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ARE CHATTLE NOTES NEGOTIABLE?

By ELTON E. RICHTER

Due to the rapid growth of installment and other forms of credit selling, accompanied with the natural consequences, over extended purchasers, the vendors have found it more and more desirable to draw their contracts so that the occurance of certain facts (usually the list of these facts is large) will give them the right to proceed at once against the financially shaky purchaser to collect the debt or regain possession of the property sold. Coupled with the desire for a contractual position which will free them from the necessity of standing idly by, hands tied until the maturity of their note, while the debtor daily becomes a poorer risk, is the desire on the part of the vendors to have their debts evidenced by negotiable contracts. On the one hand the vendor desires the contract to be negotiable, on the other he desires to be protected against any unfavorable change in the financial condition of the purchaser, the vendor's objective always is to get the maximum degree of contractual protection from unfavorable developments in the debtor's position without losing the advantages of having their contracts negotiable.

It is the purpose of this paper to note the success which the vendors have achieved in their efforts to get a protected contractual position by means of the chattle note without destroying the negotiable character of the note.

The term chattle note, as here used includes two classes of commercial agreements:

First: those contracts otherwise negotiable in form which contain simply the provision that the note is given for a chattle and providing that the title to the chattle or ownership of the

chattle shall remain in the vendor payee until the note is paid. This is the simple chattle note.

Second: those contracts otherwise negotiable in form which in addition to the title retention provision includes other provisions inserted to aid the holder in collecting the instrument. These are usually, but not always, acceleration provisions.

As to instruments included in the first class:

Before the adoption of the Uniform Negotiable Instrument Act the authorities were divided in their holdings on the negotiability of simple chattle notes. The leading case against the negotiability of such instruments came from Massachussetts.[1] The cases for negotiability were followers of the United States Supreme Court.[2]

Cases holding simple chattle notes non-negotiable usually did so on the ground that they did not contain an unconditional promise to pay. These courts interpreting the transaction not as an absolute sale but only as an agreement to sell upon condition that the purchasers should pay their notes at maturity.[3]

Those cases holding a simple chattle note negotiable proceed on the theory that the transaction represents an absolute sale, that the legal title is retained as security only, that the promise of the obligor is there from unconditional. However, these cases agree that if in a particular transaction the promise is in fact a conditional one the note is not negotiable.[4]

The weight of authority is with the view that bare retention of title by the vendor payee shows a security transaction and not a conditional promise by the buyer. The same result is reached under sub-section A of section 22 of the Sales Act.[5]

In addition to retaining title the payee may retain other rights in reference to the goods sold. Thus possession as well as title

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1 Sloan V. McCarthy 134 Mass. 245.
2 Chicago etc. Equipment Co. V. Merchant's Bank 136 US 268.
3 Ibid.
That this is the proper use of the term "conditional sale" has been questioned. Campbell's cases on Bills and Notes page 88. The term "Conditional sale" properly defined includes the very transaction recited in the note, i.e. One in which possession and beneficial ownership passed to the buyer, legal title being retained by the seller as security. Williston on Sales, Section 330: Uniform conditional sales Act Section 1.
4 Harkness V. Russell 118 US 663.
5 Where the delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of th contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligation under the contract, the goods are at the buyers risk from the time of such delivery.

may be retained. In Gazlay V Riegel[6] the agreement was, "This note is given for an Acme Turbine Separator. The express condition of the sale and purchase is that the title, ownership and possession does not pass from the DeLaval Separator Company (the payee) until this note is fully paid and satisfied." The Court by Rice, P. J., said, "To call this a sale was a mis-nomer. So far as we can judge from what appears in the instrument, it was not, in its essence, an executed contract of sale, an absolute sale, to constitute which the general property in the chattle must pass, but a contract to sell, which contemplated the transfer of the title, ownership and possession in the future. Presumably such transfer and payment of the stipulated price were to be contemporaneous: and the principle established by the modern decisions, that, in the absence of clear indications to the contrary, promises, each of which forms the whole consideration for the other, will be held to be concurrent conditions, would seem to apply. So that, if the DeLaval Separator Company was unable or refused to perform its implied obligation to transfer the title, ownership, and possession, the other party to the contract would be released from his promise to pay." The Court held the contract non-negotiable on the ground that the promise was not unconditional since the obligation of the buyer to pay the price depended upon the seller transfering title and possession.

In Fleming V Sherwood[7] the note contained the following clause: "Payee's ownership of goods account of which this note is given, the account thereof and contract condition of original sale are not affected by acepting this note until receipt in full of amount due thereon."

It was shown that the goods actualy remained in the payee's possession. Concerning the negotiability of the note the Court held that "ownership' meant both title and possession and so the note showed a real conditional sale and not a mere security transaction and was not negotiable.

According to this case retention of ownership in the vendor, payee, especially when it can be shown that possession of the goods, retained by the payee, represented a real conditional sale, that is a transaction where the buyers obligation to pay the

6 Sixteen Pa. Super. St. 501.
7 24 N.D. 144.

price is conditional upon the seller delivering the property. This being a correct interpretation of the facts the buyers promise was of course again conditional.

In Welch V. Owenby[8] the note included the statement, "This note is given for a stallion which is delivered to the maker of the note with the understanding that the stallion shall remain the property of the payee with full power to dispose of the same until the note is paid." It will be observed that the property rather than the legal title plus the right to dispose of the stallion at any time before the note was paid was reserved by the vendor, payee. It would seem that this transaction represented a conditional rather than an absolute sale, for certainly the maker could not be expected to pay the note if the payee decided to sell the stallion to another.

The Court however held that the note was negotiable, taking the view that the statement was simply a mere statement of what the note was given for[9] and the security for the payment of the note.[10]

In addition to retaining title or ownership, or ownership and possession, of the chattle the vendor payee often inserts other provisions in the contract for its protecction. Contracts containing these additional provisions are included in the seccond class of contracts previously mentioned. Among the provisions frequently inserted by the vendor, payee, are the so-called acceleration provisions.

An acceleration provision is an agreement by which the vendor payee contracts for the right to mature the instrument at a time earlier than the maturity date stated in he instrument. Under these clauses the maturity date may be moved up or accelerated. Obviously the purpose of an acceleration clause is to aid in collecting the instrument.. As in other cases the payee desires a protected contractual position. In extending his pro-

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8 175 Pacific 746.

9 Negotiable Intruments Law, Section 3 (2): "An unqualified order or promise to pay is unconditional with the meaning of this act. Though coupled with a statement of the transaction which gives rise to the instrument."

10 This construction of the negotiable instrument law Section 3 (2) thus seems to have made a reality of the interpretation anticipated by Mr. Ames in his controversy with Mr. Brewster. Concerning the interpretation of this Section Mr. Ames's query was, "Whether this section would not apply to a note with a statement that it is given for a chattle, which is to be the property of the payee until the note is paid, as to the negotiability of which there is a conflict."

tection the payee may and often does destroy the negotiable character of the Contract.

In discussing the effect of acceleration clauses on the negotiable character of the instrument such clauses may be classified as absolute and conditional. An absolute clause gives the payee full and unlimited power to move up the maturity date. Under a conditional clause the payee's right to move up the maturity is made to depend upon the maker's failing to do something which according to the contract he ought to do, or doing something, which according to the contract he ought not to do.

The effect of absolute acceleration clauses on the negotiable character of the instrument will be first considered.

In Mahony V. Fitzpatrick[11] the note was payable "on demand or in three years from this date." The contract was construed as giving the holder the right to demand payment any time within the three years. The Court held the note non-negotiable in the following language, "It is not a note payable at a named time, because it may be payable before that time, it is not a note payable upon a certain event, because the event named may never happen. Whether it will become payable by lapse of time or by a demand is uncertain and contingent depending upon the option of the holder. A not payable at a future date certain, or earlier at the option of the maker or a stranger, is not payable at a time certain and is not negotiable."

In Puget Sound State Bank V. Washington Paving Company[12] the note contained the following provision:

"This note shall become due and payable on demand at the option of the payee, when it deems itself insecure.' The Court after citing the Negotiable Instrument Law[13] held that the note was not negotiable since the time of payment was uncertain.

The law as to the effect of absolute acceleration clauses on negotiability was well stated in Nickle V Bradshaw,[14]

11 133 Mass. 151.
12 162 Pacific 870.
13 Negotiable Instrument Act Section 1. Any instrument to be negotiable must conform to the following requirements: (3) must be payable on demand or at a fixed or determinable future time.
Section 3. An instrument is payable at a determinable future time within the meaning of this act which is expressed to be payable (3) on or at a fixed period after the occurrance of the specified event, which is certain to happen, though the time of happening be uncertain.
An instrument payable upon a contingency is not negotiable and the happening of the event does not cure the defect.
14 11 A.L.R. 623.

"The cases holding that an instrument is not negotiable if it contains a clause giving the holder the right to declare the debt due if he deems himself insecure are based primarily upon the objection that the date of maturity is placed wholly under the control of the holder, is completely dependent upon his whim or caprice."

The Court obviously regarded any time of payment which depended on the whim or caprice of the holder as too uncertain to meet the requirements of the negotiable instrumnts law

Clauses giving the maker the unlimited power to accelerate the maturity[15] may be compared with the absolute acceleration clauses. It seems as a matter of fact that any maturity date which depended upon the whim of the maker was just as uncertain as any date depending upon the whim of the holder. Before the Uniform Negotiable Instruments Law some Courts made no distinction between the two cases, both clauses destroying negotiability on the ground that the time of payment was uncertain.[16] Other courts held that acceleration clauses giving the maker the option did not destroy negotiability.[17] The negotiable Instruments Law is usually interpreted as conferring the option of acceleration upon the maker and of course thus settles the question of the effect of such clauses on negotiability. With this interpretation of the law the creditor will probably come to the conclusion that acceleration clauses are poor devices to aid in collecting the instrument. That such clauses do not provide the protected contractual position which he desires. The Courts have, however, recognized the demands of the creditors by permitting conditional acceleration clauses in negotiable instruments.

In ChicagoRailway Equipment Co. V. Merchants Bank[18] a series of notes were given, each note containing the provision: "this note is one of a series of 24 notes, of even date herewith, of the sum of $5,000 each and shall become due and payable to the holder on the failure of the maker to pay the principal and interest of any one of the notes of said series."

In holding the notes negotiable the Court used the follow-

15 Negotiable Istrument Act, Section 4—an instrument is payable at a determinable future time, within the meaning of his act, which is expressed to be payable—(2) on or before a fixed or determinable future time specified therein.
16 Mahoney V. Fitzpatrick—Supra.
17 Mattison V. Marks—31 Michigan 421.
18 136 US 268.

ing language, "It is true that, upon the failure of the maker to pay the principal and interest of any note of the whole series of 25, the others will become due and payable—that is, due and payable at the option of the holder. But a contingency under which a note may become due earlier than the date fixed is not one which affects the negotiability." The contingency here was one which was not under the control of the holder.

In McCormick and Company V. Gem State Oil Company[19] certain trade acceptances had written on the margin of them the following: "The obligation of the acceptor of this bill arises out of purchase of goods from the drawer. Upon the acceptor hereof suspending payment, giving a chattle mortgage, suffering a fire loss, disposing of his business or failing to meet at maturity any prior trade acceptance, this trade acceptance, at the option of the holder, shall immediately become due and payable.' The Court in discussing the negotiability of the instrument said: "The notes involved here provided for acceleration of the time of payment upon the happening of any one of five events, four of which, viz., suspending payment, giving a chattel mortgage, disposing of his business, or failing to meet at maturity any prior trade acceptances, are wholly within the control of the acceptor or maker, and the other contingency, that is, suffering a fire loss, is an event over which no party to the paper has any control. None of the contingencies named are within the control of tre holder." And further, "Whenever the additional stipulations are merely to aid in colledtion of the note, and do not constitute an undertaking to give or do something else foreign to that end, they do not destroy the negotiability."[20] The instrument was held negotiable.

In Ernest V. Steckman[21] a note otherwise negotiable contained a promise to pay twelve months after date, or before if made out of the sale of W. S. Coffmans Improved Broadcasting SeedingMachine. The note was held negotiable. The Court in its opinion laid down the following rule: "The principle to be deduced from the authorities is this: To constitute a negotiable promissory note, the time, or the event, for its ultimate payment,

19 38 Id. 470.
20 See "acceleration provisions in time paper". by Zachariah Chaffee, Jr.—32 H.L.R. 747.
21 74 Pa. 1.

must be fixed and certain, yet it may be made subject to contingencies, upon the happening of which, prior to the time of its absolute payment, it shall become due. The contingenccy depends upon some act done or omitted to be done by the maker, or upon the occurance of some event indicated in the note, and not upon any act of the payee or holder, whereby the note may become due at an earlier date."

In Brooks V. Hargreaves[22] a note otherwise negotiable contained this provision, "To be paid when any dividends shall be declared on such shares as Joseph Smith has been holding heretofore in the Agriculture and Broom handle Manufacturing Company of Trenton, Mich." The paying of the dividend was under the control of neither the maker nor the holder. The note was held non-negotiable on the ground that the time of payment was uncertain.

The case of State Bank of Halstead V. Bilstead[23] may be compared to the preceding case. In this case notes dated April 23rd, 1904, due December 1st, 1905, and December 1st, 1907, provided that, "It is agreed that if the crop on Section 25 and 26, Township 145-48, is below 8 bushels per acre (for 1905 as to one and 1907 as to the other) this note shall be extended one year." The Court construed the notes as payable at all events December 1, 1906 and December 1, 1908 and held the notes negotiable.

In Finley V. Smith[24] the note contained this agreement, "It is further agreed by the undersigned that, in case of depreciation in the market value of securities herewith or hereafter pledged to secure this note, the undrsigned will deposit and pledge with said bank such additional security as it may from time to time require, and, in default of such deposit and pledge for three days after notice to make the same, shall be given to, or left at the place of business of the undersignd, this note at the option of the bank, shall become due and payable. And in default of payment of this note at maturity, or if it shall become payable by failure to deposit additional security, as aforesaid, or in default of the payment of any other liability of the undersigned to the said bank, said bank or its president

22 21 Michigan 254.
23 162 Iowa 433.
24 165 Ky. 445.

or cashier is hereby authorized by the undersigned to sell, transfer and deliver said securities herewith pledged, or any part thereof, and any securities which may hereafter be pledged with said bank in lieu of or in adition thereto and any other property of the undersigned which may come into due possession of said bank for safe keeping or otherwise."

The Court, after recognizing the split of authority upon the points involved, viz., was the note rendered not non-negotiable by the provisions (1) requiring the maker to pledge additional security (2) accelerating the maturity of the paper held that the note was negotiable.

In summarizing the effects of conditional acceleration clauses upon the negotiable character of instruments otherwise negotiable the cases in the main support the following conclusions:

First: If the occurance of the event upon the happening of which acceleration is permissible is within the control of the maker negotiability is not destroyed.

Second: If the occurance of the event upon which acceleration is permissable is within the control of the holder the negotiable character of the instrument is destroyed.

Third: If the occurance of the event upon which acceleration is permissable is under the control of neither the maker nor the holder the instrument is negotiable.[25]

The desire of the vendor to protect himself often takes other forms than acceleration clauses. Thus in General Moters Acceptance Corp. V.. Garrard[26] a note negotiable in form was attached to a conditional sales contract, but perforated and printed in such a manner that the note part could be torn from the title-retaining portion of the conditional sale contract. The note contained the provision, "This note covers deferred installments under a conditional sale contract made this day between the payee and the maker hereof."

Th Court held that the note and the title retaining portion of the conditional sale contract constitued one contract, that the act of detaching the note part was an alteration of the contract and that this would be true although the contract authorized the detachment of the note. The Court further held

25 See very interesting note by Prof. Aigler in 22 Mich. L. Rev. 710.
26 223 Pac. 524.

that the inspection of the instrument showed that it had been part of another contract, that the note was not negotiable and consequently that the purchaser of the note was not protected against defenses available between the immediate parties.

In Coninental Guaranty Corporation V. People's Bus Line[27] a note and conditional sales contract were executed when certain motor vehicles were sold, the note was not attached to the title retaining agreement but did include this provision, "This note is given covering deferred installments under conditional sale contract for a motor vehicle."

The note was held negotiable. It perhaps should be noted that the note and conditional sale contracts were transferred to the same purchaser, the latter as security for the former.

In the International Harvester Company V. Watkins[28] the following agreement was inserted in the note: "This note is given for McCormick-Deering Tractor No. T. G. 38413 and I hereby agree that title hereto, and to all repairs and extra parts furnished for, shall remain in the payee, owner or holder of this note until this and all other notes given therefor shall have been paid in money, and if at any time he shall deem himself insecure, he may take possession of said property, ,and hold the same until all of said notes and expenses of repossession shall have been paid." The note was held non-negotiable on the ground that it contained a promise to pay an indefinite sum of money, Viz., the sum called for by the note and the expenses of repossessing the tractor.

In Branch Banking and Trust Company V. Leggett[29] this agreement was included in the note:

"This note is given for one Hebener and Sons Peanut Picker.

,'I agree that the title thereto and to all repairs and extra parts furnished shall remain in said E. P. Hyman and Co., until this and all other notes given for the purchase price shall have been paid in full with interest.. If I fail to pay this note, or if said property is misused, or seized for my debts, the holder of this note may seize and sell the same at public or private

27 117 Atl. 215.
28 272 Pac. 139.
29 116 S. E. 1.

sale, with or without notice, pay all expenses thereby incurred and apply the net proceeds upon this and other notes given for the purchase price thereof, whether due or not due, and retain all payments before made as rent for the use of said property. I expressly agree to pay any balance on this note remaining unpaid after such property is sold or if same is burned or otherwise destroyed or damaged after its delivery to me."

The Court held the note negotiable on the ground that the portion of the instrument set out did not impose on the obligor the doing of any act in addition to the payment of money but only retained the title to the goods sold as seccurity for the debt and that the above stipulations only gave direction at the distribution of the proceeds realized from the sale of the securities.

The note in case of Murrell V.. Exchange Bank[50] contained this agreement:

"It is expressly undrestood that this note is given for the purchase money of a pump, title and right of possession to which is reserved in the payee until this note is fully paid. If at any time the payee shall deem the said property to be unsafe, he may take possession thereof at once, whether this note be due or not, and sell same at public or private sale, and in consideration of use of said pump, I hereby agree to pay the balance of note remaining unpaid after net proceeds are applied."

The Court held this note non-negotiable on two grounds, the time of payment was uncertain, and the sum to be paid was uncertain.

The decisions noted justified the following conclusions:

First: There is a continuous demand from the commercial interests for an instrument which will give protection to the vendor payee and still be negotiable.

Second: That the law is full of uncertainties as to what provision may be included in the instrument without destroying negotiability despite the Uniform Negotiable Instrument Act.

Perhaps uniformity could be obtained and commercial requirements met by reverting to fundamental principles.

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50 271 S. W. 21.

Thus the rules included in the law merchant had their origin in the practice and usage of merchants. In Goodwin V. Robarts[31] the Court spoke on this subject as follows: "The lex mercatoria is neither more nor less than the usages of merchants and traders in any department of trade, ratified by the decisions of courts of law, which, upon such usages being proved before them, had adopted them as settled law with a view to the interests of trade and public convenience, the Court proceeding herein on the well known principle of law that, with reference to transaction in the different departments of trade, courts of law, in giving effect to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing of any custom or usage prevailing generally in the particular department. By this process what before was usage only, unsanctioned by legal decision, has become engrafted upon, or incorporated into the common law and may thus be said to form part of it."

According to Justice Story the introduction and use of bills of exchange in England, as indeed it was everywhere else, seems to have been founded on the mere practice of merchants and gradually to have acquired the force of custom.

Usage adopted by the courts having been thus the origin of the whole of the so-called law merchant as to negotiable securities, ,what is there to prevent our acting upon the principle acted upon by our predecessors, and followed in the precedents they have left us? Why is it to be said that a new usage which has sprung up under altered circumstances is to be less admissable than the usage of past times?

And in Ex Parte Goldberg V. Lewis[32], "The law merchant is essentially the creation of the business world, whose practices have hardened into principles, and these principles have been shaped and polished for centuries by the lapidaries of the law—all to one supreme end, viz., the protection of a bona fide holder for value who has acquired a negotiable instrument in the due course of trade or business. Only such protection can give confidence, and only confidence can give free currency to any medium of exchange. This is the cap stone of the struc-

[31] L. R. 10 Ex. 337.
[32] 191 Ala. 356.

ture knowns as "Commercial Law". Its codification into the Uniform Negotiable Instrument Law has been accomplished not for the purpose of altering any of its essential principles, and certainly not for the purpose of destroying or weakening its cardinal principle, but for the purpose of harmonizing certain minor differences existing in the various jurisdictions."

It is, of course, taken for granted that an instrument to be negotiable must conform to the requirements of the Negotiable Instruments Law.[33]

The problem of determining the degotiability of the instruments now under consideration in the main would seem to depend upon the following factors:

First: To what extent should current decisions recognize the recent changes in commercial practice and usage, especially in installment selling, where the vendor's main security for the purchase price is the title to the chattle which he retains plus the right to retake possession of the chattle upon the occurance of certain events.

Second: Conceding that the lex mercatoria is neither more nor less than the usages of merchants and traders, are the current decisions as liberal in recognizing the usages as the requirements of the Negotiable Instrument Law permits?

As to the negotiability of a simple chattle note the Negotiable Instrument Act contains no provisions governing this particular instrument. Its negotiability will consequently be determined by the common law rules.[34]

The way is therefore open for the law to recognize commercial usage and practice which is to confer the elements of negotiability upon their instruments. It would also appear to be time for the courts to recognize the business fact that in no case does the vendor who has retained the title intend to transfer the title to the purchaser except upon the condition that the purchaser pay the price. These chattle notes then practically all represent a technical conditional sale, that is, a sale in which the possession and beneficial ownership passed to the buyer, legal title being retained by the seller as security. The test of negotiability of these instruments then would be, under

33 Manhattan Company V. Morgan 242 N.Y. 38.
34 N.I.L. Sec. 196. In any case not provided for in this act the rules of the law merchant shall govern.

the contract did the buyer get possession and use of the chattle? If so it is a sale with title retained as security only, if the buyer did not get possession then the transaction represents not a sale but a contract to sell, the payment of the price and passing of the title are dependent concurrent conditions, and the instrument not negotiable because the promise to pay is not unconditional.

It is submitted that the later cases support this conclusion.

As to the instruments under discussion other than the simple chattle note: In construing these instruments some of the following Negotiable Instrument Act Rules are usually involved

Section 1.—Be it enacted, etc., an instrument to be negotiable must conform to the following requirements:

(2) Must contain an unconditional promise or order to pay a sum certain in money.

(3) Must be payable on demand, or at a fixed or determinable future time.

Section 2.—The sum payable is a sum certain within the meaning of this act, although it is to be paid—

(2) By stated installments, or

(3) By stated installments with a provision that upon default in payment of any installment or interest the whole shall become due. Or

(5) With cost of collection or an attorney's fee, in case payment shall not be made at maturity.

Section 3—An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with —

(2) A statement of the transaction which gives rise to the instrument.

Section 4—An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable—

(2) On or before a fixed or determinable future time specified therein.

Concerning the chattle notes containing acceleration clauses:

The decisions previously cited show that the time is de-

terminable under the requirements of the Negotiable Instrument Act in all cases except where the event upon which the right to accelerate is contracted for is within the control of the holder. It is difficult to see how a time which depends upon the number of bushels of wheat which may be grown per acre is any more determinable than a time which depends upon the whim of the holder, or how a time depending upon the whim of the maker is any more determinable than a time depending upon the whim of the holder.

As for the requirements of the Negotiable Instrument Act. Section 4 part 2 expressly permits instruments payable on or before a fixed or determinable time. Here it should be noted that the statute does not say than only an instrument which uses the words "on or before" a fixed date is negotiable. It declares that an instrument which is in fact payable on or before a certain date is negotiable.[35]

The statute makes no difference between events under the control of the maker, or a third person and events under the control of the holder. The purpose of all acceleration clauses is to protect the holder of the paper and to make collection at least more probable. The decision before cited sustained the proposition that the occurance of any event under the control of the maker may be contracted for as a cause for accelerating maturity. Thus the payee may so hedge the maker with duties and restraints as to make it practically impossible for the maker to avoid giving the holder the right to accelerate the maturity of the paper. This being true it would seem that we have arrived at the point where one must either limit the events upon which accelration is permissible to events which jeopardize the collection of the paper or hold that any instrument which is in fact payable on or before a fixed date is negotiable.

To the writer it seems that the latter is preferable

First: Such an interpretation would secure uniformity in the law of commercial paper.

Second: Such an interpretation would recognize the needs of current business practice, especially in installment selling.

An instrument payable at the whim of the holder of course might be subject to certain criticisms:

35 See Utah State National Bank V. Smith 179 Pac. 160.

It might be maintained that such a contract would give the holder an unfair advantage over the maker. To this it can be answered that the law has never assumed the right to make the parties contract and any way the maker would not be worse off than in the case of a demand note. It might be argued that it would be difficult for a purchaser to ascertain whether the instrument has been in fact matured by the holder. But ascertaining this fact would seem no more diffiffcult than to determine whether the instrument has been matured because of the operation of any of the acceleration clauses now permissable and any way it would seem that under the Uniform Negotiable Instrument Act[36] a purchaser not knowing that the instrument is over-due because of the operation of acceleration clauses would be protected in his status as a holder in due course. It might be further maintained that a purchaser would never know whether indorsers have been discharged by failure to give notice. But this question is largely one of theory, since practically all instruments are now drawn in such form that an indorser assumes an absolute rather than a conditional liability, and furthermore under the Negotiable Instrument Law[37] the indorser would probably be held liable to the innocent purchaser. All in all there seems no valid reason why an instrument in fact payable on or before a named date as provided in the Negotiable Instrument Law should not be held negotiable.

A remark or so about special cases: It seems hard to see why a contract similar to the one in Murrell V. Exchange Bank[38] the sum should be held uncertain when the Negotiable Instrument Law Secion 2 Part 4 expressly authorizes collection costs, or why the instrument in the case of General Motors Acceptance Corp. V. Garrard[39] should be regarded as altered when nothing was done except what the parties to the contract in fact contemplated and authorized. In First National Bank and Trust Co. of Bogulusa[40] the court held that the attaching of notes to a lease did not destroy negotiability of notes or make the lease and notes one contract.

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36 N. I. L. Section 52—Part 2.
37 Ibid.
38 Supra.
39 Supra.
40 102 So. 513 La. 1925.