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## Recent Case

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## Recent Case

### CONFESSION OF JUDGMENT—PENNSYLVANIA CONFESSION OF JUDGMENT PROCEDURE DECLARED UNCONSTITUTIONAL

*Swarb v. Lennox*, 314 F. Supp. 1091 (E.D. Pa. 1970)

In *Swarb v. Lennox*,<sup>1</sup> the United States District Court for the Eastern District of Pennsylvania held the Pennsylvania practice of confessing judgment<sup>2</sup> unconstitutional as applied to individual natural residents of Pennsylvania having incomes of less than \$10,000.

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1. 314 F. Supp. 1091 (E.D. Pa. 1970).

2. Confession of judgment is authorized in Pennsylvania by the following statutes and rules:

PA. STAT. ANN. tit. 12, § 1482 (1962) provides:

The prothonotaries and clerks aforesaid shall have and exercise respectively, in the courts to which they severally belong, and with full effect in term time and vacation, the powers and authorities following, to wit: They shall have power

III. To enter judgments at the instance of plaintiffs, upon the confession of defendants.

PA. STAT. ANN. tit. 12, § 739 (1962), *as amended*, (Supp. 1970).

PA. STAT. ANN. tit. 12, § 738 (1962), *as amended*, (Supp. 1970):

It shall be the duty of the prothonotaries, respectively, on the application of any persons willing to become parties in an amicable suit, to enter the same without the agency of an attorney, and when thereunto required, and on confession in writing, executed in presence of two or more witnesses, expressing the amount due to the plaintiff (which confession shall be filed in his office), he shall enter judgment against the defendant, for the amount expressed as aforesaid, with stay of execution as may be agreed upon by the parties and the prothonotary shall receive fifty cents, for every such entry, to be paid by the defendant in the suit, and when any suit is ended, the clerk of the court before which it was pending, shall on the request of the plaintiff expressed in writing, enter satisfaction thereon.

PA. R. Civ. P. 2950-76.

The decision applies only to confession of judgment clauses in leases and consumer financing documents; it does not apply to bonds and warrants of attorney accompanying mortgages and notes accompanying mortgages required by governmental agencies.<sup>3</sup>

The Act of February 24, 1806, provides:

It shall be the duty of the prothonotary of any court of record, within this Commonwealth, on the application of any person being the original holder (or assignee of such holder) of a note, bond, or other instrument of writing, in which judgment is confessed, or containing a warrant for an attorney at law, or other person to confess judgment, to enter judgment against the person or persons, who executed the same for the amount, which, from the face of the instrument, may appear to be due, without the agency of an attorney, or declaration filed, with such stay of execution as may be therein mentioned, for the fee of one dollar, to be paid by the defendant; particularly entering on his docket the date and tenor of the instrument of writing, on which the judgment may be founded, which shall have the same force and effect, as if a declaration had been filed, and judgment confessed by an attorney, or judgment obtained in open court, and in term time; and the defendant shall not be compelled to pay any costs, or fee to the plaintiff's attorney, when judgment is entered on any instrument of writing as aforesaid.<sup>4</sup>

Pursuant to this section and the confession of judgment clause<sup>5</sup> in a contract, a defendant-debtor consented to waive his right to notice and hearing before entry of the judgment. One hundred fifty-four years after the passage of the Act, the District Court held the procedure complies with the due process of law clause of the fourteenth amendment<sup>6</sup> only if there has been an understanding,

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3. *Swarb v. Lennox*, 314 F. Supp. 1091, 1102-03 (E.D. Pa. 1970).

4. PA. STAT. ANN. tit. 12, § 739 (1962), as amended, (Supp. 1970).

5. In *Swarb* the clause read:

A. Each buyer and co-buyer, jointly and severally, hereby authorize and empower the Prothonotary, clerk or any attorney, or any court of record within the United States, or elsewhere, at any time, to appear for each buyer and a co-buyer and to confess judgment as often as necessary against each buyer and of co-buyer and in favor of the holder, as of any term, with or without declaration filed for such sum or sums as may be payable hereunder with the cost of suit with 20 per cent added as attorney's fees. With respect to any judgment and exemption under any law now or hereafter in force, and each hereby agrees that real estate may be sold under a writ or execution and voluntarily condemns the same and authorize the Prothonotary or Clerk to enter said condemnation on such writ; and each buyer and co-buyer agrees that a true copy hereof, verified by affidavit made by the holder or someone acting on its behalf, may be filed in such proceeding in lieu of filing the original as warrant of attorney, any rule of court, custom to practice to the contrary notwithstanding. Any judgment entered hereon or of any prior note for which the note is in whole or in part mediately or immediately renewal shall be secured, security for the payment hereof and of any future note which is in whole or in part mediately or immediately renewal hereof.

*Swarb v. Lennox*, 314 F. Supp. 1091, 1097 n.14 (E.D. Pa. 1970).

6. No State shall make or enforce any law which shall abridge

voluntary consent to the waiver in signing the document authorizing a confession of judgment.<sup>7</sup>

### CONFESSION OF JUDGMENT CLAUSE

Confession of judgment is a consensual, voluntary submission without service of process to a court's jurisdiction.<sup>8</sup> A New York court in 1868 explained:

Confession of judgment is the voluntary submission to the jurisdiction of the court, giving by consent, and without the service of process, what could otherwise only be obtained by summons and complaint and through formal proceedings. A person who confesses judgment submits to be sued in that form and manner. The confession of a judgment is but one of the ways and processes, one manner by which a person is sued.<sup>9</sup>

Because the confession of judgment clause in a contract allows a creditor to enter judgment against his debtor without the debtor's knowledge, it has come under increasing criticism in recent years.<sup>10</sup> Courts have strictly construed the authorization given by it;<sup>11</sup> at the same time, they have been liberal in opening the judgment on a showing by the debtor that he has a substantive defense.<sup>12</sup>

The judgment entered by the prothonotary pursuant to section

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the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Consr. amend. XIV, § 1.

7. *Swarb v. Lennox*, 314 F. Supp. 1091, 1095 (E.D. Pa. 1970).

8. *Horner Sales Corp. v. Motor Sport*, 377 Pa. 392, 105 A.2d 285 (1954); *Commonwealth ex rel. Bradford County v. Lynch*, 146 Pa. Super. 469, 23 A.2d 77 (1941).

9. *First National Bank v. Garlinghouse*, 53 Barb. 615, 619 (N.Y. 1868).

10. Hopson, *Cognovit Judgments: An Ignored Problem of Due Process and Full Faith and Credit*, 29 U. CHI. L. REV. 111 (1961); Leary, *Random Reflections on Remedies and Collections in the Consumer Credit Field*, 19 AM. U.L. REV. 189 (1970); Note, *Confession of Judgment*, 102 U. PA. L. REV. 524 (1954); Note, *Resort to the Legal Process in Collecting Debts from High Risk Credit Buyers in Los Angeles—Alternative Methods for Allocating Present Costs*, 14 U.C.L.A. L. REV. 879 (1967).

11. *Elizabeth Lodge No. 596 v. Ellis*, 391 Pa. 19, 137 A.2d 286 (1958); *Grady v. Schiffer*, 384 Pa. 302, 121 A.2d 71 (1956); *Cutler Corp. v. Latshaw*, 374 Pa. 1, 97 A.2d 234 (1953); *Salazo v. Boyle*, 365 Pa. 586, 76 A.2d 179 (1950).

12. See *R. & R. Trucking Co. v. Lewis Steel Products Corp.*, 424 Pa. 34, 225 A.2d 687 (1967); *Nadolny v. Scoratow*, 412 Pa. 488, 195 A.2d 87 (1963); *L. & N. Sales Co. v. Stuski*, 188 Pa. Super. 117, 146 A.2d 154 (1958).

739<sup>13</sup> has the same legal effect as a judgment entered by a jury.<sup>14</sup> After judgment has been entered, the debtor can seek relief in two ways: by petition to strike the judgment and by petition to open the judgment.<sup>15</sup> The petition to strike the judgment may be used only where irregularities appear on the face of the record.<sup>16</sup> Where the debtor has a meritorious defense against his creditor's action, he must petition to open the judgment.<sup>17</sup> As noted in the *Swarb* opinion, the petition to open the judgment casts upon the debtor the burden of proving his need for equitable relief.<sup>18</sup> This is contrary to the normal creditor-debtor cases in which the plaintiff-creditor has the burden of proving his claim on the debt before the defendant-debtor must enter his defense; in the petition to open, the debtor is the claimant.<sup>19</sup>

Heretofore, the courts have sought to give the debtor some relief by strictly construing the confession of judgment clause. According to the statute, judgment may be entered by the prothonotary only if the amount due appears on the face of the instrument or when it can be calculated from information on the face of the instrument.<sup>20</sup> In *Lenson v. Klowsky*<sup>21</sup> the court held that where the lease clause provided that upon default the lessor would be entitled to damages equal to the amount of rent reserved for the balance of the term less the fair rental value for the remainder of the term, the prothonotary could not enter judgment since the lease did not indicate what the fair rental value would be.

Another generally accepted rule is that the authorization to confess judgment must be clear, explicit, in writing and signed by the person against whom it is asserted.<sup>22</sup> In *Cutler Corp. v. Latshaw*<sup>23</sup>

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13. PA. STAT. ANN. tit. 12, § 739 (1962), as amended, (Supp. 1970).

14. *Id.* See *O'Hara v. Manley*, 140 Pa. Super. 39, 12 A.2d 820 (1940); *Helvete v. Rapp*, 7 S. & R. 306 (1821).

15. See *DeRose v. Lombardi*, 413 Pa. 258, 196 A.2d 336 (1964); *Kros v. Bacall Textile Corp.*, 386 Pa. 360, 126 A.2d 421 (1956).

16. See *Prestressed Structure, Inc. v. Bargain City, U.S.A.*, 413 Pa. 262, 196 A.2d 338 (1964); *Century Credit Co. v. Jones*, 196 Pa. Super. 210, 173 A.2d 768 (1963); *Gingrich v. Clarke*, 12 Leb. 189 (Pa. C.P. 1968).

17. *Northway Village No. 3, Inc. v. Northway Properties, Inc.*, 430 Pa. 499, 244 A.2d 47 (1968); *Prestressed Structure, Inc. v. Bargain City, U.S.A.*, 413 Pa. 262, 196 A.2d 338 (1964); *Produce Factors Corp. v. Brown*, 197 Pa. Super. 626, 179 A.2d 919 (1962); *Tornese v. Hassinger*, 114 P.L.J. 354 (Pa. C.P. 1966).

18. *Swarb v. Lennox*, 314 F. Supp. 1091, 1094-95 (E.D. Pa. 1970); *Brunwasser v. Christopher*, 192 Pa. Super. 305, 162 A.2d 228 (1960).

19. Comment, *Abolition of the Confession of Judgment Note in Retail Installment Sales Contracts in Pennsylvania*, 73 DICK. L. REV. 115 (1968).

20. PA. STAT. ANN. tit. 12, § 739 (1962), as amended, (Supp. 1970); *Smith v. Safeguard Mut. Ins. Co.*, 212 Pa. Super. 83, 239 A.2d 824 (1968); *Travelers Express Co. v. Segall*, 203 Pa. Super. 221, 199 A.2d 531 (1964); *Better Bilt Door Co. v. Oates*, 165 Pa. Super. 460, 69 A.2d 192 (1949).

21. 430 Pa. 193, 241 A.2d 66 (1968).

22. *Grady v. Schiffer*, 384 Pa. 302, 121 A.2d 71 (1956); *Frantz Tractor Co., Inc. v. Wyoming Valley Nursery*, 384 Pa. 213, 120 A.2d 303 (1956); *Cutler Corp. v. Latshaw*, 374 Pa. 1, 97 A.2d 234 (1953).

23. 374 Pa. 1, 97 A.2d 234 (1953).

and in *Frantz Tractor Co., Inc. v. Wyoming Valley Nursery*,<sup>24</sup> the Supreme Court of Pennsylvania held that where the confession of judgment appeared on the reverse side of the contract and the face side of the agreement made general reference to the terms and conditions on the reverse side, the debtor did not sign the confession of judgment clause. In *Frantz* the court stated that the signature must bear such relation to the provision authorizing the confession of judgment as to leave no doubt that the lessee signed, conscious of the fact he was conferring on the lessor a warrant to confess judgment against him.<sup>25</sup>

The courts have held that once the creditor has exercised his power to confess judgment, the power is exhausted even though the entry was invalid and the judgment stricken.<sup>26</sup> Also, the debtor's waiver of his right to appeal applies only to irregularities apparent on the face of the record; for example, he could still appeal if the one confessing judgment lacked authority to do so.<sup>27</sup>

These strict construction rules, however, do not adequately protect the unwary consumer who signs the warrant of attorney to confess judgment against him. Although Rule 2958<sup>28</sup> now provides for 20 days notice to the debtor before execution, it is doubtful that this is adequate time for him to secure an attorney and prepare a defense.<sup>29</sup> Nor does this provision appear to shift back to the creditor the burden of proving his claim.

The debtor also may have lost his opportunity to assert his personal defenses. If the confession of judgment note provides that entry be made only after default, the note is negotiable.<sup>30</sup> When the note is renegotiated, usually to a finance company,<sup>31</sup> the new holder many times becomes a holder in due course.<sup>32</sup> Under the Uniform Commercial Code, the debtor is left with only his real

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24. 384 Pa. 213, 120 A.2d 303 (1956).

25. *Id.* at 216, 120 A.2d at 305.

26. *Scott Factors, Inc. v. Hartley*, 425 Pa. 290, 228 A.2d 887 (1967); *American Bowling Club v. Kanefsky*, 370 Pa. 136, 87 A.2d 646 (1952); *Harr v. Furman*, 346 Pa. 138, 29 A.2d 527 (1943); *Mars Nat'l Bank v. Hughes*, 243 Pa. 223, 89 A. 1130 (1914).

27. *Grady v. Schiffer*, 384 Pa. 302, 121 A.2d 71 (1956); *Pittsburgh Coal Co. v. Potts*, 92 Pa. Super. 1 (1927).

28. PA. R. CIV. P. 2958.

29. *Swarb v. Lennox*, 314 F. Supp. 1091, 1101 (E.D. Pa. 1970).

30. *See Smith v. Lenchner*, 204 Pa. Super. 500, 205 A.2d 626 (1964); *Fidelity Trust Co. v. Gardiner*, 191 Pa. Super. 17, 155 A.2d 405 (1959); *Billings v. Roth*, 156 Pa. Super. 390, 10 A.2d 910 (1944).

31. Comment, *Abolition of the Confession of Judgment Note in Retail Installment Sales Contracts in Pennsylvania*, 73 DICK. L. REV. 115, 120 (1968).

32. UNIFORM COMMERCIAL CODE § 3-302 (1962):

1. A holder in due course is a holder who takes the instrument

defenses.<sup>33</sup> If the relation between the seller and the finance company is such that the finance company should have further inquired into the circumstances of the transaction between seller and buyer, the courts may deny the finance company holder in due course status.<sup>34</sup> Though the buyer is then able to assert his personal defenses, the protection given him is inadequate since he is still faced with the fact that judgment has been entered against him without his knowledge.<sup>35</sup> He still carries the burden of proof in his petition to open the judgment.<sup>36</sup>

The confession of judgment note has been defended as a quick, cheap method of debt collection.<sup>37</sup> The creditor does not have to pay the costs incident to a typical civil suit, nor does he have to hire an attorney.<sup>38</sup> Because of the relative ease of obtaining a valid judgment against the debtor, it is maintained, the creditor is more willing to extend credit, particularly to the low income, high-risk consumer.<sup>39</sup> The persuasiveness of these arguments is blunted by the results of one writer's survey of various finance companies that the industry itself would not object too strenuously to the abo-

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- (a) for value; and
  - (b) in good faith; and
  - (c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person.

33. UNIFORM COMMERCIAL CODE § 3-305 (1962):

To the extent that a holder is a holder in due course he takes the instrument free from

- (1) all claims to it on the part of any person; and
- (2) all defenses of any party to the instrument with whom the holder has not dealt except
  - (a) infancy to the extent that it is a defense to a simple contract; and
  - (b) such other incapacity, or duress, or illegality of the transaction, as renders the obligation of the party a nullity; and
  - (c) such misrepresentation as has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms; and
  - (d) discharge in insolvency proceedings; and
  - (e) any other discharge of which the holder has notice when he takes the instrument.

34. *Norman v. World Wide Distributors, Inc.*, 202 Pa. Super. 53, 195 A.2d 115 (1963).

35. See Comment, *Abolition of the Confession of Judgment Note in Retail Installment Sales Contracts in Pennsylvania*, 73 DICK. L. REV. 115, 118 (1968).

36. The harshness of the result may be caused by the holder in due course doctrine rather than the cognovit procedure. Note, *Consumer Protection—Truth in Lending and the Cognovit Judgment*, 1970 WISC. L. REV. 216 (1970).

37. Comment, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 418-19 (1966); Hopson, *Cognovit Judgments: An Ignored Problem of Due Process and Full Faith and Credit*, 29 U. CHI. L. REV. 111, 121 (1961).

38. Comment, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 418-19 (1966).

39. See Note, *Resort to the Legal Process in Collecting Debts from High Risk Credit Buyers in Los Angeles—Alternative Methods for Allocating Present Costs*, 14 U.C.L.A. L. REV. 879 (1967).

lition of confession of judgment: "Although the economic policy of the country favors credit buying, judgments without notice and opportunity to defend are not vital to that policy."<sup>40</sup>

Finally, this method of collection, while cheapest to the creditor, may prove to be expensive for the debtor. This is pointed out in the *Swarb* case in which stipulations established that the Philadelphia Bar Association Minimum Fee Schedule provides for attorney's fees of \$150 for filing a petition to open, that the debtor-petitioner must pay for transcripts of depositions, that the debtor who stays a sheriff's sale must pay whatever sheriff's costs have accrued before the stay is effective, and that the unpaid portion of the debtor's obligation is increased by a 15% to 20% attorney's fee when execution is filed.<sup>41</sup>

#### DUE PROCESS

Several writers have suggested the confession of judgment procedure may be in conflict with the fourteenth amendment due process clause.<sup>42</sup> The source of the conflict lies in the fact that, without notice or opportunity for hearing given to the debtor, his property becomes subject to a judgment lien.<sup>43</sup> As noted before, the debtors in *Swarb* were not aware of the judgment against them until they received notice of a sheriff's sale of their property.<sup>44</sup> Since the entry of judgment by the prothonotary has the same force and effect as any other judgment of the court,<sup>45</sup> the court decided that the lack of notice and opportunity to defend constituted a vital constitutional defect in the Pennsylvania procedure.

The requirements of due process have been a fertile source of litigation over the years. The Supreme Court of the United States has stated the requirements of due process:

It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the

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40. Hopson, *Cognovit Judgments: An Ignored Problem of Due Process and Full Faith and Credit*, 29 U. CHI. L. REV. 111, 125 (1961).

41. *Swarb v. Lennox*, 314 F. Supp. 1091, 1096 (E.D. Pa. 1970).

42. Comment, *Abolition of the Confession of Judgment Note in Retail Installment Sales Contracts in Pennsylvania*, 73 DICK. L. REV. 115 (1968); Hopson, *Cognovit Judgments: An Ignored Problem of Due Process and Full Faith and Credit*, 29 U. CHI. L. REV. 111 (1961); *Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909, 944 (1960).

43. PA. STAT. ANN. tit. 12, § 739 (1962), as amended, (Supp. 1970).

44. *Swarb v. Lennox*, 314 F. Supp. 1091, 1096 (E.D. Pa. 1970).

45. PA. STAT. ANN. tit. 12, § 739 (1962), as amended, (Supp. 1970). See cases cited note 14 *supra*.

constitutional requirement of due process of law.<sup>46</sup>

The basic requirement of notice and hearing has been reiterated in later decisions.<sup>47</sup>

### Notice

The courts have not established the precise form of notice to be given. However, in *Mullane v. Central Hanover Bank & Trust Co.*,<sup>48</sup> the United States Supreme Court held that the fundamental requirement of due process is notice reasonably calculated to inform interested parties of the pendency of the action and to give them a reasonable time to make an appearance.<sup>49</sup> "The right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."<sup>50</sup> The Supreme Court has taken the position that notice must be reasonably calculated to inform of the pending action in other decisions.<sup>51</sup> And, in deciding the constitutionality of a statute, that court has held that notice must be provided for in the statute and not awarded as a matter of favor.<sup>52</sup> In *Wuchter v. Pizzutti*<sup>53</sup> the Supreme Court held a New Jersey statute providing for service of process on nonresident motorists involved in accidents on its highways must contain a provision making it reasonably probable that notice of service on the Secretary of State be communicated to the non-resident defendant. Otherwise, the defendant would be deprived of property without due process of law.<sup>54</sup> Section 739<sup>55</sup> does not provide for any notice to be given to the debtor before entry of judgment against him; the lack of such provision makes it constitutionally defective.

Although notice must be reasonably calculated to reach interested parties, the form of notice to be given is not necessarily the same for all persons. In *Mullane v. Central Hanover Bank & Trust Co.*,<sup>56</sup> the appellant challenged the constitutionality of the New York Banking Law<sup>57</sup> which provided, on judicial settlement of accounts by the trustee of a common trust fund, that notice to beneficiaries be given by publication in the newspaper. The United States Supreme Court held the statutory notice provision did not

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46. *Powell v. Alabama*, 287 U.S. 45, 68 (1932).

47. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

48. 339 U.S. 306 (1950).

49. *Id.* at 314.

50. *Id.*

51. *Schroeder v. City of New York*, 371 U.S. 208 (1962); *Walker v. Hutchinson City*, 352 U.S. 112 (1956); *American Power Co. v. S.E.C.*, 329 U.S. 90 (1946); *Wuchter v. Pizzutti*, 276 U.S. 13 (1928).

52. *Coe v. Armour Fertilizer Works*, 237 U.S. 413 (1915).

53. 276 U.S. 13 (1928).

54. *Id.*

55. PA. STAT. ANN. tit. 12, § 739 (1962), *as amended*, (Supp. 1970).

56. 339 U.S. 306 (1950).

57. N.Y. Banking Law § 100-c (McKinney 1950).

meet the requirements of the fourteenth amendment as applied to known beneficiaries whose whereabouts are also known; however, the statutory notice provision was consistent with due process as applied to unknown beneficiaries. The Court stated that the notice must be reasonably calculated under all the circumstances to inform interested parties of the action. Here, the Court found the circumstances to be such that notice by publication, although not likely to reach the unknown beneficiaries, was sufficient to satisfy the due process standards. The Court declared that the state had a vital interest in providing means to close trusts and bring any issues as to its fiduciaries to a final settlement and that this interest could be served only if the interests or claims of those outside the state could be determined. Further, any construction of the due process clause which would place impossible or impractical obstacles in the way could not be justified. The Court said it previously had approved of resort to publication as a substitute for personal notice in other cases where it was not reasonably practical or possible to give more adequate warning, as where the persons were missing or unknown. Under the circumstances in this case the reasonable risk that notice might not reach every beneficiary was justifiable. However, these exceptions in the name of necessity did not sweep away the rule, and, under the circumstances, as to known beneficiaries, notice provided for in the statute was not reasonably calculated to reach those who could easily have been informed by other means.

Thus, the interests and duties of the state may be considered when deciding whether the notice meets the requirements of due process.<sup>58</sup> It is submitted, however, that no vital state interest is served by the advantage given to a creditor by the confession of judgment procedure. It, therefore, provides no excuse for relaxing the due process requirement of notice. In *Sniadach v. Family Finance Corp.*<sup>59</sup> the Supreme Court held the Wisconsin prejudgment garnishment procedure violative of the fourteenth amendment in that notice and opportunity to be heard were not given.<sup>60</sup> The Court did not consider this a situation requiring special protection

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58. *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). See *Fahey v. Mallonee*, 332 U.S. 245 (1947); *Owney v. Morgan*, 256 U.S. 94 (1921).

59. 395 U.S. 337 (1969).

60. *Sniadach* dealt with prejudgment garnishment. In *Moya v. DeBaca*, 286 F. Supp. 606 (D.N.M. 1968), *appeal dismissed*, 395 U.S. 825 (1969), the district court held postjudgment garnishment procedures constitutional because the judgment debtor had been provided with notice and an opportunity to be heard in the proceeding that resulted in judgment against him.

to state or creditor interests.

[M]any [industry attorneys] indicate that cognovits are disliked, are used only because of the competition, and could be outlawed without basically disrupting the finance industry. . . . The argument that strong remedies are needed to induce the finance industry to support the credit economy is greatly overworked. People borrow money in non-cognovit states.<sup>61</sup>

### Hearing

Inextricably tied to the due process requirement of notice is the requirement of an opportunity to be heard. In the confession of judgment procedure, the first opportunity the debtor has to be heard occurs when he petitions to strike or to open the judgment. He usually does not even know that judgment has been confessed until he is faced with a sheriff's sale or, under the new Rule 2958, until he receives notice before execution.<sup>62</sup>

In *Armstrong v. Manzo*<sup>63</sup> the petitioner sought to have an adoption decree set aside on the grounds that he had no notice of the proceedings. Texas law provided that adoption should not be permitted without the written consent of the child's natural father. However, if the father had not contributed substantially to the support of the child during a two year period, written consent of the judge of juvenile court of the city of the child's residence could be accepted by the adoption court in lieu of the father's consent. The child's natural mother filed an affidavit that the petitioner had not contributed to support for over two years, and the judge issued his consent to the adoption. On the basis of this consent, the adoption judge allowed the adoption by the wife's second husband. Petitioner had not received notice of the pendency of the adoption petition. He was later allowed a hearing on his motion to set aside the decree, but his motion was denied.

The United States Supreme Court was faced not only with the question of whether the lack of notice deprived the petitioner of due process but also with the question whether the subsequent hearing on his motion cured the constitutional defect.<sup>64</sup> After finding that due process requires notice reasonably calculated to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections, the Court held the subsequent hearings did not cure the constitutional defect. It stated that had notice been given to petitioner, those seeking the adoption would have had the burden of proving why the petitioner's consent was not required. Instead, petitioner in the subsequent hearing on

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61. Hopson, *Cognovit Judgments: An Ignored Problem of Due Process and Full Faith and Credit*, 29 U. CHI. L. REV. 111, 139 (1961).

62. PA. R. CIV. P. 2958.

63. 380 U.S. 545 (1965).

64. *Id.* at 550.

his motion was faced with the burden of affirmatively showing he had contributed to the support of his child. According to the Court, the burden on the petitioner was real since where the burden of proof lies may be decisive of the outcome.<sup>65</sup>

It is submitted an analogous situation exists in the confession of judgment procedure. The debtor, after judgment has been entered against him, will be afforded a hearing only if he petitions to have the judgment opened or stricken. The debtor will then have to affirmatively prove any defenses,<sup>66</sup> such as lack of authority in the one confessing judgment to do so.

The courts have also held that the opportunity to be heard must be granted in a meaningful time and in a meaningful manner.<sup>67</sup> Rule 2958 provides for a 20 day notice before execution on the judgment. Failure to notify the debtor, however, does not affect the lien of the judgment which has been entered without notice to the debtor; it merely delays the execution.<sup>68</sup> And, as the court in the *Swarb* case astutely noted:

We do not believe that the 20-day notice provision prior to execution of a confessed judgment under Pennsylvania Procedural Rule 2958(b), as recently revised, grants sufficient time to permit a debtor with limited resources to secure an attorney to undertake the above-described procedures for opening or striking off a confessed judgment.<sup>69</sup>

#### *Waiver of Notice*

As stated in *Swarb*, the procedure for confession of judgment

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65. *Id.* at 551.

66. See notes 18, 19 *supra*.

67. See cases cited note 51 *supra*.

68. P.A. R. Crv. P. 2958:

**Execution. Notice of Entry of Judgment**

(a) Within twenty (20) days after the entry of judgment the plaintiff shall mail to the defendant, by ordinary mail addressed to the defendant at his last known address, written notice of the entry setting forth the date, the court, term and number and the amount of the judgment, and file with the prothonotary an affidavit of mailing of the notice. Failure to mail the notice and file the affidavit shall not affect the lien of the judgment.

(b) Within twenty (20) days after the entry of judgment the plaintiff may issue a writ of execution even if the notice has not yet been mailed and the affidavit of mailing has not yet been filed. The lien of any levy or attachment made pursuant to such a writ within or after the twenty (20) day period shall be valid. However no further proceedings may be had pursuant to such writ until twenty (20) days after the notice has been mailed and the affidavit of mailing has been filed.

(c) If no affidavit has been filed within the twenty (20) day period after the entry of judgment, no writ of execution may be issued thereafter until twenty (20) days after the affidavit of mailing has been filed.

69. 314 F. Supp. 1091, 1101 (E.D. Pa. 1970).

is based on the concept of a waiver of notice by the debtor.<sup>70</sup> Parties may agree by contract to waive notice.<sup>71</sup> However, the United States Supreme Court has said that there must be every reasonable presumption against the waiver of fundamental constitutional rights,<sup>72</sup> the courts do not presume acquiescence in the loss of a fundamental right.<sup>73</sup>

Waiver has been defined as "ordinarily an *intentional* relinquishment or abandonment of a known right or privilege."<sup>74</sup> Many courts have taken the position that a constitutional right is not waived unless the consent to waive is voluntarily, intentionally given.<sup>75</sup> Thus, the *Swarb* court examined the evidence to determine whether the consent to waive notice was intentionally given by the debtors who signed confession of judgment notes. It found the debtors did not understand the legal effect of the contracts they had signed. That the debtor is unaware of the extent to which he is contracting away his constitutional rights is supported by many writers.<sup>76</sup> And, it follows that if the contracting party does not understand he has waived his rights, he cannot have done so intentionally. Since the Pennsylvania procedure allows a waiver without the understanding consent of the debtor, it violates the due process clause of the fourteenth amendment.<sup>77</sup>

Presumably, if the confession of judgment procedure provided that the creditor must show a voluntary consent to the waiver of notice by the debtor, it would be constitutional. It is submitted that although this may put a proof burden on the creditor, the added burden is justified. If there is no provision for such showing in the statute itself, the lack of voluntary consent to waiver would be merely an additional defense for the debtor in his petition to open the judgment. Thus, the evils of the procedure and the harshness, particularly as applied to low income consumers, which the courts have sought to relieve would remain. Judgment could still be entered under the statutory procedure, thereby requiring the debtor to get an attorney and sustain his burden of proof in his petition to open based on his lack of voluntary consent.

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70. *Id.* at 1100.

71. *National Equipment Rental Ltd. v. Szukhent*, 375 U.S. 311 (1964).

72. *Brookhart v. Janis*, 384 U.S. 1 (1966); *Glasser v. United States*, 315 U.S. 60 (1941); *Johnson v. Zerbst*, 304 U.S. 458 (1938).

73. *Ohio Bell Tel. Co. v. Public Util. Comm'n.*, 301 U.S. 292, 307 (1937).

74. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) [emphasis added].

75. See *Massey v. Moore*, 348 U.S. 105 (1954); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Walker v. Peppersack*, 316 F.2d 119 (4th Cir. 1963); *Commonwealth v. Cavel*, 244 F. Supp. 560 (M.D. Pa. 1965).

76. Comment, *Abolition of the Confession of Judgment Note in Retail Installment Sales Contracts in Pennsylvania*, 73 *DICK. L. REV.* 115, 116 (1968). See Comment, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 *U. PA. L. REV.* 395, 418 (1966); Leary, *Random Reflections on Remedies and Collections in the Consumer Credit Field*, 19 *AM. U. L. REV.* 189, 199 (1970).

77. *Swarb v. Lennox*, 314 F. Supp. 1091, 1095 (E.D. Pa. 1970).

### *Class Action*

The Eastern District Court in *Swarb* limited its decision by declaring the Pennsylvania statutes and rules unconstitutional only as applied to leases and consumer financing documents signed by Pennsylvania residents earning less than \$10,000 per year. It stated that, according to a study of 245 Philadelphia debtors in default, only 4% of the debtors had incomes over \$10,000 and found that the interests of these 4% were not adequately represented by the debtors who brought this action.<sup>78</sup> It also stated that the evidence did not support a finding of lack of understanding consent in bonds and warrants of attorney accompanying mortgages.<sup>79</sup>

As a general proposition, a court should never formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.<sup>80</sup> Thus, one to whom the application of the statute is constitutional cannot attack it on the ground that it may be unconstitutional as applied to other persons.<sup>81</sup> In *United States v. Raines*<sup>82</sup> the United States Supreme Court pointed out the reason for the rule: it is undesirable for the court to consider every conceivable situation which might arise in the application of complex, comprehensive situations.<sup>83</sup> However, the Court continued:

And the rule's rationale may disappear where the statute in question has already been declared unconstitutional in the vast majority of its intended applications, and it can fairly be said that it was not intended to stand as valid, on the basis of fortuitous circumstances, only in a fraction of the cases it was originally designed to cover.<sup>84</sup>

Admittedly, the confession of judgment procedure is harshest as applied to the low income consumer, and it is against this class that it is most often used. The low income consumer is less susceptible to a creditor's interim collection methods and is, therefore, more likely to be subject to the legal process.<sup>85</sup> However, if the Pennsylvania procedure is unconstitutional as applied to 96%<sup>86</sup>

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78. *Id.* at 1097.

79. *Id.* at 1098.

80. *United States v. Raines*, 362 U.S. 17 (1960); *Steamship Co. v. Emigration Comm'rs.*, 113 U.S. 33 (1885).

81. *United States v. Raines*, 362 U.S. 17 (1960); *Barrows v. Jackson*, 346 U.S. 249 (1953); *Booz v. Reed*, 398 Pa. 172, 157 A.2d 170 (1960).

82. 362 U.S. 17 (1960).

83. *Id.* at 21.

84. *Id.* at 23.

85. Note, *Resort to the Legal Process in Collecting Debts from High Risk Credit Buyers in Los Angeles—Alternative Methods for Allocating Present Costs*, 14 U.C.L.A. L. REV. 879, 895 (1967).

86. *Swarb v. Lennox*, 314 F. Supp. 1091, 1097 (E.D. Pa. 1970).

(certainly a vast majority) of the consumer-judgment debtors, the rationale of the rule fails, and the constitutional ruling need not be limited to the precise facts at hand.

The plaintiff-debtors in *Swarb* had standing to attack the validity of the law since their rights were directly affected by it.<sup>87</sup> The question then became whether they could adequately represent all judgment debtors. The *Swarb* court decided that the judgment debtors in this action could not fairly and adequately represent the interests of those earning \$10,000 or more.<sup>88</sup>

The Federal Rules of Civil Procedure provide:

One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . (4) the representative parties will fairly and adequately protect the interests of the class.<sup>89</sup>

The *Swarb* court decided the debtors in this action did not adequately represent the interests of all judgment debtors regardless of income.

The issue here, however, was whether the confession of judgment procedure deprives a debtor of due process of law because it does not provide for notice and hearing before entry of judgment. The court based its decision on the lack of adequate understanding of the debtors in waiving these fundamental rights. It is submitted that the class involved here was all debtors who have signed confession of judgment notes, and the class did not have to be limited to those earning less than \$10,000 per year.

The Federal Rules also provide:

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(3) the court finds that the *questions of law or fact predominate over any questions affecting only individual members*, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.<sup>90</sup>

The fundamental constitutional issues were raised on behalf of all judgment debtors. It cannot be assumed that those earning over \$10,000 per year would be severely hampered in their efforts to secure credit because the creditor is constitutionally unable to utilize the confession of judgment procedure.<sup>91</sup> Any adverse effect is outweighed by the necessity of securing for them their constitutional right to due process of law. It cannot be assumed that those earning \$10,000 understand the effect of the confession of judgment

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87. See *Barrows v. Jackson*, 346 U.S. 249 (1953); *Buchanan v. Warley*, 245 U.S. 60 (1917); *Smith v. Board of Education*, 365 F.2d 770 (8th Cir. 1966).

88. *Swarb v. Lennox*, 314 F. Supp. 1091, 1097 (E.D. Pa. 1970).

89. FED. R. CIV. P. 23(a).

90. FED. R. CIV. P. 23(b) [emphasis added].

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

clause any more than those earning under \$10,000. The *Swarb* court pointed out that it could not dictate what constitutes understanding waiver of notice,<sup>92</sup> but it is submitted that a man's economic status is not the standard of proof of such understanding. In *Smith v. Board of Education*,<sup>93</sup> the Circuit Court of Appeals for the Eighth Circuit stated:

[I]n order to have standing to litigate a constitutional question, one must be asserting the right in his own behalf. . . . But this 'is only a rule of practice' which may be 'outweighed by need to protect' . . . fundamental rights; that need in turn will prompt courts on grounds of broad constitutional policy to proceed without blind adherence to technical rules of representation.<sup>94</sup>

### *Statutory Classification*

A legislature may enact a statute which sets up different classes of citizens to which it will apply.<sup>95</sup> While the Constitution does not require that all persons be dealt with identically, due process and equal protection of the laws do require that the classification have some relevance to the purpose for which it was made and that it not be patently arbitrary.<sup>96</sup>

It is submitted that the court in *Swarb* engrafted onto the Pennsylvania confession of judgment statutes a classification which has no real relevance to the purpose for which it was made. Since the class involved here was debtors against whom judgment had been confessed pursuant to an unconstitutional procedure and since the debtors could adequately represent the issue of the constitutionality of the procedure as applied to all members of that class, the economic classification imposed on the statute was arbitrary and unreasonable.

The Eastern District Court has taken a position previously urged by legal writers in declaring the confession of judgment procedure unconstitutional. However, its decision is questionable in its limitation to a specified class of debtors. The rationale of the decision applies to all debtors; a debtor's income should not determine his constitutional rights.

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92. *Swarb v. Lennox*, 314 F. Supp. 1091, 1100-01 (E.D. Pa. 1970).

93. 365 F.2d 770 (8th Cir. 1966).

94. *Id.* at 776.

95. *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Baxstrom v. Herold*, 383 U.S. 107 (1966); *Fleming v. Nestor*, 363 U.S. 603 (1960); *Morey v. Doud*, 354 U.S. 457 (1957); *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939); *Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422 (1936); *District of Columbia v. Brooke*, 214 U.S. 138 (1908).

96. Cases cited note 95 *supra*.

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