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The Indiana Cognovit Note Statute

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COMMENTS

THE INDIANA COGNOVIT NOTE STATUTE*

I.

The Legislature of Indiana has attempted to prohibit any recovery in Indiana upon a confession or cognovit note, or any judgment rendered upon one. Chapter 227 of the Acts of 1927 provides that any negotiable instrument, or other written contract to pay money, which contains provisions for judgment by confession is designated as a cognovit note, and that any person shall be deemed guilty of a misdemeanor.

1. Who procures another to execute or endorse or assign such an instrument.
2. Who accepts and retains possession of such an instrument.
3. Who conspires with another to procure the execution, endorsement or assignment of such an instrument.
4. Who attempts to recover upon or enforce in Indiana any judgment obtained in any other state or foreign country based upon such an instrument.

Chapter 66 of the Acts of 1927 also provides that it is unlawful to execute or procure the execution of such an instrument. It declares that any such contracts or instruments are void, and prohibits the issuance of any execution or other process out of any court in the State of Indiana in aid of or for the enforcing of any judgment rendered upon any such an instrument in another state or foreign country.

The legislation is undoubtedly the result of the decision of the Supreme Court of Indiana in the case of *Egley v. Bennett.*[1] It

* This paper deals in part with the same subject matter as an article by G. A. Farabaugh and Walter R. Arnold of the South Bend Bar recently published in this Journal (5 Ind. L. Jour. 93). The present article was, in fact, written over a year ago but the author being uncertain as to the validity of the result reached withheld publication of it. In view of the fact that the article deals with a very specific point and reaches a different result in part from that reached by the authors of the article referred to above (see III (d) ante p. 103) it has seemed desirable to publish the present article.

[1] 196 Ind. 50, 145 N. E. 830 (1924), 139 N. E. 385, 144 N. E. 533, 19 *Ill. Law Review*, 584 and 691.

was finally held in that case by the Supreme Court of Indiana that a judgment rendered in Illinois upon such a note executed in Indiana, but payable in Illinois to a resident of Illinois, must be enforced in Indiana under the full faith and credit clause of the Constitution. The court held that the confession clause in such an instrument was not recognized under Indiana Law, but the evidence disclosing that such a provision was valid under Illinois Law, and the provision having to do with the performance of the contract, its validity was to be determined according to Illinois Law. In that case the Court said: "We have no statute nor positive law which prohibits the making of such a contract as here involved, or that makes such a contract absolutely void. This would not justify us in holding that it is against public policy to recognize that a citizen of this state might not execute in Indiana a contract of this kind that was to be performed in another state where such performance would be legal."

II.

There is serious question as to whether the acts so far as they have to do with the enforcement of a judgment rendered on a cognovit note, are sufficient as statutory enactments under the Indiana Constitution. Section 19 of Article 14 of the Constitution of the State of Indiana provides that: "Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title, but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

The title to the acts in question are as follows:

Chapter 66—"An Act entitled an act concerning contracts to pay money, making unlawful all contracts and stipulations for the confession of judgments under powers of attorney given before a cause of action to enforce payment of money due thereon shall have accrued, or for the release of errors, or for giving consent to the issue of execution under any powers of attorney so given."

Chapter 227—"An Act entitled an act defining a cognovit note, prohibiting their execution and procurement, and fixing a penalty for violation thereof."

The titles do not contain any reference to the provisions against the enforcement of a foreign judgment rendered upon

the note. It is submitted that the titles possibly are not broad enough to include this subject-matter, and also are possibly not broad enough to cover the prohibition against the endorsement of the note.[2]

As a practical proposition that question is relatively unimportant because the Indiana Constitution specifically saves the balance of the Act. Where the instrument is payable out of the state, an endorsement would normally be made out of the state and would not be governed by the Acts.[3]

If the provisions of the acts concerning the execution of the instrument have the desired effect, that is, of avoiding the instrument and of creating a public policy which would justify the refusal by the State of Indiana to recognize any rights given by the instrument, or a judgment based upon it, the subsequent clauses prohibiting suit on a foreign judgment would be immaterial as the statutes otherwise would be a defense to the action. If, on the other hand, the acts are ineffective in creating a public policy which overrides the full faith and credit clause of the Constitution, then certainly the state could not make it a crime to sue upon a judgment rendered on the instrument nor could it refuse to enforce such a judgment. The question then is: Are the acts sufficient to escape the effect of the full faith and credit clause of the United States Constitution?

III.

It is important, however, to note as a preliminary matter that the acts are directed only against "any contract, agreement, provision or stipulation giving to *any* person or persons the power of attorney, or authority of attorney, for the maker or endorser thereon, in his name, to appear in *any* court of record and waive the service of process, etc." The acts being penal and restrictive in their nature must be strictly construed. By their terms they are directed only against instruments which give a general power of attorney to confess judgment in any court. There would seem to be great force to the argument that if an instrument be limited to specified attorneys and/or specified courts, it could not be construed to be a violation of the act.

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[2] See *Dixon v. Poe*, 159 Ind. 492, 65 N. E. 518; *State v. Dorsey*, 167 Ind. 199, 78 N. E. 843; *Morgan v. State*, 179 Ind. 300, 101 N. E. 6; *In Re Talbot*, 58 Ind. App. 426, 108 N. E. 240; *In re Grant*, 79 Ind. App. 698, 137 N. E. 79; *Jackson v. State*, 194 Ind. 130, 144 N. E. 423; *But see Anderson v. Knotts*, 181 Ind. 434, 104 N. E. 754.

[3] *Smith v. Zabel*, 86 Ind. App. 310, 157 N. E. 551.

It must be conceded that so far as the acts apply to an instrument executed and payable in the State of Indiana, they are effective. It must also be conceded that, even although the obligations and rights arising out of the instrument are to be performed in a foreign state, if suit were brought upon the instrument itself in the State of Indiana that the Indiana Courts could apply the Statutes as a successful defense to the instruments. As a matter of the law of Conflict of Laws, it would be within the power of the State of Indiana to say that its avowed public policy overruled the general law to the effect that the validity of the performance of a contract is to be determined by the law of the state of performance rather than the law of the state of its execution.[4]

IV.

If the instrument is payable in a foreign state and appoints an attorney in that state to confess judgment and if a judgment be rendered upon the instrument in a foreign state, are the acts effective in preventing a recovery upon the foreign judgment in the State of Indiana?

Under the full faith and credit clause the only defenses available to a defendant in a suit upon a foreign judgment are those which would be available in a suit upon a judgment in the state where it was rendered,[5] or that the court rendering the judgment in the foreign state acted without jurisdiction.[6]

The general rule is that even a judgment by confession cannot be collaterally attacked in the state in which it was rendered. It may be vacated or set aside by the court which originally rendered it, but other courts even in the same state, are without jurisdiction to vacate it or set it aside and can only enforce it until it is legally vacated or set aside by the court rendering the

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[4] *Bothwell v. Buckbee, Mears Company*, 275 U. S. 274, 72 L. Ed. 277 (1927). This assumes, of course, that the only question is one as to the validity of performance. As we shall see, hereafter, there must always also be a valid contract entered into in the first state.

[5] *Roche v. McDonald*, 275 U. S. 449, 72 L. Ed. 365 (1927).

[6] 34 *C. J.* pp. 1138 to 1142. The fact that there would have been a defense to the action had it been brought originally in the second state is immaterial and this is true even though the defense be illegality or other public policy. *Fauntleroy v. Lum*, 210 U. S. 230 (1908).

judgment.[7] This appears to be the law in Illinois,[8] and also the law in Indiana.[9]

When, however, the question of jurisdiction is involved it is apparent that the utterances of the state court on the subject must be subjected to the scrutiny of the 14th Amendment. A state deprives one of his property without due process of law if it attempts to enforce against him a judgment rendered without jurisdiction.[10] The law of the first state must therefore be measured ultimately by the 14th Amendment. Regardless, then, of the state law, as to jurisdiction over a person, based upon an unauthorized, or void appearance by an attorney, the rights of the defendant are to be determined by the decisions of the Supreme Court of the United States. In *Hall v. Lanning*,[11] that court held that the defendant would be permitted to show in the second state (under the full faith and credit clause) that the appearance for him by an attorney in the first state was in fact and in law unauthorized.[12]

V.

The question then here narrows itself to one of the jurisdiction of the State of Indiana to prohibit the appointment (by an act in Indiana) of an attorney to act in another state.

Normally, all questions concerning the validity of anything having to do with the performance of a contract are governed by the law of the state of performance.[13] The cause of action

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[7] 34 *C. J.* pp. 407 to 414. The old rule to the effect that the authority of an attorney to act could not be questioned after judgment, even in direct proceedings, has met with some modification. See, e. g., *Hamilton v. Wright* (1868), 37 N. Y. 502; *Miedrich v. Rank*, 40 Ind. App. 393 (1907). But these cases throw no doubt on the rule that the authority can not be attacked collaterally. See the cases cited in notes 8 and 9 *infra*.

[8] *Atwater v. American Exchange National Bank*, 152 Ill. 605, 38 N. E. 1017.

[9] *Egley v. Bennett*, 196 Ind. 50, 145 N. E. 830; *Smith v. Hess*, 91 Ind. 424; *Larimer v. Krau*, 57 Ind. App. 33, 103 N. E. 1102, 105 N.E. 936; *Pressley v. Lamb*, 105 Ind. 171 (1885).

[10] *Old Wayne Life Ass'n. v. McDonough*, 204 U. C. 8, 15 (1906).

[11] 91 U. S. 160 (1875).

[12] See also 34 *C. J.* p. 1148 and cases there cited, and in particular, *Acme Food Co. v. Kirsch*, 166 Mich. 433, 131 N. W. 1123, 38 L. R. A. (N. S.) 841.

[13] Story, *Conflict of Laws*, 4th Ed. Sec. 305.

accrues in the state of performance, and is governed generally by the law of that state.[14]

The general rule also is that the validity of the action of an attorney or agent in a foreign state, is governed by the law of the state of performance rather than the state of the domicile of the principal or the place of the appointment.[15]

However, it is also true, that before there is any question as to performance, there must be a valid contract to perform. The contract arises, if at all, by force of the law of the state where the acts of the contracting party took place. So, although there were earlier cases which held that the validity of a contract to be performed in another state was to be governed by the law of the state of performance, the weight of authority is now to the contrary, and the accepted view is that it is to be governed by the law of the state where made.[16] There being, therefore, no valid contract of agency in Indiana the fact that there was to be supposed performance in another state would be immaterial.

An agency may, however, not be based on a contract; it may have its foundation in an appointment.[17] Clearly in these cases there is no contract between the maker of the cognovit note and the attorney; there is only an appointment. There is no authority with which the author is familiar discussing the effect of this distinction when a question of Conflict of Laws is concerned. Strangely enough the Restatement does not touch the distinction.[18] But it is submitted that the result must be the same. The validity of the appointment must be governed by the law of the state where the acts constituting the appointment occur. The fact that the agent is to act in another state is again immaterial; the agency, if there be one, takes its legal life from the

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[14] *Guaranty State Bank v. First National Bank*, __ Okla. __, 260 Pac. 508.

[15] Story, *Conflict of Laws*, 4th Ed. Sec. 285 to 289; Section 72, *Conflict of Laws, Restatement No. 2, American Law Institute.*

[16] Sec. 353, *Conflict of Laws, Restatement No. 4, American Law Institute.*

[17] *Mechem, Agency* (2nd Ed.) Sec. 30 (1914).

[18] The only sections on the subject are Sections 375, 376, *Conflict of Laws, Restatement No. 4*, and these deal only with contracts of agency. Section 72, *Restatement No. 2*, provides that "when a person in one state acts through an agent sent by him into another state for that purpose, he is bound by the agent's act according to the law of the state where it is done." This presupposes, certainly, that the agent was lawfully "sent."

law of the state where the acts constituting the appointment take place. As to a contract, or appointment, therefore, actually made in Indiana the acts are effective, even under the Full Faith and Credit clause. The legislation, clearly could not, however, have any extra-territorial effect, and govern acts done outside of the state.

Evasion of the Acts would be simple, for the payee could effect delivery (by mailing or otherwise) only in a second state. The acts apply only to instruments "executed" in Indiana. "Execute" has a definite legal meaning and includes delivery before "execution" is complete;[19] it must be construed to give effect to its technical meaning.[20] An instrument delivered in another state, although signed in Indiana, would not come within the prohibitions of the Acts.[21]

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[19] *Goodman v. Heby*, 37 Ind. App. 1 (1905).

[20] Section 247 (1) *Burns Ann. Ind. Stat.* 1926.

[21] Section 335, *Conflict of Laws, Restatement No. 4, American Law Institute.*