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Philip Shuchman

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CONFESSION OF JUDGMENT AS A CONFLICT OF
LAWS PROBLEM*Philip Shuchman**

In seven states¹ the judgment note or so-called "cognovit instruments," containing a warrant to confess judgment against the debtor, is in common use.² The contract permits an action in debt, assumpsit or contract resulting in an immediate judgment without prior suit or service upon the debtor or maker of the instrument. Sometimes judgment may be confessed at or shortly after execution of the note as additional security for a loan or other extension of credit³ whether or not any money is then owing;⁴ more often the instrument permits the entry of judgment only after default.⁵ In either case there has been a submission in advance to the jurisdiction of the court of rendition; often running to any court in the United States.⁶

Ordinarily an attorney of the creditor's choosing enters his appearance pro forma for the debtor and confesses a judgment against him, which, for most purposes, is a final adjudication.⁷ Several jurisdictions absolutely prohibit the use of the judgment note, deeming any such contract stipulation void as against local public policy;⁸ others provide criminal penalties for violation of

* A.B., LL.B., M.A.; member of the Pennsylvania Bar.

1 Delaware, Illinois, Ohio, Pennsylvania, Utah, Virginia and Wisconsin. See Note, *Confessions of Judgments*, 102 U. PA. L. REV. 524, 525 (1954).

2 See, e.g., Tanner, *Uniformity of Judgment Notes in Pennsylvania*, 44 DICK. L. REV. 173 (1940); Hunter, *The Warrant of Attorney to Confess Judgment*, 8 OHIO ST. L.J. 1 (1941).

3 See Annot., 3 A.L.R. 851 (1919).

4 See, e.g., Mellon v. Ritz, 332 Pa. 97, 2 A.2d 699 (1938); Harwood v. Bruhn, 313 Pa. 337, 170 Atl. 144 (1934).

5 Such notes are generally negotiable instruments both under the UNIFORM COMMERCIAL CODE § 3-112 (1) (d) and the UNIFORM NEGOTIABLE INSTRUMENTS LAW § 5 (2).

6 See, e.g., Oberlin v. Parry, 287 Pa. 224, 134 Atl. 460 (1926), Annot., 155 A.L.R. 921, 923 (1945); First National Bank of Athens v. Garland, 109 Mich. 515, 67 N.W. 559 (1896).

7 Kieda v. Krull, 101 F.2d 917 (3d Cir. 1939); Pennsylvania Co. v. Watt, 151 F.2d 697 (5th Cir. 1945).

8 A listing of those states is given in Note, *Confessions of Judgments*, 102 U. PA. L. REV. 524 (1954).

the statute.⁹ Some jurisdictions prohibit the confession of judgment as a matter of local practice. Frequently where statutes prohibit the confession of judgment, the courts regard it as a procedural device,¹⁰ which need not be herein further considered because it is generally agreed that the law of the place where the judgment is sought to be confessed should control the availability of judgment as a remedy. Such an interpretation does not prevent the local execution of cognovit instruments where judgment is to be confessed or performance made in other states which permit the practice; but merely precludes the exercise of the power to confess judgment within that state, no matter where executed.¹¹

Where there is a prohibition of the stipulation authorizing confession of judgment in the note, that involves the validity of the contract itself which must be determined by reference to the law which, for other purposes of contract validity, is regarded as proper at the forum.¹² Thus the examination of such provisions entails an examination of the law of contracts in the conflict of laws generally.

Public policy of forum

Although there is little question but that even an explicitly stated public policy in the forum against the cause of action which gave rise to the judgment cannot prevail as a defense to a judgment lawfully taken elsewhere,¹³ it is fairly patent that state courts in such jurisdictions have stretched the conflict of laws rules and the full faith and credit clause in several inconsistent directions to achieve the invalidation of judgment taken by confession elsewhere.

Merger of cause of action in the judgment

Moreover, the possibility that the illegal cause of action (the judgment note invalid by the law of the state where executed or to be performed) would be merged in the judgment and the cause of action thereby rendered immune to attack¹⁴ has been precluded by the decisions which, while holding the validity of the judgment claim not open to inquiry, except for fraud and payment, do permit examination of the jurisdiction of the court of rendition.¹⁵ And where judgment is confessed on an invalid warrant, it is, in legal effect, deemed to be a personal judgment without personal service and without the appearance of the defendants in person or by an authorized attorney; hence lacking an adequate jurisdictional basis. In sum, it is a judgment rendered without due

⁹ Indiana, IND. STAT. ANN. § 2-2906 (1946); New Mexico, N.M. STAT. ANN. § 21-9-18 (1953).

¹⁰ See, e.g., *McDade v. Moynihan*, 330 Mass. 437, 115 N.E.2d 372 (1953); *Gotham Credit Corp. v. Powell*, 22 N.J. Misc. 301, 38 A.2d 700 (1944); *Albert B. & L. Ass'n v. Newman*, 224 N.Y. Supp. 386 (Sup. Ct. 1927).

¹¹ Cf. *Comment*, 29 MICH. L. REV. 105 (1930).

¹² Cf. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 268-70 (1951).

¹³ *Christmas v. Russell*, 72 U.S. (5 Wall.) 290 (1866); *Fauntleroy v. Lum*, 210 U.S. 230 (1908).

¹⁴ Cf. *Titus v. Wallick*, 306 U.S. 282, 291 (1939); *Kenney v. Supreme Lodge*, 252 U.S. 411, 415 (1920); *Picking v. Local Loan Co.*, 185 Md. 264, 44 A.2d 462 (1945).

¹⁵ See, e.g., *Milwaukee County v. White Co.* 296 U.S. 268, 275 (1935); *National Exchange Bank v. Wiley*, 195 U.S. 257, 268 (1904).

process of law.¹⁶ In the case of the cognovit instrument, application of the law of the state of execution or performance may sometimes not only invalidate the contract which constitutes the cause of action (or at least that portion which is the remedy granted the creditors) but that step has the extraterritorial effect of divesting any other court of jurisdiction to render the judgment by confession notwithstanding express contract provisions to the contrary.

Since the United States Supreme Court has spoken often and forcefully in favor of the "intention" theory¹⁷ where federal questions are involved and since it is clear that an illegal and even a void cause of action in one state can give rise to a cause of action resulting in judgment in another state to which the first state must offer full faith and credit,¹⁸ it is curious that these states have been permitted to deny full faith and credit to judgments entered by confession solely on the ground that since the cognovit instrument was invalid where executed, (or where it is to be performed) it cannot be the basis of a lawful judgment rendered elsewhere. Clearly the denial of full faith and credit involves a federal question, for a state court has refused credit to the judgment of a sister state, in reality because of its opinion of the nature of the cause of action and the judgment in which it is merged. A federal right, it has been held, is thereby denied and the sufficiency of the grounds of denial are for the Supreme Court finally to decide.¹⁹

Where the entire cause of action resulting in the judgment is unlawful because arising out of a gambling debt,²⁰ or clearly barred by the statute of limitations before the judgment was procured,²¹ the forum cannot withhold full faith and credit from the judgment rendered in another state.²² Yet the policy of the forum, which is usually the debtor's domicile, is by no means less contravened in these cases than in the execution of a judgment note in the ordinary course of business.²³ Of course, it can be hypothesized that in fact no cause of action has been created by the making of a judgment note where prohibited by statute. But since these very states do not ordinarily impair the obligation itself, merely eradicating part of the remedy,²⁴ it is patent that some cause of action has been created; an obligation, the performance of which can be otherwise compelled, exists.

The United States Supreme Court has not yet considered these questions, but that strict observance of the terms of a warrant of attorney to confess judgment will result in a judgment entitled to full faith and credit seems a conclusion warranted by the two decisions of the Court bearing on the matter.²⁵

16 Cf. *National Exchange Bank v. Wiley*, *supra* note 15 at 268.

17 See *Pritchard v. Norton*, 106 U.S. 124, 137 (1882); cf. *Lauritzen v. Larsen*, 345 U.S. 571, 588-89 (1953).

18 Op. cit. *supra* note 14.

19 *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943); *Titus v. Wallick*, *supra* note 14, at 291.

20 *Fauntleroy v. Lum*, *supra* note 13.

21 *Christmas v. Russell*, *supra* note 13; but cf. *Brown v. Parker*, 28 Wis. 21 (1871), Annot., 21 A.L.R. 774, 776-77 (1922).

22 *Magnolia Petroleum Co. v. Hunt*, *supra* note 19 at 439.

23 Cf. *Kenney v. Supreme Lodge*, *supra* note 14 at 415.

24 See *Partial Invalidation*, *infra*.

25 *Grover & Baker Machine Co. v. Radcliffe*, 137 U.S. 287 (1890); *National Exchange Bank v. Wiley*, *supra* note 15; cf. Comment, *Full Faith and Credit for Judgments Confessed by Attorney*, 44 HARV. L. REV. 1275, 1281 (1931).

Certainly the Supreme Court has set a rigid standard of full faith and credit²⁶ which makes it doubtful that such practices at the forum can be upheld.²⁷

Presently, many of the problems presented to those using cognovit instruments are in the conflict of laws area, where, notwithstanding the constitutional admonition, various contract theories in the conflict of laws are used to uphold local public policy of the forum, evidenced by restrictive and frequently prohibitive legislation regarding the confession of judgment.

At least three inconsistent theories relating to contracts which include confession of judgment clauses are commonly found.

Place of contracting

Under this theory, the place of execution of the contract, as in the general conflict of laws rules, is determinative of its essential validity. Given the views of the Restatement,²⁸ *Beale*²⁹ and probably of most of the jurisdictions which have passed on the matter³⁰ if the law of the place where the contract is made gives it no legal validity, then no other law has the power to create a binding obligation.³¹ Although the Restatement of Judgments does provide for jurisdiction by consent given in cognovit instruments, nothing is there said of the possible contract prohibition and invalidation in the state where the contract is executed.³²

Under this rule, then, if cognovit clauses are void where the judgment note is made, the contract is invalid everywhere, and a judgment confessed thereon was rendered without proper jurisdiction in the court of rendition. Since the jurisdiction of the court out of which the judgment issued is always open to question, under the full faith and credit clause, the examination of the validity of the original contract can result in the denial of the plaintiff's claim in a suit upon the confessed judgment.

As various critics have pointed out, the place of contracting may be fortuitous, or in any of several ways an entirely insignificant factor as between parties who are not residents of the state of contracting. The often accidental location of the last "act" or the "principal event" is a frequent difficulty;³³ nor is there necessarily a single such locale. And the peculiarity of the situation where the law of the forum decides where the contract was legally executed so as to determine the applicable law has been aptly criticized as a legalistic finesse defying common sense.³⁴ The "place of contracting" theory has the inherent defect of the prior need to know the last act necessary for a binding

26 *Fauntleroy v. Lum*, *supra* note 13.

27 *Cf. EHRENZWEIG, CONFLICT OF LAWS* 197 (1959).

28 *RESTATEMENT, CONFLICT OF LAWS* § 332 (1934); see *Wilensky v. Miller*, 257 Wis. 589, 44 N.W.2d 521 (1950).

29 ". . . the effect of illegality . . . is to be determined by the law of the place of contracting. If that law makes the contract itself illegal, of course, it is void everywhere." 2 *BEALE, CONFLICT OF LAWS* 1227 (1935) (hereinafter cited as *BEALE*). But see 2 *BEALE, CONFLICT OF LAWS* 1230 for what may be a qualification in regard to cognovit instruments.

30 *Cf. Annot.*, 19 A.L.R.2d 544, 547 (1951).

31 *Cf. COOK, THE LOGICAL AND LEGAL BASES OF CONFLICT OF LAWS* 348 (1942).

32 *RESTATEMENT, JUDGMENTS* § 18, Comment (e) (1942).

33 See Note, *Party Autonomy in Contracts*, 57 *COLUM. L. REV.* 553, 568 (1957).

34 2 *RABEL, THE CONFLICT OF LAWS* 461 (1937) (hereinafter cited as *RABEL*). In *Loudonville Milling Co. v. Davis*, 248 Ala. 202, 27 So. 2d 6 (1946), it was found as a fact

agreement which can only be known after it is known which law is to determine the acts that are necessary for the creation of the contract.³⁵ Even staunch advocates of the "place of contracting" rule admit that its consistent application is often apt to frustrate the intention of the parties;³⁶ and this is especially true where both parties expressly agree on the application of a certain law in commercial loan contracts involving the use of *cognovit* instruments.

Place of performance

Unquestionably the warrant of attorney to confess judgment relates to the remedy given the creditor and, when exercised, is a procedural matter; hence some commentators and jurists have taken the view that although the substantive validity of the obligation is to be determined by the law of the place of execution, the power or warrant of attorney should ordinarily be governed by the law of the place where performance, *i.e.*, payment, is to take place.³⁷ With a nod in the direction of the autonomy of the contracting parties regarding their intent in the choice of applicable law, judgments taken by confession are deemed valid or not depending on the stipulated place of payment.³⁸

It is probably true that in many cases the place of performance is more significant to the contracting parties than the place of contracting, if any such single place there be. But the place of performance may be equally accidental or insignificant as a basis for choice of the applicable law.³⁹ It is also clear that where bilateral contracts are involved, or multiple-state performance, the test of the law of the place of performance "fails to work in a frequently encountered and important class of cases."⁴⁰ Because the forms used by the major lending and credit institutions are often drawn with a view toward the law of their domiciles, the *cognovit* clause, if included, is generally valid at the stipulated place of payment. Here it is fairly certain that at least one of the contracting parties had the law of the place of performance in mind. If the "place of performance" theory were consistently followed, the validity of judgments taken by confession might be a simple matter to insure by providing for payment in a jurisdiction which permits such entry of judgment. But this is a minority view, not sufficiently available even where a single and exclusive place of performance does exist.

that the judgment note was "executed" in Alabama although it had been delivered to the plaintiff in Ohio and accepted there. The decision went so far as to construe the statutory prohibition against "execution" within the state as synonymous with "signed." See 8 ALA. LAWYER 178 (1947).

35 EHRENZWEIG, *CONTRACTS IN THE CONFLICT OF LAWS*, 59 COLUM. L. REV. 973, 986 (1959).

36 GOODRICH, *HANDBOOK OF THE CONFLICT OF LAWS* 323 (1949) (hereinafter cited as GOODRICH).

37 3 FREEMAN ON JUDGMENTS 1314 (1925) suggests that the parties had the law of such place in mind "though of course the circumstances or contract may sufficiently indicate that the parties had some other law in mind"; 2 BEALE 1230; *cf.* Annot., 19 A.L.R.2d 544, 546 (1951).

38 *South Orange Trust Co. v. Barrett*, 45 Del. 533, 76 A.2d 310 (1950); *Vennum v. Mertens*, 119 Mo. App. 461, 95 S.W. 292 (1906); *Krantz v. Katzenstein*, 22 Pa. Super Ct. 275 (1903); *cf.* *Hastings v. Bushong*, 252 S.W. 246 (Tex. Civ. App. 1923); Comment, MICH. L. REV. 105 (1930).

39 *Cf.* 2 RABEL 472.

40 GOODRICH 325.

Some questions

Strange cases can arise under both theories. Given that an Alabama statute makes void any cognovit instrument executed in that state,⁴¹ if a debtor in Alabama signs a judgment note there and then personally travels to Ohio and delivers the signed note to his creditor in Ohio, could an Alabama court hold the judgment confessed in Ohio void merely because the instrument was signed in Alabama?⁴²

Consider the situation where a lender in Florida has a judgment note executed in Florida providing for payment in Pennsylvania. The borrower is a Pennsylvania resident and has realty there on which a confessed judgment would be a lien. Given the usual broad form of authority, judgment could be confessed upon the cognovit instrument in Pennsylvania and a valid judgment upon which local execution could issue thereby created; but that same judgment would be void in Florida, and not accorded full faith and credit.⁴³

Florida determines the validity of contracts by the place of execution⁴⁴ and Pennsylvania by the place of performance if designated.⁴⁵ Hence, it is quite possible, notwithstanding the explicit intent and purpose of the parties, that the confessed judgment in Pennsylvania would not only be void in Florida but, as a result, questionable in Pennsylvania as well, given proof of Florida law in the courts of Pennsylvania as the forum.⁴⁶ Most likely the judgment would be valid in Pennsylvania and not constitute a deprivation of due process.⁴⁷ Moreover, the citizen of Florida has received no protection whatever, a situation which would similarly obtain where both parties to the cognovit instrument were merely vacationing in Florida and happened to transact this particular business there.

Can it be reasonably said that two Ohio residents temporarily in Alabama should not have the law of Ohio control their transaction where that is both the state of performance and the situs of the security?⁴⁸ Or even where both the latter factors are lacking as *e.g.*, where payment may be made at any office of the lender in any of several states? No citizen of Alabama has been accorded any protection.

Had the loser in the gambling transaction, which is the subject matter of *Fauntleroy v. Lum*,⁴⁹ given the winner a judgment note to secure payment where Mississippi prohibits the confession of judgment⁵⁰ and makes such agreements void, could it have been held, consistent with the constitutional mandate, that the judgment confessed thereon in a state permitting such practice would not have been entitled to full faith and credit in Mississippi? If the unlawful

41 ALA. CODE tit. 20, § 16 (1940).

42 See *Loudonville Milling Co. v. Davis*, *supra* note 34; *Monarch Refrigerating Co. v. Faulk*, 228 Ala. 554, 155 So. 74 (1934); *cf.* 8 ALA. LAWYER 182 (1947).

43 *Cf.* *Pennoyer v. Neff*, 95 U.S. 714 (1887); *Grover & Baker Machine Co. v. Radcliffe*, 137 U.S. 287 (1890).

44 *Pearson v. Friedman*, 112 So. 2d 894 (Fla. Dist. Ct. App. 1959).

45 *Krantz v. Katzenstein*, *supra* note 38.

46 *Cf.* *Oberlin v. Parry*, 287 Pa. 224, 134 Atl. 460 (1926).

47 *Cf.* *Grover & Baker Machine Co. v. Radcliffe*, *supra* note 43.

48 *Cf.* *Cook* 405-06.

49 210 U.S. 230 (1908).

50 MISS. CODE ANN. § 1545 (1942).

cause of action in *Fauntleroy v. Lum* gave rise to a judgment which the Supreme Court held was entitled to full faith and credit in Mississippi, can the addition of a procedural remedy for the creditor make such a difference? It is a strange doctrine that does not permit the examination of the illegal consideration which gave rise to the judgment, but permits invalidation of the judgment merely because of a remedy given the creditor. But such is the conflict of laws rule which holds the law of the place of contracting determinative. And was it not true in *Fauntleroy v. Lum* that both the "place of contracting" and the "place of performance" was Mississippi, where the contract was void and that even the judgment recovered for the express purpose of evading the Mississippi law invalidating the contract was held entitled to full faith and credit?⁵¹

Partial invalidation

But it is generally true that a contract is not rendered entirely unenforceable because it contains a warrant of attorney authorizing the confession of judgment and is executed or to be performed in (depending upon the conflict of laws rule of the forum) a state which, because of public policy, prohibits such contract provisions.⁵² The validity of the contract is not otherwise impaired; the cognovit clause is merely disregarded if not utilized as a remedy.⁵³ The prohibitory or restrictive statutes, sometimes penal, are strictly construed and not deemed to operate a forfeiture of the creditor's rights.⁵⁴ If the contract is otherwise enforceable, *i.e.*, if the rights claimed can be established without the cognovit clause, the right of recovery on the contract is unaffected as regards an action on the obligation,⁵⁵ for the cognovit clause is held separable without invalidating the rest of the contract.⁵⁶ Such suit will be permitted in the first instance⁵⁷ and even after the failure of a suit in the forum on the judgment confessed in another state permitting the practice,⁵⁸ although it has been indicated that the cognovit may not be separable for all purposes,⁵⁹ and, in fact, there is strong dicta that a cognovit note executed in Indiana is entirely void because of the statutory prohibition of the place of contracting.⁶⁰

51 *Cf. Ehrenzweig, Contracts in the Conflict of Laws*, 59 COLUM. L. REV. 973, 1013 (1959).

52 See Annot., 111 A.L.R. 1407 (1937).

53 *Cf. 6 CORBIN ON CONTRACTS*, § 1527 (1950).

54 *Simpson v. Fuller*, 119 Ind. App. 583, 51 N.E.2d 870 (1943).

55 *Phrend v. Midwest Engineering Co.*, 93 Ind. App. 165, 177 N.E. 879 (1931); *Sales-Davis Co. v. Henderson-Boyd Lumber Co.*, 193 Ala. 166, 69 So. 527 (1915).

56 *Simpson v. Fuller*, *supra* at note 54.

57 *American Furniture Mart Bldg. Corp. v. W. C. Redmon, Sons & Co.*, 210 Ind. 112, 1 N.E.2d 606 (1936); *cf. Paulasky v. Polish Roman Catholic Union*, 219 Ind. 441, 39 N.E.2d 440, 444 (1942) cognovit provision deleted prior to the commencement of suit; *Kiernan v. Jackson*, 111 La. 645, 35 So. 798 (1904).

58 *Loudonville Milling Co. v. Davis*, 248 Ala. 202, 27 So. 2d 6 (1946), in which demurrer was sustained to complaint based on judgment entered by confession in Ohio. The court indicated by dicta that the warrant of attorney to confess judgment was, in legal effect, separate and distinct from the obligation and, at 251 Ala. 459, 37 So. 2d 659 (1948), recovery was permitted in a suit brought directly on the note in Alabama.

59 *W. H. Barber Co. v. Hughes*, 223 Ind. 570, 63 N.E.2d 417, 419 (1945).

60 *Phrommer v. Albers*, 106 Ind. App. 548, 21 N.E.2d 72 (1939); *Fodor v. Popp*, 93 Ind. App. 429, 178 N.E. 695 (1931); but *cf. Peoples National B. & T. Co. v. Pora*, 212 Ind. 468, 473, 9 N.E.2d 83 (1937).

Intent

The Restatement of Conflict of Laws⁶¹ entirely overlooks the problem of the illegality of the cognovit instrument where executed (which is usually where enforcement of the judgment entered by confession is sought); the Restatement of Judgments⁶² abdicates itself from consideration of the problem with the comment that "it is not within the scope of the Restatement of this subject to state the extent to which a power of attorney to confess judgment may be illegal, or to state the effect of such illegality in States *other than that in which it is given*."⁶³

But the United States Supreme Court⁶⁴ and most of the commentators⁶⁵ have generally agreed that the parties to a contract have the right to determine by agreement the law applicable to their contract; only the parameters of such agreements may be unclear.⁶⁶ In that connection, most advocates of the "intention" theory accede to the limitation that the choice of applicable law be such as has a reasonable or substantial connection with the contract or the underlying transaction. *Cook* suggests that the reason for the requirement is simply the practical need to preclude an inconvenient burden on the court of the forum which would result if a wider choice were given.⁶⁷ The limitation of expressed intent to those states having a substantial connection is probably a sufficient answer to the frequent charges of evasion of some local or otherwise "improper" law; the choice so limited will generally satisfy the requirement that the choice of other law be bona fide.⁶⁸

But in cognovit instruments the courts considering the matter ordinarily infer intent from the stipulated place of payment⁶⁹ or from the surrounding circumstances;⁷⁰ or by examination of the so-called contact points or center of

61 RESTATEMENT, CONFLICT OF LAWS § 81 (1934).

62 RESTATEMENT, JUDGMENTS § 18 (1942).

63 *Id.* at § 18(e).

64 *Cf. Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Mutual Life Ins. Co. v. Hill*, 193 U.S. 551 (1904); *Pritchard v. Norton*, 106 U.S. 124 (1882).

65 See, e.g., *Ehrenzweig, Contracts in the Conflict of Laws*, 59 COLUM. L. REV. 973 (1959); Note, *Choice of Law Rules for . . . Written Instruments*, 72 HARV. L. REV. 1154, 1164 (1959).

66 2 RABEL 363.

67 ". . . authorities have required . . . that the intention of the parties to select a law must be confined within certain limits . . . courts have said that an agreement of the parties to choose a law should be made with a bona fide intent, not fictitious, based on a normal relation, or a natural and vital connection": *COOK* 418; cf. 2 RABEL 402. Harper questions whether the logic of the situation is consistent with any limitation of the "intention" rule. "If the courts are willing to allow the parties to select their own law, why should it be necessary that they select the law of a state which has some factual connection with their bargain. . . . Actually, the limitation of the rule argues for its abandonment. If it be important that the state whose law is to govern the contract have some factual connection with it, why should the contract not be governed by the law of the state which has the most significant factual connection therewith?"

68 *Cf. Levin, Party Autonomy: Choice of Law Clauses in Commercial Contracts*, 46 GEO. L.J. 260, 263 (1957).

69 *South Orange Trust Co. v. Barrett*, 45 Del. 533, 76 A.2d 310 (1950); but *cf. Spahr v. P. & H. Supply Co.*, 223 Ind. 59, 63 N.E.2d 425 (1945), where although the judgment note was payable in Indiana, the forum deemed it an Ohio contract because executed in Ohio. In the other cases cited, the Delaware and Missouri courts might have held the judgment invalid by application of Indiana law.

70 *Cf. Acme Feeds, Inc. v. Berg*, 231 Iowa 1271, 4 N.W.2d 430, 432 (1942), although the contract was apparently completed in Illinois, which permits the confession of judgment.

gravity of the contract.⁷¹ In yet other cases a determination of fact is made regarding the intended law of the parties, usually as a basis for invalidation⁷² although a Kentucky court found that the parties intended Illinois law to govern in part because the remedy provided for (confession of judgment) was peculiar to Illinois and not recognized in Kentucky.⁷³

Lenders have long attempted to impose their own choice of law by contract provision; but it is said that analysis of the cases reveals that courts, even while subscribing to party autonomy in contracts, have consistently refused to accept the choice, probably because of the adhesion contract aspect of such transactions;⁷⁴ certainly that has been true to a significant extent.

Many contractual stipulations serve as devices for determining the applicable law in advance of the selection of the forum by such provisions as that the contract is deemed to have been made at the domicile of the lender or seller, or that the agreement is not a binding contract until accepted by the lender or seller at its office. *Rabel* views these stipulations as a tribute to the historical rule of the *lex locus contractus*.⁷⁵ Some jurisdictions avowedly permit the choice of law as a matter of party autonomy notwithstanding the evidence by statute of a strong public policy against cognovit instruments.⁷⁶ The Uniform Commercial Code, with few exceptions, explicitly provides for agreement on the choice of law when a transaction bears a reasonable relation to another state.⁷⁷

Certain it is that domestic conflicts law has elements of uncertainty in commercial matters which effectively hamper credit transactions in interstate commerce. One improved resolution of the conflict of laws problems in the use of cognovit instruments is the increased use of express stipulations by the parties regarding the applicable and proper law of their contracts.⁷⁸

71 Cf. *W. H. Barber Co. v. Hughes*, *supra* note 59; see *Auten v. Auten*, 308 N.Y. 155, 123 N.E.2d 99 (1954) for a discussion of the "grouping of contacts" theory.

72 Cf. *Bernard Bloecker Co. v. Baker Co.*, 52 S.W.2d 912 (Tex. Civ. App. 1932); *Paulasky v. Polish Roman Catholic Union*, *supra* note 57, where the court felt that notwithstanding execution and performance in Illinois, the parties must have contemplated that foreclosure proceedings would be at the situs of the realty, Indiana, and hence intended suit to be subject to the laws of Indiana. "... upon a reading of the cases, (one) cannot escape the feeling that whenever it seems important enough to do so, the intention of the parties is so determined as to preclude the application of a foreign rule which is disapproved at the forum." STUMBERG 236.

73 *Wedding v. First National Bank of Chicago*, 280 Ky. 610, 133 S.W.2d 931 (1939). The judgment note was delivered in Illinois and provided for payment there as well. The view embodied in this case makes intention determinative of the applicable law and that intention is found in the implicit recitation of the instrument used. In *Pritchard v. Norton*, *supra* note 64, the Supreme Court similarly felt that "the parties cannot be presumed to have contemplated a law which would defeat their engagements."

74 Ehrenzweig, *Contracts in the Conflict of Laws*, 59 COLUM. L. REV. 973, 976-77 (1959).

75 2 RABEL 380. Other examples are there given.

76 See, e.g., *Mountain States Fixture Co. v. Daskalos*, 61 N.M. 491, 303 P.2d 698 (1956); *Gotham Credit Corp. v. Powell*, 22 N.J. Misc. 301, 38 A.2d 700 (1944). Both the cited cases involve another jurisdiction with a substantial connection.

77 UNIFORM COMMERCIAL CODE § 1-105 (1) (1958). Hence, with the limitation that a reasonable relation is required, six states permit the expressed intent of the parties to govern (Conn., Ky., Mass., N.H., Pa. and R.I.).

78 See Note, *Commercial Security and Uniformity through Express Stipulations as to Governing Law*, 62 HARV. L. REV. 647, 648 (1949), indicating at 649 that an analysis of the cases and references to leading authorities shows a definite "tendency toward acceptance of express stipulations when shown to be commercially reasonable and in furtherance of business convenience or necessity." See Annot., 112 A.L.R. 124 (1938) for a survey of the then validity and effect of such stipulations.

Contacts rule

Most recently the so-called "grouping of contacts" or "center of gravity" theory has been more broadly applied and as to judgment notes it has been suggested that the court of the forum "consider all acts of the parties touching the transaction in relation to the several states involved and . . . apply as the law governing the transaction the law of that state with which the facts are in most intimate contact."⁷⁹

It has been granted that this theory affords less certainty and predictability than the other rules⁸⁰ and the suggestion, probably well taken, has been made that in practice the courts utilizing this theory tend toward application of the law of the forum with which they are best acquainted.⁸¹ It is questionable whether the determination of the proper law can reasonably be made in most of the cases involving judgments taken by confession on cognovit instruments and whether, in commercial transactions the paramount control of the state, if ascertainable, "having the most interest in the problem" is more desirable than a broad theory of validation based on a presumed intent that the parties' acts are intended to be binding.

Since the denial of full faith and credit involves the deprivation of a constitutional right, presumably the Supreme Court should be the final arbiter of the effect given to judgments taken by confession. That court has not yet considered the problem of the validity of a judgment rendered by confession on an instrument invalid by the law of any of the places deemed determinative of validity by the several theories applied. Resolution of the problem by the application of the law of the place of most significant contact(s) may well be held an unconstitutional denial of full faith and credit to the confessed judgment, for the court has rather consistently accepted the expressed intent of the parties as determinative of the applicable law.

It has aptly been pointed out that this most recent formula is an implicit admission of the failure and lack of legal viability of the prior theories.⁸²

Judgment notes as adhesion contracts

The suggestion that statutes prohibiting the execution of instruments containing cognovit clauses and rendering them void are essentially protective rules to assist borrowers when the parties to the contract have unequal bargaining power⁸³ is implicit in many of the statutes and decisions. Such so-called adhesion contracts are "agreements in which one party's participation consists in his mere adherence, unwilling and often unknowing, to a document drafted unilaterally and insisted upon by what is usually a powerful enterprise."⁸⁴ Professor Ehrenzweig's view is that the principle of party autonomy (either a total or a limited choice of applicable law by the contracting parties)

79 *W. H. Barber Co. v. Hughes*, 223 Ind. 570, 63 N.E.2d 417 (1945).

80 *Cf. Auten v. Auten*, *supra* note 71.

81 Levin, *Party Autonomy: Choice of Law Clauses in Commercial Contracts*, 46 *Geo. L.J.* 260, 268 (1957).

82 Ehrenzweig, *Contracts in the Conflict of Laws*, 59 *COLUM. L. REV.* 973, 985 (1959).

83 *Cf. Cheatham*, Book Review, 48 *COLUM. L. REV.* 1268, 1269 (1948).

84 Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 *COLUM. L. REV.* 1072, 1075 (1953).

has no place in adhesion contracts.⁸⁵ Another recent view goes so far as to advocate a presumption of adhesion and against the validity of such contracts where the decisive factor is one of the choice of applicable law.⁸⁶ And it is probably true that where lenders have attempted to impose their own choice of law by means of printed or "form" contracts, the courts have fairly consistently struck down such stipulations in adhesion contracts.⁸⁷

It may well be desirable as a matter of public policy to protect the borrower who either signs the contract provided or gets no loan and some jurisdictions, in furtherance of that view, prohibit small loan and consumer finance companies from using judgment notes.⁸⁸

But the statutes and interpretive cases invalidating cognovit instruments and the judgments confessed thereon from the standpoint of the law of the place of contracting or of performance, make no distinction between those borrowers who have exercised the "spurious freedom to adhere" and those whose bargaining power is more nearly equal to that of the lender.⁸⁹ Both purport to be merely logical applications of slightly different conceptions based on the theory of territoriality. The purpose of one such statute has been stated to be the protection of the citizens of that state "from the evil of having judgments confessed against them."⁹⁰

Under the territorial theory of the place of contracting rule, the cognovit instrument would be invalid even if both borrower and lender were residents of other states. No factual analysis of the underlying transaction is made in the invalidations of cognovit instruments and the judgments confessed thereon. If the adhesion contract is really a form of coercion, there may exist no need for other means of achieving the presumably desirable goal of invalidation. The place of contracting or of performance; the residence of the debtor and the situs of the security, etc., are irrelevant facts if it is taken that the creditor-debtor relationship constitutes sufficient restraint. If there is no tenable theory of duress, the excuses underlying the invalidation of adhesion contracts are not well founded.⁹¹

It has been commented that the statutory rights of commercial creditors are more readily waived or bargained away than those given mere debtors.⁹² Certainly the determination when an adhesion contract is before the court would not only be extremely difficult, but rather than create a situation of security and relative certainty in commercial transactions, a mild chaos would be apt to result.

85 *Ibid.*

86 Note, *Party Autonomy in Contracts*, 57 COLUM. L. REV. 553, 575 (1957).

87 Cf. Ehrenzweig, *Contracts in the Conflict of Laws*, 59 COLUM. L. REV. 973, 976-77 (1959); but cf. *Mountain States Fixture Co. v. Daskalos*, *supra* note 76; *Gotham Credit Corp. v. Powell*, *supra* note 76.

88 See, e.g., KY. REV. STAT. § 288.200 (1955).

89 Some jurisdictions prohibit corporations from interposing the defense of usury on the ground — often unjustified in fact — that corporations do not require the protection given to other debtors. See e.g., N.Y. GEN. BUS. LAWS § 374; Pa. Bus. Corp. Law § 313; Ill. Rev. Stat. c. 74, § 4.

90 *Peoples National B. & T. Co. v. Pora*, *supra* note 60.

91 Cf. Comment, *Full Faith and Credit for Judgments Confessed by Attorney*, 44 HARV. L. REV. 1275 (1931).

92 6 CORBIN ON CONTRACTS 983 (1950).

Federal jurisdiction

As is apparent by the conflicting theories in practice, the use by credit or lending institutions of judgment notes often presents considerable difficulty and uncertainty if the transaction takes place in more than one state. As one possible solution, if the jurisdictional requirements are met, judgment may be confessed in the federal district court and, if necessary, later registered in any other federal district court, where it will have the same effect as a judgment rendered by the court in which registered.⁹³ Unlike the situation as between the state courts,⁹⁴ such a judgment need not be sued upon in the court where registered.

The federal courts consider that jurisdiction can be granted by consent given prior to the bringing of an action as provided for in the usual form of judgment note and that the entire matter of the confession of judgment is one of procedure governed by the federal rules.⁹⁵ Some local rules of the federal district courts provide for the confession of judgment;⁹⁶ the Federal Rules of Civil Procedure do not preclude the entry of judgment by confession on a proper warrant of attorney.⁹⁷ Such process was early permitted in the various federal courts⁹⁸ and there seems to be no objection now raised.⁹⁹ Although it does not appear that the confession of judgment has occurred in federal district courts situated in states which prohibit such practice, there is no procedural impediment noted in the decisions. Presumably the federal courts will apply as proper the law stipulated as determinative by the parties since the Supreme Court has followed the "intention" theory.

There are few recent cases evidencing confessions of judgment in the federal courts which may indicate that this resolution of the problem is of too limited an application because of the jurisdictional requirements involved.

"A modest proposal"

It is suggested that "the problems in the conflict of laws in the field of contracts need to be broken down into groups, so that different types of social, economic and business problems may receive separate consideration";¹⁰⁰ for it is apparent that broad and sweeping rules will not solve the problems and that

93 Act of June 25, 1948, c. 646, 62 Stat. 958, 28 U.S.C. § 1963 (1948).

94 "No execution can issue upon such judgment (in another state) without a new suit . . . and they enjoy not the right of priority, or privilege, or lien, which they have in the state where they are pronounced, but that only, which the *Lex Fori* gives to them by its own laws in their character of foreign judgments." STORY, COMMENTARIES ON THE CONFLICT OF LAWS 1005 (1846). The Uniform Enforcement of Foreign Judgments Act does not alter this history as regards judgments obtained by confession, for the Act defines a foreign judgment as "any judgment . . . of a court of the United States which is entitled to full faith and credit in this state," thereby begging the questions ordinarily raised.

95 *Bowles v. J. J. Schmitt & Co., Inc.*, 170 F.2d 617 (2d Cir. 1948).

96 See, e.g., Rule 28, M.D. Pa.; Rule 39, E.D. Pa.

97 *F.D.I.C. v. Steinman*, 53 F. Supp. 644, 651 (E.D. Pa. 1943); cf. 10 CYC. OF FEDERAL PROCEDURE 35.26 (3d ed. 1953).

98 See, e.g., *George D. Harter Bank v. Straus*, 170 F. 489 (C.C.E.D. Pa. 1909); *Smith v. Hartwell*, 4 McLean 206, Fed. Cas. (No. 13054) (C.C.D. Ill. 1847); *Fairchild v. Camac*, 3 Wash. C.C. 558, Fed. Cas. (No. 4610) (C.C.E.D. Pa. 1819).

99 *Hadden v. Rumsey Products, Inc.*, 196 F.2d 92 (2d Cir. 1952), the confession of judgment took place in the U.S. District Court in Ohio, *F.D.I.C. v. Steinman*, *supra* note 97.

100 Cook 419.

the issues are both numerous and complex and best fragmented as a function of the social and business factors involved.¹⁰¹

The conflicting public policies seem to be the protection of smaller debtors who cannot bargain on equal terms and who, because of their inferior bargaining position, should be protected from such improvident contracts as judgment notes; and the desire for security in commercial transactions as well as the general view that freedom of contracting should not be restricted, except for compelling reasons; and then to the most limited extent necessary to achieve the commonweal.

Most will agree that as between commercial debtors and creditors, the warrant of authority to confess judgment is not a particularly onerous device. It gives the creditor an additional quick remedy by way of greater protection and security for his risk. And that the judgment may be entered by confession in any court of the creditor's choice merely gives added value to the security, as is intended.¹⁰²

Hence aside from statutes specifically drawn to protect those debtors having inferior bargaining positions, such as the various consumer finance laws,¹⁰³ all loan contracts involving cognovit clauses should be qualified by the usual presumptions of validity unimpaired by public policy evidenced by the laws of the place of contracting, performance, or the forum. The presumption of essential and formal validity should obtain if any law with which the transaction has a reasonable contact permits the entry of judgment by confession.¹⁰⁴ For if it is true as a matter of convenience and judicial policy that the chosen law should have some contact with the transaction, then the usual broad form of warrant to confess judgment in any court should be valid if judgment can be confessed in any state with which such contact exists. The judgment so obtained should be accorded full faith and credit in every other state. The proviso should be added that if the parties do specify an applicable law by expressed intent embodied in the agreement, that law, if it has any reasonable connection with the transaction, should apply unless it invalidates the entire agreement. Where there is no such expressed intent, if the form of the cognovit instrument satisfies the law of any state with which the transaction has a reasonable connection, it should be upheld by reference to and application of that law.¹⁰⁵

The application of such a doctrine would effectuate more fully the expectations of the parties in their negotiations and would more accurately reflect the fact that business transactions which culminate in written agreements are, after all, based on the premise that the agreement will be an enforceable obligation.

101 Cf. Cheatman, Book Review, 48 COLUM. L. REV. 1267 (1948).

102 Cf. Pirie v. Conrad, 97 Wis. 150, 72 N.W. 370 (1897).

103 See BARRETT, COMPILATION OF CONSUMER FINANCE LAWS (1952).

104 Cf. Ehrenzweig, *Contracts in the Conflict of Laws*, 59 COLUM. L. REV. 973, 1013 (1959).

105 Cf. STUMBERG 239.