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BILLS AND NOTES--CONDITIONS-NEGOTIABLE DESPITE REFERENCE TO TRUST AGREEMENT

BILLS AND NOTES—CONDITIONS—NEGOTIABLE DESPITE REFERENCE TO TRUST AGREEMENT—Bonds, stolen from the owner, were subsequently acquired by a bona fide purchaser who received payment from the obligor. The owner sued

the obligor on the ground that the bonds were non-negotiable. The first paragraph in each bond contained an unconditional promise to pay. The second and third paragraphs contained the following clauses: "This bond is one of a series . . . executed and delivered in accordance with and subject to the provisions of the Trust Mortgage hereinafter referred to and in pursuance of resolutions of stockholders. . . . The payment of this bond and of the coupons attached to it, is secured by a Trust Mortgage of even date herewith, which is hereby referred to and all of its provisions made a part hereof. . . . " It was *held* that the bonds were negotiable. *Gerrish v. Atlantic Ice and Coal Co.*, (C. C. A. 5th, 1935) 80 F. (2d) 648.

The prolix provisions in modern bond issues, often referring the holder to a mortgage indenture or other security agreement, have provided a most abundant source of litigation.[1] In the principal case the bonds were issued in Georgia before the adoption of the N. I. L. in that state [2] and the federal court followed its own construction of the law merchant.[3] But in the absence of binding local construction to the contrary, it is evident that the same result would have been reached under the N. I. L.[4] The court relied on the views expressed by state courts which were bound by the N. I. L.[5] and expressly declared that nothing in the above quoted provisions restricted or burdened with conditions the absolute promise to pay. Though not free from difficulty, the third paragraph does not drive the holder to an examination of the mortgage except for the purpose of ascertaining the nature of the security. There is the statement that the "provi-

[1] See 29 MICH. L. REV. 1062 (1931) and 31 MICH. L. REV. 984, 986 (1933) for a more complete discussion of the problem involved in this case.

[2] Bonds issued in 1910; N. I. L. adopted in 1924, Ga. Laws (1924), p. 126.

[3] Bank of Saginaw v. Title & Trust Co. of Western Pennsylvania, (C. C. Pa. 1900) 105 F. 491, cited with approval in the principal case.

[4] In the absence of statutory crystallization of the requirements for negotiable paper, it seems that on a proper proof of custom the court might have been free to recognize this particular issue as negotiable even though it found the promise conditional. See Aigler, "Recognition of New Types of Negotiable Instruments," 24 COL. L. REV. 563 (1924).

[5] Enoch v. Brandon, 249 N. Y. 263, 164 N. E. 45 (1928); Siebenhauer v. Bank of California Nat. Assn., 211 Cal. 239, 294 P. 1062 (1930); Pflueger v. Broadway Trust & Sav. Bank, 351 Ill. 170, 184 N. E. 318 (1932); Paepcke v. Paine, 253 Mich. 636, 235 N. W. 871 (1931); Bank of California v. Nat. City Co., 138 Wash. 517, 244 P. 690 (1926); Merchants' Nat. Bank v. Detroit Trust Co., 258 Mich. 526, 242 N. W. 739 (1932). The last cited case is particularly interesting in that the court interprets the language of bonds of three different issues; two are held negotiable and the other non-negotiable. In the principal case the court relies chiefly on Marine Nat. Exchange Bank v. Kalt-Zimmers Mfg. Co., 293 U. S. 357, 55 S. Ct. 226 (1934), which in turn relies on Pollard v. Tobin, 211 Wis. 405, 247 N. W. 453 (1933). See also, 31 MICH. L. REV. 986 (1933). The United States Supreme Court in the Kalt-Zimmers case decided only that the construction of the Wisconsin statute by the Supreme Court of Wisconsin was binding on the federal courts in that jurisdiction. In the principal case the court made no mention of Allan v. Moline Plow Co., (C. C. A. 8th, 1926) 14 F. (2d) 912, and Crosthwaite v. Moline Plow Co., (D. C. N. Y. 1924) 298 F. 466 in which the bonds were held non-negotiable. See 31 MICH. L. REV. 986 (1933).

sions are made a part hereof" but this clause is so linked with the reference to the holder's security that the court may well say that the mortgage is made a part of the bond for that purpose alone.[6] In the second paragraph the phrase "subject to" verbally imports a condition of the execution and delivery of the bonds and, unless it qualifies the promise, it is mere surplusage. But reading the bonds as a whole, in the light of the unconditional promise to pay in the first paragraph and the security provisions in the second, it certainly cannot be said that the reference above clearly qualifies the promise. The meaning is one on which reasonable men might differ and the court was thereby justified in adopting that interpretation which was in accord with the commercial practice relative to the bonds in question.

F. T. G.

[6] Enoch v. Brandon, 249 N. Y. 263, 164 N. E. 45 (1928).