

Once a tenancy-by-the-entireties has been created, then neither spouse can appropriate to his or her own use the property held in such tenancy and the only appropriation which can be justified is one made in good faith for the mutual benefit of both parties to the tenancy.

Shapiro, supra at 136. (emphasis in original)(citations omitted). The court finds that the defendant acted in "good faith for the mutual benefit of both parties" by putting the joint income into a special account to facilitate the payment of taxes, a donation to the fire company, the payment of life insurance premiums (which had been paid out of joint income in the past), and the payment for yard work and the installation of flood lights at the marital home. Plaintiff was not excluded from the marital home, he left and stayed away of his own volition. These uses benefitted the plaintiff as well as the defendant.

Based on the above, the court finds that the defendant, Mrs. Ryder, acted in good faith in her appropriation and use of joint income. Consequently, plaintiff's bid for partition of the tenants-by-the-entireties estate is denied.

ORDER OF COURT

September 20, 1989, the plaintiff's request for partition of tenants-by-the-entireties' property is denied.

BURKHOLDER V. BENJU CORP., C.P. Franklin County Branch,
No. D.S.B. 1988-329

Confessed Judgment - Motion to Open - Amendment of Judgment

1. Where the rate of interest set forth in a confessed judgment differs from that authorized in the warrant of attorney, the Court may correct the judgment without opening it.

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2. Where a party seeks the benefit of the cognovit clause, the clause granting the power to confess judgment will be strictly construed against the party seeking to benefit from it.

William S. Dick, Esquire, Counsel for Plaintiff
Stephen E. Patterson, Esquire, and John W. Fry, Esquire, Counsel
 for defendant

OPINION AND ORDER

Kaye, J., July 13, 1989:

The matter before the Court for disposition is the petition of defendant, Benju Corporation, ("Benju") to strike or open judgment entered by confession on June 10, 1988, against plaintiff, David A. Burkholder, in his representative capacity as personal representative of the Estate of Aaron H. Meyers, ("Meyers Estate"), deceased. The amount of judgment totalled \$57, 422.17, and consisted of the following items:

1/ Principal	\$50, 500. 78
2/ Interest to 6/22/88	\$ 1,688.01
3/ Attorney's fees	\$ 5,218.88
4/ Costs	\$ 14.50
Total:	\$57,422.17

The petition to strike or open the judgment was filed on August 4, 1988, and an answer thereto was filed on August 24, 1988. Thereafter, on September 14, 1988, a rule issued on Benju Corporation to show cause why the petition should not proceed pursuant to Pa.R.C.P. No. 209.

On November 2, 1988, an affidavit of Benju Corporation's President, Benjamin A. Stevens, was filed in support of the petition.

The matter subsequently was placed on the argument list, and is now before the Court for disposition.

Initially, we note that Pa.R.C.P. No. 209 provides as follows:

RULE 209. DUTY OF PETITIONER TO PROCEED AFTER ANSWER FILED

If, after the filing and service of the answer, the moving party does not within fifteen days:

(a) Proceed by rule or by agreement of counsel to take depositions on disputed issues of fact; or

(b) Order the cause for argument on petition and answer (in which event all averments of fact responsive to the petition and properly pleaded in the answer shall be deemed admitted for the purpose of the rule); the respondent may take a rule *as of course* on the moving party to show cause why he should not proceed as above. If after hearing the rule shall be made absolute by the court, and the petitioner shall not proceed, as above provided, within fifteen days thereafter, the respondent may order the cause for argument on petition and answer, in which event all averments of fact responsive to the petition and properly pleaded in the answer shall be deemed admitted for the purpose of the rule.

We note that the rule so issued was not answered, nor was the rule made absolute. Rather, the case was put down for argument, so the issues before the Court are limited to those raised in the petition and answer. This being the procedure employed, i.e. no depositions were taken by petitioner as provided for under Pa.R.C.P. No. 209(a), for purposes of the instant proceedings, the averments of fact set forth in the respondent's answer must be deemed admitted. *Kine v. Forman*, 404 Pa. 301, 172 A.2d 164, 166 (1961). Although an affidavit has been filed by Benju Corporation, we do not think it would be proper for the Court to consider the affidavit's allegations in connection with this proceeding. Accordingly, in this decision, the contents of the affidavit will not be considered.

The note in question provides as follows:

"\$100,000 January , 1978
 FOR VALUED RECEIVED, the undersigned corporation promises to pay to the order of Aaron H. Meyers or Clara C. Meyers, his wife, of Antrim Township, Franklin County, Pennsylvania One Hundred Thousand (\$100,000.00) Dollars, without offset, in one hundred eighty (180) monthly installments of One Thousand Fourteen Dollars Twenty-Seven Cents (\$1,014.27) each (which installments include interest at the rate of Nine (9%) Per cent Per Annum on a direct reduction basis on the unpaid principal balance), the first installment due and payable on _____, 1978, and the remaining installments on the same day of each month thereafter. On non payment of any installments when due, all remaining installments shall, at the option of the holder, and without notice, become immediately due and payable. To secure

payment of this note the undersigned corporation hereby authorizes the Prothonotary, Clerk of Court, or any attorney of any court of record to appear for it in such court, at any time after maturity or default and confess a judgment against it in favor of any holder of this note without the filing of an averment of default, with release of errors, without stay of execution, and for such amount as may appear to be unpaid thereon, together with charges, reasonable attorneys' fees and costs; and the undersigned corporation does hereby waive and release all benefit and relief from any and all appraisement, stay or exemption laws of any state, now in force or hereafter to be passed.

Attest: BENJU CORP.
(Corporate Seal) BY: Ben Stevens, Pres. (Seal)
President
/s/ Alan D. Shelley (?) BY: Judy Stevens (Seal)
[Signature illegible] Secretary"

We must, under the *Kine, supra*, case turn to the relevant portions of the petition and answer to ascertain the facts before the Court in this matter. We note that the petition avers the following:

"7.

The note provides for the payment of interest at the rate of Nine (9%) percent per annum.

8.

The judgment as confessed includes interest at the rate of thirteen and one-quarter (13¼%) per cent per annum."

The Answer to the foregoing averments is as follows:

"7. The respondent admits that the Note provides for the payment of interest at the rate of nine (9%) percent per annum. Respondent avers, however, that the Note, prepared by the petitioner, is one of several documents which form the entire transaction. In fact, the course of dealing in this transaction for a period in excess of 10 years consisted of petitioner making regular principal and interest payments directly to Citizens National Bank of Greencastle on the note payable by the decedent and his wife to said bank. Paragraphs 3 through 6 of the respondent's original Complaint in the above captioned case, which more fully describes

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LEGAL NOTICES, cont.

IN THE COURT OF COMMON PLEAS OF THE 39th JUDICIAL DISTRICT PENNSYLVANIA

Joan E. Snyder, : Franklin County
Plaintiff : Branch
vs. : Civil Action - Law
: F.R. 1989 - 893
Melvin E. Snyder, :
Defendant : In Divorce a v.m.

COMPLAINT UNDER SECTION 201 (d) OF THE DIVORCE CODE

Joan E. Snyder, Plaintiff, alleges the following cause of action in divorce a v.m. against Melvin E. Snyder:

1.

Plaintiff is Joan E. Snyder, who currently resides at 12850 Grant Shook Road, Greencastle, Franklin County, Pennsylvania, with a mailing address of 12850 Grant Shook Road, Greencastle, Pennsylvania 17225, since approximately 1978.

2.

Defendant is Melvin E. Snyder, whose last known address is 12850 Grant Shook Road, Greencastle, Franklin County Pennsylvania, with a last known mailing address of 12850 Grant Shook Road, Greencastle, Pennsylvania 17225, since approximately 1978.

3.

Plaintiff and Defendant have been bona fide residents of the Commonwealth of Pennsylvania for at least six (6) months immediately previous to the filing of this Complaint.

4.

Plaintiff and Defendant were married on January 27, 1962, in Hughesville, Lycoming County, Pennsylvania.

5.

There has been no prior action of divorce between the parties.

6.

The marriage is irretrievably broken.

7.

The Plaintiff has been advised of the availability of counseling and, further, the Plaintiff has been advised that she may have the right to request that the Court require the parties to participate in counseling.

8.

Plaintiff requests the Court to enter a

LEGAL NOTICES, cont.

Decree of divorce.

I verify that the statements made in this Complaint are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S. §4904, relating to unsworn falsification to authorities.

Joan E. Snyder, Plaintiff
Patrick J. Redding, Esq.

Date: 10/20/89

IN THE COURT OF COMMON PLEAS OF THE JUDICIAL DISTRICT PENNSYLVANIA

Joan E. Snyder, : Franklin County
Plaintiff : Branch
vs. : Civil Action - Law
: F.R. 1989 - 893
Melvin E. Snyder, :
Defendant : In Divorce a v.m.

NOTICE TO THE DEFENDANT

If you wish to deny any of the statements set forth in this affidavit, you must file a counteraffidavit within twenty (20) days after this affidavit has been served on you or the statements will be admitted.

PLAINTIFF'S AFFIDAVIT UNDER SECTION 201 (d) OF THE DIVORCE CODE

1. The parties to this action separated May 25, 1985, and have continued to live separate and apart for a period of at least three (3) years.

2. The marriage is irretrievably broken.

3. I understand that I may lose rights concerning alimony, division of property, lawyer's fees or expenses if I do not claim them before a divorce is granted.

I verify that the statements made in this affidavit are true and correct, I understand that false statements herein are made subject to the penalties of 18 Pa. C.S. §4904 relating to unsworn falsification to authorities.

Joan E. Snyder, Plaintiff

Date: 10/20/89
3/2/90

the course of dealing, are hereby incorporated as though fully set forth at length.

8. The respondent admits that the judgment as confessed includes interest at the rate of thirteen and one-quarter (13¼%) percent per annum. By way of further explanation, however, petitioner has been paying interest at said rate on this loan transaction for a substantial period of time."

The paragraphs of the Complaint referred to in the foregoing are as follows:

"3. In January of 1978 defendant [i.e. Benju Corp.], executed a note payable to Aaron H. Meyers or Clara C. Meyers, his wife, in the amount of \$100,000.00. A copy of said note marked Exhibit A is attached hereto and made a part hereof.

4. Clara C. Meyers died December 22, 1983, thereby vesting full title in the above note in Aaron H. Meyers.

5. In conjunction with the execution of the above note, Aaron H. Meyers and Clara C. Meyers, executed a note in the amount of \$100,000.00, payable to Citizens National Bank of Greencastle, Pa., which funds were loaned to Benju Corp. on the aforesaid note. A copy of said note to Citizens National Bank of Greencastle, PA., marked Exhibit B is attached hereto and made a part hereof.

6. Throughout the ten-year period since the execution of the above documents, Benju Corp has made no payment to Aaron H. Meyers or Clara C. Meyers. Rather, Benju Corp. has made the regular monthly payment to Citizens National Bank of Greencastle, Pa. for said funds. No payment has ever been made by Benju Corp. to Aaron H. Meyers or Clara C. Meyers, nor by Aaron H. Meyers or Clara C. Meyers to Citizens National Bank of Greencastle.

Initially, we will note that the Meyers Estate proceeded by confessing judgment as provided for in Pa.R.C.P. No. 2951(b), by filing a complaint in the form required by Pa.R.C.P. No.2952. When this procedure is followed, in determining if a judgment entered pursuant to a cognovit clause ought to be stricken,

"...a court is limited to a consideration of matters appearing on the face of the record. If the record is self-sustaining the judgment will not be stricken. The facts averred in the complaint are to be taken as

true; if the factual averments are disputed, the remedy is by a proceeding to open the judgment and not by a motion to strike. Nevertheless, the warrant to confess judgment must be explicit and will be strictly construed. A motion to strike will be granted when it appears that judgment has been entered for a grossly excessive amount or includes recovery for items that were not authorized by the written warrant to confess judgment.

Van Arkel & Moll Properties v. Kendor, Ltd., 276 Pa.Super. 547, , 419 A.2d 593, 595 (1980) [Citations omitted].

The only basis set forth in Benju Corp's motion to strike is that the amount of interest (13¼%) claimed in the confessed judgment does not comport with the rate of interest on the note (9%). Taking as true the facts averred in the complaint, as required in *Van Arkel, supra*, the motion to strike will be denied, even though this result compels the consideration of evidence not ascertainable from the face of the note. The "item" (interest) in question is permitted to be included in the judgment entered pursuant to the warrant of attorney, and thus this situation is distinguishable from the cases in which a judgment was ordered to be stricken because the judgment included items not authorized by the warrant. See *Langman v. Metropolitan Acceptance Corp.*, 318 Pa. Super. 381, 356, 465 A.2d 5, 8 (1983) and cases cited therein.

Having disposed of the motion to strike, we will consider the motion to open the judgment. A petition to open judgment is addressed to the equitable powers of the court. When the judgment was taken by confession, it will be opened only in limited circumstances, and only when the party seeking to open it has acted promptly, has alleged a meritorious defense, and has presented sufficient evidence of the defense to require submission of the issues to a fact-finder. *First Seneca Bank & Trust Company v. Laurel Mountain Development Corporation*, 506 Pa. 439, , 485 A.2d 1086, 1088 (1984).

From a review of the parties' briefs, it appears that there is no issue as to whether petitioner acted promptly. There are issues, however, as to the whether petitioner has asserted a meritorious defense and has presented sufficient "evidence" of the defense to

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require submission of the issue to a fact-finder.

The factual averments presented by Benju Corporation as set forth in its petition to open judgment are as follows:

"12.

The judgment includes attorneys' fees at the rate of ten (10%) per cent of the total of principal and interest alleged to be due. The amount of attorneys' fees is unreasonable.

13.

The note provides for monthly installments to be made by the Petitioner to include interest at the rate of nine (9%) per cent per annum on a direct reduction basis on the unpaid principal balance.

14.

Petitioner has made twenty-six (26) payments in the amount of \$1,014.25, and ninety-four (94) payments in the amount of \$1,471.90.

15.

On a direct reduction basis at the rate of nine (9%) per cent per annum, the Petitioner does not owe the Respondent any money".

Prior to setting forth the answer filed by the Meyers Estate, it is noted that Benju Corporation did not brief the issue of the excessiveness of attorneys' fees. Thus, we will deem that issue abandoned, and will proceed on the others. The responses to the averments of paragraphs 13. through 15. are as follows:

"13.

The respondent admits that the Note provides for the payment of interest at the rate of nine (9%) percent per annum. Respondent avers, however, that the Note, prepared by the petitioner, is one of several documents which form the entire transaction. In fact, the course of dealing in this transaction for a period in excess of 10 years consisted of petitioner making regular monthly principal and interest payments directly to Citizens National Bank of Greencastle on the note payable by the decedent and his wife to said bank. Paragraphs 3 through 6 of respondent's original Complaint in the

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above captioned case, which more fully describe the course of dealing, are hereby incorporated as though fully set forth at length.

14.

Respondent has no actual knowledge of payments and, after reasonable investigation, demands proof thereof. As set forth in paragraph 6 of the Complaint no payment has ever been made to Aaron H. or Clara C. Meyers nor has the petitioner made any averment of such payments to Aaron H. or Clara C. Meyers. To the best of respondent's information and belief, petitioner has made the regular monthly payment of principal and interest owed to Citizens National Bank of Greencastle, Pa. from the commencement of the transaction through March, 1988, all payments made directly to Citizens National Bank of Greencastle, Pa.

15.

Denied. Respondent avers that petitioner owes at least the sums set forth in the Complaint. Paragraphs 7 through 14 of respondent's complaint detail the calculations of those sums claimed to be owed by petitioner to respondent and are incorporated herein as though fully set forth at length. In the alternative, respondent avers that petitioner has made no payment to Aaron H. Meyers, Clara C. Meyers, or the estate of either. Petitioner makes no averment of any payment to said individuals or estates. Therefore, in accordance with said note, petitioner owes to the respondent the principal sum of \$100,000.00, together with interest, compounded annually at the rate of nine (9%) percent per annum from January 31, 1978, through June 10, 1988, the date of confession of judgment, in the amount of \$124,242.55 making a total amount due of principal and interest of \$224,242.55, together with reasonable attorneys' fees and costs.

Initially, we will reiterate that when a proceeding advances on petition and answer pursuant to Pa.R.C.P. No. 209, "[i]f the case is ordered for argument, regardless of which party makes the order, 'all averments of fact responsive to the petition and properly pleaded in the answer' are deemed admitted for the purpose of the argument." Goodrich-Amram 2d §209:2, citing *Killian v. Killian*, 14 Cumb. L.J. 146 (1964). Put another way, the failure of Benju Corporation to take depositions on disputed issues constitutes a concession of the averments in Meyers Estate's answer to the petition. *K of C Philadelphia Federal Credit Union v. Nicolo*, 246 Pa.Super. 419, 371 A.2d 908 (1977).

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Viewed in this light, we note the Meyers Estate concedes that the note contains an interest term of 9%, not 13¼%, being the rate of interest computed by Meyers Estate to be due and as set forth in the Complaint. (It is also noted that the rate of interest at 13¼% is nowhere set forth in either the complaint or the "confession of judgment" attached thereto, other than in the *ad damnum* clause to the Complaint.)

We further observe that the Meyers Estate in its answer rejected the claim of Benju Corporation that the obligation was fully paid. Rather, it asserted, rather expansively, that "[Benju Corporation] owes at least the sums set forth in the Complaint." [Answer to Petition to strike or Open Judgment" ¶15].

In our view, as we feel compelled to accept as true the well-pleaded factual averments in the answer, *Main Line Fed. Savings & Loan v. Sando*, 110 Mont. Co. Rep. 376, 1 Packard's Law Rep. 471 (1982), it would appear that there is no basis for opening the judgment. For this reason the petition to open the judgment will be denied.

However, we do think it appropriate to order the amendment of the judgment to reflect the rate of interest (9%) set forth in the note, as opposed to an interest rate (13¼%) which is not even pleaded in the complaint filed in this matter. This would appear to reflect the principle set forth in *McDowell National Bank of Sharon v. Vasconi*, 407 Pa. 233, 178 A.2d 589 (1962), wherein a judgment entered by confession was permitted to be "corrected" when the judgment included an amount of interest not authorized by the warrant of attorney. In the instant case, the amount not authorized is the interest claimed in excess of that on the face of the note, and not pleaded in the Complaint.

Although there is authority to permit the introduction of extrinsic evidence to determine the value of an unliquidated sum for which the warrant of attorney gives authority to confess judgment, we know of no authority to permit the alteration of a fixed rate of interest as set forth in the note. Where a party seeks the benefit of the cognovit clause, the clause granting the power to confess judgment, will be strictly construed against the party seeking to benefit from it. P.L.E. Judgment §28. In this instance, Meyers Estate

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LEGAL NOTICES, cont.

The balance due shall be paid to the Sheriff by NOT LATER THAN Monday, April 30, 1990 at 4:00 P.M., prevailing time. Otherwise all money previously paid will be forfeited and the property will be resold on May 4, 1990 at 1:00 P.M., prevailing time in the Franklin County Courthouse, 3rd Floor, Jury Assembly Room, Chambersburg, Franklin County, Pennsylvania, at which time the full purchase price or all costs, whichever may be higher, shall be paid in full.

Raymond Z. Hussack
Sheriff

Franklin County, Chambersburg, PA
3/30, 4/6, 4/13/90

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has sought to benefit from the cognovit clause, which authorized the confession of judgment against Benju Corporation according to the tenor of the note of which it was a part. The Complaint filed with the confession did not set forth any basis whatever for any departure from the rate of interest stated therein. Accordingly, we will direct that the judgment be modified to include interest computed at 9% per annum, rather than the 13¼% per annum interest rate on which judgment was confessed.

ORDER OF COURT

NOW, July 13, 1989, the petition of Benju Corporation to strike off or to open the judgment in the above case is denied.

The Respondent, David A. Burkholder, Executor under the will of Aaron H. Meyers, deceased, is directed to re-calculate the interest on which judgment is confessed at a rate of nine (9%) percent per annum, and to file with the Prothonotary within ten (10) days of the date hereof, a certificate setting forth the corrected amount of interest, whereupon the amount of the judgment shall be deemed amended *nunc pro tunc* to the date of entry of judgment to reflect this adjustment.

Execptions are granted to petitioner and respondent.

COMMONWEALTH OF PENNSYLVANIA, DEPT. OF
TRANSPORTATION V. SATTERLY, C.P. Franklin County
Branch, Misc. Doc. Vol. Y, Page 536

Suspension of Operating Privileges - Administrative Delay

1. The mere passage of time between conviction and the suspension of privileges is not sufficient justification to set aside the Bureau's actions.
2. A change of circumstances occurring during an administrative delay constitutes a sufficient ground to vacate a suspension.