the Commonwealth did establish a prima facie case of defiant trespass.

> Lawfully-enacted legislation is presumed to be constitutional. An Act of Assembly will not be declared unconstitutional unless it clearly, palpably and plainly violates the Constitution. The burden rests upon the party seeking to upset legislative action on constitutional grounds. All doubt is to be resolved in favor of sustaining the legislation. See *Singer v. Sheppard*, 464 Pa. 387, 346 A.2d 897 (1975). *(Commonwealth v. Jones, Pa. Super.* , 543 A.2d 548, 551 (1988).)

We find no merit in defendant's contention that Section 3503(b) is unconstitutionally vague.

ORDER OF COURT

NOW, this 1st day of September, 1988 the Omnibus Pre-Trial Motion of Tommie Lynn Pogue in the nature of a Motion to Quash is dismissed.

Exceptions are granted to the defendant.

FIRST NATIONAL BANK AND TRUST COMPANY V. CORNETT, ET AL., C.P. Franklin County Branch, No. D.S.B. 1987-822

Confession of Judgement - Promissory Note - Guarantee - Motion to Strike - Attorney Fee

1. For a contract authorizing confession of judgement to be enforceable, it must be free from doubt.

2. Where a guarantee agreement does not state that attorney fees for collection costs are recoverable, a reasonable doubt is raised where plaintiff argues such costs are included in the general term "costs of suit."

3. If a confessed jugement includes an item not authroized by the warrant of attorney, the judgement is void in its entirety and must be stricken.

Timothy W. Misner, Esq., Attorney for Plaintiff
Stephen E. Patterson, Esq., Attorney for Defendant Cornett

KAYE, J., October 11, 1988:

OPINION

Thismatter comes before this Court on the petition of William L. Cornett and A. Arlene Cornett, his wife, ("Petitioners") to strike or open a judgment entered by confession pursuant to the cognovit clause contained in a guaranty agreement executed by petitioners on a promissory note. Initially we will set forth the facts alleged in the petition, and which are matters of record, admitted in the pleadings, or which were conceded at the evidentiary hearing held on the petition.

On October 24, 1986, Automotive Multi-List Service, Inc. ("AMS") made and delivered to First National Bank and Trust Company, Waynesboro, Pennsylvania, ("the bank"), a promissory note in the principal amount of $198,000. William L. Cornett, in his capacity as President of AMS, was one of the makers of the note:

> Waynesboro, Pa., October 24, 1986. $198,000.00. On Demand days AFTER DATE, I, WE, OR EITHER OF US, PROMISE TO PAY TO THE ORDER OF First National Bank and Trust Company AT FIRST NATIONAL BANK & TRUST COMPANY, WAYNESBORO, PENNA. One Hundred Ninety-Eight Thousand and no/100 ----- DOLLARS WITHOUT SETOFF OR COUNTERCLAIM, FOR VALUE RECEIVED WITH INTEREST. And further _____ do hereby authorize and empower the Prothonotary or any Attorney of any Court of Record of Pennsylvania, or elsewhere, to appear for and to enter judgment against _____ for the above sum at any time before or after maturity, with cost of suit, release of errors, without stay of executiion and with 15 per cent added for collection fees; and_____ do hereby waive and release all relief from any and all appraisment, stay or exemption laws of any state, or any bankruptcy laws of the United States, now in force, or hereafter to be passed.
>
> Automotive Multi-List Service, Inc.
> /s/ William L. Cornett (seal)
> President (seal)
> /s/ W. Kenneth Haugh (seal)
> Secretary/Treasurer
>
> Witness /s/ Dale R. Kinley

Also on October 24, 1986, the following writing ("the guaranty") was executed:

For value received the under signed hereby guarantees [sic] payment of attached note bearing even date of Automotive Multi-List Services, Inc. in the amount of $198,000.00, waiving protest and notice of protest, hereby authorizing any Prothonotary or attorney to appear and confess judgment therefor with costs of suit, release of all errors, waivers of inquisition, condemnation, stay of execution, and waiver of all exemption laws.

/s/ William L. Cornett (seal)
William L. Cornett
/s/ A. Arlene Cornett (seal)
A. Arlene Cornett
/s/ W. Kenneth Haugh (seal)
W. Kenneth Haugh
/s/ Joanne C. Haugh (seal)
Joanne C. Haugh
/s/ Alton L. Pscholka (seal)
Alton L. Pscholka
/s/ Brenda K. Pscholka (seal)
Brenda K. Pscholka

/s/ Dale R. Kinley
witness as to all six

On December 15, 1987, the bank confessed judgment against petitioners and certain other individuals. That protion of the confessed judgment to this proceeding was entered pursuant to the warrant of attorney contained in the guaranty set forth above. The total amount of the confessed judgment was $247,883.62, and consisted of the following items: principal - $198,000.00; interest - $17,550.97; Attorney fees - $32,332.65. On May 20, 1988, petitioners filed a petition to Strike or Open Judgment, in which it was averred:

1/ that the judgment was defective in that it provided for interest in an amount in excess of 6%, which is alleged to be the statutory interest where the instrument fails to set forth the rate of interest;
2/ that if the guaranty is effective, it is limited to payment of the principal and interest only, and does not extend to include attorney's fees;
3/ that the guaranty was unenforceable due to the granting of a second extension of the time for payment of the underlying obligation;
4/ that the procedure employed to secure the judgment was improper due to non-compliance with Pa. R.C.P. Nos. 2981-2986, which compliance is compulsory under Act 6 of 1974, 41 P.S. §407(a).

In its Answer filed on June 21, 1988, the bank answered the above claims as follows, which is stated in the same order as above:

NOTICE

NOTICE IS HEREBY GIVEN that Articles of Incorporation have been filed with the Commonwealth of Pennsylvania, Department of State at Harrisburg, Pennsylvania, on January 10, 1989, for the purpose of obtaining a Certificate of Incorporation.

The name of the proposed corporation organized under the Commonwealth of Pennsylvania Business Corporation Law, approved may 5, 1933, P.L. 364, as amended, is FRANKLIN RESIDENCES, INC.

The purpose or purposes for which the corporation has been organized are:

"To provide elderly persons and handicapped persons with housing facilities and services specially designed to meet their physical, social and psychological needs, and to promote their health, security, happiness and usefulness in longer living, the charges for such facilities and services to be predicated upon the provision, maintenance and operation thereof on a non-profit basis. The corporation is irrevocably dedicated to and operated exclusively for non-profit purposes, and no part of the income or assets of the corporation shall be distributed to, no inure to the benefit of any individual."

Joel R. Zullinger
Suite 310
Chambersburg Trust Co. Bldg.
Chambersburg, PA 17201
Attorney

2/3/89

IN THE COURT OF COMMON PLEAS OF THE 39TH JUDICIAL DISTRICT OF FRANKLIN COUNTY, PENNSYLVANIA ORPHANS' COURT DIVISION

The following list of Executors, Administrators and Guardian Accounts, Proposed Schedules of Distribution and Notice to Creditors and Reasons Why Distribution cannot be Proposed will be presented to the Court of Common Pleas of Franklin County, Pennsylvania, Orphans' Court Division for CONFIRMATION: March 2, 1989.

BAKER: First and final account, statement of proposed distribution and notice to the creditors of Ada R. Baker and Linda Baker, Administratrices of the Estate of Francis Baker, late of Quincy Township, Franklin County, Pennsylvania, deceased.

LEGAL NOTICES, cont.

YEAGER: First and final account, statement of proposed distribution and notice to the creditors of Ralph E. Yeager, Chester Ray Yeager, John Yeager, Jr., and Richard Lee Yeager, Co-Executors of the Estate of Ethel Mae Yeager, late of Guilford Township, Franklin County, Pennsylvania, deceased.

Robert J. Woods
Clerk of Orphans' Court
Franklin County, Pennsylvania

2/3, 2/10, 2/17, 2/24/89

NOTICE OF WINDING-UP PROCEEDING
VALLEY TEXTILES, INCORPORATED

Notice is hereby given that VALLEY TEXTILES, INCORPORATED, a Pennsylvania corporation with principal offices located at 4606 Letterkenny Road West, Chambersburg, Pennsylvania, has filed a Certificate of Election to Dissolve and is winding-up its business. All communication or inquiry should be submited to: Law Offices of Welton J. Fischer, 550 Cleveland Avenue, Chambersburg, Pennsylvania 17201.

2/3, 2/10/89

NOTICE OF WINDING-UP PROCEEDING
MELLOTT MANUFACTURING COMPANY, INCORPORATED

Notice is hereby given that Mellot Manufactoring Company, Incorporated, with principal offices located at 13156 Long Lan Mercersburg, Pennsylvania, has filed a Certificate of Election to Dissolve and is windin up its business. All communication or inquiry should be submitted to: Law Offices of Welton J. Fischer, 550 Cleveland Avenue, Chambersburg, Pennsylvania 17201.

2/3, 2/10/89

NOTICE OF WINDING-UP PROCEEDING MOUNTAIN VIEW REALTY CORPORATION

Notice is hereby given that MOUNTAIN VIEW REALTY CORPORATION, a Pennsylvania, has filed a Certificate of Election to Dissolve and is winding-up its business. All communication or inquiry should be submitted to: Law Offices of Welton J. Fischer, 550 Cleveland Avenue, Chambersburg, Pennsylvania 17201.

2/3, 2/10/89

1/ That the interest rate is fixed pursuant to an agreement of AMS and the bank at an amount five percentum (5%) above the Philadelphia Federal Reserve Discount Rate;
2/ that the guaranty agreement provides for payment of attorney's fees as an integral part of the agreement;
3/ that the only extension of the time for payment was for a single four (4) month period;
4/ that the provisions of Act 6 of 1974 are inapplicable because the mortgage principal exceeds the amount required to qualify as a residential mortgage under the provisions of the Act.

Also, on June 21, 1988, on stipulation of the parties, it was ordered that the Court would proceed at this time on the issues raised in Count II of the petition, i.e. the motion to strike raising the issue of whether the judgment may include attorney's fees when the judgment was entered pursuant to a cognovit clause in a guaranty agreement which does not expressly provide for such fees. Other issues raised were reserved for later decision by the Court.

Subsequent to the foregoing, the parties submitted briefs to the Court on the limited issue set forth above, and oral argument was held thereon. This limited issue is now before the Court for resolution.

Initially, we will observe that few things in the law are more nettlesome than issues arising out of the use of warrants of attorney. The Superior Court noted in an opinion filed seventeen years ago that the majority of states had even by that time eliminated or severely limited the use of warrants of attorney. *Citizens National Bank of Evans City v. Rose Hill Cemetary Assoc. of Butler,* 218 Pa. Super. 366, 281 A.2d 73 (1971).

As only he could do, Justice Michael Musmanno of the Pennsylvania Supreme Court wrote as follows:

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

Cutler Corp. v. Lathaw, 374 Pa. 1, 4-5, 97 A.2d 234, 236 (1953), as cited in *Solebury Nat. Bank of New Hope v. Cairns,* 252 Pa. Super. 45, 49-50, 380 A.2d 1273, 1275 (1977).

The *Solebury* case, *supra,* is cited by petitioner as authority for their position, while the bank claims that that case is distinguishable on its facts. In that case, the underlying obligatin was evidenced by a promissory note made by Benjamin F. Cairns, III, and William Kratz in their capacity as officers in Kratz and Cairns Excavating Corporation. The note contained confession of judgment clause authorizing any prothonotary or clerk of courts to confess judgment for the unpaid amount of the note plus 18% for collection costs and the costs of suit. Three days after execution of the note, Benjamin F. Cairns, III, and William and Delores Kratz individually executed a guaranty instrument which provided:

> FOR VALUE RECEIVED, the undersigned jointly and severally guarantee payment of the within note according to its terms and hereby agree to all the provisions thereof. Protest and notice is hereby waived in the within promissory note and I/We hereby endorse the same.

Approximately one year thereafter, judgment by confession was entered against both the corporate makers of the note and the individual guarantors. A motion to strike and a motion to open the judgment entered against Benjamin F. Cairns, III, individually, were filed and dismissed by the trial court. In reversing the trial court, Superior Court reviewed the applicable law as follows:

> A motion to strike a judgment will not be granted unless a fatal defect in the judgment appears on the face of the record. If the record is selfsustaining, the judgment will not be stricken...*It is well-settled that a written lease or contract which authorizes a party to confess judgment must be clear and explicit and strictly construed. If any doubt exists as to propriety or effect of a warrant of attorney authorizing confession of judgment, the doubt must be resolved against the party in whose favor the warrant is given.* Our Court has recognized that this rule of strict construction may be constitutionally mandated in light of recent due process attacks on cognovit clauses.
>
> *Solebury, supra,* 252 Pa. Super. at 48-49, 380 A.2d at 1275 (Citations omitted, emphasis added).

There is a factual distinction in *Solebury,* from the case *sub judice,* in that in the former the cognovit clause itself was missing from the guaranty, while it is not in the latter. In the instant case, it is the attorney's fee term that is omitted from the guaranty.

Notwithstanding that factual difference, we do not see any logical reason that the result should be any different in the instant case. The language cited above from *Solebury* makes it abundantly clear that for a contract authorizing judgment by confession to be enforceable, it must be free from doubt. This principle is not limited solely to the cognovit clause itself, but is applicable as well to what claims are authorized to be confessed by the clause. In a review of the language in the cognovit clause under review, we find nothing therein which authorizes inclusion of attorney's fees in judgment enter by confession. The bank contends that the phrase in the guaranty which authorizes "...costs of suit" is sufficient to permit entry of judgment for attorney's fees. While there is some authority in other jurisdictions (e.g. *Alland v. Consumers Credit Corporation,* 476 F.2d 951, 958 (2d Cir., 1973), for this proposition, we think that it is clear from case law in Pennsylvania cited above, as well as additional cases cited therein, that the abiding principle is that doubts about the recovery of damages in such cases must be resolved against the party seeking to benefit form the cognovit clause. The principle herein is not whether "costs of suit" can possibly be interpreted expansively to include "attorney's fees" as included therein, but rather whether it is free from reasonable doubt that such fees are included therein. We conclude that such clarity does not exist in the instant case and therfore reject the bank's argument.

Further, we note that the judgment note in this case explicitly authorizes confession of judgment for the principal debt, "with costs of suit, release of errors, without stay of execution and with 15 percent added for collection fees", while the guaranty authorizes confession of judgment for the principal debt "with costs of suit" and without mention of the collection fees. We think this language suggests at best for the bank's position the insertion of an ambiguity regarding this element of the claim, and at worst a purposeful exclusion of this item. In any event, following the directive in *Solebury* to construe this doubtful language against the party in whose favor the warrant was given, we believe that petitioners have demonstrated that they are entitled to relief.

The inquiry does not end here, however, as we still must determine the appropriate remedy, as it does not follow *a fortiori* from the foregoing that the entire judgment is defective. We have reviewed the decisional law on the appropriate remedy, and note

the following: In a case cited by petitoners, *McDowell National Bank v. Vasconi,* 407 Pa. 233, 178 A.2d 589 (1962), when confronted with a confessed judgment which included interest which was not authorized by the warrant of attorney, the Pennsylvania Supreme Court approved a "correction" of the amount of judgment by the removal of the wrongly included item. In so doing, it distinguished cases wherein the entire judgment had been stricken under similar circumstances as follows:

> "In all these cases (in which the entire judgment was stricken) the item which was added to the face value of the judgment note was something foreign to and so unassimilable with the principal that the total which was finally found became a heterogeneous rather than a homogeneous whole. Interest, as already noted, is not something separate and apart from the substative debt - it is the bark which grows with the tree and is not regarded generally as being separable from the tree, except where the parties explicitly or implicitly agree to so strip it."
>
> 407 Pa. at 236
> 178 A.2d at 591.

With the metaphor removed, it is evident that where the wrongful item included in the confessed judgment is interest, the appropriate remedy is to direct that the judgment be amended by deducting from it the improperly included interest. However, this result appears to be an anomaly, owing to numerous other cases decided subsequent to *McDowell* which set forth the controlling legal principle as follows:

> "In numerous decisions, (the courts) have ruled that if the confessed judgment includes an item not authorized in the warrant, the judgment is void in its entirety and must be stricken."
>
> *Langman v. Metropolitan Acceptance Corp.,*
> 318 Pa. Super.
> 381, 386, 465 a.2d 5, 8 (1983)
> citing,
> *inter al., Kline v. Marianne Germantown Corp.,*
> 438 Pa. 41, 45, 263 A.2d 362, 364 (1970).

We note that the later decisions are unqualified, unequivocal and mandatory in content. As noted in *Langman,* the only question is whether the defect is procedural as opposed to the inclusion of

an item not authorized by the warrant of attorney. If it is found to be the latter, the *entire* judgment *must* be stricken.

Although we have some misgivings that this extreme remedy is appropriate, we are found by the later precedential authority that we read to permit no discretion if an unauthorized item is found to be included within the judgment. That being the finding previously made herein, the entire judgment will be stricken.

ORDER OF COURT

NOW, October 11, 1988, the Court having considered Count 2 of the petition of Defendants William L. Cornett and A. Arlene Cornett to strike the judgment entered pursuant to confession of judgment on December 15, 1987, the answer thereto filed by Plaintiff, and having reviewed the briefs submitted by the parties, and having considered the oral argument presented in support thereof, it is ordered that the judgment entered in the above as to defendants William L. Cornett and A. Arlene Cornett, shall be stricken.

COMMONWEALTH, DEPARTMENT OF ENVIRONMENTAL RESOURCES v. BAUMGARDNER COMPANY, C.P. Franklin County Branch, Misc. No. 20 of 1986

Clean Streams Law - Summary Offense - Intent of Defendant

1. Where defendant was charged with exceeding the discharge limit of defendant's permit under the Clean Streams Law, the charge is criminal in nature and requires proof beyond a reasonable doubt.

2. Intent is not an element for offenses under the Clean Streams Law.

John McKinstrey, Esquire, Counsel for Plaintiff
Jan G. Sulcove, Esquire, Counsel for Defendant

WALKER, J., August 31, 1988:

On October 9, 1988, Durand Little, a water quality specialist with the Department of Environmental Resources ("DER"), conducted a routine inspection of the defendant, Baumgardner Company, an oil recycling facility. During the inspection, Little