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# Debtor's and Creditor's Rights--Attachment and Garnishment--Constitutional Parameters of Prejudgment Remedies

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# DEBTOR'S AND CREDITOR'S RIGHTS—ATTACHMENT AND GARNISHMENT—CONSTITUTIONAL PARAMETERS OF PREJUDGMENT REMEDIES

## I. HISTORICAL PERSPECTIVE

The creditor's use of prejudgment remedies is deeply rooted in Anglo American history.<sup>1</sup> The actions of "replevin and detinue were devised to afford the remedy of a specific recovery of the chattels in question . . . ."<sup>2</sup> Replevin was premised on the theory that the recovery, prior to judgment, of a chattel unlawfully taken was justified.<sup>3</sup> Although the theoretical foundation of detinue was similar to that of replevin, it dealt not with an unlawful taking, but with "unlawful detention of the property."<sup>4</sup> The technical distinction between the two actions eventually diminished in importance<sup>5</sup> and replevin became the dominant action utilized by persons attempting to obtain a prejudgment acquisition of chattel.

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<sup>1</sup> See 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 281-83 (3d ed. 1927).

<sup>2</sup> C. KINNANE, A FIRST BOOK ON ANGLO-AMERICAN LAW 624 (2d ed. 1952).

<sup>3</sup> It [replevin] arose to fill a remedial need in cases where a tenant's chattels, such as agricultural implements and live stock, used in operating his farm were seized by a landlord. The seizure was called a 'distress' and the goods taken were said to be distrained. It is obvious that if the seizure by the landlord was unlawful, because in fact the tenant had paid his rent or other obligations to the lord, the tenant was placed unjustly in a most difficult position . . . and would be threatened almost inevitably with ruin.

In order to enable the tenant to go ahead with his farming, a new remedy was devised so as to secure to him a return of the property even before his right to it was established by suit. . . . [I]f the tenant did what was required he could first get back his property and then sue to prove that he was entitled to keep it because it had been taken from him unlawfully. Various modifications of the action have been made in modern times, but this distinctive feature still remains in our law. . . . The point is, as in the case of the remedy in ejectment, that whatever the state of the action itself may be, the remedy is substantially preserved. *Id.* at 622.

<sup>4</sup> *Id.* at 623.

<sup>5</sup> In order to illustrate the ancient technicality whereby an action was limited to a specific kind of offense, we should notice that detinue could be used in case of an unlawful detention, while replevin was used in the case of an unlawful taking. Detinue, therefore, had the broader scope of the two actions, until replevin came to be used not only for cases of unlawful taking, but also for cases of unlawful detention, even though the taking might have been lawful. *Id.* at 624.

Prejudgment remedies were transferred to the United States early in this country's history.<sup>6</sup> Eventually, they, in one form or another,<sup>7</sup> became virtually universal in the United States.<sup>8</sup>

Before 1969 the constitutionality of replevin and self-help repossession statutes was rarely challenged.<sup>9</sup> Moreover, some authorities even concluded that the constitutionality of such statutes was unequivocally clear.<sup>10</sup> Professor William D. Hawkland has suggested that considerable authority existed to substantiate the confidence many felt in the constitutionality of prejudgment attachment remedies.<sup>11</sup>

## II. NATIONAL PERSPECTIVE

Against this deeply entrenched doctrine the Supreme Court of the United States has, within the last six years, launched an attack

<sup>6</sup> "The American colonies, during the seventeenth and eighteenth centuries, transformed the common law attachment into a provisional collection remedy, often called domestic attachment and, in addition, transplanted the foreign attachment of the English boroughs." S. RIESENFELD, CREDITOR'S REMEDIES AND DEBTOR'S PROTECTION 177 (1967). [hereinafter cited as RIESENFELD].

<sup>7</sup> "Examples of such remedies are 'replevin', see, e.g., FLA. STAT. ANN. §§ 78.01-10 (Supp. 1972), as well as 'claim and delivery', see, e.g., MINN. STAT. ANN. §§ 565.01-.11 (1974), 'detinue', see, e.g., VA. CODE ANN. §§ 8-586 to -595 (1957), and 'sequestration', see, e.g., LA. CODE CIV. P. arts. 3571-76 (1960)." Anderson, *A Proposed Solution for the Commercial World to the Sniadach-Fuentes Problem: Contractual Waiver*, 79 CASE & COM. 24 (1974). [hereinafter cited as Anderson].

<sup>8</sup> "Generally speaking all American jurisdictions today have one or more provisional collection remedies, available before judgment, there are however, considerable variations in the nomenclature, the prerequisites of their availability, and in the method of their prosecution." RIESENFELD, *supra* note 6, at 180. See Anderson, *supra* note 7, at 24, for a complete listing of the specific state statutes dealing with prejudgment remedies found in 48 states and the District of Columbia.

<sup>9</sup> Note, *Mitchell v. W.T. Grant Co.-The Repossession of Fuentes*, 5 MEM. ST. U.L. REV. 74, 77 (1974) [hereinafter cited as MEM. ST.].

<sup>10</sup> Thus as late as 1967 Professor Stefan Riesenfeld, one of the leading academic experts on Creditor's Rights, was able to state confidently that, 'Although attachment is a harsh remedy because it deprives the debtor of his power of disposition over assets prior to the judicial ascertainment of his liability, the constitutionality of this procedure is firmly established.'

Hawkland, *The Seed of Sniadach: Flower or Weed?*, 79 CASE & COM. 3 (1974), citing RIESENFELD, *supra* note 6, at 180. [hereinafter cited as Hawkland].

<sup>11</sup> "Professor Riesenfeld had good authority for his position, namely several decisions from the Supreme Court, particularly *Ownbey v. Morgan* [256 U.S. 94 (1921)], *Coffin Brothers & Co. v. Bennett* [277 U.S. 29 (1928)], and *McInnes v. McKay* [279 U.S. 820 (1929)]." *Id.*

that has struck to the very core of the concept of prejudgment remedies. The Court has done so in four successive cases: *Sniadach v. Family Finance Corp.*,<sup>12</sup> *Fuentes v. Shevin*,<sup>13</sup> *Mitchell v. W.T. Grant Co.*,<sup>14</sup> and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*<sup>15</sup>

In the first case, Mrs. Sniadach's wages were garnished as a result of an alleged claim of \$420.00 on a promissory note.<sup>16</sup> She argued that "the Wisconsin garnishment procedure violates that due process required by the Fourteenth Amendment, in that notice and an opportunity to be heard are not given before the *in rem* seizure of the wages."<sup>17</sup> According to the Court, the statutory procedure<sup>18</sup> in Wisconsin at the time of the garnishment of Mrs. Sniadach's wages was clearly favorable to the creditors.<sup>19</sup> The Court, using language implying that the case was to be limited to its facts,<sup>20</sup> held that "[t]his prejudgment garnishment procedure violates the fundamental principles of due process."<sup>21</sup> Justice Douglas, writing for the majority, cited extensively to the detrimental sociological impact such a prejudgment procedure would have on the individual.<sup>22</sup> This heavy reliance on the sociological ramifications of this type of remedy prompted Mr. Justice Black to strongly suggest, in his dissenting opinion, that the Court was infringing upon state legislative power.<sup>23</sup>

The reactions generated by the holding in *Sniadach* were var-

<sup>12</sup> 395 U.S. 337 (1969).

<sup>13</sup> 407 U.S. 67 (1972).

<sup>14</sup> 416 U.S. 600 (1974).

<sup>15</sup> 95 S. Ct. 719 (1975).

<sup>16</sup> 395 U.S. at 337-38.

<sup>17</sup> *Id.* at 338.

<sup>18</sup> WIS. STAT. ANN. § 267.07(1) (Cum. Supp. 1975).

<sup>19</sup> "What happens in Wisconsin is that the clerk of the court issues the summons at the request of the creditor's lawyer; and it is the latter who by serving the garnishee sets in motion the machinery whereby the wages are frozen." 395 U.S. at 338-39.

<sup>20</sup> "We deal here with wages - a specialized type of property presenting distinct problems in our economic system. We turn then to the nature of that property and problems of procedural due process." *Id.* at 340.

<sup>21</sup> *Id.* at 342.

<sup>22</sup> *Id.* at 340-42.

<sup>23</sup> The arguments would . . . be appropriate for Wisconsin's legislators to make against that State's garnishment laws. But made in a Court opinion, holding Wisconsin's laws unconstitutional, they amount to what I believe to be a plain, judicial usurpation of state legislative power to decide what the State's laws shall be.

*Id.* at 345.

ied;<sup>24</sup> the general conclusion being that it served primarily to obfuscate the state of the law insofar as prejudgment creditor remedies were concerned.<sup>25</sup>

In 1972, the Supreme Court took a second look at the law of prejudgment remedies in the case of *Fuentes v. Shevin*.<sup>26</sup> This case concerned the plight of Margarita Fuentes, a Florida housewife who purchased a gas stove and a stereophonic phonograph from the Firestone Tire and Rubber Company under a conditional sales contract.<sup>27</sup> She had faithfully made her installment payments for over a year, until a dispute arose between her and the Firestone company over the servicing of her stove, at which time she stopped payment.<sup>28</sup> Firestone, subsequent to Mrs. Fuentes' default, instituted suit for the repossession of the property and simultaneously obtained a writ of replevin that ordered the sheriff to seize the property under dispute.<sup>29</sup> In a 4-3 decision,<sup>30</sup> the Court held that, "Prejudgment replevin provisions work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor."<sup>31</sup>

The effect of this decision was to expand the due process requirements of notice and hearing developed in *Sniadach* to "any significant property interest."<sup>32</sup> Judicial interpretations of *Fuentes* furthered the view that the requirements for notice and hearing, initially developed in *Sniadach*, had been greatly expanded.<sup>33</sup> Al-

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<sup>24</sup> "A case that may have far-reaching effects upon personal finance law . . ." 55 A.B.A.J. 985 (1969); "I predicted . . . *Sniadach* would not usher in a series of cases that would decimate all the prejudgment remedies but would be limited . . ." Hawkland, *supra* note 10, at 7.

<sup>25</sup> "Predictably, the initial reaction to *Sniadach* was mass confusion and disagreement," MEM. ST., *supra* note 9, at 75; see also Hawkland, *supra* note 10, at 11. For a discussion of the ramifications of *Sniadach* insofar as judicial interpretations of the law are concerned, see Note, 76 W. VA. L. REV. 24 (1974). See also, Hawkland, *supra* note 10, at 10.

<sup>26</sup> 407 U.S. 67 (1972).

<sup>27</sup> *Id.* at 70.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Mr. Justice Powell and Mr. Justice Rehnquist did not participate; the Chief Justice and Mr. Justice Blackmun joined Mr. Justice White in dissenting.

<sup>31</sup> 407 U.S. at 96.

<sup>32</sup> *Id.* at 86.

<sup>33</sup> *Fuentes* abolishes any constitutional distinction between different types of property. *Schneider v. Margossian*, 349 F.Supp. 741 (D.C. Mass. 1972). In a deci-

though the Court had apparently moved strongly in the direction of consumer interests, it did not do so without delineating qualifications<sup>34</sup> and guidelines.<sup>35</sup> Perhaps the most accurate conclusion which can be drawn from this case is that it “[g]reatly limited the manner in which a creditor could repossess or seize goods in the hands of a defaulting debtor.”<sup>36</sup>

On May 13, 1974, the Supreme Court re-evaluated its position with regard to creditors’ prejudgment remedies, and handed down its decision in *Mitchell v. W.T. Grant Co.*<sup>37</sup> “For 25 months the commercial bar sought to clarify the breadth of the exceptions alluded to in *Fuentes* and finally the clarification came . . . .”<sup>38</sup> The W.T. Grant Company, pursuant to Louisiana procedure, filed suit in the First City Court of New Orleans against Lawrence Mitchell, alleging the sale of various appliances and demanding

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sion striking down pre-judgment real estate attachments, the Court noted that *Fuentes* removed any doubt that the protection of the 14th amendment applies to any significant property interest. *Bay State Harness Horse R. and B. Ass’n v. PPG Industries, Inc.* 365 F. Supp. 1299 (D. Mass. 1973). “The due process clause . . . requires an opportunity for a hearing after due notice before a person is deprived of any significant property interest, except in very unusual circumstances.” *Lynch v. Household Finance Corp.*, 360 F. Supp. 720, 723 (D. Conn. 1973) (striking down the Connecticut pre-judgment attachment and garnishment statute).

<sup>34</sup> “There are ‘extraordinary situations’ that justify postponing notice and opportunity for a hearing. *Boddie v. Connecticut*, 401 U.S. at 379. [The relevant portion of *Boddie* is “except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.” (emphasis added) *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)]. These situations, however, must be truly unusual.” 407 U.S. at 90. The importance of this statement is further explicated in a note by the Court which suggests that extraordinary situations may be limited to such instances as protection of the public good [*Coffin Bros. & Co. v. Bennett*, 277 U.S. 29 (1928) - a bank failure] and to secure jurisdiction in state court - “clearly a most basic and important public interest.” [*Ownby v. Morgan*, 256 U.S. 94 (1924)]. 407 U.S. at 91 n.23. Of significance is the fact that, although governmental and public interests are included within the exceptions, creditor’s rights are not so clearly included.

<sup>35</sup> The guidelines delineated in *Fuentes* are:

First . . . the seizure has to be directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force. The person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in this particular instance. 407 U.S. at 91.

<sup>36</sup> Comment, 38 ALBANY L. REV. 467 (1974).

<sup>37</sup> 416 U.S. 600 (1974).

<sup>38</sup> Recent Decisions, 63 ILL. B.J. 212 (1974).

judgment against him for the unpaid balance of the purchase price. As a further allegation, W.T. Grant suggested that it had a vendor's lien on the goods and that a writ of sequestration should issue pending the outcome of the suit. An accompanying affidavit swore to the truth of the facts alleged in the complaint and asserted that W.T. Grant had reason to believe the debtor would "encumber, alienate or otherwise dispose of the merchandise . . . ."<sup>39</sup> Premised upon the petition and affidavit, without either prior notice to Mitchell or affording him an opportunity for a hearing, the judge ordered the constable to take into his possession the merchandise described in the petition upon the plaintiff furnishing bond for double the amount claimed. Mitchell thereafter moved to dissolve the writ on the grounds that it had issued without prior notice and opportunity for him to defend his right to possession of the property. The motion was denied and the Supreme Court of Louisiana refused to disturb the ruling.<sup>40</sup> On a writ of certiorari the Supreme Court affirmed the lower ruling holding that Louisiana's sequestration procedure, allowing a creditor to obtain a writ upon an ex parte application without notice or opportunity for a hearing, is constitutional, and does not violate the due process clause of the fourteenth amendment.<sup>41</sup>

The Court in *Mitchell* attempted to distinguish *Fuentes* primarily by suggesting that a judge, rather than a clerk, issued the writ.<sup>42</sup> It also attempted to distinguish *Fuentes* on two other grounds: "the creditor in *Mitchell* was required by local law to allege 'specific facts' justifying sequestration . . . [and] the issues that governed the plaintiff's right to sequestration were limited to the existence of a vendor's lien and a default under the sales contract."<sup>43</sup> These items of distinction between *Fuentes* and *Mitchell* have been severely criticized. As Mr. Justice Stewart stated in his dissent, "The Court's opinion in *Fuentes* . . . explicitly rejected each of these factors as a ground for a difference in decision."<sup>44</sup>

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<sup>39</sup> 416 U.S. at 602.

<sup>40</sup> 263 La. 627, 269 So. 2d 186 (1972).

<sup>41</sup> 416 U.S. 600 (1974).

<sup>42</sup> "[I]n the parish where this case arose, the requisite showing must be made to a judge, and judicial authorization obtained." 416 U.S. at 616.

<sup>43</sup> Recent Decisions, 63 ILL. B.J. 212 (1974).

<sup>44</sup> 416 U.S. at 631. Additionally, the court said:

[I]t appears that under Louisiana law the affidavits need only be conclusory submissions by an interested party. Since the creditor himself initiates the procedure, there is no initial check on misuse of the sequestration

Considerable opinion existed to support Mr. Justice Stewart's conclusion that *Mitchell* had, in effect, overruled *Fuentes*.<sup>45</sup> Perhaps the most reasonable conclusion arising out of the uproar subsequent to *Mitchell* was that:

The absolute rule of *Fuentes* has been abandoned in favor of a balancing test which 'protects the debtor's interest in every conceivable way except in allowing him to have the property to start with, and this is done in pursuit of what we deem an acceptable arrangement *pendente lite* to put the property in the possession of the party who furnishes protection against loss or damage to the other pending trial on the merits.'<sup>46</sup>

In *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,<sup>47</sup> the Supreme Court has seen fit to review for a fourth time the issue of creditor's prejudgment remedies. By a majority decision,<sup>48</sup> the Court has sought to provide the country with a definitive rule in this troubled area of the law.

In August of 1971, respondent filed suit against petitioner alleging an indebtedness due and owing for goods sold and delivered in the amount of \$51,279.17.<sup>49</sup> Respondent simultaneously filed affidavit and bond for process of garnishment, naming the First National Bank of Dalton as garnishee.<sup>50</sup> The affidavit merely asserted that the debt was in existence and that the affiant feared the loss of the goods. Based on this evidence, the clerk of the

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devise such as exists where requests for ex parte action are initiated by neutral government officials. Furthermore, judicial supervision under the Louisiana procedure is a weak and undemanding check; the judicial function appears to be virtually ministerial once the creditor submits his affidavit in proper form.

*The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 79 (1974). [hereinafter referred to as HARV. L. REV.]

<sup>45</sup> "[T]he principle of *Fuentes* has succumbed in *Mitchell*." HARV. L. REV., *supra* note 43, at 83. "It is evident that *Mitchell*, at least tacitly, has overruled *Fuentes* in part." MEM. ST., *supra* note 9, at 87; "Each of these three points of difference between *Fuentes* and *Mitchell* is minor and of questionable importance." Recent Decisions, 63 ILL. B.J. 212 (1974).

<sup>46</sup> MEM. ST., *supra* note 9, at 87 (citing 94 S. Ct. at 1905).

<sup>47</sup> 95 S. Ct. 719 (1975).

<sup>48</sup> Mr. Justice White delivered the opinion of the Court. Mr. Justice Stewart filed concurring opinion. Mr. Justice Powell concurred in the judgment and filed opinion. Mr. Justice Blackmun filed a dissenting opinion in which Mr. Justice Rehnquist joined, and Mr. Chief Justice Burger joined in part.

<sup>49</sup> 95 S. Ct. at 721.

<sup>50</sup> *Id.*



superior court issued a summons of garnishment to the bank. Petitioner moved to dismiss, including within his motion "that the garnishment procedure was unconstitutional in that it violated 'defendant's due process and equal protection rights'. . . ."<sup>51</sup> The Georgia Supreme Court denied petitioner's motion and held the statutory garnishment procedure<sup>52</sup> was constitutional. The Supreme Court reversed holding the statute unconstitutional.

The element of paramount importance in the Court's decision was that the Court distinguished *Mitchell* from *Fuentes*, thereby vitiating any speculation that *Mitchell* had, in effect, overruled *Fuentes*. The Court distinguished the two cases on the grounds that in *Mitchell*:

The writ . . . was issuable only by a judge upon the finding of an affidavit going beyond mere conclusory allegations and clearly setting out the facts entitling the creditor to sequestration. The Louisiana law also expressly entitled the debtor to an immediate hearing after seizure and to dissolution of the writ absent proof by the creditor of the grounds on which the writ was issued. (emphasis added)<sup>53</sup>

The opinions of the concurring justices seem to indicate the impact of the instant opinion.<sup>54</sup> From this decision it is clear that state statutory procedures neglecting to cover due process considerations need to be carefully scrutinized. The Court is apparently serving notice to states having prejudgment remedies<sup>55</sup> that unless the states follow the *Mitchell* exception,<sup>56</sup> their statutes will fall under the rule of *Fuentes* and be held unconstitutional.

### III. REGIONAL PERSPECTIVE

West Virginia is one such state having prejudgment creditor's remedies. Judicial interpretations of challenged prejudgment remedies in West Virginia have elucidated contradictory views of the

<sup>51</sup> *Id.*

<sup>52</sup> GA. CODE ANN. § 46-101 (1966).

<sup>53</sup> 95 S. Ct. at 722.

<sup>54</sup> Mr. Justice Stewart stated:

"It is gratifying to note that my report of the demise of *Fuentes v. Shevin* . . . seems to have been greatly exaggerated." *Id.* Mr. Justice Powell stated: "The Court's opinion in this case, relying substantially on *Fuentes*, suggests that that decision will again be read as calling into question much of the previously settled law governing commercial transaction." *Id.*

<sup>55</sup> See Anderson, *supra* note 7, at 24.

<sup>56</sup> See *supra* note 52, and accompanying text.

law. Early decisions in West Virginia followed the generally accepted rule that such statutory provisions were not violative of the constitution.<sup>57</sup> This position has recently been repudiated by the various courts of West Virginia.<sup>58</sup>

In *Payne v. Walden*,<sup>59</sup> the West Virginia Supreme Court of Appeals, overruling *Byrd v. Rector*,<sup>60</sup> held that the West Virginia distress for rent statute<sup>61</sup> violated due process in that it, "does not provide the tenant notice or the opportunity to be heard in defense before his property is distrained upon. . . ."<sup>62</sup> The court in *Payne* looked to a historical analysis of the distress for rent statutes and concluded that judicial scrutiny was applicable to the extent that this type of action now involves state officials, and has now been codified.<sup>63</sup> Finally, the concluding statement of the court is significant in that it apparently limits the decision to its facts while simultaneously giving notice to the legislature that similar statutory provisions may also be ruled unconstitutional.<sup>64</sup>

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<sup>57</sup> [A] defendant is not deprived of his property by reason of the levy of a copy of the attachment upon a person who is indebted to him or who has effects in his custody belonging to the defendant. . . . there has been no deprivation of property. The attachment, *quasi in rem* in nature, has operated only to detain the property temporarily, to await final judgment on the merits of plaintiff's claim. No constitutional right is impaired.

*Byrd v. Rector*, 112 W. Va. 192, 198, 163 S.E. 845, 848 (1932), *overruled*, 190 S.E.2d 770 (W. Va. 1972).

<sup>58</sup> See Note 76 W. VA. L. REV. 24 (1974).

<sup>59</sup> 190 S.E.2d 770 (W. Va. 1972).

<sup>60</sup> 112 W. Va. 192, 163 S.E. 845 (1932), see *supra* note 57.

<sup>61</sup> W. VA. CODE ANN. § 37-6-12 (1966).

<sup>62</sup> 190 S.E.2d at 777.

<sup>63</sup> "[I]t is now apparent that codification has accorded this procedure both the dignity and *responsibility* of a judicial proceeding." *Id.*

<sup>64</sup> Our holding goes no further. Though the reasoning applied here may be applicable also to other summary civil remedies, we must be, and are, aware that a considerable body of statute and case procedure regulating various creditor-debtor relationships is an integral part of the subsisting law of this state. It represents legislative direction, wisdom and prerogative which will not be disturbed by this court unless a particular and precise question is presented and compelling reason exists therefor.

*Id.* at 779. Of interest is the fact that the above decision, *Payne*, was cited by the same court in the case of *In re Willis*, 207 S.E.2d 129 (W. Va. 1974), in invalidating the taking away of a child from its natural parents by the Welfare Department in a child neglect proceeding: "One of the basic constitutional guarantees of due process is, of course, that no one shall be deprived of a substantial right by an arm of the state without notice and the opportunity to be heard in a meaningful manner. See *State ex rel. Payne v. Walden*. . . ." 207 S.E.2d at 138.

The view taken by the West Virginia Supreme Court of Appeals with regard to distress for rent statutes was also adopted by the United States District Court for the Southern District of West Virginia in *Shaffer v. Holbrook*.<sup>65</sup> The District Court, citing to *Sniadach*<sup>66</sup> and *Fuentes*,<sup>67</sup> held that "The complete absence of an opportunity to be heard prior to seizure deprives the West Virginia tenant of his property without due process of law. . . ."<sup>68</sup> Of major significance is the comment by the court that the use of the justice of the peace is not significant enough to validate the constitutionality of the distress for rent statute.<sup>69</sup>

The holding in *Shaffer*, while constitutionally sound, may be subject to modification to the extent that the court dismissed the justice of the peace as a valid arbiter of the issue of the reasonableness of the seizure. Recent modifications in West Virginia law concerning justices of the peace<sup>70</sup> have moved that office closer into the realm of the judiciary and away from the function of acting as an administrative body. For these reasons the *Shaffer* decision, as it relates to justices of the peace, may no longer be valid.

The district court also moved to broaden the category of pre-judgment remedies subjected to due process considerations in *Straley v. Gassaway Motor Company, Inc.*<sup>71</sup> This case invalidated a type of improver's lien,<sup>72</sup> specifically, a repairman's lien. The court, citing to *Shaffer*, concluded that "the West Virginia repairman's lien enforcement procedures are less satisfying of due process requirements than were the invalidated landlord's distress procedures."<sup>73</sup> Finally, classifying repairman's liens as unconstitu-

<sup>65</sup> 346 F. Supp. 762 (S.D. W. Va. 1972).

<sup>66</sup> *Id.* at 764.

<sup>67</sup> *Id.* at 765.

<sup>68</sup> *Id.* at 766.

<sup>69</sup> The presence of the justice of the peace in the West Virginia procedural patterns is a distinction of no difference. When issuing the distress warrant, the justice of the peace is performing a nonjudicial act similar to the Pennsylvania prothonotary, and his magisterial imprimatur on the warrant does nothing to ameliorate the unconstitutional seizure of property.

*Id.*

<sup>70</sup> See *State ex rel. Shrewsbury v. Poteet*, 202 S.E.2d 628 (W. Va. 1974). Furthermore, the recently passed "Judicial Reform Amendment" may also provide an impetus for the modification of the court's opinion in *Shaffer*.

<sup>71</sup> 359 F. Supp. 902 (S.D. W. Va. 1973).

<sup>72</sup> W. VA. CODE ANN. §§ 38-11-3, 14 (1966).

<sup>73</sup> 359 F. Supp. at 905.

tional, the court suggested heavily that this case would be limited to its facts.<sup>74</sup>

Assuming, arguendo, that *Straley* will be limited to its facts, this alone does not justify ignoring the major implication of the case. The significance of the case lies in the area of the law subjected to due process scrutiny. The fourteenth amendment and its due process considerations have generally been limited to deprivation of rights as a result of state action.<sup>75</sup> The court, in invalidating the repairman's lien, admitted that state action was non-existent.<sup>76</sup> The whole spectrum of "Miscellaneous Liens and Pledges"<sup>77</sup> within West Virginia does not require state action for its effectuation, and hence could also be subject to judicial review. Of particular significance is the improver's lien,<sup>78</sup> within which the repairman's lien was included. This statutory provision, broad in coverage,<sup>79</sup> is suspect not only as a result of the general inclusion within such non-state action judicial liens subject to due process scrutiny, but also to the extent that this was the statute under which repairman's liens were invalidated. The conclusion to be drawn is that Miscellaneous Liens and Pledges may, en bloc, be invalidated as lacking in due process safeguards regardless of the lack of state action.

One area of the law projected to be possibly free of inclusion within the above mentioned constraints was the area of attachment.<sup>80</sup> This projection was vitiated somewhat when, in 1974, the district court declared, in *Union Barge Line Corp. v. Marble Cliff*

<sup>74</sup> The statutes at *supra* note 73 were declared unconstitutional "in the context of and applied in this action . . ." *Id.* at 906.

<sup>75</sup> For an analysis of the concept of "state action", see Note, 76 W. VA. L. REV. 24, 28 (1974).

<sup>76</sup> "The repairman already has the lien afflicted personal property in his possession. He is not required to make an affidavit, arrange bond security or institute an action. He is authorized to give written notice, to advertize, and to sell at auction." 359 F. Supp. at 905.

<sup>77</sup> W. VA. CODE ANN. §§ 38-11-1 to -17 (1966).

<sup>78</sup> W. VA. CODE ANN. § 38-11-3 (1966).

<sup>79</sup> "A person who, while in possession thereof, makes, alters, repairs, stores, transports, or in any way enhances the value of an article of personal property, or boards, pastures, feeds, trains, improves or transports any animal, shall have a lien upon such article or animal while lawfully in the possession thereof . . ."

*Id.*

<sup>80</sup> "[A]ttachment liens may not fall victim to the requirements of procedural due process." Note, 74 W. VA. L. REV. 24, 33 (1974).

*Quarries Co.*,<sup>81</sup> that the prejudgment garnishment statute<sup>82</sup> was invalid as being violative of due process. The court, in invalidating it, analyzed the general method of attachment in West Virginia<sup>83</sup> and concluded that the method by which an attachment may issue<sup>84</sup> does not satisfy all of the requirements stipulated in *Fuentes*.<sup>85</sup> The court, in a footnote,<sup>86</sup> served notice upon the legislators of West Virginia to adhere to the constraints of due process in this area of the law and suggested a method to achieve this goal.<sup>87</sup>

*Union Barge* and the Supreme Court decisions subsequent to *Fuentes*<sup>88</sup> call into question the validity of yet another area of West Virginia law relating to prejudgment seizure, the detinue provisions of the Code.<sup>89</sup> These provisions are not only vulnerable to attack on the ground of a lack of notice and hearing, but also to

<sup>81</sup> 374 F. Supp. 834 (S.D. W. Va. 1974).

<sup>82</sup> W. VA. CODE ANN. § 38-7-15 (1966).

<sup>83</sup> To obtain garnishment in this state a 'plaintiff in attachment' need only append an endorsement to the order of attachment designating the person liable to the debtor or in possession of his property. In a typical case, plaintiff files with [the] Clerk of the Court an affidavit setting forth one or more of the grounds enumerated in the statute. The endorsement is attached, and the order is served on the stakeholder by the sheriff, or in this case the United States Marshal.

374 F. Supp. at 836-37.

<sup>84</sup> W. VA. CODE ANN. § 38-7-2 (1966).

<sup>85</sup> The specific grounds delineated in W. VA. CODE ANN. § 38-7-2 (1966) could be said to satisfy the first two factors suggested by the Court in *Fuentes*. Conspicuously absent from West Virginia's statutory scheme, however, is any provision satisfying the third factor. [See *Fuentes v. Shevin*, 407 U.S. at 93]. . . .

. . . Although the clerk of the court may examine the affidavit to determine if any of the statutory grounds have been included, there is no procedure for prior evaluation of the probable validity of the claim.

374 F. Supp. at 840.

<sup>86</sup> *Id.* at n.12.

<sup>87</sup> It is of course, for the legislature of West Virginia to enact legislation that satisfies the requirements of due process. In that regard, Professor William D. Hawkland has proposed a 'Model Notice and Hearing for Provisional Remedies Act' in conjunction with the Commercial Law League of America. The Model Act provides essentially that prejudgment seizure of property will be allowed only on court order and only after a hearing to determine the probable validity of the claim.

*Id.* For an analysis of Professor Hawkland's Model Act, see Note, 76 W. VA. L. REV. 24, 36 (1974).

<sup>88</sup> See notes 37 to 54 *supra*, and accompanying text.

<sup>89</sup> W. VA. CODE ANN. §§ 55-6-1 to 7 (1966).

the extent that the clerk of the court may issue the writ.<sup>90</sup> In all probability, the detinue scheme of West Virginia will, upon appropriate challenge, be invalidated as a result of these constitutional infirmities. The courts have provided clear notice that prejudgment statutory provisions not providing adequate procedural methods will be invalidated.

A final area of major concern surrounds the Uniform Commercial Code and its self-help repossession provisions.<sup>91</sup> "Self-help repossession, in contrast to replevin, allows the seller to recover goods on default of the buyer without resort to the judicial process so long as the repossession is peacefully conducted."<sup>92</sup> The West Virginia Supreme Court of Appeals in *Cook v. Lilly*<sup>93</sup> recently addressed itself to the concept of self-help repossession. The court held that under the repossession provisions,<sup>94</sup> "sufficient state action does not exist to bring the relators within the protection of the Fourteenth Amendment."<sup>95</sup> The court went on to say that *even if* state action existed, "the self help provisions under challenge are sufficiently fair to all parties to withstand fourteenth amendment scrutiny under the rule enunciated in *Mitchell*."<sup>96</sup> Interestingly enough, the court suggested that *Mitchell* had, in effect, negated *Fuentes* and had replaced its rule with that of a balancing test.<sup>97</sup> This has not borne out to be valid in light of *Di-Chem*.<sup>98</sup>

Of major significance is the conflict embodied in West Virginia law as a result of *Cook*. The court suggested that the lack of state action removed the action from due process protection. This position is in direct conflict with the ruling in *Straley*<sup>99</sup> that the repairmen's lien in West Virginia was subject to due process considerations regardless of the lack of state action.<sup>100</sup>

Since neither require state action to any significant degree, one has difficulty understanding why the miscellaneous lien

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<sup>90</sup> W. VA. CODE ANN. § 55-6-1 (1966).

<sup>91</sup> UNIFORM COMMERCIAL CODE §§ 9-503 and 9-504. In West Virginia: W. VA. CODE ANN. §§ 46-9-503, 504 (1966).

<sup>92</sup> MEM. ST., *supra* note 9, at 76.

<sup>93</sup> 208 S.E.2d 784 (W. Va. 1974).

<sup>94</sup> See note 92 *supra*.

<sup>95</sup> 208 S.E.2d at 786.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> See *infra* notes 46 to 55, and accompanying text.

<sup>99</sup> See note 70 *infra* and accompanying text.

<sup>100</sup> See note 75 *infra* and accompanying text.

scheme<sup>101</sup> has, in part, been declared invalid while the Uniform Commercial Code's self-help repossession statute<sup>102</sup> has been declared constitutionally permissible. One possible distinction between the two could concern the requirement in self help repossession to take possession if it can be done without a breach of the peace. The courts may well find this to be a distinction without a difference.

#### IV. CONCLUSION

Prejudgment remedies, having withstood the test of time, have finally begun to crumble before the courts. The United States Supreme Court in *Sniadach*, *Fuentes*, *Mitchell*, and *Di-Chem* has set the general standards for prejudgment remedies. These standards include the requirements of notice and hearing by an impartial third party, with such third party being, under most circumstances, a judge. The West Virginia federal courts have followed the United States Supreme Court in *Shaffer*, *Straley*, and *Union Barge*, but the West Virginia Supreme Court of Appeals has not consistently followed those same edicts. In *Payne*, the West Virginia court appeared to be in full accord with the United States Supreme Court and the Federal District Court for the Southern District of West Virginia, but in *Cook* it seems to have retreated from strict compliance with the procedural due process requirements of the fourteenth amendment.

Clearly, the trend of the courts today is to impose the procedural constraints of due process upon any form of prejudgment creditor's remedies. The time has come for the legislature of West Virginia, as for all state legislatures, to recognize the notice provided them by the courts and to incorporate due process safeguards into those yet unchallenged prejudgment creditor's remedies.<sup>103</sup>

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<sup>101</sup> W. VA. CODE ANN. §§ 38-11-1 to -17 (1966).

<sup>102</sup> W. VA. CODE ANN. §§ 46-9-503, 504 (1966).

<sup>103</sup> The author naturally assumes all responsibility for factual and judgmental errors within this article, but would like to express his deep felt gratitude to The Honorable John T. Copenhaver, Jr., Bankruptcy Judge of the United States District Court for the Southern District of West Virginia, for the helpful instruction and thought that aided greatly in the preparation of this article.