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The Accumulation of Contact Points Theory

THE ACCUMULATION OF CONTACT POINTS THEORY

Defendants, An Indiana partnership, indebted to the plaintiff, doing business in Illinois, agreed to make a cash payment and settle the balance of an open account with a note payable in periodic installments.

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6. Pepper v. Litton, 308 U.S. 295, 302 (1939). The opinion also stated that the trustee could collaterally attack a judgment on grounds of fraud or collusion only in the absence of a valid plea of res judicata. Id. at 306.
7. In re Noble, 42 F. Supp. 684 (Colo. 1941), reversed in Beneficial Loan Co. v. Noble, 129 F. (2d) 425 (C.C.A. 10th, 1942). See Mr. Justice Rutledge, concurring in the principal case at 860; 3 Collier, Bankruptcy (14th Ed.) p. 1800. Contra: In re Redwine, 53 F. Supp. 249 (N.D. Ala. 1944).
8. The court reasoned that since the Bankruptcy Act, 52 Stat. 840 § 57 k. (1938), 11 U.S.C.A. § 93 k. (1943) provided that "Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case . . . " that such disallowance or subordination in the light of equitable considerations may be made originally.
9. Following an understandable tendency of courts of equity jurisdiction charged with the duty of marshalling the assets of a debtor and distributing them equitably among his bona fide creditors; cf. In re Mallory, 16 Med. Cas. 549, No. 8,991 (Nev. 1871).
10. "But we are aware of no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata, which is founded upon the generally recognized public policy that there must be some end to litigation and that when one appears in court to present his case, is fully heard, and the contested issue is decided against him, he may not later renew the litigation in another court." Principal case at p. 856. Compare the language of the District Court of Massachusetts in Ex parte O'Nield, 18 Fed. Cas. 714, 715, No. 10,527 (Mass. 1867) in refusing to reduce a judgment claim based on damages challenged as excessive, "Where the court rendering judgment has jurisdiction, and there has been no fraud and no preference, no one can examine into the consideration of a judgment, and show by evidence, outside of the record, that the judgment ought not to have been rendered, or not for so large a sum."

    The similar English view is asserted In re Howell, 84 L.J. 1399, 1400 (K.B. 1915). "The working rule is that the Registrar can go behind a judgment, where it is a judgment by default or compromise. He ought not to go behind it, when the judgment has been given in open court against a person who is represented."

The plaintiff forwarded, from Illinois, a note for signature containing a cognovit which gave no indication of the place of signing. The defendants signed the note in Indiana and mailed it to the plaintiff in Illinois. The plaintiff then credited the account of the defendants as satisfied. Plaintiff obtained judgement upon the note in Illinois pursuant to the cognovit provision, the final instalment of the principal being overdue, and sought to enforce the Illinois judgement in Indiana. Held: Judgement denying recovery reversed. The instrument is to be governed by Illinois law, under which the judgment was valid; accordingly it must be given full faith and credit in Indiana. *W. H. Barber Co. v. Hughes*, 63 N.E. (2d) 418 (Ind. 1945).

The public policy of Indiana concerning the execution or enforcement of a cognovit or warrant of attorney is expressed by statute rendering such cognovit void,[1] prohibiting local enforcement of a foreign judgement obtained pursuant to a cognovit provision,[2] and providing a penalty for the violation thereof.[3] The principal case raises the issue of the force and effect of the statute under the full faith and credit clause of the U.S. Constitution,[4] which requires the enforcement by a sister state of a valid judgment,[5] even though contrary to local public policy.[6] Such prior judgement, however, is subject to collateral attack by showing a lack of jurisdiction over the subject matter[7] or of the person[8] in the foreign forum.

The principal case involves the validity of the personal jurisdiction of the Illinois court over the defendants, and, if valid, must rest upon the cognovit serving as a waiver of service of process.[9] The court classified the problem as one of contract,[10] although reference was made

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1. Ind. Stat. Ann. (Burns, 1933) § 2-2904; Farrabaugh and Arnold, "Commentaries on the Cognovit Note Act" (1929) 5 Ind. L. J. 93.
2. Ind. Stat. Ann. (Burns, 1933) § 2-2905.
3. Id. § 2-2906.
4. U.S. Const. Art. IV, § 1, "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."
5. Christmas v. Russell, 5 Wall. 290 (U.S. 1866); Roche v. McDonald, 275 U.S. 449 (1928).
6. Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943), 150 A.L.R. 413 (1944); Fauntleroy v. Lum, 210 U.S. 230 (1908); Rodenbeck v. Crews State Bank & Trust Co., 97 Ind. App. 21, 163 N.E. 616 (1933); 3 Freeman, "Judgments" (5th ed. 1925) 2887.
7. Thompson v. Whitman, 18 Wall. 457 (U.S. 1873); Restatement, "Judgements" (1942) § 10.
8. Pennoyer v. Neff, 95 U.S. 714 (1877).
9. See Note (1906) 3 L.R.A. (N.S.) 449; Restatement, "Conflict of Laws" (1934) § 81, comment b; Note (1931) 44 Harv. L. Rev. 1275.
10. The diversity of decision found in such cognovit provision cases is due largely to incomplete analysis of the problem involved. The first and major problem is that of "classification", i.e., into what broad catagory of substantive law the factual elements fall, e.g., contract, agency, corporations etc. The court is then faced with the secondary problem of "qualification", i.e., the "choice of law" appropriate to the facts, e.g., in a factual situation classified as contract, shall the law of the place of contracting, law of place of performance apply. The diversity of decision results from non-uniformity in the

to the principles of agency[11] and procedure.[12] The court then considered (1) the law of the place of execution,[13] (2) the law of the place of performance,[14] (3) the law of the place as governed by the intent of the parties[15] and (4) the method used in modern case books on conflict of laws[16] designated as "accumulation of contact points".[17] The court,

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approach to the problem. It has been suggested by some writers that the problem be solved at the first level of analysis, e.g., in the principal case by classifying as a problem in agency and applying the law of the place of the creation of the agency, where the act of consent occurred. Gavit, "Indiana Cognovit Note Statute" (1929) 5 Ind. L. J. 208; Notes (1924) 19 Ill. L. Rev. 584, (1924) 38 Harv. L. Rev. 110, (1924) 23 Mich. L. Rev. 908; see Milliken v. Pratt, 125 Mass. 374, 28 Am. Rep. 241 (1878). The majority of courts, however, have "classified" the problem as one of contract. A diversity then arises in the "qualification" of the problem. One solution is the application of the law of the place of contracting to determine the validity of the contract. Monarch Refrigerating Co. v. Faulk, 228 Ala. 554, 155 So. 74 (1934); Garrigue v. Kellar, 164 Ind. 676, 74 N.E. 523 (1905), 69 L.R.A. 870 (1906); Acme Food Co. v. Kirsch, 166 Mich. 433, 131 N.W. 1123 (1911), 38 L.R.A. (N.S.) 814 (1912). Other courts have "qualified" the problem as one relating to performance and governed by the law of the place of performance. Egley v. T.B. Bennett & Co., 196 Ind. 50, 145 N.E. 830 (1925), 40 A.L.R. 436 (1926); cf. Irose v. Balla, 181 Ind. 491, 104 N.E. 851 (1914). Still other courts have used the place of performance as the place intended by the parties. Vennum v. Mertens, 119 Mo. App. 461, 95 S.W. 292 (1906). A few states have considered the cognovit in terms of "procedure" of the forum where judgment has been rendered. Carroll v. Gore, 106 Fla. 582, 143 So. 633 (1932), 89 A.L.R. 1495 (1934); Wedding v. First Nat. Bank, 280 Ky. 610, 133 S.W. (2d) 931 (1939); Gotham Credit Corp. v. Powell and Sokalski, 22 N.J. Misc. 301, 38 A. (2d) 700 (1944); Hastings v. Bushong, 252 S.W. 246 (Tex. Civ. App. 1923). New York has apparently added consideration of the domicil of the obligor. Baldwin Bldg. & Loan Ass'n v. Klein, 136 N.Y. Misc. 752, 240 N.Y. Supp. 804 (Sup. Ct. 1930), aff'd, 230 App. Div. 827, 244 N.Y. Supp. 899 (1939). See also 2 Beale, "Treatise on Conflict of Laws" (1935) 1077 et seq. The Restatement offers assistance only in the choice of law governing the factual elements after the preliminary problem of "classification" has been solved by the law of the forum. Restatement, "Conflict of Laws" (1934) § 7.

11. Classified as an agency situation the cognovit would serve to act as an appointment of an agent to do the act of confessing judgment. See n. 10 supra.
12. Classified as a procedural matter the cognovit merely indicates the method of obtaining judgment in Illinois and is governed by the law of the place of suit. See n. 10 supra; Ailes, "Substance and Procedure in the Conflict of Laws" (1941) 39 Mich. L. Rev. 392; compare Cook, "Logical and Legal Bases of Conflict of Laws" (1942) c. 6.
13. The contract was executed in Illinois since the last act in the formation of the contract was the giving of value, the cancellation of the open account owed by the defendants. Principal case at p. 423. Compare Restatement, "Conflict of Laws" (1934) §§ 313, 314.
14. The place of performance indicated by the note was Illinois.
15. Intent to be governed by Illinois law was found by jury. Principal case at p. 419.
16. Harper and Tainter, "Cases on Conflict of Laws" (1937) 173; Cheatham, Dowling, Goodrich, Griswold, "Cases on Conflict of Laws" (2d ed. 1941) 510.
17. Harper and Tainter, loc. cit. supra n. 16.

in the principal case and in a subsequent case,[18] established the so called contact point rule as the 'choice of law' governing such instruments in Indiana.[19]

Contrasting the contact point and the intent theory[20] as a basis of determining the validity of contracts has been the subject of much controversial writing.[21] The following basic objections to the intent theory have been made: (1) where the intent has been specifically expressed the parties are permitted to choose the applicable law in order to avoid the consequences of the law normally applied,[22] (2) where the intent has not been specifically expressed, the difficulty of ascertaining the parties intent results in speculation by the court causing unpredictability and diversity of judicial opinion.[23] Consideration of the cases where the parties specifically provide for the application of the law of a particular state is without the scope of this note, as is the consideration of the rule of presumed intent frequently applied in usury cases.[24]

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18. In Spahr v. P. & H. Supply Co., 63 N.E. (2d) 425 (Ind. 1945) delivered the same day as the principal case, the court rejected the application of the law of the place of performance and applied the accumulation of contact points theory, referring to the principal case as controlling.
19. Two prior conflicting Indiana decisions which may only be reconciled through the application of the accumulation of contact points theory are referred to but not overruled in the principal case. The first, applying the rule of the place of execution, was merely distinguished in the principal case. The court indicated that in this case there was a mis-application of the rule in finding the situs of the place of execution. Garrigue v. Kellar, 164 Ind. 676, 74 N.E. 523 (1905), 69 L.R.A. 870 (1906); compare Ohio v. Eubank, 295 Mich. 230, 294 N.W. 166 (1940); Palmer Nat. Bank v. Van Doren, 260 Mich. 310, 244 N.W. 485 (1932). The second prior Indiana case applied the rule of the place of performance. Egley v. T.B. Bennett & Co., 196 Ind. 50, 145 N.E. 830 (1925), 40 A.L.R. 436 (1926).
20. One definition of the intent theory has been expressed, "If the intent of the parties is expressed, or an actual intent found, either that the Minnesota law (i.e. law of forum), or the Montana law govern, such intent must be given effect. If the intent is not expressed, or an actual intent found, the court must find the presumed intent and such presumed intent then fixes the law." Green v. Northwestern Trust Co., 128 Minn. 30, 35, 150 N.W. 229, 231 (1914).
21. Beale, "What Law Governs Validity of a Contract" (1909) 23 Harv. L. Rev. 1, 79, 194, 260; Lorenzen, "Validity and Effect of Contracts" (1921) 30 Yale L. J. 655; Goodrich, "Handbook of Conflict of Laws" (2d ed. 1938) 278, 279; Cook, "Logical and Legal Bases of Conflict of Laws" (1942) c. 15; compare Westlake, "Private International Law" (5th ed. 1912) 302; Cheshire, "Private International Law" (1935) 182, 183.
22. See 2 Beale, loc. cit. supra n. 10; cf. Gilbert v. Burnstine, 255 N.Y. 348, 174 N.E. 706 (1931).
23. See 2 Beale, op. cit. supra n. 10, at 1083.
24. 6 Williston and Thompson, "Williston on Contracts" (Rev. ed. 1938) 5097. "The usury cases have developed their own special rule whereby in the absence of circumstances indicating a contrary intent, the parties are presumed to have chosen the law which will uphold the legality of the bargain." See Note (1940) 125 A.L.R. 482.

The traditional objections to the determination of the parties intent is satisfactorily answered by the application of the accumulation of contact points method. The principal case defines the procedure as, "The court will consider all acts of the parties touching the transaction in relation to the several states involved and will apply as the law governing the transaction the law of that state with which the facts are in most intimate contact."[25] Many courts have employed similar analysis in determining the applicable choice of law, i.e., the law of the place of performance, law of place of execution etc. But it is believed that this method has not been heretofore formulated by any court into a rule for conflict of laws application.[26]

The accumulation of contact points method permits the application of the law appropriate to the factual elements of the case rather than the application of 'mechanical jurisprudence' such as the place of contract or place of performance,[27] furthermore it parallels more closely the results which the business man would normally anticipate when contracting. Utilization of this method will also result in greater uniformity of future decisions with resulting certainty in predictability of judicial action. It is believed, therefore, that the accumulation of contact points method of determining the validity or illegality of a contractual situation is therefore preferable to that advanced by the Restatement of the Conflict of Laws and utilized by many courts.[28]

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25. Principal case at p. 423.

26. Indicating the "modus operandi", see Seeman v. Philadelphia Warehouse Co., 274 U.S. 403 (1927); Union Trust Co. v. Grosman, 245 U.S. 412 (1918); Coghlan v. South C. R.R., 142 U.S. 101 (1891); Hall v. Cordell, 142 U.S. 116 (1891); Prichard v. Norton, 106 U.S. 124 (1882); Hubbard v. Exchange Bank, 72 Fed. 234 (C.C.A. 2d, 1896), cert. denied, 163 U.S. 690 (1896); Coxe v. Coxe, 21 Del. Ch. 30, 180 Atl. 612 (1935); Greenlee v. Hardin, 157 Miss. 229, 127 So. 777 (1930), 71 A.L.R. 741 (1931); Cameron v. Ellis Constr. Co., 252 N.Y. 394, 169 N.E. 622 (1930); Wilson v. Lewiston Mill Co., 150 N.Y. 314, 44 N.E. 959, 55 Am. St. 680 (1896); In re Missouri Steamship, 42 Ch. Div. 321 (1888). In the principal case the contact points indicating an Illinois contract were: (a) business transacted in Illinois, (b) debt arose in Illinois, (c) place of conference concerning settlement of debt in Illinois, (d) note on Illinois form, (e) note prepared in Illinois, and (f) lower court found parties intended to be governed by Illinois law. The Indiana contacts were found to be: (a) residence of debtors, and (b) note signed and mailed in Indiana.

27. "Every attempt to reduce the law in a given field to a rule which can be applied automatically to really new situations by process of deductive logic is of necessity doomed to failure. In the words of Mr. Justice Holmes, 'But certainty generally is illusion, and repose is not the destiny of man.' " Cook, "The Present Status of the 'Lack of Mutuality Rule' " (1927) 36 Yale L. J. 897, 912.

28. The basic objections to the application of pat rules of law such as the law of the place of performance, etc. may be summarized as follows: (1) In using the place of contracting to determine the validity of an agreement it is necessary to assume a valid contract in order to determine the locus of the last act in order to determine the applicable law. Question begging technique. (2) The courts are not consistant in ascertaining the final act. Compare Garrigue v. Kellar, 164 Ind. 676, 74 N.E. 523 (1905), 69 L.R.A. 870 (1906) with Ohio v. Eubank, 295 Mich. 230, 294 N.W. 166 (1940);