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ATTACHMENT, SEQUESTRATION, AND GARNISHMENT: THE 1977 RULES

by

Luther H. Soules III*

IN 1972 the United States Supreme Court in *Fuentes v. Shevin*¹ held the Florida replevin statute, permitting ex parte prejudgment seizure by one person of property owned or possessed by another, to be violative of the fourteenth amendment. Because the Florida procedure was similar to the Texas attachment practice, the case provoked a flurry of writing by Texas legal scholars² and raised significant questions concerning the legitimacy of the various extraordinary writ remedies provided by Texas law. Cases following *Fuentes* further emphasized the need to review and alter Texas statutes, court rules, and case law in this area.

In response to that need, the 1977 amendments to the Texas Rules of Civil Procedure governing attachment, sequestration, and garnishment were promulgated. This Article reviews the various federal and state constitutional decisions that precipitated the amendments and analyzes the new rules in light of the decisions. In addition, two areas are identified in which further revisions of the rules are necessary, and a suggested form for such revisions is set out.

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1. 407 U.S. 67 (1972).

2. An incomplete list includes: Dorsaneo, *Creditors' Rights, Annual Survey of Texas Law*, 31 Sw. L.J. 213 (1977); Figari, *Texas Civil Procedure, Annual Survey of Texas Law*, 30 Sw. L.J. 293, 312 (1976); Figari, *Texas Civil Procedure, Annual Survey of Texas Law*, 29 Sw. L.J. 265, 282 (1975); Henderson, *Commercial Transactions, Annual Survey of Texas Law*, 30 Sw. L.J. 118, 147 (1976); Hughes, *Creditors' Self-Help Remedies under UCC Section 9-503: Violative of Due Process in Texas?*, 5 ST. MARY'S L.J. 701 (1974); Krahmer, Clifford & Lasley, *Fuentes v. Shevin: Due Process and the Consumer, A Legal and Empirical Study*, 4 TEX. TECH L. REV. 23 (1972); Newton, *Fuentes "Repossessed" Reconsidered*, 28 BAYLOR L. REV. 497 (1976); Newton & Timmons, *Fuentes "Repossessed,"* 26 BAYLOR L. REV. 469 (1974); Comment, *Fuentes v. Shevin, the Constitutionality of Texas' Landlord Laws and Other Summary Procedures*, 25 BAYLOR L. REV. 215 (1973); Comment, *Procedural Due Process: For Sale in Texas to the Highest Bidder*, 10 HOUS. L. REV. 880 (1973); Comment, *Constitutional Dimensions of the Amended Texas Sequestration Statute*, 29 Sw. L.J. 884 (1975); Note, *Lack of Significant State Action Makes Prejudgment Self-Help Remedies Constitutional*, 11 HOUS. L. REV. 991 (1974); Note, *Pre-Judgment Seizures and the Due Process Clause: North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 29 Sw. L.J. 660 (1975); 11 HOUS. L. REV. 756 (1974); 7 ST. MARY'S L.J. 423 (1975); 6 ST. MARY'S L.J. 742 (1974); 51 TEXAS L. REV. 1411 (1973); 6 TEX. TECH L. REV. 1117 (1975).

I. CONSTITUTIONAL DECISIONS

The substantial volume and quality of writing on the subject renders any detailed analysis of *Fuentes* and subsequent Supreme Court decisions duplicative. An abbreviated summary of these decisions, however, is necessary to set the constitutional climate in which the 1977 amendments were drafted and in which they must function. In particular, three Supreme Court decisions, *Fuentes v. Shevin*,³ *Mitchell v. W.T. Grant Co.*,⁴ and *North Georgia Finishing Co. v. Di-Chem, Inc.*,⁵ must be analyzed and compared to ascertain the constitutional standards for attachment, sequestration, and garnishment procedures. That this task is not an easy one may be surmised from the disagreements within the Court itself.⁶ Each of these decisions involved prejudgment efforts by creditors to seize the property of debtors without prior notice or hearing. In each case the debtor challenged the statute that permitted the seizure as violative of the due process clause of the fourteenth amendment to the United States Constitution. The decision in *Fuentes* initially indicated that the fourteenth amendment required pre-seizure notice and opportunity for a hearing before a creditor could deprive a debtor of property. Failure to provide pre-seizure notice and opportunity for hearing was considered permissible only when the following three elements were present: (1) an important government or public necessity, as distinguished from a private need of a creditor; (2) a special or urgent need for prompt action; and (3) a narrowly drawn statute that requires a preliminary ruling from a judicial officer as to the necessity for and timeliness of the seizure, and, further, keeps tight state control over the power to dispossess.⁷

The Court in *Mitchell*, however, analyzed the case by application of a balancing of interests test. The Court weighed the property interests of the creditor against the interests of the debtor. In upholding the Louisiana statute, the Court focused on seven protective elements and rights afforded the debtor by the statute: (1) the property interest of the creditor must pre-exist issuance of a writ; (2) the creditor must state by a verified petition or affidavit the grounds for the writ, for example, that the debtor has the power to waste or remove the property from the jurisdiction, and the nature and amount of the creditor's claim; (3) the creditor must make a clear showing to a judge of the creditor's right to the property, although the showing may be ex parte and without prior notice;⁸ (4) the creditor

3. 407 U.S. 67 (1972).

4. 416 U.S. 600 (1974).

5. 419 U.S. 601 (1975).

6. *Fuentes*, which struck down the replevin statutes of Florida and Pennsylvania, was decided by less than a majority of the Court, with four Justices in the majority, three dissenting, and two not participating. Its 1974 successor, *Mitchell*, upheld the Louisiana sequestration statute in a split decision, five Justices in the majority and four dissenting. Thereafter, the 1975 decision of *Di-Chem* held the Georgia garnishment statute unconstitutional, with six Justices in the majority and three dissenting. Justice White, who wrote the dissenting opinion in *Fuentes*, wrote the majority opinions in both *Mitchell* and *Di-Chem*.

7. 407 U.S. at 91.

8. The second requirement is satisfied if (1) the debtor intends, or on notice would

must provide sufficient bond to compensate the debtor for all damages, including consequential damages and attorney's fees in the event the creditor is later found to have proceeded wrongfully; (5) the debtor has the right to seek immediate dissolution of the writ and to require that the creditor prove in an adversary hearing the existence of the debt, the lien, and the debtor's delinquency; (6) the debtor must have the right to post a counter-bond and regain possession with or without seeking dissolution of the writ; and (7) the creditor may continue in possession if the writ is not dissolved or a counter-bond is not posted within ten days, but the creditor may not dispose of the property until after a final judgment on the merits.⁹

The Court in *Mitchell* withdrew significantly from the broad language of *Fuentes*, which required notice and pre-seizure hearing. The *Mitchell* Court required only that a secured creditor establish on the basis of sworn ex parte documents a probability of ultimate success as justification for the issuance of a prejudgment writ of sequestration,¹⁰ so long as the debtor is given an early opportunity to put the creditor to his proof before *final* deprivation. The duration or severity of deprivation in the interim is an additional factor that must be weighed.¹¹

The Court in *Mitchell* placed considerable weight on the fact that both parties had an interest in the specific property seized, the debtor as "owner" and the creditor as secured lienholder.¹² As a result, there may be some question as to the limitation of this case to secured creditors. Nevertheless, subsequent cases¹³ have indicated that a pre-existing lien interest is probably not required, except in cases involving sequestration.¹⁴

One such case is *North Georgia Finishing Co. v. Di-Chem, Inc.*¹⁵ Although the majority opinion in *Di-Chem* mentioned that both *Fuentes* and *Mitchell* involved secured creditors, this factor was not emphasized in holding unconstitutional the Georgia prejudgment garnishment statute. Instead, the Court addressed five faults in the Georgia statute: (1) a writ was issuable on the affidavit of either the creditor or the creditor's attorney, the latter being allowed to swear on "knowledge and belief" without personal knowledge of the facts; (2) an affidavit was sufficient if it contained only conclusory allegations; (3) a writ was issuable in the absence of any participation by a judge; (4) the debtor's only means of regaining pos-

intend, to conceal or transfer the property before a hearing could be held, or (2) if the property would commence a steady decline in value if put to the debtor's intended use. *Id.* at 607. That the property would steadily decline in value if put to its intended use by the debtor will not support the issuance of a writ in Texas. See *American Mortgage Co. v. Samuell*, 130 Tex. 107, 108 S.W.2d 193 (1937); *Half Co. v. Waugh*, 183 S.W. 893 (Tex. Civ. App.—Galveston 1916, writ ref'd).

9. 416 U.S. at 606 n.7.

10. *Id.* at 609.

11. *Id.* at 618.

12. *Id.* at 604.

13. See notes 15, 21 & 36 *infra* and accompanying text.

14. The very nature of sequestration mandates that the creditor have a pre-existing lien interest in the sequestered property. See notes 66 *infra* and accompanying text for a discussion of the various causes of action in which a creditor has such an interest.

15. 419 U.S. 601 (1975).

session of the property in a garnishee's possession was by posting a counter-bond, with no right to seek dissolution of the writ provided; and (5) no provision was made for an early hearing at which the creditor would be required to demonstrate even "probable" justification for issuance of the writ.¹⁶ In focusing on the failure of the Georgia statute to provide the debtor with notice or opportunity for an early hearing after seizure,¹⁷ the Court placed itself in diametric opposition to the rule enunciated in *Fuentes* that any deprivation by prejudgment seizure without prior notice is violative of due process.¹⁸

As draftsmen of statutes and rules must respond to *Fuentes*, *Mitchell*, and *Di-Chem*, the concurring opinion of Justice Powell in *Di-Chem*¹⁹ is particularly important. Justice Powell proposed specific standards for fourteenth amendment due process compliance in prejudgment seizures: (1) the creditor must provide adequate security; (2) the creditor must establish before a neutral officer of the court, although not necessarily a judicial officer, an actual need to prevent removal or disposal of the assets required to satisfy the creditor's claim; (3) an opportunity for a prompt post-seizure judicial hearing must be provided, at which the creditor must show probable cause to believe a need exists to continue the seizure until an early trial on the merits; and (4) a debtor must be afforded an adequate opportunity to post a counter-bond to regain possession of the property.²⁰ Justice Powell commented that assets having no relation to the specific claims of the creditor against a particular debtor may be seized. This statement lends support to creditors who seek prejudgment seizure of property but have no pre-existing lien interest in that property.²¹

Relying on the *Fuentes* requirement of prior notice and hearing for any prejudgment seizure, two federal courts have rendered decisions with correct results, although the reasoning used in reaching these results appears overbroad in light of *Mitchell* and *Di-Chem*. In *Bunton v. First National Bank*²² a three-judge panel held a Florida prejudgment garnishment statute unconstitutional because the statute did not provide the debtor with notice or an opportunity to be heard *prior* to seizure, even though the statute permitted a prompt post-seizure hearing, and the writ could be dissolved without a bond if the facts supporting the garnishment were not proven at the post-seizure hearing.²³ This reasoning, however, was unnecessarily broad because the writ was issued by a clerk on an unsworn statement by the creditor's representative;²⁴ such a practice would not be sustained under any of the opinions of the Supreme Court.

In striking down a Pennsylvania attachment statute, the district court in

16. *Id.* at 607.

17. *Id.*

18. 407 U.S. at 81-82.

19. 419 U.S. at 609.

20. *Id.* at 611.

21. *Id.* at 612.

22. 394 F. Supp. 793 (M.D. Fla. 1975).

23. *Id.* at 795.

24. *Id.*

*Jonnet v. Dollar Savings Bank*²⁵ discussed the prior hearing requirement of *Fuentes*, but also recognized that the *Mitchell* balancing of interests test could not have been met by the creditor in the particular facts of that case. Affirming the district court, the Third Circuit additionally noted that, contrary to due process requisites, the Pennsylvania attachment statute allowed prejudgment seizure merely by filing a praecipe, or motion, with the court clerk that identified the property to be seized without stating a reason for the seizure.²⁶ A creditor's complaint setting forth the facts of the claim and justification for the seizure could be filed as long as five days after the filing of the praecipe.²⁷ Clearly, these provisions failed to satisfy the tests set forth in *Di-Chem*.

In *Hutchinson v. Bank of North Carolina*²⁸ a three-judge federal panel upheld a real estate attachment statute that did not provide for prior notice or hearing.²⁹ The court recognized several possible grounds for prejudgment seizure of property, including attachment to effect quasi in rem jurisdiction,³⁰ and attachment to prevent the debtors' transferral, concealment, or removal of property with intent to defraud the creditors.³¹ The court in *Hutchinson* noted that the creditor had complied with particular standards prescribed by the North Carolina statute requiring the plaintiff or his attorney (1) to state on oath the intent to secure a money judgment for the debt owed, (2) to submit a description of the nature and amount of the claim, and (3) to describe in affidavits the factual grounds supporting the issuance of a writ of attachment.³² The court also found that the issuance of the writ by the clerk of the North Carolina Superior Court rather than a judicial officer did not abrogate constitutional requisites, since the clerk had certain statutory judicial powers beyond the purely administrative authority of Texas' court clerks, including the power to consider certain prejudgment seizure motions and to make fact findings.³³

25. 392 F. Supp. 1385 (W.D. Pa. 1975), *aff'd*, 530 F.2d 1124 (3d Cir. 1976).

26. 530 F.2d at 1125 & n.2.

27. *Id.*

28. *Hutchinson v. Bank of N.C.*, 392 F. Supp. 888 (M.D.N.C. 1975).

29. *See In re The Ornaka*, 393 F. Supp. 1311 (N.D. Me. 1975); *Spielman-Fond, Inc. v. Hanson's, Inc.*, 379 F. Supp. 997 (D. Ariz. 1973), *aff'd mem.*, 417 U.S. 901 (1974) (upholding a mechanic's lien on realty). *Contra*, *Ragin v. Schwartz*, 393 F. Supp. 152 (W.D. Pa. 1975); *Gunther v. Merchant's Nat'l Bank*, 360 F. Supp. 1085 (S.D. Me. 1973).

30. Although the due process aspects of quasi in rem jurisdiction are beyond the scope of this Article, a brief discussion of *Shaffer v. Heitner*, 433 U.S. 186 (1977), is appropriate. In *Shaffer* jurisdiction was invoked in Delaware state court against nonresident defendants solely by sequestration of the defendants' stock located in Delaware. The Supreme Court in effect rejected the longstanding premise set forth in *Pennoyer v. Neff*, 95 U.S. 714 (1877), that a proceeding against property is not a proceeding against the owner of that property, and held that the mere presence of property in the forum state alone will not necessarily permit assertion of jurisdiction. The Court, thus, determined that before jurisdiction may be asserted in an action in rem or quasi in rem, the nonresident defendant must have sufficient "minimum contacts" in the forum state to satisfy the due process test of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

31. 392 F. Supp. at 895.

32. *Id.* at 890.

33. *Id.* at 896.

The circumstances in *Hutchinson* satisfied the requirements of *Mitchell* and *Di-Chem* in other respects as well. A bond was given by the creditor in an amount sufficient to cover all costs and damages that might be incurred by the debtor if the writ was dissolved or set aside, or if the creditor otherwise failed to obtain a judgment.³⁴ The North Carolina statute provides that a debtor may move to dissolve, modify, or discharge the writ or bond, and, on motion to dissolve, the creditor must prove facts sufficient to support the writ. The statute also permits the debtor to discharge the property by filing a counter-bond in the lesser amount of double the creditor's bond or double the value of the property.³⁵ An especially important feature of *Hutchinson* is its specific holding that the *Mitchell* balancing test applies to both secured and unsecured creditors; otherwise, the court reasoned, *Di-Chem* would have stated to the contrary rather than tracing the *Mitchell* balancing test.³⁶

In contrast to *Hutchinson*, the Eighth Circuit in *Guzman v. Western State Bank*³⁷ struck down the North Dakota prejudgment attachment statute. Noting that the property seized in *Guzman* was a mobile home in which the debtor resided,³⁸ the court, in balancing the debtor's interests against the right of the creditor to keep his collateral secure, considered the type of property seized and the resulting deprivation to the debtor. In applying the *Mitchell* test, the court concluded that the loss to the debtor of his home, which the debtor did not appear to be preparing to remove, outweighed the creditor's short run prejudgment remedy interest.³⁹ Defects in the North Dakota procedure were also reviewed by the court, including the issuance of the writ by a clerk rather than a judge, the lack of evidentiary fact allegations supporting the issuance of the writ, and the absence of a procedure, other than by counter-bond, by which the debtor could recover his property.⁴⁰

In *Garcia v. Krausse*⁴¹ the debtor supplemented his due process objection to the Texas "counter-bond only" statutory remedy by arguing that the "counter-bond only" practice denied equal protection of the law to poor debtors who could not provide a counter-bond. The United States district court, without reaching the equal protection issue, held the Texas sequestration statute, as it then existed, invalid due to lack of pre-seizure notice.⁴² Relying on the same due process grounds, one Texas court of civil appeals held the Texas garnishment statute unconstitutional as well.⁴³

34. *Id.* at 897.

35. *Id.* at 898.

36. *Id.*

37. 516 F.2d 125 (8th Cir. 1975).

38. *Id.* at 126.

39. *Id.* at 132.

40. *Id.* at 133.

41. 380 F. Supp. 1254 (S.D. Tex. 1974).

42. *Id.* at 1259. The Texas statute providing the grounds and procedures for sequestration has since been amended. TEX. REV. CIV. STAT. ANN. art. 6840 (Vernon Supp. 1978).

43. *Southwestern Warehouse Corp. v. Wee Tote, Inc.*, 504 S.W.2d 592 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ), thereafter cited without question in *Whittenberg v. Whittington*, 523 S.W.2d 441 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd

The *Carey v. Sugar*⁴⁴ decision in 1976 is but reaffirmation of the Supreme Court's intention to retreat from its presumed, but largely ignored, dogmatic position in *Fuentes*. In *Carey* a three-judge federal panel held the New York prejudgment attachment statute unconstitutional for lack of preseizure notice.⁴⁵ The Supreme Court remanded the case for reconsideration under the balancing formula of *Mitchell* and *Di-Chem*, regardless of the statute's failure to provide for preseizure notice.⁴⁶ An additional indication that the Supreme Court has effectively abandoned its position in *Fuentes* is suggested by the denial of writ of certiorari in a recent case in which the Washington prejudgment attachment statute withstood constitutional review by the Ninth Circuit.⁴⁷ In that case the Ninth Circuit recognized the *Mitchell* proposition that before the debtor is *finally* deprived of his property he must be afforded a prompt hearing at which the creditor is required to demonstrate that the writ was properly and regularly issued; the mere postponement of the judicial inquiry, the court held, is not a denial of due process if an opportunity for judicial determination is promptly given upon request by the debtor.⁴⁸ An important feature of the Ninth Circuit opinion is its emphasis on the fact that the property seized was real property, and at no time did the issuance of the writ deprive the debtor of ownership, actual use, or physical possession of the property.⁴⁹ Thus, the court reasoned that there was no substantial taking of the property, and the attachment statute as applied was not violative of due process.⁵⁰

The decisions discussed above precipitated a necessity to review Texas statutes and rules providing for issuance and implementation of the various prejudgment writ remedies.

II. THE STATUTORY FRAMEWORK

A. Attachment

Attachment, a prejudgment remedy governed strictly by statutes⁵¹ and

n.r.e.). For a discussion of the deficiencies of the *Wee Tote* opinion, see notes 79-82 *infra* and accompanying text.

44. 425 U.S. 73 (1976).

45. 383 F. Supp. 643 (S.D.N.Y. 1974).

46. 425 U.S. at 77.

47. *Northwest Homes of Chehalis, Inc. v. Weyerhaeuser Co.*, 526 F.2d 505 (9th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976).

48. 526 F.2d at 506. The merits of the creditor's claim, however, must be scrutinized at the post-seizure hearing. A Michigan prejudgment garnishment statute was held unconstitutional because the post-seizure hearing did not test preliminarily the merits of the creditor's claim and no bond was required of the creditor to obtain and continue garnishment. *Douglas Research & Chem., Inc. v. Solomon*, 388 F. Supp. 433 (E.D. Mich. 1975).

49. 526 F.2d at 506.

50. In another real estate matter, the Third Circuit held that despite the holdings in *Fuentes*, *Mitchell*, and *Di-Chem*, due process issues are not presented in a condemnation of property where the condemnee is not given a hearing in advance to determine that the taking by the condemnor of the property is necessary. *Virgin Islands v. 19.623 acres of Land*, 536 F.2d 566 (3d Cir. 1976).

51. TEX. REV. CIV. STAT. ANN. arts. 257-302 (Vernon 1973).

rules of civil procedure,⁵² may be implemented at the initiation of a suit or at any time during the progress of a suit. The purpose of an attachment proceeding is to seize and affix a lien by prejudgment levy on the debtors' assets subject to execution. The levying officer affixes a lien on personalty by taking actual control of the property; a lien on real estate is affixed by recording a copy of the writ and the return endorsed by the levying officer in the county in which the property is located.⁵³ Attachment is utilized most frequently when the attaching creditor has no secured interest in the attached property prior to the date the writ is levied.

A writ of attachment must be accomplished by affidavits which present statutory grounds for issuance of the writ. The grounds which must be set forth are: (1) that the attachment is not for the purpose of injuring or harassing the debtor; (2) that the debtor is justly indebted to the creditor for a specified amount; and (3) that the creditor will probably lose his debt unless the attachment is issued. Further, the affidavits must show specific grounds to warrant the attachment by alleging that the debtor (1) is not a resident of Texas, or the debtor is a foreign corporation, or is acting as such; (2) is about to move permanently from the State of Texas and has refused to pay or to secure the debt owed to the creditor; (3) is in hiding so that the ordinary process of law cannot be served upon him; (4) has hidden, or is about to hide his property for the purpose of defrauding his creditors; (5) is about to remove his property from Texas without leaving enough in the state to pay his debts; (6) is about to remove his property, or part of it, from the county where the suit has been brought, with intent to defraud his creditors; (7) has disposed of his property, or is about to dispose of it, in whole or in part, with intent to defraud his creditors; (8) is about to convert his property, or part of it, into money for the purpose of placing it beyond the reach of his creditors; or (9) owes the creditor for property obtained by the debtor under false pretenses.⁵⁴

Regardless of the good faith of the creditor,⁵⁵ if the grounds stated in the application and supporting affidavits are untrue, then the attachment is wrongful.⁵⁶ A party whose property is wrongfully attached may bring an action for damages on the attachment bond, and in the same or in a separate action, may sue the party who wrongfully attached the property.⁵⁷ The party whose property was wrongfully attached must prove that through deprivation of his possession, use, or enjoyment of his property he has been injured;⁵⁸ in the absence of such proof the injured party may hold

52. TEX. R. CIV. P. 592-609.

53. TEX. REV. CIV. STAT. ANN. art. 6662 (Vernon 1969).

54. *Id.* art. 275 (Vernon 1973).

55. *Christian v. H. Seeligson & Co.*, 63 Tex. 405, 406 (1885).

56. *Petty v. Lang*, 81 Tex. 238, 16 S.W. 999 (1891).

57. *Half, Weiss & Co. v. Curtis*, 68 Tex. 640, 5 S.W. 451 (1887); *B. Hardemon & Son v. Morgan*, 48 Tex. 103 (1877); *Leonard v. Harkleroad*, 67 S.W. 127 (Tex. Civ. App.—Houston 1902, no writ).

58. *Cahn Bros. & Co. v. Bonnett*, 62 Tex. 674 (1884).

the creditor liable only for nominal damages,⁵⁹ unless the attachment was malicious and wholly without probable cause, in which event exemplary damages may be recovered.⁶⁰

B. *Sequestration*

Sequestration is like attachment in that it is a remedy made available by statutory authority⁶¹ and rules of civil procedure.⁶² Similarly, strict compliance with the statutes and rules must be made in order for the creditor to rely thereon.⁶³ Sequestration is designed to remove specific property from the debtor's possession prior to judgment and place it in the custody of the court.⁶⁴ Levy of a writ of sequestration does not fix a lien on sequestered property, but merely gives rise to a judicial seizure of the property for ultimate disposition to the party prevailing in the suit.⁶⁵ The subject matter of the suit must relate to the sequestered property, and the cause of action must be one for (1) title or possession of the property; (2) enforcement or foreclosure of a security interest, lien, or mortgage; (3) removal of a cloud on the title; or (4) partition.⁶⁶ If a creditor may reasonably conclude that collateral will be injured, ill treated, wasted, or converted by the debtor, that creditor may sue before any default on the part of the debtor.⁶⁷

There are four specific statutory grounds for a writ of sequestration. First, a plaintiff may apply for a writ of sequestration when he sues for title or possession to property from which he has been ejected by force or violence.⁶⁸ Secondly, when a party sues for title or possession to personal property or fixtures, or sues for the foreclosure of a mortgage, lien, or security interest on such personal property, a writ of sequestration is issuable if a reasonable conclusion may be drawn that there is immediate danger that the debtor or party in possession of the property will conceal, dispose of, ill treat, waste, destroy, or remove the property from the county during the pendency of the suit.⁶⁹ Thirdly, when a party sues for title or possession of real property, or sues for the foreclosure or enforcement of a mortgage or a lien thereon, and a reasonable conclusion may be drawn that there is immediate danger that the debtor or party in possession of the property will injure, ill treat, or waste the property, or convert the timber,

59. *Bartley v. J.M. Radford Grocery Co.*, 15 S.W.2d 46 (Tex. Civ. App.—Amarillo 1929, writ ref'd).

60. *Craddock v. Goodwin*, 54 Tex. 578 (1881); *Reed v. Samuels*, 22 Tex. 114 (1858).

61. TEX. REV. CIV. STAT. ANN. art. 6840 (Vernon Supp. 1978), arts. 6844, 6846-6848, 6858 (Vernon 1960).

62. TEX. R. CIV. P. 696-716.

63. *American Mortgage Corp. v. Samuell*, 130 Tex. 107, 108 S.W.2d 193 (1937).

64. *Radcliff Fin. Corp. v. Industrial State Bank*, 289 S.W.2d 645 (Tex. Civ. App.—Beaumont 1956, no writ).

65. *Harding v. Jesse Dennett, Inc.*, 17 S.W.2d 862 (Tex. Civ. App.—San Antonio 1929, writ ref'd).

66. TEX. REV. CIV. STAT. ANN. art. 6840 (Vernon Supp. 1978).

67. *Id.* art. 6844 (Vernon 1960).

68. *Id.* art. 6840, § 1(d) (Vernon Supp. 1978).

69. *Id.* § 1(b).

rents, fruits, or revenues therefrom, the creditor may seek a writ of sequestration.⁷⁰ Fourthly, when a party sues to try a title to real property, to remove a cloud from the title thereof, to foreclose a lien thereon, or to partition the real property, and makes oath that one or more of the defendants or debtors is a nonresident of the State of Texas, a writ of sequestration may accompany the suit.⁷¹

If a writ of sequestration is dissolved, the suit proceeds as if no writ had been issued. Any action for damages for wrongfully securing the issuance of the writ, however, *must* be brought as a compulsory counterclaim.⁷² When "consumer goods"⁷³ are wrongfully sequestered, and the defendant obtains dissolution of the writ, the party securing the writ shall be liable for reasonable attorneys' fees and the greatest of \$100, the finance charge contracted for, or actual damages.⁷⁴ The minimum amount recoverable for wrongful sequestration is interest on the value of the sequestered property from the date of seizure to the time of judgment, although lost rents and lost profits may also be recovered.⁷⁵ Exemplary damages are recoverable upon a showing that a writ of sequestration was issued wholly without probable cause or maliciously, and not merely wrongfully.⁷⁶ Exemplary damages, however, may not be recovered from the sureties on the sequestration bond.⁷⁷ If the party obtaining the writ has exercised reasonable procedures to avoid errors but nonetheless has committed a "bona fide error," no damages will be awarded even though the creditor fails to prove the specific facts alleged in the application for writ of sequestration.⁷⁸

C. *Prejudgment Garnishment*

Traditionally, application for a writ of garnishment prior to judgment could be made in a suit in which a creditor instituted a claim against the debtor for a liquidated debt.⁷⁹ Yet doubt now exists as to whether Texas has a valid statute authorizing prejudgment garnishment. This doubt arises from the decision in *Southwestern Warehouse Corp. v. Wee Tote, Inc.*,⁸⁰ a civil appeals opinion holding part of the prejudgment statutory

70. *Id.* § 1(c).

71. *Id.* § 1(e).

72. *Id.* § 3(c).

73. TEX. BUS. & COM. CODE ANN. § 9.109 (Tex. UCC) (Vernon Supp. 1978) (goods are "consumer goods" if they are used or bought for use primarily for personal, family, or household purposes).

74. TEX. REV. CIV. STAT. ANN. art. 6840, § 3(d) (Vernon Supp. 1978).

75. *Commercial Credit Equip. Corp. v. Elliott*, 414 S.W.2d 35, 43-44 (Tex. Civ. App.—Eastland 1967, writ ref'd n.r.e.).

76. *See First Security Bank & Trust Co. v. Roach*, 493 S.W.2d 612, 617 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.); *O'Hara v. Ferguson Mack Truck Co.*, 373 S.W.2d 507 (Tex. Civ. App.—San Antonio 1963, writ ref'd n.r.e.).

77. *See United States Fire Ins. Co. v. MacDaniel*, 408 S.W.2d 134, 135 (Tex. Civ. App.—Beaumont 1966, no writ).

78. TEX. REV. CIV. STAT. ANN. art. 6840, § 3(d) (Vernon Supp. 1978).

79. *Cleveland v. San Antonio Bldg. & Loan Ass'n*, 148 Tex. 211, 223 S.W.2d 226, 228 (1949).

80. 504 S.W.2d 592 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ).

scheme unconstitutional.⁸¹ The validity of this decision, which was not given the benefit of supreme court review, is questionable and should not be followed. The question arises primarily because at the time *Wee Tote* was written the court did not have the benefit of *Mitchell* and *Di-Chem*.⁸² An analysis of *Wee Tote* in light of these cases would deemphasize the lack of prior notice and instead focus on whether article 4076 sets forth constitutionally sufficient requisites to satisfy the *Mitchell* and *Di-Chem* balancing test.⁸³

Pursuant to article 4076(1), an application for a prejudgment writ of garnishment is appropriate when an application for writ of attachment would be appropriate.⁸⁴ A prejudgment writ of garnishment is also appropriate under article 4076(2) when suit is brought for debt owed and an affidavit is made that the defendant does not possess property in Texas subject to execution sufficient to satisfy the debt and the plaintiff is not seeking to injure or harrass the defendant with the writ.⁸⁵

Prejudgment garnishment is wrongful when the facts set forth in the affidavits supporting the application for writ of garnishment are untrue,⁸⁶ good faith of the garnishor aside.⁸⁷ Garnishment is also wrongful if the debt or judgment on which the writ is issued does not exist or is legally insufficient to support the writ.⁸⁸ A claim for wrongful garnishment may be asserted in the same action as the garnishment,⁸⁹ or in a separate action, and third parties whose property interests are mistakenly garnished as belonging to the garnishment debtor may also sue the erring creditor for wrongful garnishment.⁹⁰ To recover exemplary damages, however, the

81. *Id.* at 594.

82. Relying almost exclusively upon the analysis set forth in *Fuentes*, the court in *Wee Tote* reasoned that art. 4084 was unconstitutional solely because the debtor was deprived of his property without prior notice or hearing. 504 S.W.2d at 594.

83. Additionally, the court in *Wee Tote* erroneously invalidated art. 4084 when its focus should have been on art. 4076. TEX. REV. CIV. STAT. ANN. arts. 4076, 4084 (Vernon 1966). Article 4084 merely traces the permissible conduct of the various parties once the writ of garnishment has been issued, while art. 4076 provides for the actual issuance of the writ. This author submits that the deprivation of property, the element on which the court focused, occurs as a result of art. 4076, not 4084.

84. See note 54 *supra* and accompanying text for a discussion of the proper grounds for issuance of a writ of attachment.

85. TEX. REV. CIV. STAT. ANN. art. 4076 (Vernon 1966). Article 4076(2) must be considered suspect even under the balancing tests of *Mitchell* and *Di-Chem*. The mere fact that the defendant does not have property in Texas sufficient to satisfy a judgment which the plaintiff expects to recover is at best a marginal foundation on which to invoke the balancing tests of *Mitchell* and *Di-Chem*. When analyzing for prejudgment garnishment, practitioners would seem better advised to rely only on art. 4076(1), *i.e.*, the circumstances in which an application for writ of attachment would be appropriate, and to regard art. 4076(2) as questionable.

86. *Peerless Oil & Gas Co. v. Teas*, 138 S.W.2d 637, 640 (Tex. Civ. App.—San Antonio 1940), *aff'd*, 138 Tex. 301, 158 S.W.2d 758 (1942), *cert. denied*, 320 U.S. 210 (1943).

87. 138 S.W.2d at 640.

88. See *Massachusetts v. Davis*, 160 S.W.2d 543 (Tex. Civ. App.—Austin), *aff'd in part and rev'd in part on other grounds*, 140 Tex. 398, 168 S.W.2d 216 (1942).

89. See, *e.g.*, *Reynolds v. Sandel*, 142 S.W.2d 527 (Tex. Civ. App.—El Paso 1940, no writ).

90. *Stevens v. Simmons*, 61 S.W.2d 122 (Tex. Civ. App.—El Paso 1933, no writ).

wrongfully garnished party must prove that the garnishment was obtained without probable cause and maliciously.⁹¹

III. THE 1977 RULES

A. *Prejudgment Attachment, Sequestration, and Garnishment*

By 1975 the Supreme Court of Texas had become acutely aware that the recent judicial decisions discussing the constitutionality of attachment, sequestration, and garnishment procedures mandated review of the Texas Rules of Civil Procedure⁹² pertaining to these ancillary writs. After the court sought assistance from the Rules Advisory Committee, the Honorable George W. McCleskey, chairman of the Advisory Committee, appointed a subcommittee to study the pertinent rules and to recommend to the committee the changes necessary to bring the rules into conformity with the recently adopted constitutional requirements.⁹³ The subcommittee's recommendations were presented to the Advisory Committee at its regular meeting on March 11, 1977, and, as revised by the Advisory Committee, were thereupon recommended to the supreme court for consideration. By order of July 11, 1977, the Supreme Court of Texas adopted, with minor changes, the rules recommended by the Advisory Committee, thereby promulgating substantially revised procedures for implementing prejudgment seizure by attachment (rules 592-609),⁹⁴ sequestration (rules 696-716),⁹⁵ and garnishment (rules 658-679).⁹⁶

Form of Application and Affidavit. Rules 592, 696, and 658, respectively, provide parallel forms of applications for writs of attachment, sequestration, and garnishment. Each rule provides that the application may be made either at the commencement of a suit or at any time during the progress of a suit. These rules additionally provide that the application shall be supported by affidavits made on personal knowledge. If affidavits are made on information and belief, however, the specific grounds for such belief must be stated. The affidavits must present facts that would be admissible in evidence; conclusory statements made in the application or the affidavits are insufficient to support the issuance of a writ. The affidavits may be made by the party seeking the writ, his agents, his attorneys, or other persons having knowledge of relevant facts.

91. *Biering v. First Nat'l Bank*, 69 Tex. 599, 7 S.W. 90 (1888). In *Biering*, the court also stated that malice might be inferrable from lack of probable cause. *Id.* at 602, 7 S.W. at 92; see *Pegues Mercantile Co. v. Brown*, 145 S.W. 280 (Tex. Civ. App.—El Paso 1912, no writ).

92. When reference is made in this section to a "rule," the reference is to Texas Rules of Civil Procedure as amended in 1977. These amendments were effective Jan. 1, 1978.

93. The appointed subcommittee consisted of Professor Mat Dawson, Baylor University School of Law, Chairman; Honorable Jack Pope, Justice, Supreme Court of Texas; Honorable Burt Tunks, then Chief Justice, 14th Court of Civil Appeals; Honorable James R. Meyers, then District Judge, 126th Judicial District; Pat Beard, Attorney at Law, Waco; and this author.

94. Only rules 592, 592a, 592b, 593, 598a, 599 & 608 were affected by the changes.

95. Only rules 696, 698, 700a, 701, 708 & 712a were affected by the changes.

96. Only rules 658, 658a, 659, 661, 663a, 664 & 664a were affected by the changes.

Only when no persons can be located by reasonable efforts within the time permitted by the circumstances surrounding the application should the affidavits be made on information and belief. In this event, the source of the information and the basis for the affiant's "belief" should be stated in detail. Some essential allegations, such as, in the instance of attachment, "the defendant is about to move permanently from Texas," or "the defendant is about to convert the plaintiff's property," *must* be made on information and belief. Since this type of allegation deals with future conduct, an explanation of these allegations based on information and belief should satisfy due process requirements. On the other hand, allegations pertaining to already existing facts, such as "the defendant is justly indebted to and has refused to pay the plaintiff," or "the defendant has disposed of the plaintiff's property," may require personal knowledge on the part of some witness to meet the constitutional requirements. Thus, whether an affidavit on information and belief is proper may depend on (1) the nature of the facts in question, (2) whether such facts are usually known to the creditor, (3) whether such facts are peculiarly within the knowledge of the debtor, or (4) whether certain events have occurred.

The essential consideration for creditors using the remedies of attachment, sequestration, and garnishment, and, conversely, the essential consideration for debtors attacking these remedies, is that every effort must be made by the applicant to comply with due process requirements to insure adequate justification for an *ex parte* issuance of a writ. A court, therefore, should inquire whether the allegations in the application sufficiently set forth the specific facts relied upon by the plaintiff for issuance of a writ and whether the facts enumerated in the affidavits would be admissible in evidence to sustain findings in support of each of the allegations; otherwise, a writ should not be issued. Although two or more grounds for issuance of a writ may be set forth in the application, issuance of a writ is permitted if only one of the grounds is properly alleged and supported with proof.

Rule 696 also requires that an application for writ of sequestration include: (1) a description of the property to be sequestered so that it may be identified and distinguished from other property; (2) the value of each article to be sequestered; and (3) the county in which each article of property is located.

Requisites and Notice. The requisites for attachment, sequestration, and garnishment are prescribed in rules 593, 699, and 661 respectively. The writ for attachment directs the sheriff to seize property in the county valued approximately in the amount fixed by the court. The writ for sequestration is similar but in addition must include a statutory legend directed to the debtor in ten-point type as follows: "You have a right to regain possession of the property by filing a replevy bond. You have a right to seek to regain possession of the property by filing with the court a motion to dissolve this writ." Although that legend was not adopted into the requisites of writs for attachment and garnishment, it was adopted into the

court rules providing for notice of those various writs to be served on the debtor.⁹⁷ Thus, the notice containing this legend is to be served on the defendant debtor regardless of the nature of the proceeding. The notice must include a copy of the writ itself pursuant to rules 598(a), 700(a), and 633(a).

Fact Finding and Order of the Court. A prejudgment writ of attachment, sequestration, or garnishment may issue only upon written order of the court after a hearing, which may be ex parte. All allegations in the applications must be carried forward and supported by fact findings in the court's order directing issuance of a writ. The court may determine on the basis of the application and affidavits that issuance of the writ does not deny due process to the debtor. In this event, the court must make specific findings of facts to support each statutory ground found to exist. The court's order may direct the issuance of several writs, simultaneously or in succession, and direct that they be served in different counties.

Applicant's Bond. The order must also specify the amount of bond required of the applicant to compensate the debtor adequately if the applicant fails to prosecute his suit or if the writ is wrongfully issued. In the instances of sequestration, rule 696 directs the court's attention to the elements of damages specified in article 6840, § 3(d).⁹⁸

The applicant's bonds for the respective writs⁹⁹ are a prerequisite to the issuance of the writs, and must be payable to the debtor in the amount fixed by the court's order with sufficient sureties as provided by statute and approved by the officer issuing the writ.¹⁰⁰ The applicant's bond in a garnishment proceeding may be reduced if the garnishee's answer indicates that the debt or property is less than that claimed by the applicant.¹⁰¹ The applicant's bond for sequestration may be conditioned to allow the applicant to replevy the property from the seizing officer pursuant to rule 708 pending final judgment.¹⁰²

Replevy Bond. During the proceedings in any type of writ the defendant may replevy his property as prescribed in rules 599, 708, and 701. A defendant's replevin bond in attachment¹⁰³ and garnishment¹⁰⁴ proceedings may be filed by a defendant at any time prior to judgment, whereupon the

97. TEX. R. CIV. P. 593 (attachment), 661 (garnishment).

98. TEX. REV. CIV. STAT. ANN. art. 6840, § 3(d) (Vernon 1978). See notes 73-77 *supra* for a discussion of damages for wrongful sequestration.

99. TEX. R. CIV. P. 592a (attachment), 598 (sequestration), 658a (garnishment).

100. Rule 658a pertaining to the applicant's bond for issuance of writ of garnishment omits the language "to be approved by such officer," *i.e.*, the officer who will issue the writ. Nonetheless, the safer practice is to have the officer approve the bond. The language was probably omitted in transcribing since the Advisory Committee's recommendation included the language in the rules for bonds pertaining to all three writs.

101. TEX. R. CIV. P. 658a.

102. *Id.* 698.

103. *Id.* 599.

104. *Id.* 664.

property seized, or the proceeds from any sale of the seized property, is restored to the debtor. The bond must be approved by the officer who levied the writ, and must be payable to the plaintiff in the amount fixed by the court's original order or, at the defendant's option, in the amount of the value of the seized property as estimated by the officer. In either event, the bond must include one year's interest at the legal rate from the date of filing the bond. In attachment and garnishment proceedings a defendant's replevin bond must be conditioned so that the defendant will satisfy, to the extent of the penal amount of the bond, any judgment rendered against the defendant in the main case. A defendant's replevin bond in sequestration¹⁰⁵ must be conditioned as provided in rule 702 for personal property,¹⁰⁶ or rule 703 for real property.¹⁰⁷

Review of Amount of Bond. Either party, on reasonable notice, which may be less than three days, has a mandatory right to a prompt judicial hearing by the court to review the amount of the bond, the denial of bond, the sufficiency of the surety, and the estimated values of properties.¹⁰⁸ Evidence must be presented at the hearing unless evidentiary affidavits are uncontroverted. The court's order following the review supersedes any previous order.

Property Substitution. An innovative procedure, not found in any other jurisdiction, has been implemented by the supreme court in rules 608 and 664, which pertain, respectively, to writs of attachment and garnishment. These writs will be sought most often when the property seized is subject to execution, rather than when, as in the case of sequestration, the creditor has a security interest in the seized property. The 1977 rules provide a new important right for debtors: On reasonable notice, which may be less than three days, the debtor may move to substitute other property of at least equal value for the property attached or garnished. In connection with the debtor's motion the court must determine the relative equity values of the properties connected with the proposed substitution, and insure that the property offered for substitution is not subject to intervening liens. The rules provide that when property is substituted, the liens on the substi-

105. *Id.* 701.

106. Rule 702 provides:

If the property to be replevied be personal property, the condition of the bond shall be that the defendant will not remove the same out of the county, or that he will not waste, ill-treat, injure, destroy, or dispose of the same, according to the plaintiff's affidavit, and that he will have such property, in the same condition as when it is replevied, together with the value of the fruits, hire or revenue thereof, forthcoming to abide the decision of the court, or that he will pay the value thereof, or the difference between its value at the time of replevy and the time of judgment and of the fruits, hire or revenue of the same in case he shall be condemned to do so.

107. Rule 703 provides: "If the property be real estate, the condition of such bond shall be that the defendant will not injure the property, and that he will pay the value of the rents of the same in case he shall be condemned so to do."

108. TEX. R. CIV. P. 599 (attachment), 664 (garnishment), 701 (sequestration), 708 (where defendant has not replevied the property).

tuted property date from the levy on the original property attached or garnished.¹⁰⁹

These provisions result from efforts of the supreme court to offer maximum accommodation to debtors. Nevertheless, the right of substitution is not afforded to a debtor whose property is seized by writ of sequestration, presumably because the creditor has pre-existing rights in specific property and should not be forced to accept other property. Moreover, the special interests of the applicant for a writ of sequestration are recognized in other rules as well. The applicant may, by filing a replevin bond or appropriately conditioning the original sequestration bond, secure actual possession of the property. The bond, which is payable to the debtor, must be in an amount not less than double the value of the property to be replevied, and is subject to the conditions found in rules 702 and 703. The provision which permits the applicant to obtain possession of the property is unique in the circumstances of sequestration because the applicant presumably has a pre-existing interest in the property sequestered; the applicant for a writ of attachment or garnishment, on the other hand, has no such pre-existing interest. Thus, pending final judgment or dissolution of the writ, the levying officer retains property attached and the garnishee retains property garnished, unless in either case the defendant replevies the property. In the instance of sequestration, however, the creditor also has the right to replevy if the debtor does not do so within ten days after the levy of the writ of sequestration by the officer and service of notice of such levy on the debtor.

Dissolution and Modification of a Writ. Rules 608, 712(a), and 664(a) extend to the debtor all significant safeguards required by the constitutional decisions subsequent to *Fuentes*. A debtor may, by sworn written motion, seek to vacate, dissolve, or modify a writ and any order directing its issuance. The debtor may set up any justification for seeking to dissolve or modify a writ or the court's order. The debtor's sworn motion must admit or deny every finding contained in the court's order or state the reasons why the debtor cannot admit or deny such findings.

The debtor's motion may be heard immediately upon reasonable notice, and must be determined within ten days after filing unless the parties agree to an extension of time. The filing of a motion by the debtor will stay, until a hearing, any further proceedings under the writ except orders concerning the care, preservation, or sale of perishable property. A motion filed prior to the levy of the writ presumably will prevent levy of the writ. At the hearing on the debtor's motion, the creditor has the burden of proving the grounds relied upon for the issuance of the writ. The credi-

109. Like the Federal Rules Enabling Act, TEX. REV. CIV. STAT. ANN. art. 1731a, § 2 (Vernon 1962) provides that the rules enacted by the supreme court "shall not abridge, enlarge or modify the substantive rights of the litigant." It is not entirely clear whether the substitution of property subject to the lien, including subjecting the substituted property to the lien from its inception date on the original property, constitutes prohibited legislative action by the court, or whether it is within the ambit of the court's rule making power.

tor's proof must be directed to the "grounds relied upon" for the "issuance" of the writ, and not merely to grounds that exist at the time of the hearing that would support issuance of the writ. The debtor has the burden of proving whether the reasonable value of the properties seized exceeds the amount necessary to secure the debt, interest for one year, and probable cost. The debtor also has the burden in attachment and garnishment proceedings to prove facts to justify any substitution of property. At the hearing the court may enter an order based upon uncontroverted affidavits; otherwise the parties must submit evidence. An order dissolving the writ will vacate the debtor's replevy bond and discharge the sureties. The court may render any orders, originally or in modification of its previous orders, that justice may require, pursuant to the debtor's motion and the parties' evidence submitted at the hearing.

The critical focus of the response to constitutional issues is found in the rules governing the applications for the various writs and ensuing orders of the court, the provisions for service on defendants of the writs with the appropriate legends thereon, the rights of defendants to replevy that property, and the required prompt review of the issuance of the writs and the various bonds. The 1977 rules provide optimum protection to a debtor when property has been seized. The rules safeguard the debtor from seizure of property in the absence of sworn facts and court findings thereon supporting the issuance of a writ, and afford the debtor the right to replevy by the mere posting of a bond, without proof that he is even entitled to the property.

B. Garnishment After Judgment

In 1975 a Texas court of civil appeals upheld the Texas post-judgment garnishment procedures, specifically emphasizing that the constitutional issues connected with prejudgment seizure proceedings are not present in post-judgment seizure of property for satisfaction of judgments.¹¹⁰ In post-judgment garnishment, the debtor is deemed to have received prior notice and hearing at the trial in which the judgment was entered, and therefore prior notice and hearing in connection with the seizure have been provided as well. Thus, none of the constitutional decisions impugn the seizure of property pursuant to writ of garnishment after a final judgment.

Rule 658 provides that "no writ shall issue *before final judgment* except upon written order of the court . . .," and rule 658(a) provides that no writ of garnishment shall issue *before final judgment* until a party applying therefor has filed a *bond* with the officer authorized to issue such writ. Prior Texas practice has required neither a court order nor bond on which to base the issuance of a post-judgment writ of garnishment. Prior Texas practice required a bond only in "the case mentioned in subdivision 2 of

110. *Ranchers & Farmers Livestock Auction Co. v. First State Bank*, 531 S.W.2d 167 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.).

Article 4076 of the Revised Civil Statutes;"¹¹¹ otherwise, a bond was not necessary. Since new rules 658 and 658(a) require a court order and a bond only when the writ is to be issued "before final judgment," the prior Texas practice providing ready access to a writ of garnishment after judgment without bond or further court order should not be deemed altered by the new rules. Thus, upon application pursuant to rule 658 for post-judgment garnishment, the clerk should proceed to issue the writ pursuant to rule 659 without a court order or bond.

C. Related Procedures

Two other sections of the rules need to be analyzed by the Supreme Court and its Advisory Committee, and appropriate amendments adopted in line with the 1977 changes in attachment, sequestration, and garnishment: specifically, the rules relating to distress warrants, rules 610 through 620, and the rules relating to trial of right of property, rules 717 through 736. These rules are deficient in the same respects as the former rules on attachment, sequestration, and garnishment. In *Stevenson v. Cullen Center, Inc.*¹¹² a Texas court of civil appeals held unconstitutional the Distress Warrant Statute, article 5239, and the rules of civil procedure applicable to distress warrants.¹¹³ The court noted that Texas distress warrant procedure is deficient in that issuance of a warrant is permitted on mere conclusory allegations in the creditor's affidavit, and the opportunity is not provided for a prompt post-seizure hearing.¹¹⁴ Consequently, statutes relating to distress warrant are in need of legislative revision. Suggested revisions to the rules pertaining to distress warrant and trial of right of property are contained in Appendices I and II respectively.

IV. CONCLUSION

Constitutional attacks on the various extraordinary writ remedies should be separated into attacks for violations of substantive due process and attacks for violations of procedural due process. Attacks focusing on whether or not the statutes authorizing prejudgment seizure are authorized only under factual circumstances that meet the *Mitchell* and *Di-Chem* balancing tests are questions of statutory validity which go directly to the substantive constitutionality of a prejudgment seizure. On the other hand, questions regarding the procedural pursuit of a seizure must focus on the Rules of Civil Procedure. All of the requirements and standards revealed in *Mitchell* and *Di-Chem* are met by the 1977 rules adopted by the Supreme Court of Texas. By providing carefully structured mechanisms to ensure that the writs will be issued only upon fully supported grounds, that a neutral officer will review the writ before issuance, that the creditor

111. TEX. R. CIV. P. 658a, effective Jan. 1, 1961. See also *Szanto v. First State Bank*, 212 S.W. 971 (Tex. Civ. App.—Texarkana 1919, no writ).

112. 525 S.W.2d 731 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ).

113. *Id.* at 735.

114. *Id.* at 734-35.

will provide adequate security, that the debtor may have prompt post-seizure notice and hearing, and that the debtor may regain possession upon adequate security, the 1977 rules adopted by the Supreme Court of Texas have fully satisfied the requirements of procedural due process.

APPENDIX I

Suggested Revised Rules on Distress Warrant

Rule 610. Application for Distress Warrant and Order: Either at the commencement of a suit or at any time during its progress the plaintiff may file an application for the issuance of a distress warrant with the justice of the peace. Such application may be supported by affidavits of the plaintiff, his agent, his attorney, or other persons having knowledge of relevant facts, but shall include a statement that the amount sued for is rent, or advances described by statute, or shall produce a writing signed by the tenant to that effect, and shall further swear that such warrant is not sued out for the purpose of vexing and harrassing the defendant. The application shall comply with all statutory requirements and shall state the grounds for issuing the warrant and the specific facts relied upon by the plaintiff to warrant the required findings by the justice of the peace. The warrant shall not be quashed because two or more grounds are stated conjunctively or disjunctively. The application and any affidavits shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence provided that facts may be stated based upon information and belief if the grounds of such belief are specifically stated.

No warrant shall issue before final judgment except on written order of the justice of the peace after a hearing, which may be ex parte. Such warrant shall be made returnable to a court having jurisdiction of the amount in controversy. The justice of the peace in his order granting the application shall make specific findings of facts to support the statutory grounds found to exist, and shall specify the maximum value of property that may be seized, and the amount of bond required of plaintiff, and, further shall command that property be kept safe and preserved subject to further orders of the court having jurisdiction. Such bond shall be in an amount which, in the opinion of the court, shall adequately compensate defendant in the event plaintiff fails to prosecute his suit to effect, and pay all damages and costs as shall be adjudged against him for wrongfully suing out the warrant. The justice of the peace shall further find in his order the amount of bond required to replevy, which, unless the defendant chooses to exercise his option as provided in Rule 614, shall be the amount of plaintiff's claim, one year's accrual of interest if allowed by law on the claim, and the estimated costs of court. The order may direct the issuance of several warrants at the same time, or in succession, to be sent to different counties.

Rule 611. Bond for Distress Warrant: No distress warrant shall issue before final judgment until the party applying therefor has filed with the justice of the peace authorized to issue such warrant a bond payable to the defendant in an amount approved by the justice of the peace, with sufficient surety or sureties as provided by statute, conditioned that the plaintiff

will prosecute his suit to effect and pay all damages and costs as may be adjudged against him for wrongfully suing out such warrant.

After notice to the opposite party, either before or after the issuance of the warrant, the defendant or plaintiff may file a motion to increase or reduce the amount of such bond, or to question the sufficiency of the sureties thereon, in a court having jurisdiction of the subject matter. Upon hearing, the court shall enter its order with respect to such bond and sufficiency of the sureties.

Rule 612. Requisites for Warrant: A distress warrant shall be directed to the sheriff or any constable within the State of Texas. It shall command him to attach and hold, unless replevied, subject to the further orders of the court having jurisdiction, so much of the property of the defendant, not exempt by statute, of reasonable value in approximately the amount fixed by the justice of the peace, as shall be found within his county.

Rule 613. Service of Warrant on Defendant: The defendant shall be served in any manner prescribed for service of citation, or as provided in Rule 21a, with a copy of the distress warrant, the application, accompanying affidavits, and orders of the justice of the peace as soon as practicable following the levy of the warrant. There shall be prominently displayed on the face of the copy of the warrant served on the defendant, in 10-point type and in a manner calculated to advise a reasonably attentive person of its contents, the following:

To _____, Defendant: You are hereby notified that certain properties alleged to be owned by you have been seized. If you claim any rights in such property, you are advised: "YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WARRANT."

Rule 614. Defendant May Replevy: At any time before judgment, should the seized property not have been previously claimed or sold, the defendant may replevy the same, or any part thereof, or the proceeds from the sale of the property if it has been sold under order of the court, by giving bond with sufficient surety or sureties as provided by statute, to be approved by a court having jurisdiction of the amount in controversy payable to plaintiff in double the amount of the plaintiff's debt, or, at the defendant's option for not less than the value of the property sought to be replevied, plus one year's interest thereon at the legal rate from the date of the bond, conditioned that the defendant shall satisfy to the extent of the penal amount of the bond any judgment which may be rendered against him in such action.

On reasonable notice to the opposing party (which may be less than three days) either party shall have the right to prompt judicial review of the amount of bond required, denial of bond, sufficiency of sureties, and estimated value of the property, by a court having jurisdiction of the amount in controversy. The court's determination may be made upon the basis of affidavits if uncontroverted setting forth such facts as would be admissible in evidence, otherwise the parties shall submit evidence. The court shall forthwith enter its order either approving or modifying the re-

quirements of the order of the justice of the peace, and such order of the court shall supersede and control with respect to such matters.

On reasonable notice to the opposing party (which may be less than three days) the defendant shall have the right to move the court for a substitution of property, of equal value as that attached, for the property seized. Provided that there has been located sufficient property of the defendant's to satisfy the order of seizure, the court may authorize substitution of one or more items of defendant's property for all or part of the property seized. The court shall first make findings as to the value of the property to be substituted. If property is substituted, the property released from seizure shall be delivered to defendant, if such property is personal property, and all liens upon such property from the original order of seizure or modification thereof shall be terminated. Seizure of substituted property shall be deemed to have existed from the date of levy on the original property seized, and no property on which liens have become affixed since the date of levy on the original property may be substituted.

Rule 615. Dissolution or Modification of Distress Warrant: A defendant whose property has been seized or any intervening claimant who claims an interest in such property, may by sworn written motion, seek to vacate, dissolve, or modify the seizure, and the order directing its issuance, for any grounds or cause, extrinsic or intrinsic. Such motion shall admit or deny each finding of the order directing the issuance of the warrant except where the movant is unable to admit or deny the finding, in which case movant shall set forth the reasons why he cannot admit or deny. Unless the parties agree to an extension of time, the motion shall be heard promptly, after reasonable notice to the plaintiff (which may be less than three days), and the issue shall be determined not later than 10 days after the motion is filed. The filing of the motion shall stay any further proceedings under the warrant, except for any orders concerning the care, preservation, or sale of any perishable property, until a hearing is had, and the issue is determined. The warrant shall be dissolved unless, at such hearing, the plaintiff shall prove the specific facts alleged and the grounds relied upon for its issuance, but the court may modify the order of the justice of the peace granting the warrant and the warrant issued pursuant thereto. The movant shall however have the burden to prove that the reasonable value of the property seized exceeds the amount necessary to secure the debt, interest for one year, and probable costs. He shall also have the burden to prove the facts to justify substitution of property.

The court's determination may be made upon the basis of affidavits setting forth such facts as would be admissible in evidence, but additional evidence, if tendered by either party shall be received and considered. The court may make all such orders, including orders concerning the care, preservation, or disposition of the property (or the proceeds therefrom if the same has been sold), as justice may require. If the movant has given a replevy bond, an order to vacate or dissolve the warrant shall vacate the replevy bond and discharge the sureties thereon, and if the court modifies the order of the justice of the peace or the warrant issued pursuant thereto, it shall make such further orders with respect to the bond as may be consistent with its modification.

Rules 615 through 620. To be renumbered to 616 through 621.

APPENDIX II

Suggested Revised Rules on Trial of Right of Property

Rule 717. Claimant Must Make Affidavit: Whenever a distress warrant, writ of execution, sequestration, attachment, or other like writ is levied upon personal property, and such property, or any part thereof, shall be claimed by any claimant who is not a party to such writ, such claimant may make application that such claim is made in good faith, and file such application with the court in which such suit is pending. Such application may be supported by affidavits of the claimant, his agent, his attorney, or other persons having knowledge of relevant facts. The application shall comply with all statutory requirements and shall state the grounds for such claim and the specific facts relied upon by the claimant to warrant the required findings by the court.

The claim shall not be quashed because two or more grounds are stated conjunctively or disjunctively. The application and any affidavits shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence; provided that facts may be stated based upon information and belief if the grounds of such belief are specifically stated.

No property shall be delivered to the claimant except on written order of the court after a hearing pursuant to Rule 718. The court in its order granting the application shall make specific findings of facts to support the statutory grounds found to exist and shall specify the amount of the bond required of the claimant.

Rule 718. Property Delivered to Claimant: Any claimant who claims an interest in property on which a writ has been levied may, by sworn written motion, seek to obtain possession of such property. Such motion shall admit or deny each finding of the order directing the issuance of the writ except where the claimant is unable to admit or deny the finding, in which case claimant shall set forth the reasons why he cannot admit or deny. Such motion shall also contain the reasons by why the claimant has superior right or title to the property claimed as against the plaintiff in the writ. Unless the parties agree to an extension of time, the motion shall be heard promptly, after reasonable notice to the plaintiff (which may be less than three days), and the issue shall be determined not later than 10 days after the motion is filed. The filing of the motion shall stay any further proceedings under the writ, except for any orders concerning the care, preservation, or sale of any perishable property, until a hearing is had, and the issue is determined. The claimant shall have the burden to show superior right or title to the property claimed as against the plaintiff and defendant in the writ.

The court's determination may be made upon the basis of affidavits, if uncontroverted, setting forth such facts as would be admissible in evidence, but additional evidence, if tendered by either party shall be received and considered. The court may make all such orders, including orders concerning the care, preservation, or disposition of the property, or the proceeds therefrom if the same has been sold, as justice may require, and if the court modifies its order or the writ issued pursuant thereto, it shall make such further orders with respect to the bond as may be consistent with its modification.

Rule 719. Bond: No property shall be put in the custody of the claimant until the claimant has filed with the officer who made the levy, a bond in an amount fixed by the court's order equal to double the value of the property so claimed, payable to the plaintiff in the writ, with sufficient surety or sureties as provided by statute to be approved by such officer, conditioned that the claimant will return the same to the officer making the levy, or his successor, in as good condition as he received it, and shall also pay the reasonable value of the use, hire, increase and fruits thereof from the date of said bond, or, in case he fails so to return said property and pay for the use of the same, that he shall pay the plaintiff the value of said property, with legal interest thereon from the date of the bond, and shall also pay all damages and costs that may be awarded against him for wrongfully suing out such claim.

The plaintiff or claimant may file a motion to increase or reduce the amount of such bond, or to question the sufficiency of the sureties thereon, in the court in which such suit is pending. Upon hearing, the court shall enter its order with respect to such bond and sufficiency of the sureties.

Rule 720. Return of Oath and Bond: Whenever any person shall claim property and shall duly make the application and give the bond, if the writ under which the levy was made was issued by a justice of the peace or a court of the county where such levy was made, the officer receiving such application bond shall indorse on the writ that such claim has been made and application and bond given, and by whom; and shall also indorse on such bond the value of the property as assessed by himself, and shall forthwith return such bond with a copy of the writ to the proper court having jurisdiction to try such claim.

Rule 721. Out-County Levy: Whenever any person shall claim property and shall make the application and give the bond as provided for herein, if the writ under which such levy was made was issued by a justice of the peace or a court of another county than that in which such levy was made, then the officer receiving such bond shall indorse on such bond the value of the property as assessed by himself, and shall forthwith return such bond with a copy of the writ, to the proper court having jurisdiction to try such claim.

Rule 722. Return of Original Writ: The officer taking such bond shall also indorse on the original writ, if in his possession, that such claim has been made and application and bond given, stating by whom, the names of the surety or sureties, and to what justice or court the bond has been returned; and he shall forthwith return such original writ to the tribunal from which it issued.

Rule 723. Docketing Cause: Whenever any bond for the trial of the right of property shall be returned, the clerk of the court, or such justice of the peace, shall docket the same in the original writ proceeding in the names of the plaintiff in the writ as the plaintiff, together with the other parties in their respective capacities, and the claimant of the property as intervening claimant.

Rule 724. Issue Made Up: After the claim proceedings have been docketed, and on the hearing day set by the court, then the court, or the justice of the peace, as the case may be, shall enter an order directing the making and joinder of issues by the parties. Such issues shall be in writ-

ing and signed by each party or his attorney. The plaintiff shall make a brief statement of the authority and right by which he seeks to subject the property levied on to the process, and it shall be sufficient for the claimant and other parties to make brief statements of the nature of their claims thereto.

Rule 725. Judgment by Default: If the plaintiff appears and the claimant fails to appear or neglects or refuses to join issue under the direction of the court or justice within the time prescribed for pleading, the plaintiff shall have judgment by default.

Rule 726. Judgment of Non-Suit: If the plaintiff does not appear, he shall be non-suited.

Rule 729 to be renumbered 727.

Rule 728. Burden of Proof: If the property was taken from the possession of the claimant pursuant to the original writ, the burden of proof shall be on the plaintiff in the writ. If it was taken from the possession of the defendant in such writ, or any other person than the claimant, the burden of proof shall be on the claimant.

Rule 731 to be renumbered 729.

Rule 730. Failure to Establish Title: Where any claimant has obtained possession of property, and shall ultimately fail to establish his right thereto, judgment may be rendered against him and his sureties for the value of the property, with legal interest thereon from the date of such bond. Such judgment shall be rendered in favor of the plaintiff or defendant in the writ, or of the several plaintiffs or defendants, if more than one, and shall fix the amount of the claim of each.

Rule 731. Execution Shall Issue: If such judgment should not be satisfied by a return of the property, then after the expiration of ten days from the date of the judgment, execution shall issue thereon in the name of the plaintiff or defendant for the amount of the claim, or of all the plaintiffs or defendants for the sum of their several claims, provided the amount of such judgment shall inure to the benefit of any person who shall show superior right or title to the property claimed as against the claimant; but if such judgment be for a less amount than the sum of the several plaintiffs' or defendants' claims, then the respective rights and priorities of the several plaintiffs or defendants shall be fixed and adjusted in the judgment.

Rules 734 through 736 to be renumbered Rules 732 through 734.

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