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Constitutional Law--West Virginia's Distress for Rent Law--A Landlord's Remedy vs. a Tenant's Protections

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cept of an oral or written contract is erroneous.³⁴ The oral or written statements do not constitute the contract. The contract is the agreement between the parties, that intangible known as the "meeting of the minds." The oral and written statements are merely evidence of this contract. Thus, when the agent puts his name on the writing, he is creating evidence of rights and liabilities incurred by his principal, but he is not creating any liability in himself. He is in no sense a party to the contract. Therefore, when a court refuses to let him introduce evidence of the agency in order to refute the evidence posed by the writing with his signature on it, it is in the truest sense making a new contract and changing the agreements of the parties.

CONCLUSION

Most courts refuse to allow an agent of a disclosed principal to introduce evidence of the agency relationship in order to relieve himself from liability on a contract. These decisions are inconsistent with those cases which allow the introduction of extrinsic evidence of the agency relationship to bind the principal or entitle him to sue the signing third party. Moreover, they seem to be incorrect under the Corbin analysis of the parol evidence rule, and contrary to modern theories of the nature of contracts. The agent should be allowed to introduce the agency in order to escape liability.

Robert R. Skinner

Constitutional Law—West Virginia's Distress for Rent Law— A Landlord's Remedy vs. A Tenant's Protections.

The legal right of the landlord to distrain his tenant's personal property for unpaid rent has been one of the landlord's common-law

³⁴ Dean Wigmore said:

[I]n opposition to the popular and natural view which tends to thrust itself forward at trials, . . . a writing has no efficacy per se, but only in consequence of and dependence upon other circumstances external to itself. The exhibition of a writing is often made as though it possessed some intrinsic and indefinite power of dominating the situation and quelling further dispute. But it needs rather to be remembered that a writing is, of itself alone considered, nothing,—simply nothing. . . . There is no magic in the writing itself. It hangs in midair, incapable of self-support, until some foundation of other facts has been built for it." 9 J. WIGMORE, EVIDENCE § 2400, at 5 (3d ed. 1940).

remedies for collection of rent in arrears since the ancient times of feudal tenure.¹ If the tenant became delinquent in the payment of his rent, his lord could persuade payment by going on the premises and seizing any chattels he might find. This power of "self-help" stemmed from the landlord's feudal right to hold court in matters against or involving his tenants.² While common-law distress for rent in arrears afforded the landlord the extra-judicial power to distrain a tenant's property without the royal court's approval or assistance, the landlord's remedy to distrain his tenant's chattels for rent in Virginia and West Virginia (as in most other states) is no longer an act of "self-help" but a judicial action.³ In light of recent civil cases involving the question of procedural due process, the statutory remedy of distress for rent in West Virginia may be a violation of the tenant's constitutional right to due process of law.⁴

The unconstitutionality of the landlord's remedy of distress for rent does not rest upon the substantive right of the landlord to recover unpaid rent through the seizure and sale of the tenant's personal property. The wrong of distraint of one's property for rent in arrears would relate to the requirements of procedural due process, *i.e.*, the tenant's right to basic procedural protections before his goods

¹ 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 573-75 (2d ed. 1898). *Jones v. Ford*, 254 F. 645 (8th Cir. 1918); *In re West Side Paper Co.*, 162 F. 110 (3d Cir. 1908).

² Although the landlord had the right to go on his tenant's property and seize any personal property he might find regardless of ownership, this power was not "self-satisfaction" because he could only hold the goods as a pledge until the rent was paid and could not sell or use the levied goods. 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 574 (2d ed. 1898).

³ *Wickham v. Richmond Standard Steel Spike & Iron Co.*, 107 Va. 44, 57 S.E. 647 (1907). The distress action in West Virginia has been held to be an *ex parte* proceeding, not a civil action. *Anderson v. Henry*, 45 W. Va. 319, 31 S.E. 998 (1898).

⁴ There is some basis to support the theory that distraint of a tenant's property may also constitute an unreasonable search and seizure. *See, e.g.*, *Blair v. Pitchess*, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971) (sheriff's search and seizure incident to the execution of a claim and delivery process is unreasonable if not made incident to a warrant issued by a magistrate upon a showing of probable cause). *See also Camaro v. Municipal Court*, 387 U.S. 523 (1967) (the fourth amendment protection against unreasonable search and seizures includes civil matters as well as criminal). *But see Wyman v. James*, 400 U.S. 309 (1971) (termination of public assistance under New York's Aid to Families with Dependent Children program because the recipient refused to permit a case worker a home visitation was held not to violate any constitutional rights).

Under West Virginia's distress for rent law, the officer with the distress warrant may, if necessary, forcibly enter the house in the daytime to seize the goods. He may also break and enter anytime into a house containing goods to be levied upon, which have been fraudulently removed from the leased property. W. VA. CODE ch. 37, art. 6, § 14 (Michie 1966).

may be levied and sold for the payment of rent allegedly in arrears. Procedural due process is founded upon the concept of "how" the state does some act or sanctions the action of a private individual, and is not necessarily related to "what" the state can or cannot do, or to what substantive rights an individual may have.⁵

Procedural due process in matters of a noncriminal nature has been increasingly used by the federal courts in recent years to hold certain state laws and procedures unconstitutional.⁶ In *Sniadach v. Family Finance Corporation*,⁷ the Supreme Court held that Wisconsin's procedure of pre-judgment garnishment of a debtor's wages was unconstitutional in the absence of notice and a hearing prior to the freezing of the debtor's wages.⁸ *Sniadach* is important

⁵ A. BICKEL, *THE LEAST DANGEROUS BRANCH* 233 (1962).

⁶ As early as 1863 the Supreme Court articulated that procedural due process meant that an individual had a right to "notice and an opportunity to be heard" before he could be deprived of life, liberty or property. *Baldwin v. Hole* 68 U.S. (1 Wall.) 223, 233 (1863). The Court felt:

Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defence.

In *Anderson National Bank v. Lockett*, 321 U.S. 233, 246 (1944), Mr. Chief Justice Stone speaking for the majority noted that: "[t]he fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked." The Court has further articulated these principles of procedural due process in *Best v. Humbolt Mining Co.*, 371 U.S. 334 (1963), and *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950). For more recent cases concerned with procedural due process in non-criminal actions, see *Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716 (N.D. N.Y. 1970); *Santiago v. McElroy*, 319 F. Supp. 284 (E.D. Pa. 1970). Mr. Justice Harlan, concurring in *Sniadach*, stated that procedural due process "limits state action by norms of fundamental fairness" which does not emanate solely from the constitution, but also embodies the spirit of our Anglo-American legal heritage. *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 342 (1969). See also, Note, *Attachment and Garnishment—Constitutional Law—Due Process of Law*, 68 MICH. L. REV. 986, 990 (1970); 5 U. RICH. L. REV. 447, 449 (1971).

⁷ 395 U.S. 337 (1969), *commented on in* 72 W. VA. L. REV. 165 (1970).

⁸ Mr. Justice Douglas in his majority opinion relied heavily upon *Schroeder v. New York*, 371 U.S. 208 (1962), and *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950). The Court in *Schroeder* held that notice to riparian owners through newspaper publications and posting on nearby trees along the river by respondent who instituted proceedings to divert a river twenty-five miles upstream from petitioner's home was insufficient to meet the requirements of due process. In *Mullane*, the Court recognizing that an opportunity to be heard is fundamental to due process, noted that "[t]his right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." 339 U.S. at 314.

because it was the first time procedural due process was used by the Court to strike down a state law which permitted the owner to be deprived of the use of his property without a prior hearing even though the deprivation was temporary and a subsequent hearing guaranteed.⁹ Like Wisconsin's pre-judgment garnishment of wages, the distress for rent law in West Virginia also provides for the seizure of the tenant's property without notice and a hearing; however, the loss in West Virginia is likely to be permanent, and there is no guarantee of an eventual hearing.

Subsequent to *Sniadach*, the requirements of procedural due process have been implemented by the Supreme Court and lower federal courts in other actions of a non-criminal nature. Following the *Sniadach* reasoning, the Court in *Goldberg v. Kelly*¹⁰ held that a state (New York in this instance) could not terminate public assistance benefits without first providing notice and pre-termination evidentiary hearing. Once the state undertakes to give an individual benefits through legislation, these statutory entitlements, whether classified as "property" or not, cannot be taken away unless the state first observes certain procedures to guarantee fairness.¹¹ In *Laprease v. Raymours Furniture Company*,¹² a district court held New York's replevin statute governing a creditor's seizure of an alleged debtor's property without notice and a hearing violative of procedural due process. The procedure was declared unconstitutional even though the creditor had to post a bond and the debtor could have stopped

⁹ 83 HARV. L. REV. 113 (1970).

¹⁰ 397 U.S. 254 (1970); *Wheeler v. Montgomery*, 397 U.S. 280 (1970) (companion case decided concurrently with *Goldberg v. Kelly*).

¹¹ Mr. Justice Brennan, writing for the majority in *Kelly*, observed that a recipient has a constitutional right to a "pre-termination evidentiary hearing." Although the Court did not denominate welfare assistance as "property," (as suggested by Professor Reich, *The New Property*, 73 YALE L.J. 733 (1964)), it did say termination of welfare is different from the termination of other forms of governmental entitlements (e.g., a blacklisted government contractor, a discharged government employee or a mere taxpayer denied a tax exemption). A welfare recipient who loses his government assistance is injured and adversely affected to a higher degree (loss of means to survive) than people receiving other types of statutory entitlements. *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970). *But see Fleming v. Nestor*, 363 U.S. 603 (1960) (old-age, survivor and disability payments under the Social Security Act were held not to be "accrued" property interest within the context of due process). *See* 84 HARV. L. REV. 100, 104 (1970) (from *Nestor to Kelly*, the Court changed its attitude toward statutory entitlements). A state that requires its residents who own and drive motor vehicles to have a driver's license and automobile registration (statutory entitlement) cannot suspend an uninsured motorist's license or registration if he was involved in an accident without first serving notice and holding a hearing to determine who was probably at fault. *Bell v. Burson*, 402 U.S. 535 (1971).

¹² 315 F. Supp. 716 (N.D.N.Y. 1970).

the sheriff from delivering the goods to the creditor by making a proper motion and showing a meritorious defense to the court.¹³

West Virginia's present distress law appears to be in conflict with the trend of modern day courts to extend the protection of procedural due process in order to strike down the state sanction of procedures which summarily adjudicate important individual interests.¹⁴

I. PROCEDURE OF A DISTRESS WARRANT—HOW A WEST VIRGINIA LANDLORD COLLECTS UNPAID RENT

In West Virginia, a landlord has two remedies available to recover unpaid rent: a civil action at law,¹⁵ or distress.¹⁶ If the rent is not paid, the landlord has one year to seek a distress warrant from a justice of the peace in the county wherein the tenant's chattels may be found.¹⁷ The landlord need not serve notice upon the tenant, and the justice is not required to hold a prior hearing before issuing the

¹³ Beds, stoves, mattresses, dishes, tables, and other necessities for ordinary day-to-day living are, like wages in *Sniadach*, a "specialized type of property presenting distinct problems in our economic system," the taking of which on the unilateral command of an adverse party "may impose tremendous hardships" on purchasers of these essentials. That it is a temporary taking, does not obviate the objection that it is a taking prior to hearing and notice.

Laprease v. Raymours Furniture Co., 315 F. Supp. 716, 722 (N.D.N.Y. 1970). *But see Brunswick Corp. v. J & P, Inc.*, 424 F.2d 100 (10th Cir. 1970); *Fuentes v. Faircloth*, 317 F. Supp. 955 (S.D. Fla. 1970), *prob. juris. noted*, 401 U.S. 906 (1971) (replevin action pursuant to a conditional sales contract does not violate conditional buyer's constitutional rights to due process). In *Fuentes*, the plaintiff-buyer purchased a gas stove and a stereo set from the conditional seller but was unable to keep up the payments. The district court refused to apply *Sniadach* because it believed the Supreme Court specifically limited *Sniadach* to a particular kind of property—wages.

¹⁴ *E.g.*, *Bell v. Burson*, 402 U.S. 535 (1971) (no summary suspension of driver's license without a "fault" hearing); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (no summary termination of welfare without prior hearing); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (no summary pre-judgment garnishment of wages without prior hearing); *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716 (N.D. N.Y. 1970) (no summary replevin of debtor's property without prior hearing); *Randone v. Appellate Dept. of Super. Ct. of Sacramento County*, 96 Cal. Rptr. 109, 488 P.2d 13 (1971) (no summary attachment of debtor's property without prior hearing).

¹⁵ W. VA. CODE ch. 37, art. 6, § 9 (Michie 1966). Before the promulgation of the West Virginia Rules of Civil Procedure, a landlord could bring a common-law action of assumpsit for the use and occupation of the leased property. *Goshorn v. Steward*, 15 W. Va. 657 (1879).

¹⁶ Distress in Virginia and West Virginia is a remedy afforded by statute only when rent is due under a contract. *See* W. VA. CODE ch. 37, art. 6, § 9 (Michie 1966).

¹⁷ W. VA. CODE ch. 37, art. 6, § 12 (Michie 1966). The landlord (or his agent) must file with the justice an affidavit—a written oath—disclosing the amount he truthfully believes is due and a description of the property to be distrained.

warrant.¹⁸ The justice, upon receipt of the landlord's affidavit, issues a warrant to a sheriff or constable of the county where the tenant's property may be subjected to distress.¹⁹ However, the landlord may distrain only the property of the tenant or his assignee found on the leased property or removed from it within thirty days prior to the commencement of the action.²⁰ Note that although there may be no rent owing, the landlord upon filing an affidavit and posting bond may institute an attachment of the tenant's property if he fears that there will not be sufficient property remaining on the premises to satisfy a distress action for rent accruing within one year.²¹

At common law, upon the landlord's seizure of his tenant's property, the property was held as a pledge to compel the tenant to pay the rent. However, the landlord could not sell the property and apply the proceeds of the sale as payment of rent.²² In West Virginia, the landlord may utilize a distress warrant to compel the sale of the tenant's distrained property and the rent due may be satisfied out of the proceeds.²³

¹⁸ *Id.*

A distress warrant is in the nature of an execution against the goods of the defendant to make the amount of money set forth in the warrant, and the costs. It is issued without judgment or other judicial investigation into the liability of the defendant for the amount claimed. The defense comes afterwards.

E. BURKE, PLEADING AND PRACTICE 706 (3d ed. 1938).

¹⁹ W. VA. CODE ch. 37, art. 6, § 12 (Michie 1966). At early common law, the feudal landlord's right or remedy was independently vested in himself without the assistance or sanction of a judicial body or royal official. If judicial action was necessary to initiate or obviate the landlord's distress for rent, the assistance came from the lord's own manorial court (commonly his own bailiff) and not from the royal courts. 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 575 - 78 (2d ed. 1898).

²⁰ Originally, at common law, all personal property, including a stranger's property found on the leased premises, was subject to distraint; but in West Virginia a stranger's chattels or the tenant's chattels, not found on or removed from the leased premises within thirty days before the commencement of the distress action, are not subject to distraint for rent. See W. VA. CODE ch. 37, art. 6, § 13 (Michie 1966); General Electric Co. v. Martin, 99 W. Va. 519, 130 S.E. 299 (1925). See also 3 H. TIFFANY, THE LAW OF REAL PROPERTY 589 (3d ed. 1939).

²¹ W. VA. CODE ch. 37, art. 6, § 17 (Michie 1966).

²² 3 H. TIFFANY, THE LAW OF REAL PROPERTY 589 (3d ed. 1939).

²³ Thus there are two important differences between common-law distress for rent and distress in West Virginia: (1) at common law the landlord or his personal servant (*e.g.*, his bailiff) could seize the tenant's chattels, but in West Virginia a justice must issue a distress warrant and a sheriff or constable must seize the property; and (2) at common law, the seized property was held as security for payment of debt, but in West Virginia the distrained property is seized for the purpose of sale.

Once the property has been seized under a distress warrant, the officer may fix a date and time for sale at public auction to the highest bidder by

If the tenant wishes to contest the validity of the landlord's right to recover or retain possession of his property, he must post with the officer a forthcoming bond.²⁴ In Virginia, if the tenant has a meritorious defense, but is unable to post bond, he may still retain possession of the levied chattels by submitting an affidavit.²⁵ However, in West Virginia, if the tenant cannot post the forthcoming bond, the officer serving the distress warrant must seize the property even though the tenant may have a meritorious defense.

II. THE DISTRESS WARRANT AND PROCEDURAL DUE PROCESS

West Virginia's Supreme Court of Appeals was confronted with the question of whether West Virginia's distress for rent law violated the fourteenth amendment and held that the due process clause of that amendment was not adopted with the design to invalidate established common-law remedies and procedures in general and distress for rent in particular.²⁶ The Court accepted the traditional

posting notice of the sale (ten days in advance) on a door of the county courthouse and in a public place near the tenant's residence if he lives in that county. W. VA. CODE ch. 37, art. 6, § 16 (Michie 1966). If the distressed property is perishable or by nature expensive to keep, an accelerated sale may be ordered after the tenant has been notified. W. VA. CODE ch. 38, art. 6, § 8 (Michie 1966). The tenant's tools of his trade may be exempted from the levy and certain dependents of a deceased tenant may also take an exemption. W. VA. CODE ch. 38, art. 8, § 1 (Michie 1966).

²⁴ W. VA. CODE ch. 38, art. 6, § 7 (Michie 1966). The forthcoming bond is usually set at double the value of the property levied and not twice the amount claimed by the landlord.

²⁵ VA. CODE § 55-232 (Michie 1969). The officer returns the warrant and tenant's affidavit to the circuit court. The landlord, after serving the tenant ten days notice, may make a motion in the circuit court for a judgment on the rent and an order to sell the tenant's property, and the tenant may present his defenses. The landlord may also post bond (twice the value of the property) requiring the officer to seize the property and hold it pending the outcome of the action.

²⁶ *Anderson v. Henry*, 45 W. Va. 319, 31 S.E. 998 (1898). *Anderson* involved a controversy over preference of the landlord's power to distrain the tenant's goods for rent and a general creditor's power to reach the tenant-debtor's goods to satisfy a debt. The court held that the landlord's claim for rent had priority for one year's rent over a general creditor's claim for a debt. See W. VA. CODE ch. 37, art. 6, § 18 (Michie 1966).

Judge Brannon writing for the majority in *Anderson* stated that:

[i]t is urged that this proceeding is in violation of amendment 14 of the Constitution of the United States, guarantying due process of law. The remedy of distress existed before the discovery of America, and was brought to Virginia by Capt. Smith, and has never ceased; and it seems useless to argue to show that a remedy so long antedating said amendment, a remedy for and against all alike, is not destroyed by it. That amendment is not the "scarecrow" it is often represented to be; it does not overthrow state laws, rights and remedies, to the extent and purposes for which it is often cited. It respects the common law, the statute, the remedies and procedure

view that common-law distress for rent is not a civil action between adversaries but is only an *ex parte* proceeding, and the justice provides only a ministerial service, not a judicial act.²⁷ However, in a recent decision,²⁸ a United States district court held that *Sniadach*²⁹ was clearly applicable to the Pennsylvania law setting forth the remedy of distress for rent. The court held the Pennsylvania distraint procedure did not meet the requirements of procedural due process. Defendant claimed that the taking was under the lease agreement³⁰ and thus no state action was involved.³¹ However, the taking of the tenant's personal property through a distraint action by the landlord involves state action because the state furnishes the landlord with the remedy of distress³² and state officials conduct the public

existing in the state at its adoption. . . . It came to preserve not to destroy, existing rights. Just as well say that the tax bill seizing a horse for taxes is not due process of law.

Anderson v. Henry, 45 W. Va. 319, 325, 31 S.E. 998, 1000 (1898).

²⁷ The landlord in exercising the remedy of distraint does not commence a civil action but merely seeks a warrant from the justice to seize his tenant's chattels and then sell them for collection of his rent. Furthermore, as proof that a distraint proceeding is not a civil action, the court reasoned that since there is no hearing prior to the issuance of the warrant, there is therefore no suit per se between the parties. 45 W. Va. at 324, 31 S.E. at 1000. But even if the distraint proceeding is only an administrative proceeding, the tenant ought to be protected by procedural due process. Goldberg v. Kelly, 397 U.S. 254 (1970).

²⁸ Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970). Plaintiffs, Santiago and others, instituted this action challenging the constitutionality of levies and sales pursuant to the procedure of distress for unpaid rent under the Landlord and Tenant Act of 1951, 68 PA. STAT. ANN. tit. 68 § 250.302 et seq. (West 1965). Plaintiffs lived in rented housing and their only income was a public assistance grant. Their landlord brought a distress action against them for alleged nonpayment of rent although the rent had been raised without giving the plaintiffs notice as required in the lease.

²⁹ Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

³⁰ The lease (a standard form) provided that the tenant agreed to permit the landlord to act pursuant to distraint for rent procedures set forth in The Landlord and Tenant Act of 1951, PA. STAT. ANN. tit. 68 §§ 250.302-313 (West 1965). The court disagreed with the defendant's contention that this provision created an independent right in the landlord to distraint. Although the tenant agreed not to object on legal grounds to the distress procedure, the tenant did not waive an objection on constitutional grounds unless it could be said that he intentionally waived a known right; the court cited Johnson v. Derbst, 304 U.S. 458 (1938).

³¹ Because the purported waiver only related to objections on legal grounds to distress procedures and the standard form lease was a contract of adhesion ("take it or leave it" situation), the court held that there was no waiver by plaintiffs of their right to object on constitutional grounds to distress procedures set forth by statute.

³² Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970). California's Innkeepers Lien Law which did not provide for a prior hearing before the imposition of an innkeeper's lien was held to be a taking of the boarder's property without due process of law. See Reitman v. Mulkey, 387 U.S. 369 (1967). See also 5 U. RICH. L. REV. 447 (1971).

sales.³³ Thus, if *Sniadach* is applicable to the remedy of distress³⁴ (*Santiago v. McElroy* said it was), procedural due process requires the state to give the tenant some form of notice and a prior hearing.

The Court in *Sniadach* also looked to the nature of the taking. The petitioner-alleged debtor was deprived of the use of part of her wages pending the outcome of respondent's action. If the debtor ultimately prevails, he is still temporarily deprived of his earnings, and even a temporary loss of a small part of his wages can create a hardship on a wage-earner and his family. The landlord under Pennsylvania's distress for rent statute could distrain the tenant's personal property for collection of the alleged rent through public sale, and if the tenant challenged the distress warrant by an action of trespass, there might not be a court decision until after the sale. Furthermore, from the time of the seizure until the sale the tenant is temporarily deprived of the use of his property. If the tenant should prevail in the trespass action after the sale, he is then permanently deprived of his property in kind. If the tenant brings a replevin suit and retains possession of his property, he is still temporarily deprived of the use of the money relinquished for his replevin bond (forthcoming bond in West Virginia) pending the outcome of the litigation. As the court noted in *Santiago*,³⁵ tenants through any of these deprivations are condemned to suffer an injustice which could have catastrophic results.

III. CONCLUSION

West Virginia's statute setting forth the landlord's remedy of distraint of his tenant's goods for collection of rent represents an outdated vestige of the feudal lord's power to force his tenants to pay their rent. Today, through state machinery, the landlord may seize his tenant's personal property, sell it, and keep the proceeds without having a judicial determination of any kind to decide whether there are rents actually due. West Virginia's distress for rent law, as Wisconsin's garnishment statute before *Sniadach v. Family Finance*

³³ *Monroe v. Pope*, 365 U.S. 167 (1961).

³⁴ If the Supreme Court in *Sniadach* was more concerned with the unconstitutional taking of a special type of property—a prejudgment freeze of a man's wages—than with deciding whether state action violated the wage-earner's right to due process (a point rejected in *Klein v. Jones*, 315 F. Supp. 109 at 122 (N.D. Cal. 1970)), still the taking of the tenant's personal property under a distraint action when rent is due (usually because he is too poor to pay) without the protections inherent in procedural due process should bring the distress procedure within the sphere of *Sniadach*.

³⁵ 319 F. Supp. at 294.

Corp.,³⁶ permits the summary procedure for seizing the alleged debtor's property. Although the Supreme Court in *Sniadach* was critical of the taking of a specialized type of property—*i.e.*, wages—it is not without basis to extend the reasoning of *Sniadach* to other forms of pre-judgment seizures of a debtor's property. In addition to *Santiago v. McElroy*,³⁷ extending the *Sniadach* principle to Pennsylvania's distress for rent law, the *Sniadach* reasoning has recently been applied to California's attachment procedure³⁸ and claim and delivery remedy.³⁹

Nor does West Virginia's distress law seem justifiable as the legislature's legitimate attempt to protect some "compelling state interest."⁴⁰ Usually compelling state interest will justify summary proceedings only when necessary for the protection of the public's health and welfare *e.g.*, summary seizure of a mislabeled vitamin product,⁴¹ adoption of wartime price controls,⁴² seizure and destruction of contaminated food,⁴³ and the revocation of a doctor's surgical privileges.⁴⁴

Although *Sniadach* suggests that a summary proceeding may be constitutional if there is an extraordinary situation in which the state has a special interest ("compelling state interest") to protect and the statute is narrowly drawn to meet that situation, the state may have a difficult task to show that distraint of the tenant's property is an extraordinary situation justifying the pre-judgment taking. As the wages in *Sniadach* and the household goods in *Laprease*,⁴⁵ a tenant's personal property may be special property deserving the same protection of procedural due process. Perhaps pre-judgment

³⁶ 395 U.S. 337 (1969).

³⁷ 319 F. Supp. 284 (E.D. Pa. 1970).

³⁸ *Randone v. Appellate Dept. of Super. Ct. of Sacramento County*, ____ Cal 3d ____, 488 P.2d 13, 96 Cal. Rptr. 709 (1971).

³⁹ *Blair v. Pitchess*, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

⁴⁰ Traditionally, the courts will not sanction the government's summary adjudication of an individual's rights in the absence of a showing by the state of some compelling need or interest. The Supreme Court found this "compelling state interest" in *Ewing v. Mytinger & Cassalbury, Inc.*, 339 U.S. 599 (1950); *Fohey v. Mallonee*, 332 U.S. 245 (1947); *Phillips v. Commissioner*, 283 U.S. 589 (1931); *Coffin Brothers & Co. v. Bennett*, 277 U.S. 29 (1928). See 17 U.C.L.A. L. Rev. 837, 842 (1970) (these cases generally involve the actions of governmental administrative agencies, and in none of them were the petitioners affected by severe economic hardships typical in *Sniadach*, *Kelly*, and *Santiago*). See also 73 W. VA. L. REV. 80, 85 (1970).

⁴¹ *Ewing v. Mytinger & Cassalbury, Inc.*, 339 U.S. 594 (1950).

⁴² *Yakus v. United States*, 321 U.S. 414 (1944).

⁴³ *North Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908).

⁴⁴ *Coach v. State*, 165 So. 2d 426 (Fla. Dist. Ct. App. 1964).

⁴⁵ 315 F. Supp. 716 (N.D.N.Y. 1970).

distress for rent would be constitutional if it was patterned after West Virginia's attachment statute⁴⁶ requiring the landlord to post a bond and show the existence of an extraordinary situation requiring the state to protect his right to collect the rent. But if the tenant believes he has a meritorious defense, he should have an opportunity to assert that defense before his property may be taken.

As a practical matter, the harshness of the distress law, as evidenced in *Santiago*, usually strikes at the poor who are forced by necessity to live in rental housing. The landlord through the state can force the seizure and sale of his tenant's chattels without the tenant realistically having the right or the means to resist the unlawful taking of his property. Cognizant of the landlord's substantive right to collect rent for the use of his property, the legislature should amend the distress law and provide the machinery for the constitutional protections that procedural due process requires. Before a tenant's goods may be seized and sold for the collection of rent, he should be provided with notice and a meaningful opportunity to be heard. Anything short of this represents a departure from a standard of "fundamental fairness"⁴⁷ and deprives a tenant of the procedural due process safeguards to which he is constitutionally entitled.

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⁴⁶ W. VA. CODE ch. 50, art. 9, § 1 (Michie 1966).

⁴⁷ Mr. Justice Harlan in a concurring opinion in *Sniadach* stressed that the states should act with "fundamental fairness" and at least require notice and prior hearing. In *Boddie v. Conn.*, 401 U.S. 371 (1971) (a welfare recipient has a right to a divorce even if he cannot afford the cost of commencing the divorce action), Mr. Justice Harlan articulated the basic requirements of procedural due process, concluding that "a state must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause." *Id.* at 379. This does not mean, however, a full evidentiary hearing on the merits in every civil case. Mr. Justice Harlan affirmed the position that the Court had taken in the past that a default judgment would be proper if the defendant failed to appear after receiving notice, *Windsor v. McVeigh*, 93 U.S. 274, 278 (1876), or without justifiable excuse failed to produce evidence necessary for orderly adjudication, *Hammond Packing Co. v. Arkansas*, 121 U.S. 322, 351 (1909).