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SOME DISPUTED QUESTIONS IN THE LAW OF COM-
MERCIAL PAPER.

1. *Stipulation for Attorney's Fee in a Promissory Note.* A difference of opinion exists as to the effect which a stipulation for the payment of an attorney's fee, in case suit is brought upon the note, has upon the character of the instrument, the stipulation being expressed in the note itself. The question is whether an agreement of this character, contained in the note, destroys the negotiable nature of the paper, and it has attracted a good degree of attention within the last few years, by virtue of the important distinctions existing between the rights attached to negotiable and non-negotiable paper. If such an agreement destroys the certainty in the amount of money to be paid on the one hand and received on the other, then of course it renders the paper non-negotiable, by depriving it of that which is one of the most important characteristics of negotiability.

The cases may be divided into three classes. First, those which maintain the negotiable character of the note, sustaining the validity of the stipulation. Second, those which deny the validity of the stipulation, thereby affirming the negotiability of the note. Third, those denying the negotiable character of the instrument. We will consider each of these classes in their order.

(1.) The Supreme Court of Iowa maintains the validity of the stipulation, upon the theory that it may be considered an agreement for the payment of liquidated damages,¹ and in *Sperry*

¹ *Nelson v. Everett*, 29 Ia. 24; *Weath-* fin, 32 Ia. 445; *McIntire v. Cagley*, 37 Ia.
erby v. Smith, 30 Ia. 131; *McGill v. Grif-* 676.

v. Horr,¹ decided in 1874, it sustained the negotiability of notes containing such stipulations. The provision in that case read: "If not paid when due, and suit is brought thereon, I hereby agree to pay collection and attorney fees therefor." It is noticeable that the amount of fees was not certain and fixed, so that a broader case could not have been presented. It was doubtful whether the amount finally to be received would or would not include these fees and costs. It was also doubtful as to what the fees and costs might amount to. The case certainly enabled counsel to argue with a good degree of plausibility that the note in question lacked one of the elements of negotiable paper, that of certainty in the amount to be received. But the court, in sustaining the negotiability of the note, or notes, for there were several of them containing the same stipulation, said: "The sums payable by the terms of the notes are fixed and certain; they are subject to no increase or diminution; when they matured, no inquiry was necessary to be made as to facts not apparent on the face of the notes, in order to fix the amount due; recovery could have been had upon the notes themselves, without other evidence."

In Indiana, too, the negotiability of the note has been sustained, although the stipulation has not been held void. The question came before the Supreme Court of that State in 1871, in *Stoneman v. Pyle*.² In the course of the opinion the court said: "On the maturity of the note, the maker knew precisely what he was bound to pay, and the holder what he was entitled to demand. In the commercial world, commercial paper is expected to be paid promptly at maturity. . . . As long as the note retained the peculiar characteristics of commercial paper, viz., up to the time of its maturity and dishonor, the amount to be paid on the one hand, and to be recovered on the other, was fixed and definite." The negotiability of such notes has since been sustained by the same court, in *Strough v. Gear*,³ decided in 1874.

In 1871, being the same year that the case of *Stoneman v. Pyle* was decided in Indiana, the question arose in Louisiana. In that case, *Dietrich v. Bayhi*,⁴ the stipulation in the note was as follows: I agree to pay "attorney fees of . . . per cent if suit

¹ 32 Ia. 184.

² 35 Ind. 103.

³ 48 Ind. 100.

⁴ 23 La. Ann. 767.

be instituted on this note." Notwithstanding this uncertainty, the negotiable character of the note was sustained.

The Supreme Court of Kansas has also sustained the negotiability of these notes, for very much the same reason as that assigned by the court in Indiana. The note in this case contained a promise to pay the "costs of collecting, including reasonable attorney fees, if suit be instituted on this note." The court said the amount due at the maturity of the paper was certain, and that the only uncertainty was in the amount to be collected in case the maker defaulted at the maturity of the paper, and the holder was driven to the necessity of instituting a suit for collection, adding that even in that case the only uncertainty would be as to the expenses of such collection.¹

(2.) On the other hand, there are cases which hold that such stipulations are absolutely void. It follows, of course, that if the stipulation is a nullity, and to be treated as of no effect, it cannot destroy the negotiable character of the note. For that which is void cannot be so far effective as to render a note non-negotiable by reason of an uncertainty which it sought, but failed to introduce into its terms. In *Bullock v. Taylor*,² decided in 1878, the Supreme Court of Michigan held a stipulation to pay an attorney's fee to be absolutely void, upon the ground that such an agreement was in the nature of an agreement to pay a penalty. The decision was announced by Mr. Justice Cooley. In the course of his opinion, which, it is needless to say, was an able one, he said: "A stipulation for such a penalty we think must be held void. It is opposed to the policy of our laws concerning attorney's fees, and it is susceptible of being made the instrument of the most grievous wrong and oppression. It would be idle to limit interest to a certain rate, if, under another name, forfeitures may be imposed to an amount without limit. The provision in those notes is as much void as it would have been had it called the sum imposed by its true name of forfeiture or penalty. There is no consideration whatever that can support it." This case has since been approved by the same court.³

Four years prior to the decision in *Bullock v. Taylor*, the question had arisen in Kentucky, in *Gear v. Louisville Banking Co.*,⁴ upon a stipulation reading as follows: I agree "to pay a reason-

¹ *Seaton v. Scovill*, 18 Kans. 433.

² 39 Mich. 137.

³ *Meyer v. Hart*, 40 Mich. 517.

⁴ 11 Bush, 180.

able attorney fee to any holder thereof, if the same shall hereafter be sued upon." The conclusion announced was that this agreement was for the payment of a penalty, and that it could not be allowed to destroy the negotiable character of the note; and in the subsequent case of *Witherspoon v. Musselman*,¹ the same court held such stipulations void, upon the ground that they were agreements to pay penalties, tending to the encouragement of litigation and the oppression of the debtor.

In Nebraska, in the case of *Heard v. Dubuque County Bank*,² decided in 1878, it was held that stipulations of this character did not destroy the negotiable character of the note. In that case the agreement read: "And if suit is brought to enforce collection I will pay reasonable attorney's fees." The court in considering the question said: "We do not think that the amount of money represented by the note or bill is rendered any the less certain by reason of its containing a stipulation that if it is not paid at maturity the maker will pay a part of the expenses of its collection. Such a stipulation adds to the value of the paper, has a tendency to lower the rate of discount on it, not only because it promises less expensive collection, but it bears evidence of a greater degree of confidence on the part of the maker in his ability to pay without suit." It would seem that this case should have been cited in the first class of cases noted, as sustaining both the negotiability of the note and the validity of the stipulation. But in the subsequent case of *Dow v. Updike*, this same court placed itself in line with the Michigan and Kentucky cases, and held that such stipulations were oppressive and usurious.³ Indeed, the reasoning in the case of *Heard v. the Dubuque Bank*, that such stipulations had a tendency to lower the rate of interest on the note, was slightly forced, inasmuch as the very note in question bore the highest rate that the law of the State allowed.

The question came up in Illinois in *Nickerson v. Sheldon*,⁴ decided in 1864. The objection was raised that the note sued upon was not negotiable, because of the following provision: "We further agree, that if the above note is not paid without suit, to pay ten dollars in addition to the above for attorney's fees." The court held that this did not render the amount due

¹ 14 Bush, 214.

² 8 Neb. 10.

³ 11 Neb. 95.

⁴ 33 Ill. 372.

at all uncertain, so as to deprive the note of its negotiability. "The amount due by this note is absolutely certain, and it possesses all the requisites of a negotiable instrument under the statute. There is no uncertainty as to the precise amount of money to be paid on the maturity of the note." And in the subsequent case of *Short v. Coffeen*,¹ decided in 1875, the same court refused to allow judgment to be entered in an action on a promissory note for the amount of the attorney fees provided for in the note, although the provision was expressed that they were, "in case of the collection thereof (the amount of the note) by suit at law or otherwise, to be added to and made a part of the amount due, or of the judgment." The court declared that the recovery could not in any case exceed the amount of the note and interest.

(3.) Finally, there is a class of cases, as already said, which hold that notes containing such provisions must be regarded as non-negotiable. This doctrine prevails in Missouri, Pennsylvania, North Carolina, Minnesota, and perhaps Wisconsin. In Missouri and in Pennsylvania the subject has been before the courts several times. The first time it came up in Missouri was in the case of the *First National Bank of Trenton v. Gay*, decided in 1876.² The note in question contained the following provision: "If not paid at maturity, and the same is placed in the hands of an attorney for collection, we agree and promise to pay an additional sum of ten per cent as an attorney fee." The court said that a portion of the amount promised to be paid depended on a contingency, whether another portion, specified by the same paper, was paid on maturity; that it could not be considered a promissory note, as the amount to be paid was not precise; and this ruling has been since adhered to in *Samstag v. Conley*,³ in *First National Bank of Carthage v. Marlow*,⁴ which was decided in 1880, as well as in *First National Bank v. Jacobs*.⁵

The Supreme Court of Pennsylvania, in 1877, adopted the same theory in *Woods v. North*,⁶ where the agreement was to pay "five per cent collection fee if not paid when due, without defalcation." Mr. Justice Sharswood announced the opinion of the court, and said: "In the paper now in question there enters an undoubted element of uncertainty. It is a mistake to suppose that if the note was unpaid at maturity, the five per cent would be payable

¹ 76 Ill. 245.² 64 Mo. 476.³ 73 Mo. 35.⁴ 63 Mo. 33.⁵ 71 Mo. 618.⁶ 84 Penn. St. 407.

to the holder by the parties. It must go into the hands of an attorney for collection. . . . The amount of the percentage cannot be arbitrarily determined by the parties; it must be only what would be a reasonable compensation to an attorney for collection." The reasonableness of the fee was said to be a question for the jury. This ruling was followed by the same court, at the January term, 1881, in *Johnson v. Speer*.¹

At the same term that *Johnson v. Speer* was being decided in Pennsylvania the subject was considered by the Supreme Court of North Carolina, and a similar opinion was expressed to that declared in the former State. The case was that of the *First National Bank v. Bynum*,² and the provision was for the payment of "all counsel fees and expenses in collecting the note if it is sued on or placed in the hands of an attorney for collection." It was also made payable in current rate of exchange on New York. Each of these provisions was regarded as rendering it uncertain in amount, and, therefore, unnegotiable.

In Minnesota the question came up in *Jones v. Radatz*,³ and was decided at the October term, 1880. The instrument provided for "a reasonable attorney's fee if suit be instituted for the collection of this note." The opinion was delivered by Chief Justice Gilfillan. After stating that it was essential to the negotiability of a note that it should be certain in amount, he said: "The instrument before us has this certainty as to the \$135 and the interest, but the whole instrument must be taken together. The promise to pay the \$135 and interest is not the whole of the promise; not the entire obligation created. The entire obligation and promise is to pay absolutely that sum and interest, and in a particular contingency, to wit, the bringing suit by the payee, after default, to pay a further sum, not fixed, and not capable of being ascertained from the instrument itself. The suggestion, in some of the cases,⁴ that a stipulation to pay attorney's fee in case of suit relates merely to the remedy, is not sound, for the payee, if he recover on that part of the promise, must recover, not because he is obliged to bring suit, but because it is part of the contract and obligation of the maker, on which the suit is brought, that he will pay them on the specified contingency.

¹ 15 *Western Jurist*, 119.

² 84 *N. C.* 24.

³ 27 *Min.* 240.

⁴ *Sperry v. Horr*, 32 *Iowa*, 128, 184;
Seaton v. Scovill, 18 *Kan.* 433.

Those cases and *Gear v. Louisville Banking Company*,¹ appear to advance the proposition that the instrument may be negotiable if the amount with which it may be discharged at maturity be fixed and certain, even though the amount required to discharge it after it has passed maturity, or recoverable upon it in an action, be entirely indefinite and uncertain. We think the certainty requisite to the negotiability of the instrument must continue until the obligation is discharged; and that any provision which before that time removes that certainty, prevents the instrument from being negotiable at all." The Supreme Court of Wisconsin handed down a decision on this question at the December term, 1881, in the case of *Morgan v. Edwards*.² The agreement in this note read as follows: "We also agree to pay all expenses, including attorney's fees, incurred in collecting, without any relief from valuation or appraisal laws." This agreement, it will be observed, was very broad, and if not void as being a stipulation for a penalty, could hardly be regarded otherwise than as introducing a very uncertain element into the note in question. The court did not enter into any discussion of the question of the validity of the stipulation. But on the other question, the uncertainty in amount, the court said: "A large number of cases have been cited which hold that if the amount payable at the maturity of the paper is fixed and certain — the instrument containing the other essentials of a note — it is still a note, although it contains a further promise to pay an uncertain sum for expenses or costs of collection if not paid at maturity, or if suit be brought upon it. We have examined many of these cases, and in all thus examined we find express stipulations that such expenses or costs are only payable provided default be made in the payment of the note at maturity, or unless suit be brought upon it, which implies a default. . . . This case does not require us to determine whether an instrument providing for the payment of an uncertain sum for expenses of collection or of a suit, in case of default, can or cannot be a promissory note. The stipulation to pay such expenses contained in the instrument in suit is not made contingent upon default of payment at maturity. If the money had been paid at the specified place on the day it was due, the defendants were liable under their agreement to pay the holder's necessary expenses of receiving it. If the bank

¹ 11 Bush, 180.

² 14 Central Law Journal, 33.

received it for the plaintiff, it might lawfully charge a fee for so doing, as the holder might have sent some other agent to the bank to receive the money, and such agent would have been entitled to compensation for his services. In either case, the charges would be expenses incurred in collecting the money, and such expenses the defendants agreed to pay by the terms of the instrument. Because of this, and because the amount thereof is uncertain, the instrument is not a promissory note, and therefore not negotiable." We have quoted somewhat at length from this decision, to show the important distinction which the court took in this case. Attention should also be called to the fact that this same court, in the case of *Leggett v. Jones*,¹ had held that an instrument in the form of a promissory note, for the payment of a certain sum of money, "with exchange on New York," was in fact a promissory note. In *Morgan v. Edwards* the decision in that case is alluded to. "The question in that case," said the court, "was not whether the instrument was a note under the law merchant, but whether it was a contract for the payment of money only under the code. The question was answered in the affirmative, and that is the whole basis of the judgment. The case cannot justly be regarded as authority for the proposition that an instrument containing such a stipulation can be a promissory note, although it has been so referred to in some of the elementary books." The court, however, goes on to express the opinion that such a provision would not destroy the negotiable character of the instrument. "In *Leggett v. James* the note was payable at the Dodge County Bank, with exchange on New York. Had the note been made payable in New York, no one would claim that there was any uncertainty in the amount, although the maker would necessarily have been subjected to the expense, uncertain in amount, of providing funds there to meet it. It is precisely that expense which constitutes and governs the cost of exchange. Hence, the same sum of money which would have been required to pay the note in New York would have paid it at the Dodge County Bank, including the exchange, according to its terms." There are cases which take a contrary view, upon the theory that the rate of exchange varies.² But without entering upon the discussion of that question we may

¹ 10 Wis. 34.

² *Read v. McNulty*, 12 Rich. Law, 445; *Lowe v. Bliss*, 24 Ill. 168.

remark that the weight of authority is no doubt in harmony with the doctrine announced in *Leggett v. James*.¹

This examination of the authorities shows that the negotiability of notes containing provisions for the payment of attorney's fees in case of non-payment at maturity is sustained by decisions in eight States, — in Iowa, Indiana, Kansas, Kentucky, Illinois, Louisiana, Michigan, and Nebraska. It shows, too, on the other hand, that the courts of four States — Missouri, Minnesota, North Carolina, and Pennsylvania — reach a contrary conclusion, and hold such notes to be non-negotiable, while the Supreme Court of Wisconsin evidently inclines to the same opinion. The question has not arisen in the Supreme Court of the United States, although it has twice been raised in the circuit courts of the United States. In *Farquhar v. Fidelity, &c. Deposit Company*² (U. S. C. C. D. Pa.), approbation was expressed of the doctrine which holds such notes to be non-negotiable. After approving the Pennsylvania case of *Woods v. North*,³ it was added: "Although there may be reason for the difference of opinion which exists as to the effect upon the commercial character of a note of a provision for the additional payment of a fixed percentage for collection, which is expressed upon its face, yet there is no conflict of opinion as to the effect of such a provision where the amount of the addition is determinable only by extrinsic evidence." The note provided for the payment of an attorney's fee of five per cent for collection, in case suit was instituted thereon. But in the Circuit Court for the District of Kansas the negotiability of notes containing a provision for an attorney fee was maintained in the case of *Howenstein v. Barnes*,⁴ decided in 1879. The note was made in Kansas, and was payable in Missouri; but the question was considered as one of general commercial law, and decided as such. An examination of the cases shows that the opinion expressed in the Circuit Court of Pennsylvania, that there is no conflict of opinion as to the non-negotiability of the note when the amount of the addition made by such a provision is determinable only by extrinsic evidence, is wholly unwarranted by the cases; for, passing, of course, the cases which have arisen where the stipu-

¹ *Bradley v. James*, 4 Bissell, 473; *Johnson v. Frisbie*, 15 Mich. 286; *Grutacap v. Woulluisse*, 2 McLean, 581; *Pollard v. Henies*, 3 P. & P. 335.

² 7 Central Law Journal, 334.

³ *Supra*.

⁴ 5 Dillon, 482.

lation was held void, we find that in Iowa, Indiana, Louisiana, and in Kentucky and Nebraska, in cases arising before the stipulation was held void, extrinsic evidence was necessary to determine the amount to be added. What is a reasonable attorney's fee is certainly a question to be determined by extrinsic evidence, and costs of collection must also be shown by extrinsic evidence.

It may be remarked, too, that the Supreme Court of Dakota has sustained the validity of a provision stipulating for a sum certain for attorney's fees, in case suit was brought. The Louisiana, Iowa, Illinois, and Indiana cases were approved; but the decision was based on a provision of the statute, which was as follows: "The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."¹

In addition to the States already named, there is little doubt that the negotiability of notes providing for an attorney fee would be sustained in Ohio, and also in Virginia. As early as 1833, the Court of Appeals of Virginia, in *Toole v. Stephen*,² held that a provision in a promissory note for the payment of costs of suit, and a commission for its collection, was a usurious agreement. And the Supreme Court of Ohio, in *State v. Taylor*,³ decided in 1841, held that an agreement in a promissory note to pay an attorney fee not exceeding five per cent was void as against public policy. If these stipulations are to be treated as void, they cannot be allowed to destroy the negotiability of the notes containing them. It seems to us to be more consistent with public policy to consider all such agreements as absolutely void. They can readily be used to cover usurious agreements, and excessive exactions may be made under the guise of an attorney's fee. It is not only a protection to the debtor to protect him against such demands, but the interest of the creditor is also promoted, by enabling him the more readily to dispose of or negotiate the note than he possibly could do if the note was to be considered as non-negotiable. The decided preponderance of authority is, as we have seen, in favor of the negotiability of notes

¹ *Farmers' National Bank v. Rasmus-*
sen, 1 Dakota, 60.

² 4 Leigh, 581.

³ 10 Ohio, 378.

containing such stipulations. The conclusion thus reached in the large majority of the cases seems to us to be correct, whether it is based upon the theory that the stipulation is void, or upon the fact that the amount due at the maturity of the note is fixed and certain. We very much doubt whether the opposite conclusion, reached by the courts in Missouri, Pennsylvania, North Carolina, and Minnesota, will be adopted in many of the States, notwithstanding the respect which may be entertained for the tribunals which have approved it.

2. *Rate of Interest after Maturity of Note.* Where the rate of interest specified in a promissory note is either greater or less than the legal rate, and the note contains no provision as to the rate after maturity, the question arises whether the note continues to draw the same rate after as before maturity. The courts widely differ in their answer to this question; some of them strenuously maintaining that the contract rate governs as well after as before maturity, while others insist, with an equal degree of confidence, that the legal rate must govern, unless it is expressly provided that the contract rate shall continue after maturity.

In the Supreme Court of the United States the rule was announced, in *Brewster v. Wakefield*,¹ decided in 1859, that, in the absence of a provision to the contrary, the statutory rate would govern after maturity. The opinion was by Chief Justice Taney, and the question came up from the territorial court of Minnesota. It is not unlikely that the very excessive rate of interest which the note called for had much to do in influencing the court to the conclusion reached; but the doctrine thus announced has since been adhered to by that tribunal. It was followed in *Burnhisel v. Firman*,² decided in 1874; and in the recent case of *Holden v. Trust Co.*,³ decided in 1877, Mr. Justice Swayne said: "If payment be not made when the money becomes due, there is a breach of the contract, and the creditor is entitled to damages. Where none has been agreed upon, the law fixes the amount according to the standard applied in all such cases. It is the legal rate of interest where the parties have agreed upon none. If the parties meant that the contract rate should continue, it would have been easy to say so. In the absence of a

¹ 22 How. 127.

² 22 Wall. 176.

³ 100 U. S. 72.

stipulation, such an intendment cannot be inferred. The analogies relied upon to support a different view are obviously distinguishable from the case in hand." This case was an appeal from the Supreme Court of the District of Columbia, where the statutory provision is that the rate of six per cent per annum is allowed upon all moneys due, where there is no contract on the subject.

But this question is regarded as being purely one of local law; and where the courts of any State have adopted a contrary rule, the rule so adopted will be applied by the Supreme Court of the United States to notes governed by the laws of that State. This principle was established in the case of *Cromwell v. County of Sac*,¹ decided in 1877, where Mr. Justice Field followed the rulings of the Supreme Court of Iowa. In the case of *Holden v. The Trust Co.*, already cited, Mr. Justice Swayne says, "The question is always one of local law." And in the case of *Town of Ohio v. Frank*,² but recently decided, Mr. Justice Woods, delivering the opinion of the Supreme Court, acted on the same principle, applying the rulings of the Supreme Court of Illinois.

The earliest American case which we have found sustaining the doctrine announced in *Brewster v. Wakefield*, and one which seems to have been generally lost sight of, is that of *Gaillard v. Ball*,³ decided in South Carolina in 1818. In that case, a person had entered into a bond, conditioned for the payment of four per cent interest on certain legacies till the legatees came of age, and as each legatee came of age, to pay him his proportion of the principal. The court held him bound to pay the statutory rate from the time the principal became due. Justice Nott delivered the opinion, saying: "The defendant's testator stipulated to pay four per cent up to a given time, and then to pay the principal. This contract to pay four per cent ended at that time, and his privilege to pay no more ended with it. A person is always bound to pay legal interest except where there is an agreement to take less. In this case the plaintiff did not agree to take less, any longer than until the principal became due. The law, which the parties had made for themselves, having ended at that time, the contract was governed by the law of the land afterwards." Jus-

¹ 96 U. S. 51.

³ 1 Nott & McCord, 67.

² 13 Central Law Journal, 55.

tice Gantt, however, thought otherwise, and said that no greater rate of interest should be allowed, on the coming of age of the legatees, than that which was stipulated by the bond. The rule in South Carolina seems to be settled that the contract rate will govern after maturity. In *Langston v. S. C. R. Co.*,¹ decided in 1870, the Supreme Court of that State expresses the opinion that the weight of authority is in favor of *Brewster v. Wakefield*. And in the more recent case of *Briggs v. Winsmith*,² decided as late as 1878, the same doctrine is asserted, the court saying that as no contract appeared to govern the rate of interest from and after the maturity of the note, the statutory rate must govern as determining the measure of damages.

The question arose in Pennsylvania as early as 1842, in *Ludwick v. Huntzinger*,³ a case much relied on in *Brewster v. Wakefield*. The bond provided for interest at the rate of six per cent, and the court held that this agreement as to interest only extended to the period fixed for the payment of the debt; that after maturity the statutory rate of six per cent governed. No reference was made to the early case of *Gillard v. Ball*, decided almost a quarter of a century before in South Carolina, but the same conclusion was reached on the same reasoning. "Until the bond became payable," it was said, "the agreement of the parties regulated the allowance of interest, and the rate of it; but after that the law interposed, not only to allow, but to regulate the rate of interest that should be paid by the defendant or debtor for and on account of his illegal detention of the debt from the plaintiffs. Whenever one man binds himself to pay a specific sum of money to another by a certain day, and he fails to do so, he becomes liable by the law of this State to pay interest thereon at the rate of six per cent per annum, afterward, as long as he shall improperly withhold payment thereof, unless, perhaps, it should be expressly agreed otherwise."

In 1858, the Supreme Court of Minnesota, in *Mason v. Callendar*,⁴ laid down the same principle, saying: "Interest is the creature of the contract, and as such is only recoverable during the continuance of the contract. When the agreement is violated the promisee has sustained a wrong for which the law gives him redress by way of damages." This case was followed by the same

¹ 2 S. C. (n. s.) 248.

² 10 S. C. (n. s.) 133.

³ 5 W. & S. 51.

⁴ 2 Minn. 350.

court in a number of decisions,¹ until, in 1879, the legislature interfered and passed the provision cited below.²

In *Robinson v. Kinney*³ the Supreme Court of Kansas, in 1863, followed *Brewster v. Wakefield*, considering that case as decisive of the question, inasmuch as the statute of that State was similar to the one passed on by the Supreme Court of the United States in the latter case; and this was followed in 1866 in *Searl v. Adams*.⁴ Such, too, is the rule in Maine,⁵ adopted in 1877, the court saying: "The practice in this State has been in accordance with the rule laid down by the Supreme Court of the United States in *Brewster v. Wakefield*, and we see no reason for departing from it." The same doctrine is also maintained in Arkansas⁶ in several recent decisions, being announced for the first time in 1876. The subject came up in Rhode Island⁷ in 1877, and the court said the parties were not entitled to interest subsequent to the maturity of the note, at the stipulated rate, on the idea of an implied contract for such interest, and that if the same rate should be allowed it would be on the assumption that such was the measure of damages; but it was held to be more in keeping with the spirit of the statute to allow only the statutory rate of six per cent.

In Kentucky⁸ the matter came up in 1876, and it was held that the statutory rate would govern after maturity. "Whatever interest," said the court, "is recoverable upon the note after maturity, is recoverable not upon the stipulations expressed in the writing, but upon the provisions of the statute. If the right to interest depended alone upon the contract, and was not given by law, the appellee would not be entitled to any interest after the maturity of the note, and could only recover, if at all, by way of damages for withholding the money due."

The Supreme Court of Indiana had occasion to determine this

¹ *Talcott v. Marston*, 3 Minn. 339; *Lash v. Lambert*, 15 Minn. 416; *Moreland v. Lawrence*, 23 Minn. 84.

² "In case of all notes or other instruments bearing interest, when no rate of interest is specified after maturity, the said note or other instrument shall be construed to bear the same rate of interest after maturity as before, and until fully paid and satisfied." Gen. Laws, 1879, ch. 66, § 5.

³ 2 Kan. 184.

⁴ 3 Kan. 513.

⁵ *Duran v. Ayer*, 67 Me. 150; *Eaton v. Boisonault*, ib. 540.

⁶ *Newton v. Kennerly*, 31 Ark. 627; *Pettigrew v. Summers*, 32 Ark. 571; *Woodruff v. Webb*, 32 Ark. 613.

⁷ *Pearce v. Hennessy*, 10 R. I. 223.

⁸ *Rilling v. Thompson*, 12 Bush, 310; *Evans v. Chapel*, 13 Bush, 12.

question at an early day, and the conclusion then arrived at was directly opposed to the theory which is now recognized by it as the correct rule in such cases. In 1836, and again in 1838, the doctrine was recognized in that State that the contract rate continued after maturity and until final payment.¹ But in 1879 the subject was again considered, when the court expressly repudiated its former rulings, and announced that, in the absence of an express agreement to the contrary, the statutory rate would govern after the maturity of the instrument. The matter was disposed of with few words, the court merely quoting *Brewster v. Wakefield*, and declaring that it announced the correct rule.

The contrary theory, on the other hand, has been maintained by courts of equal standing and ability, and in many cases. As early as 1820 the question arose in New York, in *Miller v. Burroughs*,² and was disposed of by the remark that "the contract of the parties is not confined to the time limited for the payment of the principal, but is general, and continues until the contract ceases to operate." The subject again came up in 1825, in *Van Beuren v. Van Gaabeck*,³ and it was again held that the contract rate would continue after maturity as before; the court remarking that "the contract of the parties is not confined to the time limited for the payment of the principal, but is general, and continues until the contract ceases to operate." These cases have been followed in a late case in the Supreme Court of that State, *Andrews v. Keeler*,⁴ decided in 1879. In each of these cases, however, the matter was not considered at length, but was summarily disposed of as a matter of course. Whether this theory would be sustained by the Court of Appeals is somewhat doubtful, for while the early cases already cited have not been overruled expressly, yet doubt has been cast upon them, leaving the subject somewhat involved. In *Ritter v. Phillips*,⁵ decided in 1873, Mr. Justice Folger seemed to regard the matter as an open question, and one not necessary to determine in that case. After making reference to the doctrine enunciated in the early cases, he added: "This has been somewhat shaken in *U. S. Bank v. Chapin*,⁶ where it was held that when a bank was, by its char-

¹ *Bates v. Wernwag*, 4 Black. 372;
Kilgore v. Powers, 5 Black. 22.

² 4 Johnson's Ch. 436.

³ 4 Cowen, 496.

⁴ 26 N. Y. Sup. Ct. 87.

⁵ 53 N. Y. 586.

⁶ 9 Wend. 71.

ter, limited to the rate of six per cent in its discounts, yet that it could recover at the rate of seven per cent from the time the note it had discounted became payable; and to the same effect is *Macomber v. Duuham*.”¹ The cases of *Bell v. The Mayor*,² and *Hamilton v. Van Rensselaer*,³ are also regarded as casting doubt upon the matter.

The subject next came up in Texas in 1852, in *Pridgen v. Andrews*,⁴ and was disposed of in an even more summary manner, with fewer words, than in the New York cases. The jury, in computing the interest, had proceeded upon the theory that the contract rate continued after the maturity of the note, and the court disposed of the subject with the brief remark, “There is no excess in the interest as estimated by the jury.” In the subsequent year, 1853, the question was again presented, and this time was a little more fully commented on, the case being that of *Hopkins v. Crittenden*.⁵ After referring to the statute as fixing the legal rate of interest at eight per cent, and as authorizing the recovery of that rate when no specific rate was expressed in the contract, the court held that a specific rate was named in the note, and that that rate continued after maturity. “It doubtless was the intention of the parties,” said the court, “to contract for ten per cent interest upon the debt until paid, and there can be as little doubt that it was the intention of the legislature to authorize the making and enforcing of such a contract.”

About this same time, 1852, the subject was considered in California, in *Kohler v. Smith*,⁶ and a similar conclusion was reached, without reference to any adjudications upon the matter elsewhere. The appellant complained that he was charged with interest upon his note at the rate of five per cent a month after it became due; and contended that his contract was for that rate from the time he made the note up to its maturity. “Where there is no express contract in writing fixing a different rate of interest,” the statute provided that money should bear interest at the rate of ten per cent after it became due. The court said: “This language is very explicit, and shows that the intention of the act was two-fold: first, that money demands after maturity should draw interest; and, second, that they should draw interest at whatever

¹ 8 Wend. 550.

² 10 Paige, 49 (1843).

³ 43 N. Y. 46 (1871).

⁴ 7 Tex. 461.

⁵ 10 Tex. 189.

⁶ 2 Cal. 597.

rate was expressed in the written contract, notwithstanding that nothing is said expressly about interest after maturity; and it is only where no rate is agreed on, that the statute rate takes effect." The State of Nevada adopted the California statute regulating interest, and the courts of that State have consequently placed the same construction upon it as had previously been given to it in the State from which it was adopted.¹

In *Phinney v. Baldwin*,² decided in 1854, the Supreme Court of Illinois established the rule for that State, holding that the contract rate continued after maturity, although there was no express agreement to that effect in the note. No reference was made to decisions elsewhere, but the conclusion was based upon the evident intention of the parties. The note was payable thirty days from date, and the promise was to pay the principal "with interest from date at five per cent per month." And the court said: "The note continues to bear that rate of interest so long as the principal continues unpaid. The maker undertakes to pay interest at that rate while he withholds payment of the principal; that is the compensation which the payee is to receive for the forbearance of the money. We entertain no doubt that this was the real understanding of the parties. It was not their intention that this rate should cease on the maturity of the note, and that it should thereafter only bear interest at the rate of ten per cent per annum. Such a construction could not be put upon the instrument without doing violence to the intention of the parties. It would in effect be making a new contract for them. They evidently contemplated but one rate of interest, and that rate was to continue until payment should be made." The question was up again in 1862, and the court refused to follow *Brewster v. Wakefield*, adhering to its former ruling, and declaring "that such is the common-sense understanding of the contract."³ And this doctrine is still maintained.⁴

No good purpose can be subserved by pursuing the matter further. Almost all the cases hereafter cited on this subject, as holding this same theory, base it upon the evident intent of the parties that the note should bear the same rate after as before maturity. This theory prevails in the States already named, and

¹ *Cox v. Smith*, 1 Nev. 171 (1865);
² *McLane v. Abrams*, 2 Nev. 199 (1866).

³ *Etnyre v. McDaniel*, 28 Ill. 202.

⁴ *Heart v. Rhodes*, 66 Ill. 351.

² 16 Ill. 108.

in Massachusetts,¹ Michigan,² Wisconsin,³ Ohio,⁴ Virginia,⁵ Iowa,⁶ and Tennessee.⁷ The same doctrine was maintained in Connecticut,⁸ but has been changed by a statutory provision passed in 1873, and cited below.⁹ While the matter has not yet been before the Supreme Court of Missouri, it has been raised in the St. Louis Court of Appeals, and it was there held that the contract rate continued after maturity. The Court said: "The question here presented has never been passed upon by our Supreme Court. We believe, however, that by universal usage in the courts and among business men throughout the State the rate of interest agreed upon in a written obligation for the payment of money has always been held to continue until actual payment, unless a different rule was prescribed in positive and clear terms. We find in the weight of authority nothing to justify such an innovation as the defendant here insists upon, but do find the contrary rule to be better supported by the more recent and well-considered adjudications."¹⁰

This review of the authorities shows that the Supreme Court of the United States, and the courts of Arkansas, Indiana, Kansas, Kentucky, Maine, Minnesota, Pennsylvania, Rhode Island, and South Carolina, ten in number, support the rule that the statutory rate governs after the maturity of the note, unless it has been expressly provided therein that the contract rate shall continue; while the contrary rule has been adopted in the courts of California, Connecticut, Iowa, Illinois, Massachusetts, Michigan, Missouri, Nevada, New York, Ohio, Tennessee, Texas, Virginia, and Wisconsin, being fourteen in number, and fully supporting the opinion expressed in the St. Louis Court of Appeals as to the weight of authority upon this subject. Mr. Justice Field, in the Supreme Court of the United States, expressed a similar opinion as to the preponderance of authority.¹¹

¹ *Brannon v. Hursell*, 112 Mass. 63; *Union Institution for Savings v. Boston*, 129 Mass. 82.

² *Warner v. Juiff*, 38 Mich. 662.

³ *Spencer v. Maxfield*, 16 Wis. 179; *Pruyn v. Milwaukee*, 18 Wis. 367.

⁴ *Monett v. Sturges*, 25 Ohio St. 384; *Marietta Iron Works v. Lattimer*, 25 Ohio St. 620.

⁵ *Cecil v. Hicks*, 29 Gratt. 1.

⁶ *Hand v. Armstrong*, 18 Iowa, 324; *Thompson v. Pickel*, 20 Iowa, 490.

⁷ *Overton v. Bolton*, 9 Heisk. 762.

⁸ *Adams v. Way*, 33 Conn. 431.

⁹ "No greater rate of interest than seven per cent per annum shall be recovered or allowed for the time after the money loaned becomes due." And in *Hubbard v. Callahan*, 42 Conn. 537, it was held that the statute did not apply, provided the parties had agreed that the contract rate should hold after maturity.

¹⁰ 11 Central Law Journal, 439.

¹¹ 96 U. S. 51.

It is worthy of remark that in Kentucky, and also in Maine, while maintaining the general rule that the statutory and not the contract rate governs after maturity of the note, it has been found necessary to apply the contrary theory to notes payable on demand, or within a few days from the date of the instrument. For instance, in *Gray v. Briscoe*,¹ decided in 1869, the note was payable one day after date, and bore interest at the rate of ten per cent, and the court held that the contract rate continued until the note was paid. "The amount of interest," said the court, "secured by the contract in excess of the rate of six per cent per annum for a single day, is so inconsiderable that it is scarcely reasonable to suppose the parties intended to restrict the stipulated rate of interest to the maturity of the contract; but we must conclude that they intended it to continue until the debt should be paid." In the case in Maine, *Paine v. Caswell*,² decided in 1878, the note was payable on demand, and interest was payable at the rate of ten per cent, and it was held that the note bore interest at that rate until paid. But as a matter of fact, is it any more doubtful that the parties intended that the note should continue to bear interest at the contract rate when it is made payable one week after date, or one month, or one year? How many days after date must a note be made payable to evidence to the judicial mind that the parties intended that the principal should bear interest at the rate of ten per cent until maturity, but supposed that after maturity the value of the money would immediately decline to the statutory rate of six per cent? Must it be two days, or twenty? We should judge that the judicial mind must be possessed of more than human powers of discernment to enable it to determine the intent of the parties, according to the number of days after date that the note is made payable. It is better to concede that it is the common-sense understanding of the contract, that the conventional rate of interest should continue until final payment.

3. *Liability of Third Person indorsing before Delivery.* One of the most disputed questions in the law of commercial paper is that concerning the liability of a third person indorsing a promissory note before its delivery to the payee, for the sole purpose of giving the maker credit. And the question which thus arises

¹ 6 Bush, 687.

² 68 Maine, 80.

is not as to which of two theories is the more nearly correct, but which of a half-dozen is to be regarded as the true one. It is remarkable that so great a diversity of opinion should exist in our judicial tribunals upon a question of this character, and it is matter for serious regret that the opinions entertained are so diverse in character. The law relating to commercial paper should be uniform throughout the commercial world, and it is deplorable to find, as we do upon this question, the court in Massachusetts laying down the law in one way, while in New York it is laid down in another way, in Illinois in still another way, and in Indiana in yet another. These different theories as to the nature of the liability assumed by one indorsing in the manner named are as follows:—

1. It is presumed, in the absence of proof to the contrary, that the liability intended to be assumed was that of a joint maker, of an original promisor.

2. A like presumption is indulged that the parties intended that the one so signing should assume the liability of a guarantor.

3. It is held that where one so signs, the liability thereby created is *prima facie* that of a first indorser.

4. It is held, on the other hand, that while the liability is that of an indorser, the one so signing is a second and not a first indorser.

5. It is held that one so signing is neither presumed to be an original promisor, a guarantor, nor a first or second indorser; but that the blank indorsement implies that the party making it intended that the payee should have the right to elect in what capacity he would hold him liable.

6. That the liability is that of an indorser, or that of a surety, according to the intention with which the one signing became a party, this intent to be shown by parol evidence.

As to the first of these theories, that the one so signing is a joint maker, it is supported by a decided weight of authority. It is the rule announced by the Supreme Court of the United States, being declared for the first time by that court in 1859, in *Rey v. Simpson*,¹ and followed, in 1877, in *Good v. Martin*,² when the court declared that no reasonable doubt of the correctness of the

¹ 22 How. 341.

² 95 U. S. 90.

rule could be entertained. It is the theory which the courts have adopted in Arkansas, Colorado, Delaware, Georgia, Louisiana, Maine, Massachusetts, Maryland, Michigan, Minnesota, Missouri, New Hampshire, North Carolina, Ohio, Rhode Island, South Carolina, Texas, and in Vermont.¹ The arguments advanced to support this theory are the following: (1.) The party cannot be held as a first indorser, for the reason that he is not the payee, and no one but the payee can be first indorser and put the instrument in circulation as a commercial negotiable security. (2.) That no one can be presumed to be a second indorser except one to whom the instrument has been indorsed, and who has passed title to another. That if a person indorsing in blank before delivery desires to limit his obligation to that of a second indorser, he must employ proper terms to signify that intention, the rule being that a blank indorsement supposes that there are no such terms employed. (3.) That the party cannot be held as a guarantor, for the reason that a guaranty is a collateral engagement to answer for the debt, default, or miscarriage of another person, and that as such the agreement should be in writing, and signed by the party to be charged. The party's signature is there, but the collateral agreement is not. (4.) The contract is ambiguous, because the party has failed to clearly express his intentions, and therefore it is to be interpreted most strongly against him and in favor of the payee; that as he cannot be held either as guarantor or indorser, he must be held as an original promisor, as it is clear that he intended to be held in some form.

The second theory, that the party is to be held as a guarantor, is maintained by the courts of California, Illinois, Kansas, Kentucky, Nebraska, and Nevada.² It was first promulgated in Illinois, in 1842, in *Camden v. McCoy*,³ and was there based on

¹ *Killian v. Ashley*, 24 Ark. 511, 515; *Best v. Hoppie*, 3 Col. 137; *Gilpin v. Marley*, 4 Houst. 284; *Quin v. Sterne*, 26 Ga. 224; *Collins v. Trist*, 20 La. Ann. 350; *Woodman v. Boothby*, 66 Me. 391; *Rice v. Cook*, 71 Me. 559; *Woods v. Woods*, 127 Mass. 141; *Third National Bank v. Lange*, 51 Md. 138, 145; *Rothschild v. Grix*, 31 Mich. 150; *Stein v. Passmore*, 25 Minn. 256; *Mammon v. Hartman*, 51 Mo. 168; *Currier v. Fellows*, 27 N. H. 366; *Hoffman v. Moore*, 82 N. C. 313; *Seymour v. Mickey*, 15 Ohio St. 519; *Carpenter v. McLaughlin*, 12 R. I. 270; *Carpenter v. Oaks*, 10 Rich. Eq. 17; *Carr v. Rowland*, 14 Tex. 275; *Sylvester v. Downer*, 20 Vt. 355.

² *Ford v. Hendricks*, 34 Cal. 673; *Stowell v. Raymond*, 83 Ill. 120; *Fuller v. Scott*, 8 Kan. 25; *Arnold v. Bryant*, 8 Bush, 678; *Newton Wagon Co. v. Diers*, 10 Neb. 284, 291; *Vandoren v. Tjader*, 1 Nev. 380.

³ 3 Scam. 437.

a misconstruction of early New York and Massachusetts cases, especially on certain *obiter dicta* contained in *Herrick v. Carman*.¹ It is sufficient to say that no case was ever decided in either of these States, holding that the liability in such cases was that of a guarantor. The limits of this article do not permit us to point out how this misconception of those early cases has arisen. A few years later and the matter came up in California, in 1852, in *Riggs v. Waldo*,² when a similar conclusion was reached with that arrived at in Illinois. No reference was made to the adjudged cases, the conclusion being based upon its own merits. As to the promise not being within the statute of frauds, the court said: "The first question here is, whether this kind of guaranty is within the statute of frauds, for the want of an expressed consideration in writing. While there has been some conflict of opinion, the main current of decisions, and the better reasoning, maintain the negative of the proposition. The contract imports a consideration, because it is a promissory note. Each one who writes his name upon it is a party to it, and from its commercial character each party to it is an original undertaker. The liability of one may be with conditions, that of others without any; or, in other words, the liability may be primary or secondary; but each name constitutes a direct original promise founded upon the same consideration."

The third theory, that such an indorser is liable as first indorser, has not been adopted by many of the courts. It prevails only in Alabama, Indiana, Wisconsin,³ and possibly in Mississippi.⁴

The fourth theory, that the liability is that of a second indorser, has found more favor, and is based upon the reasoning that without explanatory evidence it is a necessary presumption that the one so signing supposed he would incur no liability until the payee had first indorsed. This rule prevails in Iowa, in New York as to notes which are negotiable, in Oregon, Pennsylvania, and Tennessee.⁵ As to notes which are non-negotiable,

¹ 12 Johns. 159.

² 2 Cal. 485.

³ *Jordan v. Garnett*, 3 Ala. 610; *Hooks v. Anderson*, 253 id. 238; *Snyder v. Oatman*, 16 Ind. 265; *Houston v. Bruner*, 39 Ind. 376; *Heath v. Van Cott*, 9 Wis. 516; *King v. Ritchie*, 18 Wis. 554.

⁴ In *Jennings v. Thomas*, 13 S. & M. 617, the court say that the liability of one so indorsing is *prima facie* that of an indorser, but whether the party was helden as a first or as a second indorser is not entirely clear.

⁵ *Fear v. Dunlap*, 1 Greene, 335; *Phelps*

the New York courts hold that the liability is that of a joint maker, or a guarantor according to the intent of the parties.¹

The fifth theory, that no presumption exists as to the character of the liability assumed, but that the payee may elect in what capacity he will hold one so indorsing to be liable, is the established doctrine of the courts of Virginia² and of West Virginia.³ In the case last cited, the court, after reviewing the cases and laying down the above theory as the rule in Virginia and adopting it as the rule in West Virginia, said: "But the true nature of the transaction, and the understanding of the parties to it at the time, may be shown by parol proof, and such proof may destroy this right of election by the payee, and the third person backing such note may be held liable only as an original promisor, or as a guarantor, or as an indorser, according to the nature of the transaction and the original understanding of the parties to it. If it is shown by evidence that such third person signed his name on the back of such a note, at the time it was made, as security for the maker and for his accommodation, to give him credit with the payee, such proof does not alter the right of the payee to hold him bound as original promisor, or as guarantor, or as indorser, as he may elect, but strengthens his *prima facie* right to elect. Such option may be exercised at any time by the payee, and so long as he holds the note may be changed at his pleasure, even after the institution of a suit by him against such third person. If it be shown that the understanding between such third person and the payee at the time of the transaction was, that such third person should be bound only collaterally, such understanding will destroy the right which the payee would have otherwise had, — of electing to hold him bound as original promisor."

The sixth and last theory, we notice, is that announced in New Jersey in *Chaddock v. Vanness*,⁴ where it was said that no legal presumption arises as to the liability which is assumed by such an indorsement. It is there held that the mere signature of a third person creates *per se* no implied or commercial contract whatever; that the liability will be that of a second indorser

v. Vischer, 50 N. Y. 69; *Cogswell v. Hayden*, 5 Ore. 53; *Schafer v. F. & M. Bank*, 59 Penn. St. 144; *Iser v. Cohen*, 1 Bax. 421.

¹ *Griswold v. Slocumb*, 10 Barb. 402;

Richards v. Warring, 1 Keyes, 576; *Cromwell v. Hewitt*, 40 N. Y. 492.

² *Orrick v. Colston*, 7 Gratt. 189, 199.

³ *Burton v. Hansford*, 10 W. Va. 470.

⁴ 35 N. J. 516.

or that of a surety, according to the intention with which he became a party, and that that intent must be shown by parol evidence.

In conclusion, it is proper to note the fact that while the courts of Massachusetts have held in a long series of decisions¹ that the liability thus assumed was that of an original promisor, and have even held that parol evidence could not be received to show that the parties intended that a different liability should be assumed,² yet such is no longer the rule, owing to legislative intervention. In 1874 the legislature of the State interposed, passing an act which provided that "all persons becoming parties to promissory notes payable on time, by a signature in blank on the back thereof, shall be entitled to notice of the non-payment thereof, the same as *indorsers*."³ And the fact also remains to be noticed, that while in Pennsylvania it is authoritatively settled, as already said, that the obligation assumed is that of a second indorser, and *parol* evidence is inadmissible to show that it was intended that a different liability should be assumed,⁴ yet it is held in that State that a *memorandum in writing* signed by the party to be charged is admissible to show such an agreement.⁵

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¹ *Moies v. Bird*, 11 Mass. 436 (1810); (1871); *Allen v. Brown*, 124 Mass. 77 (1878); *Chaffee v. Jones*, 19 Pick. 260 (1837);

Union Bank v. Willis, 8 Met. 504 (1844); ³ See *National Bank v. Law*, 127 Mass. 72 (1879);

Bryant v. Eastman, 7 Cush. 113 (1851); ⁴ *Jack v. Morrison*, 48 Penn. St. 116 (1864); *Schafer v. F. & M. Bank*, 59 Penn. St. 144 (1868);

Way v. Butterworth, 108 Mass. 509 (1871); *Woods v. Woods*, 127 Mass. 141 (1879). ⁵ *Eilbert v. Finkbeiner*, 68 Penn. St.

² *Way v. Butterworth*, 108 Mass. 509 247 (1871).