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THE PROVISION FOR ATTORNEY'S FEES IN NEGOTIABLE INSTRUMENTS

IT is well to remember in the beginning of the consideration of this subject that the Uniform Negotiable Instruments Law is the only one of the Uniform Laws proposed by the American Bar Association that has been adopted in all the states and jurisdictions of the United States and which is in full force and effect therein.

Prior to the adoption of the Uniform Negotiable Instruments Law several objections had been sustained against stipulations for costs of collection or attorney's fees. In some jurisdictions the stipulation was regarded as penal and void in that it tended to encourage litigation, to oppress debtors and was against the policy of the law. Some other jurisdictions held the stipulation made the transaction usurious and thus made the instrument subject to the statutes against usury. In still other jurisdictions the stipulation was enforceable but the negotiability of the instrument was denied since it was a collateral agreement depending upon its reasonableness which must be determined by verdict of a jury. There were some good reasons, however, to sustain the stipulation as finally placed in the Negotiable Instruments Law. Among the reasons urged prior to the adoption

of the law why the provision did not make the note void were that it was incidental and ancillary to the main obligation intended to make more certain that it should be carried out or to compensate for the trouble and expense in the event there should be a breach; it was urged that it was an indemnification assured by the maker against the consequences of his own act for unless in default he would not have to pay the additional amount. It was also urged that the provision did not render the obligation uncertain since commercial paper was expected to be paid promptly and if so paid no element of uncertainty entered into the contract. As against the argument of usury it was urged that it does not render the instrument usurious as the additional amount was in consideration of additional trouble and expense inflicted on the holder and not excessive interest for the loan or forbearance of the money and that the provision related to the remedy upon the note should a legal remedy be pursued, rather than to the sum which the maker was bound to pay.¹

Later in this paper we shall consider in more detail some of the matters above enumerated.

VARIOUS JURISDICTIONS LISTED AS TO PROVISION
FOR ATTORNEY'S FEES.

The provision for attorney's fees in negotiable instruments is valid and such fees are recoverable today in all jurisdictions, except such a provision is not enforceable in Arkansas, Kansas, Kentucky, Mississippi, North Carolina, North Dakota, Ohio, South Carolina, South Dakota and West Virginia, that is, in less than one-fourth of our states and jurisdictions, it is not enforceable.

However, in the following jurisdictions, there are some qualifications, so that the provision is enforceable only after compliance with statutory conditions precedent: California,

¹ Ogden's Negotiable Instruments, 4th Ed. Pp. 106-107.

in case suit is necessary to collect; Canal Zone, if not found unconscionable by the court; Iowa, not to be taxed as part of the costs in suit unless an affidavit as required by statute is made; Florida, affidavit must show amount agreed upon; Georgia, defendants must receive statutory notice of ten days before filing of the suit; Massachusetts, only nominal attorney's fees are included in statutory costs; and Oregon, a provision for reasonable attorney's fees to be fixed by the court is commonly used.

Leading up to the discussion of the subject of this paper we might make some observations supported by authority as to attorney's fees. In the United States members of all branches of the legal profession are entitled to fair compensation for attorney's services rendered on a contract express or implied;² from a very early period, even in cases where the plaintiff could not otherwise enforce his right to fees for services, an action could be maintained upon a bill of exchange, promissory note, or other obligation given in consideration of his services.³ But where the legislature by special enactment fixes the compensation of attorneys, such statute will supersede any express or implied contract to pay for such services.⁴

And, the fact that attorney's fees are not limited by statute does not prevent their enforcement by way of contract.⁵

EFFECT OF PROVISION FOR ATTORNEY'S FEES SINCE ADOPTION OF NEGOTIABLE INSTRUMENTS LAW.

Much discussion has arisen as to attorney's fees since the adoption of subdivision 5 of Section 2 of the Negotiable In-

² *U. S. Savings Bank v. Pittman*, 80 Ala. 423, 86 So. 567 (1920); *Thigpen & Harold v. Slattery*, 140 La. 780, 73 So. 780 (1917); *Cicalese v. Fortunato*, 92 N. J. Eq. 329, 112 A. 508 (1920).

³ *Mowat v. Braun*, 19 F. 87 (C. C. Minn., 1884); *Mooney v. Lloyd*, 5 Sarg. & Rawle 412 (Pa., 1819).

⁴ *Herrick v. Barzee*, 96 Or. 357, 190 P. 141, 6 C. J. 753, notes 52, 53 (1920).

⁵ *Yates v. Robertson*, 80 Va. 475 (1885).

struments Law. This section excluding other subdivisions thereof than said subdivision 5 is as follows:

"Sec. 2. The sum payable is a sum certain within the meaning of this act, although it is to be paid. . . .

(5) with costs of collection or an attorney's fee, in case payment shall not be made at maturity."

This sub-section is not in the English Bills of Exchange Act, which was the pattern for our Negotiable Instruments Law and any decisions from that source are necessarily lacking.

This provision in the Negotiable Instruments Law settled, generally, the question as to the *negotiability* of an instrument with such a provision, but it did not settle, definitely some questions as to attorney's fees, which prior to its adoption, had given rise to much litigation and conflict of decisions.

An expert and authority on the subject of negotiable instruments stated of this provision and some others that "nothing but good could come from enacting that the *negotiability* of an instrument is not destroyed by a clause providing for the payment of the costs of collection or an attorney's fee in case of default." This authority only referred to the matter of *negotiability* and not to the validity in general.⁶

The provision "concerns only the effect of such a provision upon negotiability and does not bear upon its validity, construction or enforceability." In effect then this clause does not declare such a stipulation valid, but merely that it shall not render the paper non-negotiable. Some courts, however, declare: "The legislative act, which contains language appropriate only to saving the negotiable character of instruments which contain stipulations for the payment of attorney's fees, should not be construed to impart validity to such

⁶ James Barr Ames, 14 Harv. L. Rev. 241.

stipulations notwithstanding an established rule of the common law to the contrary.”⁷

This latter view, however, does not seem to be in accord with the spirit of the *Negotiable Instruments Law* nor founded on good reason. The fact that the legislature made provision for the stipulation of attorney's fees shows that it legalized (impliedly, at least) the existence of such a stipulation on a note. If it had been the intent of the legislature to consider it void, it would have declared so, or omitted to mention it altogether. The language and spirit of the *Negotiable Instruments Law* clearly recognizes its validity. The decision of *Miller v. Kyle*, as quoted above, is certainly a manifestation of the tendency of the courts to adhere to what is ancient without paying due regard to the change of conditions, and to use every effort to evade statutory provisions that are enacted to remedy existing evils.⁸

The *Negotiable Instruments Law* changed the law as to the negotiability of an instrument with such a provision in the states of Maryland, North Carolina, Pennsylvania and Oklahoma; the question as to the validity of a stipulation for attorney's fees in a promissory note being unsettled in Virginia, it was held that in view of the purpose and policy of the *Negotiable Instruments Law* and the course of decision in other states, such a stipulation should be regarded as valid.⁹

In the Virginia decision, the court states: “The case, thus presents to this court, for the first time since the enactment of the *Negotiable Instruments Law* the question of the valid-

⁷ *Miller v. Kyle*, 85 O. S. 186, 97 N. E. 372 (1911); *Raleigh County Bank v. Poteet*, 74 W. Va. 511, 82 S. E. 332 (1914).

⁸ Albino Z., *The Ques. of the Validity of a Stip. for Atty's Fees Under the N. I. L.*, 10 Mich. L. Rev. 485 (1912). The weight of authority sustains both the validity of the stipulation and the negotiability of the instrument. *Second Nat. Bank v. Auglin*, 6 Wash. 403, 33 P. 1056 (1893); *Salisbury v. Stewart*, 15 Utah 308, 49 P. 777 (1897); *Bank of Commerce v. Fuqua*, 11 Mont. 285, 28 P. 291 (1891); *Ramsey v. Thomas*, 14 Tex. Civ. App. 431, 38 S. W. 259 (1896); *Smith v. Silvers*, 32 Ind. 321 (1869).

⁹ *Colley v. Summers-Parrott Hardware Co.*, 119 Va. 439, 89 S. E. 906, Ann. Cas. 1917 D, 375 (1916).

ity of such a provision in an instrument governed by the laws of this state. No question arises as to the effect of the provision upon the negotiability of the paper; the statute in terms resolving that previously mooted question in favor of the stipulation. As to its validity, the authorities in the various jurisdictions are in conflict, and the same may be said of the decisions in Virginia . . . The weight of outside authority sustains the validity of the stipulation." Then the court states that the purpose and policy of the *Negotiable Instruments Law* should not be disregarded and that in giving recognition to that purpose and policy the court should not be unmindful of the course of decisions which already prevails in a majority of the states having substantially the same statutory law upon the subject; and that uniformity of interpretation and enforcement is no less important than uniformity of enactment.¹⁰

In those jurisdictions opposed to the majority rule such a provision has been held not to be enforceable on the ground that it is a (1) penalty, or (2) a device to evade the usury statutes, or (3) tends to the encouragement of litigation and generally in such jurisdictions clause 5 of section 2 of the *Negotiable Instruments Law* is held not to have changed the rule as to *enforceability* of the provision.¹¹

In 1892 five years prior to the adoption of the Uniform Law in any jurisdiction, United States Circuit Judge Taft, in reversing a District Court decision which had held that a stipulation to pay attorney's fees destroyed the negotiability of an otherwise negotiable instrument, since the stipulation rendered the amount due uncertain, stated "the authorities are in such hopeless conflict that we are unable to select that view which seems to us most consistent with the general character of such instruments." It is set out in Judge Taft's opinion that the agreement to pay attorney's fees could only

¹⁰ Colley v. Summers-Parrott Hardware Co., 119 Va. 439, 89 S. E. 906, Ann. Cas. 1917 D, 375 (1916).

¹¹ Raleigh County Bank v. J. H. Poteet, 74 W. Va. 511, 82 S. E. 332, L. R. A. 1915 B 928; Ann. Cas. 1917 D 359 (1914).

become operative after the instrument had been dishonored as it is not usual or necessary to employ attorneys to collect instruments before they are due and only such attorneys' fees could be charged against a party as were incurred after dishonor. As supporting the view the opinion cited cases from Kentucky, Iowa, Kansas, Illinois, Arkansas, Nebraska, Louisiana and Montana and then concludes: "The contrary decisions in Dakota, Minnesota, Wisconsin, Missouri, South Carolina, North Carolina, California, Pennsylvania, Maryland, and Michigan it would be useless to consider or to attempt to distinguish."¹²

In discussing provisions as to attorney's fees another Federal court has stated: "We have no evidence in this record on the subject, and need none, for we are informed by a great body of judicial decisions for at least half a century it has been customary in nearly every state in the Union to incorporate such provisions in negotiable paper. This practice has been so general and so long continued that the court itself may take judicial notice of it."¹³

EFFECT OF AN EARLY INDIANA STATUTE

While Indiana has adopted the view in favor of the validity of the provision, we should note a statute in effect in such state. In 1875, thirty-seven years before the adoption of the *Negotiable Instruments Law* in Indiana, a statute was passed in Indiana, providing that, "Any and all agreements to pay attorney fees, depending upon any condition therein set forth, and made part of any bill of exchange, acceptance, draft, promissory note, or other written evidence of indebtedness, are hereby declared illegal and void: Provided, That nothing in this section shall be construed as applying to contracts made previous to the taking effect of this act. (Acts 1875, ch. 3, Sec. 1, p. 4.)"¹⁴

¹² *Farmers' National Bank v. Sutton Mfg. Co.*, 326 S. C. C. A. 1 (1892).

¹³ *Cudahy Packing Co. v. State National Bank*, 67 N. S. C. C. A. 662, 134 Fed. 538 (C. C. A.) (1904).

¹⁴ *Burn's Ind. Stat. Ann.*, § 19-1918 (1933).

This statute was upheld the next year after its enactment in the case of *Churchman v. Martin* where it was held that a stipulation in a note for payment of ten percent attorney's fees, if suit should be instituted on the note, was invalid. So we see that such statute applies where express conditions are set forth in the instrument.¹⁵

But it should be noted that two conditions are clearly and unequivocally required to bring a case within the Indiana statute, first, the agreement to pay attorney's fees must depend upon a condition and, second, the condition must be

The legislative history of this act is interesting. It was introduced at the 49th Session of the General Assembly as House Bill 66 by Representative Harper and read first time on January 13, 1875; it passed in the House on February 1, 1875, and passed in the Senate March 5, 1875. (Journal p. 1109). In its passage it was amended with a *proviso* as follows: "Provided, that nothing in this section shall be construed as applying to contracts made previous to the taking effect of this act." The Act was approved by Governor Thomas A. Hendricks, March 10, 1875, and took effect at once. It was published in Acts of 1875, page 4, and later in 1 R. S. Indiana 1876, page 149.

Because of a disagreement between the Senate and House of Representatives over the Revenue and Appropriation bills a special session of the Legislature was called by Governor Thomas A. Hendricks on Tuesday, March 8, 1875, to convene on March 9. So the Governor signed the act after the adjournment of the Regular Session.

The Title of the Act as passed is:

"An Act declaring agreements to pay attorney's fees contained in any bill of exchange, acceptance, draft, promissory note, or other written evidence of indebtedness, illegal and void, and declaring an emergency."

It will thus be noted that the title is broader than the body of the Act as the latter covers only instruments "to pay attorney's fees, depending upon any condition therein set forth and made a part" of the instrument.

A case construing this statute came up in the Supreme Court of Judicature of the State of Indiana (now known as the Supreme Court of Indiana), in the November Term 1876 on notes executed on March 18, 1875, that is, eight days after the Act was enacted. The case is reported in 54 Indiana Reports, page 380, entitled, *Churchman v. Martin*. The most noted attorneys in Indiana at that time appeared in this case and the statute was sustained and has been ever since. The distinguished attorneys were Benjamin Harrison, Cyrus C. Hines, Wm. H. H. Miller, Conrad Baker, Oscar B. Hord and Abram W. Hendricks. They were opposed by Clarence A. Buskirk. Harrison later became United States Senator and President of the United States; Miller, Attorney General of the United States; Baker then was an Ex-Governor of Indiana, Hines, Ex-Judge of Circuit Court, Hord and Buskirk were Attorneys-General of Indiana. Hendricks, leader of Marion County bar and partner of his cousin, the Governor, and the latter became Vice President of the United States.

The principal of the five notes involved in this case was a total of \$665.00.

¹⁵ *Koons v. Davis*, 84 Ind. 387 (1882); *Churchman v. Martin*, 54 Ind. 380 (1876).

set forth in the instrument;¹⁶ however, a void stipulation for attorney's fees in such cases does not invalidate the note and consequently a demurrer to a complaint on the note does not bring in issue the validity of the stipulation.¹⁷

Does the statute apply to implied conditions as well as express conditions? This question must be answered in the negative. The provisions of the Indiana Statute only embrace such agreements to pay attorney's fees as depend upon conditions therein set forth, and not to such as might have some implied conditions;¹⁸ the agreement, "agree to pay attorney's fees for collecting the same," falls within the latter class of agreements and is, consequently, not prohibited by the statutory provisions of the Indiana Statute.¹⁹

As to an unconditional promise to pay attorney's fees it has long been settled by a long line of cases that such an unconditional promise is valid so that in a suit upon such note the judgment must include such attorney's fees.²⁰

INDIANA DECISIONS PRIOR TO ADOPTION OF THE
NEGOTIABLE INSTRUMENTS LAW.

Prior to the adoption of the *Negotiable Instruments Law* in Indiana in 1913, it was held that the question of attorney's fees was a question of damages. From cases decided prior to the adoption in Indiana, we quote:

"The holder of a note can only recover the amount as attorney's fees that he agrees to pay his attorneys, so if the holder has agreed with his attorneys for smaller fees than provided in the note, such agreement will enure to the bene-

¹⁶ Churchman v. Martin, 54 Ind. 380 (1876).

¹⁷ Maynard v. Mier, 85 Ind. 317 (1882).

¹⁸ Tuley v. McClung, 67 Ind. 10 (1879).

¹⁹ Tuley v. McClung, 67 Ind. 10 (1879).

²⁰ Harvey v. Baldwin, 124 Ind. 59, 24 N. E. 347, 26 N. E. 222 (1890); Mathews v. Norman, 42 Ind. 176 (1873); Braun v. Barber, 59 Ind. 533 (1877); Sinker, Davis & Co. v. Fletcher, 61 Ind. 276 (1878); Smock v. Ripley, 62 Ind. 81 (1878); Garver v. Pontious, 66 Ind. 191 (1879); Tuley v. McClung, 67 Ind. 10 (1879); Fitch v. Nat. Bank, 97 Ind. 211 (1884); Churchman v. Martin, 54 Ind. 381 (1876); Brown v. Barber, 59 Ind. 533 (1877); Easley v. Deer, 69 Ind. App. 264, 121 N. E. 542 (1919).

fit of the maker and will limit the amount of the holder's recovery on account of attorney's fees." ²¹

"The stipulation for the payment of attorney's fees only becomes operative when expenses have been actually and necessarily incurred in the employment of an attorney for the enforcement of collection, consequent upon the failure of the payor to keep his engagement, and then only to the extent of the expense actually paid or to be paid, or reasonably chargeable." ²²

"An unconditional promise to pay attorney's fees is valid." ²³

"As the note provides for the payment of attorney's fees it was enough to allege the breach of the contract, and state the damages generally; for where damages are expressly provided for in a contract they need not be laid as special damages." ²⁴

"Whether or not the holder of a note is an attorney and competent to prosecute the action on the note is not material as one is not bound to be his own attorney, and this ancient rule of the law is stingingly expressed in an old familiar adage" (meaning, of course that one who has himself as a client has a fool for a lawyer).

"It is immaterial whether the attorney holder of a note did or did not assist the attorney employed by him to prosecute the action on the note. He had a right to assist him, and the fact that he may have done so can not diminish the compensation of the attorney actually employed." ²⁵

RULE ESTABLISHED BY HIGHEST COURT IN INDIANA
AS TO PROMISSORY NOTES IN 1858.

An agreement to pay attorney's fees for the collection of a note providing for the payment of the same by the maker in

²¹ Goss v. Bowen, 104 Ind. 207 (1885); Harvey v. Baldwin, 124 Ind. 59, 24 N. E. 347, 206 N. E. 222 (1889); Kennedy v. Richardson, 70 Ind. 524 (1880).

²² Goss v. Bowen, 104 Ind. 207 (1885).

²³ Harvey v. Baldwin, 124 Ind. 59, 24 N. E. 347, 26 N. E. 222 (1889).

²⁴ Harvey v. Baldwin, 124 Ind. 59, 24 N. E. 347, 26 N. E. 222 (1889).

²⁵ Harvey v. Baldwin, 124 Ind. 59, 26 N. E. 222 (1889).

the event of his failure to pay the debt according to the terms of the note, he would pay the attorney's fees for its collection, did not render the contract usurious. The Indiana court in 1858 stated that it was optional with the maker "whether he should become liable to pay the expenses of collecting the debt. That liability could only result from his own default. And evidently, when a party agrees to indemnify another against the consequences of his own act, he cannot complain if the contract is enforced against him. The agreement in the case is reasonable, and there is certainly no good reason why an agreement on the part of the debtor to pay an expense resulting necessarily from his own act should not be held valid in law." ²⁶

In 1873 the court stated that an agreement to pay reasonable attorney's fees on a promissory note, if the holder is required to resort to legal proceedings to collect the note, is valid. ²⁷

And in a decision handed down by Indiana's highest court in 1869 appears the following statement:

"It is questioned here whether the stipulation for attorneys' fees was valid. It is argued that it was an indirect method of taking usury. We do not so regard it. A stipulation whereby the debtor agrees to be liable for reasonable attorneys' fees, in the event that his failure to pay the debt shall compel the creditor to resort to legal proceedings to collect his demand, is not only not usurious, but is so eminently just that there should be no hesitation in enforcing it." ²⁸

RULE ESTABLISHED IN INDIANA AS TO BILLS
OF EXCHANGE IN 1867.

In the year 1867, the highest court in Indiana in a certain case stated:

²⁶ Billingsley v. Dean, 11 Ind. 331 (1858).

²⁷ Mathews v. Norman Administrators, 42 Ind. 176 (1873).

²⁸ Smith v. Silvers, 32 Ind. 321 (1869).

"The bill on its face contained an agreement to pay attorney's fees, and when accepted, the acceptor comes under an absolute obligation to pay the bill according to its tenor; he holds the place of the maker of a note. So the stipulation for the payment of attorney's fees became a part of the contract of the acceptor." ²⁹

And in 1870 our highest court in Indiana declared:

"A stipulation in a bill of exchange for the payment of attorneys' fees for collecting the bill is not usurious; and in a suit on the bill, the drawers, acceptors, and indorsers will be liable for reasonable attorneys' fees." ³⁰

NEGOTIABILITY IN OTHER JURISDICTIONS PRIOR TO THE ADOPTION OF THE UNIFORM LAW.

The weight of authority and better reasoning, prior to the adoption of the *Uniform Negotiable Instruments Law*, was that the negotiability of a note was not, in the absence of a special statute, destroyed by a stipulation therein for payment of attorney fees, or for the payment of a reasonable attorney's fee, or for the payment of a specified sum or percent as an attorney fee, in the event it became necessary to place the note into the hands of an attorney for collection or to bring suit for collection of the note. ³¹

Many courts held the note negotiable in those cases in which the provision was merely for a reasonable attorney fee, no amount or percentage being specified; ³² and the

²⁹ *Smith v. The Muncie National Bank*, 29 Ind. 158 (1867).

³⁰ *The First National Bank of Martinsville v. Canatsey*, 34 Ind. 149 (1870).

³¹ L. R. A. 1916 B 678.

³² *Hughitt v. Johnson*, 28 Fed. 865 (1886); *Farmers' Nat. Bk. v. Sutton Mfg. Co.*, 3 C. C. A. 1, 52 Fed. 191, 17 L. R. A. 595 (1892); *First Nat. Bk. v. Slaughter*, 98 Ala. 602, 14 So. 545 (1893); *Orr v. Sparkman*, 120 Ala. 9, 23 So. 829 (1897); *Dumas v. Peoples' Bk.*, 146 Ala. 226, 40 So. 964 (1906); *Lauferty v. Johnson*, 17 Ill. App. 549 (1885); *Pitzer v. McCune*, 152 Ill. App. 144 (1909); *Stoneman v. Pyle*, 35 Ind. 103, 9 Am. Rep. 637 (1871); *Proctor v. Baldwin*, 82 Ind. 370 (1882); *Nicely v. Commercial Bk.*, 15 Ind. App. 563, 44 N. E. 572 (1896) (Costs of collection); *Sperry v. Horr*, 32 Ia. 184 (1871); *Seaton v. Scoville*, 18 Kan. 433, 26 Am. Rep. 779 (1877); *Gaar v. Louisville Bkg. Co.*, 11 Bush (Ky.) 180, 21 Am. Rep. 209 (1874); *Clifton v. Bk. of Aberdeen*, 75 Miss. 929, 23 So. 394 (1898); *Creston Nat. Bk. v. Salmon*, 117 Mo. App. 506, 93 S. W. 288 (1906); *Bk. of Com-*

courts held likewise in cases containing a provision for a specified percentage or amount as attorney fees, if suit be instituted thereon.³³

merce v. Fuqua, 11 Mont. 285, 28 P. 291 (1891).; Heard v. Dubuque County Bk., 8 Neb. 10, 30 Am. Rep. 811 (1878); Haslach v. Wolf, 66 Neb. 600, 92 N. W. 574, 60 L. R. A. 434 (1902); Benn v. Kutzchan, 24 Ore. 28, 32 P. 763 (1893); Oppenheimer v. Farmers' and M. Bk., 97 Tenn. 19, 36 S. W. 705 (1896); Garretson v. Purdy, 3 Dak. 178, 14 N. W. 100 (1882); Roads v. Webb, 91 Me. 406, 40 A. 128 (1898); Maryland Fertilizing and Mfg. Co. v. Newman, 60 Md. 584, 45 Am. Rep. 750 (1883); Altman v. Rittershofer, 68 Mich. 287, 36 N. W. 74 (1888); Altman v. Fowler, 70 Mich. 57, 37 N. W. 708 (1888); Strawberry Point Bk. v. Lee, 117 Mich. 122, 75 N. W. 444 (1898); Jones v. Radotz, 27 Minn. 240, 6 N. W. 800 (1880); Deering v. Thom, 29 Minn. 120, 12 N. W. 350 (1882); Smith v. First State Bk., 95 Minn. 496, 104 N. W. 369 (1905); Samstag v. Conley, 64 Mo. 476 (1877); McCoy v. Green, 83 Mo. 626 (1884); Clark v. Barnes, 58 Mo. App. 667 (1894); Law v. Crawford, 67 Mo. App. 150 (1896) (provision for confession of judgment for amount of unpaid costs and attorney fees.); Pace v. Gilbert School, 118 Mo. App. 369, 93 S. W. 1124 (1906); Buck v. Harris, 125 Mo. App. 365, 102 S. W. 640 (1907); Davis v. McColl, 179 Mo. App. 198, 166 S. W. 1113 (1914); American Machinery and Expert Co. v. Druge Bros., 82 Vt. 476, 74 A. 84 (1909); Morgan v. Edwards, 53 Wis. 599, 11 N. W. 21 (1881); Peterson v. Stoughton State Bk., 78 Wis. 113, 47 N. W. 368 (1890).

³³ Howenstein v. Barnes, 5 Dill 482, Fed. Cas. No. 6,786 (1879) (10%); Adams v. Addington, 4 Woods 389, 16 Fed. 89 (1882) (10%); Schlesinger v. Arline, 31 Fed. 648 (1887) (Payment of all costs including ten percent attorney fees); State Nat. Bk. v. Cudahy Packing Co., 126 Fed. 543, aff'd 134 Fed. 538 (1904) (10%); Montgomery v. Crosstwait, 90 Ala. 553, 8 So. 498 (1890) (All costs of collection not less than ten percent); Overton v. Matthews, 35 Ark. 146, 37 Am. Rep. 9 (1879) (10% attorney fee); Trader v. Chidester, 41 Ark. 242, 48 Am. Rep. 38 (1883) (10%); White-Wilson-Drew Co. v. Egelhoff, 96 Ark. 105, 131 S. W. 208 (1910) (10%); Cowing v. Cloud, 16 Colo. App. 326, 65 P. 417 (1901) (Stated sum as attorney fee); Stapleton v. Louisville Bkg. Co., 95 Ga. 802, 23 S. E. 81 (1895) (10%); Nickerson v. Sheldon, 33 Ill. 372, 85 Am. Dec. 280 (1864) (10%); Nickerson v. Babcock, 33 Ill. 374 (1864) (10%); Dorsey v. Wolff, 142 Ill. 589, 32 N. E. 495, 18 L. R. A. 428 (1892); Gehlbach v. Carlinville Nat. Bk., 83 Ill. App. 129 (1898) (Confession of judgment for amount of note and five percent attorney fee); Harris v. Pate, 7 Ind. Terr. 493, 104 S. W. 812 (1907) (10%); Shenandoah Nat. Bk. v. Marsh, 89 Ia. 273, 56 N. W. 458 (1893) (10%); Dietrich v. Bayhi, 23 La. Ann. 767 (1871) (10%); Clark v. Porter, 90 Mo. App. 143 (1901) (10% attorney fee did not destroy negotiability under Arkansas law); Roberts v. Snow, 27 Neb. 425, 43 N. W. 241 (1889) (10%); Mackintosh v. Gibbs, 81 N. J. L. 577, 80 A. 554 (1911) (6%); White v. Harris, 69 S. C. 65, 48 S. E. 41 (1903) (10%); First Nat. Bk. v. Badhorn, 86 S. C. 170, 68 S. E. 536 (1910) (Payment of all expenses in case of suit for collection of note, and if necessary to employ attorney to collect note, to pay sum not exceeding 10% for fees); Smith v. Pickhorn, 8 Tex. Civ. App. 326, 28 S. W. 565 (1894) (10%); Chicago Cottage Organ Co. v. Waddell, 35 S. W. 408 (1896) (10%); Elmore v. Rugely, 48 Tex. Civ. App. 456, 107 S. W. 151 (1908) (10%); Salisbury v. Stewart, 15 Utah 308, 49 P. 777 (1897); But see Lippincott v. Rich, 22 Utah 196, 61 P. 526 (1900), wherein the opposite conclusion was reached concerning a note calling for reasonable attorney fees only. First Nat. Bk. v. Gay, 63 Mo. 33, 21 Am. Rep. 430 (1876) (10%); First Nat. Bk. v. Marlow, 71 Mo. 618 (1880) (10%); Storr v. Wakefield, 71 Mo. 622 (1880) (10%); First Nat. Bk. v. Gay, 71 Mo. 627 (1880) (10%); First Nat. Bk. v. Jacobs, 73 Mo. 35 (1880) (10%); Creasy v. Gray, 88

The reason why the ordinary provision for an attorney's fee did not destroy negotiability is given by Magruder, J., in *Dorsey v. Wolff*,^{33a} as follows: "The promise to pay the attorney's fee is a promise to do something after the note matures. It does not affect the character of the note before or up to the time of its maturity, either as to certainty in the amount to be paid, or definiteness in the description of the person to whom the payment is to be made." The same reason is given in a leading Tennessee case³⁴ where the court said: "Upon a careful review of the authorities, we can perceive no reason why a note otherwise imbued with all the attributes of negotiability is rendered non-negotiable by a stipulation which is entirely inoperative until after the maturity of the note and its dishonor by the maker. The amount to be paid is certain during the currency of the note as a negotiable instrument, and it only becomes uncertain after it ceases to be negotiable by the default of the maker in its payment. It is eminently just that the creditor who has incurred an expense in the collection of the debt should be reimbursed by the debtor by whom the action was rendered necessary and the expense entailed." And in still another case it is stated: "Such a stipulation adds to the value of paper, has a tendency to lower the rate of discount on it, not only because it promises less expensive collection, but bears evidence of a greater degree of confidence on the part of the maker in his ability to pay without suit. . . . Looking to the spirit as well as the letter, of a time-honored definition, certainly 'a courier without luggage' is none the less efficient for all purposes by reason of having something about him with which to pay

Mo. App. 454 (1901) (10%); *Cotton v. John Deere Plow Co.*, 14 Okla. 605, 78 P. 321 (1904) (\$10 and 10% of amount collected, if suit); *Sullins v. Farmers Exch. Bk.*, 17 Okla. 419, 87 P. 857 (1906) (10%); *Clowers v. Snowden*, 21 Okla. 476, 96 P. 596 (1908) (If collected by an attorney, \$10); *Mitchell v. Altus State Bk.*, 32 Okla. 628, 122 P. 666 (1912) (10%); *American Nat. Bk. v. Halsell*, 43 Okla. 126, 140 P. 399 (1914) (10%); *Adams v. Thurmond*, 48 Okla. 189, 149 P. 1141 (1915) (10%); *Woods v. North*, 84 P. 407, 24 Am. Rep. 201 (1877) (5%).

^{33a} 142 Ill. 589, 32 N. E. 395, 34 Am. St. Rep. 99, 18 L. R. A. 428 (1892).

³⁴ *Oppenheimer v. Farmers' and Merchants' Bank*, 97 Tenn. 19, 36 S. W. 705, 56 Am. St. Rep. 778, 33 L. R. A. 767 (1896).

his reckoning.”³⁵ The same reasons given by these courts are also given in other cases,³⁶ and in the leading text books.³⁷

Under the minority rule, prior to the *Uniform Negotiable Instruments Law*, a stipulation in a note for payment of an attorney fee, or a specified sum, or percent, as an attorney fee, in the event it became necessary to place the note in the hands of an attorney for collection or to bring suit for that purpose, destroyed the negotiability.³⁸

The reason given by these courts was that a provision for the costs of collection or attorney's fees rendered the sum payable uncertain and the instruments non-negotiable.³⁹

But as set out above, prior to the adoption of the *Uniform Negotiable Instruments Law*, the decided majority of jurisdictions held that a stipulation in a promissory note for the payment of an attorney's fee or other costs for collection was valid.⁴⁰

The reason as stated in a Georgia case was as follows: “The stipulation as to costs and attorney's fees is not a part of the main engagement, but relates to the remedy in case of failure to comply with the contract, and is intended to compensate for the expense resulting from its breach. It does not become effective unless there is a failure to pay at the time specified; and it cannot then affect its negotiability, for negotiability in the full commercial sense ceases at maturity. It seems paradoxical to hold that instruments evident-

³⁵ *Heard v. Dubuque Bank*, 8 Neb. 10 (1878).

³⁶ *Sperry v. Horr*, 32 Iowa 184 (1871).

³⁷ Beutel, Brannan's *Negotiable Instruments Law*, 5th Ed., p. 113; Daniel, *Negotiable Instruments*, 7th Ed. by T. H. Calvert, vol. 1, p. 79; Ogden, *Negotiable Instruments*, 4th Ed. pp. 72, 73.

³⁸ L. R. A. 1916-B 682.

³⁹ *Kendall v. Parker*, 103 Cal. 319, 37 P. 401 (1894) (Changed by Statute, 1916); *Roads v. Webb*, 91 Me. 406, 40 A. 128 (1898); Annotation: 3 L. R. A. 51, 4 Am. Cases 264 (1889).

⁴⁰ *Raleigh County Bank v. Poteet*, 74 W. Va. 511, 82 S. E. 332 (1914); Annot. Cas. 1917-D 359, Note L. R. A. 1015-B 928; *Mathews v. Norman*, 42 Ind. 176 (1873); *Smith v. Silvers*, 32 Ind. 321 (1869); *Billingsley v. Dean*, 11 Ind. 331 (1858).

ly framed as bills and notes are not negotiable during their currency, because when they cease to be current they contain a stipulation to defray the expenses of collection. So far from tending to check the circulation of the paper, such a provision adds to its value and thus renders it more available for commercial purposes.”⁴¹

NEGOTIABILITY SUBSEQUENT TO THE ADOPTION
OF THE UNIFORM LAW.

As we have noted the great weight of authority today sustains the view that negotiability is not affected by this provision and the *Negotiable Instruments Law* has established in most jurisdictions a uniform rule that the stipulation, as to attorney's fees in negotiable instruments, shall not affect the *negotiability*; ⁴² so we see that a provision for payment of attorney's fees, in case the note is not paid at maturity, does not destroy the *negotiability* of the note; ⁴³ but what is the effect if nothing is said in the note about the maturity of the note? As to this it has been stated that where provision for attorney's fees in a note failed to limit their payment expressly to the event of default at maturity, the note is not rendered non-negotiable since no attorney's fees or other costs of collection can accrue when a note is paid promptly at maturity as the reasonable construction of the provision is that the maker agrees to pay a reasonable attorney's fee if the note is collected by an attorney after maturity.⁴⁴

The former rule in Minnesota and some other minority states that a provision for attorney's fees rendered a note *non-negotiable* was abrogated by the *Negotiable Instruments Law*.⁴⁵ And it has been held that negotiability is not de-

⁴¹ Stapleton v. Louisville Banking Co., 95 Ga. 802, 23 S. E. 81 (1895).

⁴² Uniform Negotiable Instruments Act, Sec. 2 (5).

⁴³ Gerrish v. Atlantic Ice and Coal Co., 80 F. 2d 648 (1935); Anaheim Nat. Bank v. Dolph, 201 Cal. 17, 255 P. 184 (1927).

⁴⁴ Adolph Ramish Inc. v. Woodruff, 87 Cal. Dec. 75, 28 P. 2d 360 (1934).

⁴⁵ § 2; Goehard v. Folstad, 156 Minn. 453, 195 N. W. 281 (1923).

stroyed by a provision for attorney's fees even though it involves a contingent agreement.⁴⁶

On the other hand, an agreement to pay costs, charges, and expenses, including reasonable attorney's fees in any litigation arising from or connected with the note, has been held to embrace so many factors as to leave indefinite the amount of the note and therefore to render it non-negotiable.⁴⁷

In most states which hold the provision unenforceable, it was properly held that the provision did not prevent the instrument from being a bill or note;⁴⁸ and in the jurisdictions which still hold a provision for costs of collection of attorney's fee to be contrary to public policy the provision is regarded as a nullity but does not affect the *negotiability* of the note,⁴⁹ and the Federal courts have uniformly held that provisions for costs of collection and attorney's fees do not destroy *negotiability*,⁵⁰ and in Canada, *negotiability* is not affected by such a provision.⁵¹

The effect of the provision of the *Negotiable Instruments Law* that "the sum payable is a sum certain, within the meaning of the law, although it is to be paid with costs of collection or attorney's fee in case payment is not made at maturity" is that the majority of the states holding such a stipulation valid before the *Negotiable Instruments Law* was enacted, continued to adhere to the rule that such a stipulation is valid.⁵²

⁴⁶ Pugh v. Dawson, 95 Cal. App. 505, 293 P. 39 (1930).

⁴⁷ Nussenfeld v. Smith, 110 Conn. 438, 148 A. 388 (1930).

⁴⁸ L. R. A. 1916 B, 675, 677, 2 A. L. R. 139.

⁴⁹ Holly Grove Bank v. Sudbury, 121 Ark. 59, 180 S. W. 470 (1915); Commercial Trust Co. v. Snelling, 113 Kan. 272, 214 P. 882 (1923); Sharpe v. Shoenberger, 44 S. D. 402, 184 N. W. 209 (1921).

⁵⁰ Wilson Sewing Machine Co. v. Moreno, 7 Fed. 806 (1879); Adams v. Addington, 16 Fed. 89 (1883); Schlesinger v. Arline, 31 Fed. 648 (1887); Farmers' Nat. Bank v. Sutton Mfg. Co., 52 Fed. 191, 17 L. R. A. 595 (1892).

⁵¹ Davis v. Butler (Man.) 7 West L. R. 85.

⁵² Monroe v. Staser, 6 Ind. App. 364, 33 N. E. 665 (1893); Heating & Plumbing Finance Corp. v. Third Ave. Corp., 147 Misc. 700, 264 N. Y. S. 505 (1932); Citizens' Nat. Bank of Orange, Va. v. Waugh, 78 F. 2d 325, 100 A. L. R. 939 (C. C. A. of W. Va., 1935); Curtis v. Wasem, 96 Cal. App. 604, 274 P. 607 (1929).

So where an instrument contains a stipulation for "a reasonable attorney's fee," or for "an attorney's fee," or for "costs of collection," or similar stipulations, such stipulations have been held valid,⁵³ and the majority of cases also sustain the validity of stipulations in notes for a specified sum or per cent, as attorney's fees.⁵⁴

The general reason given by the courts for upholding such a provision in a note is that such a contract for the payment of attorney's fees is merely a contract of indemnity;⁵⁵ its purpose is to make the holder of the note secure against any liability which he may incur in the event that he might be compelled to employ an attorney to enforce collection of his debt, and is effective only in case of a breach on the part of the maker, and by reason thereof the holder of the notes has necessarily incurred the liability for the attorney's fees. The courts frequently state that such stipulations in notes for the payment of attorney's fees are contracts of indemnity purely and cannot be made a cloak for speculation and profit by the holder.⁵⁶

The provision of the *Negotiable Instruments Law* has been held to give implied legislative sanction to such a stipulation. In the case of *Florence Oil Company v. Hiawatha Company*,⁵⁷ the court stated:

⁵³ *Hovey v. Edmison*, 3 Dak. 449, 22 N. W. 594 (1885); *Ray v. Pease*, 97 Ga. 618, 25 S. E. 360 (1895); *Easley v. Deer*, 69 Ind. App. 264, 121 N. E. 542 (1919); *Tyler v. Walker*, 101 Tenn. 306, 47 S. W. 424 (1898); *Harvey v. Baldwin*, 124 Ind. 59, 24 N. E. 347 (1890); *Lindley v. Sullivan*, 133 Ind. 588, 32 N. E. 738 (1892); *Shoup v. Snepp*, 22 Ind. 30, 53 N. E. 189 (1899).

⁵⁴ *Wood v. Winship Machine Co.*, 83 Ala. 424, 3 So. 757 (1888); *Alexander v. McDow*, 108 Cal. 25, 41 P. 24 (1895); *Byers v. Bellan-Price Inv. Co.*, 10 Colo. App. 74, 50 P. 368 (1897); *Keenan v. Blue*, 240 Ill. 177, 88 N. E. 553 (1909); *Goss v. Bowen*, 104 Ind. 207, 2 N. E. 704 (1885); *Rouyer v. Miller*, 16 Ind. App. 519, 44 N. E. 51 (1896); *Campbell v. Worman*, 58 Minn. 561, 60 N. W. 668 (1894); *Salisbury v. Stewart*, 15 Utah 308, 49 P. 777 (1897).

⁵⁵ *Morris Plan Co. of R. I. v. Whitman*, 51 R. I. 24, 150 A. 610 (1930); *Williams v. Flowers*, 90 Ala. 136, 7 So. 439 (1890); Annotation: 1 L. R. A. 546, Note L. R. A. 1915-B, 930, 933, 943 (1919); *Judson v. Romaine*, 8 Ind. App. 390, 35 N. E. 912 (1893); *St. Joseph County Sav. Bank v. Randall*, 37 Ind. App. 402, 76 N. E. 1012 (1905); *First Nat. Bank v. Robinson*, 104 Tex. 166, 135 S. W. 372 (1911); *Kennedy v. Richardson*, 70 Ind. 524 (1880).

⁵⁶ *Rouyer v. Miller*, 16 Ind. App. 519, 44 N. E. 51, 45 N. E. 674 (1896).

⁵⁷ 55 Colo. 378, 135 P. 454 (1913).

"On the subject of stipulations in notes for attorney's fees there is a wide variance in the adjudicated cases. In some jurisdictions it is held that they are against public policy, and therefore void. There is nothing in our statutes which will render this doctrine applicable. On the contrary, impliedly, at least, the general assembly has recognized that they are valid, by providing in the *Negotiable Instruments Law*, section 5052, rev. ed. Mill's Statutes, that a note providing for costs of collection or an attorney's fee, in case payment shall not be made at maturity, does not affect its negotiability."

In the jurisdictions heretofore holding a stipulation in a note to pay attorney's fees or other costs of collection to be void it is held that the *Negotiable Instruments Law* does not, by its provision that such a stipulation shall not affect *negotiability*, render such a stipulation valid.⁵⁸ The logic of such a rule is that the *negotiability* of paper is one thing, and the policy of the state as to usury, penalties and public policy quite another, and that the statute deals with the former and not the latter. It says nothing about usury, penalties or public policy. Its purpose was to establish uniformity in the quality, characteristics, and incidents of negotiable paper and to extend the principle of negotiability; but it assumed the validity of the paper. In other words, it assumed the paper to be such as the law permits the parties to make and allows courts to enforce. But if the law of the forum does not allow such a stipulation, the insertion of such a provision is a nullity even though it does not affect the *negotiability* of the instrument.⁵⁹

In the minority states three main objectives have been made to the validity of the provision, and all have found judicial sanction in different states. First, an objection is that

⁵⁸ *Holly Grove Bank v. Sudbury*, 121 Ark. 59, 180 S. W. 470 (1915); *Leach v. Urschel*, 112 Kan. 629, 212 P. 111 (1923); *C. I. T. Corp. v. Studebaker Sales of Ky.*, 251 Ky. 349, 65 S. W. 2d 84 (1933); *Miller v. Kyle*, 85 O. S. 186, 97 N. E. 372 (1911); *Raleigh County Bank v. Poteet*, 74 W. Va. 511, 82 S. E. 332 (1914).

⁵⁹ *Colley v. Summers-Parrott Hardware Co.*, 119 Va. 439, 89 S. E. 906 (1916).

the provision is usurious.⁶⁰ The second objection is that the provision is a penalty,⁶¹ and the third objection is that the provision violates public policy.⁶²

Are these three objections sound? First, is the provision usurious? If the provision is merely to defray expense of collection caused by the debtor's default, it is not usurious. A stipulation whereby the debtor agrees to be liable for reasonable attorney's fees, in the event that his failure to pay the debt shall compel the creditor to resort to legal proceedings to collect his demand, is not only not usurious, but is so eminently just that there should be no hesitation in enforcing it;⁶³ when a party agrees to indemnify another against the consequences of his own act, he cannot complain if his contract is enforced against him. The agreement is reasonable, and there is certainly no good reason why an agreement on the part of the debtor to pay an expense resulting necessarily from his own act should not be valid in law. Second, is the provision a penalty? The weight of authority is that such is not a penalty but a contract of indemnity; the maker does not have to pay attorney's fees unless he defaults on the note, and then he pays the amount equal to the expense of the payee in so collecting such note; so we see that the maker is not penalized but that he only indemnifies. Third, is the provision contrary to public policy? Public policy is properly a subject for the legislature and not for the courts. The legislature has declared its public policy in the *Negotiable In-*

⁶⁰ In re Beckenhaupt, 21 Ohio N. P. N. S. 7; C. I. T. Corporation v. Studebaker Sales of Ky., 251 Ky. 349, 65 S. W. 2d 84 (1933); Myer v. Hart, 40 Mich. 517, 29 Am. R. 553 (1879); White-Wilson-Drew Co. v. Egelhoff, 96 Ark. 105, 131 S. W. 208 (1910); Exchange Bank v. Apalachain Land etc. Co., 128 N. C. 193, 38 S. E. 813 (1901); Annotation: L. R. A. 1915-B, 136, 146 (1932).

⁶¹ Boozer v. Anderson, 42 Ark. 167 (1883); Arden Lumber Co. v. Henderson, 83 Ark. 244, 103 S. W. 185 (1907); White v. Egelhoff, 96 Ark. 105, 131 S. W. 208 (1910).

⁶² Campen Bros. v. Stewart, 106 W. Va. 247, 145 S. E. 381 (1928).

⁶³ Billingsley v. Dean, 11 Ind. 331 (1858); The First Nat. Bank of Martinsville v. Canatsey, 34 Ind. 149 (1870); Smith v. Silvers, 32 Ind. 321 (1869).

struments Law; so a provision for attorney's fees is not against public policy.⁶⁴

"The Oregon court has attained a more or less doubtful distinction by adopting a minority-majority view, all of its own in this field. The first case in which the court had occasion to consider the validity and effect of a provision for attorney's fees appears to have been *Peyser v. Cole* (1883) 11 Ore. 39. In that case a provision for a 'reasonable' fee was involved. The court there said that the trend of authority 'is in favor of the validity of such engagements, subject to the general supervisory power of the court as to their *bona fides* and reasonableness. Whether a specified amount or per cent, or only a reasonable fee is provided for by the stipulation, we have no doubt of either the power or duty of the court where the question of good faith and reasonableness is presented. . . .' Shortly thereafter the case of *Balfour v. Davis*, (1886) 14 Ore. 47, 12 Pac. 89 was presented; here the provision was for 20% attorney's fee. The court then asserted (the opinion was written by one of the justices who concurred in *Peyser v. Cole*) that a set fee is in violation of the rule of just compensation and against public policy, that a court cannot be expected to enforce an unconscionable bargain, and that the court did not feel disposed to extend the holding in *Peyser v. Cole*. The court went on to declare that it could not allow a reasonable fee where a set fee had been provided for because, 'This, in effect, is asking the court to make a contract for the parties that they have not made for themselves, and which we do not consider we are authorized to do. We must either enforce the contract as it appears, as to this item, or to decline to enforce it.' It is to be noted that other courts have not found themselves restrained by such scruples nor under the necessity of setting forth such apparently ephemeral objections."⁶⁵

⁶⁴ 2 Virginia Law Reg. 321 (1841); *Parkham v. Pullman*, 5 Coldw. 497 (Tenn., 1868).

⁶⁵ Carl G. Helm, *Bills and Notes*, Provision for Attorneys' Fees, 17 Ore. L. Rev. 320 (1938); *Citizens Nat. Bank of Orange v. Waugh*, 78 F. 2d 325, (C. C. A. 4th) (1935).

In some states special statutes make stipulations for the payment of attorney's fees void. Such is the case in Kansas, North Carolina, and North Dakota and in some other states heretofore enumerated.⁶⁶

Section 2 and subsection 5 providing that: "The sum payable is a sum certain within the meaning of this act, although it is to be paid with costs of collection or an attorney's fee, in case payment shall not be made at maturity," has been changed in Nebraska by adding a provision as follows: "Provided that nothing herein contained shall be construed to authorize any court to include in any judgment on an instrument made in this state any sum for attorney's fee or other costs not allowable in other cases." The North Carolina Act has attached to subsection 5 the following: "But a provision incorporated in the instrument to pay counsel fees for collection is not enforceable, but does not affect the other terms of the instrument or the negotiability thereof."

In a recent Pennsylvania case under the Small Loans Act which makes no provision for attorney's fees on promissory notes under the act, the court states: "Since the judgment as confessed includes a 'fee' or 'charge' in addition to interest, expressly prohibited by the act, it follows the judgment is a nullity . . . By the addition of an attorney fee, the judgment is so tainted with illegality as to be void on its face. It follows that the action of the lower court in striking it off was proper."⁶⁷

In Indiana under the Small Loan Companies Act,^{67a} if any charge in excess of those permitted by the act is contracted for in the contract of loan, then such loan is void.

⁶⁶ Kansas Gen. Stat. 1915, § 6475; § 197, Pells Revised (N. Car.) § 2346; § 7791, C. L. (No. Dak.) 1913; *Continental Supply Co. v. Syndicate Trust Co.*, 52 N. D. 209, 202 N. W. 404 (1924).

⁶⁷ *Lackawanna Thrift & Loan Corporation v. Habatchnick*, 20 A. 2d 903 (Pa., 1941); See also *Consolidated Plan of New Jersey Inc. v. Shanholtz*, 7 N. J. Misc. 876; *G. Nicotera Loan Corporation v. Gallagher*, 115 Conn. 102, 160 A. 426; *Smetal Corporation v. Family Loan Co.*, 119 Fla. 497, 161 So. 438.

^{67a} *Burns, Ind. Stat. Ann.*, § 18-3001, 18-3002 (1933).

As the charge for an attorney's fee is not permitted by the Act, such a charge is illegal and makes the loan void. We quote from Section 18-3002 of that act as follows:

"In addition to the rate of interest or charges herein provided for no further or other charge or amount whatsoever for examination, service, brokerage, commission, expense, fee or bonus or other thing or otherwise shall be directly or indirectly charged. . . . If any interest, consideration or charges in excess of those permitted by this act are charged, contracted for or received, the contract of loan shall be void and the licensee shall have no right to collect or receive any principal, interest, or charges whatsoever."

WHO MAY RECOVER ATTORNEY'S FEES?

An examination as to who may recover attorney's fees discloses that: The right to recover attorney's fees stipulated for in promissory notes passes to the endorsee with the note;⁶⁸ it runs in favor of any holder, such as an accommodation maker, or last indorser who has taken up the note,⁶⁹ or a pledgee suing thereon,⁷⁰ and is generally considered as a part of the drawer's, acceptor's or indorser's contract to pay attorney's fees to the holder.⁷¹

In *Roe v. Smyth*,⁷² the plaintiff was the last of several indorsers of a note which provided for the payment by the maker and indorsers of reasonable attorney's fee for collection. At maturity the plaintiff paid the full amount of the note to the holder, and subsequently recovered judgments against the defendants. In a suit to recover a reasonable at-

⁶⁸ *Winn Parish Bank v. White Sulphur Co.*, 133 La. 282, 62 So. 907 (1913).

⁶⁹ *Cox v. Hagan*, 125 Va. 656, 100 S. E. 666 (1919); *Pease v. Syler*, 78 Wash. 24, 138 P. 310 (1914).

⁷⁰ *Winn Parish Bank v. White Sulphur Lumber Co.*, 133 La. 282, 62 So. 907 (1913).

⁷¹ *Bank v. Ellis*, 2 Fed. 44 (1880) (Accommodation endorser); *Hubbard v. Harrison*, 38 Ind. 323 (1871); *Merrimon v. Parkey*, 136 Tenn. 645, 191 S. W. 327 (1917); *Contra: Robinson v. Aird*, 43 Fla. 30, 29 So. 633 (1901); *Short v. Coffeen*, 76 Ill. 245.

⁷² *Roe v. Smyth*, 300 N. Y. Supp. 1068 (1937).

torney's fee, the complaint was dismissed by the trial court, but the trial court was reversed by the appellate division which held, that an agreement in a note to pay a reasonable attorney's fee is valid and an indorser who reacquires such note may recover against the prior indorsers in a separate action. The benefit of such a stipulation passes with the note so that the ultimate holder may recover on it.

In one case it was urged that the plaintiff having once recovered on the principal obligation he could no longer sue to recover the attorney's fees which were a part of that obligation. It was there decided that whether more than one suit may be brought depends on the severable nature of the contract.⁷³ Severability may be predicated on the theory that since the attorney's fee was not due when the suit was brought recovery cannot be obtained in the same action.⁷⁴ The court interpreting a certain agreement, found that there were separate and distinct agreements, one to pay the note on the due date, the other to pay an attorney's fee if the note was not paid and if expenses were incurred in collecting it. Since a reasonable fee is required,⁷⁵ and a determination of the amount can be made only after the expenses have been incurred and an estimate taken. It is submitted that the court would not err in permitting this suit to be brought.⁷⁶

In connection with the question as to who may recover attorney's fees arises the question as to who may retain fees collected. We find that the cases generally hold that the fees are a part of the contract and belong to the client. Thus it is held that the attorney's fee is recoverable by the holders, and it is a part of their cause of action, and is not a cause of action in favor of the attorneys who might be re-

⁷³ *Bernbock v. I. Zucker Co.*, 148 Misc. 244, 26 N. Y. Supp. 607 (1933).

⁷⁴ *Dearlove v. Edwards*, 166 Ill. 619, 46 N. E. 1081 (1897).

⁷⁵ *Cutten v. Mayor of N. Y.*, 92 N. Y. 166 (1883). "If the fee were a fixed fee there is no reason why it cannot be included in the original action as in the case of a stipulation for interest."

⁷⁶ To the point that attorney's fees can be recovered in the action on the note and not in a separate action see: *Shugart v. Paltee*, 37 Iowa 422 (1872); *Smiley v. Meier*, 47 Ind. 559 (1874); *Glenn v. Porter*, 72 Ind. 525 (1880).

tained by the holders to bring the suit;⁷⁷ the client must, however, pay the attorney whatever fees have been agreed upon between them, or in the absence of an agreement such fees as are just and reasonable; he is supposed to be reimbursed more or less for this outlay by the repayment to him from the judgment against the defendant of the amount allowed for that purpose.⁷⁸

In a Louisiana case⁷⁹ the court said that: "The only sense in which it can be said that the attorney's fee stipulated in a note belongs to the owner of the note is that the owner of the note may sue for and recover the fee in his own name when he sues on the note."

In the absence of statute or express agreement to the contrary, an attorney is not entitled to the attorney's fees as taxed costs; the attorney fees become the property of his client.⁸⁰ The fact, however, that attorney's fees have been assessed as a part of the costs, or are awarded by statute, does not prevent the attorney from recovering for the reasonable value of the services from his client.⁸¹

Apart from the question of technical estoppel or technical logic, it seems probable that the courts will decline to permit the client who has recovered attorney's fees upon the theory of indemnity against his counsel's charges to retain them for his own benefit, since he should not profit by his dishonesty to his debtor with the assistance of the court.⁸²

LIABILITY OF SURETY, ACCEPTOR, ENDORSER AND OTHERS.

The liability of a surety, an acceptor or an endorser arises in the cases pertaining to attorney's fees: thus a surety on a

⁷⁷ *Johnson v. Crossland*, 34 Ind. 344 (1870); *Jenkins v. Harris*, 19 Tenn. App. 113, 83 S. W. 2d 562 (1935).

⁷⁸ *Kenner v. Whitelock*, 152 Ind. 635, 53 N. E. 232 (1899); *Price, Adm.*, 105 Ind. 543 (1885).

⁷⁹ *Foundation Finance Co. v. Robbins*, 179 La. 259, 153 So. 833, 836 (1934).

⁸⁰ *Berry v. State Bank of Otterbein*, 99 Ind. App. 655, 193 N. E. 922 (1935); *Boynton v. Tarbell*, 272 Mass. 142, 172 N. E. 340 (1930).

⁸¹ *Boynton v. Tarbell*, 272 Mass. 142, 172 N. E. 340 (1930); *Leahy v. Temp.*, 214 S. W. 228 (Mo. App., 1919).

⁸² Annotation: 51 L. R. A. (N. S.) 594, 596.

note providing for payment for attorney's fees is ordinarily liable therefor;⁸³ and the acceptor in the event a stipulation for attorney's fees is contained in a bill of exchange, is embraced in the liability assumed by him.⁸⁴

The authorities are divided as to the liability of an indorser for attorney's fees. A few support the view that the indorser is not liable;⁸⁵ and many support the view that the indorser is liable.⁸⁶ Even where the face of the note states the contract in the name of the maker only (and indorsers are in no way mentioned on the face of the note) many of the decisions hold the indorser liable for attorney's fees.⁸⁷

It has been decided in a number of well-reasoned decisions that the indorser is liable for attorney's fees, especially where the note on its face contains some special contract on his part, such as that he waives presentment for payment, protest, and notice of protest and non-payment of the note;⁸⁸ this is on the theory that such language occurring in connection with a contract for attorney's fees will be taken as indicating that he also contracts for attorney's fees, and that the stipulation passes with the instrument through the transferee, and hence the indorsee may recover the fee not only from the maker but also from the indorser and the acceptor of the bill.⁸⁹

⁸³ *McMillan v. Heard Nat. Bank of Jacksonville*, 19 Ga. App. 148, 91 S. E. 235 (1917).

⁸⁴ *Smith v. The Muncie Nat. Bank*, 29 Ind. 158 (1867).

⁸⁵ *Robinson v. Aird*, 43 Fla. 30, 29 So. 633 (1901); *Short v. Coffeen*, 76 Ill. 245 (1873); *Schaeffer v. Hodges*, 54 Ill. 337; *City Savings Bk. v. Kensington Land Co.*, 37 S. W. 1037 (Tenn. App., 1896).

⁸⁶ *Bank of British North America v. Ellis*, 2 Fed. Cas. No. 859; *Hubbard v. Harrison*, 38 Ind. 323 (1871); *Benn v. Kutzschan*, 32 P. 763 (Ore., 1893); *Smith v. Richardson Lumber Co.*, 47 S. W. 386 (Tex. Civ. App., 1898); *Riverside Mill Co. v. Cartersville Bk.*, 81 S. E. 892 (Ga., 1914); *Kummer v. Lauman*, 138 Ore. 514, 7 P. 2d 556 (1932).

⁸⁷ *Franklin v. Duncan*, 182 S. W. 230 (Tenn., 1916); *Martinsville v. Canatsey*, 34 Ind. 149 (1870); *Hubbard v. Harrison*, 38 Ind. 323 (1871); *Farmer's State Bank v. Haun*, 222 P. 45 (Wyo., 1924); *Byers v. Investment Co.*, 50 P. 368 (Colo. App., 1897).

⁸⁸ *Hall v. Pratt*, 29 S. E. 764 (Ga., 1898); *Williams v. Merchants Bank*, 4 S. W. 163 (Texas, 1887); *Bank of Commerce v. Fuqua*, 28 P. 291 (Mont., 1891).

⁸⁹ *Adams v. Addington*, 16 Fed. 89 (C. C., 1882); *Hubbard v. Harrison*, 38 Ind. 323 (1871); *Smith v. Muncie Nat. Bank*, 29 Ind. 158 (1867).

In Indiana the courts have stated that the liability for such fees attaches to all parties to the paper if the states in which the instruments were executed recognize the stipulation as valid.⁹⁰

When the parties to a note agree that in case suit is brought to enforce payment thereof, they will pay a reasonable attorney's fee, the indorser is liable for the fee incurred by the indorsee in the suit against himself but not for that incurred in a prior unsuccessful suit against the maker.⁹¹

An accommodation indorser who took up the note on dishonor at maturity without paying any attorney's fees and who brought suit against the maker may recover a reasonable attorney's fee actually incurred by him but not exceeding the percentage named in the note.⁹²

The question also often occurs in decedent's estates; in an action against a decedent's estate upon a note given by the decedent and stipulating for attorney's fees such fees may be recovered against the estate if the claim is filed after maturity,⁹³ for if the decedent were living and suit were brought against him, there could be no doubt about the plaintiff's right to recover such fees as had necessarily been incurred in the collection of the note and there is no reason why they may not be collected from his estate.⁹⁴ As a rule, any obligation that can be enforced against a person while living may be enforced against such person's estate, and a stipulation to pay attorney's fees is within the rule.⁹⁵

A note, providing for attorney's fees, filed before maturity as a claim in an estate and properly allowed by the administrators gives no right for attorney's fees;⁹⁶ in such cases

⁹⁰ *Smith v. Muncie Bank*, 29 Ind. 158 (1867); *Hubbard v. Harrison*, 38 Ind. 323 (1871).

⁹¹ *Highleyman v. McDowell Motor Co.*, 202 Mo. App. 221, 216 S. W. 52 (1919).

⁹² *Cox v. Hagan*, 125 Va. 656, 100 S. E. 666 (1919).

⁹³ *Bond v. Omdorff*, 77 Ind. 583 (1881).

⁹⁴ *Bond v. Omdorff*, 77 Ind. 583 (1881).

⁹⁵ *Bond v. Omdorff*, 77 Ind. 583 (1881).

⁹⁶ *Bond v. Omdorff*, 77 Ind. 583 (1881); See also *St. Joseph's County Savings Bank v. Randall Administrators*, 37 Ind. App. 402, 76 N. E. 1012 (1905).

there is no pretense of any breach on the part of the maker of the notes of any of the stipulations therein contained, and without a breach the expenditure for attorney's fees is not on account of any fault of the maker or his representative, and not therefore chargeable to his estate. The cost of preparing and presenting the claim of the plaintiff to the clerk is a matter for the claimant, and any expenditure made by him in the way of attorney's fees is not covered by the clause, "and attorney's fees," in the note.⁹⁷

Where a promissory note stipulating for the payment of attorney's fees is filed against a decedent's estate, the claimant is entitled to introduce evidence of the value of the attorney's fees, without any formal demand in such claim for judgment for no formal pleading is necessary in such a case.⁹⁸ However, the claim for attorney's fees must be duly filed and notice of claim must be served as prescribed by statute if a jurisdiction has a statute prescribing such.⁹⁹ In bankruptcy matters, in many cases the notes, by which a bankrupt's indebtedness is evidenced, contain a provision for an attorney's fee for the collection therefor. In such cases, if the claim has been placed with an attorney for collection prior to bankruptcy, and collection proceedings have been actually instituted, so that the attorney's fee has a fixed liability at the time of filing of petition in bankruptcy, such fee will constitute a provable debt against the estate of the debtor.¹⁰⁰ Where the obligation has not been given to an attorney to collect, or no effort has been made to realize thereon such as would authorize collection of the fee as part of the claim, the stipulated fee, in such cases, has not become such a fixed liability as to make it available as a provable debt in bankruptcy.¹⁰¹ However, under the laws of Texas,¹⁰²

⁹⁷ *St. Joseph County Sav. Bk. v. Randall*, 37 Ind. App. 402, 76 N. E. 1012 (1905).

⁹⁸ *Hanna, Executor v. Fisher*, 95 Ind. 383 (1883).

⁹⁹ *Penick Supply Co. v. Anderson*, 23 Ga. App. 244, 97 S. E. 889 (1919).

¹⁰⁰ *In re Ledbetter*, 267 F. 893 (D. C. Ga., 1920).

¹⁰¹ *In re Griffin Drug Co.*, 289 F. 140 (1923); *Merchants' Bank v. Thomas*, 121 F. 306, 57 C. C. A. 374 (Miss., 1903).

¹⁰² *In re Roche*, 101 F. 956, 42 C. C. A. 115 (Texas, 1900); *In re Gimbel*, 294 F. 883, Am. Bankr. Rep. (N. S.) 295 (C. C. A. Texas, 1923).

by which the attorney's fees, when due under the terms of the contract, become a part of the contract debt, where notes of a bankrupt provide for attorney's fees in case the notes were placed in the hands of attorney for collection, and they were so placed before the filing of a petition, the stipulated fees are allowable as part of the debt on the notes, though attorneys took no action until after the filing of the petition.¹⁰³

A debtor's insolvency does not prohibit the rendering of judgment for attorney's fees where the note provides for such fees.¹⁰⁴

REASONABLENESS OF ATTORNEY'S FEES.

Another matter often to be determined concerns the reasonableness of the attorney's fees; the problem of determining what amounts to a reasonable fee is usually one for the jury when the evidence presented is conflicting;¹⁰⁵ the court can, however, reduce the amount awarded if excessive,¹⁰⁶ or grant a new trial,¹⁰⁷ or increase the amount, if inadequate,¹⁰⁸ and where the judgment on a note includes excessive amounts for attorney's fee the court may reverse the trial court.¹⁰⁹

In deciding whether certain sums are inadequate, unreasonable, or excessive the question of what elements should be taken into consideration in determining a reasonable fee

¹⁰³ *McCabe v. Patton*, 174 F. 217, 23 Am. Bankr. Rep. 335 (C. C. A. Pa., 1909); *In re Haynsworth*, 34 F. 2d 334, affirmed in part and reversed in part; *Jones v. Kendall*, 34 F. 2d 344 (1928).

¹⁰⁴ *Security Mortgage Co. v. Powers*, 49 S. Ct. 84, 278 U. S. 149, 73 L. ed. 236 (1928).

¹⁰⁵ *Beck v. O'Dell*, 193 Ind. 386, 140 N. E. 527 (1923); *McCreary v. Stevens*, 156 Miss. 330, 126 So. 4 (1930); *Hillside State Bank v. Christensen*, 229 P. 105 (1914); *Roderer v. Schmitt*, 258 Ky. 398, 80 S. W. 2d 35 (1935); *Maxwell v. Yancy*, 167 Okla. 158, 28 P. 2d 989, 6 Chi. L. Rev. 484 (1934); *Contra*: The reasonableness of attorney's fees is for the court and not the jury. *Read Phosphate Co. v. Jenkins*, 120 S. C. 337, 113 S. E. 317 (1922); *Bank of Enoree v. Yarbrough*, 120 S. C. 385, 113 S. E. 313 (1922).

¹⁰⁶ *McCluskey v. Kalben*, 167 Md. 479, 175 A. 449 (1934).

¹⁰⁷ *Leonard v. Rosendahl*, 133 Minn. 329, 158 N. W. 419 (1916).

¹⁰⁸ *Daly v. Power*, 236 Ky. 426, 33 S. W. 2d 305 (1930).

¹⁰⁹ *Nesbitt v. Nesbitt*, 43 Ind. App. 47 (1908).

arises. While the courts take note of the time spent,¹¹⁰ the fee will not be larger because a certain length of time was taken where a diligent lawyer could have performed the services in a much shorter period.¹¹¹ Closely associated with both time and attorney's skill is his experience. One court has said, "there seems to be apparent a notion that any young gentleman two or three years out of law school has a right to charge at the rate of fifty dollars a day for his services because men of age, experienced, and established reputation and capacity to perform much legal work any day, sometimes, or ordinarily, receive that much. This is not correct."¹¹²

The amount involved is a factor invariably present in a discussion of reasonable fees;¹¹³ this is to be expected since the amount involved is large, more is at stake, the attorney's concern is greater and more work is done on the case, hence a more substantial fee. The responsibility of the attorney is important in determining his reasonable fee. Responsibility refers to the share of the litigation handled by the attorney,¹¹⁴ *i. e.*, whether he was the sole counsel or worked with others; and to anxiety, such as would be created by the knowledge that the physical well-being of the client depended upon the outcome of the case,¹¹⁵ and the result of the litigation is an important factor.¹¹⁶ The law recognizes that the results accomplished by an attorney for his client constitute a material element in the value of the legal services,¹¹⁷ also considerable regard is given to the customary fee;¹¹⁸ as to the admission of evidence to reveal the client's

¹¹⁰ *Nelson v. Auch*, 62 N. D. 594, 245 N. W. 819 (1932).

¹¹¹ *Irwin v. Swinney*, 45 F. 2d 890 (1930).

¹¹² *Syzmanski v. Syzmanski*, 151 Wis. 145, 138 N. W. 53 (1912).

¹¹³ *Smith v. Chicago I. N. W. R. Co.*, 60 Iowa 515, 15 N. W. 291 (1883); For a discussion of what constitutes reasonable attorney's fee in the absence of a provision in contract or statute fixing the amount see note 9 A. L. R. 237.

¹¹⁴ *Glidden v. Cowen*, 123 F. 48 (C. C. A. 6th, Eastern Dist. of Ky., 1903).

¹¹⁵ *Succession v. Pons*, 142 La. 721, 77 So. 515 (1918).

¹¹⁶ *Randall v. Packard*, 142 N. Y. 47, 36 N. E. 823 (1894).

¹¹⁷ *McDougal v. Black Panther Oil & Gas Co.*, 277 F. 701 (C. C. A. 8th, 1921).

¹¹⁸ *Kline v. Blackwell*, 63 F. 2d 897 (C. C. A. 5th, 1933).

financial status a division of opinion exists. Some courts allow such evidence,¹¹⁹ others refuse it;¹²⁰ whenever such evidence is admitted, it is not for the purpose of enhancing the compensation beyond a reasonable amount but to ascertain the ability of the client to pay even that sum;¹²¹ thus where the client cannot earn more than ordinary wages the charge should be small as compared to the usual fee.¹²²

No one of the elements which go to make up a reasonable fee is controlling. All of these factors are to be regarded and each is given such weight as the trier of the fact thinks appropriate in the case under consideration.¹²³

Where a stipulation for a specified fee was held valid, it was further held that unreasonableness was a matter of affirmative defense and, in the absence of proof, the holder was *prima facie* entitled to recover the stipulated sum, or that the amount stipulated in the note was reasonable.¹²⁴

EFFECT OF TENDER OF PAYMENT.

When tender of payment is made it has its effect; thus the tender of payment of notes on or at any time after maturity and before they are placed in the hands of an attorney for collection relieves the maker of liability for attorney's fees;¹²⁵ but the tender of the amount due on the promissory note must include attorney's fees, when the note calls for such fees, and the note is in the hands of an attorney for collection, and there is a dispute about the amount due;¹²⁶ where a tender is sought to be made by the maker of the

¹¹⁹ Walker v. Hill, 90 Mont. 111, 300 P. 260 (1931).

¹²⁰ Nelson v. Auch, 62 N. D. 594, 245 N. W. 819 (1932).

¹²¹ Ward v. Cohn, 58 F. 462 (C. C. A. 8th, 1893).

¹²² People v. Pio, 308 Ill. 128, 139 N. E. 45 (1923).

¹²³ Platt v. Shields, 96 Vt. 257, 119 A. 520 (1923); Schlesinger v. Dunne, 73 N. Y. Supp. 1014, 36 Misc. Rep. 529 (1901); Kirchoff v. Bernstein, 92 Ore. 378, 181 P. 746 (1919).

¹²⁴ Smiley v. Meir, 47 Ind. 559 (1874); Utah Nat. Bank v. Nelson, 38 Utah 169, 111 P. 907 (1910).

¹²⁵ Kansas City Life Ins. Co. v. Duvall, 129 S. W. 2d 770 (Tex. Civ. App., 1939); Urbish v. Rutledge, 299 S. W. 921 (Tex. Civ. App., 1927).

¹²⁶ Rouyer v. Miller, 16 Ind. App. 519, 44 N. E. 51 (1896).

note of the full amount thereof, and should the holder of such note refuse to give information concerning the attorney's fees when called for, or should the debtor be ignorant of the employment of the attorney, or the tender be refused upon other grounds, and he be thereby misled, the court would doubtlessly protect the debtor in the making of such a tender.¹²⁷ For example, where a money lender loans money and takes a note for the amount and a deed of the land as security and the debtor after the note became due and before the holder had placed it in the hands of an attorney informed the creditor that he was willing then to pay the amount due, and the creditor refused to reconvey except upon an excessive payment by the debtor and the debtor brought suit to redeem and cause a reconveyance, the creditor was not entitled to an attorney's fee upon the note.¹²⁸

Where no actual tender of the amount due on the note is made, the maker's request that the collateral be delivered to him for collection so he can pay the note is not a tender, so as to relieve him of the attorney's fee.¹²⁹

PLEADINGS, EVIDENCE AND FINDINGS.

An investigation of the law as to the pleadings, evidence and findings in *suits* upon instruments containing provisions for attorney's fees is essential to a comprehensive consideration of this subject. We find that in an action on a note providing for attorney fees, such fees cannot be assessed where there is no allegation in the complaint relative to such fees.¹³⁰ The desirable procedure, when no particular per cent is stipulated in the note, is for the plaintiff to plead the amount claimed to be a reasonable fee and to offer proof in support thereof.¹³¹

¹²⁷ Rouyer v. Miller, 16 Ind. App. 519, 44 N. E. 51 (1896).

¹²⁸ Lewis v. Lee, 75 Ind. App. 263, 130 N. E. 443 (1921).

¹²⁹ Rainey v. Jackson, 126 Cal. App. 723, 14 P. 2d 1025 (1932).

¹³⁰ Stout v. Gaar, Scott & Co., 26 Ind. App. 582, 60 N. E. 357 (1901).

¹³¹ Staheli v. Adams, 56 Utah 276, 190 P. 781 (1920); Lindley v. Sullivan, 133 Ind. 588, 32 N. E. 738 (1893); Glenn v. Porter, 22 Ind. 525 (1864); Stames v. Schofield, 5 Ind. App. 4, 31 N. E. 480 (1892).

In Indiana, while good pleading requires that in an action on a note providing for attorney's fees the value of the services should be stated, yet under the general claim for damages, evidence may be admitted without such averment as to the value of the services, and a recovery may be had for such fee, provided, however, the whole recovery does not exceed the amount for which judgment is demanded in the complaint,¹³² and where suit was brought upon a promissory note, which contained an agreement to pay a reasonable fee for the plaintiff's attorney if the note should be collected by suit, it was held not to be a sufficient cause for reversing a judgment which included an allowance for such fee, even when the complaint did not state the amount of the fee claimed.¹³³

In some jurisdictions, under what is considered the better practice, no recovery can be had on such stipulation for attorney's fees unless it is specially declared upon;¹³⁴ in other jurisdictions it is provided that attorney's fees shall not be taxed as part of the costs in a suit upon a note unless an affidavit as required by statute is made.¹³⁵ In a Georgia case a judgment for attorney's fees was held erroneous, where there was a failure to show the amount that the plaintiff agreed to pay his attorney for services in the suit. In that jurisdiction, before attorney's fees can be recovered on a note executed since the passage of the act of 1900, it must be alleged in the pleading that the required statutory notice has been given, and if such allegation is denied, it must be proved at the trial.¹³⁶ In some states the plaintiff must allege and establish that he has paid or incurred a valid liability for the serv-

¹³² *Lindley v. Sullivan*, 133 Ind. 588, 32 N. E. 738 (1893); *Stames v. Schofield*, 5 Ind. App. 4, 31 N. E. 480 (1892).

¹³³ *Roberts v. Comer*, 41 Ind. 475 (1872); *Glenn v. Porter*, 72 Ind. 325 (1880); *Price v. Jones*, 105 Ind. 543, 5 N. E. 683, 55 Am. Rep. 230 (1886).

¹³⁴ *Nickerson v. Sheldon*, 33 Ill. 372; *Miller v. Ambassador Park Syndicate*, 121 Cal. App. 92, 9 P. 2d 267 (1932).

¹³⁵ *North v. Vilas*, 114 Fla. 560, 154 So. 245 (1934).

^{135a} *Van Epps' Code*, Supp., § 6185.

¹³⁶ *Pritchard v. McCary*, 122 Ga. 606, 50 S. E. 366 (1905).

ices of an attorney when the note provides that an attorney must be employed.¹³⁷ So where a note provided for attorney's fees if it should be placed in the hands of an attorney for collection, no recovery for attorney's fees could be had in an action thereon in absence of an allegation in the petition that the note had been placed in the hands of an attorney.¹³⁸ But if the note provides for attorney's fees in case of suit, plaintiff to recover such fees need not allege the self-evident fact of the bringing of the suit.¹³⁹

Strictly, there should be an averment in the complaint of the amount claimed and reasonably due for attorney's fees, yet where a complaint on a promissory note does not contain an averment of an amount claimed and reasonably due as attorney's fees, where the note filed with the complaint stipulates for the payment of attorney's fees, the judgment taken by default will not be reviewed because it allows an amount for attorney's fees, provided the sum for which judgment is demanded is large enough to cover the judgment rendered.¹⁴⁰

In some states, however, the plaintiff suing on a note must pray for interest or attorney's fees in order to recover them.¹⁴¹

Some matters as to evidence are pertinent to this discussion. Thus where a promissory note contains an agreement to pay attorney fees, such agreement should be alleged in the same paragraph of complaint that asks a recovery on the note, and evidence is admissible in support of such averment,¹⁴² and the burden is upon plaintiff to show the amount of his attorney fees.¹⁴³

¹³⁷ *Dickenson v. First Nat. Bank*, 132 So. 835 (Fla., 1931); *Porter v. Monarch*, 17 Idaho 364, 106 P. 299 (1910); *Koppe v. Groginsky*, 132 S. W. 984 (Tex., 1910); *Fowler v. Industrial Acceptance Corp.*, 101 Fla. 259, 134 So. 60 (1931).

¹³⁸ *Le Tulle Mercantile Co. v. Rugeley*, 98 S. W. 438 (Tex., 1906).

¹³⁹ *Adams v. Bartell*, 46 Tex. Civ. App. 349, 102 S. W. 779 (1907).

¹⁴⁰ *Moore, Admx. v. Staser*, 6 Ind. App. 364, 32 N. E. 563, 33 N. E. 665 (1892).

¹⁴¹ *Sandifer v. Stephens*, 8 La. App. 546 (1928).

¹⁴² *Mathews v. Norman*, 42 Ind. 176 (1873).

¹⁴³ *Shoup v. Snepp*, 22 Ind. App. 30, 53 N. E. 189 (1899).

The rule is well established that unless evidence is heard which fairly tends to prove how much is due, it is error to add a sum for attorney's fees to the amount otherwise due on a promissory note which merely provides for "attorney's fees," without indicating the amount, in the absence of a stipulation by the parties covering the same. The court will not take judicial notice of what constitutes a reasonable fee.¹⁴⁴

It has been repeatedly held in Indiana that where the amount of attorney's fees is not fixed in the note, the amount thereof must be established by proper evidence. In the case of *Interstate Motor Freight System v. Gasoline Equipment Co. Inc.*,¹⁴⁵ the only evidence as to the value of attorney's fees which appeared in the record is the testimony of H. Nathan Swaim, who testified that he was a practicing attorney in Indianapolis and familiar with the fees charged by attorneys generally in actions for the collection of notes. A hypothetical question was then asked Mr. Swaim in which there was detailed various steps which the attorneys had followed in the preparation of the pleading and trial of the case. The witness testified basing his opinion upon the facts recited that the value of such services was \$350. This evidence was held to justify the \$300 attorney's fees.

But the rule as to evidence is reversed where the note fixes the amount of attorney's fee at a specific per cent, so if a note made a part of a complaint fixes the amount of attorney's fees at ten per cent it is the same as if the complaint alleged that a reasonable fee would be ten per cent on the amount due, and no evidence other than the note is neces-

¹⁴⁴ *Getman v. Hayhow*, 103 Okla. 161, 229 P. 559 (1924); *Atkinson v. Neblett*, 144 Va. 220, 132 S. E. 326 (1926); See also *Winslow Gas Co. v. Plost*, 69 Ind. App. 611, 122 N. E. 594 (1919); *Contra: Burt v. Schoening*, 138 Wash. 187, 244 P. 381 (1926); *Kindel v. French*, 190 Ind. 595, 131 N. E. 227 (1921); *Prescott v. Grady*, 91 Cal. 521, 27 P. 755 (1891); *Stames v. Schofield*, 5 Ind. App. 4 (1891); *Bowser v. Palmer*, 33 Ind. 124 (1870); *Wyant v. Pottorff*, 37 Ind. 512 (1871); *Fowler v. Industrial Acceptance Corp.*, 101 Fla. 259, 134 So. 60 (1931); *Wiley v. Starbuck*, 44 Ind. 298 (1873).

¹⁴⁵ *Interstate Motor Freight System v. Gasoline Equipment Co.*, 24 N. E. 2d 418 (Ind. App., 1940).

sary;¹⁴⁶ and pleadings involved, when properly identified, may be put in evidence to corroborate the testimony of the plaintiff.¹⁴⁷

The fact that the judgment for attorney fees is in excess of the fees alleged in the complaint is no ground for a reversal if it is within the total amount demanded in the complaint and the evidence is undisputed.¹⁴⁸

In one jurisdiction it has been decided that when a note provided for a stipulated attorney's fee, the burden is on the defendant to show the fee was excessive.¹⁴⁹

There are numerous cases which pass upon the amount of recovery. Thus it has been decided that a stipulation in a note to pay attorney's fees is in the nature of an indemnity contract and as a general rule the holder can recover thereunder only such sums as he has actually and necessarily expended or become liable for on account of the default of the maker and then only when they are reasonable;¹⁵⁰ a holder may recover on the note only such amount for attorneys fees as his attorney could recover from him for his services, that is, the reasonable value of his services should be the measure of the recovery;¹⁵¹ and where the admitted facts show that a client received the sum of \$300 for attorney's

¹⁴⁶ *Smiley v. Meir*, 47 Ind. 559 (1874).

¹⁴⁷ *State Exchange Bank v. Paul*, 58 Ind. App. 487, 108 N. E. 532 (1915).

¹⁴⁸ *Amott v. McClintock-Tumkey Co.*, 75 Ind. App. 308, 130 N. E. 436 (1921); *Lindley v. Sullivan*, 133 Ind. 588, 32 N. E. 738 (1893); *Wyant v. Pattorff*, 37 Ind. 512 (1871).

¹⁴⁹ *Osage Oil & Ref. Co. v. Dickason-Goodman Lumber Co.*, 106 Okla. 119, 231 P. 465 (1924).

¹⁵⁰ *Goss v. Bowen*, 104 Ind. 207, 2 N. E. 704 (1885); *Stames v. Schofield*, 5 Ind. App. 4, 31 N. E. 480 (1892); *Moore v. Staser*, 6 Ind. App. 364, 32 N. E. 563 (1893); *Judson v. Romaine*, 8 Ind. App. 390, 35 N. E. 812 (1893); *Farmers etc. Nat. Bank v. Banton*, 21 Ill. App. 403; *Winslow Gas. Co. v. Plast*, 69 Ind. App. 611, 122 N. E. 594 (1919); *St. Joseph County Sav. Bk. v. Randall*, 37 Ind. App. 402, 76 N. E. 1012 (1906); *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797 (1898); *Hamilton v. Burgess*, 170 So. 233, 348 Ala. 4, reversing; 27 Ala. 272, 170 So. 346 (1936); *Rogers v. Kemp Lbr. Co.*, 137 P. 586 (1907); *Rouyer v. Miller*, 16 Ind. App. 519, 44 N. E. 51, 45 N. E. 674 (1896).

¹⁵¹ *Texas Land & Loan Co. v. Roberston*, 38 Tex. Civ. App. 521, 85 S. W. 1020 (1905).

fees, the attorney was entitled to collect the entire \$300 from his client for his fees.¹⁵²

In the absence of a contract, express or implied, between attorney and client, the attorney is only entitled to recover from his client the reasonable value of his services;¹⁵³ in an action on a note containing an unconditional promise to pay attorney's fees, where defendant offered to prove in mitigation of damages that the attorney employed by the plaintiff had agreed to receive one-fourth of the attorney's fees, it was error to reject such offered evidence, as the holder of a note can recover only what he agrees to pay his attorneys;¹⁵⁴ as to the employment of an attorney it can be said that when a note is sued on and the pleadings are signed by an attorney, a presumption obtains that he has been employed to bring suit,¹⁵⁵ for a holder is entitled to recover attorney's fee if after default by the maker of the note it is placed with an attorney for collection, whether suit is brought or not;¹⁵⁶ but where the maker offered to pay the notes in full before the payee employed an attorney to make collection the payee cannot thereafter collect attorney fees.¹⁵⁷

The reasonable attorney's fees under the contract of the maker and indorser of a note to pay such fees, if recoverable at all, are recoverable as part of the contractual obligation and not as part of the costs;¹⁵⁸ but where a note does not provide for attorney's fees, taxation of attorney's fees as part of the costs is erroneous.¹⁵⁹

The amount of attorney's fees fixed in a note is *prima facie* the sum recoverable, subject to be reduced by proof

¹⁵² Thayer v. Harbican, 70 Wash. 278, 126 P. 625 (1912).

¹⁵³ W. E. Rogers v. Kemp Lumber Company, 137 P. 586 (N. M., 1913).

¹⁵⁴ Harvey v. Baldwin, 124 Ind. 59, 26 N. E. 222 (1891).

¹⁵⁵ Rychener v. McGuire, 66 S. W. 2d 413 (Tex. Civ. App., 1933).

¹⁵⁶ Nett v. Stockgrowers Finance Corp., 84 Mont. 116, 274 P. 497 (1929); Moore v. Staser, 6 Ind. App. 364, 32 N. E. 563, 33 N. E. 665 (1893); Explained in Shoup v. Snepp, 22 Ind. App. 30, 53 N. E. 189 (1899).

¹⁵⁷ Donohoe v. Perker, 18 S. W. 2d 180 (Tex. Civ. App., 1929).

¹⁵⁸ Schillinger v. Leary, 201 Ala. 256, 77 So. 846 (1917).

¹⁵⁹ Koontz v. Clark Bros., 209 Iowa 62, 227 N. W. 584 (1929); Rutland Sav. Bank v. Ferguson, 92 S. W. 2d 907 (Tex. Civ. App., 1936).

that such sum is unreasonable and excessive, or that the plaintiff has not incurred a liability to pay the full amount.¹⁶⁰ In New York a stipulation for fifteen per cent attorney's fees is valid;¹⁶¹ however, in Texas it is stated that if the owner of the note in good faith agrees with an attorney to pay him the percentage stated in the stipulation for attorney's fees in a note, that amount is recoverable whether it is a reasonable fee or not.¹⁶²

In some jurisdictions, where the judgment for attorney's fees corresponds with the undisputed evidence as to the value of such fees, a new trial will not be awarded on the ground that the amount of recovery is greater than the value of such fees, as alleged in the complaint. Under such circumstances the complaint, after verdict, will be deemed to have been amended to correspond with the evidence.¹⁶³ Allowance of less than the amount of attorney's fees stipulated in the note has been held not to be error;¹⁶⁴ if the amount is left blank in the note it must be understood that the maker agreed to pay a reasonable amount.¹⁶⁵

In the event there is a set-off or counterclaim the prevailing view is that the amount of attorney's fees recoverable,

¹⁶⁰ L. R. A. 1915-B, 928, 930; *McCornick v. Swem*, 36 Utah 6, 102 P. 626 (1909); *Smiley v. Meir*, 47 Ind. 559 (1874); *Conway v. Am. Nat. Bank of Danville*, 146 Va. 357, 131 S. E. 803 (1926); *Taylor v. Continental Supply Co.*, 16 F. 2d 578 (1926); *Sedgwick on Damages*, 9th Ed., Sec. 695c; *Stephenson v. Allison*, 123 Ala. 439, 26 So. 290 (1889); *Stames v. Schofield*, 5 Ind. App. 519, 44 N. E. 51, 45 N. E. 674 (1896); Also, see cases holding contra, that the plaintiff must prove the reasonable fee and can recover only that; *Campbell v. Worman*, 58 Minn. 561, 60 N. W. 668 (1894).

¹⁶¹ *Commercial Invest. Trust Ind. v. Eskew*, 212 N. Y. 5718, 126 Misc. 114 (1925).

¹⁶² *Frantz v. Masterson*, 133 S. W. 740 (Tex. Civ. App., 1911).

¹⁶³ *McKernan, Admr. v. Estabrook*, 75 Ind. App. 309, 130 N. E. 436 (1920); *Arnott v. McClintock Turnkey Co.*, 75 Ind. App. 308, 130 N. E. 436 (1921).

¹⁶⁴ *Richardson v. Breeding*, 167 Va. 30, 187 S. E. 454 (1936); *Sewell v. Wilcox*, 290 S. W. 264 (1926).

¹⁶⁵ *Hawley v. Isaacson*, 117 Wash. 197, 200 P. 1109 (1921); *McCornick v. Swem*, 36 Utah 6, 102 P. 626 (1909); *Strough v. Gear*, 48 Ind. 100 (1874); *Contra*: "Where the space left for the amount of an attorney's fee was left blank by drawing the pen across the blank, it was the intention of the parties to provide for no attorney's fees." *Scandinavian Am. Bank v. Long*, 75 Wash. 270, 134 P. 913 (1913).

if on a percentage basis, is calculated on the net amount of the judgment after subtracting set-offs and counterclaims;¹⁶⁶ the principle, however, does not permit a reduction of the amount due on a note arising from independent counterclaims. In one case¹⁶⁷ involving the provision in a promissory note the court stated that the plaintiff was entitled to an attorney's fee of fifteen percent of the net amount of the judgment, after deduction of the counterclaim. This case follows the prevailing rule throughout the United States.¹⁶⁸ It is clear that the above rule should not apply where counterclaims are unconnected with the instrument for such cannot logically be held to reduce the amount owed on the note, and hence the attorney's fee should be reckoned on the principal found due, without any deductions for independent counterclaims. The attorney's claim is not grounded upon the enrichment of his client, as in the case of a contingent fee, but is based on the promise of the maker of the note to pay a stated percentage of the due and unpaid principal as an indemnity to the holder for the expense caused the latter by the maker's failure to pay the note when duly presented. In the contingent fee case, any set-off, related or unrelated to the subject-matter of the action, diminishes the amount recovered by the attorney and consequently the fund in which the attorney is entitled to share. Similarly, in the note cases, set-offs which are directly concerned with the transaction in which the note was given may reduce the sum on which the attorney's percentage is reckoned. But set-offs, arising from claims unconnected with the giving of the note cannot logically be held to reduce the amount owed on the note, and hence the attorney's fee should be reckoned on the principal found due, without any deductions from either independent counterclaims or set-offs.

¹⁶⁶ *Slack v. Elkins*, 10 Ga. App. 571, 73 S. E. 862 (1912); *Walker v. Tomlinson*, 44 Tex. Civ. App. 446, 98 S. W. 906 (1906).

¹⁶⁷ 21 Cal. L. Rev. 275; *Bongiovanni v. Fickett*, 69 Cal. App. Dec. 305, 10 P. 2d 539 (1932).

¹⁶⁸ *Morgan v. Virginia-Carolina Chem. Co.*, 213 Ala. 551, 106 So. 136 (1925); *Ward v. Boydston*, 63 Tex. Civ. App. 656, 134 S. W. 768 (1911).

In our search of the decisions and statutes, we found only one state, Georgia, requiring written notice to be given the defendant of the intention to sue for attorney's fees along with the note. And in Georgia the rule is that attorney's fees on note cannot be recovered unless written notice is given ten days before suit of intention and court term,¹⁶⁹ and unless such notice is given, no attorney's fees can be collected even though the note states otherwise upon its face,¹⁷⁰ and this notice, requisite to recovery of attorney's fees in suit on note, cannot be waived.¹⁷¹

If a jury does not return a verdict for attorney's fees, the court may add the stipulated or reasonable fee in rendering the judgment.¹⁷²

But if a note sued on does not provide for attorney's fees, taxation of attorney's fees as part of costs is erroneous.¹⁷³

If the amount awarded by the jury as attorney's fees is excessive under a note providing for attorney's fees, it may be reduced; but if the amount awarded is so small that justice has not been done, the court may grant a new trial.¹⁷⁴

It has been held that where a note stipulates for a specified percentage for attorney's fees and is prayed for, the supreme court is justified in allowing said attorney's fees if both jury and trial court fail to allow it.¹⁷⁵

Some questions have arisen as to whether the recovery of attorney's fees must be in one cause of action with the note. The general rule is that if the plaintiff secures a judgment on the note without also having proceeded in the same

¹⁶⁹ *Walton v. Hines*, 40 Ga. App. 757, 151 S. E. 558 (1930).

¹⁷⁰ *Oliver v. Lane*, 46 Ga. App. 136, 167 S. E. 116 (1932).

¹⁷¹ *Miller v. Jackson*, 49 Ga. App. 322, 175 S. E. 409 (1934).

¹⁷² *Fuloransky v. Pope*, 57 Okla. 755, 157 P. 905 (1915); *Continental Gin Co. v. Sullivan*, 48 Okla. 332, 150 P. 209 (1915); (Mandatory upon trial court and if it does not add fees, the Supreme Court may do so.); *Pivot City Realty Co. v. State Sav. & Trust Co.*, 88 Ind. App. 222, 162 N. E. 27 (1928).

¹⁷³ *Koontz v. Clark Bros.*, 209 Iowa 62, 227 N. W. 584 (1929); *Schaefer v. Brown*, 151 So. 650 (La. App., 1933).

¹⁷⁴ *Hillsdale State Bank v. Christensen*, 32 Wyo. 68, 229 P. 105 (1914).

¹⁷⁵ *Cunningham v. Spencer*, 111 Okla. 217, 239 P. 444 (1925).

action for the costs of collection and attorney's fees, he cannot recover them in another action, since the contract has become merged in the judgment;¹⁷⁶ the wording of the provision, however, has led to a contrary holding, as when a note provided for an attorney's fee, "if it was collected by suit," it was held the fee did not become due until after the institution of suit, so that it could not be included in the judgment but must be recovered in a separate action.¹⁷⁷ It was also held in *First State Bank v. Cohasset Wooden Ware Co.*,^{177a} that a general denial does not put in issue the reasonable value of attorney's fees stipulated for in the note, since the claim is not a part of the cause of action on the note, the attorney's fees do not accrue until the services are performed and then their value may be determined by the court on application. In Illinois, recovery cannot be had in the same action.¹⁷⁸

The Indiana Supreme Court, recognizing both rules, stated:¹⁷⁹ "The attorney's fee is incident to the main debt or contract, and as we have held, cannot be sued for in a separate action, after judgment has been taken on the note for the amount of the debt. Such fees may be included in the judgment, with the principal and interest of the note. While we fully recognize the correctness of the general rule contended for by the learned counsel, that an action cannot be maintained on a cause of action which had not matured when suit was instituted, we do not see that economy, convenience, or justice would be promoted by applying the rule contended for by counsel, in preference to that which allows the whole cause of action embraced in the note, including the attorney's fee, to be included in one judgment." This decision ignores legal logic but seems to arrive at a practical and just decision.¹⁸⁰

¹⁷⁶ *Sands v. Roller*, 118 Va. 191, 86 S. E. 857 (1915); *The First Nat. Bank of Ind'pls v. The Ind'pls Piano Mfg. Co.*, 45 Ind. 5 (1873).

¹⁷⁷ *Anderson v. Terhune*, 206 Ill. App. 348.

^{177a} 136 Minn. 103, 161 N. W. 398.

¹⁷⁸ *Dearlove v. Edwards*, 166 Ill. 619, 46 N. E. 1081 (1897).

¹⁷⁹ *Smiley v. Meir*, 47 Ind. 559 (1874).

¹⁸⁰ *Smiley v. Meir*, 47 Ind. 559 (1874).

But when the recovery is not upon the note, but upon the original obligation, attorney's fees stipulated in note are not allowed.¹⁸¹ The reason for this rule is that in the original obligation there was no promise to pay attorney's fees; consequently, a suit on the original obligation should result only in judgment for the amount of the original obligation.

An executory agreement by the superintendent of banks, waiving stipulation for attorney's fees, not supported by consideration or involving *estoppel*, has been held unenforceable.¹⁸²

Attorney's fees will not draw interest pending an appeal or other legal delay before payment.¹⁸³ The Supreme Court of Washington has decided that attorney's fees are not collectible except in case of default in payment of the principal debt, and that a suit to collect an installment of interest due does not warrant an allowance of a fee to the attorney for the plaintiff.¹⁸⁴

The question has been litigated as to such a provision in school, rent, township and a variety of such notes; thus a stipulation to pay attorney's fees in case of suit on a school note is not a provision for a penalty, but one of indemnity against reasonable expenditure, which is necessarily included in the power granted to county boards of public instruction to borrow money.¹⁸⁵

Where a tenant gives a rent note containing an agreement to pay an attorney's fee, and an attachment for rent is sued out, followed by *replevin* and trial in accordance with statutory proceedings, an attorney's fee cannot be allowed to the landlord; the lien statute not including an attorney's fee.¹⁸⁶

¹⁸¹ *Park v. Newell*, 87 Wash. 431, 151 P. 783 (1915).

¹⁸² *Ross and Williams v. Southern Exchange Bank of Dublin*, 38 Ga. App. 532, 144 S. E. 338 (1928).

¹⁸³ *Star Wagon Co. v. Swezy*, 63 Ia. 520, 19 N. W. 298 (1884).

¹⁸⁴ *Merrill v. Muzzy*, 11 Wash. 16, 39 P. 279 (1895).

¹⁸⁵ *First Nat. Bank v. Bd. of Public Instruction for Jackson County*, 114 Fla. 571, 154 So. 314 (1934).

¹⁸⁶ *O'Keefe v. McLemore*, 125 Miss. 394, 87 So. 655 (1921).

Another view taken is that a school township cannot be held liable upon an attorney fee clause in a note. The powers of trustee to make contracts being limited to those granted by statute.¹⁸⁷ The matter of attorney's fees frequently arises in determining court costs. Some courts hold that as the law awards to a successful party only his taxable costs, and fees which he pays to attorneys are not taken into consideration and can only be recovered when there is some written agreement between the parties for the payment of the same or it is provided so by statute.¹⁸⁸ One court states, however, that the attorney's fees are not costs or in the nature of costs. They form a part of the cause of action. They are recovered because they are provided for in the contract sued upon.¹⁸⁹ An Oklahoma court, however, has said that it is better practice to include such fee in the judgment proper, than to tax it as part of the cost,¹⁹⁰ leaving an inference that attorney's fees might be taxed as part of the costs. This case, however, does not follow the weight of authority.

In Pennsylvania it is provided that attorney's fees cannot be taxed in more than one suit on the same instrument.¹⁹¹

Some courts hold that a stipulation for attorney's fees is one for liquidated damages and such fees are recoverable in an action on the note without proof that they were incurred.¹⁹² However, as we have seen heretofore the weight of authority is *contra*.

As to an acceleration clause and attorney fee provision, where it is provided that, if any one of a series of notes is in default, the entire series of notes shall become due, and the notes, the maturity of which has been accelerated by the de-

¹⁸⁷ Snoddy v. Wabash School Township of Fountain County, 17 Ind. App. 284 (1896).

¹⁸⁸ Wade v. Whitsill, 9 Tenn. App. 436.

¹⁸⁹ Groves v. Wiles, 1 Ind. App. 174, 27 N. E. 309 (1891).

¹⁹⁰ Kerr v. McKinney, 69 Okla. 88, 170 P. 685 (1918).

¹⁹¹ Purd. Dig., p. 188, Sec. 9; p. 1371, Sec. 9.

¹⁹² W. K. Henderson Iron Works & Supply Co. v. Meriwether Supply Co., 178 La. 516, 152 So. 69 (1934); Roller v. Hamilton, 13 Tenn. App. 241.

fault, provide for ten percent attorney's fees, the same may be collected as provided by law.¹⁹³

Another question which arises is in cases where the amount determines the jurisdiction. The general rule is that attorney's fees, expressly contracted for in a note and sought to be recovered in a suit, are a part of the contract and must be considered in estimating the amount in controversy in determining the jurisdiction of a justice court.

The general rule is that attorney's fees, expressly contracted for in a note and sought to be recovered in a suit, are a part of the contract and must be considered in estimating the amount in controversy in determining the jurisdiction of a justice court;¹⁹⁴ so where the jurisdiction of a court depends on the amount involved, the attorney's fee promised in the note and sued for and demanded in the declaration are to be included in determining said amount.¹⁹⁵

WHEN FEES DUE.

When the fee becomes due is often important, thus where an action is commenced before the time fixed for settlement, no attorney's fees can be recovered for the reason that a contract to recover attorney's fees is a contract of indemnity which is only effective in case of a breach on the part of the maker.¹⁹⁶

Reasoning from the majority rule heretofore set out that a note containing a provision for attorney's fees is negotiable, valid and enforceable, it would seem logical to say that an attorney should be allowed to recover attorney's fees or costs

¹⁹³ *Stocking v. Moury*, 128 Ga. 414, 57 S. E. 704 (1907).

¹⁹⁴ *Miller v. Mills*, 32 Okla. 388, 122 P. 671 (1912); *Jones v. McKinney*, 224 S. W. 720 (Texas, 1920); *Ring v. Merchants Broom Co.*, 68 Fla. 515, 67 So. 132 (1914); *Contra: Exchange Bank v. Apalachain Land & Lumber Co.*, 128 N. C. 193, 38 S. E. 813 (1901).

¹⁹⁵ *Miller v. Mills*, 320 Okla. 388, 122 P. 671 (1912); *Jones v. McKinney*, 224 S. W. 720 (Texas, 1920); *Ring v. Merchants Broom Co.*, 68 Fla. 515, 67 So. 132 (1914); *Contra: Exchange Bank v. Apalachain Land & Lumber Co.*, 128 N. C. 193, 38 S. E. 813 (1901).

¹⁹⁶ *McCoun v. Shipman*, 75 Ind. App. 212, 128 N. E. 683 (1920).

of collection where the note has been placed in his hands for collection and he has attempted collection thereof, though suit has not been brought. Certainly, though suit is not brought, if the attorney does attempt collection his services are worth something; and the creditor will be forced to pay out of the principal sum unless the provision in the contract is enforced.¹⁹⁷ Though there are few cases on the point, the courts that allow recovery at all seem to allow it whether or not suit has been brought, provided effort has been expended.¹⁹⁸

In some jurisdictions if a note contains a clause for attorney's fees, "if suit is brought," or "if attorneys are employed to collect it," and the note is placed in the hands of attorney to collect, the maker is liable for the fees whether the note is paid in cash or a new note is executed in lieu of the past due note. But this is not true in Indiana since under a special statute the condition prevents recovery of any attorney's fees.

Where the principal and interest of the note sued upon are paid after commencement of suit and the pleadings are amended stating such facts, the principal holder is still entitled to judgment for attorney's fees stipulated in the note.¹⁹⁹

The general rule, that a suit on a note is unwarranted until maturity of such note, also pertains to notes with provisions for attorney's fees. Suits before a maturity bear no fruit. A note, providing for attorney's fees, filed before maturity, as a claim in an estate and properly allowed by the administrators gives no right to attorney fees.²⁰⁰

¹⁹⁷ *Williams v. Dockwiler*, 19 N. M. 623, 145 P. 475 (1914).

¹⁹⁸ *Monroe v. Storer*, 6 Ind. App. 364, 33 N. E. 665 (1893); *Rouyer v. Miller*, 16 Ind. App. 519 (1896); *Indiana Bond Company v. Jameison*, 24 Ind. App. 8, 56 N. E. 37 (1900); *Morrison v. Ornbuam*, 30 Mont. 111, 75 P. 953 (1904); *Maxey v. Somerton State Bank*, 22 Ariz. 371, 197 P. 894 (1921); *Nett v. Stock-growers Finance Corp.*, 84 Mont. 116, 274 P. 497 (193).

¹⁹⁹ *Nat. Park Bank of N. Y. v. Am. Brewing Co.*, 79 Mont. 542, 257 P. 436 (1927).

²⁰⁰ *St. Jos. County Sav. Bank v. Randall*, 37 Ind. App. 402, 76 N. E. 1012 (1906).

Where plaintiff, after having agreed to make a settlement, started suit on notes before the time fixed for such settlement, she could not recover attorney's fees as called for in the notes, since the contract to recover attorney's fees is one of indemnity which is only effective in case of breach on the part of the maker.²⁰¹

CONFLICT OF LAWS.

The matter of conflict of laws deserves some attention in a consideration of this subject.²⁰² Thus we find that negotiable instruments are governed by the law relating to contracts and the validity of a contract is to be determined by the law of the place where it is made or is to be performed.²⁰³

Place of performance of a promissory note is the place of payment, and when a bill or note is executed in one state or country and payable in another, the general rule is that it is governed as to the nature, validity, interpretation, and effect by the laws of the state where made payable without regard to the place where it is written, signed, or dated; it being presumed that the parties contracted with reference to the laws of that place especially where the note would be void in the place where made and valid where payable.²⁰⁴ Thus in Virginia it has been held that a note containing a provision for the payment of ten percent for attorney's fees if valid in New York, which was the place of performance, would be enforced in Virginia.²⁰⁵

In some states the provision for attorney's fees is held invalid; and in the jurisdiction so holding, no such fees can be collected, though the stipulation was valid where made, since the allowance is regarded as contrary to public policy.²⁰⁶

²⁰¹ *McConn v. Shipman*, 75 Ind. App. 212, 128 N. E. 663 (1920).

²⁰² *Ogden's Negotiable Instruments*, 4th ed., pp. 447-450.

²⁰³ *Beadable v. Moore*, 191 N. Y. S. 826, 199 App. Div. 531 (1922).

²⁰⁴ *Beadable v. Moore*, 191 N. Y. S. 826, 199 App. Div. 531 (1922).

²⁰⁵ *R. S. Oglesby Co. v. N. Y. Bank*, 114 Va. 663, 77 S. E. 468 (1913); *Contra: Exchange Bank v. Apalachin Land and Lumber Co.*, 128 N. C. 193, 38 S. E. 813 (1901); *Campen Bros. v. Stewart*, 106 W. Va., 247, 145 S. E. 381 (1929).

²⁰⁶ *Sedgwick on Damages* (9th ed.) Vol. 2, § 695c; *Exchange Bank v. Apalachin Land and Lumber Co.*, 128 N. C. 193, 38 S. E. 813 (1901).

West Virginia, Arkansas, Kansas, North Carolina and North Dakota will not enforce a stipulation in a note for the payment of attorney's fees, the stipulation being contrary to the policy of the law of these states.²⁰⁷ However, an Ohio court will enforce, according to a federal decision, a judgment rendered in Pennsylvania on a *cognovit* note made and payable in Pennsylvania though the note contained a provision for an attorney's fee, such a provision being valid in Pennsylvania, though against the public policy in Ohio. The theory of this last case is that the Ohio courts must enforce the Pennsylvania judgment under the full faith and credit clause of the federal constitution.²⁰⁸

UNUSUAL PROVISION USED BY INDIANA BANKS.

The Indiana banks in order to avoid any semblance of a *condition* as to attorney's fees in negotiable instruments are unanimous in inserting in negotiable paper the following only: "with per cent attorney's fees" or "with attorney's fees." This is made necessary by the statute heretofore discussed, which makes void any provision to pay such fees on any condition. It might be dangerous to attempt to add any other words.

As this statute as to the payment of attorney's fees is peculiar to Indiana it is unnecessary to take this precaution in other jurisdictions, except where a matter might arise on an instrument made in another jurisdiction which might be governed by the law in Indiana.

In concluding this already too lengthy paper, may we be privileged to ask a question asked us by a law student: "Was the Kansas judge correct who made the following observation a score of years ago, in a certain decision?"²⁰⁹

²⁰⁷ *Campen Bros. v. Stewart*, 106 W. Va. App. 247, 145 S. E. 381 (1928); *Arden Lumber Co. v. Henderson Iron Works & Supply Co.*, 83 Ark. 240, 103 S. W. 185 (1907); *Young v. Nave*, 135 Kan. 23, 10 P. 2d 23 (1932); *Exchange Bank v. Apalachain Land Co.*, 128 N. C. 193, 38 S. E. 813 (1901); *Continental Supply Co. v. Syndicate Trust Co.*, 52 N. D. 209, 212 N. W. 404 (1925).

²⁰⁸ *Westwater v. Murray*, 157 C. C. A. 589, 245 F. 427 (1917).

²⁰⁹ *Holliday State Bank v. Hoffman*, 85 Kan. 71, 116 P. 239, 35 L. R. A. (N. S.) 390, Ann. Cas. 1912 D (1911).

"The adoption in recent years of the negotiable instruments law by so many of the states was in response to the general desire for uniformity in respect to commercial paper. The application, however, by the courts of legal principles to particular facts has not reached scientific exactness and never will. It is hardly to be expected, therefore, that the courts of the different states which have adopted the act will always agree in the construction and application of its provisions. Actual uniformity in the law of negotiable instruments will remain a dream more or less iridescent; substantial uniformity is all that can be hoped for."

James M. Ogden.

President of Indiana Law School, Indianapolis, Indiana.