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NEGOTIABILITY OF JUDGMENT NOTES

JAMES M. OGDEN

Judgment notes or cognovit notes, or notes containing a warranty of attorney to confess judgment, as they are variously termed, were recognized as negotiable at common law.²

¹ In the light of two statutes enacted by the Indiana General Assembly in 1927, the last session of the Legislature, such notes are of much interest at the present time. The two Indiana laws are found in Acts of 1927 at pages 174 and 656. The act on page 174 makes such notes void and forbids execution or other process to be issued to enforce the collection of any judgment procured on such notes. The act on page 656 makes it a misdemeanor, punishable with fine to which may be added imprisonment, to procure or to retain any such notes or to attempt to enforce any judgment thereon, whether procured within Indiana or in any other state or foreign country.


A satisfactory form for such a stipulation, recommended by the attorney for the American Bankers Association, is as follows:

“If this note is not paid at maturity, we, or either of us, whether makers, indorsers, sureties or guarantors, do hereby authorize any attorney of any court of record to appear for us in such court, in term time or vacation, and confess judgment without process in favor of the holder of this note, for such amount as may be due and unpaid hereon, with costs of suit and with ——— per cent attorney’s fee and with release of errors and without stay of execution.”

The following other forms taken from notes in actual circulation are inserted for study and comparison:

(1) “And ——— do hereby authorize ——— Attorney at Law, to appear for ——— in an action on the above note, at any time after said note becomes due, in any Court of Record, in or of the State of ———, to waive the issuing and service of process against ——— and confess a judgment in favor of the legal holder of the above against ——— for the amount that may then be due thereon, with interest at the rate therein mentioned, and costs of suit; and to waive and release all errors in said
Such a note has been defined as follows: "It is the name commonly applied to a promissory note which contains a warrant of attorney or power of attorney, authorizing any attorney of any court of record, to enter judgment in such court against the maker of the note, if the note be not paid at maturity. This warrant of attorney may authorize confession of judgment against indorsers also, and against sureties or guaranties. Sometimes an indorsement is made with a similar warrant of attorney; but a warrant of attorney on the back of the note does not ordinarily make the note a 'judgment note.' That term is usually applied to a note which contains the warrant on its face."

By statute and judicial decision of the courts of last resort such notes were held to be negotiable in many jurisdictions prior to the adoption of the Uniform Negotiable Instruments Law. There were, however, a number of authorities to the contrary.

The Uniform Negotiable Instruments Law, which is now adopted and in force in all the states of the Union, contains the following provision:

proceedings, petitions in error, and the right of appeal from the judgment rendered. Witness our hands and seals.”

(2) "And we, and each of us, do hereby authorize any attorney of any Court of Record in ———, to appear for us, either or any of us, in any such court, at the suit of the holder of this obligation upon the same, at any time after the maturity thereof, and waive the issuing and serving of the process, and confess judgment against us, either or any of us, and in favor of such holder, for the amount then appearing due thereon, and for costs of suit, and release all errors."

(3) "And we, the makers, sureties, endorsers and guarantors and each of us, do hereby authorize and empower any Attorney of any Court of Record, at any time after interest or principal in this obligation becomes due, to appear for us or either of us in any action or suit on this note in any such Court in ———, or elsewhere, and waive the issue and service of summons and confess judgment against us or any of us in favor of the payee or any holder of this note for the sum appearing to be due thereon, including interest and costs and ten per cent additional on the amount unpaid as attorney's fees, and thereupon to release all errors in said action.”

3 Paton's Digest.

4 See authorities collected, Ann. Cas. 1913 A 206 note. The Supreme Court of Indiana and the courts of several other states have declared that powers to confess judgment written into promissory notes at the time of their execution are contrary to public policy. Irose v. Balla, 181 Ind. 491, 499, 500, 104 N. E. 851; First Nat. Bank v. White, 220 Mo. 717, 120 S. W. 36, 132 Am. St. Rep. 612, 16 Ann. Cas. 889; McCrairy v. Ware, 6 Kan. App. 155, 51 Pac. 293; Farquahar & Co. v. Dehaven, 70 W. Va. 738, 75 S. E. 65, 40 L. R. A. (N. S.) 956, Ann. Cas. 1914 A, 640.
"But the negotiable character of an instrument otherwise negotiable is not affected by a provision which: . . .

“(2) Authorizes a confession of judgment if the instrument be not paid at maturity. . . .

"But nothing in this section shall validate any provision or stipulation otherwise illegal."\(^5\)

By this provision of the Uniform Negotiable Instruments Law promissory notes, otherwise negotiable, remain negotiable in the absence of a statute to the contrary, even though a stipulation authorizing a confession of judgment is added. All the states have the above identical provision in their law except the states of North Carolina and Illinois.

The Illinois act omits the words "if the instruments be not paid at maturity."

This subdivision is not in the English Bill of Exchange Act and was inserted in the Uniform Law largely to meet the requirements in some of the states where judgment notes were not in use, as in New York and a number of the Eastern States. Jurisdictions in which such notes have been used extensively are Colorado, Delaware, Nevada, Illinois, Iowa, Pennsylvania and Virginia. Such notes are invalid in Alabama, Arkansas, Indiana, Mississippi, Missouri and Texas. They are not in use in New Hampshire, North Dakota and Oregon. In Idaho, Ohio, South Carolina and Utah there must be an affidavit and warrant of attorney attached.

One jurisdiction at least, that is, Indiana, since the adoption of the Uniform Law has passed a statute making such notes absolutely void. The rather unusual situation in Indiana will be considered in the latter part of this discussion.

Virginia in 1922 passed a law requiring the attorney or other person authorized to confess judgment to be named in the instrument and requiring the instrument to be notarized.

A power of attorney to confess judgment may be incorporated in, or attached to a promissory note, the condition being the non-payment of the note at maturity.\(^6\)


In several jurisdictions a judgment by confession may be entered upon a written authority, called a warrant or power of attorney, by which the debtor empowers an attorney to enter an appearance for him, waive process, and confess judgment against him for a designated amount.

Several jurisdictions require by statute as an evidence of the good faith of the transaction and to prevent fraud that the warrant of attorney or statement of indebtedness shall be accompanied by an affidavit that the debt is "justly due and owing" or "justly due or to become due" and that the judgment is not confessed for the purpose of defrauding the debtor's creditors.

The provision contemplates a confession of judgment without an action or suit having been instituted.

And in the absence of a statutory provision in a confession without action, it is not necessary that any process should be issued or served on defendant, or any appearance entered by or for him other than the appearance for the purpose of confessing the judgment.

The provision for confession of judgment in promissory notes has uniformly been strictly construed and construed as against the party in whose favor it was given. And so a departure from the authority conferred will render the confession void.

It may be stated generally that such provisions are not enforceable until the instrument is due and unpaid or is not paid at maturity. It will be noted that the Uniform Negotiable Instruments Law in the provision above set out contains the following: "Authorizes a confession of judgment if the instrument be not paid at maturity." The provision is thus limited to instruments not paid "at maturity," and statutory construction makes an instrument non-negotiable which authorizes judgment before maturity. If judgment may be confessed on a note before maturity, then the instrument is not one due at a certain time, but is one in which the time of payment, since it depends on the whim or caprice of the holder, is uncertain.

Different jurisdictions have passed upon different words or phrases in such provisions, for example; a note which contains a provision authorizing a confession of judgment at any time thereafter, whether due or not, has been held to be non-ne-

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9 Keen v. Bump, 286 Ill. 11, 121 N. E. 251.
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tiable,10 and not within the terms of Section 5 of the Uniform Negotiable Instruments Law, as quoted above.11 A provision authorizing a confession of judgment "at any time hereafter" has been held to render an instrument non-negotiable;12 so a clause authorizing confession of judgment "at any time" destroys its negotiability;13 and similarly an authorization to confess judgment "as of any term" renders the note non-negotiable;14 and likewise an authorization prior to maturity;15 so also a provision authorizing confession of judgment "before maturity" makes the instrument non-negotiable.16

It has been held that a provision authorizing confession of judgment "at any time" for any sum "due" does not render the note non-negotiable as nothing can be due before maturity;17 and likewise an authorization to confess judgment "at any time after the above note became due" does not impair the negotiability of the note;18 a provision with the words "at any time . . . for such sum as may be due," does not render a note non-negotiable, since the word "due" shows that the note must mature before the entry of judgment;19 and a provision with


17 Edelen v. First National Bank, 139 Md. 422, 115 Atl. 602.


19 Edelen v. First Nat. Bank, 139 Md. 422, 115 Atl. 602; McDonald v. Mulkey (Wyo.), 231 Pac. 662.
the words "after maturity" although the words "if not paid" are absent, also does not make the note non-negotiable.  

As stated above a notable exception to the rule that a judgment may not be confessed on a note before maturity is under the statute of the State of Illinois. In the latter state the words "if the instrument be not paid at maturity" are omitted from Section 5 of the Uniform Negotiable Instruments Law, so that the Illinois statute provides that "the negotiable character of an instrument otherwise negotiable is not affected by a provision which . . . authorizes a confession of judgment." So in such state a note may provide for confession of judgment any time after execution and such provision does not destroy negotiability.

In Illinois during the vacation of court, judgments by confession can be entered only by the clerk. No order by the judge is required; and in fact the judge has no power during the vacation to order the entry of judgments by confession. But during the term such judgments can be entered only in open court.

In Illinois, it has been held that a power of attorney to confess judgment is not exhausted by the entry of a judgment which is subsequently set aside as invalid.

In one jurisdiction it has been decided that a power to confess judgment expires with the running of the Statute of Limitations against the note.

WHETHER BINDING ON INDORSERS AND OTHER PARTIES

Some questions have arisen as to what parties to a note these provisions extend. The general rule is that a provision as to confession of judgment on a note is not binding on sureties and indorsers unless it specifically so provides. And whether the power can be executed for the benefit of a holder of a note other than the payee must depend upon the language of the power itself; the power may be exercised in favor of an indorsee.

22 Conklin v. Ridgely, 112 Ill. 36, 1 N. E. 261.
A clause on the face of the note authorizing confession of judgment against all makers and indorsers binds all indorsers, but a power of attorney to confess judgment written on the back of a note binds only the indorser signing the same and not subsequent indorsers. It is held that power to any attorney of record to appear and confess judgment in favor of any holder, did not affect negotiability of the note, and that it might be executed in favor of any holder, even if he had only the equitable title. It has been determined that a note payable to the maker’s order with indorser’s authorized confession of judgment “against us,” without specifying the person in whose favor the power was to be exercised could be used by the first indorsee. And it has been held that when the authorization is in the first person singular an accommodation maker is not a party to the warrant of attorney.

THE INDIANA LAW

In Indiana, the courts by a long line of decisions have declared that it is the acknowledged public policy of that State, not to recognize powers of confession in promissory notes. After much confusion and considerable doubt as to the negotiability of such notes in Indiana, it is now firmly established in that jurisdiction by statutory enactment that such notes are now non-negotiable.

In the case of Irose v. Balla, 181 Ind. 491, 104 N. E. 851, it is stated: “At common law, the warrant of attorney was distinguishable from cognovit, and might accompany a note or bill as a part of the security, but was no part of the bill proper. The warrant of attorney was under seal, while a cognovit need not be,” and that judgment or cognovit notes are not recognized as negotiable within the state.

Prior to and subsequent to the adoption of the Uniform Negotiable Instruments Law in Indiana, which took place in the year 1913, a statute in the following words was and has been in effect in Indiana:

27 Clements v. Hall, 35 Ohio St. 141.
29 Sproul v. Monteith, 66 Colo. 541, 185 Pac. 270.
30 Irose v. Balla, 181 Ind. 491, 104 N. E. 851. As to the validity in the absence of statute of a provision in a note authorizing an attorney to appear and confess judgment against the maker, see 16 Ann. Cas. 895.
“Whenever a confession of judgment is made by power of attorney or otherwise, the party confessing shall, at the time he executes such power of attorney or confesses judgment, make affidavit that the debt is just and owing, and that such confession is not made for the purpose of defrauding his creditors. The affidavit shall be filed with the court.”

By the above statute the power is conferred by a proper instrument distinct from that containing the obligation for which the judgment is confessed and the affidavit required by the statute must be made at the time the judgment is confessed, so, as stated above, this law is still in effect in Indiana unless to the degree it may conflict with the statutory enactments of the year 1927.

This statute in so far as it requires an affidavit has been interpreted as intended only for the protection of creditors and the courts in Indiana have construed the statute so that such a judgment obtained by power of attorney is good as between the parties without the required affidavit.

In the year 1853 the Supreme Court of Indiana, in a suit upon two promissory notes and in which a warrant of attorney to confess judgment was filed, used the following language:

“The English courts have always exercised a very stringent supervision over warrants to confess, cognovits, etc. . . .”

“Without discouraging warrants to confess, this Court has also, on several occasions, shown its anxiety to guard the practice against abuse. . . .”

“It is not necessary to decide whether in this state a warrant to confess, directed to the attorney of the opposite party, is or is not regular. That question does not arise in the record. For the judgment was not entered, nor do counsel claim it to have been entered, by virtue of the warrant to confess which appears in the proceedings. Voss, the attorney for the plaintiff below, very properly abstained from acting on the warrant, and escaped from the embarrassing attitude in which he would have been placed, had he appeared as the attorney for both parties. But had the question of the validity of a power so directed, been raised, we should, on considerations of public policy, have felt great reluctance to sanction a practice so full of pernicious tendencies.”

The Indiana Supreme Court has continued to show its anxiety to guard the practice of the use of warrants to confess judgment against abuse. Accordingly, it has been held that the record must show that the execution of a warrant of attorney was duly
proved, and in accordance with the statute in force when the judgment was taken.

The courts in Indiana have consistently clung to the view as expressed in the case last quoted. There is another view held in some other jurisdictions. This latter view may be illustrated by the expression of the Supreme Court of New Mexico, as set out in the case of Las Cruces First National Bank v. Baker, 25 N. M. 208, 180 Pac. 291, 293, to the following effect:

"It was a practice from time immemorial at common law, and the common law came down to us sanctioned as justified by the reason and experience of English-speaking peoples. If conditions have arisen in this country which make the application of the common law undesirable, it is for the Legislature to so announce, and to prohibit the taking of judgments of this kind. Until the Legislature has spoken along that line, we know of no theory upon which such judgments can be declared as against the public policy of the state. We are aware that the argument against them is that they enable the unconscionable creditor to take advantage of the necessities of the poor debtor and cut him off from his ordinary day in court. On the other hand, it may be said in their favor that it frequently enables a debtor to obtain money which he could by no possibility otherwise obtain. It strengthens his credit, and may be most highly beneficial to him at times."

The jurisdictions holding this latter view do so on account of the advantage they claim to accrue from such practice. It is said the advantage of a judgment note over a promissory note without such provision for judgment is the ease and alacrity by which the holder of the former can have his judgment entered, as against the trouble and delay caused by the necessity of the drawing of pleadings, service of process and the trial of the action, in the latter case.

The decision which largely determined the present law in Indiana is contained in the case of Egley v. T. B. Bennett & Company finally decided by the Supreme Court of Indiana on March 18, 1925, at which time the Supreme Court denied a rehearing. On account of the discussion and confusion growing out of the unsatisfactory condition established by this decision some felt conditions had arisen, as suggested by the New Mexico court, which made the application of the common law undesirable in Indiana and the next session of the Legislature prohibited the taking of judgments of this nature.

The facts in the case last cited as stated by the court in that case are that appellee, a corporation having its principal office and place of business in Illinois, recovered a judgment against

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34 Egley v. T. B. Bennett & Company, 196 Ind. 50, 145 N. E. 830.
appellant, a resident of Indiana, in the circuit court of Livingston County, Illinois, on a note which was executed in Indiana, but which was made payable in the city of Flanagan, Illinois.

The note contained the following provision: "I hereby irrevocably make any attorney at law my attorney for me and in my name to appear in any court of record, in term time or vacation, at any time hereafter to waive service of process and confess a judgment on this note in favor of the payee, his assigns or the legal holder, for such sum as shall then appear to be due, including an attorney fee (as stated) ... to release all errors ... and to consent to immediate execution on such judgment."

After maturity, appellee brought suit on the note in the circuit court of the county where said city is located, said court being a court of record and of general jurisdiction. No process was issued, and appellant had no notice or knowledge thereof. By virtue of the authority contained in said note, an attorney at law appeared and confessed judgment in appellant's name for the full amount thereof, together with interest, attorney's fees and costs. Appellee brought this action upon said judgment, and the question for decision was as to the validity of said Illinois judgment.

The court in affirming the judgment of the lower court among other things said: "It may be regarded as settled in this state that such a provision as is contained in the note involved would not authorize an attorney to appear for the defendant in this state and confess judgment." Then in conclusion the court states: "There being no law in this state which prevents the making of such a contract to be performed in a state where such a provision may be lawfully carried out, we are of the opinion that a judgment rendered in pursuance to such provision and which is valid in the state where rendered, must be recognized as valid in this state."

This case at the time of the final decision had had a long journey through our courts extending over a period of about seven years. In this case the plaintiff had originally recovered in the lower court and the case going on appeal to the Indiana Appellate Court was affirmed, with one judge dissenting. The case on petition was then transferred to the Indiana Supreme Court and that court decided contrary to the Appellate Court, reversing the lower court. Two out of the total five of the justices dissented. The case next came up in the Supreme Court on a petition for rehearing and the Supreme Court changed its
prior decision, and affirmed the judgment of the lower court in favor of the plaintiff. The justice who wrote the final decision had dissented from the prior opinion of the Court and now the writer of the prior opinion became a dissenter to the final decision of the Court.

In the light of the situation as developed in this case, as heretofore stated, it was deemed advisable to have some legislative enactment to clarify the law in Indiana and this was done so clearly that there can be no doubt of the effect. Two statutes were passed as above stated. One\textsuperscript{35} makes it unlawful to execute an agreement to confess judgment before the accrual of a cause of action and declares all contracts, stipulations and powers of attorney so entered into to be void. That statute further declares that no execution or other process shall be issued to aid or enforce the collection of any such judgment and that no such judgment shall be or become a lien upon real estate.

The other law\textsuperscript{36} enacted by the Indiana Legislature in 1927, after defining a cognovit note, declares that any one executing, endorsing or assigning judgment notes or any one accepting, or retaining possession of such instruments or any one attempting to enforce within the state any judgment thereon obtained in any other state or foreign country based upon any such instrument, shall be deemed guilty of a misdemeanor and subject to a fine or imprisonment or both.

Thus in Indiana such provisions in notes are void and it is now an impossibility to secure any satisfaction from such provisions in such instruments. By these statutes such notes are non-negotiable in Indiana, and it would seem that they are not enforcible in Indiana for any purpose.

\textsuperscript{35} Acts 1927, page 174.
\textsuperscript{36} Acts 1927, page 656.