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# A Prejudgment Remedy Myst Provide Notice and a Prior Hearing.

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constituted reckless disregard for the truth.[55] He argued that he did not necessarily disagree that the basis of liability should include negligence but would leave to another day the adjudication of that issue.[56]

*Lanza* will have significant impact on the issue of *scienter*.[57] It acted to clarify the confusion that resulted from the seeming relaxation of the need for *scienter*. The case provides a definitive framework to be utilized by both the judicary and those persons who require a benchmark to measure that conduct on which liability may be imposed. In the absence of participation in the primary wrongdoing or violation of an independent duty by the defendant, imposition of liability under an aiding and abetting or conspiracy theory will require a proof of actual or constructive knowledge.[58]

By enunciating in clear terms what conduct will be held actionable under Rule 10b-5 and what conduct will not be, the court has brought the judicial language of the Court of Appeals for the Second Circuit into harmony with both the factual basis of decided cases and the Congressional intent of the Acts it seeks to interpret.

*Robert F. Nelson*

## GARAGEMEN'S LIENS—Procedural Due Process—A Prejudgment Remedy Must Provide Notice And A Prior Hearing

*Quebec v. Bud's Auto Service,* 105 Cal. Rptr. 677 (App. Dep't 1973).

Ralph and Elsa Quebec instituted an action against Bud's Auto Service for conversion, alleging in the complaint that after the defendant had completed repairs on plaintiff's motor vehicle and payment had been made, the

55. *Id.* at 93,843 (dissenting opinion).

56. *Id.* at 93,844 (dissenting opinion).

57. The majority, by agreeing with the trial court's findings of facts, *i.e.*, that defendant Coleman neither participated in nor knew of any deception practiced upon the plaintiffs, was provided with a unique fact situation allowing them to decide that point on a negligence/*scienter* continuum at which liability will be imposed. Among the factors contributing to the weight the opinion will receive is that it is a private suit for damages rather than a public enforcement action, and that a substantive test is provided to determine actionable conduct. For recent cases citing *Lanza, see, e.g.*, Gerstle v. Gamble-Skogmo, Inc., CCH FED. SEC. L. REP. ¶ 93,983 at 93,941 (2d Cir. May 9, 1973); Pearlman v. Gennaro, CCH FED. SEC. L. REP. ¶ 94,006 at 94,053 (S.D.N.Y. May 31, 1973).

58. Lanza v. Drexel & Co., CCH FED. SEC. L. REP. ¶ 93,959 at 93,829-30 (2d Cir. April 26, 1973).

vehicle ceased working. Defendant then towed the vehicle to its place of business and performed additional labor. Upon completion of the work, defendant refused to return the vehicle until the plaintiffs paid for the subsequent repairs.

The defendant relied on the California garagemen's lien provisions which permitted a garage owner to retain possession of the vehicle until the debt was discharged.[1] Plaintiffs conceded that these statutes provided a sufficient defense to the charge. They alleged, however, that the provisions failed to provide them with an opportunity to be heard or notice of the hearing *before* being deprived of their property, and as such, violated due process of law. After submission of the evidence, the trial court dismissed plaintiff's suit and plaintiff appealed. Held—*Reversed.* A prejudgment remedy that fails to provide notice and a prior hearing amounts to a deprivation of property without due process of law and is therefore unconstitutional except in "extraordinary situations."[2]

> The ability to place a lien upon a man's property, such as to temporarily deprive him of its beneficial use, without any judicial determination of probable cause dates back not only to medieval England but also to Roman times.[3]

This quotation demonstrates that historically, special advantages have been given to creditors in order to assist them in receiving satisfaction for debts. The premise that a judical determination of probable cause is unnecessary was never seriously debated in this country, notwithstanding the demands of procedural due process under our Constitution.[4] Recent case law, however, has begun to view the validity of this procedure in a new light.[5]

A lien may be broadly defined as a charge or security upon property, real or personal, in order to secure the payment of a debt or obligation.[6] Its specific classification is usually dependent upon its source; for example, common law, constitution, contract and statute.[7] The garageman's lien is a product of the last category, none having existed at common law.[8] Nevertheless, even in the absence of statute, many courts confronted with suits regarding repairs on automobiles, applied principles of the common law.[9]

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1. CAL. CIV. CODE §§ 3051-2, 3068-75 (Deering 1972).
2. Quebec v. Bud's Auto Serv., 105 Cal. Rptr. 677, 679 (App. Dep't 1973).
3. Family Fin. Corp. v. Sniadach, 154 N.W.2d 259, 264 (Wis. 1967).
4. U.S. CONST. amend. XIV, § 1 which provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."
5. *E.g.*, Hall v. Garson, 468 F.2d 845 (5th Cir. 1972); Collins v. Viceroy Hotel Corp., 338 F. Supp. 390 (N.D. Ill. 1972).
6. Gray v. Horne, 119 P.2d 779, 780 (Cal. Dist. Ct. App. 1948).
7. 53 C.J.S. *Liens* § 2 (1948).
8. Winton Co. v. Meister, 105 A. 301, 302 (Md. 1918).
9. Willis v. La Fayette-Phoenix Garage Co., 260 S.W. 364 (Ky. 1924). The court here stated:

> Before the enactment of statutes on the subject, mechanics and repairmen could retain a machine, whether an automobile or not, for the reasonable charges incurred in making repairs thereon at the instance of the owner or his representative,

In addition to imposing an expressed obligation upon those who are delinquent in payment, modern statutory provisions have created a new mode of enforcement—the public sale.[10] Under the common law there existed no means of enforcement of a possessory lien, barring a suit to obtain a writ of execution on the property[11] unless, of course, the parties contracted otherwise. With the enactment of public sale legislation, the lienholder was given an alternative method of satisfying the debt. He could seek a judgment to foreclose the lien, yet often the amount of the lien was too small to foment litigation in the courts. By complying with the statutory procedure, however, similar results could be accomplished by the public sale with a minimum of effort and expense.

Fundamentally, state statutes provide that a garage owner, if in possession of the vehicle, must notify the owner of the auto that the repairs are completed and payment is due.[12] If the bill remains unpaid for the period of time provided for by the statute, the garage owner may give notice to the owner of the vehicle that the car will be sold at public auction.[13] The proceeds of the sale are divided, the lienholder receiving the amount necessary to discharge the debt and the owner of the vehicle being entitled to the excess, if any.[14] Although the requirements vary from jurisdiction to jurisdiction, particularly in regard to notification and the time of notice,[15] all are materially alike.[16] The statutes do not require a judge to determine if a sale to satisfy the lien is warranted.[17] Under some, it is not even necessary to demonstrate that the cost of repairs is fair or reasonable; mere pro-

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and this part of the act does not enlarge the common law, but merely reasserts it. *Id.* at 366.

10. A definition of a public sale has been succinctly stated as "one where the public is invited to participate and given full opportunity to bid on a competitive basis for the property placed on sale, which is sold to the highest bidder." *In re* Katleman's Estate, 269 P.2d 257, 263 (Nev. 1954).

11. 53 C.J.S. *Liens* § 19 (1948).

12. *See, e.g.*, ALAS. STAT. § 34.35.175 (1971); CAL. CIV. CODE § 3051(a) (Deering 1972); GA. CODE ANN. § 67-2401 (1967); TEX. REV. CIV. STAT. ANN. art. 5504 (Supp. 1972).

13. *See, e.g.*, CAL. CIV. CODE § 3052 (Deering 1972); IOWA CODE ANN. § 579.2 (1950).

14. *E.g.*, TEX. REV. CIV. STAT. ANN. art. 5504 (Supp. 1972) which provides:

> When possession . . . has continued for sixty days after the charges accrue, and the charges so due have not been paid . . . the persons so holding said property . . . are authorized to sell said property at public sale and apply the proceeds to the payment of said charges, and shall pay over the balance to the person entitled to the same.

15. *E.g.*, ARK. STAT. ANN. § 51-406 (1971) (owner has 30 days to pay bill; if not paid garagemen has to notify owner by letter and post a notice in five public places); DEL. CODE ANN. ch. 25 § 39.01 (1953) (no letter is needed, only notice in five public places and a newspaper publication 10 days before the sale).

16. *See* Annot., 62 A.L.R. 1485 (1929).

17. *See, e.g.*, ALA. CODE tit. 33 § 25 (Supp. 1971); ARK. STAT. ANN. §§ 51-404 to 51-412 (1971); COLO. REV. STAT. ANN. §§ 86-1-5 to 86-1-8 (1963); DEL. CODE ANN. tit. 25 § 3901 (1953); TENN. CODE ANN. § 64-1903 (1955).

nouncement that the debt is unpaid is enough.[18] At least one state permits a commissioner to hear the owner's plea before a sale is authorized.[19] Under no statute, however, does one find a stipulation that the debtor has an opportunity for a judicial hearing before state sanction of the sale of the vehicle.

In recognition of these provisions, the vehicle owner often finds himself in a dilemma. When he believes that cost of the repairs is excessive or unreasonable, or that the repairs actually completed were unnecessary, his remedies are limited. He may pay the money allegedly due which will extinguish not only the debt, but also any opportunity to contest the validity of the charges or the extent of repairs.[20] The alternative is to forgo payment and retain an attorney to bring an action for conversion against the garageman.[21] In this instance, however, it is the garage owner who is entitled to retain possession of the vehicle pending trial and judgment.[22] Such a solution becomes both expensive and inconvenient to an owner whose vehicle may constitute a necessity, not simply a luxury. Consequently, the latter option is rarely exercised.

In the instant case,[23] Ralph Quebec elected to bring an action contesting not only the validity of the repair charges, but also the summary procedure of collecting the debt permitted by the garagemen's lien statutes.[24] The statutes, Quebec contended, were in violation of the due process clause of the fourteenth amendment which requires both notice and a hearing *before* one may be deprived of possession or use of his property.[25] Before resolving this precise issue, the court evaluated the procedural requirements stipulated in the garagemen's lien statutes.[26] Section 3051 of the California Civil Code provides in part, that

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18. *E.g.*, ALAS. STAT. § 34.35.175 (1971); FLA. STAT. ANN. § 86.08 (1964); ILL. ANN. STAT. ch. 82, § 47a (Supp. 1973).

19. CONN. GEN. STAT. ANN. § 49-61 (Supp. 1973).

20. Comment, *The Application of Sniadach To Banker's And Garageman's Liens*, 4 SW. L. REV. 285, 302 (1972).

21. *Id.* at 302.

22. If the garage owner has voluntarily returned the vehicle to the owner, he may lose his right to possession. Texas Hydraulic & Equip. Co. v. Associates Discount Corp., 414 S.W.2d 199 (Tex. Civ. App.—Austin 1967, no writ).

23. Quebec v. Bud's Auto Serv., 105 Cal. Rptr. 677 (App. Dep't 1973).

24. CAL. CIV. CODE §§ 3051-52, 3068-75 (Deering 1972).

25. A similar contention was debated in Willis v. La Fayette-Phoenix Garage Co., 260 S.W. 364, 367 (Ky. 1924). The argument was not sustained, however, the court noting that:

> [D]ue process of law is any legal procedure enforced by public authority, whether sanctioned by age or custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice.

The court based its decision on the fact that a court of equity could enforce the lien for repairs and that this was sufficient to meet "due process." The Kentucky provisions, however, also allowed a sale of the vehicle without the assistance of the courts, but the court never separated these two forms of enforcement.

26. CAL. CIV. CODE §§ 3051-52, 3068-75 (Deering 1972).

> [K]eepers of garages for automobiles shall have a lien, dependant on possession, for their compensation in caring for and safekeeping, and for making repairs and performing any labor upon or furnishing supplies or materials for such automobiles.

If the owner of the vehicle neglects or refuses to pay within 10 days of the due date, the garageman in possession may commence proceedings to sell the vehicle at public auction.[27] Not less than 10 nor more than 20 days prior to the sale, notice must be afforded the vehicle owner by registered mail and advertisement in a local newspaper.[28] Possession of the vehicle is retained by the garageman until the bill is paid or the car is sold.[29]

After summarizing this procedure, the court took cognizance of the fact that the vehicle owner was not given an opportunity to be heard before the continued retention or the sale of the vehicle. The court then stated what they considered to be the appropriate rule: "It no longer is left to doubt that the general rule is that prejudgment remedies not providing notice and hearing opportunity violate due process except in extraordinary situations."[30] To arrive at this conclusion the court relied upon four cases.[31] Although the facts involved in the cases cited were different, the question of law to be decided in each was essentially the same.

The first case relied upon by the court was *Sniadach v. Family Finance Corp.*[32] The case involved a Wisconsin garnishment procedure which permitted a defendant's wages to be frozen while a debt controversy was pending.[33] No provision for a hearing or notice prior to the time that the garnish-

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27. CAL. CIV. CODE § 3052 (Deering 1972) provides:

> If the person entitled to the lien provided in Section 3051 of this code be not paid the amount due, and for which said lien is given, within ten (10) days after the same shall have become due, then such lien holder may proceed to sell said property, or so much thereof as may be necessary to satisfy said lien and costs of sale at public auction, and by giving at least ten (10) but not more than twenty (20) days' previous notice of such sale by advertising in some newspaper published in the county in which said property is situated; or if there be no newspaper printed in such county, then by posting notice of sale in three (3) of the most public places in the town or place where such property is to be sold, for ten (10) days previous to the date of the sale; provided, however, that prior to the sale of any automobile or trailer to satisfy any such lien, twenty (20) days' notice by registered mail shall be given to the legal owner and to the registered owner of such vehicle, if registered in this State as the same appear in the registration certificate, and also to the Division of Motor Vehicles by registered letter; and the Division of Motor Vehicles shall in like manner immediately notify said legal owner and said registered owner of said proposed sale, but failure on the part of said division to give such notice shall not affect the validity of any such sale . . . .

28. *Id.*

29. First Nat'l Bank v. Silva, 254 P. 262 (Cal. 1927).

30. Quebec v. Bud's Auto Serv., 105 Cal. Rptr. 677, 679 (App. Dep't 1973).

31. Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969); Blair v. Pitchess, 96 Cal. Rptr. 42 (1971); Randone v. Appellate Dep't, 96 Cal. Rptr. 709 (1971), *cert. denied*, 407 U.S. 924 (1972).

32. 395 U.S. 337 (1969). The finance company had commenced garnishment proceedings naming Sniadach as defendant to recover some $420 on a promissory note.

33. Under Wisconsin procedure, a clerk of the court would issue a summons to the

ment became effective was included in the statutes. After analyzing this procedure the Supreme Court of the United States concluded:

> Such summary procedure may well meet the requirements of due process in extraordinary situations. But in the present case no situation requiring special protection to the state or creditor interest is provided . . . .
>
> The right to be heard "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."[34]

The standard announced by the Court appeared to be a mere reiteration of principles firmly established by prior decisions.[35] The right to be heard at a meaningful time and manner had been a central doctrine of due process for more than a century.[36] The importance of the *Sniadach* decision rests in the Court's determination that a deprivation of property occurs not only when the legal owner has his property wrongfully taken, but also when he is deprived of the *use* of his property before a final judgment.[37]

Subsequent to the *Sniadach* case, both state and federal courts took opposing viewpoints concerning the true basis of the *Sniadach* holding.[38] Some courts reasoned that although the opinion made reference to the hardship of garnishment of wages, no valid distinction between wages and other property could be maintained.[39] Courts taking a "stricter" approach agreed that *Sniadach* merely "carved out an exception for wage earners," thus it

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creditor's lawyer, who had to serve the summons and the complaint on the defendant within 10 days. WIS. STAT. ANN. § 267.07(1) (Supp. 1973). The garnishee, prior to a 1969 amendment, was entrusted to retain the defendant's property and provide no payment therefor except for a subsistence allowance. Wis. L. 1965, ch. 507 § 1, *as amended* WIS. STAT. ANN. § 267.04 (Supp. 1973). During the interim before final judgment, the amount that was to serve as subsistence was provided in Wis. L. 1965, ch. 507, § 1, *as amended* WIS. STAT. ANN. § 267.18 (Supp. 1973) which allowed payment "in the sum of $25 in the case of an individual without dependents or $40 in the case of an individual with dependents; but in no event in excess of 50 per cent of the wages or salary owing."

34. Sniadach v. Family Fin. Corp., 395 U.S. 337, 339 (1969) (citations omitted).

35. *E.g.*, Opp Cotton Mills v. Administrator, 312 U.S. 126, 153 (1940); United States v. Illinois Cent. R.R., 291 U.S. 457, 460 (1934); Southern Ry. v. Virginia, 290 U.S. 190, 194 (1933); Londoner v. City & County, 210 U.S. 373, 385 (1908); Glidden v. Harrington, 189 U.S. 255, 258 (1903).

36. Armstrong v. Manzo, 380 U.S. 545 (1965); Grannis v. Ordean, 234 U.S. 385 (1914); Havey v. Elliot, 167 U.S. 409 (1897); Windsor v. McVeigh, 93 U.S. 274 (1876); Baldwin v. Hale, 68 U.S. 223 (1863). Prior to *Sniadach*, however, the courts held that due process requires an opportunity to be heard at some stage of the proceedings. Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950).

37. *See* Note, *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 114 (1969).

38. A remark made by the Supreme Court provided the impetus for a controversy: "We deal here with wages—a specialized type of property presenting distinct problems in our economic system." Sniadach v. Family Fin. Corp., 395 U.S. 337, 340 (1969).

39. *E.g.*, Randone v. Appellate Dep't, 96 Cal. Rptr. 709 (1971); Larson v. Fetherstone, 172 N.W.2d 20 (Wis. 1969) (garnishment proceeding).

did not affect the validity of other prejudgment seizures.[40] The controversy was further extended when a later case decided by the Supreme Court involving prejudgment remedies did little to alleviate the disparity of opinion.[41]

In California, the courts were early adherents to the more "liberal" reading of *Sniadach*, applying the notice and prior hearing doctrine not only to their own method for garnishment of wages,[42] but extending it to other summary procedures.[43] The claim and delivery statutes[44] were held unconstitutional by the California Supreme Court in the case of *Blair v. Pitchess*.[45] The deprivation in *Blair* was not merely the "use" of the property. Rather it involved the intrusion of a state agent into the possessor's home to physically remove the property from the premises. In principle, however, both methods, garnishment of wages and claim and delivery, constitute a "taking" without due process of law.[46]

Shortly thereafter, in *Randone v. Appellate Department*,[47] the attachment statutes were questioned on similar grounds. Again the procedure involved failed to satisfy the due process mandates of notice and a prior hearing. The Supreme Court of California, citing *Blair* as conclusive authority, announced:

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40. American Olean Tile Co. v. Zimmerman, 317 F. Supp. 150, 152 (D. Hawaii 1970); *see* Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970); Reeves v. Motor Contract Co., 324 F. Supp. 1011 (N.D. Ga. 1971).

41. Goldberg v. Kelly, 397 U.S. 254 (1970). In this case, appellees were welfare recipients whose benefits were suddenly terminated without notice. The Supreme Court held that the fact a hearing was provided *after* the termination of benefits was insufficient to satisfy due process. Once again, however, the language used in the decision indicated that the case involved special circumstances. The Court in *Goldberg* quoted from an earlier decision in stating: "Suffice it to say that to cut off a welfare recipient in the face of . . . 'brutal need' without a prior hearing of some sort is unconscionable . . . ." *Id.* at 261, *quoting* Kelly v. Wyman, 294 F. Supp. 893, 899 (1968).

42. McCallop v. Carberry, 83 Cal. Rptr. 666 (1970); *accord,* Cline v. Credit Bureau, 83 Cal. Rptr. 669 (1970).

43. Randone v. Appellate Dep't, 96 Cal. Rptr. 709, 712 (1971), declaring unconstitutional CAL. CODE CIV. PROC. §§ 537-561 (Deering 1954); Blair v. Pitchess, 96 Cal. Rptr. 42 (1971), holding the procedure of the claim and delivery statutes unconstitutional, CAL. CODE CIV. PROC. §§ 509-521 (Deering 1954).

44. CAL. CODE CIV. PROC. §§ 509-521 (Deering 1954).

45. 96 Cal. Rptr. 42 (1971). The court in analyzing the statutory procedure noted that a party must file an affidavit stating that he owns or is entitled to the property in question and that the defendant is wrongfully detaining it. Once the affidavit is filed, a summons is issued and the party may require the sheriff, constable or marshal to retake possession from the defendant. A possessor was often unaware that the summons had issued until the sheriff was knocking at the door demanding the goods. A defendant's opportunity to be heard existed only after the seizure had been completed. *Id.* at 46-48.

46. Blair v. Pitchess, 96 Cal. Rptr. 42, 56 (1971).

47. 96 Cal. Rptr. 709 (1971). Under California attachment provisions, a creditor was permitted to attach any property of the debtor upon a filing of an action to recover the debt. This practice had become the most flexible mode of satisfaction for creditors owing first, to its broad provisions and second, to its reference to *any* property.

> *Blair* fully recognized that the *Sniadach* decision did not establish a new constitutional rule for wages, but on the contrary, simply brought the traditional procedural due process analysis . . . to bear upon the question of the validity of summary prejudgment remedies.[48]

These two cases, *Blair* and *Randone,* unmistakably informed creditors in California that all summary procedures were susceptible to attack on constitutional grounds.

Although the position of the courts in regard to prejudgment remedies was becoming settled in California, an authoritative response to the *Sniadach* controversy was not heard from the United States Supreme Court until the landmark case of *Fuentes v. Shevin.*[49] The *Fuentes* case involved replevin provisions which permitted repossession of goods upon default of payment under conditional sales contracts by the filing of an affidavit to that effect.[50] The Supreme Court held the statutes unconstitutional, relying upon the principles that *Sniadach* had previously established.[51]

In the instant case, the court apparently started with the premise that the garagemen's lien procedure was unconstitutional. The only issue presented was whether this lien came within the purview of the "extraordinary situations" referred to in *Sniadach,* that is, special need for protection of a state

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48. 96 Cal. Rptr. 709, 717 (1971).

49. 407 U.S. 67 (1972). Mrs. Fuentes had purchased a stereo and a stove under a conditional sales contract. Both articles were part of one account, therefore, when the stove stopped working and Mrs. Fuentes stopped payment on the stove, she was also in default on the stereo. Firestone Tire and Rubber Company, from whom the goods were bought, retained legal title, until final payment. Four other plaintiffs were joined in the suit. Three others had also been involved in replevin proceedings subsequent to default in monthly installment charges, the fourth having recently obtained a divorce from her husband. This latter defendant became involved when, during a custody dispute, the husband obtained a writ of replevin and repossessed their child's clothes, furniture and toys.

50. Under the Florida provisions: "Any person whose goods or chattels are wrongfully detained . . . may have a writ of replevin to recover them . . . ." No notice or opportunity of a prior hearing is provided. The plaintiff merely makes an assertion that he is entitled to the property. FLA. STAT. ANN. §§ 78.01-78.13 (Supp. 1972). The Pennsylvania statutes are essentially the same, however, there is no requirement that there *ever* be a hearing on the merits. PA. RULES CIV. PROC. 1071-1086 (1967).

51. *Sniadach* was not limited to wages according to the *Fuentes* decision, but rather it was "in the mainstream of past cases . . . establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect." Fuentes v. Shevin, 407 U.S. 67, —, 92 S. Ct. 1983, 1998, 32 L. Ed. 2d 556, 574 (1972). The *Fuentes* opinion implied that the Supreme Court considered the applicable law to be well settled.

At least one court, however, has refused to follow *Fuentes.* Roofing Wholesale Co. v. Palmer, 502 P.2d 1327, 1329 (Ariz. 1973). The court in *Palmer* noted that the *Fuentes* decision, if followed, would render the Arizona garnishment statutes unconstitutional. The court, however, felt that the *Fuentes* decision was not binding because the Supreme Court had not decided the issue by a clear majority (4-3-2 decision). This reasoning would leave many decisions beyond the reach of stare decisis.

or creditor interest.[52] The court, quoting *Fuentes*, noted the types of situations previously deemed extraordinary:

> First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.[53]

The court in considering the position of the garage owner and the vehicle owner, viewed it as nothing more than a mere debtor-creditor relationship. The opinion stated that the government surely had no more interest in this type of debt than in others of its kind created and terminated daily, nor had the evidence presented any substantial need for special creditor protection.[54] Consequently, no adequate justification having been ascertained, the court's conclusion was unavoidable: "The statutes herein contain the same evils found in *Sniadach, Fuentes, Blair* and *Randone.*"[55] This being true, they were held to be clearly unconstitutional.

Although the possessory lien issue in the *Quebec* case was one of first impression, the court had little difficulty in extending the constitutional mandates of procedural due process to obvious violations inherent in the specific statutes. While it is conceded that under garagemen's lien statutes possession is relinquished voluntarily, the retention of possession by the garage owner during the dispute is certainly a "taking" of the owner's use of his vehicle. It is no answer to say that the deprivation is only temporary. Even "[A] temporary, non-final deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment."[56] Moreover, under most existing statutes the garage owner may deprive the owner *permanently* through the extra-judicial process of public sale. These statutes then become, in practice, more oppressive than the prejudgment remedies previously held unconstitutional by the Supreme Court.

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52. In four cases cited by *Sniadach,* "extraordinary situations" were presented. A prejudgment remedy was available to enable government seizure of mislabeled goods. Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950). Another exception was found where the appointment of a conservator was necessary in view of a delicate banking situation. Fahey v. Mallonee, 332 U.S. 245 (1947). In Coffin Bro. & Co. v. Bennett, 277 U.S. 29 (1928), attachment was allowed without notice to protect against a bank failure. Finally, attachment was permitted in order to secure jurisdiction in a state court. Ownbey v. Morgan, 256 U.S. 94 (1921).

53. Fuentes v. Shevin, 407 U.S. 67, —, 92 S. Ct. 1983, 2000, 32 L. Ed. 2d 556, 576 (1972).

54. Quebec v. Bud's Auto Serv., 105 Cal. Rptr. 677, 680 (App. Dep't 1973).

55. *Id.* at 680.

56. Fuentes v. Shevin, 407 U.S. 67, —, 92 S. Ct. 1983, 1996, 32 L. Ed. 2d 556, 572 (1972).

For many years the creditors of this country have enjoyed the benefits of prejudgment remedies conferred upon them by statute. The validity of the procedures being unquestioned, the debtor was put in a position of subservience to the creditor's demands. Recent decisions in the area of prejudgment remedies suggests, however, that future litigation and legislation will create a balancing of the debtor-creditor relationship. Liens dealing with innkeepers,[57] landlords,[58] and now garage owners have all been declared violative of due process. Garnishment and attachment procedures have encountered a similar fate. Yet, as in other areas where breakthroughs have been achieved, many questions raised by the cases remain unanswered. For example, what kind of hearing is necessary to satisfy due process? At least one court noted the problem, but without reply.[59] The effect of a contractual waiver of one's right to be heard has led courts down dissimilar paths,[60] as has the status of the self-help provision of the Uniform Commercial Code.[61] Ultimately, these conflicts will have to be resolved, either by decision or statute. It is hoped that during the re-evaluation of the debtor-creditor relationship *vis-a-vis* due process, that other oppressive measures not requiring judicial involvement will be denounced.

*Michael J. Noonan*

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57. Collins v. Viceroy Hotel Corp., 338 F. Supp. 390 (N.D. Ill. 1972), declaring unconstitutional the summary procedure found in ILL. REV. STAT. ch. 71, § 2 and ch. 82, § 57 (1969) which allowed an owner of a hotel to acquire a lien upon the personal property of a guest who failed to pay the rent.

58. Hall v. Garson, 468 F.2d 845 (5th Cir. 1972). Under Texas law, TEX. REV. CIV. STAT. ANN. art. 5238a (Supp. 1972), a landlord was given a lien on the personal property belonging to the tenant that was located within the dwelling if the rent was not paid. Like other lien statutes under discussion, the landlord retained possession of the seized articles until the rent was paid.

59. Fuentes v. Shevin, 407 U.S. 67 (1972) made some very general statements about the problem but eventually determined it was a matter for the legislature, not the judiciary. They did announce, however, that the nature and form of the hearing are "open to many potential variations." The hearing must be such as to establish probable validity of the claim in question. *Id.* at —, 92 S. Ct. at 2002, 32 L. Ed. 2d at 578.

60. *See* Buckner v. Carmack, 272 So. 2d 326, 330 (La. 1973) where the court held that "a contractual confession of judgment . . . effectively waives the right to a routine adversary hearing." *Contra*, Etheredge v. Bradley, 502 P.2d 146 (Alas. 1972). The interest aroused by the recent cases is exemplified by the fact that in the Louisiana case cited above, over one page in the Southern Reporter is needed just to list the attorneys who filed amici curiae briefs. The opinion itself is less than three pages long.

61. UNIFORM COMMERCIAL CODE § 9-503 provides:

> Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking the possession the secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action.

The above section has been declared unconstitutional in Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972), yet upheld in Messenger v. Sandy Motors, Inc., 295 A2d 402 (Super. Ct. N.J. 1972).