I. F. Huntzinger, Appellate Printer, Camden, N. J.

New Jersey Court of Errors and Appeals

Katherine Schaus,
(*Plaintiff*) *Appellant,*
vs.
Horatio C. Henry, Administrator, &c.,
(*Defendant*) *Respondent.*

On Appeal from Camden County Circuit Court.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

One George W. Henry, on August 25th, 1909, gave to the appellant a promissory note dated August 25th, 1909, for $1,000, payable five years after date, to the order of appellant.

The maker of the note died July 2nd, 1912, intestate, unmarried and without issue, leaving as his only next of kin and heir at law, his father, James S. Henry (page 12).

On the 6th day of July, 1912, the said James Henry made the following endorsement on the said note:

"July 6, 1912. This note to be paid out of my
"estate after my death with interest.
James S. Henry."

Before the maturity of the note the said James S. Henry died and suit was instituted in the Camden County Circuit Court by the appellant against the respondent, who was the administrator of the estate of James S. Henry, pursuant to a notice that the claim was disputed. No suit was ever instituted against the personal representatives of George W. Henry.

Practically all of the facts were admitted by agreement of counsel (page 6).

Upon presentation of the facts at the trial court, the case being tried before Judge Lloyd, without a jury, a judgment of non-suit was awarded against the plaintiff, and this appeal is to determine the propriety of this judgment.

The defendant's answer denied consideration and further set up the defense that the debt was not due and that the promise to pay was in the nature of a testamentary instrument.

GROUND OF APPEAL.

We maintain that the judgment of non-suit was improper and that the plaintiff had made out a *prima facie* case of liability and was entitled to judgment.

ARGUMENT.

I.

We maintain:

1. That the obligation in question was a valid, negotiable promissory note importing a valuable consideration.

2. That even if this view should not be adopted, it is still a contract for the payment of money, resting upon sufficient consideration.

3. That the debt was due by virtue of the Orphans' Court Act.

4. That the instrument did not create a testamentary disposition of the property.

II.

The Negotiable Instruments Act, Comp. Stat., Vol. 3, page 3734, sets out the requisites of a negotiable instrument as follows:

1. It must be in writing and signed by the maker or drawer.

2. It must contain an unconditional promise or order to pay a sum certain in money.

3. It must be payable on demand or at a fixed or determinable future time.

4. It must be payable to order or to bearer.

5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

III.

There is no question but that the instrument under consideration conforms to the first requirement.

IV.

As to the second requirement, we submit that the language used imports an unconditional promise or order.

In construing the phrase "to be paid" the Court in *Williams vs. Sims,* 22 Ala. 512, states that these words are equivalent to the word "payable."

The question arose in a case where a note was given to be paid in solvent notes and accounts of other men.

The language of the instrument under consideration is, therefore, in effect, no different than if the maker thereof had said "this note payable out of my estate."

If, therefore, the phrase "to be paid" is equivalent to the word "payable," it remains to consider the legal meaning of the word "payable."

The following meanings have been given to the word "payable":

It has been held as equivalent to "due".

Hawes vs. Smith, 12 Me. 429;
Ball vs. Northwestern Mut. Acc. Assoc., 56 Minn. 414; 57 N. W. 1063;
Turk vs. Stahl, 53 Mo. 437;
Read vs. Worthington, 9 Bosw. (N. Y.) 617.

It was also held to be equivalent to "due to, to be paid to."

Eckel vs. Jones, 8 Pa. St. 501.

It is also said to mean "justly due; legally enforceable."

Farmersville First National Bank vs. Greenville National Bank, 84 Tex. 40; 19 S. W. 334, Citing Webster's Dictionary.

> "Legally its meaning is that a specified amount becomes due and its payment can be enforced."
>
> *Hill vs. Stetler,* 4 C. Pl. (Pa.) 119.

We submit then that the phrase "to be paid" imported an unconditional promise to pay.

In *Feeser vs. Feeser,* 93 Md. 716; 50 Atl. 406, the Court said:

> "The word 'due' has a variety of meanings, "depending upon the connection with which it "is used. It has been defined generally to be "that which is owed; that which custom, statute "or law requires to be paid."

The Negotiable Instruments Act further provides that an unqualified order or promise to pay is unconditional within the meaning of the statute, although coupled with an indication of a particular account to be debited with the amount.

V.

We further submit that the instrument under consideration satisfies the requirement of the statute that it must be payable at a fixed or determinable future time. The statute states that an instrument is so payable when it is expressed to be payable on or at a fixed period after the occurrence of a specified event, which is certain to happen, although the time of happening is uncertain.

Thus, a note payable a certain number of days after the death of the maker, or upon demand after the death of the maker, is a good promissory note, because the event is sure to happen.

Carnwright vs. Gray, 127 N. Y. 92; *Hegeman vs. Moon,* 131 N. Y. 62; *Shaw vs. Camp,* 160 Ill. 425; *Martin vs. Stone,* 67 N. H. 367; *Price vs. Jones,* 105 Ind. 544; *Bristol vs. Warner,* 19 Conn. 74.

VI.

We also think that the fourth requirement of the statute is satisfied because the endorsement made by the defendant upon the original note, included the note itself in the endorsement by adopting it through reference thereto. The original note was payable to the order of "Kate Schaus." By adopting the note in the endorsement the promisor adopted this language, and, therefore, we maintain, made the endorsement payable to the order of the plaintiff.

VII.

It is not difficult to assume that the fifth requirement of the statute is met, although the drawee is not named therein, she is indicated not only with reasonable certainty, but with absolute certainty.

VIII.

We, therefore, submit that the endorsement shows a valid promissory note and imported a consideration. The fact that the words "for value received" were omitted does not deprive the instrument of consideration.

Negotiable Instruments Act, Section 24.

In view of the above, the defense of lack of consideration, if in fact there had been no consideration, was cast upon the defendant.

IX.

Assuming, but not conceding that the burden of proof was cast upon the plaintiff to prove the consideration for the endorsement, we submit that the plaintiff fairly met this issue.

The case of *Crears vs. Hunter,* L. R. 19 Q. B., Div. 341, was very similar to the case under consideration. In this case the promisor joined with the original debtor in a note which did not provide for delayed payment. It did, however, provide for payment of interest half yearly. There was an actual

forebearance for sometime after the giving of the note, although there was no evidence of any request in express terms by the promisor of the promisee to forebear suit on the original indebtedness. It was, however, held that the request to forebear need not be expressed, but that it might be inferred from the circumstances and it was said that the circumstances detailed, authorized the jury to infer an understanding between the promisor and promisee that if the promisee would give time to the original debtor the promisor would make himself responsible. As to the effect of an actual forebearance in compliance with a request to forebear Lord Esher, M. R., said:

> "It may be true that there was no evidence of any request in express terms by the son that the plaintiff would forebear to sue the father, but what was the circumstance of the transaction contemplated in the minds of the parties? Was not the understanding obviously, that, if the plaintiff would forebear to sue the father, the defendant would become liable on the note?
>
> "I take it to be undoubted law that the mere fact of forebearance would not be a consideration for a person becoming surety for a debt. It is quite clear, on the other hand, that a binding promise to forebear would be a good consideration for a guaranty. The question is whether, if the guarantor requests the creditor to forebear from suing, and the creditor, on such request, although he does not at the time bind himself to forebear, does in fact afterwards forebear to sue, it is a good consideration for the guaranty. If at the request of the guarantor the creditor does, in fact, forebear, there is a sufficient consideration to bind the guarantor to his promise to pay the debt. The question whether the re-

quest is expressed or is to be inferred from the circumstances is a mere question of evidence. If a request is to be implied from the circumstances it is the same as if it were an express request."

X.

We have in the case under consideration a situation where the estate of the original promisor, George W. Henry, became vested in the endorser, James S. Henry, as sole beneficiary.

By virtue of Section 69 of the Orphans' Court Act, Comp. Stat., Vol. 3, page 3834, the note, although not then due by its terms, became a claim presentable for payment against the estate of George W. Henry. In this situation it is fair to presume that James S. Henry did conceive that he would be injured by any proceeding against the estate of George W. Henry, to which he succeeded, and that having this in mind he made the endorsement on the note, promising to pay the same out of his estate, after his death, thus practically giving a new promissory note to replace or secure the former one, the consideration therefor being the forebearance to proceed against the estate of George W. Henry for the amount of the note. In fact, no suit upon the note of George W. Henry was ever instituted against his estate (page 6).

While no proof was adduced at the trial showing that George W. Henry left any estate, yet we do not think that this was essential to the right of recovery or the question of consideration. For aught that plaintiff could say, George W. Henry may have left a substantial estate, the existence of which was

known only to his father, and which he would be compelled to discover if proper proceedings were taken against him for this purpose, and acting upon this state of mind, he procured plaintiff to forebear any proceedings against the son's estate.

The plaintiff was the only witness to the transaction surrounding the making of the endorsement and her lips were closed by statute.

XI.

The decision in *Crears vs. Hunter* is borne out by the following cases:

> *Niles-Bement-Pond Company vs. Ury,* 53 Misc. 305; 103 N. Y. Supp. 226; *Muir vs. Green,* 191 N. Y. 201; 83 N. E. 685; *Strong vs. Sheffield,* 144 N. Y. 392; 39 N. E. 330.

In the case last mentioned a wife was held liable upon a promise to pay the debt of her husband, in consideration of the forebearance to sue him where a promise was made by simply endorsing the past due note of her husband. The only consideration for the wife's endorsement which was or could be claimed was that, as part of the transaction, there was an agreement by the promisee when the note was endorsed to forebear its collection, or a request for forebearance which was followed by forebearance. The Court said:

> "A request followed by performance is sufficient and mutual promises at the time are not essential."

In *Boyd vs. Freize,* 5 Gray, 544, the Court in holding an acceptor upon bills of exchange liable thereon

on the theory that such bills of exchange were accepted to secure the forebearance of suit against a third person, although there was no express agreement to that effect, said:

> "Such agreement may be expressed, or implied by law. The question, we think, has been between the mere fact of forebearance without any promise to forebear and a forebearance in conformity with such express or implied agreement. Whether it was an implied agreement to forebear is a question of fact depending upon the circumstances; and if they are such as lead to a natural and reasonable conclusion that the new security or other new promise was given to induce the creditor to forebear and he did, in fact, forebear, a jury might find that there was such an implied agreement or understanding, upon which a Court would hold that there was a good and legal consideration to give effect to the new promise. The result, we think, is that where the holder of a debt due or coming due presses for payment and a third party pays part in cash and gives his own notes on time as collateral security for the residue, and the creditor forebears to take any other measures to enforce his claim on the original demand until the collateral notes become due, a jury may very properly infer an agreement on the part of the creditor thus to forebear enforcing his original claim."

In *Breed vs. Hillhouse,* 7 Conn. 523, an endorsement was made upon a note after its maturity, as follows:

> "I hereby guarantee the payment of this note within four years from this date."

This was held to be binding upon the guarantor where it appeared that the holder of the note in reliance thereon, forebore the collection of the note for a stipulated time, the Court saying:

> "The agreement in question to forebear was clearly proved on the principle of probable presumption which harmonizes with common sense and is conformed to experience, and both reason and experience bear concurrent testimony to the inference of a consideration in this case. The acceptance of the endorsed guaranty by the plaintiff and his consequent forebearance proved the agreement in question, and are incompatible with any other supposition."

In *Edgerton vs. Weaver,* 105 Ill. 43, it was said:

> "Whether actual forebearance following a promise to pay interest upon interest for forebearance, is evidence of an acceptance of the promise, is a question of fact. If the question were whether it was an express acceptance by words, there could be no difficulty in perceiving the question to be fully one of fact; yet the only difference between that and the present question is that between direct and circumstantial evidence."
>
> See also *Waters vs. White,* 75 Conn. 88, 52 Atl. 401; *Webb vs. Romona Oolitic Stone Co.,* 58 Ill. App. 222.

XII.

We submit there is nothing in the contention that the suit was brought before the obligation came due. It was due by virtue of Section 69 of the Orphans' Court Act recited above.

XIII.

As to the contention of the defendant that the instrument in question was a testamentary instrument and for that reason void, we maintain there is nothing in this point. If the endorsement was in fact as we assert, a valid, binding promise, then the fact that it was not to be performed until after the maker's death would not affect its status as a contract.

Most of the cases which touch upon this point have had reference more particularly to instruments which were in form, promissory notes.

The fact that a note was to become due upon the maker's death does not render it invalid and it is not a testamentary instrument.

> *Beatty vs. Western College,* 177 Ill. 280; 52 N. E. 432; *Bristol vs. Warner,* 19 Conn. 7; *Leader vs. Plante,* 95 Me. 341; 50 Atl. 54; *Hegeman vs. Moon,* 131 N. Y. 462; 30 N. E. 487; *Price vs. Jones,* 105 Ind. 544; 5 N. E. 683; *Hopkins vs. Marlette,* 20 N. Y. Supp. 576.

In *Crider vs. Shelby,* 95 Fed. 212, a note was made payable sixty days after the maker's death, with a direction to his administrator and executors to pay the amount thereof in good current money of the United States. The Court held in that case that this was not an attempt to make a testamentary disposition of the property, for the instrument contained no provisions resembling those of a will.

In *Maze vs. Baird,* 89 Mo. App. 352, a writing promising to pay the payee the sum of $1500 "after my death out of my estate" interest from date until

paid, was held to be a promissory note. The Court said:

> "The provision that the note should be paid out of the estate of the promisor showed only what would necessarily be the case at the maturity of the note and in no wise limits or restricts the unconditional promise to pay."

As to a promise to pay to become effective after the maker's death not being a testamentary instrument see also:

Price vs. Jones, 105 Ind. 543;
Garrigus vs. Home, &c., Soc., 3 Ind. App. 91;
Martin vs. Stone, 67 N. H. 367; 29 Atl. 845;
Worth vs. Case, 42 N. Y. 362;
Junkins vs. Sullivan, 110 Md. 539; 73 Atl. 264;
Feeser vs. Feeser, 93 Md. 716; 50 Atl. 406.

Also see the large number of cases collated in 27 L. R. A. (N. S.) 1017.

XIV.

It should be observed that the trial Court in awarding the judgment of non-suit did not do so upon insufficiency of proof, but upon the assumption that no jury question whatever had been raised, or that no more than one inference could be drawn from the facts. If the inference which we claim was raised had been decided against the plaintiff as a matter of fact, then perhaps no error would have been committed, but this was not the case. The Court de-

cided that there was no inference whatever to be drawn favorable to the plaintiff and decided the question on this ground.

XV.

We submit, therefore, that the judgment of nonsuit was erroneous and that the plaintiff was entitled to judgment upon the facts proven at the trial.

STACKHOUSE & KRAMER,
Of Counsel with Appellant.

I. F. Huntzinger, Appellate Printer, Camden, N. J.

New Jersey Court of Errors and Appeals

Katherine Schaus,
(Plaintiff) Appellant,
vs.
Horatio C. Henry, Administrator, &c.,
(Defendant) Respondent.

On Appeal from Camden County Circuit Court.

BRIEF OF RESPONDENT.

In this case it is attempted to charge the estate of James S. Henry with the amount of a promissory note for one thousand dollars made to the order of the appellant by one George W. Henry, the son of the decedent.

It is claimed by the appellant that the decedent's estate is liable for the payment of the note in question because of the endorsement thereon as stated in the brief of the appellant, viz.:

> "July 6, 1912. This note to be paid out of my estate after my death with interest.
>
> James S. Henry."

It is submitted that the note itself, before the above endorsement was added, was an negotiable instrument and a valid obligation of the estate of George W. Henry. The endorsement, however, stands on a different footing. If it be taken, as appellant contends, as fixing the terms of the note, it not only changes the time of payment of the note but destroys the negotiability of the instrument in that by said endorsement it is not payable on demand or at a fixed or determinable future time; or on or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain. (Negotiable Instruments Law, Sections 1 and 4. Compiled Statutes, Volume 3, pages 3734, 3735.)

It is submitted that the endorsement being irregular the instrument is not negotiable and that as to the endorser the presumption of consideration which attaches to negotiable instruments is destroyed; and that in order to make the respondent liable for the amount of the note in question the consideration for said endorsement must be affirmatively proved.

This being the case, the endorsement in question can be regarded in only one of two aspects, viz.: (1) as an undertaking or promise in writing to pay the debt of another; or (2) as a gift by the decedent of part of his estate.

If it be the first the consideration cannot be presumed but must be proved.

> "The defendant's written promise to pay the debt of another has no legal validity, if there be no evidence of consideration outside of the promise itself."
>
> *Pike vs. Van Riper,* 57 N. J. Law, p. 290.

It is submitted that here no evidence of consideration whatever has been produced. At the trial appellant offered the note with the endorsement thereon and rested. The stipulation of counsel shows the following facts: That George W. Henry died intestate and unmarried on July 2, 1912, the endorsement in question was made July 6, 1912, and that no suit has been instituted against the personal representatives of George W. Henry.

From these meagre facts counsel for the appellant asks the Court to hold first that no suit was instituted against the estate of George W. Henry because of the forebearance of the appellant, and second, that such forebearance was the consideration for the endorsement in question. In other words, without the slightest proof on the subject, he attempts to create a consideration entirely by inference from facts that are capable of quite different construction. It is not shown that any benefit moved to the decedent or that any detriment accrued to the appellant because no suit was instituted against the son's estate; there is no proof that the son was possessed of any property, real or personal, at the time of his death; or that the father had the slightest interest, financial or otherwise, in the son's estate which would induce him to make the endorsement in question; there is no proof that any promise was made by the appellant to forebear to bring suit against the son's estate because of such endorsement or that the failure to bring suit was in fact a forebearance in reliance upon said endorsement. In fine, the whole effort of the appellant is based entirely on inference; first, on an inference from the admitted facts, and second, on an inference based not upon facts at all, but upon the first inference drawn.

It is submitted that the judgment of a Court must rest upon tangible proof, and cannot be based entirely upon hypothesis and supposition.

All the cases cited by counsel for the appellant as bearing out his contention that the consideration may be assumed from the facts of this case are cases where attendant circumstances were such that a consideration could be properly found from them. In this case we submit that no such facts exist, that the consideration cannot be presumed from them, and that being the case, appellant having failed to show any consideration for said endorsement the judgment of non-suit should be sustained.

If, on the other hand, the endorsement be taken as evidence of a gift, it is testamentary in character, and void because it does not conform with the requirements laid down in the statute of wills (Section 24, Compiled Statutes, Volume 4, page 5867).

We submit, therefore, that the judgment of nonsuit was proper and should be sustained.

WILLIAM P. WALSH,
Attorney for Respondent.
EDWARD I. BERRY,
Of Counsel with Respondent.

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COMPLAINT.

(Filed June 19, 1913)

The plaintiff, Katherine Schaus, of the City of Camden, County of Camden, and State of New Jersey, says:

1. That George W. Henry, on the 25th day of August, 1909, gave to the plaintiff a certain promissory note, a copy of which is as follows:

"$1000 August 25th, 1909.

"Five years after date I promise to pay to the order of Kate Schaus One thousand Dollars at Camden, N. Jersey. Without defalcation. Value received.

George W. Henry"

2. On the 6th day of July, 1912, James S. Henry made the following endorsement upon the said note:

"July 6, 1912

"This note to be paid out of my estate after my death, with interest.

James S. Henry"

3. That the said endorsement was made upon this note for sufficient consideration passing to the said James S. Henry.

4. That the said claim was presented to the said defendant as administrator of the estate of the said James S. Henry.

5. That on the 17th day of March, 1913, the said defendant notified the said plaintiff that the said claim was disputed.

6. That this suit is instituted by the plaintiff within three months after such notice.

7. Plaintiff demands $2000 damages.

STACKHOUSE & KRAMER,
Attorneys for Plaintiff.

ANSWER.

(Filed July 2, 1913)

The defendant, Horatio C. Henry, administrator of the goods and chattels, rights and credits which were of James S. Henry who died intestate, says that:

1. He admits the first paragraph.

2. He admits the second paragraph.

3. He denies the third paragraph.

4. He admits the fourth paragraph.

5. He admits the fifth paragraph.

6. He admits the sixth paragraph.

7. He admits the seventh paragraph.

SECOND DEFENSE.

Defendant will object that the complaint discloses no cause of action, in that it fails to show that the money demanded on the promissory note set out in said complaint was due and payable at the time of the commencement of this action. The said note, by its terms, will not be due and payable until August 25, 1914, and the endorsement of said note in nowise alters the date when the same shall become due and payable.

THIRD DEFENSE.

Defendant will object that at the time of the endorsement of said note George W. Henry, the maker thereof, was deceased, and that said note was due and payable only out of the estate of the said George W. Henry.

WM. P. WALSH,
Attorney for Defendant.

TESTIMONY.

IN THE
CIRCUIT COURT, CAMDEN, NEW JERSEY.

KATHERINE SCHAUS, vs. HORATIO C. HENRY, Administrator of JAMES F. HENRY, Deceased.	TESTIMONY.

Camden, New Jersey, April 10, 1915.

Trial held this day before LLOYD, J., without a jury, at the Camden County Court House.

Counsel appeared as follows:

STACKHOUSE & KRAMER, ESQS., by D. T. STACKHOUSE, ESQ., Attorneys for Plaintiff.

WILLIAM P. WALSH, ESQ., Attorney for Defendant.

Mr. Stackhouse: I offer in evidence the promissory note upon which this action is based, which reads as follows:

"$1000. August 25, 1909.

"Five years after date I promise to pay to the order of Kate Schaus One thousand /100 Dollars at Camden, N. Jersey, without defalcation. Value received.

George W. Henry"

(Endorsement as follows):

"July 6th, 1912. This note to be paid out of my estate after my Death with interest.

James S. Henry"

PLAINTIFF RESTS.

Mr. Walsh: I move for a non-suit on the ground that no consideration is shown for the endorsement upon which the action has been brought.

I desire to make a further motion for non-suit upon the ground that the endorsement is an attempted testamentary disposition of the estate of James S. Henry, without the formalities which are required as incident to such testamentary disposition.

The Court: Mr. Stackhouse, do you want to rest this case without proof of consideration on either side?

Mr. Stackhouse: Since the case is being tried by your Honor without a jury, I will, with the permission of the Court, offer in evidence the answers to certain interrogatories propounded to the defendant.

The Court: Did the maker of this note die before the endorsement?

Mr. Stackhouse: Yes.

Mr. Walsh: That has been already stipulated between counsel. The stipulation is as follows:

"It is hereby stipulated between the parties in the above cause as follows:

"1. That George W. Henry, who signed the note named in paragraph one of the complaint, was the son of James S. Henry.

"2. That the said George W. Henry died on the 2nd day of July, 1912, intestate and unmarried and without issue.

"3. That no suit upon the said note has ever been instituted against the personal representatives of said George W. Henry.

"4. That defendant's answer is considered to be amended by embodying in addition to the defenses set up therein now, that the endorsement mentioned in paragraph two of the complaint was a testamentary instrument and for that reason, void, and that the plaintiff has joined issue upon the said answer as amended."

No proof was offered that George W. Henry left any estate.

The Court: I think that this endorsement, as it now appears to me, is such an irregular endorsement and coupled with such terms as to destroy the negotiability of the instrument. In that situation it is incumbent on the plaintiff to prove that there was a consideration which is not expressed in the paper, and which would be presumed if it were negotiable.

In the hurry of a preceding hearing on this case the Court struck out interrogatories tending to get

from the plaintiff such information as it had concerning the consideration for this endorsement. This was done on the motion of the plaintiff. As I understand the situation, what both sides want is that a ruling shall be obtained on the prima facies of this case as it stands. That is true, isn't it, Mr. Stackhouse?

Mr. Stackhouse: As far as I am concerned.

The Court: You have no proofs, as I understand it, that you can offer?

Mr. Stackhouse: I have no other proofs that I can offer.

The Court: Except the mere papers that have been offered, together with the admissions and the stipulation.

Mr. Stackhouse: The admissions, denials and the complaint and the answer to the interrogatories and the stipulation. I can say that this is the extent of my proofs.

The Court: When this case was before me I was under the impression that the note carried the implication of consideration. I still think so, because it is a promissory note in regular form and recites on its face that it is for value received. The endorsement, however, stands in a very different situation. I was inclined to regard the note as carrying with it the implication of consideration, even as to the endorsement, but when that was done I was under the impression that the note was drawn to the order of George W. Henry, and that he had endorsed it, and

that the present plaintiff was a holder from him. Whether or not that would be the case in view of the very terms of this endorsement it is not necessary to consider now, of course, but where it is an irregular endorsement such as this, and where the nature of the writing destroyed its negotiability, any value which might exist in the way of presumptive consideration by reason of any negotiable paper would disappear as to the endorser, and, therefore, in that situation it would be encumbent upon anyone suing on such a promise to establish the consideration affirmatively. My view is as the matter stands before me now upon the pleadings, the answer to the interrogatories and the stipulation, that this is not sufficient as a matter of law to constitute evidence of a consideration, and for that reason the non-suit is allowed.

The case handed to me of Queal against Peterson in the Iowa court sustains the view that I have just taken. Crears against Hunter is a case cited from the English courts in which it is intimated that such a question might be a jury question upon such facts, but I think our own law is that there must be some evidence of a promise either in the action of the parties implying it, or in the form of an obligation created either by formal contract or by word of mouth; and I would not be inclined to think that the mere fact that the note is endorsed by a father after the death of a son, without evidence tending to show that there was some forbearance on the part of the holder of the note, was evidence from which a consideration of forbearance could be inferred.

Mr. Stackhouse: I would ask for an exception to the ruling of the Court granting the non-suit.

JUDGMENT.

This cause being regularly on the list for trial at the April Term, nineteen hundred and fifteen, of this court, and being called, and both parties appearing, and the cause being moved by the plaintiff, and the respective parties by their counsel being heard, and the defendant having moved the Court to non-suit, and the Court heard the argument of the attorneys of the parties as to the sufficiency of the plaintiff's proofs to sustain the action, and fully considered the same, and it appearing that the plaintiff had failed to make out a legal *prima facie* case.

It is, therefore, on this tenth day of April, A. D. nineteen hundred and fifteen, considered that the plaintiff take nothing by her said suit, but that she be in mercy, etc., and that defendant do go thereof without day, etc., and it is further considered that the said defendant do recover against the said plaintiff its costs and charges by it about its defense in this behalf laid out and expended, by the Court here adjudged to the defendant and with its consent, and that defendant have execution thereof, etc.

Judgment entered and signed this tenth day of April, A. D. nineteen hundred and fifteen.

FRANK T. LLOYD,
Judge.

NOTICE OF APPEAL.

(Filed March 10, 1916)

CAMDEN COUNTY CIRCUIT COURT.

KATHERINE SCHAUS, *Appellant,* vs. HORATIO C. HENRY, administrator, &c., of James Henry, *Respondent.*	ON APPEAL TO COURT OF ERRORS AND APPEALS. NOTICE OF APPEAL.

TO WILLIAM P. WALSH, ESQ., attorney for respondent:

TAKE NOTICE that the plaintiff appeals from the judgment of non-suit entered in this cause, to the Court of Errors and Appeals of the last resort in all causes, on the following grounds:

1. That the said judgment of non-suit was erroneous and that the plaintiff had made out a *prima facie* case of liability against the defendant upon the facts proved at the trial.

2. That the Court decided that there was no jury

question in the case for him to consider, when, as a matter of fact, there was such a question.

3. That upon the facts proven at the trial judgment should have been rendered for the plaintiff.

STACKHOUSE & KRAMER,
Attorneys for Appellant.

[ENDORSED]

Service hereof acknowledged this 29th day of February, 1916.

WM. P. WALSH,
Attorney for Respondent.