



Winter 1-1-1975

## Address-Summary Prejudgment Creditors' Remedies And Due Process Of Law: Continuing Uncertainty After Mitchell V. W. T Grant Company

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### Recommended Citation

Roy L. Steinheimer, Jr., *Address-Summary Prejudgment Creditors' Remedies And Due Process Of Law: Continuing Uncertainty After Mitchell V. W. T Grant Company*, 32 Wash. & Lee L. Rev. 79 (1975).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol32/iss1/6>

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ADDRESS—SUMMARY PREJUDGMENT  
CREDITORS' REMEDIES AND DUE PROCESS OF  
LAW: CONTINUING UNCERTAINTY AFTER  
*MITCHELL v. W. T. GRANT COMPANY*\*

ROY L. STEINHEIMER, JR.\*\*

I have long felt that the Supreme Court and commercial law make strange bedfellows and the Court's recent decisions in the area of summary prejudgment remedies of creditors tend to reinforce this feeling. The Supreme Court's tinkering with these creditors' remedies started in the late sixties with its decision in *Sniadach v. Family Finance Corp.*<sup>1</sup> The facts in that case are simple enough. Christine Sniadach was an employee of Miller Harris Instrument Company in Milwaukee, Wisconsin, who borrowed money from Family Finance Corporation and failed to pay off the loan when it was due. In strict accordance with the Wisconsin garnishment statute,<sup>2</sup> Family Finance commenced a garnishment action against Mrs. Sniadach and her employer, Miller Harris, as garnishee.

Summonses were issued in the garnishment action by the clerk of the court. The summons served on Miller Harris had the effect of freezing Mrs. Sniadach's wages. Subsequently, but on the same day, Mrs. Sniadach was also served with a summons in the garnishment action. She then moved to dismiss the garnishment action, claiming that the Wisconsin garnishment statute was unconstitutional since it established a technique for taking her property without the procedural due process required by the fourteenth amendment.<sup>3</sup> Mrs. Sniadach contended that she was entitled to prior notice and hearing before her wages could be frozen by a summons served on Miller Harris. It is interesting to observe that she did not deny borrowing the money from Family Finance, nor did she deny being in default on the loan. She did not claim that any valid defenses could be asserted against Family Finance. It is therefore difficult to imagine in these circumstances what real benefit Mrs. Sniadach would have enjoyed from notice and hearing before the inevitable garnishment occurred. The Supreme Court nonetheless held that she had been

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\*Given before the West Virginia Bar Association, August 31, 1974.

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<sup>1</sup> 395 U.S. 337 (1969).

<sup>2</sup> WIS. STAT. §§ 267.01 *et seq.* (1965).

<sup>3</sup> 395 U.S. at 338-39.

denied due process under the fourteenth amendment and that the Wisconsin garnishment statute was unconstitutional.<sup>4</sup>

Frankly, I had some difficulty with the *Sniadach* decision. This difficulty did not stem from any desire to defend the merits of pre-judgment garnishment as a creditor's remedy but from the decision's implications in relation to the fourteenth amendment. Indeed, I must confess to a certain sympathy for the position taken by Mr. Justice Black in his stinging dissent in *Sniadach*.<sup>5</sup> If the garnishment remedy was to be hedged in by restrictions on its use, was it not a matter more appropriately accomplished by legislation rather than through the

<sup>4</sup> *Id.* at 342.

<sup>5</sup> The Wisconsin law is said to violate the "fundamental principles of due process." Of course the due process clause of the fourteenth amendment contains no words that indicate that this Court has power to play so fast and loose with state laws. The arguments the Court makes to reach what I consider to be its unconstitutional conclusion, however, show why it strikes down this state law. It is because it considers a garnishment law of this kind to be bad state policy, a judgment I think the state legislature, not this Court, has power to make. The Court shows it believes the garnishment policy to be a "most inhuman doctrine;" that it "compels the wage earner, trying to keep his family together, to be driven below the poverty level;" that "in a vast number of cases the debt is a fraudulent one, saddled on a poor ignorant person who is trapped in an easy credit nightmare, in which he is charged double for something he could not pay for even if the proper price was called for, and then hounded into giving up his pound of flesh, and being fired besides."

The foregoing emotional rhetoric might be very appropriate for Congressmen to make against some phases of garnishment laws. Indeed, the quoted statements were made by Congressmen during a debate over a proposed federal garnishment law. The arguments would also be appropriate for Wisconsin's legislators to make against that State's garnishment laws. But made in a Court opinion, holding Wisconsin's law unconstitutional, they amount to what I believe to be a plain, judicial usurpation of state legislative power to decide what the State's laws should be. There is not one word in our Federal Constitution or in any of its Amendments and not a word in the reports of that document's passage from which one can draw the slightest inference that we have authority thus to try to supplement or strike down the State's selection of its own policies. The Wisconsin law is simply nullified by this Court as though the Court had been granted a super-legislative power to step in and frustrate policies of States adopted by their own elected legislatures. The Court thus steps back into the due process philosophy which brought on President Roosevelt's Court fight. Arguments can be made for outlawing loan sharks and installment sales companies but such decisions, I think, should be made by state and federal legislators, and not by this Court.

*Id.* at 344-45.

medium of the fourteenth amendment? I believe so. Yet *Sniadach* in the limited context of prejudgment garnishment of wages might well have been acceptable even to the commercial community. Unfortunately, it has not been limited to prejudgment garnishment. The decision came quickly to be viewed as an open invitation to attack in the name of due process a number of respectable creditors' remedies.

This invitation in *Sniadach* did not go unheeded. Like mushrooms after a warm spring rain, dozens of actions sprouted over the nation challenging prejudgment seizures of property by creditors without prior notice and hearing. Based on *Sniadach*, debtors suddenly perceived that they had been deprived of due process by the exercise of landlords' liens,<sup>6</sup> bankers' liens,<sup>7</sup> garagemen's liens,<sup>8</sup> attachments,<sup>9</sup> seizures of real property through writs of immediate possession,<sup>10</sup> exercise of the power of sale in mortgages on real property,<sup>11</sup> and by summary repossession of collateral in secured transactions.<sup>12</sup> And the fertile fields opened by *Sniadach* have not yet yielded their full harvest to debtors who are now hypersensitive to due process. Consider the potential for attack under *Sniadach* on the vendor's lien on real property, the warehousemen's lien, the carrier's lien, laundrymen's liens, jewelers' liens, veterinarians' liens, miners' liens, loggers' liens, and agisters' liens to name just a few. How is the pledgee of collateral affected when he wishes to realize on the collateral?<sup>13</sup> How is the security interest of banks in collection items affected?<sup>14</sup> Even some of the remedies of buyers and sellers under Article 2 of the Uniform Commercial Code may well be called into question.<sup>15</sup>

The reaction of the courts to the extensive litigation provoked by *Sniadach* has been mixed. Some judges, under the *Sniadach* banner, have cut down various creditors' summary prejudgment remedies in

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<sup>6</sup> *Shaffer v. Holbrook*, 346 F.Supp. 762 (S.D.W.Va. 1972) (relying on both *Sniadach* and *Fuentes*).

<sup>7</sup> *Bichel Optical Laboratories, Inc. v. Marquette Nat'l Bank*, 336 F. Supp. 1368 (D. Minn. 1971), *aff'd*, 487 F.2d 906 (8th Cir. 1973).

<sup>8</sup> *Mason v. Garris*, 360 F. Supp. 420 (N.D. Ga.) (relying on both *Sniadach* and *Fuentes*), *modified*, 364 F. Supp. 452 (N.D. Ga. 1973).

<sup>9</sup> *Lebowitz v. Forbes Leasing & Fin. Corp.*, 326 F. Supp. 1335 (E.D. Pa. 1971), *aff'd*, 456 F.2d 979 (3d Cir), *cert. denied*, 409 U.S. 843 (1972).

<sup>10</sup> *Mihans v. Municipal Court*, 7 Cal. App. 3d 479, \_\_\_ P2d \_\_\_, 87 Cal. Rptr. 17 (1970).

<sup>11</sup> *Young v. Ridley*, 309 F. Supp. 1308 (D.D.C. 1970).

<sup>12</sup> *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716 (N.D.N.Y. 1970).

<sup>13</sup> UNIFORM COMMERCIAL CODE § 9-305.

<sup>14</sup> UNIFORM COMMERCIAL CODE § 4-208.

<sup>15</sup> *See, e.g.*, UCC §§ 2-502, 2-507(2), 2-702(2), 2-711(3), and 2-716(3). *See also* UCC § 9-113.

the name of due process. Other judges, understandably concerned with the ramifications of *Sniadach*, have restricted its impact rather severely. Out of this litigation, *Fuentes v. Shevin*<sup>16</sup> arrived in the Supreme Court for decision in 1972. By this time there had been some changes in the make-up of the Court. Chief Justice Warren and Justices Black, Fortas and Harlan were no longer on the Court. Chief Justice Burger and Justices Blackmun, Powell and Rehnquist had succeeded them. However, Justices Powell and Rehnquist did not participate in the *Fuentes* case. Thus *Fuentes* was heard and decided by only seven justices.

The decisions of two three-judge federal district courts were consolidated for hearing in *Fuentes v. Shevin*.<sup>17</sup> I will refer in detail only to the situation involving Margarita Fuentes since it is sufficiently illustrative of the basic problem faced by the Court. Mrs. Fuentes, a resident of Dade County, Florida, purchased a gas stove and a stereo set from Firestone Tire and Rubber Company on an installment plan. She signed a security agreement which granted a security interest to Firestone and gave Firestone the right to repossess the merchandise if she defaulted in her installment payments. After Mrs. Fuentes admittedly had fallen some \$200 behind in her payments, Firestone, pursuant to the Florida replevin statutes,<sup>18</sup> filed a complaint and supporting affidavit in an action of replevin in the Small Claims Court of Dade County and posted a replevin bond. Upon the filing of these papers, the clerk of the Small Claims Court issued a writ of replevin which was served on Mrs. Fuentes along with the complaint and affidavit at the time the deputy sheriff took possession of the stove and stereo set. Under the Florida replevin statute, she could have recovered possession of the goods by filing a counterbond. Instead, relying on *Sniadach*, she brought suit against Firestone for an injunction against enforcement of the Florida replevin statute alleg-

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<sup>16</sup> 407 U.S. 67 (1972).

<sup>17</sup> In the other decision, *Epps v. Cortese*, three individuals challenged the constitutionality of Pennsylvania's prejudgment replevin process. They had purchased personal property under installment sales contracts. The sellers obtained and executed summary writs of replevin claiming that the buyers had fallen behind in their payments. *Id.* at 71. Execution was in strict accordance with state law. PA. STAT. ANN. tit. 12, § 1821 (1967) and PA. R. Civ. P. 1073, 1076, and 1077.

The Court quite properly characterized the situation of a fourth appellant in *Epps* as "bizarre." 407 U.S. at 72. She had been divorced from a deputy sheriff and was engaged in a child custody dispute with him. Being familiar with the replevin process, he obtained a writ ordering the seizure of the child's clothes, furniture and toys. *Id.*

Unlike Mrs. Fuentes, none of the appellants in *Epps* was ever sued by the party who initiated seizure of the property involved. *Id.* n.4.

<sup>18</sup> FLA. STAT. §§ 78.01, 78.07, 78.08, 78.10, 78.13 (Supp. 1972).

ing that the statute was unconstitutional under the fourteenth amendment since it permitted seizure of her property without prior notice and hearing.

By a vote of four to three, the Supreme Court held that the *Sniadach* doctrine was applicable to a secured party who had repossessed collateral by replevin procedures without prior notice and hearing and declared the Florida statute unconstitutional under the fourteenth amendment.<sup>19</sup> Mr. Justice White, who had been with the majority in *Sniadach*, wrote the dissenting opinion in *Fuentes* and was joined by Mr. Chief Justice Burger and Mr. Justice Blackmun, the only justices who had not participated in *Sniadach*.

As I view it, there are sufficient differences between *Sniadach* and *Fuentes* to call for different results in the two cases. The commercial community can adjust to *Sniadach* if the impact of that case is restricted to remedies such as garnishment. However, it is unreasonable to expect the commercial community to live with *Fuentes*. In his *Fuentes* opinion, Mr. Justice Stewart stated that there might be "extraordinary situations" which could justify summary repossession without notice. To my mind it should be the other way around; *i.e.*, summary repossession should be permitted without notice *except* in "extraordinary situations."

There are significant distinctions between the situation in *Sniadach* and that in *Fuentes*. In *Sniadach*, Family Finance was an *unsecured* creditor with all that status suggests in terms of high credit risks and high interest rates to compensate for those risks. As an unsecured creditor, Family Finance had no claim to any specific property of Mrs. Sniadach's prior to the garnishment. Only when she defaulted and Family Finance was faced with the stark reality of the risks it well knew were inherent in the *unsecured* loan transaction did it suddenly seize her wages. This seizure of Mrs. Sniadach's property was little more than a "boot-strap" operation by which Family Finance hoped to obtain a preferred position in relation to her other unsecured creditors. It smacks of "race of diligence" tactics by which unsecured creditors rush in to protect themselves through summary prejudgment seizures of a debtor's property while the poor debtor usually takes the hindermost in the process. *Fuentes* presented to the Court the opportunity to limit *Sniadach* to this kind of unsecured creditor situation.

In *Fuentes*, on the other hand, Firestone was a *secured* creditor rather than an *unsecured* creditor. Firestone had insisted on collateral to secure payment of Mrs. Fuentes' indebtedness. This secured

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<sup>19</sup> 407 U.S. at 96-97.

credit arrangement must have influenced Firestone in its appraisal of the credit risks, its willingness to extend credit, and the charges it would make for the extension of credit. In appraising the transaction, Firestone undoubtedly assumed that if Mrs. Fuentes defaulted, it would be able to use time honored repossession procedures without the additional expense, delay and risks which would be involved by compliance with the requirements of procedural due process.

This distinction between the *unsecured* creditor in *Sniadach* and the *secured* creditor in *Fuentes* is significant. As a matter of policy, our state legislatures and courts have traditionally provided less protection to unsecured creditors than to secured creditors. The socio-economic reasons for this policy hardly need detailed exposition. This difference in treatment of unsecured and secured creditors is reflected in the Uniform Commercial Code.<sup>20</sup> Even among secured creditors we find differences in treatment. Our legislatures and courts have traditionally accorded the highest order of protection to *purchase money* secured creditors whose massive infusions of credit are so essential to our economy.<sup>21</sup> The traditional state policies of according different treatment to different kinds of creditors should not be ignored when questions of due process are raised. Even if one accepts the proposition that due process protection is ordinarily needed when unsecured creditors exercise summary prejudgment remedies, it does not follow that the same is true of secured creditors. The balance of interests is substantially different in the two situations. When secured creditors are involved—and particularly purchase money secured creditors—it seems appropriate that the fourteenth amendment should be invoked only in “extraordinary situations” where the secured creditor has demonstrably departed from accepted norms in the exercise of the remedy of summary repossession. In *Fuentes*, Firestone was not only a secured creditor, it was a purchase money secured creditor. Yet the Court put Firestone on the same footing under the fourteenth amendment as the lowly unsecured creditor.

Consider another difference between *Sniadach* and *Fuentes*. The unsecured creditor in *Sniadach* had no prior interest in or claim to the property which he suddenly seized. The secured creditor in *Fuentes* had contractual rights in relation to the collateral from the very inception of the secured transaction. The security agreement between the secured creditor and the debtor carefully arranged their contractual interests in the collateral for the duration of the secured transaction. The manner in which each of the parties to this agree-

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<sup>20</sup> See, e.g., UCC §§ 2-402, 9-301.

<sup>21</sup> See, e.g., UCC §§ 9-301(2), 9-301(1)(d), 9-312(3)(4).

ment could exercise these contractual rights in the collateral was spelled out in the agreement. The debtor was permitted to have full use and enjoyment of the collateral as long as she paid the installments when they fell due. Upon default, which had occurred in *Fuentes*, the secured party was given the contractual right to possession of the property. The repossession of the collateral was simply an adjustment of contractual rights between the parties in much the same way that breach of a contract results in forfeit of a deposit given to assure performance of an agreement. Is such an adjustment of interests pursuant to contractual arrangement the basis for invoking the fourteenth amendment?

We should not lose sight of the fact that the contractual arrangement of interests in collateral is authorized by our legislatures in Article 9 of the Uniform Commercial Code. The complex provisions of that Article have been painstakingly developed over a period of a quarter of a century to establish the proper balance between the interests of the secured creditor and the debtor. Provision is made for the method of creation of a secured creditor's rights in the collateral,<sup>22</sup> for the exercise of those rights by repossession,<sup>23</sup> for the right of redemption by the debtor after repossession,<sup>24</sup> and for remedies to the debtor if the repossession is improper.<sup>25</sup>

In addition, there has been widespread adoption of consumer protection legislation which bears importantly on the interests of the secured creditor and debtor. This legislation, like the Uniform Commercial Code, involves a delicate and complex adjustment of the interests of the parties. The Uniform Consumer Credit Code, for example, has been through a number of drafts over the past fifteen years or so in an effort to establish a proper balance among the competing interests in consumer transactions. One of the important interests which this legislation has carefully preserved is the secured creditor's right to summary repossession of collateral.<sup>26</sup> Whether a proper balance was struck between the competing interests of the secured creditor and the debtor by preserving this right is not a matter for the Supreme Court to decide. It is a decision which should be left to

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<sup>22</sup> UCC § 9-203.

<sup>23</sup> UCC § 9-503.

<sup>24</sup> UCC § 9-506.

<sup>25</sup> UCC § 9-507.

<sup>26</sup> See generally UNIFORM CONSUMER CREDIT CODE § 5.103. Note however that if the property subject to the security interest sold for \$1,000 or less, the buyer is not liable to the seller for any deficiency. Note also that the National Consumer Act forbids a secured party to take possession of property subject to a security interest without judicial process. Compare UCCC § 5.103 with NAT'L CONS. ACT §§ 5.024, 5.206.



the state legislatures due to their superior fact-finding abilities. The Supreme Court should disturb this right in the name of due process only where prior notice and hearing are clearly necessary to provide meaningful protection to the debtor. This will normally be an "extraordinary situation." I venture to say that in most repossession situations the default is unquestioned and the right to repossess is evident. In such circumstances, notice and hearing can be little more than a noisome and fruitless ritual. Only the "extraordinary situation" justifies the protection of due process. *Fuentes* unfortunately turns the emphasis around and disrupts the legislative structure for secured transactions by imposing requirements of notice and hearing in all summary repossession situations except the "extraordinary situation."

Multiple interests in property are not peculiar to secured transactions. Such multiple interests are found in a wide variety of situations; bailments and leases are obvious examples. Over the years, parties to such arrangements have commonly adjusted their interests without resort to the courts. This sort of extrajudicial adjustment of such interests between private parties is both expeditious and sensible. It is economically sound and is socially acceptable. To illustrate, take the simple gratuitous bailment which involves multiple interests in property. From childhood, we encounter the gratuitous bailment and in coping with it we follow behavioral patterns which come quite naturally. A child who is the proud owner of a new tricycle may magnanimously permit a friend to use the tricycle for an unspecified period of time. However, when the youthful bailor decides that the time for sharing the velocipede has expired, you may be sure that an extrajudicial adjustment of interests in the velocipede will occur. Only in the "extraordinary situation," where some violence may be involved in the process of adjustment, do fond parents intercede. We grow to adulthood repeating this accepted pattern of behavior as we lend our property to others in an endless series of gratuitous bailment arrangements. You borrow my ladder and fail to return it. I need the ladder and go to your garage and repossess it without notice to you. I borrow your sailboat and fail to return it to your mooring. Without prior notice to me, you board the boat and sail her back to your mooring. Have practical adjustments between private citizens of multiple interests in property escaped involvement with the fourteenth amendment only because there seems to be no state action involved or because such a process makes common sense, economic sense, and is socially acceptable? If the reason be the latter, as I suspect it is, why should the process suddenly become invalid under the fourteenth amendment if one uses a writ of replevin to accomplish

the same result. Should the replevin procedure not be equally as acceptable as self-help except in a truly "extraordinary situation?"

I submit that the differences between *Sniadach* and *Fuentes* were significant enough to tip the scales in favor of the constitutionality of the Florida replevin statute when one weighs the competing interests involved. Commercial reality certainly called for such a result. Even if one accepts the argument that in the case of *unsecured* creditors the debtor's need for protection from summary prejudgment seizures of his property outweighs the interests of the state and its citizens to provide appropriate remedies to such creditors, it does not follow that the same is true where *secured* creditors are involved. The interests of a debtor and a secured party in a secured transaction situation are equally deserving of protection. The state has traditionally controlled the activities of its citizens with regard to contract arrangements involving collateral security and it has an abiding interest in being able to control the delicate balance between the interests of a debtor and a secured party which are created under its laws. This state interest includes control and supervision not only of the manner in which its citizens can arrange their interests in secured transactions but also of the methods by which they can adjust their interests in such transactions, whether by summary repossession of collateral or otherwise. In *Fuentes* the Supreme Court had the opportunity to put summary prejudgment remedies of creditors in a commercially viable posture. Pursuant to *Sniadach*, summary remedies of unsecured creditors, such as garnishment, could have been left under the cloud of procedural due process except in "extraordinary situations." On the other hand, summary repossession of collateral by a secured creditor could have been placed beyond the pale of the fourteenth amendment except in "extraordinary situations."

My feelings about *Fuentes* are reflected in Mr. Justice White's dissenting opinion in that case:

. . . The Court's rhetoric is seductive, but in end analysis, the result it reaches will have little impact and represents no more than ideological tinkering with state law. . . . It is very doubtful in my mind that such a hearing would in fact result in protections for the debtor substantially different from those the present laws provide. On the contrary, the availability of credit may well be diminished or, in any event, the expense of securing it increased.

. . . The procedure that the Court strikes down is not some barbaric hangover from bygone days. The respective rights of the parties in secured transactions have undergone the most

intensive analysis in recent years. . . . I am content to rest on the judgement of those who have wrestled with these problems so long and often and upon the judgement of the legislatures that have considered and so recently adopted provisions that contemplate precisely what has happened in these cases.<sup>27</sup>

Unfavorable reaction to the *Fuentes* decision was not long in coming and was not confined to the rank and file of the commercial community. Even members of the judiciary seemed appalled by its ramifications. One judge commented that *Fuentes* "indicates a notion that until it was determined had not been held by legal thinkers anywhere in the United States, that had not been advanced by text writers [or] by courts of last resort in the various states. It had not been adopted by various molders . . . of legal opinion . . ." <sup>28</sup> Consequently, this particular judge was "not inclined to extend the doctrine of *Fuentes v. Shevin* one millimeter beyond the requirements of that case . . ." <sup>29</sup>

Another court applied the *Fuentes* doctrine "with no small measure of reluctance" and added these comments:

While I applaud any effort to secure for the poor and helpless the enjoyment of their constitutional rights, it is not clear that the present trend of judicial thinking will ultimately have this effect. For those who make an honest effort to maintain their payment schedules and default due to circumstances beyond their control, creditors have traditionally exercised considerable flexibility and have exhausted every reasonable alternative before resorting to the drastic and expensive remedy of repossession. These persons, the ostensible beneficiaries of *Sniadach* and its progeny, stand to suffer substantially in the long run, if sellers and creditors raise their prices and interest rates commensurate with the cost of the judicial process which these decisions make necessary. Further, this court cannot help but note the increasing segment of our population which has deliberately chosen to live on the lower rungs of the economic ladder, whether out of revulsion against the materialism of society or out of lack of ambition and commitment. For these persons, whether repossession is summary in nature or the result of judicial process will, in most instances, have little significance.

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<sup>27</sup> 407 U.S. at 102-03.

<sup>28</sup> *Plante v. Industrial Nat'l Bank*, 12 UCC REP. SERV. 739, 741-42 (R.I. Super. Ct. 1973).

<sup>29</sup> *Id.*

Whether or not the benefits of the present decision will prove sufficient to outweigh the possible costs remains to be seen.<sup>30</sup>

In open rebellion, the Arizona Supreme Court refused to follow *Fuentes*: "Until such time as the United States Supreme Court decides this question by a clear majority [rather than a plurality of 4 to 3], we will continue to uphold the garnishment and attachment statutes of this state in cases wherein wages are not involved."<sup>31</sup> The Louisiana Supreme Court used a less obtrusive technique to avoid the thrust of *Fuentes*. It called attention to the fact that Justice Stewart had said in *Fuentes* that there could be "extraordinary situations" to which the requirements of procedural due process would not apply and then proceeded to find it was confronted with such an "extraordinary situation" in both *Mitchell v. W. T. Grant Company*<sup>32</sup> and *Buckner v. Carmack*.<sup>33</sup>

*Mitchell v. W. T. Grant Company* was eventually heard by the Supreme Court and therefore deserves a closer look. The facts of the case are remarkably similar to *Fuentes*. Lawrence Mitchell purchased a refrigerator, stove, stereo and washer from W. T. Grant

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<sup>30</sup> *Adams v. Egley*, 338 F. Supp. 614, 622 (S.D. Cal. 1972), *rev'd sub nom*, *Adams v. Southern Cal. First Nat'l Bank*, 492 F.2d 324 (9th Cir. 1974), *cert. denied*, \_\_\_ U.S. \_\_\_, 95 S.Ct. 328 (1974). In *Adams v. Egley*, the district court held UCC § 9-503, which provides for self-help repossession, unconstitutional. The Ninth Circuit reversed stating that the fact the repossessing creditors acted pursuant to state law was of itself insufficient to establish state action. The court held that the test is not state involvement but rather significant state involvement. 492 F.2d at 330-31, *citing* *Moose Lodge v. Irvas*, 407 U.S. 163, 173 (1972); *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). Some "symbiotic relationship" is required. 492 F.2d at 330-31. The court found the appellees comparison with *Reitman v. Mulkey* inapposite. Enactment of the UCC merely codified existing law; it did not reverse any law as it had been prior to the Code, especially the creditor's remedy of self-help repossession. *Id.* at 332. The Ninth Circuit further stated that the limited state involvement which may be adequate for a finding of state action in racial discrimination cases does not require a finding of state action in economic due process cases. *Id.* at 333. In short, "subjecting all behavior that conforms to state law to the fourteenth amendment would emasculate the state action concept." *Id.* at 331 (footnote omitted). *Accord*, *James v. Pinnix*, 495 F.2d 206 (5th Cir. 1974).

<sup>31</sup> *Roofing Wholesale Co. v. Palmer*, 108 Ariz. 508, 502 P.2d 1327, 1331 (1972). This decision has been harshly criticized. See Note, *Is a 4-3 Decision of the United States Supreme Court the "Supreme Law of the Land?"*, 2 FLA. ST. L. REV. 312 (1974). See also Comment, *Four to Three Decisions of the United States Supreme Court Are Not Binding on the State of Arizona*, 1973 LAW & SOCIAL ORDER 543.

<sup>32</sup> 263 La. 627, 269 So. 2d 186 (1972).

<sup>33</sup> \_\_\_ La. \_\_\_, 272 So. 2d 326 (1973), *appeal dismissed*, \_\_\_ U.S. \_\_\_, 94 S. Ct. 2594 (1974).

Company pursuant to an installment sales contract. When he defaulted on his payments, Grant instituted suit against him in the First City Court for the Parish of Orleans to recover the unpaid balance of the purchase price of the merchandise. Grant's complaint alleged that it had a vendor's lien on the goods and that a writ of sequestration should issue to sequester the goods pending the outcome of the suit. The complaint was accompanied by an affidavit of Grant's store manager swearing to the truth of the facts alleged in the complaint and asserting that Grant had reason to believe that Lawrence would "encumber, alienate or otherwise dispose of the merchandise . . . during the pendency of these proceedings, and that a writ of sequestration is necessary in the premises."<sup>34</sup> This statement was a standard part of the printed forms used in Louisiana in requesting a writ of sequestration and was premised on the fact that under Louisiana civil law concepts,<sup>35</sup> a debtor in possession of goods subject to a vendor's lien can pass good title to a third party purchaser. Based on the complaint and affidavit and without any notice to Mr. Mitchell or opportunity for him to be heard, the judge of the First City Court for the Parish of Orleans signed an order for issuance of a writ of sequestration and directed the constable to take possession of the refrigerator, stove, stereo and washer upon Grant's furnishing bond. The bond was furnished, at which time the writ of sequestration issued and the goods were seized. At the same time, Mr. Mitchell was served with a citation directing him to appear and answer the complaint within five days. Instead, he filed a motion to dissolve the writ claiming that under *Fuentes* the summary repossession was unconstitutional. The Louisiana Supreme Court held that the procedure was constitutional because the facts of the case constituted one of those "extraordinary situations" which Mr. Justice Stewart had mentioned in the *Fuentes* opinion.<sup>36</sup>

The Supreme Court granted Mr. Mitchell's writ of certiorari.<sup>37</sup> The Court's action was intriguing because the facts were so similar to *Fuentes*. Had the Supreme Court granted certiorari to explicate the "extraordinary situations" exception to the *Fuentes* doctrine which had been mentioned by Mr. Justice Stewart? Or was it just possible that the Supreme Court intended to use the *Mitchell* case as a vehicle for a re-examination of the *Fuentes* doctrine before a full

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<sup>34</sup> 269 So. 2d at 187.

<sup>35</sup> Louisiana has not adopted the Uniform Commercial Code.

<sup>36</sup> 269 So. 2d at 190-91.

<sup>37</sup> 411 U.S. 981 (1973).

bench including Justices Powell and Rehnquist who had not participated in *Fuentes*? I, for one, hoped that it was the latter reason which had motivated the Supreme Court to grant certiorari.

The Court held in a five to four decision, that the Louisiana sequestration statute was constitutional.<sup>38</sup> Justices Powell and Rehnquist joined with the three dissenting justices in *Fuentes* to form a majority of the Court. Looking only at the end result in the *Mitchell* case, one might conclude that *Fuentes* was overruled. Indeed, Mr. Justice Powell in a concurring opinion flatly states that this is the thrust of *Mitchell*.<sup>39</sup> But when one examines the opinion of the majority of the Court, written by Mr. Justice White, it hardly seems that *Fuentes* was overruled in reaching the end result. The majority opinion carefully avoids any statement to that effect. Indeed, the opinion meticulously and painstakingly tiptoes through the facts of *Mitchell* pointing out distinctions between *Mitchell* and *Fuentes*. Mr. Justice Stewart in his dissenting opinion characterizes these factual distinctions as "insubstantial"<sup>40</sup> and I would agree. But the fact remains that the majority of the Court thinks it found distinctions, substantial or not, between *Fuentes* and *Mitchell* and thus left *Fuentes* standing.

One of the distinctions between *Fuentes* and *Mitchell* which the majority thinks it discerned serves to illustrate the Court's approach. The majority opinion found that the two cases were different because in *Fuentes* the writ of replevin could be signed by the *clerk* of the Small Claims Court in Dade County, Florida, whereas in *Mitchell*, the writ of sequestration had to be signed by the *judge* of the First City Court for the Parish of Orleans.<sup>41</sup> Mr. Justice Stewart's dissenting reply to this purported distinction could be characterized as "so what." As Mr. Justice Stewart points out, the matter of who signs the writ is beside the point.<sup>42</sup> The important issue revolves around the common fact in both cases that the writs could be issued *ex parte* without notice and hearing. In both cases, the papers used to support the issuance of the writs were nothing more than standard printed legal forms on which the blanks had been filled in. "Whether the issuing functionary be a judge or a court clerk, he can in any event do no more than ascertain the formal sufficiency of the plaintiff's allegations, after which the issuance of the summary writ becomes a

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<sup>38</sup> 416 U.S. 606, 620 (1974).

<sup>39</sup> *Id.* at 623 (Powell, J., concurring).

<sup>40</sup> *Id.* at 633 (Stewart, J., dissenting).

<sup>41</sup> *Id.* at 616-17.

<sup>42</sup> *Id.* at 632-33 (Stewart, J., dissenting).

simple ministerial act [performed without prior notice and hearing]."<sup>43</sup>

This distinction between clerk-issued and judge-issued writs seems to put writs of sequestration in Louisiana in a peculiar stance. For some reason wholly unrelated to the fourteenth amendment, the Parish of Orleans is the only parish in Louisiana where writs of sequestration are issued by the *judge* of the First City Court. In all other parishes, the *clerk* of the court performs this function. Thus, after *Mitchell*, we seem to have an anomalous situation in Louisiana. In the Parish of Orleans, summary repossession by writs of sequestration can be accomplished *ex parte* without notice and hearing but in all other parishes of Louisiana notice and hearing are required under *Fuentes*. If this be the result in Louisiana, it is an Alice in Wonderland situation.

As far as the rest of the nation is concerned, *Mitchell* seems to give little in the way of guidance. The commercial community continues to be faced with the dreary, uncertain, expensive and time consuming process of case by case examination of due process in relation to summary repossession of collateral. However, one ray of hope was flashed to the commercial community by the *Mitchell* case. The end result in *Mitchell*, by whatever rationale it was reached, indicates that the Supreme Court may now be disenchanted with *Fuentes*. While the Court is apparently not yet ready to repudiate the *Fuentes* doctrine, it has now permitted some erosion of that doctrine. We can only hope that an outright repudiation of *Fuentes* except in "extraordinary situations" will come soon in order that the commercial community will not have to suffer through a creeping process of eroding *Fuentes* into obscurity.

Meanwhile, the spectre of *Fuentes* haunts not only summary repossession but also the entire area of self-help repossession of collateral by secured parties. The self-help repossession cases differ from *Fuentes* only in the technique used to accomplish summary repossession. In *Fuentes*, a public official accomplished the repossession at the behest of the secured party, while self-help repossession is a "do it yourself" operation. The secured party repossesses the collateral without the intercession of courts or public officials. This difference, however, is not inconsequential.

The fourteenth amendment provides that no state shall "deprive any person of . . . property without due process of the law . . . ." Invasions of property rights by private individuals are not within the

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<sup>43</sup> *Id.* (footnote omitted).

purview of the fourteenth amendment. Some significant state involvement is required.<sup>44</sup> How, then, can repossession by a private citizen, the secured party, of property in the possession of another private citizen, the debtor, involve state action so that the fourteenth amendment can be invoked? Simplistically stated, the argument made for state action in the numerous self-help repossession cases that have already been inspired by *Fuentes* is that self-help repossession is authorized by the legislature in § 9-503 of the Uniform Commercial Code, and hence such repossessions are made under color of state law and the fourteenth amendment can be invoked.

Most courts which have considered this argument for state action in the self-help repossession cases have rejected it and have refused to invoke the fourteenth amendment, thus leaving self-help repossession of collateral free of due process requirements.<sup>45</sup> A few courts, however, have found that there was state action involved in the self-help repossession situation and have gone on to apply the *Fuentes* doctrine to the self-help repossession remedy.<sup>46</sup>

As you can see, these developments place the summary remedy of self-help repossession in an uncertain and unsatisfactory posture. In those jurisdictions where the courts have found state action, summary repossession is subject to due process requirements whether the

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<sup>44</sup> *Adams v. Southern Cal. First Nat'l Bank*, 492 F.2d 324, 330-31 (9th Cir. 1974), *citing*, *Moose Lodge v. Irvis*, 407 U.S. 163, 173 (1972); *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961).

<sup>45</sup> *See, e.g.*, *Turner v. Impala Motors*, 503 F.2d 607, (6th Cir. 1974); *Shirley v. State Nat'l Bank*, 493 F.2d 739 (2d Cir. 1974); *Adams v. Southern Cal. First Nat'l Bank*, 492 F.2d 324 (9th Cir. 1974), *cert. denied*, \_\_\_ U.S. \_\_\_, 95 S. Ct. 328 (1974); *Bichel Optical Laboratories, Inc. v. Marquette Nat'l Bank*, 487 F.2d 906 (8th Cir. 1973); *Mayhugh v. Bill Allen Chevrolet*, 371 F. Supp. 1 (W.D. Mo. 1973), *aff'd sub nom.*, *Nowlin v. Professional Auto Sales, Inc.*, 496 F.2d 16 (8th Cir.), *cert. denied*, \_\_\_ U.S. \_\_\_, 95 S. Ct. 328 (1974); *Kinch v. Chrysler Credit Corp.*, 367 F. Supp. 436 (E.D. Tenn. 1973); *Shelton v. General Electric Credit Corp.*, 359 F. Supp. 1079 (M.D. Ga. 1973); *Pease v. Havelock Nat'l Bank*, 351 F. Supp. 118 (D. Neb. 1972); *Kirksey v. Therley*, 351 F. Supp. 727 (D. Colo. 1972); *Greene v. First Nat'l Exch. Bank*, 348 F. Supp. 672 (W.D. Va. 1972); *McCormick v. First Nat'l Bank*, 322 F. Supp. 604 (S.D. Fla. 1971); *Giglio v. Bank of Delaware*, 12 UCC REP. SERV. 934 (Del. Ch. 1973); *Messenger v. Sandy Motors, Inc.*, 121 N.J. Super. 1, 295 A.2d 402 (1972); *Frost v. Mohawk Nat'l Bank*, 74 Misc. 2d 912, 347 N.Y.S.2d 246 (1973); *Brown v. United States Nat'l Bank*, \_\_\_ Ore. \_\_\_, 508 P.2d 208 (1973); *Sandoval v. American Nat'l Bank*, 517 P.2d 188 (Wyo. 1973); *Plante v. Industrial Nat'l Bank*, 12 UCC REP. SERV. 739 (R.I. Super. Ct. 1973).

<sup>46</sup> *Watson v. Branch City Bank*, 380 F. Supp. 945, (W.D. Mich., 1974); *Gibbs v. Titelman*, 369 F. Supp. 38 (E.D. Pa. 1973), *rev'd*, 502 F.2d 1107 (3d Cir. 1974); *Boland v. Essex County Bank & Trust Co.*, 361 F. Supp. 917 (D. Mass. 1973); *Michel v. Rex-Norelco, Inc.*, 12 UCC REP. SERV. 543 (D. Vt. 1972).



repossession is accomplished by self-help or by action of public officials, *e.g.*, by replevin. In those jurisdictions where the courts have found no state action is involved in the self-help repossession situation, the anomolous situation exists whereby summary self-help repossession is free of the restraints of due process while summary repossession by replevin, or like procedures, is subject to the *Fuentes* doctrine.<sup>47</sup>

How can the Supreme Court restore some semblance of order to this important area of summary repossession? It could, of course, review one of the self-help repossession cases.<sup>48</sup> But such a case would present the liminal issue of state action which will be a sticky wicket for the Court. If the Court were to find state action in the self-help repossession situation in order to get at the due process problem, it might find that it has opened the floodgates to a wave of cases in

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<sup>47</sup> The requirement of sufficient state action to make the fourteenth amendment and 42 U.S.C. § 1983 (1970) applicable to self-help repossession is a significant barrier. It is unlikely that such a finding would be based on *Reitman v. Mulkey*, 387 U.S. 369 (1967), since the policy considerations underlying racial discrimination would have to be considerably broadened in order to apply them to UCC § 9-503.

Problems in finding § 9-503 unconstitutional are also presented by the concept of the freedom of contract. See Note, *State Action and the Constitutionality of UCC § 9-503*, 30 WASH. & LEE L. REV. 547, 573 (1973).

On the problem of state action and UCC § 9-503 in general, see, *e.g.*, Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 46 SO. CAL. L. REV. 1003 (1973), 47 SO. CAL. L. REV. 1 (1973); Clark & Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355 (1973); Note, *UCC § 9-503—Does Repossession by a Secured Creditor Pursuant to Contractual Provisions Constitute State Action?* 50 DENVER L.J. 261 (1973); Note, *Self-Help Repossession: The Constitutional Attack, the Legislative Response and the Economic Implications*, 62 GEO. L.J. 273 (1973); Note, *State Action Considerations and Economic Implications of Holding Self-Help Repossessions Unconstitutional*, 1973 L. & SOC. ORDER 707; Note, *Self-Help Repossession Under the Uniform Commercial Code: The Constitutionality of Article 9, Section 503*, 4 N. MEX. L. REV. 75 (1973); Note, *Secured Transactions—Repossessions by Self-Help Under UCC § 9-503 as a Violation of Due Process of Law*, 24 SYRACUSE L. REV. 867 (1973); Note, *Self-Help Repossession: Fuentes and Judicial Process*, 46 TEMP. L.Q. 540 (1973); Note, *State Action and the Constitutionality of UCC § 9-503*, 30 WASH. & LEE L. REV. 547 (1973). See also Note, *Procedural Due Process—Does Attachment of Real Estate Without Notice and Hearing Constitute Deprivation of a Significant Security Interest?*, 54 B.U. L. REV. 186 (1974); Note, *Procedural Due Process—Post-Fuentes Constitutionality of Garagemen's Liens*, 54 B.U. L. REV. 542 (1974); Note, *Sniadach, Overmyer and Fuentes: Problems for the Mechanics' Lien and Protection for Real Property Developers*, 1973 L. & SOC. ORDER 497.

<sup>48</sup> A petition for certiorari in a self-help repossession case before the Court since June 1974 has recently been denied. *Adams v. Southern Cal. First Nat'l Bank*, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, \_\_\_ U.S. \_\_\_, 95 S.Ct. 32 (1974).

which protection under the fourteenth amendment is claimed in situations totally unrelated to creditors' summary prejudgment remedies. Consider, for example, the possible impact that such a finding of state action might have on all of the situations involving multiple interests in property—bailments, leases, etc.—where self-help adjustment of such interests has been traditional over the years. On the other hand, if the Court were to find no state action, nothing would be accomplished by the review. The present anomalous status of the summary repossession remedy would simply be perpetuated. To end up with a situation in which summary repossession by self-help is permitted but summary repossession by writ of replevin is not permitted is commercially unreal. Both techniques of repossession have the same ultimate impact on the debtor. Both are summary in nature. Both or neither should be subject to due process requirements.

It has been said that credibility is the morality of fiction. Verbal coherence might be said to be the morality of poetry. Certainty is ideally the morality of the market place. Summary prejudgment creditors' remedies have had precious little of this lately. I say again, the Supreme Court and commercial law make strange bedfellows.<sup>49</sup>

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<sup>49</sup> Three cases decided subsequent to the time this address was given should be of special interest to the commercial community. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, \_\_\_ U.S. \_\_\_, 43 U.S.L.W. 4192 (1975), serves to inject even more confusion into this area of the law. In *North Georgia Finishing*, a corporation garnished the bank account of North Georgia Finishing alleging only "reason to apprehend the loss of said sum or part thereof unless process of Garnishment issues." 43 U.S.L.W. 4193 (footnote omitted). North Georgia Finishing asserted that the statutory garnishment procedure was unconstitutional in that it violated due process. The Georgia Supreme Court rejected the assertion that the statute was invalid for failure to provide notice and hearing in connection with the issuance of the writ of garnishment. The Georgia court found *Sniadach* inapplicable, stating that it had only carved out an exception in favor of wage earners to the general legality of garnishment proceedings. The Supreme Court found that the Georgia court's approach failed to take account of *Fuentes*, and that no viable distinction could be made among types of property in applying the due process requirements of notice and hearing. Consequently, it refused to distinguish between a situation where consumer protection was involved and a purely commercial setting in which parties were of essentially equal bargaining power. *Id.* at 4194. Furthermore, the court stated that *Mitchell* was clearly distinguishable. In *Mitchell*, the writ was issuable only by a judge, the affidavit of sequestration was required to be factual rather than merely conclusory and an immediate hearing was provided. The decision breathed new life into *Fuentes*, which had appeared to be threatened by the result in *Mitchell*.

Mr. Justice Powell's concurring opinion in *North Georgia Finishing* also found the Georgia statute inadequate when measured against the statute in *Mitchell*. In doing so, he set forth his views on what due process does and does not require in a garnishment proceeding: (1) pregarnishment notice and prior hearing are not constitutionally mandated and indeed are antithetical to the very purpose of both garnishment and

attachment; (2) garnishor must provide adequate security; (3) garnishor must establish the factual basis of the need for a writ of garnishment or attachment before a *neutral* officer, not necessarily a judicial officer; (4) opportunity for a prompt post-garnishment judicial hearing in which the garnishor has the burden of justifying the need to continue garnishment must be provided; and (5) provision for the garnishee to free the garnished assets by posting security should also be provided since the assets may bear no relation to the controversy giving rise to the garnishment. *Id.* at 4195. Mr. Justice Powell found that the conclusory affidavit of the garnishor did not establish an adequate factual basis. *Id.* He further concluded that an even more compelling reason for invalidating the Georgia statute was its failure to provide a prompt and adequate post-garnishment hearing. *Id.* at 4196.

One case may provide an opportunity for the commercial world to ascertain whether such writs must in fact be issued by a judicial officer. The court's opinion in *Guzman v. Western State Bank*, (U.S. Jan. 22, 1975), 43 U.S.L.W. 2183 (D.N. Dak., Sept. 25, 1974), found all of the elements present which Mr. Justice Powell would require. In *Guzman*, the court found that the North Dakota attachment statute gave debtors the same constitutional protections that the Supreme Court found in *Mitchell*. The laws in question permitted a sheriff upon a debtor's default, to seize goods bought under an installment sales contract without notice or prior hearing. Creditors were required to file a sworn complaint accompanied by a bond and an affidavit setting forth the specific statutory grounds of attachment. Upon meeting these requirements, a *court clerk* then issued a warrant of attachment. After a general discussion of *Mitchell*, the district court ruled that the North Dakota statutes were sufficiently similar to those in *Mitchell* to survive constitutional scrutiny. The court focused upon three factors: (1) the attachment remedy was limited to nine specific grounds; (2) the North Dakota courts required strict compliance with the statutes; and (3) a debtor had the statutory right immediately to move for a discharge if an attachment was irregularly issued. In light of these three considerations, the court ruled that the North Dakota attachment statutes fulfilled the constitutional requirement of establishing probable cause before a warrant of attachment issued. Though the issuance of a warrant, whether by a clerk or a judge after a showing of probable cause is a ministerial act, the court stated that no constitutional deficiency exists if adequate opportunity is given for an ultimate judicial determination of liability. Accordingly, it held that the North Dakota procedure gave the same broad constitutional protection to the debtor as the statute found valid in *Mitchell*. Should *Guzman* end up in the Supreme Court, we may finally have a definitive answer to the question of exactly what is required to constitute a valid prejudgment garnishment.

Of greatest immediate importance to the commercial world may be the Supreme Court's denial of certiorari in *Nowlin v. Professional Auto Sales, Inc.*, 496 F.2d 16 (8th Cir.), *cert. denied*, \_\_\_ U.S. \_\_\_, 95 S.Ct. 328 (1974). In *Nowlin*, both the District Court for Nebraska and the District Court for the Western District of Missouri had held U.C.C. § 9-503 constitutional. The Eighth Circuit affirmed, thus concurring with a large number of decisions in other courts. See note 45 and accompanying text *supra*. The denial of certiorari may mean that the Supreme Court is satisfied with the results of those decisions. On the other hand, perhaps the Court is only "biding its time" until it finds a better case through which to enter the area.

# Washington and Lee Law Review

*Member of the National and Southern Law Review Conferences*

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Volume XXXII

Winter 1975

Number 1

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