

SUPREME COURT OF NORTH CAROLINA -- Spring Term 1931.

Federal Reserve Bank  
of Richmond, Va.,

vs.

No. 178 Craven.

G. S. Atmore, trading as  
Neuse Motor Company, and  
G.S. Atmore, individually.

Appeal by defendant from order of Small, J., at January Term, 1931, of the Superior Court of Craven County. Affirmed.

This is an action on two promissory notes, negotiable in form, and executed by defendant, G.S. Atmore, trading as Neuse Motor Company. Both said notes were endorsed by the defendant, G.S. Atmore, individually, before their delivery to the payees named therein, respectively.

One of said notes, for the sum of \$5,000.00, dated 28 September 1929, and due on 29 October 1929, was payable to the order of the maker. This note with the endorsement of the maker was negotiated to the First National Bank of New Bern, N.C., and by said Bank to the plaintiff, now the holder thereof.

The other note, for the sum of \$2,000.00, dated 8 October 1929, and due thirty days after date, was payable to the order of the First National Bank of New Bern, N.C. This note with the endorsement of the payee was negotiated to the plaintiff, now the holder thereof.

In its complaint, plaintiff alleges, both specifically and generally, that it is the holder in due course, and for value, of each of said notes. Defendant, in his answer, denies both the

specific and general allegations of the complaint to the effect that plaintiff is the holder of said notes in due course and for value. In addition to said denials, in defence of plaintiff's right to recover in this action, defendant alleges certain matters, both of law and of fact, all of which challenge the right of plaintiff to recover in this action as a holder in due course, and for value, on the notes set out in the complaint.

The action was heard on plaintiff's motion that certain matters alleged in the answer be stricken therefrom, on the ground that said matters, specifically pointed out in the motion, which was in writing, are irrelevant and immaterial, impertinent and frivolous. This motion was allowed.

From the order directing that certain matters alleged in the answer, and specifically pointed out in the order, be stricken from the answer, in accordance with the motion of the plaintiff, defendant appealed to the Supreme Court.

W. H. Lee  
M. G. Wallace

for plaintiff.

Guion & Guion

for defendant.

Connor, J. The defendant admits in his answer the execution and endorsement by him of each of the notes sued on in this action

He alleges that he executed and endorsed the note for \$5,000.00, for the accomodation of the First National Bank of New Bern, N.C., and that he received no value for said note from said Bank. C.S. 3009. It is alleged in the complaint that this note was negotiated by the First National Bank of New Bern, N.C., to the plaintiff.

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The defendant admits in his answer, that he received value for the note for \$2,000.00, from the payee, the First National Bank of New Bern, N.C. He alleges, however, that he has a set-off or counter-claim against the First National Bank of New Bern, N.C., with respect to said note. It is alleged in the complaint that this note was negotiated by the First National Bank of New Bern, N.C., to the plaintiff.

Neither of the defences alleged in the answer will avail defendant in this action if, as alleged in the complaint, the plaintiff is the holder in due course, and for value, of each of said notes. C.S. 3033, C.S. 3038. If, however, it is shown at the trial of the action, that defendant executed and endorsed the note for \$5,000.00, for the accommodation of the First National Bank of New Bern, N.C., and received no value from said Bank for said note; or if it is shown at the trial that defendant has a valid off-set or counter-claim again the First National Bank of New Bern, N.C., with respect to the note for \$2,000.00, then, in either case, the burden will be on plaintiff to prove, as alleged in the complaint, that plaintiff is the holder in due course, and for value of said notes, or of either of them. C.S. 3040. *Whitman vs. York*, 192 N.C. 87, 133 S.E. 427. Otherwise, each of said notes, although held by the plaintiff at the commencement of this action, as the result of its negotiation to plaintiff by the First National Bank of New Bern, N.C., is subject to the same defences as are available to the defendant against said Bank. C.S. 3039. *Whitman vs. York*, supra.

Defendants' answer, after the matters alleged therein have been stricken therefrom, as irrelevant and immaterial, is sufficient to raise issues both of law and of fact, involving the right of plaintiff to recover in this action, as the holder in due course of the notes sued on. The matters stricken from the answer are at least irrelevant and immaterial. The order striking said matters from the answer does not deprive defendant of any substantial right or defence at the trial of the action founded upon his equities against the First National Bank of New Bern, N.C.

Plaintiff's motion was made in apt time. C.S. 537. It was not addressed to the discretion of the Court, but was made as a matter of right. *Hosiery Mills vs. Hosiery Mills*, 198 N.C. 596, 152 S.E. 794. The order was therefore subject to review by this Court on defendants' appeal. However, there was no error in the order, and it is therefore affirmed.

The validity of the order made in this action by Judge Small, at November Term, 1930, of the Superior Court of Craven County, directing that the Receiver of the First National Bank of New Bern be made a party defendant to this action, is not involved in this appeal by the defendant from the order made at January Term, 1931. Plaintiff excepted to the order making the Receiver a party, but has not appealed from said order. We therefore do not pass upon the question discussed in the brief of plaintiff, as appellee on this appeal, as to the effect of the order at January Term, 1931, upon the order of November Term, 1930.

The order involved in this appeal is

Affirmed.