Boston College Law Review

Volume 4 | Issue 3 Article 25

4-1-1963

Negotiable Instruments—Due Date of Note—Effect of Acceleration Clause in Mortgage.—Poultrymen's Service Corp. v. Brown

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have no injunctive power,[38] whereas the Board would.[39] As this limitation does not extend to actions against employers,[40] the employee would have free access to the courts.

A further implication of the case might be that the individual employee would have standing, under section 301, to sue the union for breach of the contract. In deciding whether to classify his complaint as a contract violation or an unfair labor practice, the complainant would consider the traditional judicial requirement of exhaustion of internal remedies,[41] which is not required in complaints to the Board.[42] In such a suit it would seem that any injunctive jurisdiction of the court would not be beyond the reach of individual employees against the union, as such actions by individuals would not be "a part and parcel of the abuses against which the Act was aimed."[43]

Nevertheless, while there may be decided exceptions to the desirability of employees using the courts to bring suit against an employer, they are just that—exceptions. There can be little doubt that this new weapon of employees, and thereby of unions, against management shall be utilized in the enhancing of their bargaining position. What is definitely still in doubt is whether and where the courts will mark off the access of employees to section 301. The use of *Evening News* to answer this is limited.

PAUL E. D'HEDOUVILLE

Negotiable Instruments—Due Date of Note—Effect of Acceleration Clause in Mortgage.—*Poultrymen's Service Corp. v. Brown.*[1]—A promissory note payable to the order of the plaintiff 120 months after date was

[38] Sinclair Ref. Co. v. Atkinson, 370 U.S. 195 (1962).

[39] 61 Stat. 146 (1947), 29 U.S.C. § 160(a) (1958).

[40] Brotherhood of Locomotive Eng'rs v. B. & O. R.R., 310 F.2d 513 (7th Cir. 1962).

[41] See Parks v. IBEW, 52 L.R.R.M. 2281, 2311 (4th Cir. 1963) and Detroy v. American Guild of Variety Artists, 286 F.2d 75, 77-78 (2d Cir.), cert. denied, 366 U.S. 929 (1961) holding that Section 101(a)(4) of the Landrum-Griffin Act:

> No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided,* That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further,* That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

limits the jurisdiction of the court. Compare Sheridan v. United Bhd. of Carpenters, 306 F.2d 152 (3d Cir. 1962), holding that the four months proviso was directed only to the unions. In view of the legislative history indicating an intent to retain judicial discretion, and those decisions using the rationale of *Detroy* to establish an absolute right to sue after four months, the *Sheridan* approach seems the better interpretation. See 105 Cong. Rec. 16414 (1959).

[42] LMRA § 10(i), 61 Stat. 149 (1947), 29 U.S.C. § 101(i) (1958).

[43] Textile Workers Union v. Lincoln Mills, supra note 26.

[1] 77 N.J. Super. 198, 185 A.2d 706 (Ocean County Ct. 1962).

executed simultaneously with a mortgage to secure the note. The mortgage contained a default clause to the effect that failure to pay taxes upon the mortgaged lands within thirty days after they became due allowed the holder of the mortgage the option of declaring the entire amount secured by the mortgage due and payable. The mortgage referred to the note which it secured, but the note was devoid of any mention of the mortgage. Subsequently, upon the arrearage of taxes, the plaintiff notified the defendants of his election to accelerate the debt. The taxes were paid (thereby restoring the mortgage),[2] but suit was still commenced for recovery upon the promissory note, plaintiff contending acceleration by the breach of the default clause in the mortgage. HELD: The mortgage and the promissory note were two distinct instruments, and in the absence of any reference in the note to the mortgage, the breach of a condition in the mortgage has no effect upon the note. To hold that they are one instrument and one contract for purposes of interpretation would allow the terms of the note to be varied by extraneous instruments contrary to the theory of negotiable instruments.

On the main issue of this case, under the common law and the Negotiable Instruments Law, there exists a very decisive split of authority.[3] As in the principal case, the courts holding against non-inclusion of provisions of a mortgage simultaneously executed with a note do so largely on the theoretical grounds that the two instruments are separate and independent legal entities, each designed to fulfill a particular role in the overall financing transaction.[4] The note is intended as evidence of a personal obligation and the manner of payment, while the mortgage is to serve as a security device in specific property.[5] Under this viewpoint each instrument is to stand by itself, and

[2] The court in a foreclosure suit, being an action in equity, views the mortgage as restored upon performance of the accelerating condition. This equitable defense was held inapplicable to the note because it is an action at law. While this technical distinction made by the court is certainly correct, it could be contended that defenses available to a party upon one instrument should likewise be available to the party upon the incorporation of this instrument into another—the basis of the present suit. Furthermore, the trend is to incorporate the principles of equity within actions at law. E.g., the law of restitution is now such an action. Therefore, the court could have easily decided this controversy by applying the same equitable defense to the note.

[3] As to the jurisdictions holding the particular viewpoints and a listing of the many cases, see Brannon, Negotiable Instrument Law 173-75 (6th ed. 1938); Norton, Bills and Notes 109 (4th ed. 1914); for further citations, see Comments in 13 Cornell L.Q. 432 (1928), 9 N.C.L. Rev. 201 (1930), 4 U. Cinc. L. Rev. 203 (1930), 2 Wis. L. Rev. 469 (1924), 26 Mich. L. Rev. 436 (1928).

[4] A note and a mortgage securing the same are separate instruments, distinctly differing in their nature and purpose. The debt evidenced by the note is the principal thing, and the note is governed by the law merchant, while the mortgage is simply an incident, and governed by the law of real property.

White v. Miller, 52 Minn. 367, 372, 54 N.W. 736, 737 (1893). See also, Winne v. Lahart, 155 Minn. 307, 193 N.W. 587 (1923); Owings v. Mackenzie, 133 Mo. 323, 33 S.W. 802 (1896).

[5] A mortgage need not be accompanied by a personal obligation on the part of the mortgagor to repay the sum for which the mortgage was given. The consideration for the mortgage may have been advanced only on the security. . . . Manifestly there could be no deficiency judgment in such a case as that. If the mortgagee is not content to rely on the security alone, he must obtain a special promise for the payment of the debt, and, if the promise is contained in a note, he can only enforce it in accordance with the terms of the note.

consequently the provisions in the mortgage are viewed as being applicable only for the recovery of the debt by foreclosure proceedings against the property. The promissory note is considered to be governed exclusively by its own terms.[6]

Furthermore, some courts maintain that the requirements of uncertainty in the date when the debt is due and the unconditionality of the promise to pay would be varied to such an extent by incorporating the terms of the mortgage that the note would not be a negotiable instrument. Therefore, the allowance of the external conditions, according to this view, causes the instrument to become nonnegotiable.[7] Faced with the alternative of either interpreting the instruments as one contract, as would be dictated by the doctrine that instruments executed at the same time and having one purpose are but one instrument, or of following the historical belief that a negotiable instrument is a mercantile specialty, "a courier without luggage," these courts uphold the integrity of the note and reject all the conditions in an accompanying instrument as having any effect upon the note. This is basically the theory adopted by the court in the principal case and in the courts which follow this line of reasoning.

On the other hand, the courts favoring inclusion of the mortgage acceleration clause in the note do so on the general basis that between the original parties at the time of execution the instruments are in essence one contract.[8] As one contract, both instruments are to be interpreted to determine the intention of the parties. As to the negotiability of the note when interpreted with respect to the mortgage, the courts are subdivided. Some courts view the incorporation of the mortgage provisions into the note as destroying the negotiability of the instrument,[9] while other courts assert that this incorporation, since only applicable to the original parties and to persons holding with notice, does not destroy the negotiability.[10] The negotiability is not de-

Winne v. Lahart, supra note 4, at 312, 193 N.W. 587, 589. See also, Shanabarger v. Phares, 86 W. Va. 64, 103 S.E. 349 (1920), and cases cited note 4 supra.

[6] The stipulation in the mortgage should be construed as providing a remedy on the mortgage, and that so far as foreclosure proceedings are concerned, the notes for that purpose are due, but for general purposes, the obligations on the notes, are to be determined by their own expressed terms. In this way both contracts can stand and be fully enforced according to the manifest intention of the parties.

McClelland v. Bishop, 42 Ohio St. 113, 124 (1884). See also, Cafritz Constr. Co. v. Mudrick, 59 F.2d 864 (D.C. Cir. 1932); Smith v. Nelson Land & Cattle Co., 212 Fed. 56 (8th Cir. 1914).

[7] Birken v. Hickey, 42 S.D. 472, 483, 176 N.W. 137, 140 (1920). See also, Iowa Nat'l Bank v. Carter, 144 Iowa 715, 123 N.W. 237 (1909); Baird v. Meyer, 55 N.D. 93, 215 N.W. 542 (1927).

[8] Chambers v. Marks, 93 Ala. 412, 9 So. 74 (1891); McCormick v. Daggett, 162 Ark. 16, 257 S.W. 358 (1924); Webster v. 759 Riverside Ave., 113 Fla. 8, 151 So. 276 (1933); San Antonio Real Estate, Bldg. & Loan Ass'n v. Stewart, 27 Tex. Civ. App. 299, 65 S.W. 665 (1901); Wilson v. Kirchan, 143 Wash. 342, 255 Pac. 368 (1927).

[9] Iowa Nat'l Bank v. Carter, supra note 7; Brooke v. Struthers, 110 Mich. 562, 68 N.W. 272 (1896); Cornish v. Wolverton, 32 Mont. 456, 81 Pac. 4 (1905).

[10] Webster v. 759 Riverside Ave., supra note 8; Des Moines Sav. Bank v. Arthur, 163 Iowa 205, 143 N.W. 556 (1913); Holliday State Bank v. Hoffman, 85 Kan. 71, 116 Pac. 239 (1911); Durham v. Rasco, 30 N.M. 16, 227 Pac. 599 (1924). See also, Aigler, Conditions in Bills and Notes, 26 Mich. L. Rev. 471, 492-93 (1928).

stroyed in the opinion of the latter courts since the instrument is to be interpreted by the terms written upon its face unless the parties agree that it is subject to conditions contained in another instrument.[11] In effect this position is the middle ground between the two extremes, allowing the note to be affected by simultaneous instruments and also maintaining the negotiability of the note when it enters commerce unaccompanied by the "conditional" instrument. This position is clearly the most logical position to rectify the opposing requirements of the probable intent of the parties, the practices of the commercial world, and the freedom of negotiability.

This is in brief the status of the authority in the United States prior to the enactment of the Uniform Commercial Code. The Code's treatment of negotiable instruments, while incorporating many of the provisions of the Negotiable Instruments Law, has attempted to solve the split of authority existing in this area. Under the Code one aspect of the *Poultrymen's Service* case which was not considered to be crucial becomes of primary importance —the parties to the suit were the *original parties* to the instrument. The Code provides in section 3-119(1) that between the original parties and persons taking with notice, the negotiable instrument may be modified or affected by any written agreement executed as a part of the same transaction. The rationale for this position is based on the assumption that between the original parties the negotiable instrument and the allied instruments are one contract.[12] As one contract the court must consider all the written instruments in interpreting the terms of the contract. Furthermore, the final governing factor in the court's interpretation of this integrated contract is to be the intent of the parties gathered from the instruments themselves.[13] In this manner, between the original parties, the terms of a negotiable instrument may be intentionally modified, explained and conditioned by diverse clauses contained in accompanying instruments, while the face of the negotiable instrument is devoid of terms except those required by the formalities of negotiability.

While the above would appear to relegate the consideration of negotiability or non-negotiability to minor significance, section 3-119(2) provides that a separate agreement does not affect the negotiability of an instrument. Therefore, even though contemporaneous writings may be read together under subsection (1), the negotiability of the note will not be affected, such

[11] The purpose of the mortgage was to afford security for the payment of the note, and all the conditions in the part quoted, except one, relate to the protection and preservation of the security. These have no bearing on the engagements contained in the note. While the note and mortgage are to be construed together whenever the nature of the transaction becomes material, this does not mean that the provisions of the mortgage are thereby incorporated into and become part of the note.

Des Moines Sav. Bank v. Arthur, supra note 10, at 211, 143 N.W. 556, at 558-59.

[12] See Comment 3 to UCC § 3-119.

[13] UCC § 3-119, Comment 3:

> [A] note may be affected by an acceleration clause, a clause providing for discharge under certain conditions, or any other relevant term in the separate writing. 'May be modified or affected' does not mean that the separate agreement must necessarily be given effect. There is still room for construction of the writing as not intended to affect the instrument at all, or as intended to affect it only for a limited purpose . . . .

being exclusively determined by "what appears on the face of the instrument alone."[14] If the instrument thus explicitly states that it is subject to or governed by separate writings, it is not negotiable.[15] In this manner the Code maintains a separation between the problem of collateral instruments qualifying the terms of negotiable instruments and the problem of collateral instruments destroying the negotiability of the negotiable instruments.

In the principal case the court was not required to interpret the Code,[16] but it attempted to utilize section 3-119(2) and comment 5 thereto to augment its position against inclusion of the mortgage clause. The use of this subsection and comment was a misapplication of the Code to the facts of the case. Since the Code, as previously shown, establishes a separation between the problems of negotiability and inclusion of simultaneous instruments, the rationale that a note would lose its negotiability by incorporating other instruments within itself cannot be maintained under the Code. Nevertheless, in transactions involving immediate parties, there is still one basis by which the courts can sustain a holding that the terms of simultaneous instruments may not be included within the terms of the note—the intention of the parties. The courts in interpreting this intention may conclude that by not placing the provisions in the note itself, the parties did not intend the note to be governed by the clauses of the mortgage.[17]

In conclusion, the Code provisions demand that the jurisdictions decide anew whether or not, between the original parties and persons holding with notice, the acceleration clause in an accompanying mortgage will affect the terms of the note. The decision reached by these courts is also required to be based upon a fact determination of the intent of the parties and can no longer be founded upon the destruction of negotiability theory.

ROBERT T. TOBIN

Securities—Sale of Stock by Minority Shareholders—Effect of SEC Rule 10b-5 on Insider Activities.—***Cochran v. Channing Corp.***[1]—Action by minority shareholders against the dominant corporate stockholder and the directors of Agricultural Insurance Company for a violation of SEC Rule 10b-5 and New York tort law. Plaintiff alleged that the defendant, Channing Corp., engaged in a scheme aimed at obtaining the shares and control of

[14] Comment 5 to section 3-119 states that the key is the formality of the note.

[15] Ibid. The comment adds that "if it merely refers to a separate agreement or states that it arises out of such an agreement, it is negotiable." See UCC § 3-105 and comments thereto. The Permanent Editorial Board has recommended an addition to § 3-105(1)(c). A promise or order will not be made conditional by the fact that the instrument "refers to a separate agreement for rights as to . . . acceleration." Rep. No. 1, Permanent Editorial Board for the UCC (1962).

[16] The UCC became effective in New Jersey on January 1, 1963.

[17] This interpretation of the intent of the parties may be weak if the mortgage makes any reference at all to the note's inclusion of the mortgage terms. Since all the instruments are viewed as one contract, and the parties are deemed to intend the usual meaning of words used in contracts which they sign, the conclusion would appear to be that the parties' intent was to incorporate the acceleration clause within the note.

[1] 211 F. Supp. 239 (S.D.N.Y. 1962).