

**OPINION
79-185**

March 14, 1979 (OPINION)

Honorable Vernon Wagner
Speaker of the House
House Chambers
State Capitol
Bismarck, North Dakota 58505

Dear Mr. Speaker:

This is in response to the legislative branch's request for an opinion as set forth in Representative Wayne K. Stenehjem's letter of March 12, 1979, which was approved by you:

This is to request an opinion from your office regarding the propriety and legality of the use of a so-called landlord's lien, or the use of the common law remedy of distraint for rent, based on current statutory and case law in the State of North Dakota.

I note that the North Dakota Century Code makes no apparent provision for the use of such remedies, and a brief search of relevant case law reveals no pertinent discussion as to the constitutionality or legality of either.

Inasmuch as recent court decisions have previously struck down our former attachment statute on grounds of violation of constitutional guarantees of due process of law, I would appreciate your opinion as to whether such an extra judicial attempt as claiming a lien on, or seizing a tenant's property, or changing the locks on the door of the demised premises to prevent a tenant from gaining access to his property, might likewise fail to meet constitutional safeguards.

We understand that our opinion is sought in context of the consideration of House Bill No. 1483 and the different versions thereof adopted by the House and the Senate.

At common law, there was no "landlord's lien" arising simply out of the relationship of landlord and tenant. See, 49 Am. Jur.2d. Landlord and Tenant Section 675. We find no North Dakota statutory provision for a landlord's lien. At common law, a landlord's lien could be acquired only by actual levy under a distress (distraint) proceeding, but not by the mere right to distraint, 49 Am. Jur.2d. Landlord and Tenant Section 676. Thus a "landlord's lien" at common law was the description of the landlord's interest in the tenant's property after the same had been distrained. Therefore, we are of the opinion that there is no statutory or common law landlord's lien in North Dakota outside of the context of distraint.

The common law remedy of distraint for rent (distress) allows the landlord to go upon the demised premises and seize anything that he might find there (subject to certain exclusions), as security for rent in arrears (not for future rent, interest, damage to property, nor for other damages from breaching a lease), and hold it without

sale until the rental is paid. 49 Am. Jur.2d. Landlord and Tenant Section 726 et. seq. The landlord incurs liability for excessive seizure, unjustified seizure, seizure of exempted items and unauthorized sale.

The Supreme Court of North Dakota has never recognized the existence of common law distraint for rent in the state.

North Dakota's statutory provision for landlord's remedies for rent may be said to impliedly reject availability of distraint for rent. See, Crocker v. Mann, 3 Mo. 472 (1834).

In 1969, the Supreme Court of the United States, in the landmark case of Sniadach v. Family Finance Corp., 395 U.S. 337, 23 L. Ed.2d. 349, 89 S. Ct. 1820 (1969), mandated procedural due process in cases of procedures authorizing summary prejudgment seizure of personal property. The general standards include judicial supervision and the right to hearing (which hearing must generally be prior to seizure except in rare cases).

In 1975, the Court of Appeals for the Eighth Circuit, in Guzman v. Western State Bank of Devils Lake, 516 F. 2d. 125 (1975), struck down North Dakota's prejudgment attachment statute on due process grounds. The Guzman court found the prejudgment attachment constitutionally deficient on four grounds. First, there was no requirement of danger that the creditor's interests would be destroyed or defeated without the seizure, 516 F. 2d. at 130. Second, there was no meaningful judicial supervision, 516 F. 2d. at 131. Third, the only means of immediate dissolution prior to adjudication was debtor posting of bond, 516 F. 2d. at 131. Fourth, the gravity of the harm to the debtor (loss of home) in a summary manner, 516 F. 2d. at 132.

In the aftermath of Sniadach, numerous states having statutory provisions for distraint for rent (distress) had the same struck down for violation of constitutionally mandated due process, e.g., Barber v. Radar, 350 F. Supp. 183 (D.C. Fla. 1972) >striking down the Florida law!; Blocker v. Blackburn, 228 Ga. 285, 185 S.E.2d. 56 (1971) >Georgia!; Gross v. Fox, 399 F. Supp. 1164 (D.C. Pa. 1972) >Pennsylvania!; Hall v. Garson, 468 F. 2d. 845 (5th Cir. 1972) >Texas!; State ex rel. Payne v. Walden, 190 S.E.2d. 770 (W. Va. 1972) >West Virginia!; Adams v. Joseph F. Sanson Invest. Co., 376 F. Supp. 61 (D.C. Nev. 1974) >Nevada!. In each of the foregoing the due process afforded was greater than that of common law distraint for rent.

In view of the foregoing state and federal decisions relating to distraint statutes of other states, and in view of the fact that common law distraint for rent is constitutionally objectionable on the first, the second, and probably the fourth grounds set forth in Guzman, we are of the opinion that common law distraint for rent (whether by seizure and removal, or by constructive seizure and detention) is not constitutionally permissible.

In specific response to your inquiry we are of the opinion that neither the so-called landlord's lien nor common law distraint for rent are available in North Dakota.

We trust that the foregoing will be of assistance.

Sincerely,

ALLEN I. OLSON

Attorney General