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Fuentes v Shevin: The New York Creditor and Replevin

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FUENTES v. SHEVIN: THE NEW YORK CREDITOR AND REPLEVIN

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INTRODUCTION

It is a commonplace that replevin, and its out-of-court equivalent, self-help repossession, have become critical creditor remedies.[1] Originated in the repetitive struggle over contested property rights, they have achieved primary significance in the credit context as twentieth century financing developments have increasingly concentrated on lien and security interest devices over personal property—ranging from the financing of the kitchen stove or family automobile to complex industrial equipment.[2] The Uniform Commercial Code, with its secured lending provisions, is only one of the more recent innovations designed to provide security to the creditor with possession of movable collateral remaining in the borrower. As adopted by New York State, the Code allows the secured creditor to employ self-help repossession or statutory replevin to recover possession of the chattel upon the debtor's default.[3] Section 7102 of the Civil Practice Law and Rules details the statutory requirements for replevin.

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1. The word "replevin" no longer appears in the New York statutes. The action is referred to as an action for the recovery of a chattel, and the prejudgment remedy is referred to as "seizure." N.Y. CIV. PRAC. LAW art. 71 (McKinney Supp. 1972). The common law term, still widely used by the New York bar, is used throughout this article.

It should be noted at the outset that the technical distinction between *"replevin"* (the procedure for prejudgment seizure as an incident to the underlying action) and the *"action to recover a chattel"* (the underlying action itself) is recognized. *See* Advisory Committee Notes in 14 N.Y. STD. CIV. PRAC. SERV. 336 (1964). The distinction in language serves no useful purpose in the present context, however. "Replevin" is therefore used interchangeably in the article to refer either to the incidental prejudgment relief or to the underlying action, as appropriate in the context in which it is used.

The question of the legality of self-help repossession is not dealt with herein. To the effect that this remedy is unconstitutional, see Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972). *Contra,* Oller v. Bank of America, 342 F. Supp. 21 (N.D. Cal. 1972); McCormick v. First Nat'l. Bank, 322 F. Supp. 604 (S.D. Fla. 1971). To the effect that provisions in form contracts authorizing private repossession in a dwelling are unconscionable under section 2-302 of the Uniform Commerical Code, see Kosches v. Nichols, 68 Misc. 2d 795, 797, 327 N.Y.S.2d 968, 970 (Civ. Ct. 1971).

2. *See* N.Y. U.C.C. §§ 9-503, -504 (McKinney 1964). The replevin remedy is not, of course, limited to credit situations; it applies to any contest of property rights in specific personal property. The discussion in this article is limited to its use in the credit context, however.

3. N.Y. U.C.C. §§ 9-503, -504 (McKinney 1964).

In its decision in *Fuentes v. Shevin*,[4] the Supreme Court decisively limited the powers of creditors to effect repossession through statutory replevin. The decision specifically dealt with the constitutionality of the Florida and Pennsylvania replevin statutes, holding them unconstitutional to the extent that they permitted the prejudgment seizure of property without advance notice and opportunity to be heard. However, the impact of the decision goes far beyond the states of Florida and Pennsylvania. It directly affects the replevin statutes of virtually every state—including New York. Although the case arose out of various situations involving household items and persons of less pecunious financial circumstances, the majority rejected the distinction posited by other courts[5] which would have made the due process requirements of notice and hearing applicable only where *necessities of living* were involved. The result is a clear, narrow (as the Court suggests[6]) but sweeping rule: notice and hearing will be required in virtually all cases of prejudgment seizure of property. Procedural due process becomes the key, without regard to the value of the property, the certainty of plaintiff's right to recover possession, or the nature of the parties to the transaction.

The *Fuentes* decision failed to finally resolve certain problems which are inherent in the new procedural requirements: (1) the form and extent of the hearing which will be required to meet due process standards, (2) the extent to which prior notice and hearing may be waived by the contracting parties, and (3) what circumstances will justify avoidance of the requirement of prior notice and hearing. The cases suggest tentative answers to these questions, and legislative amendments fostered by the decision may clarify some of the areas. But the creditor's attorney is immediately faced with the need to advise creditor clients as to a proper course to be followed in the extension of credit in reliance upon—and subsequently proceeding to realize upon—personalty liens and security interests. This article attempts to chart the course which should be pursued and to highlight changes in chattel recovery remedies appropriate in light of the *Fuentes* ruling.

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4. 407 U.S. 67 (1972).

5. *See, e.g.*, Brunswick Corp. v. J&P, Inc., 424 F.2d 100, 105 (10th Cir. 1970); Epps v. Cortese, 326 F. Supp. 127, 136 (E.D. Pa. 1971); Fuentes v. Faircloth, 317 F. Supp. 954, 957-58 (S.D. Fla. 1970). *But see* Laprease v. Raymours Furniture Co., 315 F. Supp. 716, 722-23 (N.D.N.Y. 1970).

6. 407 U.S. at 96.

I. THE *Fuentes* DECISION

A brief review of the facts of the case and the reasoning of the Court will be helpful to an understanding of the impact of *Fuentes*. The case involved appeals by debtors in Florida and Pennsylvania. The Florida appellant, Margarita Fuentes, purchased a gas stove and service policy from Firestone Tire and Rubber Company under a conditional sales contract. Subsequently, she purchased a stereophonic phonograph from the same company under the same type of contract. With approximately two-thirds of the contract amount paid, a dispute developed regarding servicing of the stove. Mrs. Fuentes refused further payments and Firestone instituted the claim for replevin in the Florida court. To effect immediate seizure, Firestone was required to complete blanks on an appropriate form and post a bond of twice the stated value of the goods to be seized. In reliance upon these documents, the clerk of the court issued a writ of replevin, and the stove and stereo were seized by the sheriff. Mrs. Fuentes, under the guidance of a Legal Aid Office, instituted the federal action for an injunction.[7] A three-judge court upheld the constitutionality of the Florida statute,[8] and the appeal followed.

The Pennsylvanian appellants presented similar facts. Personal property—consisting of a bed, table, and other household goods—was involved in each instance. Seizure was obtained by writs of replevin, with all but one of the writs having been issued in connection with a debtor-creditor relationship with outstanding installment sale contracts similar to that of Mrs. Fuentes.[9] Like the Florida court, the Pennsylvania court upheld the constitutionality of the replevin statute.[10]

Both the Florida and Pennsylvania statutes permitted ex parte applications and provided for the posting by the applicant of a bond for twice the value of the property to be seized. No opportunity for a prior hearing or for notice prior to the seizure was provided. Any

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7. For an interesting recital of the facts and strategy used in the presentation of the *Fuentes* claims to the federal courts, see Abbott & Peters, *Fuentes v. Shevin: A Narrative of Federal Test Litigation in the Legal Services Program*, 4 IOWA L. REV. 955 (1972).

8. Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970).

9. One of the appellants from the Pennsylvania court was a deputy sheriff who obtained replevin process to recover his son's toys from the home of his former wife in connection with a custody dispute. As previously noted (*supra* note 2), replevin is available in any instance where the possession of personal property is at issue, not merely when the rights of secured creditors and debtors are at stake.

10. Epps v. Cortese, 326 F. Supp. 127, 136 (E.D. Pa. 1971).

judicial determination of the rights of the parties on the merits had to be made in proceedings *subsequent* to the seizure.[11]

The Court first noted that the prejudgment replevin statutes descended from the common law replevin action, which originated six centuries ago.[12] At that time, however, replevin would lie only in situations where specific goods had been "wrongfully taken or 'distrained,' " whereas a claimant to property who alleged merely that it was being wrongfully *withheld* from his possession by another person was limited to the action of detinue. There, under English law, no provision was made for the prejudgment seizure of the property. Moreover, where the common law did allow prejudgment seizure by the state, notice and an opportunity to be heard was required. Through the years, the efficacious nature of the replevin writ resulted in the expansion of its use to encompass both the wrongful *withholding* and the wrongful *taking* of property. The result, in the twentieth century, has been the widespread use of the writ in the secured credit field to obtain repossession after the occurrence of default gives the secured creditor the immediate right to possess the collateral.

The Court viewed the primary question in the case as being whether the state statutes, which rested on the right of hearing *after* seizure, satisfied procedural due process requirements under the fourteenth amendment by providing hearings "at a meaningful time" or, alternatively, whether such hearings were required *before* agents of the state were permitted to actually seize possession of the property.[13] In the view of the majority, any meaningful legal right to notice and hearing "must be granted at a time when the deprivation can still be prevented."[14] Where goods are seized before notice or hearing, and the debtor's right to the goods is subsequently established, the goods may be returned. However, "no later hearing and no damage award can undo the fact that the arbitrary taking . . . has already occurred."[15] The Court had no difficulty in finding that a property interest falling within the fourteenth amendment's protection was involved, even

11. Florida law required the commencement and subsequent prosecution of the replevin action to final judgment. Under Pennsylvania law, replevin seizure was available without the necessity of commencing a formal action. If the rights of the parties were to be litigated, subsequent suit had to be commenced by the party from whose possession the goods had been seized. 407 U.S. at 73-78.

12. *Id.* at 78.

13. *Id.* at 80.

14. *Id.*

15. *Id.* at 82.

if it were assumed that, on the merits, the plaintiff-creditor was entitled to immediate possession. The issue decided by the Court was framed in terms of the "temporary non-final deprivation of property,"[16] which would occur in all ex parte replevins where the use of the property was denied to the true owner between the date of seizure and the date when he might recover it or damages in a subsequent hearing.

Moreover, the provision (found in the Florida and Pennsylvania statutes and in the New York legislation[17]) whereby a defendant might reclaim his property pending final judgment by posting a bond, necessitated the loss of one item of property (the bond premium) for the recovery of another. In any view, the loss of the use of the collateral involved a significant taking of property so as to come within the Due Process Clause.[18]

The Court rejected the "necessities of life" limitation applied by certain of the lower courts in connection with replevin. Procedural due process would require prior notice and opportunity to be heard in all but "extraordinary situations."[19] Although there might be cases "in which a creditor could make a showing of immediate danger that a debtor [would] destroy or conceal disputed goods . . . [the Florida and Pennsylvania statutes were] not 'narrowly drawn to meet such unusual condition.' "[20]

The decision was rendered by a four to three margin, with Justices Powell and Rehnquist not participating. Speaking for the dissent, Justice White urged that the insistence that the seller of property appear at a hearing to establish that there is "reasonable basis for his claim of default" was not constitutionally required.[21] The occurrence of default is not generally an issue of dispute, nor is "the likelihood of a mistaken claim of default . . . sufficiently real or recurring to justify a broad constitutional requirement" going beyond the existing state law.[22] Noting the provisions in section 9-503 of the Uniform Commercial Code for repossession by secured creditors and the likely increase in expense and delay imposed by the new procedure, the dissenting justices would have upheld the lower courts' decisions.

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16. *Id.* at 85.
17. *See* N.Y. Civ. Prac. Law § 7103 (McKinney Supp. 1972).
18. 407 U.S. at 86-90.
19. *Id.* at 90-91.
20. *Id.* at 93, *quoting from* Sniadach v. Family Finance Corp., 395 U.S. 337, 339 (1969).
21. 407 U.S. at 99-100.
22. *Id.*

II. The Law Prior to *Fuentes*

A. *Pre-Laprease*

The decision in *Fuentes* was anticipated by the three-judge district court decision of *Laprease v. Raymours Furniture Co.*[23] Prior to that decision, no serious question had been raised to the constitutionality of the New York replevin procedure. Grounded in antiquity, the requirement for the posting of bond protection and the defendant's opportunity for a post-seizure hearing gave the appearance of the essential fairness appropriate to due process of law.

The revision of New York's procedural law in 1963 left the law of replevin substantially unchanged.[24] The replevin action codified under article 71 of the Civil Practice Law and Rules was applicable to any situation where "the right to possession of a chattel" was in issue.[25] The action was commenced by summons and complaint, and, as in any other action, it would conclude in final judgment.[26] Available here, however, was the further opportunity to the plaintiff to obtain prompt possession of the chattel, provided only that the plaintiff's attorney presented to the sheriff the summons and complaint (if not previously served), a satisfactory undertaking amounting to double the value of the chattels to be seized (as claimed or estimated by plaintiff), an affidavit (1) identifying the chattels to be seized, (2) showing that plaintiff was entitled to possession by virtue of facts stated, (3) indicating that the chattel was "wrongfully held" by the defendant in the action, (4) stating the value of the chattel and (5) setting forth the status of the action, and, finally, a requisition, consisting simply of the written direction of plaintiff's attorney instructing the sheriff to seize the chattels.[27] The last named instrument was "deemed the mandate of the court."[28]

On the strength of these papers and without any application having been made to the court or any prior process having been served on the

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23. 315 F. Supp. 716 (N.D.N.Y. 1970).

24. The Advisory Committee characterized article 71 of the CPLR as a "simplification" of previous provisions regulating the replevin action and the prejudgment replevin seizure remedy. *See* the Advisory Committee Notes in 14 N.Y. Std. Civ. Prac. Serv. 336 (1964).

25. N.Y. Civ. Prac. Law § 7101 (McKinney Supp. 1972).

26. *Id.* §§ 7102(a), 7108.

27. N.Y. Sess. Laws 1962, ch. 308, § 7102. The text of article 71 (§§ 7101-12) of that statute appears as an appendix to Laprease v. Raymours Furniture Co., 315 F. Supp. 716, 725-28 (N.D.N.Y. 1970).

28. N.Y. Sess. Laws 1962, ch. 308, § 7102(d).

defendant, the sheriff was required to summarily seize the property.[29] If the chattel was located in a building or enclosure and was not delivered on demand, the sheriff was required to break, enter and seize the items.[30] Following seizure, he was to retain the property for three days (unless a court directed otherwise), at the expiration of which period it was delivered to the plaintiff, provided the defendant had not in the interim reclaimed the property by serving a notice on the sheriff with an undertaking in the same amount as that posted by the plaintiff or served certain motion papers permitted by the article.[31] Alternatively, the court might impound the chattel before delivery to the plaintiff, if it found that "the chattel [was] of such a nature, or the circumstances [were] such, that the moving party, if found to be entitled to possession, would not be adequately compensated for its loss by the payment of its pecuniary value."[32]

Being an action to try the right to possession of a chattel, replevin could lie only where the defendant was in possession at the time of service of the original process.[33] Provision was made for an award of the value of the chattel if it was unavailable for delivery at the time of trial.[34] The sole remedy for plaintiff was delivery of the chattel at the trial together with damages for wrongful detention or depreciation of the property.[35] Accordingly, the replevin feature—prejudgment seizure—provided both an in rem type of remedy, subjecting the property to the action pending personal service of the summons on the defendant, and gave the plaintiff an opportunity for immediate possession of the chattel at its current value rather than the less advantageous final remedy of possession at a potentially reduced value and at some later date when final judgment would have been rendered. If the prejudgment seizure was not prevented by reclamation or court order, the ultimate relief in the action—possession of the chattel—was vested in the plaintiff before defendant's answer was due or, indeed, even before the action had been commenced by service.[36]

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29. *Id.* § 7102(a).
30. *Id.* § 7110.
31. *Id.* § 7102(f).
32. *Id.* § 7103(b).
33. Mahr v. Livingstone, 55 Misc. 133, 106 N.Y.S. 308, *aff'd*, 122 App. Div. 921, 107 N.Y.S. 1136 (1st Dep't. 1907).
34. N.Y. Sess. Laws 1962, ch. 308, § 7108.
35. *Id.;* Allen v. Fox, 51 N.Y. 562 (1873).
36. Frequently, the creditor-plaintiff, having obtained the chattel following the three-day holding period (N.Y. Sess. Laws 1962, ch. 308, § 7102(f)) would abandon further litigation, unless an answer to the complaint were served. Finkenberg Furniture

The secure legal position of the replevin procedure came into question following the Supreme Court's landmark decision in *Sniadach v. Family Finance Corp.*[37] There, the Court struck down Wisconsin's prejudgment garnishment law, under which a plaintiff's attorney might initiate the summary process whereby fifty per cent of a defendant's wages were garnished to secure a fund out of which any future judgment in a pending action might be paid. Justice Douglas, writing the majority opinion, emphasized (1) the special character of wages and (2) the extremely harmful effect on the wage earner of their seizure without an opportunity to be heard prior to ultimate trial.[38] Justice Harlan, concurring, was more emphatic on the fundamental due process considerations:

> From my standpoint, I do not consider that the requirements of "notice" and "hearing" are satisfied by the fact that the petitioner was advised of the garnishment simultaneously with the garnishee, or by the fact that she will not permanently lose the garnished property until after a plenary adverse adjudication of the underlying claim against her, or by the fact that relief from the garnishment may have been available in the interim under less than clear circumstances. . . . Apart from special situations . . . I think that due process is afforded only by the kinds of "notice" and "hearing" which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use. I think that is the thrust of the past cases in this Court.[39]

The *Sniadach* decision was reinforced by the Court's decision in *Goldberg v. Kelly*[40] the following year, holding that procedural due process required a hearing *before* welfare payments could be terminated, rather than just the post-termination hearing provided by law.

Sniadach and *Goldberg* became the impetus for constitutional challenges to summary prejudgment remedies across the country.[41] The

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Corp. v. Vasquez, 67 Misc. 2d 154, 155, 324 N.Y.S.2d 840, 843 (Civ. Ct. 1971). Although the sheriff was required to serve the summons and complaint with the replevin papers "on each defendant," he needed only to serve the affidavit, requisition and undertaking "upon the person from whose possession the chattel is seized." N.Y. Sess. Laws 1962, ch. 308, § 7102(b). Accordingly, seizure could precede the commencement of the action in any instance where the property was not physically in the possession of one of the defendants at the time of seizure.

37. 395 U.S. 337 (1969).
38. *Id.* at 337-42.
39. *Id.* 343.
40. 397 U.S. 254 (1970).
41. 407 U.S. at 72-73 n.5.

first decision to deal directly with the replevin remedy was *Brunswick Corporation v. J&P, Inc.*,[42] decided by the Tenth Circuit in 1970. The court denied the conditional vendee's contention that Brunswick, in its summary replevin seizure of bowling equipment, had caused the denial of the vendee's right to procedural due process. The vendee admitted default on the contract and had agreed in the instrument that upon default Brunswick might enter and repossess. *Sniadach,* in the view of the Tenth Circuit, was a "unique case involving 'a specialized type of property presenting distinct problems in our economic system.' "[43] This factor distinguished it from the commercial case before the court.

B. *Laprease v. Raymours Furniture Co.*[44]

It was in this state of the law that the challenge to New York's replevin statute was posed. *Laprease,* itself a consolidation of cases involving separate replevin seizures, presented to the Northern District Court in New York facts and contentions similar to those subsequently placed before the Supreme Court in *Fuentes.* All of the plaintiffs were persons of marginal economic vitality seeking injunctive relief against impending seizures of household goods under the replevin process. Mrs. Laprease alleged that she believed she had a meritorious defense on the action and that she was on welfare and unable to make the required payments.[45] Plaintiffs Lawson and Messler, on the other hand, contended that they were entitled, by oral agreement with the respective creditors, to make reduced payments following the initial defaults and to retain possession of the conditionally sold merchandise while such payments continued to be made.[46]

The three-judge court was confronted with three contentions by plaintiffs: (1) that prejudgment seizure deprived them of procedural due process, (2) that the seizure constituted an unreasonable search and seizure under the fourth amendment, as applicable to states through the fourteenth, and (3) that the replevin statute denied them the equal protection of the laws, due to their financial inability to take advantage of the reclaiming provisions available to others of more adequate financial means.[47]

42. 424 F.2d 100 (10th Cir. 1970).
43. *Id.* at 105. The specialized property was wages.
44. 315 F. Supp. 716 (N.D.N.Y. 1970).
45. *Id.* at 719.
46. *Id.* at 719-20.
47. *Id.* at 720.

The court declined to rule on the equal protection argument, but held for the plaintiffs with respect to both of their remaining contentions. Noting that the search and seizure protection applies to civil as well as criminal proceedings and that the warrantless search of a private dwelling is presumptively unreasonable, the court found a violation of plaintiffs' fourth amendment rights. "If the Sheriff cannot invade the privacy of a home without a warrant when the state interest is to prevent crime, he should not be able to do so to retrieve a stove or refrigerator about which the right to possession is disputed."[48] Partially foreshadowing *Fuentes,* the three-judge court further held that the plaintiffs had been deprived of their rights to procedural due process. Because the goods sought to be repossessed were necessary household goods, deprivation of which was equally as severe as the loss of wages in *Sniadach,* the court held New York's statute unconstitutional. The statute impermissibly allowed prejudgment seizure "without even an *ex parte* order of a judge or court upon a showing of justification therefor."[49]

The rule announced in *Laprease* was ambiguous, in that concepts of search and seizure (with ex parte procedures available in criminal cases) were interwoven with due process concepts. The question whether prior notice to the debtor was generally necessary was not clearly answered, although the answer was intimated.[50] Moreover, the case seemed to be limited to instances of consumer possessions of a "necessary" nature.[51] *Laprease,* in other words, apparently presented a victory for consumer creditors, if the right kind of essential property

48. *Id.* at 722.

49. *Id.* at 725.

50. The court indicated that procedural due process required prior notice "or at least that the creditor present to a judicial officer the circumstances allegedly justifying the summary action." 315 F. Supp. at 724. The definite requirement of notice was also indicated at page 722 of the decision. The court emphasized that the absence from the statute of "even an ex parte application" requirement was indicative of the denial of procedural due process and of fourth and fourteenth amendment rights. *Id.* at 723, 725. However, the court failed to articulate clearly a difference in standards between the constitutional rights at issue. (*See* text accompanying note 74 *infra.*) It was not certain whether the practical result of the decision would be the giving of notice in most cases or merely the submission of ex parte papers containing general allegations about the risk to the property unless summary seizure was used.

51. On the issue of procedural due process, the court, following its interpretation of Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), rested its decision on the character of the goods being seized (315 F. Supp. at 722-23) and disavowed any intention to interfere with the replevin remedy "except as herein specifically provided." *Id.* 725; *cf.* General Elec. Credit Corp. v. Pristone, 68 Misc. 2d 475, 479, 326 N.Y.S. 2d 898, 902 (Sup. Ct. 1971). Note, however, that the search and seizure argument (315 F. Supp. at 721-22) was not so qualified and may not be so limited.

was involved. But the result, if limited to the substitution of an ex parte order process for the previous requisition "deemed the mandate of the court,"[52] had the potential for becoming a transformation more of form than of substance.

C. *The Legislative Response*

In response to the uncertainties of *Laprease,* the 1971 Legislature took refuge in the time-honored device of answering a question with a question. The statute was amended to provide for an order of seizure, in lieu of the previous attorney-issued requisition, "[u]pon presentation of the affidavit and undertaking and *upon such terms as may be required to conform to the due process of law requirements of the fourteenth amendment to the constitution of the United States.*"[53] In lieu of the previous authority of the sheriff to break into a building or enclosure to seize the chattel if not delivered on his demand,[54] the amendment permitted the inclusion in the order of seizure of authority to break into the premises, solely as a matter of judicial discretion.[55] To permit the defendant greater opportunity to reclaim, the holding period was extended from three days to ten days[56] and special provisions were included for the return of the property to the defendant without bond under limited circumstances.[57]

Governor Rockefeller signed the legislation, while indicating substantial disapproval of it. He simultaneously referred the entire

52. N.Y. Sess. Laws 1962, ch. 308, § 7102(d).
53. N.Y. Civ. Prac. Law § 7102(d) (McKinney Supp. 1972) (emphasis added).
54. N.Y. Sess. Laws 1962, ch. 308, § 7110(d).
55. N.Y. Civ. Prac. Law § 7102(d) (McKinney Supp. 1972).
56. *Id.* §§ 7102(f), 7103.
57. *Id.* § 7103(c):

1. If a chattel which is in the custody of the sheriff is personal property which if owned by a defendant would be exempt from application to the satisfaction of a money judgment, if the value of the possession of the chattel to the defendant is greater than the value of its possession to the plaintiff, if the interest of the plaintiff would not thereby be prejudiced and if the interests of justice so require, upon motion of the defendant, upon notice to the sheriff and to all parties to the action, and on such terms and on such security and conditions as to the court may seem proper, the court may order its return to the defendant.

2. If the court orders the return of the chattel to the defendant, it shall grant a restraining order that the chattel shall not be removed from the state if it is a vehicle, aircraft or vessel or, otherwise, from its location, transferred, sold, pledged, assigned or otherwise disposed of or permitted to become subject to a security interest or lien until further order of the court. Unless the court otherwise directs, the restraining order does not prohibit a disposition of the chattel to the plaintiff. Disobedience of the order may be punished as a contempt of court.

question to the State Consumer Protection Board[58] for review and preparation of final proposed legislation for presentation to the 1973 session of the Legislature.[59]

III. The Impact of *Fuentes* on Replevin in New York State

A. *Replevin Which Meets the Fuentes Requirements*

Pending further legislation, the present statutory procedures create expense and an opportunity for delay far beyond that necessary to assure the constitutional protection of the delinquent debtor. This is particularly true where repossession is sought of goods which have relatively little value or were given as security for the recovery of a debt with a relatively low balance.

1. *Due process.* To comply with the due process requirements, the creditor may well find himself: (1) going to court to obtain an order to show cause directing the debtor to appear and be heard if he wishes; (2) arranging for satisfactory service within defined and sometimes rigid time limits;[60] (3) appearing on the return date with counsel and witnesses, prepared to give testimony in case the debtor appears and objects; (4) having obtained an order on the return date, arranging for seizure by the sheriff or marshal; (5) making subsequent application for a further order authorizing the sheriff to force entry if delivery was originally denied (perhaps through another order to show cause and follow-up return date, if the local court deems this a necessary requirement either of discretion or due process);[61] and (6) adjusting to the information subsequently received that after entry had been forced, the goods were not found, or, if found, were in a depreciated or valueless state. The creditor will also have incurred the

58. N.Y. Exec. Law § 550 (McKinney Supp. 1972).

59. Governor's Memo., N.Y. Sess. Law 1971, at 2640.

60. Section 7102(d)(1) of the CPLR now leaves it to the court to determine what notice is appropriate to comply with "terms as may be required to conform to the due process of law requirements of the fourteenth amendment . . . ." One post-*Laprease* decision imposed a requirement of service at least seven days before the return date. Kosches v. Nichols, 68 Misc. 2d 795, 798, 327 N.Y.S.2d 968, 971 (Civ. Ct. 1971). In another case, service was required not less than seven nor more than fourteen days before the return date. Finkenburg Furniture Corp. v. Vasquez, 67 Misc. 2d 154; 162, 324 N.Y.S.2d 840, 850 (Civ. Ct. 1971).

61. No specific statutory standards exist at the present. *See* N.Y. Civ. Prac. Law § 7102(d) (McKinney Supp. 1972). *See also* note 75 *infra* and the text accompanying notes 68-75 *infra*.

cost of purchasing the undertaking required by the statute, apparently at the time of the original application before it is even known whether the ultimate order of seizure will be granted.[62]

This would not necessarily exhaust the possibilities, of course. Compelled testimony[63] and contempt procedures[64] may be required to enforce the creditor's rights—with further requirements of service of process and the expenditure of time and money. Long before this route is exhausted, the creditor with a marginal collateral situation will be discouraged from further pursuit, a result which *may* accord with predominant conceptions of social policy but which might better be achieved by affirmative limitations on the original granting and receipt of collateral security. The certain result is a substantial increase in cost, either through increased legal expenses, decreased recoveries or both.

The above assumes the simple, uncontested case, with such resistance as exists being presented at the scene of the proposed seizure. At the "hearing" required by the Constitution, the Supreme Court assumes the matter will generally be disposed of by the debtor's failure to appear.[65] Where appearance is made, however, it is not clear what procedure or standard of proof is appropriate. The issue at the hearing is the question of default on the underlying debt and the consequent right of repossession. If the creditor has presented a prima facie case in his moving papers, fairness would seem to be satisfied by requiring the debtor to assume the burden of objecting with facts in affidavit form before the matter is subjected to a formal hearing. The hearing would be held at a subsequent date (unless the creditor is present with witnesses, prepared to proceed). The "hearing" is not a second trial; its

62. N.Y. CIV. PRAC. LAW § 7102(e) (McKinney Supp. 1972). The statute is not clear. The 1971 amendment substituted the requirement for execution by a sufficient surety "acceptable to the court" for the prior requirement that it be "acceptable to the sheriff." Under prior practice, all papers on the replevin were submitted simultaneously to the sheriff. Practice may vary according to the jurisdiction and the particular judge as to whether the undertaking must now be presented with the motion for the seizure order rather than subsequently after notice, hearing and indication by the court that it will grant the same.

63. N.Y. CIV. PRAC. LAW § 7112 (McKinney Supp. 1972).

64. Certain injunction sections in article 71 of the CPLR applying to replevins expressly provide for enforcement by contempt. *See* N.Y. CIV. PRAC. LAW §§ 7102(d), 7103(c), 7109(b) (McKinney Supp. 1972). But note the Advisory Committee Notes on the original recommendation of the CPLR to the legislature in 14 N.Y. STD. CIV. PRAC. SERV. 411 (1964): "No provision for contempt for failure to deliver the chattel to the sheriff before judgment is proposed."

65. 407 U.S. at 92-93 n.29.

object is to determine the "validity or at least the probable validity"[66] of the creditor's claim. The dissent in *Fuentes* refers to the issue as one of "reasonable basis for [creditor's] claim of default."[67] This may represent a standard lower than that applied in criminal cases. However, given the consumer consciousness of the times, it is doubtful that the creditor will readily obtain prejudgment possession in any strongly contested situation, despite the theoretically lower standard employed.

Allusion was made above to the possibility of a second application to the court for permission to break, enter and seize on a replevin attempt, the original order for which did not include such authority.[68] The possibility of this requirement exists because of the dual rationale under the cases—that of unreasonable search and seizure on the one hand and procedural due process on the other—coupled with the absence of definitive statutory standards to govern the seizure application.

2. *The fourth amendment.* The attack on summary replevin has been pressed both on the procedural due process and the unlawful search and seizure premises. Where *Laprease* upheld the attack on both grounds, however, the Supreme Court in *Fuentes* adjudicated only on the procedural due process argument. The Court expressly withheld final judgment on the search and seizure point, noting that "once a prior hearing is required, at which the applicant for a writ must establish the probable validity of his claim for repossession, the Fourth Amendment problem may well be obviated."[69] The question whether satisfaction of the procedural due process standard would ipso facto satisfy probable cause requirements for search and seizure was not essential to the decision in *Fuentes,* however, and remains open for future high court review.

Both *Laprease* and *Blair v. Pitchess,*[70] the two pre-*Fuentes* lower court cases which applied the procedural due process principle to disallow summary replevin seizure, also held the statutes unconstitutional on the alternative ground of unreasonable search and seizure. The principle that the fourth amendment search and seizure requirements apply to civil, as well as criminal, cases was made clear by the Supreme

66. Sniadach v. Family Finance Corp., 395 U.S. 337, 343 (1969). *See also* text accompanying *supra* note 39.

67. 407 U.S. at 99-100.

68. *See* text accompanying *supra* note 61.

69. 407 U.S. at 96 n.32.

70. 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

Court in *Camara v. Municipal Court*[71] in 1967, upholding the right of the homeowner to refuse access to civil inspectors in the absence of a warrant. The case suggested, however, that the standards of determination of probable cause in civil matters may well be more flexible than would be the case in a criminal situation, having cognizance of the legitimate interests of the state in gaining access (there for housing inspections) and the degree of intrusion contemplated.[72]

The post-*Laprease* amendment of the New York statute provided that the creditor's original application, if it sought inclusion of authority to the sheriff to break, enter and search, must include "facts sufficient under the due process of law requirements . . . to authorize the inclusion in the order of such a provision."[73] *Quaere,* whether fourth amendment search and seizure standards (applicable to the states through the fourteenth amendment) would be met by the same showing and notice necessary to comply with procedural due process (also applicable under the fourteenth amendment, but involving fifth amendment rights). *Laprease* made no ultimate distinction between the effectuation of the "probable cause" requirements of search and seizure and the general requirements of procedural due process. *Blair,* on the other hand, specifically held that a showing of probable cause was necessary, including "probable cause to believe that the property is at the location specified in the process."[74] This imports into the civil replevin action the same requirement applicable in a criminal case. The unqualified transfer of that requirement to a replevin action order for breaking, entering, and seizing collateral would impose an undue burden on the enforcement of contractual obligations.[75]

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71. 387 U.S. 523 (1967).

72. *Id.* at 534-39.

73. N.Y. Civ. Prac. Law § 7102(d) (McKinney Supp. 1972).

74. 5 Cal. 3d at 274, 486 P.2d at 1253, 96 Cal. Rptr. at 53. Regarding the standards as applied in criminal cases, see Camara v. Municipal Court, 387 U.S. 523, 535 (1967); People v. Marshall, 13 N.Y.2d 28, 34, 191 N.E.2d 798, 801, 241 N.Y.S.2d 417, 421-22 (1963).

75. The imposition of a duty on a creditor to attest to the present location of collateral where information has not been currently provided by the debtor seems an unnecessarily burdensome impediment to the protection and recovery of the collateral. At the least, this would make an application for authority to break, enter and seize in the original application for the order of seizure, pending discovery by deposition under CPLR section 7112, virtually impossible. The latter process, in turn, might be difficult or impossible, depending on the ability to make personal service on the defendant and the latter's willingness to comply with any court direction to appear and submit to examination.

The question might be obviated by the creation of a rebuttable statutory presumption that personal goods in which the debtor has conveyed a security interest are

The requirement of notice and prior opportunity to be heard, linked as it is with the proposed seizure of property, was not involved in the routine housing inspection application contemplated by *Camara.* Search and seizure requirements are consistent with ex parte applications, the universal procedure followed in criminal cases. Where anticipated seizure of property in civil proceedings requires prior notice, the requirement of a separate, ex parte or notice application for authority to break and enter does not increase the protection of the replevin defendant, except by restricting the power of the sheriff or marshal at the time of the first demand. Applying the standard of "reasonableness" in *Camara,* the Supreme Court seemed to be concerned with this, as it indicated that a warrant should normally issue in housing inspection cases "only after entry is refused . . . or there is other satisfactory reason for securing immediate entry."[76] The marginal nature of this consideration, however, hardly outweighs the public interest in efficient law administration.

Inasmuch as the sole issues in the prejudgment replevin hearing are indebtedness and default by the defendant and the right to possession in the creditor, little more than a reasonable basis to believe that the merchandise is at a particular location should be required for inclusion of the power to enter and search in the order.[77] Different considerations may obtain, however, if the property to be seized is in the possession of a third party bailee of the defendant debtor. If the bailee asserts no independent interest for possession in himself, the plaintiff may elect not to name him as a defendant in the replevin action.[78] Procedural due process would require notice to the owner of the

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located at his current residence in the absence of affirmative information to the contrary. A further rebuttable statutory presumption would be appropriate to the effect that goods to be seized are where the creditor claims them to be in his motion for a seizure order if, following proper service, defendant fails to specify where the goods are located or, if he has no knowledge of that fact, fails to provide complete information to the extent of his knowledge. This should present no insurmountable constitutional difficulty, inasmuch as the debtor is subject to examination as to the location of the collateral. In any event, it is quite probable that the courts will not impose the same stringent probable cause requirements as apply to criminal prosecutions. *Cf.* Camara v. Municipal Court, 387 U.S. 523, 534-39 (1967). *Contra,* Blair v. Pitchess, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

76. 387 U.S. at 539-40.

77. *See* discussion in *supra* note 75.

78. Note the distinction in section 7102(b) of the CPLR between the "person from whose possession the chattel is seized" and "each defendant not in default." The latter must be served with the summons and complaint; a non-party possessor of the goods is only served with the remaining replevin papers.

property, but such notice might not be necessary for the bailee. Authorization of a search of the bailee's premises, however, would certainly require compliance with probable cause standards. It would seem that the "reasonableness" standards of *Camara* militate against the issuance of authority to break, enter and search without a prior refusal by the bailee to deliver under an order of seizure.[79]

Where the immediate possession is in the defendant debtor, however, inclusion in the due process notice of reference to the creditor's application for authority to break into and search defendant's enclosure to find the chattel, absent voluntary delivery or advice of the location of the collateral elsewhere, should be sufficient. Suitable limitation of the manner of the search could be required. The statute offers no workable standards on this subject at the present time.

B. *A Streamlined Approach Consistent With Fuentes*

The creditor's counsel will be necessarily interested in procedures, where available, to obviate the need for notice and hearing and the costs in time and expense and risk of waste to the collateral which they necessarily impose. Two potential avenues are available, although their feasibility in the normal situation is limited: (1) excuse from the ordinary requirements of notice because of the existence of exigent circumstances and (2) waiver.

1. *Exigent circumstances.* The defaulting debtor generally gives little assurance to the secured creditor that he will preserve and maintain the collateral with the same degree of interest as when he assumed that his continued possession was not subject to challenge. Worse, the contemplation of imminent repossession may motivate destruction or secretion of the property, either out of malice or self-interest. *Fuentes* does not assume that this will occur, however, and leaves the proof of such risks in individual cases to the creditor.

Recognizing the possibility of "extraordinary situations" which may justify the postponement of notice and opportunity of a hearing until after preliminary relief, the Court notes that these must, necessarily, "be truly unusual."[80] Outright seizure has been upheld by the Supreme Court only where: (1) "an important governmental or general public interest" was involved, (2) there was a "special need for very prompt action," and (3) the individual initiating the seizure was

79. 387 U.S. at 539-40.
80. 407 U.S. at 90.

a government official "responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance."[81] Whether, by these comments, the Court meant to suggest that such relief would be inappropriate in the absence of a statute detailing standards to be applied is conjectural. Clearly, factual support for such an application must be precise and in evidentiary form. Oral unsworn allegations or sworn statements of a conclusory and vague nature will not suffice. The reported statement by a defendant of his intent to go back to Puerto Rico, without indication of the date of the statement or the supposed time when this will occur was held insufficient.[82] Conclusory allegations that "many of the chattels were small and of considerable value" and that "some, if not all, of those chattels could be removed by the defendant [and] that the larger items were subject to possible damage by the defendant" would not pass.[83] Moreover, an affidavit supplying exigent circumstances on "information and belief lacked any probative force."[84]

The degree of procedural due process which must be afforded in any given situation depends on the judicial weighing of the relative interest of the government in expedited compliance with its writs, on the one hand, and the need of the citizen for advance notice and opportunity to be heard in the context of the matter at issue, on the other. The result of this weighing process will determine the extent to which the courts will impose prior notice requirements on governmental procedures.[85] While the Supreme Court, in *Fuentes,* has established the general rule of notice and hearing in replevin cases, it may be anticipated that in future cases variable fact situations will be weighed against the same competing interests to determine how the balance should be struck in determining the degree of "exigent circumstances" necessary to avoid the general rule's requirements.

The governmental interest in promoting readily accessible credit resources is the prime justification for strengthened replevin rights for the creditor. The interest of the possessor of the goods in their continued use is, in general, the dominant debtor's interest to be protected. At what point will the balance tip in favor of the creditor?

81. *Id.* at 91.

82. Finkenberg Furniture Corp. v. Vasquez, 67 Misc. 2d 154, 161-62, 324 N.Y.S.2d 840, 849 (Civ. Ct. 1971).

83. Cedar Rapids Eng'r. Co. v. Haenelt, 68 Misc. 2d 206, 207-08, 326 N.Y.S.2d 653, 655 (Sup. Ct. 1971), *aff'd,* 39 App. Div. 2d 275, 333 N.Y.S.2d 953 (3d Dep't 1972).

84. *Id.* at 210-11, 326 N.Y.S.2d at 658.

85. *See* Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970).

Instances cited by the Supreme Court[86] fall within the "truly unusual" criteria mentioned in *Fuentes:* protection of the public from loss due to dangerous food substances,[87] failing banks,[88] or suspect stock issuances,[89] and expeditious adoption of wartime price regulations,[90] etc. Significantly, the attachment of property of an out-of-state resident without prior notice is permissible.[91] In the replevin context, recurrent mention is made of protection from the absconding or destruction of the property.[92] Statutes have established special standards regarding disposition of perishable goods, recognizing their special characteristics.[93] The full extent to which the exigent circumstances exception may be available must await further case development. The framing of appropriate statutory standards for such exceptions to the general due process requirements would go far toward protecting legitimate creditor interests.

2. *Waiver.* Waiver of prior notice could offer significant relief to the creditor in cases involving substantial security interests. Such will be the case primarily when the waiver is specifically drafted and negotiated in a *commercial* context in contrast to the typical *personal* loan involving form documents prepared by the lender. The availability of the relief will be diminished if the anticipated further amendment of the statute imposes specific procedural requirements not subject to waiver. The due process requirements of the Constitution will, of course, permit waiver; but its availability is limited to very restricted circumstances.

The respondents in *Fuentes* argued that the appellants who signed conditional sales contracts waived their due process rights by contract language permitting the seller, at its option, to take back the merchandise in the event of default.[94] The provisions were in the printed form, in small type, and without explanation of their meaning. No showing was made that the particular appellants "were actually aware

86. *Id* at 263. *See also* Fuentes v. Shevin, 407 U.S. 67, 91 (1972).
87. North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908).
88. Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928).
89. R. A. Holman & Co. v. SEC, 299 F.2d 127, 131 (D.C. Cir. 1962), *cert. denied,* 370 U.S. 911 (1962).
90. Yakus v. United States, 321 U.S. 414 (1944).
91. Ownbey v. Morgan, 256 U.S. 94 (1921).
92. *See, e.g.,* Fuentes v. Shevin, 407 U.S. 67, 92-93 (1972); Cedar Rapids Eng'r. Co. v. Haenelt, 39 App. Div. 2d 275, 277 333 N.Y.S.2d 953, 956 (3rd Dep't 1972).
93. N.Y. CIV. PRAC. LAW § 7105 (McKinney Supp. 1972).
94. 407 U.S. at 94.

or made aware of the significance of the fine print."[95] The language, by its terms, did not waive the constitutional right to a hearing, but merely acknowledged the right of repossession. Whether the repossession was to be by self-help, by final judgment in replevin or by prejudgment replevin (either with or without a hearing) was not indicated.

While the dissenting opinion suggested that the effect of the decision was minimal because creditors would merely alter their forms to include clear waivers,[96] the availability and effectiveness of such waivers in typical adhesion contracts is doubtful. The well-recognized presumption against waiver of a constitutional right imposes a "heavy burden" on creditors seeking to use the waiver argument in the replevin context.[97] A waiver of the constitutional right, to be effective, must have been "an intentional relinquishment or abandonment of a known right or privilege," and there is a presumption against the waiver of federal constitutional rights.[98] The question whether a purported waiver was both knowing and intentional may itself require prior hearing for judicial determination.[99]

Nonetheless, waiver can be effective where the contract involved is not one of adhesion (*i.e.* a form contract prepared by one of the parties and not subject to negotiation), where the parties are equal in bargaining power, and the waiver agreement is specifically negotiated. These principles were applied in *D. H. Overmyer Co. v. Frick Co.*[100] to uphold the waiver by a corporation of notice prior to entry of judgment against it pursuant to a cognovit note. The agreement was specifically negotiated, with both parties represented by counsel who actively pursued the negotiations on this issue. It should be noted, however, that while the successful, widespread use of waiver through form contracts by commercial lending or selling institutions is highly unlikely, limited consents on subjects such as the manner or timing of notice of hearings may be recognized and accepted by the courts.[101]

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95. *Id.* at 95.

96. *Id.* at 102.

97. Cedar Rapids Eng'r. Co. v. Haenelt, 39 App. Div. 2d 275, 277, 333 N.Y.S.2d 953, 956 (3d Dep't 1972).

98. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

99. Osmond v. Spence, 327 F. Supp. 1349, 1359 (D. Del. 1971), *vacating and remanding for further consideration,* 405 U.S. 971 (1972).

100. 405 U.S. 174 (1972).

101. Without attempting to obtain a waiver of the basic rights to prior notice and opportunity to be heard, the creditor may obtain significant consents in the loan documents which could facilitate any subsequent replevin action. For example: (1) an

IV. A PRACTICAL ALTERNATIVE: THE ABANDONMENT OF PREJUDGMENT REPLEVIN IN FAVOR OF POST-JUDGMENT REMEDIES

Enough has been said to indicate the impracticality of present replevin procedures where the items to be repossessed secure small loans or have small value. With regard to such recoveries (and, in many instances, on larger transactions as well), the creditor's attorney will increasingly consider the feasibility of avoiding prejudgment seizure altogether. Alternatives do exist which, if reinforced by statutory amendment, could function effectively as creditor remedies while preserving full protection for the defendant's right to be heard and present any defense. The existing procedures for post-judgment recovery have cumbersome features, however, which make them singularly less effective in providing legal protection to the aggrieved creditor than should be tolerated.

A. *Final Judgment in Replevin Action*

Because the time period required to give notice and to hold the hearing preliminary to a prejudgment seizure is comparable to the delay required to secure a final judgment in the replevin action, the time advantage of seizure before judgment has been lost in any action where judgment can be taken by default.[102] Consequently, the creditor may choose to avoid prejudgment seizures altogether and to proceed directly to a final judgment in the replevin action. The final judgment in the replevin action would be obtained by default due to the nonappearance of the defendant in almost all instances.[103] Default judgment now has to be entered by court order, rather than by action of the clerk, inasmuch as the claim in the replevin complaint is not "for a sum certain or for a sum which can by computation be made

agreement fixing the venue of the action (N.Y. CIV. PRAC. LAW § 501 (McKinney Supp. 1972)); (2) designation of an agent for the service of process (*id.* R. 318); (3) consent to submission of the controversy to arbitration (*id.* § 7501) or pursuant to the Simplified Procedure for Court Determination of Disputes (*id.* §§ 3031, 3033); (4) consents to a specified manner of service on the debtor of any notice in connection with a replevin action and to adoption of that manner of service by court order in any subsequent action.

102. Compare the normal time period for service of notice (*see* the discussion in *supra* note 60) with normal answering periods of ten days (*see* section 402 of the UNIFORM CITY CT. ACT in N.Y. JUDICIARY LAW (McKinney Supp. 1972)) and twenty days (*see* N.Y. CIV. PRAC. LAW § 3012 (McKinney Supp. 1972)).

103. *Cf.* Fuentes v. Shevin, 407 U.S. 67, 92-93 n.29 (1972).

certain."[104] This is true even where the plaintiff waives any claim to money damages for wrongful detention or the value of the property and requests only a decree awarding possession. If damages are sought, a hearing with testimony may be required, but judgment should be readily available on affidavit application if only the award of the property itself is at issue.[105]

While pursuing this remedy, the creditor will wish to protect his security by enjoining its removal or destruction. In this effort, he will face certain difficulties because the present statutory scheme contains inconsistent provisions for injunctive relief. The former provisions of the Civil Practice Act included authority for the issuance of an injunction to prevent a defendant from disposing of a chattel while it remained in his possession prior to trial.[106] The revisers omitted this provision from the Civil Practice Law and Rules because the same relief could be obtained by a combination of a temporary restraining order and preliminary injunction[107] followed by a prejudgment seizure of the chattel. According to article 63 of the CPLR, the issuance of an injunction is justified *only* if action, or intended action, by a defendant in detriment to the plaintiff's rights in the collateral can be shown.[108] Moreover, the adequacy of alternate relief is always at issue, inasmuch as the plaintiff can otherwise protect himself by resorting to prejudgment seizure.[109] There appears to be no general authority for the granting of an injunction to a creditor who wishes merely to proceed to final judgment and not to rely on preliminary seizure.

104. N.Y. CIV. PRAC. LAW § 3215(a) (McKinney Supp. 1972).

105. *Id.* § 3215(b).

106. N.Y. Sess. Laws 1937, ch. 512, *as amended by* L. 1939, ch. 359 *and* L. 1952, ch. 829. The section provided for discovery of the location of a chattel by court order where the location was unknown to the plaintiff. If an undertaking was filed, the court could include in the order a provision directing that the defendant not "remove from the state, transfer, sell, pledge, assign or otherwise dispose of the said chattel or any part thereof until the further order of the court or any judge thereof." The injunctive relief, accordingly, was not available where there was no occasion to obtain a discovery order.

107. N.Y. CIV. PRAC. LAW §§ 6301 *et seq.* (McKinney Supp. 1972); Advisory Committee Notes in 14 N.Y. STD. PRAC. SERV. 411 (1964).

108. N.Y. CIV. PRAC. LAW §§ 6301 *et seq.* (McKinney Supp. 1972).

109. The Advisory Committee recommended the combination of a temporary restraining order and seizure as adequate protection for the creditor in lieu of the previous provision for contempt. (*See* 14 N.Y. STD. PRAC. SERV. 411 (1964).) Presently, however, general equitable principles applicable under article 63 would seem to inhibit or prevent altogether the issuance of a temporary injunction after location of the chattel has been determined and the alternate remedy of seizure is found to be available to the creditor. A different result may require a realignment of priorities by the Legislature.

New York's replevin procedure now provides injunctive relief in the case of unique chattels, on the premise that the plaintiff in such an instance is not fully protected by the availability of a money judgment for the value of the goods.[110] However, recovery of a money judgment for the value of unavailable collateral is small solace to the creditor who already has the defaulted note or other contract obligation of the defendant. Waiver of the security and suit as a general creditor would give him as much.[111]

The inconsistency was expanded in 1971 when, as a result of the *Laprease* determination, the statute was amended by provisions which granted power to the court to restrain removal, transfer or other disposition: (1) in the order of seizure, where authority for breaking, entering and seizing the chattel was not granted to the sheriff[112] and (2) where, following prejudgment seizure of a chattel, it was returned to the defendant without the requirement of a bond under a new hardship procedure introduced into the statute at that time.[113] If the policy of the law is to permit the recovery of property by a defendant pending final judgment, with the protection of an injunction being substituted where seizure is not allowed, there is no reason to deny the same protection to creditors who voluntarily refrain from making prejudgment seizure applications.

An anomaly is created under the present state of the law, therefore. On the one hand, routine seizure without notice or a hearing is no longer permitted, and increased burdening of the courts with hearings over the rights to prejudgment seizure of relatively valueless items are and will be discouraged. On the other hand, however, injunctive relief which would protect the creditor against the disposition of his collateral before final judgment is available only if he seeks prejudgment seizure in each instance.

The situation is further complicated by the fact that the statute provides different remedies for seizure after judgment from before.

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110. N.Y. CIV. PRAC. LAW § 7109(a) (McKinney Supp. 1972); Advisory Committee Notes in 14 N.Y. STD. CIV. PRAC. SERV. 409 (1964).

111. It should be noted that the benefits of a state judgment against a defendant for the conversion of property liened to a creditor are largely eliminated by a recent amendment to the Bankruptcy Act. Bankruptcy Act §§ 14(f), 17, 11 U.S.C. §§ 32(f), 35 (1971). Such judgments are not binding on the bankruptcy court and the entire issue is subject to relitigation to determine whether the debtor has committed a willful conversion, thereby excepting the creditor's claim for the value of the collateral from the discharge provisions of the Act.

112. N.Y. CIV. PRAC. LAW § 7102(d) (McKinney Supp. 1972).

113. *Id.* § 7103(c). The section is set out in *supra* note 57.

Seizure after judgment is by execution, with no express authority for breaking into an enclosure to recover the chattel.[114] The statute formerly contained general authority for the sheriff to break and enter, which applied to both his prejudgment seizure and to execution enforcement of the replevin judgment.[115] The post-*Laprease* amendment, however, limited this power to situations where the *order of seizure,* issued for prejudgment seizures only, contained this authority.[116]

The result is a patchwork replevin procedure which discourages resort to final judgment remedies without in any way protecting the legitimate concerns of debtors. Presumably, statutory amendment will rectify the more obvious inequities. Meanwhile, however, reliance on final judgment recovery, in lieu of the more time-consuming and expensive procedures for prejudgment seizure, may still be appropriate where default is anticipated, and the danger of removal or damage to the goods in the interim is considered minimal.

B. *Action on the Debt*

The replevin remedy has a more basic drawback for the creditor seeking the shortest legal route to the maximum recovery. Against the benefit of the relatively prompt seizure of the collateral through a prejudgment replevy in the event of anticipated defense by the party in possession must be weighed the fact that replevin is a single purpose remedy, limited to the recovery of a particular item of collateral rather than the collection of the whole debt. The value of the collateral in relation to the total balance of the indebtedness will largely determine whether the chattel recovery effort is the main thrust of the creditor's cause or merely a side-line distraction. Direct suit for recovery on the debt may, in either event, be the least cumbersome and most direct route to actual recovery of the collateral.

The judgment on the underlying indebtedness is enforceable by execution, which can be levied on the goods held by the creditor as collateral, as well as against other property of the debtor. A levy on secured goods relates back in priority to the date of perfection of the security interest,[117] rather than being governed by the rules of priority

114. *Id.* §§ 5102, 7108.

115. N.Y. Sess. Laws 1962, ch. 308, § 7110.

116. N.Y. Civ. Prac. Law § 7110 (McKinney Supp. 1972). The former version of the section was captioned "Sheriff's powers to enter building on seizure or execution;" the amendment reduced the caption to read "Sheriff's powers" and limited all reference to the prejudgment order of seizure stage of the action.

117. N.Y. U.C.C. § 9-501(5) (McKinney 1964).

generally applicable to judgment levies.[118] Additionally, secured goods which would normally be subject to exemption on judgment levies are excluded from exemption "where the judgment is for the purchase price of the exempt property."[119] A purchase money security interest will, accordingly, be as readily enforceable through an action on the debt as by a replevin action. In the absence of amendment of the exemption section, however, property given as collateral security, rather than as security for the repayment of its purchase price, will not be recoverable by levy on the underlying debt if the property falls within the provisions of the judgment exemption section. It is questionable whether this is a desirable result. As long as such property may be taken as security, the same power of enforcement ought to be available in one action as in another, thereby encouraging legal economy and reducing the burden of litigation before the courts, without reducing the opportunity of the debtor to appear and defend against the claim of default on his indebtedness.

Recovery of the collateral by levy under the judgment on the debt is presently subject to the same limitations mentioned above with respect to enforcement of the final judgment of replevin.[120] Collection is by execution. No provision is available for breaking and entering in order to recover the collateral. Injunctive relief, pending judgment and levy of the execution is subject to the same showing of actual damage under section 6301 of the CPLR. But uncertainty is heightened because section 6301 requires a showing that the secured chattels are the "subject of the action," and that the conduct of defendant tends "to render the judgment ineffectual." Quite possibly these requirements will not be met on the face of the pleadings, since the action is on the general indebtedness rather than specifically on the right to the possession of the collateral.

CONCLUSION

The "blessing of age" has worn out on summary seizures in replevin actions.[121] In accepting the concept of increased consideration for debtors and a jealous regard for their "opportunity to be heard," however, the courts and legislators should not lose sight of other relevant considerations. Two of these should be noted:

118. N.Y. CIV. PRAC. LAW § 5234 (McKinney 1963).
119. *Id.* § 5205(a) & (b).
120. *See* the text accompanying *supra* notes 103-16.
121. Laprease v. Raymours Furniture Co., 315 F. Supp. 716, 722-23 (N.D.N.Y. 1970).

1. The need continues for readily available credit to those who have need to purchase the very necessaries and conveniences, the summary seizure of which the courts have so clearly disapproved, as well as for the fulfilling of other needs and desires legitimate to any free society.

2. That credit, to the extent it is founded on the security of property, must reflect the cost of ultimate realization on the credit and any losses resulting from the inability of the financer to do so.

The occasion for the discarding of the unsatisfactory features of the replevin process may be an appropriate time for a fresh consideration of this creditor remedial process. The amending process urged by Governor Rockefeller[122] should have as its object the provision of legal means for the efficient obtaining of information regarding the location of secured chattels and their inexpensive recovery in a manner which is considerate of the right of their possessor to present any defense to the underlying claim or to the allegation of the secured interest. The protection of this right, however, should not require unnecessary procedural encumbrances which add to the cost of legitimate collection and the burden of increasing commercial litigation on the courts, without thereby enhancing a defendant's rights to procedural due process. Certain amendments seem clearly indicated, although the following list is not presumed to be exhaustive.

1. Provision should be made for the granting of injunctive relief in any action (whether for replevin or on the underlying debt) where collateral security is claimed, to restrain the removal from the state of any vehicle, aircraft or vessel or the removal from its location, or the transfer, sale, pledge, assignment or other disposition of any other property, pending the further order of the court. The relief should be available with respect to all secured property, should be obtainable ex parte either prior or subsequent to the commencement of the action (but effective only on or subsequent to the service of the summons and complaint) and should be subject to review by any judge of the court which issued it after brief notice to the plaintiff, with provision for scheduling of the review and notice to defendant by plaintiff's attorneys on written demand from the defendant where the defendant is not represented by counsel. Provisions for a fixed undertaking should be included, with an undertaking in a lesser amount being obtainable for cause shown, on prior notice to defendant.

122. Governor's Memo., N.Y. Sess. Law 1971, at 2640.

2. The replevin provisions should specify standards for the granting of ex parte seizure orders in extraordinary cases (where removal of the chattel from the state or destruction or secretion of the chattel by the defendant is shown to be about to occur), together with specification of the requisite showing to be made, with opportunity for prompt review after seizure and notice of the right of the defendant to appear and be heard at the review, all to be served simultaneously with seizure.

3. The undertaking to be supplied on prejudgment replevin seizure should be required only after issuance of the order of seizure, with the bond form to be filed with and approved by the court clerk, provided a corporate surety bond is used and the notice of application includes the name of the bonding company and the amount of the proposed bond. The court should be required to approve any bond provided by other than a corporate surety. The bond for prejudgment seizure could be the same bond previously given in connection with injunctive relief, alone or in combination with any further security required by the court.

4. Procedures should be specified for the prompt scheduling and preferred handling of prejudgment seizure hearings. Issuance of the seizure order by default and without proof should be authorized. An actual hearing should be required only on service of written notice of objections specifying the defenses urged for the hearing. The notice should be served one day in advance of the return date, and the testimony at the hearing should be limited to those issues. The burden of responding with testimonial facts should be initially placed on the defendant, ruling out mere general denials, with the ultimate burden of showing the probable validity of his position on the creditor-plaintiff himself.

5. Section 7110 of the CPLR should be amended to provide for authority to break, enter and seize upon preliminary seizure orders and on the enforcement of final judgments in replevin or on the debt (the authority being limited to seizure of secured property), with specification of standards for the granting of the authority. For example, authority should be granted in any final judgment or execution where the court finds probable cause to believe the goods are on the specified premises. Where household goods are involved, the standards should be satisfied by statutory presumption, if the court finds probable cause to believe that the debtor's residence is as indicated and that the judgment creditor has no reason to believe that the collateral is not still in the

possession of the debtor. Plaintiff should be entitled to inclusion of the authority in any case where notice of application therefor is included in the procedural due process notice of the proposed prejudgment seizure of collateral and no facts are thereafter presented by defendant which would make the granting of such authority inappropriate.

6. Any replevin judgment and any judgment on the debt, to the extent of its enforcement for the recovery of a secured chattel where the plaintiff is a secured creditor of the defendant, should be enforceable by contempt (whether or not the chattel is unique).

7. Section 6205 of the CPLR should be amended to exclude from the judgment exemption provisions any collateral over which a security interest was granted to the judgment creditor by the judgment debtor, provided it constituted collateral security for the judgment debt.

Regardless of whether such amendments are pursued by state authorities, however, the creditor's attorney has an opportunity to exert the creative legal function traditionally asserted by the bar when new commercial needs required new legal remedies. Through carefully considered, narrowly drawn and fairly conceived private legal arrangements, combined with judicious use of available legal remedies, recovery of defaulted indebtedness may be enhanced and legal "red tape" minimized within the limits imposed by the legislature, the courts and general concepts of fair dealing. An enlightened creditor concern and frank acceptance of society's legitimate interest in the protection of the rights of the debtor must be recognized and fostered, at the same time that protest is made against the predominant political tendency to transmogrify all creditors by the worst practices of the least responsible members of the creditor community.