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Byron R. White
US Supreme Court Justice

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 13, 1976

MEMORANDUM TO THE CONFERENCE

Re: Case held for Carey v. Sugar -- No. 74-858
and Curtis v. Sugar -- No. 74-859

Maxwell v. Hixson -- No. 74-5887

This is an appeal from a three-judge court decision sustaining the constitutionality of a Tennessee pre-judgment wage-garnishment statute against a claim that it failed to provide for notice and a hearing prior to the garnishment. The statute permits wage garnishments, as a means of obtaining in rem jurisdiction where efforts to obtain in personam jurisdiction over a defendant fail. Garnishment is permitted for this purpose whenever the sheriff has made a return on the summons indicating that the defendant is "not to be found" in the county. The garnishment may be vacated only if (1) the defendant can show that the "not to be found" return was false; or (2) the defendant posts a bond. It may be that the garnishment is vacated if the defendant makes a general appearance in the lawsuit. Tenn. Code Ann. § 23-648 provides that if the defendant makes a general appearance the case proceeds as though begun by personal service. Perhaps the garnishment would thus disappear, since its only purpose was to secure jurisdiction. Neither state cases nor the opinion below shed any light on this question, however.

This case arose out of the garnishment of appellants' wages by plaintiffs with small claims against them after the sheriff attempted several times without success to serve process on appellants at their places of employment.

The attack on the statutes was cast, and is cast here, entirely in terms of their failure to provide for pre-garnishment notice and a hearing; and appellants relied on Fuentes v. Shevin, 407 U.S. 67, and Sniadach v. Family Finance Corp.,

395 U.S. 337. In upholding the statute against this attack, the court below relied on Ownbey v. Morgan, 256 U.S. 94, which sustained pre-judgment attachment for purposes of obtaining jurisdiction, and whose continuing authority was approved in Fuentes v. Shevin, supra. It also relied on Mitchell v. Grant, 416 U.S. 600. The decision seems inconsistent with that of another three-judge federal court in Reeves v. Motor Contract Company of Georgia, 324 F. Supp. 1011 (N.D. Ga. 1971), requiring pre-attachment notice and hearing.

Since our decision in Carey v. Sugar went off on abstention grounds, it sheds no light on the issues presented in this case. It seems to me, however, that it is difficult to give notice and a hearing to one who cannot be found in the county. Moreover, Mitchell v. Grant and Ownbey v. Morgan read together would seem to permit a state to dispense with a pre-garnishment hearing so long as a prompt opportunity to vacate it is afforded afterwards. Thus the only claim made below or here -- that a pre-garnishment notice and hearing were required -- was properly rejected. I will vote to affirm.

Sincerely,

Byron