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# The Creditor, the Debtor and the Fourteenth Amendment

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# The Creditor, the Debtor and the Fourteenth Amendment

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There has been much commentary on the rights and liabilities arising out of the debtor-creditor relationship. Much of that discussion has centered on the constitutional issues related to the use of such remedies as garnishment, attachment, replevin and repossession. The controversial issue in repossession has been the propriety and constitutionality of the self-help provision of §9-503 of the Uniform Commercial Code. These remedies have provoked discussion when creditors have used them without giving notice and a hearing to debtors.

The difficulty encountered in a discussion of these issues is caused by the difference between the Supreme Court's confident pronouncements about due process in cases like *Sniadach v. Family Finance Corp.*[1] and *Fuentes v. Shevin*[2] and its approach in subsequent cases like *Mitchell v. W.T. Grant Co.*[3] What we have seen is a transition from the orthodox approach in *Fuentes* to the balancing of interests in *Mitchell* and thus a change in emphasis concerning the need for prior notice and hearing. The Court's guidance on due process requirements has in some respects confused lower courts in their quest for resolutions of due process problems.

With this in mind, one must approach a review of this area with some reservations. First, while the Supreme Court has said a great deal about the rights of debtors and creditors, it has not been particularly clear in distinguishing those rights. One must, therefore, seek some basis for distinguishing the Court's decisions in an effort to understand the current state of the law. In addition, there must be some discussion of the legal and policy questions underlying the creditor's right to repossess under §9-503. Such an inquiry may prove interesting, although somewhat speculative, because the Supreme Court has not yet issued an opinion on the constitutionality of this section.

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1. 395 U.S. 337 (1969).
2. 407 U.S. 67 (1972).
3. 416 U.S. 600 (1974).

### *Sniadach* TO *Fuentes*

In 1969 new ground was broken for debtor's rights. The U.S. Supreme Court, deciding *Sniadach v. Family Finance Corp.*,[4] held unconstitutional a statute that provided for the garnishment of wages without prior notice and hearing. The *Sniadach* decision was unique because it affected a special property interest, wages. Because of the Court's characterization of the property interest, it was thought that this advance in the protection of consumer rights might be restricted to the kind of situation presented in *Sniadach*. But along came *Fuentes v. Shevin*,[5] in which the Court required prior notice and hearing before a debtor's goods could be replevied. A hearing could be dispensed with in extraordinary situations, which might exist if (1) action was necessary to protect a governmental interest; (2) immediate action was required; and (3) the government had strict control over its monopoly of force in the retaking process.[6]

In *Fuentes*, the Court said the basic proposition was that a person had a right to be heard before he could be deprived of a significant property interest. It is noteworthy that the property interest of which the debtor was deprived was less than full title to goods; yet the Court saw no difficulty with that, because it regarded the deprivation of the use and possession of property, even though temporary, as a significant invasion of the individual's property rights under the Fourteenth Amendment.[7] This approach raised a problem concerning the creditor's rights. Obviously, if the debtor had less than full legal title to the property and still owed the creditor money on default, the creditor was in effect being deprived of a property interest—the basis of the security for his debt. Yet the Court in *Fuentes* did not perform a balancing test. It dealt essentially with the immediate problem of protecting the debtor's possessory interest in the property.

Nor did the Court see the debtor's assertion of his constitutional rights as dependent upon the involvement of necessities of life. Unlike *Fuentes*, *Sniadach* and *Goldberg v. Kelly*[8] dealt respectively with wages and welfare benefits, property interests that could be regarded appropriately as striking at the core of human existence. But the protection of the debtor in *Fuentes* was not restricted by this kind of limitation.

In *Fuentes*, the statutes required the creditor to post a bond in the event of replevin.[9] But, as the Court pointed out, this bond was no substitute for

4. 395 U.S. 337 (1969).

5. 407 U.S. 67 (1972).

6. *Id.* at 91. The exception for "extraordinary situations" was stated in Boddie v. Connecticut, 401 U.S. 371 (1971), in which the Court held that "due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals to seek judicial dissolution of their marriages." 401 U.S. at 374.

7. 407 U.S. at 86.

8. 397 U.S. 254 (1970). In this case a state's termination of welfare benefits without giving the recipient a hearing was held unconstitutional.

9. FLA. STAT. ANN. §78.07 (Supp. 1972); PA. RULES CIV. PROC. 1073(a), 1076 (1967).

due process, even though it was intended to deter frivolous claims. Furthermore, even if debtors could get their property back by posting other security, that too was an ineffective substitute for prior notice and hearing.[10] Any significant property interest fell within the protection of the Fourteenth Amendment and, in *Fuentes*, that property interest was continued possession and use of the goods despite the fact that legal title lay in the creditors. Of course, as the Court aptly pointed out, the nature of the hearing might be affected by the defenses lodged by the debtor.[11]

The Court also believed that the state could not yield its control over the exercise of state power.[12] In other words, the state could not allow an individual to use its vast resources to effect his own private objective without giving the debtor some effective means of stating his case. With respect to waiver, the Court was not convinced that the *Fuentes* debtors had effectively waived their constitutional rights. The waiver provision was part of a form contract, and there was no bargaining between the parties. By signing such an adhesion contract, the debtors could not have intended unequivocally to waive their right to a prior hearing. The debtors' agreement that the creditors could take back their property if the debtors defaulted by no means led to the conclusion that possession would be yielded under all conditions.

In his dissent, Justice White recognized the antagnostic interests of the creditor and the debtor. He said creditors would institute actions only if there was a real default; it would not be in the creditors' interest to institute default proceedings otherwise, because the creditors' objective was to obtain payment of the purchase price rather than the used goods.[13] He felt that the creditors had a real interest in preventing deterioration of their property while awaiting the outcome of the main action and that the creditors' desire to protect that legitimate interest was just as deep as the debtors' desire to protect their use and possession. In addition, Justice White recognized that creditors and debtors could effectively circumvent the requirement of prior notice and hearing by incorporating a waiver in their credit documents. Furthermore, he suggested that the initiation of this type of hearing might increase the cost of credit.[14]

### AFTER *Fuentes*: *Mitchell v. W.T. Grant*

Just when everyone thought that *Fuentes* had spoken authoritatively on the question of prior notice and hearing in connection with the deprivation

10. 407 U.S. at 83.

11. *Id.* at 86.

12. *Id.* at 93. The Court contrasted a seizure under replevin and a seizure under a search warrant. There was to be no implication that there should be a hearing before the issuance of a search warrant. *Id.* at 93-94 n. 30.

13. *Id.* at 100.

14. *Id.* at 103.

of property, *Mitchell v. W.T. Grant Co.*[15] came along and introduced some additional considerations. In that case, the purchaser had bought goods under an installment sales contract and the seller had retained a vendor's lien under state law for the balance of the purchase price. The purchaser defaulted and his property was retaken without prior notice and hearing pursuant to a writ signed by a judge. Justice White, the dissenter in *Fuentes*, wrote the majority opinion in *Mitchell*. As in *Fuentes*, he made the point that continued use of the property by the buyer after default would create some problems for the creditor because the goods would be depreciating during the period of default. This was true in both cases, but the Court in *Fuentes* had no difficulty in regarding this depreciation as a natural risk which the seller assumed in installment sales contracts. But, the Court pointed out, the distinction in *Mitchell* was that the sequestration of the property was ordered by a judge, whereas in *Fuentes* a judicial officer was not involved in the replevin process.[16]

Because of the real chance of concealment or destruction of the property by the buyer, the Court said, it was expedient for sequestration to occur without prior notice and hearing.[17] But one would think that this same condition would obtain in any case when property was in possession of the buyer with part of the purchase price outstanding. Clearly, prior notice that a sequestration or replevin proceeding has begun will always give a defaulting debtor the opportunity to make his own judgment with respect to the disposition of those goods. However, this was no more compelling under the facts of *Mitchell* than it was under the facts of *Fuentes*. *Mitchell* created something of a perplexity when one considers that the seller in *Fuentes* raised this very argument but lost.

The Court in *Mitchell* said all that the seller needed to do to effect sequestration was to display the probability of his success in a final adjudication.[18] Under these circumstances the seller usually asserts that he is entitled to the property because of the buyer's default. Arguably, the debtor should be given an opportunity to prove that the seller is wrong. The Court in *Mitchell* pointed out that the questions in cases of this sort normally were questions about the debt, the existence of the lien, and the fact of delinquency and said that these matters were easily established. The Court stressed that the debtor could have a full hearing on the ques-

15. 416 U.S. 600 (1974).

16. *Id.* at 615.

17. *Id.* at 609. The Court in *Fuentes* did recognize the possibility of certain special situations in which the creditor could show that he was in immediate danger of losing the value of his security through destruction or concealment by the debtor. But the statutes under consideration were not narrowly drawn to deal with such a situation. 407 U.S. at 93. The Louisiana statutes in *Mitchell* provided for sequestration if the creditor had the power to conceal or dispose of the property. 416 U.S. at 605. Perhaps the Louisiana statute was itself not narrowly drawn, and therefore the distinction between *Fuentes* and *Mitchell* on this ground was not substantial.

18. 416 U.S. at 609.

tion of possession immediately after sequestration of his property. But this justification seems to ignore the *Fuentes* mandate. The requirement of prior notice and hearing protects the debtor from an unwarranted interruption of his use and possession of the property. Thus it is not meritorious to argue that the prior hearing can be dispensed with simply because the debtor will have a later hearing.[19] The later hearing may be too late. The Court's view of the pre-*Sniadach* cases as mandating a hearing only before final deprivation of property may be questioned for the same reason.[20] The issue is not really whether there will be a hearing before final deprivation; it is whether the debtor is to be deprived of his possessory interest in the property before he has had an opportunity to refute the creditor's claims to that property.

It was also suggested in *Mitchell* that *Sniadach* had recognized that garnishment could be exploited by creditors against unsuspecting debtors. But it seems as if that possibility exists in other situations—in sequestration cases, for example. It is true that in *Fuentes* the writ of replevin was issued by a court clerk, whereas in *Mitchell* the process was supervised by a judge. But it is appropriate to ask whether in either of those cases the supervision protected the debtor's rights to the extent required. The assertion that *Mitchell* was different because there was judicial supervision from beginning to end necessarily implied that the judge issuing the writ delved into the matters at hand to forestall the commission of error.[21] The fact is that regardless of the approach, the creditor in any given case is in effect asserting a claim to ownership of the property based upon the facts as he sees them. Therefore, the bare assertion of judicial supervision over the issuance of the writ does not necessarily suggest that the debtor's rights are going to be protected ex parte.

The difficulty with the *Mitchell* decision was recognized by Justice Powell in his concurring opinion when he said that the *Fuentes* decision was overruled by *Mitchell.*[22] While Justice Stewart made the point in his dissent that the Court was not adhering to the doctrine of stare decisis,[23] Justice Powell did not regard that doctrine as preventing the Court from reconsidering its decision in *Fuentes.*[24] Furthermore, Justice Powell saw a

19. 416 U.S. at 611. Of course,it depends on the importance that one attaches to the temporary deprivation of a significant property interest.

20. *Id.* at 611. The Court relied on such cases as Phillips v. Commissioner, 283 U.S. 589 (1931), and Scottish Union & National Ins. Co. v. Bowland, 196 U.S. 611 (1905).

21. 416 U.S. at 616. In North Georgia Finishing v. Di-Chem, 419 U.S. 601 (1975), Justice Powell suggested in a footnote that due process did not require a judicial officer to issue a writ of garnishment as long as the debtor was assured of a prompt post-garnishment hearing before a judge. He said it was sufficient for a clerk to issue the writ upon the filing of a proper affidavit. 419 U.S. at 611 n.3.

22. 416 U.S. at 623. Justice Powell came to grips with the basic inconsistency between the two cases by recognizing that *Fuentes* overlooked the concurrent property interests of the creditor and the buyer.

23. *Id.* at 635.

24. *Id.* at 629.

distinction between the prejudgment garnishment of wages in *Sniadach*, in which the creditor lacked a pre-existing property interest, and the facts in *Mitchell*, in which the creditor had a vendor's lien for the remaining installments. He also suggested that the debtor in *Mitchell* did not have a "brutal need."[25] This language suggested that Justice Powell was making a distinction between the type of property in these cases. Of course, this was a complete separation from the *Fuentes* doctrine that procedural due process required a hearing before a temporary deprivation even if the property was not a necessity of life.[26] Thus, *Mitchell* weakened the impact of *Fuentes* to the extent that it viewed the deprivation of property as not being as crucial as it sounded at first blush if the property did not meet the criteria suggested by Justice Powell.

Justice Stewart, in his dissenting opinion, came to grips with the similarity of the facts in *Fuentes* and *Mitchell*. As he so rightly pointed out, the filing of a bond and the allegations in a petition for sequestration were relevant to the form, but not to the requirement, of a pre-seizure hearing.[27] So, if *Fuentes* were to remain respectable authority, one would have to question the view, enunciated by the Court in *Mitchell*, that the decision there could be sustained on the following grounds: (1) the plaintiff had to file an affidavit setting out his basis for relief; (2) a judge issued the writ; (3) the basic issue was whether the plaintiff had a vendor's lien and whether the debtor was in fact in default.

The majority in *Mitchell* emphasized that an affidavit alleging the facts on which relief was sought was necessary and that the writ was eventually issued by a judge. But, as Justice Stewart correctly asserted, an affidavit would hardly be a substitute for prior notice and hearing, because it was simply a firm statement of the creditor's side of the issue and a subsequent issuance of a writ by a judge was in many cases simply a ministerial function. As a matter of fact, outside Orleans Parish the function was performed by a court clerk rather than a judge. Even in Louisiana, judicial supervision was not universally regarded as a necessary ingredient of the writ-issuing process.[28]

The dissent also recognized that the complexity of the issues should have nothing to do with the requirement of notice and hearing. Obviously, to the extent that the factual issues could be easily determined, the formality and the depth of the hearing could be lessened. But that goes to the form of the hearing. It was so held in *Fuentes*, but the majority in *Mitchell*

25. *Id.* at 628 n.3.

26. 407 U.S. at 85. *See also* Bell v. Burson, 402 U.S. 535 (1971), in which statutes allowed the parties to recover their property by posting the necessary security. Despite this, the Court held that the debtors could not be deprived of their property without a prior hearing.

27. 416 U.S. at 631.

28. LA. CODE OF CIV. PROC. arts. 281-283 (1960). The Court conceded that the validity of procedures outside Orleans Parish was not an issue in the *Mitchell* case. 416 U.S. at 606.

apparently did not see fit to continue that approach and made a distinction between *Fuentes* and *Mitchell* on this point.[29]

An interesting question is why the Court was persuaded to reach a different conclusion in *Mitchell* just a short time after *Fuentes* had made constitutional history. Could it be that the *Mitchell* Court was convinced that judicial issuance of the writ was an overriding consideration, and that *Fuentes* could not be considered binding authority on this constitutional question because of the Court's composition at the time of the decision?[30] Or was it the presence of the vendor's lien in *Mitchell*? Obviously, one can argue that there was always a question of balancing of interests between the creditor and the debtor, but these interests were no more apparent at the time of *Mitchell* than they were at the time of *Fuentes*. The creditor's assertion that his interest was greater than that of the debtor at the time of default could not necessarily be shown. His assertion of the right to possession of the property in question assumed that the debtor had no basis on which to prevent sequestration of the property. The basic question was not a decision on final deprivation but rather on the disposition of the property before a final determination on the merits. On that basis, therefore, it may be argued that in a case like *Mitchell* the debtor ought to be granted the privilege of forestalling any deprivation of his property, however temporary. After all, *Fuentes* had made the point that the deprivation of a significant property interest, however temporary, without prior notice and hearing was constitutionally unacceptable.[31] It is for this reason that *Mitchell* has provided an apparent constitutional dilemma. While *Fuentes* may not have been overruled, *Mitchell* has raised a serious question about its viability.[32]

### AFTER *Mitchell: North Georgia Finishing v. Di-Chem*

As if this were not enough, only a year later the Court decided *North Georgia Finishing, Inc. v. Di-Chem., Inc.*[33] In that case, a bank account was impounded pursuant to a writ of garnishment issued by a court clerk

29. 416 U.S. at 617-618.

30. In *Mitchell*, Justice Stewart's dissenting opinion drew attention to the only perceivable change since the *Fuentes* decision—the Court's composition. 416 U.S. at 635-636. In *North Georgia*, Justice Blackmun, dissenting, said that *Fuentes* should not have been decided by a 4-3 vote when two new justices were available for a re-argument. 419 U.S. 601, 616 (1975).

31. The Court reasoned that "Any significant taking of property by the State is within the purview of the Due Process Clause. While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind." 407 U.S. at 86. This statement was made in the face of evidence that the debtors lacked full legal title to the property in question and despite the fact that the debtors could regain their property again by posting the necessary security.

32. *See* Pearson, *Due Process and the Debtor, The Impact of Mitchell v. W. T. Grant*, 28 OKLA. L. REV. 743, 792 (1975).

33. 419 U.S. 601 (1975).

without notice or an opportunity for an early hearing. The Court held that this procedure was unconstitutional. It is interesting that Justice Powell, in his concurring opinion, stated in a footnote that the participation of a judge in the issuance of the garnishment writ was not a necessary ingredient of due process.[34] This comment suggested that the emphasis of the *Mitchell* Court on a judicially issued writ was not all that important in the final analysis. Justice Powell then went on to say that the most compelling circumstance was that there was no early hearing available after the garnishment.[35] But apparently, even if there had been a timely post-garnishment hearing, the strict *Fuentes* mandate of a pre-seizure hearing would not have been satisfied.

On the question of the clerk-judge distinction, Justice Blackmun suggested in his dissent that the distinction was insignificant as long as the court officer issuing the writ was acting impartially.[36] But he was of the opinion that the *Sniadach* holding should be restricted to its facts—that is, to situations involving necessities of life such as wages. Accordingly, he would not extend the *Sniadach* principles to business relationships of the type found in *North Georgia*.[37] Justice Blackmun also exhibited some of the perplexity arising out of the *Fuentes-Mitchell* sequence. He could see no difference between the facts of the cases but was of the opinion that *Mitchell* had severely restricted *Fuentes*.[38] He also believed that *Fuentes* should not have been decided by only seven justices when two new justices were available for a reargument.[39]

Justice Powell's concurring opinion recognized the satisfaction of procedural due process by the requirement of adequate security and an opportunity for a prompt judicial hearing after garnishment. But in *Fuentes* the Court did not regard the Florida statute's provision for a post-seizure hearing as a satisfactory substitute for a pre-seizure hearing. Justice Powell's opinion merely continued the approach of *Mitchell* and recognized as the important deficiency in the Georgia statute the failure to provide for a prompt hearing after garnishment.[40]

It is significant that the Court in *North Georgia* purported to rely on

34. 419 U.S. at 611 n.3.

35. *Id.* at 613.

36. *Id.* at 619.

37. *Id.* This contrasted with the approach taken by the majority in concluding that corporations could also suffer irreparable injury through the deprivation of their bank accounts without due notice and hearing. The majority was, therefore, not prepared to make a distinction for purposes of applying the Due Process Clause. *Id.* at 608. *See also* Fuentes v. Shevin, 407 U.S. at 89-90.

38. 419 U.S. at 616. In *Mitchell*, Justice Blackmun's view was amply supported by the dissenting opinions of Justice Stewart and Justice Brennan and the concurring opinion of Justice Powell.

39. 419 U.S. at 616. Argument in *Fuentes* took place on November 9, 1971. Justice Powell and Justice Rehnquist took their seats as members of the Court on January 7, 1972.

40. 419 U.S. at 613.

*Fuentes* for its ultimate conclusion that the Georgia statute was unconstitutional. Yet the Court did not dwell on the requirement of a prior hearing for the debtor. It talked mainly in terms of the requirement of an early hearing.[41] That language suggested, therefore, that while the Court was attempting to rely on *Fuentes,* it recognized the rationale used in *Mitchell* to support a prompt post-seizure hearing in fulfillment of the due-process requirements. Justice White went even further in finding the Georgia statute unconstitutional by adding that the seizure of the property involved had been carried out "without notice and without opportunity for a hearing or other safeguard against mistaken repossession . . . ."[42] The implication was that something other than a hearing could be constitutionally acceptable. A minor change had therefore been wrought in the face of *Fuentes,* because that case seemed to accept nothing short of a prior hearing under similar circumstances. Even if *Fuentes* had not been shaken by the reasoning of *Mitchell,* its strict language had been weakened by the complement of *Mitchell* and *North Georgia.*[43]

The Court's recognition in *North Georgia* of other safeguards for the debtor's protection was not strictly in line with the *Fuentes* approach, which recognized a deviation from the prior hearing rule only under "extraordinary situations."[44] Of course, this was not unpredictable in view of *Mitchell,* for the Court in *North Georgia* seemed bent on preserving the *Mitchell* heritage to any extent possible. Thus, for example, it was not surprising that the Court found the Georgia statute deficient partly because there was no judicial issuance of the writ, as there had been in *Mitchell.* It is unfortunate that the majority in *North Georgia* placed such reliance on this aspect of the case because it assumed that judicial participation at this point in the process went to the substance of the matter.[45] The essential consideration should have been whether the requirement of judicial participation was essential to due process under the facts of the case. Surely if the same objective could be accomplished through the nonjudicial issuance of the writ, then due process should be satisfied regardless of the participants.

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41. *Id.* at 607.

42. *Id.* at 606.

43. *See* Pearson, *supra* note 32, at 792, in which the author suggests that Fuentes survives with respect to its conclusion and nothing more. *Cf.* Alexander, *Cutting the Gordian Knot: State Action and Self-Help Repossession,* 2 HASTINGS CONST. L. Q. 893, 930 (1975).

44. See Catz and Robinson, *Due Process and Creditors' Remedies: From Sniadach and Fuentes to Mitchell, North Georgia and Beyond,* 28 RUTGERS L. REV. 541, 564 (1975), in which the authors suggest that *North Georgia's* reliance on *Fuentes* was superficial.

45. For a discussion of this point, see Pearson, *Due Process and the Debtor: The Impact of Mitchell v. W. T. Grant,* 29 OKLA. L. REV. 277, 293-295 (1976). This assumption was particularly questioned by Justices Powell and Blackmun in *North Georgia* on the theory that what was really necessary was the participation of a neutral person rather than the formality of judicial participation. 419 U.S. 601, 619 (1975). *See also* Scott, *Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process,* 61 VA. L. REV. 807, 853-854 (1975).

*Mitchell* AND *North Georgia:* SOME OBSERVATIONS

*Mitchell* made the point that the property involved did not belong exclusively to the debtor and that both the seller and buyer had concurrent interests in the sequestered property.[46] The same observation could have been made concerning the interests of the buyer and the seller in *Fuentes,* but the Court did not find this duality of interests convincing enough to detract from the recurring principle that deprivation of the buyer's interest could not be accomplished without a hearing.[47] The Louisiana statute in *Mitchell* provided for sequestration when the seller claimed ownership or possession of the property and when it was within the debtor's power to conceal or dispose of it.[48] But that power also existed in *Fuentes,* and the same allegation may be made whenever the seller is trying to recover property purchased from him by the buyer.

In the same vein, the presence of the vendor's lien in *Mitchell* should not have been accorded such weight in the due-process considerations of that case. It is not clear that the vendor's right in *Mitchell* to be paid or to repossess the goods was any more forceful than in *Fuentes,* in which the buyer had promised in the retail sales contract that he would pay the full puchase price for the goods he was using. Furthermore, the buyer's incentive to destroy or dispose of the goods in *Mitchell* was no stronger than it was in *Fuentes.* The decline in value of the property during its continued use should not have militated against the application of the prior-hearing requirement, because depreciation was also possible in *Fuentes.*[49] The buyer's use and possession of the property were much more important considerations in *Fuentes* than they apparently were in *Mitchell* because the Court in *Mitchell* was not prepared to regard use and possession as overriding features when considered against the seller's security interest in the property. To that extent, the *Mitchell* Court expressed great interest in protecting the seller's access to property that was in the buyer's possession and went so far as to suggest that the seller was protected in the normal course of events only if the buyer continued to make payments that were commensurate with the deterioration of the property's value.[50] After

46. 416 U.S. at 608-609.

47. 407 U.S. at 86-87.

48. LA. CODE CIV. PROC. art. 3571 (1960). There was no suggestion by the creditor in *Mitchell* that the debtor was about to destroy the goods and, of course, that allegation was not required under the terms of the statute. 416 U.S. at 605.

49. The Court in *Mitchell* expressed concern for the seller's interest in the property. "Clearly, if payments cease and possession and use by the buyer continue, seller's interest in the property as security is steadily and irretrievably eroded until the time at which the full hearing is held." 416 U.S. at 608.

50. *Id.* The Court said: "Wholly aside from whether the buyer, with possession and power over the property, will destroy or make away with the goods, the buyer in possession of consumer goods will undeniably put the property to its intended use, and the resale value of the merchandise will steadily decline as it is used over a period of time. Any installment seller

*Fuentes,* one would have thought that such a mechanical application of a value formula would be avoided when due process was required.

In addition, the assertion that the buyer might destroy goods within his own control was not part of the limiting language in the *Mitchell* statute. If the statute had set out specific requirements dealing with the possibility of the property's destruction, there would have been less difficulty about the urgency of granting sequestration.[51] In *Fuentes,* the Court recognized that there might be circumstances in which the property would have to be rescued from the buyer's control because it was about to be concealed or destroyed.[52] That kind of situation had been expressly recognized in *Sniadach*[53] and may be regarded as one of the extraordinary situations in which prompt action has to be taken to protect the seller's rights. But the Louisiana statute in *Mitchell* did not require the presence of that element, and therefore it was not narrowly drawn to come within the concept of an extraordinary situation.

Furthermore, the fact that a transfer of the property would effect a termination of the vendor's lien did not, by itself, add to the emergency that the Court was dealing with in *Mitchell.*[54] After all, the major question

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anticipates as much, but he is normally protected because the buyer's installment payments keep pace with the deterioration in value of the security." *Mitchell* seemed to make the point that a prior hearing would have exposed the creditor's goods to a substantial depreciation. This assumption was not supported by adequate data. *See* Pearson, *supra* note 32, at 762, in which the author makes the point that the period between the filing date for sequestration and the hearing date is the period of delay caused by the requirement of the debtor's constitutional right to notice and hearing and that the state can make this intervening period as short as possible to accommodate the conflicting interests of the creditor and the debtor. *See also* Dauer and Gilhool, *The Economics of Constitutionalized Repossession: A Critique for Professor Johnson, and a Partial Reply,* 47 S. CAL. L. REV. 116, 122-123 (1973).

51. The Louisiana statute provided: "When one claims the ownership or right to possession of property, or a mortgage, lien, or privilege thereon, he may have the property seized under a writ of sequestration, if it is within the power of the defendant to conceal, dipose of, or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action." LA. CODE CIV. PROC. art. 3571 (1960). There is a serious question whether the debtor in *Mitchell* had it within his power to conceal or dispose of the property. It seemed as if this would present a complex factual determination. On this basis, there might be very little difference between the standard of fault applied in *Fuentes* and the purportedly simple questions involved in *Mitchell,* which were supposed to be susceptible to documentary proof.

52. 407 U.S. at 93. The Court made the point as follows: "Nor do the broadly drawn Florida and Pennsylvania statutes limit the summary seizure of goods for special situations demanding prompt action. There may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods."

53. 395 U.S. at 339. In *Sniadach* the Court conceded that summary garnishment might comply with due process requirements in extraordinary situations. The Court cited Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928), in which attachment was necessary in the case of a bank failure, and Ownbey v. Morgan, 256 U.S. 94 (1921), in which attachment was sustained to obtain jurisdiction in a state court.

54. *See* Pearson, *supra* note 32, at 757, where the author suggests that the importance of the vendor's lien was overstated, in the sense that it added nothing to the vendor's fundamental rights against the debtor.

was not whether the vendor would retain his lien but whether the buyer could be deprived of his possession without notice and a hearing. The issue of continued use and possession of property cannot, therefore, be obviated by the bare assertion that the vendor's lien is likely to disappear if the buyer transfers the property to another. To assure the continuity of the vendor's lien through sequestration was to elevate that interest above the buyer's interest in the continuing use and possession of the property in dispute. The *Mitchell* Court never did quite explain its reasons for assigning such relative importance to the continuity of the vendor's lien in the face of the buyer's due process claim.[55] If the vendor's lien was in fact a special kind of property interest, then the decision could have been categorized on that basis. However, the Court in *Mitchell* proceeded to balance the interests of the seller and the buyer, and it conveniently ascribed to the vendor's lien a superiority which could not be otherwise explained.[56]

If, in fact, the vendor's lien grants the seller a priority which does not exist in other circumstances, then it can be argued that the case for summary deprivation is not as strong as when the vendor's lien ceases to exist or has not arisen at all. The characterization of the seller's interest under state law should not have been sufficient to relieve the Court of the responsibility for maintaining the constitutional adjudication of the buyer's rights.

In *Sugar v. Curtis Circulation Co.*,[57] a federal district court in New York invalidated a pre-judgment attachment statute, mainly because it did not provide a prompt post-seizure hearing at which the creditor would have to prove the grounds underlying issuance of the writ. Though the Supreme Court remanded the case for a construction of the statute by the New York state courts, an examination of the district court's approach to the *Fuentes* and *Mitchell* precedents may be instructive as one that echoes some of the perplexity experienced by other courts.

In *Sugar*, the creditor was seeking an attachment of the debtor's funds because the debtor had engaged in fraud. The court in *Sugar* seemed to rely on *Fuentes* somewhat, but it regarded the available post-seizure hearing as inadequate mainly because such a hearing would concentrate on the question whether the attachment was unnecessary to the plaintiff's security. If it was, the sole ground for vacating the attachment was met. The Court in *Fuentes* required a pre-seizure hearing. By stating its essen-

55. Perhaps the difference between *Fuentes* and *Mitchell* can be explained simply by a different approach to the value of the interests involved. Justice White treated the existence of the vendor's lien as an overriding interest and in so doing retreated from the importance of the property rights, use and possession, enunciated in *Fuentes*.

56. It may be explained to some extent, however, on the basis of a fundamental shift in the application of due-process standards. One may surmise that *Mitchell* altered the framework of property values.

57. 383 F. Supp. 643 (S.D. N.Y. 1974), *remanded sub. nom.*, Carey v. Sugar, 425 U.S. 73 (1976).

tial reliance on the *Fuentes* ruling and then shifting to the *Mitchell* analysis, the court in *Sugar* showed some confusion in its opinion.[58] Furthermore, the court adverted to the lack of a concurrent possessory interest in the plaintiff and contrasted this with the situation in *Mitchell,* in which the creditor had a vendor's lien in the sequestered property.[59] The reference to this element in *Sugar* is somewhat misleading, because the Supreme Court in *Mitchell* did not explain in detail the significance of concurrent possessory interests in the creditor and the debtor even though it apparently was a basis for the Court's decision.[60]

The court in *Sugar* further relied on the fact that the issues in *Mitchell* were rather uncomplicated. The only allegations necessary for the issuance of the writ were the existence of the debt, the lien and the default, and it was felt that the simplicity of those factors made it easy to determine whether an attachment of property should be sustained. On the other hand, the issue in *Sugar* was the existence of fraud, so an ex parte determination of that question could not be properly made. The difficulty with this approach is that it misses the point made in *Mitchell* that the right of sequestration was based on the possibility that the debtor might conceal property and that it was therefore necessary to protect the creditor's interests. Although one would think that the classic case for attachment would be an allegation of fraudulent conduct by the debtor,[61] the court in *Sugar* stressed the undesirability of deciding fraud ex parte. Thus the court in *Sugar* used the *Mitchell* formula to deny the remedy of attachment in a situation in which the remedy might have fit nicely into the scheme of things.

It is arguable that *Sugar* went beyond *Mitchell* in denying summary process in a situation in which it seemed merited. One can regard the court's discussion in *Sugar* with some interest, because the Court in *Mitchell* had raised the question of the buyer's power to defraud and conceal as a rationalization for the existence of sequestration in that case.[62] It

58. This confusion was somewhat akin to the Court's treatment of the *Fuentes* and *Mitchell* decisions in *North Georgia.* Justice White quoted a passage from *Fuentes* which underlined the fact that any significant taking of property by the state came within the coverage of the Fourteenth Amendment. The Court did not read that as requiring a prior hearing, but proceeded to state that either a hearing or similar safeguards would meet the constitutional mandate. 419 U.S. at 606.

59. 383 F. Supp. at 649.

60. It is significant that the Court in *North Georgia* did not deal with the existence of a creditor's security interest in *Mitchell.* Yet the district court in *Sugar* regarded it as a significant issue on the basis of the *Mitchell* discussion.

61. One of the reasons usually mentioned for the preservation of the creditor's rights in sequestration or attachment is the situation in which the debtor might conceal or dispose of the creditor's property if he were granted the right to a prior notice and hearing. The provision under discussion in *Sugar* gave the debtor the opportunity of getting his property back if the court determined that the attachment was unnecessary for the creditor's security. N.Y.C.P.L.R. §6223 (McKinney 1963).

62. The Court adverted to the fact that the debtor might secrete the goods to the disad-

is significant, then, that the very point raised in *Mitchell* was treated differently in *Sugar*. This is not to underestimate the importance of the power of defaulting debtors to conceal property. However, *Mitchell* ascribed a significance to that issue which has led to a certain degree of wandering on the part of other courts.[63] Perhaps the probability of fraudulent conduct may, together with other circumstances, constitute an extraordinary situation calling for the invocation of an extraordinary remedy like sequestration or attachment. But surely it is not an item to be taken in isolation, without the presence of other overriding factors, nor is its existence to be assumed in every occurrence of default. It may be assumed that the average creditor carefully considers his risk when he extends credit to his debtor. Even in the absence of a lien or other adequate security for the debtor's performance, the mere chance that the property might be concealed should not automatically grant the petitioner the right to summary process without a hearing upon the debtor's default.

The Supreme Court's remand of the case paid due attention to another factor, the merits of the underlying claim.[64] It was quite possible that the statute would be interpreted by the New York courts as permitting an examination of the plaintiff's claim, thereby preserving the statute's validity. That approach would be consistent with an establishment of the grounds underlying the issuance of the writ of attachment.

In *Mitchell,* there was a duality of interests which should have been recognized as important. But in *Fuentes,* was there not a similar conflict of interests—did the Court not say that the right to a hearing must be granted at a time when deprivation can still be forestalled?[65] The Court in *Fuentes* did not feel that the duality of interests should be emphasized in the face of an unconstitutional deprivation of property.[66] Furthermore, the

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vantage of the creditor. There was no real showing in the *Mitchell* case that the debtor had this propensity. 416 U.S. at 608. *See also* Pearson, *supra* note 45, at 289.

63. *See, e.g.,* Guzman v. Western State Bank, 516 F.2d 125 (8th Cir. 1975).

64. Carey v. Sugar, 425 U.S. 73 (1976). In a per curiam opinion, the Supreme Court asked the district court to refrain from a decision on the constitutional issues until the state courts could interpret the statute. The Court was not sure that the New York courts would interpret the statute as precluding an inquiry into the merits of the creditor's claim. Accordingly, the Court conceded that the New York courts would consider other grounds for vacating the attachment besides the one concerning the creditor's security. The Court therefore disagreed with the lower court that the New York statute prohibited a broad inquiry on a hearing to vacate the attachment.

65. The Court recognized the peculiar kind of property interest that the debtor was protecting in *Fuentes.* "The appellants who signed conditional sales contracts lacked full legal title to the replevied goods. The Fourteenth Amendment's 'protection of property,' however, has never been interpreted to safeguard only the rights of undisputed ownership." 407 U.S. at 86.

66. In connection with the debtors' right to constitutional protection of their possessory interest, the Court said: "Clearly, their possessory interest in the goods, dearly bought and protected by contract, was sufficient to invoke the protection of the Due Process Clause." 407 U.S. at 86-87 (footnote omitted).

Court said that a pre-seizure hearing could be avoided only where there was an extraordinary situation justifying postponement. Thus, the attempt to rationalize the difference in results between the cases can be only moderately successful. In *Fuentes,* the seller retained an interest in Mrs. Fuentes' replevied property, but the Court did not see fit to discuss it in any great detail. If the Court in *Mitchell* had decided to vary from its holding in *Fuentes* and to recognize the seller's interest as providing an additional element for the resolution of the conflicting claims, then it should have said so and not have regarded the authority of *Fuentes* as unchallenged.[67] It is reasonable to regard the secured creditor as different from the unsecured creditor in terms of the constitutional protection to which each may be entitled. But if the Court wanted to make that distinction, it should have chosen a case other than *Mitchell.* So soon after the decision of *Fuentes,* it was impolitic to regard *Mitchell* as appropriate for an insertion of the dual-interest principle without creating an implication that the *Fuentes* decision was overruled.[68]

A dual-interest test, requiring the strict adherence to due process required in *Fuentes,* would be understandable if the Supreme Court had not subsequently decided *North Georgia.* In that case, there was no duality of interest in the property in question, and the principles of the *Fuentes* decision could have been applied on a strict basis.[69] Instead, *North Georgia* adverted to the absence of *Mitchell* factors, such as the judicial issuance of the writ and the corporation's right to an immediate post-seizure hearing.[70] Thus, if the duality principle had credibility before, the *North Georgia* decision certainly undermined it substantially.[71] The Court caused

67. One author has suggested that *Fuentes* and *Mitchell* can be reconciled on the basis that when there is a dual interest, the additional factors mentioned in Mitchell would have to be considered, but when there is a single interest, *Fuentes* would control. The author mentioned that while he was arguing that *Fuentes* controlled where there was a sole interest, it was not his contention that *Fuentes* was an example of a sole interest. He then conceded that *Mitchell* could be regarded as a "retreat" from *Fuentes.* Rendleman, *Analyzing the Debtor's Due Process Interest,* 17 WM. & MARY L. REV. 35, 41-42 (1975).

68. The court in Turner v. Impala Motors, 503 F.2d 607 (6th Cir. 1974), viewed the impact of *Mitchell* on *Fuentes* as follows: "However, in the recent case of Mitchell v. W.T. Grant Co., . . . . it would appear that *Fuentes* has been effectively overruled." *Id.* at 610. In that case the Sixth Circuit sustained the constitutionality of a Tennessee self-help repossession statute. Justice Stewart, in his dissenting opinion in *Mitchell,* regarded it this way: "Yet the Court today has unmistakably overruled a considered decision of this Court that is barely two years old, without pointing to any change in either societal perceptions or basic constitutional understandings that might justify this total disregard of stare decisis." 416 U.S. at 635. In *North Georgia,* Justice Stewart, in his concurring opinion, expressed his gratification that his previous suggestion of the extinction of *Fuentes* had been exaggerated. 419 U.S. at 608. One must indeed search diligently for the basis of his optimism.

69. Rendleman, *supra* note 67, at 43.

70. 419 U.S. at 607.

71. The Court in *North Georgia* did not discuss the dual interest principle. It proceeded to point out that some of the factors present in *Mitchell* were not present in *North Georgia.* Other courts have considered and followed the North Georgia approach and considered the

some perplexity by its reference in *North Georgia* to *Fuentes*, while at the same time emphasizing other factors present in *Mitchell*.[72] At the moment, then, there is some doubt that the presence of concurrent interests in the buyer and the seller has created any solution to the due-process question concerning the deprivation of property. If the Supreme Court wanted to state categorically that the nature of due process depended upon the application of a single or dual interest test, then *North Georgia* was the classic case for the emphasis of such an approach. As it turned out, that case did not apply the three-tier approach suggested by one commentator.[73] That approach would have considered the debtor's interest, the existence of a single or dual interest in the property and the type of process due under the circumstances. *Mitchell* has created such perplexity because after the strict application of the due-process requirement in *Fuentes*, one would have thought that *Mitchell* would not have added factors to be considered in the resolution of the problem without a clear statement of its impact on the *Fuentes* approach.

It may be argued that ignoring the three-step approach to the resolution of the problem may lead to an unfortunate result based on the other factors mentioned in *Mitchell*.[74] The strict application of the *Fuentes* doctrine to the *Mitchell* facts would have mandated a holding that the Louisiana statute was unconstitutional because it allowed a deprivation of property without a prior hearing. But even in the face of additional elements having to do with the judicial issuance of the writ, the fact is that an interesting feature of *Mitchell* was the debtor's ability to have an early opportunity for a hearing.[75] Furthermore, the Court in *Mitchell*, conceding that the debtor no doubt owned the goods, was careful to point out that despite that claim, his "title was heavily encumbered."[76] But in *Fuentes* the seller had

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*Mitchell* factors even where there is no duality of interests. *See, e.g.*, Hutchison v. Bank of North Carolina, 392 F. Supp. 888 (N.D. N.C. 1975); Douglas Research & Chemical, Inc. v. Solomon, 388 F. Supp. 433 (E.D. Mich. 1975).

72. 419 U.S. at 605-606.

73. *See* Rendleman, *supra* note 67, at 41, where the author suggests that *Sniadach*, *Fuentes* and *Mitchell* can be reconciled by the creation of this three-step process.

74. If *Mitchell* is to have any vitality, one cannot ignore the pertinence of an inquiry about the dual interest. Thus, to apply the *Mitchell* factors to a case in which there was no security interest, for example, might create an injustice in light of *Fuentes*.

75. 416 U.S. at 609. The Court said that the Louisiana statute comported with due process and that the statute would permit seizure of the debtor's property as long as the debtor had "early opportunity to put the creditor to his proof." *Id.*

76. *Id.* at 604. As it turned out, this statement took an added significance in the opinion, because the Court went on to deal with the basic financial risk and the depreciation which might befall the seller during the buyer's default. The Court, therefore, engaged in a quantitative analysis of the seller's interests and gave considerable weight to the economic implications of the creditor's rights under the sequestration statute. The Court recognized the same issues in *Fuentes* but took a different approach when it regarded the cases dealing essentially with a creditor's private gain. In those cases retaking could be supported only when (1) there was an immediate danger of concealment or destruction of the goods or (2) there was an overriding public interest to be served. 407 U.S. at 90-93.

retained title to the property in dispute, so his interest was equally important.[77] Why did the Court, hardly three years later, deem it fit to base such importance on this competing interest of the creditor without saying something definitive about *Fuentes*?[78] It is eminently reasonable to support a policy which would articulate the duality of interest propounded in *Mitchell*. If that is the governing standard, then it is submitted that *Mitchell* has, in fact, diluted the effect of *Fuentes* to the extent that its authority can be seriously questioned.

### FROM *Sniadach* TO *North Georgia*: IMPACT ON LOWER COURTS

A recent case, *Barry Properties, Inc. v. Fick Bros. Roofing Co.*,[79] discussed the effect of *Sniadach* and its progeny in passing on the constitutionality of the Maryland mechanics' lien statute.[80] The mechanics' lien attached to the property as soon as the work was performed, and in any case involving a subcontractor, the subcontractor had to provide notice of his intention to claim a lien if the lien was to be effective. The property owner claimed that the statute deprived him of his property without due process. The court found the statute unconstitutional in its present form but proceeded to treat it as severable so as to sustain some constitutional provisions. Furthermore, the court found that the property owner knew of the subcontractor's claim to the lien long before enforcement procedures were brought and that he was not deprived of any property prior to the court's decision to enforce the lien. The court, therefore, decided that the property owner did, in fact, receive procedural due process on the lien question. One of the interesting points in this opinion was the court's synchronization of *Sniadach, Fuentes, Mitchell* and *North Georgia*.

> What we glean from *Sniadach, Fuentes, Mitchell* and *North Georgia Finishing* is that, lacking extraordinary circumstances, statutory prejudgment creditor remedies which even temporarily deprive a debtor of a significant property interest without notice and an opportunity for a prior-probable-cause-type hearing are, as held in *Fuentes*, unconstitutional under the fourteenth amendment's due process clause unless safeguards such as those mentioned in *Mitchell* and *North Georgia Finishing* are present and even then, although this is less clear, the law may be invalid

77. In *Mitchell*, the seller had a lien which gave him priority over other creditors for the price of his goods. *See* LA. CODE OF CIV. PROC. art. 3227 (1960). In *Fuentes*, the seller's protection was not quite as broad for he could lose his security interest to buyers in the ordinary course of business and also to consumer buyers. FLA. STAT. ANN. §679.9-307 (1969). The risk to the seller was probably as great in both cases.

78. One supposes that Justice Stewart was asking himself the same question in his dissenting opinion in *Mitchell* when he suggested that the Court "has unmistakably overruled a considered decision of this Court that is barely two years old . . . ." 416 U.S. at 635.

79. 277 Md. 15, 353 A.2d 222 (1976).

80. MD. ANN. CODE, Real Property, §§9-101 to 9-111 (1974, Supp. 1975).

> if the issues underlying the seizure are not susceptible to uncomplicated documentary proof or if the creditor does not have a present interest in the property seized.[81]

The interesting part of this statement is that toward the end the court conveyed its lack of confidence about the state of the law in those cases where the issues affecting the seizure of property are not supported by simple documentary proof or the existence of a security interest. That is quite understandable in view of the fact that Justice White in *North Georgia* had mentioned only three of the elements so clearly set out in the *Mitchell* decision and did not discuss the element dealing with the facility of documentary proof attending issuance of the writ.[82] That omission made it difficult to tell whether *North Georgia* meant to remove the question of documentary proof as an essential element in a decision about the requirement of prior notice and hearing.

Furthermore, there was no discussion in *North Georgia* of the absence of a security interest on the part of the creditor. The controlling distinction seemed to be the absence of any of the *Mitchell* safeguards.[83] Justice Powell's concurring opinion in *Mitchell* specifically mentioned the inherent risk that a defaulting debtor might prejudice his creditor's security by a concealment of the property in question.[84] His language in *North Georgia* approximated that in *Mitchell* but there was no specific mention of a security interest and, as a matter of fact, he discussed the disposition of the property in terms of an assurance that the debtor would have assets on hand to satisfy the creditor's claims.[85] The use of this language in *North Georgia* suggested that Justice Powell was retreating, even if slightly, from his previous portrayal of the security interest as an overriding consideration in his disposition of the constitutional question.[86] The court in *Barry Properties* was naturally perplexed by its inability to articulate with any certainty the message flowing from the sequence of *Sniadach, Fuentes,*

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81. 277 Md. at 30, 353 A.2d at 231.

82. 419 U.S. at 607. *See also* Catz & Robinson, *supra* note 49, at 563; Pearson, *supra* note 45, at 300. Perhaps the Court did not deem it necessary to raise this issue in *North Georgia* because it was dealing there with a buyer-seller situation, which can be easily documented in the normal course of events.

83. 419 U.S. at 607.

84. 416 U.S. at 625.

85. 419 U.S. at 610. Justice Powell expressed his view this way: "Garnishment and attachment remedies afford the actual or potential judgment creditor a means of assuring, under appropriate circumstances, that the debtor will not remove from the jurisdiction, encumber, or otherwise dispose of certain assets then available to satisfy the creditor's claim." *Id.* (Footnote omitted.)

86. One would have thought that the Court, in its reverence for the *Mitchell* factors, would have mentioned the lack of the creditor's security interest as an additional basis on which to invalidate the statute. *See also* Douglas Research & Chemical, Inc. v. Solomon, 388 F. Supp. 433 (E.D. Mich. 1975).

*Mitchell* and *North Georgia.*[87] The problem revolves essentially around the question of which combination of elements mentioned at one time or another in those cases must be present for a statute to be constitutionally sustained. The district court in *Sugar v. Curtis Circulation Co.* took the view that the omission of one of the elements, a prompt post-seizure hearing, was sufficient to render the statute unconstitutional.[88] Yet, the Supreme Court in *North Georgia* did not use its latest opportunity to make a clear delineation of the essential elements. It is easy, therefore, to be sympathetic with the court's position in *Barry Properties* and to appreciate its interpretation of the hearing requirement.

The court in *Barry Properties* disagreed in principle with the result in *Spielman-Fond, Inc. v. Hanson's, Inc.*,[89] a mechanics' lien case, which was affirmed without opinion by the Supreme Court two weeks after *Mitchell.* Because the plaintiffs were not deprived of the possession or use of their property, the district court in *Spielman-Fond* did not believe that merely filing a lien amounted to taking a "significant property interest." The lien was regarded as a cloud on title which did not prohibit alienation. The encumbrance could create some difficulty in disposing of the property, but once a willing buyer was found, the sale could still be made.

The court in *Barry Properties* suggested that the Supreme Court's summary affirmance of *Spielman-Fond* might have been based on its satisfaction with the safeguards contained in the Arizona statute.[90] It found no difficulty, therefore, in disregarding *Spielman-Fond* because the Maryland statute in *Barry Properties* lacked those safeguards. It is significant that the district court in *Spielman-Fond* did not reach the question of statutory safeguards because it could find no significant taking of property. Thus, the presumption of the court in *Barry Properties* concerning the procedural niceties of the Arizona statute in *Spielman-Fond* may have been misplaced. While the Supreme Court's affirmance may not have been a concurrence with the reasoning of the court in *Spielman-Fond,* there is very

87. 277 Md. at 30, 353 A.2d at 231.

88. 383 F. Supp. 643, 648 (S.D. N.Y. 1974). This district court's approach is mentioned solely as an example of the approach the lower courts are taking to the factors enumerated in *Mitchell.*

89. 379 F. Supp. 997 (D. Ariz. 1973), *aff'd,* 417 U.S. 901 (1974). *See also In re* The "Oronoka," 393 F. Supp. 1311 (N.D. Me. 1975); Connolly Development, Inc. v. Superior Court, 17 Cal. 3d 803, 132 Cal. Rptr. 477, 553 P.2d 637 (1976).

90. ARIZ. REV. STAT. ANN. §§33-981 to 33-1006 (1974). The salient features of the statute are: (1) the claim to a lien has to be made under oath; (2) any claim by the original contractor must be recorded within 90 days and any claim by any other person must be recorded within 60 days after the completion of the work and the property owner must be notified within a reasonable time thereafter; (3) the claimant must sue to enforce the lien within 60 days after filing; (4) the property owner can discharge the lien by filing a bond. The sufficiency of the safeguards suggested by the court in *Barry Properties* are not immediately apparent. The notice to the owner of the policy must be given within a *reasonable* time, a standard which is itself subject to variance. Further, the discharge of the lien could be obtained by filing a bond, hardly a compliance with the *Fuentes* mandate.

little basis for the court's perceptible confidence in *Barry Properties* concerning statutory safeguards.[91] The court in *Spielman-Fond* saw the liens as impinging on the economic interests of the property owner without constituting a deprivation of a significant property interest.[92] It is reasonable to suggest, therefore, that the Supreme Court's affirmance of *Spielman-Fond* must have rested on that basis.

Another court recently tried to fathom the pronouncements of the Supreme Court and construed a statute dealing with the prejudgment attachment of real estate without prior notice and hearing. In that case, *Hutchison v. Bank of North Carolina*,[93] the court applied the balancing approach of *Mitchell* and upheld the constitutionality of the North Carolina statute.[94] One of the requisite grounds for attachment was an allegation that the property owner had an intent to defraud his creditors through the concealment of property. This requirement was somewhat stronger than that called for in *Mitchell;* there the Louisiana statute provided for sequestration if the defendant had the power to conceal the property.[95] Thus, the Louisiana statute found constitutional in *Mitchell* did not require specific intent by the debtor to defraud. The stricter standard enunciated in the North Carolina statute certainly inured to the benefit of the property owner, because his property could be attached only if the creditor could prove that the property owner intended to use fraudulent tactics in secreting the property and that it was within his power to do so. Of more significance in the *Hutchison* case was the requirement of the statute that the attachment order should be issued by the court clerk, an arrangement frowned upon in *Mitchell.*[96] The court was anxious to point out, however, that the court clerk in North Carolina courts was in fact a judicial officer and not merely an administrator.[97] As a matter of fact, the statute provided that the clerk would hear motions in connection with the modification or dissolution of the attachment order. But, as if this were not enough, the *Hutchison* Court buttressed its conclusion by a statement that the writ of

91. 277 Md. at 34, 353 A.2d at 234.
92. 379 F. Supp. at 999.
93. 392 F. Supp. 888 (N.D. N.C. 1975).
94. N.C. GEN. STAT. §1-440.3 (1969) provides:

> Grounds for attachment—In those actions in which attachment may be had under provisions of §1-440.2, an order of attachment may be issued when the defendant is
>
> . . . .
>
> (5) A person or domestic corporation which, with intent to defraud his or its creditors,
>
> (a) has removed, or is about to remove, property from this State or
>
> (b) has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, property.

95. 416 U.S. at 605.
96. 460 U.S. at 615.
97. 392 F. Supp. at 896-897.

attachment must be predicated on affidavits which include specific allegations supporting the issuance thereof.[98] In addition, the defendant whose property was subject to attachment had the right to file a motion for dissolution of the attachment before the clerk or judge. Thus these procedures were held to be in accord with the procedure required by the Louisiana statute in *Mitchell.*

The plaintiff in *Hutchison* made another point. She argued that the *Mitchell* decision should be confined to creditors holding a security interest in the disputed property and that in the absence of such an interest, prior notice and hearing were required under the *Fuentes* approach.[99] To that contention the court responded quite firmly that the lack of conflicting interests did not necessarily require prior notice and hearing, relying on *Mitchell* and *North Georgia.*[100] Whereas the court in *Barry Properties* was unsure about the importance of the conflicting interest concept, the court in *Hutchison* was confident that the absence of such conflicting interests did not automatically require prior notice and hearing.[101] The court reacted reasonably when it stated that if the Court in *North Georgia* had wanted to restrict the *Mitchell* approach to situations involving dual interests, it could have said so. As a matter of fact, Justice White compared the statute in *North Georgia* with the one considered in *Mitchell* and found that there was an absence of the *Mitchell* safeguards. For that reason, the statute was found to be unconstitutional.[102] In accord with the Court's view in *Hutchison,* it is suggested that if the existence of a security interest was an essential element in deciding the necessity of prior notice and hearing, then the Court in *North Georgia* was at liberty to make that pronouncement without delving into a deep comparison of the two statutes.

### SELF-HELP REPOSSESSION AND SECTION 9-503

It has been said that §9-503 of the Uniform Commercial Code was intended to achieve a "fair allocation of the burdens, risks, and rights of the parties to a secured transaction in a system of self-help and private disposition of collateral."[103] Since *Sniadach,* the section has been challenged in the courts with little success, but the question of its constitutionality has

98. *Id.* at 897.

99. *Id.* at 898. The plaintiff was on firm ground in advancing this point since the Court in *Mitchell* went to great pains to underline the creditor's interest in the property. Yet the court's response in *Hutchison* was predictable since the Court in *North Georgia* neglected to deal with the point and the court was convinced that the duality of interests was not an important consideration.

100. 392 F. Supp. at 898.

101. As a matter of fact, the court in *Hutchison* felt that if the plaintiff's view of *Mitchell* was correct, then the Court in *North Georgia* could have found the statute in that case unconstitutional simply on the basis of a lack of the duality principle.

102. 419 U.S. at 607.

103. Mentschikoff, *Peaceful Repossession under the Unifrom Commercial Code: A Constitutional and Economic Analysis,* 14 WM. & MARY L. REV. 767, 772 (1973).

certainly encouraged frequent commentary, much of which has concerned the state action concept.[104]

Initially, consideration of the constitutionality of §9-503 must logically include a determination of whether state action is present in self-help repossession.[105] Thus far, the weight of opinion is that there is not significant state action in the operation of §9-503 and that, therefore, the Fourteenth Amendment does not apply. It may be instructive to examine the diverse grounds on which state action has been predicated.[106]

Various theories have been advanced in a search for state action. The public-function theory of state action operates traditionally when individuals exercise functions which the state normally reserves to itself. For example, in *Evans v. Newton*,[107] the Supreme Court maintained that a park could not remain segregated even though the city of Macon, Georgia, had been removed as trustee under a will providing for the continued segregation of the park. Despite the city's removal as trustee, the park had in fact become public property, and therefore the public function concept of state action came into operation to prevent the continued segregation. Along the same lines, it was decided in one case that political parties should be enjoined from discriminating in the conduct of election primaries on the theory that they were performing a function which was basically entrusted to government. As agencies of that government, the political parties ought to be subject to the same standard of conduct as are imposed on the state through the Fifteenth Amendment.[108] Other cases have discussed the encouragement concept as a basis for finding state action. Such an argument was used successfully in *Reitman v. Mulkey*.[109] There it was held that the state had encouraged racial discrimination by amending its constitution to facilitate the right of its citizens to discriminate in the sale of their property. It was decided that the state had used its power to

104. *See, e.g.*, Benschoter v. First Nat'l Bank of Lawrence, 218 Kan. 144, 542 P.2d 1042 (1975), *appeal dismissed*, 425 U.S. 928 (1976); Calderon v. United Furniture Co., 505 F.2d 950 (5th Cir. 1974); Turner v. Impala Motors, 503 F.2d 607 (6th Cir. 1974); James v. Pinnix, 495 F.2d 206 (5th Cir. 1974); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974).

105. U.S. CONST. amend. XIV, §1 provides "All persons born are naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *See also* Civil Rights Cases, 109 U.S. 3 (1883).

106. See cases cited in note 104 *supra*.

107. 382 U.S. 296 (1966). *See also* Marsh v. Alabama, 326 U.S. 501 (1946).

108. Terry v. Adams, 345 U.S. 461 (1953). *See also* Smith v. Allwright, 321 U.S. 649 (1944). The election of public officials is so vital to the normal exercise of government that it may be said that an agency performing such a function is essentially carrying out a governmental exercise.

109. 387 U.S. 369 (1967).

encourage private discrimination in housing and, to that extent, its neutrality on this issue could not be supported.

Some cases, like *Burton v. Wilmington Parking Authority*,[110] have found state action when "the state has so far insinuated itself into a position of interdependence . . . that it must be recognized as a joint participant in the challenged activity."[111] In that case, a restaurant located within property owned and operated by an agency of the State of Delaware had refused to serve a black patron. Such action was found to be discriminatory state action in violation of the Fourteenth Amendment. The Court said no state agency could abdicate its responsibilities by failing to require adherence to the requirements of the Fourteenth Amendment when it extensively participated with a private party in the challenged conduct. The state agency, as lessor, had agreed to provide parking facilities and the necessary upkeep and services for the operation of the lessee's restaurant, and such expenses were payable out of public funds. The restaurant therefore was an essential part of a public facility, and to that extent the interrelationship between the state and its private operators could not be ignored.

In *Hall v. Garson*,[112] a landlady, acting under a Texas lien statute, took possession of property belonging to a tenant who had defaulted in payment of his rent. Discussing the state-action concept, the court concluded that "Article 5238(a) vests in the landlord and his agents authority that is normally exercised by the state and historically has been a state function."[113] The entry into the tenant's premises was regarded by the court as the execution of a function which was traditionally relegated to the sheriff, an agent of the state, and in this respect such conduct could not be sustained in the absence of due process safeguards. *Hall* was distinguished in *Adams v. Southern California First National Bank*[114] on the basis that in *Hall* the landlady had no interest in the seized property, whereas in *Adams* the creditor had a security interest pursuant to a sales contract. This kind of distinction was readily recognized in *Mitchell*.[115]

*Culbertson v. Leland*[116] continued the discussion of the constitutionality of lien statutes. The statute under discussion was the Arizona Innkeepers

110. 365 U.S. 715 (1961). *See also* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

111. 365 U.S. at 725.

112. 430 F.2d 430 (5th Cir. 1970).

113. *Id.* at 439. The historical basis for this purported exercise of a state function has been questioned. *See, e.g.*, Burke & Reber, *State Action, Congressional Power & Creditors' Rights: An Essay on the Fourteenth Amendment* (Part III), 47 S. CAL. L. REV. 1, 50 (1973). In Anastasia v. Cosmopolitan National Bank of Chicago, 527 F.2d 150 (7th Cir. 1975), *cert. denied*, 424 U.S. 928 (1976), the court expressly disagreed with the result in *Hall* and found no basis for state action on either the entwinement theory or the public function theory. The case involved a hotelkeeper's lien on the personal property of guests.

114. 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974).

115. 416 U.S. at 609.

116. 528 F. 2d 426 (1975).

Lien Statute,[117] which authorized a hotel owner to seize the personal property of a guest. The court recognized the *Adams* holding as applying to repossession of property subject to a security interest. In *Culbertson,* the Arizona statute gave the defendant a right which did not exist at common law.[118] This was particularly important because the traditional approach of courts dealing with the right of repossession has been concerned intimately with the common-law roots of that remedy. If statutes have created new rights, it has been easier for courts to find state action as distinguished from cases where statutes merely codified common-law doctrine. But, despite the judgment of the *Culbertson* court that the defendant had enjoyed a right which was not his at common law, it did not rest its decision merely on this historical basis. It proceeded to discuss the relationship of the seized property to the outstanding debt and said that where there was a security interest in specific property, the repossession exercise was more narrowly confined than in cases of general seizure of property.[119] The court then examined the effect of the absence of a contract between the parties and emphasized that whereas in *Adams* the parties had set out their respective rights and liabilities affecting repossession, there was no such agreement in *Culbertson.* As a matter of fact, said the court, the defendant could not have taken the tenant's property in the absence of the appropri-

117. ARIZ. REV. STAT. ANN. §33-951 (1956): "**Lien on Baggage and Property of Guests.** Hotel, inn, boarding house, lodging house, apartment house and auto camp keepers shall have a lien upon the baggage and other property of their guests, boarders or others, brought therein by their guests, boarders or lodgers, for charges due for accommodation, board, lodging or room rent and things furnished at the request of such guests, boarders or lodgers, with the right to possession of the baggage or other property until the charges are paid."

Section 33-952 allows the hotelkeeper to sell the property if it is not claimed or the charges are not paid within four months. But there must be notice of the sale, "published in a newspaper once a week for four consecutive weeks. The notice shall contain a description of each piece of property, the name of the owner, if known, the name of the person holding the property, and the time and place of sale. If the indebtedness does not exceed $60, the notice may be given by posting at not less than three public places located at the place where the hotel, inn, boarding house,lodging house, apartment house, or auto camp is located." If the owner does not claim any of the leftover funds from the sale "within one month from the date of the sale, [the balance] shall be paid into the treasury of the county in which the sale took place, and if not claimed by the owner within one year thereafter, the money shall be paid into the general fund of the county."

118. On this point, the court said: "But we disagree with the proposition that lien statutes which create new rights in favor of creditor landlords have only a minimal impact on private ordering, especially when the parties themselves have failed to agree on a like ordering in the particular case." 528 F.2d at 432. In a similar case, the court had said, "The focus for state action purposes should always be on the impact of the law upon private ordering." Davis v. Richmond, 512 F.2d 201, 204 (1st Cir. 1975). In *Culbertson,* the court's view of that impact did not permit it to ignore the historical origin of the statute under discussion. 528 F.2d at 432. Much emphasis has been placed on the antiquity of the statute in particular cases at the expense of an inquiry into the impact of the particular statute upon private affairs. *See* Burke & Reber, *supra* note 113, at 47.

119. 528 F.2d at 431.

ate statute, and to that extent there was significant state action.[120]

The interpretation of the *Adams* case in *Culbertson* leaves one with the impression that state action was not found in *Adams* because of the existence of a security agreement. Obviously, the relevance of that agreement cannot be underestimated because one of the important considerations in any discussion of state action has always been whether the creditor was acting pursuant to a contractual right.[121] But to the extent that the right to repossess existed in the absence of a contract, there should be no difference for state action purposes between *Adams* and *Culbertson;* the creditor's rights would be the same in any event. As Judge Choy, dissenting, so eloquently put it in *Culbertson:* "[T]he creditor finds his power to repossess before a hearing depending paradoxically on a fact that will not be established until a hearing is held."[122] Dictum in *Adams,* that in *Hall* the creditor had taken property that was not his while in *Adams* the creditor had taken property in which he had a security interest, obviously raised questions on the very issue to be decided.[123] In any event, *Fuentes* had already made the point that an encumbrance on the debtor's title did not detract from the debtor's right to due process and that the use and ownership of the property in question were the important factors for making that constitutional determination.[124] The creditor's right to repossess property before a hearing is held ought not to depend on the existence of a fact which cannot be ascertained before that hearing. In *Hall,* the creditor was operating under a statute which granted him the right to enter the debtor's private domain to retrieve collateral in payment of his outstanding debt. In *Culbertson,* the tenancy had been terminated lawfully and the personal property of the tenant remaining thereafter was merely security for the payment of an outstanding debt.

Some courts have taken the position that the right to repossess is not created by the Uniform Commercial Code but rather by agreement between the parties.[125] This principle is perhaps persuasive when there is in fact an agreement which incorporates the basic language of §9-503. In the absence of language in the contract granting a repossession right, however,

120. *Id.* at 432. In Davis v. Richmond, 512 F.2d 201 (1st Cir. 1975), the court found no state action on similar facts. The court was not particularly impressed with the distinctions based on the common-law heritage of statutes.

121. In Anastasia v. Cosmopolitan National Bank of Chicago, 527 F.2d 150 (7th Cir. 1975), *cert. denied,* 424 U.S. 928 (1976), the court found no state action in a seizure, without notice or hearing, of property belonging to guests, pursuant to a hotelkeeper's lien. The court agreed that the statute created rights for the hotel owners that did not exist at common law but it regarded this as only one element to be considered.

122. Judge Choy was referring to the distinction made by the majority in *Culbertson* that the result in *Adams* could be sustained on the ground that the creditor had a security interest in the property. 528 F.2d at 336.

123. 492 F.2d at 336.

124. 407 U.S. at 86-87.

125. *See, e.g.,* Shirley v. State Nat'l Bank, 493 F.2d 739 (2d Cir. 1974).

one is faced with a statutory right only. The question then arises whether the creditor, in executing the right to repossess the debtor's property, is acting pursuant to rights which would not be available in the absence of statute.

In *Reitman v. Mulkey,* the court found the state intimately involved in the encouragement of racial discrimination by virtue of an amendment to the state's constitution.[126] Thus, it is sometimes said that the very existence of §9-503 promotes the same kind of encouragement found in *Reitman.* It must be observed, though, that Proposition Fourteen, as the amendment in *Reitman* was known, not only repealed anti-discrimination legislation but also effectively prevented any state agency from interfering with the rights of any citizen to practice racial discrimination in disposing of his real property.[127] Furthermore, another constitutional amendment would have been required to restore Fourteenth-Amendment protections to minorities under the California scheme. It was this interference with the minorities' access to the political process which compelled the court to find Proposition Fourteen constitutionally unacceptable.[128] Thus, while *Reitman* was permeated with "encouragement" language, it did have peculiar facts which went beyond mere encouragement to discrimination. Therefore the analogy between *Reitman* and the §9-503 cases, while strong, is not complete.

But even beyond this, the encouragement theory is tenuous when used to apply the state action concept to §9-503. Such action cannot be predicated solely on the fact that the state statute authorizes a certain type of conduct. If that were the case, there would be very little private conduct which would not be covered by the state-action concept and thus subject to the requirements of due process under the Fourteenth Amendment.[129] Section 9-503, in effect, restricts the common-law rights of the creditor in the sense that it prevents him from using self-help reposession when there is a possibility of a breach of peace.[130] There is some argument, therefore, that the state in fact does not encourage self-help repossession, and a state statute which confers that right merely restates a basic policy of consumer transactions. It may be suggested that §9-503 merely recognizes the exist-

126. 387 U.S. at 381. While the Supreme Court accepted the lower court's finding that Proposition Fourteen in effect encouraged racial discrimination, that encouragement concept was not the basis of the Supreme Court decision. The crux of the decision was that Proposition Fourteen prevented any state agency from acting in the future to prevent racial discrimination. *Id.* at 374. *See also* Burke & Reber, *State Action, Congressional Power & Creditors' Rights: An Essay on the Fourteenth Amendment* (Parts I and II), 46 S. CAL. L. REV. 1003, 1077-1078 (1973); Black, *Foreword: State Action, Equal Protection, and California's Proposition 14,* 81 HARV. L. REV. 69, 75-82 (1967).

127. 387 U.S. at 374.

128. Burke & Reber, *supra* note 126, at 1079.

129. *Id.* at 1109.

130. *See* McCall, *The Past as Prologue: A History of the Right to Repossess,* 47 S. CAL. L. REV. 58 (1973).

ence of certain contractual relationships which would continue to exist even without the enactment of such language. In any event, to find state action on the basis of the encouragement or authorization theory would undercut the state's ability to regulate the conduct of its citizens.[131] A logical extension of this application might result in bringing everything within the state action definition, which would be contrary to the basis for the state action requirement in the first place.[132]

The encouragement test has also been discussed in cases dealing with the constitutionality of mortgage foreclosures conducted pursuant to a power of sale contained in the mortgage. In a recent case, *Northrip v. Federal National Mortgage Ass'n,*[133] a mortgagor challenged the Michigan statutory scheme permitting foreclosure by advertisement.[134] Because the statute set out the procedure to be followed for foreclosure, the mortgagor argued that this constituted state action based on the state's encouragement of the foreclosure action.

The court did not accept the *Reitman* parallel, because that case dealt with an amendment creating a constitutional right to engage in racial discrimination. The court recognized the power of sale in the mortgage as a private contractual right which had its origin in the common law. Thus, in the same way that §9-503 did not create the right to repossess, the Michigan statute did not create the power of sale in the mortgage. The involvement of a sheriff in the foreclosure sale did not constitute state action in the court's view[135] because his participation was not mandatory.[136] The parties could agree to the conduct of the sale by another person. Thus, the sheriff's involvement was held to be "incidental" rather than "essential." The public function theory did not impress the court either because the power of sale was not created by the statute but was simply regulated by it and there was no performance of functions traditionally reserved for the state.[137]

The difficulty arises, of course, when there is no evidence that the common-law right of self-help repossession was recognized as such in a particular state. This presented a problem in *James v. Pinnix.*[138] The court recognized that previous cases had held that §9-503 did not create the self-help repossession right and that, therefore, such a right emanated solely from the provisions of the contract which had the recognition of the com-

131. Burke & Reber, *supra* note 113, at 54-55.

132. *Id.* at 16.

133. 527 F.2d 23 (1975).

134. MICH. COMP. LAWS ANN. §§600.3201 through 600.3280 (1968).

135. 527 F.2d at 28.

136. MICH. COMP. LAWS ANN. §600.3216 (1968).

137. 527 F.2d at 29. *See also* Federal National Mortgage Ass'n v. Howlett, 521 S.W. 2d 428 (Mo. 1975), *appeal dismissed for want of a substantial federal question,* 423 U.S. 909 (1975); Barrera v. Security Bldg. & Inv. Corp., 519 F.2d 1166 (5th Cir. 1975). *Contra,* Turner v. Blackburn, 389 F. Supp. 1250 (W.D. N.C. 1975).

138. 495 F.2d 206 (1974).

mon law. The court recognized the difficulty of substantiating that position on the basis of Mississippi law and, therefore, did not rest its holding on that point.[139] Thus, the codification concept does encounter some difficulty where the court cannot substantiate the state's pre-Code position on the issue of self-help repossession unless a provision to that effect was contained in the contract.[140] In that case, the traditional argument that §9-503 merely continued the common-law approach to the problem could not be substantiated. Thus, the codification argument remains tenuous, because it could conceivably depend upon the status of the pre-Code law in the different states. The federal question of constitutionality ought not to be predicated on a difference in the approach of the various states to the remedy of self-help repossession.

In discussing self-help repossession, some courts have felt that the constitutional questions arising under that section are completely different from those arising in discrimination cases like *Reitman*. The court in *Adams* purported to make that same distinction.[141] The court there adverted to the fact that in *Reitman* there was apparently an intent to discriminate against minority groups, but that in *Adams* there was no evidence that the state intended to violate the constitutional rights of debtors.[142] The court's distinction cannot be sustained merely by a broad characterization of the intent formulated by a state legislature. One has to look also to the effect of the legislation to determine the constitutionality of the provision.[143] That approach may indirectly suggest a basic distinction between the state-action tests for due process and those for equal protection.[144] While that has not been stated as one of the bases of the *Adams* decision, the discussion in that case may lead to that conclusion.[145]

A further comment may be made about implying state action on the basis of the state's recognition of the remedy of private repossession. This theory may sometimes be advanced because of the pervasive nature of the repossession statutes, and more particularly, because of §9-503.[146] It is also

139. *Id.* at 209.

140. *Id.* The creditor argued that §9-503 merely perpetuated past Mississippi practice as exemplified by the cases. The court did not recognize this as compelling and therefore did not rest its holding on that basis.

141. 492 F.2d at 333. *See also* James v. Pinnix, 495 F.2d at 208, where the court said: "The outer boundaries of 'imputed' state action have been charted primarily in race discrimination cases. We are unwilling to push out the frontiers still farther in a case devoid of racial overtones." (Footnote omitted.)

142. 492 F.2d at 333.

143. Palmer v. Thompson, 403 U.S. 217 (1971).

144. Catz and Robinson, *supra* note 44, at 583.

145. While the courts in the *James* and *Adams* cases both agreed that the question of self-help repossession should not be settled by a decision involving racial discrimination, the court in *Adams* was careful to point out in a footnote that it was not suggesting different state action tests for due process and equal protection. 492 F.2d at 333. But perhaps this is the effect of that analysis.

146. *See, e.g.*, Clark, *Default, Repossession, Foreclosure, and Deficiency: A Journey to the Underworld and a Proposed Salvation*, 51 ORE. L. REV. 302, 329 (1972).

said that the state is intimately involved when it permits creditors to use its judicial machinery for the enforcement of their repossession rights through the extensive statutory framework covering consumer transactions. The effect of the state's machinery may be particularly evident when the creditor is seeking a deficiency judgment after property has been repossessed and sold. The argument is made that the creditor's resort to judicial enforcement of his deficiency judgment is sufficient basis for invoking the state-action concept. The state's enforcement of the deficiency judgment is regarded as the state's recognition of the legality of the repossession procedure and, the argument runs, such recognition results in an endorsement of that procedure. In this connection, *Shelley v. Kraemer*[147] has often been recognized as an example of the state's being used as a vehicle for the enforcement of racially restrictive covenants in violation of the Fourteenth Amendment.[148]

The prevailing error is in a failure to distinguish between the enforcement of privately created rights and the recognition of the legal effect resulting from those rights.[149] For example, in *Evans v. Abney*,[150] it was held that a trust provision mandating racial restrictions in the conveyance of land could not be enforced in the courts; the land therefore had to revert to the donor's heirs. The court's failure to enforce the racially restrictive covenants deprived the parties of the right to enforce a provision that was constitutionally unacceptable. But in the absence of that enforcement, a legal decision had to be made about the status of the property involved. To that extent, the courts gave legal recognition to the racially restrictive covenant by providing for a reversion to the donor's heirs after the restriction could not be enforced.[151] But that is a far cry from suggesting that the state was enforcing the racial restrictions.

It is to be observed that §9-503 is not simply an isolated statute authorizing self-help repossession but rather one in a framework of creditor remedies sanctioned by the state. Such remedies are permitted pursuant to

147. 334 U.S. 1 (1948).

148. *See, e.g.*, Neth, *Repossession of Consumer Goods: Due Process for the Consumer: What's Due for the Creditor*, 24 CASE W. RES. L. REV. 7, 59 (1972).

149. *Id.* at 60.

150. 396 U.S. 435 (1970).

151. *See* Neth, *supra* note 148, at 60. The Supreme Court characterized the effect of the lower court's decision as follows: "Here, the effect of the Georgia decision eliminated all discrimination against negroes in the park by eliminating the park itself, and the termination of the park was a loss shared equally by the white and negro citizens of Macon since both races would have enjoyed a constitutional right of equal access to the park's facilities had it continued." 396 U.S. at 445. Justice Brennan, in his dissent, found state action on basically three grounds: (1) the state had entered into an arrangment that created private rights to compel the conversion of a public facility; (2) the state court had enforced a racial restriction to promote segregation; (3) the state had encouraged the testamentary provision of Senator Bacon and that was the sole basis on which the state court had ordered reversion of the property to the testator's heirs. 396 U.S. at 455-458.

"creditor oriented" legislation that gives substance to contracts that are not privately negotiated to the extent supposed.[152] It may be, therefore, that the state is not in fact neutral in this creditor-debtor relationship and that this lack of neutrality is confirmed by the existence of §9-503 which, unlike the Uniform Conditional Sales Act,[153] does not require notice before repossession. It must be noted that the state provides an alternative remedy of replevin, itself a state-action remedy, and that the threat to utilize replevin can be very real if there is objection to self-help repossession.[154] The pertinence of this observation is underscored when it is recognized that self-help facilitates the resolution of the issues surrounding the particular property, thus avoiding the difficulties inherent in the replevin action. But the mere existence of such statutes does not constitute significant state action. It is simply a codification of an existing remedy.

In the first place, statutes regulating the relationship between debtor and creditor should not give rise to a claim of state action solely on that basis. There is hardly a sphere of human activity that escapes some kind of regulation. If the test came down to the mere existence of a statute, there would be state action to an intolerable degree. Even the existence of a replevin remedy within the same statutory framework does not impress the self-help provisions with the elements necessary to find state action. There is indeed a clear choice. The creditor may embark on a self-help mission, if it can be achieved without a breach of the peace, or he may choose the security of state participation through replevin. Moreover, the threat to use replevin if self-help is resisted by the debtor should not make the case stronger for implying state action in self-help repossession even if the state benefits indirectly by the use of that remedy. The key ought to be whether the state is so enveloped in the procedure that it must be regarded as a participant. The existence of the remedy does not detract from the neutrality of the state for state action purposes. Something more must be adduced. Until it is, the case for state action on this basis will be less than compelling.

## SELF-HELP REPOSSESSION: OTHER CONSIDERATIONS

### *Public Policy*

Most recent observations have borne on the issue of state action. How-

152. Clark & Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355, 380 (1973).

153. UNIFORM CONDITIONAL SALES ACT §16.

154. In Adickes v. Kress & Co., 398 U.S. 144 (1970), a white woman in the company of blacks was refused service because it was customary to do so, and this custom was enforced by police harassment. The Court did not find state action in that case and felt that the petitioner would have to prove not only the existence of a state-enforced custom compelling segregation but also that the preponderance of discriminatory action was motivated by state enforced custom. 398 U.S. at 169-174.

ever, state action aside, what are the public policy considerations that might militate against the continued existence of self-help repossession? In connection with automobile repossession, it has been said that "only in a truly infinitesimal number of cases . . . [will] the defaulting debtor . . . have any defense justifying his continued use of the car."[155] It has also been suggested that the requirement of prior notice and hearing will affect only a small number of debtors and that, on balance, it would not generate enough positive results.[156] While a mandatory injunction is available to the debtor who wishes to ensure the creditor's proper disposition of the property under §9-507,[157] knowledge of that available remedy does not have a salutary effect on the debtor who is in imminent danger of suffering a deprivation. Furthermore, even though the debtor will eventually be called upon to state his defense against his pursuing creditor, his right to be free of the deprivation, however temporary, ought not in the first analysis to depend on a defense that will win the day. This is precisely why a hearing is sought. In this age of consumerism, when holders in due course are becoming less fashionable, one cannot be sure that debtors will be reticent to assert defenses against their creditors. While on one hand it may be true that very few debtors have asserted defenses against the claims of repossessing creditors, that may not be an accurate portrayal of future events.

Recently, the Federal Trade Commission in effect abolished the status of holder in due course in certain consumer transactions.[158] The action, which certainly was meritorious on grounds of public policy, was taken because the consumer's obligation to pay usually continued after the seller transferred the consumer's negotiable instrument to a third party despite a breach of warranty, misrepresentation or other default by the seller. The FTC rule also nullified waiver-of-defense clauses on the theory that the average consumer does not willingly waive his rights to assert defenses. Thus, the rule now protects the rights of the consumer to assert such defenses when the seller does not live up to his side of the bargain. In view

155. Mentschikoff, *supra* note 103, at 782.

156. Johnson, *Denial of Self-Help Repossession: An Economic Analysis*, 47 S. CAL. L. REV. 82, 115 (1973). *But cf.* Countryman, *The Bill of Rights and the Bill Collector*, 15 ARIZ. L. REV. 522, 575 (1973), in which the author suggests that many debtors would not pass up the opportunity for a hearing if they had competent counsel.

157. U.C.C. §9-507 provides certain remedies for the debtor if the secured party fails to following the procedure set out in Article 9 after he has repossessed the collateral. Remedies are available after repossession has occurred and therefore do not really deal with the question of the merits of the right to repossess in the first place.

158. 16 C.F.R. §433 (1976). On May 14, 1976, the FTC Trade Regulation rule became effective. It abolished the status of holder in due course with respect to negotiable instruments obtained in consumer transactions and nullified waiver of defense clauses frequently inserted in credit-sale contracts. In the case of a purchase-money loan, it requires the seller to ensure that a notice is contained in the documents that the holder of the credit contract is subject to any claims or defenses which the buyer could assert against the seller of the particular goods or services. The rule applies to transactions affecting commerce as defined in the Federal Trade Commission Act.

of these developments, there may be a number of instances when buyers may want to offer defenses to repossession.

The same point may be made about the recommendation of the National Commission on Consumer Finance that a debtor be given notice of the claim against him before repossession by a creditor.[159] The Commission said this right to prior notice and hearing was predicated on the belief that an individual has a right to continued "use and possession of property free from arbitrary encroachment."[160] In formulating its recommendation, the Commission referred to its survey, which showed that in approximately 65% of all default cases the debtors did not appear to assert a defense and default judgment was entered against them.[161] There is no documented evidence about the reasons these defaulters did not appear at their hearings; the causes may have been fear and ignorance.[162] Even if it is assumed that the debtor has had the opportunity to avoid repossession by explaining the reasons for his delinquency to the creditor, his right to a hearing prior to repossession ought not to be affected; otherwise the creditor would be the sole arbiter of the right to repossess.[163]

The contract between the creditor and the debtor may contain a repossession clause which, it may be assumed, acts as a valid waiver of the debtor's rights.[164] This is somewhat like a waiver of the debtor's right to assert defenses against the lender once the contract has been assigned. In *Overmyer Co. v. Frick Co.*,[165] it was held that a debtor could waive his rights through a cognovit note if that waiver was knowingly executed and the debtor was aware of the right he was yielding. That will always be the case when a waiver is contemplated. Thus, the possibility of a waiver in the contract itself ought not to affect the decision about the desirability of the right to repossess under §9-503. Furthermore, if a private agreement can fill the void created by the absence of a statutory right, that agreement must be knowingly executed if the right to repossess is to be effective.[166]

There has been considerable speculation about the effect that abolition of self-help repossession would have on the consumer market. The Wiscon-

159. REPORT OF THE NATIONAL COMMISSION ON CONSUMER FINANCE 30 (1972).

160. The Commission made its recommendation despite its own concession that the cost of credit "would be substantially increased and availability severely curtailed . . . ." *Id.*

161. *Id.* This kind of data has been used to suggest that consumers as a rule have no valid defenses to creditors' claims and that they are not, therefore, being prejudiced by the creditors' right to repossess. *See* Johnson, *supra* note 156, at 114.

162. *See* Dauer & Gilhool, *supra* note 50, at 143; D. Caplovitz, *Debtors in Default*, ch. 11 (1972). *See also* White, *The Abolition of Self-Help Repossession: The Poor Pay Even More*, 1973 WIS. L. REV. 503, 528.

163. *See* Yudof, *Reflections on Private Repossession, Public Policy and the Constitution*, 122 U. PA. L. REV. 954 (1974).

164. *See* Clark & Landers, *supra* note 152, at 374-375.

165. 405 U.S. 174 (1972).

166. *See* Clark & Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355 (1973).

sin Consumer Act,[167] enacted in 1973, requires notice, hearing and judicial approval before repossession of a debtor's collateral. The impact of the legislation on automobile credit in Wisconsin has been the subject of a recent study, in which the authors reached some interesting conclusions.[168] First, it seemed that the number of automobile loans did not decrease greatly between 1973 and 1975. It appeared, though, that credit was restricted to the extent that higher deposits were required. As a result, some consumers were forced to buy cheaper cars. Second, while the costs of repossession have increased, the act has instituted some procedural economies, such as dispensing with the requirement of an attorney. Third, the abolition of self-help in favor of judicial repossessions has probably provided an incentive for creditors and debtors to work around the defaults in an attempt to avoid actual repossessions. During the first year of the existence of the Wisconsin act, repossessions decreased sharply, but they rose again in the second year. Thus, it can be expected that they will level off as the act continues to operate. The initial decrease can be expected if the 55-day waiting period applicable to breaches of a refinancing agreement is shortened. This would provide some incentive for creditors to grant refinancing where it is needed.[169]

*The State and the Settlement of Disputes*

An additional element worthy of discussion in connection with §9-503 is the state authority to settle disputes between private parties.[170] This concerns the state's exercise of legitimate force in problem-solving. The admonition that self-help repossession ought not to be sustained in the face of a breach of the peace itself creates problems in the use of self-help.[171] The state is the one agency that can be depended upon to exercise legitimate force in a judicious manner, and its monopoly on that exercise should not be abdicated except for compelling reasons.

The prohibition against breach of the peace creates, in effect, only a proscription of such force as might constitute a disturbance of the public tranquility.[172] The restriction is more effective to invalidate a particular repossession after its occurrence than to prevent a violation of public order. The injunction against breach of the peace does not, therefore, prevent the aggressive creditor from taking certain liberties; furthermore, there may be

167. WIS. STAT. §§421.101-428.106 (1973).

168. Whitner & Laufer, *The Impact of Denying Self-Help Repossession of Automobiles: A Case Study of The Wisconsin Consumer Act*, 1975 WIS. L. REV. 607.

169. *Id.* at 654-656.

170. Yudof, *supra* note 163, at 972.

171. The perplexities are posed by the definition of a breach of the peace. The prohibition against such a breach perhaps simply encourages creditors to violate a debtor's privacy by using stealth and ploys to avoid detection.

172. *See* Martin, *Secured Transactions*, 19 WAYNE L. REV. 593, 640-641 (1975); Yudof, *supra* note 163, at 978-979.

circumstances in which the aggrieved debtor may be unwilling to complain. This may be so even when there is a legitimate basis for default but the debtor feels that a complaint about an unlawful repossession will avail him nothing.[173] The potential for the invasion of the debtor's privacy is always present where the private agent seeks to repossess. If privacy is to be protected, the right to repossess should be contingent not only on a preservation of public order but also on the security of the private citizen.[174]

The draftsmen of the Uniform Consumer Credit Code (U.C.C.C.) recognized the delicate problems created by self-help repossession by imposing further restrictions on the right to repossess. Section 5.112 of the U.C.C.C. permits self-help repossession only if it can be accomplished "without entry into a dwelling and without the use of force or other breach of the peace."[175] The prohibition against incursion into a debtor's home is certainly based in part on the concept of privacy. But the absence of a clear statement invites an aggravation of the basic dispute between the parties by permitting the creditor to devise methods of recapturing the property which barely fall short of a disturbance of the peace. The U.C.C.C. provision is a step in the right direction, for it recognizes that much more than merely the "peace" should be preserved in the repossession process. Such an achievement is notable, but other aspects must also be considered—among them the concept of privacy and the right of the state to preserve for itself, as far as possible, the responsibility for determining possessory rights.

There is, therefore, something to be said for the principle which places in the state alone the power to disturb possessory interests.[176] This concept rests on the fundamental doctrine of fair play. The state ideally can be depended upon to exercise impartiality in connection with possessory interests in property. The delegation of the right to interfere with that possessory interest would in effect constitute a prejudgment that the individ-

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173. *See, e.g.*, Calderon v. United Furniture Co., 505 F.2d 950 (5th Cir. 1974), in which the creditor broke into the debtor's home to retrieve a washing machine and was said not to have breached the peace. The court sustained the repossession on the grounds that the creditor had a security interest in the property. *See also* Cox v. Galigher Motor Sales Co., 213 S.E.2d 475 (W. Va. App. 1975), in which the creditor repossessed a truck on the pretense that he was taking it into the shop for repairs. The court did not relish the use of deceit, but it did not invalidate the repossession because it did not find any breach of the peace.

174. Yudof, *supra* note 163, at 979.

175. U.C.C.C. §5.112 provides as follows: "Upon default by a consumer with respect to a consumer credit transaction, unless the consumer voluntarily surrenders possession of the collateral to the creditor, the creditor may take possession of the collateral without judicial process if possession can be taken without entry into a dwelling and without the use of force or other breach of the peace."

176. Yudof, *supra* note 163, at 972. *Cf.* Alexander, *supra* note 43, at 931, where the author says very few repossessions involve a wresting away of property. He says the physical interference sanctioned by self-help repossession statutes relates to the legal right to control property. In that sense, the author is correct, and that point must be weighed heavily here in determining whether repossession should be barred on the physical-interference principle he advocates.

ual engaged in the retaking process somehow has the basic right to engage in that exercise because of a default by the debtor under his contract. But that is the very point in issue, and a unilateral determination by the creditor ought not to suffice as a basis for the state's abdication of its power to interfere with the possessory rights of the debtor.[177]

The insistence on the state's involvement in the deprivation process also assures that a debtor will have an opportunity to assert whatever defenses he might have to forestall the disturbance of his possessory interest in the property. These defenses may not provide a complete set-off against the creditor's claim, but at least they may serve as a basis for the resolution of a particular controversy underlying the creditor's claim for payment. The creditor's repossession may have been instigated by a controversy surrounding a single payment. A judicial resolution of this problem will provide a basis on which payments can be resumed and the whole basic controversy settled without a disturbance of the debtor's possessory interest.

## CONCLUSION

One cannot be sure about the combined effect of the recent Supreme Court decisions discussed in this article. There has been, without doubt, a change in the hierarchy of values espoused by the Court. If some crystallization is necessary, one would have to suggest that *Fuentes* is diluted to the extent that prior notice and hearing are not mandated before every deprivation, even in the absence of an extraordinary situation. There may be some idea that *Fuentes* survives outside the area of secured transactions; that may be a convenient way of harmonizing the Court's decisions. Since *North Georgia,* however, it is not clear that the seller's security interest is a prerequisite for the acceptability of post-seizure rather than pre-seizure hearings. Putting aside the seller's security interest, one can go further and suggest that there must be an early hearing, in which the creditor must carry the burden of proof. Or it may be that some other safeguard against mistaken repossession that approximates the early-hearing concept may suffice. The objective is to recognize the interests of the creditor and the debtor and to arrive at a solution that protects the creditor's right to be paid while granting the debtor an opportunity to shorten the period of deprivation. Finally, there seems to be a requirement of judicial participation in the issuance of the writ, which must be supported by an affidavit stating the facts that justify the remedy sought by the creditor. The additional requirement that the creditor file a bond adds

177. It is true that self-help has been sanctioned in other areas. For example, a certain amount of self-help is sanctioned by the state when a thief is rushing off with property belonging to another. But it is not clear that such a comparison necessarily makes the case for self-help in consumer transactions. *Cf.* Alexander, *supra* note 43, at 933.

a protective feature that assures the debtor of redress in appropriate circumstances.

The response to the controversy over self-help repossession must be based on a statutory amendment. It is settled that repossession is not subject to state-action attack; the state is not involved to the extent necessary to create a constitutional hazard. Further attacks must therefore be based on other strategies. In the absence of state action, the approach must emphasize public policy considerations. On those grounds, the case for self-help becomes less attractive. If the creditor has suffered some setbacks by the partial abrogation of the doctrine of holder in due course, it is only because experience has shown that the creditor has enjoyed an enviable advantage in the past. Repossession has conferred on him a similar advantage. If it is the result of a common-law heritage, then its place in today's consumer market must be re-examined. Now is the opportunity to reconsider the relevance of that historic remedy to today's debtor-creditor relationship. If the response to a prohibition of self-help is an increase in the cost of credit, then that factor must be acknowledged. But public policy considerations have always been pitted against increases in cost, time and effort. The same argument might have been made about the sanctity of the holder in due course doctrine. Yet, on the face of it, the self-help doctrine is no less vulnerable.