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CREDITORS' PREJUDGMENT REMEDIES: EXPANDING STRICTURES ON TRADITIONAL RIGHTS

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The law of debtor and creditor, for so long so largely impervious to change,[1] has become in recent years the subject of intensive reexamination in the light of pressing social and economic issues. This interest, engendered as a facet of the over-all plight of the consumer with its resulting societal malaise, has provided the impetus for profuse legislative proposals and, sometimes quite independent thereof, decisional law imposing restrictions on some time-honored devices of creditors.

The purpose of this article is threefold: to examine the traditional circumcriptions placed on the more common creditors' provisional remedies in order to evaluate in historical perspective the ambit and function of these remedies in modern debtor-creditor relationships; to analyze the recent case law and other proscriptions evoking additional limitations, particularly constitutional ones, on these remedies; and to assess significant trends in the continuing evolution of the law in this area with some consideration and conjecture as to their socio-economic implications. In the labyrinth of creditor and debtor law, illumination of concepts may sometimes best be achieved by focusing on the laws of one state, particularly in those instances where there are substantial differences as well as subtle nuances among the rules of the various jurisdictions. This is especially true in examining the conventional grounds for the provisional remedies for although influenced by a common origin, development on a state-by-state basis, has not been marked by considerable uniformity. Prepared for this medium, this study resorts to frequent excursions into the laws of Florida; nevertheless, many of the observations made may have more general applicability.

PREJUDGMENT ATTACHMENT AND GARNISHMENT

The Traditional Ambit

Prejudgment garnishment and attachment have historically been deemed extraordinary remedies[2] and, indeed, they offer unique benefits to the successfully invoking creditor. By removal of certain of the debtor's assets from his control, the creditor obtains a measure of immediate protection against a diminution in value either by design or neglect of the property that will provide a means, perhaps the only means, of partially or fully satisfying his claim once it is reduced to judgment. Subject to certain exceptions, the rule in Florida is that personal property subjected to attachment by levy "shall remain in custody of the officer who attached it until disposed of according

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1. *See, e.g.*, J. MOORE & W. PHILLIPS, DEBTORS' AND CREDITORS' RIGHTS pt. 1, §1, at 3 (3d ed. 1966).

2. *E.g.*, F.A. Haber & Co. v. Nassits, 12 Fla. 589, 609 (1868).

to law.[3] . . ." Similarly, although the property or debt garnished may not be brought directly into *custodia legis*, garnishment also gives solace to the creditor by making provision for the personal liability of the garnishee "for all debts due by him to defendant, and for any tangible or intangible personal property of defendant in his possession or control at the time of the service of the writ or at any time between the service and the time of his answer."[4]

Not only is security obtained against the voluntary acts or omissions of the debtor but the lien status afforded the creditor's claim by the levy of the writ of attachment,[5] provides the attaching creditor with all important priority status in contests with third parties whose interests attached subsequently by either voluntary or involuntary means.[6] Although the judicial lien acquired by attachment is often characterized as an inchoate one until judicial approval of plaintiff's claim is forthcoming, it provides the attaching creditor seniority against the subsequent execution lien of a judgment creditor of the debtor even though the execution lien was obtained prior to judgment in the attachment suit. The determinative point is that the attachment lien preceded the execution lien, and so long as judgment was subsequently obtained upon the plaintiff-in-attachment's claim it is of no moment that the attachment lien was an inchoate one at the inception of the execution lien.[7] Thus, without the agreement of the debtor, required for a consensual lien, and even prior to a judicial determination of the merits of his claim, required for judgment and execution liens, the creditor invoking attachment process acquires the right to satisfaction of his claim from specific property of the debtor good not only against the debtor but third parties as well and, therefore, the favorable transformation of his status from general to lien creditor.

Early lien acquisition is advantageous in the attaching creditor's contests not only against other individual creditors but representatives of creditors in collective actions as well. When a levy of attachment precedes a valid assignment for the benefit of creditors, the rights of the attaching creditor in the goods levied upon are superior to those of the assignee for the benefit of creditors.[8] Moreover, unique powers of the bankruptcy trustee serve to emphasize the urgency of early lien acquisition in priority contests. For example, the trustee in bankruptcy may not only prevail over any interest that a creditor who obtained a lien by legal or equitable proceedings upon the date of bankruptcy could prevail by virtue of his status as such creditor under section 70c of the Bankruptcy Act,[9] but also, if the respective requisites are met, the trustee may excise attachment or other liens obtained within four

3. FLA. STAT. §76.22 (1971).
4. FLA. STAT. §77.06(1) (1971).
5. FLA. STAT. §76.14 (1971). There is doubt as to whether garnishment creates a lien in Florida. See authorities collected in 3 FLA. JUR. *Attachment and Garnishment* §128 (1955).
6. FLA. STAT. §76.15 (1971); *see, e.g.*, McClellan v. Solomon, 23 Fla. 437, 2 So. 825 (1887).
7. *See* Zinn v. Dzialynski, 14 Fla. 187 (1872).
8. H.B. Claflin Co. v. Harrison, 44 Fla. 218, 31 So. 818 (1902).
9. 11 U.S.C. §110(c) (1970).

months of bankruptcy as preferential transfers under section 60[10] or as liens obtained through legal or equitable proceedings under section 67a.[11]

No compendium of the value of attachment and garnishment to creditors would be complete without noting their use in producing quasi in rem jurisdiction.[12] In this function the before-judgment procedures produce both the security for the satisfaction of a forthcoming judgment and the very basis for obtaining that judgment. Of course, the use of the writs will often induce the general appearance of a defendant not amenable to personal service of process within the jurisdiction, so attachment and garnishment may also aid the plaintiff in obtaining in personam jurisdiction.

One other function of the writs is worthy of note. A common provision of the garnishment statutes, and one contained in the Florida procedure, provides for a discovery function of garnishment process.[13] The garnishee is required to include in his answer whether he knows any other person indebted to the defendant or having any of the property of the defendant in his possession or control.[14]

As both the uses and limitations of the writs are a product of their history, it seems appropriate to give some study to their origin and early development. Whatever stigmas its detractors may now ascribe to prejudgment garnishment and attachment, the early use of the process in England, both before and after the abolishment of imprisonment for debt, compelled the appearance of the defendant by the attachment of his property in lieu of his body,[15] and must necessarily be characterized as relatively benign. The primordial institution from which stems the practice in this country was the custom of foreign attachment of the City of London[16] whereby the creditor of an absent debtor could attach the latter's goods in the possession of a third party, the garnishee, or a debt owing his debtor by the garnishee to obtain judgment and satisfaction thereof from the debt or chattels attached.[17] As the debtor was entitled to terminate the attachment by special bail or surrender of his person, however, the London custom was directed more toward compelling the defendant's appearance than toward providing a means of satisfying plaintiff's claim should the suit result in a judgment against the defendant.[18] The significance of the device as a means of compelling the appearance of the debtor lies in the restrictions common law procedure placed on default judgments in other than real actions in England until 1725.[19]

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10. 11 U.S.C. §96 (1970).

11. 11 U.S.C. §107(a) (1970). The partial overlap between §§60 and 67a avoiding powers is discussed in 3 W. COLLIER, BANKRUPTCY §60.11(3) (14th ed. 1969).

12. Pennoyer v. Neff, 95 U.S. 714 (1877).

13. FLA. STAT. §77.04 (1971).

14. *Id.*

15. 1 R. SHINN, ATTACHMENT AND GARNISHMENT §2 (1896).

16. C. DRAKE, SUITS BY ATTACHMENT §1 (4th ed. 1873).

17. S. RIESENFELD, CASES AND MATERIALS ON CREDITORS' REMEDIES AND DEBTORS' PROTECTION 177 (1967).

18. R. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 486-87 (1952).

19. *Id.* at 361; S. RIESENFELD, *supra* note 17, at 179.

The American colonies nurtured the development of the process at an early date[20] and extended it to encompass not only the debtor's property in the possession of third persons, but also in the New England colonies the prejudgment seizure of tangible personalty in the defendant's own possession and ultimately real property when it became liable to execution for debt. Further expansion in the New England jurisdictions made the process available not only against non-resident and absconding debtors but all defendants in common law actions for the recovery of money. Of particular significance in the New England development of these provisional remedies was their eventual emergence as a collection remedy or judicially imposed security device whereby the attached property was not released upon the appearance of the defendant but would stand charged with any judgment that might be rendered against him.[21] In this function, therefore, creditors found a very real protection against dissipation of assets pending litigation. Those inroads on the restrictions contained in the primordial process embodying direct attachment of the property in the debtor's possession as well as the continued availability of the property for satisfaction of any judgment obtained have found common acceptance in the jurisdictions of this country outside of New England. However, the other jurisdictions have generally limited both direct attachment and garnishment of property or credits in the hands of third parties to special grounds rejecting the reasoning that these extraordinary remedies should be available against all debtors generally.[22]

Considerable variation exists among the jurisdictions imposing special grounds on the use of these provisional writs. With regard to the dangers inherent in generalization, however, three broad grounds are commonly found: (1) the nonresidency, absence or concealment of the defendant, which defeats efforts at personal service of process; (2) the threatened or actual secretion, removal or disposition of the defendant's property to make it unavailable for creditors; (3) the conferring of the right based on the special nature of the plaintiff's underlying claim.[23] Although garnishment, known generally in New England as "trustee process," and attachment have experienced a complementary growth in this country, in some jurisdictions two separate writs exist.[24] Florida is within this group and anomalously has assigned less stringent grounds to the writ of garnishment.[25]

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20. If we may ascribe some degree of credence to one commentator's enumeration of those factors that made the provisional writs popular with American creditors in colonial times, they are present a fortiori today. The multiple jurisdictions of this country coupled with the unrestrained privilege of transit, an economy that utilized extensive credit and laws that were for their time debtor-oriented such as the abolishment of imprisonment for debt in colonial days contributed then as now to their utility function and, therefore, popularity with creditors. *See* C. DRAKE, *supra* note 16, §3.

21. R. MILLAR, *supra* note 18, at 485-88.

22. R. MILLAR, *supra* note 18, at 489.

23. V. COUNTRYMAN, CASES AND MATERIALS ON DEBTOR AND CREDITOR 10 (1964).

24. J. MOORE & W. PHILLIPS, *supra* note 1, pt. 2, §1, at 16-17.

25. In light of their historical development, garnishment is more firmly grounded in the custom of foreign attachment in London with its attendant restrictions on use to cases

Historical considerations aside, in Florida "[e]very person who has sued to recover a debt . . . against any person, natural or corporate, has a right to a writ of garnishment, in the manner hereinafter provided, to subject any debt due to defendant by a third person, and any tangible or intangible personal property of the defendant in the possession or control of a third person."[26] The Court has construed the antecedent of the phrase "to subject any debt due to defendant by a third person" stating: "If there is anything contingent or to be done by a person before the liability of another becomes fixed, there is not such an 'indebtedness due' as contemplated by the statute to which a writ of garnishment can apply."[27] Furthermore, the debt that forms the basis for the underlying claim of the plaintiff against the defendant must be actually due[28] and apparently not contingent nor unliquidated.[29] The still broad legislative grant is delimited further, however, by a prohibition against the issuance of the prejudgment writ in tort actions[30] and by the requirement that plaintiff's motion initiating the writ state "that movant does not believe that defendant will have in his possession after execution

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in which the defendant was a nonresident or absconding debtor than to direct attachment of property in the possession of the debtor. The latter remedy having its origins in this country in the New England procedure that was available against all debtors including those amenable to personal service of process within the jurisdiction. The anomaly may perhaps be partially explained on the basis that the Florida procedures were formulated in the 19th century after the coalescence of the two historical antecedents in the older jurisdictions of this nation, which obviated to some extent the earlier dichotomy. This conjecture fails to offer any reason for the existence of two different grounds in Florida.

26. FLA. STAT. §77.01 (1971). This section and related ones also make provision for garnishment in aid of execution, a subject not within the purview of this article.

27. West Fla. Grocery Co. v. Teutonia Fire Ins. Co., 74 Fla. 220, 226, 77 So. 209, 211 (1917); *accord,* Chaachou v. Kulhanjian, 104 So. 2d 23 (Fla. 1958); Cobb v. Walker, 144 Fla. 600, 198 So. 324 (1940). One insurance company garnishee attempted to forestall any indebtedness from arising under its liability policy that restricted recovery to the assured for loss actually sustained and paid in money by him after actual trial. This did not prevent garnishment in aid of execution from lying although the post-judgment process, like the provisional writ, requires that the garnishee's debt to the defendant be due. The garnishee as insurer had defended the action, which resulted in judgment against its insured, and the court relied on an earlier decision in which a term similar to the pertinent one had been "interpreted" as applying only in case the insurer denied liability and refused to defend. Of course, policy considerations embodying regulation of the insurance industry were predominant in the holding. *See* Standard Accident Ins. Co. v. Hancock, 124 Fla. 725, 169 So. 617 (1936). Other requisites to the insurer's liability to the defendant such as the insured's failure to give notice may cause a writ of garnishment not to lie. *See* United States v. United Bonding Ins. Co., 422 F.2d 277 (5th Cir. 1970).

28. FLA. STAT. §77.031 (1) (1971).

29. *See* Ake v. Chancey, 152 Fla. 677, 13 So. 2d 6 (1943) (equitable garnishment not applicable where the amount claimed was unliquidated, in dispute or uncertain); Cobb v. Walker, 144 Fla. 600, 198 So. 324 (1940) (equitable garnishment requires that debt be due absolutely and without contingency); Moss v. Sperry, 140 Fla. 301, 191 So. 531 (1939) (equitable attachment allowed as the legal remedy of garnishment lies only for a debt actually due and not contingent); Williams v. T.R. Sweat & Co., 103 Fla. 461, 137 So. 698 (1931) (writs of garnishment issued ancillary to suit in equity properly dissolved where *inter alia* there was contingency as to amount due). *See also* authorities cited notes 39-43 *infra.*

30. FLA. STAT. §77.02 (1971).

is issued, visible property in this state and in the county in which the action is pending on which a levy can be made sufficient to satisfy plaintiff's claim."[31] The belief of the movant must be supported by the facts known to him and an effort on his part to ascertain the existence of relevant ones, or the writ, although issued on the general allegation, will be subject to a motion to dissolve.[32]

Florida's attachment statute will not reach debts owed nor personal property of the defendant held by third persons, that being, of course, the office of the writ of garnishment. Attachment does apply, however, to personal and real property of the debtors, the property subject to the writ being designated as "goods and chattels, lands and tenements"[33] and "shares of stock in any corporation incorporated by the laws of this state."[34] In further contrast with garnishment, attachment does not issue after judgment but is solely a provisional remedy; levy made after judgment on the property otherwise within its purview is the function of execution process.[35]

Statutory grounds for attachment in Florida, although in most respects more circumscribed than those for garnishment, do recognize the use of the remedy not only on a debt due but also when the plaintiff's claim has not matured. When the debt is due, the creditor is given twelve separate grounds for attachment.[36] All are encompassed, however, within slightly altered ambits of the first two of the three bases previously cited for limiting the use of the process. Subsections 4 through 8, 11, and 12 of the Florida statute set forth in the footnote embrace not only the nonresidency or concealment of the defendant but also provide for a debtor "actually moving" or "about to move himself out of the state" as well as a debtor "about to remove himself" or "actually removing himself beyond the limits of the judicial circuit in which he resides." Additional grounds for attachment on a matured claim contained in the remaining subsections of section 76.04 may be summarized generally as actual or threatened removal, actual secretion and actual or threatened fraudulent disposition of the debtor's property. It is the

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31. FLA. STAT. §77.031 (1) (1971) also requires that the "motion (which shall not be verified or negative defendant's exemptions) stat[e] . . . that the garnishment is not sued out to injure either defendant or garnishee . . . ."

32. Bertman v. Kurtell & Co., 205 So. 2d 685, 686 (3d D.C.A. Fla. 1967).

33. FLA. STAT. §76.01 (1971).

34. FLA. STAT. §76.02 (1971).

35. The designation of property subject to execution may be broader in scope than that available for attachment, however. *Compare* FLA. STAT. §56.061 (1971), *with* FLA. STAT. §§76.01-.02 (1971).

36. FLA. STAT. §76.04 (1971) provides: "The creditor may have an attachment on a debt actually due to him by his debtor, when the debtor: (1) Will fraudulently part with his property before judgment can be obtained against him. (2) Is actually removing his property out of the state. (3) Is about to remove his property out of the state. (4) Resides out of the state. (5) Is actually moving himself out of the state. (6) Is about to move himself out of the state. (7) Is absconding. (8) Is concealing himself. (9) Is secreting his property. (10) Is fraudulently disposing of his property. (11) Is actually removing himself beyond the limits of the judicial circuit in which he resides. (12) Is about to remove himself out of the limits of such judicial circuit."

debtor's acts in regard to his property that, likewise, provide the grounds for attachment when the debt is not due, and the grounds when the claim is unmatured are limited to actual removal, actual fraudulent secretion, and actual frandulent disposition of that property.[37]

Attachment, therefore, may lie on an unmatured claim and the existence of the grounds for attachment will accelerate the maturity of the debt to one "falling due on a day before commencement of the action."[38] However, other limitations, which stem from cases construing the legislative grant and were encountered in the analysis of the grounds for garnishment, similarly restrict attachment. An unliquidated claim is not a proper basis for attachment because the use of the term "debt," with its common law connotations in denoting the statutory basis for plaintiff's underlying action, includes only those claims "capable of being readily reduced to a certainty."[39] This result will occur "if the amount thereof is fixed, has been agreed upon, or is capable of ascertainment by mathematical computation or operation of law."[40] If an unliquidated claim is included with liquidated ones the validity of the latter is not affected but the former is subject to being struck on motion.[41] If, however, no motion is filed a waiver of the defendant's rights will occur.[42] Moreover, the predecessor of the current statute embodying the requirements for contents of the plaintiff's motion when the debt is not due was held to exclude the use of attachment when the liability of the defendant upon the contract was still contingent. The ruling is probably viable under the present act, which incorporates substantially similar language in the relevant provision.[43] Although the attachment statutes contain no specific counterpart to the legislative proscription of prejudgment garnishment in tort actions, the same rationale attendant in the prohibition of attachment in the cases of unliquidated and contingent claims would seem to apply with equal or even greater force to its prohibition in actions sounding in tort.[44]

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37. FLA. STAT. §76.05 (1971) states: "Any creditor may have an attachment on a debt not due, when the debtor: (1) Is actually removing his property out of the state. (2) Is fraudulently disposing of his property to avoid the payment of his debts. (3) Is fraudulently secreting his property to avoid payment of his debts."

38. FLA. STAT. §76.06 (1971).

39. Papadakos v. Spooner, 186 So. 2d 786, 789 (3d D.C.A. Fla. 1966) (reasonable attorney's fee).

40. Robinson v. Loyola Foundation, Inc., 236 So. 2d 154, 157 (1st D.C.A. Fla. 1970).

41. *Id.* at 158.

42. *Id.* at 158.

43. *Compare* FLA. STAT. §76.10 (1971), which provides: "When the debt is not actually due, the motion shall state the amount of the debt or demand; that it is *actually an existing debt* . . . ." (emphasis added), *with* the statute construed in Tanner & Delaney Engine Co. v. Hall, 22 Fla. 391 (1886): "The purpose in [the statute] requiring the statement that the debt or demand is actually an existing debt or demand [even though not due] is to exclude from, or rather to show *clearly* the intent not to include within the remedy contracts upon which the liability of the defendant is still contingent." *Id.* at 395.

44. FLA. STAT. §§76.04-.05 (1971) (debts only). "It has been *generally* held that liquidated claims arise ex contractu rather than ex delicto." Robinson v. Loyola Foundation, Inc., 236 So. 2d 154, 157 (1st D.C.A. Fla. 1970) (dictum). *See* 6 AM. JUR. 2d *Attachment and Garnishment* §50 (1963); 3 FLA. JUR. *Attachment and Garnishment* §18 (1955).

In addition to the general grounds for attachment on debts due and not due, special grounds exist. One basis for the writ in Florida recognizes the nature of plaintiff's underlying claim as entitled to special consideration and, thus incorporates the third general grounds used in this country to allow the process. In an obvious exception to the proscription of the use of the writs generally for unliquidated, contingent, or tort claims, section 76.32 provides for attachment against the vessel "[i]n all actions . . . to recover damages . . . resulting from negligence in the navigation, direction or management of any ship or boat . . . within the territorial jurisdiction of the state."[45] Another distinct basis for attachment in Florida is in aid of foreclosure of a mortgage on personal property when the statutory requisites are present.[46] In this case, although the grounds all relate to the creditor's reasonable belief that the property will be diminished in value or physically unavailable to answer a foreclosure judgment, they differ from those relating to property in the general writs. The property that may be subjected to the writ and is the subject of the ills set forth in the grounds for attachment in aid of foreclosure would appear to be not the debtor's general property but the collateral upon which foreclosure is sought.[47] The secured creditor's right to take possession of his collateral from his debtor upon default is examined subsequently at greater length in the discussion of the writ of replevin, but it should be noted that the adoption of the Uniform Commercial Code in this state has probably diminished the need, although not abrogated the grounds, for the use of attachment in liquidating upon default a personal property security interest.[48]

In delineating the bases for attachment further examination of the contents of pleadings required to commence the action should be made. Attachment on all grounds requires the filing of a motion, "which shall not be verified or negative the attachment debtor's exemption,"[49] but the contents of the motion then vary based on whether the action is based on a debt due,[50] not due,[51] is in aid of foreclosure,[52] or is for the attachment of a vessel under the special grounds prescribed therefor.[53] The requirements as to contents of

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45. FLA. STAT. §76.32(1) (1971).

46. FLA. STAT. §76.07 (1971) provides: "Any creditor who is commencing or has commenced an action to foreclose a mortgage on personal property may have an attachment against the property, when he has reason to believe and does believe that: (1) The property or part of it will be concealed or disposed of so that it will not be forthcoming to answer a judgment on foreclosure. (2) The property or part of it will be removed beyond the jurisdiction of the court. (3) The property or part of it is of a perishable character and is being used and consumed by the mortgagor or other parties. (4) The property or part of it has been disposed of without the consent of the party holding the mortgage, and stating who has the property, if known and if not known, that he does not know who has it."

47. *Compare* FLA. STAT. §§76.07, .13(2) (1971), *with* FLA. STAT. §§76.04-.05, .13(1) (1971).

48. *See* text accompanying notes 217-228 *infra*.

49. FLA. STAT. §§76.08, .32(3) (1971). A similar requirement obtains for garnishment. *See* note 31 *supra*.

50. FLA. STAT. §76.09 (1971).

51. FLA. STAT. §76.10 (1971).

52. FLA. STAT. §76.11 (1971).

53. FLA. STAT. §76.32(3) (1971).

the motions add little to what may be expected in the light of the different bases for the writs and the various grounds assigned,[54] but it should be noted that when the debt is not due in addition to the required motion "plaintiff shall produce before the officer granting the attachment, satisfactory proof, by affidavit (other than his own) or otherwise, of the existence of the special ground."[55]

In addition to statutory garnishment and attachment, Florida recognizes remedies of somewhat similar import in suits cognizable in equity. Although the attachment statutes previously examined are limited to actions "at law,"[56] the court has found that "equitable attachment" will lie in proper cases where there is no adequate remedy at law.[57] The statutes enumerating the grounds for garnishment do not include a self-contained proscription limiting their application to suits at law, but the court had held there is no provision for use of the writ in equity under the general garnishment statutes as garnishment is considered to be a legal, as distinguished from an equitable proceeding, and provision is made for a parallel proceeding in equity, albeit of more limited application.[58] The court was referring to the forerunner of Florida's present provision for sequestration, which allows for securing the party commencing an action in chancery for any judgment he might obtain against a nonresident or absent defendant out of the effects of that defendant in the hands of, or a debt owing the absent defendant by a defendant within the state.[59]

Aside from the necessity of grounds for the writs in actions at law, a common practical limitation on the use of attachment and garnishment is the requirement that plaintiff must post a statutory bond usually in twice the amount of his claim.[60] Florida statutes recognize this method of according some degree of protection to the defendant against the dangers inherent in prejudgment deprivation of his property and premise the issuance of the prejudgment writs in attachment and garnishment generally on the filing of bond with surety "payable to defendant in at least double the debt demanded conditioned to pay all costs and damages which defendant sustains in consequence of plaintiff's improperly suing out the [writs.]"[61] The bond require-

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54. Reference has previously been made to the interpretation given part of the required contents of the motion prescribed when the debt is not due in excluding attachment of contingent debts. *See* note 43 *supra.*

55. FLA. STAT. §76.10 (1971).

56. FLA. STAT. §76.01 (1971).

57. Jansik v. Studstill & Holenbeck, Inc., 153 Fla. 870, 16 So. 2d 165 (1944); Moss v. Sperry, 140 Fla. 301, 191 So. 531 (1939); *see* authorities cited note 29 *supra.*

58. Williams v. T.R. Sweat & Co., 103 Fla. 461, 137 So. 698 (1931).

59. FLA. STAT. §68.03 (1971).

60. V. COUNTRYMAN, *supra* note 23, at 43.

61. FLA. STAT. §§76.12 (attachment), 77.031 (2) (garnishment) (1971). The former statute also provides: "[T]he bond shall be made payable to the state for the use and benefit of all parties interested . . . ." when mortgaged personal property the subject of the attachment by the mortgagee, has been allegedly disposed of without his consent and he does not know the identity of the possessor. FLA. STAT. §76.12 (1971). When the attach-

ments are a very real factor in plaintiff's consideration of the use of the provisional remedies as the law of this jurisdiction has long been that the attachment writ is improperly issued, thus an action for breach of the condition of the bond will lie when there is a judgment for the defendant on the merits of the underlying claim or the grounds imposed as a prerequisite to its issuance are nonexistent.[62] When the attachment is dissolved for some irregularity or for some technical reason only, recovery on the bond will not be forthcoming,[63] and the defendant in garnishment has not stated a cause of action on the garnishment bond when he alleges and proves that the garnishment writ was dissolved on dismissal of plaintiff's suit solely for want of prosecution.[64]

The measure of damages for the wrongful attachment of chattels is the value of their use for the period the defendant is deprived of possession and any loss or injury to the chattels during that period.[65] Damages based on any profits that would have resulted from the use of the chattels are not proper,[66] although damages proximately resulting from attachment of defendant's land, which had an "interrupting effect" on his real estate development, were recoverable in suit on the bond.[67] Garnishment of defendant's bank deposit, which froze her account with the garnishee bank until after that institution failed, resulted in damages in a suit on the plaintiff's bond in the amount of the account plus interest less the dividends received if the garnishment were improperly sued out.[68] That the defendant in garnishment might have averted the loss by giving bond with surety conditioned to pay any judgment the plaintiff may have recovered and thus released the account from the writ,[69] does not alter the rule as such damages are not special ones but are the natural and probable result of the garnishment.[70] Reasonable attorney's fees incurred by the defendant and other expenses of the contest are a proper element of damages in an action on the bond when those fees and expenses are for services rendered in dissolving the attachment as opposed to defending the claim to which the attachment is ancillary. The distinction is obtained so that the fees and other expenses of litigation are recoverable

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ment is based on the special grounds provided for the attachment of vessels, the "debt demanded" language is necessarily altered to reflect the different basis for the claim, "the amount of money in good faith demanded," and the bond requirement is waived when the state is plaintiff. FLA. STAT. §76.32(4) (1971).

62. Steen v. Ross, 22 Fla. 480 (1886).

63. *Id.* at 486.

64. American Sur. Co. v. Florida Nat'l Bank & Trust Co., 94 F.2d 126 (5th Cir. 1938).

65. Florida Transp. Co. v. Dixie Sightseeing Tours, Inc., 139 So. 2d 175 (3d D.C.A. Fla. 1962).

66. *Id.*

67. Norman Babel Mortgage Co. v. Golden Heights Land Co., 117 So. 2d 205 (3d D.C.A. Fla. 1960). Any difference in damage criteria may result from attachment of real property not divesting the defendant of possession thereof. *See* text accompanying notes 165-167 *infra.*

68. American Surety Co. v. Florida Nat'l Bank & Trust Co., 94 F.2d 126 (5th Cir. 1938).

69. FLA. STAT. §77.24 (1971).

70. American Surety Co. v. Florida Nat'l Bank & Trust Co., 94 F.2d 126 (5th Cir. 1938).

only when the defendant achieves dissolution of the writ in a proceeding separate from the trial of the case on the merits.[71]

Although defendant's suit to recover damages on the attachment bond is limited by the amount of that bond,[72] suit on the bond is not the defendant's exclusive remedy. Florida recognizes a subsequent action against the plaintiff in garnishment or attachment for malicious prosecution of the original action when the elements of that tort are present.[73]

Of perhaps greater significance in delimiting the use of attachment and prejudgment garnishment are the exemption provisions of state law. This is especially true in Florida in regard to remuneration for "personal labor or services" where the legislature has long seen fit to totally exempt such compensation from court process when it is "due to any person who is the head of a family residing in this state."[74]

In the case of *Wolf v. Commander*[75] an equally divided Florida supreme court affirmed the lower court's holding that the exemption applied not only when the right to payment was for manual labor, but also to a debtor's salary for "services requiring special skill and intellectual fitness and for the performance of executive and administrative duties."[76] The case has been followed,[77] and it would appear that any judicially construed dichotomy based on wages paid for manual labor and salary paid for other personal services is tenuous at best and not supported by the facts of economic reality when service performed by those commonly denoted as blue-collar workers are often equally or more remunerative than those of their white-(today more commonly bright-) collar counterpart.[78]

Very few jurisdictions have general exemption statutes that totally remove the debtor's compensation for personal labor or services from the legal process

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71. L. Bucki & Son Lumber Co. v. Fidelity & Deposit Co., 109 F. 393 (5th Cir. 1901), *aff'd*, 189 U.S. 135 (1903); Bondy v. Royal Indemnity Co., 134 Fla. 776, 184 So. 241 (1938); Gonzales v. De Funeak Havana Tobacco Co., 41 Fla. 471, 26 So. 1012 (1899); Ritter v. Miami Marine Agency, Inc., 133 So. 2d 107 (3d D.C.A. Fla. 1961) (third-party claimant's attorney's fees for dissolution); Norman Babel Mortgage Co. v. Golden Heights Land Co., 117 So. 2d 205 (3d D.C.A. Fla. 1960).

72. Florida Transp. Co. v. Dixie Sightseeing Tours, Inc., 139 So. 2d 175 (3d D.C.A. Fla. 1962).

73. Iowa Mut. Ins. Co. v. Gulf Heating & Refrigeration Co., 184 So. 2d 705 (2d D.C.A. Fla. 1966); Strickland v. Commercial Loan, 158 So. 2d 814 (1st D.C.A. Fla. 1963).

74. FLA. STAT. §222.11 (1971). The exemption is extinguished, however, so that garnishment will lie "to enforce the orders of the court of this state for alimony, suit money, or child support, or other orders in proceedings for dissolution, alimony, or child support. FLA. STAT. §61.12 (1971); *e.g.*, Reynolds v. Reynolds, 113 Fla. 361, 152 So. 200 (1934). Recent cases, however, seem to interpret the exemption from the exemption narrowly. *See* Healey v. Toolan, 227 So. 2d 55 (4th D.C.A. Fla. 1969) (contractual obligation to pay child support not incorporated in foreign decree of divorce); Noyes v. Cooper, 216 So. 2d 799 (3d D.C.A. Fla. 1968) (past due sums first reduced to judgment).

75. 137 Fla. 313, 188 So. 83 (1939).

76. *Id.* at 316, 188 So. at 84.

77. White v. Johnson, 59 So. 2d 532 (Fla. 1952).

78. *See id.* at 533.

of his creditors,[79] and the supreme court of this state has opined that the argument made against the statute in judicial proceedings might be well made "to the legislature for we are not prepared to say that it is wholly devoid of merit."[80] Indeed, it is reprehensible for a judgment debtor's annual salary of 67,000 dollars to be wholly exempt from garnishment, especially when he lives with his wife in a home worth 200,000 dollars; owns with his wife a one-half interest in a $3.5 million motel; and, as a final embellishment drives a Cadillac automobile, all in terms of 1964 dollars and, we may assume, current model Cadillacs, but such is the law of Florida.[81] The court is correct in failing to distinguish between wages for manual labor and salary or other compensation for personal services for such a posture "would result in inequality as between citizens in the same income bracket."[82] Nevertheless, such wholesale largess of justifiable creditor interests should be reexamined by the appropriate branch of government, since the underlying purpose of the exemption statute—to ameliorate the debtor's position by preserving to him and his family a means of subsistence and economic viability[83]—can be accomplished by more circumspect action devoid of the inequities of the present exemption law. No statute should sanction debtors' riches beyond the dreams of avarice at the expense of and removed from the just claims of their creditors.

The position taken by Congress is illustrative of a finer balancing of the respective rights of debtor, creditor, and society in its grant of a limited exemption tied to a percentage of the debtor's wages delimited by the imposition of an additional and controlling standard affixed to the federal minimum wage for the low-income wage earner.[84] Of course, the partial federal exemption need only be invoked by the debtor when state exemption law fails to provide greater protection, but that position is reached in a Florida proceeding when the debtor fails to meet the dual qualification of residency and head of family.[85] Thus, federal law now fills a void in the ambit of protection afforded debtors by the state and the ordinary creditor is in any event limited to "25 per centum" of his debtor's "disposable earnings . . . or . . . the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage . . . in effect at the time the earnings are payable, whichever is less."[86]

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79. *See* B. CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION 338-41 (1965).

80. White v. Johnson, 59 So. 2d 532, 534 (Fla. 1952).

81. *See* France v. Hart, 170 So. 2d 52 (3d D.C.A. Fla. 1964). All of the enumerated property was held by the judgment debtor as an estate by the entirety and was also not available to answer for the judgment debts of one of the tenants individually. *Id.* at 53.

82. White v. Johnson, 59 So. 2d 532, 533 (Fla. 1952).

83. *See, e.g.*, Patten Package Co. v. Houser, 102 Fla. 603, 136 So. 353 (1931). Of course, society and the state also benefit as the debtor and his family do not become public charges.

84. Consumer Credit Protection Act §§301-07, 15 U.S.C. §§1671-77 (Supp. V, 1970).

85. FLA. STAT. §222.11 (1971).

86. 15 U.S.C. §1673 (Supp. V, 1970). The statute removes from its restrictions on maximum allowable garnishment " (1) any order of any court for the support of any person. (2) Any order of any court of bankruptcy under Chapter XIII of the Bankruptcy Act. (3) Any debt due for any state or Federal tax." *Id.*

The proposed, and in a few states enacted, Uniform Consumer Credit Code adopts the same formula for limiting garnishment of earnings "to enforce payment of a judgment arising from a consumer credit sale, consumer lease, or consumer loan," but increases the exemption from thirty times the minimum hourly wage to forty.[87] Another proposed comprehensive piece of consumer legislation, the National Consumer Act, completely exempts "unpaid earnings" from "levy, execution, sale and other similar process in satisfaction of a judgment for an obligation arising from a consumer credit transaction."[88] It should be noted, however, that the exempt status accorded by the proposed act has no application to the obligations of a business debtor, whereas present Florida exemption legislation is not so limited.[89] The fault with the Florida statute is not that it totally exempts income from personal labor or services for debtors of moderate or lesser income, but that it also provides a haven of total protection for those who could well afford and should be required to pay their debts off the top of remuneration well in excess of that required to sustain a current adequate standard of living. It should not be a formidable task to draft a statute that would remove an adequate portion of the debtor's wages from the reach of creditors taking into account in even generous measure the cost of living of the debtor and his dependents, but making any excess available for the payment of creditors.

Of course, Florida has other general exemptions delimiting the use of attachment and garnishment. Constitutional status is accorded the exemption for the homestead with no limitations as to monetary value and personal property to the value of 1,000 dollars.[90] The language of the provision only exempts the property "from forced sale under process of any court,"[91] but it has been construed to exempt funds due from a property insurer to an insured that were the subject of a garnishment action even though the plaintiff, if successful in the action, could have applied the funds to his judgment without the necessity of a "forced sale."[92] The court recognized an overriding "beneficient purpose of the Constitution" requiring that construction.[93] Once again, the failure to place any monetary limitation on the value of the homestead on occasion may result, as does the open-ended exemption for payment for personal labor or services, in misplaced solicitude for the anything but impecunious debtor.

Furthermore, Florida statutes exempt certain life insurance proceeds,[94] the

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87. UNIFORM CONSUMER CREDIT CODE §5.105 (1970).

88. NATIONAL CONSUMER LAW CENTER, NATIONAL CONSUMER ACT §5.106 (First Final Draft 1970).

89. For the definition of "consumer credit transaction" *see id.* §1.301 (10).

90. FLA. CONST. art. X, §4.

91. *Id.* §4 (a).

92. West Fla. Grocery Co. v. Teutonia Fire Ins. Co., 74 Fla. 220, 77 So. 209 (1918).

93. *Id.* at 229, 77 So. at 212. The Florida statute implementing the constitutional provision by setting forth the method for exempting personal property speaks, *inter alia*, to protection from "a writ of garnishment upon any . . . money or choses in action." FLA. STAT. §222.06 (1971).

94. FLA. STAT. §222.13 (1971).

cash surrender value of certain life insurance policies,[95] wages due to a deceased employee,[96] and disability income benefits under certain policies or contracts of insurance.[97] In addition to the general provisions, however, special state statutory exemptions exist such as that applicable to workmen's compensation benefits,[98] and Congress has seen fit to remove from the reach of creditors certain pension and retirement benefit funds.[99] Exemptions of both state and federal law, general and special, contribute significantly then to the multicircumscribed status of prejudgment garnishment and attachment.

A review of the mechanics of attachment and garnishment proceedings once they are found to lie is beyond the scope of this study. However, there is one rule of application that should be examined, as it diminishes the effectiveness of the garnishment writ when it is directed against the employer or any other continuous debtor of the defendant as garnishee. It has been previously noted that in Florida the indebtedness due the defendant by the garnishee must be other than contingent before it may be made the subject of garnishment.[100] In this state the garnishee's liability on any one writ is limited to his indebtedness due the defendant at the time of the service of the writ or accruing between the date of that service and the time of his answer, which must be served on the plaintiff within twenty days.[101] This rule then does not subject earnings made subsequent to the filing of the answer to the garnishment process unless an additional writ is filed before those wages are paid the employee.[102] The impediment thus placed on the garnishment procedure is that successive writs will be required if the collection process is to continue in those numerous cases where the amount accruing to the plaintiff's benefit under the first writ is insufficient to satisfy his claim. This procedure may impose unnecessary hardship and expense on all parties to the action, and if adequate safeguards to the undesirable use of the garnishment writ are otherwise provided, there seems to be no good reason why the writ should not be continuously binding on the defendant's wages until such time as a sufficient amount is accrued to satisfy plaintiff's claim.

One other commonly contained provision in proceedings under the writs of attachment and garnishment is the right of the defendant to obtain by the giving of bond the return of the property in attachment cases[103] and the dis-

95. FLA. STAT. §222.14 (1971).
96. FLA. STAT. §§222.15-.16 (1971).
97. FLA. STAT. §222.18 (1971).
98. FLA. STAT. §440.22 (1971). Others cited by one commentator include "fraternal benefit society payments, teacher retirement benefits [and] recoveries by persons injured that come within the purview of the hazardous occupations act." LaGrone, *Recovery of a Florida Judgment by Garnishing Wages of the Head of a Family*, 17 U. FLA. L. REV. 196, 197 (1964) (footnotes omitted).
99. 5 U.S.C. §8346 (civil service retirement benefits); 38 U.S.C. §3101 (1970) (Veterans' Administration benefits); 42 U.S.C. §407 (1970) (Social Security benefits); 45 U.S.C. §228*l* (1970) (railroad pensions).
100. *See* text accompanying note 27 *supra*.
101. FLA. STAT. §§77.04, .06 (1971).
102. Chaachou v. Kulhanjian, 104 So. 2d 23 (Fla. 1958).
103. FLA. STAT. §§76.18, .19, .32(5) (1971). Professor Countryman observes two different

charge of the writ and release of the property in garnishment cases.[104] This right of the defendant has no appreciable effect on the advantages obtained by a garnishing or attaching creditor, since a bond meeting the statutory standards will generally provide a better and more convenient source of collection to the creditor than the property originally subjected to the writ. Conversely, by release of his property the defendant may obtain such benefits as immediate freedom of enjoyment and possession and a restoration, at least in some cases, of the power to alienate free of the encumbrance of the judicial lien.[105]

Further containment of the garnishment process is encountered in the general immunity accorded the state government except when the writ is to enforce court orders for alimony, suit money, support, or other orders in actions for divorce or alimony.[106] Finally, all creditors must recognize the indeterminancy of the scope of the writs that results from the ever continuing process of interpretation of existing statutes. An intermediate Florida appellate court has recently held that the Juvenile and Domestic Relations Court of Dade County did not have jurisdiction to issue writs of garnishment.[107] While an exhaustive listing of the limitations of provisional attach-

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types of bonds, one of which is conditioned on defendant's payment of a judgment recovered against him while the other is conditioned only on the availability of the attached property to the plaintiff should he recover judgment. The former releases the lien on the property while the latter does not. *See* V. COUNTRYMAN, CASES AND MATERIALS ON DEBTOR AND CREDITOR 13 (1964). Florida opts for a debtor's choice offering both types of bonds in the provisions made for defendant's bond in attachment generally. FLA. STAT. §§76.18-.19 (1971). The reason for the option may well be the desire to give the defendant an immediate means of discharging the property from the lien even though this may require a bond conditioned upon a greater obligation upon default of condition as would be the case where the property attached is worth less than the claim, but plaintiff posts bond conditioned on payment of the debt and costs in lieu of the forthcoming of the property to abide the final order of the court. When the defendant posts bond to obtain restoration of a vessel attached under the special provisions provided in the case of the negligent operation thereof, the bond must be conditioned for the forthcoming of the property to abide the judgment. FLA. STAT. §76.32(5) (1971).

104. FLA. STAT. §77.24 (1971). Here, the defendant's bond is "conditioned to pay any judgment recovered against him in the action with interest and costs, or so much thereof as shall equal the value [of the property subjected to garnishment]." *Id.* Nevertheless, the bond is sufficient to release the property from a lien if one exists. "On the approval of the bond the court shall discharge the garnishment and release the property." *Id.*

105. *See* notes 103, 104 *supra.*

106. FLA. STAT. §61.12 (1971); OPS. ATT'Y GEN. FLA. 069-12 (1969).

107. State *ex rel.* Cosgrove v. Juvenile & Domestic Relations Court, 252 So. 2d 597 (3d D.C.A. Fla. 1971). The Third District found that process issued on "judgments" of the Domestic Relations Court of Dade County arising out of the petitioner's duty toward some member of his family failed to comply with statutory requirements for the post or prejudgment writ contained in Florida Statutes, §77.01. "It cannot, in our opinion, be said that Vivian Duncan, as custodian of John, Sandra L. and Frank F. Cosgrove, Jr. sued to recover a debt or recovered a judgment." *Id.* at 599. Furthermore, the appellate court refused to find that the power to issue writs of garnishment was implicit in the act creating the court of limited jurisdiction, such implication being negated by specific grants of power to issue garnishment writs given by the legislature in the case of certain other enumerated courts of limited jurisdiction. No express provision for a jury in the Domestic

ment and garnishment may be indeed a quixotic quest, this writer takes solace in the hope that this work does raise and examine to some extent the principal ones apposite to Florida practice.

The reader who has endured this necessarily technical analysis of the confines of the attachment and garnishment writs will have noted that at this point in the discussion those limitations are the result almost entirely of state action. The work of Congress in providing exemptions has been the sole direct exception to the picture of unfettered state regulation thus far presented.

Florida has been prolific in modifying what initially appears to be a broad grant of power to creditors. The legislation in its entirety, and especially when coupled with judicial interpretation thereof, has not produced a panacea for the ills of creditors in the form of before-judgment garnishment and attachment. This is not to say, however, that the Florida judicial and legislative experience with the writs is aberrant. The unusual powers enjoyed by a creditor in the exercise of these provisional remedies have historically been a source of no small concern to courts, which no doubt has taken form in the oft-stated maxim: "[A]ttachment, being in derogation of the common law, courts are not inclined to extend its provisions beyond the requirements of the statute authorizing it."[108] Nor are the Florida statutes, with the exception of the unlimited exemption provisions previously noted, an uncommon approach to the subject.

Although the regulation of the use of the writs had historically been a function of the several states, the very caution of judges in policing their use by strict constructions might well have forewarned, especially in recent years, of the difficult testing against expanding constitutional standards that lay ahead. Perhaps creditors took solace in the case of *Ownbey v. Morgan*[109] where the Supreme Court upheld a Delaware statute that not only preconditioned prejudgment release of property to the debtor upon posting of surety bond but also harshly required a nonresident individual to enter the same security as a condition to making appearance and defending the action. The proceeding was held not violative of due process although the Court noted that the hardship occasioned by the facts of the case – the defendant had been unable to raise bond with the attached stock as collateral because the corporation was in receivership – had resulted in the Delaware Legislature amending the attachment statute.[110] This seeming immunity from constitutional incursions

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Relations Court of Dade County vis-a-vis the provision for jury trial of issues contained in the garnishment statutes also influenced the court. *Id.* The opinion while technically sound is an example of judicial inclination to strict interpretation of garnishment statutes. Here the result seems to work at cross-purposes to that policy favoring the collection of alimony and support money exemplified by the previously noted removal of the debtor's exemption for remuneration for personal labor or services and the removal of the immunity of public bodies from garnishment proceedings in such cases. FLA. STAT. §61.12 (1971). In accord with the decision is Awbrey v. Nevell, 260 So. 2d 281 (4th D.C.A. Fla. 1972).

108. Mitchell v. St. Maxent's Lessee, 71 U.S. 237, 243 (1866).

109. 256 U.S. 94 (1921).

110. *Id.* at 107.

was not to continue, however, and when a Wisconsin debtor decided to contest the validity of a state statute allowing prejudgment garnishment of a resident's wages, the stage was set for a new era in balancing the rights of debtor and creditor in provisional remedies. The case has become a *cause celebre, Sniadach v. Family Finance Corp.*[111]

THE RAMIFICATIONS OF *Sniadach* AND ITS PROGENY

In *Sniadach* the Wisconsin supreme court upheld the validity of the state's provisional garnishment procedure against a number of constitutional attacks.[112] State statutes afforded the defendant no right to an immediate hearing to challenge the validity of the garnishment as opposed to the merits of the underlying claim but as Wisconsin case law established a right to such judicial review, no denial of due process was found to result.[113] A more comprehensive due process argument was found in defendant's contention that deprivation of property without due process resulted from the immediate *loss of use of her wages* stemming from the service of the summons on the garnishee, a summary process that afforded the defendant no notice nor opportunity to be heard. This factor is, of course, basic to all provisional writs and is indeed what distinguishes prejudgment garnishment and attachment from garnishment in aid of execution and execution itself once a judgment is obtained. The Wisconsin court was not without precedent for invalidating this incursion into the realm of the prejudgment writs, however, and found no reason for distinguishing the case from the rule in *Ownbey.*[114]

> The garnishment before judgment proceedings do not involve any *final* determination of the title to a defendant's property, but merely preserve the status quo thereof pending determination of the principal action. The defendant receives notice and a hearing before being permanently deprived of his or her property.[115]

Although all the Supreme Court precedent relied on by the Wisconsin court: the foreign attachment of corporate stock in *Ownbey,*[116] the attachment of real estate and share interest in a corporation of a defendant who appeared specially to object to the jurisdiction of the court in *McKay v. McInnes,*[117] and a Georgia proceeding that authorized the superintendent of banks to issue an execution against the property of a stockholder of an insolvent bank upon whom a stock assessment had been levied in *Coffin*

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111. 395 U.S. 337 (1969).

112. Family Fin. Corp. v. Sniadach, 37 Wis. 2d 163, 154 N.W.2d 259 (1967).

113. *Id.* at 174, 154 N.W.2d at 265. The Florida statute specifically provides: "The Court to which garnishment is returnable shall always be open for hearing motions to dissolve the garnishment." FLA. STAT. §77.07(1) (1971). A similar provision is made for attachment. FLA. STAT. §76.24(1) (1971).

114. Ownbey v. Morgan, 256 U.S. 94 (1921).

115. 37 Wis. 2d at 169, 154 N.W.2d at 262 (emphasis added).

116. Ownbey v. Morgan, 256 U.S. 94 (1921).

117. 279 U.S. 820 (1929), *aff'd per curiam,* 127 Me. 110, 141 A. 699 (1928).

Brothers & Co. v. Bennett[118] were not cases on all fours with the garnishment of wages of a resident defendant in *Sniadach*, the Wisconsin court applied the rule of these cases, validating prejudgment deprivation against contentions of unconstitutionality *generally* to provisional writs and thus to the facts of the case at bar.[119]

It is noteworthy that the decision of the Wisconsin court in *Sniadach* and the precedent upon which it is based rest on the rationale that there is no due process deprivation because the property subjected to the provisional writs is in *custodia legis* or is, in no event, given over to the plaintiff in the form of proceeds from execution sale until after a judicial determination of the merits of the plaintiff's case has been made. In a strong dissent to the Wisconsin court's disposition of *Sniadach*, Judge Hefferman attacked this reasoning: "The constitutional question is not whether defendant has lost his title to the property nor whether another has gained its beneficial use. The test is whether he was deprived of his property."[120] In upholding prejudgment attachment the Maine court, in its decision in *McKay*, recognized that deprivation "takes place when the free use and enjoyment of the thing or the power to dispose of it at will is affected," but did not think that was "the deprivation of property contemplated by the Constitution."[121] But does subsequent notice and a hearing prior to any permanent deprivation that might result validate the temporary taking inherent in provisional attachment and garnishment procedure in all the instances in which the laws of the various states make these writs available? In the balancing of debtor and creditor rights, are the interests of the latter as promulgated by the attachment and garnishment laws of the various jurisdictions, necessarily preponderant in all cases when subjected to the constitutional test of due process? The Supreme Court in *Sniadach* categorically answered these questions in the negative.

Justice Douglas, speaking for the majority in *Sniadach*, first observed the hiatus in the right to present enjoyment of wages caused by state action prior to a hearing engendered by the judicial process embodied in the statutory proceeding. His initial inroad on the constitutional scantity of the procedure is couched, however, in terms of its invulnerability in certain cases. The statement is nonetheless a very real encroachment on the traditional prejudgment process. "Such summary procedure may well meet the requirements of due process in *extraordinary situations*."[122]

The statement is followed by a citation to cases lending analogous support.

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118. 277 U.S. 29 (1928).

119. The Supreme Court of Wisconsin further cited a West Virginia decision, Byrd v. Rector, 112 W. Va. 192, 163 S.E. 845 (1932), in support of its holding of no denial of due process. In *Byrd* the court held there was no denial of due process in a prejudgment garnishment of a non-resident defendant.

120. 37 Wis. 2d at 178-79, 154 N.W.2d at 267 (dissenting opinion).

121. 127 Me. at 116, 141 A. at 702. "And if it be, it is not a deprivation without 'due process of law' for it is a part of a process, which during its proceeding gives notice and opportunity for hearing and judgment of some judicial or other authorized tribunal." *Id.*

122. 395 U.S. at 339 (emphasis added).

In addition to the cases of *Ownbey v. Morgan*[123] and *Coffin Brothers & Co. v. Bennett*,[124] considered by the Wisconsin court, two further opinions are cited. In *Fahey v. Mallonee*[125] the Court upheld a statute authorizing a taking of possession of the assets of a building and loan association prior to notice or hearing by a Federal Home Loan Administration conservator due to the delicate nature of the institution and the impossibility of preserving credit during an investigation. *Ewing v. Mytinger & Casselberry, Inc.*[126] upheld a provision of the Federal Food, Drug and Cosmetic Act permitting multiple seizures of misbranded articles prior to a hearing where the Administrator had probable cause to believe that the misbranded article would be materially misleading to the injury or damage of a purchaser. Having established a basis – extraordinary situations – for the omission of prior notice and hearing requirements and given illustrations thereof, the Court then distinguished the instant case, removing it from the sanctioned perimeter.[127]

> But in the present case, no situation requiring special protection to a state or creditor interest is presented by the facts; nor is the Wisconsin statute narrowly drawn to meet any such unusual condition. Petitioner was a resident of this Wisconsin community and *in personam* jurisdiction was readily obtainable.

The court attempts no compendium of causes that would require special protection to a state or creditor interest other than the cases cited presumably as illustrative,[128] but the opinion does bespeak two grounds for distinguishing the garnishment in *Sniadach* from the area where extraordinary situations are present. The first is the availability of in personam jurisdiction or, more generally stated, the absence of a "situation requiring special protection to a state or creditor interest." The other factor is the type of property subjected to the writ, and this element is the subject of a great deal of examination in *Sniadach*. "We deal here with wages – a specialized type of property presenting distinct problems in our economic system."[129]

A freezing of wages, when the process is combined with inadequate wage exemptions not only deprives many wage earners of a primary or sole means of support but, concomitantly, the creditor is able to exert undue leverage on the debtor, who is all too often forced to take the most expedient means available of releasing his wages from the writ even though the payment or

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123. 256 U.S. 94 (1921).
124. 277 U.S. 29 (1928).
125. 322 U.S. 245 (1947).
126. 339 U.S. 594 (1950).
127. 395 U.S. at 339.
128. The Court specifically disposes of one other precedent relied upon by the Wisconsin court in the following language: "A procedural rule that may satisfy due process for attachments in general, see McKay v. McInnes, 279 U.S. 820, does not necssarily satisfy procedural due process in every case." 395 U.S. at 340.
129. 395 U.S. at 340.

other form of settlement may be one of a justly disputed or even fraudulent claim.[130]

Another attendant evil of wage garnishment recognized by the Court[131] is the possibility of discharge from employment by employers who with some just cause view the process as a source of annoyance and expense, if not also casting doubt on the reliability of the employee. Congress has deemed this practice of sufficient concern to legislate some protection in the area, and now the employee is sheltered to the extent of garnishment for one indebtedness.[132] The National Conference of Commissioners on Uniform State Laws would not limit the prohibition against discharge to any one or more garnishments, but the protection is limited to garnishment on *judgments* arising from covered consumer transactions[133] for the Act proposed by that body abolishes *prejudgment* garnishment of unpaid earnings arising from a covered consumer debt.[134] The Act promulgated by the National Consumer Law Center likewise prohibits prejudgment attachment of unpaid earnings arising from a consumer credit transaction but furthers the proscription to cover any property of the consumer.[135] As previously noted, however, the latter statute totally exempts unpaid earnings as well as certain other categories of the debtor's property from process in satisfaction of a judgment for an obligation arising from a consumer credit transaction,[136] thus obviating any need for a prohibition against discharge from employment precipitated by garnishment of wages.

An additional case against wage garnishment is contained in the rapid growth of consumer bankruptcies. Threat to job security or direct loss of income necessary for support resulting from garnishment of wages has doubtlessly driven many consumers into bankruptcy when other viable alternatives would otherwise have been present. One commentator has well documented this argument by drawing upon available data to show a positive correlation between the portion of a debtor's wages subjected to garnishment in the various jurisdictions and the frequency of filings for bankruptcy.[137] Of course, as is pointed out in that study, cause and effect relationship does not necessarily stem from correlation,[138] and as the ill may be remedied by provision for adequate exemption and prohibition against discharge, it would appear that a remedy embodying the absolute prohibition of wage garnishment would not be dictated in this instance.

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130. See the authorities presented by the Court. *Id.* at 340-42.

131. *Id.* at 340.

132. "No employer may discharge any employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness." CONSUMER CREDIT PROTECTION ACT §304(a), 15 U.S.C. §1674(a) (Supp. V, 1970).

133. UNIFORM CONSUMER CREDIT CODE §5.106 (1970).

134. UNIFORM CONSUMER CREDIT CODE §5.104 (1970).

135. NATIONAL CONSUMER LAW CENTER, NATIONAL CONSUMER ACT §5.105 (First Final Draft 1970).

136. *Id.* §5.106. *See* text accompanying note 88 *supra.*

137. Brunn, *Wage Garnishment in California: A Study and Recommendations,* 53 CALIF. L. REV. 1214, 1234-38 (1965).

138. *Id.* at 1235-36.

It is apparent from the foregoing discussion, however, that in its application of the constitutional stricture to garnishment of *wages*, the *Sniadach* Court selected an area where the process is all too often replete with adverse social aspects. The according of stricter notice and hearing requirements when the deprivation involves property essential to subsistence has found favor in another recent opinion of the Supreme Court, *Goldberg v. Kelly*.[139] In that case the Court held that a welfare recipient's benefits could not be terminated without a prior evidentiary hearing. Gaining analogous support from *Sniadach*, the Court justified the dichotomy sometimes present in notice and hearing standards thusly:[140]

> Thus the crucial factor in this context – a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended – is that termination of aid pending resolution of controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.

Supreme Court recognition of the unique function of certain property is further evidenced by *Lines v. Frederick*[141] where the property essential to subsistence was once again wages, but a particular variety thereof, vacation pay. The question was whether the employee's trustee in bankruptcy succeeded to the bankrupt's accrued but unpaid vacation pay as of the date of bankruptcy, the trustee claiming the vacation pay under the comprehensive grant given him as successor to the debtor's interests in clause 5 of section 70a of the Bankruptcy Act.[142] Holding that vacation pay was not property the title to which vested in the trustee, the *Lines* Court distinguished *Segal v. Rochelle*[143] in which loss-carryback tax refunds resulting from pre-bankruptcy business losses not collected until the end of the calendar year in which bankruptcy occurred were found to be property passing to the trustee. The distinction is attributable solely to the "specialized type of property" in litigation in *Lines*, property that supports "the basic requirements of life" for wage earners and their families "during brief vacation periods or in the event of layoff."[144] Considering the breadth of coverage of section 70a (5) of the Bankruptcy Act,[145] the decision is indeed significant in illustrating the Court's increased concern for maintaining mimimal standards for the debtor and his family.

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139. 397 U.S. 254 (1970).
140. *Id.* at 264 (footnotes omitted).
141. 400 U.S. 18 (1970).
142. 11 U.S.C. §110 (a) (5) (1970).
143. 382 U.S. 375 (1966).
144. 400 U.S. at 20.
145. 11 U.S.C. §110 (a) (5) (1970); *see* 4A W. COLLIER, BANKRUPTCY §70.15 (1) (14th ed. 1969).

While the Court ruled unconstitutional as violative of due process the prejudgment garnishment of wages of a resident defendant in the context of *Sniadach*, it certainly does not follow that the Court foreclosed all further use of prejudgment attachment and garnishment. The "extraordinary situations" test set forth as excusing prior notice and hearing would seem to be a product of two factors — the immediate dependency of the debtor on the uninterrupted use of the particular property and the countervailing interest embodied in the necessity of the use of the provisional process to affect legitimate public or creditor interests. In *Sniadach*, as there was no particular impediment to the plaintiff's collection of an indebtedness of the resident defendant by ordinary judicial process not embodying the use of the provisional writs in contradistinction to the case of a defendant not amenable to personal service of process or the presence of other exigent circumstances and, as the Court recognized that debtors are generally inordinately dependent upon the use of the property garnished, the case provided a vehicle for a facile application of the test. Conversely, the greater dependency of the creditor on prejudgment process and the less the dependency of the debtor on the property subjected, the greater the possibility that the Court will excuse notice and hearing prior to a temporary deprivation of the debtor's property.

Examination of subsequent cases will establish that this rule is too narrow a reading of *Sniadach* for some courts and too broad for others. As a balancing rule it is also most difficult to apply to the myriad of cases that may arise and, in the absence of more positive guidelines, lower courts have not reached uniform results in the prejudgment garnishment and attachment cases that have followed in the wake of *Sniadach*. An analysis of the extent of the restrictions placed by the Supreme Court on the prejudgment remedies by an examination of the following lower court cases must necessarily proceed on the basis of the then existing Supreme Court pronouncements. Only after these necessary steps in the evolution of the doctrine will it be meaningful to consider the amplifications and modifications stemming from the Supreme Court's second and latest direct holding in the realm of constitutional strictures on prejudgment remedies, *Fuentes v. Shevin*.[146]

Causing the least difficulty but offering the least amplification of the Supreme Court's initial restraint are those cases that parallel in both important aspects the narrow rule in *Sniadach*. When the property garnished was wages and in personam jurisdiction of the defendant was apparently obtainable in a context in which no other special creditor or state interest was present, the absence of extraordinary situations uniformly has been found.[147] So long as the freezing of wages occurred prior to hearing, attempts to distinguish these cases from *Sniadach* on the grounds that the statutory

146. 407 U.S. 67 (1972).

147. McMeans v. Schwartz, 330 F. Supp. 1397 (S.D. Ala. 1971); Reeves v. Motor Contract Co., 324 F. Supp. 1011 (N.D. Ga. 1971); Termplan, Inc. v. Superior Court, 105 Ariz. 270, 463 P.2d 68 (1969); McCallop v. Carberry, 1 Cal. 3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970); Cline v. Credit Bureau, 1 Cal. 3d 908, 464 P.2d 125, 83 Cal. Rptr. 669 (1970).

procedure was less harsh to the debtor in certain particulars than the Wisconsin process have been unsuccessful.[148]

When the property garnished is wages but the debtor is a nonresident and apparently not amenable to personal service of process within the jurisdiction, should the debtor's reliance on the property or the creditor's special need for the process prevail? There is authority for the proposition that the debtor's interest is paramount in the holding of an intermediate Delaware appellate court.[149] The court disposed of any difference between foreign and domestic garnishment by declaring it to be "irrelevant and immaterial" in a case in which defendant's wages were frozen.[150] As the debtor will often be amenable to in personam jurisdiction even if a nonresident of the forum state, due to his presence at the garnishee's place of business within that state during working hours, the *necessity* of quasi in rem jurisdiction may not be present in a large number of cases. However, in the Delaware case it does not appear that the defendant, a resident of Massachusetts, was brought within the state of Delaware by his employment or otherwise and, in any event, the court gave no consideration to the importance of the garnishment process as a means by which a resident of Delaware may proceed against a nonresident defendant. When quasi in rem jurisdiction provides the only means upon which a state can afford its citizens redress against damages caused by nonresidents, it would seem that the special creditor and state interest should not be lightly dismissed.[151] One federal court has concluded that the nonresidency of the debtor is such an "unusual condition" as to excuse prior notice and hearing even in the context of wage garnishment.[152]

Must the special creditor interest that may arguably justify prejudgment garnishment of even wages be limited to nonresidency? In *Reeves v. Motor Contract Co.*[153] it was advanced that as plaintiff's ground for the writ was that the defendant was "concealing himself," the situation contemplated by the Georgia statute negated "the feasibility of having a prior hearing on the merits."[154] The Court did not find that the argument pushed the boundaries of "extraordinary situations" beyond the nonresidency of the defendant,

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148. McMeans v. Schwartz, 300 F. Supp. 1397, 1400 (S.D. Ala. 1971) (requirement of an affidavit and the necessity of the bond); Termplan, Inc. v. Superior Court, 105 Ariz. 270, 272, 463 P.2d 68, 70 (1969) (not necessary to embark on a detailed comparison of the two garnishment procedures); McCallop v. Carberry, 1 Cal. 3d 903, 907, 464 P.2d 122, 124-25, 83 Cal. Rptr. 666, (1970) (requirements that plaintiff file affidavit, that defendant receive notice prior to issuance of writ, that plaintiff file an undertaking with sufficient sureties and provision for automatic exemption in certain cases).

149. Mills v. Bartlett, 265 A.2d 39 (Del. Super. 1970).

150. *Id.* at 41. The court further noted that as Delaware's foreign attachment procedure failed to exempt any portion of the defendant's salary, the case was more offensive than *Sniadach*. *Id.* State exemption laws are frequently limited to residents of the jurisdiction. V. COUNTRYMAN, CASES AND MATERIALS ON DEBTOR AND CREDITOR 21 (1964).

151. *But see* Randone v. Appellate Dep't of Super. Court, 5 Cal. 3d 536, 558, 488 P.2d 13, 28, 96 Cal. Rptr. 709, 723 (1971).

152. Tucker v. Burton, 319 F. Supp. 567 (D.D.C. 1970) (three-judge court).

153. 324 F. Supp. 1011 (N.D. Ga. 1971).

154. *Id.* at 1015.

however, for it held that the reasoning "further exemplifies the logical inconsistency inherent within the statutory allowance of garnishment of wages."[155] The Court concluded that, as under Georgia procedure, the creditor must know the debtor's place of employment, he could not "simultaneously aver that the debtor has 'concealed himself.'"[156] The reasoning does point up the lack of real extraordinary situations that may be present in many cases even in those jurisdictions that do limit garnishment of wages or other property to special grounds. The argument does, however, overlook the case where the debtor is not physically present at his employer's place of business within the jurisdiction — doubtlessly not an uncommon occurrence in this day of multi-state business enterprises.[157] Certainly, due to the paucity of cases upon which an authoritative rule may be formulated, the possibility of garnishment of wages against a nonresident justifying a prejudgment freezing of that asset should not be discounted. Similarly, the possibility of extraordinary situations embodying other than nonresidency, such as the debtor's commencement of the removal of his property from the jurisdiction to put it beyond the reach of his creditors, may raise the type of creditor interest deserving of protection and excusing prior hearing even in a garnishment of wages. The lower court cases do affirm the proposition, however, that when the property subjected to the prejudgment writs is wages, the debtor has a better foundation for erecting *Sniadachian*[158] defenses than in other cases.

When the property attached or garnished is other than wages, the debtor has not met with the same degree of success in his constitutional attack on the writs. Thus, foreign attachment of the defendant's checking account satisfied due process requirements,[159] and it has been held that the constitutional prohibition is not evoked when the checking account and payments due on completed contracts subjected to the writ were the property of defendants who were apparently residents of the jurisdiction.[160] Likewise, in an opinion that thoughtfully traces the history of attachment and garnishment in the

155. *Id.*

156. *Id.*

157. In a dissent in Tucker v. Burton, 319 F. Supp. 567 (D.D.C. 1970) (three-judge court), Wright, J., observed that "availability to personal service and not mere nonresidency is the touchstone in determining due process" in applying the rule of *Sniadach*. *Id.* at 580. In First Nat'l Bank & Trust Co. v. Pomona Mach. Co., 107 Ariz. 286, 486 P.2d 184 (1971), the court upheld the Arizona garnishment of the Arizona bank account of a California business enterprise by a California creditor. While admittedly the garnishment may have furnished the only basis for proceeding in Arizona, was Arizona chosen as the forum simply to obtain the benefits of summary deprivation in a context in which there were no special creditor interests deserving of protection?

158. The term is apparently coined by Judge Becker in a decision in Lebowitz v. Forbes Leasing & Fin. Corp., 326 F. Supp. 1335 (E.D. Pa. 1971).

159. Michael's Jewelers v. Handy, 6 Conn. Cir. 103, 266 A.2d 904 (1969).

160. American Olean Tile Co. v. Zimmerman, 317 F. Supp. 150 (D. Hawaii 1970). "[T]he Supreme Court did nothing more than carve out an exception for wage earners from what the Court deemed to be otherwise lawful prejudgment seizures, *i.e.*, that garnishment of wages was a limited exception to the general rule of legality of garnishment statutes." *Id.* at 152.

light of *Sniadach*, Judge Becker felt constrained, in view of the language of the Supreme Court opinion, "which at least recognizes the vitality of *Ownbey* and *McKay*," to uphold the Pennsylvania foreign attachment law in a case in which the bank account of the defendant foreign corporation had been attached.[161] It is noteworthy that the defendant in that case, although a non-registered foreign corporation, was amenable to personal service of process through the state's long arm statutes.[162] The Arizona court has found that impounding the reserve assets of a foreign business enterprise by garnishment of its bank account in that state does not create the constitutional vice.[163] Garnishment of defendants' obligors for other than wages and attachment of the defendants' real property and items of personal property consisting of an inventory of books, processing equipment, and office furnishings have successfully met the test of constitutional validity applied by a California intermediate appellate court.[164]

Other due process attacks on attachment of real property have met with no success. A federal district court has ruled that attachment of the defendant's home under Connecticut procedure may be distinguished from the wages garnished in *Sniadach* as "[t]he defendant is neither deprived of the use or enjoyment of the property pending a trial on the merits nor is his livelihood threatened by the deprivation of the right to freely transfer the realty."[165] Florida is in accord. In refusing the application of *Sniadach* to a case in which the non-resident defendant was not amenable to personal service of process and constructive service was predicated upon attachment of real property, an intermediate Florida appellate court held:[166]

> We do not conceive that the rationale of the *Sniadach* case is applicable to the attachment of property under the Florida statute here considered. The attachment amounts to little more than constructive notice that a suit for damages is pending against the owner and if judgment is rendered in favor of the claimant the attached property might be subjected to levy and sale to satisfy the judgment. Such proceeding does not create the evils nor result in the hardships which often follow the garnishment of wages owed to a worker. We therefore conclude that the *Sniadach* case is not authority for the proposition urged by appellants that the attachment statute involved herein is unconstitutional and void.

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161. Lebowitz v. Forbes Leasing & Fin. Corp., 326 F. Supp. 1335, 1353 (E.D. Pa. 1971). "The thrust of the analysis contained in this opinion is directed to the theory that were it to have *Ownbey* and *McKay* before it directly today, the United States Supreme Court might well decide them differently." *Id.*

162. *Id.* at 1348-49.

163. First Nat'l Bank & Trust Co. v. Pomona Mach. Co., 107 Ariz. 286, 486 P.2d 184 (1971).

164. Western Bd. of Adjusters, Inc. v. Covina Publishing, Inc., 9 Cal. App. 3d 659, 88 Cal. Rptr. 293 (2d Dist. Ct. App. 1970). *But cf.* Randone v. Appellate Dep't of Super. Court, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971). *See* text accompanying note 174 *infra.*

165. Black Watch Farms, Inc. v. Dick, 323 F. Supp. 100, 102 (D. Conn. 1971).

166. Robinson v. Loyola Foundation, Inc., 236 So. 2d 154, 159 (1st D.C.A. Fla. 1970).

Certainly when attachment of land does not dispossess the debtor[167] there is no interrupted use by the debtor and, therefore, no deprivation of property prior to hearing except in the limited sense of imposing possible restraints on freedom of alienation. Consequently, in the case of attachment of real property, any legitimate state or creditor interest would seem sufficient to tip the scales in favor of excusing prior notice and hearing requirements. The reader may well conclude at this point that if *Sniadach* is limited to wages — a position not unjustified by the authorities examined hitherto[168] — the doctrine is of little import in Florida, since the utility of wage garnishment is greatly diminished due to the exemption provisions of the state in effect long before the pronouncement in *Sniadach*. But the opinion of the Florida court, if controlling, does not command such a narrow reading of the Supreme Court's proscription and certainly no direct ruling was made as to the constitutionality of attachment or prejudgment garnishment of tangible or intangible personalty other than wages. More importantly, however, *Sniadach* is difficult to contain within the limited sector of contests to control rights to wages.

A leading case extending the restrictions on prejudgment garnishment to property other than wages is a subsequent holding of the same court that the Supreme Court reversed in *Sniadach*. In *Larson v. Fetherston*[169] the property subjected to prejudgment garnishment consisted of the bank accounts of the defendant corporation, a travel agency. While there is a difference in terms of immediate social ramifications in the prejudgment seizure of the assets of a commercial enterprise and the deprivation of a wage earner's means of subsistence, certainly there is also a very real parallel in terms of economic hardship to the debtors in the two cases. The loss of use of its most liquid asset can result in the same hardships and application of undue leverage to the business firm as the loss of use of wages produces in the case of the consumer defendant.[170] Additionally, there were apparently no creditor's interests other than the understandable but ubiquitous desire of all creditors to safeguard against financial loss by prompt assurance of a means of collection — presumably not an extraordinary situation envisaged by *Sniadach*. The Wisconsin opinion does not lend itself to such a narrow holding, however. The text of the opinion makes no direct reference to the absence of a special creditor interest deserving of protection, and special consideration of the type of property taken is indeed obviated:[171]

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167. Such is the case in Florida. Florida Ins. Exchange v. Adler, 174 So. 2d 75 (3d D.C.A. Fla. 1965); FLA. STAT. §76.14 (1971).

168. In addition to the cases cited refusing to extend prior notice and hearing requirements to attachment and garnishment of property other than wages, many of the authorities that have imposed the requirements on wage garnishment contain dicta limiting the rule to seizure of wages only. *See, e.g.*, Reeves v. Motor Contract Co., 324 F. Supp. 1011, 1016 (N.D. Ga. 1971).

169. 44 Wis. 2d 712, 172 N.W.2d 20 (1969).

170. If the debtor corporation were unable to meet its payroll as a result of the garnishment, the parallel would appear to be complete even from a humanitarian standpoint.

171. 44 Wis. 2d at 718, 172 N.W.2d at 23 (1969).

> Although the majority opinion in *Sniadach* makes considerable reference to the hardship of the unconsitutional procedure upon the wage earner, we think that no valid distinction can be made between garnishment of wages and that of other property. Clearly a due process violation should not depend upon the type of property being subjected to the procedure. Under the respondent's contention wages in the hands of the employer would be exempt from prejudgment garnishment, but wages deposited in a bank or other financial institution would be subject to prejudgment garnishment.

Due to the absence in *Larson* of an analysis of the effect of a situation requiring special protection to a state or creditor interest, one can only speculate as to the general availability of prejudgment garnishment and attachment in Wisconsin. Doubtlessly, *Larson* produces at least a reweighting of the scales more heavily in favor of the debtor's interest when the property attached is other than an individual defendant's means of subsistence. To this extent the Wisconsin court may well have practiced one-upmanship on the court that had previously reversed it.

In the Minnesota case of *Jones Press, Inc. v. Motor Travel Service, Inc.*[172] there is an explicit recognition of the similarity between the garnishment of the accounts receivable of a business firm and the wages of a worker, but the Court expresses doubt as to whether *Sniadach* can be so narrowly read as being restricted to only certain types of property.[173] Again, however, in the facts before the Minnesota court there appear to be no extraordinary circumstances existing in favor of the creditor.

Judicial interpretations of the type of property protected by *Sniadach* then have ranged from a limitation of the rule to one particular type of property, wages, to a failure to recognize any restriction arising from the property subjected to attachment or garnishment. As might well be expected, however, there is a middle ground and that doctrine has been articulated by the California court in *Randone v. Appellate Department of Superior Court of Sacramento County.*[174]

The analogy between "wages" and "necessities of life" is sharply drawn in *Randone,* the court observing: "extreme hardship arises not only from the attachment of liquid assets such as wages or bank account proceeds, but also from the summary seizure of such items of personal property as 'television sets, refrigerators, stoves and sewing machines, and furniture of all kinds,' items that might loosely be described as 'necessities' in our modern society."[175] Some further indication of the breadth of coverage intended by

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172. 286 Minn. 205, 176 N.W.2d 87 (1970).

173. "No rational distinction can be drawn between a livelihood dependent on wages and one derived from the sale of services and goods if the rationale of the *Sniadach* case is based on the policy of protecting a breadwinner from the harassment of creditors. If, as we have indicated, that decision is premised on the broader constitutional concept of notice and an opportunity to be heard, the rule should apply to the garnishment of all property." *Id* at 210, 176 N.W.2d at 90-91.

174. 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971).

175. *Id.* at 560, 488 P.2d at 29, 96 Cal. Rptr. at 725.

the term "necessities" is contained in the court's observation that their decision gives practical effect to the protection afforded necessities by the California exemption statutes — practical effect because apparently the California exemption statutes, as do those of other states, provide as to personal property only for post-attachment operation, thus placing the burden on the debtor to seek exemption and, in fact, in the interim incur some temporary deprivation.[176]

Doubtlessly to restrict *Sniadach* to wages alone is myopic in view of the equal or perhaps even greater degree of hardship thrust upon the debtor by the even temporary deprivation of various other property. The problem encountered is delimiting the type of property entitled to protection, if indeed any limitations seem desirable. If *Randone* is read as equating the type of property subject to special consideration under the rule of *Sniadach* to that same property exempted by the constitution or statutes of the jurisdiction, then some degree of certainty may be added to the law in this troubled area. The problem encountered here, however, is that personal property exemptions are not always stated in terms of specific property,[177] and even when so stated are often archaic statements of public policy.[178] It seems perhaps more desirable to recognize the California court's ruling as doing nothing more than reaffirming the statement of the extraordinary situations test previously made, a test balancing the public's or creditor's special need for summary procedure against the hardship of temporary deprivation to the debtor. The latter factor would most certainly take into account the type of the debtor's property seized and would recognize greater hardship from temporary deprivation of some property than from other but it would in no way limit the protection afforded debtors by *Sniadach* to wage garnishment alone. Support for this view, which requires a consideration of all elements in the balancing of the rights of debtor and creditor, is contained in the *Randone* court's characterization of *Sniadach* as "not a rivulet of wage garnishment but part of the mainstream of the past procedural due process decisions of the United States Supreme Court."[179]

If the *Sniadachian* "reevaluation of the potential and actual effect of prejudgment seizure upon debtors"[180] was but a part of traditional procedural due process analysis, the product of decades of litigation, then there is authority for reevaluating in the light of *Sniadach* not only the effect of summary seizure on property other than wages by attachment or garnishment, but also the seizure of property under any other remedy whereby the debtor is even temporarily summarily deprived. Some evaluation then of other provisional remedies that have been subjected to the scrutiny of *Sniadach* is necessary to assess the effect of that landmark decision on all facets of debtor-creditor law.

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176. *Id.* at 562-63, 488 P.2d at 31, 96 Cal. Rptr. at 727.

177. *E.g.*, FLA. CONST. art. X, §4(2).

178. *E.g.*, MISS. CODE ANN. §307 (1966).

179. 5 Cal. 3d at 550, 488 P.2d at 22, 96 Cal. Rptr. at 718; *accord*, Adams v. Egley, 338 F. Supp. 614, 618-19 (S.D. Cal. 1972).

180. 5 Cal. 3d at 551, 488 P.2d at 23, 96 Cal. Rptr. at 719.

THE EXTENSIONS OF *Sniadach* TO OTHER SUMMARY PROCEEDINGS

Statutory Lien Proceedings

Not all liens arising by operation of law are the result of judicial action. Arising quite separate and distinct from the custom of London, which evolved into the modern judicial writs of attachment and garnishment, were the rights at common law accorded the tradesman who furnished services on the personal property of the debtor in his possession.[181]

In any exchange when the performance of one party extends over a period of time but the performance of the other party may be performed instantly, one of the parties must necessarily give credit to the other. In the absence of express agreement by the parties, contract law has long recognized that the performance of the service by the tradesman was a constructive condition precedent to the customer's duty to pay.[182] The granting of a lien on the chattels of his debtor to the party performing the service then might well be justified on the basis of mitigating the rigors of a rule that did not imply even a right to periodic payments as performance progressed.

During the nineteenth century many of the service liens recognized at common law were reduced to statute but the legislatures of the various states did more than codify earlier case law and in many instances created liens protecting new classes of laborers and suppliers while providing more effective enforcement provisions for all service liens.[183] The mechanic's lien on real property, a charge unknown to the common law, was a legislative product of this period.[184] Today most states have various acts protecting those service industries that at some period of time were able to convince the legislature of their importance to the local economy and need for protection. Although there has been some conversion of the common law possessory lien into a nonpossessory one, often by resort to a filing system, most of the statutory service liens on personal property are dependent, as were their common law antecedents, on continuous possession by the lienor.[185]

A fair sample of the variety of service liens recognized by statute is contained in the legislation of Florida, which provides for a mechanic's lien on real property in favor of laborers and materialmen furnishing improvements;[186] for liens on personal property in such general instances as the performance of labor on and with machines, the performance of labor or services upon the personal property of another, for labor in raising crops, for manufacturing and repairing articles and for furnishing articles to be manu-

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181. *See* B. MONTAGUE, LIEN 28-29 (1824).

182. RESTATEMENT OF CONTRACTS §270 (1932).

183. 1 L. JONES, THE LAW OF LIENS 93 (3d ed. 1914).

184. L. BOISOT, MECHANICS' LIENS 3 (1897). The first such statute was enacted in Maryland in 1791 to encourage construction in the City of Washington. *Id.*

185. 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY §33.2 (1965). In Florida, possession is an important element not only in the continuation of the lien but also in contests with third parties. *See* FLA. STAT. §713.74 (1971).

186. FLA. STAT. §§713.01-.36 (1971).

factured; and for liens on personal property in such specific instances of economic intercourse as the services of stallions, jackasses, or bulls in areas of their common expertise and for board and lodging.[187] There is doubtlessly some redundancy in the statutory scheme and the above list is illustrative only, there being provision for many other groups in the legislative largess.[188]

Service liens, today commonly referred to as "statutory liens" in recognition of their legislative adoption if not natural parentage, are an important and unique device of creditors offering, if requisites are met, protection not only against the debtor's voluntary acts diminishing the value of the property but the competing claims of third parties as well.[189] Statutory liens are unique because unlike attachment and garnishment liens they are not dependent for their inception upon judicial action, and although they stem from a contractual relationship between the parties, they are not consensual liens as there is no requirement of the parties manifesting intent to create a lien.[190] They are the creatures of statute and although consensual and judicial liens are subject to and regulated by statute as well, both of the latter two are dependent on something not required of the statutory lien — intent of the parties to create a lien for the consensual lien and levy under a properly issued writ for the judicial lien.

The statutory liens have one striking similarity to the provisional judicial writs subjected to *Sniadach*, however, and that is that they provide for possession by the lienor, and thus deprivation of possession by the debtor, prior to notice and opportunity for hearing.[191] For this reason the statutory liens did not long escape reappraisal in the light of *Sniadach*.

In *Klim v. Jones*[192] California's Innkeeper Lien Law had sanctioned the extrajudicial padlocking of the non-paying boarder's room depriving him of all his scant personal belongings including property used in his livelihood, his painting tools. The hardships to the debtor and the lack of special circumstances requiring protection of a state or creditor interest dictated a finding that the California statute was unconstitutional.[193] Landlord's liens for rent

187. *See generally* FLA. STAT. §§713.50-.77 (1971).

188. *Id.*

189. FLA. STAT. §713.50 (1971) accords the statutory lien on personal property priority in dignity to all accruing thereafter, and by virtue of the provisions of FLA. STAT. §679.310 (1971), which is UNIFORM COMMERCIAL CODE §9-310 (1962 and 1971 versions), certain statutory liens will take priority over a perfected security interest in personal property.

190. FLA. STAT. §713.74 (1971) provides for acquisition of the statutory lien on personal property "by any person in privity with the owner by the performance of the labor or the furnishing of the materials."

191. FLA. STAT. §85.011 (1) (1971) provides for retention of possession by the lienor of both real and personal property for a period not exceeding three months.

192. 315 F. Supp. 109 (N.D. Cal. 1970).

193. The court finds the loss to the debtor transcends the loss of wages in *Sniadach* for several reasons, including the lack of any meaningful provision for exemptions to the statutory lien and the inclusion of a greater portion of the debtor's property in the taking. "[A]ll of the boarder's possessions may be denied him if such possessions are all kept in his lodgings." *Id.* at 123. The court was not persuaded that the use of the lien to

have likewise been found to be constitutionally infirm in Georgia,[194] Pennsylvania,[195] and Illinois.[196]

CONSENSUAL LIEN HOLDERS' PREJUDGMENT REMEDIES

The judicial expurgation of creditors' summary procedures on constitutional grounds has not been limited to traditional practices of lienholders whose interests arise by operation of law but has also encompassed prejudgment remedies utilized by the holders of liens expressly created by the agreements of debtors and creditors. The claim of the mortgagee of real property and the creditor having a security interest in some personal property of his debtor, the secured party, is afforded protection by their foresight in obtaining lien creditor status. When proper measures are taken to obtain protection against competing third parties, ordinarily notice filing in the case of personalty and recordation in the case of realty,[197] the holder of a consensual lien generally obtains priority over the subsequently attaching liens or other interests of third parties both in their individual capacities[198] and as representatives of creditors in collective actions.[199]

The secured party in personal property financing may, and most commonly does, leave possession of the collateral with the debtor.[200] Therefore, as there is no necessity for the secured party to deprive the debtor of possession of the collateral – at least not by state action – for his interest to attach and obtain perfected status,[201] prejudgment deprivation will not be a factor

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obtain jurisdiction over transients who frequent California hotels was a sufficient creditor interest to justify relaxation of strict procedural safeguards. *Id.* at 124.

194. Blocker v. Blackburn, 228 Ga. 285, 185 S.E.2d 56 (1971).

195. Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970).

196. Collins v. The Viceroy Hotel Corp., 338 F. Supp. 390 (N.D. Ill. 1972).

197. Exemptions and alternatives to filing requirements to perfect a security interest in personal property are catalogued in the UNIFORM COMMERCIAL CODE §9-302 (1962 *and* 1971 versions) [hereinafter cited as UCC]. Obviously, no attempt to explore these provisions can be attempted herein, but the reader's attention is invited to that common exception to the filing requirement encountered in the consumer finance market relating to "automatic perfection" of purchase money security interests in certain consumer goods. *See* UCC §§9-302 (1) (d), 9-307 (2) (1962 and 1971 versions).

198. The rule is not without exceptions. *See, e.g.,* note 189 *supra.*

199. Some contractual liens, however, good under state law against third parties are subject to the avoiding powers of the trustee in bankruptcy and, in particular, the trustee's power to avoid preferential transfers under §60 of the Bankruptcy Act. *See* 11 U.S.C. §96 (1970).

200. Obviously, the very purpose of the loan is often defeated if the debtor is required to forego use of the collateral by surrender of possession to the secured party prior to default. The interesting story of the development of non-possessory security devices in this country is told by Professor Gilmore. *See generally* 1 G. GILMORE, *supra* note 185.

201. This is not to say that modern security law, article 9 of the Uniform Commercial Code, does not recognize the oldest of personal property security devices, the pledge, where collateral is delivered to the creditor at the time the loan is made or prior to default. *See* UCC §9-203 (1) (a) (1962 and 1971 versions). Perfection of security interests in many types of personal property may be achieved by possession of the collateral by the secured party. *See* UCC §§9-302 (1) (a), 9-305 (1962 and 1971 versions).

in the creation and perfection of security interests. But possession of the collateral by the debtor when coupled with the all too common characteristic of the collateral to depreciate rapidly in value, especially while the debtor continues to use it, produces in the secured party justifiable interest in the procedures enabling him to take possession of the collateral promptly upon default by the debtor. It is to the remedies enabling the out-of-possession secured party to take the collateral from the debtor that the rule in *Sniadach* has been applied.

The secured party's right to possession is generally predicated upon the event of default.[202] Although there is certainly respectable authority for the proposition that a provision in the security agreement may validly provide for the secured party's possession at any time without the necessity of default by the debtor,[203] the Uniform Commercial Code preconditions the secured party's right to dispose of the collateral and thus realize the benefits of his security upon the event of default.[204] Default will occur when the debtor fails to make payments or breaches any other covenant contained in the security agreement.[205] Although the secured party may dispose of the collateral after default while it is still in the possession of the debtor,[206] creditor self-interest almost always dictates that the acquiring of possession precede disposition of the collateral.

Once default has occurred the Uniform Commercial Code provides: "In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action."[207] The Code does not provide for the form of the proceeding "by action," which is an optional recovery method in all cases and will be necessitated when the self-help alternative cannot produce recovery of the collateral absent breach of the peace. Instead, the draftsmen have incorporated all local judicial proceedings, which are provided by each state enacting the Code. In addition to this recognition of repossession procedures existing apart from the provisions of the Code, the enforcement provisions of the Code[208] are not exclusive, and the secured party "may reduce his claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure."[209] Accordingly, the procedures for possession and enforcement are

202. UCC §9-503 (1962 and 1971 versions).

203. Would a fine print clause in a contract of adhesion be given effect? Otherwise, the pledge concept of security is still with us being incorporated within the UCC. *See* 2 G. GILMORE, *supra* note 185, §43.3; note 201 *supra*.

204. UCC §9-504 (1962 and 1971 versions). The secured party's right in proper cases to accept the collateral in discharge of the obligation likewise is triggered by default. *See* UCC §9-505 (1962 and 1971 versions).

205. *See generally* 2 G. GILMORE, *supra* note 185, §43.3.

206. UCC §9-503 (1962 and 1971 versions).

207. *Id.*

208. The general enforcement provision of the Code is by nonjudicial public or private sale of the collateral. *See* UCC §9-504 (1962 and 1971 versions). Other methods are provided, however, such as the right of the secured party in certain cases to retain the collateral in satisfaction of the obligation. *See* UCC §9-505 (1962 and 1971 versions).

209. UCC §9-501(1) (1962 and 1971 versions).

not uniform from state to state and depending on the jurisdiction and choice of alternatives, the secured party will resort to such remedies as replevin, claim and delivery, judicial foreclosure sale, or execution issued on judgment for the unpaid obligation.

As previously noted, however, in most cases the secured party is desirous of pursuing the remedy that will result in his possession of the collateral, or at least the debtor's deprivation of the use of the collateral, at the earliest time following default. Other factors bearing on the secured party's choice of available remedies will be the expense and simplicity of the procedure and its effectiveness in producing maximum realization within a minimum time following default. When these considerations are examined the range of practical alternatives in any given case is narrowed considerably.

While the Code explicitly provides for foreclosure of the security interest by judicial sale pursuant to writ of execution issued on a previously obtained judgment on the debt,[210] the time and expense of obtaining the judgment after default and the debtor's continued use of the property until seizure under the execution writ only issued after judgment, militate against the secured party's use of a remedy available to even general creditors.

Mortgage foreclosure proceedings of state law are also recognized by the Code as a method of enforcing the security interest.[211] When the secured party wishes to proceed with caution, this choice of disposition as well as judicial sale under execution may be recommended for the Code provides that either of such dispositions "shall conclusively be deemed to be commercially reasonably."[212] The "commercial reasonableness" test of the Code is indeed the key provision in Code default procedures,[213] but the draftsmen of the Act expressly negate any inference that only sales under judicial proceedings should be deemed commercially reasonable.[214] When the worth of the collateral is small, as is the case of most security interests arising from consumer transactions, judicial foreclosure is a relatively expensive method of disposition and, although these expenses may be satisfied from the proceeds of the sale,[215] the secured party whose collateral will not produce the amount of the debtor's obligation must necessarily be interested in the economics of the disposition procedure. This is especially true when the prospects of collecting any deficiency from the debtor seem remote.[216]

An additional disadvantage of the judicial foreclosure proceeding from the creditor's viewpoint is the continued use by the debtor of the collateral. In this case, however, the secured party in Florida may be protected if he has

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210. UCC §9-501 (1962 and 1971 versions). The execution lien relates back to the date of perfection of the security interest so no claim to priority of lien is sacrificed. *Id.*

211. *Id.*

212. UCC §9-507 (2) (1962 and 1971 versions).

213. *See* UCC §9-504 (3) (1962 and 1971 versions).

214. UCC §9-507 (2) (1962 and 1971 versions).

215. UCC §9-504 (1) (a) (1962 and 1971 versions).

216. The debtor's liability for a deficiency is contained in the Code. UCC §9-504 (2) (1961 and 1972 versions).

statutory grounds to invoke the aid of attachment in aid of foreclosure.[217] The statutory remedy is provided the creditor "who is commencing or has commenced an action to foreclose a mortgage on personal property."[218] Although the statute is addressed to the holder of a particular kind of pre-Code security device, the chattel mortgagee who had distinct need of such protection as his only other means of taking possession by judicial action was by mortgage foreclosure,[219] the only meaningful interpretation to give the provision, since the enactment of the Code with its unified concept of security interest,[220] is to conclude that it applies to all secured creditors who have the requisite grounds for its invocation.[221]

As replevin statutes commonly provide for a taking prior to judicial hearing[222] and as presumably no reason exists to require the secured party to use judicial foreclosure sale following seizure under the writ,[223] the remedy is understandably a favorite of secured parties. As previously noted, Florida did not allow the pre-Code chattel mortgagee to make use of the writ of replevin to obtain possession of the collateral but limited his judicial remedies to sale under mortgage foreclosure[224] with the ancillary remedy of attachment in aid of that action if elected in proper cases. Replevin procedure is still governed, of course, by provisions outside those contained in the Code, but as the pre-Code conditional vendor in Florida could make use of replevin[225] and as the dichotomy was based on title and lien theory[226] no longer viable under the Code,[227] the better view would appear to be that all secured creditors can now make use of replevin in this state. Otherwise, the Florida courts must still distinguish between a chattel mortgagee and other secured parties, a scheme not recognized by article nine of the Code.[228]

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217. *See* FLA. STAT. §76.07 (1971). The secured party is required to post bond as in other cases of attachment. FLA. STAT. §76.12 (1971).

218. FLA. STAT. §76.07 (1971).

219. Snow v. Nowlin, 125 Fla. 166, 169 So. 598 (1936); Fincher Motors, Inc. v. Northwestern Bank & Trust Co., 166 So. 2d 717 (3d D.C.A. Fla. 1964).

220. UCC §9-202 and comment; §9-507, comment 1 (1962 and 1971 versions), *cf. In re* Yale Express Sys., Inc., 370 F.2d 433 (2d Cir. 1966).

221. *Cf.* FLA. STAT. §680.104(4) (1971), which provides that the remedies otherwise available to a *secured party* under the Code shall not be restricted by the chapter on Attachment, but all such remedies shall be cumulatively available in accordance with their respective terms.

222. *See, e.g.,* FLA. STAT. §78.01 (1971).

223. On the other hand, the use of the replevin writ should not excise the alternative of judicial foreclosure proceedings as the method of disposition. *See* 2 G. GILMORE, *supra* note 185, §44.1.

224. *See* text accompanying note 219 *supra.*

225. *E.g.,* Evans v. Kloeppel, 72 Fla. 267, 73 So. 180 (1916).

226. Intertype Corp. v. Pulver, 2 F. Supp. 4 (S.D. Fla.), *appeal dismissed,* 56 F.2d 992 (5th Cir. 1932), *aff'd,* 65 F.2d 419 (5th Cir.), *cert. denied,* 290 U.S. 660 (1933).

227. *See* note 220 *supra.*

228. *See generally* Hogan, *The Secured Party and Default Proceedings Under the UCC,* 47 MINN. L. REV. 205, 253 (1962). In Maryland, Pennsylvania, and Utah the enactment of the official text of UCC §9-503 (1962 and 1971 versions) was altered by addition of the following sentence: "If a secured party elects to proceed [to take possession] by process

It has been previously advanced, although not authoritatively resolved, that not only should all secured parties be able to invoke the replevin remedy in Florida, but that the use of that remedy to obtain possession of the collateral should not dictate disposition in this state by judicial sale under mortgage foreclosure. Should the latter view prove erroneous, however, there is still need for examining those Code provisions that provide for non-judicial disposition as the procedure is available to the secured party who succeeds in taking possession by self-help. Indeed, aside from some real practical limitations, there would appear to be no reason in law why the secured party could not proceed with Code disposition procedures prior to taking possession. For these reasons, disposition remedies provided specifically by the Code warrant further examination.

In opting for permissive non-judicial disposition,[229] the draftsmen of the Code were not according greater weight to the creditor's interests than those of the debtor. The provisions are a manifestation of the convictions of the draftsmen that judicial sales do not always produce maximum net realization.[230] This underlying premise would appear to be a sound one, and the policy can only further the interests of both parties as the other than judgment-proof debtor must have some concern for the grim reality of further seizure under execution issued on deficiency judgment.

Therefore, the Code provides for public or private disposition proceedings outside of the framework of judicial sales.[231] A recognition that there are creditors who would claim losses in excess of those that were or should have been sustained, coupled with the difficulty of formulating a detailed procedure to police the myriad and diverse transactions that may be encompassed, has led to the imposition of a flexible rule for judicial application – the test of commercial reasonableness.[232] Although the Code provides for notice to the debtor and certain interested third parties,[233] the most striking feature of the disposition procedure specifically provided by the Code is its open-endedness. While some attempt is made to set the standards for commercial reasonableness in the statutes,[234] the test is primarily and must necessarily remain one of judicial application to the facts of each case when the secured party's methods are challenged either before or after disposition.[235] Provisions for the recovery of damages including a statutorily prescribed minimum re-

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of law he may proceed by writ of replevin or otherwise." MD. ANN. CODE art. 95B, §9-503(2) (Supp. 1971); PA. STAT. ANN. tit. 12 A, §9-503(2) (Supp. 1971); UTAH CODE ANN. §70A-9-503 (Supp. 1971). If this commentator's premise is correct, certainty in Florida law could best be achieved by a similar enactment. Other vestiges of fragmented pre-Code security law exist. *E.g.*, FLA. STAT. §56.08 (1971).

229. UCC §9-504(3) (1962 and 1971 versions).

230. *See id.* comment 1; 2 G. GILMORE, *supra* note 185, §44.6; Hogan, *supra* note 228, at 219.

231. UCC §9-504(3) (1962 and 1971 versions).

232. *Id.*

233. *Id.*

234. *See* UCC §9-507(2) (1962 and 1971 versions).

235. UCC §9-507(1) (1962 and 1971 versions).

covery against the financier of consumer goods should serve generally to make the secured party responsible to his duties.[236]

Under the common law replevin lay for the recovery of goods unlawfully taken; in cases of wrongful detention after lawful acquisition, the common law action for recovery was detinue.[237] These ancient distinctions need no longer concern us, however, as modern procedure allows the plaintiff to utilize the replevin remedy based on wrongful detention, whether the original taking was lawful or not.[238] Thus, the modern writ of replevin or its statutory equivalent in some states, claim and delivery,[239] has utility to any party who claims a right to immediate possession of personal property; a right given the secured party upon the debtor's default.

Replevin procedure does provide some safeguards to the defendant. When there is a prejudgment seizure of the property[240] the defendant in Florida has three days from the seizure to give bond with surety for double the value of the property and obtain its redelivery from the executing officer.[241] Otherwise, the property shall be delivered to the plaintiff.[242] Where the defendant who is a debtor in a secured transaction obtains possession by such forthcoming bond, however, and the plaintiff is successful in his action, the plaintiff shall take judgment for the property *and* against the defendant and the surety on the forthcoming bond for the amount of plaintiff's lien on that property.[243] As the plaintiff may then enforce his judgment at his election by recovery of the property *or* the amount adjudged against the defendant and his surety, that is the amount of the lien,[244] his choice of recovery on the bond will enable him to make full collection of the debtor's obligation even when the value of the collateral would not have been sufficient to fully secure him. It would appear, however, that in those cases where the debtor is financially able to give a forthcoming bond, he would elect instead to redeem the collateral under the provisions of the Code.[245] In either event though the secured party would be paid in full and the debtor would reobtain the collateral.

As is true with the prejudgment remedies of attachment and garnishment, the plaintiff who utilizes replevin for prejudgment seizure is required prior to the issuance of the writ to file bond with surety for double the value of the property.[246] When the defendant prevails in the suit and the property

236. *Id.*
237. R. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 472-73 (1952).
238. *Id.* at 503.
239. 77 C.J.S. *Replevin* §1 (1952).
240. Florida gives the plaintiff the option of seizure before or after judgment. FLA. STAT. §78.01 (1971).
241. FLA. STAT. §78.13 (1971).
242. *Id.*
243. FLA. STAT. §78.19 (1971).
244. *Id.*
245. UCC §9-506 (1962 and 1971 versions).
246. FLA. STAT. §78.07 (1971). No bond is required where the plaintiff requests seizure only after judgment. FLA. STAT. §78.01 (1971).

has been redelivered to him on his forthcoming bond "he shall have judgment against the plaintiff and the sureties upon his bond for his damages for the taking of the property and for his costs."[247] When the property has not been redelivered to the defendant who prevails in the action he shall have judgment "against the plaintiff for possession thereof and costs *and* against him and his surety for the value of the property and costs."[248] The defendant in enforcing his judgment is then expressly given the same election provided the successful plaintiff is out of possession.[249]

The foregoing discussion has endeavored to analyze the fundamental differences between secured parties and creditors who obtain liens by operation of law. The analysis also reveals, however, a striking parallel in certain default proceedings given the secured party and other prejudgment remedies found constitutionally wanting. By resort to such remedies as replevin, claim and delivery, and attachment in aid of mortgage foreclosure, the secured party at least temporarily deprives the debtor of his interests prior to notice and hearing. Counsel for debtors were not long in drawing upon the analogy, and secured parties in the important commercial states of New York[250] and then California[251] were soon without prejudgment judicial repossession procedures. Contrariwise, the Tenth Circuit upheld the constitutionality of the secured party's use of the prejudgment replevin law of Oklahoma[252] while federal district courts reached like results in passing upon similar proceedings in Florida,[253] Maryland,[254] and Pennsylvania.[255]

Various factors account for the conflict resulting from the application of due process standards. Some of these factors are common to the previous examination of attachment, garnishment, and service lien remedies; others, however, reflect differences in judicial acceptance of the unique aspects of the secured creditor's position. In *Laprease v. Raymours Furniture Co.* the court restricted *Sniadach* to a taking of property that may impose tremendous hardships on the debtor but found "beds, stoves, mattresses, dishes, tables, and other necessaries for ordinary day-to-day living" to be within the protected class.[256] *Blair v. Pitchess* recognized not only the direct detrimental effect of the seizure of such personal property upon the debtor, but additionally the unwarranted leverage the process may give the creditor.[257] In the lower court's holding in *Epps v. Cortese*, however, it was noted that "stereo sets,

247. FLA. STAT. §78.20 (1971).

248. FLA. STAT. §78.21 (1971) (emphasis added).

249. *Id.*

250. Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970) (three-judge court).

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

252. Brunswick Corp. v. J & P, Inc., 424 F.2d 100 (10th Cir. 1970).

253. Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970) (three-judge court), *vacated and remanded sub nom.* Fuentes v. Shevin, 407 U.S. 67 (1972).

254. Wheeler v. Adams Co., 322 F. Supp. 645 (D. Md. 1971).

255. Epps v. Cortese, 326 F. Supp. 127 (E.D. Pa. 1971) (three-judge court), *vacated and remanded sub nom.* Parham v. Cortese, 407 U.S. 67 (1972).

256. 315 F. Supp. 716, 722-23 (M.D.N.Y. 1970).

257. 5 Cal. 3d 258, 279, 486 P.2d 1242, 1257, 96 Cal. Rptr. 42, 57 (1971).

rings, diamond watches, tables, stools, and beds" are property that the debtor can temporarily live without while wages are the means for the purchase of the "necessities of life."[258] The federal district court in *Fuentes v. Faircloth*, distinguishing prejudgment replevin from the Supreme Court's holdings in *Goldberg* and *Sniadach*, concluded: "The hardships facing the welfare recipient, like those facing one whose wages are garnished, are not present in the instant situation where goods purchased are replevied."[259]

Although the contrary results are in some measure attributable to differing conclusions as to the type of property within the protection of *Sniadach*, the primary issue framed by the opposing cases would appear to be differing judicial views on the constitutional validity of the special creditor interest presented. *Brunswick Corporation v. J & P, Inc.* observed no comparison between prejudgment garnishment of wages and the enforcement of a security agreement.[260] The lower court in *Epps* noted that the creditor sought "specifically identifiable property to which he has reserved title."[261] It may be meaningfully observed that the special creditor interest accorded protection in these cases was special only in the sense that the creditor had a property interest by contract in the particular goods seized unlike the attaching or service lien creditor prior to seizure – in Code parlance a security interest. To this extent the cases upholding the secured party's right to a prejudgment taking recognized a new dimension in the previously examined area of special creditor's interest.

The position is not without merit. The existing property interest of the secured party is important not only in the abstract legal sense but more so in terms of its application in the workings of a credit economy. In determining whether to grant credit, firms in the finance industry have long concerned themselves with what is characterized as the "four C's" of risk determination.[262] The three factors of character, capacity, and conditions, which relate respectively to the debtor's attitudes toward debt repayment, his ability to repay based on the specifics of his income, and a forecast of the relevant economic conditions over which the debtor has no control are of only indirect interest to this study. The fourth factor of credit worthiness, capital that has reference to the assets of the debtor that may be seized in the event of failure to pay, is highly relevant. Because consumers often have few assets with any appreciable market value,[263] it may be concluded that this factor is negligible in consumer finance. But if to the concept of general assets of the debtor, the capital factor, we engraft with appropriate alliteration, the collateralization

258. 326 F. Supp. 127, 133 (E.D. Pa. 1971), *vacated and remanded sub nom.* Parham v. Cortese, 407 U.S. 67 (1972).

259. 317 F. Supp. 954, 958 (S.D. Fla. 1970), *vacated and remanded sub nom.* Fuentes v. Shevin, 407 U.S. 67 (1972).

260. 424 F.2d 100, 105 (10th Cir. 1970).

261. 326 F. Supp. 127, 133 (E.D. Pa. 1971), *vacated and remanded sub nom.* Parham v. Cortese, 407 U.S. 67 (1972).

262. *See generally* T. BECKMAN & R. FOSTER, CREDITS AND COLLECTIONS: MANAGEMENT AND THEORY 82-91 (8th ed. 1969).

263. *Id.* at 85.

of the loan, the converse of these arguments may be the more compelling. Because the consumer has few if any other assets out of which collection may be made, and because, traditionally at least, the secured consumer financier has been able to take possession of particular property, collateral, either without resort to legal process or at least prior to notice and hearing in a judicial proceeding, the capital factor where reinforced by collateralization of the loan may be of real importance in any determination to extend credit. The argument would appear to be of even greater import in consumer financing of low income families where consideration of various of the other determinants of credit extension tend to negate acceptance of the credit application.[264]

The market value of chattel security is a fleeting thing, however. Previous discussion has focused on the secured party's desire to promptly take possession after default and thereby forego further loss in value of the collateral. This diminution is not only a result of the continuing reasonable or even accelerated use or misuse of the goods by the debtor but, in the glitter of a market beset with frequent model changes and, therefore, some degree of enforced obsolescence, is attributable also to mere passage of time.

The ability of the financier to be adequately secured by resort to the collateral upon default has not been enhanced by the trends of reduction of down payment requirements and extension of the contract term that has accompanied the growth of installment credit in this country.[265] From requirements of a down payment equal to one-third the price of the car and amortization of the balance over twelve months characteristic of the 1920's, the industry had moved by the decade of the 60's to a down payment of about one-fourth of the discounted cash price and a term of thirty to thirty-six months for installment payments.[266] This data simply points up what so many of us as debtors must intuitively realize: That when the new car is driven from the showroom the amount we have paid prior to delivery is far from equal of what we have unfortunately yet to pay. The corollary of this statement is that the investment and thus economic interest of our financier in the collateral at that time and perhaps for many months to come is in excess of our own. Thus, the secured party's legal interest is coupled with a significant economic one.[267] Although judicial decisions imposing prior notice and hearing requirements may well retard the efforts of the secured party to take possession, they do not hold in abeyance the laws of marketing economics and the value of the collateral, which may be marginal or insufficient to liquidate the indebtedness at the time of default, will most assuredly con-

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264. *See* Kripke, *Consumer Credit Regulation: A Creditor—Oriented Viewpoint,* 68 COLUM. L. REV. 445, 448 (1968).

265. *See* P. MCCRACKEN, J. MAO & C. FRICKE, CONSUMER INSTALLMENT CREDIT AND PUBLIC POLICY 1-2 (1965).

266. *Id.* Even the most casual observer of the advertising media is aware of the availability today of 48 month financing for new automobiles.

267. "It goes without saying that in the typical installment sale of personal property both seller and buyer have interests in the property until the purchase price is fully paid, the seller early in the transaction often having more at stake than the buyer." Fuentes v. Shevin, 407 U.S. 67, 99 (1972) (dissenting opinion).

tinue to depreciate during the interim between default and adjudication. Of course it is unlikely that the debtor will continue in the interim to make offsetting payments on his obligation.[268]

Sniadach couched the countervailing rights to the debtor's interest in continued possession or immediate right to possession in terms of circumstances "requiring special protection to a state or creditor interest."[269] In this context the foregoing discussion has equated the secured party's interest with a creditor interest, but the analysis need not be so limited. Although the interests of any one debtor and his secured party may well be adverse, the interests of debtors and creditors collectively is largely compatible. It is axiomatic that one of the expenses incurred in the extension of credit is bad debt losses.[270] It is also elementary economic law that in the private sector of our economy all costs of successful businessmen must be passed on to their customers.[271] Thus, when the debtor's need for credit at minimal cost is seen to be determined in some measure by the value of chattel security, there is validity to the argument that there is more at stake than a mere creditor interest. The lower court in *Epps* recognized the breadth of this interest by noting not only the debtor's dependency on credit to obtain expensive goods, but the importance of summary procedures in the maintenance of many large and small retail businesses and in the reduction of costs incurred in evidentiary hearings.[272]

The foregoing discussion has assumed the useful function served by consumer credit in our economy. To recognize that all the advantages associated with mass markets for consumer durables are dependent on readily available financing is to recognize the important role played by the credit industry in our economic development.[273] A recognition of the abuses of credit by the overextension of some debtors and the overreaching of some creditors serves only to point out that the system is obviously an imperfect one.

The observations, however, may also aid in formulating the basic issue in determining due process requirements in the area of chattel security. Should the importance of chattel security to the economy be outweighed by the possibility of the secured creditor's erroneous allegation of default so as to require notice and hearing before any seizure of the collateral? In a 4-to-3

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268. "At least the debtor, who is very likely uninterested in a speedy resolution that could terminate his use of the property, should be required to make those payments, into court or otherwise, upon which his right to possession is conditioned." *Id.* at 102 (citations omitted).

269. 395 U.S. 337, 339 (1969).

270. A compendium of the various factors that constitute the costs of credit extension is contained in T. BECKMAN & R. FOSTER, *supra* note 262, at 69.

271. Of course increments of costs may be reflected wholly or partially in profits as well as in prices. The factors are complex and the consequences of increased competition in the consumer finance industry on the costs and availability of credit are inconclusive. *See* White, *Consumer Credit in the Ghetto: UCCC Free Entry Provisions and the Federal Trade Commission Study*, 25 BUSINESS LAW. 143 (special issue 1969).

272. 326 F. Supp. at 135-36.

273. *See generally* P. MCCRACKEN, J. MAO & C. FRICKE, *supra* note 265, at 1-6.

decision in *Fuentes v. Shevin* the Supreme Court in ruling on the district courts' decisions upholding the Florida and Pennsylvania replevin statutes failed to find a constitutional distinction between the contractual basis of the secured creditor's interest and the prejudgment garnishment of wages by a general creditor.[274] The Court did more, however, and a close reading of the due process tests of *Fuentes* is not only necessary to assess the present status of the secured creditor's position, but also to put in proper perspective the rules formulated for those previously examined remedies under attachment, garnishment, and service lien procedures.

The Present Status of Creditors' Prejudgment Remedies

The Supreme Court's basis in *Fuentes* for according the secured creditor no better treatment in prejudgment judicial seizures than the creditor whose lien arose by operation of law is primarily the result of an express recognition of and emphasis on the debtor's present possessory interest. Applying the fourteenth amendment's protection of property to "any significant property interest" the Court concludes: "The appellants were deprived of such an interest in the replevied goods – the interest in continued possession and use of the goods."[275] This argument is bolstered by the Court's observation that for immediate possession the debtors had obligated themselves "to pay a major finance charge beyond the basic price of the merchandise" and in fact had made substantial payments by the time of repossession.[276] "Clearly, their possessory interest in the goods, dearly bought and protected by contract, was sufficient to invoke the protection of the Due Process Clause."[277]

Although the Court does recognize " 'extraordinary situations' that justify postponing notice and opportunity for a hearing,"[278] the criteria of situations "requiring special protection to a state or creditor interest" enunciated in *Sniadach*[279] are stated in *Fuentes* in terms of necessity "to secure an important governmental or general public interest."[280] No explanation is offered for the removal of "creditor interests" from the "extraordinary situations" test, but perhaps of greater importance in view of the preceeding discussion is the Court's characterization of the Florida and Pennsylvania proceedings as furthering "no more than private gain."[281] In this fashion the general interest of the public in the availability of credit at low cost and the analogous contribution of prejudgment repossession of chattel security to that end is summarily dismissed.

Stressing that only the opportunity to be heard must be provided, the

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274. 407 U.S. 67 (1972).
275. *Id.* at 86.
276. *Id.*
277. *Id.* (footnote omitted).
278. *Id.* at 90.
279. 395 U.S. at 339.
280. 407 U.S. at 91.
281. *Id.*

Court in a footnote cautions against an exaggeration of the aggregate costs as "there is a likelihood that many defendants would forego their opportunity sensing the futility of the exercise in the particular case."[282] The statement offers no consideration of that other element of costs, the depreciation of the collateral during the interval between notice and the date set for disposition of the case. With crowded court dockets and the granting of continuances to even the debtor who subsequently fails to contest at the date set for the hearing, this cost could be substantial.

In addition to limiting extraordinary situations to ones that secure "an important governmental or general public interest" the majority in *Fuentes* further defined the concept by interpretation of precedent as embodying "a special need for very prompt action" and one in which "the State has kept strict control over its monopoly of legitimate force."[283] The Florida and Pennsylvania replevin statutes also failed to qualify under the latter two tests. Recognizing that "there may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods," the Court concluded that neither were the statutes narrowly drawn nor did the facts encompass such an unusual situation.[284] The "need for prompt action" recognized by *Fuentes* once more failed to distinguish between the secured creditor's position vis-a-vis that of the garnishment creditor and it would appear that except for the possible exception subsequently noted,[285] what would encompass extraordinary situations for the one would do likewise for the other.

Finally, the Court held that the prejudgment replevin statutes of Florida and Pennsylvania "abdicate effective state control over state power."[286] Having noted that the writs issued on "no more than the strength of the applicant's own belief in his rights,"[287] the Court observed the absence of a state official's participation in the decision to seek the remedy, to review the basis for the claim to repossession, and to evaluate the need for immediate seizure."[288] Issuance of the prejudgment replevin writ on the creditor's allegations alone without an ex parte appearance before a judge to make a prima facie showing of entitlement appears to be the practice in all but one state[289] where the process has been recently tested. It would seem unrealistic in the context of individual actions by creditors to impose state participation in the decision to seek the remedy. State review of the basis of the claim and evaluation of the need for summary seizure could presumably

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282. *Id.* n.29.
283. *Id.* at 91.
284. *Id.* at 93.
285. *See* text accompanying note 290 *infra.*
286. 407 U.S. at 93.
287. *Id.* at 83.
288. *Id.* at 93.
289. The Maryland procedure upheld in Wheeler v. Adams, 322 F. Supp. 645, 648-49 (D. Md. 1971), required the creditor to appear personally before a judge and make a prima facie case.

be provided at some cost by vesting the power to issue the writs in a state official with discretionary powers.

One further amplification of the "extraordinary situations" test is contained in *Fuentes*. The Court states: "These situations, however, must be truly unusual."[290] The extent of the caveat is not easily assessed but some further indicia of permissive use of prejudgment seizure may be found in the Court's citation in *Fuentes*, as it did in *Sniadach*, to the case of *Ownbey v. Morgan*.[291] *Ownbey* is cited for the proposition that "attachment necessary to secure jurisdiction in state court [is] clearly a most basic and important public interest."[292] It would appear then that prejudgment seizure for jurisdictional purposes is still viable, but the statement of the *Fuentes* Court may well adopt the more restrictive view "that availability to personal service and not mere nonresidency"[293] is the determinative factor.

Previous discussion of *Sniadach* and the lower court cases, which attempted to delimit the rule therein, has revealed that the pre-*Fuentes* test of permissive prejudgment seizures was a product of two factors – not only the special need of the creditor for the process but the balancing of that interest with the hardship to the debtor presented by temporary deprivation of the type of property seized. There was soon precedent as previously examined to support three conflicting views of the latter element. A narrow view of *Sniadach* that limited its application to wages alone was transformed by some courts to include any necessities, but still others refused to recognize any distinctions founded on gradations in the importance of the property to the debtor. As the difficulty of delineating the categories of necessities is great and as the limitation of the protection to wages alone seems unjustifiable, it is not surprising that the sanction of the Supreme Court in *Fuentes* was given the latter doctrine.[294]

That the decision adds certainty to the law is undeniable. Indeed many of the variances in setting due process standards in the cases examined in this work are attributable to this one issue. Although the *Fuentes* Court disclaims any extension of the rules laid down in *Sniadach* and *Goldberg*, in this respect attributing its discussion of the importance of the property interest before the Court in those cases to mere emphasis of "special importance,"[295] it seems that *Fuentes* did extend the rule of *Sniadach* to *all* property.[296] Otherwise the

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290. 407 U.S. at 90.

291. 256 U.S. 94 (1921).

292. 407 U.S. at 91 n.23.

293. Tucker v. Burton, 319 F. Supp. 567, 580 (D.D.C. 1970) (three-judge court) (dissenting opinion).

294. 407 U.S. at 89-90.

295. *Id.* at 89.

296. When prejudgment attachment of real property does not dispossess the debtor of the use thereof at least until after opportunity for hearing (*see* text accompanying notes 165-167 *supra*), the extension of *Sniadach* to all property may still not cause attachment of land to fall within prior notice and hearing requirements even when an extraordinary creditor need is not present. The distinction is not based on the type of property but the absence of deprivation.

opinions of those many able jurists who struggled with formulating a property test must be written off to a futile exercise based on a misreading of *Sniadach*, a position not seemingly tenable. Whether by extension or reaffirmation though, the *Fuentes* Court emphasized that *Sniadach* and *Goldberg* did not mark "a radical departure from established principles of procedural due process" but "were in the mainstream of past cases having little or nothing to do with the absolute 'necessities' of life."[297]

In summary, the post-*Fuentes* extraordinary situations that obviate the need for notice and hearing before the taking in a judicial action must be based on important governmental or general public interests and the interest of a secured creditor is not per se in that category but must qualify specially. In the context of debtor and creditor law this basis would probably include a taking necessary to secure jurisdiction and cases where damage or concealment of the goods in dispute is eminent.[298] This latter category may be limited by the language in *Fuentes* to those cases where the creditor claims a right against specific goods of his debtor, as in cases of security interests or perhaps service liens on particular property, and thus may not be available to the attachment or garnishment creditor who may subject the general property of his debtor to seizure.[299] The absence of any particular hardship to the debtor resulting from temporary deprivation of the particular property seized has no place in the test. Finally, it would appear that even when otherwise proper, the writ commanding the prejudgment seizure, whether it be in replevin, attachment, or garnishment, must be the result of a judicial act.

Another issue, which had contributed in some measure to the conflicting decisions of the lower courts in the context of prejudgment replevin, is laid to rest in *Fuentes*. Preceeding discussion has established that in modern personal property security financing not utilizing a pledge of the collateral, the secured party's right to take possession by Code provision and usually contract term as well is predicated on the event of default. The *Laprease* court in striking New York's replevin statutes distinguished the Tenth Circuit's upholding of Oklahoma's prejudgment replevin procedures in *Brunswick* at least in part "by reason of the admission by the defendants in the replevin action [in *Brunswick*] that they were in default under the conditional sale contract."[300] In the lower court's disposition of *Fuentes* the debtor attempted to distinguish *Brunswick* on the grounds *inter alia* that although she was delinquent in payments she could not be in default when there had been a

297. 407 U.S. at 88.

298. Presumably then the pre-*Fuentes* holding of the Court in Jernigan v. Economy Exterminating Co., 327 F. Supp. 24 (N.D. Ga. 1971) (three-judge court), would still be viable. In that case the disputed automobile had been hidden and the court found "a situation requiring special protection" under a statute "narrowly drawn." *Id.* at 30.

299. That distinction, if there is one, is based on the Court's statement that the summary action might lie on "a showing of immediate danger that a debtor will destroy or conceal *disputed goods*." 407 U.S. at 93 (emphasis added). The writer questions whether there are goods in dispute when attachment or garnishment is ancillary to a suit on an ordinary indebtedness.

300. 315 F. Supp. 716, 724 (N.D.N.Y. 1970).

breach of the contract by the seller.[301] The effort was unavailing, however, as the Court construed the contract literally to allow the secured party the right of possession "not in the event of mere 'default,' " but "in the event of 'default of any payment or payments,' "[302] thus triggering the seller's remedies when the buyer was delinquent regardless of justification. In view of the buyer's statutory right on notice to deduct damages resulting from breach from any part of the price still due under the contract,[303] the reasoning is questionable, but the Supreme Court opinion in *Fuentes* would render that exercise moot. That decision unequivocally makes the issue of default *vel non* immaterial in invoking procedural safeguards.[304] In so holding the Court exposes an inherent weakness in the argument previously advanced for according the secured party's status such recognition as a weighty interest deserving of protection and justifying a temporary prejudgment taking. When the secured party's right to possession of the collateral does not arise until default, and that is the usual case, the secured party's present interest does not include a right to possession until the resolution of an issue that requires judicial determination. Of course, the contention that the public's interest in the availability of secured credit transcends the harm to those non-defaulting debtors whose property is temporarily taken might still have appeal although it is without judicial sanction after *Fuentes*.

Closely related to the issue of default as actuating the secured party's right to possession is the issue of advance contractual waiver of procedural due process rights. In its recent decision in *D. H. Overmyer Co. v. Frick Co.* the Supreme Court had recognized that prejudgment notice and hearing are subject to waiver in a civil action, and upheld the validity of a cognovit provision in a note in conformity with Ohio law whereby the maker consented in advance of any actual dispute to judgment without notice or hearing should it default in payments.[305] Certainly if the debtor may waive procedural safeguards in the action that establishes his default for purposes of judgment on the primary issue of the indebtedness, then he may do likewise on the issue of default giving rise to the secured party's claim of right to take possession of the collateral, merely an intermediate step in establishing the final rights of the parties.

The concept was recognized by the Court in *Fuentes*, but in none of the contracts before the Court did the language relied upon establish the requisite intent of the parties to create such a waiver.[306] Dispositive of the issue was the Court's conclusion that those terms providing for repossession upon

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301. 317 F. Supp. at 957-58.

302. *Id.* at 958.

303. *See* UCC §2-717 (1962 version).

304. 407 U.S. at 87. "But even assuming that the appellants had fallen behind in their installment payments, and that they had no other valid defenses, that is immaterial here. The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing." *Id.* (footnotes omitted). Litigable issues in hearings may be subject to statutory limitations, however. *See* text accompanying note 320 *infra*.

305. 405 U.S. 174 (1972).

306. 407 U.S. at 94-95.

default did not "indicate *how or through what process*" the repossession was to be made.[307] The issue as thus developed seems to allow secured parties to maintain their prejudgment seizure rights in judicial actions by retailoring the security agreement. This solution by draftsmanship may well be controlling in the context of such an agreement as was before the Court in *Overmyer,* but the rule of that case and the language of the Court in *Fuentes* made clear that there are real limits to the creditor's ability to draft away his problem. *Fuentes* observes that the contract in the *Overmyer* case was negotiated between corporations and that the waiver clause was a result of negotiations bargained for and drafted by parties represented by counsel.[308] Contrasting this substantial commercial transaction with the setting in which consumer financing occurs is not difficult. The lack of equality in bargaining power and the element of unfair surprise, which are so often the rule in consumer transactions, will no doubt militate against judicial acceptance of waiver of constitutional rights in the form contracts common to consumer finance.[309] The parallel between the doctrine of waiver of constitutional rights and the Code's concept of unconscionability[310] is striking, and an appreciation of the policing function of the courts in the former may be gained by study of those cases interpreting the related doctrine of the Code.[311]

Fuentes furthermore reaffirms and in some instances amplifies in the creditor-debtor context basic tenets of due process recognized in *Sniadach.* The hearing must be at a "meaningful time," which requires notice and hearing before the seizure "to minimize substantively unfair or mistaken deprivations."[312] Although the taking without hearing under the prejudgment writ may be only temporary, the Court holds that "it is now well settled that a temporary nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment."[313] Not surprisingly, the deterrent effects of the requirements that the plaintiff in replevin post a bond, "allege conclusorily that he is entitled to specific goods, and open himself to possible liability in damages if he is wrong," were found to be no substitute for the basic notice and hearing requirements.[314] Nor was it significant that the defendant in replevin could recover the goods on posting of counterbond, since the prejudgment deprivation is still present whether or not the defendant "has the funds, the knowledge and the time needed to take advantage of the recovery provision."[315]

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307. *Id.* at 96 (emphasis by the Court).
308. *Id.* at 95.
309. *See, e.g.,* Swarb v. Lennox, 405 U.S. 191 (1972); Blair v. Pitchess, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).
310. *See* UCC §2-302 (1962 version).
311. *See, e.g.,* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965); Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).
312. 407 U.S. at 81.
313. *Id.* at 84-85 (citations omitted).
314. *Id.* at 83.
315. *Id.* at 85.

Fuentes is replete with comments as to the type of hearing required. The Court reaffirms that "due process tolerates variances in the *form* of a hearing 'appropriate to the nature of the case' and 'depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any]' . . . ."[a] The requirement that the plaintiff post bond[b] and the salutary effects of provisions for the defendant's counterbond on "the length and consequent severity of a deprivation"[c] are both relevant in determining the type of hearing required. Finally, the hearing that must predate seizure except in extraordinary situations does not have to result in a "final judgment," is "open to many potential variations" and is a subject "for legislation" provided that it establish "the validity or at least the probable validity of the underlying claim."[d]

Legislative implementation of these edicts in the form of early-trial provisions with limitations on litigable issues may offer creditors more palatable forms of hearings even when their attempt at contractual waiver of the hearing has failed. The recent constitutional test of Oregon's procedure for eviction of tenants after nonpayment of rent points the way. In *Lindsey v. Normet*[e] there was a statutory requirement of a trial no later than six days after service of the complaint unless the tenant provided security for the accruing rent. There was also a statutory limitation of the triable issue to the tenant's default thereby precluding consideration of defenses based on the landlord's breach of a duty to maintain the premises. Both provisions passed due process and equal protection tests.[f] It is highly probable, therefore, that creditors will soon lobby for statutes that use *Lindsey* as a model and thereby mitigate the rigors of expanded hearing requirements.

Pre-*Fuentes* replevin cases had added new dimensions to the constitutional scrutiny of creditors' provisional remedies. The prejudgment replevin provisions of New York and California were not only found to constitute a deprivation of due process but additionally to run afoul of the fourth amendment's strictures against unreasonable search and seizure made applicable to the states by the fourteenth.[316] While other lower courts had reached opposite results,[317] the Supreme Court by its holding in *Fuentes* found the issue of due process to be determinative and did not reach the fourth amendment contentions of the debtors. The Court does note, however, that satisfaction of the dictates of due process by proof of the probable validity of

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a. *Id.* at 82 (citations omitted) (emphasis by the Court).

b. *Id.* at 83.

c. *Id.* at 86.

d. *Id.* at 97.

e. 405 U.S. 56 (1972).

f. *Id.* at 64. The additional appeal bond requirements imposed on the tenants did violate their rights to equal protection of the laws. *Id.* at 74.

316. *E.g.*, Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970) (three-judge court); Blair v. Pitchess, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

317. *See* Epps v. Cortese, 326 F. Supp. 127 (E.D. Pa. 1971) (three-judge court), *vacated and remanded sub nom.* Parham v. Cortese, 407 U.S. 67 (1972); Wheeler v. Adams Co., 322 F. Supp. 645 (D. Md. 1971); Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970) (three-judge court), *vacated and remanded sub nom.* Fuentes v. Shevin, 407 U.S. 67 (1972).

the creditor's claim may well serve the dual function of obviating the fourth amendment problem.[318]

Fuentes will have a profound influence on the use of provisional remedies by creditors. The case not only brought the secured party's prejudgment judicial remedies into substantial conformance with those of other creditors but also made sufficient inroads on the general doctrine of permissive prejudgment seizures as it had been developed by some courts through rejection of a "necessities" test. *Sniadach* was transitional at least in the application of due process to debtor-creditor law; *Fuentes* is a broad extension thereof.

But is the constitutional erosion of provisional remedies complete? In previous discussion it has been noted that under the Code the secured party on default may take possession of the collateral "without judicial process if this can be done without breach of the peace."[319] The secured party will commonly first attempt to gain possession in this manner[320] as a recovery under judicial process, even of the prejudgment variety, entails both additional time and expense. The permissive self-help remedy, the standards of which are not set forth by the Code, has encompassed everything from gently persuading the debtor to expressly and voluntarily surrender the collateral to recapturing the property without the debtor's knowledge or consent such as by the simple expedient of a driveaway of the unattended automobile.[321] The latter procedure exposes the creditor to the debtor's claim that he had valuable goods in the vehicle and the self-help remedy should always be employed with circumspection as punitive damages for breach of the peace may be substantial.[322]

In *Adams v. Egley*[323] repossession of vehicles was accomplished without judicial process under both the provisions of the Code and the terms of the security agreements expressly entitling the secured parties to take possession in the event of default.[324] The creditors therefore contended that as the repossessions had occurred under the self-executing terms of private contracts there was no significant state involvement so as to raise federal question jurisdiction[325] under due process or jurisdiction under the Civil Rights Act providing for remedies when there is deprivation "under color of state law."[326] Rejecting that contention the Court held that as the contractual terms were merely an embodiment of the policy contained in California's Code provisions,

318. 407 U.S. at 96 n.32. Another constitutional attack leveled at the writs in some of the lower court cases was that the provision for defendant's counterbond in the case of an impecunious debtor was a denial of the equal protection clause of the fourteenth amendment. *See, e.g.*, LaPrease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970) (three-judge court). The Supreme Court does not address the issue.

319. UCC §9-503 (1962 and 1971 versions).

320. *See* Hogan, *The Secured Party and Default Proceedings Under the UCC*, 47 MINN. L. REV. 205, 211 (1962).

321. *See* 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY §44.1 (1965).

322. *Id.*

323. 338 F. Supp. 614 (S.D. Cal. 1972).

324. *Id.* at 616.

325. 28 U.S.C. §1331 (1970).

326. 28 U.S.C. §1343 (1970); 42 U.S.C. §1983 (1970).

the repossessions were made "under color of state law" and that the enactment of the Code provisions authorizing such acts were sufficient state action to raise a federal question.[327]

Previous examination of cases invalidating distraint proceedings under statutes providing for landlord's liens for rent has revealed that state action may encompass other than seizure under judicial process by state officers.[328] In most of these cases the self-help provision was based exclusively on the terms of the statute[329] in contrast with the contract terms providing for self-help repossession in *Adams*. The Court concluded, however, that even if an independent right to repossess were created by contract, that right was the result of state authorization.[330]

Certainly in view of the subsequent Supreme Court holding in *Fuentes*, the position of the *Adams* Court is defensible to the extent that it invalidates California's Code provision authorizing self-help repossession.[331] If the secured party cannot resort to judicial action to obtain possession prior to hearing, a fortiori, he should not be able to accomplish these same ends without judicial process.

Presumably, although the facts are unclear, the repossessions in *Adams* were not made with even the implicit consent of the debtors,[332] for the Court limits its discussion in failing to find a waiver of constitutional rights to a consideration of waiver before default.[333] Certainly a better argument could be made for meaningful waiver of hearing before repossession if the debtor had consented to the return of the collateral after the alleged default. Hopefully, the secured party is not required to use judicial process when the debtor tenders back the collateral.

But *Adams* does not only invalidate the Code section providing for repossession, but strikes the disposition provisions of the Code as well.[334] Because the objections of the Court to the disposition procedures of the Code are not separately stated, it may be assumed the Court is concluding that any invalidation of a wrongful repossession procedure should also necessarily encompass an invalidation of the attendant disposition proceedings. That is to say, *Adams* strikes the Code's disposition procedure only because it complements the constitutionally infirm Code repossession procedures, and that where

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327. 338 F. Supp. at 618. *Contra*, Oller v. Bank of America, 342 F. Supp. 21 (N.D. Cal. 1972); McCormick v. First Nat'l Bank, 322 F. Supp. 604 (S.D. Fla. 1971).

328. *See* text accompanying notes 192-196 *supra*.

329. In Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970), a written lease provision also permitted levies and sales, but the contract term was held not to create a right to distrain independently of the statute.

330. 338 F. Supp. at 618.

331. UCC §9-503 (1962 and 1971 versions).

332. *See* 338 F. Supp. at 616.

333. 338 F. Supp. at 619-21.

334. *See* UCC §9-504 (1962 and 1971 versions). While California law encompasses the exact text of §9-503 of the Code, there are variations in that state's adoption of §9-504. *Compare* CAL. COMM. CODE §9504 (West 1964), *with* UCC §9-504 (1962 and altered 1971 versions). The variations in the California enactment do not seem relevant to the issue in *Adams*, however.

repossession is rightful, the non-judicial disposition proceedings of the Code are not unconstitutional.

The opinion is not clear, however, and the Court's statement that "the statutes providing for summary repossession and sale must be held unconstitutional,"[335] lends itself to dual interpretations. If the adjective "summary" modifies the term "repossession" only, then the reasoning just advanced is sound, but if "summary" modifies "sales" as well, then one federal judge with one stroke of his pen has summarily rejected that reasoning that caused the draftsmen of the Code after careful study to conclude that both debtor and creditor benefit by flexible disposition procedures that do not require judicial sale.[336] Hopefully, the latter interpretation is erroneous for it would appear that at least some reason for the rejection of basic Code disposition policy should have been advanced.[337]

Furthermore, there is support for validating non-judicial sales by the holders of consensual liens in the case of *Young v. Ridley*.[338] In that case the Court refused to invalidate under *Sniadach* statutes authorizing mortgagees of real property under instruments containing powers of sale to foreclose by public auction without a hearing for the mortgagor prior to sale.[339] Although the court relies to some extent on the contractual waiver of hearing provision,[340] and this reliance in a consumer transaction may be misplaced under the subsequent ruling in *Fuentes*, the Court advances further reasons for its decision. The provisions for statutory notice to the debtor in *Young*[341] are not unlike those provided for extrajudicial sale under the Code,[342] and the Court noted that the draftsmen of the statutes tested in *Young* felt that judicial foreclosure would unduly restrict legitimate business interests and thus the availability of mortgage money.[343] Furthermore, *Young* relied on the right of the mortgagor to seek remedies such as emergency injunctive relief during the interval between receipt of notice and sale,[344] remedies not at all unlike those accorded the debtor under the Code.[345]

Hopefully then, if *Adams* is read as a decision declaring unconstitutional the non-judicial sales provisions of the Code, it will be an aberrant one. In its extension of constitutionally restricted action to non-judicial repossession remedies alone, however, it represents a major but perhaps predic-

335. 338 F. Supp. at 622.

336. *See* UCC §9-504, Comment 1 (1962 and 1971 versions); 2 G. GILMORE, *supra* note 321, §44.6; Hogan, *supra* note 320, at 219.

337. Also relevant to this discussion is the Court's statement: "Sections 9503 and 9504 of the California Commercial Code which provide for such takings, are therefore constitutionally defective and void." 338 F. Supp. at 618. In the context of the facts of this case there is no taking under §9504 except that entailed in disposition of the collateral previously taken from the debtors' possession.

338. 309 F. Supp. 1308 (D.D.C. 1970).

339. *Id.* at 1309-10.

340. *See id.* at 1311-13.

341. *See id.* at 1310-11.

342. *See* UCC §9-504(3) (1962 and 1971 versions).

343. 309 F. Supp. at 1311.

344. *Id.*

345. *See* UCC §9-507(1) (1962 and 1971 versions).

table extension of *Fuentes*. Whether the decision is indicative of a trend toward still more strictures on prejudgment remedies is impossible to ascertain but as all further litigation in this area will hinge largely on *Fuentes*, a return to the effects of that landmark decision is essential to the conclusion of this study.

Some Further Conclusions

The Court's stated purpose for a prior hearing requirement in *Fuentes*—"to prevent unfair and mistaken deprivations of property"[346]—is a worthy objective. The creditor whose rights are at stake is not an impartial arbiter of the dispute[347] and a hearing prior to even temporary deprivation can only increase respect for our system of justice whether the debtor ultimately prevails with a defense or offers none whatsoever. The goal is not obtained without costs, however. The adverse effects on the availability and costs of credit that may result from a curbing of creditors' provisional remedies has previously been suggested, but it seems only proper to devote some consideration to those arguments that view these byproducts, at least in some respects, as desirable.

Even the casual student of consumerism is aware that easy credit is often the vehicle by which the unscrupulous and irresponsible members of the business community mulct the uneducated and unsophisticated members of the lower and even middle classes.[348] But aside from its use in the more questionable practices of the marketplace, the availability of credit contributes to unwise spending habits on the part of many more sophisticated Americans. Even when the consumer has not subjected himself to the nightmares of overextension, that portion of his income consumed in interest or carrying charges is simply not available for purchases of other more tangible goods and services. Furthermore, although consumer credit may contribute to the creation of mass markets and therefore greater productivity, there are those who contend that the demand for many of the goods produced is not founded in real consumer needs or wants but is a product through salesmanship and advertising of the same industrial system that produced the goods.[349] Finally, there is some evidence that movements in consumer installment borrowing contribute to the instability of the economy.[350]

These arguments may be largely countered, however. The contributions of consumer credit to cyclical movements of the economy are not substantial and may be controlled by general monetary and credit policy.[351] Each individual consumer is best able to decide his own allocation of resources in-

346. 407 U.S. at 97.

347. *See id.* at 81.

348. *See, e.g.*, D. Caplovitz, The Poor Pay More (1965); W. Magnuson & J. Carper, The Dark Side of the Marketplace (1968).

349. This has been a theme of many of the writings of Professor Galbraith. *See, e.g.*, J. Galbraith, The Affluent Society 139-60 (1958).

350. *See* P. McCracken, J. Mao & C. Fricke, Consumer Installment Credit and Public Policy 45-72 (1965).

351. *See id.* at 73-96.

cluding the amount of his expenditures for credit for as the Court concluded in rejecting a necessities doctrine in *Fuentes*: "[U]nder our free enterprise system, an individual's choices in the marketplace are respected, however unwise they may seem to someone else."[352] And although the deceptive practices of those who prey upon the uninformed are often coupled with or made possible by overextensions of credit, does this abuse by some creditors require that measure of overkill contained in a restriction of all creditors' remedies? Increased regulation of offending businesses and consumer education may be both more direct and effective measures to cure these ills. Professor Kripke suggests that corrective measures be aimed at the specific abuses for he correlates the majority of defaults not with the overreaching of creditors but with changed conditions in the debtor's financial picture such as loss of job or family illness.[353] While these changed economic conditions are often beyond the control of the debtor, they are likewise often impossible for the creditor to forecast and thus defaults stemming therefrom are not a result of overextension by creditors. Finally, the restrictions on the provisional remedies work to the direct benefit of those, who having no justification or excuse, can and should pay their obligations but refuse to do so.

If a realignment of debtor-creditor law requires that the debtor be protected against unscrupulous creditors, it conversely should require that creditor and public interests be protected against unscrupulous debtors. Consumerism must advance beyond the quixotic view so often taken by the media and aspiring politicians that equates any victory of any consumer over a business interest, regardless of how unfounded and undeserving, with furtherance of the public interest. The importance of credit to our over-all productivity is deserving of more than passing interest.

Humanitarian concern for debtors must always be exercised with a view to all consequences of the remedial procedure employed. Although the costs of credit for the purchase of purely consumer goods can only decrease the over-all purchasing power of the debtor for other goods and services, and although the poor pay dearly for the privilege, "[a] washing machine, for example, in the hands of a relief client might become a fruitful source of income."[354] Then there is overlying the entire issue of availability of credit the ominous presence of the loan shark who will operate by processes that are not concerned, euphemistically speaking, with the amenities of due process.

The efforts to trace the evolutive strictures placed on the provisional remedies through the traditional patterns placed thereon by the states and the now paramount constitutional limitations of first *Sniadach* and now *Fuentes,* establish that most present law on the subject is not only couched in terms of some rather arbitrary restraints but is of highly questionable constitutional validity. Yet there remains a constitutionally sanctioned area in which policy dictates that temporary deprivations before hearing have validity.

352. 407 U.S. at 90.

353. *See* Kripke, *Consumer Credit Regulation: A Creditor-Oriented Viewpoint,* 68 COLUM. L. REV. 445, at 478-86.

354. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 450 (D.C. Cir. 1965) (dissenting opinion).

Doubtlessly, legislation will soon be forthcoming that will represent the best efforts of legislators to implement this policy, which is embodied in the words of *Sniadach* as a "statute narrowly drawn to meet any such unusual condition."[355] The discussion of *Fuentes* recognized cases of takings necessary to secure jurisdiction and to protect against the immediate danger of destruction or concealment of the goods as being within the privileged area, but these instances may be only illustrative and others may well exist particularly when creditors are proceeding collectively through such representatives as trustees or receivers. Hopefully, forthcoming legislation will do more. Any meaningful reassessment of the law in this area should also address itself to the elimination of unjustifiable restraints on legitimate collection efforts and certainly this should encompass a reexamination of exemption policies to insure that while no debtor will be forced to the poverty level, no creditor will be otherwise frustrated in his collection efforts.

Constitutional censure of traditional practices should produce more than mere stop-gap measures and will perhaps serve as the catalyst for a comprehensive reexamination of laws that for too long have escaped such scrutiny. If a state of law of extraordinary complexity contributed to the movement toward synthesis that culminated in article nine of the Uniform Commercial Code,[356] there may be reason to hope that the same stimulus will produce a similar herculean effort in the other fields of debtor-creditor relations. Certainly while the consumer would be deserving of special consideration in any comprehensive proposal that developed, the juxtaposition of creditor, debtor, and public interests demands that the consumer's problems be considered in relation to the whole. We must do more than pluck some of the offending titles from the mosaic.

In any even, practitioners and students of this once venerable field of law can no longer be accused of working in a static area. Although the issues are complex and consensus as to solutions notably lacking, the future of debtor-creditor relations will be both eventful and exciting.

355. 395 U.S. at 339.
356. *See* 1 G. GILMORE, *supra* note 321, §9.1.

LAW, LOVE AND PERCEPTIONS OF REALITY

PETER WARD*

I

God is, at least, infinite creation; observable, to an extent, in the transmutation of matter and energy; experiencable, to a degree, in sacrificial love.

II

This definition has both a material and non-material aspect combined in an over-all unity.

III

It is assumed that the material aspect is in continual flux because of (1) the influence of the forces in its own aspect and (2) the influence of the forces in the non-material aspect.

It is assumed, also, that the non-material aspect is in continual flux because of the influence of its forces and the forces in the material aspect.

Hence, it is presumed that the unitary aspect of the material and non-material aspects is in continual flux.

IV

Religion utilizes revelation and intuition to describe this unity.

Philosophy utilizes the intellectual processes to describe this unity.

Hence, it is presumed that religion and philosophy will be in continual flux.

V

Sacrificial love is a means by which this unity can be experienced.

Hence, it is presumed that such experiences will be in continual flux.

VI

Positive law is assumed to be a command operating within the material aspect.

Hence, it is presumed that positive law is in continual flux.

It is assumed that the material aspect can be described in ways that are relational to the non-material aspect.

It is assumed that positive law should seek solutions to the intrarelational problems of the material aspect which are tolerable to the non-material aspect (the correlary for law in the non-material aspect is apparent but beyond the ambit of this paper).

It is presumed that legal solutions will be in continual flux.

It is assumed that sacrificial love is a measure of adequacy in such solutions.

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