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FUENTES V. SHEVIN: PROCEDURAL DUE PROCESS AND LOUISIANA CREDITOR’S REMEDIES

John C. Anderson* and Howard W. L’Enfant, Jr.**

Under the Louisiana Code of Civil Procedure a defendant can be dispossessed of his property without prior notice or a hearing if the plaintiff’s allegations in his verified petition meet the requirements for the issuance of either the writ of sequestration or attachment and if the plaintiff furnishes security.1 Under both writs the defendant remains dispossessed of his property pending the outcome of the litigation unless he files a motion to dissolve the writ and, at the contradictory hearing, the plaintiff fails to prove he is entitled to the provisional remedy.2

A debtor can also be dispossessed of his property without notice or a prior hearing when the creditor, relying on the debtor’s confession of judgment, proceeds through executory process to have the property seized and eventually sold3 unless the debtor pre-

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1. LA. CODE Civ. P. art. 3501 provides: “A writ of attachment or of sequestration shall issue only when the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts shown by the petition verified by, or by the separate affidavit of, the petitioner, his counsel or agent.

“The applicant shall furnish security as required by law for the payment of the damages the defendant may sustain when the writ is obtained wrongfully.”

But the writ of sequestration may be obtained in certain cases without fixing security, e.g., to enforce lessor’s privilege, LA. CODE Civ. P. art. 3575; to enforce the repairman’s privilege, LA. R.S. 9:4501, 4502 (1950).

2. LA. CODE Civ. P. art. 3506 provides: “The defendant by contradictory motion may obtain the dissolution of a writ of attachment or of sequestration, unless the plaintiff proves the grounds upon which the writ was issued. If the writ of attachment or of sequestration is dissolved, the action shall then proceed as if no writ had been issued.

“The court may allow damages for the wrongful issuance of a writ of attachment or of sequestration on a motion to dissolve, or on a reconventional demand. Attorney’s fees for the services rendered in connection with the dissolution of the writ may be included as an element of damages whether the writ is dissolved on motion or after trial on the merits.”

3. LA. CODE Civ. P. art. 2631: “Executory proceedings are those which are used to effect the seizure and sale of property, without previous citation and judgment, to enforce a mortgage or privilege thereon evidenced by an authentic act importing a confession of judgment, and in other cases allowed by law.”

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vents the sale by obtaining an injunction or by taking a suspensive appeal. The long existence and widespread use of these procedures showed confidence that such remedies did not violate the fourteenth amendment prohibition against depriving a person of property without due process of law. This confidence was justified in the light of early United States Supreme Court cases. In *McInnes v. McKay*, a Maine statute which provided for the attachment of the defendant's goods pending the outcome of litigation was challenged on the grounds that it deprived the defendant of property without due process of law. In upholding the constitutionality of the statute the Maine court reasoned that the attachment was not "deprivation of property" as contemplated by the Constitution because it was temporary, conditional, and part of the procedure by which property of a debtor is taken to satisfy a judgment. And the court further reasoned that even if it were such a "deprivation" it was not "without due process of law" because the procedure gave notice and an opportunity for a hearing before final disposition of the property. The U. S. Supreme Court affirmed *per curiam* on the basis of two prior decisions.

In the first, *Ownbey v. Morgan*, the Court held that a Delaware foreign attachment law which required a defendant to post security before he could defend on the merits did not vio-

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4. LA. CODE Civ. P. art. 2751: "The defendant in the executory proceeding may arrest the seizure and sale of the property by injunction when the debt secured by the mortgage or privilege is extinguished, or is legally unenforceable, or if the procedure required by law for an executory proceeding has not been followed."

5. LA. CODE Civ. P. art. 2642: "Defenses and procedural objections to an executory proceeding may be asserted either through an injunction proceeding to arrest the seizure and sale as provided in Article 2751 through 2754, or a suspensive appeal from the order directing the issuance of the writ of seizure and sale, or both.

"A suspensive appeal from an order directing the issuance of a writ of seizure and sale shall be taken within fifteen days of the signing of the order. The appeal is governed by the provisions of Article 2081 through 2088, 2083 through 2122, and 2124 through 2167, except that the security therefore shall be for an amount exceeding by one-half the balance due on the debt secured by the mortgage or privilege sought to be enforced, including principal, interest to date of the order of appeal, and attorney's fee, but exclusive of court costs. As amended Acts 1964, No. 4, § 1."

6. LA. CODE OF PRACTICE arts. 732-753 (executory process); 239-268 (attachment); 269-283 (sequestration); 284-295.1 (provisional seizure).

7. 127 Me. 110, 141 A. 699 (1928).

8. 279 U.S. 820 (1928).


10. 256 U.S. 94 (1921).
late the due process clause of the fourteenth amendment. The Court reasoned that the requirement of giving security in a proceeding begun by foreign attachment was well established and widely used at the time the Constitution was adopted and thus could not be deemed inconsistent with due process especially because the condition bore a reasonable relation to the conversion of the proceeding from quasi in rem into an action in personam and, moreover, the defendant was held to know that if he left the jurisdiction, his property would have to answer for the demands against him.

In *Coffin Brothers & Co. v. Bennett,* the Court rejected a due process challenge to a Georgia statute which gave the Superintendent of Banks the power to issue an execution which operated as a lien on the property of shareholders of defunct banks where the shareholders failed to pay an assessment. The Court rejected the challenge because shareholders could provoke a trial by executing an affidavit of illegality and therefore there would be opportunity to be heard and to present defenses to the execution. The Court further concluded that the fact that the execution was issued by an agent of the state and not from a court was not grounds for objection because the execution was followed by personal notice and a right to take the case into court for a hearing.

Thus the Supreme Court seemed to be saying that in cases involving preliminary seizure of a debtor's property by a creditor without a prior hearing there was no violation of due process because the debtor had an opportunity to challenge the seizure at a subsequent judicial hearing. This position found further support in the Supreme Court cases upholding state action to eliminate nuisances which were threats to the welfare of its citizens where property was taken and destroyed before the owner had a hearing. For example, in *North American Cold Storage Co. v. Chicago,* the Chicago Health Department had seized food alleging it was unfit for human consumption and the owner had

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11. 277 U.S. 29 (1928).
argued that he was being deprived of property without due process of law. The Court rejected this, concluding that the state could seize the contaminated food without a prior hearing because of its duty to protect the health of its citizens and that the rights of the owner were fully protected because he could sue for a wrongful taking of his property and if the defendants could not prove that the food was indeed unfit for human consumption, then the owner would be awarded damages.

In particular with respect to Louisiana's executory process the Supreme Court had observed, in dicta, that the proceeding was analogous to well known common law proceedings whereby execution might issue without previous notice to the debtor and that such proceedings were never denied to be due process of law. In addition, the Court noted that under the Louisiana provisions the sale of the debtor's property could not take place until the debtor had had notice and an opportunity to interpose objections.

This well-established assumption that creditors could seize debtors' property without a prior hearing through attachment and similar procedures without violating the requirements of due process of law was shaken somewhat by the 1969 Supreme Court case of Sniadach v. Family Finance Corp., in which the creditor had instituted a garnishment action under a Wisconsin statute and had seized fifty percent of the defendant's wages. The argument that this seizure of wages without notice or an opportunity to be heard violated the due process requirements of the fourteenth amendment was rejected by the Wisconsin supreme court. In so doing, the court reasoned that the garnishment was not a final determination of the defendant's rights to the property and that the defendant would receive notice and an opportunity to be heard before permanently losing the property. In reaching this conclusion, the court cited McInnes, Ownbey and Coffin and, after noting that this type of remedy dated back to Roman Law, quoted Mr. Justice Holmes, "If a thing has been practiced for two hundred years by common consent, it will need

16. 37 Wis.2d 163, 154 N.W.2d 259 (1968).
17. 127 Me. 110, 141 A. 699 (1928), aff'd per curiam, 279 U.S. 820 (1928).
18. 256 U.S. 94 (1921).
a strong case for the Fourteenth Amendment to affect it ...."20

As a further basis for rejecting the defendant's claim of a denial of due process the court pointed out that the defendant could contest the plaintiff's right to use garnishment by a summary proceeding before trial21 and also that a garnishment without probable cause could be the basis of a suit for malicious prosecution.

The Supreme Court reversed.22 Mr. Justice Douglas, writing for the majority, found that under the Wisconsin statute the wages would remain frozen until trial without the defendant having any opportunity to present any defense (no mention was made of the summary proceeding to test whether there was a good faith controversy, possibly because it would be of such limited utility in most cases) and whereas such a summary seizure might be justified in extraordinary circumstances, this was not a case requiring special protection for creditor or state interest and, moreover, the statute was not narrowly drawn to meet such unusual situations. The majority emphasized that this case dealt with wages, a specialized type of property presenting distinct problems, and that a prejudgment garnishment might impose tremendous hardship on debtors ("a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall")23 while, at the same time, such a procedure would give the creditor tremendous leverage in negotiations with the debtor. The Court concluded that without notice and a prior hearing the taking of property under the Wisconsin garnishment procedure violated the fundamental principles of due process.

In his concurring opinion, Mr. Justice Harlan stated that "due process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor


21. But the dissent argued that under Wisconsin law the defendant's motion to dismiss is limited to determining whether a good faith controversy exists and that all the plaintiff has to do is to file an affidavit of indebtedness and that this will defeat the defendant's motion to dismiss. 37 Wis.2d 163, 182; 154 N.W.2d 259, 270 (1968).


23. Id. at 340-41.
before he can be deprived of his property or its unrestricted use.”

In his dissent, Mr. Justice Black argued that the majority struck down the Wisconsin garnishment statute because it considered it to be a bad state policy and that by so doing it was usurping the power of a state legislature to decide what laws the state should have and, further, that this was not a sound basis for striking down legal practices and customs which had previously been upheld.25

Because the majority in Sniadach had emphasized that the case concerned wages—"a specialized type of property presenting distinct problems in our economic system"26—and that wage garnishment may impose tremendous hardship on the wage earner, it was not clear whether the requirement of prior notice and a hearing was to be applied only where seizures involved other special kinds of property and there was the danger of tremendous hardship or whether Sniadach was to be applied broadly to mean that due process required prior notice and a hearing before a debtor can be deprived of the use of his property except in special situations. The question was not answered by the next two Supreme Court cases to deal with the due process requirement of notice and a hearing. In the first, Goldberg v. Kelly,27 the Court held that due process required notice and a prior hearing before the state could terminate welfare payments. In the second, Bell v. Burson,28 the Court held that a prior hearing on the question of possible liability was required before a state could deprive an uninsured motorist of his license if he did not provide security for claims arising out of the accident. These cases did not clearly define the scope of Sniadach’s applicability to prejudgment seizures by creditors because, first, both cases dealt with actions by state agencies and so in each case government interests were competing with the private interests of citizens in the continued possession and use of their property whereas in

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24. Id. at 343.
25. The dissent cited McInnes v. McKay, 127 Me. 110, 141 A. 699 (1928), aff’d per curiam, 279 U.S. 820 (1928), and Ownbey v. Morgan, 256 U.S. 94 (1921), among others.
The competing interests were private—those of creditor and debtor; and secondly, in both cases, the property could be considered special and necessary. Welfare payments are clearly as important to the well-being of a family as are wages, maybe even more so, and so should be given the same protection. And although at first a driver's license may not seem entitled to similar protection, when, as in Bell, it is necessary in order for the driver to carry on his occupation then it too can be considered special property.

With the question not clearly resolved by the Supreme Court, it was not surprising that federal and state courts divided on the scope of the Sniadach rule. Some courts gave it a narrow reading, for example, in *Almor Furniture & Appliances, Inc. v. MacMillan*, the court upheld the constitutionality of New Jersey's replevin statutes under which the plaintiff had repossessed household furniture when the defendants had defaulted on their payments. In arguing that their rights to due process had been violated the defendants relied on *Sniadach* and *Goldberg* but the court distinguished these cases as applicable to special situations and not to the issues presented in this case. In refusing to strike down the replevin statute, the court recognized that the replevin procedure had not been questioned before in the state and had become such an integral part of modern financing that it should not be disturbed by a sudden declaration of unconstitutionality. Moreover, the buyer was aware that "If you don't pay, they take it away." The court concluded that a higher court should review the constitutionality of the statute in the light of the conflicting interests and the impact a declaration of unconstitutionality would have on existing credit transactions.

29. 116 N.J. Super. 65, 280 A.2d 862 (1971). Also, American Oil Co. v. McMullin, 433 F.2d 1091, 1096 (10th Cir. 1970): "We do not think that Sniadach was intended to preclude all attachments and garnishments merely because some hardship may result."


But other courts gave Stniadach a broader reading. After Stniadach had declared Wisconsin's wage garnishment statute unconstitutional, the Wisconsin Supreme Court applied that decision to all garnishment actions because it could see no valid distinction between the garnishment of wages and that of other property. The court concluded the type of property involved should not determine whether there had been a violation of due process.

California courts also gave Stniadach a liberal interpretation, applying it to strike down not only a wage garnishment statute but also other statutes which allowed a creditor to dispossess a debtor without a prior hearing. In Blair v. Pitchess, the court, in striking down California's claim and deliver statute, interpreted Stniadach to mean that any taking of property prior to a hearing must be justified by strong state or creditor interests and, applying that principle, concluded that the general risk that the debtor might abscond with the property was not a sufficient creditor interest to outweigh the possible hardship the seizure of personal property might cause to the debtor. Although the court did recognize that in some cases there might be such a serious danger that a debtor might destroy or abscond with the property that a seizure without a hearing might be justified, it concluded that the California statute could not be upheld on that basis because it was not narrowly drawn to cover only such extraordinary situations.

Similarly, in Randone v. Appellate Dept., the California
court stated that *Sniadach* did not create a special constitutional rule for wages but rather that it returned the whole area of prejudgment remedies to the due process principle that, except in extraordinary circumstances, no person shall be deprived of property without notice and a prior hearing.37 The court recognized that *Sniadach* was a departure from earlier cases which had upheld summary prejudgment attachment and garnishment but stated that this was a change in result—caused by a re-evaluation of the potential and actual effect such seizures had upon debtors—and not a change in the principles of due process. The court further reasoned that, whereas prior courts had concluded that these seizures were not a "taking" of property because they were only temporary, *Sniadach* had ruled that the loss of the use of the property was indeed a "taking" which often resulted in serious hardship. Based on these principles the court struck down that California prejudgment attachment statute which had sanctioned a deprivation of the debtor's use of his property without notice or a hearing. In voiding the statute the court rejected the contentions that this procedure was in the general public interest by making credit more available and also rejected as insufficient the general interest of creditors in having security against the debtors concealing or destroying the property. The court recognized the possible validity of such a procedure in extraordinary circumstances but ruled that this could not save the statute because it was not narrowly drawn to cover just those situations.

With lower courts thus divided, the Supreme Court moved to eliminate the uncertainty about the scope of its prior rulings in *Sniadach* and *Goldberg* when, in the companion cases of *Fuentes v. Shevin* and *Parham v. Cortese*,38 it ruled that the Florida and Pennsylvania prejudgment replevin statutes were inconsistent with the requirements of due process because they allowed the seizure of a debtor's property without first giving him notice and opportunity to be heard. Under the Florida statute a party could obtain a writ of replevin by filing a complaint in an action for repossession and by posting bond. Once this was done the writ would be issued by the clerk and the property would be seized and, unless the defendant reclaimed it within

37. Id. at 715, 488 P.2d at 19.
three days by posting bond, it would be transferred to the plaintiff. The defendant would have a hearing at the trial of the action for repossession. The Pennsylvania statute was similar except that the person seeking the writ need not file an action for repossession and thus if the party losing the property wanted a hearing he would have to initiate the suit himself. In each case a three judge federal court had upheld the constitutionality of the statutes by finding that *Sniadach* and *Goldberg* required prior notice and a hearing only when seizure of special types of property—wages and welfare payments—might result in serious hardship to the debtor and therefore were not applicable because in the cases before them the creditors were repossessing personal property—a stereo, stove and other household goods—to which they held title under the conditional sales contracts and that the seizures would not impose a hardship on the debtors comparable to that which would result from a seizure of the necessities of life, e.g., wages.

The Supreme Court reversed in a four to three decision. The Court stated that the due process guarantee of notice and an opportunity to be heard was to protect an individual from the danger of an arbitrary, unfair, or mistaken deprivation of the use or possession of his property and that therefore it must be given at a time when the deprivation could still be prevented. Whereas earlier cases had found due process to be satisfied because, even though there had been no prior hearing, nevertheless there was a hearing before a defendant's rights to the property were permanently cut off, the Court rejected this position stating that no subsequent hearing or award of damages for wrongful dispossession could undo the fact that the arbitrary taking had already occurred. The Court also rejected the contention that the requirement of a bond was a sufficient substitute for the prior hearing because, the Court stated, the bond merely tests the plaintiff's belief in his position and this confidence may be misplaced particularly when his self-interest is at stake. The Court concluded that the only adequate safeguard is a prior hearing at which a court would have a chance to hear both sides

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40. Justices Powell and Rehnquist did not participate in the decision.
before taking any action and that this principle had long been recognized under the fifth and fourteenth amendments.\textsuperscript{42}

In applying this basic principle to the cases before it, the Court ruled that even though the debtors lacked full title to the goods, their interest in the continued use and possession of the goods was a significant property interest protected by the Due Process Clause and, further, that even the temporary loss of the use and possession of the goods was a deprivation within the terms of the fourteenth amendment. The fact that the purchasers had fallen behind in their payments and had no valid defense was immaterial because the right to a hearing is not conditioned on a showing of probable success at that hearing.

The district courts\textsuperscript{43} had limited Sniadach and Goldberg to requiring prior hearing for necessary property such as wages and welfare benefits but this, the Supreme Court stated, was because of an incorrect premise that these decisions were a radical departure from established principles of procedural due process whereas both cases were actually in the mainstream of prior cases\textsuperscript{44} and that this should have been made clear by the Bell\textsuperscript{45} decision. The Court concluded that the fourteenth amendment speaks of property generally and that if the principle of procedural due process is to be applied objectively it cannot be based on whether courts consider the property to be a necessity or not.

In stating the requirements of procedural due process, the Court recognized that extraordinary situations might justify

\textsuperscript{42} Fuentes v. Shevin, 92 S. Ct. 1983 (1972) and cases cited therein at 1995. E.g., Boddie v. Connecticut, 91 S. Ct. 750, 758 (1971), where the court stated, "[t]hat the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity or [sic] a hearing before he is deprived of any significant property interest [citing Goldberg v. Kelly, 397 U.S. 254 (1970), and Sniadach v. Family Finance Corp., 395 U.S. 337 (1969)], except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).


\textsuperscript{44} Fuentes v. Shevin, 92 S. Ct. 1983, 1998 (1972), where the court in n.19 stated: "The Supreme Court of California recently put the matter accurately: 'Sniadach does not mark a radical departure in constitutional adjudication. It is not a rivulet of wage garnishment but part of the mainstream of the past procedural due process decisions of the United States Supreme Court.' Randone v. Appellate Department, 5 Cal.3d 536, 96 Cal. Rptr. 709, 718, 488 P.2d 13, 22."

postponing notice and an opportunity for a hearing but stated that these must be truly unusual situations. In the prior cases where summary seizure had been allowed the Court found that three important factors had been present: first, the seizure secured an important governmental or general public interest; second, there was need for very quick action; and, third, the seizure was initiated by a government official who determined the need for the seizure in the light of a narrowly drawn statute (e.g., seizure of contaminated food by health officials). The Court found that the replevin statutes served no similarly important government or general public interest for they authorized summary seizure when only private gain is at stake and concluded that reducing the costs involved in repossessing goods would not be a sufficient reason to override the requirements of due process.

Secondly, the statutes are not limited to special situations requiring prompt action and here the Court recognized that a creditor might justify summary seizure by a showing of immediate danger that the debtor might conceal or destroy the property. And, on the last point, the Court found no strong state control but instead an abdication of such control because no state official participated in the decision to seek the writ, or reviewed the basis for the claim to repossession, or evaluated the need for immediate seizure.

In its conclusion, the Court held the statutes to be a deprivation of property without due process of law because they deny the right to a prior opportunity to be heard before property is seized. But in so holding the Court recognized that a state has the power to seize goods before a final judgment in order to protect the security interests of creditors provided the creditors have tested their claim to the goods through the process of a fair prior hearing. The form such a hearing may take is for the legislature to determine but since the purpose of the hearing is to prevent

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46. As recognized exceptions to the right of a prior hearing, the Court cited Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928) and Ownbey v. Morgan, 256 U.S. 94 (1921). With respect to McInnes v. McKay, 127 Me. 110, 144 A. 690, aff'd per curiam, 279 U.S. 820 (1929), the Court stated, "As far as essential procedural due process doctrine goes, McKay cannot stand for any more than was established in the Coffin Brothers and Ownbey cases on which it relied completely." Fuentes v. Shevin, 92 S. Ct. 1983, 1999, n.23 (1972).


unfair and mistaken deprivations of property, it is essential that the hearing provide a real test of the validity of the underlying claim against the debtor before he can be deprived of his prop-

erty.49

The dissent50 in Fuentes took the position that the replevin statute properly balanced the antagonistic interests of the buyer and seller by providing that the buyer would lose use of the property temporarily but would be protected by the bond and that the seller would be protected against deterioration of the property pending final adjudication but would have to furnish security for the buyer and concluded that whether this violated the Constitution depended upon how the practical considerations were viewed. From the point of view of the majority a hearing was necessary to prevent unfair and mistaken deprivation of property, but, as the dissent saw it, if the debtor had in fact defaulted, then it was not only fair but essential that the creditor be allowed to repossess and that dollar and cents considerations would protect the debtor from false claims of default because it is in the creditor-seller's interests that the transaction be completed rather than end in repossession and further because a creditor would not lightly undertake the expense of instituting a replevin action and posting a bond. The dissent distinguished the prior cases of Goldberg and Bell by stating that they provided no automatic test for determining when due process required adversary hearings because what is required depends upon a determination of the private interest that may be affected in each case. The dissent reasoned that in these cases due process would not require that creditors do more than they already had because the creditor has a substantial interest in preventing further use and deterioration of the property to which he retained title (an interest the dissent stated had been ignored by the majority) and that this interest is as deserving of protection as that of the debtor. In its conclusion the dissent expressed doubt that the requirements established by the majority would result in greater protection for the debtor than the present laws pro-

50. The dissent was written by Mr. Justice White who was joined in his dissent by the Chief Justice and Mr. Justice Blackmun.
vided and that, in effect, the only result of the decision would be to make credit less available or, at least, more expensive.

These decisions, particularly Fuentes, raise serious doubt as to the validity of Louisiana's prejudgment remedies of sequestration and attachment and also executory process for each of these remedies allows a party to be dispossessed of property without a prior notice or opportunity to be heard. Considering each remedy specifically, it seems that the use of the writ of sequestration would be a denial of due process because, as expressed above, there is no prior notice or a hearing and a plaintiff who claims the ownership or right to possession or a security interest (lien, privilege or mortgage) in the property may have it summarily seized if it is simply within the power of the defendant to waste, conceal or dispose of the property. This is too broadly drawn to be a justified exception to the requirements of due process for only truly unusual and extraordinary situations would justify postponing notice and an opportunity for a hearing.

The Code of Civil Procedure allows a writ of attachment to be issued and the property to be seized without prior notice or hearing in several situations. Specifically, one of the grounds for the writ is the fact that the defendant is a nonresident and attachment secures quasi in rem jurisdiction over him. The use of the writ in this situation should still be valid because an earlier Supreme Court case, Ownbey v. Morgan, had upheld the

51. 92 S. Ct. 1983, 2005 (1972): "It would appear that creditors could withstand attack under today's opinion simply by making clear in the controlling credit instruments that they may retake possession without a hearing, or, for that matter, without resort to judicial process at all. Alternatively, they need only give a few days' notice of a hearing, take possession if hearing is waived or if there is default; and if hearing is necessary merely establish probable cause for asserting that default has occurred."
52. See notes 1 and 3 supra.
54. 92 S. Ct. 1983, 1999 (1972): "There are 'extraordinary situations' that justify postponing notice and opportunity for a hearing. Boddie v. Connecticut, supra, 401 U.S. at 379, 91 S.Ct. at 786. These situations, however, must be truly unusual." Id. at 2000: "There may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods. But the statutes before us are not 'narrowly drawn to meet any such unusual condition.' Sniadach v. Family Finance Corp, supra, 395 U.S. at 339, 89 S. Ct. at 1821. And no such unusual situation is presented by the facts of these cases."
57. 256 U.S. 94 (1921).
validity of such a seizure and Fuentes recognized this as a justified exception because securing jurisdiction was considered a most basic and important public interest.58 The writ can also be issued when a defendant has concealed himself to avoid service of citation, and this may also be justified because of the same important public interest, that is, enabling a court to secure jurisdiction.59 Another basis for obtaining the writ is that the defendant has or is about to leave the state permanently before a judgment can be obtained and executed against him. If strong public interest justifies summary attachment where the defendant is already a nonresident then it should also justify summary attachment when the defendant has left the state permanently or is about to do so because in both cases the attachment enables a court to render a judgment and execute it against the property attached. The other two grounds for attachment are intended to protect creditors when the debtor has, or is about to, mortgage, assign or dispose of his property with the intent to defraud his creditors or to give one of them an unfair preference or when the debtor has converted or is about to convert his property into money or evidence of debt with the intent to place it beyond the reach of his creditors. Fuentes recognized that postponing notice and a hearing would be justified where a creditor could show immediate danger that a debtor will destroy or conceal property but the statute must be limited to such special situations60 and it is submitted that the provisions above should fit within that test because they are narrowly drawn—the attachment will only issue when the debtor has acted or is about to act (unlike sequestration which only requires that the defendant have the power to conceal or dispose of the property). More importantly, these provisions are necessary if the creditor's interests are to be protected at all because if the creditor's fears are well founded, then only summary seizure will protect him and if he is wrong, then the award of damages61 should adequately protect the debtor for the temporary loss of the property. Also, the creditor has the difficult burden of proving intent to defraud on the part

59. Id.
60. See note 54 supra.
61. See note 2 supra.
of the defendant in order to justify the attachment and this should be a strong deterrent to the abuse of this remedy because he is unlikely to undertake this burden, with the attendant risk of damages, unless he is convinced he can succeed.

Executory process presents special problems. Unlike the writs of attachment and sequestration which are issued upon the verified petition of the creditor and upon the posting of a bond, the writ of seizure and sale is issued only if the creditor presents authentic evidence of the obligation and of the act of mortgage or privilege containing the confession of judgment. This raises the question whether the requirement of authentic evidence would be a sufficient equivalent to notice and a hearing to satisfy due process. That it would not seems clear from the statements by the majority in Fuentes (and by the concurring opinion in Sniadach) that arbitrary and unfair deprivations of property can be prevented only by a hearing which is a real test of the validity or probable validity of claim against the debtor and to be a real test it must be a hearing in which the debtor has an opportunity to present his side. "For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented." Moreover, the crucial fact of default which entitles the creditor to use this summary procedure is simply shown by allegations in the verified petition or by the creditor’s affidavit and this would be no more of a test of the probable validity of the claim that the ex parte application for a writ of replevin found constitutionally defective in Fuentes and where the Court stated that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . [and n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."

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The Code further provides that the writ shall not issue until after the debtor has been served with a demand for payment within three days after service.68 The demand may be waived69 (and almost always is) and therefore in almost all cases the writ issues immediately and without prior notice to the debtor. But would Louisiana's executory process be in accord with the constitutional requirements of due process if a creditor did not take advantage of the waiver and had the demand for payment served on the defendant? The debtor could then file a petition to enjoin the issuance of the writ of seizure and sale70 (in many cases without posting bond)71 and at the hearing on the petition for injunction the court would determine the creditor's right to use executory process. There would thus be notice and a hearing before seizure and this would seem to satisfy due process. But there are difficulties with this position. First, the notice simply demands that the debtor pay the debt,72 it does not notify him of his opportunity to have a hearing either through the petition for an injunction or by taking a suspensive appeal.73 Moreover, the demand only allows the debtor three days and therefore it is doubtful that this would meet the requirement of giving notice and an opportunity to be heard at a meaningful time and in a meaningful manner. There is also a more fundamental difficulty in that this position shifts the burden to the debtor to call the hearing. It is submitted that when the Court in Fuentes spoke of the due process requirements of notice and an opportunity to be heard it did not mean simply notifying the debtor that he could provoke a hearing if he wanted one, but rather that there must be a hearing on the creditor's right to seize the property and the debtor must be timely notified so that he can appear to challenge if he wishes.74 If he does not, the hearing will be one-sided but the debtor will, at least, have had his opportunity to be heard.

An important question to be answered is whether a debtor could waive his right to notice and a prior hearing. This argu-

69. Id.
70. See note 4 supra.
72. See note 68 supra.
73. See note 5 supra.
ment was advanced in *Fuentes* based on language in the conditional sales contracts which provided that, upon default, the creditor could retake or repossess the goods sold. The Court rejected the argument by stating that any waiver must be clearly expressed and that in these contracts there was no mention of a waiver of a prior hearing, only a statement of the creditor's right to retake the goods without indicating how this could be done. But even if a contract contained a clear statement that the debtor waived his right to notice and a prior hearing, there would be other problems. In an earlier case, *Overmeyer v. Frick*, the Court upheld the waiver of notice and a prior hearing because, under the facts in that case, the waiver was found to have been voluntarily, knowingly, and intelligently made. In *Overmeyer* the waiver had been specifically bargained for in negotiations between two corporations conducted by their respective attorneys, was not part of an adhesion contract and was not the product of unequal bargaining power. The facts in *Fuentes* were quite different as the Court noted: there was no bargaining over the waiver; the parties were far from equal in bargaining power; the waiver was in a printed form sales contract, and there was no showing that the buyers were made aware that the fine print contained a waiver of constitutional rights. Although, as noted earlier, the Court rejected the waiver simply because the language was not a clear waiver of any rights, the enumeration of these factors is significant in trying to answer the question of how a waiver could be intelligently and knowingly made. A contract could contain very clear language to the effect that the debtor is waiving his right to notice and a hearing before property is seized and he could be required to initial that language to indicate that he was made aware of it but there would still be the problem of equal bargaining power. In *Overmeyer* the waiver was given after the debtor was in default in his payments on a construction contract and in return for the creditor's agreeing to release specific liens on the property—clearly an intelligent, voluntary waiver—but could the same be said for the waiver given by the debtor at the time the contract is executed, where consideration for the waiver would be the willingness of the creditor to advance credit? If such a waiver were to be upheld then it would be part of every credit trans-
action and property would almost always be seized summarily without notice or a hearing just as it had been before *Sniadach* and *Fuentes*. It was this possibility which led the dissent in *Fuentes* to conclude that in the end the decision will have little impact. On the other hand, if the Court were to strike down a waiver because the debtor could not really bargain with respect to it since every creditor would insist on the waiver, then the result would probably be more expensive credit or even the denial of credit in certain cases but, as one court noted, maybe more restrictive credit practices might be in the general public interest.

If the assumption that the due process requirements of notice and a prior hearing are applicable to Louisiana's writ of sequestration and executory process is correct, then the solution would have to be amendments to the Code of Civil Procedure which would provide, for example, that after the plaintiff files a petition in executory process or for a writ of sequestration, then a date for hearing would be set and the defendant would be served with notice that any objections he may have should be presented at that hearing. But before these amendments are enacted, creditors would be well advised to use attachment rather than sequestration and an ordinary proceeding rather than executory process especially since, after *Fuentes*, a sale of immovable property under a writ of seizure and sale carries with it the risk of a serious defect in the title.

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76. *See* note 51 *supra.*
78. In order to give adequate notice and time to prepare, the hearing should be set at least ten days from date of service of notice.
79. There is nothing in the opinion to indicate that *Fuentes* would be applied retroactively and, since title security is involved, it is unlikely that it would be so applied. But there is still the problem of titles based on sales through executory process after *Fuentes* was decided (June 12, 1972). If it were held to apply to all those sales then it is possible that the defendant in executory process might be able to recover the property. Cf. Pennoyer v. Neff, 95 U.S. 714 (1877), where plaintiff sued purchaser at judicial sale and recovered his property because the court which had rendered the judgment under which the property had been sold lacked jurisdiction and therefore plaintiff's rights to procedural due process had been violated.