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Confession of Judgement - Warrant of Attorney - A Return to the Writ

RECENT DECISIONS

CONFESSION OF JUDGMENT — Warrant of Attorney — A Return To The Writ — A warrant of attorney in a written agreement must bear a direct physical relationship to the signature of the party charged.

L. B. Foster Co. v. Tri-W Construction Co., Inc., 409 Pa. 318, 186 A.2d 18 (1962)

The defendant executed certain equipment rental and steel piling rental agreements, each of which on the reverse side contained a warrant of attorney to confess judgment. On the face of each of the one page agreements, signed by the defendants, there were three references to the terms and conditions printed on the reverse side. The face provided that:

> ". . . the Lessee acknowledges that he has read this Contract before signing, understands the terms hereof and has received a copy of this Contract."

These references were in bold type. There was, however, no reference to a warrant of attorney. On the reverse side of the equipment rental agreement there were eleven terms and conditions, while on the steel piling rental agreement there were seventeen such paragraphs. On the top of the reverse side appeared a statement in bold print that "the terms and conditions below stated shall have the same effect and shall be construed as if contained on the obverse side hereof, above the signatures of the lessor and the lessee." But, in neither form of agreement did any of the paragraph headings of the terms and conditions indicate that a warrant of attorney was contained therein.

Upon default in payment, the L. B. Foster Co. confessed judgment for the amount due. Defendants challenged the validity of the warrant and their motion to strike the judgments was granted. On appeal, the decision was affirmed on the ground that the confession of judgment clause should have been contained in the body of the agreement or should have been signed where it did appear.

Undoubtedly, the warrant of attorney to confess judgment is a potent capitulation. Seventeen states have limited its use.[1] As Justice Musmanno of the Pennsylvania Supreme Court described:

> A warrant of attorney authorizing judgment is perhaps the most powerful and drastic document known to civil law. The signer deprives himself of every defense and every delay of execution, he waives exemption of personal property from levy and sale under the exemption laws, he places his cause in the hands of a hostile defender. The signing of a warrant of attorney is equivalent to a warrior of old entering a combat by discarding his shield and breaking his sword. For that reason the law jealously insists on proof that this helplessness and impoverishment was voluntarily accepted and consciously assumed.[2]

In spite of the seriousness of the warrant, or more correctly, perhaps, because of it, the confession of judgment clause is widely used. It is found in business and legal forms of every type and description. The security and convenience afforded by its use make it an important ingredient in the life of the business and legal community. In the main, those who employ the warrant do so in good faith and without any attempt at deception; and in accord with the general rule,[3] it would seem that the warrant should be binding if the party to be charged therewith knew or should have known of its existence.

The objectivity of the "reasonable man test" may tempt some to engage in deceptive practices to gain advantage in the bargain. The courts usually protect the unwary from such practices by refusing to enforce the deceptive provisions. The basis for the exception to the rule lies in the fact that a reasonable man would be unaware of the existence of such provisions. A leading case in this area is *Cutler Corporation v. Latshaw*[4] which involved a five page construction contract. On the reverse side of each page were several conditions, among which appeared a warrant of attorney to confess judgment. Although the face of the agreement, which was signed, referred to the conditions the court held the warrant invalid and struck the judgment entered thereon. The court stated:

> When a party to a contract seeks to bind the other party with the unyielding thongs of a warrant of attorney-confes-

1. Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Kentucky, Massachusetts, Michigan, Mississippi, Montana, New Jersey, New Mexico, Tennessee, Texas, Vermont, and West Virginia.

2. Cutler Corp. v. Latshaw, 374 Pa. 1, 97 A.2d 234 (1953).

3. CORBIN, CONTRACTS, § 107 (1952).

4. *Supra* note 2.

> sion of judgment, a device not ordinarily expected by a home-owner in a simple agreement for alterations and repairs, the inclusion of such a self-abnegating provision must appear in the body of the contract and cannot be incorporated by a casual reference with a designation not its own.[5]

The deceptive position of the warrant in the agreement and the seriousness of the provision were the controlling considerations. Had the warrant been more obvious to the signer, the warrant should have been binding and effective. The Pennsylvania courts, however, have now taken an extreme view which may deprive those who rely upon the warrant of its effective use, regardless of the intent of the parties or bona fides of the transaction.

Culminating in the *Foster* case, the trend toward this drastic result began in *Frantz Tractor Co. v. Wyoming Valley Nursery.*[6] The writing in this case was one page equipment rental agreement which contained the following clause on its face:

> This contract and all Terms and Conditions, rights and remedies herein contained and set forth on the reverse side hereof shall bind the parties hereto, . . .

On the reverse side were 21 paragraphs, one of which contained the warrant of attorney. The court stated:

> We recently had occasion to point out that ordinarily, it is immaterial where the parties to a written agreement sign it so long as the meeting of the parties' minds, which their signing betokens, embraces all of the writings constituting the contract at the time of its execution. See *Petrie v. Haddock,* 384 Pa. 7, 119 A.2d 45. But, that is not true of a provision for a warrant of attorney. Where a lease contains a warrant of attorney, the signature of the lessee must bear such direct relation to the provision authorizing the warrant as to leave no doubt that the lessee signed, conscious of the fact that he was thereby conferring upon the lessor a warrant to confess judgment against him for a breach of a covenant of the lease. A general reference in the body of an executed lease to terms and conditions to be found outside the agreement is sufficient to bind the lessee to a warrant of attorney not contained in the body of the lease unless the lessee signs the warrant where it does appear. In short, a

5. *Id.* at page 8.

6. 384 Pa. 213, 120 A.2d 303 (1956).

> warrant of attorney to confess judgment is not to be foisted upon anyone by implication or by general and nonspecific reference.

The language is ambiguous. It makes reference to the "consciousness" of the existence of the warrant. Yet other portions can be and have been interpreted to mean that the validity of the warrant is dependent upon its *physical relation* to the writing as a whole. In one case,[7] reference was made to the warrant of attorney on the face of the agreement, while the provision itself appeared on the reverse side. The court, citing the *Frantz* case, held that the warrant should have been included on the face of the agreement, or, at least, signed where it did appear. The *form* of the agreement, as opposed to the manifested *intent* of the parties, was controlling. The *Frantz* case has been the subject of discussion elsewhere[8] but never has it been suggested that the Pennsylvania Supreme Court would endorse an archaic view analogous to the common law writ system. One lower court,[9] prior to the *Frantz* decision, in dealing with the problem stated:

> We find nothing on the face of this record which would permit us to conclude that the writing was likely to ensnare the signer. Where the parties to a written agreement utilize their agreement, effect will be given to all provisions fairly a part of their accord: *Cooper v. Shaver,* 101 Pa. 547. We know of no law that requires both sides of the paper to be executed where there is clear and explicit language making the unsigned side a part of the whole. To so hold would render void most policies of insurance and commercial documents.
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> The decisions . . . do not decide, as is here argued, that a warrant of attorney is generally ineffective merely because it appears on the reverse side of a single sheet of paper the front of which was executed by the defendant. The courts will look at the face of the proceeding in each instance to determine whether the factor of unfairness has prevented the making of an agreement.[10]

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7. Shell Construction Co., Inc. v. Griffing, 22 Pa. D. & C. 2d 43 (1960).

8. 61 DICK. L. REV. 198 (1957).

9. Ricci v. Barcluski, 55 Lack. Jur. 209 (Pa. Com. Pl. 1954).

10. *Id.*

In the *Foster* case, the lower court granted the defendant's motion to strike and relied in main upon the *Frantz* decision. On appeal, the plaintiff argued that the forms in question were prepared in light of the decision in the *Frantz* case and that the clarity of the cross reference between the face and reverse side of the agreement make it clear that the parties *intended* to be bound by all of the terms and conditions stated therein.

The majority opinion held:

> It is the contention of the Appellant that it is immaterial where such an agreement is signed so long as the writing contains the intentions of the parties thereto. Although this conclusion is generally correct it is not true of a provision for a warrant of attorney to confess judgment.

The court then quoted and emphasizend the following language from the *Frantz* case:

> *'A general reference in the body of an executed lease to terms and conditions to be found outside the agreement is insufficient to bind the lessee to a warrant of attorney not contained in the body of the lease unless the lessee signs the warrant where it does appear. In short, a warrant of attorney to confess judgment is not to be foisted upon anyone by implication or by general and nonspecific reference.'* (Emphasis supplied).

The court concluded:

> A warrant of attorney to confess judgment must be self-sustaining and to be self-sustaining the warrant must be in writing and signed by the person to be bound by it. The requisite signature must bear a direct relation to the warrant of attorney and may not be implied. On the basis of those requirements the action of the court below in striking off the confessed judgment in the cases before this court was proper.

The term "body" is ambiguous. It could be interpreted to mean any part of the writing which appears before the signature of the parties, regardless of the number of pages involved. It does not seem, however, that the warrant in such a case would be manifestly more obvious than if it appeared on the reverse side or on a subsequent page of the agreement. It is submitted, therefore, that the physical relation of the warrant to the signature of the person to be charged therewith is of paramount importance. *Form* and not *intent* is controlling.

The question has been posed: suppose the signer admits that the plaintiff pointed out the warranty of attorney? Few would deny that the other party *should* be bound by the provision. But, if the *Foster* case means what it says, this would not be the result, unless the party signed the warrant where it appeared. Such emasculation of the manifest intent of the parties is a drastic departure from the generally accepted rule. As Chief Justice Bell stated in his dissent in the *Foster* case:

> The language could not be clearer, nor could the intention of the parties be more clearly expressed.
>
> I believe that *Frantz Tractor Company, Inc. v. Wyoming Valley Nursery,* 384 Pa. 213, 120 A.2d 303, is distinguishable, because the warrant of attorney authorizing the confession of judgment was so finely printed as not to be readily legible and so close in type as to be blurred in places. However, if not distinguishable, I would overrule *Frantz.* For these reasons, I dissent.

As a result, in many cases the proponent of a warrant of attorney can be deprived of its effective use even though the party had full knowledge of its existence and intended to be bound thereby at the time the agreement was made. Clearly, a wholesale revision of business and legal forms containing the warrant is now in order, and many judgments now of record are vulnerable.

CONTRACTS — Uniform Commercial Code — Statute of Frauds — The check was not a sufficient memorandum to satisfy the Statute of Frauds provision of the Uniform Commercial Code—Requirements writing must contain in order to fulfill such provision.

Arcuri v. Weiss, 198 Pa. Super. 506, 184 A.2d 24 (1962).

The plaintiff initiated an action in assumpsit for the recovery of a deposit of $500.00 on the purchase of the defendant's restaurant business. The defendant had offered his restaurant for sale and the plaintiff made out and gave to the defendant a check payable to him for $500.00 with the following note on the check: "Tentative deposit on tentative purchase of 1415 City Line Ave., Phila. Restaurant, Fixtures, Equipment, Goodwill."

The defendant inquired several times as to what the plaintiff intended to do regarding the transaction. Finally in May, 1958, the plain-