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Bills and Notes: Words "as per contract" may be either construed to qualify the promise to pay or as reference to the consideration

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NOTES AND COMMENT

Bills and Notes: Words "as per contract" may be either construed to qualify the promise to pay or as reference to the consideration.—In a somewhat recent case the *International Finance Corporation v. Calvert Drug Co.* 124 Atl. 891. (Maryland) the facts material are as follows: The Reolo Inc. and the Calvert Drug Co. entered into a contract by which the Reolo Inc. were to supply the Calvert Drug Co. a quantity of medicine to be shipped from time to time. The Reolo Inc. drew two notes on the Calvert Co. which the latter accepted in the following manner, "accepted for payment as per Reolo contract." The contract stated that the notes should become null and void if the contract was not performed. The Reolo Inc. had these notes discounted by the International Finance Corporation. The contract was never performed and the Finance Corporation protested the notes. The court construed the words "as per contract" to qualify the promise to pay because they were so situated that it was clear that the parties intended these words as qualification of the promise to pay rather than as a mere reference to the consideration. Under Section 141 of the Negotiable Instruments Act "acceptance is qualified which is, 1—conditional—that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated."

The Wisconsin Negotiable Instruments Act, section 116.02 provides as follows: An instrument to be negotiable must conform to the following requirements: . . . . It must contain an unconditional promise or order to pay a certain sum in money.[1] Where words are used which qualify or limit this promise to pay, the instrument which otherwise is negotiable is rendered nonnegotiable and is subject to the equities which exist between the original parties. The word "payable" followed by "subject to the policy,"[2] "in consideration of and subject to" a certain contract existing between the maker and the payor[3] "subject to the provisions contained in an agreement this day made between" the parties,[4] "as per contract dated March 24, 1913"[5] or "value received, subject to terms of contract between maker and payee of October 25,

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[1] Wis. Stat. 1923, ch. 116, sec. 116.02.

[2] *American Ex. Bank v. Blanchard,* 7 Allen 333 (Mass.)

[3] *McComas v. Haas,* 107 Ind. 512; 8 N.E. 579.

[4] *Dilley v. Van Wie,* 6 Wis. 209.

[5] *Continental Bank & Trust Co. v. Times Pub. Co.,* 76 So. 612, in which the court decided that the words "rent for month of August, 1915, for part of brick building on corner of Marshall street and alley, in Shreveport, as per contract dated March 24, 1913" operated to qualify the promise to pay. Provosty J. dissenting.

1905"[6] and other similar words[7] have been construed to qualify and limit the promise to pay, thus rendering the instrument nonnegotiable. Some courts base their decision on the fact that the intention of the original parties was to make the instrument nonnegotiable[8] but the majority of the courts base their opinion on the construction of the particular words used without regard to the intention of the parties. Some courts thus construe the particular words used to limit and qualify the promise to pay while others construe them as merely stating the mere transaction out of which the note arose or merely referring to the consideration and not to the promise to pay.

The Negotiable Instruments Act[9] provides that an unqualified order or promise to pay is unconditional within the meaning of this chapter, though coupled with: . . . . "A statement of the transaction which gives rise to the instrument." An instrument therefor will not be reduced to a non-negotiable instrument by the mere statement of the consideration or by a reference made thereto. So the words "value received as per contract," written into the body of the instrument will not render it nonnegotiable because it refers to the consideration and not to the promise to pay and is a mere statement of the transaction out of which the instrument arose.[10] Words "as per contract" written on

[6] *Manufacturer's Commercial Co. v. Klots Throwing Co.*, 170 Fed. 311.

[7] *Howard v. Kimball*, 65 N.C. 175; 6 Am. Rep. 739. This is not followed by the majority of the courts. The court held in this case that where a purchaser of land, upon taking a bond for title, gives in payment therefor a note expressing on its face that it is so given, the note itself will be notice of the vendee's equity in case the title of the land shall prove defective, and an assignee or holder of the note cannot in case of such defect in the title of the land, recover on the note though he took it before it became due. *Klots Throwing Co. v. Manufacturer's Commercial Co.*, 179 Fed. 813, 103 C.C.A. 305, 30 L.R.A. (N.S.) 40. In this case the court held that the following note was nonnegotiable because the special stipulation in the body of the note qualified the promise to pay;

$3,166. New York, January 15, 1906.

Six months after date we promise to pay to the order of Regenerated Cold Air Company, thirty-one hundred and sixty-six 00/100 dollars at 487 Broadway, New York City, with interest at six per cent per annum.

Value received, subject to terms of contract between maker and payee of October 25, 1905.

McClelland v. Norfolk South R. Co., 110 N.Y. 469, 1 L.R.A. 299, 6 Am. St. Rep. 397, 18 N.E. 237; in which the court held that where coupons payable to bearer, refer to the bonds for the interest on which they are issued and the bonds refer to the mortgage securing them, for conditions limiting or explaining them, the coupons are not negotiable.

[8] *Bank v. Michael*, (N.C.) 1 S.E. Rep. 855; where it was held that the recital in a bond of the following did not destroy its negotiability: "it being the balance of the purchase money for one hundred and forty-three acres of land at Reedy Creek,"—that this referred to the consideration for which the bond was given.

[9] Wis. Stat. 1923, ch. 116, sec. 116.07.

[10] *National Bank of Newbury v. Wentworth* (1918), 105 N.E. 626, 218 Mass. 30. *Waterbury-Wallace Co. v. Ivey*, 163 N.Y.S. 719, 99 Misc. Rep. 260.

the back of the note under which the payée indorsed at the time of negotiation does not effect the negotiability[11] nor do the words "for value received in one machinery as per contract" render the note non-negotiable.[12] It has been further held that the words "this note is given in accordance with the terms of a certain contract under the same date, between the same parties,"[13] also the words "this note is given in accordance with a land contract of even date between B and C" do not destroy the negotiability of the instrument.[14]

The cases referred to in this comment will show that some courts hold that a particular word or number of words destroy the negotiability of an instrument while other courts decide that they do not.

There seems to be no uniform or hard and fast rule of law to follow in construing instruments which have all the essentials of negotiability with some added words. It resolves itself down to a question of construction for the courts. Where the words "subject to" are in the instrument the courts have almost uniformly held that they clearly show the intention of the parties to make the instrument contingent upon some extrinsic document thus rendering the promise to pay dependent and qualified.

The general rule evident from all of the cases reviewed seems to be: Where an instrument otherwise negotiable expressly refers to an extrinsic document so as to indicate that the promise to pay is to be burdened with the terms of such extrinsic document it is notice sufficient to put the holder on inquiry and renders the instrument non-negotiable, but if such extrinsic document is not to effect the instrument until after maturity it will not destroy the negotiability of the instrument.

M. T. L.

Contracts: Manner in which question whether contract is entire may arise.—In the recent case of *Fuller v. Ringling*, 202 N. W. 183 (Wis.), a real estate broker, who procured a purchaser of a part of land, described in a non-exclusive contract, was held to be entitled to a commission, even though the contract was entire and was not fully performed by the broker, where complete performance was rendered impossible by the owner's sale of another part of the property.

There are at least six different ways in which questions may arise as to whether a contract is entire or severable.[1] (1) Such a question may arise in connection with the sufficiency of a consideration on the one side to support two or more convenants on the other. For example, where a common carrier requires a shipper to pay regular rates and also assent to a limitation of the carrier's common law

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[11] *Snelling State Bank v. Clausen*, 132 Minn. 404, 157 N.W. 643.

[12] *First Nat. Bank v. Badham*, 86 S.C. 170, 68 S.E. 536, 138 Am. Rep. 1043.

[13] *Markey v. Corey*, 108 Mich. 184, 66 N.W. 493, 33 L.R.A. 117, 62 Am. St. Rep. 698.

[14] *Doyle v. Considine*, 195 Ill. App. 311.

[1] Page on *Contracts*, Vol. 4, page 2084.