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REVOLUTION AND COUNTERREVOLUTION:  
THE SUPREME COURT ON CREDITORS' REMEDIES

*Earl Phillips*

Creditors have more than a dozen prejudgment, no-notice remedies which permit them to seize or encumber a debtor's property even before the creditor has sued the debtor and recovered a judgment. Moreover, a creditor may take a debtor's property without giving the debtor prior notice and the opportunity to oppose the taking in a judicial proceeding. These remedies include repossession of collateral by the procedure of replevin, the attachment of a defendant's assets at the beginning of a lawsuit by an unsecured plaintiff, confession of judgment, and the various forms of self-help: for example, the right to set off mutual debts, wage assignments, and the assignment of receivables.

When one considers it, it is extraordinary that a person may take another's property without giving notice until the deed is done. Yet these extraordinary remedies are ancient; they have been employed in England and the United States for centuries. In the twenties the Supreme Court affirmed their constitutionality, and in 1967 it could be stated that "[a]lthough attachment is a harsh remedy, because it deprives the debtor of his power of disposition over assets prior to the judicial ascertainment of his liability, the constitutionality of this procedure is firmly established." But even as those words were written, the Supreme Court was about to undo all those centuries of law.

In 1969, a Wisconsin litigator asserted, along with several other allegations in which he probably had more confidence, that the

* Professor of Law, Fordham University School of Law.
2. In Ownbey v. Morgan, 256 U.S. 94 (1921); Coffin Bros. v. Bennett, 277 U.S. 29 (1928); and McKay v. McInnes, 279 U.S. 820 (1929) (per curiam), the Supreme Court held that under a variety of circumstances attachment is a constitutional remedy.
garnishment of wages at the beginning of a lawsuit without prior notice and the opportunity for a hearing violated due process. To everyone’s surprise, the Supreme Court agreed. In *Sniadach v. Family Finance Corp.*, the Court ruled that a creditor may not garnish a workman’s wages until he has given the debtor notice and an opportunity to contest the garnishment in (at least) a preliminary hearing of some kind.

The scope of the *Sniadach* holding was originally unclear. Some authorities persuasively argued that *Sniadach* did not outlaw all prejudgment remedies, but merely invalidated wage garnishment, and garnishment and attachment of any other kinds of property as essential to a debtor’s day-to-day life as his wages. But the possibility that the Court would give *Sniadach* a limited reading was removed in 1972. In *Fuentes v. Shevin* and *Parham v. Cortese*, the Court made clear that the *Sniadach* holding was almost universally applicable. These decisions laid down the broad principle that, except in extraordinary circumstances, no private citizen could use

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6. These two cases were decided together at 407 U.S. 67 (1972).
7. *Id.* at 90-92. The Court indicated that if a debtor is, in fact, about to destroy or conceal disputed goods, the creditor may summarily seize them. In this extraordinary case, prior notice of the impending repossession would merely serve to warn the debtor to act quickly to prevent this recovery, and so the creditor may capture them without prior notice and a hearing. *See id.* at 93-94 n.30. The Court also spoke of the case of attachment of goods at the beginning of a lawsuit against a nonresident defendant over whom personal jurisdiction cannot be obtained. In this extraordinary case, attachment is necessary to give the court in rem jurisdiction over the controversy or the court cannot exercise jurisdiction at all. Here, a summary attachment is permissible to secure the court’s jurisdiction before the defendant can remove the property from the state and thus defeat the court’s jurisdiction. *See id.* at 91 n.23; Ownbey v. Morgan, 256 U.S. 94 (1921). It is interesting that the *Fuentes* Court considered the mere possibility of removal of property as justifying summary seizure when the seizure was in aid of a governmental agency—i.e., a court seeking jurisdiction of a case, but thought the possibility of removal or concealment too remote to justify summary seizure in aid of a “mere” private creditor when the defendant is a resident over whom the court can exercise personal jurisdiction. At any rate, *Mitchell v. W.T. Grant Co.*, 416
the courts to summarily seize another's property. In speaking of extraordinary situations in which summary seizures were constitutionally permissible, the Supreme Court made clear that the government could still do this: the Internal Revenue Service, for example, is not impeded by Fuentes; nor are the police when they summarily seize a vessel used for unlawful purposes. But department stores, banks, and finance companies were all required to leave a debtor's assets alone, no matter how many payments he had missed, or how egregious his default, until the creditor gave notice and the opportunity for a hearing.

Naturally, debtors—particularly consumers—wielded Sniadach and Fuentes like the jawbone of an ass; it seemed for a while that they would lay low the entire rank and file of prejudgment, no-notice creditors' remedies except, possibly, self-help. Now, however, the Supreme Court has retreated from the extreme position it took in Fuentes; indeed, the Court has gone a long way toward rehabilitating most forms of summary remedies. We are almost back to where we were in 1972 prior to Fuentes—almost but not quite.

The Supreme Court's retreat from Fuentes was signalled by its actions in three cases in May, 1974. The first, Mitchell v. W.T.

U.S. 600 (1974) seems to have done away with the distinction. It holds that a court may summarily issue a writ of replevin on behalf of a secured creditor against a resident defendant upon a showing that the defendant has the power to remove, conceal, or destroy collateral; it is not necessary to show that the defendant, in fact, intends to do any of these things. See id. at 605 n.4. Mitchell makes another point, too: even in an extraordinary situation, a writ of replevin or attachment may be issued only by a judge—not a clerk of court—after an ex parte hearing in which the plaintiff makes a clear showing that the case is extraordinary. See id. at 606 n.5. That is, the plaintiff must show that, prima facie, the defendant has the power to destroy, remove, or conceal the goods in question or the creditor's security interest; or that it is prima facie impossible to obtain personal jurisdiction over the defendant.

Grant Co.,\textsuperscript{12} rehabilitated replevin. The second, Spielman-Fond, Inc. v. Hanson's Inc.,\textsuperscript{13} upheld the constitutionality of mechanics' and materialmen's liens. Finally, in Carmack v. Buckner,\textsuperscript{14} the Court approved a decision of the Louisiana Supreme Court to the effect that cognovits are valid. However, because of the facts of the case, the Court's action in Carmack is ambiguous, as will be explained later.

The cumulative effect of these and other Supreme Court actions, beginning with Sniadach in 1969, may be summarized in this fashion: wage garnishment is out; replevin is in; statutory liens and other encumberances of a debtor's property which do not disturb the debtor's possession are acceptable; cognovits and self-help seem permissible; but the constitutionality of attachment and garnishment of items such as an automobile or a bank account—property other than wages—is still uncertain.

**I. Liens Which Do Not Disturb Possession**

A creditor need not give a debtor notice and the opportunity for a hearing before encumbering property with a lien, as long as the lien does not deprive the debtor of possession and use of the property pending a trial. Such is the effect of the Supreme Court's action in Spielman-Fond.\textsuperscript{15}

The fourteenth amendment provides that no person shall be "deprived of property" without due process.\textsuperscript{16} According to the federal district court in Arizona,\textsuperscript{17} this means that no person shall be deprived of the use of property. In Spielman-Fond, that court held that the fourteenth amendment, despite the Supreme Court's rulings in Sniadach and Fuentes, does not invalidate mechanics' and materialmen's liens: in both Sniadach and Fuentes the debtor was prevented from using the property in question—in Sniadach, part

\textsuperscript{12} 416 U.S. 600 (1974).
\textsuperscript{15} 94 S. Ct. 2596 (1974) (mem.).
\textsuperscript{16} U.S. Const. amend. XIV.
of his wages were withheld from him so he could not spend the money; in *Fuentes*, some household goods and a stereo set were actually seized by the sheriff and removed from the debtor's house. However, it is possible to place a mechanic's lien or a materialman's lien on real property without prior notice and a hearing because these liens do not interfere with the owner's continued use of the land.

When a workman or supplier places a lien on realty, the owner's possession is undisturbed: he can continue to use the property while the controversy is thrashed out. The only thing he can't very well do is sell or mortgage the land because of the cloud on his title. But a cloud on title is not a deprivation of property within the meaning of the fourteenth amendment, said the district court, which concluded that a statutory lien may be placed against real property without prior notice or a hearing.¹⁸

The Supreme Court affirmed the judgment of the district court.¹⁹ It wrote no opinion, but its affirmance clearly approved the district court's decision.²⁰

There is no reason to limit *Spielman-Fond* to statutory liens. Its rationale would permit creditors to use other prejudgment, no-notice remedies as long as the creditor merely encumbers the debtor's property and does nothing more than make a sale or mortgage of the property difficult. For example, a plaintiff could begin a collection suit by an attachment of the defendant's real property, without prior notice or the opportunity for a hearing. This would not violate due process because a levy of attachment does not deprive the defendant of the use of the land;²¹ the sheriff merely records a

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¹⁸. *Accord*, *Ruocco* v. Brinker, 380 F. Supp. 432 (S.D. Fla. 1974). The *Ruocco* court's alternative ruling was that, even though the imposition of a lien was considered a deprivation of property within the meaning of the fourteenth amendment, a summary imposition would nevertheless be consistent with due process under the balancing of interests test announced in *Mitchell* v. W.T. Grant Co., 416 U.S. 600 (1974) to be discussed infra. Where the deprivation of property is so slight, due process is satisfied by a subsequent notice and the opportunity for a hearing of the controversy. See *Cook* v. *Carlson*, 364 F. Supp. 24, 26-27 & n.1 (D.S.D. 1973).

¹⁹. 94 S. Ct. at 2596.

²⁰. The Supreme Court's affirmance of a three-judge district court judgment is controlling precedent for cases involving the same constitutional claims. *Doe* v. *Hodgson*, 500 F.2d 1206, 1207 (2d Cir. 1974).

notice of levy in the local land office and leaves the defendant in possession. The attachment would give the plaintiff the lien he needs to secure payment if the collection suit ends in judgment in his favor, but the lien is constitutional because, while it deprives the defendant of the power to easily sell the land or mortgage it, it does not disturb his use of it while the collection suit proceeds.

II. Judicial Remedies of Secured Creditors

A. Replevin

After Sniadach, Fuentes, and subsequent decisions by a score of lower courts, it was generally concluded that all forms of creditors' remedies were unconstitutional except self-help, and that even self-help was questionable. But in spite of the doubtful outlook, W.T. Grant Co. argued that replevin was a constitutional remedy. Amazingly, the Supreme Court agreed, and, in Mitchell v. W.T. Grant Co., gave new life to replevin, i.e., the repossession of collateral by a secured creditor pursuant to a court order executed by a peace officer without giving the debtor prior notice and an opportunity for a hearing. Different states give this procedure different names, but whatever the name, it is once again constitutional with this proviso: to minimize the danger of a wrongful repossession and to otherwise safeguard the debtor, the replevin process must incorporate features

that serve in lieu of notice and hearing.\textsuperscript{28}

It is important to note that the Supreme Court did not overrule \textit{Fuentes}.\textsuperscript{29} Rather than do obvious violence to the principle of \textit{stare decisis} by overruling a decision only two years old,\textsuperscript{30} the new majority on the Court discerned substantial differences between the Louisiana statute in \textit{Mitchell} and the Florida and Pennsylvania statutes which the Court invalidated in \textit{Fuentes}.\textsuperscript{31} Nevertheless, it is clear that \textit{Mitchell} severely limits \textit{Fuentes} and restores replevin to sellers with a vendor's lien, lenders with a chattel mortgage, and other secured creditors, so long as safeguards similar to those found in the Louisiana statute exist.

What are these safeguards? What distinguishes the replevin procedures struck down by the Supreme Court in 1972 from the procedure upheld in 1974?

\textsuperscript{28} These "features" are not traditionally found in the replevin process.

\textsuperscript{29} Consequently, replevin statutes like the statutes held unconstitutional in \textit{Fuentes}, which afford a debtor none of the procedural safeguards incorporated in the Louisiana statute, are still unconstitutional. \textit{See also} Garcia v. Krausse, \textit{summarized at 43 U.S.L.W. 2120} (S.D. Tex. Aug. 23, 1974) (procedure for the replevy of collateral by secured creditors unconstitutional because writ issued by clerk of court upon conclusory allegations of right to possession unsupported by sworn, documentary evidence); Jones v. Banner Moving \\& Storage, Inc., 358 N.Y.S.2d 885 (Sup. Ct. 1974). In addition, it seems that seizures by governmental agencies for a governmental purpose, \textit{e.g.}, to protect the public good as opposed to aiding a private creditor, are still governed by \textit{Fuentes} rather than \textit{Mitchell}. Thus, summary seizures by governmental agencies are still limited to extraordinary cases in which action is urgent, \textit{e.g.}, to protect the public from adulterated food. To put it another way, the more flexible balancing of interests test of due process announced in \textit{Mitchell} may not be used to justify summary seizure by the police of a vessel used for unlawful purposes. \textit{See Calero-Toledo v. Pearson Yacht Leasing Co.}, 416 U.S. 663 (1974) (decided two days after \textit{Mitchell}).

\textsuperscript{30} This implies no adverse criticism of the \textit{Mitchell} decision, which is actually a reaffirmance of \textit{stare decisis} despite the Court's refusal to follow \textit{Fuentes}. As already pointed out, \textit{Fuentes} outlawed a remedy that had been employed for centuries and did so in the face of previous Supreme Court decisions upholding its constitutionality. Thus \textit{Mitchell} repairs the damage done to \textit{stare decisis} by \textit{Fuentes}.

\textsuperscript{31} 416 U.S. at 616.
Mitchell is premised on the proposition that a secured creditor has an in rem interest in the collateral which is as deserving of protection as the debtor's ownership. The due process problem is to balance these conflicting interests fairly. This balance was achieved in the Louisiana procedure because court clerks, who have no discretion to evaluate the merits of a request for a writ of replevin, may not issue the writ. A secured creditor may obtain a writ only by initiating a collection suit; even then, he may obtain a writ only after an ex parte hearing before a judge in which he produces sworn, documentary evidence establishing a prima facie case of default by the debtor: the creditor must prove to the judge's satisfaction that a valid debt exists, the creditor has a security interest, and the debtor has probably missed one or more installments without justification. This minimizes the risk of a wrongful repossession, e.g., repossession when the debtor has not defaulted. On the other hand, since the hearing is ex parte and the writ is served on the debtor without prior notice, the creditor is able to obtain the collateral before further use by the debtor depreciates its value as security. In addition, summary issuance of the writ permits the creditor to recover the collateral before the debtor has a chance to destroy, sell, hide, or take it out of the county. However, the creditor must post a bond in an amount sufficient to pay the debtor for the compensable injuries he will suffer should it transpire that the creditor was not entitled to repossess.

32. Id. at 603.
33. Id.
34. Id. at 606 n.5.
35. Id. at 606.
36. Id. at 605.
37. Id. at 604-05.
38. Id. at 609-10.
39. Id. at 608.
40. Id. at 606. In Louisiana, a debtor whose property has been wrongfully repossessed is entitled not only to damages for the temporary deprivation of his property, but also to damages for injury to his reputation, humiliation, and his attorney's fees. Id. at 606. There may be states which do not permit recovery for injury to reputation, humiliation, and attorney's fees; in these states, the creditor would be required only to post a bond securing the debtor against wrongful interference with his use of the collateral. However, this alone probably would not render replevin unconstitu-
If the creditor proves a prima facie case and posts the required bond, the judge may order the collateral summarily repossessed. This is not the end though. After the collateral is seized by the sheriff, the debtor must have the immediate right to demand a second, bilateral preliminary hearing—unless there is a prompt trial to finally determine the controversy. However, the creditor again has the burden of clearly showing that the debtor has probably defaulted on a valid debt, although this time the creditor must overcome any opposing evidence presented by the debtor, e.g., that he was justified in stopping payment because the creditor had breached a warranty of merchantability. Moreover, the debtor

42. See Fuentes v. Shevin, 407 U.S. at 96-97. See also text accompanying note 41 supra.
43. The kind of hearing required is illustrated by the hearing held in Long Island Trust Co. v. Porta Aluminum Corp., 44 App. Div. 2d 118, 124, 354 N.Y.S.2d 134, 140 (2d Dep't 1974). This bilateral hearing was held before the seizure: Mitchell had not yet revealed that it could be postponed until immediately after the seizure.
44. The Mitchell opinion is unclear on the nature of the hearing which must immediately follow seizure of collateral. There is a possibility the decision requires a hearing on the merits issuing in a final judgment concluding the controversy. But the opinion speaks of a “full hearing on the matter of possession,” 416 U.S. at 610, i.e., a preliminary hearing on the collateral issue of who is to have possession pendente lite. The opinion also speaks of the debtor's right “immediately to seek dissolution of the writ . . . unless the creditor 'proves the grounds upon which the writ issued' . . . .” Id. at 606, citing La. Code Civ. Pro. Ann. art. 3506 (West 1961). Article 3506 contemplates a preliminary hearing pending the final outcome of the collection suit: “The defendant by contradictory motion may obtain the dissolution of a writ of . . . sequestration [replevin], unless the plaintiff proves the grounds upon which the writ was issued. If the writ . . . is dissolved, the action shall then proceed as if no writ had been issued.” Id. (emphasis added). Garcia v. Krausse, summarized at 43 U.S.L.W. 2120 (S.D. Tex. Aug. 23, 1974) construed Mitchell as requiring a full hearing on the merits immediately after the seizure. Nonetheless, the author believes the Supreme Court intended only to require a preliminary hearing on the question of who shall have possession of the collateral pending a full hearing on the merits of the collection suit.
must be permitted to regain possession of the collateral, if he chooses, by posting a bond securing payment of the amount claimed by the creditor. Finally, there must be a prompt adversary hearing of the creditor’s collection suit. And until the suit is concluded by a final judgment on the merits, the creditor may not sell or otherwise dispose of the collateral.

A secured creditor has a lien on collateral to the extent of the unpaid balance. Consequently, the creditor has an interest in quickly seizing the property, in the event of a default, in order to prevent deterioration, removal, or other disposition of the property that would place it beyond the creditor’s reach. What is more, creditors want a cheap, i.e., summary, method of recovering collateral in order to keep down the cost of credit. The debtor, on the other hand, has an interest in avoiding an arbitrary and unjustified seizure.

In Fuentes, the Supreme Court ignored the creditor’s security interest and ruled that, in the ordinary case, nothing except notice and the opportunity for a preliminary hearing before the creditor seizes the collateral could adequately protect the debtor’s interest. Indeed, the Court announced an almost absolute principle that, except in extraordinary situations, a private creditor could never summarily deprive a debtor of property.

Mitchell introduces a less doctrinaire, more flexible approach—a balancing of interests test of due process. The Court said, “[T]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.” Consequently, Mitchell is by no means the last word; litigation will be necessary to test the various creditors’ remedies on a remedy by remedy, case by case basis before the new constitutional law of

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45. 416 U.S. at 607.
46. Id. at 626-27 (Powell, J., concurring).
47. Id. at 606 n.7; LA. CODE CIV. PRO. ANN. art. 3510 (West 1961).
48. 407 U.S. at 80-84.
49. Id. at 82.
52. See Sugar v. Curtis Circulation Co., summarized at 43 U.S.L.W.
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creditors' remedies is finally settled. Nevertheless, it appears that only a judge may order the summary seizure of a debtor's property after an examination of sworn evidence in an *ex parte* hearing analogous to the hearing held on an application for a temporary restraining order; the days when the clerk of a court could mechanically order any summary seizure are no doubt over forever. Moreover, it may be necessary to give the debtor the immediate right to a post-seizure hearing, in which the creditor has the burden of proving the grounds upon which the writ was issued.

However, it is probably unnecessary that every prejudgment, no-notice remedy include all of the safeguards found in the Louisiana replevin procedure. For instance, it may not always be necessary for the creditor to post a bond. Shortly after the *Mitchell* decision the Supreme Court approved both summary seizure of collateral pursuant to a confession of judgment clause in a mortgage, and the summary execution of the judgment against the mortgaged property, although the creditor was not required by state law to post a bond for the indemnification of the debtor in the event the entry of judgment was wrongful.

On the other hand, the presence of all the safeguards found in the Louisiana replevin procedure is probably no guarantee of constitutionality. Replevin could violate due process in a particular case—despite these safeguards—where the results of a seizure are so terrible that a wrongful repossession must be avoided at all costs. Thus, *Mitchell* suggests that a creditor may never summarily deprive a debtor of his "basic source of income." The decision indicates that *Sniadach* is still good law. It seems, therefore, that a debtor's wages may not be garnished summarily because even a temporary loss of income could drive the typical debtor and his

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56. 416 U.S. at 610.
57. *Id.* at 614.
family to the wall\textsuperscript{59} and put them in a position of "brutal need."
\textsuperscript{60}

The same could be said of the temporary loss of the means of earning a living, \textit{e.g.}, a car needed by a salesman to call on customers. It may be, therefore, that prior notice and the opportunity for a hearing is the only procedure which will adequately protect a debtor against a wrongful replevy of collateral he uses to earn a living.

The issue of hardship could conceivably arise in another way. \textit{Mitchell} involved the repossession of a refrigerator, kitchen range, stereo set, and washing machine. The loss of these items undoubtedly involves a degree of hardship—it is rather difficult to feed your family without a refrigerator and stove. Nevertheless, \textit{Mitchell} makes clear that the hardship is not so great as to require prior notice and a hearing when the creditor can show, \textit{ex parte}, that he is probably entitled to get the property back. But suppose the (undoubtedly rare) case in which someone buys all of his furnishings and equipment at one time and then allegedly defaults. Repossession denudes the consumer's home and leaves him with nothing but bare floors and empty rooms. That might be too much, a degree of hardship which a creditor may constitutionally inflict on a debtor only after giving notice and the opportunity for, at least, a preliminary, bilateral hearing.\textsuperscript{61}

Another problem might also present itself: what if a creditor's right to seize the property depends upon issues which do not lend themselves to documentary proof, but require testimony and cross examination, \textit{e.g.}, fraud on the part of the debtor? Perhaps then a judge may not issue a writ after an \textit{ex parte} hearing in which only documentary evidence is presented by the creditor.\textsuperscript{62} If this is the

\textsuperscript{59} 416 U.S. at 614, citing 395 U.S. at 341-42.

\textsuperscript{60} Id. at 625 (Powell, J., concurring).

\textsuperscript{61} Cf. Jones v. Banner Moving & Storage, Inc., 358 N.Y.S. 2d 885, 898 (Sup. Ct. 1974). A landlord evicted a tenant on welfare while she was out of the city and stored all of her furnishings and possessions in a warehouse. The court noted the balancing of interests test of due process announced in \textit{Mitchell}. It held unconstitutional the warehouseman's lien securing payment of storage costs because of, among other factors, the extreme hardship suffered by a person deprived of all her furniture and other household articles. \textit{Id.} at 899; accord, Grossman Furniture Co. v. Pierre, 291 A.2d 858 (N.J. Dist. Ct. 1972).

\textsuperscript{62} See Sugar v. Curtis Circulation Co., \textit{summarized} at 43 U.S.L.W.
case, the judge must require that the creditor, seeking to make a showing of fraud, introduce oral testimony as well as any available documentary evidence proving the debtor's fraudulent intent. If there is insufficient evidence to prove a prima facie case, the court must deny the writ. On the other hand, if there is sufficient evidence the court may issue the writ, as a court issues a temporary restraining order, to prevent any fraudulent conduct contemplated by the debtor. Then, immediately after the seizure, the court must give the debtor a chance for a bilateral hearing (with testimony and cross examination), and once again require the creditor to prove a prima facie case of fraud.

B. Confessions of Judgment In Favor of Secured Creditors

The case of a secured creditor who summarily enters judgment against a debtor and levies execution on collateral pursuant to a cognovit is not too different from the case of a secured creditor who summarily replevies collateral. It follows that summary execution of a confessed judgment would be constitutionally permissible where the entry of judgment and levy are accompanied by safeguards which serve to adequately protect the debtor in lieu of prior notice and the opportunity for a hearing. And, indeed, it seems that this is the law. Aside from the fact that the Mitchell rationale will cover both cases, the Supreme Court, in Carmack v. Buckner, dismissed for want of a substantial federal question a Louisiana decision which upheld a confession of judgment statute authorizing summary seizure of collateral by a secured creditor.

The trouble is, an argument can be made against this analysis of Carmack.

In Louisiana, when a secured creditor seeks a writ to execute a confessed judgment (the writ is called an order for seizure and sale),


63. 94 S. Ct. 2594 (1974).

the debtor is given three days prior notice of the impending levy on the collateral. This is accomplished by serving the debtor with a demand for payment within three days, to which demand there is attached the creditor's petition for an order of seizure and sale. If the debtor takes no action, the collateral is seized after three days. However, during the three days he may interpose defenses to the petition for an order of seizure and sale; and if he does, the seizure must await the outcome of the hearing on these defenses. Alternatively, the debtor may seek an injunction barring the seizure and sale. Here too, the seizure must await the outcome of the injunction action. Thus *Carmack* could be viewed as simply holding that the enforcement of a confessed judgment is constitutional when the debtor is given notice of an impending levy and the opportunity to contest it in a hearing held before the seizure occurs.

There is, however, a more likely analysis. The dissent to the Louisiana court's decision pointed out that the debtor's opportunity for a hearing prior to seizure is more theoretical than real. When the debtor is served with the petition for an order of seizure and sale, he is not informed of his right to a hearing. He is merely told to pay the amount demanded by the creditor within three days or lose the collateral. Thus, in practice the enforcement of cognovits in Louisiana amounts to a summary procedure in which the debtor has no real right to a hearing in advance of the levy on the collateral. Consequently, the dismissal by the United States Supreme Court of the constitutional objections to the procedure, coming just fifteen days after the Court's *Mitchell* decision, suggests that secured creditors may summarily enforce confessions of judgment against collateral as long as the enforcement procedure contains, in lieu of prior notice and hearing, safeguards similar to those which permit secured creditors to summarily replevy collateral.

There is yet another possibility. *Carmack* involved a confession of judgment clause contained in a real property mortgage: the collateral was a tract of land. In such cases the levy of execution is constructive. It is accomplished by serving a notice of seizure on the debtor and recording the notice; the debtor is not actually dispossessed until after the execution sale; in the meantime, he may demand a hearing to contest the creditor's claim. Since the Court

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disposed of Carmack the same day it affirmed Spielman-Fond, it can be inferred that constructive levy of execution of a confessed judgment does not trigger the due process clause, simply because the levy does not disturb the debtor's possession.

Even so, a levy by a secured creditor which actually dispossesses the debtor of collateral would seem constitutional under Mitchell. Once again, the author is led to the conclusion that the summary enforcement of confessed judgments against collateral by secured creditors is constitutional, given safeguards adequate to protect the debtor from a wrongful levy.

Assuming this is correct, what procedures are sufficient to justify the absence of prior notice and the opportunity for a hearing? Mutatis mutandis, they are the same procedures that justify their absence in a replevin action. Summary entry of a confessed judgment and its execution may be ordered only by a judge—never a clerk of court—upon documentary proof of a prima facie case of default. Moreover, the debtor must be entitled to a preliminary hearing to oppose the seizure of the collateral immediately after the seizure, or to a prompt, full scale hearing of the controversy that will result in a final judgment disposing of the controversy.

III. Judicial Remedies of Unsecured Creditors

A. Attachment and Garnishment

In Mitchell, the Supreme Court expressly stated that its decision, involving the right of a secured creditor, did not control "[t]he question . . . whether a debtor's property may be seized by his creditors, pendente lite, where they hold no present interest in the property sought to be seized." Consequently, the Mitchell decision sheds little light on the constitutionality of the prejudgment, no-notice remedies used by unsecured creditors to reach assets owned outright by their debtors. Still, the decision affords us some hints.

On the one hand, the Court rejected the Fuentes rule that, in the usual case, due process invariably requires prior notice and the opportunity for a hearing before a creditor may seize a debtor's assets.

66. 272 So. 2d at 330.
67. Cf. id.
69. 416 U.S. at 604.
Mitchell announced the rule that the constitutionality of creditors' remedies is determined by balancing the need of creditors for summary action—i.e., simple, expeditious, and inexpensive collection procedures—against the danger of unjustified seizures. The balance can be achieved through safeguards built into a given remedy.\(^\text{70}\) Summary attachment and garnishment of a defendant's assets at the beginning of a collection suit brought by an unsecured plaintiff may be constitutional if the order of seizure is, for example, issued by a judge after an *ex parte* hearing in which the creditor's sworn evidence establishes a prima facie case of the defendant's default; and if the debtor is given the opportunity for a bilateral, preliminary hearing immediately after the seizure to determine who shall possess the property pending the final outcome of the lawsuit.

Moreover, Mitchell suggests that the new majority on the Supreme Court is less likely to impose its idea of constitutionality on remedies that have evolved from centuries of interaction between generations of creditors, debtors, lawyers, judges, and legislators, who have been as sensitive to the requirements of fairness and due process as are the present members of the Court.\(^\text{71}\) That is to say, the Court may have adopted Justice Frankfurter's doctrine of judicial restraint when it comes to invalidating legislation on the ground of unconstitutionality. If so, it will uphold the traditional creditors' remedies employed by unsecured creditors where efforts have been made to limit summary seizures to the case in which debtors are not current in their payments and have no defenses to the creditor's claim. In addition, the Mitchell decision relies,\(^\text{72}\) *inter alia*, on a 1921 case which upheld the constitutionality of a Maine statute permitting an unsecured creditor to begin a collection suit by summarily attaching real property and corporate shares in which the creditor previously had no interest.\(^\text{73}\)

However, an important factor in Mitchell was that the creditor was a secured creditor; it was the necessity of protecting the creditor's in rem property interest in his collateral that justified its sum-

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70. When these safeguards minimize the possibility of a wrongful taking, prior notice and the opportunity for a hearing may be omitted.

71. 416 U.S. at 618-19 n.13.

72. *Id.* at 613.

73. McKay v. McInnes, 279 U.S. 820 (1929), *aff'g* 127 Me. 110, 141 A. 699 (1928).
mary repossession. The Court said: "[T]he reality is that both seller and buyer had current, real interests in the property. . . . With this duality in mind, we are convinced that the Louisiana sequestration [replevin] procedure is not invalid. . . ." Where that duality is missing it may well be that prior notice and the opportunity for a hearing are the only procedural safeguards that will adequately protect debtors from unjustified seizures. In short, the use of attachment and garnishment by unsecured creditors remains unsettled (except that, of course, the use of garnishment to reach a defendant's wages is forbidden).

B. Confessions of Judgment—Cognovits

Whatever the constitutionality of attachment and garnishment, the constitutionality of confessions of judgment in favor of unsecured creditors is clear. The Supreme Court has spoken at length on this remedy. In three cases, the Court has ruled that cognovit provisions in promissory notes and installment sales contracts are not inherently bad; i.e., there are circumstances in which cognovit clauses are constitutionally permissible. The exact circumstances are unclear, but the Court's decisions suggest that cognovits are unconstitutional in consumer credit transactions under present practice because of the take it or leave it basis on which retailers and loan companies offer to do business with consumers. Therefore, it seems that creditors will have to change their practice to some degree if, indeed, they may continue to use confessions of judgment in consumer transactions at all.

Ordinarily, under the due process clause of the fourteenth amendment, a creditor may not recover a judgment for money against a debtor and execute on the debtor's assets unless the creditor sues the debtor and gives notices of the suit. If the debtor does not respond to the notice, the court may enter a "default" judgment

74. 416 U.S. at 604-05 (emphasis added).
75. Sugar v. Curtis Circulation Co., summarized at 43 U.S.L.W. 2183 (S.D.N.Y. Oct. 17, 1974) limits Mitchell to cases where the creditor has a security interest in the goods that are seized.
77. See cases cited note 76 supra.
against him without further ado. But if the debtor denies that he owes the money, the creditor is forced to trial. No judgment may be entered against the debtor unless the creditor proves his claim by the introduction of evidence at the trial. Moreover, the debtor has the opportunity to prove any defenses he may have, such as delivery of defective goods. Only when the creditor has proved his right to the money claimed, and the debtor has failed to establish a defense, does the court grant judgment for the creditor; and only then may the creditor execute on, i.e., seize and sell, the debtor's property to satisfy the judgment.

To recapitulate: due process ordinarily requires a creditor to give a debtor notice and an opportunity to defend before a judgment is entered against him and his property seized.

The purpose of a confession of judgment clause—a cognovit—is to dispense with all this. A confession of judgment authorizes a court, at the creditor's request, to enter judgment against the debtor without a lawsuit, without notice that it's going to be entered, without a hearing of the debtor's defenses; and to immediately levy execution on the debtor's property, also without notice. When a debtor signs a promissory note or contract containing a confession of judgment provision he waives all notice and hearing. Thereafter, if he defaults on a payment, a judgment for the amount supposedly due can be entered against him immediately at the creditor's request.78

In three cases the Supreme Court has held that both business debtors and consumers may constitutionally waive their right to notice and hearing before judgments are entered against them.79 A waiver by either a business or a consumer is constitutional if done knowingly, intelligently, and voluntarily. Conversely, an unknowing, unintelligent, or involuntary waiver is probably unconstitutional.

Creditors can take steps to insure that waivers by their debtors are knowing and intelligent. But it is uncertain whether they can assure voluntariness in the case of consumers; that may depend on factors beyond their control. The crucial question, therefore, which

78. Prior to a sale of the property, however, the debtor is entitled—under the laws of all states—to a hearing if he wants one.
79. See cases cited note 76 supra.
the Court has not yet answered, is this: can a waiver by a consumer ever be sufficiently voluntary to be constitutional?

1. "Knowing" Waiver

A debtor waives his right to notice and a hearing when he consents to the inclusion of a cognovit provision in the instrument which he signs.

The debtor gives his consent "knowingly"—i.e., he is aware that the instrument contains a cognovit provision—when he sees and reads it. If he is merely handed something to sign with the explanation that it is the promissory note or contract he must sign to obtain the credit he wants, and if he signs without knowledge of the content of the instrument, his consent to the cognovit provision is unknowing. This suggests that the waiver was obtained unfairly and is, accordingly, unconstitutional and void.

2. "Intelligent" Waiver

Even though a debtor sees and reads the cognovit clause before he signs the note, he may not understand its meaning and legal consequences. That is, he may not appreciate that he is giving up his right to notice and an opportunity to defend before judgment is entered against him. In that event, his consent, though knowing, is unintelligent. Once again, the waiver is probably unconstitutional and void.

3. "Voluntary" Consent

Whether a debtor consents freely to a cognovit depends, inter alia, upon (1) the relative bargaining power of the creditor and debtor; (2) whether the cognovit is included in the note as a result of the give and take of negotiations between the parties; and (3) whether the creditor provides the debtor with consideration for consenting to the cognovit.

In one of the cases decided by the Court, the bargaining power of the parties was equal: the creditor was a manufacturer of refrigeration equipment; the debtor, a large corporation operating refrigerated warehouses. The debtor had trouble making the cash payment for equipment it had purchased. The parties engaged in some hard bargaining, advised by their respective attorneys, and reached an

agreement under which the purchaser executed a promissory note calling for twelve monthly installments of $15,498 each with six and a half percent interest per annum. The note contained no cognovit provision. After the first few installments the purchaser requested additional time in which to pay. There were more negotiations and a new agreement was reached. The purchaser executed a new note containing a cognovit provision, the consequences of which the purchaser fully understood. 81

As consideration for the cognovit note, the buyer obtained a longer time in which to pay, smaller installments, a lower interest rate, and the extinction of certain mechanics liens. 82

The Supreme Court had no doubt that the purchaser’s consent to the cognovit clause was voluntary. Since the buyer also knew that the clause was in the note and understood its consequences, the clause was held constitutional.

4. Waiver by Consumers

Creditors can assure that a consumer waives his rights knowingly and intelligently. All they need do is tell the consumer about the cognovit provision in the instrument he is about to sign and explain its consequences. To prove that they have done so they could give the explanation both orally and in writing and have the consumer sign the writing. Nonetheless, the consumer’s consent to the cognovit provision would be involuntary under present practice. 83

The typical consumer does not have the bargaining power of the creditors with whom he deals. This is especially true of poor and blue-collar consumers, the very consumers against whom most confessed judgments are enforced. Therefore, consumers cannot usually negotiate with creditors as to whether a cognovit clause is going to be included in the note they sign. Creditors offer them a cognovit agreement on a take it or leave it basis; either accept the cognovit clause or get no credit. But consumers need the credit and, having no choice, they sign the cognovit note.

Such a cognovit clause is probably unconstitutional and void be-

81. Id. at 180.
82. Payment was to be in twenty-one monthly installments of $6,891.85 each, at six percent interest; moreover, the seller released some mechanics’ liens it had placed on the purchased equipment. Id.
83. See cases cited note 76 supra.
cause the waiver of prior notice and hearing is involuntary. Therefore, unless creditors are willing to change their way of dealing with consumers, they will probably have to give up confessions of judgment.

5. What Can a Creditor Do?

There is nothing creditors can do to equalize the bargaining power of their customers. And if the constititutionality of cognovit clauses depends upon equality, cognovit provisions are hopelessly unconsti-tutional in most consumer transactions. Nor is it likely that creditors will begin to negotiate terms with consumers merely to insure the constitutionality of those cognovit clauses the creditor is able to obtain. We are not going to convert retail stores and finance companies into oriental bazaars where extensive haggling over terms and conditions is the practice.

But equality of bargaining power and negotiation are relevant only as evidence that the debtor has freely accepted the cognovit clause and has not been forced to do so to obtain the credit he needs. Voluntariness is what counts. Suppose, therefore, creditors were to offer consumers a choice: either one contract containing a cognovit clause, but with a relatively low interest rate; or another contract without a cognovit provision, but with a higher interest rate. If the creditor then chooses the cognovit agreement, has he not done so voluntarily? It would seem that he has, assuming, of course, that he fully understands the differences in the two contracts offered.

It is probably along these lines that creditors should begin to think if they wish to continue using confessions of judgment.

This by no means disposes of the use of cognovits by unsecured creditors. As explained, the relaxation of the due process requirement of notice and hearing announced in Mitchell may be limited to the use of summary remedies by secured creditors against collateral. In that event, Fuentes still controls the judicial remedies of unsecured creditors, including cognovits. There is a degree of inconstistency between Fuentes and the three cases in which the Supreme Court ruled that debtors may waive their right to prior notice and the opportunity for a hearing by confessing judgment in favor of unsecured creditors (as long as the waiver is knowing, intelligent, and voluntary). Fuentes holds that unsecured creditors may not summarily seize a debtor's property in the absence of a valid waiver of prior notice and hearing. It therefore raises this question: when
may a debtor obtain a hearing on the issue of whether he agreed to a cognovit knowingly, intelligently, and voluntarily?

Some lower courts have adopted this approach: Under Fuentes, a creditor with a cognovit must give the debtor notice and the opportunity for a bilateral hearing before a judgment may be entered and execution levied; but the only issue that may be raised in this hearing is the validity of the cognovit. The creditor is not required to prove a prime facie case of default and the debtor may not argue, for instance, that the creditor delivered defective goods. However, the creditor must notify the debtor of the impending entry of judgment so that he may request a bilateral hearing to show that the cognovit is void because he did not know the cognovit clause was in the instrument he signed, or because he had not understood what it meant, or had not agreed to it voluntarily.  

What happens should the debtor fail to demand or appear at a hearing? Some courts would still hold an ex parte hearing and require proof of the probable validity of the confession of judgment. These courts would not enter judgment against the debtor and order execution unless the creditor proved to the court's satisfaction that the debtor had most likely agreed to the cognovit knowingly, intelligently, and voluntarily. Other courts might not require a hearing if the debtor does not demand and participate in one. In such a situation they would summarily enter judgment and order execution, as requested by the creditor.

The courts are divided on the question of who must prove what when the debtor demands and appears at the hearing preceding entry of the confessed judgment. One court held that the burden of proving probable validity of a cognovit is on the creditor, and would not enter judgment unless the creditor's evidence clearly indicated that the debtor had voluntarily accepted the cognovit after its meaning was explained to him. But another court believed that the

85. 359 F. Supp. at 127.
86. Cf. 407 U.S. at 82.
87. 314 F. Supp. at 1100.
creditor was entitled to entry of judgment unless the debtor could prove invalidity; i.e., the burden of proof is on the debtor.\textsuperscript{88} It noted, however, that a debtor could easily carry this burden by proving that he had no lawyer when he entered the credit transaction; and that, in the absence of professional advice, he had not understood the complicated cognovit clause, filled with esoteric legal terms, even though it was read to him. Which is the correct view? \textit{Mitchell} suggests the former, indicating that, in a repossession case, the burden of proof must be placed on the creditor in both the pre-seizure \textit{ex parte} hearing and in the post-seizure bilateral hearing.\textsuperscript{89}

To repeat: an unsecured creditor who wishes to enter a confessed judgment against a debtor may have to give the debtor prior notice and the opportunity for a hearing on the single issue of the validity of the cognovit. If the creditor is unable to prove, prima facie, that the debtor agreed to the cognovit knowingly, intelligently, and voluntarily, the court will refuse to enter or enforce the confessed judgment. Thus, there will be no seizure of the debtor's assets. In this event, the creditor is forced to initiate a full scale collection suit, although this was exactly what the cognovit was supposed to avoid.

If the creditor proves that the cognovit is prima facie valid (or the debtor does not request a hearing at this stage), the court may enter judgment and order levy of execution on the debtor's assets. At this point the debtor may demand a full scale hearing on his alleged default, e.g., by motion or by initiating an action to enjoin an execution sale.\textsuperscript{90} If he does not make timely demand for this hearing, the creditor may sell at execution the property upon which the sheriff levied. If timely demand is made and a full scale trial promptly held, the controversy is quickly and finally settled. If the hearing ends in favor of the creditor, he may proceed to sell at execution the assets previously levied upon. If the debtor prevails, the judgment and levy of execution are vacated, the property returned to the debtor, and the creditor resumes the collection of installments as they fall due.

When the debtor demands a full scale hearing which cannot promptly occur, \textit{Mitchell} suggests that he may demand an immediate preliminary hearing to determine who shall have possession,
pedente lite, of the assets levied on, i.e., whether he has prima facie defaulted on a valid debt. If this hearing is not demanded, the sheriff may retain possession, pedente lite, of the property he levied on. He may also retain possession if the hearing is demanded and the creditor proves a prima facie case of default. But in the absence of such proof, the levy must be vacated and the property returned to the debtor pending the final hearing on the alleged default.  

This procedure sounds complicated, expensive, and time consuming. It is. But it is not as bad as it sounds. In most cases the debtor has in fact defaulted, and the money claimed by the creditor really is due and owing. Sensing that they cannot succeed, and that their confessions of judgment are valid, most business debtors will demand no hearing at any stage. They will submit to summary entry and execution of the judgment they have confessed.

What creditors have to fear is that cognovits are presently invalid in consumer credit transactions because they amount to contracts of adhesion, and that many consumers will successfully raise the issue in the initial, pre-seizure hearing which, it seems, Fuentes requires. Then the creditor has no choice but to initiate a full scale collection suit. But if creditors can devise cognovits which are valid, consumers, like business debtors, are going to permit summary entry and execution of confessed judgments when they realize the creditor's claim is well founded. Thus, careful, conscientious creditors could continue to use cognovits much as they have in the past.

IV. Self-Help Remedies

In Mitchell, the Supreme Court stated that the decision "will not affect recent cases dealing with garnishment or summary self-help remedies of secured creditors or landlords." Since there are cases which hold that self-help is constitutional and others that hold it is not, the Court seems to be saying that Mitchell does not decide the question of self-help.

However, one of the reasons given by the Court in upholding replevin pursuant to a court order was that judicial supervision of repossessions afforded the debtor a degree of protection absent in the case of self-help repossession. Thus, self-help could conceivably be unconstitutional because of the absence of judicial supervision

91. 416 U.S. at 601-07.
92. Id. at 620 n.14.
and consequent inadequate protection of the debtor. But this argument is not persuasive.

For one thing, statutes regulating the various forms of self-help surround the debtor with all kinds of protection. These safeguards would seem sufficient to adequately protect a debtor against wrongful seizures of property even though the seizure is not preceded by notice and hearing. In self-help, the state does not lend to the creditor the awesome powers of coercion possessed by the government, its courts, and peace officers; hence, in cases of self-help, the debtor does not need the same kind and degree of protection as, for example, in the case of replevin.

Moreover, where the creditor acts without the aid of a court or sheriff the "state action" necessary to trigger the due process clause of the fourteenth amendment seems to be absent. Nor is the necessity for "state" action a mere technicality. As two astute commentators noted:

Underlying our basic constitutional system is the philosophical tenet that one of the most important functions of our federal and state governments—and one of the fundamental reasons for limiting their activity [by the due process clauses of the fifth and fourteenth amendments]—is to preserve the personal freedom of the individual. The fourteenth amendment is itself an affirmation

93. See Jones v. Banner Moving & Storage Inc., 358 N.Y.S.2d 885 (Sup. Ct. 1974), in which a warehouseman's lien was found unconstitutional because it was enforced by the private actions of the warehouseman without judicial supervision. The court relied upon Mitchell. Id. at 897. This is one of the issues raised in Adams v. Egley, 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), cert. denied, 43 U.S.L.W. 3281 (U.S. Nov. 11, 1974).

94. For example, section 9-503 of the Uniform Commercial Code authorizes repossession of collateral only in the event of default. Moreover, even when the debtor has defaulted, a repossession must not involve a breach of the peace. If a creditor wrongfully repossesses collateral from a debtor not in default and resells the collateral, the sale is a breach of section 9-504; the debtor may sue the creditor for the value of the collateral in a court action or he may recover the generous damages authorized by section 9-507(1). If the debtor acts before a resale, he may prevent a sale as well as collect damages. Mojica v. Automatic Employees Credit Union, 363 F. Supp. 143 (N.D. Ill. 1973), vacated and remanded for lack of jurisdiction sub nom. Gonzalez v. Automatic Employees Credit Union, 43 U.S.L.W. 4025 (U.S. Dec. 10, 1974).
of that tenet in its establishment of protections to prevent state governments from arbitrarily and unjustifiably interfering with individual liberties. It is at the heart of the American libertarian tradition that the individual be given wide rein in structuring his relationships with other individuals...  

It would be ironic, indeed, should the fifth and fourteenth amendments, designed to protect us from arbitrary governmental restrictions, eventually restrain everyone but the government. Yet, ultimately, that would be the state of affairs if the self-help remedies of creditors are finally ruled unconstitutional. The Internal Revenue Service could continue to seize the assets of alleged tax delinquents without prior notice or a hearing despite the fifth amendment's declaration that the federal government shall not deprive persons of property without due process of law. State banking authorities could seize allegedly insolvent banks without notice or a hearing despite the fourteenth amendment's prohibition of state action without due process. But an auto dealer or finance company could not summarily repossess an automobile from a consumer who has defaulted; banks could not exercise their right of set-off; nor could assignees of receivables summarily demand that account debtors pay them instead of the assignor—all because the courts had used the due process clause to structure the relation between private creditors and debtors.

Happily, this world-turned-upside down will probably never exist. Six of the eleven United States courts of appeals have held that a secured creditor may, acting on his own without the aid of a court or sheriff, constitutionally repossess an automobile from a buyer who has allegedly defaulted. Since, in the view of these courts, the state (and its agencies) do not participate in the repossession, the due process clause of the fourteenth amendment simply does not apply. If the fourteenth amendment is inapplicable, a cred-

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The creditor may obviously seize collateral without giving the buyer prior notice of the opportunity for a hearing. The Supreme Court has denied certiorari in four of these cases.

Several courts of appeals have ruled that other kinds of self-help remedies—the banker's right of set-off, wage assignments, and assignments of receivables—are also constitutional despite the absence of prior notice and a hearing. The Supreme Court has also denied certiorari in two of these cases. However, the Second Circuit has held garagemen's liens unconstitutional, and the Fifth Circuit has ruled against the landlord's lien.

As far as the presence or absence of state action is concerned, there is no difference between one form of self-help and another. If self-help repossessions, wage assignments, assignments of receivables, and set-offs are constitutional, so are garagemen's liens and landlord's liens (when they are privately enforced by garagemen and landlords rather than by a sheriff). The weight of present author-


100. In some states a landlord's lien is enforced by a peace officer such as a constable or sheriff; the peace officer is the one who enters the tenant's premises and seizes his personal property for the payment of back rent. In such cases, the lien is more like attachment and garnishment than any other remedy, and its constitutionality should be decided accordingly.
ity certainly supports the constitutionality of these remedies despite the fact that they involve the seizure or retention of a debtor's property without prior notice or the opportunity for a hearing. In the author's opinion, the Supreme Court will agree, when it finally decides the question.

Where has all this led us? To this: wage garnishments are out; statutory, attachment, garnishment, and other liens that do not deprive the debtor of possession pending a final resolution of the controversy are in; so are replevin and cognovits when used by secured creditors to reach collateral; cognovits may also be used by unsecured creditors; self-help seems to be acceptable, but attachment and garnishment of property other than wages by unsecured creditors are up for grabs.

V. Conclusion

The fuel that has powered our legal engine for the past twenty years is the ideal of perfection—the concept that perfection in every detail of legal proceedings is necessary for justice. The United States Supreme Court has noticeably applied the concept in the field of criminal justice, but in 1969 it turned its attention to creditors' remedies, and overturned centuries of careful evolution.

The ideal of perfection implies universal conformity to an absolute standard of excellence. Thus, in the case of creditors' remedies, the Court ruled that private persons may almost never seize a debtor's property without first giving the debtor notice and the opportunity to contest the seizure in a court hearing, unless the debtor has voluntarily waived notice and a hearing, fully understanding what it is he is waiving.

But surely, this is all to the good! Can anyone argue that legal

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102. Id. passim.
103. Id. at 4.
proceedings need not conform in every detail to an ideal of perfection discerned by a majority of the Supreme Court? Indeed, one can do just that.

The vindication of abstract and subjective notions of procedural due process is not the business of the courts. To insist that justice invariably requires notice and the opportunity for a hearing in every conceivable case in which a creditor reaches out for a debtor's property is mere "ideological tinkering with state law" in the absence of any showing that the traditional creditors' remedies have, in fact, caused injustice. Justice in particular cases, not procedural perfection, is the business of the courts. Moreover, the evidence indicates that justice, by and large, has been done despite the ability of a creditor to seize a debtor's property in certain cases without prior notice and a hearing. "For those [debtors] who make an earnest effort to maintain their payment schedules and default due to circumstances beyond their control, creditors have traditionally exercised considerable flexibility and have exhausted every reasonable alternative before resorting to the drastic and expensive remedy of repossession." In Fuentes, the very case in which the Supreme Court outlawed replevin, it was either admitted or found as a fact that four of the five debtors were in default and had received several notices of delinquency but had still failed to pay. No injustice was done in their cases by the summary seizure of collateral by their creditors. Since justice had been done, and the creditors had every right to repossess, the Court should have left their cases alone.

What is more, the judiciary should not decide economic and social policy; in a democracy, that is best left to the political process. The rare exceptions involve extreme cases of demonstrated injustice that is widespread, i.e., racial discrimination. If debtors and their champions wish the abolition of the traditional creditors' remedies, but cannot convince a majority of voters and legislators, that should end

106. 407 U.S. at 102 (White, J., dissenting).
109. 407 U.S. at 101 n. * (White, J., dissenting). The trial court did not determine whether the fifth debtor had defaulted.
There is nothing more undemocratic than the reversal by the fiat of four or five members of the Supreme Court of a policy adopted by a state legislature after extensive consultation with interested and knowledgable parties. Yet that is precisely what the Court did (by majority of four of the seven Justices participating) when it held, in *Fuentes*, that replevin violated due process. As Mr. Justice White wrote:

The procedure that the Court strikes down is not some barbaric hangover from bygone days. The respective rights of the parties in secured transactions have undergone the most intensive analysis in recent years. The Uniform Commercial Code, which now so pervasively governs the subject matter with which it deals, permits secured creditors to repossess collateral in the event of default either by self-help or replevin. Recent studies have suggested no changes in [the Code] in this respect. See Permanent Editorial Board for the Uniform Commercial Code, Review Committee for Article 9 of the Uniform Commercial Code, Final Report, §9-503 (April 25, 1971). I am content to rest on the judgment of those who have wrestled with these problems so long and often and upon the judgment of the legislatures that have considered and so recently adopted provisions that contemplate precisely what has happened in these cases.

Courts should leave social, economic, and political questions to the people’s legislators because the quality of judicial legislation is poor.

Courts] are accustomed to working with ideas, phrases, and words rather than with people, organizations, and things; and they possess the occupational weaknesses of those who deal with problems secondhand.

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110. Which is not to say that efforts to change the law of creditor’s remedies are always frustrated. For example, the Wisconsin Consumer Act, Wis. Stat. Ann. §§ 425.101-.401 (West 1974), is a hybrid resulting from grafting the UCCC to the National Consumer Act promulgated by the National Consumer Law Center of Boston College. (The Center has since been separated from Boston College.) Among other things, the Wisconsin Act severely limits the waiver of defenses against assignees and places restrictions on creditors’ remedies. See generally Holbrook & Bugge, *Creditor’s Responsibilities and Duties Under The WCA*, 46 Wis. B. Bull. 37 (Feb. 1973); Stute, *An Overview of the Wisconsin Consumer Act*, id. at 9. Moreover, the National Commission on Consumer Finance has recommended similar changes in its report. *National Comm’n on Consumer Fin., Consumer Credit in the United States* 32-39 (1972).

111. *Fleming* 158-59. See also id. at 114-20.

112. 407 U.S. 67, 103 (White, J., dissenting).
They are out of touch with many aspects of contemporary life. . . . Legislatures are better equipped, better informed, possess greater sensitivity, and exercise a broader vision in making new law than do the courts.  

Of course, not everyone agrees with these observations. But it appears that the present Supreme Court may agree, at least to an extent, in the area of creditors' remedies. The Court's disposition last May of Mitchell, Spielman-Fond, and Carmack indicates that it will no longer insist that creditors' remedies conform to a Platonic ideal of universal application. It seems to have adopted an Aristotelian approach by which it will individually evaluate each creditor's remedy on a pragmatic, empirical basis to insure substantial justice in the concrete cases before the Court. What is more, it seems that the present Court is more likely to defer to the judgment of the people's legislators—a judgment based on a weighing of the benefits and burdens of their constituents. If this is so, creditors' remedies which inflict no injustice on debtors in general or upon a particular debtor in a given case will pass constitutional muster despite the absence of prior notice and the opportunity for a hearing.


114. Even so, the Mitchell decision is an example of judicial legislation insofar as it construes the Constitution as mandating procedural details such as the necessity of filing a complaint in a collection suit to obtain a writ of replevin, an ex parte hearing prior to issuance of the writ, and a preliminary hearing afterwards. The Court would have done better had it completely overruled Fuentes as bad law and left it to state legislatures to prescribe the details of replevin.