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Negotiable Instruments-Filling Blank-Cognovit Note

NEGOTIABLE INSTRUMENTS—FILLING BLANKS—COGNOVIT NOTE—On or about August 24, 1927, in pursuance of carrying out a contract of sale of real estate located in the city of South Bend, Indiana, defendants gave to plaintiff, both parties residents of Indiana, a note as part payment of the purchase price. This note had the following clause with the blanks indicated: "————hereby authorizes any Attorney at Law to appear in any Court of Record in the United States, after the above obligation becomes due, and waive the issuing and service of process and confess a judgment against ——— in favor of the holder." Plaintiff sues on this note. By statute in Indiana the enforcement of a cognovit note is a misdemeanor. *Held*, the note is not a cognovit note.[1]

This decision turns in part upon the recent cognovit note statutes.[2]

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[19] *Union Traction Co. v. Berry* (1919), 188 Ind. 514, 121 N. E. 655; *Feldman v. Chicago Rys. Co.* (1919), 289 Ill. 25, 124 N. E. 334; *Mansfield Public Utility Co. v. Grogg* (1921), 103 Ohio 418, 132 N. E. 481; *Williamson v. Salt Lake & O. R. Co.* (1918), 52 Utah 84, 172 Pac. 630; *Hughes v. Atlantic City & S. R. Co.* (1914), 85 N. J. L. 212, 89 Atl. 769; *Norfolk, etc. Ry. Co. v. Birchett* (1918), 252 Fed. 512.

[19] *Gillis v. Cambridge Gaslight Co.* (1909), 202 Mass. 222, 88 N. E. 779.

[20] *Excelsior Elec. Co. v. Sweet* (1894), 57 N. J. L. 224, 30 Atl. 553.

[21] *Scheller v. Silbermintz* (1906), 98 N. Y. S. 230, 50 Misc. 175; *Kearner v. C. S. Tourner Co.* (1910), 31 R. I. 203, 76 Atl. 833.

[23] *Kearney v. London, B. & S. C. R. Co.* (1870), L. R. 5 Q. B. 411, 19 Eng. Rul. Cas. 1; *Brown v. Bryant* (1911), 166 Mich. 18, 131 N. W. 577; *McNamara v. Boston & M. R. Co.* (1909), 202 Mass. 491, 89 N. E. 131; *Connolly v. Des Moines Invest. Co.* (1905), 130 Iowa 633, 105 N. W. 400; *Hughes v. Harbor, etc. Savings Assoc.* (1909), 115 N. Y. S. 320.

[25] *Shephard v. Creamer* (1894), 160 Mass. 496, 36 N. E. 475.

[24] *Byrne v. Boadle* (1863), 2 H. & C. 722, 159 Eng. Repr. 299; *Lowner v. New York, etc. R. Co.* (1900), 175 Mass. 166, 55 N. E. 805.

[26] *Snyder v. Wheeling Electrical Co.* (1897), 43 W. Va. 661, 28 S. E. 733.

[1] *Fodor v. Pott*, Appellate Court of Indiana, Dec. 9, 1931, 178 N. E. 695.

[2] Acts 1927, page 656; Sec. 640, 3 Burns 1929 Supplement: "Any negotiable instrument, or other written contract to pay money, which contains any provision or stipulation giving to any person or power of attorney, or authority as attorney, for the maker, or any indorser, or assignor, or other person liable thereon, and in the name of such maker, indorser, assignor, or other obligor to appear in any court, whether of record or inferior, or to waive the issuance or personal service of process in any action to enforce payment of the money, or any part claimed to be due

These statutes may be considered as enactments of the rule many times decided in Indiana that a contract made in advance of the coming into existence of a cause of action, providing that something other than an adjudication by a court having jurisdiction of the parties and the subject matter shall be final and conclusive on the parties if and when such cause of action shall arise, is contrary to public policy and void, as in effect undertaking to oust the courts of jurisdiction.[3]

The statute[4] does not expressly declare a cognovit note to be void but makes it a misdemeanor to be a party to such a note, but a contract in violation of a statute prohibiting the doing of the thing contracted for is void, and no right can be founded on the violation of the law.[5]

Section 5 of the Negotiable Instrument Law[6] says that the negotiable character of an instrument otherwise negotiable is not affected by a provision which authorizes a confession of judgment if the instrument be not paid at maturity or waives the benefit of any law intended for the advan-

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thereon, or which contains any provision or stipulation authorizing or purporting to authorize an attorney, agent, or other representative, be he designated howsoever, to confess judgment on such instrument for a sum of money when such sum is to be ascertained, or such judgment is to be rendered or entered otherwise than by action of court upon a hearing after personal service upon the debtor, whether with or without attorney's fee, or which contains any provision or stipulation authorizing or purporting to authorize any such attorney, agent or representative to release errors, or the right of appeal from any judgment thereon, or consenting to the issuance of execution on such judgment, is hereby designated, defined and declared to be a cognovit note." Said act further provides that: "Any person, natural or corporate, who directly or indirectly, shall procure another, or others, to execute as maker, * * * or whoever being the payee, * * * thereof shall accept and retain in his possession any such instrument, * * * shall be deemed guilty of a misdemeanor and upon conviction shall be fined," etc.

Acts 1927, page 174; Sec. 640, 1, Burns 1929 Supplement: "It shall be unlawful to execute or procure to be executed as part of or in connection with the execution of any negotiable instrument, or other written contract to pay money, and before a cause of action thereon shall have accrued, any contract, agreement, provision or stipulation giving to any person or persons a power of attorney or authority as attorney for the maker or endorser thereof, in his name to appear in any court of record, aid waive the service of process in an action to enforce payment of money claimed to be due thereon, or authorizing or purporting to authorize an attorney or agent, howsoever designated to confess judgment on such instrument for a sum of money to be ascertained in a manner other than by action of the court upon a hearing after notice to the debtor, whether with or without an attorney fee, or authorizing or purporting to authorize any such attorney to release errors and the right of appealing from such judgment, or to the issue of execution on such judgment. Any and all contracts, stipulations and powers of attorney given or entered into before a cause of action on such promise to pay, shall have accrued, shall be void." This section, however, is not directly referred to in the opinion.

[3] *Kistler v. Indianapolis, etc. R. Co.,* 88 Ind. 460, 464; *Louisville, etc. R. Co. v. Donnegan,* 111 Ind. 179, 187, 12 N. E. 135; *Supreme Council, etc. v. Forsinger,* 135 Ind. 52, 56, 25 N. E. 129, 9 L. R. A. 501, 21 Am. St. 196; *McCoy v. Able,* 131 Ind. 417, 423, 30 N. E. 528; *Ditton v. Hart,* 175 Ind. 181, 193, 93 N. E. 961; *Maitland v. Reed,* 37 Ind. App. 469, 471, 77 N. E. 290; *Irose v. Balla,* 181 Ind. 491, 104 N. E. 851. The force given to a judgment obtained in another state by confession of judgment is discussed in *Garrigue v. Kellar,* 164 Ind. 676, 74 N. E. 523, 69 A. L. R. 870, 108 Am. St. 324; *Egley v. T. B. Bennett & Co.,* 196 Ind. 50, 145 N. E. 830, 40 A. L. R. 436, superseding 144 N. E. 533, which superseded 139 N. E. 385.

[4] Sec. 640, 3 Burns 1929 Supplement.

[5] See *Moorhouse v. Kunkalman,* 177 Ind. 471, 96 N. E. 600.

[6] Sec. 11364 Burns 1926.

tage or protection of the obligor. This statute would be overruled by implication as conflicting with the later cognovit note statutes.[7]

Section 14 of the Negotiable Instrument Laws[8] says "Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. In order, however, that any such instrument when completed, may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with authority given." Prima facie authority means ordinarily that there is a presumption of authority until the presumption has been overcome by evidence which clearly rebuts it. In this case there being no evidence that authority to fill the blanks was not given, it would seem to follow by a literal interpretation of the words of the statute that the blanks would be filled by implication, thus rendering the note valueless and unlawful under the statute. Such an erratic conclusion by a negative inference, the court refused to reach and adopted the more liberal and commercially expedient rule that words would not be supplied by construction which would make the note void and it is not to be presumed that the intention was to execute a contract that could not be enforced. A code statute unlike the ordinary statute familiar to the common-law lawyer is not an exception to the law on the subject which it covers. Therefore its words are to be given a broad meaning rather than a strict construction, and when the plain meaning of the words does not cover a point, then they are to be used as examples of principles of law which are deduced from the code itself and not from previous cases.[9] The Latin maxim *"Ut res magis valeat quam pereat"*—that the thing may prevail, rather than be destroyed—is a sound rule of construction which is frequently adopted by the courts to effectuate the intention of parties to written instruments.[10] The same maxim applies to the construction of statutes.[11]

There are several other states which have adopted the same view as Indiana concerning a cognovit note and confession of judgment.[12] The cognovit note statute was discussed in two articles soon after it was enacted: "The Indiana Cognovit Note Statute," by Bernard C. Gavit;[13] "The Cognovit Note Act," by G. A. Farabaugh and Walter R. Arnold.[14]

J. D. W.

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[7] *Schaffer v. State,* 202 Ind. 318, 173 N. E. 229.

[8] Sec. 11373 Burns 1926.

[9] See article by Frederick K. Beutel, 80 U. of Pa. L. Rev. (1932), 368, 373.

[10] *Heaston v. Krieg,* 167 Ind. 101, 77 N. E. 805

[11] *Board, etc. v. Albright,* 168 Ind. 564, 81 N. E. 578.

[12] *First National Bank v. White,* 220 Mo. 717, 16 Ann. Cas. 889; *Farquhar v. Dehaven,* 70 W. Va. 738, 75 S. E. 65, 1914 A Ann. Cas., 640, 40 L. R. A. (n. s.) 956.

[13] 5 Ind. L. J. 208.

[14] 5 Ind. L. J. 93.