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# Conflict of Laws--Law Governing the Performance of a Contract--Validity of Power of Attorney to Confess Judgment (Comment on Recent Cases)

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years of labor, and giving it to the relatives of the wife, who were strangers to the husband. And in *Elliott v. Prater*,<sup>11</sup> the court lays stress upon the two considerations, (1) the admissions by the wife of ownership in the husband and (2) the fact that this property constituted the bulk of the husband's estate, and gives scant weight to the consideration of dominion exercised by the husband over the property.

In the principal case now under comment.<sup>12</sup> The sole consideration was that the effect of the presumption of gift would be to transfer to the children by the second wife the whole of the accumulation of the husband's earnings, to the deprivation of the children of the first wife, a result which the court termed an inequitable one.

From these cases must it not be the conclusion that first and last the consideration that will prove the prevailing one in the mind of the court is that of the natural equity between the parties, the court bearing in mind the common pressure to which the wife often, and properly, subjects the husband to have the title to the property placed in her name? So that when the relationship of the parties is terminated by death, the direction the property will take, whether along the line of the wife or that of the husband, will depend upon the equities of their respective heirs and not upon the seat of the legal title.

ELMER M. LEESMAN.

## OTHER JURISDICTIONS

CONFLICT OF LAWS—LAW GOVERNING THE PERFORMANCE OF A CONTRACT—VALIDITY OF POWER OF ATTORNEY TO CONFESS JUDGMENT.—[Indiana] A suit was brought in Indiana upon an Illinois judgment rendered upon a promissory note payable in Illinois, but executed by the maker in Indiana, and containing an irrevocable power of attorney to confess judgment. The power was valid under the law of Illinois, and invalid under the law of Indiana. The judgment was by confession under the power. It was held that the judgment was void for lack of jurisdiction and unenforceable in Indiana.<sup>1</sup>

This case reverses the prior decision of the Appellate Court of Indiana in the same case.<sup>2</sup> It is submitted that the first decision is the correct one. It went upon the ground that, because the note was payable in Illinois, the parties intended the transaction to be governed by the law of that state; and, being valid there, the judgment bound the Indiana courts under the full faith and credit clause of the United States Constitution. The case was transferred to the Supreme Court of Indiana.<sup>3</sup> The reasoning of the Supreme Court

11. 269 Ill. 69.

12. *Reid v. Reid* supra.

1. *Egley v. T. B. Bennett & Co.* (1924) 144 N. E. 533; (1925) 145 N. E. 830.

2. 139 N. E. 385.

3. Under Section 1394, Burns' Ann. Stat., Ind., 1914.

is as follows: (1) The note was an Indiana contract; (2) it was invalid as "undertaking to oust the courts of jurisdiction"; (3) the power to confess judgment was invalid under Indiana law; (4) the Illinois court never acquired jurisdiction of the defendant and the Indiana court was not bound to give effect to its judgment.

To sustain its first proposition the court cites two cases: *Equitable Life, etc., Soc. v. Perkins*<sup>4</sup> and *Swing v. Marion Pulp Co.*<sup>5</sup> The latter case merely holds that a contract of insurance is complete when mailed by the company. The first case holds that an insurance contract mailed in New York to the insured in Kentucky is a New York contract (the premiums were payable in New York). There was nothing to take the contract out of the general rule as to the law governing a contract right, both as to the place of execution and performance. The cases, therefore, support the proposition made by the court, but it is clear that they do not contravene the well established rule that the validity of a contract is governed by the law of the state of performance, especially where the provisions as to performance are valid in that state and invalid in the state where the contract is executed. Upon this point the court says nothing, but in effect the decision is inconsistent with this well established principle.

As supporting its second proposition the court cites several Indiana cases which hold invalid a provision of a building or insurance contract which makes conclusive an architect's or arbitrator's award. But the reason given is that such a contract "ousts the courts of jurisdiction." The contract in question, however, does not attempt to oust the courts of jurisdiction, but rather attempts to confer jurisdiction upon them. There would certainly seem to be no objection to a citizen of Indiana appointing an agent in Illinois to do an act which the law of Illinois sanctions. Had the defendant executed the note in Illinois the judgment would have been valid; had he employed an Illinois attorney to act for him in confessing judgment in Illinois the judgment would have been valid. It seems, therefore, no proper concern of the state of Indiana that the preliminary step was taken in Indiana. The appointment was contingent upon an event to happen in Illinois and the act authorized was to be performed in Illinois.

The court cites the case of *Old Wayne Life Assn. v. McDonough*<sup>6</sup> to sustain its result. That case involved the validity of service of summons upon a state insurance commissioner in a suit against a foreign corporation which had never done business in the state. The court held the service invalid. The case does not help any in the determination of the question as to whether or not an attempted voluntary submission to the jurisdiction of another state by an individual is valid.

As supporting its third proposition the court argues that the power to confess judgment is not authorized by statute or by the

4. (1907) 41 Ind. App. 183, 80 N. E. 682.

5. (1910) 47 Ind. App. 199, 93 N. E. 1004.

6. (1906) 204 U. S. 8, 27 Sup. Ct. 236, 51 L. Ed. 345.

common law and is contrary to public policy, and therefore void. If the Indiana court refuses to recognize the power for the reason that there is no authority in the statute law or common law for its use, then whether or not it is contrary to public policy is immaterial. The first two propositions are admittedly the law of Indiana. But to sustain the third premise the court cites the Indiana statute<sup>7</sup> and says:<sup>8</sup>

"So far from such contracts being made legal or the recovery of judgment thereon by confession being authorized by any statute of Indiana, the statutes to which we have referred (sections 615, 1004, supra) expressly forbid such action as was taken in the Circuit Court of Livingston County, Illinois, in the case at bar."

Section 615 expressly provides for confession of judgment by power of attorney where the party at the time he executes the power makes an affidavit that the debt is just and owing and that such confession is not made for the purpose of defrauding his creditors. Section 1004 is ambiguous, providing that, "No judgment shall be rendered against any party upon the agreement of an attorney, nor any judgment by default, where the party has not been notified, or personally entered his appearance, unless the written authority of the party be first produced and its execution proved to the satisfaction of the court." At its worst this section certainly sanctions action similar to that complained of in the principal case.

In addition to the above statutes the court cites two Indiana cases as sustaining its position as to public policy, *Irose v. Balla*<sup>9</sup> and *Garrigue v. Kellar*.<sup>10</sup> The first case involved an Illinois judgment by confession on a power of attorney contained in a promissory note executed and payable in Indiana. The substance of the court's decision in that case is that the judgment was not enforceable in Indiana for the reason that the power of attorney was not supported by the affidavit required by Section 615, supra; that the contract was wholly an Indiana contract and consequently invalid; that the power of attorney could not be construed to permit a confession of judgment in Illinois. The second case holds that a promissory note executed by a married woman in Illinois and payable in Indiana is governed by the law of Illinois as to the capacity of the married woman to contract as surety, and that, though the Indiana law would have forbidden a recovery had the note been executed in Indiana, there was nothing in the public policy of the state to forbid recovery on an admittedly valid right acquired in a foreign state. It is apparent that neither case strengthens the court's argument, and that in fact the *Garrigue* case defeats it, both on the question as to the law governing the performance of contracts, and as to the question of public policy.

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7. (1914) Burns' Ann. Stat. secs. 615 and 1004.

8. P. 535.

9. (1913) 181 Ind. 491, 104 N. E. 851.

10. (1905) 164 Ind. 676, 74 N. E. 523, 69 L. R. A. 870, 108 A. S. R. 324.

It is submitted that in view of the able and correct decision of the Appellate Court that the Supreme Court has gone out of its way to contravene several well settled principles of law in an attempt to afford police protection to unwary citizens of Indiana, and that the decision would not be upheld by the Supreme Court of the United States.

BERNARD C. GAVIT.

EQUITY—INJUNCTION IN SUIT FOR ALIENATION OF AFFECTION.—[Ohio] In *Snedaker v. King*,<sup>1</sup> the Supreme Court of Ohio was called upon to decide whether it is a proper exercise of equity jurisdiction perpetually to enjoin an insolvent defendant, who is engaged in alienating the affection of the plaintiff's husband, from "visiting or associating" with him, "going to or near him, . . . writing or speaking to him, or in any manner, either directly or indirectly, communicating with him by word, letter, writing, sign or symbol." By a vote of four to two, it was held that the injunction should have been denied. "The opening of such a wide field for injunctive process," we read in the opinion per curiam, "enforceable only by contempt proceedings, the difficulty if not impossibility of such enforcement, and the very doubtful beneficial results to be obtained thereby, warrant the denial of such a decree."

The case is of interest, not only because of the novelty of the issue involved, but because Allen, J., not only voted with the majority but wrote a concurring opinion setting forth her reasons for so doing. She thought that the injunction would be unenforceable unless a probation officer were attached permanently to both the husband and the defendant; that it was too broad in scope, since for the defendant to say "good morning" to the plaintiff's husband would be to communicate with him; that it would merely add fuel to the flame, and "from the perversity of human nature" would "almost inevitably make wrongdoing even more alluring"; that a money judgment, even though in a nominal sum or uncollectable, since it brands the defendant is the plaintiff's most adequate remedy.

No authority is cited, either in the per curiam opinion or in that of Allen, J. In the dissenting opinions of Marshall, C. J., and Day, J., ex parte *Warfield*<sup>2</sup> and *Stark v. Hamilton*<sup>3</sup> are considered. The former was a habeas corpus proceeding to release Warfield, who had been committed to jail for violation of an order almost identical in terms with that in the case before us. The only question before the court was that of jurisdiction, in the strict sense of the term, and it was held that the order was not a nullity, and that consequently Warfield was not entitled to be released. But the opinion leaves the impression that the court felt that the order was not only within the power of a chancellor but was a proper exercise of that power. In *Stark v. Hamilton*,<sup>4</sup> where a temporary

1. (1924) 145 N. E. 15.

2. (1899) 40 Tex. Cr. 413, 50 S. W. 933, 76 Am. St. Rep. 724.

3. (1919) 149 Ga. 227, 99 S. E. 861, 5 A. L. R. 1041.

4. *Supra*, note 3.