

January 1928

## Bills and Notes—Combined Note and Chattel Mortgage, Whether Negotiable

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### Recommended Citation

*Bills and Notes—Combined Note and Chattel Mortgage, Whether Negotiable*, 13 ST. LOUIS L. REV. 215 (1928).

Available at: [http://openscholarship.wustl.edu/law\\_lawreview/vol13/iss3/9](http://openscholarship.wustl.edu/law_lawreview/vol13/iss3/9)

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## Comment on Recent Decisions

**BILLS AND NOTES—ACCOMMODATION MAKER UNDER NEGOTIABLE INSTRUMENTS LAW—EXTENSION OF TIME.**—F. Holland borrowed \$1700 from plaintiff bank and gave to the bank a note signed by himself and W. Holland, the defendant, whom plaintiff then knew to be an accommodation maker. The original note was renewed by a subsequent note to which defendant's co-signature was forged. Plaintiff on learning of this procured the original note and was successful in a suit thereon below. On appeal it was *held*, that defendant as an accommodation maker was liable on the note as a maker, and was not discharged by an extension of time granted by the payee through the acceptance of the renewal notes. *Rosendale State Bank v. Holland*, 217 N. W. 645. (Wis., 1928.)

The theory of this case was that by Sec. 11601 of Wisconsin Statutes (Uniform N. I. L., Sec. 192) defendant was primarily and absolutely liable on the note and was not a surety who will be discharged by a time extension. This is undoubtedly in accord with the great weight of authority in this country. *Richards v. Market Exchange Bank*, 81 Ohio St. 348, 90 N. E. 1000, 26 L. R. A. N. S. 99; *Vanderford v. Farmers Bank*, 105 Md. 164, 66 Atl. 67, 10 L. R. A. N. S. 129; *Union Trust Co. v. McGinty*, 212 Mass. 205, 98 N. E. 679, Am. Cas. 1913C, 525; *Bradley Eng. Co. v. Heyburn*, 56 Wash. 628, 106 P. 170, 134 Am. St. R. 1127; *Wolstenholme v. Smith*, 34 Utah 300, 97 P. 329; *Vernon Center State Bank v. Mangelsen*, 166 Minn. 472, 208 N. W. 186, 48 A. L. R. 710. The following sweeping statement in 48 A. L. R. at p. 716 shows the extent to which this line of reasoning is adhered to: "Except in Iowa, Missouri and Texas, it has been held uniformly in the jurisdictions which have passed upon the question that an accommodation maker of, or surety on, a negotiable instrument, is not, under the Negotiable Instruments Law discharged by an extension of time granted to the principal maker such as would have discharged the surety or accommodation party prior to that law, although the holder has knowledge of the real character of such accommodation party or surety." The exhaustive and excellent annotation then cites many cases from numerous jurisdictions in support of its statement, which it is not necessary to list here. The minority rule as adhered to in the three states mentioned is treated fully in a note entitled "Suretyship Defenses by Co-Makers in Missouri since the Negotiable Instruments Law," 13 St. Louis L. Rev. 69, which recognizes that the reasoning of the Missouri Courts is out of line with that of most tribunals. R. L. A., '28.

**BILLS AND NOTES—COMBINED NOTE AND CHATTEL MORTGAGE, WHETHER NEGOTIABLE.**—This was a suit on a promissory note by the assignee of the payee. The defendant alleged a defense of fraud which would be valid against the payee, and the issue therefore was the negotiability of the instrument, which was headed "Combined Note and Chattel Mortgage With Power of Sale." The first part of it was a note in the usual form, providing for the payment of the total amount in specified monthly installments. Immediately below the note appeared a mortgage on the automobile for which the note was given, which contained the following clause: "If default be made in the payment of the above debt, or any part thereof, or if at any time the said mortgagee, or holder thereof deems himself insecure, . . . said mortgagee may without demand or performance take into possession and sell such chattels at public or private sale. . . ." *Held*, that each portion of the instrument is to be construed a

separate contract; that if the instrument were construed as one contract, the note would be non-negotiable; that the construction as two contracts enabled the note to retain its negotiability; and that the plaintiff, having taken without knowledge and for value before maturity, could recover on the instrument. *Morgan v. Mulcahey*, 298 S. W. 242, (Mo. App. 1927).

The Missouri doctrine of construing such a combined note and chattel mortgage as separate instruments is an anomalous one. The writer has been unable to find decisions in any other states which follow the holding. The leading case in its support is *Kennedy v. Broderick*, 216 Fed. Rep. 137. The instrument in that case was a note on which there appeared directly under the note and opposite the signature an agreement giving the holder the right to demand more collateral as security if the security already given depreciated in value; and on the maker's failure to furnish more, the note was to mature at once. It was not necessary to decide whether that acceleration clause would make the note non-negotiable because the court held each part of the instrument as separate in itself, and the clauses in the one are not to be read into or construed with the other. The following cases are cited as authority for the holding: *Morgan v. Martien*, 37 Mo. 438; *Mason v. Barnard*, 36 Mo. 384; *Hurck v. Erskine*, 45 Mo. 484; *Brownlee v. Arnold*, 60 Mo. 79; *Wheelan v. Reilly*, 61 Mo. 565; *Noel v. Gaines*, 68 Mo. 649; *Owings v. McKenzie*, 133 Mo. 323; *McMillan v. Grayson*, 83 Mo. App. 425; *The College v. Piersol*, 161 Mo. 270; *Curry v. LaFon*, 155 Mo. App. 678. It is doubtful, however, if any one of these cases bears out the exact holding of the *Kennedy v. Broderick* case, because in none of them is the separate construction applied to determine negotiability.

Whether this theory of construing the instrument to be two separate contracts can be supported on principle is doubtful, because where both portions of the instrument are on one piece of paper it might very well be presumed that it was the intent of the parties that it should be one contract.

The court in the principal case assumes that the acceleration clause in the instrument would make the note non-negotiable if the instrument were construed as entire. The authority given for this holding are: *Holliday State Bank v. Hoffman*, 85 Kan. 71; *Oklahoma State Bank v. National Bank*, 108 Okla. 272. (See also *Reynolds v. Vint*, 73 Or. 528.) There is, however, a conflict of authority on this proposition. (See Professor Z. Chafee's note in 32 Harv. L. Rev. 747, 776). Of this conflict the Missouri court made no mention, and although it is true that the weight of authority is with *Holliday State Bank v. Hoffman*, the better modern holding is in accord with *Finley v. Smith*, 165 Ky. 445. This latter case holds a note negotiable which includes an agreement to furnish additional security, and on failure to do so, gives the holder the option to declare the note immediately due. In line with this holding are *Ernst v. Steckman*, 74 Pa. 13; *Jorgenson v. Jorgenson*, 68 Pa. 913; *Merrel v. Hurely*, 63 O. 592; *Stark v. Oleson*, 44 Neb. 646 (failure to pay interest). It is interesting to note that the United States Cir. Ct. sitting in Missouri in the case of *Kobey v. Hoffman*, 229 Fed. Rep. 486, declared that the issue of whether an acceleration clause in a note rendered it non-negotiable had not yet been decided in Missouri, and the court held such a note to be negotiable. This is, of course, *contra* to the case of *State Bank v. Hoffman*, *supra*, which the court in the principal case professed to follow.

This view finds its opposite in the theory of the California courts which construe such contemporaneously executed instruments as non-negotiable where the mortgage is on another paper and is cited on the note thus: "This note is secured by mortgage of even date." *Meyer v. Weber*, 133 Cal. 681. In accord, *National Hardware Co. v. Sherwood*, 165 Cal. 1, 5 and cases there cited. M. C., '29.