

January 1972

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Recommended Citation

John T. Arnold, Comment, *Due Process Evolution - Fuentes and the Deed of Trust*, 26 Sw L.J. 876 (1972)
<https://scholar.smu.edu/smulr/vol26/iss5/4>

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COMMENTS

DUE PROCESS EVOLUTION — FUENTES AND THE DEED OF TRUST

by John T. Arnold

The history of the writ of replevin began somewhat obscurely during the thirteenth century in England.¹ Replevin at early common law was an action brought by a tenant against his lord for the return of chattels "distrained" by the lord.² The action arose after the feudal lord had seized possessions from a tenant to satisfy a debt of services owed.³ If the tenant then instituted a replevin action, and gave security, the sheriff could order the lord to return the chattels at once, pending a final judgment in the underlying dispute.⁴ This prejudgment replevin of property at common law did not follow from an *ex parte* application by the tenant-distrainee. Here "[t]he distrainor [landlord] could always stop the action of replevin by claiming to be the owner of the goods . . . which enabled the sheriff to determine summarily the question of ownership."⁵ As the feudal era passed, creditors began to invoke state power in place of "self-help."⁶ In order to validly implement this power, the creditor had to proceed through the action of debt or detinue.⁷ These actions, however, did not provide for prejudgment return of property to the creditor.⁸ Consequently, whenever a creditor sought a prejudgment seizure of property, only the writ of replevin and the summary jurisdiction of the sheriff afforded the parties a minimal hearing on the issue of indebtedness.

From these early common law actions our states derived their respective attachment, garnishment, and replevin statutes. This Comment will discuss the procedures which these modern statutes must incorporate in order to afford constitutional protection to both debtor and creditor. The impact of these principles on the Texas deed of trust will then be considered.

I. EARLY VIEWS OF DUE PROCESS

One of the first cases concerning the validity of private attachment upon debtor default was decided by the Supreme Court in 1902.⁹ In refusing to elucidate on the due process arguments advanced by the debtor, the Court relied on its familiar "hands off" doctrine in declaring that "[t]o what actions the

¹ 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 283 (1966).

² T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 367-69 (1956).

³ *Id.* at 368.

⁴ *Id.* See also J. COBBEY, A PRACTICAL TREATISE ON THE LAW OF REPLEVIN 19-29 (1890); W. HOLDSWORTH, *supra* note 1, at 284-85; 2 F. POLLACK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 577 (1923).

⁵ W. HOLDSWORTH, *supra* note 1, at 284.

⁶ *Id.* at 278.

⁷ T. PLUCKNETT, *supra* note 2, at 362-65. In their subsequent history, debt became a vital factor in the history of contracts, while detinue contributed much to the rules of personal property law. *Id.* at 364.

⁸ This caused some creditors to circumvent the state and revert to the former "self-help" by appropriating the property before judgment. *Id.* at 368. Extensive commentary on this resort to replevin and the pleading and procedures required is found in F. ENEVER, HISTORY OF THE LAW OF DISTRESS (1931).

⁹ *Rothschild v. Knight*, 184 U.S. 334 (1902). Here, a creditor of a retail fur merchant seized fur garments from the debtor's shop after a default amounting to \$4,000.

remedy of attachment may be given is for the legislature of a State to determine and its courts to decide. . . ."¹⁰ Six years later, in a case involving the right of a taxpayer to obtain a fair hearing before the final assessment of his property taxes, the Court qualified its previous attitude by holding that due process of law required not only a hearing, but also sufficient notice to the taxpayer that such a hearing would take place.¹¹ That same year, the Court made clear its position that the due process requirement of a prior hearing does not extend to any seizure made in protection of a vital "public interest."¹² Unfortunately, an extensive identification of the various types of property falling into this category was not offered by the Court.

Developing the concept of due process, the Court held that a creditor's judgment against a corporation, though conclusive as to the existence and amount of the debt, did not countenance a seizure of a stockholder's personal property upon the ground that the stockholder was indebted to the corporation.¹³ This method of obtaining satisfaction of a debt from a third party was strongly denounced by the Court as a device designed to afford the creditor jurisdiction for his claim where none existed as to the primary debtor.¹⁴

Amid the emergence of this compulsory prior hearing requirement, the importance of valid notice as a necessary prerequisite to any hearing went unheeded. The case which recognized this important concept was *Mullane v. Central Hanover Trust Co.*¹⁵ In *Mullane* the named trustee sought judicial settlement of accounts representing a common trust fund. Notice of the action was printed in various newspapers, with no further attempt made to notify the persons known by the trustee to be interested parties. The Court held that notice by publication in a newspaper to known persons is not sufficient under the fourteenth amendment as a basis for adjudication depriving them of substantial property rights. Furthermore, serious efforts must be made in order to notify such persons at least by ordinary mail to their addresses of record.¹⁶

¹⁰ *Id.* at 341.

¹¹ *Londoner v. City & County of Denver*, 210 U.S. 373 (1908).

¹² *North Am. Storage Co. v. Chicago*, 211 U.S. 306, 315 (1908). This case involved the seizure, condemnation, and destruction of spoiled food discovered in a Chicago warehouse. The Court alluded to the idea that the right to a hearing is absolute, thus requiring the granting of a hearing after such goods are seized, provided the injured party puts forth a valid request. In an extension of this post-seizure hearing notion to the area of financial institutions, the Court, in *Fahey v. Mallone*, 332 U.S. 245 (1947), held that a bank is not entitled to a hearing before a conservator takes possession, but the bank must have a hearing after possession.

In another more recent case, *Ewing v. Mytinger & Casselberry*, 339 U.S. 594 (1950), the Court held that the seizure of misbranded articles under the command of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 334 (1970), was constitutionally permissible without a prior hearing. The majority was in agreement that due process is satisfied by the opportunity which the claimant has for a full hearing before a court in subsequent libel proceedings, assuming the claimant brings such an action.

¹³ *Coe v. Armour Fertilizer Works*, 237 U.S. 413 (1915). The Court elaborated by saying that though such action standing alone is not violative of due process, there must nevertheless be a hearing held *before* such a seizure takes place.

¹⁴ *Id.* at 416.

¹⁵ 339 U.S. 306 (1950).

¹⁶ *Id.* Justice Jackson, writing for the majority, attacked the practicality of notice by publication:

It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a news-

As to persons whose identity is unknown, the Court reaffirmed its position that "resort to publication as a customary substitute where it is not reasonably possible or practicable to give more adequate warning"¹⁷ will be constitutionally sufficient.

II. DEVELOPMENT OF NEW DUE PROCESS STANDARDS

Because of the extensive use of credit in consumer purchasing patterns, the Supreme Court has been confronted with the problem of defining the degree of due process protection to be afforded owners of what has been called "necessary property." Recent decisions of the Court indicate a trend toward broadening the sphere of due process protection.

The petitioner in *Sniadach v. Family Finance Corp.*¹⁸ attacked the constitutionality of a Wisconsin prejudgment wage garnishment procedure. The original plaintiff, a finance corporation, filed a garnishment complaint alleging indebtedness on a promissory note executed by petitioner. The garnishee employer answered the complaint by stating that it was in possession of wages due the petitioner and that it would pay only one-half of that amount as a "subsistence allowance," as provided by statute.¹⁹ *Sniadach* unsuccessfully sought dismissal of the garnishment action on several constitutional grounds, including deprivation of property without due process of law. The United States Supreme Court reversed the decision of the lower court. Mr. Justice Douglas, writing for the majority, stressed the fact that an "interim" freezing of wages from the filing of the garnishment action to the trial on the merits was as serious as permanent deprivation of property and "may as a practical matter drive a wage-earning family to the wall."²⁰ Relying on congressional testimony,²¹ Justice Douglas

paper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed.

Id. at 315.

¹⁷ *Id.* at 317. See *Blinn v. Nelson*, 222 U.S. 1 (1911); *Cunnius v. Reading School Dist.*, 198 U.S. 458 (1905).

¹⁸ 395 U.S. 337 (1969), noted in *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 113 (1969).

¹⁹ 395 U.S. at 338, n.1.

²⁰ *Id.* at 341-42.

²¹ 114 CONG. REC. 1833 (1968) (Congressman Gonzales); *id.* at 1831-32 (Congressman Reuss & Congresswoman Sullivan); H.R. REP. NO. 1040, 90th Cong., 1st Sess. (1967). The Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146 (1968), relating to both pre- and post-judgment wage garnishment, sets the maximum amount which may be garnished under federal law. The pertinent provision reads:

[T]he maximum part of the aggregate disposable earnings of an individual for any work week which is subjected to garnishment may not exceed

- (1) 25 per centum of his disposable earnings for that week, or
- (2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage . . . whichever is less.

15 U.S.C. § 1673(a) (1970). The above provision, however, does not limit the power of the states to establish exemptions more favorable to the wage earner. 15 U.S.C. § 1677 (1970). For a survey of state statutory patterns relating to both pre- and post-judgment wage garnishment, see *Brunn, Wage Garnishment in California: A Study and Recommendations*, 53 CALIF. L. REV. 1214 (1965). For extensive commentary based on empirical studies, see *Note, Attachment in California: A New Look at an Old Writ*, 22 STAN. L. REV. 1254 (1970).

The Uniform Consumer Protection Credit Code prohibits employee discharges for garnishments and completely bars pre-judgment garnishment as a collection device. UNIFORM CONSUMER CREDIT CODE §§ 5.104-106 (1969). See generally *Note, Garnishment Under*

branded wage garnishment as a cause of employee discharges and bankruptcy.²² Calling wages a "specialized type of property presenting distinct problems in our economic system,"²³ the majority considered the *use* of property to come within the purview of "property" under the due process clause.²⁴ Earlier decisions on prejudgment attachments had either ignored the proprietary nature of the *use* of property,²⁵ or had considered its temporary loss of insufficient significance.²⁶ The majority also expressed concern over the tendency of garnishment to deprive the defendant of a realistic judicial settlement because of the pressure on him to settle with the plaintiff and thereby pacify his employer.²⁷

Whether the Court determined the precise kind of hearing required in *Sniadach* prejudgment seizure situations is subject to conjecture. The majority indicated that a hearing determining the validity and substance of the debt would suffice.²⁸ A narrowly drawn state statute incorporating some form of fair hearing before the taking occurs would satisfy this requirement. Nevertheless, the unelaborated implications of *Sniadach* and its subsequent impact on kindred areas of the law have stimulated a continuing attack on various statutory prejudgment remedies.

The first major test of *Sniadach*'s applicability to other forms of non-judicial taking came in *Brunswick v. J & P, Inc.*,²⁹ a diversity case decided by the Tenth Circuit. Brunswick sold bowling equipment to the defendant corporation by way of a conditional sales contract. After the defendants defaulted, Brunswick filed the replevin bond as required by statute and took possession of the equipment. The court held that since *Sniadach* was concerned with wage garnishment, it was "not in the least comparable"³⁰ to a case involving

the Consumer Credit Protection Act and the Uniform Consumer Credit Code, 38 U. CIN. L. REV. 338 (1969).

²² 395 U.S. at 341-42. Two years later, in *Bell v. Burson*, 402 U.S. 535, 542 (1971), the Court clarified its position when it stated:

[W]hile 'many controversies have raged about . . . the Due Process Clause,' . . . it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate an interest such as that here involved, it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective.

²³ 395 U.S. at 340.

²⁴ This characterization is not entirely new. See *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928) (owner's use of property protected by fourteenth amendment against unreasonable zoning restrictions).

²⁵ See, e.g., *Coffin Bros. v. Bennett*, 277 U.S. 29 (1928); *Ownbey v. Morgan*, 256 U.S. 94 (1921).

²⁶ See *McKay v. McInnes*, 279 U.S. 820 (1929), *aff'g per curiam* 127 Me. 110, 141 A. 699 (1928).

²⁷ In a study prepared by a State of Washington judge it was revealed that not one of the 227 prejudgment garnishments filed during the study period actually went to trial. Patterson, *Wage Garnishment—An Extraordinary Remedy Run Amuck*, 43 WASH. L. REV. 735, 735-36 (1968). It has been suggested that this could lead to the signing of a new contract by the debtor which would incorporate in its payment schedule an increase in additional charges representing the collection fees incurred by the creditor's attorneys. Comment, *Wage Garnishment in Washington—An Empirical Study*, 43 WASH. L. REV. 743 (1968); Comment, *Wage Garnishment as a Collection Device*, 1967 WIS. L. REV. 759.

²⁸ 395 U.S. at 343. In *Goldberg v. Kelly*, 397 U.S. 254 (1970), decided almost a year after *Sniadach*, the Court hinted that the decisionmaker at the hearing need not file a full opinion or make formal findings of fact or conclusions of law, but should state the reasons for his determination and indicate on what evidence he relied.

²⁹ 424 F.2d 100 (10th Cir. 1970).

³⁰ 424 F.2d at 105. The Oklahoma doctrine of *custodia legis* means essentially that when

enforcement of a security interest. In drawing this narrow distinction, the court relied on the wording of the conditional sales contract to find that the debtor was placed on notice of the consequences of failure to perform, and that the constitutional right to notice and hearing before removal of the property was thereby waived.³¹ The underlying implications of *Sniadach* pertaining to the protection of individuals contracting with sophisticated commercial enterprises were apparently considered inapplicable where both parties are commercial entities, and their bargaining power is to some degree equal. Nevertheless, one can question the power of fine print to waive the constitutional rights of any party when no explanation of the impact of enforcement is reasonably available.

The most recent and far-reaching decision on the requirements of notice and hearing under the fourteenth amendment is *Fuentes v. Shevin*,³² decided by the Supreme Court of the United States. The manifest result of prior doctrine, *Fuentes* declares with finality that broadly drawn statutes allowing pre-judgment seizure of property by state officers without an opportunity to be heard will no longer withstand constitutional scrutiny. Citing *Boddie v. Connecticut*,³³ the Court stated that only where extraordinary situations exist may a state interest justify postponement of notice and the opportunity for a hearing.

Fuentes was specifically concerned with the constitutionality of the pre-

personal property is repossessed under a writ of replevin, the property is considered to be in the custody of the court. In such cases where the replevined property is held under bond in *custodia legis* and is sold so as to amount to a conversion, Oklahoma case law permits the defendant to the replevin action to void the sale and prove the reasonable market value of the property at the time and place of the conversion. Upon such proof, the defendant-chattel mortgagor is entitled to credit his indebtedness for whatever amount he is able to show the property was reasonably worth. *Scott v. Standridge*, 117 Okla. 111, 245 P. 591 (1926); *Salisbury v. First Nat'l Bank*, 99 Okla. 138, 221 P. 444 (1923).

³¹ The pertinent provision of the contract relied on by the court stated that upon default Brunswick "may take immediate possession of said property [collateral] and for this purpose Seller may enter the premises where said property may be and remove the same without notice or demand, and with or without legal process; thereupon all the rights and interests of the Buyer to and in said property shall terminate." 424 F.2d at 105. The presumption against such contractual waivers of constitutional rights is well settled. *Glasser v. United States*, 315 U.S. 60 (1942); *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389 (1937).

A more recent decision embracing the *Sniadach* reasoning was *Collins v. Viceroy Hotel Corp.*, 338 F. Supp. 390 (N.D. Ill. 1972). Plaintiff, while a guest of the defendant hotel, had failed to pay his room rent for eight consecutive days. Upon returning to his room, he found that the lock on his door had been plugged in such a way as to not admit his doorway. Although his personal property was still in the room, the hotel management had constructively seized it under an Illinois statute. After an injunction was issued returning the property to him, the plaintiff sought a declaratory judgment and damages under the Civil Rights Act of 1964, 42 U.S.C. § 1983 (1970), and the fourth and fourteenth amendments. In rejecting a defense of mootness, the court characterized plaintiff's claim for damages based on the deprivation of his property for the period it was held as a "remaining live issue." 338 F. Supp. at 392. The court invalidated the Illinois law as failing to incorporate the requisite notice and hearing needed to withstand the effect of *Sniadach*. Calling the seizure of plaintiff's personal effects a "deprivation . . . which causes greater hardships than the deprivation of mere wages," the court had no difficulty applying the *Sniadach* Court's characterization of "necessary" property. 338 F. Supp. at 397. See also *Klim v. Jones*, 315 F. Supp. 109 (N.D. Cal. 1970).

³² 407 U.S. 67 (1972).

³³ 401 U.S. 371 (1971). *Boddie* involved a state statute requiring that costs for divorce proceedings be posted before the issue could come to trial. The Court found that this offended the concept of due process, since it deprived a certain class of the opportunity to be heard. The Court declared that "absent a countervailing state interest of overriding significance," persons must be afforded "a meaningful opportunity to be heard." *Id.* at 377.

judgment replevin provisions of Florida and Pennsylvania.³⁴ Appeals were taken from two federal district courts and joined for the Court's review.³⁵ Petitioner Fuentes purchased a gas stove, and later, a stereophonic phonograph from Firestone under a conditional sales contract. After a disagreement concerning servicing of the stove, Mrs. Fuentes allegedly refused to make her remaining payments. At this point, Firestone filed an action for repossession of both the stove and the stereo in conformance with the Florida procedure.³⁶ Before Mrs. Fuentes received notice of the action, Firestone obtained a writ of replevin directing the sheriff to seize the goods from the Fuentes' home. Concomitant with the taking, the sheriff delivered notice of the underlying complaint. By virtue of the Florida statute, the petitioner was provided no prior notice and was allowed no opportunity to challenge the issuance of the writ.

Although a post-seizure hearing is provided by the challenged statutes, the Court saw this procedure as one unlikely to dispel the danger of arbitrary and unsubstantiated governmental interference in property enjoyment.³⁷ The Court concluded that if the right to notice and hearing is to serve its designated purpose, then this right must be given at a time when the deprivation can still be prevented.³⁸ Accordingly, even though the seized property could have been recovered upon the posting of security, the Court nonetheless considered this temporary deprivation to be a substantial deprivation.³⁹

Turning to the "necessary property" standard derived from *Snidach* and

³⁴ FLA. STAT. ANN. §§ 78.01, 78.07, 78.08, 78.10, 78.13 (Supp. 1972-73); PA. STAT. ANN. tit. 12, § 1821 (1972); PA. RULE CIV. PROC. §§ 1073, 1076, 1077, 1037(a) (1972). In essence, these provisions permit a private party, without a hearing or prior notice to the other party, to obtain a prejudgment writ of replevin by means of an ex parte application to a court clerk, upon the posting of a bond for double the value of the property to be seized. The sheriff is then required to execute the writ by seizing the property. Unlike the private powers granted by the Uniform Commercial Code, these statutes require that a state officer must supervise the taking.

Under the Florida statute the officer seizing the property must keep it for three days. During that period, the defendant may reclaim possession by posting his own security bond for double the property's value, in default of which the property is transferred to the applicant for the writ, pending a final judgment in the underlying repossession action.

In Pennsylvania the applicant need not initiate a repossession action or even allege (as Florida requires) legal entitlement to the property. It is sufficient that he file an "affidavit of the value of the property." To secure a post-seizure hearing, the party losing the property through replevin must himself initiate a suit to recover the property. He may also post his own counterbond within three days of the seizure to regain possession.

³⁵ *Fuentes v. Faircloth*, 317 F. Supp. 954 (S.D. Fla. 1972); *Epps v. Cortese*, 326 F. Supp. 127 (E.D. Pa. 1972). Both cases were heard by three-judge federal courts pursuant to 28 U.S.C. § 2281 (1970). The courts in both cases upheld the constitutionality of the statutes.

³⁶ Under the Florida statute "[a]ny person whose goods or chattels are wrongfully detained by any other person . . . may have a writ of replevin to recover them . . ." FLA. STAT. ANN. § 78.01 (Supp. 1972-73). "There is no requirement that the applicant make a convincing showing before the seizure that the goods are, in fact, 'wrongfully detained.'" 407 U.S. at 73-74.

³⁷ See generally Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965): "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense on the merits." citing *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915).

³⁸ "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." *Stanley v. Illinois*, 405 U.S. 645, 647 (1972).

³⁹ 407 U.S. at 84-85. "The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause." *Id.* at 86.

Goldberg v. Kelly,⁴⁰ the *Fuentes* Court aptly noted that a more desirable term to describe the property interests essential in the pursuit of a livelihood would be "important interests."⁴¹ While this shift in semantics may aid the trier of fact in assessing a particular individual's needs, it can have no rational basis within the ambit of procedural due process. It subjects the individual's freedom of choice to the criticism of a court having contrary views as to the property "necessary" or "important" to another's livelihood. It is submitted that neither distinction implements the objectives and uniform application of the true principles of due process.

Under the doctrine of "grievous loss,"⁴² any substantial and adverse impact on one's private interests is sufficient to require due process protection. This theory provides a rationale capable of application to deprivations of property. A base of interpretation unhindered by classifications of specific private interests, the "grievous loss" concept concentrates on the ideological protection of the individual's rights.⁴³ Its application to deprivations of all types of property is apparent.

Realizing that the existence of extraordinary situations may validate statutes allowing summary seizures, the Court in *Fuentes* stressed the fact that these situations must be "truly unusual."⁴⁴ Only those statutes making seizure of certain goods necessary to an important governmental or public interest have been upheld.⁴⁵ Certainly the state interest in assisting retail merchants to regain possession of household goods is not such an emergency taking of property.⁴⁶ Therefore, the Court had no difficulty in deciding that the statutes in question were devices only protective of private gain. Whether this position was meant to proscribe reposessions without direct state action is a question left unanswered by *Fuentes*. Accordingly, there continues to exist a void of uncertainty in the nexus between direct state action and state-condoned private action.

The contention that the appellants had sufficiently waived their rights of due process by signing the installment agreement met stiff resistance by the Court.⁴⁷ The terms of the contract allegedly representing the waiver were in printed form, unobtrusively small, and unaided by any exemplification of

⁴⁰ 397 U.S. 254 (1970); see note 28 *supra*.

⁴¹ *Bell v. Burson*, 402 U.S. 535, 539 (1971).

⁴² *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

⁴³ See Note, *Prior Notice and Hearing Before Attaching a Badge of Disgrace*, 25 SW. L.J. 622, 626-27 (1971).

⁴⁴ 407 U.S. at 90.

⁴⁵ See note 12 *supra*, and accompanying text.

⁴⁶ The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Stanley v. Illinois, 405 U.S. 645, 656 (1972).

⁴⁷ The contracts at issue provided in part that "in the event of default of any payment or payments, Seller at its option may take back the merchandise" 407 U.S. at 94.

their meaning. In another recent case, *D.H. Overmyer Co. v. Frick*,⁴⁸ the Supreme Court outlined the considerations relevant to determining the existence of a contractual waiver of due process. There, both the parties to the contract were corporations, with the negotiation of the contract primarily in the hands of their attorneys. The waiver provision in question was specifically bargained for and the Court acknowledged that it was "not a case of unequal bargaining power or overreaching."⁴⁹ Clearly, this situation is distinct from a printed waiver, which is confusing and yet forms an integral condition to the sale. The simple recital, as in *Fuentes*, that the seller may "take back" items whenever it considers the purchaser to be in default can on no rational grounds be read as a waiver of a prior hearing as guaranteed by the concept of procedural due process.⁵⁰ Had the language constituted a waiver on its face, the Court intimated that the involuntariness or unintelligence of the waiver would be a somewhat weaker defense.⁵¹ Apparently the Court has formulated a new test for an effective contractual waiver of due process. To insure validity, such a waiver (1) must appear in type commensurate in size with the type or print in the body of the contract, (2) must be actually bargained for on a status of equal and full understanding of its meaning, and (3) must be accompanied by an explanation of its impact or must specifically describe what is in fact being waived.

Although the Court explicitly states that its holding is narrow, this statement may be viewed with some skepticism. In light of the broad language used by the Court, it can be reasonably argued that the principles which constitute the foundation of its holding are not limited to writs of replevin or the summary taking of personal property. Indeed, the Court has stated that the opportunity for a hearing can in no way be limited to isolated, case-by-case considerations.⁵²

III. THE CONCEPT OF STATE ACTION

In *Adams v. Egley*,⁵³ decided this year, a federal district court held sections 9-503 and 9-504 of the Uniform Commercial Code, as adopted in California, to be violative of the due process clause.⁵⁴ While the trend toward invalidation of certain state garnishment and replevin statutes had become commonplace,

⁴⁸ 405 U.S. 174 (1972). Any such waiver must be found to have been "voluntarily, intelligently, and knowingly" made. *Id.* at 187.

⁴⁹ *Id.* at 186.

⁵⁰ The contracts "did not indicate *how* or *through what process*—a final judgment, self-help, prejudgment replevin with a prior hearing, or prejudgment replevin without a prior hearing—the seller could take back the goods." 407 U.S. at 96. The Court will not "presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel. Co. v. Public Util. Comm'n*, 301 U.S. 292, 307 (1937).

⁵¹ 407 U.S. at 95.

⁵² *Id.*

⁵³ 338 F. Supp. 614 (S.D. Cal. 1972).

⁵⁴ Section 9-503 of the California Commercial Code provides in part: "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 the peace or may proceed by action . . ." CAL. COMM. CODE § 9-503 (West 1964). Section 9-504 of the Code describes the manner in which collateral, once taken, may be disposed of, and provides for the disposition of the proceeds. CAL. COMM. CODE § 9-504 (West 1964).

the *Adams* decision was the first successful attempt to invalidate parts of the UCC.⁵⁵

In *Adams*, the plaintiff executed a promissory note and security agreement in favor of a bank in return for a loan of one thousand dollars. The security agreement stated that the bank would "have all of the rights and remedies of a Secured Party under the California Uniform Commercial Code."⁵⁶ After the plaintiff fell behind on his payments, the bank instructed the defendant to take possession of the vehicles serving as security. Pursuant to section 9-503 of the code, the plaintiff was given no notice of the planned summary repossession. After the repossession was completed, the collateral was sold by the bank at a private sale.

The initial question raised by the defendant was whether the court had jurisdiction to hear a cause of action based on a purely private contractual undertaking. The plaintiff had based his claim on a charge that the taking of his property was a violation of the due process clause and that the 1964 Civil Rights Act⁵⁷ entitled him to relief. The Act itself requires that any alleged deprivation of a constitutional or statutory right must be attributable to the actions of any person "acting under color of state law."⁵⁸ Since no state official was involved in the repossession process, the court was constrained to find some state action behind the enforcement rights of parties to a private, self-executing contract. Using the Supreme Court decision in *Reitman v. Mulkey*,⁵⁹ the court found the California legislature's adoption of the UCC, coupled with the repossession action of the bank, to be sufficient state involvement to bring the alleged acts within the purview of the fourteenth amendment.⁶⁰

This reasoning failed to meet with the court's approval in *Oller v. Bank of America*,⁶¹ a case decided two weeks later in the northern district of California. The facts were substantially the same as those in *Adams*. In rejecting the plaintiff's claim that the bank's repossession constituted action taken under color of state law, the court took the position that "the requirement of 'State action' can rarely be satisfied when the action is taken by one not a state

⁵⁵ The Uniform Commercial Code has been adopted in 49 states. Louisiana, with its civil law concepts of property, is the only state that has not adopted the Code. See generally Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1 (1967).

⁵⁶ 338 F. Supp. at 616.

⁵⁷ 42 U.S.C. § 1983 (1970).

⁵⁸ *Id.* Since only those acting "under color of" state law may be sued under this section for deprivation of constitutional rights, an analysis of the class of persons coming within its mandate is necessary. In *United States v. Classic*, 313 U.S. 299 (1941), the Court stated: "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *Id.* at 326. Although *Classic* dealt with the action of state officials, its doctrine has been held to cover acts of private individuals exercising authority granted by state law. *Hall v. Garson*, 430 F.2d 430 (5th Cir. 1970); *Santiago v. McElroy*, 319 F. Supp. 284 (E.D. Pa. 1970); *DeCarlo v. Joseph Horne & Co.*, 251 F. Supp. 935 (W.D. Pa. 1966). In *Reitman v. Mulkey*, 387 U.S. 369 (1967), the Supreme Court held that when a state statute sanctions private discriminations, the prohibited state involvement necessary to invoke the equal protection clause is achieved. Although *Reitman* was concerned with equal protection, it is submitted that the same "state action" reasoning is applicable to the area of due process.

⁵⁹ 387 U.S. 369 (1967); see note 58 *supra*.

⁶⁰ 338 F. Supp. at 616.

⁶¹ 342 F. Supp. 21 (N.D. Cal. 1972).

official."⁶² The *Adams* decision, through its reliance on *Reitman*, was viewed as a resolution of the jurisdictional question on "misplaced"⁶³ grounds. Dismissing *Reitman* as a case confined to state-sanctioned racial discrimination, the court could find no state action in the bank's conduct, absent "exceptional factors" which compelled an extension of the Civil Rights Act on "moral" grounds.⁶⁴

Although the conclusion drawn by the *Adams* court has not met with universal acceptance, the reasoning behind its decision has been employed to invalidate other types of state-condoned private redress. In *Hall v. Garson*, recently decided by the Fifth Circuit, the Texas Landlord's Lien Act⁶⁵ was held violative of due process since no notice or prior hearing was afforded the defaulting tenant.⁶⁶ The Texas statute grants the operator of any apartment a lien upon certain personal property found within the tenants' dwelling, and, upon the accumulation of unpaid rent, the operator may peremptorily seize the property and retain it until the rent is paid. No state officer is involved, as the statute grants the apartment operator the exclusive right of seizure. Turning to the language in *Fuentes*, which requires that notice and the opportunity to be heard must come at a meaningful time, the court made clear its position on state action through private enforcement: "Art. 5238a clothes the apartment operator with clear statutory authority to enter into another's home and seize property contained therein. *This makes his actions those of the State.*"⁶⁷ Similarly, the court could find none of the important governmental or general public interests alluded to in *Fuentes* as a possible basis for upholding such a statute.⁶⁸

IV. CONSTITUTIONAL INFIRMITY OF THE TEXAS DEED OF TRUST ACT

The broad constitutional principles mandating prejudgment notice and hearing before seizure of one's property are reasonably applicable to the real property foreclosure proceeding set out in the Texas Deed of Trust Act.⁶⁹ The Act has recently been criticized as lacking any form of *effective* notice.⁷⁰ The particular form of notice required by the Texas statute consists of two optional methods: by posting written notice in three public places in the county where the property is situated, or by exercising a particular plan of foreclosure adopted by the terms of the deed of trust.⁷¹ In situations where

⁶² *Id.* at 23. See also *McCormick v. First Nat'l Bank*, 322 F. Supp. 604, 606 (S.D. Fla. 1971).

⁶³ 342 F. Supp. at 23.

⁶⁴ *Id.*

⁶⁵ TEX. REV. CIV. STAT. ANN. art. 5238a (1966).

⁶⁶ No. 72-1189 (5th Cir., Nov. 2, 1972).

⁶⁷ *Id.* (emphasis added).

⁶⁸ *Id.* See also *Gross v. Fox*, 41 U.S.L.W. 2246 (E.D. Pa., Oct. 24, 1972), where § 302 of the Pennsylvania Landlord and Tenant Act was held unconstitutional by application of the *Fuentes* rationale.

⁶⁹ TEX. REV. CIV. STAT. ANN. art. 3810 (1966).

⁷⁰ See Comment, *Nonjudicial Foreclosure Under a Deed of Trust: Some Problems of Notice*, 49 TEXAS L. REV. 1085 (1971).

⁷¹ The statute reads:

All sales of real estate made under powers conferred by any deed of trust or other contract lien shall be made in the county in which such real estate is

sophistication in bargaining is absent, the statute is incorporated into the agreement and thereby provides the sole standard of notice.⁷² Although the number of abuses by trustees is probably small, there remains a segment of the populace which is forced to subject itself to the unscrupulous lender. While the need for additional statutory protection is clear, an analysis of the constitutionality of the statute is also necessary.

The State-Action Requirement. In order to invoke the due process standard, it must be shown that state action is involved in the procedure in question. Since the Texas deed of trust statute does not provide for the intervention of a state officer, the replevin statutes invalidated in *Fuentes* are distinguishable, but the procedure invalidated by the Fifth Circuit in *Hall* is certainly parallel. On the issue of state involvement in allegedly private affairs, the Supreme Court has stated that "when a State has commanded a particular result, it has saved to itself the power to determine that result and thereby to a significant extent has become involved in it"⁷³ The Court added that whether the end result is compelled by statute or custom having the force of law, it is the state that has commanded the result. Adding force to this argument, the Court had previously found sufficient state involvement by the California legislature's enactment of a statute which served merely to encourage private discrimination.⁷⁴ Indeed, the courts of Texas, by their enforcement of the procedure of sale under a deed of trust, have advanced the position that regardless of the trust terms, the trustee is vested with state authority, thus reinforcing the state action argument.⁷⁵ It follows that the trustee's right to act at all is a statutory creation. It is submitted that the statute, and its questionable form of notice, works a hardship on the mortgagor even when the trustee acts in accordance with the letter of the statute. The trustee, though not technically a state officer, is the only person authorized by the statute to sell the property upon foreclosure. The foreclosure sale provision is wholly inoperative without his legislatively condoned action. The position taken by the Fifth Circuit in *Hall* indicated

situated. . . . Notice of such proposed sale shall be given by posting written notice thereof for three consecutive weeks prior to the day of sale in three public places in said county or counties, one of which shall be made at the courthouse door of the county in which such sale is to be made, and if such real estate be in more than one county, one at the courthouse door of each county in which said real estate may be situated, or the owner of such real estate may, upon written application, cause the same to be sold as provided in said deed of trust or contract lien.

TEX. REV. CIV. STAT. ANN. art. 3810 (1966).

⁷² In *Roedenbeck Farms v. Broussard*, 124 S.W.2d 929 (Tex. Civ. App.—Beaumont), error ref., 127 S.W.2d 168 (Tex.), appeal dismissed, 308 U.S. 514 (1939), the court held that by operation of law the deed of trust statute was made a part of the deed of trust.

⁷³ *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 171 (1970). The Court further stated: "The State may not discriminate 'by direct action or through the medium of others who are under state compulsion to do so.'"

The Fifth Circuit has interpreted the Supreme Court's holding in *United States v. Classic*, 313 U.S. 299 (1941), to cover acts of private individuals exercising authority granted by state law, even though *Classic* was concerned with the action of state officials. See note 58 *supra*.

⁷⁴ *Reitman v. Mulkey*, 387 U.S. 369 (1967).

⁷⁵ The Texas courts have consistently held that a sale made under a deed of trust is equivalent to strict foreclosure in a court of equity. See, e.g., *Koehler v. Pioneer Am. Ins. Co.*, 425 S.W.2d 889 (Tex. Civ. App.—Ft. Worth 1968). See also *Shelley v. Kraemer*, 334 U.S. 1 (1948).

that the "coupling" effect of the legislature's action and the action of the private enforcer upon an individual's due process rights have begun to override the traditionally narrow definitions of state action.

The Concept of Effective Notice. Unlike the replevin statutes attacked in *Fuentes*, the Texas statute does provide for some notice. The pertinent inquiry at this point is whether the notice provided will *effectively* and *fairly* apprise the mortgagor of the default and subsequent foreclosure sale.⁷⁶ In a case of notice by publication, the Supreme Court held that any method of notice is unsatisfactory when it fails in acquainting interested parties of the fact that their rights are in jeopardy.⁷⁷ Surely a parallel can be drawn between notice by publication and the Texas method of posting notice on the courthouse door. In the larger metropolitan areas, it is unreasonable to assume that the general population peruses notices posted in such a place.⁷⁸

A system of personal notice is the only equitable solution. Only one state has provided a means, other than by contract, whereby the mortgagor can insure that he will receive personal notice.⁷⁹ It requires a request on the part of the mortgagor to receive all notices arising from default or foreclosure upon the property. Of course, such a statute should require that the mortgagor be made aware of the fact that he must file the request in order to receive notification.

Impact of the Fuentes Dictum. Although the Court in *Fuentes* attempted to confine the substance of its holding to pre-judgment seizures of personal property, its use of prior doctrine lends itself to a much broader interpretation. Quoting *Boddie v. Connecticut*,⁸⁰ the Court made clear the underpinnings of its decision: "That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest. . . ."⁸¹

The fourteenth amendment speaks of "property" in its broadest sense. Certainly, it must be conceded that one's home is indeed "a significant property interest" or "necessary property." In dispelling the notion that decisions such as *Sniadach* were limited to the taking of specific items of property, the Court

⁷⁶ Unless a higher standard of notice is provided for in the deed of trust itself, the statute alone controls the standard required of the trustee. TEX. REV. CIV. STAT. ANN. art. 3810 (1966). Notice ineffective to acquaint the mortgagor of default and impending sale is, in reality, no notice at all.

⁷⁷ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). See notes 15, 16 *supra*, and accompanying text.

⁷⁸ The fundamental right to notice "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

Practically speaking, most trustees will give notice to the mortgagor upon default. The time and expense involved in the sale of realty is not attractive to the mortgagee. But, the assurance of effective notice is not specifically provided for in the Texas statute.

⁷⁹ California law utilizes a procedure whereby any person may file with the county recorder a written request for copies of all notices relating to the disposition of a certain parcel of realty. The trustee is then required to send a copy of the notice of default to all registered persons. Any notice of sale must also be sent 20 days before the sale. CAL. CIV. CODE art. 2924b (West Supp. 1971).

⁸⁰ 401 U.S. 371 (1971).

⁸¹ 407 U.S. at 82.

in *Fuentes* reiterated its view of uniform application of the fourteenth amendment.

In none of these cases did the Court hold that this most basic due process requirement is limited to the protection of only a few types of property interests. While *Sniadach* and *Goldberg* emphasized the special importance of wages and welfare benefits, they did not convert that emphasis into a new and more limited constitutional doctrine.⁸²

The line of cases ending with *Fuentes* indicates that distinctions in types of property are no longer to be made. This development, coupled with the mainstream of cases defining effective notice, makes it incumbent upon the Texas legislature to amend the statute with a view toward conforming its language to the basic right of notice embodied in the fourteenth amendment.

Contractual Waiver. A mortgagor's signature on the deed of trust instrument cannot actually be construed to be a waiver of notice. Rather, it evidences agreement to conform to the standard of notice called for by the Texas statute. Whether labelled as waiver of notice or conformity to statutory notice procedures, the action taken by the mortgagor must be "voluntarily, intelligently, and knowingly" made.⁸³ The printed recitation in the deed of trust of a statute which does not require effective notice would have the same practical effect as the printed waiver disallowed in *Fuentes*.⁸⁴

Of course, as *Overmyer* established, it is necessary to determine the sophistication and bargaining position of the parties. Once it is established that the parties were of unequal bargaining power, the opportunity arises to attack the agreement as being a contract of adhesion, thus giving weight to the "involuntariness-of-waiver" argument. Though the waiver argument provides a somewhat weaker base from which to challenge the process of the Texas statute, it is nevertheless a relevant consideration.⁸⁵

V. CONCLUSION

Just as replevin statutes must now conform to the holding in *Fuentes*, so must statutes which unfairly deprive a person of his right to enjoy his real property. It would be an unnecessary prolongation of the status quo to ignore the constitutional ideology behind the Supreme Court's piece-meal invalidation of state statutes lacking *effective* notice. Likewise, the Fifth Circuit's grant of relief to those who have been deprived of their property through the direct action of a private individual should not be ignored. Seemingly, statutes which circumvent the concepts of due process will no longer be shielded from invalidation simply because all enforcement rights are given to private parties.

A workable solution to the problem of effective notice under the Texas Deed

⁸² *Id.* at 89.

⁸³ *D.H. Overmyer v. Frick Co.*, 405 U.S. 174, 187 (1972).

⁸⁴ The standard deed of trust form prepared by the State Bar of Texas contains a recital, in fine print, of the statute itself. It appears simply as another long paragraph, confusingly worded, with no designation identifying it as the law controlling the agreement.

⁸⁵ This is especially true in the case of the small homeowner who is unaware of the impact of late or forgotten payments on his ownership rights.

of Trust Act may take one of several forms.⁸⁶ Whatever suggestion is finally adopted, the need for personal notice is clear. The vast institutional involvement in the financing of realty purchases in Texas would not be hindered by a new system of personal notice. The efficacious and mechanical procedure of "auctioneering" on the courthouse steps has outlived the era for which it was suited. Legislative procrastination will only result in the judicial enforcement of a constitutional right no greater and no less substantial than the others we now enjoy.

⁸⁶ One writer has suggested three alternatives: (1) the insertion of a provision requiring that personal notice of default and sale be mailed to the mortgagor after he has filed a written request with the county recorder; (2) requiring the posting of notice on the mortgaged property itself; and (3) absent personal notice, the mortgagor's equity of redemption will not be cut off. Comment, *supra* note 70. The second suggestion, however, could not reasonably be expected to inform absentee owners of the action. Since the trustee would, in most instances, be aware of the owner's address, the second alternative would not provide effective notice. Cf. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).