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Can Distraint Stand Up as a Landlord's Remedy?

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Though a landlord's right of seizure is well established in the common law and provided for by the laws of many states, some federal courts have found distraint procedures to be incompatible with Fourteenth Amendment due process requirements. This article examines the constitutionality and validity of the present Pennsylvania distraint statute, surveys the cases dealing with the issue, and reviews some recent decisions concerning due process which are relevant to the determination of the statute's constitutionality. The Pennsylvania experience can serve as an example for practitioners in other jurisdictions since most of them have had few, if any, cases concerning the validity of their distraint statutes, while there have been a number of decisions dealing with the constitutionality of the Pennsylvania law.

Introduction

The Pennsylvania Landlord and Tenant Act allows for the procedure of distraint.[1] Under the statute, a landlord or his agent may

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[1] Pub. L. No. 69, Art. III, § 301 (April 6, 1951); Pa. Stat. Ann. tit. 68, § 250.302 *et seq.*

Other states also have statutes providing for distraint. E.g., Del. Code Ann. tit. 25, § 6301 *et seq.* (1974); Ga. Code Ann. § 61-40 *et seq.* (Supp. 1975); Ill. Ann. Stat. ch. 80, § 16 *et seq.* (Smith-Hurd 1966); Ky. Rev. Stat. Ann. § 383.010 *et seq.* (1972); Md. Ann. Code, Real Prop. § 8-301 *et seq.* (1974); N.J. Stat. Ann. § 2A:33-1 *et seq.* (Supp. 1976-1977); S.C. Code Ann. § 41-151 (Supp. 1975); Va. Code Ann. § 55-230 (Supp. 1976); W. Va. Code Ann. § 37-6-12 *et seq.* (1966). See also Mo. Ann. Stat. § 441.300 (Vernon 1952).

Some jurisdictions have landlord lien statutes which closely resemble the distraint procedure. Generally, under these statutes, the landlord is given a lien on the possessions of the tenant and, on default of rent payments, the landlord has a right to seize the possessions and sell them or a right to cause the goods to be seized and sold by a public official. E.g., Cal. Civ. Code § 1861a (West 1954); Neb. Rev. Stat. § 41-124 *et seq.* (1974); Nev. Rev. Stat. § 108.510 *et seq.* (1975); N.C. Gen. Stat. § 44A-2 (Supp. 1975).

take possession of property on leased premises as security for rent in arrears, without the requirement of a prior judicial determination of the validity of the landlord's claim for rent or prior notice to the tenant.[2] This right of seizure is of ancient origin, well established in the common law, and the statute is a codification of this part of the distress procedure.[3] Moreover, if the landlord complies with the statute and fulfills certain requirements, the Act provides an added remedy beyond the common law. Under the statutory rule, the seized goods can be sold at a public sale and the landlord can satisfy his claim for rent out of the proceeds.[4] This sale can be

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Other landlord lien statutes grant the landlord a lien on the tenant's goods and provide for other types of enforcement procedures. E.g., Ala. Code tit. 31, § 29 *et seq.* (1959); D.C. Code Ann. § 45-915 *et seq.* (1973); Fla. Stat. § 713.67 (Supp. 1976-1977); Iowa Code Ann. § 570.1 *et seq.* (1950); N.M. Stat. Ann. § 61-3-4 (1974); N.Y. Lien § 1 (McKinney 1966); Tenn. Code Ann. § 64-1201 (1955); Utah Code Ann. 38-3-2 *et seq.* (1974). See also Mich. Comp. Laws § 427.201 *et seq.* (1967); S.D. Compiled Laws Ann. § 38-17-1 *et seq.* (1967); Wash. Rev. Code Ann. § 60.72.010 *et seq.* (1961).

[2] Pa. Stat. Ann. tit. 68, § 250.302; Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970); Gross v. Fox, 349 F. Supp. 1164 (E.D. Pa. 1972), *vacated* 496 F.2d 1153 (3d Cir. 1974); Ragin v. Schwartz, 393 F. Supp. 152 (W.D. Pa. 1975); Sum. Pa. Jur. Landlord and Tenant § 189.

Section 250.302 reads as follows:

"Personal property located upon premises occupied by a tenant shall, unless exempted by article four of this act, be subject to distress for any rent reserved and due. Such distress may be made by the landlord or his agent duly authorized thereto in writing. Such distress may be made on any day, except Sunday, between the hours of seven ante meridian and seven post meridian and not at any other time, except where the tenant through his act prevents the execution of the warrant during such hours.

"Notice in writing of such distress, stating the cause of such taking specifying the date of levy and the personal property distrained sufficiently to inform the tenant or owner what personal property is distrained and the amount of rent in arrears, shall be given, within five days after making the distress, to the tenant and any other owner known to the landlord personally, or by mailing the same to the tenant or any other owner at the premises, or by posting the same conspicuously on the premises charged with rent.

"A landlord or such agent may also, in the manner above provided, distrain personal property located on the premises but only that belonging to the tenant, for arrears of rent due on any lease which has ended and terminated, if such distress is made during the continuance of the landlord's title or interest in the property."

[3] Santiago v. McElroy, note 2 *supra*; Sum. Pa. Jur. Landlord and Tenant § 189.

[4] Pa. Stat. Ann. tit. 68, § 250.309.

held providing the following measures are completed. First, if the owner of the property fails to replevy the distrained property within five days after the distress, an appraisal must be made of the property distrained upon.[5] Thereafter, the sheriff or constable shall fix a date, time, and place for sale, giving at least six days' public notice in writing by handbills. Finally, on that date and time, the selling officer must publicly sell the property and pay the landlord the amount of rent that is owed him.[6]

In recent years, there have been challenges made concerning the constitutionality of the distraint procedure in Pennsylvania. Some federal district courts have declared it to be incompatible with the due process requirements of the Fourteenth Amendment of the U.S. Constitution and have thus held the Act to be unconstitutional. It should be emphasized, though, that there is no opinion of the Federal Court of Appeals for the Third Circuit holding the Pennsylvania distraint provisions to be invalid. Rather, the only court of appeals decision on the issue vacated a judgment by a federal district court that the distress portions of the Act were unconstitutional.[7] Moreover, there is no case in which the Pennsylvania appellate courts rule that the statute is invalid. On the contrary, in one case the Commonwealth Court of Pennsylvania discussed the constitutionality of distraint and indicated that it did not recognize any clear holding in the federal district court cases that all distraint was unconstitutional.[8]

Therefore, the status of the distress portions of the Act is not clear at this time. The confusion presents great problems to the practicing bar in advising both landlord and tenant clients, and does not indicate to the legislature whether the statute needs to be reformed and alternative remedies provided for the landlord. This article will examine the scope and reasoning of the federal district courts' decisions to determine the decisions' validity; it will also survey recent trends in the due process area which cast light on the issue of the constitutionality of Pennsylvania's distraint statute and which give some guidelines that could be followed by the court of

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[5] Pa. Stat. Ann. tit. 68, § 250.308.

[6] Pa. Stat. Ann. tit. 68, § 250.309.

[7] Gross v. Fox, note 2 *supra.*

[8] Commonwealth v. Monumental Properties, Inc., 10 Commonwealth Ct. 596, 314 A.2d 333 (Pa. 1973), *rev'd on other grounds* 459 Pa. 450, 329 A.2d 812 (1974).

appeals and the Pennsylvania appellate courts in deciding a case on the validity of the Act.

Past Cases in the Federal Courts

The case which is most often relied on by the district courts in finding the Pennsylvania distraint provisions unconstitutional is *Sniadach v. Family Finance Corp.*[9] In that case, the Court found that a Wisconsin wage garnishment statute denied due process because it authorized a prejudgment freeze on wages. Plaintiff there alleged that the procedure denied due process of law because there was no notice given and no opportunity for a hearing before the in rem seizure of the wages. Under the Wisconsin law, the clerk of the court issued a summons at the request of creditor's lawyer and the latter served the garnishee and thus set in motion the machinery by which the wages were frozen. The Court discussed this method in light of the due process requirements of the Constitution:

> Such summary procedure may well meet the requirements of due process in extraordinary situations. [Citations omitted.] But in the present case no situation requiring special protection to a state or creditor interest is presented by the facts; nor is the Wisconsin statute narrowly drawn to meet any such unusual condition.[10]

The Court indicated that wages involved a special type of property presenting distinct problems in the economic system. The great hardships involved in wage garnishment were also shown. Often, garnishment was based on a fraudulent debt, and it frequently drove the wage earner below the poverty level and pressured him to settle the alleged debt to get the wages back. The Court then held that

> When the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing [citation omitted] this prejudgment garnishment procedure violates the fundamental principles of due process.[11]

Many of the district court opinions considered the distraint procedure and its characteristics to be "indistinguishable from *Sniadach*." [12] These courts indicated that there were several factors

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[9] 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969).

[10] *Id.* at 339, 89 S. Ct. at 1821, 23 L. Ed. 2d at 352.

[11] *Id.* at 342, 89 S. Ct. at 1823, 23 L. Ed. 2d at 354.

[12] Santiago v. McElroy, note 2 *supra* at 293.

that led them to apply the *Sniadach* ruling to the Landlord and Tenant Act. First, the courts showed that the personal property of the tenants was in fact being affected by the statutory procedure, just as property being affected in *Sniadach*. The levy and the eventual sale denies the tenant the right to use his property and inevitably denies him the right to freely dispose of it.[13] Second, a basic objection was that the landlord was acting on a *unilateral* claim that rent was owing when he levied on the tenant's property to sell it.[14] The district court in *Gross v. Fox* said that "modern notions of due process leave no room for landlords to be judges in their own cases." [15] Moreover, as in *Sniadach*, there is no provision in the statute for notice to the tenant before the distraint is made and no opportunity for a hearing to challenge the landlord's claim.[16]

Third, the courts have found that the procedures available to the tenant to challenge the distraint are inadequate to alleviate the hardships on the tenant and do not provide a constitutional substitute for prior notice and hearing. The tenant can challenge the propriety of the distraint by suing in trespass.[17] However, even in that case the property may be sold long before the litigation is finally decided, and even if the tenant succeeds on the merits, he will nonetheless be deprived of his property *in specie*.[18] The statute also allows for a suit in replevin so the tenant can recover the goods.[19] However, the tenant must wait for the final disposition of that action in order to regain control.[20] The courts also noted that while certain property is statutorily exempt from levy and sale,[21]

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13 Gross v. Fox, note 2 *supra*.

14 Santiago v. McElroy, note 2 *supra*; Musselman v. Spies, 343 F. Supp. 528 (M.D. Pa. 1972).

15 Note 2 *supra* at 1167.

16 Pa. Stat. Ann. tit. 68, § 250.302 *et seq.*; Santiago v. McElroy, note 2 *supra*; Gross v. Fox, note 2 *supra*; Musselman v. Spies, note 14 *supra*; Stots v. Media Real Estate Co., 355 F. Supp. 240 (E.D. Pa. 1973); Sellers v. Contino, 327 F. Supp. 230 (E.D. Pa. 1971).

17 Pa. Stat. Ann. tit. 68, § 250.312.

18 Santiago, note 2 *supra*.

19 Pa. Stat. Ann. tit. 68, § 250.306.

20 Ragin v. Schwartz, note 2 *supra*.

21 Pa. Stat. Ann. tit. 68, § 250.401.

this exemption is not broad enough to mitigate the impact of the loss in a substantial manner.[22]

Fourth, the federal district courts have indicated that the Pennsylvania distraint procedure does not fall within the exception of *Sniadach* that allows summary procedures in extraordinary situations. The courts have generally followed the reasoning set forth in *Santiago*:

> There has been no evidence presented in this case which indicates that the distress procedure is a response to an extraordinary situation requiring special protection to a state or creditor interest. There has been no evidence which indicates that it is any more difficult to satisfy a judgment against a tenant than against any other debtor, and none which indicates that distress is central to the state's interest in protecting the housing market.[23]

Finally, the courts noted that *Sniadach* has not been limited solely to its facts and has been extended to other areas. The Supreme Court relied on *Sniadach* to invalidate other statutes because they denied procedural due process.[24] Thus precedent existed for the application of *Sniadach* to other situations.

Therefore, with many of these factors in mind some lower federal courts in Pennsylvania have held the Pennsylvania Landlord and Tenant Act to be invalid under the Fourteenth Amendment of the U.S. Constitution. However, these decisions could perhaps be challenged on various grounds and/or limited to the particular facts and considerations set forth in those cases. It must be noted at the outset that the decisions of the district courts differ in their scope. Some holdings have ruled the Act to be unconstitutional on its face,[25] while others have declared the statute to be invalid as applied.[26] Some cases have restricted their determination of uncon-

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[22] Musselman v. Spies, note 14 *supra*; Santiago v. McElroy, note 2 *supra*.

[23] 319 F. Supp. at 294-295.

[24] See, e.g., Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, *rehearing denied* 409 U.S. 902, 93 S. Ct. 177, 34 L. Ed. 2d 165 (1972) (Pennsylvania and Florida prejudgment replevin statutes); Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) (withdrawal of welfare benefits); Bell v. Burson, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971) (suspension of driver's license).

[25] Stots v. Media Real Estate Co., note 16 *supra*; Gross v. Fox, note 2 *supra*.

[26] Santiago v. McElroy, note 2 *supra*; Sellers v. Contino, note 16 *supra*.

stitutionality to separate provisions of the Act,[27] while others have dealt with the Act as a whole.[28]

Unconstitutionality "As Applied"

Distress Sales Prohibited in Cases Involving Lower-Income Residential Tenants

The decisions finding unconstitutionality "as applied" should be examined to determine both their validity and their reach. The Federal District Court for the Eastern District of Pennsylvania has heard quite a number of constitutional challenges to the Pennsylvania Landlord and Tenant Act.[29] The first of these opinions, *Santiago v. McElroy*, was written by Chief Judge Lord and was the first federal district court opinion in all of Pennsylvania on the validity of distraint. *Santiago* dealt with a 42 U.S.C. Section 1983 claim alleging that defendants, who were constables (now landlord and tenant officers) of the City of Philadelphia, denied plaintiffs due process of law by conducting levies and sales pursuant to the Pennsylvania Act. The suit was brought as a class action, and the plaintiff class was defined by the court to be low-income tenants residing in Philadelphia. ("Low income" was defined in terms of the poverty line used by the Office of Economic Opportunity.) The court ruled that plaintiffs did not sustain their burden of showing that the levy and steps taken prior to the sale harmed them in any fashion, and that the record did not provide an adequate basis for the finding that the provisions of the Act, other than the provisions authorizing sale of tenant's property after distress, violate the Fourteenth Amendment. Therefore, the court enjoined the defendants from making sales of property pursuant to Section 250.309 of the Act. Note that the court (1) did not find facial unconstitutionality, (2) limited the plaintiff class, and (3) dealt only with the sales provisions of the Act.

In *Sellers v. Contino*, the ruling of *Santiago* was extended to Delaware County.[30] The court again limited the plaintiff class to

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[27] Santiago v. McElroy, note 2 *supra*; Musselman v. Spies, note 14 *supra*.

[28] Stots v. Media Real Estate Co., note 16 *supra*.

[29] E.g., Santiago v. McElroy, note 2 *supra*; Gross v. Fox, note 2 *supra*; Stots v. Media Real Estate Co., note 16 *supra*; Litton Business Sys., Inc. v. Paul L'Esperance, Inc., 387 F. Supp. 1265 (E.D. Pa. 1975).

[30] Note 16 *supra*.

tenants of Delaware County with income below the OEO poverty level. The court also limited their finding of unconstitutionality to the sales provisions of the Act, finding that no deprivation of the use of property was shown by a distraint notice left on the premises as long as the property was not removed.

Musselman v. Spies, decided by the Federal District Court for the Middle District of Pennsylvania,[31] also found unconstitutionality "as applied" rather than facial invalidity. The court in *Musselman* relied on the holding and rationale of *Santiago*. The plaintiff class was found to be tenants residing in York County with an income below the OEO poverty line. The court also confined itself to the distress sales provisions of Section 250.309. Thus, the court enjoined the defendant constables from selling, threatening to sell, advertising for sale, or removing from leased premises any property belonging to or found in homes of members of the plaintiff class.

Some questions can be raised concerning the basis of these decisions and their ultimate reach as precedents. First of all, the district courts' opinions virtually ignored the important concerns and special problems of the landlord. There was no discussion of the historical and practical reasons for the distraint procedure. The West Virginia Supreme Court in *State ex rel. Payne v. Walker*,[32] while declaring the West Virginia distraint statute to be unconstitutional, ably stated the needs and hardships of the landlord:

> Undoubtedly, there are special characteristics incident to the landlord tenant relationship which may justify statutory treatment inapplicable to other litigants. The tenant is, by definition, in possession of property of the landlord. Unless the law leaves an aggrieved landlord to his own devices, the legislature must provide a judicial mechanism of relative swiftness to prevent the withholding tenant from denying the landlord the right of income incident to ownership by the tenant's refusal to pay rent and by his prevention of rental or sale to a third party. Many expenses of the landlord continue to accrue, whether the tenant pays his rent or not.[33]

Because the district court opinions failed to specifically discuss these basic landlord interests, the results reached by the district courts in *Santiago*, *Musselman*, and *Sellers* can be questioned.

Second, it should be noted that *Santiago*, *Sellers*, and *Musselman* held that there was unconstitutionality only in the sales provisions

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[31] Note 14 *supra*.

[32] 190 S.E.2d 770 (W. Va. S. Ct. 1972).

[33] *Id.* at 778.

of the Pennsylvania Landlord and Tenant Act.[34] It thus seems that after these cases there can still be distress (which would establish a lien on the goods) as long as the goods are not removed and/or sold.

Third, *Santiago*, *Musselman*, and *Sellers* specifically deal with a limited class of plaintiffs, i.e., low-income "consumer" tenants of residential space. The courts in these cases specifically refused to broaden the class to include moderate-income groups. In *Santiago*, the court limited the size of the class "in light of the fact that all the evidence developed in this case relates to the distraint of low income tenants, and there being no showing that the same facts obtained in the case of moderate income tenants. . . ." [35] It is not clear, though, why the courts have refused to include middle-income groups in the class. This limitation to lower-income tenants could be the result of the district courts' heavy reliance on *Sniadach*. As discussed above, *Sniadach* was especially concerned with the great negative effects that wage garnishment had on lower-income families.

Will Protections Extend to Higher-Income Residential Tenants?

The Pennsylvania appellate courts and/or the Court of Appeals for the Third Circuit could choose to maintain a distinction between the lower-income residential tenants of *Santiago*, and middle- and upper-income residential tenants, and thus limit the applicability of any future ruling of unconstitutionality of distraint to the poorer group. However, the courts could well decide that despite the wealth of the tenant, the guarantees of due process must be extended to all persons, and that all residential tenants are entitled to notice and hearing before distraint. Despite the statement in *Santiago* that there was no showing that the facts presented therein obtain in the case of moderate-income tenants, it could be argued that it is hard to imagine what key information could be different in the case of a middle- or upper-income family. All factors with which the courts were concerned would seem to be the same regardless of wealth: All tenants are denied use of their property by the distraint and sale; in all cases the landlord is acting on a uni-

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[34] Pa. Stat. Ann. tit. 68, § 250.309.

[35] 319 F. Supp. at 290.

lateral claim with no opportunity for notice and hearing; and all tenants are restricted to the same actions to challenge the distraint. The only real difference seems to be the *effect* of the deprivation on the individual.

A court could perhaps avoid a broad declaration of unconstitutionality applying to all residential tenants by relying on a narrow view of *Santiago*. The major concern in *Santiago* was that distraint of a poor family's goods would deprive the family of property necessary to keep at the subsistence level. This will not usually be the case with higher-income families. However, even if this were true, it is not at all clear whether or not the *effect* of the distraint is a valid criterion in deciding what protections are to be afforded to tenants by procedural due process. This question of the importance of the effect of the distraint appears to be crucial and remains to be determined by the Pennsylvania appellate courts and/or the court of appeals. It should be noted, though, that *Sniadach* unconditionally invalidated the Wisconsin wage garnishment statute and did not just limit the declaration of unconstitutionality to poorer workers who suffered the most disastrous effects from the procedure. This decision may cast doubt on any attempt to distinguish between richer and poorer tenants for the purpose of an attack on the distress procedure.

Moreover, it should not be extremely difficult to provide for both notice and hearing to determine the underlying validity of the landlord's claim before the actual distress seizure or sale. Such a reasonably expedient alternative adds weight to the argument for total unconstitutionality of distraint.

Do Commercial Tenants Share Residents' Rights?

Even more difficult questions arise in reference to whether the Pennsylvania appellate courts and/or the court of appeals should declare distraint unconstitutional in the case of a landlord and a commercial tenant. A commercial tenant, with experience in the business world and with assets, who fails to pay rent and has his property seized in distress is a far different person than the poverty-stricken tenant of *Santiago* or even a wealthier residential tenant. The case of a commercial tenant defaulting on rent may well be "a situation requiring special protection to a state or creditor interest," [36] and thus distraint may be permitted.

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[36] Sniadach v. Family Fin. Co., note 10 *supra*.

Therefore, some courts may distinguish between commercial and residential tenants as far as the constitutionality of distraint. Factors in such a decision could be the experience and financial position of the commercial tenant as opposed to a consumer, the fact that distraint of a commercial tenant's goods will not usually deprive the tenant of property necessary to keep at subsistence level and drive the tenant into poverty, and the legitimate and pressing concerns of the landlord in receiving payments due from the tenant for the use of the landlord's property.

However, a court could reject any distinction between commercial and residential property and decide that any declaration of unconstitutionality of distraint should be extended to commercial tenants. Most commercial leases, like residential leases, are contracts of adhesion with no bargaining over terms. Thus a commercial tenant is also confronted by the weight and pressure of landlords and form leases. To add the large statutory advantage of distraint to the landlord's position could be considered impermissible by the courts.

Moreover, the recent case of *North Georgia Finishing, Inc. v. Di-Chem, Inc.* lends support to the position that distraint should be declared unconstitutional for commercial property as well as residential.[37] In that case a corporation, against which a suit for alleged indebtedness had been brought, challenged the constitutionality of a Georgia statute under which the plaintiff corporation had garnished the defendant's back account. The Georgia statute allowed garnishment solely on affidavit by the collector's attorney and without participation of a judge. The Supreme Court held the statute unconstitutional. The Court specifically rejected the notion that because two companies were involved the rationale of *Sniadach* should not be applied:

> Respondent also argues that neither Fuentes nor Mitchell is apposite here because those cases dealt with the application of due process protections to consumers who are victims of contracts of adhesion and who might be irreparably damaged by temporary deprivation of household necessities, whereas this case deals with its application in the commercial setting to a case involving parties of equal bargaining power. . . . It may be that consumers deprived of household appliances will more likely suffer irreparably than corporations deprived of bank accounts but the *probability of irreparable injury in the latter case is sufficiently great so that some procedures are necessary to guard against the risk of initial error. We are no more inclined now*

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[37] 419 U.S. 601, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1974).

than we have been in the past to distinguish among different kinds of property in applying to Due Process Clause.[38] (Emphasis added.)

Therefore, it is quite possible that the Pennsylvania distraint statute could be invalidated for both residential and commercial tenants by applying the force of *North Georgia Finishing*, and the broad scope of its language.

The case of *Van Ness Industries, Inc. v. Claremont Printing & Decorating, Inc.* is of interest in this regard.[39] Under the New Jersey statute, distraint was forbidden by an amendment in 1971 for money owed on a lease for property used solely as a residence.[40] Distraint was allowed for commercial property. However, the court in *Van Ness* held that the statute was facially unconstitutional and that distraint was impermissible for commercial, as well as residential, property because the statute was inconsistent with the requirements of due process.

Despite the rejection of distinctions between consumer and commercial interests in reference to due process requirements in *North Georgia Finishing*, the recognition of a difference between residential and commercial tenants formed the basis of the decision of the Federal District Court for the Western District of Pennsylvania in *Ginsberg v. George Stern Advertising Agency, Inc.*[41] It must be emphasized, though, that *Ginsberg* predated *North Georgia Finishing*. *Ginsberg* dealt with a tenant who purchased the rights and obligations of prior tenants under the terms of a written lease covering certain storeroom premises wherein he conducted a delicatessen and sandwich shop business. The tenant failed to pay the $333.33 monthly rental due for each of the three months. After two unanswered demands for payment from the landlord's attorneys, the constable acting on the landlord's behalf distrained property of the tenant to satisfy a claim of $4,815, and gave notice of a sale. Even though the demanded sum was reduced, the tenant did not pay it and the distrained goods were sold at public sale. The tenant brought suit challenging the constitutionality of the Landlord and Tenant Act. The court noted that there was no diversity of citizenship and that less than $10,000 was involved. The court then said that

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[38] *Id.* at 608, 95 S. Ct. at 723, 42 L. Ed. 2d at 758.

[39] 129 N.J. Super. 507, 324 A.2d 102 (Ch. 1974).

[40] N.J. Stat. Ann. § 2A:33-1 *et seq.*

[41] 325 F. Supp. 349 (W.D. Pa. 1971).

> There has been *no showing of any deprivation of plaintiff's personal rights* by the distraint and sale for $2,500 of the *commercial property* on the leased premises and, hence, this court has no jurisdiction over the subject matter of this civil rights action.[42] (Emphasis added.)

The court specifically rejected the jurisdictional reasoning of *Santiago*, noting that there was no showing that the tenant could not secure employment in the delicatessen business (in which he had over forty years' experience) and that the tenant had never been on welfare. (In *Santiago*, the court assumed arguendo that 28 U.S.C. Section 1343(3) did not cover property rights but assumed that the tenants' claims involved taking of household goods. The court then concluded that the deprivation of such property necessary to keep a family at subsistence level is covered by 28 U.S.C. Section 1343(3).)

The district court in *Ginsberg* seemingly found differences between a lower-income residential tenant and a commercial tenant as far as recognizing the right to challenge distraint. The court placed much emphasis on the facts that when plaintiff had acquired the lease he had been advised by counsel who explained its terms, that plaintiff was aware that the landlord had remedies under the lease, that the lease was of a commercial nature, and that the tenant had a $13,000 equity in his home as well as other property assets.

However, as noted above, *Ginsberg* predated *North Georgia Finishing*. Thus the present validity of *Ginsberg* is somewhat doubtful because of the U.S. Supreme Court's rejection of commercial/consumer distinction in reference to due process. *Ginsberg* is even more questionable in light of the decision of the Supreme Court in *Lynch v. Household Finance Corp.*[43] In that case a Connecticut resident's savings account was garnished under a state statute authorizing summary prejudicial garnishment. Plaintiff brought suit seeking to enjoin enforcement of the statute as denying due process. The district court dismissed the complaint, holding that 28 U.S.C. Section 1343(3) applied only to deprivations of "personal" rights and not "property" rights. The Supreme Court reversed and specifically rejected any distinction between personal liberties and property rights as far as Section 1343(3) jurisdiction.

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[42] *Id.* at 351.

[43] 405 U.S. 538, 92 S. Ct. 1113, 31 L. Ed. 2d 424 (1972), *rehearing denied* 406 U.S. 911, 92 S. Ct. 1611, 31 L. Ed. 2d 822 (1972).

The Court said that the Fourteenth Amendment protected the right to enjoy, own, and dispose of property, and that such protection was included in 42 U.S.C. Section 1983 and 28 U.S.C. Section 1343(3).

Finally, if a distinction between commercial and residential tenants in regard to distraint were upheld, it is not clear how a lower-income commercial tenant would be treated. Such a tenant bears a similarity to both the poor lessee of *Santiago* and the commercial tenant of *Ginsberg*.

Facial Unconstitutionality

The Pennsylvania Statute

Some federal district courts have indeed declared the Pennsylvania Landlord and Tenant Act to be facially unconstitutional. However, as will be shown, one decision has been vacated and the precedential value of the others is also doubtful. There does not seem to be a clear and valid case holding the Pennsylvania Landlord and Tenant Act to be facially unconstitutional at the federal district court level. The applicability of past decisions, even just within the district courts, can be questioned.

The first federal district court case to declare the Pennsylvania Landlord and Tenant Act to be unconstitutional on its face was *Gross v. Fox*, in an opinion by Chief Judge Lord.[44] The plaintiff was granted a declaratory judgment of the invalidity of Act Section 250.302 *et seq.* because there was no notice or hearing before the distraint. The effect of such a broad declaration could have been great as it could have applied to all tenants and all types of property. However, the Court of Appeals for the Third Circuit, in its only opinion on the constitutionality of the Pennsylvania Act, vacated the judgment of the district court.[45] The court was concerned with the fact that the issue was mooted by plaintiff's termination of her lease, the constitutional issue need not have been reached, the declaratory judgment would not end the controversy, the Commonwealth of Pennsylvania did not appear as a party, and the statute could be amended before another complaint challenging it were filed. The court thus ruled that declaratory relief was inappropriate considering the posture of the litigation.

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[44] 349 F. Supp. 1164 (E.D. Pa. 1972).

[45] Gross v. Fox, 496 F.2d 1153 (1974).

The reasons for the decision of the court of appeals decision are not clear. The court could have been showing the district courts that it does not agree with the theory that all distraint is unconstitutional. Or, it could have been delaying a review of the statute, perhaps till a clearer case came before it.

The Federal District Court for the Eastern District of Pennsylvania again held the Act unconstitutional on its face in *Stots v. Media Real Estate.*[46] The court relied heavily on the district court opinion in *Gross*, which was not vacated till after the opinion in *Stots*. Chief Judge Lord wrote in *Stots* that after *Gross*, presentation of evidence would be nothing but a "ritualistic time consumption." The court ordered that pursuant to *Gross* a declaratory judgment be entered declaring Section 250.302 *et seq.* unconstitutional. However, while *Stots* has not been overruled, it is of doubtful validity because of its heavy reliance on *Gross*, which has been vacated as discussed above.

Litton Business Systems, Inc. v. Paul L'Esperance, Inc.,[47] which is a recent case on the unconstitutionality of the Pennsylvania distraint statute, is also of questionable value since it relied strongly on *Stots*. The court in *Litton* cited and applied the holding of facial unconstitutionality of *Stots*. *Litton* held that the plaintiff corporation was entitled to the return of two copying machines which were seized in distress when the tenant to whom the machines were leased failed to pay rent. It should be noted that this case presented the special problem of a third party drawn into a dispute between a landlord and a tenant. Moreover, by relying on a flat declaration of facial unconstitutionality, the court avoided the examination of differences between residential and commercial tenants.

The most recent case in the federal district courts dealing with the constitutionality of distraint is *Ragin v. Schwartz.*[48] That case was brought as a class action with the plaintiff class being all the residents of Allegheny County who rent their residences and are thus potentially subject to distraint. The court granted the plaintiffs the injunctive relief they sought. The court did not distinguish between facial unconstitutionality and unconstitutionality as applied.

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[46] 355 F. Supp. 243 (E.D. Pa. 1973).

[47] Note 29 *supra.*

[48] Note 2 *supra.*

However, it seems that this judgment, while limited in geographical area, apparently reflected a belief by the district judge that the statute was unconstitutional on its face, and the opinion can be best understood when viewed in this manner.

Distraint Laws of Other States

Some mention must be made of decisions in other jurisdictions holding statutory distraint procedures to be facially unconstitutional. As in Pennsylvania, federal district courts have been active in this process while state courts have been relatively inactive. *Holt v. Brown* held that the Kentucky distraint statute was facially unconstitutional because it allowed for seizure and sale of property without notice or hearing.[49] The factual situation in *Holt* was not discussed in the court's opinion. The West Virginia distraint statute was also held invalid by a federal district court.[50]

The West Virginia Supreme Court found that state's distress statutes to be unconstitutional on its face, because there was no provision for notice and hearing, in *State ex rel. Payne v. Walden.*[51] The opinion, referred to previously, is of note for its thoroughness and clarity. The Georgia distraint statute was invalidated by that state's supreme court in *Blocker v. Blackburn.*[52]

Pennsylvania State Court Cases

As mentioned earlier, there are no Pennsylvania cases on the appellate level ruling on the constitutionality of the state's distraint statute. However, one recent case before the Commonwealth Court of Pennsylvania discussed the constitutionality of distraint, *Commonwealth v. Monumental Properties, Inc.*[53] *Monumental* dealt

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[49] 336 F. Supp. 2 (W.D. Ky. 1971).

[50] Shaffer v. Holbrook, 346 F. Supp. 762 (D.C. W. Va. 1972).

[51] 190 S.E.2d 770 (W. Va. 1972).

[52] 228 Ga. 285, 185 S.E.2d 56 (1971).

In related cases federal courts have declared landlord lien statutes, which allow the impressment of a lien on the tenant's personal property for allegedly unpaid rent without notice or hearing, to be unconstitutional. E.g., Dielen v. Levine, 344 F. Supp. 823 (D. Neb. 1972); Adams v. Joseph P. Sanson Inv. Co., 376 F. Supp. 61 (D. Nev. 1974); Barber v. Rader, 350 F. Supp. 183 (S.D. Fla. 1972); MacQueen v. Lambert, 348 F. Supp. 1334 (M.D. Fla. 1972); Hall v. Garson, 430 F.2d 430 (5th Cir. 1970).

[53] 10 Commonwealth Ct. at 596, 314 A.2d at 333.

with a suit under the Unfair Trade Practices and Consumer Protection Law[54] to enjoin alleged violations of the statute arising out of the use of "legal forms" in the leasing of property. The court said in reference to distraint that

> The landlord's right to distrain for rent was upheld by our appellate courts in the case of McAnniny v. Miller, 19 Pa. Super. 406 (1902). This case has not been overruled by any appellate court. Admittedly, there are Federal lower court decisions which have held that under certain sets of circumstances, the right to distrain may be unconstitutional. See Gross v. Fox, 349 F. Supp. 1164 (E.D. Pa. 1972); Musselman v. Spies, 343 F. Supp. 528 (M.D. Pa. 1972); Sellers v. Contino, 327 F. Supp. 230 (E.D. Pa. 1971) and Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970). As we read these Federal cases, however, we do not discern any firm holding that all clauses of distraint are unconstitutional.[55]

The Commonwealth Court went on to hold that leases are not within the Consumer Protection Law. This holding was overruled by the Pennsylvania Supreme Court,[56] which held that leases were within the scope of the statute and remanded the case to the Commonwealth Court to consider the validity of the leases under attack. No further disposition of the case is reported as of this writing.

It should be pointed out that *McAnniny v. Miller*,[57] which was cited by the Commonwealth Court, only briefly mentioned that a distress sale performed by a landlord was valid. *McAnniny* did not face the issue of constitutionality. Similarly, in *Mountcastle v. Schumann*, the court dealt with questions concerning the correct method of distraint under law.[58] Although the court at one point said that "the landlord's right to distrain has long been favored by the law . . .," [59] the problem of constitutionality was never considered.

Finally, there is one common pleas decision dealing with the constitutionality of the distraint provisions of the Pennsylvania Landlord and Tenant Act.[60] *Bank of Hanover* involved a challenge

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[54] Pa. Stat. Ann. tit. 73, § 201-1 *et seq.*

[55] 10 Commonwealth Ct. at 611-612, 314 A.2d at 370.

[56] 459 Pa. 450, 329 A.2d 812 (1974).

[57] 19 Pa. Super. 406 (1902).

[58] 205 Pa. Super. 21, 205 A.2d 642 (1965).

[59] *Id.* at 25, 205 A.2d at 644.

[60] Bank of Hanover & Trust Co. v. Oxford Wood Prods., Inc., 16 Adams L.J. 23 (1974).

by a tenant to a distraint made on his property. Initially, the landlord distrained the tenant's property but no sale was held. Approximately six months later, the landlord distrained again on the same property since his counsel felt that the first distraint might have been invalid because of the manner in which it was performed. The court held that the second distraint was invalid because an initial distraint can only be abandoned and a new proceeding instituted only where there was insufficient property to satisfy the first distress or where there was a mistake in the evaluation of the property. The court also cited the district court's holding of facial unconstitutionality in *Gross v. Fox*. Still, the court basically relied on the technical violations to invalidate the distraint and glossed over the constitutional question.

Conclusion

The status of the Pennsylvania distraint statute is not clear. There is no case in which the Pennsylvania appellate courts or the U.S. Court of Appeals for the Third Circuit squarely face the issue of the constitutionality of the Act. However, a strong case exists for declaring the distraint provisions of the statute to be invalid for all residential property because of the logic and weight of the modern decisions of the U.S. Supreme Court concerning the requirements of procedural due process. Moreover, after the Supreme Court's recent rejection of a distinction between consumer and commercial interests in reference to procedural due process in *North Georgia Finishing*, the precedent and reasoning exist to declare the Pennsylvania distraint statute to be unconstitutional in its entirety and for all groups of tenants.

OLD-AGE SECURITY

When prodded about providing low-cost housing, suburbs tend to point to developments that set aside a certain number of units for the elderly. Old people, as a rule, are not dangerous. They do not, as a rule, produce children. Peter Wolf, a New York planner who has often written about zoning problems, has suggested that if elderly couples realized how valuable they were to suburban planners, they might auction themselves off.

—*The New Yorker*
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