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## Constitutional Law - Due Process - Prejudgment Garnishment

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## Constitutional Law — Due Process — Prejudgment Garnishment

The Wisconsin prejudgment garnishment statute provides that a creditor may garnish the property of anyone he claims is indebted to him.<sup>1</sup> Under this statute garnishment is permitted before any judicial determination as to the legal rights of the parties in the garnished property has been made. Included within the property that could be garnished before judgment are wages of the debtor.<sup>2</sup> That part of the statute, however, which provided for prejudgment wage garnishment, was recently held unconstitutional by the United States Supreme Court in *Sniadach v. Family Finance Corporation*.<sup>3</sup> That Supreme Court decision, however, did not rule on the constitutionality of the remaining part of the Wisconsin statute.

Shortly after the *Sniadach*<sup>4</sup> case was handed down, the Wisconsin prejudgment garnishment statute once again became the subject of a constitutional attack. A Wisconsin travel agency, unable to meet its financial obligation, found its bank accounts being garnished by several creditors including the Air Traffic Conference (ATC) and Northwest Airlines, Inc. under Wisconsin's prejudgment garnishment statute. Upon trial of the main suit on the debt, the lower state court held that the funds on deposit should be divided among the creditors of the defendant. ATC and the directors of the defendant corporation appealed the judgment to the Wisconsin Supreme Court. *Held, reversed and dismissed*: A prejudgment garnishment statute that does not provide for notice and prior hearing violates the fundamental principles of due process and is unconstitutional. *Larson v. Fetherston*, 44 Wis. 2d 712, 172 N.W. 2d 20 (1969).

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<sup>1</sup>"The garnishee complaint in a garnishment action before judgment must allege the existence of one of the grounds for garnishment mentioned in § 267.02(1) (a), the amount of the plaintiff's claim against the defendant, above all off sets, known to the plaintiff, and that plaintiff believes that the named garnishee is indebted to or has property in his possession or under his control belonging to the defendant (naming him) and that such indebtedness or property is to the best of plaintiff's knowledge and belief, not exempt from execution." WIS. STAT. § 267.05(1) (Supp. 1969).

<sup>2</sup>(a) "When wages or salary are the subject of garnishment action, the garnishee shall pay over to the principal defendant on the date when such wages or salary would normally be payable a subsistence allowance, out of the wages or salary then owing, in the sum of \$25 in the case of an individual without dependents or \$40 in the case of an individual with dependents; but in no event in excess of 50 per cent of the wages or salary owing. Said subsistence allowance shall be applied to the first wages or salary earned in the period subject to said garnishment action.

(b) If the court determines that the principal defendant is entitled to an exemption in excess of the subsistence allowance paid over or to be paid over pursuant to this subsection, such subsistence allowance shall be set off and applied against said exemption. If the court determines that the principal defendant is entitled to an exemption less than the subsistence allowance paid over or to be paid over pursuant to this subsection, such subsistence allowance shall be the exemption to which the principal defendant is entitled in such garnishment action." WIS. STAT. § 267.18(2) (a) (Supp. 1969).

<sup>3</sup>*Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969).

<sup>4</sup>*Id.*

## I. PREJUDGMENT GARNISHMENT AND DUE PROCESS

Garnishment is an extraordinary writ that was developed in common law but dates back to Medieval and Roman times.<sup>5</sup> Today, garnishment is a statutory remedy only.<sup>6</sup> The purpose of the writ is to prevent the disposition of property that may be subject to satisfaction of a judgment, which is owned by the debtor but is in possession or control of a third person.<sup>7</sup> The garnishment proceedings are purely ancillary to the main suit and can be brought either before or after judgment. The procedure for prejudgment garnishment is about the same in most states. The plaintiff (garnishor) sues a third person (garnishee) in garnishment, demanding the property he is holding for the defendant of the main suit. The property is impounded by the court when the writ of garnishment is served on the garnishee, although no final judgment on the garnishment suit may be had until there is a final judgment on the main suit. A prejudgment garnishment proceeding has the effect of "freezing" the use of the property garnished until there is judgment on the main suit unless the property is excepted from execution by statute<sup>8</sup> or the defendant puts up a replevy bond.<sup>9</sup> Frequently, the defendant is not a party to the garnishment suit even though his property is involved. However, the defendant usually can be impleaded by the garnishee in order that the garnishee might protect himself;<sup>10</sup> but this does not always happen, and though the defendant may

<sup>5</sup> WADE ON ATTACHMENT § 1 (1886); Riesenfeld, *Collection of Money Judgments in American Law*, 42 IOWA L.R. 155 (1942).

<sup>6</sup> Sanders v. Armour Fertilizer Works, 292 U.S. 190 (1934).

<sup>7</sup> Lowe, *Collection of Debts by Extraordinary Proceedings: Attachment, Garnishment and Receivership*, in CREDITORS RIGHTS IN TEXAS 208 (J. McKnight ed. 1963).

<sup>8</sup> Massachusetts, Michigan, and Texas exempt all wages from garnishment before judgement. California, Ohio, Florida, Illinois, New Jersey, and New York, all provide for partial wage exemption. The trend is in the direction of increasing exemptions of the debtor; at least twenty states did so between 1954 and 1964.

<sup>9</sup> "The defendant may file with the clerk of the court a bond, executed by at least 2 sureties, resident freeholders of the state, to the effect that they will on demand pay to the plaintiff the amount of the judgment that may be recovered against such defendant not exceeding a sum specified, which shall be 1½ times the amount of the debt specified in the garnishes complaint or in such less sum as the court directs. If the plaintiff fails to take issue with the garnishee answer the bond shall be conditioned to pay to the plaintiff the amount of the debt admitted or of the value of the property held by the garnishee.

The sureties shall justify their responsibility by affidavit annexed, stating a sum which each is worth in property within this state, above all his liabilities and exclusive of property exempt from execution, the aggregate of which sums shall be double the amount specified the bond. The defendant shall serve on the plaintiff a copy of such bond with a notice of where the same was filed. Within 3 days after the receipt thereof the plaintiff may notify the defendant that he excepts to the sufficiency of the sureties, otherwise he waives all objections to them. When the plaintiff excepts, the sureties shall justify in like manner as bail on arrest, and §§ 264.17, 264.18 and 264.19 shall be applicable thereto. Thereafter the garnishee shall be discharged and the garnishment proceedings shall be deemed discontinued, and any money or property paid or delivered to any officer shall be surrendered to the person entitled thereto, and the costs shall be taxable as disbursements of the plaintiff in the action if he recovers." WIS. STAT. § 267.21 (Supp. 1969).

<sup>10</sup> "When the answer of the garnishee discloses that any 3rd person claims the debt or property in his hands and the name and residence of such claimant the court may order that such claimant be impleaded as a defendant in the garnishment action and that notice thereof, setting forth the facts, with a copy of such order and answer be served upon him, and that after such service is made the garnishee may pay or deliver to the officer or the clerk such debt or property and have a receipt therefor, which shall be a complete discharge from all liability for the amount so paid or property so delivered. Such notice shall be served as required for service of a summons. Upon such service being made such claimant shall be deemed a defendant in the garnishee action, and within 20 days shall answer setting forth his claim or any defense which the garnishee might have made." WIS. STAT. § 267.17 (Supp. 1969).

be a proper party, he is not made a necessary party by most state statutes.<sup>11</sup> The defendant is effectively denied the use of his property with no statutory requirement that he be notified or be given a right to a hearing before the property is taken.

Due process of law has been held to require that notice and judicial hearing must be provided before a person is deprived of his property.<sup>12</sup> However, many cases have held that the required hearing need not take place immediately, and that the requirements of due process are met if all litigants have had notice and a hearing is held before final judgment is entered.<sup>13</sup> The stage of the proceeding in which a hearing is to be provided has been left to the discretion of the state legislature, and statutes have been held constitutional even though they provide for the taking of property by a ministerial act before the right to that property has been judicially determined.<sup>14</sup> Under this theory it would appear that because a defendant is only temporarily deprived of his property in prejudgment garnishment proceedings, and has the opportunity to be heard at the main suit before being permanently deprived of his property, such a procedure is within the bounds of due process requirements.

## II. PREJUDGMENT GARNISHMENT AND THE SUPREME COURT

The United States Supreme Court has dealt with only a few cases which have alleged that the state garnishment statutes violated the fundamental principles of due process of law. The majority of these cases have dealt with garnishment statutes that provided for prejudgment garnishment without notice or hearing only in extraordinary situations. In *Ownbey v. Morgan*<sup>15</sup> the state statute under attack required a nonresident defendant, sued by foreign attachment, to give security for the value of the attached property located within the state.<sup>16</sup> That procedure was held not to be a denial of due process even if the defendant was unable to give the required security. The United States Supreme Court in *Coffin Bros. & Co. v. Bennett*<sup>17</sup> upheld as constitutional a state statute that gave the state superintendent of banks authority to issue execution on the property of stockholders of a failing bank in order to assure that the statutory liability of the stockholders to depositors could be satisfied if later found to exist. This procedure allowed state officials to place a lien on the property of stockholders before any hearing was held, the public sale of which would depend on the outcome of the judicial determination of stockholder liability.<sup>18</sup> In still another case, *McKay v. McInnes*,<sup>19</sup> the United States Supreme Court upheld a state attachment statute that allowed the plaintiff of the main

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<sup>11</sup> Lowe, *Collection of Debts by Extraordinary Proceedings: Attachment, Garnishment and Receivership*, in *CREDITORS RIGHTS IN TEXAS* 208 (J. McKnight ed. 1963).

<sup>12</sup> *Schroder v. City of New York*, 371 U.S. 208 (1962).

<sup>13</sup> See Notes 15-57 *infra*.

<sup>14</sup> *Id.*

<sup>15</sup> *Ownbey v. Morgan*, 256 U.S. 94 (1921).

<sup>16</sup> DEL. CODE ANN. § 4123 (1969).

<sup>17</sup> *Coffin Bros. & Co. v. Bennet*, 277 U.S. 29 (1928).

<sup>18</sup> 12 Park's Ann. Civ. Code, § 2268, *Now amended*, 13 GA. CODE ANN. § 13-806 (1919).

<sup>19</sup> *McKay v. McInnes*, 279 U.S. 820 (1929).

suit to put a lien on the debtor's property, which after final judgment and execution, could be sold to satisfy the debt.<sup>20</sup> That case was affirmed *per curiam* by the United States Supreme Court on authority of *Ownbey* and *Coffin*.

*Sniadach v. Family Finance Corp. of Bay View* is the most recent Supreme Court case to rule on the constitutionality of a prejudgment garnishment statute that did not provide for either notice or hearing. In this case the United States Supreme Court overruled the Supreme Court of Wisconsin and held that the Wisconsin prejudgment wage garnishment statute was unconstitutional and denied the defendant the procedural due process required by the fourteenth amendment. The Supreme Court of Wisconsin had relied on *Ownbey*, *Coffin* and *McKay* to uphold the constitutionality of the statute. It was noted by the state supreme court that *McKay* had defined Maine's attachment statute as merely creating a temporary lien "which did not destroy defendant's title."<sup>21</sup> While this is correct, it was perhaps a mistake for the Supreme Court of Wisconsin to rely on *McKay* in the *Sniadach* case. In *McKay* the United States Supreme Court decided the constitutionality of a state attachment law which put a lien on the defendant's property but did not deny him the use of that property or even restrict his disposition of the property. This kind of "deprivation" is very different from the kind of taking found in wage garnishment proceedings. *Ownbey* and *Coffin* were concerned with statutes which deprived the owner of the *use* of his property as well as the power to dispose of it. In prejudgment garnishment cases the defendant retains title, but loses his "property" as property is defined by *McKay*:

Property in legal conception is the total of the rights and powers incident to a thing rather than the thing itself . . . Deprivation does not require physical taking of property or the thing itself. It takes place when the free use and enjoyment of the thing or the power to dispose of it at will is affected.<sup>22</sup>

In *Sniadach* the Wisconsin Supreme Court not only relied on *Ownbey* and *Coffin* to support its position that there was not a taking of property, but also relied on those cases to find that the Wisconsin prejudgment garnishment statute did not deprive the debtor of due process simply because no notice or hearing was required before garnishment. The United States Supreme Court stated in its opinion in the *Sniadach* case that: "Such summary procedures may well meet the requirements of due process in *extraordinary situations* (citing *Ownbey*, *Coffin* and *Fabee v. Mallonee*<sup>23</sup>)."<sup>24</sup> [Emphasis added.]. Thus, the Supreme Court seemed to reaffirm *Ownbey* and *Coffin*, and hold that a statute which provides for the prejudgment garnishment of property in extraordinary circumstances does not violate the due process clause even though notice and hearing is not given until after the property is impounded. In *Ownbey* the United States Supreme

<sup>20</sup> ME. REV. STAT. ANN. tit. 86, § 2 (1961).

<sup>21</sup> *McInnis v. McKay*, 127 Me. 110, 141 A. 699, 702.

<sup>22</sup> *Id.*

<sup>23</sup> *Fabee v. Mallonee*, 332 U.S. 245 (1947).

<sup>24</sup> *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 339 (1969).

Court held that a statute designed "to protect its own citizens in their claims against non-resident owners of property within the state" warranted exception to the strict rules of due process.<sup>25</sup> Likewise in *Coffin* the Supreme Court found the statute sufficiently limited to the protection of its citizens who were depositors in state banks. In *Fahey v. Mallonee*<sup>26</sup> the United States Supreme Court upheld a state statute that provided for the summary taking by receivership of loan institutions by a state agency, when it was in the public interest to do so.<sup>27</sup> It has also been held in another Supreme Court case<sup>28</sup> that the Federal Security Administration could summarily seize property on the market which the Administrator felt was in violation of the Federal Food, Drug and Cosmetic Act.<sup>29</sup> The United States Supreme Court in each of these cases, upheld state statutes which authorized the taking of property of the defendant without a hearing but which narrowly defined the circumstances of the taking to those situations involving the public interest. The Supreme Court in the *Sniadach* case said of the Wisconsin garnishment statute:

. . . in the present case no situation special protection or creditor's interest is presented by the facts; nor is the Wisconsin statute narrowly drawn to meet any such unusual condition.<sup>30</sup>

### III. LARSON V. FETHEURSON

*Sniadach* was decided on the facts of a wage garnishment situation. Most of the Supreme Court's opinion was directed at the hardship placed on the defendant whose wages were garnished. The Wisconsin Supreme Court in its *Larson*<sup>31</sup> decision effectively expanded *Sniadach* to include the garnishment of any property. Apparently, the Wisconsin Supreme Court thought that its holding in *Larson* was a natural consequence of the *Sniadach* decision:

Clearly, a due process violation should not depend upon the type of property being subjected to the procedure. Under the respondents' contention wages in the hands of the employer would be exempt from prejudgment garnishment, but wages deposited in a bank or other financial institution would be subject to prejudgment garnishment.<sup>32</sup>

There is reason to believe, however, that the *Sniadach* decision was restricted to prejudgment wage garnishment and that the Wisconsin Supreme Court mistakenly interpreted *Sniadach* by expanding that decision to include all prejudgment garnishment cases. It is difficult to imagine that the United States Supreme Court meant to emasculate the effective use of prejudgment garnishment statutes in all but "extraordinary situations," especially since so many states have statutes that provide protection for the

<sup>25</sup> *Ownbey v. Morgan*, 256 U.S. 109 (1921).

<sup>26</sup> *Fahey v. Mallonee*, 332 U.S. 245 (1947).

<sup>27</sup> Federal Home Loan Act of 1933, § 5(d), as amended, 12 U.S.C.A. § 1464(d) (1964).

<sup>28</sup> *Ewing v. Mystinger & Casselbery, Inc.*, 339 U.S. 594 (1950).

<sup>29</sup> Federal Food, Drug, and Cosmetic Act, § 304(a), 52 Stat. 1044, 21 U.S.C.A. § 334(a), as amended, 62 Stat. 582, 21 U.S.C.A. 334(a) (1964).

<sup>30</sup> *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 339 (1969).

<sup>31</sup> *Larson v. Fetherston*, 44 Wis. 2d 712, 172 N.W.2d 20 (1969).

<sup>32</sup> *Id.* at 713, 172 N.W. 23 (1969).

debtor such as: (1) the creditor is usually required to post a bond and will forfeit that bond in the event he fails to prove a meritorious case;<sup>33</sup> (2) the creditor is often made liable for damages resulting from wrongful garnishment and the garnishee is also liable for his negligence; (3) the debtor usually has the right to post a replevy bond;<sup>34</sup> and (4) much of the debtors' property is exempt from garnishment in most states.<sup>35</sup> Also, the following statement from *Sniadach*, together with the Court's discussion of the harshness of wage garnishment, present a strong argument that the case is to be narrowly construed:

We deal here with wages—a specialized type of property presenting distinct problems in our economic system. We turn to the nature of that property and problems of procedural due process.<sup>36</sup>

If, however, *Larson* is the correct interpretation of *Sniadach*, the state legislatures will be faced with a dilemma. If states have garnishment statutes that do not provide for a hearing before the taking (as temporary and conditional as it may be), they will be held violative of the due process clause. If they provide for a prejudgment garnishment hearing, the procedure will probably prove ineffective because the delay will allow the defendant time to dispose of his garnishable assets. However, it is very possible that the United States Supreme Court would approve a statute that *requires* notice to both the garnishor and debtor immediately upon garnishment and a hearing within a reasonable time thereafter. Two factors support this position: first, both the *Sniadach* and *Larson* decisions held unconstitutional a prejudgment garnishment statute which provided for garnishment without *any* provision for judicial determination except on the main suit; second, neither case stated when notice to the debtor must be given or how soon thereafter a hearing must be held. While it is likely the United States Supreme Court meant that a hearing must be held before garnishment, it might be possible to *require* that a hearing be held within a time adequate to prepare a defense and short enough that neither the debtor nor creditor would be damaged. Together with the safeguards already provided the debtor and in light of the strong public policy arguments in favor of some type of prejudgment garnishment, such a statute would seem to afford sufficient "due process."

#### IV. CONCLUSION

It is unfortunate that *Sniadach* left so many questions unanswered regarding the constitutionality of prejudgment garnishment. *Larson* is a consequence of that vague decision. It is still not clear whether the United States Supreme Court, by its holding in *Sniadach*, meant to apply its due

<sup>33</sup> Such a bond is required in Texas, TEX. R. CIV. P. 658(a).

<sup>34</sup> See note 10 *infra*.

<sup>35</sup> For instance, in Wisconsin property in a safe deposit box is exempt from garnishment. WIS. STAT. § 267.025 (Supp. 1969). In Texas such property as current wages (TEX. REV. CIV. STAT. ANN. art. 4099 (1969)), proceeds from sale of a homestead or insurance paid thereon for six months after such payment is made, and benefits under the Workmans Compensation Act, is exempt from garnishment.

<sup>36</sup> *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 340 (1969).

process requirement of notice and prior hearing to the prejudgment garnishment of all property. Mr. Justice Black re-emphasized the Court's pre-occupation with the harshness of wage garnishment when he stated in his dissenting opinion:

The arguments the Court makes to reach what I consider to be an unconstitutional conclusion, however, shows why it strikes down this state law. It is because it considers a garnishment law of this kind [prejudgment wage garnishment] to be bad state policy. . . .<sup>37</sup>

If the Supreme Court actually required that all prejudgment garnishment statutes must provide for notice and prior hearing before garnishment, it becomes important to know what constitutes "extraordinary situations" that will be exempt from such due process requirements. It would appear from the cases discussed above, that those situations where the public interest and welfare is protected by such a statute, notice and prior hearing would be waived as a due process requirement.<sup>38</sup> Apparently, this will have to be decided on a case by case basis.

No matter how far *Sniadach* is to be construed, the question of when notice and hearing should be provided must be answered. Mr. Justice Harlin, in his concurring opinion, stated his own opinion as to this issue:

Apart from special situations, some of which are referred to in this Court's opinion, . . . I think that due process is afforded only by the kinds of "notice" and "hearing" which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property or its unrestricted use.<sup>39</sup>

The preceding quote from Mr. Justice Harlin's concurring opinion points out still another unsettled issue: what must be proved at the prejudgment garnishment hearing? Mr. Justice Harlin's position would appear to be the most reasonable; that is, the garnishor must prove that he has a meritorious claim against the debtor's property. It is possible, however, that due process will require that the garnishor prove his claim before he can "take" the property of the debtor in garnishment. Such a requirement would effectively do away with *prejudgment* garnishment.

It is also possible that other statutes which provide for a "taking" of property before hearing or notice, such as state attachment laws and temporary restraining orders, will be attacked as unconstitutional.<sup>40</sup> One thing is certain, however, the *Sniadach* and *Larson* cases indicate a fertile area of litigation.

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<sup>37</sup> *Id.* at 344. Wage garnishment has been attacked from many sources: Brunn, *Wage Garnishment in California; A Study and Recommendations*, 53 CALIF. L. REV. 1214 (1965); Patterson, *Forward: Wage Garnishment—An Extraordinary Remedy Run Amuck*, 43 WASH. L. REV. 735 (1968); Latter, *Argument For The Abolition of Wage Attachment*, 52 ILL. B.J. 1026 (1964); Comment, *Garnishment of Wages in Pennsylvania; It's History and Rational*, 70 DICK L. REV. 199 (1966); Comment, *Wage Garnishment in Washington—An Empirical Study*, 43 WASH. L. REV. 743 (1968); Comment, *Wage Garnishment as a Collection Device*, 1967 WIS. L. REV. 759.

<sup>38</sup> See notes 17-29 and accompanying text.

<sup>39</sup> *Sniadach v. Family Finance Corp.*, 395 U.S. 343 (1969).

<sup>40</sup> Fleming, *Garnishment and The Supreme Court*, 74 COMMERCIAL L.J. 264 (1969).