RECENT DEVELOPMENTS

LAW AND POVERTY: SUMMARY PREJUDGMENT WAGE GARNISHMENT HELD UNCONSTITUTIONAL

In *Sniadach v. Family Finance Corp.*[1] the United States Supreme Court held a Wisconsin statute[2] authorizing garnishment of wages without notice and prior hearing to be a denial of due process under the fourteenth amendment. In 1966 Family Finance instituted statutory garnishment proceedings[3] against Mrs. Sniadach and against her employer as garnishee. Upon presentation of a promissory note, the clerk issued a summons to the employer instructing him to retain the wages then due Mrs. Sniadach, exempting only a subsistence allowance. This garnishment established a lien on the wages until there was a disposition of the principal action. Motions for dismissal on the grounds of a denial of due process and equal protection were denied by the clerk of court, the district court, and the Wisconsin Supreme Court.[4]

Wage garnishment,[5] which most states have among their creditor collection devices,[6] is the attachment of unpaid wages owed to an alleged debtor by his employer. Garnishment is most often invoked by professional credit agencies as the surest, most expedient method of enforcing payments[7] and is used both to execute judgments and to prevent the dissipation of wages before judgment is obtained.[8] The

[1] 395 U.S. 337 (1969).

[2] WIS. STAT. ANN. §§ 267.04, 267.07 (Supp. 1969). Subsequent to the Supreme Court opinion, the Wisconsin legislature amended the state's garnishment statute so as to abolish prejudgment garnishment. Senate Bill 315, ch. 127, Laws of 1969 (Aug. 8, 1969).

[3] WIS. STAT. ANN. § 267.04 (Supp. 1969), *as amended*, Senate Bill 315, ch. 127, Laws of 1969 (Aug. 8, 1969).

[4] Family Fin. Corp. v. Sniadach, 37 Wis. 2d 163, 154 N.W.2d 259 (1967).

[5] The garnishment process is a special form of attachment enabling creditors to reach any property of an alleged debtor in the hands of a third person. Hereinafter "garnishment" will refer to garnishment of wages.

[6] *See* M. Shimm, The Impact of State Law on Bankruptcy 14-18, 1968 (unpublished paper at Duke University School of Law); Bruun, *Wage Garnishment in California: A Study and Recommendations*, 53 CALIF. L. REV. 1214, 1222, 1250-53 (1965); Note, *Wage Garnishment As a Collection Device*, 1967 WIS. L. REV. 759.

[7] *See* Bruun, *supra* note 6, at 1229-30, 1240, 1245.

[8] *See* Bruun, *supra* note 6, at 1215. *See generally* Wilder v. Inter-Island Steam Nav. Co., 211 U.S. 239 (1908).

latter use, outlawed in *Sniadach*, is prejudgment garnishment which compels the employer to hold a statutorily set amount of his employee's wages until judgment is rendered. To initiate the proceeding, the creditor must file an affidavit with the clerk of court stating the amount of his claim, that the debt is "owing and just," and that the garnishee as employer is indebted to the defendant.[9] Then follows a summons to the garnishee establishing the lien. Noting that the enormous expansion of installment credit in this decade has led to a concomitant rise in wage garnishment,[10] commentators have agreed that this frequent conclusion of the credit cycle increases bankruptcy and compounds unemployment problems.[11] While seeking total abandonment of wage garnishment, critics have in particular deplored the prejudgment technique[12] because its effect, and possibly the creditor's purpose, is to destroy any defense to the action the debtor may have, since he is forced to settle on the creditor's terms to gain release of his wages and to protect his job.[13] Many legislatures have responded to the criticisms and social costs by allowing larger subsistence exemptions,[14] and some states have effectively abolished prejudgment relief by providing exemptions equal to the total amount of back wages.[15] Also, Congress sought to ameliorate partially the harshness of prejudgment garnishment in the Truth in Lending Act[16] through the prohibition of firing an employee whose wages are garnished[17] and the establishment of large minimum exemption requirements.[18]

Prejudgment garnishment statutes are the source of due process questions[19] sinee neither notice nor a hearing prior to the withholding

[9] Rougle v. Turk, 76 Idaho 427, 283 P.2d 915 (1955); United Colleries, Inc. v. Martin, 248 Ky. 808, 60 S.W.2d 125 (Ct. App. 1933).

[10] Project, *Wage Garnishment in Washington An Empirical Study*, 43 WASH. L. REV. 743 (1968).

[11] *E.g.*, Bruun, *supra* note 6, at 1234, 1246; 43 WASH. L. REV., *supra* note 10, at 744; 1967 WIS. L REV., *supra* note 6, at 760-62; Note, *Garnishment Under the Consumer Credit Protection Act and the Uniform Consumer Credit Code*, 38 U. CIN. L. REV. 338, 352 (1969).

[12] *But see* 1967 WIS. L. REV., *supra* note 6, at 772.

[13] Bruun, *supra* note 6, at 1246; Patterson, *Foreword: Wage Garnishment—An Extraordinary Remedy Run Amuck*, 43 WASH. L. REV. 735, 738 (1968). Employers often find it less expensive to fire the garnished employee.

[14] *See, e.g.*, ALA. CODE tit. 7, § 630 (1960).

[15] *See, e.g.*, MASS. ANN. LAWS ch. 246, § 28 (Supp. 1968).

[16] § 301, 82 Stat. 146 (1968 U.S. CODE CONG. & AD. NEWS 176, 196).

[17] *Id.* § 304 (1968 U.S. CODE CONG. & AD. NEWS at 197).

[18] *Id.* § 303 (1968 U.S. CODE CONG. & AD. NEWS at 197).

[19] *See, e.g.*, Patterson, *supra* note 13, at 738-39.

of wages is provided. In *Mullane v. Central Hanover Bank & Trust Co.*,[20] where the adequacy of notice by publication to beneficiaries of a common trust fund was questioned,[21] the Supreme Court defined a minimal standard for civil proceedings as requiring that "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."[22] Although the state's interest in closing trusts was great and its power to so act was unchallenged, the Court held that the property interests of known beneficiaries whom the publication did not reach required greater protection. The effect of the decree closing the trust was "to settle 'all questions respecting the management of the common fund,' "[23] thus severing the plaintiff's property rights without notice and an opportunity to be heard. *Mullane,* however, did not solidify the minimal standards necessary for compliance with procedural due process, since variations have resulted from the states' power to establish their own procedures within the confines of due process[24] and the presumption of constitutionality accorded these legislative acts.[25] The interplay of these three coneepts—notice and hearing as requisites of due process, legislative power to formulate procedures, and the presumption of constitutionality accorded to that formulation—has structured judicial determination of the due process question created by prejudgment garnishment and attachment statutes.

Until *Sniadach* the United States Supreme Court had not reviewed prejudgment garnishment, but in *McKay v. McInnes*[26] it had summarily affirmed the constitutionality of a Maine statute permitting prejudgment attachment without posting of bond or presentment of an affidavit. The Maine Supreme Court ruled the attachment procedure itself fulfilled the notice requirement of due process, while the opportunity to be heard was provided in the trial of the principal action.[27] Since the lien was only temporary, and thus a provisional remedy, the Maine court held that the deprivation

[20] 339 U.S. 306 (1950).
[21] *See also* Schroeder v. City of New York, 371 U.S. 208 (1962).
[22] 339 U.S. at 313.
[23] 339 U.S. at 311.
[24] Bute v. Illinois, 333 U.S. 640 (1948); Snyder v. Massachusetts, 291 U.S. 97 (1934).
[25] United States v. Carolene Products Co., 304 U.S. 144 (1938).
[26] 279 U.S. 820 (1929).
[27] McInnes v. McKay, 127 Me. 110, 141 A. 699 (1928).

involved was not an unconstitutional taking.[28] In affirming the decision, the United States Supreme Court relied on *Owenby v. Morgan*[29] and *Coffin Brothers v. Bennet*.[30] The *Owenby* case dealt with the attachment of a foreign debtor's property pursuant to a statute requiring the alleged debtor to post bond in the amount of the creditor's claim before defending. Two related points were emphasized in upholding the statute: (1) states are free to establish their own procedures for the administration of justice within the limits of due process, and (2) long standing practice supports the argument that the procedure, though harsh, is a reasonable exercise of legislative power.[31] The Georgia banking statute under attack in *Coffin* described procedures for paying depositors in the event of insolvency. The statute authorized the state bank superintendent to assess shareholders an amount equal to the par value of their stock. If a shareholder neglected or refused to pay, the superintendent could then impose a lien on his property and seek its execution. The Court held that since the stockholder was allowed to raise every defense in court, by an affidavit of illegality, before execution, a reasonable opportunity to be heard was provided.[32] In deciding *Sniadach*[33] the Wisconsin Supreme Court relied heavily on these cases, especially the temporary lien theory advanced in *McInnes*.[34] Since it was established that the legislature should determine to what actions the attachment remedy will apply[35] and since the deprivation was subject to judicial scrutiny before finalization, the Wisconsin court found the statute to be reasonable and in accord with due process requirements. Ruling on a similar procedure a year later,[36] the Supreme Court of Vermont, citing *McInnes*, affirmed the constitutionality of the Vermont prejudgment garnishment statute upon the same rationale as that of the Wisconsin Supreme Court in *Sniadach*.[37]

In *Sniadach* the United States Supreme Court stipulated that a prejudgment statute on its face does not provide the requisite elements

[28] *Id*
[29] 256 U.S. 94 (1921).
[30] 277 U.S. 29 (1928).
[31] Owenby v. Morgan, 256 U.S. 94 (1921).
[32] Coffin Bros. v. Bennet, 277 U.S. 29 (1928).
[33] Sniadach v. Family Fin. Corp., 37 Wis. 2d 163, 154 N.W.2d 259 (1967).
[34] *Id.* at 167, 154 N.W.2d at 263.
[35] Rothschild v. Knight, 184 U.S. 334, 341 (1902).
[36] Shell Oil Co. v. Milne, 127 Vt. 249, 246 A.2d 837 (1968).
[37] *Id*

of notice and hearing explored in *Mullane*.[38] The question then became whether the wage lien was a taking sufficient to require these protections. Mr. Justice Douglas, writing for the majority, distinguished *Owenby* and *Coffin* as presenting extraordinary situations,[39] and *McInnes* was distinguished as involving "a procedural rule . . . for attachments in general."[40] Wage garnishment, the Court said, involved a "specialized type of property presenting distinct problems in our economic system."[41] Disclaiming any usurpation of legislative power, the majority opinion reviewed the impact of wage garnishment on the employee and noted that loss of family income and consequent poverty, the danger of fraud perpetrated on the poor and ignorant, and the lack of adequate subsistence exemptions were blatant weaknesses in the proceeding which worked great hardship upon wage earners.[42] It concluded that such an "obvious" taking violates the fundamental principles of due process when accomplished without notice and a hearing.[43] In concurrence Justice Harlan expressly discounted the significance of a *per curiam* opinion like *McInnes*[44] and indicated that the deprivation of the "unrestricted use" of property amounts to actual deprivation.[45] Mr. Justice Black attacked the Court's decision as judicial legislation devoid of legal reasoning and agreed with the Wisconsin Supreme Court that the temporary nature of the lien, coupled with the opportunity for defense at trial, preserved the constitutionality of the procedure as a reasonable exercise of legislative judgment. Critical of Harlan's concurrence, Black deplored the use of a "Natural Law concept" which ignored the specific language of the Constitution and substituted for it the "admonitions of the Court's own consciences."[46]

If the taking of property in prejudgment garnishment is "obvious," one might ask why the procedure has survived until 1969, for one must agree with Justice Black that *Sniadach* is a significant departure from the history of garnishment and attachment

[38] 395 U.S. at 341-42. See notes 20-25 *supra* and accompanying text.
[39] 395 U.S. at 339.
[40] *Id.* at 340.
[41] *Id.*
[42] *Id.* at 340-42.
[43] *Id.* at 342.
[44] *Id.* at 344.
[45] *Id.* at 342-43.
[46] *Id.* at 350-51.

proceedings. An analysis of the implications of the departure as well as the rationale which supports it begins beneficially with the Court's treatment of *Owenby, Coffin,* and *McInnes,* the cases traditionally cited to support approval of prejudgment and postjudgment attachments and garnishments. The statute in *Owenby,* protecting creditors from foreign debtors beyond a court's jurisdiction and that in *Coffin,* protecting the financial welfare of a "large segment of the public,"[47] are apparently founded on sufficiently high state interests in contrast to the individual interest to justify expeditious statutory procedures, since Justice Douglas preserved the decisions as special situations. *McInnes* was arguably overruled *sub silentio,* although the fact that the attachment of corporate interests and real estate in that case did not have the critical effect on the individual as does garnishment of wages may have prompted the qualification of *McInnes* as involving a valid procedural rule for attachments in general.[48] In *Sniadach,* as in *McInnes,* the Court was faced with the threshold question of whether there was a taking of property at all, before balancing the importance of the right to be heard against the state interest in protecting creditors through summary proceedings. Prejudgment proceedings were upheld previously because the alleged debtor's property rights were considered not to have been disturbed, since he maintained title until suffering adverse judgment in formal adjudication. Such reasoning, however, evaded proper consideration of the individual's interest involved, as the Wisconsin and Vermont opinions reveal. In *Sniadach* the question of whether there was a taking was answered in practical terms: "The result is that a prejudgment garnishment of the Wisconsin type may . . . drive a wage earning family to the wall."[49] Therefore, on balancing the impact on the individual against the state interest, the Court could not find the state interest paramount and held the provision for its administration an unreasonable exercise of legislative power.

The Court's emphasis upon the effect of the deprivation on the individual rather than upon traditional title concepts indicates a possible movement toward a redefinition of property, suggesting ramifications in situations where the property right is even less clearly vested in the defendant.[50] The same view of property which supported

[47] Patterson, *supra* note 13, at 739 n.9.

[48] 395 U.S. at 340.

[49] *Id.* at 341-42.

[50] *See generally* Reich, *The New Property*, 73 YALE L.J. 733 (1964).

the validity of prejudgment garnishment as a temporary taking supports the conclusion that matters involving welfare benefits and public housing may be summarily handled because the recipient or tenant has no property right. *Kelly v. Wyman*,[51] argued this term, raised the question of whether summary withdrawals of welfare payments violate due process. As commentators note,[52] the impact on the recipient amounts to a deprivation of necessities while the interest of the state is limited to insuring against excessive payments [53] Implicit in the recognition of the proper weight given individual interests when balanced against those of the state is the assumption that a recipient possesses a right in public benefits given him,[54] calling forth protections accorded to rights in property.[55] An analogous assumption inheres in the argument in *Sanks v. Georgia*,[56] on the docket this term, to overturn a summary eviction statute on due process grounds. Incorporating the *Sniadach* language, the petitioner argues that "a tenant's interest in his home is more than a simple property right. Rather it is a right that involves 'a specialized type of property,' one that presents severe problems not only for our economic system but for our social system as well."[57] The implications of a "new property" concept stretch far beyond the low income or poverty area to procedures involving all manners of licensing, veteran's benefits, franchise grants, and employment opportunities.[58] This concept may mean that government must treat

[51] 294 F. Supp. 893 (S.D.N.Y. 1968), *oral argument sub nom.* Goldberg v. Kelly, 38 U.S.L.W. 3141 (U.S. Oct. 13, 1969) (No. 62). The case is now awaiting decision. 38 U.S.L.W. 3231 (Dec. 23, 1969).

[52] *See, e.g.*, Comment, *Due Process and the Right to a Prior Hearing in Welfare Cases*, 37 FORD. L. REV. 604 (1969).

[53] *Id.* at 609.

[54] *See* Reich, *supra* note 50, where Mr. Reich argues for a recognition of one's rights to future benefits as well as for the accrued right in them after payment, since "[t]hese benefits are based upon a recognition that misfortune and deprivation are often caused by forces far beyond the control of the individual, such as technological change, variations in the demand for goods, depressions, or wars." *Id.* at 785.

[55] *See* Morris, *Welfare Benefits as Property: Requiring a Prior Hearing*, 20 AD. L. REV. 487 (1968). *But see* Note, *Withdrawal of Public Welfare: The Right to a Prior Hearing*, 76 YALE L.J. 1234 (1967).

[56] Brief for Appellants, Sanks v. Georgia, *appeal docketed*, 38 U.S.L.W. 3024 (U.S. April 23, 1969) (No. 266). *See* Williams v. Shaffer, 385 U.S. 1037 (1967) involving an attack on the same statute. Certiorari was denied on the grounds that the case was mooted, since the tenant had been evicted. Mr. Justice Douglas voiced a strong dissent on equal protection grounds. 385 U.S. at 1037. 20 STAN. L. REV. 766 (1968) discusses the relative weights of the equal protection and due process questions raised by *Williams*.

[57] Brief for Appellants at 35, Sanks v. Georgia, *appeal docketed*, 38 U.S.L.W. 3024 (U.S. April 23, 1969) (No. 266).

[58] Reich, *supra* note 50.

all benefits, upon continuation of which there is great personal dependence, as property which is entitled to constitutional protection.[59] However, the situation of the poor litigant dramatizes the need for recognition of a new property concept and thus is the predictable source for its origination and growth. Judicial deference to the plight of the class to which a litigant belongs has been witnessed in the areas of criminal procedure[60] and civil rights,[61] reflecting concern for those who have little leverage in the legislative arena because of their poverty, race, or criminal record. Such concern provides the impetus for redefinition of rights in terms of consequences and has resulted in a high level of judicial activism which sets aside ordinary presumptions attendant to legislative acts that tread heavily on an important interest of a disadvantaged group.[62]

Although the harsh consequences of the deprivation of property are not as clearly present in repossession and confession of judgment, *Sniadach* also renders these two summary proceedings suspect. Repossession, usually provided by statute to secured creditors,[63] may

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[59]This is not to suggest necessarily that formal judicial proceedings be required in administrative decision making. *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1454 (1968):

> Although the right to some form of process may be absolute, the extent to which particular safeguards are available nonetheless varies according to the circumstances. Where the consequence of error is relatively insubstantial, protection against the risk of error through the use of elaborate quasi-judicial procedures is subject to a constitutional trade-off with the need for administrative and fiscal economy. *Id.*

See also Schoshinski, *Public Landlords and Tenants: A Survey of the Developing Law*, 1969 DUKE L.J. 399, 447-56; Special Project, *Public Housing*, 22 VAND. L. REV. 875, 956-75 (1969). These studies, recognizing the economic barriers to full judicial participation in public housing eviction procedures, explore proeedural improvement possibilities within the housing authorities which do not greatly impede administrative functions.

[60]*E.g.*, Griffin v. Illinois, 351 U.S. 12 (1956).

[61]*E.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954).

[62]*See* United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938); Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A.L. REV. 716 (1969). Mr. Karst interprets Justice Stone's words as making "the legitimacy of judicial protection of the losers in the legislative process turn on the losers' long-term chances of becoming winners." *Id.* at 725. He explores the egalitarian propensity of Justice Douglas, proposing that, primarily due to Douglas' influence, a "double standard" of judicial review is developing in equal protection cases involving minority groups. *Id.* at 724-25. The result is to "invert the presumption of constitutionality" of a statute when an important right of a minority group is involved. *Id.* at 735, 739-41. *Cf.* Comment, *The Constitutional Minimum for the Termination of Welfare Benefits: The Needs for and Requirements of a Prior Hearing*, 68 MICH. L. REV. 112, 121 (1969).

[63]UNIFORM COMMERCIAL CODE § 9-503; *see* 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 44.1 at 1212 (1965).

be exercised through self-help or by legal process in which an officer of the court seizes the property.[64] The confession of judgment procedure, not a statutory device but included in many installment contracts,[65] is a grant of a power of attorney to someone, authorizing him to confess judgment as to the buyer's default without notifying the buyer.[66] However, the property involved when these devices are employed may often not be necessities and, therefore, the harsh consequences test of *Sniadach* is arguably not met. Nevertheless, the state interest in providing expedient, inexpensive remedies to the creditor may not be seriously frustrated by requiring minimum due process standards, and since the consumer most often involved is the uneducated poor,[67] his interest might be accorded great weight. Two other factors would enter this determination: the difficulty in assessing constitutionality according to whether the collateral was a "necessity" and the possibility that the absence of these remedies would greatly decrease the availability of credit to low-income consumers. While *Sniadach* clearly does not invalidate these summary procedures, it does present the test against which they will be measured.

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[64] G. GILMORE, *supra* note 63, § 44.1 at 1212-13.

[65] *See* Skilton & Helstad, *Protection of the Installment Buyer of Goods Under the Uniform Commercial Code*, 65 MICH. L. REV. 1465, 1475 (1967).

[66] *Cf. id.*

[67] *See* Lawson v. Mantell, No. 2324 (N.Y. Sup. Ct., filed Aug. 20, 1969) (3 CLEARINGHOUSE REV. 105 (1969)). Following a complaint alleging a violation of due process under *Sniadach*, a temporary restraining order was granted to a poor consumer enjoining the defendant and the county sheriff from repossessing the plaintiff's property. *Id.*