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Constitutional Law: Replevin Statute Authorizing Seizure of Property without Notice and Hearing Held Denial of Due Process and Seizure of Property under Such a Statute without Warrant Violates the Fourth Amendment

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Case Comment

Constitutional Law: Replevin Statute Authorizing Seizure of Property Without Notice and Hearing Held Denial of Due Process and Seizure of Property Under Such a Statute Without Warrant Violates the Fourth Amendment

In two actions consolidated for hearing before a three-judge federal court,[1] plaintiffs sought to enjoin law enforcement officials of New York from seizing plaintiffs' property pursuant to a state replevin statute. The facts of each action were similar: The plaintiffs had purchased various items of household furniture but were unable to continue to make the agreed payments on the purchase price and interest and were unable to post a bond to reclaim the chattels in the event that they were seized for the defendants. Plaintiff Laprease's case was typical. After she had purchased furniture, including a bed, box-spring and mattress and a dinette set, she defaulted on her payments. A welfare recipient, responsible for the care of her sick husband and ten children, she alleged that she was unable to replace the goods to be seized and that the pretrial seizure of these items would constitute an irreparable injury not permissible under constitutional standards.[2]

Reasoning from *Sniadach v. Family Finance Corp.*,[3] Judge Port held the statute unconstitutional as a denial of due process under the 14th amendment insofar as it permitted pre-hearing seizure of the subject matter of the action without notice or hearing. The court held moreover, that since the statute permitted a law enforcement official to enter upon private property without a warrant issued by a magistrate for the purpose of seizing goods in the possession of the defendants in these actions, the statute in that regard violated the 4th amendment's guarantees of freedom from unreasonable searches and seizures. *Laprease v. Ray-*

1. The three federal judges of the Northern District of New York, Feinberg, Foley and Port, convened pursuant to 28 U.S.C. § 2281 *et seq* (1964).

2. Laprease also alleged that she had a meritorious defense to the action and said that she had no intention of moving the chattels during the pendency of the action. Laprease v. Raymours Furniture Co., Inc., 315 F. Supp. 716, 719 (N.D.N.Y. 1970).

3. 395 U.S. 337 (1969). In that case the United States Supreme Court found a Wisconsin wage garnishment statute unconstitutional because it sanctioned the taking of property without due process of law; *i.e.*, wage garnishment prior to judgment and without notice or prior hearing is unconstitutional. *See* Comment, 54 MINN. L. REV. 853 (1970).

mours Furniture Co., Inc., 315 F. Supp. 716 (N.D.N.Y. 1970).[4]

"Replevin is one of the most ancient and well-defined writs known to the common law."[5] Originally replevin lay only where chattels were unlawfully taken and detained,[6] but the remedy was gradually expanded so that it lay in any case where a defendant wrongfully detained chattels belonging to the plaintiff, without regard to the question of the wrongfulness of the taking.[7] In some jurisdictions the common law action of replevin has been replaced with the statutory remedy of claim and delivery,[8] or some other statutory surrogate.[9]

In pertinent part, the New York statute invalidated in *La-*

4. Plaintiff's contention that the statutory requirement that one could reclaim his goods only by posting a bond violated the equal protection clause because it discriminated against poor people was not ruled upon by the court. The court noted that such a contention took them into a ". . . murky and uncertain area." *Id.* at 724-25. Moreover, the court noted that this area may be the subject of renewed examination by the United States Supreme Court in the near future. *Id.* at 725. *See* Sanks v. Georgia, 399 U.S. 922 (1970), which was restored to the calendar for reargument. In prior cases the equal protection argument has been rejected by the courts. *See, e.g.*, Douglas v. California, 372 U.S. 353, 361 (1963) (dissent of Harlan, J.); Williams v. Shaffer, 385 U.S. 1037 (1967) (dissent of Douglas, J.); Bynum v. Connecticut Comm'n on Forfeited Rights, 296 F. Supp. 495 (D. Conn. 1968) (whether fee necessary before a restoration of voting rights petition would be accepted violated equal protection of one who could not afford the fee); Boddie v. Connecticut, 286 F. Supp. 968 (D. Conn. 1968) (whether the inability to pay filing fees for institution of divorce proceedings gives one equal protection argument); West Haven Housing Authority v. Simmons, 5 Conn. Cir. 282, 250 A.2d 527 (1969). *See also* Note, *Poverty and Equal Access to the Courts: The Constitutionality of Summary Dispossess in Georgia*, 20 STAN. L. REV. 766 (1968).

5. Three States Lumber Co. v. Blanks, 133 F. 479, 481 (6th Cir. 1904). *See also* J. AMES, LECTURES ON LEGAL HISTORY 64-70 (1913). The general use of the remedy arose in the latter part of the 13th century as the remedy *vetitum namium* was falling into desuetude. BOUVIER'S LAW DICTIONARY 1051 (Baldwin's Cent. Ed. 1948).

6. Coit v. Waples, 1 Minn. 110 (1850). In such a case, only the taking (*cepit*) was in issue. This replevin in the *cepit* resembled the old trespass *vi et armis*, and concentrated only on the taking. On the other hand, replevin in the *detinet* was a substitute for the old action of detinue, where the injury was only in the keeping, the taking not having been wrongful. In the latter case only the detention (or title) was in issue. Rong v. Dawson, 9 Wis. 246 (1859); A & A Credit Co. v. Berquist, 230 Minn. 303, 41 N.W.2d 582 (1950).

7. Coit v. Waples, 1 Minn. 110 (1850).

8. *See, e.g.*, MINN. STAT. ANN. § 565.01 *et seq* (1947).

9. 77 C.J.S. *Replevin* §§ 1-3 (1952). The New York replevin statute held unconstitutional in *Laprease* was claimed to be a descendant of the Statute of Marlbridge, 52 Henry III, ch. 21 (1267). *See* N.Y. CIV. PRAC. LAW § 7102.01 (McKinney 1963). *See also* ILL. ANN. STAT. ch. 119, § 1 *et seq* (Smith-Hurd 1954); IOWA CODE ANN. § 643.1-.22 (1950); WIS. STAT. ANN. § 265.01-.13 (1957).

prease provided as follows:[10]

> The sheriff shall seize a chattel without delay when the plaintiff delivers to him an affidavit[11] requisition[12] and undertaking[13] and, if an action to recover the chattel has not been commenced, a summons and complaint.[14]
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> . . . .
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> If a chattel is secured or concealed in a building or enclosure and it is not delivered pursuant to his demand, the sheriff shall cause the building or enclosure to be broken open and shall take the chattel into his possession.[15]

The sheriff retains custody of the chattel for three days, and provided that the defendant has not taken the steps necessary to reclaim the chattel, it is delivered to the plaintiff at that time.[16]

Prior to 1969 few persons would have supposed that a provisional remedy like replevin or garnishment would be found constitutionally inadequate. The major congressional and legislative reaction to inequities in the consumer credit industry had been to require that lenders make full and fair disclosures to consumers instead of attempting to protect the consumer at some later stage in the collection process.[17] In *Sniadach*, how-

10. MINN. STAT. ANN. § 565.01 *et seq.* (1947) follows very closely the wording of the New York statute (*footnotes added*).

11. The affidavit identifies the chattel to be seized and states its value, alleges that the plaintiff is entitled to possession which the defendant wrongfully withholds, and indicates that the action has commenced. *See* N.Y. CIV. PRAC. LAW § 7102(c) (McKinney 1963).

12. The requisition is deemed to be the mandate of the court directing the sheriff to seize the chattel described. *See* N.Y. CIV. PRAC. LAW § 7102(d) (McKinney 1963). Under New York law it does not matter whether the person in possession is the defendant in the action.

13. The undertaking is simply a bond in an amount not less than twice the value of the chattel which guarantees the return of the chattel by the person then in possession if an adverse judgment is rendered against him. *See* N.Y. CIV. PRAC. LAW § 7102(e) (McKinney 1963).

14. N.Y. CIV. PRAC. LAW § 7102 (McKinney 1963). The sheriff is not required by statute to serve the summons and complaint upon the defendant.

15. N.Y. CIV. PRAC. LAW § 7110 (McKinney 1963). An Iowa statute provides the sheriff with similar authority in a replevin action. IOWA CODE ANN. § 643.10 (1950).

16. N.Y. CIV. PRAC. LAW §§ 7103(a) & 7102(f) (McKinney 1963). Defendant can also prevent the plaintiff from obtaining possession if he excepts to the plaintiff's securities or if he secures an impounding order from the court.

17. Note, *Provisional Remedies in New York Reappraised Under Sniadach v. Family Finance Corp.: A Constitutional Fly in the Creditors' Ointment*, 34 ALBANY L. REV. 426 (1970). More recent statutes, however, have begun to take cognizance of later consumer-credit relations. *See, e.g.*, UNIFORM COMMERCIAL CREDIT CODE § 5-104, prohibiting prejudgment garnishment.

ever, the Supreme Court began to change the focus of the law from the inception of the debtor-creditor relationship (where legislative intent had been to equalize the bargaining positions of the parties by increasing the purchaser's knowledge) to the dissolution of that relationship when such termination involves the courts and the legal process generally.

Speaking for the Court in *Sniadach*, Justice Douglas pointed out the hardships that garnishment imposes on a wage earner and the injustices made possible under a prejudgment garnishment statute of the Wisconsin type. He went on to hold that where there was no notice or opportunity to be heard before the garnishment seizure, the taking was so "obvious" that no extended argument was necessary to show that the statute in question violated "fundamental principles of due process."[18] *Sniadach* therefore may be read as saying two quite different things. First, where property is of such a character that its deprivation will bring substantial hardship,[19] the court will apply a more rigorous constitutional standard to the procedures which result in deprivation.[20] *Sniadach* may also be read for the proposition that the Constitution requires, in all cases where property is taken, the right to notice and an opportunity to be heard.[21] These ideas could be characterized respectively as the *subjective* approach and the *objective* approach. The former is

18. 395 U.S. at 340-42. Prior to *Sniadach* two state courts had held that prejudgment or attachment was not violative of due process. Byrd v. Rector, 112 W. Va. 192, 163 S.E. 845 (1932); McInnes v. McKay, 127 Me. 110, 141 A. 699 (1928), *aff'd per curiam*, 279 U.S. 820 (1929). Due process means, of course, that one must be afforded notice and an opportunity to be heard before he may be deprived of life, liberty or property. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

19. Of course, the hardship imposed will depend in part on the property taken, so the relationship between the type of property and the extent of the harm is apparent. Each is clearly different from the procedural question. In this regard see McCallop v. Carberry, 1 Cal. 3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970) (wage garnishment statute held unconstitutional on basis of hardship).

20. *E.g.*, the statement of Douglas, J., in *Sniadach*, 395 U.S. 337, 340 (1969): "We deal here with wages—a specialized type of property presenting distinct problems in our economic system." It is not likely that Douglas meant to hold that only wages were special property, but some courts have taken that view. *See* note 33 *infra* and accompanying text.

21. "[T]he 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.'" 395 U.S. at 339-40. *See also* Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970); McConaghley v. City of New York, 60 Misc. 2d 825, 304 N.Y.S.2d 136 (1969) (general order of the Department of Hospitals which permitted it to

concerned primarily with the *type* of property involved and the effect of its deprivation as a major determinant of due process while the latter is concerned solely with the *procedures* followed.

In *Laprease*, the court emphasized that since the statute permitted a pre-hearing seizure "possibly" without notice to the defendant, it violated due process and could not withstand constitutional scrutiny.[22] The court was not content to stand on the *objective* constitutional argument alone, however, but continued to point out that:

> Beds, stoves, mattresses . . . and other necessaries 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.
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> . . . .
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> Lack of refrigeration, cooking facilities and beds create hardships, it would seem, equally as severe as the temporary withholding of ½ of Sniadach's pay, and measured by *Sniadach*, the hardships imposed cannot be considered *de minimis*.[23]

The court was also quick to point out that contrary to defendant's suggestion,[24] the statute is not immune from attack because of its age since the "blessing of age" may wear out.[25]

It is unclear from *Laprease* whether the court was concerned with the procedure involved, the *type* of property (or harm), or both. At a minimum it does reject the idea that only wages are a "specialized type of property." Whatever is the precise *ratio decidendi* of *Laprease* and other recent post-*Sniadach* decisions, it is clear that concepts of due process are rapidly expanding.

Other courts which have found it necessary to construe the decision in *Sniadach* have been unable to agree on the scope of its mandate. Some courts look merely at the procedure involved vis-a-vis notice and hearing, while others concentrate on the

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determine if a patient is pecunious, how much she must pay and the pay itself, all without notice and hearing, is void).

22. 315 F. Supp. at 722.

23. 315 F. Supp. at 722-23. Judge Port, like Douglas, J., in *Sniadach*, cites several sources for the proposition that garnishment and attachments in replevin are unjust. *Id.* at 723-24 nn. 11 & 12.

24. 315 F. Supp. at 720-21.

25. *Id.* at 723. Note the statement of Douglas, J., in *Sniadach*, 395 U.S. 337, 340 (1969): "The 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."

type of property involved. Thus, in *Arnold v. Knettle*,[26] an Arizona court concerned only with procedure, struck down two writs of garnishment. Only one of the writs garnished wages, the other garnished accounts receivable. Similarly, in deciding whether bank accounts could be garnished without notice and hearing, the Wisconsin Supreme Court, in *Larson v. Fetherston*,[27] stated:

> Although the majority opinion in *Sniadach* makes considerable reference to the hardship of the unconstitutional procedure upon the wage earner, we think that no valid distinction can be made between garnishment of wages and that of other property. Clearly, a due process violation should not depend upon the type of property being subjected to the procedure.[28]

The Wisconsin court noted the difficulty of distinguishing between wages in the hands of an employer and wages that have been deposited in a bank.[29]

The same result was reached by the Minnesota Supreme Court in *Jones Press, Inc. v. Motor Travel Services, Inc.*,[30] which held that garnishment of accounts receivable without prior notice and hearing was unconstitutional. The court noted: "No rational distinction can be drawn between a livelihood dependent on wages and one derived from the sale of services and goods. . . ."[31] In spite of the fact that the Minnesota court compared the property involved in *Jones Press* to that involved in *Sniadach* (indicating a subjective reading of *Sniadach*), several factors lead to the conclusion that the Minnesota court construes *Sniadach* broadly or objectively. First, both parties in *Jones Press* were corporations, and the garnishment was the result of business dealings and not personal or consumer dealings as in *Sniadach*.[32] Second, in construing *Sniadach*, the court also noted that

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26. 10 Ariz. App. 509, 460 P.2d 45 (1969). *But see* Termplan, Inc. v. The Superior Court of Maricopa County, 105 Ariz. 270, 463 P.2d 68 (1969), wherein the Supreme Court of Arizona refused to extend the *Sniadach* doctrine beyond wages.

27. 44 Wis. 2d 712, 172 N.W.2d 20 (1969).

28. *Id.* at 718, 172 N.W.2d at 23. A Hawaii court was faced with the question of whether the Hawaii garnishment statute was constitutional but avoided the question by narrowly construing the statute. Frank F. Fasl Supply Co. v. The Wigwam Investment Co., 308 F. Supp. 59 (D. Hawaii 1969). *See also* People *ex rel* Lynch v. Superior Court, 1 Cal. 3d 910, 464 P.2d 126, 83 Cal. Rptr. 670 (1970).

29. Larson v. Fetherston, 44 Wis. 2d 712, 718, 172 N.W.2d 20, 23 (1969).

30. 286 Minn. 205, 176 N.W.2d 87 (1970).

31. *Id.* at 210, 176 N.W.2d at 90-91.

32. The Minnesota court noted that while the plaintiff was a corporation it was operated by one man, and said further: "If the wage earner is entitled to prior notice and opportunity to be heard, no

the garnishment of accounts receivable is in no way analogous to the extraordinary situations cited in *Sniadach* as permissible situations in which due process requirements could be relaxed.[33] Finally, the issue as seen by the Minnesota court was whether *Sniadach*

> . . . applies *only* to the garnishment of *wages*, or whether it is more *broadly based* on the principle that *any* taking without prior notice and an opportunity to be heard is a denial of due process in violation of the Fourteenth Amendment.[34]

By asking whether *Sniadach* applies only to wages or to all property, the court's decision (which in fact goes beyond wages) necessarily implies a broad reading of *Sniadach*.

A recent federal court decision in California has carried the doctrine of *Sniadach* even further. In *Klim v. Jones*,[35] the court held that a state innkeeper's lien law which permitted the taking of a roomer's property without notice and hearing was unconstitutional.

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reason occurs to us why the corner grocer, the self-employed mechanic, or the neighborhood shopkeeper should have his income frozen . . . ." 176 N.W.2d at 90. Although the court failed to include corporations or partnerships specifically in this list, the fact that the plaintiff was a corporation and that some $165,000 of the plaintiff's money was tied up cannot be ignored. Although accounts receivable owed to a corporation are like wages owed to an individual, once the *Sniadach* doctrine is applied to a corporation without a showing of hardship to the owner, *Sniadach* should perhaps be applied to all business forms. If a line were to be drawn, *Jones Press* provided the opportunity. It involved a business, not consumer background, and there was no showing of individual hardship.

33. The special situations where due process can be relaxed according to cases cited by *Sniadach* include the attachment of a nonresident's property—Ownbey v. Morgan, 256 U.S. 94 (1921); execution of property of bank stockholders—Coffin Bros. & Co. v. Bennet, 277 U.S. 29 (1928); seizure of mislabeled goods by the government—Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950), and the appointment of a conservator to manage a savings and loan association—Fahey v. Mallonee, 332 U.S. 245 (1947).

34. Jones Press, Inc. v. Motor Travel Services, Inc., 286 Minn. 205, 207, 176 N.W.2d 87, 89 (1970) (emphasis added).

35. 315 F. Supp. 109 (N.D. Cal. 1970). The court, while stressing the right to be heard as the main ingredient of due process, noted that this lien law enabled an innkeeper to deprive one of all his property, and not simply his wages. Under the facts of the case, this included the tools of the man's trade, his driver's license and all other articles one might find in a single man's room. Moreover, the court noted that innkeepers have a simple remedy whereby they may protect themselves—advance collection. An interesting aspect of the case is that the court premised jurisdiction under the Civil Rights Act, 42 U.S.C. § 1983 (1964) holding innkeepers' actions to be under color of state law. It is clear from this decision that all distraint or distress statutes, with few relevant exemption provisions, are constitutionally suspect.

On the other hand, some courts have held that the type of property involved is crucial. In *Michael's Jewelers v. Handy*,[36] a Connecticut court refused to find a prejudgment, foreign attachment[37] of a debtor's bank account unconstitutional. It held, contrary to the Wisconsin court in *Fetherston*, that "[t]he garnishment of one's bank account . . . is not the attachment of wages."[38] Moreover, in *Brunswick Corp. v. J. & P., Inc.*,[39] the Tenth Circuit refused to find that the pre-hearing seizure of bowling equipment under a replevin statute violated due process. The court distinguished *Sniadach* as involving a "specialized type of property . . . ."[40] Judge Port had little difficulty distinguishing *Brunswick* because the debtor in that case had consented to the creditor's seizure of the goods without notice or demand, and had admitted in the replevin action that he was in default on the contract. In order to prevent creditors from simply putting a waiver into all their installment sales contracts, enabling them to take the goods without notice or hearing on default, Judge Port included this caveat in distinguishing *Brunswick*: "[W]e question that the fine print in the usual consumers conditional sales contract gives rise to a competent or intelligent waiver of a constitutional right."[41]

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36. 6 Conn. Cir. 103, 266 A.2d 904 (1969).

37. Foreign attachment here simply meant garnishment and did not mean that the defendant was a nonresident.

38. Michael's Jewelers v. Handy, 6 Conn. Cir. 103, 105, 266 A.2d 904, 906 (1969).

39. 424 F.2d 100 (10th Cir. 1970). The major issue in this case was whether the sale of replevied goods pursuant to Oklahoma's version of Article IX of the UNIFORM COMMERCIAL CODE constituted a conversion *custodia legis*. Two other replevin statutes have recently been attacked as unconstitutional. In one, the procedure was found unconstitutional without citation to *Sniadach*. Blair v. Pitches, ___ Cal. Rptr. 2d ___ (Super. Ct. Los. Ang. County, No. 942,966 1970). In the other case the replevin statute was sustained, the court distinguishing *Sniadach* on the basis that the repossession of a gas stove and a stereo did not create a hardship like the garnishment of wages. Fuentes v. Faircloth, 317 F. Supp. 859 (S.D. Fla. 1970).

The *Brunswick* court, like the Supreme Court of the United States in Goldberg v. Kelly, 397 U.S. 254 (1970) seems to be more interested in the type of property involved. In *Goldberg*, while finding that welfare benefits could not be terminated without a prior notice and hearing, the Supreme Court 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'. . . ." *Id.* at 262-63.

40. Brunswick Corp. v. J & P., Inc., 424 F.2d 100, 105 (10th Cir. 1970).

41. Laprease v. Raymours Furniture Co., Inc., 315 F. Supp. 716, 724 (N.D. N.Y. 1970). Although the court did not mention unconscionability there is a question whether the insertion of a "fine print" waiver

A District of Columbia statute which permitted the foreclosure of a mortgage without a hearing was recently sustained against objections that such a procedure violated due process under *Sniadach*.[42] The court placed great emphasis on the fact that foreclosure was possible only if that power was included in the mortgage. Similarly, a court in *Balthazar v. Mari Ltd.*,[43] held that *Sniadach* was not applicable to an Illinois real property tax deed statute.

There is equally little agreement among the courts when attachment is made in order to give constructive notice to nonresidents that a suit for damages is pending against them. In *Robinson v. Loyola Foundation, Inc.*,[44] a Florida court refused to find a Florida statute which permitted the *ex parte* attachment of a nonresident's real property unconstitutional. It is clear from the opinion that the court did not consider the real property attached in the action to be analogous to the wages in *Sniadach*. Finding no hardship akin to the deprivation of wages, the court simply made a subjective decision that *Sniadach* was inapplicable.[45] The court wholly failed to consider the Supreme

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would be unconscionable under the UNIFORM COMMERCIAL CODE § 2-302, even though the Code provides for the contractural modification of remedies in § 2-719. A finding of unconscionability is a possibility. Justice Brennan, speaking for the court in Goldberg v. Kelly, 397 U.S. 254, 261 (1970) notes that in the face of "brutal need," it would be "unconscionable" to deprive a person of property (in that case, welfare payments) without "overwhelming" governmental interests. If that is so, it might be unconscionable not only for a businessman to put a waiver into a contract, permitting the businessman to repossess without notice and hearing, but it might also be unconscionable to use self-help in any case where self-help would impose "brutal need" upon the debtor.

Such a hardship argument, of course, may or may not have a bearing on the purely procedural question of whether the government, which cannot permit the replevy of goods by a sheriff without notice and hearing, can permit a creditor under § 9-503 of the UNIFORM COMMERCIAL CODE to use self-help in respossessing property. Judge Port gives no indication in his opinion whether self-help under the UCC is constitutionally permissible.

42. Young v. Ridley, 309 F. Supp. 1308 (D.D.C. 1970). For a pre-*Sniadach* state court decision sustaining such a statute see Roos v. Belcher, 79 Idaho 473, 321 P.2d 210 (1958).

43. 301 F. Supp. 103 (N.D. Ill. 1969). It is interesting to note that in both this case and in *Young*, the courts realized that the result they sustained could have harsh consequences.

44. ___ Fla. Supp. ___, 236 So. 2d 154 (1970).

45. Some writers have taken the view that *Sniadach* should not apply to the prejudgment attachment of realty because such a lien merely restricts alienability. *See, e.g.*, Note, *Attachment and Garnishment—Constitutional Law—Due Process of Law*, 68 MICH. L. REV. 986, 1000 (1970). On the other hand, the use of foreign attachment pro-

Court's apparent "blessing" of the propriety of a pre-notice and hearing attachment of a nonresident's property. In *Sniadach,* Justice Douglas distinguished acquisition of quasi in rem jurisdiction through attachment of property of a nonresident saying that a ". . . procedural rule that may satisfy due process for attachments in general, see *McKay v. McKinnes* . . . does not necessarily satisfy procedural due process in every case."[46] As was noted in *Laprease, McInnes* was affirmed *per curiam,* the Court citing two prior cases.[47] One of the prior cases cited involved the attachment of the property of a nonresident debtor.[48] The other case cited in the *McInnes* affirmance involved the special governmental interest in protecting the public during a time of bank failures.[49] Implicit in *Sniadach,* therefore, is the premise that the requirements of due process are not the same where there is a nonresident debtor or where there is an overriding interest to be protected.[50]

Justice Harlan, concurring in *Sniadach,* said, ". . . I am quite unwilling to take the unexplicated *per curiam* in *McKay v. McInnes* . . . as vitiating or diluting these essential elements of due process."[51] When the classic case arose involving the garnishment of a nonresident's wages the Delaware court, in *Mills v. Bartlett,*[52] had no difficulty striking down the statute:

> Since the *Sniadach* case clearly holds that it is the garnishment of *wages* without notice and prior hearing which offends due process principles, the fact that the instant case concerns a foreign rather than a domestic attachment or garnishment is irrele-

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cedures has been severely criticized. *Id.* at 1003-04; Carrington, *The Modern Utility of Quasi in Rem Jurisdiction,* 76 HARV. L. REV. 303 (1962).

46. 395 U.S. 337, 340 (1969).

47. McKay v. McInnes, 279 U.S. 820 (1929).

48. Ownbey v. Morgan, 256 U.S. 94 (1921). *See* note 33 *supra* and accompanying text.

49. Coffin Bros. v. Bennett, 277 U.S. 29 (1928).

50. *See* note 33 *supra* and accompanying text. *See also* the statement in Goldberg v. Kelly, 297 U.S. 254, 262-63 (1970): "The extent to which procedural due process must be afforded the [welfare] recipient [before her benefits are terminated] . . . depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication." This kind of statement indicates an intent that due process varies with hardship and competing interests. If that is so, the *type* of property involved in a summary proceeding will probably be of greater probative influence than the kind of procedure. In other words, the hardship of the deprivation will be weighed against some other social or individual interest and the resolution of that balancing will determine the type of procedure constitutionally required.

51. 395 U.S. at 343-44.

52. ___ Del. ___, 265 A.2d 39 (1970).

> vant and immaterial since it is the defendant's wages which have been frozen.[53]

The factors that will determine the outcome of any particular case have been summarized by one writer as follows:

> (T)here seem to be no cogent reasons for limiting the scope of the *Sniadach* rationale to the wage garnishment context so long as the following suggested factors are present: (1) a prejudgment seizure without notice or an opportunity to be heard; (2) a "strong" (i.e., corporate or institutional) creditor versus a "weak" consumer-debtor; (3) an absence of "special" creditor interests (i.e., where the debtor is a resident of the state, is not avoiding process and is not threatening to dispose of the property in fraud of his creditors); (4) an absence of special state interests (i.e., where the property involved is not dangerous to health and does not otherwise affect the public interest); and (5) a type of property intrinsically valuable to the debtor but only extrinsically valuable to the creditor (e.g., where the nature of the property is relevant to the creditor only to the extent that it is convertible into money or its equivalent, but where the debtor does find its inherent qualities important).[54]

The finding by the *Laprease* court that New York's replevin statute violated the plaintiff's rights to notice and hearing before their property could be taken was compelled, both objectively and subjectively, by the decision in *Sniadach*. The taking of wages from a wage earner is not distinguishable from the taking of his essential home furnishings, and the lack of notice and hearing in *Laprease* is obvious. *Laprease* leaves unanswered the principle question following the *Sniadach* ruling, which is whether *Sniadach* is to be read narrowly, as concerned only with certain types of property, or whether the decision is to be read broadly, as laying out a procedural rule to be followed in all but exceptional cases. At the least, *Laprease* expands *Sniadach* in two ways. First, it indicates clearly that wages are not the only type of property the courts will protect under *Sniadach*; second, it indicates that garnishment is not the only procedure that will be struck down. Therefore, not only will such traditional remedies as replevin, attachment and self-help come under further examination by the courts, but cognovit notes, mortgage foreclosure by advertisement and various foreclosures of statutory liens will surely be the subject of renewed litigation.[55]

Whatever the eventual scope of *Sniadach*, two important problems will remain: the scope of the hearing required and

53. *Id.* at ___, 265 A.2d at 41.

54. Note, *supra* note 17, at 431.

55. Also suspect would be arrest, receivership and temporary injunctions. *See* Note, *supra* note 17, at 434-50; Fleming, *Garnishment and the Supreme Court*, 74 COM. L.J. 264, 265 (1969).

the effect of contractual waiver. The only clue Judge Port gives as to the nature of the hearing required is the statement that he does not mean to suggest that ". . . nothing less than a full adversary evidentiary hearing prior to seizure . . ."[56] is necessary. Instead, he suggests that the *ex parte* order of a judge might be sufficient. In his concurring opinion in *Sniadach*, Justice Harlan was more specific. He said:

> . . . 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 debtor *before* he can be deprived of his property or its unrestricted use.[57]

The recent Supreme Court case of *Goldberg v. Kelly*[58] described the type of hearing required before one's welfare benefits could be terminated as not necessarily of the judicial or quasi-judicial type, but that the defendant should be able to confront witnesses that are adverse to him, present witnesses of his own and present evidence before a decision maker. The defendant is permitted to have counsel, but the decision maker is not required to file a full opinion or make findings of fact and conclusions of law. He may simply list the reasons for his decision. A procedure of this formality clearly will be time-consuming and costly to creditors.

The second problem the courts will eventually have to face is the effect of a contractural waiver of the right to prior notice and hearing. As was noted earlier,[59] *Laprease* indicated that a waiver might be invalid. On the other hand, the court in *Young v. Ridley*,[60] said:

> . . . the practical effect of *Sniadach* will probably be minimal, since creditors will henceforth probably require debtors to execute promissory notes containing wage assignments contingent upon default in repayment.[61]

In addition to its due process infirmities, the New York statutory provision,[62] which permitted the sheriff to break open a building if necessary to take possession of a chattel without a

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56. Laprease v. Raymours Furniture Co., Inc., 315 F. Supp. 716, 725 (N.D. N.Y. 1970).

57. 337 U.S. at 343. Justice Harlan cites, *inter alia*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

58. 397 U.S. 254 (1970).

59. *See* note 41 *supra* and accompanying text.

60. 309 F. Supp. 1308 (D.D.C. 1970). The court noted that the contractual power to foreclose a mortgage was similar to a confession of judgment clause in a contract.

61. *Id.* at 1312.

62. N.Y. CIV. PRAC. LAW § 7110 (McKinney 1963).

warrant and without the intervention of a judicial officer, was held by the court in *Laprease* to violate the fourth amendment's guarantee against unreasonable searches and seizures. Judge Port, citing *James v. Goldberg*,[63] held that a search of a private dwelling without a warrant is presumptively unreasonable. The court was unimpressed with defendant's argument that the fourth amendment applies only to criminal and not civil proceedings. The court said:

> The argument that the Fourth Amendment does not apply, is supported by neither good sense nor law. If the sheriff cannot invade the privacy of a home without a warrant when the state interest is to prevent crime, he should not be able to do so to retrieve a stove or refrigerator about which the right to possession is disputed. Nor should he have any greater right to make a seizure of these or similar chattels not within a building or enclosure by virtue of a requisition "*deemed* to be the mandate of the court . . . ."[64]

The finding that the fourth amendment does not exist as a shield merely to prevent intrusions in criminal matters is supported both by developing case law[65] and by reason. See, for example, statement of Prettyman, J., in *District of Columbia v. Little*:[66]

> [T]he common-law right of a man to privacy in his home . . . is one of the . . . essentials of our concept of civilization. It was firmly established in the common law as one of the brightest features of the Anglo-Saxon contributions to human progress. It was not related to crime or suspicion of crime. . . . To say that a man suspected of crime has a right to protection against (the) search of his home without a warrant, but that a man not suspected of crime has not such protection, is a fantastic absurdity.[67]

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63. 303 F. Supp. 935, 940 (S.D.N.Y. 1969) *prob. juris. noted sub. nom.* Wyman v. James, 397 U.S. 904 (1970). In that case the court held that a New York welfare department could not deny, reduce or terminate Aid to Families with Dependent Children benefits to an individual who refused to allow a case worker entry into her home without a warrant issued upon probable cause under the fourth amendment.

64. 315 F. Supp. at 722. *See also* Camara v. Municipal Court, 387 U.S. 523 (1967) (city must secure a warrant before it can search an apartment building for housing code violations if the owner denies entry); See v. City of Seattle, 387 U.S. 541 (1967) (city must have a warrant to inspect commercial buildings for code violations). It should be noted that in both *Camara* and *See* a criminal penalty lay behind an uncorrected housing code violation. Similarly, one who hindered a sheriff in his efforts to replevy goods was subject to punishment. The court noted this fact as supporting the proposition that this was not exclusively a civil matter where the fourth amendment might not apply.

65. *See id.*

66. 85 App. D.C. 242, 178 F.2d 13 (1949), *aff'd. on other grounds*, 339 U.S. 1 (1950).

67. *Id.* at 246, 178 F.2d at 16-17.

One can have little dispute with the judicial enlargement of the protection of the fourth amendment to civil actions.[68] Similarly, the extension of the *Sniadach* rationale to household furnishings in *Laprease* is equally desirable. Although it has been suggested that *Sniadach* be limited to property "important to daily life,"[69] such an approach seems to misplace priorities. The better rule would seem to be to expand *Sniadach* to include all property. The latter approach recognizes that due process of law, as a concept, is concerned with procedure and emphasizes the point that legal analysis of any case should better begin with the feeling that the absence of procedural due process is unacceptable rather than acceptable. There is, after all, a definite interest in maximizing liberty and minimizing restraint. Only after these ground rules are adopted should the courts begin their delicate process of balancing competing goals by weighing the hardship involved in the particular case and the identity of the parties with such interests as promoting the extension of credit, collection of claims and unclogged court calendars.

68. This type of decision may eventually lead to the legal doctrine requiring counsel for a defendant in a civil action as well as a criminal action. *See, e.g., In re* Harris, 69 Cal. 2d 486, 446 P.2d 148, 72 Cal. Rptr. 340 (1968).

69. Note, *supra* note 45, at 1002.