

OPINION
69-68

July 8, 1969 (OPINION)

Mr. Alfred C. Schultz

Executive Director

State Bar Association of North Dakota

RE: Civil Procedure - Garnishments - Constitutionality

This is in response to your letter in which you call our attention to the recent decision of the United States Supreme Court in the case of Christine Sniadach v. Family Finance Corporation, issued on June 9, 1969, Case No. 130. (Not yet printed in the Reporter system.) You then ask what effect will this decision have on our statutes authorizing garnishment before a hearing on the issues involved.

We presume you are referring to the provisions of Chapter 32-09 and other statutory provisions relating thereto.

The Supreme Court decision involved a Wisconsin law which permitted garnishment of wages upon instituting garnishment proceedings. The Wisconsin statute gave the plaintiff ten days in which to serve the summons-complaint on defendant after service of the garnishee. The North Dakota statute is similar except as to the specific amount of days. A notice before garnishment is required under Section 32-09-03. Under Section 32-09-28, we find the various provisions creating a liability on the garnishee after service of the summons was made upon the garnishee.

The Supreme Court did not go into detail of the various statutory provisions but summarized the question before it by saying that the question is whether the interim freezing of the wages without a chance to be heard violates procedural due process. The Court in the majority opinion held that where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing (cf. Coe v. Armour Fertilizer Works, 237 U.S. 413, 423) this prejudgment garnishment procedure violates the fundamental principles of due process. The Court recognized that summary procedures may well meet the requirements of due process in extraordinary situations, but in the case before the Court it concluded that this was not an extraordinary situation and that due process must be adhered to in all respects. In this respect, in a concurring opinion it was said: "Apart from special situations * * * I think that due process is afforded only by the kinds of 'notices' and 'hearings' which are aimed at establishing the validity, or at least probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property or its restricted use."

The Court has made it clear that due process must be afforded the debtor, and that where the procedures do not afford the debtor this constitutional right, the procedures are invalid and unconstitutional. It is, therefore, our opinion that the provisions

and procedures under Chapter 32-09 of the North Dakota Century Code, which permit the freezing or seizing of property without first having given the debtor-defendant an opportunity to be heard and have the matter adjudicated, are in violation of due process and are, therefore, invalid.

The procedures and statutory provisions referred to are those which pertain and relate to garnishment procedure prior to the securing of a judgment. The United States Supreme Court in its decision made no comment on garnishments in aid of execution. Such procedure is available only after a judgment has been obtained. A judgment necessarily infers that the defendant had been given an opportunity to be heard, or was heard, and thus the due process was met. It would further appear that garnishments in aid of executions are not deemed invalid if the judgment upon which the execution is based was properly obtained.

HELGI JOHANNESON

Attorney General