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Forcible Prejudgment Seizures

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Forcible Prejudgment Seizures

Each of three plaintiff-families purchased household goods[1] "on time" from the defendant-merchants.[2] In each instance plaintiffs were unable to complete payments.[3] The defendants seized or threatened to seize the property pursuant to a New York civil statute permitting the forcible seizure of the goods without a court order.[4] The plaintiffs sought to enjoin the repossessions and requested that a federal three-judge court declare the statute unconstitutional as being violative of the fourth amendment protection against unreasonable searches and seizures and the due process clause of the fourteenth amendment. Financially unable to secure a surety or post the bond prescribed by the statute to replevy the goods until such time as a judicial determination of the rights of the parties could be made, the plaintiffs obtained temporary restraining orders to prevent the defendants from seizing the property. *Held, permanent injunction granted*: The provisions of the New York statute permitting the forcible, prehearing seizure of chattels by an unsatisfied creditor without an order

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[1] These goods included the following items: Laprease had a bed, box-spring and mattress, a highchair, an 11-piece dinette set and other household furnishings; Lawson had a stove and a refrigerator; and Messler had kitchen furniture, a rug, 3 end tables, lamps, a chair and a record player. Laprease v. Raymours Furniture Co., 315 F. Supp. 716, 719-20 (N.D.N.Y. 1970).

[2] Two separate actions were joined for consideration. Also named as defendants were nonjudicial enforcement officers, city marshals, a sheriff, and the attorney general of the State of New York. *Id.* at 716, 720.

[3] Mrs. Laprease, a welfare recipient, was threatened with seizure of conditionally sold goods pursuant to the statute by defendants Engles, marshal for the city of Syracuse, and representatives of Raymours. One of the representatives agreed to hold the seizure in abeyance if certain payments were made. Mrs. Laprease was unable to make these payments and alleged that she was in immediate danger of having the goods seized and that the goods were necessary and essential for the health of herself and her family. She further alleged that she was unable to post the bond required by the statute to retrieve the goods and was unable to replace the goods in the event of seizure.

The Lawsons had as their sole income $77.50 a week derived from Mr. Lawson's wages. The Lawsons' total assets consisted of goods purchased on time from Mantell's. The Lawsons met their payments to Mantell's until Mr. Lawson's income ceased as a result of an illness. In a subsequent agreement Mantell's agreed not to repossess the goods if one-half of the normal bi-weekly payments was made. The Lawsons alleged that they made payments pursuant to the agreement, but that the goods were seized by Mantell's in violation of the agreement.

Mrs. Messler was a recipient of Aid for Dependent Children and had no other income. Her husband purchased goods on time from Mantell's, but subsequently stopped payment on these goods. Mrs. Messler entered into an oral agreement with Mantell's whereby she agreed to assume the payments on the furniture if she could obtain title to the goods. A representative of Mantell's threatened subsequently to seize the goods if she did not surrender them voluntarily. *Id.* at 719-20.

[4] N.Y. CIV. PRAC. LAW §§ 7102, 7110 (McKinney 1963). Section 7102 provides in relevant part:

> (a) Seizure of a chattel. The sheriff shall seize a chattel without delay when the plaintiff delivers to him an affidavit, requisition and undertaking and, if an action to recover the chattel has not been commenced, a summons and complaint.
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> . . . .
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> (f) Disposition of chattel by sheriff. Unless the court orders otherwise, the sheriff shall retain custody of the chattel for a period of three days after seizure. At the expiration of such period, the sheriff shall deliver the chattel to the plaintiff if there has not been served upon him either a notice of exception to plaintiff's surety, a notice of motion for an impounding order, or the necessary papers to reclaim the chattel. Upon failure of the surety on plaintiff's undertaking to justify, the sheriff shall deliver possession of the chattel to the person from whom it was seized.

See notes 46-47 *infra*, and accompanying text for definition and description of affidavit, requisition, and undertaking.

Section 7110 provides: "If a chattel is secured or concealed in a building or enclosure and it is not delivered pursuant to his demand, the sheriff shall cause the building or enclosure to be broken open and shall take the chattel into his possession."

from a judge or a court of competent jurisdiction violate the fourth and fourteenth amendments. *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716 (N.D.N.Y. 1970).

I. The Development of Nonjudicial Repossession

At early common law the physical possession of property was the most important manifestation of the right of ownership.[5] Thus, a seller's right to repossess goods from a buyer who refused to pay for them was recognized.[6] But courts, busily engaged in real estate disputes, offered lengthy and cumbersome procedures to the impatient and unpaid seller of personalty.[7] The Statute of Marlbridge[8] was an early attempt to rectify this situation. Pursuant to this statute the sheriff was permitted upon receipt of a complaint to seize goods alleged to be wrongfully taken. While originally available only for goods wrongfully taken, the statute was later expanded to include the repossession of goods rightfully taken, but wrongfully detained. The sellers of merchandise were thus able to recover their goods without resort to the courts. This was the origin of the doctrine of self-help, or repossession.[9]

American jurisdictions have adopted variations of the English concept of repossession. In *Kenny v. Planer*,[10] decided in 1869, the right of a seller to recover a conditionally sold sewing machine from a buyer who failed to meet his payments was upheld. The court noted that the right to possess one's own property allows him to use any possible means short of a breach of the peace to recapture it.[11] Some jurisdictions have recognized contractual agreements providing for nonjudicial repossession.[12] In a notable example, *Percifield v. Florida*,[13] the seller repossessed an automobile on which the buyer had paid nothing, and in which the buyer had placed a "for sale" sign. The court held that the seller had committed no offense in repossessing the automobile, provided no breach of the peace was committed, and that a provision of the sales contract either expressly or impliedly provided for repossession upon default without judicial process.[14] Some form of nonjudicial repossession was recognized in virtually every jurisdiction by 1919 when the Uniform Commercial Sales Act (UCSA) was drafted.[15] Section 16 of the UCSA merely reiterated some of the century-old accumulation of American case law, permitting in most cases the repossession of conditionally sold chattels without judicial process upon default, provided that (1) this could be done without a breach of the

[5] F. Pollock & R. Wright, An Essay on Possession in the Common Law 1 (1888).
[6] F. Pollock & F. Maitland, History of English Law Before the Time of Edward I 27 (1923).
[7] Note, *The Forcible Recaption of Chattels*, 28 L.Q. Rev. 263, 264-65 (1912).
[8] Statute of Marlbridge of 1267, 52 Hen. 3, c. 21.
[9] Note, *supra* note 7, at 265.
[10] 9 N.Y.C.P. 131 (1869).
[11] *Id.* at 134.
[12] *See* Annot., 146 A.L.R. 1331-34 (1943).
[13] 93 Fla. 247, 111 So. 519 (1927).
[14] For an excellent discussion on the concept of the defaulting vendee, see Comment, *Non-Judicial Repossession—Reprisal in Need of Reform*, 11 B.C. Ind. & Com. L. Rev. 435, 437 (1970).
[15] *Id.*

peace, and (2) this was part of a contractual agreement.[16] The Uniform Commercial Code (UCC), which superseded the UCSA, similarly authorized nonjudicial repossession of secured interests.[17]

The UCC has been enacted in Texas[18] and, therefore, as to secured transactions, nonjudicial repossession is possible.[19] Unsecured goods are treated somewhat differently, however. The relevant Texas statutes provide that an officer of the appropriate court may issue a writ of attachment upon the receipt of an affidavit from the plaintiff, his agent or his attorney.[20] The affidavit must allege that the defendant is justly indebted to the plaintiff.[21] Further, it must state that the plaintiff will probably lose his debt unless such attachment is issued.[22] The writ cannot issue until suit has been instituted[23] and the plaintiff has posted bond or obtained sureties to protect the defendant against wrongful actions.[24] The writ is delivered to the sheriff or constable[25] who, upon receipt, proceeds to levy upon the property.[26] The defendant is permitted to replevy at any time prior to judgment by posting bond or obtaining sureties.[27]

While the nonjudicial remedy of repossession was developed for the protection of the rights of creditors, the remedy has often failed adequately to safeguard whatever rights debtors might have in certain types of property.

II. Due Process Protection of a Debtor's Property Rights

At common law little sympathy was shown towards debtors unable to satisfy their obligations.[28] In the past there was a tendency to ignore what are now considered to be the requirements of procedural due process with respect to debtors' property rights.[29] Recently the Supreme Court has

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[16] Uniform Commercial Sales Act § 16.

[17] Uniform Commercial Code § 9-503: "Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of peace or may proceed by action."

[18] Tex. Bus. & Comm. Code Ann. § 9.503 (1968).

[19] The provisions in a security agreement giving the lienholder the right to repossess in the event of a default, without notice to, or consent of, the debtor (and even over his protest), are valid, provided that this right is exercised without the use of either force or violence. Gulf Oil Corp. v. Smithey, 426 S.W.2d 262 (Tex. Civ. App.—Dallas 1968), *error dismissed.*

[20] Tex. Rev. Civ. Stat. Ann. art. 275 (1959):

> The judges and clerks of the district and county courts and the justices of the peace may issue writs of original attachment . . . upon the plaintiff, his agent or attorney, making an affidavit stating:
> (1) That the defendant is justly indebted to the plaintiff, and the amount of the demand, and . . . .
> . . . .
> (12) That the debt is due for property obtained under false pretenses . . . .

[21] *Id.*

[22] "The affidavit shall further state that the attachment is not sued out for the purpose of injuring or harrassing the defendant; and that the plaintiff will probably lose his debt unless such attachment is issued." *Id.* art. 276.

[23] *Id.* art. 277.

[24] *Id.* art. 279.

[25] Tex. R. Civ. P. 596.

[26] *Id.* 597.

[27] *Id.* 599.

[28] C. Nadler, The Law of Debtor Relief 2 (1954).

[29] Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale L.J. 1245 (1965).

apparently begun to reverse this trend.[30] Particularly of interest is a recent decision concerning the garnishment of wages.

Wisconsin permitted the prejudgment garnishment of wages and merely required that the creditor request the court clerk to issue a summons to be served on the debtor's employer.[31] Thus, the debtor might first learn of the garnishment of his wages on the day he received his paycheck. In *Sniadach v. Family Finance Corp.*[32] the Supreme Court held that Wisconsin's prejudgment garnishment statute, with its confiscation of property without notice and prior hearing, violated the debtor's right to fundamental due process. The Court reasoned that wages are a specialized type of property presenting distinct problems in the national economic system.[33] In most situations those having wages garnished are unable to adjust to any reduction of income, even for a short time. The very least that they must be accorded in terms of procedural due process is a hearing in advance of the initiating order.[34] At this hearing the validity, or at a minimum the probable validity, of the claim must be established before the wage earner may be deprived of the unrestricted use of his property.[35]

A possible exception to the prohibition of prejudgment garnishment exists when in extraordinary circumstances summary denial of property rights without due process may be both justified and permissible.[36] In *Fahey v. Malonee*[37] the United States Supreme Court held that one may be deprived of property by administrative action prior to a hearing when such action is essential to protect a vital governmental interest or the general public. Here the Federal Home Loan Bank Administration, without notice or hearing, appointed a conservator for the Long Beach Federal Savings and Loan Association on the grounds that the Association was conducting its affairs illegally.[38] The Administration alleged that the management was unfit and was jeopardizing the interests of its members, creditors, and the public.[39] The Court rejected the contention of the Association's shareholders that they had been denied due process. The Court conceded the drastic nature of appointing a conservator without a hearing, but noted that the "delicate nature of the institution and the impossibility of preserving credit during an investigation has made it an almost invariable custom to apply supervisory authority in this summary manner."[40]

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[30] *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970), wherein the Court held that welfare payments could not be denied a recipient without due process of law. The Court specifically held that denial of welfare entitlements, in order to satisfy the minimal standards of procedural due process, must be preceded by some form of evidentiary hearing in which the welfare recipient might confront and cross-examine adverse witnesses.

[31] Ch. 127, § 10, [1969] Wis. Laws 237.

[32] 395 U.S. 337 (1969).

[33] *Id.* at 340.

[34] *Id.* at 343, citing United States v. Illinois Cent. R.R., 291 U.S. 457, 463 (1934).

[35] Sniadach v. Family Fin. Corp., 395 U.S. 337, 343 (1970) (Harlan, J., concurring). However, the Court has held that if the creditor has obtained a judgment against his debtor, the debtor's wages may be garnished without a hearing since the judgment is deemed to be sufficient notice. Endicott-Johnson Corp. v. Encyclopaedia Press, 266 U.S. 285, 288 (1929).

[36] Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 598-600 (1950).

[37] 332 U.S. 245 (1946).

[38] *Id.* at 247.

[39] *Id.*

[40] *Id.* at 253.

Thus, a balancing test must be applied before procedural due process can be compromised.[41]

III. LAPREASE V. RAYMOURS FURNITURE CO.

In *Laprease v. Raymours Furniture Co.*[42] a three-judge court in the northern district of New York held unconstitutional those provisions of a New York statute[43] permitting the forcible, prehearing seizure of property by an unsatisfied creditor. The panel based its decision on both the fourth amendment and the due process clause of the fourteenth amendment.

The Fourth Amendment. The procedure outlined by the statute allowed the sheriff, in repossessing a concealed chattel that was not delivered to him upon demand, to forcibly break into any enclosure or building where the chattel might be found.[44] He was armed only with what was termed by the statute to be an affidavit, a requisition, and an undertaking.[45] Briefly defined, the affidavit required, among other things, identification of the chattel to be repossessed and statement of its value.[46] The "undertaking" was in effect a bond in an amount "not less than twice the value of the chattel stated in the plaintiff's affidavit."[47] The "requisition" was apparently the only order the sheriff possessed to authorize seizure of the chattel

[41] There are other instances where extraordinary circumstances exist and in which it is neither practical nor possible to wait for procedural due process. When a particularly urgent situation emerges, an immediate response is necessary. The Court will sustain these extraordinary responses. *See, e.g.*, Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (seizure of mislabeled vitamin product); Yakus v. United States, 321 U.S. 414 (1944) (adoption of wartime price regulations); North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908) (seizure of food not fit for human consumption). One court of appeals has stated that "in a wide variety of situations, it has long been recognized that where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing." R.H. Holman & Co. v. SEC, 299 F.2d 127, 131 (D.C. Cir), *cert. denied*, 370 U.S. 911 (1962).

[42] 315 F. Supp. 716 (N.D.N.Y. 1970).

[43] N.Y. CIV. PRAC. LAW §§ 7102, 7110 (McKinney 1963).

[44] *Id.*; *see* note 3 *supra.*

[45] If an action has been commenced by the alleged creditor, the statute requires the plaintiff to additionally deliver to the sheriff a summons and a complaint. *See* note 3 *supra.* However, the court interpreted the statute as not requiring service of the summons and complaint by the sheriff upon the alleged *defendant*, while seizing the property. 315 F. Supp. at 722 n.8; *see* note 62 *infra*, and accompanying text.

[46] N.Y. CIV. PRAC. LAW § 7102(c) (McKinney 1963):

> (c) Affidavit. The affidavit shall clearly identify the chattel to be seized and shall state:
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> 1. that the plaintiff is entitled to possession by virtue of facts set forth;
> 2. that the chattel is wrongfully held by the defendant named;
> 3. whether an action to recover the chattel has been commenced, the defendants served, whether they are in default, and, if they have appeared, where papers may be served upon them; and
> 4. the value of each chattel or class of chattels claimed or the aggregate value of all chattels claimed.

[47] *Id.* § 7102(e):

> (e) Undertaking. The undertaking shall be executed by sufficient surety, acceptable to the sheriff. The condition of the undertaking shall be that the surety is bound in a specified amount, not less than twice the value of the chattel stated in the plaintiff's affidavit, for the return of the chattel to any person to whom possession is awarded by the judgment, and for payment of any sum awarded by the judgment against the person giving the undertaking. A person claiming a lien on the chattel may except to the plaintiff's surety . . . .

and was "deemed the mandate of the court."[48] No search warrant was required, nor was any intervention or action by a judicial officer contemplated. The *Laprease* court held this procedure to be unconstitutional on its face, in violation of the fourth amendment as applied through the fourteenth.[49]

The court noted that the fourth amendment prohibits unreasonable searches and seizures in both civil and criminal matters.[50] Any search of a private dwelling without a search warrant as required by the fourth amendment, the court argued, is presumptively unreasonable.[51] The rationale is the prohibition of arbitrary intrusions of private property by government officials. Warrantless searches are permissible only under exceptional circumstances,[52] but none existed in the situation confronting the court in *Laprease*. Hence, the unconstitutionality turns on the application of the fourth amendment to civil matters.[53] Even though support is found only in dictum of a United States Supreme Court decision,[54] argument with the court on this point is difficult, especially in view of the particular situation. A private party, desiring repossession under the New York statute, can in effect raise himself to the legal status of a law enforcement officer and require the sheriff, acting as his agent, to beat down the door of anyone concealing unsatisfactorily paid-for property, simply by filling out a few papers and without even an *ex parte* proceeding before a judge.[55] The possibilities for abuse should be apparent.[56]

While the application of the fourth amendment to civil proceedings may or may not be a novel concept, the importance of *Laprease* would

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[48] *Id.* § 7102(d).

[49] 315 F. Supp. at 722.

[50] *See* note 51 *infra.*

[51] For this proposition the court cited James v. Goldberg, 303 F. Supp. 903, 935 (S.D.N.Y. 1969). If such a presumption of unconstitutionality exists, it must be rebuttable since the holding of unconstitutionality was reversed by the Supreme Court *sub nom.* Wyman v. James, 400 U.S. 309 (1971). In *Wyman* a mandatory visit of a welfare recipient's home by a caseworker was held constitutional. The Court noted that the *Wyman* facts were distinguishable from prior cases involving searches of dwelling houses since in *Wyman* the refusal to allow the caseworker to enter was not made a criminal offense. The Court said: "If a statute made [the welfare recipient's] refusal a criminal offense, and if this case were one concerning her prosecution under that statute, *Camara* [v. Municipal Court, 387 U.S. 523 (1967)] and *See* [v. City of Seattle, 387 U.S. 541 (1967)] would have conceivable pertinency." 400 U.S. at 325.

Although *Laprease* was not a criminal prosecution, had plaintiffs resisted the repossession they could have been prosecuted under N.Y. PENAL LAW § 195.05 (McKinney 1965):

> *Obstructing governmental administration*
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> A person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act.

[52] United States v. Jeffers, 342 U.S. 48 (1951).

[53] *But see* note 51 *supra.*

[54] Camara v. Municipal Court, 387 U.S. 523, 530 (1967), in which the Court stated: "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."

[55] The *Laprease* court took special exception to the statutory requirement that the requisition be deemed the mandate of the court; rather, such was "the mandate of the plaintiff's attorney issued without the examination of an intervening magistrate, and resulting in a taking against the will of the owner." 315 F. Supp. at 722.

[56] "If the sheriff cannot invade the privacy of a home without a warrant when the state interest is to prevent crime, he should not be able to do so to retrieve a stove or refrigerator about which the right to possession is disputed." *Id.*

appear to lie in the voiding of the New York statute under the due process clause of the fourteenth amendment.

Due Process. The court in *Laprease* equated the repossession of certain household furnishings and "other necessaries" with the loss of wages in *Sniadach.*[57] Both courts termed the property involved "special." In *Sniadach*, however, the Supreme Court defined precisely what property was to be included as "special"—wages. In *Laprease* "special" property seems to have no boundaries. No test is established to determine whether certain property is "special." By leaving this question unanswered, *Laprease* seemingly indicates that a characterization of property as "special" would turn on the exigencies of each case. The courts, in making such a determination, would not be bound to any limitations; rather, each determination would be based on the individual judgment of each court involved.

Interestingly, the court discussed the objectionable aspects of taking necessaries from persons because of the extreme hardships created.[58] No mention was made of property that is not a necessary of daily life. A glance at the list of goods repossessed in *Laprease* would reveal examples of items that were only questionably necessaries.[59] The court apparently thought it unwise to make fine distinctions. That the goods taken might have been necessaries was sufficient for the court to hold the prehearing seizure unreasonable. Had such a distinction been made, endless litigation might have been commenced by creditors in an attempt to distinguish between necessaries and non-necessaries.

In effect the court has pronounced unconstitutional those provisions of the statute that deny persons their "special" property without due process. The court determined that the statute was unconstitutional even as applied to a family above the poverty level[60] who might be able to redeem the property through a surety or by posting a bond as prescribed by the statute.[61] The objection to the statute is that it may take a person's property without notice and an opportunity to be heard. That he may be able to retrieve his property after a temporary taking does not obviate the lack of due process.

Another shortcoming of *Laprease* is its failure to explain whether the relevant provisions of the statute might be upheld if sufficient notice of a pending suit were given. The statute does not require the creditor to commence an action prior to serving the sheriff with the papers necessary to obtain repossession. If the creditor has not commenced an action he must serve upon the sheriff a summons and a complaint; but the sheriff is not statutorily required to serve upon the debtor any more than the affidavit, the requisition, and the undertaking.[62] Thus, the debtor may be

[57] *Id.* at 723.
[58] *Id.*
[59] It is with difficulty that an 11-piece dinette set, 3 end tables, and a record player can be recognized as essentials. *See* note 1 *supra.*
[60] 315 F. Supp. at 723.
[61] N.Y. CIV. PRAC. LAW § 7102(f) (McKinney 1963).
[62] *See* note 45 *supra.*

uninformed as to the institution of an action by his creditor until some time after the property has been delivered to that creditor. The question whether the serving of a summons and a complaint prior to or simultaneously with the repossession would be sufficient notice of the pendency of the suit so as to justify a prehearing seizure remains unanswered.

An attempt was made by the defendants to establish the goods as either secured or unsecured. As previously noted,[63] UCC section 9-503 permits nonjudicial repossession of a secured chattel in the event of a default. The defendants apparently hoped to establish the goods as secured and pleaded the UCC as a defense to their actions. The court rejected this contention, reasoning that the plaintiff's allegations that there had been no default and that in one instance no secured interest was held[64] dissolved the argument of defendants. Apparently then, any denial of default by a debtor would be sufficient to obviate this section of the UCC. Thus, if the court's reasoning were accepted by the United States Supreme Court or by other courts, the potential devastation of the spirit and intent of section 9-503 is obvious. The court defends its position by noting that the New York statute is not narrowly drawn to cover only secured transactions, but rather it applies to any replevin situation.

IV. Conclusion

Despite the fact that *Laprease* purports to meet the challenge of the constitutionality of nonjudicial repossessions, regretfully many questions remain. The failure of the court to limit the scope of "special" property indicates the difficulty of making such a determination except on a case-by-case basis—and then only at the whim of the judge involved. In the final analysis a determination of whether the property is "special" seems immaterial. Any deprivation of property without notice and the chance to be heard is a denial of procedural due process. That the taking is temporary or that the person so deprived is financially able to retrieve his property pursuant to the statute does not obviate the objection to the denial of due process. The court does not appear to make allowances for nonjudicial repossession even under extraordinary circumstances. The *Laprease* court, temporarily at least, has eradicated a centuries-old custom and right of nonjudicial repossession. This appears to have been done without due regard to the potential repercussions on the economic situation.

The *Laprease* court, in making the determination that the statute does not cover merely special situations and circumstances, gives no indication whether special circumstances might warrant the types of action contemplated under the statute. The holding requires notice and an opportunity to be heard. However, certain extraordinary circumstances, such as the situation where the defaulting vendee plans to remove himself and the goods in question from the jurisdiction of the court, may justify extra-

[63] *See* note 17 *supra*, and accompanying text.

[64] Plaintiff Messler alleged that the vendor held no secured interest in the property which he threatened to seize. 315 F. Supp. at 723.

ordinary action. *Fahey* recognized that public policy might be an overriding consideration permitting extraordinary remedies. The interest of the creditor in being paid must be balanced against the right of the debtor to due process. It would seem that in the interest of justice the scales would tip more heavily, in extraordinary circumstances, in favor of the creditor's being paid—or at least being able to regain lost goods. *Laprease*, however, would not seem to permit even this type of prehearing seizure. Notice and a chance to be heard, it appears, must be granted in every case prior to seizure.[65]

The repossession statutes[66] now in force in Texas with regard to chattels not covered by the UCC might be adversely affected if *Laprease* were upheld by the United States Supreme Court. Although notice is usually given in Texas prior to seizure, there is no statutory requirement to that effect. This deficiency could be cleared up easily through minor legislation. The Texas statute might be more palatable to the Court than its New York counterpart because under the Texas statute the plaintiff may proceed only if a court of competent jurisdiction issues a writ of attachment. On the other hand this might be interpreted as a rubber stamp procedure involving little more than the securing of the signature of a judge who knows nothing about the circumstances of the case. Furthermore, the statutes do not meet the most objectionable aspect of nonjudicial repossession—*i.e.*, that the defendant is not allowed to be heard prior to seizure.

Laprease, like *Sniadach* and *Goldberg*, attempts to remove the objectionable omission of procedural due process from the daily transactions of American life. If the question in *Laprease* is faced by the United States Supreme Court, the Court must balance the interest of the individual in procedural due process against the potential disruption that could occur in the aftermath of striking down this tradition-honored procedure. The Court might find the holding in *Laprease* insufficiently narrow in scope; for to uphold *Laprease* would be effectively to abrogate UCC section 9-503. Hopefully the Court would be hesitant to do this. Perhaps the Court could distinguish between the repossession of secured and unsecured property to avoid this result. Perhaps too, the Court could establish a minimally acceptable standard of due process applicable to repossession situations. Surely the Supreme Court would at least attempt to answer these objections to *Laprease*.[67]

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[65] The court considered and rejected two further contentions by defendants. Defendants argued that the New York statute was a descendant of the ancient Statute of Marlbridge of 1267, 52 Hen. 3, c. 21, and as such, should be sustained on the basis of its age. The court reasoned that age alone is insufficient to sustain an otherwise unconstitutional statute. 315 F. Supp. at 723. The court also dismissed the defendant's contention that the debtors had contractually consented to nonjudicial repossession because the typical sales contract is filled with fine print relieving the debtor of his constitutionally guaranteed rights. While debtors should be bound by their contracts, the court doubted whether signing such a contract gave rise to a "competent waiver of a constitutional right." *Id.* at 724.

[66] *See* notes 20-27 *supra*.

[67] Reecntly, in Sanks v. Georgia, 401 U.S. 144 (1971), the Supreme Court refused to address itself to some of the questions raised by *Laprease* because intervening changes in the status of the