Negotiable Instruments-Filling Blank-Cognovit Note

Follow this and additional works at: https://www.repository.law.indiana.edu/ilj

Part of the Commercial Law Commons

Recommended Citation
(1932) "Negotiable Instruments-Filling Blank-Cognovit Note," Indiana Law Journal: Vol. 7 : Iss. 7 , Article 8. Available at: https://www.repository.law.indiana.edu/ilj/vol7/iss7/8

This Note is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.
large group of cases that apply the doctrine of \textit{res ipsa loquitur} in cases where a passenger on a common carrier is injured by machinery, appliances, and other instrumentalities that are within the exclusive control and management of the carrier.\footnote{Union Traction Co. v. Berry (1919), 183 Ind. 514, 121 N. E. 655; Feldman v. Chicago Rys. Co. (1919), 229 Ill. 25, 124 N. E. 324; Mansfield Public Utility Co. v. Grogg (1921), 163 Ohio 418, 122 N. E. 481; Williamson v. Salt Lake & O. R. Co. (1918), 52 Utah 84, 172 Pac. 880; Hughes v. Atlantic City & S. R. Co. (1914), 85 N. J. L. 212, 89 Atl. 769; Norfolk, etc. Ry. Co. v. Burchett (1913), 252 Fed. 515.}

Aside from the above cases where there was some relation between the parties, the doctrine has been applied in cases where there is no relationship between the parties, as where one who is lawfully in a public street is injured by falling objects, obstructions, openings, etc., that are wholly within the control of the defendant. The following cases are examples of such applications: where a passerby fell into an open coal hole on defendant's sidewalk.\footnote{Gillis v. Cambridge Gaslight Co. (1909), 202 Mass. 222, 88 N. E. 779.}

\textbf{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.\footnote{Acts 1927, page 656; Sec. 656, 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 statute4 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 Law6 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-

---

3 Kistler v. Indianapolis, etc. R. Co., 38 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. 230; 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. 370, 108 Am. St. 324; Egley v. T. E. 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, 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, 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 or purporting to authorize any such attorney, agent or representative, be he designated howsoever, 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.

5 See Moorehouse v. Kunkalman, 177 Ind. 471, 96 N. E. 600.

6 Sec. 11364 Burns 1929.
tage or protection of the obligor. This statute would be overruled by implication as conflicting with the later cognovit note statutes.  

Section 14 of the Negotiable Instrument Lawss 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. 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. The same maxim applies to the construction of statutes. 

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

J. D. W.

8 Sec. 11373 Burns 1926.
9 See article by Frederick K. Beutel, 80 U. of Pa. L. Rev. (1932), 368, 373.
11 Board, etc. v. Albright, 168 Ind. 564, 81 N. E. 578.
13 5 Ind. L. J. 208.
14 5 Ind. L. J. 93.