DEBTOR AND CREDITOR—DUE PROCESS—SEQUESTRATION OF PROPERTY WITHOUT PRIOR NOTICE AND HEARING TO DEBTOR DOES NOT VIOLATE THE FOURTEENTH AMENDMENT—*Mitchell v. W. T. Grant Co.*, 94 S. Ct. 1895 (1974).

Lawrence Mitchell had purchased several major household appliances on an installment sales contract from the W. T. Grant Company. When Mitchell defaulted in his payments, Grant brought suit in the First City Court of New Orleans, alleging an unpaid balance overdue on the purchase price of the items and asking judgment in that amount. Mitchell was served in due course with notice of the action, directing him to plead or make appearance in the case.[1]

At the time of filing its complaint, Grant additionally alleged a vendor's lien on the merchandise[2] and petitioned that a writ of sequestration issue, directing that the property be seized and placed in the custody of the court to assure its preservation and availability pending final judgment.[3] By affidavit, Grant's credit manager affirmed the facts of the complaint and asserted that the company had reason to fear Mitchell would encumber or alienate the goods while the main proceedings were pending.[4] On the basis

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[1] Mitchell v. W. T. Grant Co., 94 S. Ct. 1895, 1897 (1974).

[2] *Id.* Although the United States Supreme Court utilizes the term "vendor's lien," it should be noted that the Louisiana law which enables a vendor to look to the goods sold in order to satisfy the debt thereon is instead denominated a "vendor's privilege." This privilege differs from the common law vendor's lien in that the lien is lost when the vendee takes possession of the article sold, while the privilege is enforceable as long as the vendee has possession. *See* Comment, *Vendor's Privilege*, 4 TULANE L. REV. 239, 243 & n.15 (1929). The privilege is also distinguishable from a vendor's lien as defined by Louisiana civil law which, like the common law lien, also attaches only to goods in the vendor's possession. *Id.* at 243.

A similarity appears to exist, however, between the vendor's privilege under Louisiana civil law and a vendor's rights in the collateral under a statutory purchase money security agreement. *Compare* LA. CIV. CODE ANN. art. 3227 (West 1952) *with* UNIFORM COMMERCIAL CODE § 9-107 & Comment 1 (1972 version). For a general discussion comparing the law of secured transactions under the Uniform Commercial Code to Louisiana law see Sachse, *Report to the Louisiana Law Institute on Article Nine of the Uniform Commercial Code* (pts. 1-2), 41 TULANE L. REV. 505, 785 (1967).

For clarity and consistency this Note will apply the Supreme Court's terminology and will utilize "vendor's lien" to denote "vendor's privilege" under Louisiana law.

[3] Mitchell v. W. T. Grant Co., 94 S. Ct. 1895, 1897 (1974). Sequestration is the procedural machinery by which the vendor's lien is protected and enforced. W. T. Grant Co. v. Mitchell, 263 La. 627, 638, 269 So. 2d 186, 190 (1972). *See generally* Johnson, *Attachment and Sequestration: Provisional Remedies Under the Louisiana Code of Civil Procedure*, 38 TULANE L. REV. 1 (1963).

[4] Mitchell v. W. T. Grant Co., 94 S. Ct. 1895, 1897 (1974). The procedure for issuing

of the petition and affidavit, the presiding judge ordered that the writ issue upon Grant furnishing a bond in a specified amount.[5] This done, the writ of sequestration issued immediately, and the sheriff executed it by confiscating the appliances from Mitchell.[6]

Subsequent to his dispossession, Mitchell moved to dissolve the sequestration writ. Stipulating that a vendor's lien in Grant's favor existed on the items, Mitchell nevertheless contended that by permitting the writ to issue ex parte and by allowing the seizure of his property without prior notice or hearing, the sequestration statutes violated the due process clause of the fourteenth amendment.[7] The trial court denied the motion, an appellate court refused review,[8] and the Supreme Court of Louisiana affirmed, specifically rejecting Mitchell's due process challenge.[9]

On certiorari[10] the United States Supreme Court affirmed, holding, in *Mitchell v. W. T. Grant Co.*, that "the Louisiana sequestration procedure [was] not invalid, either on its face or as applied."[11] The issue, as the Court perceived it, was whether due

writs of sequestration is governed by LA. CODE CIV. PRO. ANN. art. 3501 (West 1961), which provides in pertinent part:

> A writ of . . . sequestration shall issue only when the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts shown by the petition verified by, or by the separate affidavit of, the petitioner, his counsel or agent.

The grounds for sequestration are set forth in LA. CODE CIV. PRO. ANN. art. 3571 (West 1961) which provides:

> When one claims the ownership or right to possession of property, or a mortgage, lien, or privilege thereon, he may have the property seized under a writ of sequestration, if it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action.

[5] Mitchell v. W. T. Grant Co., 94 S. Ct. 1895, 1897 (1974). A bond to protect the vendee's interest is required by LA. CODE CIV. PRO. ANN. art. 3501 (West 1961), which mandates that

> [t]he applicant shall furnish security as required by law for the payment of the damages the defendant may sustain when the writ is obtained wrongfully.

[6] Mitchell v. W. T. Grant Co., 94 S. Ct. 1895, 1897 (1974). The sheriff's right of entry and the provisions controlling the execution of the writ are specified in LA. CODE CIV. PRO. ANN. arts. 325 (West 1960), 3504 (West 1961) respectively.

[7] Mitchell v. W. T. Grant Co., 94 S. Ct. 1895, 1897-98 (1974).

[8] *See* W. T. Grant Co. v. Mitchell, 263 La. 627, 632, 269 So. 2d 186, 187 (1972).

[9] *Id.* at 639-42, 269 So. 2d at 190-91. The court, quoting Fuentes v. Shevin, 407 U.S. 67, 93 (1972), suggested that no hearing prior to seizure was necessary where " 'a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods.' " 263 La. at 640, 269 So. 2d at 190. The court decided that the creditor had made such a showing in the case at hand. *Id.*

Additionally, the court reasoned that Mitchell's very act of buying created an irrefutable inference that he had consented to preservation of the vendor's lien and its attendant right to sequestration. *Id.* at 640-42, 269 So. 2d at 190-91.

[10] 411 U.S. 981 (1973).

[11] 94 S. Ct. 1895, 1899 (1974).

process demanded a hearing on the matter of possession before the disputed property could be taken.[12] In this respect, the Court emphasized at the outset that this was not a case where the sequestered goods belonged exclusively to the vendee-debtor.[13] By state law the vendor-creditor also had a property right in the same goods,[14] and therefore resolution of the due process question had to take into account the interests of buyer and seller alike.[15]

The Court began its analysis of these interests with the observation that Grant, with its vendor's lien to secure payment of the purchase price, had the right either to be paid according to the contract or to have possession of the goods in order to foreclose its lien and recover the unpaid balance of the debt.[16] It was desirable for Grant to repossess immediately for two reasons. First, once payments had ceased, Mitchell's continued use of the merchandise would have irreversibly eroded Grant's interest in the property as security.[17] Second, there was the continuing danger that Mitchell would transfer possession of the appliances, thereby extinguishing Grant's lien under state law.[18]

Acknowledging that under these circumstances Louisiana was entitled to protect the creditor-vendor, the Court recounted the steps of the procedure. Grant had produced documents and had sworn to facts which under the sales contract would have entitled

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[12] *Id.* at 1900.

[13] *Id.* at 1898. LA. CODE CIV. PRO. ANN. art. 2373 (West 1961) dictates the procedure for disposing of the proceeds following a foreclosure sale:

> After deducting the costs, the sheriff shall first pay the amount due the seizing creditor, then the inferior mortgages, liens, and privileges on the property sold, and shall pay to the debtor whatever surplus may remain.

Mitchell's interest in the property was therefore no greater than the potential surplus. 94 S. Ct. at 1898.

[14] Grant's interest was equal to the amount of the debt outstanding. 94 S. Ct. at 1898.

[15] *Id.* This perception of the concept of due process appears to stand in sharp contrast to the view expressed by the Court in Fuentes v. Shevin, 407 U.S. 67, 90 n.22 (1972), wherein it was stated that

> [p]rocedural due process is not intended to . . . accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken.

[16] 94 S. Ct. at 1900.

[17] *Id.* The Court explains that an installment seller can fairly anticipate that the goods in the hands of the buyer will depreciate in resale value over any given period of time, but that "he is normally protected because the buyer's installment payments keep pace with the deterioration in value of the security." *Id.* Cessation of payments therefore jeopardizes the seller's protection from value depreciation.

[18] *Id.* at 1901. LA. CIV. CODE ANN. art. 3227 (West 1952) reads in pertinent part:

> He who has sold to another any movable property which is not paid for, has a preference on the price of his property, over the other creditors of the purchaser, whether the sale was made on a credit or without, if the property still remains in the possession of the purchaser.

the company to immediate possession of the goods.[19] The factual demonstration in this case had been made to a judge,[20] and security had been furnished in an amount sufficient to insure that Mitchell would have been reimbursed for any damages or expenses had the sequestration later proven unjustified.[21]

As for Mitchell, the Court noted that a full and immediate post-seizure hearing on possession had been available to him,[22] as well as a procedure for securing release of the goods by posting his own counterbond.[23] Mitchell had posted no such bond to protect Grant's security in the event Mitchell's interim possession was held to be wrongful at a later adjudication.[24] The Court therefore determined that the jeopardy to Grant's interest in the goods outweighed any hardship to Mitchell occasioned by the temporary loss of his household items.[25]

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[19] 94 S. Ct. at 1900.

[20] *Id.* at 1897. Under Louisiana law writs of sequestration generally can be issued by court clerks. LA. CODE CIV. PRO. ANN. arts. 282, 283 (West 1960). Under the provision of LA. CODE CIV. PRO. ANN. art. 281 (West 1960), however, the authority to issue writs of sequestration in the parish of Orleans is restricted to a judge, and it was in this jurisdiction that Grant brought its action. 94 S. Ct. at 1899 & n.5.

[21] 94 S. Ct. at 1899 & n.6. LA. CODE CIV. PRO. ANN. art. 3506 (West 1961) provides in pertinent part:

> The court may allow damages for the wrongful issuance of a writ of . . . sequestration on a motion to dissolve, or on a reconventional demand. Attorney's fees for the services rendered in connection with the dissolution of the writ may be included as an element of damages whether the writ is dissolved on motion or after trial on the merits.

[22] 94 S. Ct. at 1901. The provisions for a post-seizure inquiry are set forth in LA. CODE CIV. PRO. ANN. art. 3506 (West 1961), which reads in relevant part:

> The defendant by contradictory motion may obtain the dissolution of a writ of . . . sequestration, unless the plaintiff proves the grounds upon which the writ was issued. If the writ of . . . sequestration is dissolved, the action shall then proceed as if no writ had been issued.

Although the language of this article would appear to permit a vendee-debtor to move to dissolve the writ at any time after its issuance, this provision must be read in conjunction with LA. CODE CIV. PRO. ANN. arts. 3501 (West 1961) and 321 (West 1960), which together contemplate immediate execution of the writ by the sheriff. *See* note 4 *supra*. It appears then that article 3506 would in practice come into play only after seizure has been effected.

[23] 94 S. Ct. at 1900. Under LA. CODE CIV. PRO. ANN. art. 3507 (West 1961), the amount of security required of the vendee must be sufficient to satisfy any potential adverse judgment.

[24] 94 S. Ct. at 1900.

[25] *Id.* at 1901. The Court injected the observation at this point that Mitchell's basic source of income was unaffected by the temporary deprivation of his household appliances. *Id.* This comment might be construed merely as a makeweight for the decision or as an attempt to reconcile the holding in *Mitchell* with the Court's prior opinion in Sniadach v. Family Finance Corp., 395 U.S. 337, 342 (1969), in which it was held that a prejudgment garnishment of wages could not constitutionally be carried out without prior notice or hearing. *See* notes 45-57 *infra* and accompanying text. In another context this remark might be interpreted as a suggestion that in cases involving property which is directly used in the

Reviewing and summarizing the salient features of the Louisiana sequestration scheme, the Court found that the system itself tended to minimize the risk of a wrongful repossession.[26] According to the Court's analysis, the hardship to the debtor was restricted; the seller had a substantial interest; the proceedings were supervised judicially, and the successful party was insulated from any loss.[27] Therefore, it was the opinion of the Court that, notwithstanding the absence of prior notice and a hearing, the sequestration procedure "effect[ed] a constitutional accommodation of the conflicting interests" of buyer and seller[28] and worked no denial of procedural due process to the debtor.[29]

Mitchell was not the first case in which a summary taking of property came under due process attack before the Supreme Court. In several previous instances the Court had upheld the outright seizure of goods without prior notice or hearing, on the theory cogently expressed by Justice Brandeis, writing for the Court in *Phillips v. Commissioner,*[30] that

> [w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate.[31]

Illustrative of this principle is *Ewing v. Mytinger & Casselberry, Inc.*[32] The *Ewing* Court was confronted with a challenge to a statute which permitted seizure of misbranded articles in commerce, where an administrative official had reason to believe, from facts found without a hearing, that such products would be dangerous or misleading to the public.[33] A distributor, whose allegedly mislabeled vitamins had been so seized, protested that this was a taking of property without due process of law.[34] The Court, however,

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pursuit of a livelihood, due process requirements would be more stringent. *See* note 98 *infra* and accompanying text.

[26] 94 S. Ct. at 1905.

[27] *Id.* at 1906.

[28] *Id.* at 1900.

[29] *Id.* at 1906.

[30] 283 U.S. 589 (1931). The Court disposed of the challenge to a procedure allowing for the summary assessment of delinquent taxes against a stockholder of a dissolved corporation on the basis of the earlier cases of Springer v. United States, 102 U.S. 586 (1880), and Scottish Union & Nat'l Ins. Co. v. Bowland, 196 U.S. 611 (1905). 283 U.S. at 597.

[31] 283 U.S. at 596-97.

[32] 339 U.S. 594 (1950). *See also* North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908).

[33] 339 U.S. at 595-96.

[34] *Id.* at 596-98. It was also urged that the seizures might have caused irreparable

sustained the ex parte procedure, stating that for due process purposes it was sufficient that at some point the opportunity for judicial determination was provided.[35]

Similarly, the Court in *Ownbey v. Morgan*[36] had upheld a prejudgment attachment of property effected by a creditor without prior notice or hearing to the debtor.[37] Seven years later in *Coffin Brothers & Co. v. Bennett,*[38] the Court reaffirmed this position, Justice Holmes, speaking for a unanimous Court, observing that

> nothing is more common than to allow parties alleging themselves to be creditors to establish in advance by attachment a lien dependent for its effect upon the result of the suit.[39]

In *McKay v. McInnes,*[40] the Court was called upon to review a Maine statute which permitted a nonresident creditor, suing in a Maine court, to summarily attach the property of a state resident in

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damage to the distributor's business. *Id.* at 599. Acknowledging that this could indeed happen, the Court nevertheless responded:

> The impact of the initiation of judicial proceedings is often serious. Take the case of the grand jury. It returns an indictment against a man without a hearing. It does not determine his guilt; it only determines whether there is probable cause to believe he is guilty. But that determination is conclusive on the issue of probable cause. . . . The harm to property and business can also be incalculable by the mere institution of proceedings. Yet it has never been held that the hand of government must be stayed until the courts have an opportunity to determine whether the government is justified in instituting suit in the courts.

Id. (citations omitted).

[35] *Id.* at 599.

[36] 256 U.S. 94 (1921).

[37] *Id.* at 111. *Ownbey* involved a challenge to a Delaware statute which provided that a nonresident, whose property within the state had been attached in the initiation of a quasi in rem proceeding, would be denied the right to appear and defend unless he first posted security equal to the value of the property attached. *Id.* at 98-100. The Court stated:

> A procedure customarily employed, long before the Revolution, in the commercial metropolis of England, and generally adopted by the States as suited to their circumstances and needs, cannot be deemed inconsistent with due process of law, even if it be taken with its ancient incident of requiring security from a defendant who after seizure of his property comes within the jurisdiction and seeks to interpose a defense.

Id. at 111. For a discussion of this case see Black, *Ownbey v. Morgan—A Judicial Milepost on the Road to Absolutism,* 23 KY. L.J. 69 (1934). *See generally* Carrington, *The Modern Utility of Quasi In Rem Jurisdiction,* 76 HARV. L. REV. 303 (1962); Comment, *Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness,* 69 MICH. L. REV. 300 (1970).

[38] 277 U.S. 29 (1928).

[39] *Id.* at 31. At issue in *Coffin* was a Georgia statute which permitted the Superintendent of Banks to summarily attach all property belonging to stockholders of a defunct bank, where the stockholders had neglected to pay an assessment. *Id.* at 30. The Court sustained the procedure, stating:

> The fact that the execution is issued in the first instance by an agent of the State but not from a Court, followed as it is by personal notice and a right to take the case into court, is a familiar method in Georgia and is open to no objection.

Id. at 31.

[40] 279 U.S. 820 (1929).

advance of judgment.[41] In sustaining the constitutionality of the procedure, the Supreme Judicial Court of Maine had reasoned that because attachment was conditional, temporary and part of the legal remedy by which a debtor's property is taken to satisfy a judgment, it was not the "deprivation of property" envisioned by the United States Constitution.[42] Even if it were, the court continued, it would not be a deprivation "without due process of law" because the procedure provided notice and an opportunity for a hearing before final disposition of the property.[43] The United States Supreme Court affirmed the decision without opinion, merely citing *Ownbey* and *Coffin* as determinative.[44]

The first case to question these principles was *Sniadach v. Family Finance Corp.*[45] At issue in *Sniadach* was a Wisconsin garnishment statute[46] which permitted a creditor, suing on a promissory note, to "freeze" by court directive one-half the wages due an employee,[47] so that the money would be available to satisfy a potential judgment.[48] The procedure was available on the creditor's ex parte application, and the garnishment took place without either prior notice to the wage earner or the opportunity to be heard.[49]

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[41] Since the Court rendered a per curiam decision, the underlying facts of this case must be gleaned from the state court decision. McInnes v. McKay, 127 Me. 110, 112-13, 141 A. 699, 701 (1928).

[42] *Id.* at 116, 141 A. at 702.

[43] *Id.*, 141 A. at 702-03.

[44] 279 U.S. at 820.

[45] 395 U.S. 337 (1969). For an overview of *Sniadach* see Comment, *The Constitutional Validity of Attachment in Light of Sniadach v. Family Finance Corp.*, 17 U.C.L.A.L. REV. 837 (1970); Note, *Some Implications of Sniadach*, 70 COLUM. L. REV. 942 (1970); Note, *Garnishment of Wages Prior to Judgment Is a Denial of Due Process: The Sniadach Case and Its Implications for Related Areas of the Law*, 68 MICH. L. REV. 986 (1970); Note, *Sniadach v. Family Finance Corp.—The Death Knell of Prejudgment Wage Garnishment*, 16 N.Y.L.F. 263 (1970).

[46] WIS. STAT. ANN. § 267.01 *et seq.* (1965). Garnishment denotes a statutory proceeding by which a debt owed by a third person to the defendant is made subject to the plaintiff's claims. "Garnishment," BLACK'S LAW DICTIONARY 810 (4th rev. ed. 1968). For due process purposes, this procedure has been deemed analogous to the attachment of tangible property and is governed by the same legal principles. *See* Harris v. Balk, 198 U.S. 215, 222 (1905); *cf.* Pennoyer v. Neff, 95 U.S. 714, 734 (1877). *See generally* Beale, *The Exercise of Jurisdiction In Rem to Compel Payment of a Debt*, 27 HARV. L. REV. 107 (1913); Carpenter, *Jurisdiction over Debts for the Purpose of Administration, Garnishment, and Taxation*, 31 HARV. L. REV. 905 (1918); Riesenfeld, *Creditors' Remedies and the Conflict of Laws—Part One: Individual Collection of Claims*, 60 COLUM. L. REV. 659 (1960).

It should be noted that at present federal legislation regulates and restricts the percentage of wages available for garnishment. 15 U.S.C. § 1671 *et seq.* (1970).

[47] 395 U.S. at 337-39.

[48] *See* note 46 *supra.*

[49] 395 U.S. at 338-39. In practice the attorney for the plaintiff would obtain a summons

The Supreme Court stated that such summary procedure might meet the demands of due process in exceptional situations necessitating special protection of a state or creditor interest.[50] However, no such situation was perceived in the facts of the case. Moreover, the Wisconsin statute was not narrowly drawn to accommodate this type of unusual circumstance.[51] Acknowledging *McKay,* the Court reasoned that a rule which might comport with procedural due process for attachments generally would not necessarily do so in every case, nor protect all types of property in contemporary society.[52]

The Court emphasized that it was dealing with wage garnishment, a procedure particularly susceptible to abuse by creditors with questionable claims who would have tremendous leverage in any settlement negotiations with a debtor whose family had been "driven to the wall" by the immobilization of his wages.[53] Therefore, in spite of the long history of the remedy,[54] prejudgment

from a court clerk. The attorney would then personally serve the garnishee (employer) and the defendant respectively. *Id.*

[50] *Id.* at 339. The *Sniadach* Court cited Fahey v. Mallonee, 332 U.S. 245, 253-54 (1947) (summary appointment of conservator for bank accused of unlawful and injurious practices), *Ewing, Ownbey,* and *Coffin* as examples of cases where extraordinary situations justified the summary action taken. 395 U.S. at 339. *See* notes 32-39 *supra* and accompanying text.

[51] 395 U.S. at 339. The Court noted that in personam jurisdiction could easily have been obtained over the wage earner, who resided in Wisconsin. *Id.*

[52] *Id.* at 340.

[53] *Id.* at 340-42. This danger was well illustrated by the Court:

> "The debtor whose wages are tied up by a writ of garnishment, and who is usually in need of money, is in no position to resist demands for collection fees. If the debt is small, the debtor will be under considerable pressure to pay the debt and collection charges in order to get his wages back. If the debt is large, he will often sign a new contract of 'payment schedule' which incorporates these additional charges."

Id. at 341 (footnote omitted) (quoting Note, *Wage Garnishment in Washington—An Empirical Study,* 43 WASH. L. REV. 743, 753 (1968)). Further, the Court found "the statutory exemption granted the wage earner is 'generally insufficient to support the debtor for any one week.' " 395 U.S. at 341 (footnotes omitted) (quoting Note, *Wage Garnishment as a Collection Device,* 1967 WIS. L. REV. 759, 767).

The Court appeared to be satisfied that the mere potential for such untoward consequences rendered the procedure unconstitutional, for the Supreme Court of Wisconsin in sustaining the statute specifically found neither abuse of the process, nor undue hardship worked upon the defendant in the case. Family Finance Corp. v. Sniadach, 37 Wis. 2d 163, 166-68, 174, 154 N.W.2d 259, 261-62, 265 (1967).

[54] This argument was dismissed peremptorily: "The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection . . . ." 395 U.S. at 340. *But see id.* at 349 (Black, J., dissenting), where the Justice quotes Justice Holmes in Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922):

> "The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it . . . ."

garnishment of the Wisconsin type, which made no provision for prior notice and a hearing, was held to violate basic principles of due process.[55]

The concurring opinion made it clear that the "property" of which the wage earner was deprived was the use of the frozen portion of the fund during the interval between garnishment and the conclusion of the main suit.[56] Since this deprivation was seen as more than de minimis, it was asserted that due process requires notice and hearing designed to establish at least the probable merit of the primary claim against the debtor before any taking of property or interference with property rights could occur.[57]

Sniadach clearly sounded the tocsin for a variety of summary creditor remedies which were available ex parte and which failed to afford debtors prior notice or a hearing.[58] But it was unclear how far the rationale of *Sniadach* was to be carried, for the case dealt with property that was both special and necessary, and in which the

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[55] 395 U.S. at 342.

[56] *Id.* (Harlan, J., concurring).

[57] *Id.* at 342-43.

[58] Following *Sniadach* such remedies were subjected to due process challenges throughout the country, with differing results. Many courts read the case as a broad attack on the constitutionality of all summary remedies and consequently struck down similar ex parte procedures. *See, e.g.*, Hall v. Garson, 468 F.2d 845 (5th Cir. 1972) (summary seizure of portable television in enforcement of landlord's lien); Schneider v. Margossian, 349 F. Supp. 741 (D. Mass. 1972) (summary garnishment by trustee process procedure); Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972), *rev'd sub nom.* Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 43 U.S.L.W. 3281 (U.S. Nov. 11, 1974) 'nonjudicial repossession); Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970) (distress sale of tenant's goods by landlord); Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970) (prejudgment statutory replevin); Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970) (innkeeper's lien enforceable by summary seizure); Randone v. Appellate Dep't, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), *cert. denied*, 407 U.S. 924 (1972) (prejudgment attachment of bank account); Blair v. Pitchess, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971) (prejudgment claim and delivery); Jones Press, Inc. v. Motor Travel Serv., Inc., 286 Minn. 205, 176 N.W.2d 87 (1970) (prejudgment garnishment of accounts receivable); Larson v. Fetherston, 44 Wis. 2d 712, 172 N.W.2d 20 (1969) (prejudgment garnishment of commercial bank account).

Other courts interpreted *Sniadach* to be narrowly confined to its facts and upheld related summary procedures where the property at issue was other than wages. *See, e.g.*, Lebowitz v. Forbes Leasing & Fin. Corp., 456 F.2d 979 (3d Cir.), *cert. denied*, 409 U.S. 843 (1972) (foreign attachment); Brunswick Corp. v. J & P, Inc., 424 F.2d 100 (10th Cir. 1970) (statutory replevin); Black Watch Farms, Inc. v. Dick, 323 F. Supp. 100 (D. Conn. 1971) (attachment of real estate); American Olean Tile Co. v. Zimmerman, 317 F. Supp. 150 (D. Hawaii 1970) (garnishment of bank accounts and accounts receivable); Young v. Ridley, 309 F. Supp. 1308 (D.D.C. 1970) (mortgage foreclosure); Termplan Inc. v. Superior Court, 105 Ariz. 270, 463 P.2d 68 (1969) (attachment and garnishment of property other than wages); 300 W. 154th St. Realty Co. v. Department of Bldgs., 26 N.Y.2d 538, 260 N.E.2d 534, 311 N.Y.S.2d 899 (1970) (administrative procedure authorizing use of tenants' rent to abate nuisance without notice or hearing to landlord).

suing creditor had no previous interest.[59] In particular, *Sniadach* did not purport to be controlling in the typical case where an installment seller instituted an action for an unpaid balance and sought to repossess the sold merchandise on which a lien to secure payment had been retained. Such a case came before the Supreme Court in *Fuentes v. Shevin,*[60] the holding of which was the "mainstay" of the debtor's due process attack in *Mitchell.*[61]

The appellants in *Fuentes* were purchasers on conditional sales contracts,[62] whose goods had been repossessed by their creditors upon default of payment, pursuant to the replevin laws of Florida and Pennsylvania.[63] Both statutes allowed for the ex parte seizure of property, without prior notice or hearing, upon the creditor furnishing security keyed to the value of the items repossessed.[64] The seizures were to be effected by state officials,[65] and the debtors were permitted to secure release of the goods by posting their own bond.[66]

While a creditor could, under the Florida statute, obtain the replevin writ from a court clerk by merely asserting in the com-

[59] In this respect subsequent Supreme Court cases dealing with the notice and hearing requirements of procedural due process seem to provide scant additional guidance in the context of summary repossession by private creditors. In Goldberg v. Kelly, 397 U.S. 254 (1970), the Court held that welfare benefits could not be terminated without first affording the recipient a full evidentiary hearing concerning eligibility. *Id.* at 270-71. In Bell v. Burson, 402 U.S. 535 (1971), it was held that the exclusion of questions of liability in connection with a car accident rendered a hearing prior to suspension of an uninsured motorist's license violative of due process. *Id.* at 542-43. Thus, in both cases it was a governmental interest competing against a private one, with the property at issue being a statutory entitlement. *See also* Boddie v. Connecticut, 401 U.S. 371 (1971); Wisconsin v. Constantineau, 400 U.S. 433 (1971).

[60] 407 U.S. 67 (1972). For general discussions of this case see Abbott & Peters, *Fuentes v. Shevin: A Narrative of Federal Test Litigation in the Legal Services Program,* 57 IOWA L. REV. 955 (1972); Gardner, *Fuentes v. Shevin: The New York Creditor and Replevin,* 22 BUFFALO L. REV. 17 (1972); Note, *Right to Hearing Before Taking of Property,* 86 HARV. L. REV. 85 (1972).

[61] 94 S. Ct. at 1904.

[62] 407 U.S. at 70-71. This was not true of appellant Rosa Washington, whose child's clothes, furniture, and toys had been repossessed on a writ of replevin obtained by her ex-husband, a deputy sheriff who was familiar with the procedure. *Id.* at 72.

[63] *Id.* at 70-72. *See* FLA. STAT. ANN. § 78.01 *et seq.* (1967), *as amended,* FLA. STAT. ANN. § 78.01 et seq. (Supp. 1974); PA. STAT. ANN. tit. 12, § 1073(a) *et seq.* (1967).

[64] 407 U.S. at 69-70, 73 n.6, 75 n.7.

[65] *Id.* at 69. The argument that such provisions authorize "unreasonable searches and seizures" and so violate the fourth amendment is discussed in Comment, *Laprease and Fuentes: Replevin Reconsidered,* 71 COLUM. L. REV. 886, 898-901 (1971). The fourth amendment issue was raised by appellants in *Fuentes,* but not decided by the Court. *Compare* 407 U.S. at 71 n.2 *with id.* at 96 n.32.

[66] 407 U.S. at 75, 78. For a discussion of how such provisions may violate the equal protection clause by discriminating against persons of low income see Comment, *supra* note 65, at 901-03.

plaint his entitlement to the property, the requisite filing of the complaint assured an ultimate post-seizure adjudication of the issues.[67] To obtain the writ in Pennsylvania, however, a creditor had only to file an affidavit as to the value of the property in dispute. There was no requirement that a complaint be made; thus, unless the dispossessed debtor initiated an action, there might never have been a hearing on the merits.[68]

The Court found that the right to be heard was basic to a process that acted to confiscate a person's possessions.[69] To have full effect in preventing unfair or mistaken deprivations, the notice and hearing had to be supplied before any property was taken,[70] especially where the procedural safeguards already provided to the debtors appeared insufficient to deter or weed out unjustified claims for repossession.[71]

Earlier cases permitting postponements of a hearing were distinguished as "extraordinary situations" involving a substantial governmental or general public interest,[72] and the mere "private gain" directly at issue in the normal creditor-debtor circumstance

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[67] 407 U.S. at 74-75.

[68] *Id.* at 75-78. Compare the procedures prescribed by the Florida and Pennsylvania replevin statutes to the procedure authorized by the Louisiana sequestration law. *See* notes 19-23 *supra* and accompanying text.

[69] 407 U.S. at 80. The Court had earlier disposed of an historical argument advanced on behalf of replevin by pointing out that the modern statutory replevin procedures under consideration bore little actual resemblance to their common law ancestor. *Id.* at 78-80 & n.10. *See* note 54 *supra* and accompanying text.

Although functionally similar to statutory replevin, the sequestration scheme at issue in *Mitchell* was not at all a product of the common law, having its roots instead in the law of Rome, as it was later developed in France and Spain. Millar, *Judicial Sequestration in Louisiana: Some Account of its Sources*, 30 TULANE L. REV. 201, 227 (1956).

[70] 407 U.S. at 81. The Court observed that

> [a]t a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking . . . has already occurred.

Id. at 81-82.

[71] *Id.* at 83-84.

[72] *Id.* at 90-92. The cases were further distinguished on the basis of a need for expeditious action and the fact that each involved a governmental official who operated under a restrictively drawn statute. *Id.* at 91.

Echoing *Sniadach*, the Court distinguished the seizure cases, including *Ewing*, and the attachment cases *Ownbey* and *Coffin*, on the basis of some overriding governmental or public interest it found to be present in each. *McKay* defied similar characterization, but the *Fuentes* Court asserted that the unexplained per curiam decision could stand for no more than was established by *Ownbey* and *Coffin*, upon which *McKay* relied completely. *Id.* at 90-92 & nn.22-28; *see* note 50 *supra* and accompanying text.

The *Mitchell* Court did not appear to perceive any such distinction, finding *McKay* to state the general rule and *Sniadach* the exception. 94 S. Ct. at 1902-04.

was deemed insufficient to justify delay.[73] Having found that a non-final seizure was nonetheless a "deprivation"[74] and that a possessory interest in ordinary household goods was "property" within the meaning of the fourteenth amendment,[75] the Court rejected a purported contractual waiver of due process rights as not sufficiently clear[76] and held that in the context of these cases a state, acting on behalf of a creditor, could constitutionally seize property pending final judgment only when a creditor had tested his claim at a "fair prior hearing."[77]

The dissent criticized the *Fuentes* majority for failing to consider fully the creditor's interest in the property repossessed, an "interest as deserving of protection as that of the debtor."[78] The Court's prior hearing rule was characterized as mere "ideological tinkering with state law"[79] because creditors appeared able to circumvent the mandate by use of a more artfully drawn waiver provision[80] or by resort to self-help repossession.[81] Alternatively, it

[73] 407 U.S. at 92. It was asserted that

> [t]he replevin of chattels, as in the present cases, may satisfy a debt or settle a score. But state intervention in a private dispute hardly compares to state action furthering a war effort or protecting the public health.

Id. at 92-93.

The concurrence in *Mitchell* suggested that there was an interest in summary repossession greater than that of the creditor alone, namely a governmental interest in providing "a reasonable and fair framework of rules which facilitate commercial transactions on a credit basis." 94 S. Ct. at 1908 (Powell, J., concurring).

[74] 407 U.S. at 84-85. *See* text accompanying note 56 *supra*. The Court found that the provisions permitting the debtors to recover their goods by posting a bond merely exchanged one deprivation for another. 407 U.S. at 85.

[75] 407 U.S. at 86-87, 89-90. It should be emphasized that this involved two distinct findings: (1) the Constitution protects more than absolute ownership and (2) "property" means any property and not merely a necessity. *Id.*

[76] *Id.* at 95. The contracts provided that upon default the seller could "take back," "retake," or "repossess" the merchandise; no waiver of a prior hearing was specified. *Id.* at 95-96. The Court distinguished the cognovit clause upheld in D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972), where the waiver of due process rights was clear, understood, and bargained for by commercial parties of equal strength. 407 U.S. at 95. For a discussion of cognovit clauses see Hopson, *Cognovit Judgments: An Ignored Problem of Due Process and Full Faith and Credit*, 29 U. CHI. L. REV. 111 (1961).

[77] 407 U.S. at 96.

[78] *Id.* at 102 (White, J., dissenting). Some clue as to the importance of this protection is supplied by UNIFORM COMMERCIAL CODE § 9-501, Comment 1 (1972 version), which reads in part:

> The rights of the secured party in the collateral after the debtor's default *are of the essence of a security transaction.* These are the rights which distinguish the secured from the unsecured lender.

(Emphasis added).

[79] 407 U.S. at 102 (White, J., dissenting).

[80] *Id.* That this could in fact be done was not altogether as clear as the Justice had implied. While D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972), sustained a cognovit clause between merchants, the Court there had observed that

was asserted that creditors could prevail at prior hearings merely by establishing probable cause for claiming default, and therefore that the hearings would provide little extra protection for debtors, while such a requirement could possibly render credit more expensive or less readily available.[82]

Against this background, *Mitchell* substantially modifies and limits the holding of *Fuentes*. The teaching of *Mitchell* is that the absence of prior notice and hearing is not the talisman, but merely a factor to be considered along with other procedural elements in determining whether a state-effected taking of property is constitutional.[83] The *Mitchell* Court significantly adjudged that when the procedure is fair in other respects, the interest of a private creditor in summary repossession will outweigh the debtor's interest in having his possession undisturbed until afforded notice and a hearing.[84]

Mitchell thus demonstrates that, at least in the secured creditor-debtor context, the broad ex parte remedy still has vitality, and so much of *Fuentes* as established a "Procrustean rule of a prior adversary hearing" has been clearly rescinded.[85] That rule will

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> where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the [waiver] provision, other legal consequences may ensue.

Id. at 188. Since installment sales contracts are almost always adhesive in nature, it had been suggested that the issues raised by any purported waiver would have themselves necessitated a prior hearing. Note, *The Prior Hearing Rule and the Demise of Ex Parte Remedies*, 53 B.U.L. REV. 41, 59-60 (1973); *cf.* Osmond v. Spence, 359 F. Supp. 124 (D. Del. 1972). *See generally* Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Shuchman, *Consumer Credit by Adhesion Contracts* (pts. 1-2), 35 TEMPLE L.Q. 125, 281 (1962); Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971).

[81] 407 U.S. at 102 (White, J., dissenting). Nonjudicial repossession is not only a contractual remedy, as the Justice here suggested, but is authorized by UNIFORM COMMERCIAL CODE § 9-503 (1972 version), which reads in part:

> Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action.

For decisions holding that this and other private creditor remedies are outside the purview of the fourteenth amendment owing to the absence of "state action" see note 99 *infra*.

[82] 407 U.S. at 102-03 (White, J., dissenting). A similar argument was made by Justice Black in Goldberg v. Kelly, 397 U.S. 254, 279 (1970), where the Justice in his dissent suggested that the increased burden placed upon the welfare agencies by the Court's requiring full pretermination hearings would ultimately result in longer investigations of eligibility, to the detriment of potential recipients.

[83] 94 S. Ct. at 1901.

[84] *Id.* This view differs markedly from the position taken by the Court in *Fuentes*. *See* note 15 *supra*.

[85] 94 S. Ct. at 1908, 1910 (Powell, J., concurring).

presumably give way to the kind of flexible interest-balancing that was characteristic of due process considerations in the past.[86]

The Court in *Mitchell* was ultimately able to distinguish *Fuentes* because the statutes under consideration in the latter case were deficient not only in their failure to provide pre-seizure notice and a hearing but also in other respects. Those "arbitrary and unreasonable provisions"[87] stood in sharp contrast to the Louisiana sequestration procedure, which was available to claimants on narrowly defined grounds particularly amenable to ex parte documentary proof and which provided for judicial supervision throughout.[88] The Court reasoned that in such a case, *i.e.*, where the ex parte process itself tended to minimize the risk of a wrongful repossession, the efficacy of an adversary hearing on possession would be diminished, and in this case a hearing was available in any event immediately after seizure.[89]

The *Mitchell* dissent, however, was less than persuaded by these arguments, finding the case "constitutionally indistinguishable" from *Fuentes* and representing no more than the triumph of the analysis in the *Fuentes* dissent, made possible by a change in membership on the Court.[90] It was asserted that the procedural differences between the Louisiana sequestration scheme and the replevin statutes at issue in *Fuentes* were matters of form rather than substance, insufficient to justify the result in *Mitchell*.[91] For the

[86] *See, e.g.*, Arnett v. Kennedy, 94 S. Ct. 1633, 1643 (1974) (governmental interest in controlling its labor force balanced against federal worker's interest in continued employment); Goldberg v. Kelly, 397 U.S. 254, 265-66 (1970) (governmental interest in conserving fiscal resources balanced against consequences to eligible recipient of wrongful welfare termination); Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886, 895-96 (1961) (security of military base balanced against civilian employee's right to further employment); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 173 (1951) (Frankfurter, J., concurring) (national security interest balanced against injuries caused to individuals by summary inclusion on subversive list).

[87] 94 S. Ct. at 1908 (Powell, J., concurring).

[88] *Id.* at 1904-05.

[89] *Id.* at 1905. The Court distinguished the repossessions in *Fuentes* as having been premised on wrongful detention, a "broad 'fault' standard . . . inherently subject to factual determination and adversarial input." *Id.*

[90] *Id.* at 1913-14 (Stewart, J., dissenting). Although Justices Powell and Rehnquist were members of the Court when *Fuentes* was decided, they had not been members when the case was argued and therefore took no part in its consideration or decision. These Justices combined with the dissent in *Fuentes* to constitute the majority in *Mitchell*. *Compare id.* at 1895 *with* 407 U.S. at 97.

[91] 94 S. Ct. at 1912-13 (Stewart, J., dissenting). The dissent argued that the factual showing required for issuance of the writ meant little more than providing enough information on the appropriate documents so that a judge could find them formally sufficient, thus rendering the subsequent issuance of the writ a mere ministerial act. These procedural safeguards were found to be no replacement for a prior hearing. *Id.* at 1912.

dissent, the absence of prior notice and hearing were still at the heart of the case and were constitutional necessities for the reasons advanced in *Fuentes*.[92]

Following *Mitchell*, it would appear that due process challenges of a summary ex parte remedy will have to be directed against the procedure in its entirety. *Mitchell* indicates that such elements as the grounds for obtaining the remedy,[93] the type of showing required,[94] judicial presence[95] and the celerity with which a seizure may be challenged by the debtor after it has been effected,[96] all influence the determination of constitutionality, though none alone would appear to be decisive.[97] Also to be considered are the degree of hardship worked upon the debtor and the nature of the property seized.[98] As to the relative weights to be accorded each, the Court provides only general guidance, and a largely case-by-case consideration is invited, with the sequestration procedure in *Mitchell* and the replevin statutes in *Fuentes* standing as examples of what will and will not pass constitutional muster.

Viewed in perspective, *Mitchell* appears both fair and practical, especially while self-help repossession still looms as a viable alternative to creditors in most jurisdictions.[99] Still, one aspect of the case

[92] *Id.* at 1911-12 (Stewart, J., dissenting). So important was this prior hearing issue that, even though the majority had taken pains to distinguish the earlier case, the dissent maintained that *Mitchell* had "unmistakably overruled" *Fuentes*. *Id.* at 1913.

[93] *Id.* at 1905.

[94] *Id.* at 1904.

[95] *Id.* at 1904-05. The majority in *Mitchell* asserted that the case would not abruptly turn the tide of post-*Fuentes* cases because in most of those cases judicial supervision was not absolutely required, thereby implying that they were distinguishable from *Mitchell* on that ground. *Id.* at 1906 n.14. *See, e.g.*, Turner v. Colonial Finance Corp., 467 F.2d 202 (5th Cir. 1972); Thorp Credit, Inc. v. Barr, 200 N.W.2d 535 (Iowa 1972), *cert. dismissed*, 410 U.S. 919 (1973). *But see* Inter City Motor Sales v. Judge of the Common Pleas Court, 42 Mich. App. 112, 201 N.W.2d 378 (1972).

[96] 94 S. Ct. at 1901.

[97] *See* Guzman v. Western State Bank, 43 U.S.L.W. 2183 (D.N.D. Sept. 25, 1974).

[98] 94 S. Ct. at 1901. Due process considerations may change where the property sought to be repossessed is not, for example, a television set, but instead, the tools of one's trade or an artificial kidney machine. *See* note 25 *supra*. From the creditor's point of view, however, the fact that the particular collateral is an item of necessity for the debtor should bear no relevancy to the creditor's right of action on default.

[99] Self-help repossession pursuant to section 9-503 of the Uniform Commercial Code has been held not to involve the "state action" necessary to invoke the protections of the fourteenth amendment at all. *See, e.g.*, Gibbs v. Titelman, 502 F.2d 1107 (3d Cir. 1974) (repossession of automobile); Nichols v. Tower Grove Bank, 497 F.2d 404 (8th Cir. 1974) (repossession and resale of automobile); James v. Pinnix, 495 F.2d 206 (5th Cir. 1974) (repossession of automobile); Shirley v. State Nat'l Bank, 493 F.2d 739 (2d Cir.), *cert. denied*, 43 U.S.L.W. 3281 (U.S. Nov. 11, 1974) (repossession of automobile); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 43 U.S.L.W. 3281 (U.S. Nov. 11, 1974) (repossession of automobiles). Other private creditor remedies have been upheld

may require further clarification. In broadest terms the *Mitchell* Court has announced that due process is not violated by postponing a hearing on the issues in the possessory action until after seizure.[100] But precisely what are these issues? Specifically, the crucial question yet to be answered is whether a creditor, assuming the debt and lien were valid, could always prevail by proving no more than a missed payment, even where the debtor asserts some defense for the delinquency.[101]

An affirmative answer would be consistent with the view expressed in the *Fuentes* dissent,[102] but then the *Mitchell* Court's emphasis on judicial presence would seem misplaced, since the hearing would practically be an empty formality. Such a stance would also be distinctly anti-consumer, for the buyer may have refused to pay for some specific reason related to a defect in the goods or to misrepresentation on the part of the seller.[103] Indeed,

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on a like rationale. *See, e.g.*, Fletcher v. Rhode Island Hosp. Trust Nat'l Bank, 496 F.2d 927 (1st Cir.), *cert. denied*, 43 U.S.L.W. 3280 (U.S. Nov. 11, 1974) (bank's set-off of depositors' accounts); Bond v. Dentzer, 494 F.2d 302 (2d Cir.), *cert. denied*, 43 U.S.L.W. 3209 (U.S. Oct. 15, 1974) (filing of wage assignment with debtor's employer); Bichel Optical Laboratories, Inc. v. Marquette Nat'l Bank, 487 F.2d 906 (8th Cir. 1973) (bank's seizure of borrower's funds and accounts receivable). *See generally Symposium—Creditors' Rights*, 47 S. CAL. L. REV. 1 (1973); Note, *Self-Help Repossession: The Constitutional Attack, the Legislative Response, and the Economic Implications*, 62 GEO. L.J. 273 (1973).

[100] The Court variously defined these issues as: (1) "default, the existence of a lien and possession of the debtor"; (2) "the existence of the debt, the lien, and the delinquency"; (3) "the existence of a vendor's lien and the issue of default." 94 S. Ct. at 1900, 1901, 1905.

[101] This was the case in *Fuentes*, where appellant Margarita Fuentes had ceased payments because of a dispute with her creditor over the servicing of a purchased stove. 407 U.S. at 70. She argued that Florida law allowed her to defend on grounds that the creditor breached the sales contract. *Id.* at 87 n.17. *See* Abbott & Peters, *supra* note 60, at 966 n.36. Because of the ultimate disposition of the case, the Court found it unnecessary to consider the issue. 407 U.S. at 87 n.17.

The Uniform Commercial Code is intended theoretically to provide some recourse for purchasers. *See generally* Skilton & Helstad, *Protection of the Installment Buyer of Goods Under the Uniform Commercial Code*, 65 MICH. L. REV. 1465 (1967). However, standard sales contracts are usually set up so that any missed payment will trigger the default provision, regardless of the reason for the delinquency. For an excellent discussion of how article 9 of the Uniform Commercial Code in practice works for the creditor and against the consumer in these respects see Clark, *Default, Repossession, Foreclosure, and Deficiency: A Journey to the Underworld and a Proposed Salvation*, 51 ORE. L. REV. 302 (1972).

[102] It was asserted that even if a hearing were necessary, creditors would only have to establish "probable cause" for claiming default. 407 U.S. at 102 (White, J., dissenting). Presumably this meant showing no more than that the debtor was in arrears. *See id.* at 101 n.*.

The *Fuentes* majority had announced that it was "axiomatic that the hearing must provide a real test," but they neglected to explain what the subject of the test would be. *Id.* at 97.

[103] A recent study of consumer defaults indicates that more than one fourth of the buyers claim such a reason for ceasing payments, most often fraud or misrepresentations

withholding payments may be the only leverage a consumer-debtor has, and this may be done almost as a visceral retaliation, especially by low-income consumers who might have little conception of the legal consequences which may ensue.[104] Perhaps in such a case due process would be provided only by a hearing, even after seizure, on all pertinent issues actionable under the substantive law of the state.[105]

But this approach also leads to problems. If all issues could be raised at a post-seizure hearing, what would distinguish the hearing from the main trial? Furthermore, while a creditor generally must protect a buyer by bond, what dollars-and-cents protection would a creditor have if repossessed goods are permitted to be returned to a defaulting debtor upon the debtor's preliminary demonstration of a prima facie defense on the merits?

Perhaps the ultimate solution will be some compromise formula by which a judge would be given the authority to evaluate whatever pleadings or affidavits are forthcoming and to fashion such remedy in each case as would fairly protect both parties, at the same time taking account of the particular rights and equities presented.[106] For the present, such procedures must await imaginative legislation on the part of the states[107] and further consideration of the problem by the United States Supreme Court.

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concerning the merchandise. *See* 1 D. CAPLOVITZ, DEBTORS IN DEFAULT 4-12 (1970). While not all of these complaints are legitimate, one commentator has concluded "that there is a significant percentage of cases where the debtor has a good defense and the creditor has no legal right to repossess." Neth, *Repossession of Consumer Goods: Due Process for the Consumer; What's Due for the Creditor*, 24 CASE W. RES. L. REV. 7, 15 (1972).

[104] *See* D. CAPLOVITZ, THE POOR PAY MORE 157-58 (1963).

[105] *See* Clark & Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355, 408 (1973). Compare Lindsey v. Normet, 405 U.S. 56 (1972), in which the Court upheld a procedure whereby litigable issues at a forcible entry and detainer hearing were limited to the tenant's default, and defenses based on the landlord's breach of duty to maintain the premises were precluded, since the covenants were independent according to the substantive law of the state. *Id.* at 68-69. *Cf.* Bianchi v. Morales, 262 U.S. 170 (1923); Grant Timber & Mfg. Co. v. Gray, 236 U.S. 133 (1915).

[106] Other such schemes have been suggested. *See* Clark, *supra* note 101, at 335-42; Clark & Landers, *supra* note 105, at 408-09; Neth, *supra* note 103, at 38-48; Note, *supra* note 80, at 62-69.

[107] It was stated in *Fuentes* that

> [t]he nature and form of such . . . hearings . . . are legitimately open to many potential variations and are a subject, at this point, for legislation—not adjudication.

407 U.S. at 96-97 (footnote omitted).