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Constitutional Law--Prejudgment Replevin As a Contravention of the Due Process Clause

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Kentucky, the recent judicial attitude has been to protect the surface from destruction. In the future, legislation will likely recognize these common law rights. Many states have already enacted strip mine reclamation acts that require the mineral owner to restore the surface to its natural state. Ultimately, the common law rights of surface preservation will probably be replaced by legislation with stringent regulations and strict enforcement to protect the surface estate.

KENNETH O. McCUTCHEON

CONSTITUTIONAL LAW—PREJUDGMENT REPLEVIN AS A CONTRAVENTION OF THE DUE PROCESS CLAUSE

I. INTRODUCTION

Commercial enterprise is currently being subjected to a multiphased attack launched under the auspices of consumer protection. An integral part of this attack involves a challenge to allegedly unconscionable creditor practices, particularly those that are widespread among low-income consumers. Bureaucratic investigations¹ and federal statutes² have sought to reduce the uninformed use of credit sales transactions by exposing exorbitant finance charges. Several consumer advocates suggest the need for legislation abolishing the holder in due course doctrine.³ And in the courts, several traditional creditor's remedies have recently been attacked under the due process clause of the fourteenth amendment.

A particular target of attack under the due process clause has been prejudgment replevin, which is a favorite creditor's remedy because it provides a quick, inexpensive means of repossessing property from a debtor who is allegedly in default. This comment will explore recent judicial developments that limit the use of prejudgment replevin as a creditor's remedy. It will then point out some situations in which a creditor may still be able to use prejudgment replevin and some other means that a creditor may use to accomplish nearly the same purpose. In addition, this comment will examine Missouri's codified replevin in the light of the recent case law.

II. HISTORICAL BACKGROUND FOR MODERN STATUTORY REPLEVIN

Replevin is an ancient remedy, yet its modern statutory forms are a combination of two common law actions—replevin and detinue. The former developed in 12th-century England from the plea *de vetito namio*,⁴ which had developed as a means of recourse for tenants who had fallen victim to a wrongful distress by their overlord. Distress was an overlord's common

1. See FEDERAL TRADE COMM'N, ECONOMIC REPORT ON INSTALLMENT CREDIT AND RETAIL SALES PRACTICES OF DISTRICT OF COLUMBIA RETAILERS (1968) [hereinafter cited as FTC REPORT].

2. See Consumer Credit Protection Act, 15 U.S.C. §§ 1601-07 (1970).

3. For examples of such curative legislation see N.Y. PERS. PROP. LAW § 403 (McKinney 1962); PA. STAT. ANN. tit. 69, § 615 (1965).

4. See 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 283 (3d ed. 1927).

law right to appropriate his tenant's personal property, usually cattle, to compel satisfaction of arrearages in rent.⁵ This arrangement entitled a creditor to retain the seized property until either satisfaction of the debt or an offer of gage or pledge.⁶ The right to distress by self-help eventually became an instrument of oppression, however. The overlord often seized too much property, misused and damaged seized property, or refused to redeliver the property upon the tenant's offer of satisfaction.⁷ If the overlord refused to accept gage or pledge, the tenant could plead *de vetito namio* to the sheriff. After the tenant supplied appropriate security, the sheriff would seize the property for immediate delivery to the tenant.⁸

Two aspects of ancient replevin are noteworthy. First, early replevin was a debtor's protective remedy, as compared to its present status as a creditor's weapon. Second, most authorities maintain that replevin was originally available only for recovery of wrongfully taken chattels, and not for chattels merely wrongfully detained.⁹ Yet, in many cases the creditor had a right to seize the property, and the tenant could obtain redelivery only after an offer in satisfaction of his debt. Thus, the distrainor may only have been guilty of a wrongful detention in some of the early cases. Later, however, as the action developed as an inexpensive means of trying title to land,¹⁰ both a wrongful taking and a wrongful detention became necessary elements of replevin.

Detinue, the other ancestor of modern replevin, is itself a progeny of the action of debt.¹¹ One of the earliest recognized forms of personal action in England, debt was designed to secure plaintiff "his due," whether in the form of money or chattels. The gravamen of detinue was a wrongful detention; thus, detinue was commonly the remedy of a bailor against his bailee, *i.e.*, where the defendant had acquired a chattel with plaintiff's consent.¹² Unlike a plaintiff in replevin, a plaintiff in detinue was unable to gain prejudgment repossession of the chattel. In fact, the law developed to the extent that the defendant could elect between restoring the chattel or merely paying its price.¹³

A modern-day creditor seeking prejudgment repossession would find the separate common law remedies of replevin and detinue useless. Al-

5. See 10 HALSBURY'S LAWS OF ENGLAND 439 (2d ed. 1933).

6. J. COBBEY, LAW OF REPLEVIN 21 (2d ed. 1900).

7. See *Crocker v. Mann*, 3 Mo. 472 (1834).

8. See 2 F. POLLACK & F. MATTLAND, THE HISTORY OF ENGLISH LAW 577 (2d ed. 1898). Strong policies militated against wrongful distress, and an overlord retaining property after an offer of satisfaction was subject to criminal prosecution. Bracton indicated the offense was as serious as robbery. *Id.*

9. See J. COBBEY, *supra* note 6, at 30.

10. Rather than utilize an expensive *in rem* action, a plaintiff could sue another claimant of the land in replevin, alleging that the defendant had trespassed upon his property, wrongfully seized his personalty, and thereafter refused its return. Litigation of the wrongful taking issue entailed a determination of title to the land as between plaintiff and defendant. A. GULLIVER, CASES AND MATERIALS ON THE LAW OF FUTURE INTERESTS 210 (1959).

11. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 369 (5th ed. 1956).

12. *Id.*

13. *Id.*

though replevin seemed to permit prejudgment repossession, it was unavailable to the creditor because it required a wrongful taking. Detinue, which required only a wrongful detention, was available, but it lacked the prejudgment repossession feature. Therefore, from the creditor's standpoint, a need existed for a remedy with the features of both common law detinue and common law replevin. The states have fulfilled this need by statute.¹⁴

III. STATUTORY REPLEVIN IN MISSOURI

Early Missouri lawmakers struggled with the problems of whether to combine replevin and detinue and whether to allow a prejudgment remedy in both cases. The legislature apparently consolidated the two actions in an 1816 statute,¹⁵ which was repealed two years later. Its replacement allowed prejudgment seizure only in the event of a wrongful taking.¹⁶ However, the Missouri Supreme Court construed a subsequent statute, which arguably retained the distinction between replevin and detinue,¹⁷

14. All 50 states and the District of Columbia have statutes providing for prejudgment replevin. *See* 40 TENN. L. REV. 125, 127 n.8 (1972).

15. Ch. 149, §§ 1, 4, RSMo 1824 provided:

In all cases where there shall be an actual taking of property, whether such a taking does amount to a trespass or not, it shall be lawful for any plaintiff to bring his action of replevin therefore.

....

And in all cases of replevin under this act, when the taking of property would not be a tortious taking, the plaintiff . . . shall also file an affidavit that he verily believes that the property mentioned in the declaration is his property.

16. §§ 1, 6, at 500, RSMo 1825 provided:

The plaintiff shall file in the office of the clerk of the proper court, an affidavit stating that he was lawfully possessed of the property in the declaration mentioned, and that the same was unlawfully taken . . . and without his consent, within one year next preceding his application for such writ.

....

In all declarations of detinue, where the plaintiff shall file in the office of the clerk of the proper court, an affidavit stating that the property in the declaration mentioned is his property, and that he is lawfully entitled to the possession thereof, and the value thereof, and that defendant unlawfully detains the same, the clerk shall issue a writ of *capias* in detinue, and endorse thereon the amount so sworn to, and direct the sheriff to take bail of the defendant in double that sum and it shall be the duty of the sheriff to whom such writ may be directed, to take a bond of such defendant to the plaintiff with sufficient securities in double the sum so sworn to, conditioned that he be and appear at the term of the court to which the writ is returnable, and then and there to defend and make good his claim to the property in the declaration mentioned, and that if judgment shall be given against him, at that or any subsequent term, he will deliver to the plaintiff the property for which judgment shall be given.

17. Ch. 4, § 1, RSMo 1825 provided:

Before any writ of replevin shall be issued, the plaintiff shall file in the office of the clerk of the proper court an affidavit, stating that he was lawfully possessed of the property . . . , and that the same was unlawfully taken from his possession, and without his consent, within one year next preceding his application for such writ, and that he is lawfully entitled to possession thereof.

as providing that no allegation of wrongful taking was necessary to obtain the prejudgment remedy.¹⁸ Our current statute's ancestor, enacted in 1845, again consolidated the two actions.¹⁹

While their provisions are basically parallel, the Revised Statutes of Missouri now have separate sections for replevin in magistrate court²⁰ and circuit court.²¹ In addition, the provisions governing only circuit court replevin appear to have been enacted in rule 99 of the Missouri Supreme Court Rules.²²

In either court, a plaintiff seeking prejudgment restoration of a chattel in a replevin suit must file his petition and execute an affidavit containing the following allegations:

1. He is lawfully entitled to possession, or is the owner of the chattel;
2. the chattel is wrongfully detained;
3. the actual value of the chattel;
4. the chattel is not seized under any process, execution, or attachment against the plaintiff; and
5. he will be in danger of losing the property unless it is removed from defendant's possession or otherwise secured.²³

To obtain the prejudgment remedy, plaintiff need only swear to the allegations; the statute does not require him to produce independent proof of their truth.

Upon plaintiff's filing of the affidavit and delivery of a bond in double the value of the chattel,²⁴ the clerk or judge orders the defendant to make delivery of the property.²⁵ If the defendant fails to deliver the property, the clerk or judge will order the sheriff to seize it.²⁶ Defendant often may rebond in double the value of the chattel to prevent the prejudgment repossession. If, however, plaintiff states in the affidavit that his right of action accrued within one year and that the property was wrongfully taken, a rebond by defendant cannot defeat plaintiff's right to repossess the property pending judgment.²⁷

IV. THE CONSTITUTIONAL ISSUES

A. *Due Process*

The fourteenth amendment provides that no state shall "deprive

18. See *Crocker v. Mann*, 3 Mo. 472 (1834). *But see* *Skinner v. Stouse*, 4 Mo. 93 (1835).

19. See ch. 145, §§ 1-15, RSMo 1845.

20. See §§ 533.240-450, RSMo 1969.

21. See §§ 533.010-230, RSMo 1969.

22. See Mo. R. Civ. P. 99.01-22. Rule 99 may be expanded in the future to cover replevin in magistrate as well as circuit court.

23. Mo. R. Civ. P. 99.01 (circuit court); § 533.260, RSMo 1969 (magistrate court).

24. Mo. R. Civ. P. 99.03 (circuit court); § 533.270, RSMo 1969 (magistrate court).

25. Mo. R. Civ. P. 99.02 (circuit court); § 533.270, RSMo 1969 (magistrate court).

26. Mo. R. Civ. P. 99.04 (circuit court); § 533.310, RSMo 1969 (magistrate court).

27. Mo. R. Civ. P. 99.06 (circuit court); § 533.260, RSMo 1969 (magistrate court).

any person of life, liberty, or property, without due process of law. . . ."²⁸ This statement looms as one of the most majestic, yet fluid concepts in our constitutional law. The interference with property rights occasioned by the prejudgment remedies usually amounts to a "deprivation" of property. In addition, these remedies typically are available merely upon plaintiff's sworn allegations of certain facts. As a result, over the years many of the prejudgment remedies have been attacked as violating the due process clause.

Early courts were unconcerned about prejudgment seizures of property, refusing to examine the "form" of a proceeding.²⁹ The case of *Owenby v. Morgan*³⁰ may have undermined this view, however. In *Owenby*, the Supreme Court upheld a Delaware foreign attachment statute in the face of a due process attack. Speaking for the majority, Justice Pitney emphasized that foreign attachment facilitated the obtaining of quasi in rem jurisdiction over a defendant who had absented himself from the state,³¹ thereby indicating that the Court saw a countervailing interest that justified postponement of due process. Language early in the opinion, however, suggested that the Court might not even be concerned whether a countervailing interest was present. The Court stated:

[T]he question reduces itself to whether this condition is an arbitrary and unreasonable requirement, so inconsistent with established modes of administering justice that it amounts to a denial of due process. And this must be determined . . . with respect to the general effect and operation of the system of procedure established by the statutes.³²

Thus, because attachments made pursuant to this statute came as part of a total process wherein defendant could air his claim, the Court held the procedure comported with due process.

Further evidence of this attitude appeared in *McInnes v. McKay*,³³ where the Maine Supreme Court held a property attachment statute constitutional under due process. This statutory scheme did not facilitate subject matter jurisdiction; it did little more than compel a local defendant's appearance.³⁴ The United States Supreme Court affirmed in a one-sentence opinion,³⁵ citing *Owenby v. Morgan* and another similar case.³⁶ Thus, the Court apparently considered a temporary deprivation of property as de minimus so long as it remained part of an overall process providing for ultimate hearing and judgment.

The landmark decision of *Mullane v. Central Hanover Bank & Trust*

28. U.S. CONST. amend. XIV, § 1.

29. See *Coffin Bros. v. Bennett*, 277 U.S. 29 (1928); *Hurwitz v. North*, 271 U.S. 40 (1926); *Owenby v. Morgan*, 256 U.S. 94 (1921); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855).

30. 256 U.S. 94 (1921).

31. *Id.* at 110-11.

32. *Id.* at 103-04.

33. 127 Me. 110, 141 A. 699 (1928), *aff'd per curiam*, 279 U.S. 820 (1929).

34. *Id.* at 113, 141 A. at 701.

35. *McInnes v. McKay*, 279 U.S. 820 (1929).

36. *Coffin Bros. v. Bennett*, 277 U.S. 29 (1928).

Co.³⁷ further suggested that the Court considered the essence of due process to be the ultimate protection of title rights. *Mullane* dealt with a statutory common trust fund. Under the statutes, periodic accountings were required. All beneficiaries were to be given notice of the accountings by publication. A cause of action for a breach of trust occurring during a particular accounting period was lost unless asserted in the accounting covering that period.³⁸ The Court decided the beneficiaries had what amounted to a property interest that could be permanently impaired by an accounting decree.³⁹ In a famous opinion holding that the notice by publication was insufficient under the due process clause, Justice Jackson stated that

[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded *finality* is notice reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.⁴⁰

Thus, the Court indicated that a taking arises when there is either an ultimate deprivation of property or a binding determination of title rights. By implication, a temporary deprivation would not rise to the level of a taking.

Since *Mullane*, the courts have concerned themselves more with temporary seizures of property, and in 1969 it became apparent that at least some deprivations of property pending judgment violated procedural due process. In *Sniadach v. Family Finance Corp.*,⁴¹ the Supreme Court held a prejudgment garnishment made pursuant to a Wisconsin statute unconstitutional. Justice Douglas emphasized the fluid nature of procedural due process when he stated that "[a] procedural rule that may satisfy due process for attachments in general . . . does not necessarily satisfy procedural due process in every case."⁴² In rejecting the *McInnes* de minimus approach, upon which the lower court had relied,⁴³ Douglas maintained that even a temporary prejudgment garnishment of wages violated due process, primarily because of the importance of salary to the daily existence of the low income garnishee-defendant.

Following *Sniadach*, there was a proliferation of case law concerning similar alleged deprivations of property, including: Termination and reduction of welfare benefits;⁴⁴ distress for rent by a landlord;⁴⁵ enforce-

37. 339 U.S. 306 (1950).

38. *Id.* at 308-09.

39. *Id.* at 313.

40. *Id.* at 314 (emphasis added), citing *Milliken v. Meyer*, 311 U.S. 457 (1940); *Grannis v. Ordean*, 234 U.S. 385 (1914); *Priest v. Las Vegas*, 232 U.S. 604 (1914); *Roller v. Holly*, 176 U.S. 398 (1900).

41. 395 U.S. 337 (1969).

42. *Id.* at 340.

43. See *Sniadach v. Family Fin. Corp.*, 37 Wis. 2d 163, 154 N.W.2d 259 (1967), *rev'd*, 395 U.S. 337 (1969).

44. See *Daniel v. Goliday*, 398 U.S. 73 (1970); *Wheeler v. Montgomery*, 397 U.S. 280 (1970); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

45. See *Hall v. Garson*, 430 F.2d 430 (5th Cir. 1970); *Santiago v. McElroy*, 319 F. Supp. 284 (E.D. Pa. 1970).

ment of innkeepers' liens;⁴⁶ dismissal of civil service employees;⁴⁷ mortgage foreclosures;⁴⁸ suspension of drivers' licenses;⁴⁹ prejudgment garnishment of accounts receivable;⁵⁰ confessions of judgment;⁵¹ and, finally, prejudgment replevin.⁵² The courts were divided on the propriety of extending the principle of *Sniadach* beyond wages, which Douglas had remarked were a "specialized type of property presenting distinct problems in our economic system."⁵³ Through 1971, the replevin statutes of California, Florida, Maryland, New York, Oklahoma, and Pennsylvania were challenged as contravening the principle of *Sniadach*.

The first decision to hold prejudgment replevin unconstitutional was *Laprease v. Raymours Furniture Co.*⁵⁴ In that case, a federal district court held that the New York statute violated due process insofar as it allowed prejudgment seizure of daily necessity items, stating: "Beds, stoves, mattresses . . . and other necessities for ordinary day-to-day living are, like wages in *Sniadach*, a specialized type of property . . ."⁵⁵

The case of *Fuentes v. Faircloth*⁵⁶ typified another view of the issue. The court in *Fuentes* upheld prejudgment seizure of a gas stove and stereo pursuant to Florida's replevin statute, even though a stove was one of the items mentioned in *Laprease* as being a "necessar[y] of ordinary day-to-day living."⁵⁷ Likewise, in *Epps v. Cortese*⁵⁸ and *Wheeler v. Adams Co.*,⁵⁹ two federal courts limited *Sniadach* to its facts by refusing to classify such items as tables and beds as specialized property.

46. See *Klim v. Jones*, 315 F. Supp. 109 (N.D. Cal. 1970).

47. See *Ricucci v. United States*, 425 F.2d 1252 (Ct. Cl. 1970).

48. See *Young v. Ridley*, 309 F. Supp. 1308 (D.D.C. 1970), discussed in Nelson, *Deed of Trust Foreclosure Under Powers of Sale—Constitutional Problems—Legislative Alternatives*, 28 J. Mo. B. 452 (1972).

49. See *Bell v. Burson*, 402 U.S. 535 (1971).

50. See *Arnold v. Knettle*, 10 Ariz. App. 509, 460 P.2d 45 (1969). But see *Terplan Inc. v. Superior Court*, 105 Ariz. 270, 463 P.2d 68 (1969) (dictum).

51. See *Swarb v. Lennox*, 405 U.S. 191 (1972); *D.H. Overmeyer Co. v. Frick Co.*, 405 U.S. 174 (1972).

52. See *Fuentes v. Shevin*, 407 U.S. 67 (1972), *rev'd Epps v. Cortese*, 326 F. Supp. 127 (E.D. Pa. 1971), & *Fuentes v. Faircloth*, 317 F. Supp. 954 (S.D. Fla. 1970); *Brunswick Corp. v. J. & P. Inc.*, 424 F.2d 100 (10th Cir. 1970); *Wheeler v. Adams Co.*, 322 F. Supp. 645 (D. Md. 1971); *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716 (N.D.N.Y. 1970); *Blair v. Pitchess*, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

53. 395 U.S. at 340.

54. 315 F. Supp. 716 (N.D.N.Y. 1970).

55. *Id.* at 722-23. It is submitted that the uncertainty as to which items should be classified as specialized property makes this approach unsatisfactory. For example, while personal luxury items or most property subject to litigation between commercial enterprises are probably outside the category established in *Laprease*, a gray area would exist as to almost all property possessed by a low-income family.

56. 317 F. Supp. 954 (S.D. Fla. 1970), *rev'd sub nom. Fuentes v. Shevin*, 407 U.S. 67 (1972).

57. See text accompanying note 55 *supra*.

58. 326 F. Supp. 127 (E.D. Pa. 1971), *rev'd sub nom. Fuentes v. Shevin*, 407 U.S. 67 (1972).

59. 322 F. Supp. 645 (D. Md. 1971).

The case of *Blair v. Pitchess*⁶⁰ presented the next major development. *Blair* was a taxpayers' suit challenging all prejudgment replevin under an 1872 California claim and delivery law. Abandoning the specialized property concept, the California Supreme Court held the statute unconstitutional in its entirety. The court's sole basis for analogizing prejudgment claim and delivery to prejudgment garnishment was that both involved a taking of property prior to notice and opportunity for hearing.⁶¹ Under the view represented by this decision, whenever persons are required to settle their claims of right through the judicial process, they must be given a meaningful opportunity to be heard before the state may deprive them of any significant property interest, except in an extraordinary situation.

In 1972 the Supreme Court met squarely with the prejudgment replevin problem in the case of *Fuentes v. Shevin*,⁶² which was an appellate consolidation of *Fuentes v. Faircloth* and *Epps v. Cortese*. In *Shevin*, the Court struck down the replevin statutes of Pennsylvania and Florida on due process grounds. In so doing, the Court put aside the specialized property concept as a measure of the intensity of due process protection. It indicated that a necessity of life need not be involved for due process to require opportunity for hearing prior to a temporary deprivation of property.⁶³ Justice Stewart, writing for the majority, believed that this attitude was more in line with the mainstream of past cases, and that the *Sniadach* holding was not geared purely to the absolute necessities of life. Stewart gave some indication, however, that the importance of the property interest to the individual is relevant to the form of notice and hearing to be afforded.⁶⁴

Thus, the Supreme Court has handed down a definitive ruling that notice and opportunity for hearing must normally precede any seizure in replevin. In the wake of *Shevin*, the Missouri Supreme Court has also ruled on Missouri replevin procedures. In *Williams v. Berrey*,⁶⁵ the court held that a prejudgment replevin order issued by a magistrate court failed to comport with the due process standards in *Shevin*. Plaintiff filed his petition, executed an affidavit praying for prejudgment delivery, and posted the appropriate bond. Thereupon, a magistrate clerk issued an order for seizure of the property described in the affidavit and petition. The property was thereafter seized from defendant's residence prior to obtaining service of process. While refusing to invalidate facially the prejudgment possession portions of the statute, the court held the procedure unconstitutional as applied to defendant.⁶⁶ Presumably, the procedure would be constitutional if an extraordinary circumstance existed.

These decisions leave unanswered, however, at least two questions that will confront future courts in ruling upon the validity of prejudgment replevin. First, the Supreme Court's indication in *Shevin* that notice and op-

60. 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

61. *Id.* at 278, 486 P.2d at 1256, 96 Cal. Rptr. at 56.

62. 407 U.S. 67 (1972).

63. *Id.* at 89.

64. *Id.* at 89-90; see *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971).

65. 492 S.W.2d 731 (Mo. En Banc 1973).

66. *Id.*

portunity for hearing are not required in certain extraordinary circumstances⁶⁷ means that a court must determine whether such circumstances existed. Second, if an extraordinary situation was not present, a court must determine what constitutes an adequate opportunity to be heard.

In evaluating the first issue, a court must weigh governmental or public interests favoring prompt action against the obvious due process mandate. If a sufficient countervailing state-creditor interest is at stake, notice and opportunity for hearing may be postponed until after the seizure. Several countervailing governmental interests have been suggested in lower court cases, but only a few of those were favorably received in *Shevin's* dictum. Justice Stewart indicated that these situations must be truly unusual and that even then the state should strictly control its monopoly of force.⁶⁸ The Court cited such examples as collection of federal taxes, seizures to meet the needs of war, and protection against bank failure, misbranded drugs, and contaminated food.⁶⁹

Prejudgment seizure for the benefit of a secured creditor involves three countervailing state-creditor interests arguably sufficient to constitute an extraordinary condition. These interests are: (1) the necessity of preventing a defaulting vendee from absconding with property that is subject to litigation;⁷⁰ (2) the paramount importance to the expansion of consumer credit of the ability of a defaulted vendor to gain speedy repossession of his security;⁷¹ and (3) the possible necessity of seizure as a means of obtaining jurisdiction.⁷²

If the statute authorizing prejudgment seizure is narrowly drawn so as to provide relief only when there is imminent danger the property may disappear, the first interest might be strong enough to allow postponement of notice and hearing.⁷³ Most statutes, however, are not so narrowly drawn. For instance, the Missouri replevin procedure provides for a prejudgment remedy only in the event plaintiff swears he will otherwise be in danger of losing the property pending judgment. Yet the Missouri Supreme Court recognized in *Williams v. Berrey* that affidavits for prejudgment seizure are filed as a matter of course, with little, if any, consideration by either plaintiff or the court as to the truth of the allegations made therein. Furthermore, some courts view the vendor's fear of losing track of secured property

67. 407 U.S. at 90-91.

68. *Id.*

69. *Id.* at 92, citing *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (misbranded drugs); *Fahey v. Mallonee*, 332 U.S. 245 (1947) (protection against bank failure); *Phillips v. Commissioner*, 283 U.S. 589 (1931) (collection of taxes); *United States v. Pfitsch*, 256 U.S. 547 (1921) (war effort needs); *Stoehr v. Wallace*, 255 U.S. 239 (1921) (war effort needs); *Central Union Trust Co. v. Garvan*, 254 U.S. 554 (1921) (war effort needs); *North Am. Storage Co. v. Chicago*, 211 U.S. 306 (1908) (contaminated food).

70. See *Epps v. Cortese*, 326 F. Supp. 127, 135 (E.D. Pa. 1971) *rev'd sub nom.* *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Blair v. Pitchess*, 5 Cal. 3d 258, 279, 486 P.2d 1242, 1256, 96 Cal. Rptr. 42, 56 (1971).

71. See *Wheeler v. Adams Co.*, 322 F. Supp. 645, 657 (D. Md. 1971); *Blair v. Pitchess*, 5 Cal. 3d 258, 280, 486 P.2d 1242, 1257, 96 Cal. Rptr. 42, 57 (1971).

72. See *Blair v. Pitchess*, 5 Cal. 3d 258, 279-80, 486 P.2d 1242, 1257, 96 Cal. Rptr. 42, 57 (1971).

73. See *Fuentes v. Shevin*, 407 U.S. 67, 93 (1972).

as an un compelling consideration in light of the common creditor practice of threatening a defaulting vendee with repossession long before any replevin suit is filed. Any debtor intending to abscond with an item therefore receives his cue long before service of the petition.⁷⁴

Second, the need for continued expansion of consumer credit probably fails to present an extraordinary condition. The suggestion has been made that elimination of prejudgment replevin will raise financing charges on conditional sales agreements because the ability to gain speedy repossession is necessary to reduce overall expenses of selling.⁷⁵ Yet, this ability may be vital only to the "easy credit" merchants who do volume business with low-income families.⁷⁶ Since credit terms enable these merchants to charge higher prices than those set by general credit retailers,⁷⁷ expansion of consumer credit to the poor under current conditions may be undesirable. Further, lower economic groups have traditionally been most affected by deceptive lending practices. In 1968, the Truth-in-Lending Act manifested the strong legislative desire to curtail uninformed use of credit in order to combat unconscionable creditor practices.⁷⁸ Finally, growth of credit among lower economic groups merely allows proliferation of high interest rates and possibly unwise purchases. A recent Federal Trade Commission report revealed that while general market retailers take legal action against delinquent customers only as a last resort, some "easy credit" retailers depend on court action as a matter of course.⁷⁹ The report contained a survey of practices by retailers in the District of Columbia, which indicated that in one year some creditors averaged one judgment for every \$2,559.00 of sales.⁸⁰ To the extent that prejudgment replevin remains an integral part of low-income credit schemes, its elimination would aid in curtailing unjust practices.

With regard to the third interest, the Court in *Shevin* indicated that it considered the necessity of using prejudgment seizure to obtain jurisdiction sufficient to warrant postponement of the hearing. The Court referred to this factor as "clearly a most basic and important public interest."⁸¹ Nevertheless, the presence of a liberal long arm statute may dilute the significance of this interest. In Missouri, when the parties to a replevin action have an underlying contractual relationship of local origin, the

74. *Blair v. Pitchess*, 5 Cal. 3d 258, 279, 486 P.2d 1242, 1256, 96 Cal. Rptr. 42, 56 (1971).

75. *See Wheeler v. Adams Co.*, 322 F. Supp. 645, 657 (D. Md. 1971).

76. *See FTC REPORT, supra* note 1, at 76.

77. *Id.*

78. Consumer Credit Protection Act, 15 U.S.C. § 1601 (1970), provides: The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure that a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.

79. *FTC REPORT, supra* note 1, at 75-76.

80. *Id.* at 76.

81. 407 U.S. at 91 n.23.

plaintiff may obtain personal service of process against the out-state defendant,⁸² thus largely eliminating the need for quasi in rem jurisdiction. Nevertheless, unless property subject to replevin against a foreign defendant is seized or otherwise secured, he may abscond with the chattel pending judgment, thus making satisfaction of a judgment economically impractical.

The second phase of the due process problem, *i.e.*, what constitutes adequate opportunity to be heard, was inadequately dealt with in *Shevin*. The scope of hearing necessary to provide a meaningful opportunity to be heard remains unclear, possibly due to the many-faceted nature of due process. The Court indicated the scope of hearing might vary according to the type of interest involved,⁸³ but that the nature and form of such hearings were subjects for legislative, not judicial, determination.⁸⁴ The most specific enumeration yet given as to the requisite form of proceedings is only that some type of hearing on the merits is necessary.⁸⁵ The Missouri court in *Williams v. Berrey* specified "the judge must make a finding of the probable validity of the plaintiff's underlying claim before issuing the order of delivery,"⁸⁶ which would also contemplate some consideration of the merits at the pre-seizure hearing.

In passing, it should be noted that the concept of specialized property and its accompanying evaluational problems⁸⁷ have not been completely escaped. Our legislators may also need to attack this problem in styling the appropriate form of hearing.

B. Search and Seizure

The Supreme Court in *Shevin* did not decide whether fourth amendment protection operates under prejudgment replevin, but stated that satisfaction of due process hearing requirements might well obviate any search and seizure problem.⁸⁸ However, application of the fourth amendment to prejudgment seizure may be important in "extraordinary situations" where notice and the opportunity to be heard is postponed until after the taking.

In *Murray's Lessee v. Hoboken Land & Improvement Co.*,⁸⁹ which dealt with a warrant of distress against real property, the Supreme Court enunciated the longstanding rule that the fourth amendment does not apply to civil proceedings for the collection of debts.⁹⁰ Two recent Supreme Court holdings have eroded this rule, however. *Camara v. Municipal*

82. See § 506.240, RSMo 1969.

83. 407 U.S. at 91. As the property interest increases in importance to the debtor, particularly where daily necessity items are involved, a more extensive hearing may be required prior to seizure.

84. *Id.* at 97.

85. See *Blair v. Pitchess*, 5 Cal. 3d 258, 268, 486 P.2d 1242, 1248, 96 Cal. Rptr. 42, 48 (1971).

86. 492 S.W.2d at 736.

87. See note 55 *supra*.

88. 407 U.S. at 96 n.32. The Missouri court also avoided this issue in *Williams v. Berrey*.

89. 59 U.S. 227 (1855).

90. *Id.* at 239.

*Court*⁹¹ and *See v. City of Seattle*⁹² held that civil fire and health inspections are searches within the meaning of the fourth amendment. Yet, the Court has refused to apply fourth amendment protections to all civil intrusions. For instance, in *Wyman v. James*,⁹³ the Court held that the fourth amendment does not apply to statutorily required home visitations by social workers to ADC stipend recipients because such visitations do not rise to the level of a search. The tone of the visitations provided the primary motivation for the holding in *Wyman*. Justice Blackmun, for the majority, elucidated that the caseworker's posture was more rehabilitative than investigative, and that no criminal sanctions were available for a refusal to allow entrance.⁹⁴

Seizure by the sheriff in a replevin action probably rises to the level of a constitutionally protected search and seizure. The tone of the intrusion is hostile, and a refusal of entry may be a criminal act.⁹⁵ If the fourth amendment applies in situations involving prejudgment replevin, the sheriff must either obtain a warrant predicated on probable cause,⁹⁶ or, in situations where dispensation with the warrant is appropriate, make a reasonable search for the chattel.⁹⁷

An examination of civil warrant requirements reveals that their protection may be illusory. As expressed in *Camara* and *See*, the probable cause standard in the civil area is marginal compared to that required in criminal search and seizure. A mere valid public interest in enforcement of reasonable health regulations through area-wide searches constitutes probable cause to issue a suitably restricted search warrant.⁹⁸ Furthermore, the Court made clear the inspector need not demonstrate a definite indication of any violation within the premises to be searched.⁹⁹

That the Court may also contemplate such a marginal probable cause standard for a search and seizure in a replevin action is indicated by its assumption in *Shevin* that fulfillment of due process notice and hearing requirements will obviate any search and seizure issue. In *Blair v. Pitchess*,¹⁰⁰ the California Supreme Court fashioned a more precise standard of probable cause. An injunction granted in that case prohibited the sheriff from making any replevin search prior to establishing, before a magistrate, probable cause to believe: (1) That the property to be replevied is located in the area to be searched; and (2) that plaintiff has a right to immediate possession. The latter requirement means that the magistrate must be given sufficient facts to suggest the truth of the allegations in the complaint.¹⁰¹

91. 387 U.S. 523 (1967); see *James v. Goldberg* 303 F. Supp. 935 (S.D.N.Y. 1969).

92. 387 U.S. 541 (1967).

93. 400 U.S. 309 (1971).

94. *Id.* at 325.

95. See Mo. R. Civ. P. 99.18.

96. U.S. CONST. amend. IV, § 2.

97. *Id.* § 1.

98. *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967).

99. *Id.*

100. 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

101. 5 Cal. 3d at 274, 486 P.2d at 1253, 96 Cal. Rptr. at 53.

Thus, an uncertainty exists as to what, if any, probable cause standard applies in replevin.

The problem of what constitutes probable cause in a replevin action may never arise, however, because a warrant may never be required for a search and seizure in a replevin action. The companion to the warrant clause of the fourth amendment is the reasonableness test for warrantless searches. Some countervailing governmental interest is necessary to allow dispensation with a warrant. For example, in the criminal area, searches of moving vehicles,¹⁰² hot-pursuit searches,¹⁰³ and streetside pat-downs¹⁰⁴ all present instances where such a countervailing interest exists. The courts have resorted to a balancing process to determine the reasonableness of civil intrusions;¹⁰⁵ with regard to replevin, they have used the same elements as those evaluated previously under the due process issue.¹⁰⁶ Therefore, any extraordinary circumstance justifying postponement of notice and hearing may also justify dispensation with a warrant. If so, and if the notice and hearing required in the absence of extraordinary circumstances obviate the warrant requirement,¹⁰⁷ a search warrant would never be required in a replevin action.

V. ALTERNATIVE APPROACHES

A. *Non-Judicial Repossessions*

Section 9-503 of the Uniform Commercial Code sanctions self-help repossession by a secured creditor upon default by the vendee, provided the secured party avoids breach of peace in his actions.¹⁰⁸ In addition, most installment sales contracts include, with varying precision, these provisions of the code.¹⁰⁹ At first glance, section 9-503 appears to provide an easy means of circumventing the notice and hearing requirements in replevin. Nevertheless, several problems may limit the utility of self-help as a remedy.

The creditor and his agent must guard against possible breach of the peace in making repossession.¹¹⁰ Courts have held the right to breach the

102. See *Chambers v. Maroney*, 399 U.S. 42 (1970); *Carroll v. United States*, 267 U.S. 132 (1925).

103. See *Warden v. Hayden*, 387 U.S. 294 (1967).

104. See *Sibron v. New York*, 392 U.S. 40 (1968); *Terry v. Ohio*, 392 U.S. 1 (1968).

105. See *Fuentes v. Shevin*, 407 U.S. 67 (1972).

106. See text accompanying notes 64-80 *supra*.

107. See *Fuentes v. Shevin*, 407 U.S. 67, 96 n.32 (1972); text accompanying note 88 *supra*.

108. UNIFORM COMMERCIAL CODE § 9-503 provides:

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. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Section 9-504.

109. *Blair v. Pitchess*, 5 Cal. 3d 258, 282, 486 P.2d 1242, 1258-59, 96 Cal. Repr. 42, 58 (1971).

110. UNIFORM COMMERCIAL CODE § 9-503.

peace is not necessary for protection of the secured party's investment¹¹¹ A contractual provision authorizing the creditor to breach the peace is likely to be void.¹¹² Breach of peace in repossession may result in tort liability for trespass (including punitive damages),¹¹³ statutory liability under section 9-507 of the UCC,¹¹⁴ or loss of the right to a deficiency judgment.¹¹⁵

Two factors are crucial in defining acts that constitute a breach: (1) Whether there is entry into the debtor's home; and (2) whether contemporaneous consent is obtained.¹¹⁶ Relatively few breach of peace problems arise when the vendor repossesses property outside the debtor's dwelling, as when a car is taken from the driveway.¹¹⁷ The issue of consent becomes crucial, however, whenever an entrance into the home is necessary.¹¹⁸ Fraud in gaining admission to the debtor's premises negates any free and contemporaneous consent.¹¹⁹ In addition, some question exists as to when a third party may give consent for the debtor. The validity of third party consent hinges on the consenter's authority to speak for the debtor, as well as his age and familial relationship to the debtor.¹²⁰

Case law is divided on whether entry in the debtor's absence constitutes a breach of peace.¹²¹ The cases are also split on whether entry in the face of a mere oral protest against repossession constitutes a breach of peace.¹²² These uncertainties render self-help less attractive as a remedy.

111. See, e.g., *Hileman v. Harter Bank & Trust Co.*, 174 Ohio St. 95, 186 N.E.2d 853 (1962).

112. *Id.*

113. See *Kensinger Acceptance Corp. v. Davis*, 223 Ark. 942, 269 S.W.2d 792 (1954); *Jones v. H. Martini Furnishing Co.*, 77 Mo. App. 474 (St. L. Ct. App. 1898); *Beneficial Fin. Co. v. Wiener*, 405 P.2d 691 (Okla. 1965). See also *Annots.*, 99 A.L.R.2d 358 (1965), 35 A.L.R.3d 1016 (1971).

114. UNIFORM COMMERCIAL CODE § 9-507 provides in part:

[T]he debtor . . . has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this Part. If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service charge plus ten per cent of the principal amount of the debt or the time price differential plus ten per cent of the cash price.

115. See *White, Representing the Low-Income Consumer in Repossessions, Resales and Deficiency Judgment Cases*, 3 U.C.C.L.J. 199 (1971).

116. *Id.* at 200.

117. *Id.*

118. *Id.*

119. See *Rhodes-Carroll Furniture Co. v. Webb*, 230 Ala. 251, 160 So. 247 (1935); *Barham v. Standridge*, 201 Ark. 1143, 148 S.W.2d 648 (1941). But see *North v. Williams*, 120 Pa. 109, 13 A. 723 (1888).

120. See, e.g., *Bing v. General Motors Acceptance Corp.*, 237 F. Supp. 911 (E.D.S.C. 1965) (sister of debtor could consent); *Luthy v. Philip Werlein Co.*, 163 La. 752, 112 So. 709 (1927) (daughter of debtor could not consent); *Austin v. General Motors Acceptance Corp.*, 239 Miss. 699, 125 So. 2d 79 (1960) (wife of debtor could consent).

121. *Breach*: *Girard v. Anderson*, 219 Ia. 142, 257 N.W. 400 (1934); *Davis v. Nash Cent. Motors*, 332 S.W.2d 475 (K.C. Mo. App. 1960); *Hileman v. Harter Bank & Trust Co.*, 174 Ohio St. 95, 186 N.E.2d 853 (1962). *No breach*: *Cherno v. Bank of Babylon*, 54 Misc. 2d 277, 282 N.Y.S.2d 862 (1968).

122. *Oral protest sufficient*: *Manhattan Credit Co. v. Brewer*, 232 Ark. 976, 341 S.W.2d 765 (1961); *Baber Elec. Co. v. Greer*, 183 Okla. 541, 83 P.2d 598 (1938); *Lark v. Cooper Furniture Co.*, 114 S.C. 37, 102 S.E. 786 (1920); *Mor-*

The UCC sanctions repossession of the security only upon default by the vendee,¹²³ but problems arise concerning the meaning of default. Article 9 of the UCC fails to define this term; scholars loosely define it as a failure by the debtor to perform his legal or contractual obligation.¹²⁴ To resolve this uncertainty, the parties often clearly delineate default in the financing agreement.¹²⁵ However, because most consumer credit contracts are adhesive, there may be some limits in defining default within the sales agreement.¹²⁶ If the definition of default is unconscionable under section 2-302,¹²⁷ the provision may be unenforceable. However, the courts have yet to label unconscionable a provision allowing repossession upon any default in payment.

Recent case law developments to the effect that self-help by the vendor may constitute state action add another element of uncertainty to the use of this remedy. The due process clause governs only deprivations of property by the state;¹²⁸ it does not govern actions by a private individual. However, the doctrine of state action expands the reach of the due process clause to certain activities of private individuals.¹²⁹ The point where activities by a private person become state action is unclear under the cases, partly because most state action litigation has involved the equal protection clause and racial segregation problems.¹³⁰ It is difficult to determine the extent to which the result orientation in the area of racial desegregation has affected the decisions in these cases.

Plaintiffs in several lower federal courts have litigated the state action issue in suits involving self-help creditor's remedies.¹³¹ In these cases, the chief issue is whether actions by a creditor are conducted under "color" of state law,¹³² *i.e.*, pursuant to a delegation of duties normally reserved to

risson v. Gaylon Motor Co., 16 Tenn. App. 394, 64 S.W.2d 851 (1932) (dictum). *Oral protest insufficient*: Commercial Credit Co. v. Cain, 190 Miss. 866, 1 So. 2d 776 (1941); Willis v. Whittle, 82 S.C. 500, 64 S.E. 410 (1909); Singer Mfg. Co. v. Rios, 96 Tex. 174, 71 S.W. 275 (1903).

123. See statute quoted note 106 *supra*.

124. See Squillante, *Commercial Code Review: A Summary of Leading Decisions & Articles*, 74 COM. L.J. 17 (1969).

125. *Id.*

126. See Comment, *Consumer Credit by Adhesion Contracts*, 35 TEMP. L.Q. 125, 127 (1962).

127. UNIFORM COMMERCIAL CODE § 2-302 provides:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clauses, or it may limit the application of any unconscionable clause as to avoid any unconscionable result.

128. U.S. CONST. amend. XIV, § 1.

129. See Horan, *Law & Social Change: The Dynamics of the "State Action" Doctrine*, 17 J. PUB. L. 258 (1968).

130. *Id.*

131. See Hall v. Garson, 430 F.2d 430 (5th Cir. 1970); Oller v. Bank of America, 342 F. Supp. 21 (N.D. Cal. 1972); Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972); McCormick v. First Nat'l Bank, 322 F. Supp. 604 (S.D. Fla. 1971); Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970); Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970).

132. State action roughly equates with the concept of "color of state law" con-

government or judicial process.¹³³ Arguably, any action sanctioned by state statute could meet this test. On the other hand, practically all statutory provisions control human relationships in some manner.¹³⁴ Thus, it is impractical to say that all human behavior conforming to statutory requirements is state action. Nevertheless, activity sanctioned, and possibly encouraged, by local statutes more nearly approaches state action than activity made possible solely by private agreement.

In *Hall v. Garson*,¹³⁵ the Fifth Circuit Court of Appeals examined a Texas statute that gave a landlord a lien on his tenants' personal property and allowed peremptory seizure without judicial process.¹³⁶ In holding that such a seizure constituted state action, the court noted that this amounted to the execution of a lien, which is traditionally the function of the sheriff or constable.¹³⁷ Similarly, in *Klim v. Jones*,¹³⁸ a federal district court held that seizure pursuant to a statutory self-help innkeepers' lien constituted state action, noting that explicit state authorization was all that made it possible.¹³⁹ In accordance with these cases, a federal district court in California recently held that self-help repossession under UCC section 9-503 constituted state action, to which all the notice and hearing requirements of *Shevin* would apply. In *Adams v. Egley*,¹⁴⁰ the court found state action from the mere enactment of this code section because the enactors had set forth a positive state policy.¹⁴¹ Conceivably, section 9-503 delegates rights normally obtainable only in replevin or attachment.

Several other cases have taken a different position. For example, in the case of *Young v. Ridley*,¹⁴² the court held that a non-judicial power of sale under a deed of trust was bargained for by the parties at the time of the mortgage agreement.¹⁴³ While the court did not discuss the state action issue specifically, it appears the element of private bargain between the parties negated the existence of state action. Further, in *McCormick v. First National Bank*,¹⁴⁴ a Florida federal district court held that non-judicial repossessions under section 9-503 failed to constitute state action, stating that the remedy was a product of a private contract between the parties and that the mere presence of the Code as a backdrop to the transaction failed

tained in 42 U.S.C. § 1983 (1970). In *United States v. Classic*, 313 U.S. 299 (1941), the Supreme Court stated:

Misuse of power, possessed by virtue of state law and made possible *only* because the wrongdoer is clothed with the authority of state law, is action "under color of" state law (emphasis added).

133. See W. LOCKHART, Y. KAMISAR, & J. CHOPER, CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS 1237-64 (3d. ed. 1970).

134. See *Oller v. Bank of America*, 342 F. Supp. 21, 23 (N.D. Cal. 1972).

135. 430 F.2d 430 (5th Cir. 1970).

136. *Id.* at 432-33.

137. *Id.* at 439.

138. 315 F. Supp. 109 (N.D. Cal. 1970).

139. *Id.* at 114.

140. 338 F. Supp. 614 (S.D. Cal. 1972).

141. *Id.* at 618.

142. 303 F. Supp. 1308 (D.D.C. 1970).

143. *Id.* at 1312.

144. 322 F. Supp. 604 (S.D. Fla. 1971).

to show a lack of independent bargaining.¹⁴⁵ Also, in *Oller v. Bank of America*,¹⁴⁶ the court held that the self-help remedy under the UCC was purely contractual in origin. This case criticized the court in *Adams v. Egley* for relying on state action law developed in civil rights litigation.¹⁴⁷

The most recent ruling on section 9-503 has come from the New Jersey courts. In *Messenger v. Sandy Motors Inc.*,¹⁴⁸ the court noted that repossession on default had been a recognized practice long before adoption of the UCC.¹⁴⁹ The court believed that the mere codification of a time-honored common law right could not clothe the practice of self-help with color of state law, so as to take it out of the private area and subject it to due process scrutiny.¹⁵⁰

This split of authority on the status of section 9-503, particularly in light of the division in the federal circuits, increases the probability of a future Supreme Court ruling to settle the controversy. However, it is noteworthy that a ruling to the effect that self-help constitutes state action, because section 9-503 exists as a backdrop to the practice, may not eliminate these activities. If sanction by the UCC is necessary to provide the state action taint to self-help, repeal of section 9-503 might eliminate any state action argument.

B. *Equitable Replevin*

In lieu of legal replevin under rule 99, the creditor may be able to obtain an equitable remedy if he can demonstrate that the remedy at law is inadequate. An advantageous feature of equitable replevin is the ability of the court to issue a temporary mandatory injunction to compel return of the chattel to plaintiff pending trial. Likewise, the court has the option to issue a temporary prohibitive injunction or a temporary restraining order that defendant not disturb, damage, or dispose of the chattel before disposition of the case.¹⁵¹ One or both of these alternatives may provide a solution to the notice and hearing requirements in *Shevin* in that in both situations a right to a hearing on the temporary relief normally exists.

In lawsuits involving chattels, the prevalent attitude is that the remedy at law is presumptively adequate.¹⁵² Many chattels possess a degree of fungibility, since a reasonable facsimile to the chattel can be located and purchased with the proceeds of a judgment. Exceptions to the presumption of legal adequacy exist, however, where personalty sought to be replevied

145. *Id.* at 606-07.

146. 342 F. Supp. 21 (N.D. Cal. 1972).

147. *Id.* at 23.

148. 295 A.2d 402 (N.J. Sup. Ct. 1972).

149. *Id.* at 405-06.

150. *Id.* at 406. Another interesting aspect of this decision is the conclusion, drawn from several sources, that self-help is far more prevalent than replevin as a summary remedy in automobile financing. See *id.* at 407-08.

151. See Van Hecke, *Equitable Replevin*, 33 N.C.L.R. 57 (1954). See also D. DOBBS, REMEDIES § 5.13 at 400 (1973); 1A MO. PRACTICE SERIES § 1211, at 352 (1966).

152. See H. McCLINTOCK, PRINCIPLES OF EQUITY § 107 (2d ed. 1948).

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possesses a uniqueness to the plaintiff, either because of its intrinsic or aesthetic value,¹⁵³ or because of peculiar market conditions.¹⁵⁴

With respect to the unique chattel, as opposed to the fungible chattel, rule 99 may be an inadequate legal remedy for two reasons. First, where the defendant can rebond and retain the property pending final judgment, he has the power to use up or wear out the chattel. Second, it is not entirely clear that rule 99 orders for delivery of a chattel, either pre-trial or after final judgment, are enforceable under the contempt power. Thus, it may be possible for a defendant to secrete, alienate, or destroy a chattel and ultimately be answerable only in money damages. These inadequacies would exist even if rule 99 provided for pre-trial notice and hearing.

Rule 99.01 implies that the court may either prescribe a prejudgment seizure or "otherwise secure" the property.¹⁵⁵ This language arguably indicates that the legislature and Rules Committee intended to vest blanket power in the courts to issue an equitable in personam order in any Missouri replevin action. Still, it remains unclear whether rule 99.01 confers equitable powers on the courts. One authority takes the position that no such powers exist because a prejudgment order is not enforceable by contempt,¹⁵⁶ despite the fact that rule 99.17 provides for enforcement "as other orders of court are enforced."¹⁵⁷

A prohibitive order requiring that defendant preserve the chattel pending trial would comply with the *Shevin* due process formula insofar as defendant would retain possession pending trial. It is perhaps less clear, however, whether the court could constitutionally issue a mandatory temporary injunction requiring delivery of the chattel to plaintiff pending the outcome on the merits. Temporary injunctions typically involve an adversary hearing prior to issuance.¹⁵⁸ Moreover, the court usually makes a preliminary estimate about the ultimate merits in determining whether to issue the in personam order.¹⁵⁹ Consequently, since the hearing on the temporary injunction would entail consideration of the merits, it would arguably comport with due process requirements.

C. Waiver of Constitutional Rights

The question of the feasibility of using a waiver of constitutional rights in the sales contract or financing statement is extremely important to the creditor seeking prejudgment repossession. If a waiver can be achieved, the

153. *Id.*

154. *Id.*

155. See Mo. R. Civ. P. 99.01.

156. See Volz, Logan, Blackmar, Rowland, & Hilpert, *Replevin*, 1A MO. PRACTICE SERIES § 1211, at 352 (1966), where the authors suggest:

The action is one at law rather than in equity. It does not insure the specific recovery of the property, and the defendant cannot be compelled under pain of contempt to reveal the location of the property or to refrain from concealing it. Consequently the action has its limitations, and if unavoidable harm will result . . . it may be necessary to proceed by a separate action in equity rather than by replevin . . . Temporary orders to restrain the alienation or concealment of the property might be asked.

157. Mo. R. Civ. P. 99.18.

158. See D. DOBBS, REMEDIES § 5.13, at 402 (1973).

159. *Id.* at 403.

creditor avoids any due process notice and hearing requirements in both the replevin and self-help areas.¹⁶⁰ Again, however, it is important to note the fluid nature of due process, which is likely to affect any attempt to create a waiver of rights.

In criminal procedure case law, a basic requirement for waiver of constitutional rights is a voluntary, knowledgeable, and intelligent relinquishment.¹⁶¹ Moreover, there is a presumption against waiver.¹⁶² While the cases have yet to decide whether the standard for waiver is the same in both civil and criminal matters,¹⁶³ at least one difference may exist between the two. Any waiver of rights from a suspected criminal must be reasonably contemporaneous with the activity to which the waiver applies.¹⁶⁴ It is submitted that such spontaneity need not exist where a property right in the civil area is involved.¹⁶⁵

Whatever the degree of spontaneity required, it is clear that any waiver of constitutional rights must clearly be indicated as such.¹⁶⁶ In other words, the contractual language relied upon must amount to a waiver on its face. This requirement gives rise to several practical problems for the creditor. For instance, a contractual provision that grants the seller a mere right to repossession on default may not serve as a waiver of rights to the sheriff in replevin.¹⁶⁷ Further, a repossession sanctioned by the waiver might result in the taking of some property not specified as collateral in the security agreement,¹⁶⁸ as where the property seized is a vehicle having extraneous items stored inside.¹⁶⁹ Cautious action and careful draftmanship will be necessary in order to avoid these pitfalls.

Regardless of the constitutional standard for waiver of rights in civil litigation, difficulties in effecting a waiver may vary according to the relative strengths of the parties involved. When two parties bargain on equal footing, they may easily bargain for the relinquishment of a known right.¹⁷⁰ Thus, when two commercial entities negotiate a sales contract containing a

160. In the context of a sale of goods on credit, one usually thinks of the buyer as the party who waives his rights. In at least one situation, however, the buyer can obtain replevin from the seller. UNIFORM COMMERCIAL CODE § 2-716 provides:

The buyer has a right of replevin for goods identified to the contract if after a reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing . . .

Consequently, the buyer may want to obtain a waiver of the seller's due process rights where he anticipates he will be unable to cover in the event of breach.

161. See, e.g., *Johnson v. Zerbst*, 304 U.S. 458 (1938).

162. See, e.g., *Bumper v. North Carolina*, 391 U.S. 543 (1968).

163. See *D.H. Overmeyer Co. v. Frick Co.*, 405 U.S. 174 (1972).

164. See, e.g., *State v. Brochu*, 237 A.2d 418 (Me. 1967). In that case, the defendant waived his fourth amendment rights by consenting to a search of his house. The court held that this waiver did not survive defendant's arrest and that therefore a search of his house the following day violated his fourth amendment rights.

165. See *D.H. Overmeyer Co. v. Frick Co.*, 405 U.S. 174 (1972).

166. See *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972).

167. See *Blair v. Pitchess*, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

168. See *Adams v. Egley*, 338 F. Supp. 614, 621 (S.D. Cal. 1972).

169. *Id.*

170. See *D.H. Overmeyer Co. v. Frick Co.*, 405 U.S. 174 (1972).

waiver of due process, it probably should be given effect. Consumer contracts are by nature adhesionary,¹⁷¹ however, and nearly all contain some type of purported waiver.¹⁷² The consumer cannot shop for more favorable terms. Thus, a waiver of notice and hearing may fail to rise to the level of a knowledgeable, intelligent relinquishment. It would be unrealistic, however, to assume that no waiver of rights is possible in a consumer credit transaction.

The difficulty in obtaining a waiver of rights is analogous to that encountered in drafting a valid disclaimer of implied warranties in a sales contract. Section 2-316 of the UCC sanctions disclaimers¹⁷³ only when made conspicuous.¹⁷⁴ Moreover, certain specified words must be used in some cases.¹⁷⁵ A number of cases have even dictated that public policy militates against any disclaimer of implied warranties of merchantability or fitness.¹⁷⁶

The *Shevin* Court hedged a discussion of the waiver issue, finding no language in the sales contract that could rise to the level of a relinquishment of constitutional rights.¹⁷⁷ The Court said the language simply lacked the necessary clarity. However, in *D.H. Overmeyer Co. v. Frick*,¹⁷⁸ the Supreme Court, in examining a due process waiver in a judgment note, hinted that it would be difficult to find a waiver of constitutional rights in any contract of adhesion. At this time, however, the waiver issue remains unresolved.

VI. REFORM LEGISLATION

The Missouri Supreme Court has indicated that Missouri codified replevin is due for a change,¹⁷⁹ to the extent that the opportunity for some type of adversary hearing must ordinarily precede a judicial order for prejudgment delivery. As mentioned earlier, the court must give defendant adequate notice and the opportunity for a hearing at which

171. This stems from the vendor's need to be able to plan his risks in an orderly fashion. Adhesion contracts enable the seller to engage in transactions that would be profitless if a new agreement were composed for each transaction. In addition, standard form agreements allow automation in processing and filing, which result in great savings to the vendor and a cheaper bargain for the vendee. Reasonably consistent judicial interpretation of such contracts constitutes a further advantage. Yet their use also results in a widespread disparity in the bargaining power of the parties, and in some cases may lead to overreaching by the vendor. Comment, *supra* note 124, at 127-28 & 130-31.

172. See *Blair v. Pitchess*, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

173. UNIFORM COMMERCIAL CODE § 2-316.

174. See UNIFORM COMMERCIAL CODE § 2-317.

175. *Id.*

176. See, e.g., *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960). But see *Marshall v. Murray Oldsmobile Co.*, 207 Va. 972, 154 S.E.2d 140 (1967).

177. 407 U.S. at 95.

178. 450 U.S. 174 (1972). But see *Zap v. United States*, 328 U.S. 624 (1946), where the court upheld a waiver of fourth amendment rights by a government contractor. Business dealings between private enterprises and the government would appear to produce adhesionary contracts.

179. See *Williams v. Berrey*, 429 S.W.2d 731 (Mo. En Banc 1973).

a judge determines at least the probable validity of plaintiff's underlying claim.¹⁸⁰ The legislature will undoubtedly review varied approaches for aligning out statute and rules with the recent pronouncements in *Shevin* and *Williams*. In the interim, tribunals must individually fashion procedures to comport with these directions.

There are several possible approaches to statutory revision. In New York, the legislature has placed the burden of reform on the courts by adopting a provision to the effect that to obtain a prejudgment remedy a plaintiff must allege in his affidavit "facts sufficient under the due process of law requirements of the fourteenth amendment to the constitution of the United States to authorize inclusion of the order of such a provision."¹⁸¹ While this may be a typical approach to reform legislation, it leaves much to be desired, since reform must proceed on a case-by-case basis.

It is submitted that there are numerous ways in which the Missouri statutes or court rules can be revised to comply with the recent mandates. First, replevin procedures might be made similar to those governing attachment. Prior to the ruling in *Williams v. Berrey*, one author suggested our statutes and rules were constitutional because the allegations required in plaintiff's affidavit were equivalent to those required for attachment.¹⁸² Since the Court in *Shevin* noted that attachment constitutes an extraordinary situation requiring postponement of notice and hearing until after the seizure, the position was tenable. The two procedures are only comparable, however, insofar as there is a similarity in the allegations required for relief. Traditionally, a wrongful attachment is redressable through civil tort liability, including punitive damages.¹⁸³ Because prejudgment seizure in replevin does not amount to a levy, replevin does not offer the same protection to defendant. Furthermore, affidavits in replevin are typically filed without any consideration by plaintiff or the court of the truth of the allegations therein.¹⁸⁴ The superficial similarity between replevin and attachment could be coupled with a narrow reading of *Williams* so as to theorize the legality of our local procedures; yet realistically our present replevin provisions do not pass constitutional muster. Replevin could be made more emulatory of attachment by providing for civil redress in cases where plaintiff makes false

180. *Id.* at 736.

181. N.Y. CIV. PRAC. LAW § 7102 (McKinney 1971). The amendment further provides:

Upon presentation of the affidavit and undertaking and upon such terms as may be required to conform to the due process of law requirements of the fourteenth amendment to the constitution of the United States, the court shall grant an order directing the sheriff to . . . enter and search for the chattel in the place where the chattel may be.

182. See Vetter, *The Flag*, 28 J. Mo. B. 365 (1972); Comment, *Missouri's "Replevin in Magistrate Courts": Some Constitutional Considerations*, 15 Sr. L.U.L.J. 596, 605 (1971).

183. See *Miller v. Smith*, 1 F.2d 292 (8th Cir. 1924); *Powell v. Schultz*, 118 S.W.2d 25 (St. L. Mo. App. 1938) (court indicated wrongful attachment exists when there is no probable cause to believe the allegations in plaintiff's affidavit).

184. *Williams v. Berrey*, 429 S.W.2d 731 (Mo. En Banc 1973).

allegations in his affidavit. In most replevin cases, however, this approach would eliminate any chance for prejudgment seizure.

In some cases it would be possible to speed up the hearing and judgment process, as has been done in cases of forcible entry and unlawful detainer, where the defendant can be required to appear within five days.¹⁸⁵ However, because of overloaded dockets in circuit courts, this approach may be tenable only in magistrate courts.

Preservation of the prejudgment remedy will require the styling of an appropriate form of preseizure hearing. In devising a scheme to comply with *Shevin* and *Williams* it will be important to insure due consideration of plaintiff's underlying claim, as well as a preliminary examination of any purported defenses. This scope of hearing would appear to comply with due process requirements. Extraordinary circumstances, as defined by case law, could facilitate ex parte orders for prejudgment delivery.

Assuming that revision of the statutes or rules is imminent, it would also be worthwhile to insure that prejudgment replevin procedures comport with possible fourth amendment requirements.¹⁸⁶ In this respect it should be noted that the Supreme Court merely speculated that fulfillment of due process requirements obviated the search and seizure question. This dicta may prove unreliable in the future.

VII. CONCLUSION

The aspects of consumer protection efforts discussed in this comment represent a legal victory for advocates of consumer reform. While it has been noted that the aim of these efforts has been largely to secure protection of the poor, the recent cases have not been so limited as to protect only the low-income consumer. Thus, the principles in *Shevin* and its progeny will be important, not only in the legal aid office, but also in dealings between commercial entities.

Some skeptics reason that imposition of a prima facie hearing requirement in prejudgment replevin will do little to discourage atrocities in creditor practices.¹⁸⁷ It is suggested that waiver or self-help will enable the creditor to circumvent the hearing requirements in replevin, or that in any event the consumer will suffer through higher financing charges. The validity of these indictments remains unsettled, however. Waiver of a consumer's rights may be difficult, if not impossible, to achieve in a standard form contract. Likewise, self-help may be vested with the same hearing requirements as replevin. Concerning increased costs, the hearing requirement may have little overall effect on marketwide finance charges, because only a small segment of the consumer credit industry relies on prejudgment replevin as a normal order of business. Moreover, an informal hearing conducted on five or six days notice would not significantly add to the expense of maintaining a replevin suit.

The law decided in *Shevin* does not provide a panacea for con-

185. § 534.090, RSMo 1969.

186. See pt. IV, § B of this comment.

187. See *Adams v. Egley*, 338 F. Supp. 614, 622 (S.D. Cal. 1972).

sumer protection, but it does provide an important step in an emerging area of the law. As future litigation unfolds, one hopes that it will become apparent that *Shevin* dealt with more than just "ideological tinkering."¹⁸⁸

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188. 407 U.S. at 102.