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Conflict of Laws--Bills and Notes--Stipulation for Attorney's Fee

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CONFLICT OF LAWS—BILLS AND NOTES—STIPULATION FOR ATTORNEY'S FEE.—The Negotiable Instrument Law has settled the question of the negotiability of an instrument containing a provision for costs of collection or an attorney's fee in case payment shall not be made at maturity.\(^1\) It has not settled the question of the validity of such a provision.\(^2\) In most of our states such a stipulation was valid before the adoption of the Negotiable Instrument Law,\(^3\) and other states, since its adoption, have fallen into line, believing that "uniformity of interpretation and enforcement is no less important than uniformity of enactment."\(^4\) In West Virginia and a few other states, however, where such a stipulation in an instrument has been regarded as contrary to public policy and void, it has been held that the statute does not give validity to such stipulations, but provides only that they shall not destroy the negotiable character of the instrument.\(^5\) Such provisions, therefore, are unenforceable in these few jurisdictions if the contract is a local one. If the suit is on an instrument made and payable in a state where such a provision is valid, its enforceability presents a question of conflict of laws on which the courts apparently are not in agreement.

In People's State Bank of Crown Point, Ind. v. Jeffries et al.,\(^6\) the Supreme Court of Appeals of West Virginia allowed reasonable attorney's fees in a suit on a note made and payable in Indiana, the laws of that state permitting the recovery of such fees where the promise to pay them is unconditional. As the courts of other states which deny the validity of such provisions have uniformly refused in like cases to make such allowance, it is to be regretted that the West Virginia court failed to make clear its reason for so doing.

The courts which have refused to enforce a provision for attorney's fees although such provision is valid where the instrument was made have not agreed upon the grounds for this refusal. In some cases the question has been disposed of upon the theory that the provision pertains to the remedy only and so is governed by the law of the forum; in others, upon the ground that it would be contrary to the public policy of the forum to enforce such a stipulation. The first position is maintained vigorously by the Su-

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\(^1\) W. Va. Code, Ch. 98A, 2.
\(^2\) Raleigh County Bank v. Potech et al., 74 W. Va. 511, 82 S. E. 332 (1914).
\(^3\) See note in L. R. A. 1915B, 928, and cases cited.
\(^5\) White-Wilson-Drew Co. v. Eggelhoff, 96 Ark. 105, 131 S. W. 208 (1919); Raleigh County Bank v. Potech et al., note 2, supra.
\(^6\) 129 S. E. 462 (W. Va. 1925).
prem e Courts of Oregon,\textsuperscript{7} Nebraska\textsuperscript{8} and North Carolina.\textsuperscript{9} If it is true that such a stipulation pertains to remedy, then the \textit{lex fori} must govern under the well settled rule of conflict of laws.\textsuperscript{10} But an examination of cases reveals a wide variance of opinion as to the nature of such a provision. Besides the courts already mentioned,\textsuperscript{11} which insist that the effect of such an agreement is to provide for an increase of costs which are only incidental to the judgment, the Montana Supreme Court\textsuperscript{12} permits attorney's fees to be taxed as "costs" when expressly stipulated for; and the Supreme Court of Minnesota\textsuperscript{13} holds that the claim for attorney's fees is not part of the cause of action on the note. On the other hand, such a provision is regarded as a "stipulation for liquidated damages" in Louisiana;\textsuperscript{14} as "a constituent part of the obligation" in Tennessee;\textsuperscript{15} as "a part of the contractual obligation and not a part of the costs" in Alabama;\textsuperscript{16} and "a mere incident to the principal contract" in Virginia.\textsuperscript{17} Still other courts treat the provision as a contract of indemnity.\textsuperscript{18} This is probably the prevailing view in those states which treat the provision as valid.\textsuperscript{19}

One of the reasons assigned for holding such a provision void and unenforceable in the West Virginia case of \textit{Raleigh County Bank v. Poteet},\textsuperscript{20} was that our statute fixed the legal costs and therefore no more could be recovered. While the correctness of this view has been questioned\textsuperscript{21} and this ground has not been assigned in later cases, at least a part of the court regarded a provision for attorney's fees as one for additional costs for which there was no consideration. If the court still entertains this view as to the nature of such a provision it seems that it should have refused to allow attorney's fees on the ground that, being additional costs, the provision pertained to remedy and was therefore governed by

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  \item \textsuperscript{7} Commercial National Bank v. Davidson, 18 Ore. 57 (1899).
  \item \textsuperscript{8} Security Co. v. Eyer, 36 Neb. 507, 54 N. W. 838, 38 Am. St. Rep. 735 (1893).
  \item \textsuperscript{9} Exchange Bank v. Appalachian Land & Lumber Co., 128 N. C. 193, 38 S. E. 813 (1901).
  \item \textsuperscript{11} See notes 7, 8 and 9 supra.
  \item \textsuperscript{12} Dovee v. Helland, 52 Mont. 51, 156 Pac. 416 (1916).
  \item \textsuperscript{13} First State Bank v. Cohasset Wooden Ware Co., 136 Minn. 103, 161 N. W. 308 (1917).
  \item \textsuperscript{14} First Nat. Bank of Vicksburg v. Mayer, 129 La. 891, 57 So. 318 (1912).
  \item \textsuperscript{15} Merrimon v. Parkey, 135 Tenn. 646, 191 S. W. 327 (1917).
  \item \textsuperscript{16} Schillinger v. Lesry, 201 Ala. 256, 77 So. 846 (1917).
  \item \textsuperscript{17} R. S. Oglesby Co. v. Bank of N. Y., 114 Va. 663, 77 S. E. 468 (1913).
  \item \textsuperscript{18} Mechanics'-American Nat. Bank v. Coleman, 304 Fed. 24, 122 C. C. A. 338 (1913).
  \item \textsuperscript{19} S. C. J. § 1436.
  \item \textsuperscript{20} N. 2, supra.
  \item \textsuperscript{21} Vol. 24, \textit{THE W. VA. BAR}, p. 166.
\end{itemize}
our law. No such solution of the problem, however, is even suggested in the opinion of the court.

The other ground for refusing to enforce such a provision, i.e., that it would be contrary to the public policy of the forum, is taken by the Supreme Courts of Kentucky, Arkansas and, quite recently, by North Dakota. "The public policy of a state, established either by express legislative enactment, or by the decision of its courts, is supreme, and, when once established, will not, as a rule, be relaxed, even on the ground of comity, to enforce contracts which, though valid where made, contravene such policy." In the case of R. S. Oglesby Co. v. Bank of New York, the Virginia court held that attorney’s fees should be allowed on a New York note when such a provision was still regarded as invalid in a Virginia note; but it expressly held that such a clause was not contrary to the public policy of that state. Soon after this decision it overruled its former decisions and upheld the validity of such stipulations in Virginia notes. No case has been found in which a court has felt bound by comity to enforce such a stipulation where it was plainly contrary to its public policy.

That such a provision does contravene the public policy of West Virginia was another and perhaps the principal ground for denying its validity in the case of Raleigh County Bank v. Poteet, and the court has maintained this position in later cases. In view of this declared public policy the recent decision of our court is not easily understood. "The note in this case having been executed in Indiana is subject to the laws of that state," is the sole reason advanced by the court for its holding. It is true, as a general rule, that the lex loci governs, but that rule is qualified by the doctrine that provisions pertaining to remedy are governed by the law of the forum, and that even comity cannot set the public policy of

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22 “Parties cannot by contract made in another state engrat upon our procedure here remedies which our laws do not contemplate nor authorize.” Hamilton v. Schoenberger, 47 Iowa 385, quoted with approval in Farquhar & Co. v. Dehaven, 70 W. Va. 735, 76 S. E. 65 (1912).
23 Clark v. Tanner, 100 Ky. 275, 38 S. W. 11 (1896) ; Rogers v. Raines, 100 Ky. 295, 38 S. W. 483 (1896).
24 N. 5, supra.
26 5 R. C. L. 944.
27 n. 17, supra.
28 N. 4, supra.
29 N. 2, supra.
31 N. 6, supra.
32 Idem, p. 464.
33 See authorities cited in n. 10, supra.
a state at naught.  A premise which fails to take these qualifications into account, when obviously they are factors in the problem, can hardly lead to a correct conclusion. Unless the court has changed its view as to the nature of a stipulation for attorney’s fees, and has also ceased to regard such a provision as contrary to public policy, it is difficult to see how the decision can be supported.

The writer believes that a provision for attorney’s fees should be valid in this state as it is in a great majority of our jurisdictions and that such change should be made by legislation if the court persists in its view. If the decision in People’s State Bank v. Jeffries marks a change in the attitude of our court on this question and prophesies an overruling of the line of cases beginning with Raleigh County Bank v. Poteet, then it is most welcome. The profession will await with interest further indication of the court’s position on this question.

—E. C. D.

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25 n. 6, supra.
26 n. 2, supra.