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Judicial Construction of General Covenants of Renewal

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COMMENTS

JUDICIAL CONSTRUCTION OF GENERAL COVENANTS OF RENEWAL

It is said to be one of the most fundamental concepts of the law of contracts that in order to be enforceable, a contract must be definite and certain.[1] That is, the promise or agreement of the parties to it must be clear and explicit so that the nature and extent of the obligation may be ascertained to a reasonable degree of certainty. It is evident that unless such intention and obligations are sufficiently definite and certain, courts will be unable to specifically enforce the agreement.[2]

The subject of this paper is general covenants of renewal; a covenant being defined as an agreement reduced to writing and executed under seal, by which either of the parties thereto pledges himself to the other that some act shall or shall not be done.[3] Under the more modern view, a covenant need not be under seal.[4] It is thus apparent that covenants of renewal are creatures of contract law, and are subject to the same demands of definiteness and certainty as are other types of contracts. In a recent case, however, the Wisconsin Supreme Court held a three-year mortgage-note containing the clause, "note to be renewed until paid in full," to be enforceable. The court said the renewal clause implied a single renewal period of three years, and thus it was sufficiently definite and certain.[5] This decision is illustrative of the problem with which this article is concerned. The scope of the article is restricted to those general covenants of renewal which are incorporated into the instrument to which they appertain. The questions of the necessity of notice of renewal, or the effect of holding over by a tenant in a lease case[6] and those cases in which the renewal is conditioned on other outside factors,[7] will not be considered here.

The decision of the Wisconsin Court in the *Sardino* case raises an immediate question as to when such renewal clauses are so uncertain and indefinite that they are thereby rendered unenforceable. The Wisconsin decision would seem to be clearly violative of the funda-

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[1] 13 C. J. CONTRACTS 1936 §59; 6 R.C.L. 643 §59; 1 WILLISTON, CONTRACTS §49 (Rev. ed.) 1936; GRISMORE, CONTRACTS §25 (1947); CORBIN, CONTRACTS §16 (1952); Baurman v. Binzen, 16 N.Y.S. 342 (1891); Re Friese, 336 Pa. 241, 9 A.2d 401 (1939); Carthell v. Summit Thread Co., 132 Me. 94, 167 Atl. 79 (1933).

[2] RESTATEMENT, CONTRACTS §32 (1932).

[3] Atlantic Pacific Oil Co. of Montana v. Gas Development Co., 105 Mont. 1, 69 P.2d 750, 756 (1937); De Grasse v. Verona Mining Co., 185 Mich. 514, 152 N.W. 242 (1915).

[4] C.J. COVENANTS §2; 7 R.C.L. 1084 §2.

[5] Riepl v. Sardino, 162 Wis. 131, 56 N.W.2d 493 (1953).

[6] See Note 29 L.R.A.(N.S.) 174 (1911); L.R.A. 1916E, 1232, 1237.

[7] See Note 41 L.R.A.(N.S.) 387 (1912).

mental contract requirement of definiteness. In considering this question, it is obvious that ours is a problem of judicial construction. This problem, in turn, involves two additional questions, namely; just how long a term or period of time is such a renewal clause intended to cover, and second, how many renewals are intended by such a covenant?

Because these renewal clauses are creatures of contract, the so-called rules of construction which the courts apply to contract problems are equally applicable to the problem at hand.[8] There are many such construction rules,[9] but just a few need be noted here. The cardinal rule in the construction of contracts is to ascertain the intention of the parties as it is expressed in the language used.[10] Just as important perhaps, is the rule that if two different interpretations are possible, one which would render the agreement meaningless and the other would make its meaning reasonable and fair, the court will adopt the latter construction.[11] This latter rule is well founded, in that it may be logically presumed that parties to a contract do not intend to agree to meaningless things. Further consideration of the problem involved in this paper will disclose the reason why there is a third rule which is apropos, namely: where words or phrases having a definite legal meaning and effect are used in a contract, the parties to such contract will be presumed to have intended them to have their proper legal meaning and effect in the absence of anything in the contract showing the intention to use them in a different sense.[12]

This problem of interpreting renewal clauses has arisen most frequently in the field of leases. This is due to the fact that the device is employed in that field more often than in any other. For the same reason, the field of leases affords the best place for beginning an analysis of the problems involved in renewal clauses. There can be no doubt that provisions or agreements for the renewal of leases are valid and enforceable; if the renewal agreement is incorporated into the lease itself it is clearly supported by the same consideration as that which supports the lease.[13] These agreements of renewal must be definite and certain

[8] Launtz v. Kinloch Tel. Co., 239 Ill. App. 204 (1925); Butt v. Zabelien Brewery Co., 6 Cal.App. 581, 92 P.2d 652 (1907); Kaufmann v. Liggett, 209 Pa. 87, 58 Atl. 129 (1904); Swank v. St. Paul City Rwy. Co., 72 Minn. 380, 75 N.W. 594 (1898).

[9] See 12 AM. JUR. CONTRACTS §226.

[10] 12 AM. JUR. CONTRACTS §227; Richmond Mining Co. v. Eureka Min. Co., 103 U.S. 839 (1881); Farmers' Loan & T. Co. v. Commercial Bank, 15 Wis. 424, 82 Am. Dec. 689 (1862).

[11] 12 AM. JUR. CONTRACTS §251; Chenango Bridge Co. v. Binghamton Bridge Co., 3 Wall. 51 (U.S. 1866); Hunt v. Hunt, 119 Ky. 39, 82 S.W. 998 (1904); Schofield v. Zion Co-op. Mercantile Inst., 85 Utah 281, 39 P.2d 342 (1934).

[12] Rothschild v. Weinthel, 191 Ind. 85, 131 N.E. 917, 132 N.E. 687 (1921); See Note 12 L.R.A. 375 (1891); RESTATEMENT, CONTRACTS §234 (1932).

[13] See Note 16 R.C.L. 884, §388.

in order to be enforceable and binding upon the parties.[14] Because of this requirement, the great majority of courts will hold a renewal clause based "on terms to be agreed upon" to be void and unenforceable.[15]

The first time a general covenant of renewal was submitted to judicial review, the New York Court held such a provision in a lease to be totally void for uncertainty. The Court went on to say however,

> "How far this uncertainty might be obviated by a bill in the Court of Chancery to which the decision of this point properly appertains, I do not know . . ."[16]

In Wisconsin the first case to present this point to the Court was that of *Boyle v. Laird.*[17] There, the Court considered a one year lease containing the phrase, "subject to be renewed." The court said:

> "It is true, the lease contained a provision for renewal but upon what terms and for what length of time the lease should be renewed, it is altogether silent, and we think that this provision or covenant is void for uncertainty, as it appears in the lease."

Thus, it may be readily observed that these tribunals considered the requirement of certainty to be a very stringent one.

It was, however, just six years after the *Radcliff* decision in New York that a Court of Chancery of that state was presented with a like question. Chancellor Kent considered a lease with a covenant which provided the lessor would, at the expiration of the term of the lease, either pay for the buildings erected by the lessee, redemise the property at such terms and rent as might be agreed upon between the parties, or he would renew the lease. The Chancellor considered the *Radcliff* decision but distinguished it on its facts and then held that the covenant to "renew" implied a renewal upon the same terms and rent as provided in the original lease, with the exception of the covenant to renew. In explaining this one exception he said:

> "If a covenant to renew the lease, necessarily included a renewal of all the covenants in it, it would be tantamount to a covenant for perpetual renewal, and so extraordinary a covenant ought not to depend on inference merely."[18]

This decision by Chancellor Kent is generally conceded to be the leading case in the United States on the rule that a general covenant of renewal in a lease implies but one renewal for the same period of time as that provided in the original lease.

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[14] Streit v. Fay, 230 Ill. 319, 82 N.E. 648 (1907); Abeel v. Radcliff, *infra* note 16.
[15] Tracy v. Albany Exhng., 7 N.Y. 474 (3 Seld. 472) (1852); Carlson v. Johnson, 275 Mich. 35, 265 N.W. 517 (1936); See Note 32 L.R.A.(N.S.) 201 (1911).
[16] Abeel v. Radcliff, 13 Johns Rep. (N.Y.) 297 (1816).
[17] 2 Wis. 316, *431 (1853).
[18] Rutgers v. Hunter, 6 Johns Ch. 215 (N.Y. 1822).

In allowing only one renewal, the court was following a long standing policy of the courts against interpretations of contracts which tend to create rights in perpetuity.[19] The first case to be decided which touched upon this precise question was that decided in 1715.[20] In this case the English Court construed a lease which contained a covenant providing the lessor should grant such further lease as the lessee or his heirs should desire, to be a covenant for perpetual renewals. Just eight years later a similar covenant in a lease was said not to import a perpetual renewal.[21] After this, a distinct line of cases may be found which cite with approval this latter decision.[22] In 1796 Sir Richard Pepper Arden observed:

> "I collect from these cases, this: that the courts in England, at least, lean against construing a covenant to be for a perpetual renewal, unless it is perfectly clear that the covenant does mean it."[23]

And in 1807 the rule was stated:

> "Covenants for perpetual renewal, if fairly entered into and distinctly expressed are no doubt valid; but if the language of such covenants be not perfectly unambiguous a court of equity will never adopt a construction which would lead to a perpetuity of leasehold interests."[24]

This rule of construction has since become so well established in the law, that the courts refer to it with the comment that it is needless to cite authority for it. Lord Ellenborrough illustrates the attitude of the courts when they are confronted with such a problem of construction as that with which we are concerned.

> ". . . the case on the part of the plaintiff supposes that it was the intention of the parties to express what, if they had so intended,

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[19] 4 KENT COMM. *109; Abeel v. Radcliff, *supra* note 16; See Note 3 A.L.R. 498 (1919).

[20] Bridges v. Hitchcock, (1715) 5 Bro. P.C. 6, 2 Eng. Rep. 498.

[21] Hyde v. Skinner, (1723) 2 P.Wms. 196, 24 Eng. Rep. 697.

[22] Davis v. Taylor's Co. (1736) 3 Ridgeway P.C. 395; Russel v. Darwin, (1767) 2 Bro. C.C. 639; Tritton v. Foote, (1789) 2 Bro. C.C. 636, 29 Eng. Rep. 352; Earl of Inchquin v. Burnell (1794) 3 Ridgeway 376; Baynham v. Guy's Hosp. (1796) 3 Ves. Jr. 295, 30 Eng. Rep. 1019; Moore v. Foley (1801) 6 Ves. Jr. 232, 31 Eng. Rep. 1027; Clinan v. Cook (1802) 1 Sch. & Lef. 558; Harnett v. Yielding (1805) 2 Sch. & Lef. 558; Iggulden v. May (1806) 7 East 237, 103 Eng. Rep. 91; City of London v. Mitford (1807) 14 Ves. 41, 33 Eng. Rep. 437; Willan v. Willan (1809) 16 Ves. 72, 216, 33 Eng. Rep. 911, 966; Lewis v. Stephenson (1898) 67 LJ(Q.B.) 296, 31 Digest 70, 2178.

[23] Baynham v. Guy's Hosp., *Ibid.*

[24] City of London v. Mitford, *supra* note 22; this is still the rule in the U.S., see Note 3 A.L.R. 395 (1919); but in England since 1925 perpetually renewable leases have been abolished. (see law of Property Act, 1922(12 & 13 Geo.5 c.16), s.145, Sched. XV, paras.1(1),(5) which came into operation on Jan. 1, 1926. If a lease contains a renewal amounting to a covenant for perpetual renewal, the lease now takes effect as a demise for a term of 2000 years; Parkus v. Greenwood (1950) Ch. 644, 66 (pt.1) T.L.R. 496, 1 All. E. R. 436, C.A.

> might have been expressed, without difficulty or ambiguity, by words which would have obviously have occurred to the most inexperienced draftsman."[25]

The reason for this predeliction on the part of the courts to refuse to interpret a covenant as requiring a perpetuity of renewals unless the language implying that is utterly devoid of all ambiguity is not difficult to perceive. The intention of the parties is clearly the controlling factor and it is hardly reasonable in most cases, at least, to construe such clauses as manifesting the intention to convey a fee, which, de facto, is the result of a perpetual series of renewals. The courts have said that such construction of renewal clauses in the absence of a showing of a proper consideration is hardly reasonable.[26]

This policy of the courts to refuse to imply a perpetual right of renewal from a general clause is manifestly the basis of the New York decision[27] that a general covenant of renewal implies but one renewal; its construction of the term of such a clause is, however, founded upon a different basis.

The English rule that a general covenant of renewal implies the same terms and covenants as the original lease is first found in a dictum of Lord Abinger in 1834.[28] However, the best statement of the reasoning which underlies this interpretation of such a general clause is that of Sir Knight Bruce the Vice Chancellor in the case of *Rickards v. Rickards.*[29] Sir Bruce was there considering the definiteness of such a clause when he said:

> "That turns upon the meaning of the word 'renewal'. . . . The word 'renewal' is a relative term, which of necessity requires to be construed by reference to something else. . . . By reference to what? To the lease that he has at the moment; it can be construed with reference to nothing else. . . . I take it that the term 'renewal' means a renovation—a restoration of something to a former or original state—a repetition—a beginning again; it may mean each or either of those things so far as there is any difference between them; it must however, be a renewal, a renovation or repetition or restoration of the same subject so far as it is possible to restore that subject. A renewal of a lease, where the contract does not require any different interpretation to be given to it, must therefore mean the obtaining of a lease as near as possible in every practical circumstance to the existing lease—as if the subject, worn, or wearing out, was to begin again."

[25] Iggulden v. May, *supra* note 22.
[26] *Ibid.* and cases cited at note 22; See Note ANN. CAS. 1916C 1096.
[27] Rutgers v. Hunter, *supra* note 18.
[28] Price v. Assheton, (1834) 1 Y.&C. Exch. 82, 160 Eng. Rep. 34; The Chief Baron's statement was dictum because it was based on the premise that the clause under discussion was one of renewal whereas it was later held not to be such by Alderson in 1 Y.&C. Exch. 441, 160 Eng. Rep. 180. The dictum was recognized and expressly approved by Bruce J. in Lewis v. Stephensone, *supra* note 22.
[29] (1843) 2 Y.&C. C.C. 427, 160 Eng. Rep.

This is the rationale of the rule which has been followed in a great number of cases in England and in the United States as well.[30] Thus it is observed that the basis of the *Rutger's* case in New York is found to have been developed in two separate lines of cases, that following the *Skinner* case[31] and that illustrated by the *Rickard* case.[32] The opinion of Chancellor Kent in the *Rutger's* case has been noted, approved and followed in many subsequent decisions in New York,[33] and other jurisdictions.[34]

In Massachusetts, in the first of many cases to express this rule, the court interpreted a general covenant of renewal as importing a new lease like the old one with the same terms and stipulations, at the same rent and with all the essential covenants contained therein. Though the phrase, *ex vi termini,* was not to be found in the clause in dispute, the court implied its presence, holding the above rule to express its meaning.[35]

In 1875,[36] the Michigan Court adopted this rule of leases and in the year 1882, North Carolina, after deciding the words "refusal of the premises" addressed to the lessee, is a renewal clause, held the lessee to have the election to rent or not, on the same terms and conditions and to pay the same rent as found in the original lease.[37] The Indiana Court put itself in line with these cases in 1894 when it held that a renewal contract must be deemed to contemplate the same terms of the rental for the renewal period.[38] The court went on to say that "otherwise the privilege would be mere idle words, and the continuance of the tenancy would be entirely at the option of the lessor, instead of the lessee because he could easily make the rent prohibitive." One of the more outstanding decisions to establish this rule in its jurisdiction was that of *Kollock v. Scribner*[39] in Wisconsin. In this case, decided in 1897, the court considered the *Laird* case,[40] and said that it had never

[30] Indian Head Mills v. Hamilton, 212 Ala. 97, 101 So. 747 (1924); Keating v. Michael, 154 Ark. 267, 242 S.W. 563 (1922); Karn v. Di Lorenzo, 95 Conn. 267, 111 Atl. 195 (1920); Obrien v. Hurley, 325 Mass. 249, 90 N.E.2d 335 (1950); Gardella v. Greenburg, 242 Mass. 405, 136 N.E. 106 (1922); Leavitt v. Maykel, 203 Mass. 506, 89 N.E. 1056 (1909); Starr v. Holck, 318 Mich. 452, 28 N.W.2d 289 (1947); Drake v. Board of Education, 208 Mo. 540, 106 S.W. 650 (1907); Austin v. Newham (1906) 2 K.E.B.(Eng.) 167, 75 L.J.K.B. 563.

[31] Hyde v. Skinner, *supra* note 21.

[32] Rickard v. Rickard, *supra* note 29.

[33] Piggot v. Mason, 1 Paige 412 (1829); Carr v. Ellison, 20 Wend. 178 (1838); Whitlock v. Duffield, 1 Hoffm. Ch. 110 (affd.26 Wend.55) (1839); Robinson v. Kettletas, 4 Edw. Ch. 67 (1842); Willis v. Astor, 4 Edw. Ch. 594 (1844); Tracy v. Albany Exch., 7 N.Y. (3 Seld. 472) 472 (1852); Ryder v. Jenny, 2 Robt. 56 (1864); Muhlenbrinck v. Pooler, 40 Hun. 526 (1886).

[34] See cases cited in note 30.

[35] Cunningham v. Pattee, 99 Mass. 248 (1868).

[36] Brand v. Frumveller, 32 Mich. 215 (1875).

[37] McAdoo v. Callum, 86 N.C. *419 (1882).

[38] Hughes v. Windpfenning, 10 Ind. App. 122, 37 N.E. 432 (1894).

[39] 98 Wis. 104, 73 N.W. 776 (1897).

[40] Boyle v. Laird, *supra* note 17.

been supported in subsequent cases in Wisconsin or in any other reputable jurisdiction. The court then overruled the earlier case and said that a general covenant of renewal in a lease will be held to refer to the terms of the lease in which it is used so as to be in effect, an agreement to renew on the precise terms and conditions of that lease with the exception of the covenant to renew. This decision was later cited and approved by the Wisconsin Court in *Fergen v. Lyons.*[41] Thus, it is apparent from a reading of the cases that this rule first stated in the *Rutgers* case, is now the law in England and throughout the United States.

There is another field of law in which the use of renewal clauses is quite prominent, that of commercial paper. Having determined the rule as it appertains to general renewal clauses in leases, we may now turn our attention to the use and effect of these clauses in their application in commercial instruments. The principal reason for an inquiry into this field in this paper is to ascertain the effect of such a renewal clause when applied to a species of commercial paper such as a promissory note; negotiable, or non-negotiable.[42] The question which manifests itself immediately is whether the rule of construction so uniformly applied in the field of leases is applicable to commercial paper as well. In the event such a rule is apropos to commercial instruments, a corollary question arises as to the effect its application would have in this field.

In 1881, the Wisconsin Court in considering a note containing the words "This note to be extended if desired by the makers" held that clause to be so indefinite as to be without legal significance.[43] Much later, however, in the case of *Duggan v. Krevonick,*[44] cited by the Wisconsin Court in the *Sardino* case,[45] a land contract providing that the deferred part of the purchase price was to be payable in three years "with the privilege of renewal" was held to be sufficiently certain and definite. The renewal provision was held to contemplate a renewal for three years and only one renewal. The court cited the lease rule with apparent approval and applied its construction to the instrument at hand. In a much earlier decision the Massachusetts Court construed an indorsement on a note to be sufficiently definite and certain and said:

> "The words 'I renew the within note' means something more than the words 'I admit the within note to be due.' A common meaning of the word 'renew' is to make again, as to renew a treaty or a covenant."[46]

[41] 162 Wis. 131, 155 N.W. 935 (1916).
[42] See Goodrich, *Nonnegotiable Bills and Notes,* 5 IOWA L. BULL. 65 (1920); 8 C.J. BILLS & NOTES §§50, 51; 1 RANDOLF, C*MMERCIAL PAPER §177 (1886).
[43] Krouskopus v. Shonty, 51 Wis. 204 (1881).
[44] 169 Va. 57, 192 S.E. 737 (1937).
[45] Riepl v. Sardino, *supra* note 5.
[46] Daggett v. Daggett, 124 Mass. 149 (1878).

In this case also, the court went on to draw an analogy between a note and a lease in their relation to renewals.

In reference to negotiable instruments as distinguished from non-negotiable instruments the controlling law is set forth in the Uniform Negotiable Instruments Act which has been adopted substantially by all the forty-eight states, and the Bills of Exchange Act of England. Case law is controlling in this field only in the event that the rulings of such cases are not covered by the NIL. This paper is concerned only with the provisions of the NIL set out in sections 1 and 4(2) of the Model Act.[47] The question arises whether such a general covenant of renewal as has been under discussion renders a commercial instrument non-negotiable. Stated in the language of the Act, the question is whether an instrument containing such a clause is payable on or before a fixed or determinable future time specified therein.

An early decision of the Iowa Court might throw some light on this problem. Although the case was not decided on the precise point in question, it is closely analogous and offers a well accepted interpretation of the meaning of the relevant provisions of the NIL. The court held that an agreement to extend the time of payment of a note to a certain date does not destroy the negotiability of an instrument. Speaking of these provisions of the NIL, the court said that they were clearly intended to allow flexibility in the fixing of the time of payment. This flexibility being conditioned only on the requirement that by its terms, the note must certainly come due at some time. In other words, the Act recognizes the right of the parties to an instrument to contract for their mutual benefit, and if such a contract is to be performed at some future date, certain to arrive, its negotiability is not destroyed.[48] The words of Justice Shaw of Massachusetts illustrate the position of the courts, prior to the NIL, to be in substantial accord with the current view of the law.[49]

There have been very few cases decided on the precise question under discussion. Many of those cases which do involve the construction and effect of renewal clauses in commercial instruments regard the problem solely in the light of the effect of such clauses on the rights

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[47] Section 1. "An 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 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;***"

[48] State Bank of Halstad v. Bilstad, 162 Iowa 433, 136 N.W. 204 (1912).

[49] "The true test of the negotiability of a note seems to be whether the undertakings of the promisor to pay the amount at all events, at some time which may certainly come, and not out of a particular fund or upon a contingent event." Cota v. Buck, 7 Metc. (Mass.) 588 (1840).

and duties of sureties,[50] an inquiry which is outside the scope of this paper. There are, however, a limited number of cases[51] which have touched squarely on the issue under discussion; and most of these seem to hold such clauses to render the instrument non-negotiable. The basis of these decisions is generally the view of the courts that such clauses enable the parties to extend indefinitely so that the instrument may never become due. The following clause within a note has been held to render the note non-negotiable: "This note is given for advancements and it is the understanding it will be renewed at maturity."[52] Britton, in his excellent work on Bills and Notes, in discussing this decision says:

> "If this language could be construed to mean that the note should be renewed for the same period as originally specified, upon the election of the maker it should be negotiable, for it is but a note for the longer period subject to call at a specified date and clearly negotiable under Sec. 4(2)."[53]

The crux of the problem under discussion now becomes quite apparent in the light of Britton's observation. If his view of the law is correct, and there appears to be no logical reason why it is not, then the application of the rule of *Rutgers v. Hunter*,[54] to commercial paper would supply the precise rule of construction he contemplates. Consideration of the rationale which underlies that rule as it has been applied to the law of leases reveals that the same rationale applies just as logically in the law of commercial instruments. This rule of leases, that a renewal clause implies the same terms and covenants as provided in the original lease is really a rule of semantics. The courts, in other words, have held that general renewal clauses by their very definition imply a revitalization of the old lease; even more succinctly, the term 'renewal' means what it says.

As it might be expected, the courts have not been oblivious to this interpretation of the term "renewal" even in its application in fields other than leases. There would seem to be no logical reason why this meaning of the term should apply solely when it is employed in a lease. In addition to the *Krevonick*[55] and the *Daggett*[56] cases which have been

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[50] *Cf.* Navjo County Bank v. Dolson, 163 Cal. 485, 126 Pac. 153 (1912); Sioux Nat. Bank v. Lundberg, 54 S.D. 581, 223 N.W. 826 (1929); Farmer, Thompson & Helsell v. Bank of Graettinger, 130 Iowa 469, 107 N.E. 170 (1906); First Nat. Bank v. Buttery, 17 N.D. 326, 116 N.W. 341 (1908); See Notes 16 L.R.A.(N.S.) 878; 17 ANN. CAS. 520 (1908).

[51] Miller v. Poage, 56 Iowa 96, 8 N.W. 799 (1881); Woodbury v. Roberts, 59 Iowa 348, 13 N.W. 312 (1882); Quinn v. Bane, 182 Iowa 843, 164 N.W. 788 (1917); Osborne v. Millikan, 140 Kan. 592, 38 P.2d 104, noted in 15 B. U. L. REV. 297; See Aigler, *Time Certainty in Negotiable Paper,* 77 U. PA. L. REV. 316 (1929) and cases cited therein.

[52] Citizens' Nat. Bank v. Piollet, 126 Pa. 194, 17 Atl. 603 (1889).

[53] BRITTON, BILLS AND NOTES 114 n.1 (1943).

[54] *Supra,* note 18.

[55] *Supra,* note 44.

[56] *Supra,* note 46.

discussed above, some courts[57] have taken direct notice of this interpretation of the term "renewal" and although many of these decisions may not be in point due to differences in their fact situations, they are of definite value here as illustrative of the fact that the quoted meaning of the word in question applies as well to the field of commercial instruments as it does to the field of leases. In an often cited opinion, the Indiana Court construed a renewal clause of a mortgage-note in this manner:

> " 'Renewed' or 'renewal' as applied to promissory notes, in commercial and legal parlance means something more than the substitution of another obligation for the old one. It means to re-establish a particular contract for another period of time. It means to restore to its former conditions an obligation on which the time of payment has been extended imparting continued or new force and effect; to make again. . . ."[58]

These words have been quoted in their entirety or with little variation by courts of many other jurisdictions.[59] The similarity of the wording of this interpretation of the term "renewal" in the *Petty* case[60] to that of Knight Bruce in the *Rickard* case[61] and to that of the Massachusetts Court in the *Pattee* decision[62] is not just coincidental. In 1852 a case involving a promissory note containing the endorsements, "(date) Received, Renewed" was put before the Supreme Court of Maine. The court said that the word "renewed" as endorsed on a note may be considered as meaning that the note should be considered as if made in the same terms anew from the renewal date.[63]

Although the cases cited and referred to herein are not exhaustive of those available they do illustrate that the courts have considered the term "renewal" as having the same meaning in both the field of leases and that of commercial paper. Since the most fundamental reason expressed by these courts for adopting this rule in the law of leases is the very definition of the term itself, it would seem to follow quite logically that this same reasoning is equally apropos to commercial paper. This view might be clarified by a few fundamental observations. The only reason there is any need to construe such a clause in either field of law is the requirement of definiteness and certainty. This requirement as it is found in each of these fields springs from the

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[57] Lowry Nat. Bank v. Fickett, 122 Ga. 489, 50 S.E. 396 (1905); Parchen v. Chessman, 53 Mont. 430, 164 Pac. 531 (1917); W. R. Grace & Co. v. Strickland, 188 N.C. 369, 124 S.E. 856 (1924); Dyer v. Bray, 208 N.C. 248, 180 S.E. 83 (1935); Guie v. Byers, 95 Wash. 492, 164 Pac. 75, 76 (1917); Lime Rock Bank v. Mallett, *infra* note 63.

[58] Kedey v. Petty, 153 Ind. 179, 54 N.E. 798, 800 (1899).

[59] *Supra*, note 57.

[60] *Supra*, note 58.

[61] *Supra*, note 29.

[62] *Supra*, note 35.

[63] Lime Rock Bank v. Mallett, 34 Me. 547, 56 Am. Dec. 673 (1852).

same common source, the law of contracts. The practical basis for this requirement of certainty and definiteness is to enable a court to enforce the agreement should the need arise; this basis is the same in the law of contracts, leases or commercial paper.

The recent Wisconsin decision of *Rieple v. Sardino,*[64] seems to have decided exactly the same thing. In that case, which was one of first impression in Wisconsin, the court apparently took the rule of construction of renewal clauses from the law of leases and applied it in specie to the law of promissory notes. The negotiability of the note in that case was not in issue for the note was still in the hands of the original parties.[65] However, in view of the foregoing observations, there is no reason to presume that had the note passed to a third party and its negotiability been put in issue, the court would have arrived at any different decision.

There is another approach to this question of construction which has not as yet been mentioned. This approach might be nominated as the "reasonable time approach." In ordinary contracts for performance where ambiguities have arisen, this mode of construction is often utilized by the courts.[66] It is submitted, however, that no matter how well this might work in the interpretation of renewal clauses in an ordinary contract or even possibly in a lease, it would not be a satisfactory rule with reference to commercial instruments. Both the Law Merchant, which is said to apply to non-negotiable instruments, and the NIL are very explicit in their demands that the time of payment be certain or at least determinable.[67] A fundamental reason for this demand of certainty is to be found in the very reason for the existence of commercial instruments, that of facility of transfer or negotiation with the least amount of danger to the parties concerned. If a note is not in its terms sufficiently clear as to its maturity date, certainly this purpose has not been attained. Therefore, if the "reasonable time approach" were to be applied to commercial instruments the certainty demanded would not be attained. Just what is a reasonable time would have to be decided in court and in such a case, how could the parties to an instrument ascertain at the time of execution just what the court would find to be reasonable? Where a court adopts the lease rule to commercial instruments, it is submitted, the certainty and definiteness demanded by the NIL will be attained.

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[64] *Supra,* note 5.

[65] Gross v. Von Dolcke, 313 Mich. 132, 20 N.W.2d 838 (1945) "As between the original parties it is immaterial whether the instrument is negotiable or non-negotiable."

[66] See A & R Realty Co. v. N.W. Mut. Life Ins. Co., 95 F.2d 703 (8th Cir. 1938); Nunez v. Dautel, 86 U.S. 560 (1873); Van Stone v. Stillwell Co. 142 U.S. 128 (1891); Banque Russo-Asiatique v. Doclch 3 F.2d 266 (9th Cir. 1925).

[67] See cases cited at note 51 *supra.*

As the *Sardino* decision[68] illustrates, the use of renewal clauses is not restricted to those categories of the law already discussed, but at least in their effect, they extend to the field of mortgages. A search of the cases discloses no decision in the mortgage field which is decided on the precise question of construction with which this paper is concerned. Perhaps the reason for this absence of decisions is to be found in the fundamental concepts of mortgages:

> "that the debt is the principal thing, and the mortgage the mere incident following the debt wherever it goes and deriving its character from the instrument which evidences the debt."[69]

A mortgage is considered as a mere security device,[70] it is said to be a mere shadow of the debt which it secures. This concept is carried even further in the idea that it is the debt itself that is secured and not the evidence of the debt,[71] in most cases a promissory note. A necessary corollary to this second principal is the holding of the majority of the courts that a change in the form of the obligation, e.g. substitution of a new note for the old one, or changes in the maturity date, etc., do not affect the mortgage so long as the secured debt itself is not destroyed.[72] From these considerations of the principles of mortgage law, it may be observed that the validity of a renewal clause, or its construction is not often found to be strictly within the purview of the law of mortgages. In other words, if a renewal clause in a note, which is secured by a mortgage, is construed to be sufficiently definite and certain to be enforceable, then it should follow almost as a matter of course that the mortgage securing that note is unaffected by this change in the form of the secured debt. In the *Sardino* case,[73] the Wisconsin Court has apparently based its decision on the same reasoning as that used here. It has taken a well established rule of construction of leases and has applied that rule to the construction of commercial instruments and incidentally to the mortgage securing the commercial instrument. In other words, the court has taken a rule from one part of the law of contracts and applied that rule to another part of that same general category of the law. Keeping in mind the relevant contract rules of

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[68] *Supra,* note 5.

[69] Bailey v. Smith, 14 Ohio St. 396, 84 Am. Dec. 385 (1863); *accord;* Carpenter v. Longan, 83 U.S. 271 (1872).

[70] Morris v. Bacon, 123 Mass. 58, 25 Am. Rep. 17 (1877); Ladue v. Detroit & M.R.Co., 13 Mich. 380, 87 Am. Dec. 759 (1865); Mead v. York, 6 N.Y. 449, 57 Am. Dec. 467 (1852).

[71] Fowler v. Bush, 38 Mass. (21 Pick.) 230 (1838); WILLISTON, CONTRACTS 1875F (Rev.Ed. 1936); Lierman v. O'Hara, 153 Wis. 140, 140 N.W. 1057 (1913).

[72] Tolman v. Smith, 85 Cal. 280, 287, 24 Pac. 743 (1898); Bunker v. Barron, 79 Me. 62, 8 Atl. 253 (1887); Foster v. Paine, 63 Iowa 85, 18 N.W. 699 (1884); Gravlee v. Lamkin, 120 Ala. 210, 24 So. 756 (1898); Lee v. Fletcher, 46 Minn. 49, 48 N.W. 456 (1891); and see note 13 MINN. L. REV. 157 (1929).

[73] *Supra,* note 5.

construction, the general policies of the law, the current trends of the courts to lean toward negotiability of commercial instruments and toward liberality in problems of judicial construction, it is submitted that the Wisconsin decision is a satisfactory approach to a vexatious problem.

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