ORIGINAL

In the

Supreme Court of the United States

D. H. OVERMYER CO., INC., OF OHIO, et al.,

Petitioners,

v.

No. 69-5

FRICK COMPANY,
a Pennsylvania Corporation,

Respondent.

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v.	:	No. 69-5
FRICK COMPANY, a Pennsylvania Corporation, Respondent.	:	

Washington, D. C.,

Tuesday, November 9, 1971.

The above-entitled matter came on for argument at 10:01 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

RUSSELL MORTON BROWN, ESQ., Brown, Storey, Stanziale and Ferry, 508 Federal Bar Building, Washington, D. C. 20005, for the Petitioners.

GREGORY M. HARVEY, ESQ., 2107 The Fidelity Building, Philadelphia, Pennsylvania 19109, for the Respondent.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 5, Overmyer against Frick Company.

Mr. Brown, you may proceed whenever you're ready.

ORAL ARGUMENT OF RUSSELL MORTON BROWN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. BROWN: Thank you, Your Honor.

Mr. Chief Justice, may it please the Court:

This case brings up for consideration a judgment rendered in the Ohio State Court on a promissory note which contained a provision for confession of judgment. This is the note commonly known as a cognovit note, by which the maker of the note agrees that if there is any default in the payment of an installment, or in the principal of the note, that he appoints any attorney in the State to enter an appearance, waive notice and service of process, and confess judgment for the amount demanded.

Appointment of this attorney is to be made by the holder of the note, the adverse party to the maker of the note. In the case at bar, it appears that the parties had a contract whereby the respondent, holder of the note, was to install a cold storage refrigeration plant in a very large warehouse. And the original contract was for some $230,000 -- or 223,

01/aic/ The payment of $94,000 was made and a note in the amount of $130,000 was executed to cover the balance. This

was to be paid in monthly payments of some 16 months, and it contained this provision that we're considering here, the cognovit provision. That is, any attorney might be designated by the holder of the note to enter an appearance and confess judgment.

Now, --

Q This was made in Ohio?

MR. BROWN: Yes, Your Honor, it was.

Q And there is no question but that the applicable State law is all that we're dealing with here?

MR. BROWN: That would be correct, yes, sir.

Now, after the installation was completed, the equipment was put into operation, it was to be automatically controlled, to produce a temperature of 10 degrees below zero and it functioned for a little while and then died of heart failure. And the warehouse company lost some ice cream, and very nearly lost a large quantity of turkeys, but they were salvaged; and they called on the supplier to remedy the defect, and they tried, it was unsuccessful, and they had to maintain a staff of people to watch the machinery and keep it going and keep it controlled.

And so the purchaser notified them that he would not make payment unless they could put it in good order, and refused to go forward with the scheduled payments. And when that happened, why, they proceeded to take judgment.

The attorney who confessed judgment for the defendant -- the petitioner here -- was completely unknown to the defendant, never communicated with the defendant; was obviously selected by the holder of the note, and paid by the holder of the note, and he simply entered an appearance and confessed judgment, waiving notice and service.

Then, under Ohio procedure, notice was given that there's a judgment against you, and the defendant engaged counsel in an attempt to set it aside. They filed a motion for new trial; they filed a motion to stay execution on a motion to vacate the judgment, setting forth that it was entered without notice and that they wanted a trial, and tendered a sworn answer showing the difficulties with the equipment and the problems that had arisen. And also attached a cross-action which alleged claims in excess of the amount demanded on the note as damages due to the malfunctioning of the equipment.

The court, the trial court, declined to entertain the cross-action, and simply affirmed the judgment; refused to vacate.

Q Did the court do that without any hearing at all?

MR. BROWN: Yes, Your Honor. There was some discussion as to whether it should or should not; but it did not go into the merits.

Q There was a little oral argument, but --

MR. BROWN: Yes.

Q -- no testimony?

MR. BROWN: No witnesses, no; nothing of that kind.

Thereafter an appeal was taken to the Court of Appeals, and the constitutional question was set forth, and the Court of Appeals simply said: This is a matter of discretion, and it won't be upset.

They then asked the Ohio Supreme Court to review the matter on constitutional grounds, federal and State, and the Ohio Supreme Court, on its own motion, dismissed the appeal, saying that there is no constitutional question involved.

We then filed this petition for certiorari, and the court granted it.

Now, we say there are three objections here, really.

First and foremost, and most important, is the question of in personam jurisdiction. And I have to dredge up from our law school days the case of Pennoyer v. Neff, in which this Court very clearly set forth the rule that unless there is jurisdiction in personam, there can be no judgment in personam. And there certainly was no jurisdiction here.

In the first place, it's established that in personam jurisdiction must rest upon service of process within the jurisdiction, or a voluntary appearance and submission to the court.

Now, there's no argument that service was made in this case, because it was expressly waived. But they rest the entire

judgment on appearance by this attorney who was unknown to the defendant, who was selected by the adversary and paid by him, for the sole and only purpose of coming into court and confessing judgment.

It might be different if he had communicated with the defendant and said, Have you got any defense? Have you got any case? Is there anything you want me to do?

He didn't do anything. He just confessed the judgment, and that was all.

Now, we take it as fundamental that a lawyer owes an obligation to a client to represent his interests, that he can't go in there and throw his client into the hands of the other side without even communicating.

For example, I can conceive of a situation where this note -- and I'm not saying that that happened in this case -- the note might be signed by somebody other than the person whose name is on there, or it might have been signed under circumstances that he might validly object to. For example, there might be some misrepresentation or fraud in the inducement, in inducing him to sign.

Q That would be subject to collateral attack, would it not?

MR. BROWN: It possibly would, Your Honor, but in Ohio you have a judgment against you, you have a lien on all the real estate, and in Ohio the statute and the case law -- and

we noted it in our brief here, and the statute is set forth -- the burden of proof is on the person who moved to set it aside, that is, upon the defendant, and he must show that he has a valid defense. That's what the statute says.

In other words, there's a shifting of the burden of proof from the plaintiff to the defendant to overcome this, whereas, as a matter of fact, if the case were tried in good order and in accordance with usual standards, the burden of proof would rest upon the plaintiff to make out his case.

In this kind of situation he might not be able to make out a case but for the promissory note, with the cognovit provision.

At any rate, it's clear that this confession, or this appearance by this attorney, should not be permitted to stand. And we have referred in the brief to Canon 6 of the American Bar Association, which we have set out verbatim, and which says, in so many words, that an attorney owes the kind of obligation to his client to disclose any conflict of interest, to disclose any possible basis upon which the client might object to his representation. He owes single-minded loyalty to his client; and the Canon even says it is unprofessional for an attorney to accept an obligation where his -- he may be obligated to carry water on both shoulders. It is his duty to contend for that -- if it is his duty to contend for that which duty to another client requires him to oppose.

Clearly, that happens in this case. The lawyer who was engaged by the plaintiff below, the respondent here, has only an obligation to the adversary of his client, and he goes into court only for the purpose of throwing his client to the wolves, not for the purpose of representing him, but for the purpose of betraying him.

Now, that's strong language, but that's the obvious and inevitable construction that must be placed upon his undertaking. He goes in there only to confess judgment against his client. And I can't get by the fact that he does so without ever talking to his client.

Q Would you think the situation is different, Mr. Brown, if the debtor had designated a trustee, as distinguished from -- he might be a lawyer or he might not be a lawyer; a trustee, as is done under the practice of trust notes in real estate transactions , often. Do you think that's any different?

MR. BROWN: In that event, Your Honor, -- beg your pardon?

Q Would you think that would be different?

MR. BROWN: I would think it would be materially different on the facts, because the trustee, under a trust note, is held, as I understand it, Your Honor, to represent both parties. He's not a partisan, he can never take action against the maker of the trust note --

Q Well, he can confess judgment.

MR. BROWN: Ordinarily, Your Honor, I am not familiar with a situation where the trustee is authorized to do more than hold the property in trust and, at the request of the debtor, offer it for sale.

Q Well, I suppose it varies from State to State, but in some places he has the -- he is given a power of attorney go confess judgment in the event of his own independent determination of a default.

MR. BROWN: If that should happen, Your Honor, and assuming the facts as you state them, I would say, Mr. Chief Justice, that he is under an obligation certainly to give notice to the debtor of what he proposes to do, and what is being done, and give the debtor an opportunity to be heard before his rights are concluded or represented in a judgment.

In that event, Your Honor, though, the trustee is really not engaging to be attorney for one of the parties, but presumably to represent both parties to the trust transaction. We have that in the District of Columbia as a general practice, as I am sure Your Honor is well aware; and the trustee commonly sits as a disinterested third party, holding the note for the benefit of both parties, and with an obligation to advertise or give notice upon a default.

Q He's always or I suppose invariably, isn't it true, selected by the creditor?

MR. BROWN: That's almost always the case, yes, Your Honor. But his obligation has been held by the courts to run to both parties to the trust transaction.

At any rate, it is our conclusion that because there was no service of process, and there was no voluntary appearance by an attorney, in the sense in which we members of the bar would like to look upon attorneys, as obligated to represent a client truthfully and honorably and fairly, there was no jurisdiction in personam within the meaning of decisions cited in our brief, by this Court holding that such jurisdiction in personam is a vital prerequisite to a judgment in personam.

Now, Point No. 2 brings us to this Ohio statute, which authorizes this kind of confession. And it's our position that the Ohio statute is unconstitutional when it is measured against the due process clause of the Fourteenth Amendment.

Q When was this contention raised in the State courts?

MR. BROWN: If Your Honor please, Mr. Justice White, this contention of no notice was raised when the --

Q I understand that, but when was the federal question raised and presented as a federal question?

MR. BROWN: If Your Honor please, I would say the first time the due process language was used was in the Court of Appeals. And it was raised there; then again in the Supreme

Court of the State.

Q Did the Supreme Court -- did the Court of Appeals or the Supreme Court deal with it at all?

MR. BROWN: Yes, Your Honor, they did.

The Court of Appeals did not specifically treat of it, but it was raised; they said that the matter of the proceedings in the trial court were a matter of discretion and that they would not set aside the judgment. When it went to the Supreme Court of the State of Ohio, that court sua sponte dismissed the appeal, saying there is no constitutional -- no substantial constitutional question involved.

Now, we have referred to cases and decisions of this Court which require the court to give notice and an opportunity to be heard. These are fundamental requisites that have been dealt with by this Court from the very beginning of the Republic. The Fifth Amendment, with the due process clause, has been in the Constitution from the very beginning; and the Fourteenth Amendment's due process clause isn't materially different.

We have cited the authorities in our brief, and we feel that the Court's decisions speak very well for themselves, and for the rule for which we're contending.

There is one point that I need to make here, and that is this: The waiver that we're dealing with here is a waiver that's embodied in the contract. It's a waiver of the right to notice and an opportunity to be heard, and it's a

waiver before there is any controversy. We feel that that is very, very important and crucial.

We make no point of the fact that a person who is served with process can certainly waive a hearing; he can waive any rights that he has. But at that point he knows what the controversy is, he knows what the consequences will be, and he knows what he's doing.

Q Would it satisfy due process in your view of this particular case if the creditor had given notice by mail, actual notice, that he intended to exercise the powers given under the cognovit note?

MR. BROWN: I believe it would, Your Honor. Yes, sir. I think, as I read some of the Court's decisions, that actual notice will measure up to the constitutional provision. It needn't take any particular form. As long as the individual has reasonable notice, and an opportunity to come in and present his defense. That's all that's required. Provided, of course, Your Honor, that the court, the trial court, would entertain the defense. And on this I have serious doubts in Ohio.

Because the courts out there have, from time immemorial, given effect to this cognovit provision. And I am inclined to believe that even though the defendant had come in here, the court would hold him to that confession of judgment. I'm not in a position to say that they would, because I'm not an Ohio lawyer, but that appears to be the

situation, Your Honor.

Q Wouldn't he end up with two lawyers?

MR. BROWN: Well, --

Q One lawyer confessing judgment, and the other lawyer putting in the defense?

MR. BROWN: Well, Mr. Justice Marshall, --

Q How do you get around that?

MR. BROWN: Mr. Justice Marshall, it's my opinion that unless a party to litigation himself engages counsel, that isn't his lawyer. So he only would have one lawyer. He would certainly disown the lawyer selected by the other side.

We have set forth in the brief cases in which this has happened in other courts. Fortunately, I must confess, very extensive research has not disclosed a great volume of case law on the subject, because lawyers are generally very careful not to appear in a case where there is a conflict of interest.

All of our training is to be faithful and loyal to one client, look out for his interests. And in the Glasser case, which we've cited in the brief, this Court invalidated a conviction because counsel for the petitioner, who was one of several defendants, also represented other defendants in the case below, where there was a possibility of conflict. They were on the same side, but there was a possibility of conflict. And the Court, in very clear language, announced the doctrine that there must be no conflict of interest in a lawyer's under-

taking when he appears in court.

Now, that Glasser case is typical of many that we have cited, and we have discussed it at length, the cases where -- for example,in the Indiana court, a proceeding was brought against a nonresident and appearances was entered by a nonresident employee of the defendant, who sent an answer to counsel for the plaintiff in Indiana, and they entered a confession of judgment.

The Indiana court threw it out, saying, "public policy prohibits this."

A matter of serious public policy prohibits a party from representing both sides in a litigation. And the defendant in the case cannot be represented by counsel for the plaintiff.

Now, that's exactly what happens in the case at bar.

There is one more point I'd like to touch upon briefly, and that is the waiver.

The other side says, Well, he waived his constitutional rights. It doesn't seem sensible to say that when you sign a contract you waive even the right to performance of the contract. And that's what this argument goes to.

In other words, you may waive rights when you know what those rights are. But the best --

Q No one suggests that he waive the right to recover for breach of warranty. All that's suggested is that he waived his right to present it as a defense to collection of the note. No one suggested he couldn't sue the -- for breach

of warranty.

MR. BROWN: That's correct, Mr. Justice White.

The point comes up this way, though, if you please, sir: When the defendant is sued on his note, he has a valid defense for the note. For example, that there was no performance by the other side.

Q I understand.

MR. BROWN: And he shouldn't be permitted to recover.

Now, under the Ohio practice that's under attack here, they go ahead and get a judgment, this judgment is subject to immediate execution. It could result in tying up the bank account. It constitutes a lien automatically under Ohio --

Q But you don't suggest that he's precluded from filing his own suit for breach of warranty, do you?

MR. BROWN: No, sir. No, sir. Ohio law --

Q And he's is no different position than if there had been a negotiation of the note and a holder of due course sued him. You think he would have a defense for breach of warranty?

MR. BROWN: If the note were in the hands of a holder in due course, I'm inclined to think the holder could recover; yes, Your Honor.

Q Yes, and then he'd just have to sue for breach of warranty?

MR. BROWN: He'd have to proceed against the holder

of the -- against the payee of the note.

Q Yes, he would.

MR. BROWN: The original holder, for breach of warranty.

However, in this case, Your Honor, we don't have that situation at all.

Q Well, this note never was negotiated and then given back to the maker when there was the default?

MR. BROWN: Not to my knowledge, Your Honor, no, sir.

At any rate, the note -- the action on the note --

Q Well, I understand that's not the facts of this case.

MR. BROWN: And I don't believe, Your Honor, that it ever was in any other hands.

Q You say -- you just say it's unconstitutional to waive in advance the right to present a defense in an action on the note?

MR. BROWN: Yes, Your Honor.

In other words, we have referred here to a Wisconsin case in which they required that any insurance company coming into the State had to waive the right to remove a case from State court to federal court. This Court passed on that and said, We will not stand for waiver of fundamental rights. And that's the position.

Now, after we came up here with this case, the State

of Ohio amended its statute, and we set that forth on page 23 of the brief. It says the note must contain this language:

"Warning: By signing this paper you give up your right to notice and court trial. If you do not pay on time a court judgment may be taken against you without your prior knowledge and the powers of a court can be used to collect from you or your employer regardless of any claims you may have against the creditor, whether for returned goods, faulty goods, failure on his part to comply with the agreement, or any other cause."

Now, this --

Q Do you think it would be unconstitutional if the note said that he waives his right to present a defense in an action on the note but not his right to file an independent suit for breach of warranty?

MR. BROWN: I believe so, Your Honor. I believe anything that strips him of notice and an opportunity to be heard before judgment is unconstitutional under the authorities of this case.

I'd like to reserve the rest of my time.

Q In this particular case there was some intervening litigation in the federal district court in the Southern District of New York, did you mention that? Has that got anything to do with it?

MR. BROWN: I don't believe so, Your Honor. It was

an attempt to stay the proceedings in Ohio. The court refused to interfere with the proceedings in Ohio. And that's all that happened.

Q Did the court consider the -- the federal court consider the merits of your claim of breach of warranty?

MR. BROWN: I would say no. There was no hearing on the merits, there were no witnesses, there was no testimony taken.

The court simply declined to stay the Ohio proceedings and very properly so, I'm sure. I was not a party to that litigation in court.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Brown.

Mr. Harvey.

ORAL ARGUMENT OF GREGORY M. HARVEY, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. HARVEY: Mr. Chief Justice, and may it please the Court:

The facts in the record in this case conclusively refute each of the constitutional contentions which have just been advanced. By that I refer to both the facts as to what happened between Frick and Overmyer over a period of several years prior to Overmyer's default on the second installment note, and the facts as to what subsequently occurred, first in the district court in New York, and what occurred in the State courts in Ohio.

Now, I think I should start just by making reference to what actually happened in the federal district court in New York.

The opinion of Judge Mansfield is set forth in full in the Appendix, at page 81. I think that is instructive reading.

It is true that no witnesses appeared in the New York proceeding, but that is because Overmyer chose to present no witnesses.

At page 81 through 81 in the record, gentleman.

Overmyer presented no witnesses. The matter is gone into preceding the opinion, in the affidavits of New York counsel who handled the matter, which established, in Judge Mansfield's opinion, that there was no merit to Overmyer's position.

I think that is merely one example of how the record has not accurately been stated in the brief for the petitioners.

Q How does -- who is Nixon?

MR. HARVEY: Nixon is an Overmyer affiliate, Your Honor, which was the construction company for whom Frick performed the subcontract. So Nixon is Overmyer, for these purposes.

Q Right.

MR. HARVEY: Now, I think I have to proceed chronologically --

Q In that action still pending, that apparently is an action for damages, I gather, based on breach of the contract; isn't it?

MR. HARVEY: Yes, it is, Your Honor.

Q The relief judgment which Mansfield denied was the motion for injunctive relief, wouldn't it be; is the action still pending?

MR. HARVEY: Well, Your Honor, I would have to go outside the record to answer that. I'll do so only if the Court requests me to.

Q Well, is it pending now?

MR. HARVEY: No, that action is not, but there is another action pending.

Q Well, this was dismissed by agreement, or what?

MR. HARVEY: I believe it was dismissed by agreement as moot.

Or dismissed by Overmyer, as a matter of fact, voluntarily, I'm informed by my associate.

Now, I think we have to start chronologically from the beginning to establish briefly just what occurred prior to the litigation. It is very important to the case, both on the constitutional issues and because what happened between Frick and Overmyer was the basis for the Ohio court's decision that Overmyer had no valid defense to the note; although it might well have a counterclaim for breach of warranty to be

asserted separately against Frick.

Now, the first contract relevant to the case was the original construction subcontract which has been described for the installation of refrigeration machinery in a warehouse under construction in Toledo.

The record before you, printed in the Appendix, establishes that Overmyer consistently failed to make the progress payments which were required under that construction subcontract, and Frick, accordingly, after numerous demands for payment, which are again printed in the Appendix, Frick accordingly stopped work and, as was its right under Ohio law, recorded mechanic's liens against the property in the total amount of $194,000-and-some-odd.

Those liens have never been challenged at any stage in this proceeding.

Three months later, Frick, the respondent here, agreed to an Overmyer proposal for extended terms of payment. Frick agreed to take ten percent of the balance then due and owing in cash, and the remainder in 12 monthly installments with interest at six and a half percent.

The effect of that was that instead of being paid in full in October 1966, as required by the original contract, Frick agreed to receive the final payment in February of 1968. And Overmyer accordingly executed the first installment note, which is in the record at page 51, which contains no confession

of judgment clause, and which, in language which appears in the middle of Appendix page 52, expressly preserves Frick's mechanic's liens against the property, Frick agreeing to forego their enforcement so long as there is no default.

Immediately after delivery by Overmyer to Frick of this first installment note, Frick completed the work, placed the system in operation, conducted a demonstration of the system, and formally requested of Overmyer that it accept the system.

Overmyer did accept the system, and the acceptance documents are also printed in the record at page 54.

Now, under the subcontract, and the subcontract is in the record, although not printed in the Appendix, but under the subcontract if Overmyer had been dissatisfied with the system, Overmyer was required to give written notice of the alleged deficiencies, and Frick was required, under the subcontract, to correct those deficiencies to Overmyer's satisfaction.

I think this is very important. Because the original construction subcontract reserved to Overmyer's engineer the final determination of whether the work done was in accordance with the specifications.

On the other hand, however, the effect of Overmyer's written acceptance, which you see in the record at page 54, was to waive all claims except those which might be made under

the continuing warranty provisions of the contract, which are also in the Appendix; and Overmyer's failure to specify in writing any deficiencies, of course, would have the same effect under the contract. But Overmyer did formally accept the work.

Now, the next development in the relations between the two sides --

Q Mr. Harvey, may I ask you --

MR. HARVEY: Yes, Mr. Justice Brennan.

Q -- one thing. I understood you to say that as part of the agreement for the second new note, Frick released the mechanic's liens.

MR. HARVEY: I'm about to get to that.

Q Right.

MR. HARVEY: We're not to that stage chronologically.

Q Yes, but what I'm trying to get to, when you do get to it, if you don't mind --

MR. HARVEY: All right; I'm right at it.

Q -- what's the relation between that release and the cognovit?

MR. HARVEY: Yes. That's exactly the stage at which I am.

Overmyer desired to have the liens released, that is made plain in the record at several points. Why they so desired is not clear, but it was apparently an urgent desire. I can infer some reasons for it.

There were negotiations, there were exchanges of correspondence between general counsel for Overmyer and counsel for Frick, negotiations were conducted largely through lawyers on both sides.

The result of those negotiations was the execution of the second installment note, which did three things very favorable to Overmyer. First, it extended the term time of payment for 21 months, so instead of getting the money in full in October 1966, which had then been extended to February '68, Frick now agreed to wait until February of 1969.

Second, the rate of interest was reduced by half a point.

Third, Frick agreed in the second note to release, and Frick actually did release, the three mechanic's liens.

I think that the text of the note is instructive in that. It appears at page 6 and 7 of the record. You will see on page 7 of the Appendix that the two provisions follow immediately upon them. And there is in the record the affidavit of the Frick person responsible for the work to the effect that in Frick's mind the two were linked. That appears in the middle of page 32, Mr. Justice Brennan.

In other words, that Frick was willing to extend the time of payment so long as it could obtain security. And the security which Frick desired was either the mechanic's liens, which it thought were adequate security, or a bundle of other

rights, including, first, the confession of judgment clause; second, to second mortgages; and -- I think that's it. That was the additional security.

But it's clear from the record in another point, Mr. Justice Brennan, also. I refer to Frick's letter of October 10, reproduced in the record at page 49, the second numbered paragraph of that letter says: "in lieu of actual cash", Frick has indicated their willingness to accept 35,000 -- I'm just giving you the high points -- provided the balance can be evidenced by interest-bearing judgment notes.

Q What are the interest-bearing judgment notes?

MR. HARVEY: Well, the second installment note was an interest-bearing judgment note, a note containing a confession of judgment clause and bearing interest.

The first installment note, however, was not a judgment note, and Frick did not require, so long as the mechanic's liens continued on the record, any confession of judgment clause.

Q This final arrangement is reflected, I guess, in the exchange of correspondence appearing on page 59 and 60? Is it?

MR. HARVEY: Yes, it is.

Q Between Frick and Overmyer.

MR. HARVEY: And I'm sorry to say that due to a clerical error at some stage, the letter at page 59 has been truncated, the last three paragraphs refer explicitly to a

release of the mechanic's liens and requests that Frick make arrangements with its local counsel in Toledo, to be able to have those released promptly. And then that's referred to again in the letter on page 60 --

Q Yes, I noticed that.

MR. HARVEY: I think there is no doubt on the entire record, and of course it is a small record before you --

Q Well, I gathered what you're saying, really, is that this is a whole judgment procedure that is simply part of a consideration that went into a negotiated settlement bearing on the default under the first note and the substitution of the second note?

MR. HARVEY: That's correct, and of course the first note was to cure the defaults under the original contract.

Q And that they agreed to give judgment notes in lieu of -- and substituted these for what previously had been secured by mechanic's liens.

MR. HARVEY: By three mechanic's liens, yes. It's as plain as can be that that's what actually happened, and I think, skipping ahead in my argument somewhat, that that creates what is a very unique situation; but the Court has passed on it before in the Shepard case in 194 U.S., which I cite.

It creates an estoppel situation. The mechanic's liens were of record, they were regarded by Frick as entirely satisfactory security. Overmyer desired that they be released.

Frick had no interest in obtaining Overmyer's consent to this judgment note. Frick would have gotten its money earlier under the first installment note. Overmyer induced Frick to release the mechanic's liens and take, in consideration for that, the confession of judgment clause. Both parties knew what they were doing.

And since it involves -- if it involves any constitutional right at all, it is merely a due process right for the protection of property rights and not individual freedom. That is an estoppel situation, and this Court should never reach the question of constitutionality.

I think that's a decisive argument if in fact you ever get to that stage.

Now, if I may take up the constitutional issue of voluntariness first, because it follows from what I've just said. There is the estoppel argument, there is also the fact that this is plainly not a contract of adhesion in the Hemmingson? or the Walker Furniture case from the District of Columbia Circuit.

Compare the first note with the second note. It is plain that Frick does not require of its customers that they sign confession of judgment clauses. Also this is not a case in which there has been a disparity of bargaining power on the two sides, or in which a poor -- poor in the economic sense -- individual of limited education has been seduced into signing

something, the meaning of which he does not know.

Q And I gather this was not just a standard form, it was a tailor-made agreement, wasn't it?

MR. HARVEY: Tailor-made --

Q Typed out.

MR. HARVEY: -- and typed, as best as I can determine, Mr. Justice Brennan, typed on the typewriter of general counsel for Overmyer and transmitted by him and, insofar as the record shows, prepared by general counsel for Overmyer. And that may be why, as a matter of fact, the text of the confession clause is about the most favorable to the judgment debtor that I have ever seen. And I am a Pennsylvania lawyer.

I would urge you to compare that confession clause on page 7 in the instant record with the typical Pennsylvania notes which will be before you in an hour; compare them also with the typical Delaware note, which appears at page 1353 in the Osmond decision, that's in 327 F. Supp. And you will see that this is a very limited form of power to confess judgment.

I would just like to make one other point under voluntariness, and that is this: . The transaction which resulted in the second installment note was entirely to the benefit of Overmyer, insofar as the record shows. There was nothing of any substance, and nothing of any value that Frick obtained from that transaction. And I think that distinguishes

it again, perhaps, from those retail cases in which it might be argued -- I'm sure it will be argued -- that the consumer gets nothing for signing a confession of judgment clause. That's not the case here. Here Overmyer obtained a very tangible benefit, the release of the lien.

Q Does this record reflect any challenge at any time to the validity of the liens that were --

MR. HARVEY: None whatsoever, in fact it reflects quite to the contrary, Mr. Chief Justice. At least an implicit recognition in the first installment note, and that's set forth at page 52, an implicit recognition that the liens were valid, and that Overmyer requested Frick to forego enforcement of the liens.

I think I may comment there, of course, that the mechanic's lien is a very, very severe weapon in the law; it is an equitable proceeding; there is no right to jury trial; it is in rem; it operates against the property, the property can be sold off by the sheriff; and there are very few defenses which the courts recognize to --

Q Under the Ohio statutes, must the lienor give notice to the debtor at the time he files the lien?

MR. HARVEY: Yes. And that was done.

There is also a provision by which the debtor may give notice to the lien holder to proceed to enforcement, so that the question of whether the lien is valid must be promptly

resolved. So Overmyer had the right to test the lien if it desired, but it never did so.

Q So that -- there is judicial foreclosure of the mechanic's lien?

MR. HARVEY: Oh, yes, absolutely.

Q And in that proceeding, breach of warranty could be a basis of defense?

MR. HARVEY: It could have been raised as a defense.

Q And if it were found valid, there would have been a judgment against the plaintiff to that extent.

MR. HARVEY: To that extent.

Q And in this transaction, plaintiff retained his rights for breach of warranty, Frick admitted those were not being waived?

MR. HARVEY: Well, in this transaction, of course, bear in mind this transaction was negotiated two months after Overmyer had executed the unconditional acceptance, which appears at page 54 of the record.

Q Well, let's assume that instead of confessing judgment, the -- Frick had just sued on the note.

MR. HARVEY: Yes.

Q And served Overmyer, if they could have found him, and Overmyer came in and presented a defense of breach of warranty.

MR. HARVEY: Yes.

Q That would have had to have been dealt with, wouldn't it?

MR. HARVEY: It would have had to have been dealt with under the --

Q Well, what is your explanation -- what's your constitutional ground for saying that in the confession of judgment proceeding Overmyer wasn't entitled to notice and a hearing?

MR. HARVEY: Oh, well, notice had been waived in the confession of judgment, --

Q So you --

MR. HARVEY: I think it's clear notice --

Q -- rest strictly on the advance waiver.

MR. HARVEY: No, I want to get to the hearing question. I'm dealing just with notice. Now, also, the record in this case establishes that the absence of notice, in the sense of a notice we're going to proceed on the note, notice was of no detriment -- lack of notice was of no detriment to Overmyer. The first notice which Frick, my client, received that Overmyer intended to default on the note, was the service upon it of an ex parte restraining order obtained in the Southern District of New York from Judge Frankel, restraining their entry of judgment on the note.

Only at that point did Frick know that it wasn't going to be paid that monthly installment.

Q But it knew then that claims of breach of warranty were being presented?

MR. HARVEY: Well, it knew that there was going to be a claim raised as a defense to the note, and the exact claim which is raised is set forth in the record; yes, it then knew at that point.

But let's proceed -- I think your question is answered by what happened in the Ohio courts with respect to these defenses, which I think is your question. Did Overmyer actually have a chance to assert its defenses? Which I think is where your question takes us.

And the record on that point is very clear. If you look at the text of the note, the note does only two things: it waives notice, and it waives a prejudgment hearing. It certainly does not purport to waive a postjudgment hearing. Some of the notes which will be before you later today do purport to do that, and do purport to waive rights to appeal and various other things.

Q Or any cause of action for breach of warranty?

MR. HARVEY: Right. Or things like that; there are such notes. I have seen them.

This note does none of those things.

Q Where, in the Appendix, is the note and so on?

MR. HARVEY: It's at page 6 and 7.

Q Thank you.

MR. HARVEY: Now, this note -- and it's page 7 is the only page which is relevant. It is short; it is simple. It waives a prejudgment hearing, but it does not waive a postjudgment hearing. And this is what is most important. The note does not waive any defenses whatsoever.

And what actually happened is that Overmyer presented its defenses to the Ohio courts when it is said that there was only oral argument, the record is not being correctly stated to this Court. I urge you to have the original record, this thick, brought before you, to see how many papers were filed, how much factual material was presented to the court by way of affidavit, how much informal testimony was delivered by Mr. Garrigan, attorney for Overmyer, who came in --

Q Is this all on the motion to set aside?

MR. HARVEY: This is all on the motion to vacate. There were several hearings. A few excerpts, merely, from the hearings are included at pages 28 and 29, but I refer you to page 29, toward the end of the page, where the court expressly gives Overmyer -- says, "I want to give him a reasonable time to file whatever he wants to." And they filed a great deal of what they wanted to file, and it is now in the record before this Court.

And it's our contention that Overmyer received a very full hearing, and an adjudication on its defenses.

Q Well, what's your understanding of the basis of

the adjudication?

MR. HARVEY: All right. Let me -- if I can answer that by starting first with the Ohio procedure, and then I will give you the exact basis of the adjudication.

The Ohio procedure on a motion to vacate requires that the trial court do two things.

First, --

Q Can you back up just a little bit?

MR. HARVEY: Yes, surely.

Q There's a time limitation within which such a motion must be filed, is there not?

MR. HARVEY: Not really. There used to be a distinction between filing it in term and out of term --

Q Oh, that's it.

MR. HARVEY: -- which the recent decisions really tend to overlook.

Q I've been away from there too long.

MR. HARVEY: Yes.

In this case, however, it was filed in term, immediately after; and therefore the term distinction in this court, as in others, is tending to become --

Q And going back again even a little further, after there is a judgment by confession on a cognovit note, is there a procedure for notifying the judgment debtor?

MR. HARVEY: Yes, indeed. The court must give notice,

and the notice went out in this case to five different Overmyer locations, so far as I'm aware it was received in all of them, --

Q Notice by mail?

MR. HARVEY: Notice by mail, yes. And the notice, the form of notice appears in the record here, and the docket entries reflect the places to which the notice was sent. That's page 1 and 2, you'll see set forth all the places that notice was sent.

Now, the Ohio courts have a two-step procedure, which the trial court takes in passing on a motion to vacate. First, is to determine whether the judgment debtor has presented a valid defense, and that is a question of examining the pleading. That doesn't go to whether it's meritorious or whether it will eventually prevail. That's just has he pleaded a valid defense?

And then second, since under the Ohio procedure you are not supposed to plead your evidence -- and it's a very special pleading system -- under the Ohio procedure you're not supposed to plead your evidence. The next step is to determine whether there is some evidence adduced by way of affidavit, testimony in open court, deposition, or anything else, by the judgment debtor which would avoid a directed verdict against him if the matter went to trial. Very similar to avoidance of summary judgment in the federal procedure. Can he show an issue of fact?

If that occurs, he presents a valid pleading and enough evidence in support of it to avoid judgment against him, then the court has the duty -- that's the phrase used -- has the duty in the Ohio cases to open the judgment and a full trial is had, in which there is the right to trial by jury, if demanded, in which the burdens are the same as in a normal proceeding not started by confession of judgment, and the result is a determination either that the judgment was good, in which case it is confirmed and relates back, or that the judgment is stricken.

Q You said "in which the burdens are the same"?

MR. HARVEY: Yes.

Q What did you mean by that?

MR. HARVEY: Well, I mean that the burden on Overmyer to present evidence in support of his affirmative defenses in that plenary proceeding, following the opening of the judgment, if it had occurred, would be the same.

Q The same as --

MR. HARVEY: As in a normal trial.

Q -- in one had the note holder brought the lawsuit?

MR. HARVEY: Merely brought suit without attempting to confess judgment.

Q Including a possible judgment over on the cross-claim?

MR. HARVEY: Yes.

Q Even though that exceeded the --

MR. HARVEY: Yes.

Q -- amount of the judgment?

MR. HARVEY: Yes.

Q All of that could happen?

MR. HARVEY: All that could happen; could still have happened in that proceeding, if Overmyer chose to prosecute it there. They could have kept going. The answer could have -- the counterclaim would have been filed, they could have proceeded to a trial.

They did not.

Now, what the -- and my time is just about to expire -- what the Court of Appeals held, and I refer you to page 84 of the record, the motion for reconsideration, what the Court of Appeals held, and unfortunately it is not in the Appendix but it is in the docket entries which are part of the record in this Court, the Court of Appeals said, "Finding that the defendants-appellants failed to prove the existence of a valid defense; further finding therefrom that the answer and cross-petition of defendants-appellants constituted only a counterclaim to the petition on the judgment note", and they go on to hold that the judgment properly was not opened.

The entire constitutional issue presented here, may it please the Court, depends upon Overmyer's contention that it

had a valid defense rather than a counterclaim. But the Ohio courts, for reasons which I think are not properly to be passed upon by this Court, but with which this Court would agree, in view of the factual background, the Ohio courts found that there was no valid defense as a matter of the pleadings, that there was a counterclaim --

Q What's the significance of that, Mr. Harvey? That the answer on cross-petition constituted only a counterclaim; what's that mean?

MR. HARVEY: Because, under Ohio law, Mr. Justice Brennan, if it is only a counterclaim, then that may be litigated in the same proceeding and eventually there may be judgment in favor of the judgment debtor against the judgment creditor in the amount of the counterclaim.

But since it is only a counterclaim, under Ohio law it is no defense to an obligation of the certainty of the second installment note, which was a replacement for the first installment note.

Q Well, is that to say, on the basis of this adjudication, they might have proceeded on the counterclaim had they chosen to do so?

MR. HARVEY: Absolutely. Absolutely. They were not cut off from proceeding on that. They have the full right to assert it. They have, in fact, asserted it in New York in another civil action. And the matter is still open and still

available to them.

Q Now, is that counterclaim, then, still pending in Ohio? Or is that also --

MR. HARVEY: No, it is now pending, may it please the Court, in the Southern District --

Q No, what happened to the counterclaim in the Ohio court? Was that dismissed or what?

MR. HARVEY: Well, they have proceeded no further with the Ohio matter, because it has been constantly on appeal. But they did assert the counterclaim in a separate civil action in New York, filed December 20, 1968, and answer was filed within 20 days. There has been no action taken to prosecute that proceeding; no action whatsoever. Counterclaim is still open and available to them.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Harvey.

Mr. Brown, you have five minutes left.

REBUTTAL ARGUMENT OF RUSSELL MORTON BROWN, ESQ.,
ON BEHALF OF THE PETITIONERS

MR. BROWN: Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Do you wish to take issue with any of the factual aspects emphasized by Mr. Harvey?

MR. BROWN: I don't believe so, Mr. Chief Justice.

Our issue is on constitutional law, and I would particularly ask the Court to have in mind two cases, which we

have cited in our brief, Armstrong v. Manzo and Griffin v. Griffin, particularly the latter which was decided by this Court, in the opinion by Mr. Chief Justice Stone. Where the shifting of the burden is the unconstitutional aspect of things.

In the New York case they imposed the burden to pay alimony without hearing; brought it down here and filed suit on it, and it was held by this Court that the shifting of the burden, the postjudgment determination will not measure up to constitutional standards of due process --

Q Mr. Brown, --

MR. BROWN: Yes, sir?

Q -- certainly on what Mr. Harvey has been presenting to us, it does appear as though this whole arrangement was at arm's-length both with lawyers appearing for both and with an understanding, certainly on the part of the lawyers, I would suppose, of what the consequences were of this judgment note. Can you really suggest it wasn't -- call it waiver, call it what you will; that there wasn't a complete understanding on the part of Overmyer of what they were getting into?

MR. BROWN: I think, Mr. Justice --

Q Well, you've argued earlier that the arrangement effected by the lawyer was a breach of his professional responsibility, and yet your client entered into this with his eyes open for a quid pro quo, the release of the mechanic's

liens, and all the rest of it, knowing that this is precisely the way, if the security had to be enforced, that it would be enforced, didn't he?

MR. BROWN: If Your Honor please, Mr. Justice Brennan, that on its face appears to be the thrust of the facts. However, who would know at the time that the debtor would be held to pay for something he never got?

Q I want to suggest to you that your client must have known. That's the form of security that he gave Frick in substitution for what Frick had in the way of security before that.

MR. BROWN: Now, that relates, Mr. Justice Brennan, to the merits that should be determined in the trial court.

Q I know, but you're asking us to say that this procedure, as applied in this case, was unconstitutional.

MR. BROWN: That's exactly --

Q It's a Sniadach sort of thing, because --

MR. BROWN: Exactly. Precisely. That's the constitutional issue. And it's our position --

Q Well, it's certainly not -- not if you put yourself with your eyes open, is it? In that position, wouldn't you either have waived it or be estopped to raise it, or something, based on that kind of fact situation?

MR. BROWN: Well, let me put it this way, Mr. Justice Brennan, if it turned out that they had not installed

the equipment at all, or a material part of it was omitted --

Q I know, but that's not -- that's not this case, as I understand it.

MR. BROWN: No, it isn't this --

Q Here it was a second note that was substituted for an earlier note; Frick had one form of security and they swapped it for this form of security. Surely your client had to know, in giving this form of security, what that meant, didn't he?

MR. BROWN: He knew that it meant, Your Honor, that he had to pay this obligation. But, I submit --

Q I suggest that he also knew that if he defaulted, it meant that Frick could do exactly what it did here.

MR. BROWN: And that then it would go into court and try to get a hearing on the valid defense it had on the merits. But it never got that.

It's our position --

Q Didn't it just -- it just waived the particular proceeding or the forum in which it could present its claim; just couldn't present it, just waived its right to present the judgment in the forum in which the judgment was obtained.

MR. BROWN: In Manzo and in Griffin, this Court has held that that will not measure up to constitutional standards of due process.

Now, let me just say one thing --

Q Well, Manzo never waived his right to notice.

MR. BROWN: Beg your pardon?

Q Manzo never -- or, I don't know which one --

MR. BROWN: No, he didn't --

Q -- was the father; I don't know which one was the father --

MR. BROWN: He was the father, yes, Your Honor.

Q Manzo never waived his right to notice in that case --

MR. BROWN: Well, it was said --

Q -- and he didn't even purport to.

MR. BROWN: Well, it was said in that case that he had forfeited his right because he hadn't kept in touch and supported the child; he defaulted.

Q Yes, but that's a forfeiture, that's not a waiver.

MR. BROWN: Well, that's right. But the court said that you can't adjudge -- adjudicate these rights without notice, and an opportunity to be heard.

Q Well, if you didn't have notice, why was this action filed in the Southern District?

MR. BROWN: This was to restrain them from going ahead with any action --

Q Well, could that --

MR. BROWN: -- out there in Ohio.

Q That could keep them from realizing on the security which you had given. Isn't it the fact, if you know, Mr. Brown, -- Mr. Harvey suggested that your client's lawyer -- I know it wasn't you at the time --

MR. BROWN: Yes.

Q -- actually drafted this agreement, and actually drafted this form?

MR. BROWN: I'm not informed, and I would be inclined to think that that's immaterial, Your Honor.

Q Well, I think so, too. The lawyer was certainly there --

MR. BROWN: Yes, there's no question about that.

Q -- they negotiated an arrangement.

MR. BROWN: There's no question about that. They were represented by counsel. But there is one factor I'd like to emphasize, if you please, sir. And that is that this business of waiving in the beginning, before you know what the controversy is about, before you know anything about it, it simply doesn't conform to the decisions of this Court.

Now, we have no quarrel with the fact that, for example, now, as a judge you'll be aware of course that all this information about the prior negotiations would not be admissible at trial. These were merged in the note. That's the contract on which they sue. They can't bring up all this prior negotiation; it's merged. As a matter of evidentiary

law, I would object at the trial, and the court would sustain that objection, I'm sure. Nothing can modify the agreement between the parties. And that's where we stand here, if you please, sir.

Was this a constitutional agreement? Does it measure up to standards of due process, notice, and an opportunity to be heard?

All this business simply says he got consideration. Same thing applies in the case of these little consumers. They got something.

MR. CHIEF JUSTICE BURGER: I think you've covered that territory; and your time is up now, Mr. Brown.

MR. BROWN: Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Brown, and Mr. Harvey.

The case is submitted.

[Whereupon, at 11:01 a.m., the case was submitted.]