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Landlord May Not Exercise Contractual Lien over Tenant's Property without Affording Opportunity for Prior Notice and Hearing.

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of law and establish a flexible rule compatible with statutory case law and modern securities transaction situations, the Supreme Court took a narrow view of the *Birnbaum* doctrine, as well as the applicable antifraud provisions, and pronounced a rule which does not sufficiently recognize established modifications and exceptions. Since section 10(b) and rule 10b-5 do not specify the class of person protected, a limiting doctrine may be necessary; however, a flexible standard is also necessary in dealing with various factual situations and to assure proper plaintiffs a cause of action. In view of the broad, remedial purpose of section 10(b) and rule 10b-5, this decision is regrettable for it will deprive many deserving plaintiffs of a remedy for fraud in connection with the purchase or sale of securities.

Roberta Gail Weatherby

LANDLORD'S LIEN STATUTE—Article 5236d—Landlord May Not Exercise Contractual Lien Over Tenant's Property Without Affording Opportunity for Prior Notice and Hearing

Fancher v. Cronan,

——F. Supp. —— (S.D. Tex. 1975).

Joe Fancher moved into an apartment complex in Houston, and signed a written rental agreement which included a contractual landord's lien pursuant to article 5236d of the Texas civil statutes.[1] After notifying Fancher of

1. TEX. REV. CIV. STAT. ANN. art. 5236d (Supp. 1975) provides in pertinent part:
Section 1. The operator of any residential house, apartment, duplex, or other single or multi-family dwelling, shall have a lien upon all property stored by the tenant within a storage room for all rentals due and unpaid by the tenant, except that property specifically exempted hereinafter.
Section 2. Notwithstanding any other statute to the contrary, there shall be exempt from the lien set out in Section 1 above, the following: (1) all wearing apparel, (2) all tools, apparatus and books belonging to any trade or profession, (3) school books, (4) one automobile and one truck, (5) family library and all family portraits and pictures, (6) household furniture to the extent of one couch, two living room chairs, dining table and chairs, (7) all beds and bedding, (8) all kitchen furniture and utensils, (9) all food and foodstuffs, (10) all medicine and other medical supplies, (11) all goods known by the landlord or his agent to belong to persons other than the tenant or other occupants of such dwelling, (12) all goods known by the landlord or his agent to be subject to a recorded chattel morgage lien or financing agreement, and (13) all agricultural implements . . . .
. . . .
Section 4. A contractual landlord's lien shall not be enforceable unless underlined or printed in conspicuous bold print in the rental agreement.

an alleged rental arrearage, apartment manager Jane Cronan entered the apartment while Fancher was absent and removed a television set and stereo components. Later that day Fancher received written notice of the seizure. He brought an action in United States District Court, claiming that the rental agreement was contrary to the public policy of the State of Texas and thereby void. Fancher based his allegations on the premise that the action by defendants constituted state action for the purposes of the fourteenth amendment, and that therefore he was denied procedural due process because he did not receive prior notice or hearing before the items were seized. The plaintiff also contended that he did not waive any rights to such notice or hearing by signing his rental agreement. Held—*For Plaintiff.* Regardless of the provisions of the written rental agreement, the landlord may not seize his tenant's property without providing an opportunity for prior notice and hearing. Such action constitutes a denial of due process; therefore, article 5236d is violative of the fourteenth amendment.[2]

The present day landlord's lien is similar to the common law innkeeper's lien.[3] In 17th century England, the dangers of traveling required that the innkeeper accept all guests. He was completely responsible for the safety of their possessions, but he also had a lien on a guest's property, excluding clothing and other personal effects, until all reasonable and just charges were paid.[4]

From the common law innkeeper's lien evolved the statutory lien now available in many jurisdictions throughout the United States to proprietors of such establishments as boarding houses, apartment houses, motels and hotels.[5] The Texas Legislature in 1874 passed the predecessor of the current landlord's lien statute in the form of a Hotel Operator's Baggage Lien Law, following the guidelines of the common law innkeeper's lien.[6] This 1874 Act was later amended to allow the hotel proprietor to take possession of the guest's property.[7] In 1969, article 5238a—more commonly known as the "Baggage Lien for Rent" statute or the "Landlord's Lien" statute—went into effect.[8]

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2. Fancher v. Cronan, — F. Supp. — (S.D. Tex. 1975).

3. *See* Watkins v. Hotel Tutwiler Co., 76 So. 302, 304 (Ala. 1917); Stoll v. Almon C. Judd Co., 138 A. 479, 481 (Conn. 1927). *See also* Annot., 37 A.L.R.3d 1276 (1971).

4. *See* Cedar Rapids Inv. Co. v. Commodore Hotel Co., 218 N.W. 510, 511 (Iowa 1928); Fudge v. Downing, 27 P.2d 33, 37 (Utah 1933). *See generally* 40 AM. JUR. 2d *Hotels, Motels & Restaurants* § 187, at 1049 (1968).

5. *See* Stalcup & Williams, *Annual Survey of Texas Law: Property*, 24 SW. L.J. 30, 32 (1970).

6. *See* Comment, *Fuentes v. Shevin: The Constitutionality of Texas' Landlord Laws and Other Summary Procedures*, 25 BAYLOR L. REV. 215, 220 (1973).

7. TEX. REV. CIV. STAT. ANN. art. 4594 (1960).

8. Tex. Laws 1969, ch. 686, at 2008 provided in part:

> The operator of any residential house, apartment, duplex or other single or multi-family dwelling, shall have a lien upon all baggage and all other property found within the tenant's dwelling for all rents due and unpaid by the tenant thereof; and

Thus from the common law landlord's right of distress[9] and the inkeeper's lien there developed a statute which gave the lessor a lien upon all baggage and other property not exempt by statute, which was found within the tenant's dwelling. This lien provided the landlord with the right to retain such property until the amount of unpaid rent was tendered, and also entitled the landlord to use self-help remedies for debt satisfaction.[10] Acting under color of the law, the landlord determined not only the existence of the unpaid rent, but also the need for immediate seizure of the tenant's property. Under authority of the statute, the lessor could enter the tenant's apartment with a pass-key while the latter was gone and remove any non-exempt item. This was purely an extrajudicial, self-help remedy which afforded the tenant no right to notice or hearing before his property was seized.[11]

The Fifth Circuit Court of Appeals held article 5238a unconstitutional declaring that it worked a deprivation of property without allowing for due process of law because it denied a tenant the right to be heard before his chattels were seized by his landlord.[12] In *Hall v. Garson*,[13] plaintiff Claudine Hall returned to her apartment and discovered her television set missing. She was allegedly in arrears on her rent, and her landlord had seized her television under the authority of article 5238a; neither notice nor hearing was provided before the set was removed. After taking the television, the landord notified Hall that it was being held for the rent and would be returned upon payment of the arrearage. Rather than paying the disputed rent, Hall brought suit individually and in the form of a class action challenging the constitutionality of the Texas Landlord's Lien Statute under the Due Process Clause of the fourteenth amendment.

The *Hall* decision, abrogating article 5238a, came in the wake of two United States Supreme Court decisions, *Sniadach v. Family Finance Corp.*[14] and *Fuentes v. Shevin*.[15] *Sniadach* attacked the constitutionality of a Wisconsin prejudgment wage garnishment procedure under which the plaintiff finance corporation had filed a garnishment complaint alleging indebtedness on a promissory noted executed by the garnishee.[16] In striking down the

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said operator shall have the right to take and retain possession of such baggage and other property until the amount of such unpaid rent is paid.

9. This method of self-help developed from the feudal tenure relationship which existed between lord and vassal, and was limited to the collection of a rent service due to the tenure relationship which existed between the landlord as owner of the reversion and the tenant as owner of the leasehold estate. 2 AMERICAN LAW OF PROPERTY § 9.45, at 473 (A. Casner ed. 1952).

10. Tex. Laws 1969, ch. 686, at 2008.

11. *See* Comment, *Procedural Due Process: For Sale in Texas to the Highest Bidder?*, 10 HOUS. L. REV. 880, 893 (1973).

12. Hall v. Garson, 468 F.2d 845 (5th Cir. 1972).

13. *Id.*

14. 395 U.S. 337 (1969).

15. 407 U.S. 67 (1972).

16. Texas civil procedure laws were not affected by *Sniadach* because wage garnish-

prejudgment seizure, the Court held that notice and a fair hearing must be afforded a garnishee before such a prejudgment wage garnishment could be enforced.[17] In *Fuentes*, the Supreme Court invalidated Florida and Pennsylvania statutes which provided for summary seizure of goods in a person's possession under a writ of replevin issued upon the *ex parte* application of any other person claiming a right to those goods who posted a security bond.[18] The *Fuentes* decision resolved the dispute over the proper scope of *Sniadach*, holding that the constitutional protection of procedural due process can be properly applied to summary prejudgment actions other than a prejudgment wage garnishment.[19]

Article 5238a, by allowing a landord to seize a tenant's property without notice or hearing, was within the category of prehearing seizures affected by the *Sniadach* and *Fuentes* decisions; therefore, the Texas Legislature expressly repealed that statute and replaced it with the somewhat more restrictive article 5236d.[20] The present article denies the landord self-help as to the tenant's property unless such right is specifically granted as a contractual lien in the written rental agreement between the landlord and tenant.[21] Under the statute the landlord is precluded from enforcing a contractual landlord's lien unless such provision is underlined or printed in bold, conspicuous type.[22]

In *Fancher v. Cronan*,[23] the federal district court refused to acknowledge any true distinction between repealed article 5238a and article 5236d. It chose instead to rely extensively on *Hall v. Garson*[24] in determining that

ment is prohibited by the Texas Constitution. TEX. CONST. art. XVI, § 28; *see* TEX. REV. CIV. STAT. ANN. art. 4099 (1966).

17. Sniadach v. Family Fin. Corp., 395 U.S. 337, 339-42 (1969). *See also* Comment, *Procedural Due Process: For Sale in Texas to the Highest Bidder?*, 10 HOUS. L. REV. 880 (1973).

18. Fuentes v. Shevin, 407 U.S. 67, 92-93 (1972).

19. *Id.* at 90-93.

20. Art. 5238a was repealed effective Sept. 1, 1973, Tex. Laws 1973, ch. 441, § 5, at 1228, and replaced by the Texas Landlord's Lien for Rent Act, TEX. REV. CIV. STAT. ANN. art. 5236d (Supp. 1975).

21. TEX. REV. CIV. STAT. ANN. art. 5236d (Supp. 1975). This contractual lien upon chattels has been construed to be a chattel mortgage. *See* Thomas v. Gulfway Shopping Center, Inc., 320 F. Supp. 756, 764 (S.D. Tex. 1970); United States v. Menier Hardware No. 1, Inc., 219 F. Supp. 448, 458 (W.D. Tex. 1963); Shwiff v. City of Dallas, 327 S.W.2d 598, 602 (Tex. Civ. App.—Dallas 1959, writ ref'd n.r.e.); Leonard v. Burton, 11 S.W.2d 668, 670 (Tex. Civ. App.—El Paso 1928, no writ). *See generally* Wallenstein, *Annual Survey of Texas Law: Property*, 28 Sw. L.J. 27, 60 (1974).

22. TEX. REV. CIV. STAT. ANN. art. 5236d (Supp. 1975). Some 13 categories of property are nonetheless exempt from a duly authorized landlord's lien in a written rental agreement. The list of exempt items does not include televisions, stereos, records, musical instruments, typewriters, calculators, adding machines, certain paintings and books, sewing machines, radios, clocks, certain furniture, sports equipment, or motorcycles or bicycles (if found within the tenant's dwelling or within the storage area). *Id.* § 2.

23. — F. Supp. — (S.D. Tex. 1975).

24. 468 F.2d 845 (5th Cir. 1972).

article 5236d, like article 5238a, authorizes state-like action by permitting the landlord to remove the tenant's property without prior notice or hearing.[25] Plaintiff Fancher based his claim on a charge that the taking of his property was a violation of the Due Process Clause and that the 1964 Civil Rights Act entitled him to relief.[26] That Act requires any alleged deprivation of a constitutional or statutory right to be attributable to the actions of any person "acting under color of state law."[27] In determining that the defendant's seizure constituted such state action, the court in *Fancher* relied on the reasoning employed by the Fifth Circuit Court of Appeals in *Hall*. In that case the court held that although the alleged wrongful act was committed by a person who was not an officer of the state or an official of any state agency, the entry into the tenant's home and the seizure of his property was an act characteristic of the state because such action has traditionally been the function of a state officer, such as a sheriff or constable.[28]

Although the defendants in *Fancher* argued that no state official was involved in the seizure of the television set, the court agreed with the *Hall* decision in that the acts of a private citizen can become the actions of the state for purposes of the Civil Rights Act and under the Due Process Clause of the fourteenth amendment.[29] The *Hall* decision went much further than previous cases in holding that a private citizen acting *alone* can be acting with the requisite state action necessary to constitute a cause of action under section 1983.[30] The *Fancher* court was willing to rely on this precedent and to ignore other holdings to the effect that a mere finding of state action is insufficient to bring such a claim within the purview of section 1983. Those cases have held that the proper test, where there is no direct state action, is whether the state action rises to the level of significant involvement.[31]

The *Fancher* court reinforced its ruling by relying on several decisions which have held that self-help repossessions under Section 9-503 of the Uniform Commercial Code,[32] unlike the landlord's lien, do not involve state

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25. Fancher v. Cronan, — F. Supp. — (S.D. Tex. 1975).

26. 42 U.S.C. § 1983 (1970).

27. In United States v. Price, 383 U.S. 787, 794 n.7 (1966), the Court stated: "In cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment."

28. Hall v. Garson, 430 F.2d 430, 439-40 (5th Cir. 1970).

29. Fancher v. Cronan, — F. Supp. — (S.D. Tex. 1975).

30. *Compare* Hall v. Garson, 468 F.2d 845 (5th Cir. 1972) *with* Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) *and* Baldwin v. Morgan, 287 F.2d 750 (5th Cir. 1961).

31. *See* Turner v. Impala Motors, 503 F.2d 607, 609 (6th Cir. 1974); Gibbs v. Titelman, 502 F.2d 1107, 1111 (3d Cir.), *cert. denied*, 419 U.S. 1039 (1974); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 330 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974).

32. UNIFORM COMMERCIAL CODE § 9-503 provides, in 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

action.[33] The leading case in the Fifth Circuit is *James v. Pinnix*,[34] in which a purchaser of a used automobile brought a class action under section 1983 against an auto dealer to restrain him from further attempts at self-help repossession of the automobile after default in payments, and to have the statute authorizing such repossessions declared unconstitutional. The district court granted the relief requested, but the Fifth Circuit reversed, finding a lack of requisite state action.[35] In refusing to extend the *Hall* state action theory to cover the *James* situation, the court in *James* noted the difference between the landlord-tenant relationship, emphasizing that in *Hall* the debt arose from an agreement having nothing to do with the goods, and the seizure of the tenant's property closely resembled a taking in satisfaction of a judgment, which is traditionally performed by a state agent.[36]

Although the *James* court refused to apply the *Hall* doctrine, it did recognize the doctrine as valid law; therefore, the court in *Fancher* was confident in its reliance on *Hall*. In *Hall*, the landlady seized goods pursuant to rights granted by statute,[37] whereas in *Fancher*, the defendants seized only those goods specified in the lease agreement to be seized in case of default, and the goods were taken pursuant to the contractual agreement between the parties.[38] Perhaps as in *James*, the *Fancher* defendants "possessed and claimed no roving commission" arising out of a statute, but rather derived their power to seize the goods solely from the lease agreement.[39]

Other cases have affirmed the view set forth in *James* concerning UCC Section 9-503. In *Calderon v. United Furniture Co.*,[40] the appellant claimed that because the furniture company which had sold him a washing machine had its agents break into his home to repossess it, there was state action, thus distinguishing his case from *James* and bringing it under the purview of *Hall*, where the acts possessed many of the characteristics of the state. The court in *Calderon* rejected that rationale, pointing out that the Texas Landlord's

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process if this can be done without breach of the peace or may proceed by action. It should be noted that under § 9-104(b) of the Uniform Commercial Code, the landlord's lien is specifically exempted from § 9-503.

33. *See* Turner v. Impala Motors, 503 F.2d 607, 611-12 (6th Cir. 1974); Gibbs v. Titelman, 502 F.2d 1107, 1110-11 (3d Cir.), *cert. denied*, 419 U.S. 1039 (1974); Nowlin v. Professional Auto Sales, Inc., 496 F.2d 16, 17 (8th Cir.), *cert. denied*, 419 U.S. 1006 (1974); Adams v Southern Cal. First Nat'l Bank, 492 F.2d 324, 328-29 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974). *See generally* Spak, *The Constitutionality of Repossession by Secured Creditors Under Article 9-503 of the Uniform Commercial Code*, 10 HOUS. L. REV. 855 (1973).

34. 495 F.2d 206 (5th Cir. 1974).

35. *Id.* at 208-209.

36. *Id.* at 208.

37. 430 F.2d 430, 433 (5th Cir. 1970). The Fifth Circuit held virtually the same on a second appeal, 468 F.2d 845 (5th Cir. 1972).

38. Fancher v. Cronan, — F. Supp. — (S.D. Tex. 1975).

39. James v. Pinnix, 495 F.2d 206, 208 (5th Cir. 1974).

40. 505 F.2d 950 (5th Cir. 1974).

Lien Statute encompassed state action because it authorized the landlord to enter the tenant's home and seize property which had no relationship whatsoever to the debt.[41]

The court in *Fancher* denied the existence of any relationship between its situation and the UCC 9-503 situations because of the landlord's lack of secured interest in the property seized.[42] But the defendant's authority to seize the tenant's property was derived solely from their contract, and while the purchase of the property seized had not created the debt, the property was related to the debt in that the plaintiff had granted the defendant a lien on that property in the written lease agreement.

The defendants in *Fancher* conceded that if the action complained of constituted state action, then the plaintiff was denied due process of law.[43] The federal district court again chose to rely on the *Hall* decision, noting that what was said about article 5238a is also applicable to article 5236d.[44] In *Hall* the court stated that under article 5238a the landlord himself decided when to seize the tenant's property, without an impartial determination of the validity of his claim, and without providing an opportunity for challenge by the tenant.[45]

Sniadach set forth the premise that due process can be achieved only by the kinds of notice and hearing which attempt to validate the underlying claim of the debtor before he is deprived of his property.[46] *Fuentes* extended the requirements of notice and hearing under the fourteenth amendment; the Supreme Court stated that broadly drawn statutes allowing prejudgment seizure of property by state officers without an opportunity to be heard no longer would withstand constitutional scrutiny.[47] The court in *Fancher* therefore relied on the reasoning that the tenant must be given notice and a reasonable opportunity for such a hearing prior to any seizure.[48]

The Supreme Court held in *Mitchell v. W.T. Grant Co.*[49] that a Louisiana trial judge had not violated due process when he ordered personal property sequestered without allowing prior notice or affording an opportunity for hearing.[50] The writ of sequestration was ordered upon an *ex parte* application of an installment sales creditor whose affidavit alleged an arrears in

41. *Id.* at 951. *See also* Brantley v. Union Bank & Trust Co., 498 F.2d 365 (5th Cir.), *cert. denied*, 419 U.S. 1034 (1974).
42. Fancher v. Cronan, — F. Supp. — (S.D. Tex. 1975).
43. *Id.* at —.
44. *Id.* at —.
45. *Id.* at —.
46. Sniadach v. Family Fin. Corp., 395 U.S. 337, 342 (1969).
47. Fuentes v. Shevin, 407 U.S. 67, 93 (1972).
48. Fancher v. Cronan, — F. Supp. —, — (S.D. Tex. 1975), *citing* North Georgia Finishing, Inc. v. Di-Chem, Inc., — U.S. —, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974).
49. 416 U.S. 600 (1974).
50. *Id.* at 605.

payment creating a vendor's lien. The writ could have been dissolved immediately by the debtor upon his bond, or upon the creditor's failure to prove the debt, the lien, or the delinquency. The Supreme Court held that this was an acceptable accommodation of the parties' conflicting interests in the sequestered property.[51] It was stressed throughout that the seller-creditor had a legally recognized interest in the property seized, and as a result, the court in *Fancher* did not hesitate in maintaining that *Mitchell* had no effect on the landlord's seizure of plaintiff Fancher's property being a denial of due process.[52]

The court in *Fancher* reached a similar conclusion about *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,[53] in which the Supreme Court held that due process was violated when a Georgia court clerk issued a garnishment summons, upon the *ex parte* application of the plaintiff on a bond where the defendant maintained a bank account.[54] The plaintiff's application was accompanied by an affidavit which asserted the debt sued upon and the reason for apprehension of loss of the garnished sum. Defendant had no notice or opportunity to be heard before the issuance of the process of garnishment, but again, the *Fancher* court recognized no relation between its situation and the one in *North Georgia*.[55]

The individual defendants in *Fancher* ignored the issue of plaintiff's waiver of his rights in the signing of the rental agreement, but the State of Texas, as intervenor, contended that the plaintiff accomplished "an intentional relinquishment or abandonment of a known right or privilege when he signed the rental agreement."[56] The court rejected this argument, for lack of proof, relying instead on the proposition for an effective waiver of due process set forth in *Fuentes*. To insure validity under *Fuentes*, such a waiver must appear in type commensurate in size with the type or print in the body of the contract, must actually be bargained for on a status of equal and full understanding of its meaning, and must be accompanied by an explanation of its impact or must specifically describe what is in fact being waived.[57] The court held that the lease in *Fancher* did not satisfy these requirements, particularly since the purported waiver was a printed part of a standard form apartment lease and a necessary condition for rental.[58]

The federal court's decision in *Fancher* leaves unanswered the question of whether the Constitution prohibits a landlord and tenant from entering into a

51. *Id.* at 604.
52. Fancher v. Cronan, — F. Supp. — (S.D. Tex. 1975).
53. — U.S. —, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975).
54. *Id.* at —, 95 S. Ct. at 757, 42 L. Ed. 2d at 757.
55. Fancher v. Cronan, — F. Supp. —, — (S.D. Tex. 1975).
56. *Id.* at —; *accord*, D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185-86 (1972); Adams v. Joseph F. Sanson Inv. Co., 376 F. Supp. 61, 67-68 (D.C. Nev. 1974). *See also* Johnson v. Zerbst, 304 U.S. 458, 464 (1938).
57. *See* Fuentes v. Shevin, 407 U.S. 67, 94 (1972).
58. Fancher v. Cronan, — F. Supp. — (S.D. Tex. 1975).