

The Burger Court Opinion Writing Database

D.H. Overmyer Co. v. Frick Co.
405 U.S. 174 (1972)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 14, 1972

Re: No. 69-5 - D. H. Overmyer Co. v. Frick Co.

Dear Harry:

Please join me in your opinion in the above.

Regards,

WEB

Mr. Justice Blackmun

cc: The Conference

Bo
Please give me
Pls

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Black

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 69-5

From: Douglas, J.

circulated: 1/18/71

D. H. Overmyer Co., Inc., of
Ohio, et al., Petitioners,
v.
Frick Company.

On Writ of Certiorari to
the Court of Appeals of
Ohio, Lucas County.

[January —, 1972]

MR. JUSTICE DOUGLAS, concurring.

I agree that the heavy burden against the waiver of constitutional rights, which applies, even in civil matters, *Ohio Bell Tel. Co. v. Pub. Utilities Comm'n*, 301 U. S. 292, 307 (1937); *Aetna Ins. Co. v. Kennedy*, 301 U. S. 389, 393 (1939), has been effectively rebutted by the evidence presented in this record which shows that whatever procedural hardship the Ohio confession of judgment scheme worked upon the petitioner were voluntarily and understandingly self-inflicted through the arm's length bargaining of these corporate parties.

I add a word concerning the contention that opening of confessed judgments in Ohio is merely discretionary and requires a higher burden of persuasion than is ordinarily imposed upon defendants. As I read the Ohio law of cognovit notes, trial judges have traditionally enjoyed wide discretion in vacating confessed judgments. 52 Ohio Jur. § 588 (1958). In *Livingstone v. Rebman*, 169 Ohio St. 109, 158 N. E. 2d 366 (1959), however, the Ohio Supreme Court imposed certain safeguards on the exercise of judge's discretion in opening confessed judgments. That case also involved a petition to open a confessed judgment where, as here, the debtor alleged the affirmative defense of failure of consideration. Using the preponderence of the evidence test, the trial court had found insufficient support for the debtor's claim and

81
91
1/5/72

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 69-5

D. H. Overmyer Co., Inc., of
Ohio, et al., Petitioners, } On Writ of Certiorari to
v. Frick Company. } the Court of Appeals of
Ohio, Lucas County.

[January —, 1972]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE MARSHALL concurs, concurring.

I agree that the heavy burden against the waiver of constitutional rights, which applies even in civil matters, *Ohio Bell Tel. Co. v. Pub. Utilities Comm'n*, 301 U. S. 292, 307 (1937); *Aetna Ins. Co. v. Kennedy*, 301 U. S. 389, 393 (1939), has been effectively rebutted by the evidence presented in this record. Whatever procedural hardship the Ohio confession of judgment scheme worked upon the petitioner was voluntarily and understandably self-inflicted through the arm's length bargaining of these corporate parties.

I add a word concerning the contention that opening of confessed judgments in Ohio is merely discretionary and requires a higher burden of persuasion than is ordinarily imposed upon defendants. As I read the Ohio law of cognovit notes, trial judges have traditionally enjoyed wide discretion in vacating confessed judgments. 52 Ohio Jur. § 588 (1958). In *Livingstone v. Rebman*, 169 Ohio St. 109, 158 N. E. 2d 366 (1959), however, the Ohio Supreme Court imposed certain safeguards on the exercise of judge's discretion in opening confessed judgments. That case also involved a petition to open a confessed judgment where, as here, the debtor alleged the affirmative defense of failure of consideration. Using the preponderence of the evidence test, the trial court

WJ
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR. January 3, 1972

RE: No. 69-5 - Overmyer Co. v. Frick Co.

Dear Harry:

I'm happy to join. May I suggest that you introduce the second sentence in paragraph 2 at page 14 with "For example"? This is only to be on the safe side in case someone comes up with another exception.

Sincerely,

WJ

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Memorandum

, 19

Asst. Sec.

Set off with your
Motions to the Supreme
Court

12/10/10

WSB

69-5

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 21, 1972

RE: Overmyer case

Dear Harry:

I have a response from Mr. Saul Tischler to the letter I mentioned to you I had written in answer to his first inquiry. This latest letter states, "I believe that New Jersey would cite more properly to footnote 8 in the Overmyer case" I am inclined to think he may be right but I leave it up to you.

Sincerely,



Mr. Justice Blackmun

CH
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 28, 1971

69-5 - Overmyer Co. v. Frick Co.

Dear Harry,

I am glad to join your opinion for the Court in this case, with one request: that you insert the word "compulsory" after "against" in the top line on p. 12.

Sincerely yours,

P.S.

Mr. Justice Blackmun

Copies to the Conference

SCA
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 5, 1972

Re: No. 69-5 - D. H. Overmyer Co.
v. Frick Co.

Dear Harry:

Please join me.

Sincerely,



Mr. Justice Blackmun

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 4, 1972

Re: No. 69-5 - Overmyer v. Frick

Dear Bill:

Please join me in your concurrence.

Sincerely,



T.M.

Mr. Justice Douglas

cc: The Conference

December 23, 1971

Re: No. 69-5 - Overmyer Co. v. Frick Co.

Dear Potter:

Inasmuch as this ties into the law of your old state, please give it your thorough consideration and advise me of any errors in methods of citation and the like that you may observe.

Sincerely,

HAB

Mr. Justice Stewart

3
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 23, 1971

MEMORANDUM TO THE CONFERENCE

Re: No. 69-5 - Overmyer Co. v. Frick Co.

Herewith is a preliminary memorandum. The case, of course, must be coupled with No. 70-6, Swarb v. Lennox, which I shall circulate later. This is given you for your preliminary review.

H. A. B.

To: The Chief Justice
 Mr. Justice Douglas
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Powell
 Mr. Justice Rehnquist

1st DRAFT

From: Blackman, J.

Circulated: 12/23/71

No. 69-5

Recirculated: _____

D. H. Overmyer Co., Inc., of
 Ohio, et al., Petitioners, } On Writ of Certiorari to
 v. Frick Company. } the Court of Appeals of
 Ohio, Lucas County.

[January —, 1972]

Memorandum of MR. JUSTICE BLACKMUN.

This case presents the issue of the constitutionality, under the Due Process Clause of the Fourteenth Amendment, of the cognovit note authorized by Ohio Rev. Code § 2323.13.¹

¹ When the judgment challenged here was entered in 1968 the statute read:

"Sec. 2323.13. (A) An attorney who confesses judgment in a case, at the time of making such confession, must produce the warrant of attorney for making it to the court before which he makes the confession, which shall be in the county where the maker or any one of several makers resides or in the county where the maker or any one of several makers signed the warrant of attorney authorizing confession of judgment, any agreement to the contrary notwithstanding; and the original or a copy of the warrant shall be filed with the clerk.

"(B) The attorney who represents the judgment creditor shall include in the petition a statement setting forth to the best of his knowledge the last known address of the defendant.

"(C) Immediately upon entering any such judgment the court shall notify the defendant of the entry of the judgment by personal service or by registered or certified mail mailed to him at the address set forth in the petition."

Senate Bill No. 85, Laws of Ohio, Volume 133, Book I, 1969-1970, pp. 196-198, effective September 16, 1970, amended paragraphs (A) and (C), in ways not pertinent here, and added paragraph (D):

"(D) A warrant of attorney to confess judgment contained in any

January 5, 1972

Re: No. 69-5 - Overmyer Co. v. Frick Co.

Dear Potter:

I am glad to adopt the suggestion contained in your letter of December 28. I am making the same adjustment in the next to the last line on page 11.

Sincerely,

HAB

Mr. Justice Stewart

2
minor changes
throughout

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall ✓
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

From: Blackman, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

Recirculated: 1/5/72

No. 69-5

D. H. Overmyer Co., Inc., of
Ohio, et al., Petitioners. } On Writ of Certiorari to
v.
Frick Company. } the Court of Appeals of
Ohio, Lucas County.

[January —, 1972]

Memorandum of MR. JUSTICE BLACKMUN.

This case presents the issue of the constitutionality, under the Due Process Clause of the Fourteenth Amendment, of the cognovit note authorized by Ohio Rev. Code § 2323.13.¹

¹ When the judgment challenged here was entered in 1968 the statute read:

"Sec. 2323.13. (A) An attorney who confesses judgment in a case, at the time of making such confession, must produce the warrant of attorney for making it to the court before which he makes the confession, which shall be in the county where the maker or any one of several makers resides or in the county where the maker or any one of several makers signed the warrant of attorney authorizing confession of judgment, any agreement to the contrary notwithstanding; and the original or a copy of the warrant shall be filed with the clerk.

"(B) The attorney who represents the judgment creditor shall include in the petition a statement setting forth to the best of his knowledge the last known address of the defendant.

"(C) Immediately upon entering any such judgment the court shall notify the defendant of the entry of the judgment by personal service or by registered or certified mail mailed to him at the address set forth in the petition."

Senate Bill No. 85, Laws of Ohio, Volume 133, Book I, 1969-1970, pp. 196-198, effective September 16, 1970, amended paragraphs (A) and (C), in ways not pertinent here, and added paragraph (D):

"(D) A warrant of attorney to confess judgment contained in any

144

31 21

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall ✓
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Blackmun, J.

Circulated: _____

No. 69-5

Recirculated: 2/4/72

D. H. Overmyer Co., Inc., of
Ohio, et al., Petitioners. } On Writ of Certiorari to
v. Frick Company. } the Court of Appeals of
Ohio, Lucas County.

[February —, 1972]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue of the constitutionality, under the Due Process Clause of the Fourteenth Amendment, of the cognovit note authorized by Ohio Rev. Code § 2323.13.¹

¹ When the judgment challenged here was entered in 1968 the statute read:

"Sec. 2323.13. (A) An attorney who confesses judgment in a case, at the time of making such confession, must produce the warrant of attorney for making it to the court before which he makes the confession, which shall be in the county where the maker or any one of several makers resides or in the county where the maker or any one of several makers signed the warrant of attorney authorizing confession of judgment, any agreement to the contrary notwithstanding; and the original or a copy of the warrant shall be filed with the clerk.

"(B) The attorney who represents the judgment creditor shall include in the petition a statement setting forth to the best of his knowledge the last known address of the defendant.

"(C) Immediately upon entering any such judgment the court shall notify the defendant of the entry of the judgment by personal service or by registered or certified mail mailed to him at the address set forth in the petition."

Senate Bill No. 85, Laws of Ohio, Volume 133, Book I, 1969-1970, pp. 196-198, effective September 16, 1970, amended paragraphs (A) and (C), in ways not pertinent here, and added paragraph (D):

"(D) A warrant of attorney to confess judgment contained in any

June 13, 1972

69-5

Dear Bill:

Thank you for sending in to me this letter from Mr. Tischler.

You and he know far more about New Jersey law and practice than I shall ever know.

I enclose a one-page note one of my clerks prepared. I am inclined to agree with him and to leave the footnote as it is. If you would feel more comfortable about transferring the New Jersey reference to footnote 8, I would be willing to ask Mr. Putzel's office to make this change. I certainly do not wish to have lawyers uncomfortable, but I suspect that this is not a very vital error if it is an error at all. The footnotes in question are on pages 177 and 178 of 405 U.S.

Sincerely,

HAB

Mr. Justice Brennan