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Constitutional Law -- Prejudgment Attachment and Garnishment -- The Progeny of the Sniadach-Kelly Marriage

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In light of the decisions in *Shapiro* and *Keenan* and the questions raised therein, the states should re-examine all of their residence requirements, especially those for professional licenses, to insure that they protect not only legitimate state interests but also the rights of new residents.

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Constitutional Law—Prejudgment Attachment and Garnishment—The Progeny of the Sniadach-Kelly Marriage

In the summer of 1969, the Supreme Court held in *Sniadach v. Family Finance Corp.*[1] that a prejudgment garnishment of wages under the facts involved in the case constituted a taking of property without due process of law unless the wage earner was afforded a hearing prior to the garnishment. The Wisconsin garnishment procedure involved in *Sniadach* entitled one with a claim against a wage earner to a court order freezing one half of the worker's wages until the merits of the claim could be litigated.[2] Mr. Justice Douglas, speaking for the Court, stated that "[s]uch summary procedure may well meet the requirements of due process in extraordinary situations. . . . But in the present case no situation requiring special protection to a state or creditor interest is presented by the facts . . . ."[3] The opinion noted that "[w]e deal here with wages —a specialized type of property presenting distinct problems in our economic system,"[4] stressed the serious harm that wage garnishment could cause, and concluded that the Wisconsin garnishment procedure and others like it "may as a practical matter drive a wage-earning family to the wall."[5]

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

[2] The statutes involved in *Sniadach* were Ch. 507, [1965] Wis. Sess. L. — which were codified as WIS. STAT. ANN. §§ 267.01-.24 (Supp. 1969). These statutes have been amended and are presently codified as WIS. STAT. ANN. §§ 267.01-.24 (Supp. 1970).

[3] *Id.* at 339. As examples of "extraordinary circumstances" which would justify summary procedures, Justice Douglas cited Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (federal statute authorizing seizure of misbranded articles without a prior hearing); Fahey v. Mallonee, 332 U.S. 245 (1947) (appointment of a conservator to take possession of a federal savings and loan association prior to a hearing); Coffin Bros. v. Bennett, 277 U.S. 29 (1928) (state statute authorizing prejudgment liens on the property of stockholders of insolvent banks); Owenby v. Morgan, 256 U.S. 94 (1921) (state statute conditioning the opportunity to appear and defend in foreign attachment proceedings upon the posting of a bond).

[4] *Id.* at 340.

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

The vagueness of the *Sniadach* opinion and the summary fashion in which Justice Douglas disposed of the problem have resulted in confusion and disagreement among courts and legal commentators. Some have argued that because of the opinion's pointed emphasis on the damaging effects of wage garnishment and its repeated references to the possibilities of abuse of summary garnishment procedures, the decision was in reality based on substantive due process grounds.[6] Others have contended that since only the wages of the poor are subjected to garnishment, the opinion must have been based in part upon the equal protection clause.[7] There is also disagreement as to the scope of *Sniadach*, some asserting that Justice Douglas limited application of the decision exclusively to wage garnishment[8] and others arguing that the characterization of wages as a "specialized type of property" was not intended to limit the scope of the decision.[9]

Much of the confusion and disagreement attributable to the *Sniadach* opinion can be resolved by superimposing on Justice Douglas' rather cryptic language traditional constitutional principles developed to deal with procedural due process problems. The Court restated and summarized these principals in *Goldberg v. Kelly*,[10] decided after *Sniadach*. Considering the question of whether due process required a hearing prior to the termination of welfare benefits, Mr. Justice Brennan said:

> The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss" . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication.[11]

Thus, resolution of due process problems ordinarily requires a weighing of the harm caused to the individual by the challenged procedure against the "interest of society served by quick and decisive action."[12]

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[6] *E.g.*, *id.* at 345 (Black, J., dissenting).

[7] *E.g.*, Note, *Some Implications of Sniadach*, 70 COLUM. L. REV. 942, 954 (1970).

[8] *E.g.*, Termplan Inc. v. Superior Court, 105 Ariz. 270, —, 463 P.2d 68, 70 (1969).

[9] *E.g.*, Larson v. Fetherston, 44 Wis. 2d 712, 718, 172 N.W.2d 20, 23 (1969).

[10] 397 U.S. 254 (1970).

[11] *Id.* at 262-63, *quoting* Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). For examples of other cases employing similar language see Cafeteria Workers, Local 473 v. McElroy, 367 U.S. 886, 895 (1961); Frank v. Maryland, 359 U.S. 360, 363 (1959); Wasson v. Trowbridge, 382 F.2d 807, 811 (2d Cir. 1967).

[12] Hall v. Garson, 430 F.2d 430, 440 (5th Cir. 1970).

In *Sniadach*, Justice Douglas followed this traditional approach although he failed to articulate adequately the balancing test and to consider fully each of the test's components. The opinion vividly demonstrated that summary garnishment procedures might cause the wage earner to be deprived of the essentials of life on the basis of an invalid claim, resulting perhaps in capitulation to the claim in order to survive. And this harm directly results from the peculiar attributes of wages—the fact that wages are generally used for present consumption. The opinion, however, failed to weigh against this harm to the wage earner any interests which the state might have in summary wage garnishment.[13] This failure is perhaps due to Justice Douglas' tacit assumption that the harm was so great that it could be outweighed only in the extraordinary situations which he mentioned.[14] At any rate, *Sniadach* represents neither a break with long-established constitutional principles nor a rejection of the procedural due process balancing test. Instead, it adopts and applies that test, although it does so inartfully.

Klim v. Jones,[15] a recent example of the application of *Sniadach* in a non-wage context, demonstrates more fully the operation of the balancing test. The statutory procedure involved in the case granted to innkeepers liens upon the personal property of tenants who failed to pay their rent and authorized self-help tactics in seizing the property subject to the lien.[16] Pursuant to this law Jones seized Klim's belongings, including clothes, tools, and identification papers. Klim filed a complaint seeking a declaration that the law was unconstitutional, an injunction against enforcement of the law, a return of the seized property, and certain damages. In

[13] One writer has suggested that the public interests in summary garnishment statutes are (1) ensuring that valid claims will be collectible and (2) promoting the extension of credit. He contends, however, that this second interest must be discounted by the risk of encouraging, through facile collection devices, unwise credit extension. Note, *Attachment and Garnishment—Constitutional Law—Due Process of Law—Garnishment of Wages Prior to Judgment Is a Denial of Due Process: The Sniadach Case and Its Implications for Related Areas of the Law*, 68 MICH. L. REV. 986, 996-97 (1970). Unless otherwise stated, this note will proceed on the theory that such are the public interests in all attachment and garnishment statutes.

[14] *Id.* at 997-98. *See* note 3 *supra*.

[15] 315 F. Supp. 109 (N.D. Cal. 1970).

[16] CAL. CIV. CODE § 1861 (West Supp. 1971). Arguably this statute and many prehearing attachment statutes authorize constitutionally impermissible searches and seizures. *Compare* Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970), *with* Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970). In *Fuentes* motion for leave to proceed in forma pauperis has been granted and probable jurisdiction noted. 91 S. Ct. 893 (1971). The search and seizure issue, however, is beyond the scope of this note and will receive no further consideration.

granting plaintiff's motion for summary judgment on the constitutional issue, the court concluded that the lien statute imposed even greater economic hardships than prejudgment wage garnishment. And the court found no public interest in the summary procedure sufficient to outweigh those hardships. The interest offered to justify the law—the use of the lien to obtain in personam jurisdiction over transient tenants—was discounted by the court because the threat of the lien provided no "iron-clad safeguard for the California proprietor"[17] against absconding tenants and because "the danger of a non-paying transient leaving the state just to avoid a lodging bill does not seem to be at all common"[18] since many of the establishments employing the lien device catered to lodgers who stayed for significant periods of time. Furthermore, the court noted that it was not abolishing the innkeeper's lien altogether but was only requiring certain procedural safeguards in its use, and that the innkeeper had an alternative protective device available—advance payment.

The due process balancing test worked exceptionally well in *Klim* and resulted in a holding which seems unquestionably correct. Two other recent cases, however, provide examples of situations where the balancing test operates much less smoothly. In *Fuentes v. Faircloth*[19] and *Laprease v. Raymours Furniture Co.*,[20] the statutes under consideration entitled a plaintiff in a replevin action to a writ of replevin and seizure of the subject matter of the suit without any prior notice to the defendant and without a hearing before the seizure.[21] In *Fuentes* a stove and a stereo set had been seized and in *Laprease* the seized property included a stove, a refrigerator, a bed, a rug, and a record player. In both cases the merchandise had been purchased under conditional sales contracts.

The three-judge court in *Fuentes* held that the replevin procedure comported with the requirements of due process. The court seemed to base its holding on two alternative grounds: first, that the balancing test of *Sniadach* and *Kelly* did not apply since the wage garnishment and welfare situations "[are] not at all comparable to a private contract providing for enforcement of a security interest";[22] and second, that even if the balancing test did apply "[t]he hardships facing the welfare recipient,

[17] 315 F. Supp. at 124.
[18] *Id.*
[19] 317 F. Supp. 954 (S.D. Fla. 1970).
[20] 315 F. Supp. 716 (N.D.N.Y. 1970).
[21] The statutes involved in *Fuentes* were FLA. STAT. ANN. §§ 78.01, .04, .07, .08 (Supp. 1971). The statute involved in *Laprease* was N.Y. CIV. PRAC. LAW §§ 7101-02 (McKinney 1963).
[22] 317 F. Supp. at 958.

like those facing one whose wages are garnished, are not present in the instant situation where goods purchased are replevied."[23]

The three-judge court in *Laprease* reached exactly the opposite result. The opinion stated that the factual difference between *Sniadach* and the case under consideration—that one dealt with an unsecured interest while the other involved a secured interest—"dissolves before the purchasers' claims that there were no defaults and no right to repossession."[24] Applying the balancing test, the court concluded that "[l]ack of refrigeration, cooking facilities and beds create hardships . . . equally as severe as the temporary withholding of [one-half] of Sniadach's pay,"[25] and that no counterbalancing public interest in the summary procedure existed.[26]

Neither *Fuentes* nor *Laprease* appears to be precisely correct. The suggestion in *Fuentes* that the presence of a security interest will remove a case from the operation of the *Sniadach-Kelly* balancing approach is without justification. As the dissenting judge in the case noted, "when one signs a contract which includes the words 'in the event of default of any payment or payments, seller at its option may take back the merchandise,' he does not waive his Fourteenth Amendment right to 'due process of law.' "[27] The *Fuentes* court likewise erred when it concluded that seizure of the stove presented no hardships comparable to those suffered by the plaintiffs in *Sniadach* and *Kelly*. The loss of an appliance as necessary as a stove for the preparation of food can produce harm quite as serious as the loss of one-half of one's wages or the loss of welfare benefits. At any rate, since the loss of the stove obviously produced *some* harm, the question with which the court should have concerned itself was whether that harm was outweighed by the public interest in the summary procedure.

The *Laprease* court avoided the errors discussed above but became so immersed in the question of whether the replevin of essential items like stoves, beds, etc., violated due process that it overlooked the fact that the propriety of the summary seizure of such non-essential items as a rug and a phonograph was at issue as well. Loss of a phonograph or a rug causes harm much less severe than that caused by the loss of a stove or refrigerator, and, had the court applied the due process balancing test to the seizure of the non-essential items, it might have concluded that the

[23] *Id.*
[24] 315 F. Supp. at 723.
[25] *Id.* at 723-24.
[26] *Id.* at 723.
[27] 317 F. Supp. at 959 (Eaton, J., dissenting).

summary procedure as applied to those items was constitutionally permissible.

The *Fueutes* and *Laprease* opinions, with all their imperfections, and the *Klim* decision demonstrate many of the problems with the *Sniadach-Kelly* balancing approach.[28] One of the most serious of these problems is that where the public interest in a summary procedure and the harm precipitated by the procedure appear to be nearly evenly balanced, as where non-essential items are replevied without a prior hearing, any conclusion as to which interest preponderates is no more than a highly subjective value judgment. Not only is this intellectually unsatisfying; it also militates against any certainty in the law on procedural due process questions.

Most of the other problems with the due process balancing test stem from the fact that the test must be applied on a case-to-case basis. The type of property involved as well as the individual circumstances of the person whose property is summarily interfered with must be considered before any balancing can take place. This means that any procedure authorizing interference with one's property without the normal due process safeguards will be open to attack in every case where the procedure is employed, and that no amount of case law can limit these attacks since the property owner in every instance can argue that his is a special case. It also means that state legislators will find it most difficult, if not impossible, to draft statutes authorizing summary attachment or garnishment procedures which will pass muster under the balancing approach.[29]

Notwithstanding these difficulties, there is no reason to believe that the Supreme Court will discard or modify the due process balancing test. It is too well grounded in precedent and too well suited to the recognition of the competing interests involved in due process questions to be tossed aside. Prognostication in this area is wholly speculative but it is not altogether unreasonable in this day of consumer protection to wonder if

[28] One initial problem with the balancing approach is that it does not answer the question of what type of hearing, if any, must be granted prior to the seizure. Considerable controversy over this question existed after *Sniadach.* See, *e.g.*, Note, *Poverty Law—Garnishment—Protection of Debtors' Rights,* 48 N.C.L. REV. 164, 170-71 (1969). Goldberg v. Kelly, 397 U.S. 254 (1970), seems to have resolved this controversy by requiring that the hearing determine only the probable validity of the claim. *Id.* at 266-67.

[29] This problem will become especially acute if—as suggested in *Sniadach,* 395 U.S. at 339, and in *Laprease,* 315 F. Supp. at 723—any statute not narrowly drawn to meet situations where the public interest outweighs the individual harm will be held impermissible.

legislatures, perhaps with a shove from the courts, might not abolish prehearing attachment and garnishment procedures altogether or at least limit their use to the "extraordinary situations" referred to in *Sniadach*.[30]

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Constitutional Law—Racial Imbalance in Public Schools: The Affirmative Duty to Integrate Administrators

On May 28, 1968, the Board of Education of Newark, New Jersey voted to invalidate a promotional list which was formerly the sole criterion in the appointment of grade-school administrators.[1] The action by the Board of Education admittedly was motivated by a desire to promote racial balance in the school system.[2] The Negro student population in Newark was 72.5%, yet there were only two Negroes on the promotional list.[3] Moreover, of 249 administrators in the city school system, only twenty-seven were Negro.[4] In lieu of appointments from the list, the Board of Education appointed seven new grade-school administrators—six Negro and one white.[5] As a result, ten white teachers[6] brought a suit seeking money damages and injunctive relief under the fourteenth amendment and the Civil Rights Act of 1964.[7] The principal issue raised

[30] See note 3 *supra*.

[1] The contract entered into between the plaintiffs and the defendant on February 1, 1967 reads in part:

> The positions of principal, vice principal, head teacher, department chairman and counsellor shall be filled in order of numerical ranking from the appropriate list, which ranking shall be determined by written and oral examination. Appointments to the position of teacher to assist the principal (formerly called Administrative Assistant) shall be made annually on a temporary basis if the Superintendent determines that such a position is necessary or desirable, and all appointments to such positions shall be made in order of numerical ranking from the appropriate vice principal's list if such list exists.

Porcelli v. Titus, 431 F.2d 1254, 1256 n.2 (3d Cir. 1970), *cert. denied*, 39 U.S.L.W. 3486 (U.S. May 4, 1971) (No. 850).

[2] Record at 89, 95, 98, Porcelli v. Titus, 302 F. Supp. 726 (D.N.J. 1969).

[3] Porcelli v. Titus, 431 F.2d 1254, 1255-56 (3d Cir. 1970).

[4] *Id.*

[5] *Id.* at 1256 n.3. Since the purpose in deviating from the list was to promote racial balance, it is curious that the Board of Education chose to make a white appointment. No particular reason can be discovered.

[6] Four of the plaintiffs—Hickey, Dunne, LaRusso, and Chagnon—had taken only the first of two stages of the examination to qualify for the list when the list was suspended. 302 F. Supp. at 728 n.1.

[7] 42 U.S.C. § 1983 (1964). The provision reads: