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BILLS AND NOTES — EFFECT ON NEGOTIABILITY OF PROVISION FOR CONFESSION OF JUDGMENT — A note was made providing for eighteen monthly payments, and on default of any payment, the whole amount to become due; a clause was inserted in the note authorizing confession of judgment on the note in favor of the holder "at any time hereafter . . . for such amount as may appear to be unpaid thereon, together with costs and attorney's fees." *Held*, the provision for confession of judgment did not destroy the negotiability of the note, since it authorized confession of judgment only after default in one of the installments due. *United States v. Nagorney*, (D. C. Kan. 1939) 28 F. Supp. 298.

Before the enactment of the Negotiable Instruments Law, it was generally held that a warrant of attorney to confess judgment on a note before maturity would destroy the negotiability of the note.¹ This rule of law was adopted in the N. I. L. in section 5(2),² which provides that the negotiable character of an instrument otherwise negotiable will not be affected by a provision which "authorizes a confession of judgment if the instrument be not paid at maturity." The big problem confronting the legal profession since then has been to determine what type of warrants to confess judgment will destroy the negotiability of bills or notes payable at fixed determinable times. The first step was to hold negotiable, notes containing a warrant to confess judgment "*at any time . . . for such sum as may be due thereon.*"³ This ruling was handed down on the theory that nothing could be due until after maturity, and judgment would be necessary only if the note were not paid. The next step was to uphold the negotiability of a note containing a warrant to confess judgment "*at any time after the date hereof . . . for the amounts then owing.*"⁴ The theory here used was that the "amounts owing" merely meant the amounts due, and hence came within section 5(2) of the N. I. L. Only one other court is known to have gone as far as the court did in the principal case in construing this language liberally so as to uphold and preserve their negotiability;⁵ while at least one court has held the exact opposite.⁶ One court has held that the negotiability of an instrument is saved by a provision in the instrument that it is to be negotiable, although it contains a warrant to confess judgment that would normally destroy negotiability.⁷ To render an instrument non-negotiable it appears that the clauses providing for confession of judgment must expressly provide for confession before maturity,⁸ or for confession for the face amount of the instru-

¹ See generally: Aigler, "Time Certainty In Negotiable Paper," 77 UNIV. PA. L. REV. 313 at 325 ff. (1929); Chafee, "Acceleration Provisions In Time Paper," 32 HARV. L. REV. 747, especially at 772 (1919).

² Neither Georgia nor South Dakota, however, have enacted subdivision 2 of section 5. 14 Ga. Code Ann. (1935), § 14-205; S. D. Rev. Code (1919), § 1709. Apparently neither state has dealt with the question in its common law. Illinois omits the words "if the instrument be not paid at maturity" from § 5(2) of its enactment of the N. I. L. Ill. Ann. Stat. (Smith-Hurd, 1934), c. 98, § 25. Thus an authorization for confession of judgment even prior to maturity will not destroy negotiability. See, Beard v. Baxter, 258 Ill. App. 340 (1930).

³ Edelen v. First Nat. Bank, 139 Md. 422, 115 A. 602 (1921); Adams v. Clarke, 14 Vt. 9 (1842); Swanson v. Spencer, 177 Mo. App. 124 (1914); McDonald v. Mulkey, 32 Wyo. 144, 231 P. 662 (1924).

⁴ Stewart v. Public Industrial Bank, 85 Colo. 546, 277 P. 782 (1929).

⁵ Jones v. Turner, 249 Mich. 403, 228 N. W. 796 (1930). This case in effect overrules Conrad Seipp Brewing Co. v. McKittrick, 86 Mich. 191, 48 N. W. 1086 (1891), which was decided before the passing of the Michigan N. I. L.

⁶ Muender v. Muender, 182 Wis. 417, 196 N. W. 773 (1924).

⁷ Gray v. Gardner, 12 Pa. Dist. & Co. 449 (1929).

⁸ Inglehart v. Farmers' Nat. Bank of Annapolis, (Md. 1938) 197 A. 133, 200 A. 833, 117 A. L. R. 667; see also, Vogt Farm Meats Products Co. v. Kehler, 9 Pa. Dist. & Co. 232 (1927), where a note containing the clause "and do hereby confess judgment for the above sum" was held non-negotiable.

ment "at any time,"⁹ or "at any time after the date hereof."¹⁰ From this review of the action of the courts in regard to these judgment notes (provisions for confession of judgment in bills are rarely found), it appears that the courts will generally go as far as possible in upholding negotiability, and find them non-negotiable only when the wording of the clause is in clear conflict with the N. I. L. In doubtful cases, it would seem that public policy as to negotiability becomes a material element in influencing the decision of the courts.¹¹ Such considerations were certainly the basis on which the court in the principal case construed "such amount as may appear to be unpaid" as meaning the amount owing, or amount due on the note. It is submitted that the court here acted properly in construing the warrant to confess judgment in an otherwise negotiable instrument in such a way as to preserve negotiability, for, where possible, public policy should favor upholding negotiability and the maintenance of private credit, which is at the bottom of all negotiable instruments. It should be noted, though, that some states will not enforce any authorization to confess judgment when contained in a negotiable instrument on the ground that such a power of attorney is void as against public policy, but such invalidity has not yet been held to void the instrument as a whole.¹² At least three states have explicit legislative enactments against enforcing warrants to confess judgment contained in negotiable instruments, but are in disagreement as to whether this will make the whole instrument void and unenforceable.¹³ The great majority of states, however, both judicially and legislatively, uphold the validity of the warrants to confess judgment contained in judgment notes.¹⁴

⁹ In *re* Reardon's Estate, 307 Pa. 350, 161 A. 315 (1932); *Johnson v. Phillips*, 143 Md. 16, 122 A. 7 (1923).

¹⁰ *Wooleyhan v. Green*, 34 Del. 503, 155 A. 602 (1931), noted 30 MICH. L. REV. 297 (1931).

¹¹ Such reasoning was at the basis of the decision in *International Finance Corporation v. Philadelphia Wholesale Drug Co.*, 312 Pa. 280, 167 A. 790 (1933), a case not at all in point, but having the same public policy at the basis of the decision.

¹² *Tolman v. Janson*, 106 Iowa 455, 76 N. W. 732 (1898); *Kemp v. Klaus*, 8 Neb. 24 (1878); *First Nat. Bank v. White*, 220 Mo. 717, 120 S. W. 36, 42, 16 Ann. Cas. 889 (1910); *H. & M. Finance Co. v. Brandt*, (Mo. App. 1935) 86 S. W. (2d) 196.

¹³ Texas and North Carolina both have statutes which refuse to permit the enforcement of any warrant to confess judgment in a negotiable instrument. N. C. Code (1935), § 2986; Tex. Civ. Stat. Ann. (Vernon, 1938), art. 2224. That this does not make the whole note void, see *Bernard Gloeckler Co. v. Baker Co.*, (Tex. Civ. App. 1932) 52 S. W. (2d) 912. Indiana specifically makes judgment or cognovit notes entirely void and unenforceable as to every part of them, and further makes it a misdemeanor to make such a note. Ind. Stat. Ann. (Burns, 1933), §§ 2-2904, 2-2906.

¹⁴ See 34 C. J. 105 (1924).