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Fuentes v. Shevin: The Application of Constitutional Due Process to the Garageman's Lien in Kentucky

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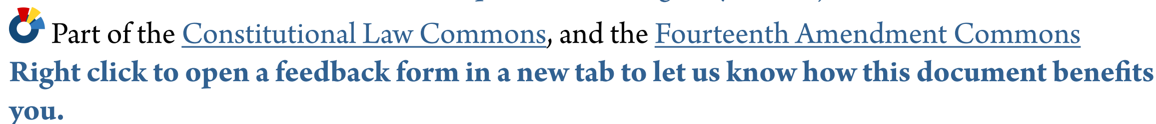
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FUENTES v. SHEVIN: THE APPLICATION OF CONSTITUTIONAL DUE PROCESS TO THE GARAGEMAN'S LIEN IN KENTUCKY

INTRODUCTION

In 1969, the Supreme Court decided in *Sniadach v. Family Finance Corp.*[1] that a Wisconsin statute allowing prejudgment garnishment of a debtor's wages was unconstitutional as a violation of fourteenth amendment due process.[2] In *Fuentes v. Shevin*[3] in 1972, the Court's decision effectively called into question the due process constitutionality of almost every statutory provisional remedy.

The Fuentes Case

Fuentes challenged the prejudgment replevin law of Florida whereby one could have the sheriff repossess goods held by another by filing an affidavit that the goods were wrongfully detained. The Firestone Tire and Rubber Company had the sheriff repossess a stereo and stove held by Mrs. Fuentes because she had defaulted on her payments under a conditional sales contract.[4] Mrs. Fuentes claimed that she had not made the payments because the company refused to fix the stove and instituted action in a federal district court whereby she challenged the constitutionality of Florida's prejudgment replevin procedures under the due process clause of the fourteenth amendment.[5]

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[1] 395 U.S. 337 (1969).

[2] *Id.* at 342. U.S. CONST. amend. XIV, § 2 provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

[3] 407 U.S. 67 (1972). On May 13, 1974, the Supreme Court decided in Mitchell v. W. T. Grant Co., 94 S. Ct. 1895 (1974), that a Louisiana judicial sequestration procedure, similar to the replevin statute in *Fuentes*, did not violate fourteenth amendment due process, even though it allowed a creditor to obtain sequestration of property without a hearing. The procedure provided that a creditor would receive a writ of sequestration after he had submitted an affidavit to a judicial authority on an *ex parte* basis and after he had posted a security bond. The majority of the Court distinguished the *judicial* control over the process involved in *Mitchell* from the court clerk's control in *Fuentes*.

Although Justice Powell, concurring, and Justice Stewart, dissenting, felt that *Fuentes* had been effectively overruled, it is this writer's opinion that *Mitchell* has merely narrowed some of the broad language used in the *Fuentes* decision. It will be left to future decisions to establish precedent as to what types of property deprivation are condemned under the *Fuentes* doctrine and what exceptions are carved out under *Mitchell*. No one is suggesting the *Mitchell* has overruled *Sniadach*, which dealt with a particular type of property (wages). At any rate, there seems to be very little in the language of *Fuentes* or *Mitchell* which is dispositive of the primary issues in the Garageman's Lien: "taking" of property or action "under color of state law".

[4] *Id.* at 71.

[5] Fuentes v. Faircloth, 317 F. Supp. 954, 956 (S.D. Fla. 1970).

The district court found that no issue of due process was involved and held for the creditor.

The Supreme Court upheld Mrs. Fuentes' argument and reversed the district court. The Court held that even a "temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment"[6] and that the 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."[7]

The effect of *Sniadach, Fuentes,* and *Reitman v. Mulky*[8] on provisional remedies[9] in the United States has been widespread and contradictory. California statutes involving innkeepers' liens,[10] claim and delivery,[11] and garageman's liens[12] have been held unconstitutional as a denial of fourteenth amendment due process. Kentucky's landlord distress warrant[13] and claim and delivery[14] statutes have received the same treatment, as have provisions of New York's personal property law permitting attachment of wages without an order of court,[15] Alabama's detinue statute,[16] West Virginia's improver's lien,[17] and Georgia's garageman's lien.[18]

In *Adams v. Egley*[19] a United States district court held that the self-help remedy provided for in California's Commercial Code sections 9-503 and 9-504 (identical to Uniform Commercial sections 9-503 and 9-504) [hereinafter cited as UCC] were unconstitutional because they encouraged and authorized creditors to repossess without due process. However, this decision was reversed in *Adams v. Southern California First National Bank.*[20] Other state versions of UCC 9-503

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[6] Fuentes v. Shevin, 407 U.S. 67, 85 (1972).

[7] *Id.* at 96.

[8] 387 U.S. 369 (1967). *Reitman* was a civil rights case, and some courts have distinguished it as being inapplicable to the debtor-creditor situation. *See* text accompanying note 64 *infra.*

[9] A provisional remedy is one of a temporary nature, ordinarily designed to secure property or to prevent its destruction pending judicial proceedings.

[10] Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970).

[11] Blair v. Pitchess, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

[12] Quebec v. Bud's Auto Service, 105 Cal. Rptr. 677 (Los Angeles County Super. Ct., App. Dep't 1973). *See* Adams v. Department of Motor Vehicles, 520 P.2d 961, 113 Cal. Rptr. 145 (1974) and Quinones v. S. & K. Chevrolet, 2 CCH Pov. L. REP. ¶ 16,060 (Solano County Super. Ct. Cal. June 29, 1972).

[13] Holt v. Brown, 336 F. Supp. 2 (W.D. Ky. 1971). *See* 73 KY. OP. ATT'Y GEN. 24 (1973).

[14] Thompson v. Keesee, 375 F. Supp. 195 (E.D. Ky. 1974) (three judges sitting).

[15] Bond v. Dentzer, 362 F. Supp. 1373 (N.D.N.Y. 1973), *rev'd,* 42 U.S.L.W. 2502 (2d Cir. Mar. 13, 1974).

[16] Yates v. Sears, Roebuck and Co., 362 F. Supp. 520 (M.D. Ala. 1973).

[17] Straley v. Gassaway Motor Co., 359 F. Supp. 902 (S.D.W. Va. 1973).

[18] Mason v. Garris, 360 F. Supp. 420 (N.D. Ga. 1973).

[19] 338 F. Supp. 614 (S.D. Cal. 1972), *rev'd,* 492 F.2d 324 (9th Cir. 1973).

[20] 492 F.2d 324 (9th Cir. 1973).

and 9-504 which have been held constitutional since *Fuentes* are those of Virginia,[21] Florida,[22] Tennessee,[23] Illinois,[24] Minnesota[25] and Nebraska.[26]

The Sixth Circuit, based on *Fuentes,* has also held that it is a denial of due process for a utility company to terminate services without a hearing.[27] The Eighth Circuit is in agreement,[28] but the Seventh Circuit has held otherwise.[29]

The Garageman's Lien in Kentucky

It is clear from *Fuentes* and *Sniadach* that any statute which allows a creditor, *through* a local or a state official, to take possession of property from a debtor, even on a temporary basis, without prior notice and an opportunity for a hearing will not satisfy the due process requirements of the fourteenth amendment. Whether the retention of property by an individual to whom the property has been voluntarily delivered is a "taking" of the property under due process standards when the individual retaining the property has acted in accordance with a provisional remedy statute which allows him to do so *without* the aid of any local or state official is a question which will be developed in detail in this article.

KY. REV. STAT. § 376.270 [hereinafter cited as KRS] allows a person in the business of repairing motor vehicles to detain a motor vehicle in his possession until he has been paid for his work.[30] KRS § 376.280

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[21] Greene v. First Nat'l Exch. Bank, 348 F. Supp. 672 (W.D. Va. 1972).

[22] Northside Motors, Inc. v. Brinkley, 282 So. 2d 617 (Fla. 1973).

[23] Kinch v. Chrysler Credit Corp., 367 F. Supp. 436 (E.D. Tenn. 1973).

[24] Johnson v. Associates Fin. Inc., 365 F. Supp. 1380 (S.D. Ill. 1973).

[25] Bichel Optical Labs. Inc. v. Marquette Nat'l Bank, 487 F.2d 906 (8th Cir. 1973).

[26] Pease v. Havelock Nat'l Bank, 351 F. Supp. 118 (D. Neb. 1972).

[27] Palmer v. Columbia Gas, Inc., 479 F.2d 153 (6th Cir. 1973).

[28] Ihrke v. Northern States Power Co., 459 F.2d 566 (8th Cir. 1972), *vacated as moot,* 409 U.S. 815 (1972).

[29] Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638 (7th Cir. 1972), *cert. denied,* 409 U.S. 1114 (1973).

[30] KY. REV. STAT. § 376.270 (1971) [hereinafter cited as KRS] provides that:

> Any person engaged in the business of selling, repairing or furnishing accessories or supplies for motor vehicles shall have a lien on the motor vehicle for the reasonable or agreed charges for repairs, work done or accessories or supplies furnished for the vehicle, and for storing or keeping the vehicle, and may detain any motor vehicle in his possession on which work has been done by him until the reasonable or agreed charge therefore has been paid. The lien shall not be lost by the removal of the motor vehicle from the garage or premises of the person performing labor, repairing or furnishing accessories or supplies therefore, if the lien shall be asserted within six (6) months by filing in the office of the county clerk a statement showing the amount and cost of materials furnished or labor performed on the vehicle. The statement shall be filed in the same manner as provided in the case of a mechanic's and materialman's lien, after the removal of the vehicle, unless the owner of the vehicle consents to an additional extension of time, in which event the lien shall extend for the length of time the parties agree upon. The agreement shall be reduced to writing and signed by the parties thereto.

permits this individual to sell such property after 30 days without a judicial hearing if the charges have not been paid.[31] KRS § 376.275 gives this same right to one in the business of storing vehicles if the charges have not been paid within 60 days.[32] Although KRS § 376.270 allows the garageman a lien on the vehicle even if it has left his possession, the requirements for enforcement of this lien are the same as those for the Mechanic's Lien,[33] which involve a judicial proceeding before the property can be attached or sold. This procedure appears to meet the due process requirements of *Fuentes*.

The constitutionality of Kentucky's Garageman's Lien[34] depends upon two factors: (1) whether the action taken by the garageman is under "color of law" and (2) whether this action amounts to a "taking" of property under the due process clause of the fourteenth amendment.

I. COLOR OF LAW

42 U.S.C. § 1983 provides that:

> Every person who, under color of any ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[35]

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[31] KRS § 376.280 (Supp. 1974) provides that:
(1) Any boat or motor vehicle remaining in the possession of a person who has made repairs, performed labor or furnished accessories or supplies therefor and to whom the charges for such repairs, labors, accessories or supplies has been owing for a period of more than thirty (30) days, may be sold to pay such deferred purchase money or charges. The proposed sale shall be advertised pursuant to KRS Ch. 424, and notice thereof shall be sent by certified mail, return receipt requested or by registered mail to the owner of the boat or motor vehicle and to any other person known to have any interest therein, addressed to such persons at their last known addresses, at least ten (10) days before the sale is held.

[32] KRS § 376.275 (1971) provides that:
Any person engaged in the business of storing or towing motor vehicles, shall have a lien on the motor vehicle, for the reasonable or agreed charges for storing or towing the vehicle, as long as it remains in his possession. If after a period of sixty (60) days the reasonable or agreed charges for storing or towing a motor vehicle have not been paid, the motor vehicle may be sold to pay the charges after the owner has been notified by registered letter of the time and place of the sale. This lien shall be subject to prior recorded liens.

[33] KRS § 376.010 (1971).

[34] KRS § 376.270 which allows the possession and KRS § 376.280 which provides for the subsequent sale are treated together in this article as the garageman's lien since KRS § 376.280 is simply the enforcement provision of KRS § 376.270.

[35] 42 U.S.C. § 1983 (1970).

Jurisdiction over § 1983 actions is given to the district courts in 28 U.S.C. § 1343:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.[36]

The majority of cases discussed herein have arisen under § 1983, and jurisdiction has either been granted or denied under § 1343 based on the "color of law" provision.

In *Fuentes* the Supreme Court had no problem with the "color of law" issue since the actual repossession of the appliances had been undertaken by the sheriff based on an affidavit supplied by the creditor.[37] The Court stated that "[T]he constitutional right to be heard is a basic aspect of the duty of *government* to follow a fair process of decision making when *it acts* to deprive a person of his possessions."[38]

Reitman v. Mulky[39] is a Supreme Court case upon which many courts have relied when faced with a "color of law" issue. In *Reitman* the issue involved an article of the California Constitution[40] which prohibited the state from denying the right of any person to sell his property to anyone he chose. The Court concluded that this article involved the state in private racial discrimination to an unconstitutional degree and upheld the California Supreme Court's decision that a constitutional provision repealing an existing law forbidding racial discrimination encouraged and authorized racial discrimination.[41]

Relying on *Reitman*, the District Court for the Northern District of California found that the California innkeeper's lien, whereby an innkeeper could impose a lien on personal effects of a person, was the *sole* basis upon which an innkeeper was authorized to sell property without a judicial hearing.[42] Therefore, this statute encouraged private

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[36] 28 U.S.C. § 1343 (1970).
[37] 407 U.S. 67 (1972).
[38] *Id.* at 80 (emphasis added).
[39] 387 U.S. 369 (1967).
[40] CAL. CONST. art. I, § 26.
[41] *Id.*
[42] At common law an innkeeper was required to accept travelers and therefore the innkeeper's lien was necessary to protect him against loss. The court reasoned that California's innkeeper statute was not based on common law since the reason for the common law no longer existed.

action sufficient to place it within the "color of law".[43] As will be developed at a later point in this Comment, *purely* private action between individuals is not enough to bring such action within the "color of law". It is only when the state becomes a party to the enforcement of such actions that the "color of law" argument becomes pertinent.

A. *The Common Law Argument*

The District Court for the Northern District of California in *Klim v. Jones*[44] and the Supreme Court in *Fuentes* distinguished the statutory provisional remedies involved in those cases from the provisional remedies that were available at common law. The involvement of the State of Kentucky in allowing the possessory lien of a garageman and the subsequent sale for charges has substantive connotations which must be resolved.

Holdsworth[45] traces the development of possessory liens back to certain tradesmen prior to 1371. Gradually, the law developed and the rules were defined so that in order to maintain a possessory lien the ". . . work done must have improved the chattel, and . . . the possession of the person asserting it must be exclusive."[46] In addition, ". . . the right of the person who [had] a lien [was] only to retain, and he [had] no right to sell."[47]

The Kentucky Court of Appeals, interpreting section 2739h-1 of CARROLL'S CODE (now KRS § 376.270) stated that:

> We think that the first section of the act which merely gives a lien to the garage for repairs[,] accessories[,] and storage is but an expression of the common law. Before the enactment of the statutes on the subject, mechanics and repairmen could retain a machine, whether an automobile or not, for the reasonable charges incurred in making repairs thereon at the instance of the owner or his representative, and this part of the act does not enlarge the common law, but merely reasserts it.[48]

The Court found that while the *sale* provision of the statute, CARROLL'S CODE 2739h-2, (now KRS § 376.280) did not exist at common law, the enactment of the legislature nonetheless conformed to fourteenth amendment due process requirements.[49]

The importance of the common law argument lies in the fact that

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[43] Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970).
[44] *Id.*
[45] 7 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW (1926).
[46] *Id.* at 512.
[47] *Id.* at 513.
[48] Willis v. LaFayette-Phoenix Garage Co., 260 S.W. 364, 366 (Ky. 1924).
[49] *Id.* at 368.

if a statute has merely *codified* the common law, *i.e.*, the remedy would be available absent the statute, there is not sufficient state involvement in the action to warrant a fourteenth amendment due process challenge. The fourteenth amendment applies only to state, not private actions.[50] However, in *Palmer v. Columbia Gas, Inc.*,[51] the Sixth Circuit, deciding that state regulation of a utility company was sufficient state involvement to prevent termination of service to a customer without a hearing, stated:

> Statutes, ordinances and regulations which codify the common law are no less actions of the state than are laws which create new offenses, restrictions or regulations, or which otherwise alter the common law.[52]

Thus, the common law argument, although persuasive to the effect that the lien statute does not involve state action, is not conclusive. Additionally, the enforcement provision of the lien, KRS § 376.280, was not based on the common law.[53] If the garageman cannot sell an automobile on which he has a lien, it does him little good simply to maintain possession and to incur greater storage costs each day. *Sniadach* and *Fuentes* were concerned with deprivations of use of property and removal of possession prior to a hearing. In both cases the state was involved because it issued the order of garnishment, and it was a local official who did the actual repossessing. However, no state official ever need become involved (except the county court clerk who is authorized to transfer title to a motor vehicle pursuant to the statute) under the Kentucky garageman's lien law. The garageman maintains possession of the automobile and can eventually sell the car without the intervention of any state or local official.[54] An action under the Kentucky garageman's lien can therefore be distinguished from *Fuentes* in two areas: the sale does not involve any state officials and there is no "taking" since the car is voluntarily delivered to the garageman.

B. *State Involvement—The UCC Cases*

The *Reitman* holding seemed to indicate that almost any action by the state would be sufficient to bring a subsequent action under the "color of law" provision of § 1983. Following this line of reasoning, it can be argued that the state is involved in action taken by the garageman, because he effects the sale of property pursuant to statute; and

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[50] Civil Rights Cases, 109 U.S. 3 (1883).
[51] 479 F.2d 153 (6th Cir. 1973).
[52] *Id.* at 163.
[53] Willis v. LaFayette-Phoenix Garage Co., 260 S.W. 364, 366-67 (Ky. 1924).
[54] KRS § 376.280 (1971).

the county court clerk is authorized to effect the transfer of title pursuant to KRS § 376.280. However, in 1973 the Supreme Court decided *Moose Lodge 107 v. Irvis*[55] which held that even though the state of Pennsylvania had granted a liquor license to a private club that practiced racial discrimination, this did not sufficiently involve the state in private action to amount to a deprivation of fourteenth amendment equal protection rights. The Court stated:

> However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise.[56]

The result of the Supreme Court's holdings in *Reitman* and *Moose Lodge* has been that the lower courts have subsequently determined the extent of state involvement in private actions based upon which decision they see as controlling. A court which views *Moose Lodge* as determinative is likely to hold that the state is not involved in the private action, while one which follows the reasoning of *Reitman* is more likely to find state involvement in almost any private action.

After *Fuentes* a number of actions were brought seeking to invalidate Sections 9-503 and 9-504 of the UCC.[57] The holdings in these cases can be applied by analogy to Kentucky's garageman's lien, because § 9-503 allows a secured creditor to repossess property after default through self-help as long as it can be done without a breach of the peace and § 9-504 provides for a non-judicial sale of such property as long as the sale is "commercially reasonable" and notice of the sale is given to anyone with an interest in the property. The corresponding provisions of the garageman's lien state that possession may be maintained until the charges are paid[58] and that the garageman may sell the automobile after 30 days a) if the charges have not been paid, b) if notice is provided through advertisement in a local paper over a period of three weeks[59] and c) if a registered or certified

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[55] 407 U.S. 163 (1973).

[56] *Id.* at 176-77.

[57] UNIFORM COMMERCIAL CODE §§ 9-503, 9-504 [hereinafter cited as UCC]. On September 20, 1974, the Sixth Circuit upheld the constitutionality of the Tennessee version of U.C.C. § 9-503 in Turner v. Impala Motors, No. 73-1826 (6th Cir. Sept. 20, 1974). Although the court had Mitchell v. W. T. Grant Co., 94 S. Ct. 1895 (1974), upon which to rely, the court focused instead upon the analysis contained in previous U.C.C. cases. *See infra* notes 61-65 and accompanying text. The court found, essentially, that there was no state action involved because § 9-503 was a codification of common law, and the creditor had not invoked the aid of any state machinery. Turner v. Impala Motors at 8.

[58] KRS § 376.270 (1971).

[59] KRS § 376.280 (1971) provides that the public notice shall be in accord

(Continued on next page)

letter is sent to the owner's last known address at least 10 days prior to the sale.[60]

The UCC cases have almost universally held that § 9-503 and § 9-504 do not violate due process rights, because the action taken by the secured creditors is not under "color of law". The cases arrive at this holding by stating that Sections 9-503 and 9-504 are codifications of the common law[61] or by focusing on the fact that there is no involvement by a state official.[62] *Adams v. Southern California First National Bank*[63] makes the most cogent argument in support of the constitutionality of UCC Sections 9-503 and 9-504. The sections are constitutional, *Adams* holds, because the remedies provided do not sufficiently involve state action to violate § 1983. In so holding, the Ninth Circuit was relying in part upon *Moose Lodge* and distinguished the actions taken under the UCC from those involved in *Reitman*. The court found that the enactment of the UCC provisions did not abrogate existing common law but *codified* it and that action taken under the UCC does not involve racial discrimination. The court stated:

> Unlike *Reitman*, there has been no finding that it was the intent of the State in passing § 9-503 to authorize any conduct that would violate the Fourteenth Amendment. And unlike racial discrimination cases in general, which have evidenced a pattern of intentional

(Footnote continued from preceding page)
with KRS ch. 424 which provides in part that:

> When an advertisement is for the purpose of informing the public and the advertisement is of a sale of property or is a notice of delinquent taxes, the advertisement shall be published once a week for three successive weeks. . . .

KRS § 424.130(1)(c) (1971).

[60] KRS § 376.280 (Supp. 1974).

[61] Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973); *see also* Northside Motors, Inc. v. Brinkley, 282 So. 2d 617, 622 (Fla. 1973) (Florida version of UCC § 9-503 "is no more than a codification or restatement of a common law right and a contract right recognized long before the promulgation thereof and creates no new rights.").

[62] Bichel Optical Labs., Inc. v. Marquette Nat'l Bank, 487 F.2d 906 (8th Cir. 1973) (Bank seizure of accounts receivable without notice not under "color of law" or violation of Fuentes requirements because *Fuentes* concerned with prejudgment seizures by state agents); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973); Kinch v. Chrysler Credit Corp., 367 F. Supp. 436 (S.D. Tenn. 1973) (Action not under color of law because nothing of the nature of a "symbiotic relationship" between the state and the creditor, citing *Moose Lodge v. Irvis*, 407 U.S. 163 (1973); Johnson v. Associates Fin., Inc., 365 F. Supp. 1380 (S.D. Ill. 1973) (UCC §§ 9-503 and 9-504 not violative of due process because not under "color of law" since the UCC drafters were not attempting to evade constitutional requirements but were allowing private decision-making); Oller v. Bank of America, 342 F. Supp. 21, 23 (N.D. Cal. 1972) ("To say . . . that all human behavior which conforms to statutory requirements is 'State action' or is 'under color of State law' would far exceed not only what the framers of the Civil Rights Act ever intended but common sense as well.").

[63] 492 F.2d 324 (9th Cir. 1973).

> indirect circumvention of constitutional rights, these creditor remedies were based on economically reasoned grounds of very long standing. . . .[64]

With respect to the concept of "color of law", the court said:

> The objective finding that the creditors in part acted with knowledge of and pursuant to state law is but one element of the action taken under color of state law requirement; alone it is not sufficient. The test is not state involvement, but rather is significant state involvement. Statutes and laws regulate many forms of purely private activity, such as contractual relations and gifts, and subjecting all behavior that conforms to state law to the Fourteenth Amendment would emasculate the state action concept.[65]

The majority opinion at the present time is clearly that the provisional remedies of self-help repossession and subsequent non-judicial sale as provided for under UCC Sections 9-503 and 9-504 are constitutional. If these particular remedies do not violate due process, it follows that the garageman's lien, which authorizes a sale of property already held by the creditor, cannot be said to be a greater deprivation of property without due process.

Hawkland, discussing the UCC self-help remedy in conjunction with the holding in *Moose Lodge*, concluded:

> It may be doubted that the enactment of a declaratory statute which does not compel anyone to engage in the challenged conduct will be considered a 'significant involvement' of the state in that conduct. For identical reasons it seems to me that common law doctrine and declaratory statutes that give a creditor the right to withhold goods, or to exercise a right of set-off or foreclosure with respect to property that has been voluntarily placed in his possession by the debtor, will pass constitutional muster.[66]

Other authorities disagree, however. Anderson believes that if, according to *Fuentes*, one cannot use the judicial process to repossess goods without notice and a hearing then ". . . there is an inconsistency in permitting the creditor to bypass that protective rule . . . and [to] repossess without judicial aid."[67] It has also been observed that:

> . . . under most existing statutes the garage owner may deprive the owner *permanently* through the extra-judicial process of public sale. These statutes then become, in practice, more oppressive than the pre-judgment remedies previously held unconstitutional by the Supreme Court.[68]

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[64] *Id.* at 333.
[65] *Id.* at 330-31.
[66] W. D. Hawkland, *The Seed of Sniadach: Flower or Weed,* 79 CASE & COMMENT 3, 21 (1974).
[67] R. ANDERSON, UNIFORM COMMERCIAL CODE 267 (Supp. 1973-74).
[68] Case Note, *Garageman's Liens--Procedural Due Process--A Prejudgment Remedy Must Provide Notice and A Prior Hearing,* 5 ST. MARY'S L.J. 380, 398 (1973).

Some writers concluded that possessory lien statutes are unconstitutional because they ". . . provide a means by which an alleged debtor can be deprived of the use and title to his property without . . . a hearing to determine the validity of the underlying claim. . . ."[69] These statutes also give a garageman too great an economic lever because the customer might pay an excessive charge when faced with the less desirable alternative of being unable to use his property.[70]

II. TAKING OF PROPERTY

Because the garageman holds the debtor's property as a result of its voluntary delivery into his possession, he does not "take" the property in the *Fuentes* sense. However, the garageman can eventually sell the property without a judicial hearing—which thus "takes" the title from its original possessor. The problem is whether this "holding" and "selling" amounts to a taking of property without due process.

Magro v. Lentini Bros. Moving and Storage Co.[71] was one case wherein possession was voluntarily relinquished. In *Magro* a warehouseman had stored furniture and had later sold it because the moving and storage charges were not paid. Faced with a challenge to the validity of UCC Sections 7-209 and 7-210,[72] the court concluded that since the property had already been sold, the declaratory judgment sought was not a proper remedy in this case.[73]

However, the court also found that the property involved, household furniture, could not qualify under *Sniadach* as those types of "goods[,] the deprivation of which will drive the debtor 'to the wall'."[74] After discussing the prior cases which had held replevin statutes unconstitutional, the court stated:

> All of the above cases, however, involved a taking of property from the possession, either actual or constructive, of the debtor. The statute under attack here, however, cannot come into play without possession first being surrendered to the warehouseman.[75]

The court additionally found that the sale provision, UCC § 7-210, did not operate to deny the plaintiffs due process of law, because the type

[69] Comment, *Constitutionality of North Carolina's Statute Concerning Possessory Liens on Personal Property*, 9 WAKE FOREST L. REV. 97, 107 (1972).

[70] Note, *The Application of Sniadach to Bankers' and Garageman's Liens*, 4 SW. U.L. REV. 285, 304 (1972).

[71] 338 F. Supp. 464 (E.D.N.Y. 1971), *aff'd* 460 F.2d 1064 (2d Cir. 1972), *cert. denied*, 406 U.S. 961 (1972).

[72] UCC § 7-209 gives a warehouseman a lien against bailed goods covered by a warehouse receipt. UCC § 7-210 allows the warehouseman to sell bailed goods in a "commercially reasonable manner" after notifying all persons with a continuing interest in the goods.

[73] Magro v. Lentini, 338 F. Supp. 464, 469 (E.D.N.Y. 1971), *aff'd*, 460 F.2d 1064 (2d Cir. 1972), *cert. denied*, 406 U.S. 961 (1972).

[74] *Id.* at 468.

[75] *Id.*

of goods involved required the availability of summary action; a prior hearing would have done nothing but weaken the security.[76] It should be pointed out, however, that the facts of the case undoubtedly had a great deal of influence on the court's decision. The plaintiffs had been represented by counsel, and the actual sale had been delayed several times to allow the plaintiffs the opportunity to pay the charges. Moreover, there was no dispute over the amount of the charges.

In *Huber v. Union Planters National Bank*[77] the Sixth Circuit held that a replevin action under which the sheriff took possession of a car before a hearing did not deprive the plaintiff of the due process afforded by *Fuentes*. The bank had originally taken the car under the UCC self-help provision of Article 9, but the plaintiff had retrieved the car from the bank parking lot. Subsequently, the car was towed to a service station because it had been illegally parked. The bank replevied the car from the service station lot and eventually sold it. The court reasoned that the car was not technically in the plaintiff's possession and that *Fuentes* was only concerned with a hearing before chattels are taken from a *possessor*.[78] Although the plaintiff was deprived of property in the first self-help action, the court noted that it was not contested by the plaintiff and thus was not an issue in the case. The possession thereafter was "tenuously held" by the plaintiff because it resulted from an "unauthorized 'self-help' recovery", and the subsequent replevin action did not take the automobile from the plaintiff's possession.[79]

In *Hernandez v. European Auto Collision, Inc.*[80] a New York district court had upheld the State's possessory lien law and sale provisions, but was subsequently reversed by the Second Circuit. In *Hernandez*, the plaintiff's auto was towed to the defendant's garage after an accident. Despite the plaintiff's instructions that nothing was to be done to the car, it was repaired. The plaintiff refused to pay and was notified that the defendant would enforce his garageman's lien at a public sale 21 days after the notice. The plaintiff asserted that a municipally licensed public auctioneer was a state official and asked for an injunction restraining the enforcement of the challenged act. Holding that the auctioneer did not qualify as a state or local official, the district court denied the injunction.[81] The district court

[76] *Id.*
[77] 491 F.2d 846 (6th Cir. 1974).
[78] *Id.* at 849-50.
[79] *Id.* at 850.
[80] 346 F. Supp. 313 (E.D.N.Y. 1972), *rev'd*, 487 F.2d 378 (2d Cir. 1973).
[81] 346 F. Supp. 313, 316 (E.D.N.Y. 1972).

did not reach the issue of whether the garageman's action was one under "color of law", because it held that the plaintiff had not suffered a deprivation of a right secured by the Constitution.[82] The court reasoned that the plaintiff had voluntarily placed the auto in the defendant's possession and had thereby given the defendant a property interest entitled to possession.[83] Under New York law, the plaintiff's proper remedy was to pay the amount he claimed *he* owed into court, *i.e.*, the towing charges, replevy the property from the possession of the lienor,[84] and institute an action on the merits of the claim for repairs. The court, citing *Magro,* decided that the public sale provisions of the lien law were not violative of due process because the owner had been notified of the sale and was given ample opportunity to challenge the debt through court action, which is all that is mandated by the Constitution.[85] The Second Circuit reversed. Because the statute provided for sale without judicial hearing and due to the fact that there was a genuine dispute as to the debt involved, the court held that the statute was unconstitutional under the principles enunciated in *Fuentes* and *Sniadach.*[86] Concurring opinions also questioned whether the "voluntary transfer" reasoning of *Magro* was still valid after *Fuentes.*[87] The concurring judges advanced the thesis that the lien law was an even greater deprivation of a significant property interest than replevin, because replevin procedures normally preserve the integrity of goods while an action on the merits is commenced. The sale provision of the lien law extinguishes any possibility of future repossession.[88]

The district court's ruling in *Hernandez* was also criticized in *Mason v. Garris.*[89] The *Mason* court found that the sale provision of Georgia's lien law violated due process because it permitted foreclosure on liens and subsequent sale without notice or an opportunity for a hearing. The court found that the garageman had only a security interest in the goods and that it was the owner who had the "use" interest.[90] Therefore, the court stated:

> Since the Supreme Court, and this court have held that statutes cannot constitutionally allow one who has a propriety [*sic*] interest in goods to take them from the user of the goods without

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[82] *Id.*
[83] *Id.* at 318.
[84] *Id.*
[85] *Id.* at 319.
[86] 487 F.2d 378 (2d Cir. 1973).
[87] *Id.* at 384 (Timbers and Lumbard, JJ., concurring).
[88] *Id.* at 385.
[89] 360 F. Supp. 420 (N.D. Ga. 1973).
[90] *Id.* at 424.

> abiding by procedural due process, it follows *a fortiori* that statutes cannot constitutionally allow one who has only a security interest in goods to take them from the user without abiding by procedural due process.[91]

The one feature which seems to distinguish *Magro* from *Hernandez* and *Mason* is that in *Magro*, as in *Fuentes*, there was no dispute as to the amount of the charges. However, in recent cases involving Sections 9-503 and 9-504 of the UCC, there was no dispute as to the amount owed; the only dispute centered around the method of enforcement of the security interest. Thus, the issue becomes crystallized: the supporters of *Sniadach* and *Fuentes* argue that notice and a hearing are required in all self-help cases, whether there is a dispute as to the debt or not. In contrast, the opposing viewpoint insists that the requirement of notice and a hearing unduly burden the legal process where there is no dispute as to the debt.

Mason can be distinguished from the Kentucky garageman's lien law sale provision. In *Mason* there was no requirement of notice, while the garageman's lien law specifically requires it. However, notice was also required in *Hernandez*, and even with such a requirement the Second Circuit held that the self-help remedy violated due process.

A. *The Notice Requirement*

KRS § 376.280 requires that notice of the sale of an automobile must be provided in accordance with the provisions of Ch. 424 of KRS. In addition, the section further requires that a registered or certified letter be sent to the last known address of the owner of the car. It would appear that this should be sufficient to satisfy any due process requirements, since the debtor then has the opportunity to challenge the debt by initiating court action. However, this was the sort of reasoning the Second Circuit rejected in *Hernandez*. Others have criticized such statutory language because the notice requirement contained therein only ". . . provides that the owner be informed of the proposed sale of his property; it is *not* notice of an opportunity to be heard on the amount or validity of the claimed lien."[92]

Although there is ample opportunity for the debtor to bring an action, as well as statutes which allow the debtor to file a bond and sue in replevin for the property,[93] it has been held that "[t]hese

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[91] *Id.*

[92] Comment, *Constitutionality of North Carolina's Statute Concerning Possessory Liens on Personal Property*, 9 WAKE FOREST L. REV. 97, 103 (1972).

[93] KRS § 382.063 (1971).

remedies, though, fall short of the rationale and minimum legal requirements set forth in recent authority."[94]

B. *Kentucky's Garageman's Lien in Federal Court*

In the recent case of *Cockerel v. Caldwell*,[95] a three judge district court for the Western District of Kentucky declared the sale provision of Kentucky's garageman's lien (KRS § 376.280(1)) unconstitutional. Cockerel had authorized towing services for his automobile, but disputed his authorization for repairs and refused to pay these charges. When the plaintiff was notified that the car would be sold to satisfy the repair charges, he requested injunctive relief, class action certification, and a declaration that KRS § 376.280(1) was unconstitutional. The class action certification was denied.[96]

The three judge court, in a 2 to 1 decision, declared KRS § 376.280(1) unconstitutional, prohibited the sale of the automobile, and permanently enjoined the clerk of the Jefferson County Court from effecting transfers of title pursuant to the provisions of KRS § 376.280(1).[97]

In deciding that the statute was unconstitutional, the majority[98] relied upon the reasoning of *Hernandez* which had applied *Fuentes* and *Sniadach* to a similar fact situation. The fact that the plaintiff voluntarily delivered the car to the defendant was of little significance to the majority. The finding that there was a deprivation of a significant property interest in the automobile was enough to satisfy the requirement of a "taking of property".[99]

The majority also found that the statute provided sufficient state action to invoke jurisdiction. Applying the reasoning of *Reitman v. Mulky*[100] and *Palmer v. Columbia Gas, Inc.*,[101] the majority determined

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[94] Holt v. Brown, 336 F. Supp. 2, 6 (W.D. Ky. 1971).

[95] Cockerel v. Caldwell, Civil Action No. 7892-A (W.D. Ky. Apr. 22, 1974) (three judges sitting). After a subsequent hearing on the constitutionality of KRS § 376.270 [the possessory lien provision], the majority held that provision of the statute constitutional. Although reciting the decision in Mitchell v. W. T. Grant Co., 95 S. Ct. 1895 (1974), the court found that it was not dispositive and relied instead upon the balancing test of *Adams v. Department of Motor Vehicles* to decide the issue. [The language of this balancing test is set out in the text accompanying note 111 *infra*.] Even in light of *Mitchell*, KRS § 376.280(1) is still unconstitutional.

Judge Bratcher, in dissent, would have held the entire statute unconstitutional based upon his interpretation of *Mitchell*. *See* text accompanying note 103 *infra*.

[96] *Id.* at 4.

[97] *Id.*

[98] Lively, Circuit Judge, and Allen, District Judge.

[99] Cockerel v. Caldwell, Civil Action No. 7892-A at 3 (W.D. Ky. Apr. 22, 1974).

[100] 387 U.S. 369 (1967).

[101] 479 F.2d 153 (6th Cir. 1973).

that ". . . statutes . . . can be considered actions of the state, *even where they codify the common law*, when the consequence of the statute enables private citizens to act in derogation of the Constitution."[102]

In his dissent, Judge Bratcher concluded that there was not sufficient state involvement in the action of the defendant to invoke a Fourteenth Amendment due process claim, relying in part upon the holdings of *Oller v. Bank of America*[103] and *Kinch v. Chrysler Credit Corp.*[104] He further concluded that "[t]he fact that the state has enacted legislation does not, per se, create 'state action',"[105] and stated that the notice of sale provisions of the statute gives the customer ample opportunity to challenge the garageman's lien.[106]

In *Bond v. Dentzer*[107] the Second Circuit reversed a district court ruling that New York's wage assignment law was unconstitutional, stating that they were unable to find that the challenged statute involved the state within the legal conceptualizations of partnership, encouragement, or traditional state function.[108] It is doubtful that the Kentucky garageman's lien statute involves the state as a partner in any action upon the lien, and an argument that the existence of the statute encourages such actions is tenuous. However, the California Supreme Court has held the sale provision of that state's garageman's lien law unconstitutional[109] on dual grounds: (1) the garageman is acting in a traditional state function and (2) the sale of property without a prior hearing violates the due process requirements as enunciated in *Fuentes*. In its holding the California court stated:

> The vehicle service lien and the procedures for its enforcement are created and governed by statute. The procedure is administered by the Department of Motor Vehicles, and transfer of title . . . is ultimately recorded by the department. Thus, although a private individual retains and sells the car, his power to do so arises from and is subject to specific provisions of state statute and his exercise of that power is supervised by the department.
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> . . . Even more importantly, by statutes authorizing and empowering Stellato [the garageman] to sell the car and requiring the

[102] Cockerel v. Caldwell, Civil Action No. 7892-A at 4 (W.D. Ky. Apr. 22, 1974).
[103] 342 F. Supp. 21 (N.D. Cal. 1972).
[104] 367 F. Supp. 436 (E.D. Tenn. 1973).
[105] Cockerel v. Caldwell, Civil Action No. 7892-A at 8 (W.D. Ky. Apr. 22, 1974) (Bratcher, J., dissenting).
[106] *Id.*
[107] 42 U.S.L.W. 2502 (2d Cir. Mar. 13, 1974).
[108] *Id.* at 2503.
[109] Adams v. Department of Motor Vehicles, 520 P.2d 961, 113 Cal. Rptr. 145 (1974).

> department to recognize and record transfer of title, the state delegated to Stellato the traditional governmental function of lien enforcement and enabled him to pass good title to an automobile he did not own.[110]

In the same decision however, the court upheld the California statutory provision which allows the garageman to retain possession of the automobile until he is paid because:

> The provisions permitting interim retention of the automobile without prior notice or hearing do not violate due process principles. The garageman has a possessory interest in a car left for him to repair with his own labor and materials. Thus, he has an interest that, in a sense, is superior to that of a conditional vendor or chattel mortgagee. Moreover, at the time he asserts his lien, the garageman is in rightful possession of the vehicle. Striking down the garageman's possessory lien would alter the status quo in favor of an opposing claimant; the garageman would be deprived of his possessory interest.[111]

CONCLUSION

Even in the face of the district court's ruling that KRS § 376.280(1) is unconstitutional, a strong and cogent argument can be made that the state does not violate due process requirements. UCC Sections 7-209 and 7-210 provide virtually the same remedy for warehousemen as KRS § 376.270 and 376.280 provide garagemen, and these provisions have been upheld.[112] UCC sections 9-503 and 9-504 even allow a secured creditor to retake possession of the property through self help and to subsequently sell it. These provisions have withstood several court tests.[113] Reasoning by analogy, it seems clear that if the application of UCC Sections 9-503 and 9-504 do not deprive a person of significant property interests or involve state action, then KRS §§ 376.270 and 376.280 are constitutionally sound as well.

The foremost argument that Kentucky's garageman's lien, especially the sale provision (KRS § 376.280), is unconstitutional is the rationale adopted by the California Supreme Court,[114] that is, a) that the garageman is acting in a traditional state function and b) that the sale of property without a hearing violates due process. Moreover, it should be noted that, essentially, KRS § 376.280(1) allows a garageman to proceed with the sale of another's property even

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[110] *Id.* at 965.
[111] *Id.*
[112] Magro v. Lentini, 338 F. Supp. 464 (E.D.N.Y. 1971).
[113] *See* text accompanying footnotes 61, 62, and 63 and cases cited therein.
[114] Adams v. Department of Motor Vehicles, 520 P.2d 961, 113 Cal. Rptr. 145 (1974).

though it has never been established that he has a valid claim underlying the sale.

The garageman should be allowed to hold the property until he is paid for his work. To require the garageman to surrender an automobile on which he has expended labor and parts without compensation is just as much a taking of property without due process as the situation cited in *Sniadach* and *Fuentes*. The proper remedy available to the owner is to replevy the property simply by filing a bond and initiating an action to determine if the property is being held improperly.[115] The property interests of the garageman and the owner have to be balanced at some point, and thus it appears reasonable that in exchange for the security of the property, the garageman should receive some assurances that he will receive the value of his labors. If the owner does not dispute the charges or authorization or if he does not respond to notification that the auto will be sold to pay for the charges, then the garageman should be able to proceed with a non-judicial sale. It seems unreasonable to require the garageman to go to the expense of a court action if the owner has abandoned the vehicle or does not dispute either the amount of the charges or his authorization for the repair work.

However, if there is a dispute on the garageman's underlying claim, he should not be allowed to simply sell the property without a judicial determination of the validity of the claim. In *Sniadach* the Court stated:

> . . . due process is afforded only by the kinds of notice and hearing which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use.[116]

In *Bond v. Dentzer*[117] a New York federal district court stated that due process

> . . . is the notion that society must recognize a moral obligation to see that disputes are resolved on the basis of their merits rather than on the basis of the relative power of the contestants.[118]

The property interests of the garageman and the automobile owner must be balanced. It appears that the best solution is to amend Sections 376.275 and 376.280 of KRS to provide the following: When the owner

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[115] KRS § 383.063 (1971).

[116] 395 U.S. 337, 343 (1969) (Harlan, J., concurring).

[117] 362 F. Supp. 1373 (N.D.N.Y. 1973), *rev'd*, 42 U.S.L.W. 2502 (2d Cir. Mar. 13, 1974).

[118] *Id.* at 1384, *citing* B. CRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS 79 (1970) (cited in Brown, *A Meaningful Opportunity to be Heard*, 46 ST. MARY'S L. REV. 25 (1971).

of the automobile disputes either the amount of the charges or his authorization for the repair work, the garageman must use the same procedure to enforce his possessory lien as he would use to enforce a non-possessory lien, *viz.*, he must act in accordance with KRS § 376.270, which provides that before the property can be attached or sold, there must be a judicial proceeding. Thus, if the garageman wants to sell the automobiles he will bear the burden of proving the validity of his claim. However, if he merely proposes to retain possession under his lien, the burden then is placed on the debtor to persuade the court to alter the status quo and allow him to regain possession of his automobile.

The retention of possession by the garageman is a "temporary, non-final deprivation" of the use of property as spoken of in *Fuentes*, that is, it is a "taking" of the automobile and the owner is deprived of its use. However, one should note the nature of the situation in which the retention arises (the voluntary delivery of the automobile to the garageman), the special character of the lien, and the absence of *direct* state action. The result of this combination of factors is that the retention does not amount to a "taking" of property in the sense of the Fourteenth Amendment due process clause.

Roger L. Crittenden