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January 1975

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### Recommended Citation

Mark Zvonkovic, Comment, *Constitutional Dimensions of the Amended Texas Sequestration Statute*, 29 Sw L.J. 884 (1975)  
<https://scholar.smu.edu/smulr/vol29/iss4/5>

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# COMMENTS

## CONSTITUTIONAL DIMENSIONS OF THE AMENDED TEXAS SEQUESTRATION STATUTE

by Mark Zvonkovic

Although the United States Constitution guarantees that an individual may not be deprived of property without due process of law,<sup>1</sup> the procedures required to guarantee due process are not easily ascertainable. The United States Supreme Court's analysis of *ex parte* procedures in the area of provisional creditors' remedies has led to incongruous results. In *Fuentes v. Shevin*<sup>2</sup> the Court formulated a strict standard requiring a hearing before seizure in all but extraordinary circumstances. The Court then departed from this standard by holding in *Mitchell v. W.T. Grant Co.*<sup>3</sup> that an immediate post-seizure hearing would satisfy constitutional requirements. Finally, in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*<sup>4</sup> the *Fuentes* and *Mitchell* holdings were combined to reach an uncertain result: due process demands an "early" hearing.

Against the background of the Court's discontinuity, the Texas Legislature has amended the Texas sequestration statute.<sup>5</sup> Given the vacillations of the Supreme Court in this area, the amended Texas statute must be cautiously examined. This Comment will dissect the Texas attachment, garnishment, and sequestration statutes. The statutes' component parts will then be analyzed in accordance with the standards set by the Supreme Court's holdings and compared to recently amended statutes in other states.

### I. THE CHANGING NATURE OF DUE PROCESS IN EX PARTE REMEDIES

Procedural due process has for more than a hundred years mandated that an individual whose rights are to be disturbed be given notice and the opportunity to be heard.<sup>6</sup> Nevertheless, state statutes have traditionally permitted no-notice seizure of a debtor's goods by a state official acting on behalf of a creditor. Only recently have these statutes come under constitutional attack.<sup>7</sup> The following sections will trace the development of modern creditors' remedies and examine the effect of recent due process challenges.

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1. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1.

2. 407 U.S. 67 (1972).

3. 416 U.S. 600 (1974).

4. 419 U.S. 601 (1975), noted in 29 Sw. L.J. 660 (1975).

5. Ch. 470, § 1, [1975] Tex. Laws 1246 (to be codified at TEX. REV. CIV. STAT. ANN. art. 6840).

6. See *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1863).

7. Not more than twenty years ago, for example, the remedy of attachment was considered to be firmly established constitutionally. See S. RIESENFELD, CREDITORS' REMEDIES AND DEBTORS' PROTECTION 180 (1967).

A. *History*

The history of provisional creditors' remedies<sup>8</sup> brings perspective to the modern remedies and deserves mention. Replevin was originally a common law debtors' remedy<sup>9</sup> brought as a result of the extrajudicial appropriation by a creditor of the debtor's chattels for the satisfaction of the creditor's independent claim.<sup>10</sup> The debtor, who was a defendant to the creditor's cause of action, became the plaintiff to the replevin action.<sup>11</sup> Upon the receipt of a security from the plaintiff-debtor, a court would order the local sheriff to recover the goods for the debtor and "do justice in respect of the matter in dispute in his own county court."<sup>12</sup> It was eventually discovered, however, that the delay from such a proceeding caused "great loss and damage" to the debtor.<sup>13</sup> For this reason, the Statute of Marlbridge<sup>14</sup> was enacted. The Statute bypassed the need to obtain a chancery writ and directed the sheriff, upon a complaint from the debtor, immediately to replevy the goods.<sup>15</sup> The Statute was subsequently revised to require the debtor to give his pledge to prosecute the matter<sup>16</sup> and post a bond double in value of the goods.<sup>17</sup>

Replevin at common law was separate but comparable to another common law action: detinue, an action for the unlawful retention of another's property.<sup>18</sup> Modern statutes, however, have merged the two actions into a broad

8. The term "provisional creditor remedy" refers to a broad range of pre-judgment statutory procedures. Generally, these procedures allow a debtor's assets to be seized pending an adjudication of a creditor's underlying claim. This Comment will be concerned with two groups of provisional creditors' remedies: (1) pre-judgment replevin or sequestration statutes which permit a secured creditor to repossess goods in the possession of the debtor; and (2) pre-judgment attachment and garnishment statutes which permit seizure by an unsecured creditor for purposes of attaining jurisdiction or preventing removal or destruction of assets prior to adjudication. Provisional creditors' remedies may additionally include statutory provisions which allow a lien to repairmen, landlords, warehousemen, and innkeepers on goods in their custody pending payment for services. For a general discussion of these liens see Clark & Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355, 383-403 (1973).

9. Replevin appeared scripturally for the first time in the writings of Glanvil. Glanvil, writing in the late twelfth century, recorded the writ of replevin (*replegari facias*) as follows:

The king to the sheriff, greeting. I command you justly and without delay to cause G. to have, in return for gage and sureties, his cattle, which he complains that R. took and kept unjustly on account of customary dues which he is demanding from G., who does not admit that he owes them; and afterwards cause him to be justly dealt with, that he need no longer complain for default of justice in this matter. Witness, etc.

R. GLANVIL, *TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND*, bk. 12, ch. 12 (G. Hall ed. 1965). Another example appears at *id.*, ch. 15.

10. 3 W. BLACKSTONE, *COMMENTARIES* \*147 [hereinafter cited as BLACKSTONE]. For a general history of replevin see H. WELLS, *LAW OF REPLEVIN* 4 (1879) [hereinafter cited as WELLS].

11. BLACKSTONE \*147.

12. *Id.*

13. *Id.* Only the King's Chancellor, residing in Westminster, could issue the writ. WELLS 9.

14. The Statute of Marlbridge, 52 Hen. 3, c. 21 (1267), is the first codification of the replevin procedure.

15. BLACKSTONE \*147.

16. Statute of Westminster 2, 13 Edw. 1, c. 2 (1285). This insured that the debtor would either prove the creditor's claim invalid, or return the goods if valid. BLACKSTONE \*147; see WELLS 17-20.

17. 11 Geo. 2, c. 19 (1738). If the judgment was then adverse to the debtor, the creditor's recompense was in the bond. BLACKSTONE \*148; see WELLS 20.

18. Replevin was an action in distress while detinue was an action for goods

remedy that covers both the detention and the taking.<sup>19</sup> The modern replevin action is a creditors' remedy; the only surviving vestige of the debtors' common law remedy is the posting of a bond to recover the repossessed goods.<sup>20</sup> In Texas the creditor may take possession of goods to secure performance of an alleged debt by a process called sequestration.<sup>21</sup>

Unlike replevin, garnishment and attachment arose as statutory remedies.<sup>22</sup> The use of attachment and garnishment as provisional creditors' remedies involves the taking of a debtor's property to secure a possible judgment for an unsecured and allegedly unsatisfied debt. Attachment<sup>23</sup> seizes property in the possession of the debtor while garnishment<sup>24</sup> seizes a debtor's assets in the hands of a third party. Garnishment may be utilized either provisionally

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wrongfully detained. WELLS 29-36. If a distreiner claimed a property right to the goods taken, the sheriff could not proceed with a replevin until the issue was settled. BLACKSTONE \* 148. If the distreiner did have a right to the goods but his repossession of the chattels was wrongful, the distreinee's recourse was an action in trespass. WELLS 36.

19. Repossession by the creditor under a modern replevin statute for the breach of an installment sales contract is founded upon the wrongful detention of the goods by the debtor. See Comment, *Laprease and Fuentes: Replevin Reconsidered*, 71 COLUM. L. REV. 886, 888 (1971).

20. TEX. R. CIV. P. 701.

21. See ch. 44, [1887] TEX. LAWS 30, 9 H. GAMMEL, LAWS OF TEXAS 828 (1898) (formerly codified as TEX. REV. CIV. STAT. ANN. art. 6840 (1960)). Texas has never recognized the common law forms of action. *White v. Texas Motor Car & Supply Co.*, 228 S.W. 138, 141 (Tex. Comm'n App. 1921, holding approved). Replevin exists in form, if not by name, in an action as a procedure to bring about the release of goods sequestered. This is accomplished by the posting of a bond. See *O'Shea v. Twohig*, 9 Tex. 336 (1852); *Crim v. Lukenbill*, 21 S.W.2d 83 (Tex. Civ. App.—Texarkana 1929, no writ); *Miller v. Fenton*, 207 S.W. 631 (Tex. Civ. App.—Texarkana 1918, no writ). Sequestration is an equitable remedy. A writ of sequestration is issued to preserve specific property to which a creditor alleges a claim. Accordingly, sequestration is a judicial deposit of property claimed by each of two parties. The property is brought within the protection of the court until a final determination of the claim. See generally 6A L. LOWE, TEXAS PRACTICE §§ 1292-1420 (1973). With respect to consumer credit, sequestration is comparable to detinue, claim and delivery, and replevin in other jurisdictions. See, e.g., ALA. CODE tit. 7, §§ 918-36 (Supp. 1973) (detinue); N.C. GEN. STAT. §§ 1-472 to -484.1 (Supp. 1974) (claim and delivery); PA. STAT. ANN. tit. 12, § 1821 (1967) (replevin).

22. *Sanders v. Armour Fertilizer Works*, 292 U.S. 190 (1934). Although attachment and garnishment did not develop from common law forms as did replevin, they traditionally date back to the middle ages. Garnishment, for example, was originally a child of "foreign attachment," which permitted a creditor to attach the foreign debtor's goods found in the medieval English boroughs. See 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 387 (4th ed. 1936). A discussion of the American adaptation of this principle is found in B. MORRIS, SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY 1674-1784, at 19 (1935). A concise examination of the history of garnishment is found in Mussman & Riesenfeld, *Garnishment and Bankruptcy*, 27 MINN. L. REV. 1, 7-17 (1942).

23. Attachment places a lien on a debtor's property in order to furnish security for the satisfaction of a possible judgment. Attachment has a twofold purpose: (1) to prevent a debtor from alienating, destroying, or removing his property from the jurisdiction in order to frustrate the debt; or (2) to attain jurisdiction over a nonresident debtor who owns property within the jurisdiction. See Comment, *Attachment and Garnishment—Prejudgment Garnishment—Study and Proposed Revisions*, 9 NATURAL RESOURCES J. 119, 120 (1969). For a discussion of attachment in Texas see 6 L. LOWE, *supra* note 21, §§ 691-820.

24. Garnishment is actually a species of attachment used chiefly as a collection device. Until *Sniadach* the action was predominantly used with respect to wages. See Comment, *Constitutional Law—Garnishment—Prejudgment Wage Garnishment, in Absence of Conditions Requiring the Special Protection of a State or Creditor Interest Violates the Due Process Clause of the Fourteenth Amendment*, 22 VAND. L. REV. 1400, 1401-02 (1969). For a discussion of garnishment in Texas see 6 L. LOWE, *supra* note 21, §§ 821-950.

or after attaining judgment.<sup>25</sup> Attachment, on the other hand, is only a preventive remedy, ancillary to a main suit, which may secure property in which the creditor has no real interest, pending judgment on the debt.<sup>26</sup> Consequently, attachment is normally used where there is danger the debtor may fail to satisfy a judgment.<sup>27</sup> Neither remedy may be used to take possession of property which is exempt by statute.<sup>28</sup>

### B. *Due Process Attack*

To the modern legal sensibilities any procedure utilized for the taking of one's property without an opportunity to be heard is immediately suspect. However, until recently, various forms of provisional creditors' remedies did just that.<sup>29</sup> Faced with three due process challenges to provisional creditors' remedies in the 1920's the United States Supreme Court held the remedies constitutional.<sup>30</sup> A short time later the Court announced that the final determination of the liability accorded sufficient due process.<sup>31</sup> Provisional remedies affecting property have been upheld on a variety of grounds, including the lack of significant state action,<sup>32</sup> contractual waiver by one of the parties,<sup>33</sup> an overriding government interest in the seizure,<sup>34</sup> and even tradition.<sup>35</sup>

The first successful due process attack upon provisional creditors' remedies came in 1969.<sup>36</sup> In *Sniadach v. Family Finance Corp.*<sup>37</sup> the Court held that the garnishment of a workman's wages without a prior hearing violated due

25. For an example of a garnishment statute see TEX. REV. CIV. STAT. ANN. art. 4076 (1966).

26. For an example of an attachment statute see art. 275.

27. See note 23 *supra*.

28. For example, wages for personal services are exempt in Texas. TEX. CONST. art. XVI, § 28; TEX. REV. CIV. STAT. ANN. art. 4099 (1966).

29. See notes 19-26 *supra* and the accompanying text. It must be noted, however, that the provisional remedies existing in England six centuries ago were distinguishable from the remedies that have recently been challenged on due process grounds in this country. See *Fuentes v. Shevin*, 407 U.S. 67, 78-79 (1972).

30. In *Ownbey v. Morgan*, 256 U.S. 94 (1921), the Court, noting the remedies' long history, found strong state interests in the provisional remedy of attachment and upheld the attachment of a foreign debtor's property so as to facilitate the state's obtaining of jurisdiction over the nonresident debtor. Finding a strong state interest in the protection of bank deposits, the Court, in *Coffin Brothers & Co. v. Bennett*, 277 U.S. 29 (1928), affirmed a no-notice seizure of the assets in an insolvent bank's stockholder. Finally, in a case involving only a state's interest in aiding the collection of debts, the Court, in *McKay v. McInnes*, 279 U.S. 820 (1929), *aff'g per curiam* 127 Me. 110, 141 A. 699 (1928), affirmed a statute authorizing prehearing seizure of goods.

31. *Phillips v. Commissioner*, 283 U.S. 589, 596-97 (1931).

32. Self-help repossession under the UNIFORM COMMERCIAL CODE § 9-504 does not involve significant state action requiring due process. *Adams v. Southern Cal. First Nat'l Bank*, 492 F.2d 324 (9th Cir. 1973), *rev'g* 338 F. Supp. 614 (S.D. Cal. 1972). For a discussion see Note, *Self-Help Repossession Under the UCC: Presence or Absence of State Action?*, 28 Sw. L.J. 796 (1974). *But see Boland v. Essex County Bank & Trust Co.*, 361 F. Supp. 917 (D. Mass. 1973).

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

34. See *Central Union Trust Co. v. Garvan*, 254 U.S. 554 (1921).

35. See *Coffin Bros. & Co. v. Bennett*, 277 U.S. 29 (1928).

36. There was some litigation in the lower courts between 1929 and 1969 which upheld the validity of provisional remedies. See, e.g., *Shell Oil Co. v. Milm*, 127 Vt. 249, 246 A.2d 837 (1968); *Byrd v. Rector*, 112 W. Va. 192, 163 S.E. 945 (1932). For a general view of the lower courts' decisions during this time period see Note, *Procedural Due Process—The Prior Hearing Rule and the Demise of Ex Parte Remedies*, 53 B.U.L. REV. 41, 44 (1973).

37. 395 U.S. 337 (1969).

process of law.<sup>38</sup> Departing from the traditional methods of determining whether due process should be applicable, the Court considered the severity of the deprivation upon the one whose property was seized.<sup>39</sup> Since the property seized was one of a "specialized type,"<sup>40</sup> the Court determined that a prior hearing was necessary.<sup>41</sup> Although the *Sniadach* opinion initiated more problems than it resolved,<sup>42</sup> the Court's association of the "nature" of the property seized with the "problems of procedural due process"<sup>43</sup> suggested a new constitutional approach in the area of provisional creditors' remedies.<sup>44</sup> Three years later, in *Fuentes v. Shevin*,<sup>45</sup> the Court took a step in this new direction by holding that an individual must be afforded a hearing prior to the seizure of *any* significant property interest except in the case of "extraordinary situations" which involve strong governmental interests.<sup>46</sup> This "extraordinary situation" terminology in *Fuentes* was obverse to the "specialized type of property" language of *Sniadach*. A prior hearing was no longer an exception, it was a requirement protecting an individual from "substantively unfair or mistaken deprivations of property."<sup>47</sup> In reaching this conclusion the Court refused to attempt to "accommodate all possible interests."<sup>48</sup> Rather, the Court concluded that "[p]rocedural due process . . . is intended to protect the particular interests of the person whose possessions are about to be taken."<sup>49</sup> Only upon a clear showing of exceptional circumstances could such protection be disturbed.<sup>50</sup>

The expansive definition of due process in *Fuentes* occasioned an extensive

38. *Id.* at 342.

39. *Id.* at 340-42.

40. *Id.* at 340.

41. *Id.* at 342.

42. The Court left unclear whether "specialized property" would include property other than wages. Additionally, the Court did not provide a format for a required prior hearing. For a discussion of these areas by commentators writing immediately after *Sniadach* see Clark & Landers, *supra* note 8, at 357-58; Hawkland, *Prejudgment Garnishment of Wages After Sniadach*, 75 CONN. L.J. 5, 7 (1970); *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 115-16 (1969).

43. 395 U.S. at 340. The Court also stated that summary garnishment procedures may satisfy due process requirements in "extraordinary situations." *Id.* at 339.

44. The Court did not weigh the state's interests as it had done in the three 1920's cases. See note 29 *supra*. In addition, the Court did not discuss the balancing of public and private interests. See Note, *Garnishment of Wages Prior to Judgment Is a Denial of Due Process; The Sniadach Case and Its Implications for Related Areas of the Law*, 68 MICH. L. REV. 986, 995 n.51 (1970). The "extraordinary situations" statement coupled with the strong consumer interests involved in a provisional seizure of personal property (e.g., refrigerators, cars) is more than suggestive that the *Sniadach* opinion would not be solely confined to the garnishment of wages. *Id.* at 1000-01. *Contra*, Hawkland, *Prejudgment Garnishment of Wages After Sniadach*, 75 COM. L.J. 5, 7 (1970). The Court soon after *Sniadach* recognized that the form of procedural due process required would depend upon the "importance of the interests involved." *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971). See also *Bell v. Burson*, 402 U.S. 535 (1971).

45. 407 U.S. 67 (1972).

46. A seizure prior to a hearing will be upheld only when the seizure is necessitated by a compelling governmental interest, there is need for prompt action, and the procedure for such a seizure requires a proper government official to determine under narrowly constructed statutes when the seizure is necessary and justified. *Id.* at 91. For examples provided by the Court see *id.* at 92.

47. *Id.* at 81.

48. *Id.* at 90 n.22.

49. *Id.*

50. *Id.* at 90-91.

attack in the lower courts on a wide range of provisional creditors' remedies.<sup>51</sup> However, subsequent Supreme Court decisions have indicated that *Fuentes* was in fact an unwarranted leap<sup>52</sup> from which there was no recourse but retreat. In *Mitchell v. W.T. Grant Co.*<sup>53</sup> the Court upheld a Louisiana sequestration statute<sup>54</sup> which permitted a prehearing seizure of goods. Unfortunately, the majority in *Mitchell* merely put a whitewash over the due process portrait painted in *Fuentes*.<sup>55</sup> Distinguishing the Louisiana statute from the statutes held unconstitutional in *Fuentes*,<sup>56</sup> the Court determined that repossession under a state statute is constitutional when the statute provides safeguards which minimize the risk of a wrongful repossession.<sup>57</sup> Conversely, the *Fuentes* decision had found that no risk was acceptable where a prior hearing could limit the possibility of error.<sup>58</sup> Due process, the *Mitchell* Court reasoned, is a flexible standard that must accommodate all possible situations rather than a rigid predetermined rule which will apply in all cases.<sup>59</sup> Minimization of risk provided such an accommodation for the Court, and the judicially supervised safeguards in the Louisiana statute achieved that accommodation.<sup>60</sup>

The most significant conflict between the *Mitchell* and *Fuentes* decisions involves the examination of the nature of creditor-debtor relationships. The Court in *Mitchell* focused on the dangers shouldered by the creditor when the debtor is in possession of the goods.<sup>61</sup> Repossession protects the cred-

51. An examination of the subsequent litigation applying *Fuentes* is beyond the scope of this Comment. For a short but encompassing listing of these cases see Note, *Constitutional Law—Procedural Due Process—Georgia Prejudgment Garnishment Statute Violates Due Process Clause of the Fourteenth Amendment by Failing To Provide Necessary Procedural Safeguards in the Absence of Prior Notice and Hearing*, 28 VAND. L. REV. 908, 913-14 n.45 (1975). For an excellent commentator's view of the effects of the *Fuentes* decision see Clark & Landers, *supra* note 8, at 359-409.

52. The Court has been criticized for deciding *Fuentes* with only seven Justices present. Mr. Justice Powell and Mr. Justice Rehnquist, newly appointed, did not participate in the consideration or decision. See *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 616-19 (1975) (Blackmun, J., concurring).

53. 416 U.S. 600 (1974).

54. LA. CODE CIV. PRO. ANN. art. 3571 (West 1961).

55. The Court did not overrule *Fuentes*. Accordingly, statutes similar to the New York and Pennsylvania statutes in *Fuentes* remain unconstitutional. See, e.g., *Garcia v. Krause*, 380 F. Supp. 1254 (S.D. Tex. 1974); *Woods v. Tennessee*, 378 F. Supp. 1364, 1365 (W.D. Tenn. 1974). However, many did conclude that *Fuentes*, in effect, had been overruled. See *Mitchell v. W.T. Grant*, 416 U.S. 600, 623 (1974) (Powell, J., concurring); *Id.* at 634 (Stewart, Douglas and Marshall, JJ., dissenting); *Id.* at 636 (Brennan, J., dissenting); *Ruocco v. Brinker*, 380 F. Supp. 432, 436 (S.D. Fla. 1974); *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 13, 71-83 (1974); Note, *Mitchell v. W.T. Grant—The Repossession of Fuentes*, 5 MEMPHIS ST. L. REV. 74, 87 (1974).

56. 416 U.S. at 615-16.

57. The particular safeguards of the Louisiana statute as pointed out by the majority may be summarized as follows: the sequestration writ may only be issued by a judicial officer, not a clerk; the writ may only be issued upon the submission of an affidavit containing specific factual evidence which establishes the debtor's alleged default and the possibility the debtor may conceal, destroy, or dispose of the collateral; the creditor must initiate a collection suit prior to the request for a writ; the creditor must post a bond; the debtor is given the opportunity for an immediate post-seizure hearing at which he may dispute the creditor's allegations; and, as an alternative to the post-seizure hearing, the debtor may post a bond to regain possession of the seized property. *Id.* at 605-07.

58. 407 U.S. at 81-83.

59. 416 U.S. at 607.

60. See note 57 *supra*.

61. The creditor is only protected by the debtor's installment payments. 416 U.S. at 608. Upon default and pending litigation the creditor runs the risk of the debtor's

itors' security interest in the goods. Prior hearing and notice increases the likelihood that a debtor, acting in bad faith, will defraud the creditor of his security interest.<sup>62</sup> As to the effect of deprivation upon the debtor, the *Mitchell* decision recited that "his basic source of income is unimpaired."<sup>63</sup> The statement is reminiscent of the "specialized type of property" terminology in *Sniadach*.<sup>64</sup> *Fuentes*, on the other hand, had given extensive consideration to the impact of a deprivation of a debtor's property<sup>65</sup> and concluded that subjective analysis of the "importance" or "necessity" of a debtor's goods must not be a part of objective application of due process.<sup>66</sup>

The Court's decision in *Mitchell* was a well-aimed attack on the comparably rigid due process standard set forth in *Fuentes*. One may fairly conclude that the Court in *Mitchell* was more concerned with the demise of *Fuentes* than it was with evincing a workable solution to the applicability of due process to provisional creditors' remedies. Rather than rework the *Sniadach* and *Fuentes* holdings into a comprehensive and flexible test for future cases, the *Mitchell* decision, announcing that interests must be balanced and that balancing must be flexible, merely provided a roster of creditors' interests in ex parte remedies. Subsequently, one court strictly applying *Mitchell* reached a harsh conclusion.<sup>67</sup> Nevertheless, the concept of a flexible accommodation of due process to a particular situation by a balancing process<sup>68</sup> may ultimately be a redeeming facet of the *Mitchell* opinion. If due process is to protect an individual's rights, the Court is correct in stating that a creditor's interests must be balanced with the debtor's. Assuming a "balancing of interests" doctrine is to be the measure by which due process is applied, the Court in *Mitchell* left these questions unanswered: What, if not all, interests of a creditor and debtor must be taken into consideration? What procedures are necessary to insure that a just "balancing of interests" may be

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concealment, alienation, or destruction of the goods. *Id.* at 608-09. This is especially true in Louisiana where a sale of the goods by the debtor will put them out of the creditor's reach. See LA. CIV. CODE ANN. art. 3228 (West 1952). In a jurisdiction which has adopted the Uniform Commercial Code the seller has a stronger position with respect to transferees of the buyer. See UNIFORM COMMERCIAL CODE § 9-307.

62. 416 U.S. at 609.

63. *Id.* at 610.

64. 395 U.S. at 340.

65. 407 U.S. at 82.

66. *Id.* at 89-90.

67. For example, in *Guzman v. Western State Bank*, 381 F. Supp. 1262 (D.N.D. 1974), *rev'd*, 43 U.S.L.W. 2398 (8th Cir. Mar. 11, 1975), a secured creditor's assignee attached buyer's mobile home, an act resulting in buyer's eviction. Rejecting the buyer's constitutional challenge, the court, citing *Mitchell*, stated that protection against hardships brought about by summary deprivation is not a right guaranteed by the Constitution. 381 F. Supp. at 1267. For a contrary result see *Jones v. Banner Moving & Storage, Inc.*, 78 Misc. 2d 762, 358 N.Y.S.2d 885 (Sup. Ct. 1974).

68. The balancing test suggested by *Mitchell* involves the individual interests of creditor and debtor. Due process balancing by the Court had previously involved a debtor's interest weighed against the government's interest. See, e.g., *Cafeteria Workers Local 473 v. McElroy*, 367 U.S. 886, 895 (1961); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 598 (1950); *Phillips v. Commissioner*, 283 U.S. 589, 596-97 (1931). The *Fuentes* decision used a balancing process to the extent that a prior hearing would be required unless outweighed by a special state or creditor interest. 407 U.S. at 90-93. The *Mitchell* opinion acknowledged the creditor's interest in state remedies which protect his property, insure the preservation of credit, and expedite the flow of commerce. *Id.* at 607-08. See generally *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 13, 71-83 (1974).



accomplished? Should there be standards under which a debtor must be afforded a prior hearing?

In *North Georgia Finishing, Inc. v. Di-Chem, Inc.*<sup>69</sup> the Court did not provide answers to these questions. In an apparent attempt to reconcile the conflict of *Fuentes* and *Mitchell* the Court held a Georgia garnishment procedure unconstitutional for failure to provide sufficient safeguards against wrongful ex parte action.<sup>70</sup> Without providing specific grounds for its decision, the Court cited both *Fuentes* and *Mitchell* favorably. The opinion affirms the *Fuentes* position that due process must always be accorded a debtor whose property is seized under an ex parte procedure.<sup>71</sup> However, in an evident accommodation of *Mitchell*, the Court stated that due process mandates an early hearing rather than a prior hearing.<sup>72</sup> The early hearing under *North Georgia Finishing* must be occasioned by the safeguards provided by the statute upheld in *Mitchell*.<sup>73</sup>

Although *North Georgia Finishing* does not offer a ready solution to the problems surrounding application of procedural due process to provisional creditors' remedies, it does resolve much of the confusion engendered by the *Fuentes-Mitchell* conflict. Procedural due process emerges from *North Georgia Finishing* as a flexible animal. The Court has done away with the "specialized type of property" and "extraordinary situations" terminology which had given rise to so much confusion. There is still no guidance as to when or if a prior hearing will be afforded. The Court's "early hearing" terminology avoids that issue. However, it does appear that all interests of both creditor and debtor will now be considered. As to what procedures will be necessary adequately to protect these interests, the Court has merely, for now, left the *Mitchell* safeguards intact. But the diversity of interests involved in creditor-debtor relationships must counsel against taking assurance that compliance with the *Mitchell* safeguards insures constitutionality. *North Georgia Finishing* cannot be construed to be such a guarantee. If there is to be a guarantee from *North Georgia Finishing*, it must be that the Court has not yet spoken its last word concerning provisional creditors' remedies.

## II. DUE PROCESS ATTACK ON TEXAS LAW

The Supreme Court's due process attack on provisional creditors' remedies had some effect on all the states.<sup>74</sup> Three state statutes fell under *Sniadach*<sup>75</sup>

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69. 419 U.S. 601 (1975).

70. *Id.* at 606-07.

71. "Although the length or severity of a deprivation of use or possession would be another factor to weigh in determining the appropriate form of hearing, it was not deemed to be determinative of the right to a hearing of some sort." *Id.* at 606.

72. *Id.* at 607.

73. *Id.* See note 57 *supra* and accompanying text.

74. When the Court decided *Fuentes* in 1972 only Delaware and Kentucky did not have ex parte replevin procedures. The California statute in 1971 had been held unconstitutional by a state court. See *Blair v. Pitchess*, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971). These states, however, were affected by an ensuing attack in lower courts on self-help remedies under the UNIFORM COMMERCIAL CODE § 9-504. See *Adams v. Eclely*, 338 F. Supp. 614 (S.D. Cal. 1972), *rev'd sub nom. Adams v. Southern Cal. First Nat'l Bank*, 492 F.2d 324 (9th Cir. 1973); Note, *supra* note 32.

75. *Sniadach* struck down the Wisconsin garnishment procedures: WIS. STAT. §§ 267.01-22 (1965).

and *Fuentes*.<sup>76</sup> *Mitchell*, however, upheld an ex parte sequestration statute.<sup>77</sup> Commentators and courts subsequently reviewed state statutes by a comparison with the statutes which had been subject to Supreme Court scrutiny,<sup>78</sup> especially the statute upheld in *Mitchell*.<sup>79</sup> Yet, in *North Georgia Finishing* the Court was faced with a statute that, upon a simple comparison to *Mitchell*, could clearly have been declared unconstitutional.<sup>80</sup>

The Court did not follow that route, however, choosing rather to offer an approach which combined the *Mitchell* safeguards with a modified version of *Fuentes*.<sup>81</sup> As a result, any method of analysis which simply utilizes a mechanical comparison to any of the statutes reviewed by the Court is questionable.<sup>82</sup> Analysis of existing state statutes must take into consideration two interdependent factors: the balancing of all interests involved in debtor-creditor controversies may demand a more adaptable and expansive system of safeguards to accommodate those interests, and an *early* hearing may in some situations demand an opportunity for some form of *prior* hearing.

Immediately following the Supreme Court's decision in *Mitchell*, the United States District Court for the Southern District of Texas, in *Garcia v. Krause*,<sup>83</sup> adjudged the Texas sequestration statute<sup>84</sup> unconstitutional.<sup>85</sup> By a mechanical comparison of the Texas sequestration statute and its corresponding procedural rules<sup>86</sup> with the Louisiana procedure upheld in *Mitchell*, the court found Texas sequestration deficient in three areas.<sup>87</sup> First, the statute failed to require judicial supervision.<sup>88</sup> *Mitchell* had demonstrated that the Louisiana statute<sup>89</sup> provided a required safeguard by allowing only a judge to issue the writ.<sup>90</sup> Conversely, under the Texas statute a writ could be issued by a clerk of the court.<sup>91</sup> The second deficiency regards the cred-

76. *Fuentes* struck down the Florida and Pennsylvania replevin statutes: FLA. STAT. ANN. §§ 78.01-21 (1972); PA. STAT. ANN. tit. 12, §§ 1821-47 (1967). The Florida statute has been revised to conform with the Court's holding. FLA. STAT. ANN. 78.01-21 (Supp. 1975).

77. LA. CODE CIV. PRO. ANN. arts. 3501-14, 3571-76 (West 1961).

78. A federal district court in New York characterized this as follows: "The issue before us . . . is whether the New York provisions . . . squeeze through the narrow door of constitutionality left open in *Mitchell*, or remain out in the unconstitutional territory chartered in *Fuentes*." *Sugar v. Curtis Circulation Co.*, 383 F. Supp. 643, 647 (S.D.N.Y. 1974).

79. See *Garcia v. Krause*, 380 F. Supp. 1254 (S.D. Tex. 1974); Comment, *Procedural Due Process: For Sale in Texas to the Highest Bidder*, 10 HOUS. L. REV. 880, 886-89 (1973).

80. 419 U.S. at 607.

81. See notes 70-73 *supra* and accompanying text.

82. The Court's decision not simply to apply the *Mitchell* decision to the Georgia garnishment statute may suggest that the constitutionality of ex parte procedures will hereafter be decided on a case-by-case basis. See 419 U.S. at 620 (Blackmun, J., dissenting).

83. 380 F. Supp. 1254 (S.D. Tex. 1974).

84. Ch. 44, [1887] Tex. Laws 30, 9 H. GAMMEL, LAWS OF TEXAS 828 (1898) (formerly codified as TEX. REV. CIV. STAT. ANN. art. 6840 (1960)).

85. The district court had stayed its decision pending the Supreme Court's final determination in *Mitchell*. 380 F. Supp. at 1256.

86. The procedural rules governing the Texas sequestration statute are set out in TEX. R. CIV. P. 696-716.

87. 350 F. Supp. at 1259.

88. *Id.*

89. LA. CODE CIV. PRO. ANN. arts. 3501-14, 3571-76 (West 1961).

90. 416 U.S. at 604.

91. Ch. 44, [1887] Tex. Laws 30, 9 H. GAMMEL, LAWS OF TEXAS 828 (1898)

itor's affidavit.<sup>92</sup> Under the Louisiana practice the creditor's affidavit must clearly set forth specific facts which may entitle the creditor to ex parte seizure.<sup>93</sup> The Texas procedure merely required the creditor to submit the conclusory allegation that he is entitled to the property.<sup>94</sup> Finally, the Texas procedure lacked the safeguard upon which the Court in *Mitchell* had placed so much emphasis: an immediate post-seizure hearing.<sup>95</sup> The Louisiana practice explicitly entitles the debtor to an immediate post-seizure hearing at which the writ may be dissolved should the creditor fail to prove the grounds upon which the writ was issued.<sup>96</sup> There was no provision in the Texas statute for any hearing at which the creditor would be required to prove the alleged grounds for the seizure.<sup>97</sup> For failure to provide these safeguards approved in *Mitchell*, the court held that the Texas sequestration procedures did not "meet constitutional muster."<sup>98</sup>

In evident response to *Garcia* the Texas Legislature recently amended the sequestration statute<sup>99</sup> to conform to the *Mitchell* safeguards elucidated in *Garcia*.<sup>100</sup> Only a judicial officer may now issue a writ of sequestration in Texas.<sup>101</sup> For a writ to issue, section 1 necessitates a "reasonable conclusion" that the property in question is in "immediate danger."<sup>102</sup> Section 2 provides that a creditor must submit an application under oath which contains specific facts demonstrating the nature of the claim, the amount in controversy, and the grounds for issuance of the writ.<sup>103</sup> Sections 1 and 2, when read together,

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(formerly codified as TEX. REV. CIV. STAT. ANN. art. 6840 (1960)). In *North Georgia Finishing*, however, Justice Powell suggests that a clerk may issue a writ so long as a prompt post-seizure hearing is conducted by a judge. 419 U.S. at 611 (Powell, J., concurring).

92. 350 F. Supp. at 1259.

93. The Louisiana procedure calls for a showing by specific facts that the creditor is justified in fearing that the debtor will "conceal, dispose 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. PRO. ANN. art. 3571 (West 1961).

94. In Texas the creditor was required to describe the property, state that he is the owner and allege that he is entitled to possession. TEX. R. CIV. P. 696. In addition, the creditor was required to give an oath that he fears the debtor will injure, ill-treat, waste, destroy, or remove the property from the court's jurisdiction during the pendency of the suit. Ch. 44, [1887] Tex. Laws 30, 9 H. GAMMEL, LAWS OF TEXAS 828 (1898).

95. 416 U.S. at 607.

96. LA. CODE CIV. PRO. ANN. art. 3506 (West 1961).

97. Pending litigation of the creditor's claim in Texas, the debtor could only regain possession of the seized property by posting a replevy bond. TEX. R. CIV. P. 701.

98. 380 F. Supp. at 1259.

99. Ch. 470, § 1, [1975] Tex. Laws 1246, amending ch. 44, § 1, [1887] Tex. Laws 30, 9 H. GAMMEL, LAWS OF TEXAS 828 (1898).

100. See notes 88-97 *supra* and accompanying text.

101. Section 1 of the amended article 6840 provides in part: "Judges of the district and county courts and justices of the peace shall, at the commencement or during the progress of any civil suit, before final judgment, have power to issue writs of sequestration . . ." Ch. 470, § 1, [1975] Tex. Laws 1246. There may be some question as to whether a justice of the peace qualifies as the "judicial officer" required by the Court in *Mitchell*. Interview with Joseph W. McKnight, Professor, Southern Methodist University School of Law, Nov. 3, 1975.

102. Section 1 of the amended article 6840 provides in part: "[A] writ of sequestration may be issued if a reasonable conclusion may be drawn that there is immediate danger that the defendant or party in possession thereof will conceal, dispose of, ill-treat, waste or destroy such property, or remove the same out of the limits of the county during the pendency of the suit." Ch. 470, § 1, [1975] Tex. Laws 1246-47.

103. Section 2 of the amended article 6840 provides: "The application for the issuance of the writ shall be made under oath and shall set forth specific facts stating the

appear to prevent the issuance of a writ upon mere conclusory allegations. A writ will issue under the amended statute only after a creditor has alleged specific facts which enable a judicial officer to draw a reasonable conclusion that issuance is justified. Section 4 of the amended statute<sup>104</sup> requires notice be given the one dispossessed that he may regain possession either by filing a motion to dissolve the writ<sup>105</sup> or by posting a replevy bond.<sup>106</sup> Section 3 provides for an immediate post-seizure hearing not later than ten days after a debtor's motion for dissolution. The writ will be dissolved unless the creditor proves the allegations and grounds relied upon for the issuance.<sup>107</sup> If the writ is dissolved the creditor's action will, nevertheless, continue as if no writ had been issued.<sup>108</sup>

The most noticeable aspect of the amended Texas sequestration statute is its similarity to the Louisiana procedures upheld in *Mitchell*. A mirror-image of the Louisiana statute, however, is not decidedly constitutional. The immediate problem for the amended Texas statute is the Supreme Court's failure

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nature of the plaintiff's claim, the amount in controversy, if any, and the facts justifying the issuance." *Id.* at 1247.

104. Section 4 of the amended article 6840 provides:

Sec. 4. Requisites of Writ of Sequestration. There shall be prominently displayed on the face of the writ, in 10-point type and in a manner calculated to advise a reasonably attentive person of its contents, the following:

"YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A 'REPLEVY' BOND.

"YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT."

*Id.* at 1247-48.

105. See note 107 *infra*.

106. TEX. R. CIV. P. 701.

107. Section 3 of the amended article 6840 provides:

Sec. 3. (a) When a writ of sequestration has been issued as provided in this article and the rules of civil procedure, the defendant may seek a dissolution of the writ by written motion filed with the court.

(b) A hearing on the motion to dissolve the writ shall be held and the issue determined not later than 10 days after the motion to dissolve is filed, unless the parties agree to an extension of time. At the hearing, the writ shall be dissolved unless the party who secured the issuance of the writ proves the specific facts alleged and the grounds relied upon for its issuance.

(c) If the writ is dissolved, the action shall proceed as if no writ had been issued except that an action for damages for wrongfully securing the issuance of the writ must be brought as a compulsory counterclaim. In addition to all other elements of damages, the party moving to dissolve the writ may recover his reasonable attorney's fees incurred in the dissolution of the writ.

(d) If the writ is dissolved and the personal property sought to be subjected to the writ is consumer goods, as that term is defined in the Texas Business and Commerce Code [TEX. BUS. & COMM. CODE ANN. § 9.109 (1968)], the defendant or the party in possession shall be entitled to damages which shall be reasonable attorney's fees and the greatest of One Hundred Dollars (\$100.00), the finance charge contracted for, or actual damages. No damages may be awarded for the failure of the plaintiff to prove by a preponderance of the evidence the specific facts alleged and such failure is a result of a bona fide error. For a bona fide error to be available as a defense, the plaintiff must prove the use of reasonable procedures to avoid such error.

(e) A motion to dissolve the writ is cumulative of the right of replevy, and the filing of the motion to dissolve shall stay any further proceedings under the writ until a hearing is had, and the issue is determined.

108. *Id.*

in *Mitchell* to specify what type of post-seizure hearing will be acceptable. The *Garcia* court interpreted the *Mitchell* post-seizure hearing as being an "immediate opportunity for a dissolution of the writ with a hearing on the merits of the case."<sup>109</sup> If this is to be taken literally, the amended Texas statute may be deficient for merely providing a hearing to test the grounds justifying the issuance of the writ.<sup>110</sup> Rigidly to require adjudication upon the merits in all cases soon after issuance of a writ, on the other hand, would not only place an intolerable administrative burden upon courts but would also be out of tune with the concept of flexibility found in *Mitchell*.<sup>111</sup> Nevertheless, there has emerged from *Mitchell* and *North Georgia Finishing* a "balancing of interests" doctrine which appears to require that ex parte procedures accommodate a wide range of situations.<sup>112</sup> A particular case may involve an extremely complex fact situation coupled with a severe deprivation. The proper balancing accommodation in such a case may very well be an immediate post-seizure adjudication upon the merits. For this outcome, the amended Texas statute has provided no procedures. One final problem is that *North Georgia Finishing* spoke in terms of an *early* hearing.<sup>113</sup> Such language does not illogically suggest that some situations may indeed necessitate a *prior* hearing.<sup>114</sup> For these situations, the amended Texas statute would again have no procedure.

Immediately subsequent to the Supreme Court's holding in *Sniadach*<sup>115</sup> the lower courts were evenly split as to whether the Court's due process attack on garnishment should be confined to wages.<sup>116</sup> If *Fuentes* did not confirm that the due process doctrine applied in *Sniadach* would extend to garnish-

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109. 380 F. Supp. at 1259 (emphasis added). One writer has suggested that the *Garcia* court misread *Mitchell*. Note, *Federal District Court Declares Texas Sequestration Procedure Unconstitutional*, 12 HOUS. L. REV. 732, 738 (1975).

110. The amended statute provides for a hearing within ten days on the grounds for issuance not on the merits. Ch. 470, § 1, [1975] Tex. Laws 1246, 1247. In addition, the statute places a burden on the debtor to come forward and request a post-seizure hearing. The Louisiana statute, however, demands that a creditor prove grounds for issuance at a post-seizure hearing. LA. CODE CIV. PRO. ANN. art. 3506 (West 1961). In Texas, absent a debtor's motion for a hearing, the creditor will not be put to such proof in a bilateral forum. A New York statute has recently been found unconstitutional on similar grounds. See *Sugar v. Curtis Circulation Co.*, 383 F. Supp. 643 (S.D.N.Y. 1974), *prob. juris. noted*, 421 U.S. 908 (1975). A final problem arises with respect to the ten-day limit. If the courts uniformly schedule a hearing only after a maximum time period (*i.e.*, ten days), the delay in some cases may be constitutionally impermissible.

111. The majority in *Mitchell* took issue with the inflexibility of the *Fuentes* holding. 416 U.S. at 610.

112. *Id.*

113. 419 U.S. at 606.

114. It is important to remember that *North Georgia Finishing* openly spoke favorably of *Fuentes* when the Georgia statute could easily have been struck down by sole reliance on the principles from *Mitchell*. See notes 69-72 *supra* and accompanying text.

115. 395 U.S. 337 (1969).

116. Three federal district courts determined the *Sniadach* opinion was confined to wages. *Reeves v. Motor Contract Co.*, 324 F. Supp. 1011 (N.D. Ga. 1971); *Black Watch Farms, Inc. v. Dick*, 323 F. Supp. 100 (D. Conn. 1971); *American Olean Tile Co. v. Zimmerman*, 317 F. Supp. 150 (D. Hawaii 1970). Three state supreme courts, however, extended the *Sniadach* opinion to other forms of property. *Randone v. Appellate Dept. of S. Ct.*, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), *cert. denied*, 407 U.S. 924 (1972); *Jones Press, Inc. v. Motor Travel Services, Inc.*, 286 Minn. 205, 176 N.W.2d 87 (1970); *Larson v. Fetherston*, 44 Wis. 2d 712, 172 N.W.2d 20 (1969).

ment of other types of property,<sup>117</sup> *North Georgia Finishing* most assuredly did.<sup>118</sup> Following *Fuentes* a Texas court of civil appeals, in *Southwestern Warehouse Corp. v. Wee Tote, Inc.*,<sup>119</sup> held the Texas garnishment statute to be unconstitutional. The court determined that the statute did not provide the opportunity for a prior hearing mandated in *Fuentes*.<sup>120</sup> The court made no mention of *Mitchell*. However, since the statute also fails to provide safeguards which require specific facts in the affidavit and the opportunity for an immediate post-seizure hearing,<sup>121</sup> the court's holding would be unchanged by a *Mitchell* analysis. The court's same analysis would also appear to invalidate the Texas attachment statute.<sup>122</sup> Under these circumstances, why the Texas legislature did not also amend the attachment and garnishment statutes is a mystery.

### III. A COMPARATIVE ANALYSIS OF THE TEXAS, CALIFORNIA, AND FLORIDA AMENDMENTS

The Supreme Court decisions indicate that extensive procedures designed to accommodate the balancing of both debtor and creditor interests are required to satisfy procedural due process in ex parte proceedings. Two states<sup>123</sup> have amended their prejudgment seizure statutes to provide a range of procedures which are far more extensive than those in Texas. An examination of the amended statutes in these states will serve to demonstrate the limits of the current Texas procedures.

#### A. Sequestration and Replevin

California and Florida procedures currently provide that upon a creditor's application for a writ of replevin the court shall issue to the debtor an order to show cause why the claimed property should not be seized.<sup>124</sup> Under the Florida statute, the show cause order must state a date and time for the hearing<sup>125</sup> and fix the manner of service upon the debtor.<sup>126</sup> If the court deter-

117. The *Fuentes* opinion states that "[t]he Fourteenth Amendment speaks of 'property' generally." *Fuentes v. Shevin*, 407 U.S. 67, 90 (1972).

118. The *North Georgia Finishing* opinion states: "We are no more inclined now than we have been in the past to distinguish among different kinds of property in applying the Due Process Clause." *North Georgia Finishing Co. v. Di-Chem, Inc.*, 419 U.S. 601, 608 (1974).

119. 504 S.W.2d 592 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ). This case has recently been cited with approval by another Texas court. *See Texas Commerce Bank Nat'l Ass'n v. Tripp*, 516 S.W.2d 256 (Tex. Civ. App.—Ft. Worth 1974, writ granted).

120. 504 S.W.2d at 594.

121. TEX. REV. CIV. STAT. ANN. art. 4076 (1966).

122. *Id.* art. 275.

123. The two states are California and Florida. These states were chosen because, like Texas, they amended their statutes subsequent to a holding of unconstitutionality in the courts. The Florida statute was amended after *Fuentes v. Shevin*, 407 U.S. 67 (1972). California amended its statute after *Blair v. Pitchess*, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

124. CAL. CIV. CODE § 512.040 (West Supp. 1975); FLA. STAT. ANN. § 78.065 (Supp. 1975).

125. The date set for the hearing must be at least five days but no more than ten days from service of the order. FLA. STAT. ANN. § 78.065(2)(a) (Supp. 1975).

126. *Id.* §§ 78.065(2)(c), (d). In addition the order must inform the debtor of the

mines after service that the debtor has clearly waived his right to a hearing,<sup>127</sup> the writ will issue.<sup>128</sup> Absent the waiver, the court will determine at the hearing by a consideration of the showings made by the parties whether the creditor's claim has probable validity.<sup>129</sup> If the court finds probable validity, the property will be seized unless the debtor posts a bond.<sup>130</sup>

The Florida procedure provides safeguards for the creditor.<sup>131</sup> If the creditor presents to the court evidence which reasonably tends to show that the debtor is engaging in conduct which places the value of the alleged collateral in jeopardy, the court may issue a temporary restraining order to prevent such conduct.<sup>132</sup> The court also has the discretion, upon a showing that the debtor will probably violate a restraining order pending a hearing on a show cause order, immediately to issue a writ of replevin.<sup>133</sup>

The California procedure<sup>134</sup> is basically similar to that set out above, with one exception. Like its Florida counterpart,<sup>135</sup> California procedure requires a probable cause showing before an ex parte writ may be issued.<sup>136</sup> However, unlike the Florida procedure, the California procedure additionally requires that "[t]he property is not necessary for the support of the defendant or his family . . . ."<sup>137</sup> In this respect the California procedure appears to be more debtor oriented than the Florida approach.

The amended Texas sequestration statute contains none of the pre-seizure safeguards found in California or Florida. In Texas there is no provision that accords a debtor an opportunity for a prior hearing under any circumstances. The amended Texas procedure merely provides two outcomes: the writ will issue or it will not. A Texas creditor may seek a temporary restraining order under Texas rules of procedure.<sup>138</sup> However, since the grounds required for a restraining order would appear also to be sufficient grounds for the issuance of a writ,<sup>139</sup> the distinction is inconsequential.

The Texas position, as expressed in the amended sequestration statute, is that a prior hearing will in no case be necessary; if a creditor's affidavit is insufficient, no writ will issue. There are two likely dangers inherent in such a position. First, the procedure may create a presumption in favor of the

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manner in which he may contest the creditor's claim and that failure to appear will cause issuance of the writ. *Id.* §§ 78.065(2)(e), (f).

127. *Id.* § 78.075 sets out the manner in which a debtor may have waived his right to a hearing.

128. *Id.* § 78.067(1).

129. *Id.* § 78.067(2).

130. *Id.*

131. *Id.* §§ 78.069, .063.

132. *Id.* § 78.069.

133. *Id.* § 78.073.

134. CAL. CIV. CODE §§ 511.010-515.030 (West Supp. 1975).

135. FLA. STAT. ANN. § 78.069 (Supp. 1975).

136. CAL. CIV. CODE § 512.020(b)(3)(iii) (West Supp. 1975) provides in part: "A writ of possession may be issued ex parte . . . if probable cause appears that . . . [t]he ex parte issuance of a writ of possession is necessary to protect the property."

137. *Id.* § 512.020(b)(3)(i).

138. TEX. R. CIV. P. 680.

139. In fact, absent specific facts which clearly show the danger of immediate and irreparable injury, loss or damage, the court will conduct a prior hearing upon application for a temporary restraining order. *Id.* See *Millwrights Local No. 2484 v. Rust Eng'r Co.*, 433 S.W.2d 683 (Tex. 1968); *Ex parte Pierce*, 161 Tex. 524, 342 S.W.2d 424, cert. denied, 366 U.S. 928 (1961).

creditor. Such a presumption will cause a court simply to issue a writ upon the presentation of marginal facts in a creditor's affidavit, leaving adequate review for the post-seizure hearing. The second danger is that the statute may create a debtor's presumption. In this case marginal facts may prevent issuance of the writ, leaving adequate review for an adjudication upon the merits.<sup>140</sup> Either presumption would appear to be in conflict with the Supreme Court's evolving balancing standard for due process. A presumption favoring either creditor or debtor will by its nature preclude fair review of all concerned interests. For example, specific facts which are difficult of proof inherently evoke doubt, especially when it is considered that the facts are presented in the creditor's own self-interest. The facts may show no more than the creditor's conviction in his rights.<sup>141</sup> On the other hand, the facts may possibly support a valid claim. When a judge may not procedurally resolve these doubts in a prior bilateral hearing, any action taken must be presumptive. Depending upon a judge's presumption of the equities, the debtor will lose his property with doubtful grounds or the creditor's interest in the property will be subjected to the danger of loss without the opportunity to confront the debtor in a judicially supervised forum. The result is not a fair protection accorded by a balancing of all involved interests, nor is it the reasoned conclusion<sup>142</sup> that the Texas statute pretends to prescribe. Rather, the result is a ministerial determination<sup>143</sup> providing no better due process protection than a clerk's issuance of a writ upon conclusory allegations. This is not to say that all situations require a prior hearing. The prior hearing need only be an option, not an absolute requirement. A judge presented with specific facts which are easily provable may certainly find that the balanced interests warrant issuance of an ex parte writ. However, when borderline facts are presented to a judge, the lack of an option for a prior hearing must inevitably make any balancing doctrine meaningless.

The California and Florida procedures protect both creditor and debtor from judicial presumption by providing an expansive range of options for the judge faced with a borderline claim. The Florida procedures, for example, protect all debtors at the outset by providing an opportunity for a prior hearing upon a creditor's application for a writ of replevin.<sup>144</sup> The creditor, on the other hand, may be protected by an ex parte writ when he can establish to a judge's satisfaction an immediate danger that the debtor will defraud him of his alleged security interest.<sup>145</sup> The Florida procedures even provide

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140. Considering the variety of harassment tactics employed by some creditors, the innocent debtor may be better off with a prior hearing than he is with judicially uncontested possession of the property until a hearing on the merits. *See* D. CAPLOVITZ, *CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT* 177-89 (1974).

141. If the debtor is an uneducated consumer without ready access to legal assistance, the facts may show no more than a creditor's gamble that the debtor will default. *See* *Fuentes v. Shevin*, 407 U.S. 67, 83 (1972). In fact, once the property has been repossessed, there are heavy odds that a debtor will default. *See* D. CAPLOVITZ, *supra* note 140, at 216-22.

142. Ch. 470, § 1, [1975] Tex. Laws 1246.

143. *See* *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 632-33 (1974) (Stewart, J., dissenting).

144. FLA. STAT. ANN. § 78.065 (Supp. 1975).

145. *Id.* § 78.073.



for the issuance of a temporary restraining order in cases where a judge may not be entirely satisfied that an immediate danger exists.<sup>146</sup> These statutes, accordingly, provide a judge with a wide spectrum of procedures readily adaptable to all possible situations which may arise. Such a spectrum makes available a procedure for whatever the result of the judge's balancing of the conflicts involved. The amended Texas statute, unfortunately, is not so flexible.

### B. Attachment and Garnishment

The Texas attachment and garnishment statutes have not recently been amended. A Texas court, however, has adjudged the garnishment statute to be unconstitutional.<sup>147</sup> The attachment statute appears to suffer from the same deficiencies. The following analysis will examine the statutes' weak points and explore a variety of factors which should be taken into account in any attempt to cure those infirmities.

Under the Texas attachment statute<sup>148</sup> judges and clerks may issue a writ directing a sheriff to seize non-exempt property<sup>149</sup> of a debtor to prevent frustration of a creditor's debt.<sup>150</sup> In order for the writ to issue the creditor must file an affidavit stating that there is a debt owed.<sup>151</sup> In addition, the creditor must state the amount of the debt and one of eleven grounds for issuance.<sup>152</sup>

146. *Id.* § 78.069.

147. *Southwestern Warehouse Corp. v. Wee Tote, Inc.*, 504 S.W.2d 592 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ).

148. TEX. REV. CIV. STAT. ANN. art. 275 (1973).

149. *Id.* art. 288. In Texas, particular kinds of property, such as wages, are exempt from attachment or garnishment. *See, e.g., id.* arts. 6228a, § 9 (pensions), 6243e, § 13 (Firemen's Relief and Retirement Fund).

150. *See Orr & Lindsley Shoe Co. v. Harris*, 82 Tex. 273, 18 S.W. 308, 309-10 (1891); *Lipscomb v. Rankin*, 139 S.W.2d 367, 369 (Tex. Civ. App.—El Paso 1940, no writ).

151. TEX. REV. CIV. STAT. ANN. art. 275 (1973).

152. The judges and clerks of the district and county courts and justices of the peace may issue writs of original attachment, returnable to their respective courts, 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

(2) That the defendant is not a resident of the State, or is a foreign corporation, or is acting as such; or

(3) That he is about to remove permanently out of the State, and has refused to pay or secure the debt due the plaintiff; or

(4) That he secretes himself so that the ordinary process of law can not be served on him; or

(5) That he has secreted his property for the purpose of defrauding his creditors; or

(6) That he is about to secrete his property for the purpose of defrauding his creditors; or

(7) That he is about to remove his property out of the State, without leaving sufficient remaining for the payment of his debts; or

(8) That he is about to remove his property, or a part thereof, out of the county where the suit is brought, with intent to defraud his creditors; or

(9) That he has disposed of his property, in whole or in part, with intent to defraud his creditors; or

(10) That he is about to dispose of his property with intent to defraud his creditors; or

(11) That he is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors; or

The creditor must post a bond to insure prosecution of the claim and deter wrongful attachment.<sup>153</sup> The debtor may regain possession of the property by posting a bond for double the value of the debt.<sup>154</sup>

A writ of garnishment may also be issued by a judge or clerk.<sup>155</sup> The writ, however, is directed at a third party (the garnishee) rather than the debtor.<sup>156</sup> For the writ to issue the creditor must allege that there is a just, due, and unpaid debt, and that the debtor does not hold property within the jurisdiction of the court sufficient to satisfy such debt.<sup>157</sup> The creditor must post a bond<sup>158</sup> and state that the writ is not pursued to injure either the debtor or the garnishee.<sup>159</sup>

Attachment and garnishment statutes in California<sup>160</sup> and Florida<sup>161</sup> do not offer so extensive a due process protection as do their respective replevin statutes. Like Texas, neither state affords an opportunity for a prior hearing. The similarity, however, ends there. Under the California procedure a creditor must present an affidavit which establishes a "prima facie" case that issuance of a writ is justified.<sup>162</sup> If the court finds the affidavit satisfactory, it will issue a temporary restraining order<sup>163</sup> accompanied by a notice of a hearing to determine whether a writ shall issue.<sup>164</sup> At this hearing the court will determine either that the writ shall issue or that the temporary restraining order shall be dissolved.<sup>165</sup> The court may, in its discretion, forego the temporary restraining order if the creditor satisfactorily demonstrates the presence of a substantial danger that the debtor will ignore a temporary restraining order and in some manner dispose of the property pending the hearing on the order.<sup>166</sup> If the writ is issued in this manner the debtor is afforded the same opportunity for a hearing as he would be given if a temporary restraining order had issued.<sup>167</sup>

The Florida procedures<sup>168</sup> are somewhat narrower than their counterparts in California. In Florida a restraining order is not issued. Upon a specific showing by the creditor that the debtor will act in a manner to frustrate the debt, the court may immediately issue the writ.<sup>169</sup> Similar to the Texas pro-

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(12) That the debt is due for property obtained under false pretenses.

*Id.*

153. *Id.* art. 279.

154. *Id.* art. 290; TEX. R. CIV. P. 599.

155. TEX. REV. CIV. STAT. ANN. art. 4076 (1966).

156. *See, e.g.*, *Beggs v. Fite*, 130 Tex. 46, 52, 106 S.W.2d 1039, 1042 (1937); *Blanks v. Radford*, 188 S.W.2d 879, 885-86 (Tex. Civ. App.—Eastland 1945, writ ref'd w.o.m.).

157. TEX. REV. CIV. STAT. ANN. art. 4076(2) (1966). A writ of garnishment may also issue where an original attachment has been issued or the creditor holds an unsatisfied judgment. *Id.* arts. 4076(1), (3).

158. TEX. R. CIV. P. 658(a).

159. TEX. REV. CIV. STAT. ANN. art. 4076(2) (1966).

160. CAL. CIV. PRO. CODE § 537-553.5 (West Supp. 1975).

161. FLA. STAT. ANN. §§ 76.01-.32, 77.01-.28 (Supp. 1975).

162. CAL. CIV. PRO. CODE § 538.1 (West Supp. 1975).

163. *Id.*

164. *Id.* § 538.2.

165. *Id.* § 538.4.

166. *Id.* § 538.5(b).

167. *Id.* § 538.5(d).

168. The Florida attachment and garnishment statutes are procedurally identical. Reference in subsequent footnotes will be made to attachment procedures only.

169. FLA. STAT. ANN. § 76.04 (Supp. 1975).

cedure,<sup>170</sup> the required showing is based on a list of situations.<sup>171</sup> Upon the issuance of the writ, however, the debtor in Florida is afforded an immediate hearing at which he may challenge the creditor's allegations.<sup>172</sup> The writ will be dissolved if the court finds the creditor's allegations to be untrue.<sup>173</sup> Conversely, under the Texas procedures the debtor is not afforded any hearing at which he may challenge the creditor's allegations. The Texas debtor may regain possession of the property in question only by posting a replevy bond.<sup>174</sup>

Both *Mitchell* and *Fuentes* involved summary seizure by secured creditors.<sup>175</sup> In ex parte procedures under an attachment or garnishment statute, on the other hand, the creditor has an interest only in the debt, not in the property attached or garnished. A due process balancing of the situation regarding a creditor seeking to attach or garnish a debtor's property, in which the creditor's only interest is satisfaction of an extraneous debt, would appear to weigh in favor of some sort of pre-seizure safeguard. The Supreme Court has directly considered this situation in the garnishment of wages area.<sup>176</sup> *North Georgia Finishing* did not reach this question as the Georgia statute,<sup>177</sup> like the Texas statute, did not provide any post-garnishment hearing "to demonstrate at least probable cause for the garnishment."<sup>178</sup> This issue was reached, however, in *Sugar v. Curtis Circulation Co.*<sup>179</sup> In that case a federal district court struck down the New York attachment statute for its failure to grant the debtor "an immediate post-seizure hearing at which the creditor-plaintiff must prove the grounds 'upon which the writ issued.'"<sup>180</sup> Although such a finding alone was dispositive,<sup>181</sup> the court proceeded to make note of

170. TEX. REV. CIV. STAT. ANN. art. 275 (1973).

171. The creditor may have an attachment on a debt actually due him by his debtor, when the debtor:

(1) Will fraudulently part with his property before judgment can be obtained against him.

(2) Is actually removing his property out of the state.

(3) Is about to remove his property out of the state.

(4) Resides out of the state.

(5) Is actually moving himself out of the state.

(6) Is about to move himself out of the state.

(7) Is absconding.

(8) Is concealing himself.

(9) Is secreting his property.

(10) Is fraudulently disposing of his property.

(11) Is actually removing himself beyond the limits of the judicial circuit in which he resides.

(12) Is about to remove himself out of the limits of such judicial circuit.

FLA. STAT. ANN. § 76.04 (Supp. 1975).

172. *Id.* § 76.24.

173. *Id.*

174. TEX. R. CIV. P. 599. The debtor may also seek relief for wrongful attachment or garnishment by filing a separate action for the creditor's bond. TEX. REV. CIV. STAT. ANN. art. 279 (1973); TEX. R. CIV. P. 658a.

175. A secured creditor has a security interest, usually by virtue of an installment contract, in the debtor's property. The debt is the purchase price plus a finance charge for the property. *See Mitchell v. Grant*, 416 U.S. 600, 604-05 (1974).

176. *See Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

177. GA. CODE ANN. chs. 46-1 to -99 (1973).

178. 419 U.S. at 607.

179. 383 F. Supp. 643 (S.D.N.Y. 1974), *prob. juris. noted*, 421 U.S. 908 (1975).

180. 383 F. Supp. at 648.

181. *Id.* at 649.

two factors which weigh in favor of some type of pre-seizure safeguard. The first of these is the creditor's lack of a "possessory interest in the attached property."<sup>182</sup> The court did not give explanation for this statement, but the logic attending the argument is obvious. Unlike the secured creditor-debtor controversy, there is no dispute as to ownership of the property. By repossession the secured creditor is demanding his contractual right to the property. The unsecured debtor, conversely, has exclusive rights to the property.<sup>183</sup> The debtor's rights include protection of that property by the state from theft and vandalism. It does not follow that the debtor's exclusive rights in the property should not also be protected in some manner from ex parte seizure upon a creditor's claim to an extraneous debt. As a second factor, the court determined that the nature of a creditor's allegations may weigh, in some cases, in favor of a pre-seizure safeguard.<sup>184</sup> A creditor's allegation of a debtor's fraud, for example, may be "ill-suited" for ex parte review.<sup>185</sup> A fair determination of a creditor's request for ex parte seizure in such a situation would require a prior hearing.

Ex parte attachment may have survived despite these difficulties as a method insuring that a state will retain jurisdiction over the controversy.<sup>186</sup> However, in the past few decades the Supreme Court has extended the power of a state's jurisdiction over foreign debtors to a point which invalidates reliance on such justification.<sup>187</sup> There still may be justification for ex parte seizure, on the other hand, when a creditor presents factually convincing evidence that a debtor, absent attachment, will conduct himself pending litigation in such a manner as to expose the creditor to the danger of an unsatisfied judgment. The court in *Sugar* recognized such a situation,<sup>188</sup> but found that factually convincing evidence may not be present in all controversies.<sup>189</sup>

Of the three statutes examined, only California's statutes offer a court the opportunity to opt for some type of safeguard pending seizure.<sup>190</sup> California's temporary restraining order, nevertheless, does encumber the property, albeit to a lesser extent, without prior notice and hearing. At the other extreme are the Texas statutes which offer no hearing pending final judgment. Assuming the Texas statutes were to be amended in the same manner as the amended Texas sequestration statute, it is submitted that the statutes would not stand under a controversy similar to that presented in *Sugar v. Curtis Circulation Co.*<sup>191</sup> Due process demands procedures that must accommodate

182. *Id.* In fact, the creditor has no interest at all prior to levy.

183. The situation would be further complicated if a third-party creditor had a security interest in the property.

184. *Id.*

185. *Id.*

186. The Florida statute, for example, authorizes attachment when the debtor is a non-resident, or a resident debtor is about to remove himself or his property from the jurisdiction of the court. *See* FLA. STAT. ANN. § 76.04 (Supp. 1975); *cf.* TEX. REV. CIV. STAT. ANN. art. 275 (1973).

187. *See* *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

188. 383 F. Supp. at 649.

189. Fraud, for example, presents difficult issues of proof. *Id.* at 649-50.

190. CAL. CIV. PRO. CODE § 538.1-.5 (West Supp. 1975).

191. 383 F. Supp. 643 (S.D.N.Y. 1974), *prob. juris. noted*, 421 U.S. 908 (1975).

a balancing of all interests involved. The Texas procedures, in some circumstances, will not accommodate the interests of either debtor or creditor.

### C. *A Creditor's Right to Pre-Seizure Safeguards*

In the area of provisional creditors' remedies, the due process movement has been a debtor's movement. The debtor has often been categorized as a poor, helpless consumer at the hands of an oppressive creditor.<sup>192</sup> Such a categorization is not surprising after a reading of the facts in some of the more spectacular consumer protection cases.<sup>193</sup> The creditor has traditionally been able to protect himself to some extent against a debtor's default by a finance charge or the increased price of consumer items sold on credit.<sup>194</sup> Misuse of these practices by a dishonest faction of creditors<sup>195</sup> has stigmatized creditors as a class.

Due process, however, is an individual right which must be afforded no less to creditors than to debtors. Therein lies the dilemma. How may adequate protection be provided to both? To grant the dishonest debtor a prior hearing may effectively frustrate the rights of a creditor before any opportunity for a judicial determination may take place. On the other hand, to deny an honest debtor the opportunity to expose abusive credit practices before his goods are seized would be an unwarranted intrusion upon his rights. A solution to this dilemma is balancing.

A fair determination of individual rights by balancing cannot be achieved if statutory procedures do not guarantee an accommodation for both sets of interests. This is the point at which the recently amended Texas sequestration statute fails. Strange as it may seem, the Texas procedures do not in all circumstances protect the creditor. The debtor in all circumstances is guaranteed the opportunity to challenge, before a judge, a creditor's claim to possession pending adjudication upon the merits.<sup>196</sup> The creditor is not afforded a parallel guarantee, the right to a bilateral hearing when his factual allegations are too complex or insubstantial to warrant issuance of a writ. The significance of this imbalance may be demonstrated by the following example. In a secured credit transaction the debtor has complete possession upon default under a security agreement. A balancing of interests upon the creditor's alleging the debtor's default would necessarily take into consideration the amount of unpaid balance. Suppose the debtor has allegedly defaulted soon after purchase and the creditor can only present borderline facts. The creditor has reason to fear that the debtor may conduct himself in a man-

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192. See generally D. CAPLOVITZ, *CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT* (1974).

193. See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

194. *Hearings on the Federal Trade Commission Report on Credit Practices Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 90th Cong., 2d Sess. 40 (1968).

195. See, e.g., *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969); *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 274 N.Y.S. 757 (Dist. Ct. 1966). See generally Note, *The Assignment and Discounting of Consumer Installment Contracts: Transactions Within the Periphery of the Truth-in-Lending Act and Regulation Z*, 29 Sw. L.J. 622 (1975).

196. Ch. 470, § 1, [1975] Tex. Laws 1246, 1247.

ner dangerous to the creditor's interest since the debtor has the property in his possession without paying more than a small portion of the purchase price. Yet, the creditor can do no more than present a sales agreement and allege the debtor's non-payment. Despite his substantial equity in the property, the creditor is not guaranteed, under these circumstances,<sup>197</sup> the opportunity to confront the debtor's claim of possession pending adjudication. The court may, of course, issue the writ and stage the confrontation immediately after seizure. But this would be a compromise, not a balanced determination, of the creditor-debtor conflict.

However, debtor-creditor relations are seldom so simple. The right of possession pending adjudication may in the more complex situation present extreme problems of unilateral proof. Nevertheless, the fact remains that, if the parties' rights are to be balanced, a pre-seizure safeguard of some type must be made available in some circumstances. Practically speaking, a judge in his discretion may order some form of preliminary safeguard even though the statute does not so provide. Due process, however, speaks in terms of guarantees, not discretion. California and Florida provide those guarantees by incorporating within the scope of their statutes a broad range of procedures which secure safeguards for creditor and debtor alike. The Texas statutes, especially with respect to attachment and garnishment, are limited in comparison.

#### IV. DUE PROCESS BALANCING

*North Georgia Finishing* did little if anything to develop the "balancing of interests" doctrine that had evolved in the *Sniadach*, *Fuentes*, and *Mitchell* decisions. One possible explanation for this failure is that a balancing process has been a traditional method of resolution for the Court in other areas of the law.<sup>198</sup> Accordingly, any particular form the balancing is to take with respect to provisional creditors' remedies may have been viewed by the Court as a matter of mechanics to be worked out by lower courts.<sup>199</sup> Of course, this solves none of the immediate problems.<sup>200</sup>

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197. An ex parte writ is issued only when the court may reasonably conclude that there is immediate danger to the property. *Id.*

198. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (right of privacy); *Terry v. Ohio*, 392 U.S. 1 (1968) (fourth amendment criminal problems); *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945) (regulation of interstate commerce). For a discussion of the balancing in *Roe v. Wade* see Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 10-15 (1973).

199. This is actually a very sensible explanation of the Court's action. Given the diversity of interests which may arise in debtor-creditor disputes, most of which will never appear in a single case, the Court could not be so foolhardy as to attempt to set out a universally applicable formula of balancing procedures. Lower courts, which are closer to the issues involved in debtor-creditor disputes, are now free to apply balancing techniques according to a particular state's legislative scheme and the nature of the dispute which has arisen. Once these balancing techniques have been applied by the lower courts, the Supreme Court is free to affirm, modify, or reject them in so far as they accomplish the ends which due process demands.

200. Although the Court's refusal to develop the balancing doctrine may be justified, its failure to specify what procedures may be necessary to carry out the safeguards expounded in *Mitchell* is astounding. If a balancing process is to operate equitably, it must be afforded a medium through which the result may be channeled. In a request for ex parte seizure by a creditor, for example, a court may find that the nature of the claim

A general area of confusion concerning due process balancing has stemmed from the Supreme Court's attitude toward defining what due process procedures may be required in future cases. In the area of revocation of parole the Court has specifically defined the type of procedures necessary.<sup>201</sup> With respect to pre-judgment creditors' remedies, however, the Court has failed to specify the form or nature of a required hearing.<sup>202</sup> The Court's failure is baffling because the mechanical aspects of any due procedure must be taken into account by the "balancing of interests" doctrine. The relative usefulness of a set of procedures must undoubtedly tip the scales. The allegation of a debtor's fraud in an unsecured creditor's application for summary attachment, for example, presents a difficult issue for determination.<sup>203</sup> Due process may in such a case require a prior hearing for a sufficient resolution of the validity of the allegations.<sup>204</sup> On the other hand, an immediate post-seizure hearing may be sufficient in the case of a secured creditor's affidavit alleging a debt past due.<sup>205</sup> The severity of a deprivation, then, will be enhanced or discounted by the relative usefulness of the due process procedures requested.<sup>206</sup>

The narrow scope of the procedural remedies provided by the amended Texas sequestration statute necessarily limits the "balancing of interests" doctrine. The statute balances interests only in a broad sense. Creditor-debtor conflicts are placed in two groups. The conflicts which warrant *ex parte* issuance of a writ compose a group granted wholesale protection in the form of a post-seizure hearing. The remaining conflicts, regardless of the interests involved, are not guaranteed any remedy until adjudication. Some form of summary action, however, is desirable from the point of view of the state and its citizenry since summary action protects the availability of credit at accessible interest rates.<sup>207</sup> Accordingly, when the only alternative is no

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alleged is so difficult of proof that issuance of a writ on the facts would be unwarranted. Some form of prior hearing may be warranted. The failure of a state statute to provide a prior hearing under these circumstances may render that statute unconstitutional.

201. See *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972), which listed the prerequisites for a revocation hearing.

202. See *Fuentes v. Shevin*, 407 U.S. 67, 96-97 (1972). Although the requirement for a prior hearing has been modified somewhat, the Court's most recent decision in the area also fails to elaborate upon the form of the safeguards set out. See *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 602 (1975).

203. The court in *Sugar v. Curtis Circulation Co.*, 383 F. Supp. 643, 649 (S.D.N.Y. 1974), *prob. juris. noted*, 421 U.S. 908 (1975), stated that "such issues, which involve determination of subjective elements of motive and intent, are notably unsuitable to determination on documentary proof alone."

204. *Id.* at 649-50.

205. Documentary proof for an *ex parte* determination is well-suited for showing the existence of a debt and a debtor's default. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 617-18 (1974).

206. For a detailed analysis of this area see Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975).

207. The length of time between default and judgment allows a deterioration in the resale value of the goods which is unrecoverable by the creditor. Therefore, from the creditor's standpoint the lack of a summary procedure will either curtail availability of credit or increase its cost to low-income consumers. Note, *Provisional Remedies and Due Process in Default—Mitchell v. W.T. Grant Co.*, 1974 WASH. U.L.Q. 653, 700-01. For an interesting cost analysis of procedural due process see Scott, *Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process*, 61 VA. L. REV. 807 (1975).

summary action in any form, placement of a conflict into the first group is the most appealing choice. Assuming, then, that the majority of conflicts will fall into the first group, the statutory procedures protect the majority's interest in summary action, not the individual's right to due process.

This wholesale balancing, it is submitted, stems from a misconception of the due process question. If balancing is to weigh a majority's interest in summary action, the resulting determination is legislative, not judicial.<sup>208</sup> The due process right, it must be remembered, was not intended to be limited by the interests of the majority.<sup>209</sup> Due process, rather, is the individual's protection from the majority where the individual's injury may be in the best interest of the majority.<sup>210</sup> The validity of the "balancing of interest" doctrine as applied to creditors' prejudgment remedies depends, therefore, upon a balancing of individual interests on both sides. If, in a particular case, a debtor's property is to be summarily seized, the creditor's interest in the protection of the debt must be weighed with the debtor's interest in a wrongful deprivation of his property. This analysis refutes the argument that creditors' *ex parte* remedies must be preserved to ensure availability of credit at low interest rates.<sup>211</sup> The individual's due process protection is separate and distinct from the interests of the majority of his fellow citizens.<sup>212</sup> To confuse the interest of the individual with the interest of the majority is to misconstrue the issue.

## V. CONCLUSION

There should be no question as to whether a debtor must be afforded due process under state action on behalf of a creditor for the deprivation of a debtor's property. Due process is a guarantee that arbitrary and unfair governmental action will not interfere with an individual's constitutional right of liberty and property.<sup>213</sup> In this light, due process protects the individual by making a clear record for later judicial review<sup>214</sup> that the facts upon which deprivation of liberty or property is based are legitimate.<sup>215</sup> There can be no "balancing" of this protection. The issue with respect to provisional creditors' remedies is, rather, a question of what type of due process protection shall be afforded a debtor or creditor. To this issue and to this issue alone may the "balancing of interests" doctrine apply.

If confined to the individual interests of creditor and debtor, the "balancing of interests" doctrine has a legitimate role in the application of due process

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208. See Note, *supra* note 206, at 1523-27.

209. Prohibitions in the Constitution were enacted to limit the powers of the Government. *Id.* at 1525.

210. *Id.* at 1527.

211. See note 207 and accompanying text.

212. Dworkin, *Taking Rights Seriously*, in OXFORD ESSAYS IN JURISPRUDENCE 202, 214-15 (2d Series, A. Simpson ed. 1973).

213. See *Twining v. New Jersey*, 211 U.S. 78 (1908); *Hurtado v. California*, 110 U.S. 516 (1884); *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235 (1819).

214. See *McGautha v. California*, 402 U.S. 183, 268-70 (1971) (Brennan, J., dissenting).

215. See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring).



safeguards to creditors' ex parte remedies. However, if the doctrine is to be a flexible yet fair method of applicability, the legislatures, aided by the courts, must establish procedures designed to facilitate an impartial balancing of the individual interests involved. These procedures must cover the gambit of protections that may be available to the respective individuals. Procedures which are so inflexible as simply to afford or deny complete protection make balancing a futile exercise. Few controversies involve individual equities which are so one sided. The right to due process when balanced between individuals must afford the protection to each individual that the equities of the controversy, when balanced, so demand.

To administer justly balanced protection to parties in controversy, a judge, if his power is not to be usurped, must have at his disposal as broad a range of procedures as is necessary to accommodate his every determination. The amended Texas sequestration statute inflexibly offers a choice between two absolutes: to writ or not to writ? Such inflexibility, unfortunately, may only operate to produce grave interference with the rights and interest of both creditor and debtor.