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Comment on Recent Decisions

BILLS AND NOTES—BONDS—INCORPORATION OF DEED OF TRUST—EFFECT OF LIMITING RIGHT TO SUE ON NEGOTIABILITY.—Plaintiff brings an action in replevin to recover several bonds and coupons against the trustee to whom the bonds were sent for registration but who refused to register or return them because the bonds were stolen from the co-defendant. The bonds referred to the deed of trust not only for a description of the property rights and franchises mortgaged and the nature and extent of the security, but also for the terms and conditions upon which the bonds were issued and secured with the same effect as if the provisions were expressly set forth in the bonds. *Held*, that the bonds incorporated the provisions of the deed of trust, and a provision that no holder of any bond or coupon secured by the deed of trust shall have any right as such holder to institute any suit, action, a proceeding, in equity or at law on account of any such bond or coupon, but that all rights shall be vested exclusively in the trustee, rendered the bonds non-negotiable, so that the plaintiff could not recover. *Globe Indemnity Co. v. Mississippi Valley-Merchants State Trust Co.* (Mo. App. 1931) 41 S. W. (2d) 962.

An early test laid down in English decisions to determine the negotiability of an instrument was whether the instrument was, by custom, transferable by delivery, like money, and whether it was capable of being sued upon by the holder. *Crouch v. Credit Foncier of England* (1873) L. R. 8, Q. B. 374; *Jones & Co. v. Country* (1909) 2 K. B. 1029. The effect of a holder being denied the right to sue on the negotiability of an instrument was first determined in *Glyn v. Baker* (1811) 13 East. 509, where bonds issued by the Government of India were declared non-negotiable because no other person could have sued on them but the obligee. A remedial statute, 51 Geo. III, c64 (1811) was later passed.

In this country, after the adoption of the Negotiable Instrument Laws, it was questionable at first, whether they applied to bonds. *Pratt v. Higginson* (1918) 230 Mass. 256, 119 N. E. 661, 1 A. L. R. 714; note (1924) 24 COL. L. REV. 563; Brannon, NEGOTIABLE INSTRUMENTS (4th ed. 1926) 13-16. Bonds secured by trust deeds which were incorporated in the bonds were held non-negotiable because of the necessary reference to extrinsic facts. *King Cattle Co. v. Joseph* (1924) 158 Minn. 481, 198 N. W. 798. The better view is that if the bonds are negotiable on their face, the mere incorporation does not render the bonds non-negotiable but that the terms of the bond and the trust deed as a whole should be examined to determine if they are compatible with negotiability. *Hubbard v. R. B. Wallace Co.* (1926) 210 Iowa 1143, 208 N. W. 730; *Williams v. Silverdein* (Cal. App. 1930) 293 Pac. 102; *Morgan v. Mulcahey* (Mo. App. 1927) 298 S. W. 242.

The essential requirements of negotiability under the Negotiable Instrument Laws is that the instrument should provide for the unconditional payment to a person or order, or bearer, of a certain sum of money at a

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time capable of exact ascertainment. R. S. Mo. (1929) sec. 2630; Daniels, NEGOTIABLE INSTRUMENTS (1914) secs. 27-104. Where the fulfillment of conditions in the bonds was made precedent to the right of the holder to sue the maker, the bonds containing these provisions were held non-negotiable because the payment was subject to a contingency not in the control of the holder. *St. Louis-Carterville Coal Co. v. Southern Coal Co.* (1916) 194 Mo. App. 598, 186 S. W. 1152; *Evertson v. Bank of Newport* (1876) 66 N. Y. 14; *McClelland v. Norfolk S. R. Co.* (1888) 110 N. Y. 469, 18 N. E. 237, 1 L. R. A. 299. A provision expressly excluding the right to sue on the bond in any action will be binding on the holder and a bar to any proceeding brought against the maker. *Reitz v. Pontiac Realty Co.* (Mo. 1927) 293 S. W. 382; *Kimber v. Gunnell Min. & Mil. Co.* (C. C. A. 8, 1903) 126 Fed. 137. The effects of this provision upon the rights of a holder against the maker's liability at maturity or on a default are distinguishable from its effects upon the negotiability of the instrument before its maturity on a default. In the principal case the right to demand payment is not abrogated when the instrument matures or becomes due by reason of a default, even though the collectibility of the instrument is unquestionably hampered by the provisions denying the holder a right to bring an action of the bond. The Negotiable Instrument Laws, however, do not prescribe the right of a holder to sue in his own name as a necessary element of negotiability. *Palpke v. Paine* (Mich. 1931) 235 N. W. 871. In this case the provision was construed as an agreement by the holders to appoint the trustee as their agent for the purpose of bringing actions. A similar interpretation could be given to the provision of the principal case. Equitable aid could be employed by the holder to force the trustee to perform the office efficiently for the purpose intended.

The bonds in the principal case contain provisions that are becoming common to bonds issued by business corporations and railroads. The right of a holder to sue on an instrument as a basis for determining its negotiability is a common-law distinction which would seem unimportant in the light of the purpose for which the bonds are issued and purchased. On the face of these bonds, it is stated that they are to be negotiable; and though this mere statement will not render a bond negotiable, if of itself it does not satisfy the requirements of the Negotiable Instrument Laws, it may be evidence of the intent of transferors and transferees to treat the instrument as negotiable. These bonds are to be construed as incorporating and becoming subject to the provision of the deed of trust but the interpretation of this incorporation is subject to the query whether the purpose of negotiability, the transfer of instruments of credit with the freedom of money, is impeded by provisions not contained in the bond itself.

Statutes in several states provide that if an instrument is negotiable on its face, such negotiability is not destroyed by any conditions contained in the mortgage or deed of trust securing the same. Under such a statute, a different result might have been reached. Utah Laws (1923) c. 2. *Subenhauer v. Bank of Calif. Nat. Ass'n* (Cal. 1930) 294 Pac. 1062. L. S., '33.

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