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# Negotiable Instruments, 1940-1945

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## NEGOTIABLE INSTRUMENTS, 1940-1945.

JAMES M. OGDEN\*

The decisions of the Indiana Supreme and Appellate courts relating to negotiable instruments are briefly noted in the order of their decision. The few relevant statutes are set forth following the discussion of the cases.

### INDIANA SUPREME COURT DECISIONS.

*Hardiman v. Hollingsworth*, 216 Ind. 631, 25 N.E. (2d) 640 (1940). The evidence was sufficient to support a verdict in favor of the maker of a promissory note on the ground that it was an accommodation note to be used as collateral, and that the debt for which the note was pledged was paid by the payee of the collateral note.

*First National Bank of Goodland v. Pothuisje et al.*, 217 Ind. 1, 25 N.E. (2d) 436, 130 A.L.R. 1288 (1940). Where a husband and wife were liable jointly on a note executed by them, the fact that they had been adjudicated as bankrupts, the husband not having been discharged, did not prevent recovery of a joint judgment nor the enforcement of the judgment against their property held by entireties.

*In re Liquidation of Bourbon Banking Company, Bourbon, Indiana. First State Bank of Bourbon v. Binkley et al.*, 218 Ind. 96, 31 N.E. (2d) 52 (1940). A promissory note imports consideration.

Where a note of a liquidating bank to another bank that had assumed the assets and liabilities of the liquidating bank was given for balance due on notes assigned by the liquidating bank, such note imports consideration.

*Paulausky et al. v. Polish Roman Catholic Union of America et al.*, 219 Ind. 441, 39 N.E. (2d) 440 (1942). The alteration of a mortgage note, executed in Illinois, with cognovit provision where such provision was valid, by the striking out of the cognovit provision, was not fraudulent, notwithstanding that cognovit provision could not be exercised in Indiana; where the provision was struck out openly pursuant to custom in the office of the general counsel of the holder of the note, preparatory to sending note and mortgage

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to Indiana for enforcement, such note was enforceable in Indiana if cognovit provision was not relied on.

*Ryan, Administrator v. Smeltzer*, 220 Ind. 60, 41 N.E. (2d) 138 (1942). Promissory notes given for the unpaid balance due upon former promissory notes are supported by a sufficient and lawful consideration.

*First National Bank of Crown Point, Indiana, A Corporation, v. St. John Evangelical Church, A Corporation*, 220 Ind. 72, 41 N.E. (2d) 197 (1942). The release of an individual's accommodation note does not discharge the principal for whom the note was executed.

*Wabash Valley Trust Company v. Fisher*, 220 Ind. 133, 41 N. E. (2d) 352, 142 A. L. R. 486 (1942). The execution of a promissory note is not in issue in the absence of a plea of *non est factum*.

Where a note was delivered to an agent for a certain purpose and the agent violates an instruction of the owner in transferring the note to a holder in due course for another purpose in violation of instruction, the holder is entitled to recover on the promissory note in the absence of a plea of *non est factum*.

*Kelley, Glover & Vale, Inc., et al. v. Heitman*, 220 Ind. 625, 44 N. E. (2d) 981 (1942). Money consideration is not essential for a promissory note. Benefit or detriment is sufficient.

Complete failure and partial failure of consideration are distinguishable.

*Fardy et al. v. Mayerstein*, 221 Ind. 339, 47 N. E. (2d) 315, 966 (1943). Appellant says the sale in question was a valid public sale under Massachusetts law of which we must take judicial notice. There was no such issue presented by the pleadings. The Uniform Judicial Notice of Foreign Law Act (Burns R. S. 2-4801 to 2-4807) dispenses with proof but not pleading.

Section 4 of the Uniform Judicial Notice of Foreign Law Acts requires that one asking that judicial notice be taken of foreign law must give reasonable notice to the adverse parties either in the pleadings or otherwise.

*Hammond Pure Ice & Coal Company v. Heitman*, 221 Ind. 352, 47 N. E. (2d) 309, 145 A. L. R. 997 (1943). The pledgee of a negotiable note does not have such an interest

therein that the maker of such note may set off against it a debt which he holds against the pledgee.

"While it is true that the pledgee of a negotiable instrument, may, on default thereon, sue on such pledged instrument in his own name and may also accept payment of such instrument according to its tenor and thereby discharge the instrument, the pledgee is not the full owner of the instrument, for the application of the proceeds is subject to the rights of the pledgor."

"The pledgee actually has only a lien on such an instrument to secure the payment of the principal debt. As against the pledgor any unauthorized disposition of the pledged instrument by the pledgee would constitute a conversion thereof. The pledgee is not authorized to accept payment before maturity of a pledge note which is payable on a day certain; he is not authorized to exchange such a pledged instrument for any other security; nor is he authorized to accept in payment and discharge of such a pledged note anything other than the full amount of the cash due thereon."

*McGuire v. Indianapolis Broadcasting, Inc., et al.* ——— *Ind.* ———, 61 N. E. (2d) 642 (1945). Action on a promissory note in the sum of \$15,000.00. To this action a plea of "non est factum" was filed. Judgment for defendant.

The rule is that where the execution of a note or other similar instrument in writing sued on is denied under oath, and no evidence of the authenticity of such note or other instrument is given, it cannot be read to the jury, but where evidence addressed to the court is adduced, making out a prima facie case of authenticity of such note or other instrument, or reasonably tending, even slightly, to prove the formal execution of it, such evidence is sufficient to entitle such note or other instrument to go to the jury.

Where the execution of a written instrument is denied under oath, the party relying on the instrument has the burden of proof on that issue throughout the trial.

And if on considering the evidence on the issue of "non est factum" it cannot be said that the evidence is such that it compels but one conclusion, which conclusion is contrary to the decision of the lower court, the case should be affirmed.

*McGuire v. Indianapolis Broadcasting, Inc., et al.* ——— *Ind.* ———, 61 N. E. (2d) 642 (1945). Judgment was af-

firmed, as the evidence on the issue of "non est factum" was not such as to force a conclusion, different from that reached by the trial court.

*Spahr v. P & H Supply Co.*, — *Ind.* —, 63 *N. E.* (2d) 425 (1945). A note executed in Ohio by an Ohio resident and delivered in Ohio to an agent of an Indiana corporate payee, for value presumably given in Ohio since record was silent as to place where value was given for the note, must be deemed executed in Ohio and subject to Ohio law though payable in Indiana, and hence Ohio judgment taken pursuant to a cognovit provision in the note must be given full faith and credit in Indiana.

*W. H. Barber Co. v. Hughes et al.*, — *Ind.* —, 63 *N. E.* (2d) 417 (1945). Where a member of an Indiana partnership, which was indebted to an Illinois creditor on an open account which arose mainly out of Illinois transactions, agreed in Illinois to settle the account by paying part in cash and the balance in a cognovit note, and subsequently in Indiana both partners signed a cognovit note and mailed it to the Illinois creditor in Illinois, where creditor accepted the note and applied it to the satisfaction of the balance, all the parties did not intend that the note should take effect until the old obligation was discharged, and consequently the note must be deemed to have been executed in Illinois, and the validity of the note and its cognovit clause must be determined by the Illinois law.

Consequently as the note was executed in Illinois where such note is valid, the Indiana provision could have no extra-territorial effect, where judgment was taken on the note in Illinois as full faith and credit must be given to the Illinois law.

We quote from the opinion of Chief Justice Richman who delivered the opinion in the case.

"Looking for the contact points in the present case, we observe first that the parties were at all times engaged in purely business transactions. They transacted this business almost exclusively in Illinois. The accumulated indebtedness "on September 30, 1940, arose solely from Illinois transactions. The place of their conferences to arrive at a settlement was in Illinois. The note was payable in Illinois. \* \* \* It was valid in that state and was there to be performed. It was actually intended that Illinois law control, as expressly found by the court. On the other hand the only contact points with Indiana were the residence of the debtors, their signing of the note in

Indiana and their placing it in the mail in Indiana. Considering all these circumstances it is impossible to escape the conclusions that the transaction centered in the State of Illinois and that its law should be applied to the note and the judgment taken thereon in the Municipal Court of Chicago."

#### INDIANA APPELLATE COURT DECISIONS

*Interstate Motor Freight System v. Gasoline Equipment Co., Inc.*, 107 Ind. App. 494, 24 N. E. (2d) 418 (1940). In an action on a promissory note providing for attorney's fees where the amount of the attorney's fees is not fixed in the note, the amount of such fees must be established by proper evidence; and, when the attorneys are actually present in court seeking to collect on the note so providing, it is not incumbent on the holder of such note to prove the actual employment of counsel.

*Vincennes Savings and Loan Association of Vincennes v. Robinson et al.*, 107 Ind. App. 558, 23 N. E. (2d) 431 (4939). A plea of *non est factum* is not in effect a plea of forgery. The former plea alleges in effect simply a denial of the execution of a written instrument. The latter plea alleges in effect such a denial and alleges further in effect a fraudulent execution of the written instrument. Evidence of fraud alone is not admissible to prove a defense of *non est factum*.

*George et al. v. Massey Harris Company*, 109 Ind. App. 305, 34 N. E. (2d) 956 (1941). The holder of a promissory note may sue the whole or any number of the parties liable to such holder. Section 19-1915, Burns' 1933.

The statute (Section 2-1009, Burns' 1933) prohibits the reversal of a judgment for any error committed in sustaining or overruling a demurrer for misjoinder of causes of action.

*Satterblom et al. v. Wasson et al.*, 111 Ind. App. 377, 41 N. E. (2d) 674 (1942). The party alleging that consideration of a note is illegal or that there was no consideration thereof has the burden of proof to establish such fact.

*Erwin v. Erwin et al.*, 111 Ind. App. 448, 41 N. E. (2d) 644 (1942). The Statute of Limitations does not begin to run against the ordinary certificate of deposit, payable on the return of the certificate properly endorsed, prior to the time when payment is demanded.

*Blume v. Kruckberg, Executor*, 112 Ind. App. 390, 44

*N. E. (2d) 1010 (1942)*. A note was executed by a child to a parent, to be held by such parent as evidence of an advancement to such child.

The note is without consideration, and the above facts may be shown as a defense to an action on such note.

*Franklin Nat. Bank v. Kerlin et al., 112 Ind. App. 641, 45 N. E. (2d) 368 (1942)*. Marginal figures on the face of a note are not part of it, and where the body of the note is in writing and is clear and unambiguous, the written body of the note controls, and the obligation of the note is not affected by a change made in the marginal figures.

Such a change in the marginal figures, where the words written on the face of the note remain unchanged, is not a material alteration.

*Gradeless et al. v. Gradeless, Administrator, 114 Ind. App. 10, 49 N. E. (2d) 398 (1943)*. Where a defendant in an action on notes failed to plead in abatement the noncompliance with the Intangible Tax Act but pleaded the matter in bar, such defendant thereby waived his right to raise such question, since such matters go to abatement of the action and not to the defense.

*Nardine v. Kraft Cheese Company, 114 Ind. App. 399, 52 N. E. (2d) 634 (1944)*. When the holder of a check has it certified by the bank on which it is drawn, the drawer is discharged and the debt becomes that of the bank.

So, when tendered in full payment of a claim which was unliquidated or concerning which a *bona fide* dispute existed, the acceptance of the check discharges the debt.

*Simpson et al. v. Fuller, 114 Ind. App. 583, 51 N. E. (2d) 870 (1943)*. The inclusion of a cognovit clause in a conditional sale contract does not invalidate the contract where the clause is separable without affecting the remainder of the contract, and where sellers did not attempt to act under the clause but filed their complaint in due form and process issued thereon. (Burns R.S. Sections 2-2904, 2-2906).

The statute defining a cognovit note and making the execution, procurement and attempt to enforce such a note as a misdemeanor is penal in nature and must be strictly construed.

*Snyder v. Heinrichs, — Ind. App. —, 55 N. E. (2d) 332 (4944)*. Where there was nothing in a complaint to recover on a promissory note to indicate that plaintiff was

engaged in the business of making small loans, failure to allege possession of a license under Small Loan Act (Burns' Ann. St. Sections 18-3001 to 18-3004) was not fatal.

And under a statute (Burns' Ann. St. Section 19-2004) pertaining to usury, usurious interest called for by the terms of a note sued upon does not prevent collection of the principal amount thereon.

### LEGISLATION

*Ind. Act 1941, c. 43, p. 127.* Good Friday has been made a legal holiday in the state of Indiana for all purposes. This necessarily makes such day a legal holiday as to commercial paper or negotiable instruments.

*Ind. Acts 1941, c. 53, p. 148.* Transactions on legal holidays, except on Sundays, have been made valid generally throughout Indiana by legislative action.

The act also provides: "All checks received by any bank or trust company on Saturday may be presented for payment on the next following business day, and all checks presented to any bank or trust company on Saturday and dishonored, may be protested and notice of protest thereof given or deposited in the post office on the next following business day."

*Ind. Acts 1943, c. 63, p. 161.* Amendment to the intangible Stamp Act (Burns R.S. 64-930) effective February 25, 1943, by the addition of the following proviso: "Provided: That a valid judgment may be rendered in any action on any such intangible, if at the trial of said action it is shown that all such taxes and penalties are then fully paid."



