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NEGOTIABILITY OF A CONFESSED JUDGMENT NOTE PAYABLE ON DEMAND

*Iglehart v. Farmers National Bank*¹

Defendant-appellant endorsed two notes executed by another person to plaintiff-appellee. The notes were payable "on demand after date" and authorized confession of judgment "at any time before maturity".² Judgment by confession having been entered against both the maker and defendant, he moved to strike out the judgment, contending, *inter alia*, that the notes were negotiable, wherefore he was entitled, as an indorser, to notice of dishonor, in the absence of which he was discharged. From an order overruling his motion to strike out the judgment, defendant appealed. *Held*: Affirmed. (On rehearing, affirmed by a divided court without opinion.) The note was non-negotiable since it contained a power to confess judgment at any time. Since it was non-negotiable, defendant, having signed his name on the back of the instrument at the time of its issuance, was a joint maker, and as such he was not entitled to notice of dishonor.

The Court applied the rules that a time note which is payable at the uncontrolled whim or caprice of the holder is non-negotiable,³ and that the anomalous indorser⁴ of non-negotiable paper is a co-maker.⁵ Conceding the correctness of the latter rule (it should be noted that the instant case is

¹ 197 A. 133, rehearing 200 A. 833, 117 A. L. R. 667 (Md. 1938); noted (1938) 24 Va. L. R. 921; and 117 A. L. R. 673 (1938). The latter annotation pays no attention to the fact that the notes were payable on demand.

² The notes read as follows: "Joint and several note. Annapolis, Md., , 192... On demand after date, for value received we jointly and severally promise to pay to the Farmers National Bank of Annapolis, or order dollars, negotiable and payable at said bank; and agree upon defalcation, to pay an attorney's fee of ten per cent; and hereby authorize any attorney of record to appear for us in any court, or before any Justice of the Peace, at the suit of the holder, and confess judgment in favor of said holder for the amount due, with interest and costs. And authorize any Justice of the Peace or Clerk of any Court to enter judgment for any amount due on this note, within his jurisdiction, without appearance of attorney; waiving all exemptions. And whenever in the judgment of the holder of this note, it may become necessary, for his or its protection, we authorize entry of judgment against us at any time before maturity of this note."

³ The confessed judgment cases are the only acceleration cases that have arisen in Maryland to date.

⁴ An irregular or anomalous indorsement is one made by a person not a party to the instrument, before its delivery or indorsement by the payee, and does not transfer the instrument. 10 C. J. S. 692.

⁵ *Nussear v. Hazard*, 148 Md. 345, 129 A. 506 (1925), 10 C. J. S. 441.

one of the few places in the law of Bills and Notes where the *obligor* is in a better position by virtue of the negotiability of the note), questions are, nevertheless, raised as to the soundness of the former rule and as to the propriety of its application in the principal case.

The cases are legion which hold that time paper payable at the uncontrolled whim and caprice of the holder is non-negotiable.⁶ Despite the fact that the rule is firmly imbedded in the law, and arises out of the wording of the Uniform Negotiable Instruments Law, it creates a definite and somewhat arbitrary inconsistency in the law. It is said that for an instrument to be negotiable it must be payable on demand or at a fixed or determinable future time. Certainty of time of payment is apparently made the criterion of negotiability, but it is obvious that demand paper, which is concededly negotiable, is the most uncertain form of paper from point of view of time of payment. If it be answered that the law distinguishes between time and demand paper, it may be said that there is no apparent reason why such distinction should be made, for there is no greater uncertainty as to time of payment of a note payable at a specified time or earlier at the option of holder or maker, and demand paper which, perforce, is payable at the option of the holder.

The policy of the law as concerns bills and notes is in favor of negotiability, that is to say, it favors that form of instrument which will circulate most readily and easily in the market. Consistent with such a policy is the rule that paper payable on the happening of an uncertain contingency such as the arrival of a ship, or the coming of age of the payee, or the election to office of the maker, or when the maker is able,⁷ is non-negotiable, since no business man would invest his funds in such paper, uncertain as it is as to the time of repayment and also as to whether repayment is to be made at all. But, viewed in the light of such a policy, a note the payment of which the holder is assured of at a specified time, or earlier at his option, should be accorded negotiability. It thus becomes apparent that the rule of the law merchant and of the Uniform Negotiable Instruments Law that "an instrument to be negotiable must be payable on demand or at a fixed or determinable future time" relates more to certainty as to whether the instrument will ever be payable, than to certainty as to when it will be payable. If it be said that a note payable at the un-

⁶ 10 C. J. S. 544, ff., and notes.

⁷ 10 C. J. S. 547, Sec. 97.

controlled option of the maker would be unmarketable, though apparently negotiable under a rule disregarding certainty of time of payment, it may be answered that such an instrument is uncertain not only as to time of payment but also as to whether it will be payable at all. The view contended for is even more strongly substantiated by those cases which hold that the length of time an instrument is to run has, in the absence of statute, no effect on its negotiability. Thus if legal negotiability is not affected (though marketability would be) by the fact that an instrument may be payable in the far distant future, so long as the instrument is certain of payment at some time, there is no reason why legal negotiability should be affected by a provision that an instrument, certain as to payment, may become payable at an earlier time than that specified as its due date (which can only have the effect of increasing its marketability).

In addition to the fact that the rule as it now exists is the result of an incorrect construction of the phrase "payable at a fixed or determinable future time", the various constructions applied in different situations are themselves inconsistent. Questions as to certainty of time arise under the conventional rule when the instrument provides that it is payable "on or before" a named date, upon the happening of a named event, at a named date or earlier if the holder deems himself insecure, at a named date or earlier if the maker defaults in the payment of an instalment or of interest, or at a named date or earlier if the holder exercises a power to confess judgment.⁸ The majority of the cases hold that a note payable "on or before" a named date is negotiable since the promise to pay on the date fixed remains absolute, and also since the Negotiable Instruments Law provides that an instrument may be made so payable.⁹ However, while it is factually true to say that, under the provisions giving the *holder* rather than the *maker* the option to accelerate payment, the promise to pay at a fixed date is abrogated by acceleration, yet this is rather to deal in words than results. It is obvious that there is still an absolute promise to pay, of which, by acceleration, advantage has been taken. While it is true that where the option is the maker's, rather than the holder's, the maker is pro-

⁸ No account is here taken of provisions for extension of time, also involving a certainty of time problem. The instant discussion is limited to acceleration questions.

⁹ 10 C. J. S. 549.

tected against a call for payment when it would be unfortunate, financially, for him to have to pay; yet it is also true that the maker has so contracted of his own free will.

A note payable upon the happening of a named event may or may not be negotiable accordingly as the event is bound to happen (as death) or morally certain to happen (as the ending of a war), or may never happen (as the coming of age of the payee).¹⁰ As indicated above, the actual factor which determines negotiability here is not when the note will be payable, but whether it will ever be payable at all.

It is generally held that a note payable at a named day or earlier if the maker defaults in the payment of an instalment or of interest is negotiable.¹¹ On the other hand a note payable at a named day or earlier if the holder deems himself insecure is usually held non-negotiable,¹² although there is authority to the contrary. A note payable at a named date or earlier if the holder exercises a power to confess judgment is almost universally held non-negotiable.¹³ In each of these cases, the element of uncertainty of time is equally present, but a differentiating factor is found in the fact that the instrument may or may not be accelerated at the holder's uncontrolled option. Although, in the case of a confessed judgment note, the maker may be protected from the possibility of having to pay twice by a holding that the note is non-negotiable, nevertheless negotiability is a matter of protection of the holder rather than the maker. Therefore, the fact that acceleration is at the uncontrolled option of the holder has no apparent effect on negotiability, and none is set forth by the cases.

It is thus apparent that, with the exception of notes payable upon the happening of an event neither absolutely nor morally certain to happen (and which are therefore possibly not payable at all) the only instruments of the types above enumerated which are held non-negotiable are those providing for confession of judgment or acceleration when the holder deems himself insecure, although in every instance the element of uncertainty as to the exact time at which the instrument will be payable is equally present. The conclusion, therefore, can only be that not only have the courts, blinded by precedent, announced and enforced an incorrect

¹⁰ 10 C. J. S. 547.

¹¹ 10 C. J. S. 551.

¹² 10 C. J. S. 553.

¹³ 10 C. J. S. 549.

rule, but that even in its enforcement the courts have been inconsistent in their holdings.

Conceding, for the purpose of the remaining discussion, the existence of the general rule above criticized, was it properly applied in the instant case? Under this given rule, it is held that a time note authorizing confession of judgment after maturity is negotiable, although, in such a note, authorization to confess judgment before maturity renders the instrument non-negotiable.¹⁴ This view has been followed in Maryland.¹⁵ The particular point of the instant case, the negotiability of a confessed judgment note *payable on demand*, is however one of first impression in the Maryland Court of Appeals, and indeed, has apparently arisen in only one other state.¹⁶

The line of demarcation which determines negotiability *vel non* as concerns time paper being whether or not judgment may be confessed before or after maturity, an inquiry concerning the time of maturity of a note payable "on demand after date"¹⁷ is essential, for if such a note be time paper then the court correctly applied the general rule. While the opinion in the principal case did not discuss the time of maturity of the notes, the only possible inference is that the Court regarded them as maturing at some time after the date of delivery,¹⁸ for in holding them non-negotiable the Court said:¹⁹

"It seems to us that there is no ambiguity in their meaning, and that their effect is to leave to the discretion of the holder the determination of the time at which judgment might be entered, thereby making it possible

¹⁴ 10 C. J. S. 538.

¹⁵ *Edelen v. First National Bank of Hagerstown*, 139 Md. 422, 115 A. 602 (1921) (after maturity); *Crothers v. National Bank*, 158 Md. 587, 149 A. 270 (1929) (before maturity). The problem of the negotiability of a confessed judgment note was incidentally involved in *Johnson v. Phillips*, 143 Md. 16, 21-22, 122 A. 7 (1923).

¹⁶ Pennsylvania. *Lozler v. Admy*, 5 Pa. Dist. & Co. 69 (1924). See also: *Miner's State Bank v. Auksztokalmis*, 283 Pa. 18, 128 A. 726 (1925) which held such a note non-negotiable, its lack of negotiability having been conceded.

¹⁷ It should be noted here that photostatic copies of the notes show them to have been form notes which read, after the date line, "..... after date" and that the "on demand" was written in on this printed form at the time of execution of the notes. From this it is at least a plausible inference that the notes were intended to be simply demand notes, and that the additional words "after date" were not intended to have any effect whatsoever.

¹⁸ Rather than immediately upon delivery, as is the case with an ordinary demand note. See *infra* note 24 and text of this note to which it relates.

¹⁹ 197 A. 133, 136.

that the judgment could have been entered on the note, upon the warrant of attorney, *at any time either before or after the maturity thereof.*'²⁰

Such a view is substantiated by at least one case which is on all fours with the principal case,²¹ but it is submitted that both cases are clearly contrary to the weight of authority.

That notes payable "after date", "on demand after date", "on demand next after date", "on demand, after date, without grace" are payable on demand has been the consistent holding of many courts.²² Of the many cases to be found so holding, the parent case is *Hitchings v. Edmands*.²³ That case held a note payable "on demand after date" was not a note payable on time, in the face of a contention that the additional words "after date" had the effect of excluding the day of delivery. In so holding the Court said that the words "on demand after date" were more nearly analogous to such an expression as "with interest after date" and that if a promissory note payable on demand with interest after date is paid the next day after it is given, one day's interest is due and payable. Further, the intention of the parties to the note was apparently that it should be payable immediately, no indication appearing on the face of the note that the parties intended to stipulate for at least one day's time before a demand could be made.

The inclusion within the notes of the words "after date" therefore had no effect on its date of maturity, which was the same as that of any other demand note. For the purposes of determining whether the holder has acquired the note after maturity, or when the note is due as concerns

²⁰ Italics ours. This inference is further substantiated by the Court's quotation from 7 Am. Jur. 892 (see 197 A. 133, 136). The sentence preceding the part quoted by the Court reads "According to the weight of authority, however, a note which, *while purporting to be due and payable at a fixed time after date*, contains a provision authorizing a confession of judgment "in favor of the holder 'at any time thereafter' is not negotiable under the law merchant". (Italics ours.) It is apparent that the section was dealing with the case of a note other than one which matures immediately upon execution, i. e., with time paper.

²¹ *Lozier v. Admy*, *supra* note 16, where the note contained the same provisions as in the instant case, and the Court said, "Judgment could have been entered on this note upon delivery, but payment could not have been demanded until the following day. Therefore, the judgment could have been entered before maturity, and this destroys the negotiability of the note." 10 C. J. S. 538 n. 44 cites also, in support of this proposition, *Kaszer v. Breyer*, 156 A. 632, 102 Pa. Super. 315 (1931) but the reports of that case do not show whether the note was a demand or a time note. It is significant, however, that neither the opinion of the Court, nor briefs of counsel for either party contains any citation to these Pennsylvania cases.

²² See cases cited 8 C. J. 404, n. 54, 55; 10 C. J. S. 742, n. 16, 17, 18, 19; and *Kenyon v. Youngland*, 40 F. (2d) 812 (C. of A., D. C.).

²³ 132 Mass. 338 (1882).

the question of presentation, demand and notice of default, a demand note is held to mature after a reasonable time, and what is a reasonable time varies even as between these two situations. However, for the purpose of determining when limitations begin to run, i. e., when suit may be maintained on the instrument, a note payable on demand is due immediately, without any other demand but the suit, unless a different intention is apparent from the terms of the instrument or the purposes and circumstances of the transaction.²⁴ While it may be argued that the provision of the note in the principal case for confessed judgment "at any time before maturity" shows another intention, it is submitted that such a contention is not well founded, especially in view of the fact that that particular wording was in the printed part of a form note. The conclusion, therefore, is that the note was a demand note, payable and maturing immediately.

That a provision for confessed judgment should not render non-negotiable such a note, if not a readily apparent proposition of itself, is one which finds support in *Security and Trust Co. v. Foster*.²⁵ There a demand note providing that the holder could declare the note due whenever it deemed itself insecure was held negotiable, the Texas Court reasoning as follows:

"In behalf of this objection many cases have been cited wherein notes containing provisions the same or similar to the ones incorporated in the present note have been held to render the same non-negotiable under the N. I. L. The ground of these decisions is that the date of payment is thereby made uncertain, and is wholly dependent upon the will or caprice of the holder. But in every case so holding which has been cited, the note was payable upon a day fixed and certain. In such a note it is readily apparent that a provision which gives to the holder the right to declare the same due whenever he deems himself insecure . . . injects the element of complete uncertainty in the maturity date, and in effect makes it dependent upon the will of the holder, and thus comes in conflict with that provision of the act which requires that an instrument to be negotiable 'must be payable on demand, or at a fixed or determinable future time'.

²⁴ 10 C. J. S. 744 and n., 8 C. J. 406, n. 83 and cases cited, and *Blick v. Cockins*, 131 Md. 625, 630, 102 A. 1022 (1917).

²⁵ 249 S. W. 227 (Tex. Civ. App. 1923). See also: *City Nat. Bk. v. Roberts*, 165 N. E. 470, 266 Mass. 239 (1929).

“But the present note is payable upon demand, and no case has been cited wherein such a note was held to be non-negotiable upon the ground indicated. In such a note by its terms there is complete uncertainty as to the date it is payable, and it is wholly dependent upon the holder’s will. Provisions of the character indicated add nothing to the element of uncertainty, and the reason for the rule of decision announced in cases of notes payable at a fixed or determinable future time has no application. The reason for the rule failing, the rule should also fail.”

Again, in *First National Bank v. Blackman*,²⁶ the New York Court said:

“The volition of the holder or maker of demand paper is complete; the former may at will declare the paper presently payable; the latter may presently pay if he elects so to do. Self-evidently that which is instantly payable, at the will of either of the parties, cannot, through a so-called acceleration clause, be rendered more immediately payable. Therefore, the essential nature of an obligation ‘payable upon demand’ is not affected by an acceleration clause.”

It is particularly apparent that the notes in the instant case should not have been held non-negotiable, when it is seen that the use of the words “at any time before maturity” was occasioned by the use of form notes. It may therefore be said that this provision was inserted purely accidentally, and that had the provision for confession of judgment been limited to “at or after maturity” the notes would have been held negotiable, although the contracts would have been the same in either case.

In conclusion it is submitted that the usually recognized policy for negotiability should have been followed in the instant case, and that the notes in question should have been held negotiable instruments. Regardless of the propriety of such a conclusion, it would seem that the Court should not have inferentially propounded the metaphysical brain-twister, “when is a demand note not a demand note?” without giving some further answer than simply “when it contains provision for confession of judgment before maturity”. Some recognition of the true problem in the case, the date of the maturity of a note payable “on demand after

²⁶ 164 N. E. 113, 249 N. Y. 322 (1928).

date'', was necessary to the rendition of a complete decision of the cause. While, in view of the wide-spread acceptance of the generally applicable rule that provision for acceleration at the holder's uncontrolled option defeats negotiability, the Court cannot be fairly criticized for blindly following it rather than inquiring into its reason and soundness; yet the affirmance and reaffirmance of the lower court's decision can only be characterized as an erroneous application of a dubious rule.

It is to be regretted that no more than four of the members of the Court could be persuaded to recognize that the decision on the original argument of the case was an obvious mistake which, as a result, has become perpetuated under the rule that an even division of an appellate court causes an automatic affirmance of the ruling before them.