Vanderbilt Law Review

Volume 25
Issue 3 *Issue 3 - April 1972*

Article 5

4-1972

Recent Developments

Law Review Staff

RECENT DEVELOPMENTS

Due Process—Confession of Judgment Procedures Are Not Unconstitntional Per Se

I. INTRODUCTION

Confession of judgment procedures[1] have seldom received unrestricted legislative approval by the states[2]—the vast majority of jurisdictions have enacted legislation either to eliminate the practice entirely or to limit severely its use.[3] Unrestricted employment of the procedure in consumer transactions is prevalent only in the states of Pennsylvania,

---

1. A warrant of attorney is "an instrument in writing, addressed to one or more attorneys therein named, authorizing them, generally, to appear in any court, or in some specified court, on behalf of the person giving it, and to confess judgment in favor of some particular person therein named, in an action of debt." BLACK'S LAW DICTIONARY 1757 (4th ed. 1951). Throughout this Comment, the terms "warrant of attorney" and "confession of judgment" are used interchangeably.

2. Hopson, *Cognovit Judgments: An Ignored Problem of Due Process and Full Faith and Credit*, 29 U. CHI. L. REV. 111 (1961).

3. Eleven states declare such judgments void and unenforceable. ALA. CODE tit. 20, § 16 (1958); ARIZ. REV. STAT. ANN. § 44-143 (1956); FLA. STAT. § 55.05 (1969); GA. CODE ANN. § 110-601 (1959); KY. REV. STAT. ANN. § 372.140 (Supp. 1971); MASS. GEN. LAWS ANN. ch. 231, § 13A (1956); MISS. CODE ANN. § 1545 (1942); MONT. REV. CODES ANN. § 13-811 (1947); N.J. REV. STAT. § 2A:16-9 (1951); TENN. CODE ANN. § 25-201 (1955); TEX. REV. CIV. STAT. art. 2224 (1971). Two other states go even further and make the execution of such a clause a criminal misdemeanor. IND. ANN. STAT. § 2-2906 (1968); N.M. STAT. ANN. §§ 21-9-16, 21-9-18 (1953). Twenty-three states have either effectively abolished the use of confession of judgment or have eliminated its attractiveness by placing various procedural limitations on the practice. ALASKA STAT. § 09.30.050 (1962) and ALASKA R. CIV. P. 57(c) (1962); ARK. STAT. ANN. § 29-301 to -303 (1948); CAL. CODE CIV. PRO. §§ 1132-35 (West 1955) *as amended* (West Supp. 1968-69); CONN. GEN. STAT. REV. §§ 52-193 to -195 (1958); IDAHO CODE ANN. §§ 10-901 to -903 (1947); IOWA CODE §§ 676.1-.4 (1950); KAN. STAT. ANN. § 61-105 (1964); LA. CONST. art. 7, § 44; MD. ANN. CODE, RULE OF PROCEDURE 645 (1947); MINN. STAT. ANN. §§ 548.22-.23 (1947); MO. REV. STAT. § 511.070-.100 (1952); 2 NEB. REV. STAT. §§ 17.090-.111 (1967); NEW YORK CIV. PRAC. § 3218 (McKinney 1963); N.D.R. CIV. P. 68(c); OKLA. STAT. ANN. tit. 12, §§ 689-95 (1960); ORE. REV. STAT. §§ 26.010-.130 (1961); S.C. CODE ANN. §§ 10-1535 to -1538 (1962); S.D. COMPILED LAW ANN. §§ 26-1 to -5 (1967); UTAH R. CIV. P. 58A(e) (1953); VT. STAT. ANN. tit. 12, § 4671 (1958); WASH. REV. CODE ANN. §§ 6.60.010-.070 (1962); W. VA. CODE ANN. § 50-13-5 (1966). Four states, although having no general legislation on point, do prohibit confessed judgment clauses in particular situations. COLO. REV. STAT. ANN. § 13-16-6 (1963); ME. REV. STAT. ANN. tit. 9, § 3084 (1964); N.H. REV. STAT. ANN. § 361-A:7(VIII) (1955); R.I. GEN. LAWS ANN. § 19-25-24 (1968). The remaining states generally permit the procedure. DEL. CODE ANN. tit. 10, § 2306 (1953); HAWAII REV. STAT. § 633-3 (1968); ILL. ANN. STAT. ch. 110, § 50(3) (Smith-Hurd 1968); MICH. STAT. ANN. § 27A.2906 (1962); OHIO REV. CODE ANN. § 2323.13 (Supp. 1971); PA. STAT. tit. 12, § 739 (Supp. 1971); VA. CODE ANN. §§ 8-355 (Supp. 1971) to -356 (1950); WIS. STAT. ANN. § 270.69 (1958); WYO. STAT. ANN. § 1-309 to -313 (1957).

Illinois and Ohio,[4] which account for a preponderance of the confessed judgments in the United States today.[5] Although the constitutional validity of cognovit notes has been questioned on numerous occasions,[6] the Supreme Court had never addressed this issue until its recent decisions upholding the use of these devices in *D.H. Overmyer Co. v. Frick Co.*[7] and *Swarb v. Lennox*.[8] An examination of these decisions, together with judicial treatment of other areas presenting similar constitutional considerations, indicates a fundamental inconsistency in delineation of the scope of an individual's due process right to be protected in his person and property.

II. Due Process and the Protection of Property

As early as 1876, the Supreme Court recognized that "wherever one is assailed in his person or his property, there he may defend."[9] In *Hovey v. Elliott*, the Court held that "due process of law signifies a right to be heard in one's defense."[10] The resulting doctrine—that the opportunity to be heard prior to the deprivation of a property right is a fundamental requisite of due process—has continuously been upheld by the Court.[11] Further judicial refinements of this doctrine prescribe not only that the property owner must be afforded a hearing, but also that this hearing must be held at a meaningful time and conducted in a manner meaningful and appropriate to the nature of the particular case.[12] The Court has recognized, however, that under certain extraordi-

4. 16 Vill. L. Rev. 571, 573 (1971).

5. *See* Hopson, *supra* note 2, at 115; Note, *Confessions of Judgment*, 102 U. Pa. L. Rev. 524, 525 (1954).

6. *See, e.g.*, Osmond v. Spence, 327 F. Supp. 1349 (D. Del. 1971) (Delaware statutory scheme for confession of judgments held unconstitutional); Atlas Credit Corp. v. Ezrine, 25 N.Y.2d 219, 250 N.E.2d 474, 303 N.Y.S. 382 (1969) (constitutionality of Pennsylvania confession of judgment procedure questioned in a proceeding to determine whether a Pennsylvania confessed judgment should be given full faith and credit in New York).

7. 405 U.S. 174 (1972).

8. 405 U.S. 191 (1972).

9. Windsor v. McVeigh, 93 U.S. 274, 277 (1876) (barring owner of real property from appearing in confiscation proceeding was unconstitutional).

10. 167 U.S. 409, 417 (1897) (defendant may not be denied hearing as punishment for contempt).

11. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971) (due process prohibits a state from denying indigents access to its courts to dissolve their marriages solely because of inability to pay court fees); Goldberg v. Kelly, 397 U.S. 254 (1970) (due process requires a hearing prior to termination of welfare benefits); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (due process prohibits prejudgment garnishment of wages); Grannis v. Ordean, 234 U.S. 385 (1914) (due process requires appropriate service of process).

12. *E.g.*, Armstrong v. Manzo, 380 U.S. 545 (1965) (failure to give petitioner notice of pending adoption proceeding was violative of due process); Mullane v. Central Hanover Bank &

nary circumstances a hearing may be postponed until after the seizure of an individual's property in order to protect a valid governmental[13] or creditor[14] interest. In other words, due process assures to each individual the right, within reasonable limits, to a meaningful opportunity to be heard before he may be deprived of a significant property interest.[15] This does not mean, however, that an individual cannot waive his due process right to notice and an appropriate hearing,[16] but rather that there exists a strong presumption against any waiver of these constitutional rights.[17] The Supreme Court has stated that in order for a waiver to be effective it must be an intentional relinquishment or abandonment of a known right or privilege.[18] Moreover, the courts may not presume acquiescence in the loss of fundamental rights, but must examine the relevant circumstances to determine whether the waiver was made voluntarily, intelligently, and with a sufficient awareness of the legal consequences.[19] More recently, the Court has become increasingly sensitive to the hardship imposed upon individuals in lower- and middle-income groups who are deprived of property without a prior, meaningful hearing. In *Sniadach v. Family Finance Corp.*,[20] the Court held that, when no special need for immediacy exists, garnishment of wages by a creditor prior to a hearing violates the fourteenth amendment prohibition against the taking of property without due process of law.[21] Justice

---

Trust Co., 339 U.S. 306 (1950) (notice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to be heard).

13. *See, e.g.*, Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886 (1961) (summary exclusion from government property without a hearing upheld when activities were of a highly classified nature); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (seizure of articles dangerous to the public health without a prior hearing sustained).

14. *See, e.g.*, Fahey v. Mallonee, 332 U.S. 245 (1947) (Federal Home Loan Bank's appointment of a conservator to take charge of the affairs of a loan association without holding a hearing did not violate due process).

15. *See* Boddie v. Connecticut, 401 U.S. 371 (1971).

16. In National Equip. Rental, Ltd. v. Szukshent, 375 U.S. 311, 316 (1964), the Supreme Court said that the "parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether."

17. *See, e.g.*, Glasser v. United States, 315 U.S. 60 (1942) (right to counsel in a criminal case); Aetna Ins. Co. v. Kennedy, 301 U.S. 389 (1937) (right to jury trial); Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292 (1937) (order by commission requiring telephone company to refund excess earnings).

18. Brookhart v. Janis, 384 U.S. 1, 4 (1966); Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

19. Brady v. United States, 397 U.S. 742 (1970).

20. 395 U.S. 337 (1969).

21. Never before had the Court held that due process requires a prior hearing even when the restrictions on the use of the property are relatively brief and an eventual hearing is guaranteed. *See The Supreme Court, 1968 Term*, 83 HARV. L. REV. 60, 113 (1969).

Douglas, speaking for the Court, was careful not to assert the absolutist proposition that any interference with an individual's property prior to judgment is necessarily violative of the due process clause; he reasoned, rather, that when no paramount state or creditor interest is present and when the debtor is readily subject to the in personam jurisdiction of the state courts, the due process clause mandates that he be afforded an opportunity for a hearing before his wages may be taken.[22] Further support for the proposition that this kind of prejudgment garnishment cannot be constitutionally tolerated was drawn from the categorization of wages as "a specialized type of property presenting distinct problems in our economic system,"[23] and the recognition of the substantive evils inherent in any type of wage garnishment procedure.[24] A similar concern regarding the hardships that may be inflicted upon the poor when they are deprived of significant property interests without notice and an opportunity to be heard was evidenced in *Goldberg v. Kelly*,[25] which held that due process requires that recipients of welfare benefits be afforded evidentiary hearings before these benefits may be terminated, regardless of the availability of procedures for full hearings following benefit termination.[26] The Court engaged in a balancing process and concluded that the individual's interest in retaining his welfare benefits until an impartial hearing on the issue can be held outweighs the government's interest in summary action.[27]

Prior to the *Overmyer* and *Swarb* decisions, the Supreme Court had decided only two cases that concerned confession of judgment provisions in cognovit notes. In both, rather than examining the constitutionality of the procedure under the due process clause, the Court rested its decision upon the full faith and credit clause.[28] At least one state court, however, has inquired whether confession of judgment procedures violate the due process clause. In *Atlas Credit Corp. v. Ezrine*,[29] the

22. 395 U.S. at 339.

23. *Id.* at 340.

24. A number of prejudgment garnishment claims are fraudulent. Moreover, the procedure gives a creditor considerable leverage over a wage-earner and, as a practical matter, may deprive a wage-earning family of access to the necessities of life. *See* 68 MICH. L. REV. 986 (1970).

25. 397 U.S. 254 (1970).

26. *Id.* at 261.

27. *Id.* at 266.

28. National Exchange Bank v. Wiley, 195 U.S. 257 (1904) (the Ohio court was without jurisdiction to enter judgment in favor of the bank since the bank was not the holder of the note; therefore the Ohio judgment was not entitled to full faith and credit); Grover & Baker Sewing Mach. Co. v. Radcliffe, 137 U.S. 287 (1890) (since the warrant of attorney authorized only an attorney to confess judgment, the Pennsylvania judgment entered by a prothonotary was invalid and not entitled to full faith and credit).

29. 25 N.Y.2d 219, 250 N.E.2d 474, 303 N.Y.S.2d 382 (1969).

Court of Appeals of New York held that enforcement of a judgment entered pursuant to an unlimited warrant of attorney that permitted entry of judgment by confession anywhere in the world is violative of due process.[30] The majority opinion intimated that the warrant of attorney would have posed no constitutional problem had it authorized confession in only one state,[31] but that the provision allowing entry of judgment anywhere in the world was too broad to satisfy due process requirements.[32] In a recent federal district court decision that examined the constitutionality of the Delaware confession of judgment statute, the court was not concerned with the situs of the confessed judgment, but rather directed its inquiry toward whether the statutorily prescribed method infringed upon plaintiff's right to notice and hearing before judgment could be entered against him. The court concluded that this statutory scheme was unconstitutional because it failed to require notice and hearing before the entry of judgment and provided no method for judicially determining whether a particular debtor knowingly and intelligently signed the judgment note and waived his fourteenth amendment rights.[33] Moreover, the opinion stated that the mere signature of a debtor on a judgment note does not overcome the strong presumption against waiver of constitutional rights and that in the case before the court, the creditors had failed to sustain their burden of proving that the debtors understood the legal consequences of signing the notes containing the waiver provisions.[34]

III. D.H. OVERMYER CO. v. FRICK CO.[35]

In *Overmyer*, petitioner, a warehousing corporation, sought to obtain an order vacating a judgment confessed against it in an Ohio court[36] pursuant to a confession of judgment provision contained in a note payable to respondent corporation. Petitioner had inserted the confession of judgment clause in the note in consideration for respondent's granting it additional time in which to pay a debt owed under a construction contract. The Supreme Court held that petitioner, in its

30. The court also held that cognovit judgments are not judicial proceedings within the meaning of the full faith and credit clause; therefore, a New York court need not enforce a cognovit judgment obtained in Pennsylvania, since the enforcement of that judgment would conflict with New York public policy.

31. *See* 45 N.Y.U.L. REV. 367 (1970).

32. *See* 56 VA. L. REV. 554 (1970).

33. Osmond v. Spence, 327 F. Supp. 1349 (D. Del. 1971).

34. *Id.* at 1359.

35. 405 U.S. 174 (1972).

36. The Ohio confession of judgment procedure is set forth in OHIO REV. CODE ANN. § 2323.13 (Supp. 1971).

execution and delivery of the note, voluntarily, intelligently, and knowingly waived the rights it would have otherwise possessed to prejudgment notice and hearing. Although it recognized that courts are not to presume acquiescence in the loss of fundamental rights, the Court stated that the due process rights to notice and hearing prior to a civil judgment may be waived. Justice Blackmun, writing for the Court, emphasized that petitioner was a corporation, as opposed to an individual, and the case involved neither a disparity of bargaining power nor an adhesion contract. The Court further noted that petitioner had never contended that it was unaware of either the existence or the legal significance of the cognovit provision, and that it specifically had included this provision in the note in return for substantial consideration. Furthermore, the Court found that Overmyer was not rendered defenseless by executing the judgment note, since in Ohio the judgment court may vacate its judgment upon a showing of a valid defense. In its summation, the majority opinion emphasized that cognovit clauses do not violate the due process clause per se, that under certain circumstances these provisions may serve a useful and proper purpose in the commercial world, and that the instant holding should not be viewed as controlling precedent for other cases arising in different factual settings.[37]

IV. SWARB v. LENNOX[38]

In *Swarb*, appellants, on behalf of a class consisting of all Pennsylvania residents who had signed consumer financing agreements or lease contracts containing cognovit provisions authorizing confessed judgments in Philadelphia County, sought to have the Pennsylvania rules and statutes providing for confession of judgment[39] declared unconstitutional.[40] The district court declared the Pennsylvania procedure un-

37. Mr. Justice Douglas, in a concurring opinion, noted that, although trial judges traditionally have enjoyed wide discretion in vacating confessed judgments, the Ohio Supreme Court has placed certain restrictions on the exercise of a judge's discretion in opening confessed judgments. 405 U.S. at 189 (Douglas, J., concurring). In Livingstone v. Rebman, 169 Ohio St. 109, 158 N.E.2d 366 (1959), the Ohio Supreme Court established the principle that a confessed judgment should be opened if the debtor is able to present evidence sufficient to constitute a jury question.

38. 405 U.S. 191 (1972).

39. The Pennsylvania confession of judgment procedure is set forth in PA. STAT. tit. 12, § 739 (Supp. 1971).

40. Appellants alleged that the Pennsylvania procedure deprived class members of procedural due process in the denial of notice and hearing before the entry of judgment, since the signing of the cognovit contract was not an intelligent and voluntary waiver of those rights. Appellants also alleged that this procedure violated the equal protection clause, since the only recourse against the recorded judgment—an action to strike or to open the judgment—is costly and burdensome to low-income consumers.

constitutional only as it applied to those Pennsylvania residents signing cognovit provisions in consumer sales or financing transactions who earn less than 10,000 dollars annually.[41] From this judgment, the consumers appealed,[42] contending that the district court erred in limiting its holding of unconstitutionality to the Pennsylvania procedure as applied to individuals earning less than 10,000 dollars a year. The Supreme Court rejected the consumers' contention and held that in light of *Overmyer*, the Pennsylvania confession of judgment procedure is not unconstitutional per se, since it is possible that, under appropriate circumstances, a cognovit debtor might be held effectively and legally to have waived his due process rights to prejudgment notice and hearing. Despite the *Overmyer* Court's warning that its decision should not be used as controlling precedent in situations involving adhesion contracts, bargaining power disparity, or absence of valid consideration for the cognovit provisions, the Court in *Swarb* concluded that the one-sided appeal before it did not present an appropriate occasion for delineating the impact and effect of *Overmyer* upon the Pennsylvania confession of judgment procedure. Finally, the majority was careful to point out that its affirmance of the district court's decision on the issue of whether the Pennsylvania system was unconstitutional on its face[43] should not be taken to imply approval of other aspects of the lower court's opinion that were not raised on appeal.[44]

V. CONCLUSION

The *Overmyer* and *Swarb* decisions appear to indicate the Supreme Court's attitude that, although confession of judgment provisions are not constitutionally improper per se, execution of confessed judgments

41. 314 F. Supp. 1091 (E.D. Pa. 1970). In essence, the district court determined that the Pennsylvania system does comply with due process if there has been an understanding and voluntary waiver of due process rights by the debtor, but the court said that it would be presumed that there was no such intentional waiver of known rights by consumers earning less than $10,000 annually.

42. The Commonwealth of Pennsylvania and the intervening finance companies did not cross-appeal. The Pennsylvania Attorney General's office, instead of pursuing its traditional role of defending the Commonwealth's legislation, joined the appellants in urging that the Pennsylvania confession of judgment system is constitutionally invalid on its face.

43. Mr. Justice White, in a concurring opinion, argued that the Court has no jurisdiction to examine that portion of the district court's judgment from which no appeal or cross-appeal was taken. He did believe, however, that the appellees were free to support that part of the judgment which was in their favor with arguments that were presented in the court below and rejected by the district court in arriving at an adverse judgment on other aspects of the case.

44. Mr. Justice Douglas, dissenting in part, believed that the Court should have undertaken a specific delineation of the standards required in applying the *Overmyer* rationale to the Pennsylvania confession of judgment procedure.

without appropriate procedural safeguards is constitutionally suspect. These decisions indicate further that courts should proceed on a case-by-case basis after judgment has been confessed to determine whether the debtor adequately understood that he had relinquished his constitutional rights. The practical effect of this development is to relegate the issue of whether there was a voluntary and intelligent waiver of due process rights in a given case to the mere status of a claim by the debtor in his petition to open the judgment.[45] Thus, the evils and harshness of the procedure, particularly as applied to low-income consumers, remain. The debtor must bear the expense of attorneys' fees and court costs, the hardship resulting from loss of his property, and the burden of proving that he did not voluntarily and intelligently waive his right to notice and hearing.[46] Furthermore, the injustices inherent in a procedure that provides for the entry of judgment without prior notice or hearing are not cured simply because it is possible theoretically for the consumer to file a petition to open or to strike the judgment.[47] It is more difficult for a debtor who has had a judgment confessed against him to obtain relief through either of these procedures than if he were afforded a hearing prior to the entry of judgment.[48] A motion to strike the judgment will be sustained only if defects appear on the face of the record.[49] A petition to open the judgment is addressed to the sound discretion of the court,[50] and the proceeding is essentially equitable in nature,[51] with relief as a matter of grace and not of right. Moreover, in spite of the presumption against the waiver of constitutional rights and the established policy that the creditor must sustain the burden of proving that a debtor made a voluntary waiver, the debtor, in petitioning the court to open a judgment, has the burden of convincing the court of the appropriateness of such action,[52] and reversal of the trial court's decision on the petition will be granted only in instances involving a clear abuse

45. *See* 75 DICK. L. REV. 169, 180 (1970).

46. *Id.*

47. *See* 49 TEXAS L. REV. 169 (1970). *See also* Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969); Griffin v. Griffin, 327 U.S. 220 (1946).

48. *See* note 4 *supra.*

49. *See, e.g.*, Lipshutz v. Plawa, 393 Pa. 268, 141 A.2d 226 (1958); Century Credit Co. v. Jones, 196 Pa. Super. 210, 173 A.2d 768 (1961).

50. Patton v. Pyle, 52 Del. 210, 155 A.2d 55 (1959).

51. Roche v. Rankin, 406 Pa. 92, 176 A.2d 668 (1962).

52. Ahrens v. Goldstein, 376 Pa. 114, 102 A.2d 164 (1954). In Pennsylvania, the debtor must carry the burden of convincing the court of the merit of his position to open the judgment solely through the use of depositions. PA. R. CIV. P. 209. In Ohio, the courts have lessened to some extent the debtor's burden of proof. In Livingstone v. Rebman, 169 Ohio St. 109, 158 N.E.2d 366 (1959), the court held that the confessed judgment may be opened if the debtor poses a jury question.

of discretion.[53] In view of these limiting factors, the debtor's opportunity to be heard in his own defense can hardly be considered sufficient to satisfy the constitutional mandate that an individual not be deprived of his property without due process of law. Since neither the Ohio nor the Pennsylvania confession of judgment procedure provides a method for judicially determining whether a particular debtor knowingly and intelligently waived his fourteenth amendment rights, it would have been appropriate for the Supreme Court to declare these procedures violative of the due process clause.[54]

This conclusion of constitutional invalidity under the due process clause also may be reached by an application of the *Sniadach* rationale to the cognovit note issue. Although the language used by the Court in *Sniadach* clearly indicates that the import of that decision was restricted to prejudgment garnishment of wages, logic compels the interpretation that *Sniadach* requires a meaningful hearing before an individual may be deprived of *any* significant property interest by having a judgment confessed against him. There is no apparent justification for refusing to extend *Sniadach's* garnishment rationale to the taking of other kinds of property.[55] The procedural schemes involved in confessing judgments are sufficiently similar to prejudgment garnishment procedures to warrant application of the same considerations,[56] and the hardships imposed upon a debtor in a confession of judgment situation are no less onerous than those inflicted upon an individual whose wages are garnished prior to the entry of a judgment against him. Therefore, the underlying reasons for declaring prejudgment garnishment statutes unconstitutional should apply with full force to confession of judgment procedures. Thus, under the *Sniadach* principle, a balancing of the individual's interest in not being deprived of his property without an appropriate hearing against the government's interest in judicial economy and the dubious interest of creditors in retaining self-executing foreclosure devices necessarily results in a conclusion that the individual's interest should prevail and, therefore, that confession of judgment provisions should be declared unconstitutional per se as violative of the due process clause.[57]

Another plausible theory for striking down confession of judgment

53. Wilson Laundry Co. v. Joos, 200 Pa. Super. 595, 189 A.2d 917 (1963).

54. *See* Osmond v. Spence, 327 F. Supp. 1349 (D. Del. 1971).

55. *See* note 4 *supra.*

56. *Id.*

57. *See* note 24 *supra.* In Goldberg v. Kelly, 397 U.S. 254 (1970), the Court engaged in a similar balancing process and found that the individual's interest in not having welfare benefits terminated without a prior hearing outweighed the state's interest in summary action and in reducing administrative expenses.

procedures is that these procedures violate the equal protection clause, since their operative effect is to discriminate against the poor.[58] The proposition that a statute, though neutral on its face, cannot be applied constitutionally when its application will have a discriminatory effect upon poor persons as a class can be inferred from the *Sniadach* decision's recognition of the effect of wage garnishment on the poor as a basis for invalidating the statute. Clearly, the harmful impact of confession of judgment procedures on the poor is, at least, as great as that of wage garnishments.

In view of the constitutional arguments presented above, the Supreme Court's failure to find that confession procedures are unconstitutional per se is less than satisfactory. Additionally, the Court's disposition of the *Overmyer* and *Swarb* cases leaves the precise constitutional standards to be applied in confession of judgment cases very much in doubt. The *Swarb* case presented an opportunity for the Court to delineate the constitutional limitations on confession of judgment procedures intimated in *Overmyer*. The Court's failure to take advantage of this opportunity has left the lower courts with no manageable standards by which to judge the constitutionality of a confession of judgment procedure as it applies to a particular debtor. The only guidance given by the Court is this broad statement in *Swarb*: "[t]he [*Overmyer*] decision is 'not controlling precedent for other facts of other cases,' and we refer to contracts of adhesion, to bargaining power disparity, and to the absence of anything received in return for a cognovit provision."[59] This statement indicates that the Court *is* aware of the possibilities for imposition of grave injustices upon the poor through the use of cognovit provisions. Nevertheless, the *Overmyer* and *Swarb* decisions do not indicate clearly the extent to which the Court would act to invalidate confessions of judgment resulting from situations involving bargaining power disparities or adhesion contracts.

58. *See* Note, *Some Implications of Sniadach*, 70 COLUM. L. REV. 942 (1970). This rationale has been invoked by the Court to invalidate otherwise nondiscriminatory state statutes that operated to preclude indigent criminal defendants from securing judicial review of their convictions. Griffin v. Illinois, 351 U.S. 12 (1956). Similarly, it has prevailed to invalidate statutes requiring the payment of a fee as a condition precedent to the right to vote. Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966). The Court, however, never has declared that the equal protection clause guarantees the poor equal access to the courts in civil matters. In 1968 and 1969, 2 federal district courts refused to sanction the application of the equal protection clause to civil litigation. Frederick v. Schwartz, 296 F. Supp. 1321 (D. Conn. 1969); Boddie v. Connecticut, 286 F. Supp. 968 (D. Conn. 1968); Moya v. Debaca, 286 F. Supp. 606 (D.N.M. 1968). There is only one reported decision that has done so. Jeffreys v. Jeffreys, 58 Misc. 2d 1045, 296 N.Y.S.2d 74 (Sup. Ct. 1968).

59. Swarb v. Lennox, 405 U.S. 191, 201 (1972).