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Constitutional Law--Procedural Due Process Application To Pre-Judgement Garnishment

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off between the top two vote getters if no candidate polls a majority, alleviates the problem to some extent by giving the voters an alternative choice.

These possible applications of the *Lance* principle occur in West Virginia: obviously these extensions of the rule will profoundly affect the state's electoral processes. The ultimate national effect of the *Lance* decision will depend on the action taken by the United States Supreme Court in the event of review. However, even if certiorari is denied, it is reasonable to assume that the case will lead to a flood of litigation.

Diana Everett

Constitutional Law—Procedural Due Process Application To Pre-Judgment Garnishment

Christine Sniadach was a mill worker employed at a salary of $63.18 per week. The complainant, Family Finance Corporation of Bay View, alleged a claim of $420 on a promissory note, and instituted an action against her in the Wisconsin courts. Taking advantage of the Wisconsin garnishment laws,[1] Family Finance proceeded to have her wages frozen pending disposition of the suit. Mrs. Sniadach sought to have the pre-judgment proceedings dismissed on the ground that they deprived her of property without satisfying due process requirements of the fourteenth amendment. The county court found, however, that the pre-judgment garnishment procedure satisfied the requirements for due process. After the decision was affirmed by the circuit court and the Supreme Court of Wisconsin, Mrs. Sniadach petitioned the United States Supreme Court for certiorari. *Held,* reversed. This pre-judgment garnishment of wages without notice and a prior hearing violated due process of law. *Sniadach v. Family Finance Corp. of Bay View,* 395 U.S. 337 (1969).

In the *Sniadach* decision, the Supreme Court emphasized that in extraordinary situations certain summary proce-

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[1]Under Wisconsin law, all that is necessary to garnish an alleged debtor's wages is that the clerk of the court issue a summons at the request of the creditor's lawyer; and it is the lawyer who, by serving the garnishee, sets in motion the machinery whereby the wages are frozen. The Supreme Court paid particular attention to: WIS. STAT. ANN. § 267.04 (1) (Supp. 1969). WIS. STAT. ANN. § 267.07 (1) (Supp. 1969); and WIS. STAT. ANN. § 267.18 (2) (Supp. 1969).

dures may well meet the requirements of due process. One type of extraordinary situation that the Court mentioned occurs where summary procedure is used against an individual or an organization in the public interest.[2] This type of situation is distinguishable from *Sniadach* where the summary procedure was being employed solely to benefit the private interest of the complainant, Family Finance Corporation of Bay View. Another type of extraordinary situation exists where summary procodure is used to attach a non-resident's property located within the state where the action is brought.[3] In this situation the attachment is used as an aid to jurisdiction. In *Sniadach,* however, both parties were residents of Wisconsin, and *in personam* jurisdiction was readily obtainable. The Court additionally sought to distinguish a pre-judgment wage garnishment from a pre-judgment property attachment[4] by emphasizing the difference between due process sufficient for property of a feudal nature and that necessary for modern forms of property.[5]

[2]For example, there was no denial of due process where the Federal Home Loan Bank Administration sent a conservator into a private savings and loan association to straighten matters out, because of the delicate nature of the institution and the impossibility of preserving credit during an investigation. There was also an administrative hearing prior to appointment of the conservator. Fahey v. Mallonee, 332 U.S. 245 (1947). There was also no denial of due process in an administrator's seizure for probable cause of goods of a private company pursuant to federal legislation protecting the health and welfare of the public. Ewing v. Mytinger and Casselberry, Inc., 339 U.S. 594 (1950). Finally, no denial of due process was found where a state bank administrator issued execution against stockholders of a bank pursuant to their statutory liability to depositors, and stockholders had the right to attack illegality of execution by affidavit. Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928).

[3]There is no denial of due process in an attachment of a non-resident's property in the state of the claimant. By leaving his property in the state, the non-resident is deemed to consent to the state's subjection of the property to judicial process. Ownbey v. Morgan, 256 U.S. 94 (1921).

[4]No denial of due process was found where there was a prejudgment attachment of property. McInnes v. McKay, 127 Me. 110, 114 A. 699, *aff'd per curiam* 279 U.S. 820 (1928).

[5]Justice Douglas placed a special emphasis on the type of property taken here. He stated, "[T]he fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms." 395 U.S. at 340. He found that wages are "a specialized type of property presenting distinct problems in our economic system." 395 U.S. at 340. Wages are a modern form of property in the sense that they have developed out of the accrual bookkeeping system. Prior to the development of the accrual bookkeeping system, salaries were paid on a daily basis, but this new type of bookkeeping system permitted weekly or monthly wages to be paid. Without the accumulation of daily wages weekly or monthly garnishment could not have been used against wages. Justice Douglas went on to argue that wage garnishment could be a great drain on the already impoverished family against whom it is usually used. He stated in his conclusion that "[t]he result is that a pre-judgment garnishment of the Wisconsin type may . . . drive a wage-earning family to the wall." 395 U.S. at 341-42.

In determining that pre-judgment garnishment of wages failed to meet due process requirements, the Court in *Sniadach* drew an analogy to *Coe v. Armour Fertilizer Works.*[6] In *Coe,* the plaintiff sued out a writ of execution against Parrish Vegetable and Fruit Co. in which Coe was a stockholder. When the plaintiff was unable to find property to levy upon, they sued out an execution against Coe as a stockholder without any notice to him. The Court held that before a party's property "may be taken to pay that indebtedness upon the ground that he is a stockholder and indebted to the corporation for an unpaid subscription, he is entitled . . . to a day in court and a hearing upon such . . . defenses personal to him."[7] Applying the rationale of *Coe,* the Court in *Sniadach* held that without notice and a prior hearing, the Wisconsin pre-judgment wage garnishment procedures violated the basic principles of due process.

In the *Sniadach* decision,[8] the Wisconsin Supreme Court had relied on a West Virginia case, *Byrd v. Rector,*[9] for the proposition that the pre-judgment garnishment of wages is not a denial of due process. The Wisconsin court quoted a lengthy passage from *Byrd* to the effect that where a writ of attachment is issued prior to a judicial determination of the rights of the parties there is no denial of due process since the attachment serves only as a lien on the property until there is such a determination. There was said to be no denial of due process because there had been "no deprivation of property."[10]

In overruling the decision of the Wisconsin court, the United States Supreme Court relied on the test of whether the petitioner was deprived of the use of her property rather than whether she was merely temporarily deprived of her property until there could be a final adjudication of the rights of the parties. However, the *Sniadach* decision does not appear to contravert the holding in *Byrd.* The main distinction between the two cases is that in the *Byrd* decision the defendant was a non-resident in a tort action[11] rather than a resident in a debt action. Since the defendant

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[6]237 U.S. 413 (1915).
[7]*Id.* at 423.
[8]Family Finance Corp. of Bay View v. Sniadach, 37 Wis. 2d 163, 154 N.W. 2d 259 (1967).
[9]112 W. Va. 192, 163 S.E. 845 (1932).
[10]*Id.* at 198, 163 S.E. at 848.
[11]Infant Byrd was injured while playing with blasting caps negligently left by the defendant Rector while he was completing construction work.

in *Byrd* was a non-resident, there was no way to get personal jurisdiction over him. Consequently, attachment was used as an aid to jurisdiction. On the other hand, in *Sniadach* both parties were residents of Wisconsin and *in personam* service was available to bring Mrs. Sniadach personally before the court. There was therefore no need to garnish her wages as an aid to jurisdiction. This distinguishing feature may place the *Byrd* case within one of the extraordinary situations where summary procedure may meet the requirements of due process.[12]

In addition to the West Virginia provision for the attachment of the property of non-residents,[13] there are other statutory grounds for the attachment of property.[14] These appear to exist to help a creditor prevent a debtor from defrauding him by removing his person or his property from the jurisdiction of the court.

The attachment is a summary procedure and would appear on its face to violate due process just as pre-judgment was garnishment did in *Sniadach*. However, in *Sniadach* Justice Douglas emphasized that wages are a specialized, modern form of property, and as such, require a higher standard of procedural due process before they can be taken from the wage earner.[15]

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[12]See Ownbey v. Morggan, 256 U.S. 94 (1921(, where attachment of the property of a non-resident was held to be an extraordinary situation in which summary procedure did not violate due process.

[13]The general statutes pertaining to attachment are in W. VA. CODE ch. 38, art. 7, § § 1-46 (Michie 1966). The specific statute dealing with attachment of a non-resident's property is W. VA. CODE ch. 38, art, 7, § 2, (Michie 1966).

[14]W. VA. CODE ch. 38, art. 7, § 2 (Michie 1966) provides as follows:

> The grounds upon which an order of attachment may issue . . . are the following: (a) That the defendant, or one of the defendants, is a foreign corporation or is a non-resident of this State; or (b) has left, or is about to leave the State with intent to defraud his creditors; or (c) so conceals himself that a summons cannot be served upon him; or (d) is removing or is about to remove, his property, or the proceeds of the sale of his property, or a material part of such property or proceeds, out of this State, so that process of execution on a judgment or decree in such action or suit, when it is obtained, will be unavailing; or (e) is converting, or is about to convert, his property, or a material part thereof, into money or securities, with intent to defraud his creditors; or (f) has assigned or disposed of his property or a material part thereof, or is about to do so, with intent to defraud his creditors; or (g) has property or rights in action, which he conceals; or (h) fraudulently contracted the debt or incurred the liability for which the action or suit is about to be or is brought.

[15]Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337, 340 (1969).

The West Virginia garnishment statute[16] is closely related to the attachment statutes because there can be no garnishment unless a writ of attachment has already been issued. Garnishment proceedings in West Virginia do not apply to wages, but rather to other property of a defendant which is in the hands of a third party. In fact, the only way a wage earner in West Virginia may be deprived of his salary through his employer is by the procedure of suggestion of employee wages.[17] But in the case of suggestion, it is purely a post-judgment remedy rather than a pre-judgment procedure.[18]

Other West Virginia statutes, such as those dealing with distress for rent,[19] innkeepers liens,[20] and certain other possessory liens,[21] should be considered in light of the *Sniadach* decision. All these statutes deal with the summary procedure for seizing an alleged debtor's property in one form or another. In *Anderson v. Henry*,[22] the West Virginia Supreme Court of Appeals found that distress for rent does not violate the due process clause of the four-

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[16]W. VA. CODE ch. 38, art. 7, § 15 (Michie 1966) provides that:
> The plaintiff in an attachment may, by an indorsement on the order of attachment, designate any person as being indebted or liable to, or having in his possession, the effects of the defendant, or one of the defendants; and in such case the clerk shall make as many copies of the order as there are persons so designated, with an indorsement thereon that the person so designated is required to answer at the next term of the court in which the action or suit is pending, and disclose on oath in what sum he is indebted to the defendant, and what effects of the defendant he has in his possession or under his control. . . .

[17]The general statutes pertaining to suggestion of wages of employees of the state are at W. VA. CODE ch. 38, art. 5B § § 1-16 (Michie 1966). The general statutes pertaining to suggestion of wages of employees of private enterprises are at W. VA. CODE ch. 38, art. 5A, § § 1-13 (Michie 1966).

[18]W. VA. CODE ch. 38, art. 5A, § 2 (Michie 1966) provides that: "Salary or wages payable to any person . . . whether due and owing or to become due and owing, shall be subject to *suggestion by judgement creditors* . . . ." (emphasis added).

[19]W. VA. CODE ch. 37, art. 6, § 9 (Michie 1966) provides that: "Rent of every kind may be recovered by distress . . . ." W. VA. CODE ch. 37, art. 6, § 12 (Michie 1966) outlines the methods which are to be used when rent is being recovered by distress. W. VA. CODE ch. 37, art. 6 § 13 (Michie 1966) provides that: "The distress may be levied on any goods of the lessee, or his assignee or undertenant, found on the premises, or which may have been removed therefrom not more than thirty days. . . ."

[20]W. VA. CODE ch. 38, art. 11, § 5 (Michie 1966).

[21]W. VA. CODE ch. 38, art. 11, § 3 (Michie 1966) deals with improver's, storer's or transporter's liens on personal property and animals. W. VA. CODE ch. 38, art. 11, § 4 (Michie 1966) deasl with the bailee's liens of animals and vehicles.

[22]45 W. Va. 319, 31 S.E. 998 (1898).

teenth amendment. The court based its decision on the fact that distress was in existence before the settlement of America and is founded in the common law.[23] Although the approach of the court may be questionable in light of some later day theories of legal philosophy and reasoning, it does not necessarily follow that the decision might be overruled by the Supreme Court of the United States on the vasis of *Sniadach*. The same is true of innkeepers' liens and possessory liens. Before these liens can exist, the claimant must have possession of the property in question. There are certain minimal requirements which the holder of the lien must exercise before he can sell the property to obtain his monetary claim.[24] Here also, the summary procedure might amount to a denial of due process; but it does not necessarily follow that this would be the end result using *Sniadach* as the basis for making that determination. These statutory techniques are all distinguishable from the pre-judgment garnishment procedure of *Sniadach*. Furthermore, the Supreme Court apparently perceives some special nature in the property of wages.

Nevertheless, the fact remains that in each of these West Virginia procedures there is some form of taking of property without the normal protections associated with due process of law. Does this mean that in light of the *Sniadach* decision these procedures will be held to be unconstitutional as a denial of due process, or are they to be considered a legitimate exercise of legislative discretion? In the *Sniadach* decision, Justice Douglas was careful to point out that the Court did not sit as a super-legislative body determining the wisdom of the pre-judgment wage garnishment statutes. On the other hand, Justice Black, in dissenting, accused the Court of usurping legislative power.[25] These conflicting

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[23]*Id.* at 325, 31 S.E. at 1000.

[24]See W. VA. CODE ch. 38, art. 11, § 14 (Michie 1966).

[25]Justice Black dissented from the majority opinion of the Court stating that "[o]f course the Due Process Clause of the Fourteenth Amendment contains no words that indicate that this Court has the power to play so fast and loose with state laws." 395 U.S. at 344. He emphasized that the considerations of the Court went to the morality of the law and that the Court acted as a super-legislature which "frustrate[s] policies of States adopted by their own elected legislatures." 395 U.S. at 345. He found the Court relying on emotional rhetoric and claimed that the basis for the majority decision was that the Court "considers a garnishment law of this kind to be bad state policy." 395 U.S. at 344. Justice Black recognized that under the Wisconsin garnishment laws, the debtor is given notice and a chance to defend at the regular hearing and trial of the case. However, he failed to consider that the debtor is summarily deprived of the *use* of his wages until there is such a final judicial determination.

statements raise the issue of whether the Court determined the question solely on procedural grounds or whether they based their decision on policy questions. If the former is true, the effect of *Sniadach* will be far-reaching; however, if the latter is true, then *Sniadach* will have a much more limited effect.

David Jeffrey Millstone

Insurance—Pickup Truck is not a Private Passager Automobile

Robert L. Laraway, the insured, was killed while riding as a passenger in a 1966 Chevrolet pickup truck. The vehicle was owned by a Pennsylvania construction corporation which employed him as a foreman. The accident took place while Laraway was going to work on Monday, September 11, 1967. Plaintiff, as beneficiary of an accident insurance policy, sought a recovery and the insurance company disavowed liability. The Circuit Court of Monongalia County, sitting in lieu of a jury, rendered a judgment of $12,000 in favor of plaintiff. Defendant appealed. *Held,* reversed and remanded. The pickup truck was not a *private passenger automobile* within the meaning of the clear and unambiguous words of the insurance policy's coverage. *Laraway v. Heart of America Life Ins. Co.,* 167 S.E. 2d 749 (W. Va. 1969).

The *Laraway* case introduced an issue which, had not previously been considered by the West Virginia court. The problem centered around the interpretation of the policy coverage as applied to the vehicle in which Laraway was riding, the 1966 Chevrolet pickup truck. On the face of the policy appeared the following language: "THIS IS A LIMITED POLICY READ IT CAREFULLY."[1] The restrictive language in the policy said that the policy covered "bodily injuries to the insured resulting in his death while actually riding in or driving 'any private passenger automobile.'"[2] The policy then defined "the word 'automobile' and the words 'a private

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[1]Laraway v. Heart of America Life Ins. Co., 167 S.E. 2d 749, 751 (W.Va. 1969).
[2]*Id.*