows, 86 Ind., 351; Yeagley *v.* Webb, 86 Ind., 424; but in Webb *v.* Corbin, 78 Ind., 403, where the alleged maker was an old man, sick and feeble and unable to read and with no one to whom he could appeal to read the note to him, and the payee induced him to sign by a false reading thereof, the Court, on demurrer to the defendant's plea, held that as a matter of law the defendant was not guilty of any negligence, and not liable to the plaintiff, who was a *bona fide* purchaser for value without notice: Mitchell *v.* Tomlinsin, 91 Ind., 168.

In Michigan, as in Wisconsin, the courts lean far toward protecting the maker, on the grounds indicated by DIXON, J., in Walker *v.* Ebert *supra*).

Thus, in Gibbs *v.* Linabury, 22 Mich., 479, the maker of a negotiable note, whose eyesight was weak, was induced by agents of payees to sign a number of papers overlying one another on the representation that they were duplicates of a contract of agency. The court below directed a verdict for the plaintiff, who was a *bona fide* holder, but the Supreme Court reversed, and, while they found that there was no negligence, they based their decision on the broad ground that as the defendant did not intend to make negotiable paper he was not bound.

Anderson *v.* Walter, 34 Mich., 113, lays down a rule directly opposite to that laid down in Shirts *v.* Overjohn, 60 Mo., 305 and Nebeker *v.* Custinger, 48 Ind., 436 (*supra*); Soper *v.* Peck, 51 Mich., 563.

The leading case in New York on this subject is Chapman *v.* Rose, 56 N. Y., 137, where the plaintiff, a *bona fide* holder for value without notice, sued the maker of a promissory note, and the judge charged the jury that if the paper sued upon was never delivered by the defendant as a note the plaintiff must fail in his action. On appeal JOHNSON, J., in reversing the court below on the ground of misdirection, says: "The evidence tends to show that the signature of the defendant was obtained by a very gross and fraudulent representation perpetrated on him by Miller, the payee (as to the nature of the instrument). . . . There was no physical obstacle to the defendant's reading the paper; the defendant had the power to know with certainty the exact obligation he was assuming and chose to trust to the integrity of the person with whom he was dealing instead of exercising his own power to protect himself. . . . The charge of the judge excluded the consideration of negligence." . . . After examining a number of the cases, including Foster *v.* Mackinnon, the judge concludes: "In all these cases the real ground of decision is not that the party meant to make a promissory note, but that *meaning to make an obligation in writing*, and which was put in writing that it might of itself import both the fact and the form and measure of the obligation, he trusted another to fix that form and measure

without exercising that supervision that was in his power and by which perfect protection was possible. In such cases the rule is that he is bound by the act of him who has been trusted, in favor of a holder in good faith:" Whitney *v.* Snyder, 2 Lansing (N. Y.), 477.

In Pennsylvania the rule is carried even further to protect the *bona fide* holder. Thus, in State Bank *v.* Schreck, 1 Legal Chr., 65, overruling without noticing Mercur *v.* Schwankie, 4 Leg. Gaz., 99, the defendant offered to prove in a suit by a *bona fide* holder of a promissory note that he had executed the note on the fraudulent representation of the payee, who asserted that it was an agreement constituting him agent for the sale of patent hay forks. The lower court rejected the offer and the Supreme Court affirmed this view. So, in Broadbent *v.* Huddlestone, 2 W. N. C., 293, it was held that the fact that the payee had slipped one paper under another and thus made the defendant sign what he never intended to was no defence as against a *bona fide* holder. See also McSparran *v.* Neeley, 91 Pa. St., 17.

In Abbott *v.* Rose, 62 Me., 194, a case similar to those above, the lower court was reversed for not leaving the question of the defendant's negligence to the jury, as the test of his liability, and in Kellogg *v.* Curtis, 65 Me., 59, the rule laid down in Missouri and New York as to the liability of a man who signs a promissory note relying solely on the representations of the other party that it is an instrument of another nature, when that note passes into the hands of a *bona fide* purchaser for value, is affirmed by PETERS, J., as follows: "We by no means mean to be understood as saying that a person may be holden in every case where his signature to a note has been surreptitiously obtained. . . . But the defendant signed a paper which he knew was to be effectual for some purpose by means of his name thereto and he was in fault for entrusting it with an adversely interested party without knowing what it was."

The law in Iowa in this case is well illustrated in two cases decided the same day. In the former, Caulkins *v.* Whistler, 29 Iowa, 495, the defendant wrote his name on a blank piece of paper which the one obtaining it asserted was to be used in identifying his signature. A promissory note having been written in over this signature, and the note negotiated to an innocent holder for value, it was held that the instrument was a forgery and the defendant was not liable thereon. In the latter case of Douglass *v.* Matting, 29 Iowa, 498, the defendant executed a promissory note, relying on the payee as to its contents, and it was held that he could not defend as against a *bona fide* holder, on the ground that the representations of the payee were false: Bank *v.* Steffes, 54 Iowa, 214; Hopkins *v.* Hawkeye Ins. Co., 57 Iowa, 203.

In Illinois the negligence is held to be the test of the defendant's liability, and relying on the representations of the payee as to the contents of the paper executed will not, as a matter of law, constitute negligence. Thus, in Taylor *v.* Atchison, 54 Ill., 196, the defendant, who could read without difficulty, was induced by the agents of the payee to execute a note which they read to him (at his request) as a contract of agency

Suit having been brought by a *bona fide* holder of this note, a verdict for the defendant was sustained on the ground that the defendant used reasonable caution: Leach *v.* Nichols, 55 Ill., 273; Puffer *v.* Smith, 57 Ill., 527; Vanbrunt *v.* Singley, 85 Ill., 281; Sims *v.* Bice, 67 Ill., 88; Auten *v.* Gruner, 90 Ill., 300.

In the case of De Camp *v.* Hamma, 29 Ohio, 467, the maker of a promissory note was induced to execute it by the fraudulent representations of the payee that it was a contract of agency; suit having been brought on the note by a *bona fide* holder, the question of negligence was left to the jury, and they having found that there was no negligence, a verdict for the defendant was sustained by the Supreme Court, McILVAIN, J., using the following rather remarkable reasoning: "It does not appear, however, in the case before us, that Hamma was a person possessing the ordinary faculties and knowledge, it being simply found in the special verdict that he was not guilty of any negligence or want of ordinary care; but in order that we may not be misunderstood in relation to the amount of care requisite in such cases, it is well to add that there can be no doubt that a person possessing the ordinary faculties, and being able to read and write, who relies solely upon the representations of the other contracting parties as to the character of the instrument, should be regarded as negligent as against an innocent endorsee for value." It would seem from this opinion that a citizen of Ohio is not presumed to possess ordinary common sense, but that the fact that he does must be proved affirmatively!

In New Hampshire, in the case of Bank *v.* Smith, 55 N. H., 593, the defendant, who was an old man of limited education and poor eyesight, and who was unaccustomed to write anything but his own name, was induced by the fraudulent representations of the payee to sign a negotiable promissory note on the assertion that it was a contract of agency merely. The defendant's daughter, an intelligent woman, was present at the time and could have read the paper if appealed to. Held by a referee that the defendant was estopped by his own negligence from setting up these facts as against a *bona fide* holder of the note. And the Supreme Court sustained this view.

In Bank *v.* Johnson, 22 W. Va., 520, one of the latest cases on this subject in which all the authorities are carefully reviewed, JOHNSON, P. J., says: "A *bona fide* holder of negotiable paper has a valid title, and can recover against a maker unless at the time he purchased the note it was absolutely void, although the maker was induced to sign such note by fraud, not intending to sign such a note, but a paper of an entirely different character. And in such a case the question of negligence in the maker forms no legitimate subject of inquiry. . . . When one of two innocent parties must suffer by the act of a third, he who by his act has enabled such third person to cause the loss must sustain it."

In Mackey *v.* Peterson, 29 Minn., 298, the defendant was a foreigner who could not read English, nor was there any one within a half mile who could. Having, under these circumstances, executed a negotiable promissory note, on the

fraudulent representation of the payee that it was a receipt, it was held that he could not defend on this ground as against a *bona fide* holder for value.

In Ort *v.* Fowler, 31 Kan., 478, a still later case, the same principle is laid down, BREWER, J., in an elaborate and able opinion affirming the charge of the trial judge as follows: "If the note was procured from the defendant without any negligence on his part, by fraud and trickery, and without any consideration, the plaintiff cannot recover; *but the mere relying upon the reading and word of a stranger, if such was the fact, would be evidence of such negligence on the part of defendant as would make him liable for the amount of the note in the hands of an innocent holder for value.*"

To reconcile these conflicting authorities is out of the question, but it is submitted that the true rule, and that which is considered in the most carefully considered cases, is embodied in the two following propositions:

(1) Where a man, whether he can read and write or not, intends to execute a written instrument of some kind, and, relying on the representations of the other party to the instrument as to its character, executes a negotiable promissory note in lieu of the instrument he intends to execute, he will be estopped by his own negligence from impeaching the validity of such note in the hands of a *bona fide* holder for value, and the judge should so instruct the jury.

(2) Where a man intends to execute a written instrument of some kind, and by some trick or shifting of papers on the part of the other party a negotiable note is substituted for the instrument intended to be executed, then the test of the defendant's liabiltity to a *bona fide* holder for value is whether he has been guilty of any negligence in executing the instrument or not, and the question should be left to the jury to pass upon.

CHAS. C. TOWNSEND.