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"Self-help" Remedies and Due Process

The Supreme Court's ruling in *Sniadach v. Family Finance Corp.*\(^1\) that the *ex parte* garnishment by a creditor of his debtor's wages violates the due process clause of the fourteenth amendment precipitated a reevaluation of the entire field of creditors' prejudgment remedies.\(^2\) At the heart of due process, the Court held, are notice and an opportunity to be heard.\(^3\) The reaction of a majority of states, including New York, was to construe *Sniadach* as applicable only in situations where the *ex parte* seizure would create severe economic hardship.\(^4\)

*Sniadach* was thereafter clarified and expanded by the Supreme Court in *Fuentes v. Shevin*,\(^5\) which held that procedural due process must be accorded whenever a party is deprived of "any significant property interest."\(^6\) Armed with *Fuentes*, consumer advocates began an all-out attack upon theretofore sacrosanct prejudgment remedies. Among the summary procedures struck down as constitutionally defective were provisional remedies such as *ex parte* orders of attachment\(^7\) and replevin,\(^8\) statutorily sanctioned consensual agreements permitting wage

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\(^3\) 395 U.S. at 389.


\(^6\) Id. at 87. Only extraordinary circumstances, the Court felt, would justify summary *ex parte* seizure. In determining when such circumstances exist, the Court outlined the following criteria by which it had been guided in the past to condone dispensation with a prior hearing:

1. The seizure need be necessary to achieve an important governmental or public interest;

2. A special need for precipitous action need be present;

3. The one initiating the procedure need be a governmental official acting within the guidelines of a narrowly drawn statute, which determines the particular need for its application under the circumstances.

The following examples were cited: Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (Federal Food and Drug Administrator permitted to seize dangerous, mislabeled or adulterated drugs); Fahey v. Mallonee, 332 U.S. 245 (1947) (summary seizure of bank assets pending investigation of its operations); Ownbey v. Morgan, 256 U.S. 94 (1921) (attachment without notice permitted to secure jurisdiction or prevent a debtor from concealing property). 407 U.S. at 90-92.


garnishment or income assignment,\(^9\) and landlord's,\(^10\) innkeeper's\(^11\) and garageman's\(^12\) lien laws.

In a recent decision, *Blye v. Globe-Wernicke Realty Co.*,\(^13\) the Court of Appeals held New York's innkeeper's lien law\(^14\) "irreconcilable with evolving concepts of due process" and therefore unconstitutional.\(^15\) This statute permitted the proprietor of a hotel to detain the baggage and other property of a defaulting guest without notice or opportunity for a hearing.

An act must be performed under color of state law before a violation of the due process clause can be found. Thus the Court was faced with the task of finding the requisite state action in the innkeeper's seizure. Writing for the majority, Judge Jasen cited two sources of state involvement: (1) the line of Supreme Court decisions holding that where a private individual receives encouragement or authorization by statute to commit constitutional deprivations, this is sufficient to clothe his action with the authority of state law;\(^16\) and (2) the more recent theory that the requisite state action for due process purposes exists in situations where private persons perform traditionally public functions.\(^17\) With respect to the latter, since the execution of a lien had traditionally been the function of the sheriff, the innkeeper's execution

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\(^14\) N.Y. LIEN LAW § 181 (McKinney 1966).


\(^16\) 33 N.Y.2d at 19-20, 300 N.E.2d at 714, 347 N.Y.S.2d at 175. The Court relied upon Reitman v. Mulkey, 387 U.S. 369 (1967) (constitutional amendment barring state limitation on private racial discrimination in housing held to be state action); Adickes v. Kress & Co., 398 U.S. 144 (1970) (acts of private racial discrimination pursuant to state-enforced custom held to be under color of state law for fourteenth amendment purposes); and Shelley v. Kraemer, 344 U.S. 1 (1948) (judicial enforcement of racially restrictive covenant in deed "bears the clear and unmistakable imprimatur of the state. . . "). See also Burton v. Wilmington Parking Authority, 365 U.S. 718 (1961) (lease in municipal parking structure held sufficient nexus with the state).

\(^17\) See Hall v. Garson, 430 F.2d 430, 439 (5th Cir. 1970); Barber v. Rader, 350 F. Supp. 183, 189 (S.D. Fla. 1972) (statutes vesting landlord with power to execute lien deemed to grant him authority traditionally reserved to the state).
of his own lien was deemed a sufficient state involvement to invoke the procedural due process standards enunciated in *Fuentes.* Blye did not, however, effect a per se invalidation of the statute but only an emasculation of its prejudgment mechanism; the seizure must now be prefaced by notice and an opportunity for hearing, absent extraordinary circumstances.

Shortly before the Blye decision, the Supreme Court, Rensselaer County, in *Frost v. Mohawk National Bank,* upheld the constitutionality of the most controversial of prejudgment remedies, the common law "self-help" procedure embodied in section 9-503 of the Uniform Commercial Code. This allows the secured party to repossess the collateral upon the debtor's default without notice or an opportunity for a hearing. The standard retail installment sales contract invariably contains such a self-help clause.

The *Frost* court was able to sidestep the state action issue by upholding the procedure on the basis of the specific contractual authorization. Furthermore, the section 9-503 clause could not be deemed unconscionable under section 2-302 of the Code because the two Code provisions are to be read as consistent.

It would be presumptuous to view the later Court of Appeals rul-

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18 33 N.Y.2d at 20, 300 N.E.2d at 715, 347 N.Y.S.2d at 177.
19 Judges Breitel and Gabrielli dissented on the grounds that there was no issue of recurring public interest, that the return of the plaintiff's property had rendered the case moot, and finally, that a time-honored statute had been struck down without considering the practical impact. 33 N.Y.2d at 23, 300 N.E.2d at 715, 347 N.Y.S.2d at 177.
20 The majority considered that the recurring nature of the controversy coupled with the plaintiff's claim for monetary damages for mental distress prevented mootness. 33 N.Y.2d at 19, 300 N.E.2d at 713, 347 N.Y.S.2d at 174, citing Powell v. McCormack, 395 U.S. 486, 496-97 (1969).
21 N.Y. U.C.C. § 9-503 (McKinney 1964) reads in pertinent part: "Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial notice if this can be done, without breach of the peace. . . ."
22 74 Misc. 2d at 913, 347 N.Y.S.2d at 248.
23 It has been argued that allowing a creditor to avoid the procedural safeguards by providing for summary repossession in the contractual agreement is a dangerous solution. Once deprived of the sanction of section 9-503, the provision becomes vulnerable to attack as a waiver of constitutional right (and thus subject to close scrutiny under *Sniadach*) or unenforceable under section 2-302. Adams v. Egle, 338 F. Supp. 614 (S.D. Cal. 1972), rev'd sub nom. Adams v. Southern Cal. First Nat'l Bank, — F.2d — (9th Cir. 1973). The district court in *Adams* felt that permitting contractual authorization could lead to the widespread adoption of adhesion contracts:

If the provision of a contract can legitimize summary repossession, wage garnishment might then be valid on the same theory, as long as a private agreement could be shown. This would fly in the face of the reasoning in *Sniadach* and is rejected by this court.

388 F. Supp. at 621. But even with the sanction of section 9-503, a creditor is not immune from attack on the foregoing grounds. See text accompanying notes 78-79 infra.
ing in Blye as having tacitly overruled Frost. While numerous prejudgment creditor remedies have fallen in many jurisdictions, both federal and state courts throughout the country, with rare exception, continue to sustain the validity of section 9-503.25

Generally, where the remedy depends for its enforcement solely upon the self-help of the creditor, the necessary state action would appear to be lacking. Yet “state action” has proved to be a concept that can be manipulated according to the interests the court deems worthy of protection.

In Reitman v. Mulkey, a California initiative and referendum produced an amendment to the state constitution affecting the repeal of previously enacted fair housing legislation and prohibited the legislature from interfering with an owner’s right to sell, lease or rent his property to whomever, in his absolute discretion, he pleased. The Supreme Court viewed the enactment as an indirect authorization of private discrimination in the housing market and as erecting a state constitutional barrier to the exercise of federal rights. Moose Lodge No. 107 v. Irvis involved the refusal of a private club to serve a black state senator as a guest. Here the Supreme Court found insufficient state involvement although the state had granted the club a liquor license and had required the club to enforce its racially restrictive by-laws.

Important constitutional cases thus hinge on whether a sufficient state nexus is found. The different conclusions reached in Reitman and Moose Lodge on this determinative issue can be explained in terms of the interests involved: the minorities’ need for housing, a basic necessity of life, was deemed worthy of greater protection under the Consti-

24 See notes 7-12 supra.


In the field of prejudgment creditor remedies, *Reitman* has been advanced as a touchstone for those who would surround a particular statute with due process safeguards. But the courts should refrain from too loosely analogizing from the area of racial discrimination to the field of creditor remedies. State action is not a rigid concept; indeed, the invitation to fashion a precise formula has been declined by the United States Supreme Court in a related field:

To fashion and apply a precise formula for recognition of state responsibility under the equal protection clause is an impossible task which has never been attempted. . . . Only by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance.

Manipulation of the state action requirement has therefore effectuated desired social policy in the equal protection area, and the same approach has been followed by the courts in the due process field. Thus, while there appears to be little procedural distinction between section 9-503 and other prejudgment remedies, courts have more readily found state action with respect to the latter, as, for example, where the validity of the innkeeper's lien law has been called into question.

One rationale that has been advanced by the courts for their dissimilar treatment of section 9-503 and innkeeper's lien statutes is the divergence in origin of the two remedies. Section 9-503 merely codifies a remedy that had long been sanctioned under the common law. Since the provision grants the creditor no new statutory right, the nexus

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Professor Mentschikoff, a member of the permanent editorial board for the Uniform Commercial Code, filed an amicus curiae brief in the appeal of Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972), to the Court of Appeals for the Ninth Circuit. She argues:

Section 9-503 simply recognizes this common knowledge of buyers on time that repossession follows default and makes unnecessary its statement in the contract. It cannot be that codifying a generally understood practice of ancient and honorable lineage and surrounding it with safeguards renders the practice unconstitutional.


But the use of this "origin" approach was impugned by Judge Byrne in his dissent in Adams v. Southern Cal. First Nat'l Bank, — F.2d — (9th Cir. 1973):

The State of California deliberately chose to follow a State policy of encouraging the repossession and sale of collateral without a prior hearing. It embodied such a policy in §§ 9503 and 9504. The creditors admit that they acted pursuant to those sections when they repossessed and sold the collateral. The State meaningfully encouraged the repossessions and sales and thus became significantly involved within the meaning of Reitman v. Mulkey, 387 U.S. 369 (1967).
with the state is attenuated. On the other hand, the common law accorded the innkeeper no similar right of summary procedure and the state, in enacting the innkeeper's lien law, may properly be deemed the fountainhead of the right and responsible for violations of due process that attend its exercise. But as courts continue to adjudicate the validity of other summary creditor remedies, this distinction becomes tenuous.

In Bond v. Dentzer, the United States Court of Appeals for the Second Circuit upheld the validity of another New York self-help mechanism, the assignment of earnings statute. By contractual provision, a creditor is authorized, upon default, to execute against the debtor's wages. The statute, like section 9-503, contains no provision for judicial or other official interposition. Despite this, the District Court for the Northern District of New York had struck down the procedure, finding the necessary quantum of state involvement to be present. Conceding that no organ of the state was actively involved in the summary procedure, Chief Judge Foley proffered three alternative theories upon which a finding of state action could be predicated:

(1) When private and public interests combine for mutual economic interest, as pursuant to a state licensing scheme, a "silent partnership" is said to obtain. Alternatively, by allowing the creditor to circumvent the judicial process, the state secures an advantage for the creditor's private interests by enhancing his economic leverage over the debtor. In either case, though the private party be the dominant actor, his acts depriving others of due process are imputed to the state.

(2) In the Reitman vein, the state's purported neutrality in fact

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33 Ten days' advance notice to the debtor is required but no prior judicial determination as to the fact of default is provided for. Id. § 48.
35 Id. at 1378-79. The leading case propounding this theory is Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), where a racially discriminating restaurant leased space in a municipal parking facility, and state action was found. "The State has so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity." 365 U.S. at 725, cited in 362 F. Supp. at 1378. See also Adickes v. Kress & Co., 398 U.S. 144 (1970), where a racially motivated refusal of service by a party was considered an act in conformity with a state-enforced custom of discrimination and therefore attributable to the public or state interest.

Moose Lodge was deemed inapposite because there was no factual showing of "economic mutuality." Yet even state regulation of liquor licenses could rise to the level of state action, the court noted, when used as a means to secure an economic advantage for private interests. 362 F. Supp. at 1378-79, citing Bennett v. Dyer's Chop House, 350 F. Supp. 153, 154-55 (N.D. Ohio 1972); Seidenberg v. McSorleys' Old Ale House, Inc., 317 F. Supp. 593, 603 (S.D.N.Y. 1970).
encourages the parties to enter into this one-sided agreement and has fostered its pervasive use in the small loan market.\textsuperscript{36}

(3) The creditor, in executing on the wages, is performing a traditional state function.\textsuperscript{37}

Having found the requisite state action, the court, relying on Fuentes, held the adhesive contractual forms to be ineffective as a waiver of constitutional rights.\textsuperscript{38} The court noted that even by common law standards the wage assignment statute violated due process as traditional prejudgment seizure had always been prefaced by at least cursory official review of the merits of the claim.\textsuperscript{39} The court appeared to reject the notion that its common law origin immunized the statute: "Common law or codification of it may be overly harsh when viewed in the light of the Constitution."\textsuperscript{40}

\textsuperscript{36} 362 F. Supp. at 1379-81.

The atmosphere created by the New York wage assignment scheme encourages the finance companies to take unilateral, non-judicial action and compels the debtor, usually of low income, to capitulate to these pressures, "waiving" certain rights to get the needed loan and signing away the right to judicial intervention against the finance company's action, no matter the presence of valid defense or dispute. . . . New York's statute makes these wage assignment agreements so advantageous to the finance companies that they are contracts of adhesion. . . .

\textit{Id.} at 1380.

\textsuperscript{37} \textit{Id.} at 1381, citing Hernandez v. European Auto Collision, 346 F. Supp. 313, 317 n.4 (E.D.N.Y. 1972), rev'd and remanded, 487 F.2d 978 (2d Cir. 1973); Palmer v. Columbia Gas Co., 342 F. Supp. 241, 245 (N.D. Ohio 1972). The court noted that while an action on a debt generally requires a judicial examination as to its validity before a state official is authorized to execute upon the property, the statute here in question obviated this procedure by empowering the creditor to unilaterally decide the existence of the default and levy upon the property himself.

\textsuperscript{38} The agreement provided for wage assignment "if there is a default." (emphasis added). The court deemed these words insufficient to allow the finance company "to unilaterally and presumptively declare default." 362 F. Supp. at 1388.

\textsuperscript{39} The court found that:

\[\text{[t]he New York statutes countenance a legal procedure that can be set in motion by one party depriving another of his property without a court or state official ever being aware of it. Neither the Constitution, common law or common sense ratify this type of procedure.}\]

362 F. Supp. at 1387.

The statute was also deemed vulnerable in that it effected a reversal of the burden of proof:

Instead of the finance company having to initiate action and prove that there is a debt and that there has been default thereon, the debtor must initiate the action and prove the invalidity of the debt. Given the relative economic power and legal resources of these parties, the anomaly has a particularly harsh effect upon the debtor.

362 F. Supp. at 1384. The court could not tolerate a procedure which, it felt, forced resolution of disputes to turn not on the merits but on the relative power of the parties.\textit{Id.} See Brown, \textit{A Meaningful Opportunity to be Heard}, 46 St. John's L. Rev. 25, 25-26 (1971).

\textsuperscript{40} 362 F. Supp. at 1386. In his dissent in Northside Motors v. Brinkley, 282 So. 2d 617 (Fla. 1973), Judge Ervin was willing to concede the historic roots of creditor self-help agreements, but for him antiquity carried a different connotation:
Further language in the opinion indicates, moreover, that the court would have struck down any summary self-help procedure, including section 9-503, had that statute been before it:

It is always preferable to determine the merits prior to a taking and to thereafter allow the taking of property to proceed under the supervision and by written order of a court, rather than to statutorily authorize a party in interest to take the property unfettered by even an ex parte review by a court.11

The Court of Appeals for the Second Circuit, however, rejected the foregoing approach.42 Each of the three theories of state action presented by the lower court was specifically rejected.

1. Partnership. This theory, the Court opined, generally depended upon direct government subsidization of private enterprise. Since loan companies receive no state aid and their facilities are privately owned, there is no state participation.43

The fact that lending institutions are regulated by a state licensing scheme was deemed an insufficient state nexus.44 To make state regula-
tion alone determinative, the court noted, would be to extend the state action concept to every corporation licensed by the state, a proposition not asserted even by those advocating the most liberal application of the concept. "The requisite state action," it was said, "must be related to the challenged activity." Finally, the courts are not enlisted, as in Shelly v. Kraemer, to enforce an offensive, private covenant. Here the private agreement seeks to circumvent judicial interposition.

2. Encouragement. Wage assignment by private agreement, the court noted, had always been enforceable at common law without a prior judicial determination of the merits. Therefore, the state cannot be deemed to deprive the debtor of anything. On the contrary, the Legislature, concerned with protecting the debtor from overreaching, has prescribed by statute many safeguards to "equalize the borrowing posture" of the debtor who, at common law, had been left at the mercy of the loan shark.

3. Traditional State Functions. The Court's study of the common law directed it to no practice requiring a creditor to first establish his debt before attaching the wages or requiring the creditor to obtain a prior court order. Wage assignment, the court said, had always been by private levy: "In sum the statute has not given the assignee anything new; it has in fact circumscribed substantially the rights of the creditor which were untrammeled at common law."

Only one month earlier, the Second Circuit, in Shirley v. State National Bank of Connecticut, sustained the constitutionality of self-help repossession. Shirley involved a challenge to Connecticut's Retail Sales Financing Act, a statute "substantially the same as section 9-503 of the Uniform Commercial Code which permits peaceful repossession by a secured party upon default." The remedy was invoked against the buyer by seizing her automobile pursuant to a contractual provi-

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pervasive regulation of the liquor trade provided substantial revenues for the state. By contrast, the state was said to derive no revenue from the licensing of lenders nor did the state confer any monopoly privileges on the lending institutions.— F.2d at —.

46 Id. at —.
47 A court may intervene, under the wage assignment statute, only when requested by assignor, his employer, or any party in interest, to vacate the assignment. N.Y. PERS. PROP. LAW § 47-e (McKinney 1973).
48 Among the more significant safeguards prescribed in the statute are minimum print size in the agreement and maximum interest rates chargeable; furthermore, the limit of assignable wages is fixed at 10% of earnings, and assignment is prohibited unless earnings exceed a specified dollar amount. Id. § 47 et seq.
49 — F.2d at — (2d Cir. 1974).
50 Id. at — (2d Cir. 1974).
52 — F.2d at — (2d Cir. 1974).
sion. In determining that no state action was present, the court emphasized the purely private nature of the agreement. Since the State "plays no significant role" in its execution, the Moose Lodge test was not satisfied.

A theory of state action based upon statutory authorization was rejected. The origin of self-help repossession was traced to Greek and Roman law; so firmly embedded had the remedy become in common law tradition that it existed even absent its provision by contract. Moreover, far from generating a new creditor right, the statutory scheme under review was regarded as extending significant protection to the consumer by regulating finance charges and prohibiting confession of judgment clauses: "... the State does not encourage seizure, nor does it in any way aid or abet the seller. The partnership, if any, is with the purchaser and not the [seller]." 53

The court expressed particular concern for protecting the codification of common law in the commercial law area:

New York has a Law Revision Commission, for example, which is charged with this responsibility; were the mere codification of common law sufficient to constitute significant state involvement, then, of course, the door to Fourteenth Amendment intrusion would be opened wide to continuing federal scrutiny. We find no support for this proposition in the precedents which bind us. 54

Shirley thus advanced three basic propositions which were later applied in the Bond decision: (1) the fact of legislation alone is insufficient state intrusion for fourteenth amendment purposes, especially where the enactment is a mere codification of a right long recognized under the common law; 55 (2) the legislative scheme, to constitute state action, must be related to the private conduct under attack; 56 and (3) racial discrimination, under Reitman, is an area requiring a lesser degree of state intrusion for state action purposes than the field of commercial transactions. 57 Thus, in determining the issue of state action, the factors to be weighed in the balance are not only the degree of government involvement but "the offensiveness of the conduct, and the value of

53 Id. at —.
54 Id. at —.
55 Rather than depriving the debtor of anything by conferring a new right on the creditor, both the New York and Connecticut statutes were viewed as providing the debtor with additional protection not enjoyed at common law.
56 F.2d at —.
57 The Bond court further distinguished Reitman on the ground that the amendment there enacted was regressive, having repealed prior fair housing laws and prevented subsequent change. By contrast, article 3A accorded the debtor greater rights than before and erected no constitutional barrier to further change.
preserving a private sector free from constitutional requirements applicable to government institutions."

Judge Kaufman dissented in both cases, relying upon the approach of the Supreme Court in *Boddie v. Connecticut*. Boddie reasoned that a non-consensual taking could be lawfully accomplished only by the state since the state is deemed to have a "monopoly over techniques for binding conflict resolution." Only where there is mutual consent can the parties resort to private conflict resolution. The authorization of self-help in a contract of adhesion, Judge Kaufman urged, is insufficient to supply this element of consent. The seizure, then, amounts to a unilateral, non-consensual taking, often without even the knowledge of the other party. Thus, he concluded, a creditor who may lawfully seize property without the holder's consent must be deemed to act pursuant to a state delegation of its monopoly power and is subject to the restraints of due process.

In upholding self-help repossession, the Second Circuit has adopted the approach of the Court of Appeals for the Ninth Circuit in *Adams v. Southern California National Bank*. The appeal therein had pressed resolution of differing conclusions reached by two California district courts concerning the due process rights of debtors whose automobiles had been repossessed pursuant to security agreements authorized under section 9-503. The court found insufficient state involvement to trigger application of the due process clause and thus avoided adjudication of the due process claim.

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68 F.2d at —. It is significant to note that both *Bond* and *Shirley* were decided by a split vote, the three judges consistently aligned around the state action question, Judges Mansfield and Mulligan found no state action in each and Judge Kaufman dissented. The result points up the similarity between the two remedies under review: neither statutory scheme required interposition by an organ of the state, either judicial or administrative, and in both cases the right of seizure had arisen pursuant to private agreement between the parties and was one that had long been recognized under common law.


60 F.2d at —, citing 401 U.S. at 375.

61 Judge Kaufman, dissenting in *Bond*, urged that the wage assignment here sanctioned was equivalent in effect to the wage garnishment proscribed in *Sniadach*:

Indeed, by following the "consensual" path hewn by the majority, we go far toward eviscerating the salient teaching of *Sniadach v. Family Finance Corp.* . . . concerning the injustices which arise from "prejudgment garnishment whereby the sole opportunity to be heard comes from the taking."

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F.2d at — (citations omitted). Judge Kaufman also rejected the distinction proffered by the majority based on the ministerial role of the court clerk in *Sniadach* in issuing the *ex parte* summons. Id. at —.

62 F.2d at —.

63 F.2d — (9th Cir. 1973).


65 California had prescribed by comprehensive statutory scheme many of the terms to be included in and procedures to be followed under a retail installment sales contract.
The court deemed racial discrimination cases inapposite for resolution of the state action question in the self-help area. Yet it cited Moose Lodge for the proposition that even in the equal protection area, a comprehensive state regulatory system, in and of itself, is insufficient to constitute state action.

The Adams court noted that in security agreements providing for the self-help remedy, the creditor needs no benediction from the state. Even repeal of section 9-503 would leave the parties free to provide for the remedy in their contractual undertaking. The ultimate source of the right to repossess and resell, stressed the court, is in the common law security agreement and not in the Code. Repossession is thus an individual invasion of rights and not subject to the fourteenth amendment.

The "partnership" theory advanced by the district court in Bond was rejected by the majority, which failed to find anything approaching the "symbiotic relationship" present in Burton v. Wilmington Parking Authority, where the state and private enterprise had combined for mutual economic benefit. The landlord's lien statutes were distinguished on the ground that they delegated a traditional state function to the landlord and allowed him to seize the tenant's private property.

The significant state involvement alleged by the debtors was this authorization and encouragement of self-help repossessions. But the court felt that the mere sanction of summary seizure by private parties with no request for state participation and without official action or review did not meet the requirements of Moose Lodge. Of greater relevance, the court felt, were those cases dealing with the right of a power company to arbitrarily terminate service. To the extent that utilities are controlled by the state and enjoy the monopolistic benefits the state confers upon them, they are deemed to perform a legitimate state function. When the utility exercises the authority given it by the state to enter private property and disconnect service or remove equipment, such activity has been held to constitute state action. Of course, cited, inter alia, Palmer v. Columbia Gas, Inc., 479 F.2d 153 (6th Cir. 1973). However, the court approved a Seventh Circuit decision which found no state action when the utility merely terminated service from its own headquarters, and culled from the court's opinion: "Affirmative support must be significant, measured by its contribution to the effectiveness of defendant's conduct, or perhaps its defiance of conflicting national policy . . . ." — F.2d at —, citing Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638, 656 (7th Cir. 1972), cert. denied, 409 U.S. 1114 (1973).


In landlord lien situations, there is no contractual authorization. The landlord's conduct amounts to what would ordinarily be breaking and entering but for the statutory safeguard.

This lien was termed in Blye a "hangover from the bygone days," originally given to the innkeeper in exchange for the duty of absolute care imposed upon him, which obligation has since been abrogated by statute, and his duty not to refuse anyone service. 33 N.Y.2d at 22, 300 N.E.2d at 715, 347 N.Y.S.2d at 177. See Navagh, A New Look at the Liability of Inn Keepers For Guest Property Under New York Law, 25 Fordham L. Rev. 62, 63 (1956).
The court adopted the view of the minority in *Fuentes* that the holding there would permit private repossession where no arm of the state was involved:

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.\(^2\)

Indeed strong policy considerations militate in favor of preserving creditor self-help remedies in the field of commercial transactions. In implementing these policies, courts will be reluctant to find sufficient state involvement and thereby avoid the due process issue entirely.

Judges tend to be pragmatists; they realize that, to a very great extent, our economy is built on credit. According to Standard and Poore’s [sic] Statistical Summary, as of August, 1973 the outstanding consumer debt in this nation amounted to $172 billion. Obviously, creditors are unlikely to continue making loans unless they can be reasonably assured of collecting the debt.\(^3\)

Important, too, is the fact that under the standard installment sales contract the creditor retains title to the goods until the price has been paid in full. While the seller’s security interest may be said to decrease upon each payment, the interest he retains is in the specific goods he seeks to repossess. Moreover, often a seller’s only means of salvaging the contract price from a defaulting buyer is by timely seizure of the goods themselves.

It has been argued that forcing creditors into court will jeopardize the marketing of credit and will result in increased costs to be passed on to the consumer;\(^4\) and, once in court, a creditor, formerly satisfied with the collateral alone, will find it in his interest to press for a deficiency judgment.\(^5\) Also to be considered is the effect of this litigation on already congested court calendars.

Yet procedural due process is not to be bartered away in the name of efficiency or economy.\(^6\) Where the state is sufficiently involved, the

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\(^1\) It has also been argued that the lien falls hardest on permanent residents and provides little protection against the transient who defaults and absconds. Blye v. Globe-Wernicke Realty Co., 33 N.Y.2d 15, 21, 300 N.E.2d 710, 714, 347 N.Y.S.2d 170, 176 (1973).


\(^3\) 23 DEFENSE L.J. 28 (1974).

\(^4\) F.2d at —.


\(^6\) As Justice Stewart wrote in *Fuentes*: “Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken.” 407 U.S. at 90 n.22.
message of *Fuentes* and its progeny seems clear: notice and a hearing are required *before* the deprivation of any significant property interest.\(^\text{77}\)

Judicial reluctance to per se invalidate section 9-503 will not protect the creditor in situations of obvious overreaching. In *D. H. Overmyer Co. v. Frick*,\(^\text{78}\) a cognovit clause, the product of equal bargaining between two corporations represented by counsel, was upheld, but the Supreme Court cautioned:

> Our holding, of course, is not controlling precedent for other facts of other cases. For example where the contract is one of adhesion, where there is great disparity in bargaining power and where the debtor receives nothing for the . . . clause, other legal consequences may ensue.\(^\text{79}\)

The case is cited in *Adams* as confirming the proposition that in certain instances, summary repossession without notice and an opportunity for a hearing may be unconscionable and void as a matter of public policy.

Ultimate resolution of the constitutionality of section 9-503 in light of recent developments in the area of summary creditor remedies probably lies with the Supreme Court.\(^\text{80}\) Whether the sweep of *Fuentes* will reach this area will depend, to large degree, upon the Court's perception of the practical consequences of invalidating this procedure.\(^\text{81}\)

\(^{77}\) Some feel that *Fuentes* casts doubt upon the constitutionality of all self-help repossession, common law in origin or codified. See, e.g., Fontain v. Industrial Nat'l Bank, 298 A.2d 521, 523 n.3 (R.I. 1973). Ronald Anderson, in his work on the Uniform Commercial Code, has concluded in reference to section 9-503:

> If the trend of protecting consumers and indigent persons continues, it is believed that it will be held unconstitutional, unlawful, contrary to public policy or unconscionable for a creditor to repossess the collateral without affording the debtor some opportunity to be heard. . . . Revolutionary as is the conclusion that repossession is unlawful, it is believed that the conclusion is an inevitable and logical development from the *Fuentes* decision.

\(^{78}\) 405 U.S. 174 (1972).

\(^{79}\) *Id.* at 188.

\(^{80}\) The Court recently agreed to review questions of standing and mootness in relation to Illinois' self-help automobile repossession statute. Gonzalez v. Automatic Employees Credit Union, 42 U.S.L.W. 2480 (U.S. Feb. 26, 1974) (No. 73-858). A three-judge district court for the Northern District of Illinois had held that a debtor whose automobile had been repossessed lacked standing to seek a declaratory judgment as to the constitutionality of the repossession provision of the Uniform Commercial Code since he had an alternative remedy of suing in conversion, and that his claim for injunctive relief was moot because the automobile had already been repossessed and sold.

\(^{81}\) In his dissent in *Fuentes*, Mr. Justice White poignantly argued:

> It is very doubtful in my mind that such a hearing would in fact result in protections for the debtor substantially different from those the present laws provide. On the contrary, the availability of credit may well be diminished or, in any event, the expense of securing it increased.

None of this seems worth the candle to me . . . . The Uniform Commercial Code . . . now . . . pervasively governs the subject matter with which it deals. . . . Recent studies have suggested changes in Art. 9 in this respect. . . . I am content
If its attendant abuses are deemed to outweigh the advantages it holds for creditors and consumers alike, its demise is inevitable.

As this article goes to press, it appears the Supreme Court has significantly withdrawn from its stance in *Fuentes*. In *Mitchell v. W.T. Grant Co.* 42 U.S.L.W. 4671 (U.S. May 13, 1974) (No. 72-6160), the Court upheld the Louisiana sequestration statute which allows *ex parte* seizure of chattels without notice or prior hearing. *Fuentes* was limited to require a hearing before a final deprivation of property and was distinguished by the majority on the following grounds: (1) the Louisiana procedure, in the particular parish in which the case arose, provides for issuance of the sequestration writ by a judge rather than a clerk of the court; (2) a plaintiff must make a more convincing showing by filing an affidavit reciting "specific facts" to justify the seizure rather than a mere conclusory statement as to the merits of the plaintiff's claim; (3) an immediate hearing is provided under the Louisiana procedure, followed by immediate dissolution of the writ if the plaintiff fails to meet his burden of proof; and (4) a plaintiff is required to file a bond to protect the debtor from any possible loss (including deprivation of use) if the seizure proves wrongful.

The Court felt *Sniadach* was inapposite. The Court viewed wages as sui generis and their garnishment as particularly amenable to creditor abuse. Further, the Court noted that garnishment is invoked against property in which the creditor had no prior interest, whereas, in *Mitchell*, both the creditor and the debtor had interests in the chattels.

To the extent that *Fuentes* had required a hearing prior to even a temporary deprivation of any property interest, Justice Powell, concurring, deemed *Fuentes* to have been overruled. 42 U.S.L.W. at 4678. Three of the four dissenting justices viewed *Mitchell* as "indistinguishable" from *Fuentes* and as undermining the principle of stare decisis. 42 U.S.L.W. at 4680, 4682.

The decision purported not to affect garnishment, "self-help," or other summary remedies over which, the Court said, commentators are still "in the throes of debate." 42 U.S.L.W. at 4677 n.13.