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ABSENCE OF CONSIDERATION IN THE LAW OF BILLS AND NOTES

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I

BY the latter part of the sixteenth century the theory of liability on bills of exchange had been adapted to common law theory of contract so as to lie in assumpsit.[1] In 1787 it was fully settled by the House of Lords that all " contracts in writing . . . [which are] merely written and not specialties . . . are parol " and require consideration.[2] Promissory notes and bills of exchange fell into this category.[3] Indeed, " bills and notes were contracts and being such there was no persuasive reason why the basis of liability on a bill or note should be any different from that on any other written contract for payment of money." [4] While there is no provision in the Bills of Exchange Act (" the Act ") [5] directly to the point,[6] it is well established indeed that consideration of " value " [7] is needed for the creation of an obligation under a negotiable instrument.[8] According to Chalmers, " where B, by way of gift, makes a note in favour of C, C cannot recover from B." [9]

It seems to follow that a holder not in due course takes the

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1 See general: T. A. Street, *The Foundations of Legal Liability* (1906) Vol. II, p. 343.

2 *Rann* v. *Hughes* (1787) 7 T.R. 350 n. (a); 101 E.R. 1014 n. (a).

3 Street, *supra* note 1, at p. 389. For a short historical account as to the necessity of consideration in the law of bills and notes, see W. E. Britton, *Handbook on the Law of Bills and Notes* (1961), pp. 211 *et seq.*

4 Britton, *ibid.*, p. 213.

5 U.K. 1882, 45 & 46 Vict. *c.* 61; Can.: R.S.C. 1970, c. B-5. For a list of jurisdictions which have adopted a statute modelled on the Act, see: Falconbridge, *On Banking and Bills of Exchange*, 7th ed. (1969), by Rogers, pp. 431–432.

6 *Cf.* U.K., ss. 27–28; Can., ss. 53–55.

7 " Value " means " valuable consideration "; U.K., s. 2; Can., s. 2. " Valuable consideration . . . may be constituted by . . . *any consideration sufficient to support a simple contract* [or] an antecedent debt or liability "; U.K., s. 27 (1); Can., s. 53 (1), emphasis added.

8 For a general discussion on the subject with a specific application to jurisdictions where the common law consideration is not required for the formation of a contract (Quebec, Louisiana, Scotland and Israel) see: Barak, " The Requirement of Consideration for Bills and Notes in Israel " (1967), 2 Is.L.Rev. 499. Note that consideration under the Act includes " past consideration " (U.K., s. 27 (1) (*b*); Can., s. 53 (1) (*b*) and as such is broader than the common law consideration; *cf.* in general: Wickhem, " Consideration and Value in Negotiable Instruments " (1926), 3 Wis.L.Rev. 321, 323–324.

9 Chalmers, *On Bills of Exchange*, 13th ed., by Smout (1964), p. 102 and n. 16 digesting *Holliday* v. *Atkinson* (1826) 5 B. & C. 501; 108 E.R. 187.

instrument subject to the defence of original absence of consideration. Indeed, " a bill or note . . . is both a chattel and a chose in action." Its ownership " involves not only the right to possess a thing but the right to sue. . . ." [10] Corresponding " to the duplex nature of the negotiable instrument," equities affecting it " must [thus] be classified . . . as they relate to . . . ownership of the chattel or to liability on [the] obligation." [11] Equities affecting the right to sue and recover on the obligation, side by side with those affecting the right to possess the piece of paper, consitute defects of title [12] to which a holder not in due course is subject.[13]

Consistent with this analysis, the American Uniform Commercial Code follows its predecessor the Uniform Negotiable Instruments Law and explicity provides that " [w]ant . . . of consideration is a defense as against any person not having the rights of a holder in due course." [14] Against the absence of a corresponding provision in the Anglo-Canadian Act, Falconbridge concludes however that " [o]riginal absence of consideration is not a defect of title or equity attaching to the instrument." [15] He bases his view on pre-Act cases [16] as well as on the fact that " absence of consideration is not one of the defects of title specified in [the Act]." [17] He adds that " [t]he general principle, that absence of consideration is not a defect of title, seems to be implied in s. 54 [18] which defines a holder for value." His summary is in line with Chalmers.[19] " Original absence of consideration . . . is a matter of defence against an immediate party, or a remote party [20] who is not a holder for value, but it is not a

[10] Chafee, " Rights in Overdue Paper " (1918) 31 Harv.L.Rev. 1104, 1109. The " *right to sue* " in this context is the *power* to enforce the obligation rather than the *standing* to bring the action.

[11] *Ibid.*, p. 1110.

[12] Equities affecting the instrument or " attaching to the bill " are interchangeable with defects of title ": Chalmers, *supra*, note 9, p. 122; Falconbridge, *supra*, note 5, pp. 654, 667 and 670; *Alcock* v. *Smith* (1892) 1 Ch. 238, 263.

[13] The subjection of a holder not in due course to defects of title is supported by the Act (U.K., ss. 36 (2) and 36 (5), Can., ss. 70 (1) and 72) and agreed among text book writes: Falconbridge, *supra*, note 5, p. 666; Byles, *On Bills of Exchange* 23rd ed., by Megrah and Ryder (1972), p. 195, (but *cf.* p. 190); Cowen, *On the Law of Negotiable Instruments in South Africa* 4th ed., by Cowen and Gering (1966), p. 274.

[14] U.C.C. § 3-408. The prior provision of the Uniform Negotiable Instruments Law (N.I.L.) is s. 28, see note 63 and text, *infra*.

[15] Falconbridge, *supra*, note 5, p. 619. See also: Byles, *supra*, note 13 p. 222, and note 36.

[16] *Charles* v. *Marsden* (1808) 1 Taunt. 224; 127 E.R. 818; *Sturtevant* v. *Ford* (1842) 4 Man. & G. 101; 134 E.R. 42; *Lazarus* v. *Cowie* (1843) 3 Q.B. 459; 114 E.R. 583.

[17] *Supra*, note 15. The list in U.K., s. 29 (2) and Can., s. 56 (2) includes fraud, duress, force and fear, illegality and breach of faith.

[18] Can., s. 54 is U.K.'s 27 (2) (3). The relevant part is U.K.'s s. 27 (2) set forth in text subsequent to note 37, *infra*.

[19] Chalmers, *supra*, note 9, p. 102.

[20] Parties are " immediate " or " remote " in relation to their own dealings underlying the instrument. In a promissory note issued by a buyer to the order of a

defence against [a remote party who is] a holder for value." [21] "Holder for value" is a holder who either himself took the instrument for value, or who derives his title from one who had given value for it.[22] He does not have to be a holder in due course.[23]

This summary reflects the prevailing view on the availability of absence of consideration as a defence to an action on a bill or note.[24] The present article challenges this summary by critically examining and refuting its grounds. It presents the proposition that absence of consideration to a promise on a bill [25] or note is an equity as to the liability of the promisor, which under the Anglo-Canadian Act is available to him as a defence against every holder not in due course. While there is no direct authority supporting it, it will be argued that unlike Falconbridge's summary, this proposition is consistent with general principles of law as well as with the scheme of the Act. Thus, pursuing Chalmers's example,[26] when C negotiates the note (made in his favour by B by way of gift) to D, D's power to recover from B depends on whether he (D) is a holder in due course. Otherwise, having a title to a piece of paper and to an unenforceable promise, D is under the same disability as C. The power of a subsequent holder E (D's indorsee) to recover from B depends on whether he himself (E) is a holder in due course, or alternatively on whether he "derives title to [the note] through a holder in due course [*i.e.*, D], and . . . is not himself a party to any fraud or illegality affecting it." [27] The holding in due course requirement could be waived only when value is given before the promisor's (B's) death for "an actual dealing for value with a note would complete the gift as a valid *donatio mortis causa*" so as to entitle the holder (even if not in due course) to payment out of B's estate.[28]

seller of goods and subsequently discounted with a finance company, the maker-buyer and the payee-seller are immediate parties, the maker-buyer and the indorsee-finance company are remote parties, and the payee-seller and the indorsee-finance company are immediate parties.

[21] *Supra*, note 15.

[22] *Cf. Barclays Bank Ltd.* v. *Astley Industrial Trust Ltd.* [1970] 2 Q.B. 527, 538–539 *per* Milmo J.

[23] A holder in due course holds the instrument "free from any defect of title of prior parties . . .": U.K., s. 38 (2); Can., s. 74 (*b*).

[24] See also: Jacobs, *On Bills of Exchange, Cheques, Promissory Notes, etc.*, 2nd ed. (1924) pp. 57, 106; Cowen, *supra*, note 13, p. 247–248; Byles, *supra*, note 13, p. 191; B. B. Riley, *Bills of Exchange in Australia* 3rd ed., by Chappenden and Bilinsky (1976), p. 87.

[25] Unlike a promissory note (U.K., s. 176 (1); Can., s. 83 (1)) a bill of exchange is an "order" rather than "promise" (U.K., s. 3 (1); Can., s. 17 (1)). Nonetheless, the liability of the drawer is on his own promise to pay: U.K., s. 55 (1) (*a*); Can., s. 130 (*a*).

[26] *Supra*, note 9 and text.

[27] U.K., s. 29 (3), Can., s. 57.

[28] *Rolls* v. *Pearce* (1877) 5 Ch.D. 730, 734. See note 50, *infra*. *Query* whether this exception does not depend on the promisor's liability not being contested by the executors of his will.

II

Falconbridge's reliance on the enumeration of the defects of title in the Act [29] goes contrary to the accepted view that the examples given by the Act "do not exhaust the category." [30] As to pre-Act leading cases [31] establishing that "absence of consideration is not a defect of title or equity attaching to the instrument," [32] Falconbridge himself acknowledges [33] that all involved an accommodation party.[34] They stand for the modest proposition presently provided for by the Act,[35] that an accommodation party, as a surety to the obligor, is liable to a holder for value notwithstanding the fact that the consideration under the underlying transaction was not given to him (the accommodation party) but to the person accommodated. This however is consistent with the surety's position under general principles of law,[36] and is not a case of "absence of consideration," as consideration in the common law has to move from the promisee, but not necessarily to the promisor.[37] In fact, under the pre-Act cases relied upon by Falconbridge,[38] what could have been an equity attaching to the accommodation bill is in reality "an agreement not to negotiate it after it became due." [39] This, as well as the liability of an accommodation party, is absolutely irrelevant to the proposition that absence of value is or is not a defect of title.

This leaves us with "s. 54 which defines a holder for value." [40] In its relevant part the section provides that "[w]here value has at any time, been given for a bill, the holder is deemed to be a holder for value as regards . . . all parties . . . who become parties prior to [the giving of the value]" (hereafter: the "holder for value" pro-

[29] See note 17 and text, *supra*.

[30] Cowen, *supra*, note 13, p. 270. See also: Riley; *supra*, note 24, p. 93; Byles, *supra*, note 13, p. 193. *Cf.* Chalmers, *supra*, note 9, p. 98; Falconbridge, *supra*, note 5, p. 672. The list in U.K., s. 29 (2) and Can., s. 56 (2) (sote 17, *supra*) is preceded by "In particular . . ."

[31] Cited in note 16, *supra*.

[32] See note 15 and text, *supra*.

[33] Falconbridge, *supra*, note 5, p. 619.

[34] An accommodation party is a party to an instrument who has signed it "without receiving value therefor and for the purpose of lending his name to some other person": U.K., s. 28 (1); Can., s. 55 (1). He is thus not a party to the underlying contract but a surety of the obligor thereon.

[35] U.K., s. 28 (2); Can., s. 55 (2).

[36] In general for the consideration requirement in guarantees, see L. A. Sheridan, *Rights in Security* (1974), p. 289.

[37] See generally Anson's *Law of Contract* 24th ed., by Guest (1975), p. 97.

[38] Cited is note 16, *supra*.

[39] *Charles* v. *Marsden*, *supra*, note 16, p. 225 *per* Mansfield C.J.; see also p. 226 *per* Lawrence J.; *Sturtevant* v. *Ford*, *supra*, note 16, p. 106 per Cresswell J. *Cf.* "Equities Attaching to Overdue Bills of Exchange" (1870) 49 L.T. 122: Indeed, an agreement governing a bill constitutes an equity thereto: *Holmes* v. *Kidd* (1858) 3 H. & N. 891, 894; 157 E.R. 729.

[40] See notes 18–21, *supra*, Can., s. 54 is U.K., s. 27 (2).

vision). Nonetheless, this is an ambiguous provision.[41] While extending the concept of "holder for value" to cover also a holder who is subsequent in the chain of title to the giving of value, the provision neither defines "holder for value" nor specifies his rights and powers. As such the provision is potentially susceptible to alternative interpretations. Thus, in one context in the Act, "holder for value" denotes the fulfilment of the value requirement as one of the qualifications of a holder in due course.[42] The "holder for value" provision could therefore mean that a holder who himself gave no value but derives his title from one who did give value is to be considered as one who "took the bill . . . for value"[43] for the purpose of holding in due course.[44] As it is well established that only a holder who himself gave value can qualify as a holder in due course, this interpretation should be rejected.[45] Indeed, "it seems . . . impossible to argue . . . that . . . a holder for value within the meaning of [the provision]—which does not require that he himself should have given value—. . . [has] an indefeasible right on the [instrument]."[46]

Alternatively, there are those who construe the "holder for value" provision to mean that a holder of an instrument who either takes it for value or derives his title from one who took it for value, overcomes the defence of absence of consideration on a promise of a prior party.[47] As a "holder for value" is not required by the provision to be a holder in due course, the effect of this construction seems indeed to establish "[t]he general principle that absence of consideration is not a defect of title."[48] This construction is nonetheless inconsistent with viewing "the benefits of negotiability . . . applied exclusively in favour of a *bona fide* transferee for value."[49] It is further unsupported by authorities.[50] Indeed, it was

[41] *Cf. Hunter*, "Holders for Value of Negotiable Paper" (1928) 22 Ill.L.Rev. 287. The reason for its inclusion in the Act "is not altogether obvious"; Byles, *supra*, note 13, p. 190.

[42] U.K., s. 27 (3); Can., s. 54 (2): "a holder for value to the extent of the sum for which he has a lien." See also: U.K., s. 29 (3); Can., s. 57.

[43] U.K., s. 29 (1) (*b*); Can., s. 56 (1) (*b*).

[44] *Cf.* Hunter, *supra*, note 41, pp. 290, 295.

[45] Indeed, the draftsmen of the U.C.C. considered the "holder for value" provision "as erroneous and misleading, since a holder who does not himself give value cannot qualify as a holder is due course . . . merely because value has previously been given for the instrument"; UCC § 3-303, Comment 1.

[46] Megrah, letter to the editors, reproduced in Note, "*Diamond* v. *Graham*, The Doctrine of Consideration and Value for a Cheque" (1969) 15 McGill L.J. 487, 492.

[47] See, *e.g.*, Thornely, "Consideration for Negotiable Instruments" [1968] C.L.J. 196.

[48] See note 18 and text, *supra*.

[49] Cowen, *supra*, note 13, p. 271. "Negotiability" in the phrase denotes the "transfer free from equities," as distinguished from "the simplicity of transfer"; Cowen, *ibid.*, p. 3 *et seq.*

[50] But *cf. Rolls* v. *Pearce* (1877) 5 Ch.D. 730; the holding in due course requirement is waived where value given prior to the promisor's death completes the

stated in *Collins* v. *Martin* that "no evidence of *want of consideration* or other ground to impeach the apparent value received, was ever admitted in a case between . . . an acceptor or drawer, and *a third person holding the bill for value.*" [51] It is however submitted here, that the reference to the "third person holding the bill for value" was actually directed at the "*bona fide* holder for value." [52] First, there is later in the decision, a reference to the power of such a holder to enforce payment "against good faith and conscience." [53] This is compatible only with reading "good faith" into the definition of the "holder for value." Secondly, besides "want of consideration," the phrase covers any "other ground to impeach the apparent value received." [54] It is inconceivable that the phrase confers on a holder for value though not in due course the power to overcome every "other ground," for this would put him in the same position of a holder in due course. Thirdly, there are other instances where courts inaccurately used the terms "indorsee for value," [55] holder for value" [56] or "remote party" [57] as interchangeable with "holder in due course." [58] On final account, *Collins* v. *Martin* cannot sup-

gift "as a valid *donatio mortis causa*" see note 28 and text, *supra*. There is nothing in the case to suggest its application to either gifts *inter vivos* or perhaps even to a donee *mortis cause* who first deals with the instrument for value *after* the promisor's (donor's) death. The narrow scope of the decision is reinforced by the fact that Malins V.-C. decided the case primarily on the basis of his desire "to do all [he could] to make the gift good" *ibid.*, p. 733. The executors of the donor's will did not "argue the point adversely to the [donee]" but "only [wished] to see that the case is fairly presented"; *ibid.*, p. 732.

51 (1797) 1 Bos. & Pull. 648, 651; 126 E.R. 1113 *per* Eyre C.J. emphasis added. It was held there on the basis of this proposition that one who indorsed bills in blank and handed them to his banker for collection and credit to his account, could not recover the bills from a *bona fide* pledgee who had lent money to the banker (who had later failed) against the bills. The similarity between the proposition and the case is questionable; in the principal-agent for collection situation (unlike in a donor-donee case), besides want of consideration there is absence of intention to convey anything to the agent (If the customer's account has been credited but not withdrawn—the case anyway involves the *failure* of consideration by the failure of banker rather than absence of consideration). The pledgee in *Collins* v. *Martin* was *bona fide*, *ibid.*, p. 648. Even if taken at face value, the case is therefore hardly persuasive as to the rights of the holder for value. The court used this peculiar analogy to reach the result in favour of the pledgee as under contemporary law, since *Paterson* v. *Tash* (1743) 2 Strange 1178; 93 E.R. 1110, a pledgee of goods from a factor exceeding his authority was defeated by the principal, *ibid.*, p. 651. The latter law has eventually been reversed by the first *Factors Act*, 4 Geo. IV, *c.* 83 (1823).

52 *Bona fide* holder for value, *bona fide* holder for value without notice, as well as *bona fide* holder of the bill without notice before it is overdue, are all synonyms substituted in the Act by "holder in due course"; *cf.* Chalmers *supra*, note 9, p. 94.

53 (1797) 1 Bos. & Pull. 648, 651; 126 E.R. 1113.

54 See note 51 and text, *supra*.

55 *Robins* v. *Reynolds* (1841) 2 Q.B. 196, 211; 114 E.R. 76.

56 *Thiedemann* v. *Goldsmith* (1859) 1 De G.F. & J. 4, 12; 45 E.R. 260 *per* Lord Justice Knight Bruce. The Lord Chancellor properly referred to the indorsee as "a holder *bona fide* for value"; *ibid.*, 10, emphasis in the original.

57 *Ashley Colter Ltd.* v. *Scott* [1942] 3 D.L.R. 538, 541 (Can. S.C.).

58 As to the inaccurate nature of this terminology, see notes 22–23 and text, *supra*.

port the power of a holder for value to overcome the defence of absence of original consideration.

An argument that absence of consideration is not an equity as to liability cannot rest on the language of the "holder for value" provision. Indeed, as by its own terms it is inapplicable to the relations between immediate parties,[59] the provision is consistent with pre-Act case law under which absence of consideration constitutes an equity as to the liability of an immediate party.[60] While under the provision remote parties are liable towards a holder for value, there is nothing to suggest therein that this liability depends on one's signature alone and is irrespective of the absence of consideration. Indeed, reading the "holder for value" provision as meaning that absence of consideration is not a defence to the liability of a remote party whose promisee gave no consideration, is often explained on the basis that "the party who first parts with consideration is deemed to have done so in reliance upon the promises of all the parties whose names appear on the instrument."[61] Yet if it is the reliance on the appearance of the instrument which counts, it is hard to see why it is only the defence of absence of consideration and not any other defence to liability which is overcome. It is further hard to see how this explanation is provided in the context of one who is not only not a holder in due course but may well have actual knowledge of the absence of consideration.

The argument that absence of consideration is not a defence as to the liability can be made only by analogy to the language of the section dealing with an accommodation party which speaks of the latter's liability to a holder for value in absolute terms.[62] Nonetheless, this kind of language is characteristic to the whole legislative technique of the Act. Though the engagement of each party to an instrument, whether the acceptor, drawer or endorser is defined as absolute and unrelated to the holder's title,[63] the right to enforce full payment on an instrument over equities affecting it depends on the plaintiff's status as a holder in due course.[64] Not reading this dependence as to the entitlement of the "holder for value," would confer on him the power to overcome *any* defence as to liability and

[59] See text that follows and note 40, *supra*.

[60] *Holliday* v. *Atkinson* (1826) 5 B. & C. 501; 108 E.R. 187 (payee *v.* maker); *Easton* v. *Pratchett* (1835) 1 C.M. & R. 798, 808; 149 E.R. 1302 (indorsee *v.* indorser).

[61] Britton, *supra*, note 3, p. 234. *Query* whether this explanation was not provided by Professor Britton only in the context of the liability of an accommodation party.

[62] U.K., s. 28 (2); Can., s. 55 (2): "An accommodation party is liable on the bill to a holder for value. . . ."

[63] U.K., ss. 53–58; Can., ss. 127–138.

[64] U.K., s. 38 (2); Can., s. 74 (b).

not only on absence of consideration [65] as if he were a holder in due course. This indeed is untenable.[66]

Finally, it is noteworthy that also the American Uniform Negotiable Instruments Law [67] contained a " holder for value " provision [68] side by side with a section establishing the liability of an accommodation party towards a holder for value.[69] Both provisions were modelled on their counterparts in the Act and used language virtually identical to them. The American statute contained however a third section providing that absence of consideration " is a matter of defence against *any* person not a holder in due course." [70] Hence this reflects, that it would be totally incompatible to construe the " holder for value " provision as establishing that absence of consideration is not an equity as to the liability of a remote as well as an immediate party.

It is submitted here, that in its true sense the " holder for value " provision means that absence of consideration is not an equity as to ownership. The provision does not deal with absence of consideration as an equity as to liability. Its effect is indeed that only inasmuch as a holder seeks to establish his property in the instrument rather than to charge a party with liability, absence of consideration is not a defect of title.[71] Thus, as " the outgrowth of the fundamental idea in the law of negotiable paper . . . that a bill or note is a species of property," the provision means that once " value has . . . been given for the instrument, it becomes the subject of gift." [72] Accordingly, " [i]f a party gives to another a negotiable instrument, *on which other parties are liable*, the man who makes the gift cannot recover the bill back, and the man to whom the bill is given may recover against the other parties on the bill." [73] As such the " holder for value " provision is merely a " sheltering " provision [74] which is complementary to the section conferring on the transferee for value " such title as the transferor had," [75] as well as to another section giving to " [a] holder . . . who derives his title to a bill through a holder in due course " the same " rights of that holder in due

65. *Cf.* note 61 and text *et seq.*, *supra.*
66 *Cf.* note 46 and text, *supra.*
67 The Uniform Negotiable Instruments Law (N.I.L.) is the predecessor of Art. 3 of the U.S. Uniform Commercial Code (U.C.C.).
68 N.I.L. § 26. The provision was omitted from U.C.C. Article 3. See note 45, *supra.* Its effect as a " sheltering provision " (notes 71–76 and text, *infra*) is looked after in U.C.C. § 3–201 (1); see note 92, *infra.*
69 N.I.L. § 29.
70 N.I.L. § 28, emphasis added. *Cf.* note 14 and text, *supra.*
71 *Cf.* notes 10–13 and text, *supra.*
72 Britton, *supra*, note 3, p. 234.
73 *Easton* v. *Pratchett* (1835) 1 C.M. & R. 798, 808; 149 E.R. 1302, 1307, *per* Lord Abinger C.B. emphasis added.
74 Note in McGill L.J., *supra*, note 46, p. 487 and note 2.
75 U.K., s. 31 (4); Can., s. 61 (1).

course."[76] Its effect is thus to confer the endorser's title on a holder who took the instrument without giving value thereto, thereby giving him a cause of action against *prior parties already liable on the instrument.*[77] This indeed means that absence of consideration is not an equity as to ownership of the instrument.[78] But it falls short from providing that absence of consideration is also not an equity as to liability on the instrument. In fact, it is submitted, the section does not even deal with the latter.

This analysis dispells the myth of the "holder for value" as an intermediate concept who though not a holder in due course overcomes the defence of absence of consideration. As consideration given by his promisee is required to charge a promisor with liability on an instrument, the "holder for value" is in fact the only holder entitled to recover thereon. Where no promisor is a party to consideration there is neither liability nor a "holder for value." Consideration thus gives rise to liability as well as to the emergence of a "holder for value."[79] Yet unless the latter is a holder in due course, his right is subject to all equities affecting the instrument. As the nature of the liability on a bill or note is not "different from that on any other written contract for payment of money,"[80] absence of consideration to a promise thereon is an equity as to liability. It is available as a defence to an immediate as well as remote party against every holder not in due course.

III

Reading the "holder for value" provision as establishing a special status of "holder for value" and as such imposing some kind of absolute liability on an instrument is a source of ongoing confusion.[81] Thus, in *Diamond* v. *Graham*[82] one H received a cheque from D

[76] U.K., s. 29 (3); Can., s. 57.

[77] But see *Diamond* v. *Graham* [1968] 1 W.L.R. 1061 where the Court of Appeal, while not articulating any specific theory behind the "holder for value" provision, understood it to have a wider effect than suggested in this article. The case is critically examined in Part III *infra*.

[78] By itself the power to sue on the instrument given by U.K., s. 38 (1) (Can., s. 74 (*a*)) to *every holder* does not necessarily lead to this result, as the section deals only with *standing* to sue and is silent as to *equities* (whether available or unavailable) against the plaintiff. As a codification of an existing general principle of law (see note 93 and text, *infra*) the "holder for value" provision (as construed in this article) is no more superfluous than, for example, the provisions cited in notes 75–76 and text, *supra*.

[79] Whether he is the promisee himself or his transferee even without value, *cf.* note 22 and text.

[80] See note 4 and text, *supra*.

[81] *Queries* as to the range of his rights (even beyond his alleged power to overcome original absence of consideration) were raised by Byles, *supra*, note 13, p. 190; Megrah, *supra*, note 46, p. 402; Milmo J. in *Barclays Bank Ltd.* v. *Astley Industrial Trust Ltd.* [1970] 2 Q.B. 527, 538.

[82] [1968] 1 W.L.R. 1061; commented on in [1968] C.L.J. 196; (1969) 15 McGill L.J. 487.

signed by D payable to H (" cheque I ") in return for another cheque drawn by G payable to D, which was delivered to D by H (" cheque II "). On his part, H gave G his own cheque payable to G (" cheque III "). When D sued G on cheque II, G (who had been unable to collect from H on cheque III) argued that he had received no consideration from D. Finding that the case " turns upon the construction of [the ' holder for value ' provision] " [83] a unanimous Court of Appeal [84] held that D " clearly . . . falls within all the requirements of the section " [85] and decided in his favour.

It is submitted here that the " holder for value " provision was totally irrelevant in resolving this case. In holding that " [t]here is nothing in the subsection which appears to require value to have been given by the holder as long as value has been given for [cheque II] " [86] the court stated the obvious but failed to see that this did not establish " an indefeasible right [on cheque II]." [87] Moreover, in the facts of the case D did give value for cheque II by paying H for it with cheque I. As consideration has to move from the promisee but not necessarily to the promisor,[88] this could have supported D's entitlement. Yet no direct contractual relationship ever existed between D and G. The proper analysis of the case is rather that H, the " remitter " of cheque II, procured its issuance [89] and by paying for it to G with cheque III became its owner. Thereby he came to be in position " to confer title to [cheque II] upon the payee." [90] D himself acquired title to cheque II by *purchasing* it from H *for value* (paying H for it with cheque I). The point to be decided was whether D, the payee of cheque II but a purchaser thereof, could qualify as a holder in due course [91] so as to overcome the failure of consideration (the dishonour of cheque III) between G and H. In determining this issue, the " holder for value " provision is indeed immaterial. Reading it as establishing a special status of " holder for value " and as such imposing some kind of absolute liability on the instrument was indeed a source of confusion.

IV

The " holder for value " provision is one aspect of the general proposition that any transfer of an instrument, whether by endorse-

[83] [1968] 1 W.L.R. 1061, 1064 *per* Diplock L.J.
[84] Danckwerts, Diplock, and Sachs L.JJ.
[85] [1968] 1 W.L.R. 1061, 1065 *per* Diplock L.J.
[86] *Ibid.*, p. 1064 *per* Danckwerts L.J.
[87] *Cf.* note 46 and text, *supra.*
[88] See note 37 and text, *supra.*
[89] In general for the " remitter " as one who procures the issuance of an instrument payable to another, see Beutel, " Rights of Remitters and Other Owners not within the Tenor of Negotiable Instruments " (1928) 12 Minn.L.Rev. 584.
[90] *Munroe* v. *Bordier* (1849) 8 C.B. 862, 872.
[91] Since *R. E. Jones Ltd.* v. *Waring and Gillow Ltd.* [1926] A.C. 670 (H.L.) it

ment or not, whether by a holder or not, or whether for value or without value, vests in the transferee such rights as the transferor has therein.[92] In the framework of this provision, absence of consideration moving from the promisee of an immediate as well as a remote party is indeed not an equity attaching to ownership of the instrument.

Whether the plaintiff holder not in due course is a remote or immediate party, absence of consideration from the defendant's promisee is nonetheless an equity as to liability on an instrument. Thus, only inasmuch as a holder not in due course seeks to establish his property in the instrument rather than to charge a party with liability, absence of consideration is not a defect of title. The divided effect of the defence is the result of the confinement of the consideration requirement in the general law to the enforceability of an obligation but not to the transfer of property.[93] Though not an equity as to ownership under property law, absence of consideration is indeed an equity as to liability under contract law.

would be difficult to hold that an original payee can be a holder in due course (subject perhaps to the recent qualification which emerges from *Jade International Steel Stahl und Eisen Gmb H and Co. Kg* v. *Robert Nicholas (Steels) Ltd.* [1978] 3 W.L.R. 39 with regard to the payee who reacquires the instrument from a holder in due course, see Thornely [1978] C.L.J. 236). But see the effective criticism of this understanding of *Jones* (in particular as applied to the "remitter") in Aigler, "Payees as Holders in Due Course" (1927) 36 Yale L.J. 608, 609–619. It is submitted here that in *Diamond* v. *Graham*, if D could not be a holder in due course of cheque II (as a matter of either law or fact), he should not have been allowed to recover from G.

[92] See notes 71–76 and text, *supra*. Note that such a general proposition is embodied in U.C.C., § 3–201 (d): "Transfer of an instrument vests in the transferee such rights as the transferor has therein. . . ." This is a considerable improvement in relation to the piecemeal treatment of the subject in the Act.

[93] *Cf.* in general Stoljar, "A Rationale of Gifts and Favours" (1956) 19 M.L.R. 237.