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Constitutional Law - Due Process - Replevin - Right to Notice and Hearing Prior to Deprivation - Fuentes v. Shevin

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CONSTITUTIONAL LAW--Due Process--Replevin--Right to Notice and Hearing Prior to Deprivation of Property. Fuentes v. Shevin, 92 S. Ct. 1983 (1972).

Appellant Fuentes purchased a gas stove and service policy from the Firestone Tire and Rubber Company. Later, she purchased a stereophonic phonograph from Firestone under another installment contract similar to the first. Both contracts provided that until the purchase price was fully paid, Firesone was to retain title to the merchandise. Mrs. Fuentes was entitled to possession until default on her payments. The total cost of both stove and stereo, including finance charges, was about $600. With approximately $200 remaining to be paid, a dispute developed between appellant and Firestone regarding the servicing of the stove. Claiming that appellant had refused to make the remaining payments, Firestone instituted an action in small claims court for repossession of the stove and stereo. Firestone simultaneously obtained a writ of replevin. Florida procedure provided that the clerk of court could issue the writ upon Firestone's filling in the appropriate blanks on a replevin form document and posting bond.[1] Later the same day, a local deputy sheriff and an agent of Firestone went to Mrs. Fuentes' home and seized the stove and stereo. Appellant then instituted the present action in federal district court. She sought declaratory and injunctive relief against continued enforcement of the Florida prejudgment replevin procedures alleging violation of the due process clause of the fourteenth amendment.[2] The United States Supreme Court held: "[T]he Florida and Pennsylvania prejudgment replevin provisions work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor."[3]

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1. FLA. STAT. §§ 78.01-.21 (Supp. 1972).
2. Fuentes v. Shevin, ... U.S. ....., 92 S. Ct. 1983, 1989 (1972).
3. *Id.* at 2002. The case of *Parham v. Cortese*, a companion case to *Fuentes*, challenged the constitutionality of the Pennsylvania replevin statute. Because the reasoning of the Court is applicable to either case, reference will only be made to *Fuentes*.

REPLEVIN

Present replevin statutes bear little resemblance to their common law ancestor. An act of replevin at common law would lie only for the recovery of property wrongfully taken *and* wrongfully detained. In an action of replevin, the sheriff was empowered, prior to judgment, to seize the disputed property from the distrainor and return it to the prior possessor. If, on the other hand, a creditor wished to invoke state action to recover goods wrongfully detained but not wrongfully taken, he had to proceed through the action of detinue. Detinue did not provide for a return of the disputed property until final judgment.[4] In the nineteenth century, the actions of replevin and detinue were merged into statutory replevin.[5]

Typical replevin statutes today provide for seizure of goods allegedly wrongfully detained upon the *ex parte* application of the plaintiff.[6] The clerk of court has the power to issue the writ upon application and the plaintiff obtains possession upon his filing of double bond.[7] The defendant can prevent the plaintiff from obtaining possession by posting a double bond himself, in which case the defendant retains the property sought to be replevied.[8] While the interim right to possession is determined in this manner, the ultimate right to possession of the property in question is determined upon final judgment.[9]

Present Wyoming law is consistent with this general replevin concept except for one deviation. Once the property is placed in the hands of the plaintiff, the action proceeds as one for damages only, with no subsequent transfer of possession upon final judgment.[10] However, where the replevin is handled by a justice of the peace, the above deviation does not obtain.[11]

4. 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 284-85 (1927); MILLER, COMMON LAW PLEADING 31-35 (1912).
5. Deschenes v. Beall, 61 Wyo. 39, 48, 154 P.2d 524, 526 (1945).
6. *See, e.g.*, FLA. STAT. §§ 78.01-.21 (Supp. 1972).
7. *E.g., Id.* § 78.07. "Double bond," as used in this note, means a bond equal to twice the value of the object sought to be replevied.
8. *E.g., Id.* § 78.13.
9. *E.g., Id.* § 78.21.
10. WYO. STAT. §§ 1-1005, -1010, -1012 (1957). Hunt v. Thompson, 19 Wyo. 523, 120 P. 181 (1912).
11. WYO. STAT. §§ 1-694, -699, to -701 (1957).

JUDICIAL BACKGROUND TO *Fuentes*

> In 1950, the United States Supreme Court said:
> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.[12]

Until 1969, these words meant that there must be notice and an opportunity to be heard before *final* judgment.

On June 9, 1969, the Supreme Court let fall a bombshell. In the case of *Sniadach v. Family Finance Corporation of Bay View,*[13] the Court held the Wisconsin wage garnishment statute unconstitutional in violation of the due process clause of the fourteenth amendment. The Wisconsin statute failed to provide for notice and a hearing *prior* to the prejudgment garnishment. While the opinion in *Sniadach* mentioned the requirement of notice and a hearing prior to the garnishment,[14] it dealt mainly with the theme that wages are "a specialized type of property" and the hardships affecting those whose wages are garnished.[15]

Following *Sniadach,* two lines of decisions appeared in the courts. Some courts saw *Sniadach* as standing for the principle that wages are to be accorded special treatment and restricted *Sniadach* to its facts.[16] But a review of subsequent decisions indicates the majority of courts saw *Sniadach* as setting forth the basic idea that the due process clause required notice and hearing prior to *any* prejudgment remedy. Relying on *Sniadach,* the Wisconsin Supreme Court held that notice and hearing must be accorded prior to garnishment of

12. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). This case held that notice must be given to known beneficiaries of a trust prior to a settling of accounts.
13. 395 U.S. 337 (1969).
14. *Id.* at 342.
15. *Id.* at 340.
16. *E.g.*, Hilburn v. Butz, 40 U.S.L.W. 2833 (5th Cir. June 2, 1972) (held that the Secretary of Agriculture may withhold sums admittedly due a farmer as an offset against sums determined without a hearing to have been overpaid); American Olean Tile Co., Inc. v. Zimmerman, 317 F. Supp. 150 (D. Hawaii 1970) (garnishment of a business' regular checking account, payroll account and accounts receivable without a prior hearing was not a violation of due process).

funds in a checking account. The court said, "Clearly, a due process violation should not depend upon the type of property being subjected to the procedure."[17] United States district courts held the New York replevin statute and the California and Illinois Innkeeper's Lien Laws unconstitutional for not requiring notice and hearing prior to seizure of property.[18] Another district court held that a creditor holding a secured instrument, which gave a right of repossession upon default by the debtor, could not privately repossess without giving notice and a prior hearing because he was acting under color of state law.[19]

In 1970, the United States Supreme Court held that, regardless of whether welfare benefits are entitled a "privilege" or a "right," they cannot be denied without notice and a prior hearing.[20] The Court said, "The extent to which procedural due process must be afforded the recipient . . . depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication."[21] The Court found the possibility that an indigent might wrongfully be deprived of welfare assistance to outweigh the desire to protect public funds. The Supreme Court has also required notice and hearing prior to the posting of notices forbidding sale of liquors to those who drink excessively,[22] prior to the suspension of a driver's license,[23] prior to the taking of a child of an unwed father,[24] and prior to the revocation of parole.[25]

17. Larson v. Fetherston, 44 Wis. 2d 712, 172 N.W.2d 20, 23 (1969). *Accord,* Jones Press, Inc. v. Motor Travel Services, Inc., 286 Minn. 205, 176 N.W.2d 87 (1970).

18. Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970); Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970); Collins v. Viceroy Hotel Corp., 338 F. Supp. 390 (N.D. Ill. 1972).

19. Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972). The statute involved was CAL. COMM. CODE §§ 9503, 9504 (West 1964) (UNIFORM COMMERCIAL CODE §§ 9-503, -504). This case is discussed later in the note.

20. Goldberg v. Kelly 397 U.S. 254 (1970).

21. *Id.* at 262-63.

22. Wisconsin v. Constantineau, 400 U.S. 433 (1971).

23. Bell v. Burson, 402 U.S. 535 (1971).

24. Stanley v. Illinois, ... U.S. ....., 92 S. Ct. 1208 (1972).

25. Morrissey v. Brewer, ... U.S. ....., 92 S. Ct. 2593 (1972).

BASIS OF THE *Fuentes* DECISION

Although only a small step in the developing area of law regarding prejudgment remedies, the Supreme Court's decision in *Fuentes* completely changed the law of replevin. The Court noted that the Florida statute allowed a writ of replevin to be issued by the clerk of court upon the bare assertion of the plaintiff-creditor that he was entitled to one, that he file a double bond and that he promise to prosecute his action without delay.[26] The net effect was that the person whose property was taken learned of the action the moment his property was seized from him. He was given no prior opportunity to challenge issuance of the writ.[27] The Florida replevin statute was unconstitutional because it failed to provide notice and an opportunity for a hearing "at a meaningful time," *i.e.*, before seizure.[28]

At the heart of the Court's ruling that notice and an opportunity to be heard are necessary before seizure was the desire to minimize mistaken deprivations of property. "[W]hen a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented."[29] This theme has been echoed in other recent Supreme Court cases involving prejudgment actions.[30] The traditional safeguards deterring excessive and unwarranted use of the writ of replevin are the posting of a double bond, the allegation by affidavit of the plaintiff that he is entitled to the property sought to be replevied and the liability of the plaintiff for damages should his replevin action fail. These safeguards, said the Court, go only to test the strength of the plaintiff's own belief and do not substitute for a hearing before a neutral official prior to the seizure. Even if the plaintiff is liable for damages following an ad-

26. FLA. STAT. §§ 78.01 and .07 (Supp. 1972).
27. Fuentes v. Shevin, *supra* note 2, at 1991-93.
28. *Id.* at 1994.
29. *Id.*
30. "[T]ermination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits." Goldberg v. Kelly, *supra* note 20, at 264. "This appellee was not afforded a chance to defend herself. She may have been the victim of an official's caprice." Wisconsin v. Constantineau, *supra* note 22, at 437.

verse decision, the Court "has not . . . embraced the general proposition that a wrong may be done if it can be undone."[31] The Court also points out:

> [I]f an applicant for the writ knows that he is dealing with an uneducated, uninformed consumer with little access to legal help and little familiarity with legal procedures, there may be a substantial possibility that a summary seizure of property—however unwarranted—may go unchallenged, and the applicant may feel that he can act with impunity.[32]

In the Court's view, a deprivation of property is not limited by duration of deprivation, partial ownership, or whether the item sought to be replevied is or is not a "necessity." The right to a prior hearing must be afforded *any* deprivation of property within the protection of the fourteenth amendment. The Court was not concerned with the fact that Mrs. Fuentes had the right, under the Florida statute, to regain the seized property within three days upon the posting of a double bond. A three day deprivation was a deprivation within the meaning of the fourteenth amendment. So would by the payment of the double bond to regain possession.[33] The length and severity of a deprivation are only factors to be weighed in the form of hearing to be required. The due process clause also extends to "any significant property interest."[34] Mrs. Fuentes clearly had a possessory interest in the stove and stereo purchased by installment contract, although, by the term of those contracts, she was not the title owner. Although her right to continued possession was in dispute, she could not be deprived of that right without a hearing. Nor was the right to a prior hearing destroyed by the fact that

31. Fuentes v. Shevin, *supra* note 2, at 1995, citing from Stanley v. Illinois, *supra* note 24, at 1210-11.

32. Fuentes v. Shevin, *supra* note 2, at 1995 n.13. *Accord,* Laprease v. Raymours Furniture Co., *supra* note 18, at 723 n.11: "The ability to make good the threat to repossess . . . coupled with inability of the consumer to post security for the return of the goods, often results in the abandonment by the impecunious purchaser of defenses he may have to a replevin, and instead, agreement to the terms imposed by the seller."

33. "The economic burden [of posting bond] which defendant has sustained to achieve the result is one which stems directly from the garnishment proceedings. It inflicts a hardship which is different only in form and not in substance." Jones Press, Inc. v. Motor Travel Services, Inc., *supra* note 17, at 91.

34. Boddie v. Connecticut, 401 U.S. 371, 379 (1971).

the items replevied were not "necessities." The Court said that it was not up to it to make a determination of what is or is not a "necessity," adding, "The Fourteenth Amendment speaks of 'property' generally."[35]

The Court recognized that there were extraordinary circumstances which might justify summary seizure without the opportunity for prior notice and hearing. Such an instance would be if the creditor could show that the debtor intended to destroy or conceal the property.[36] But the Court found no such unusual situation presented by the facts of the case nor was the Florida statute narrowly drawn to meet such a contingency. The Court found that the "State acts largely in the dark"[37]: No state official participated in the issuance of the writ—Firestone unilaterally invoked the power of the state to settle a private dispute. As such, the prejudgment replevin statute served no important governmental or general public inerest. The "extraordinary circumstances" requirement for a pre-hearing seizure suggests a weighing of the creditor's interest against the debtor's interest similar to that stated by *Goldberg*.[38]

Lastly, the Court met the contention that Mrs. Fuentes had waived her right to due process by language in the contracts that upon default the seller might "take back" or "repossess" the merchandise. The Court said, "[A] waiver of constitutional rights in any context must, at the very least, be clear. The contracted language relied upon must, on its face, amount to a waiver."[39] Since the contracts said nothing about any waiver nor anything about *how* the seller might retake the merchandise, the Court found the contractual language unclear and thus no waiver of due process.

35. Fuentes v. Shevin, *supra* note 2, at 1999.

36. Other situations include attachment necessary to secure jurisdiction in state courts and seizure of property "to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food." Fuentes v. Shevin, *supra* note 2, at 1999 n.23, 2000.

37. *Id.* at 2001.

38. *But see* Morrissey v. Brewer, *supra* note 25, at 2600: "The question is not merely the 'weight' of the individual's interest, but whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment."

39. Fuentes v. Shevin, *supra* note 2, at 2002.

WAIVER OF DUE PROCESS RIGHTS

The Supreme Court, in determining whether Mrs. Fuentes had waived her right to notice and prior hearing, leaned heavily on the criteria set forth in *D. H. Overmyer Co., Inc., of Ohio v. Frick Company.*[40] In that case, the Court had said, "The due process rights to notice and hearing prior to civil judgment are subject to waiver."[41] The Court then qualified its position by saying, "[W]here the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue."[42] In short, the facts of the transaction are important in determining if there has been an effective waiver of constitutional rights.

The Court in *Fuentes,* held that there had been no waiver of due process by appellant because the contractual language purportedly waiving due process was unclear. The Court also alluded to the fact that the appellant was not made aware of the significance of the "fine print" nor was there any bargaining between the contracting parties.[43] From the reasoning presented in *Overmyer* and *Fuentes,* the existence of a waiver of constitutional rights thus appears to turn on the presence of three factual criteria: *First,* clarity of the contractual language. *Second,* that the debtor was made aware of the significance of the language and intelligently signed the contract. *Third,* the equality of bargaining power of the parties.

It would seem reasonable that a party to a printed form contract, who was made aware of the terms of waiver and their significance and who signed with full knowledge of the consequences, would waive his due process rights, even though there was inequality of bargaining power present. The concept of freedom of contract weighs heavily on our law. But increasingly, courts are beginning to see that, in some situations, there is no freedom of contract between those of unequal bargaining power:

40. 405 U.S. 174, 92 S. Ct. 775 (1972). This case involved the validity of a cognovit note executed between two large companies. The Court held that the debtor waived his right to notice prior to judgment.

41. *Id.* at 782.

42. *Id.* at 783.

43. Fuentes v. Shevin, *supra* note 2, at 2002.

> We take judicial notice of the fact that form leases are put before tenants on an "accept this or get nothing" basis . . . and that tenants—who need housing—are compelled to sign. There is no freedom of contract—there is merely a freedom to adhere to the terms of the contract written by the landlord.[44]

The District Court for the Southern District of California took a more pragmatic approach:

> If the provisions of a contract can legitimize summary repossession, wage garnishment might then be valid on the same theory, as long as private agreement could be shown. This would fly in the face of the reasoning in *Sniadach* and is rejected by this court.[45]

Of the three criteria affecting a valid waiver, as set forth above, the first two are clearly within the control of the creditor. He can write specific language into his "form" contract and can point out the "fine print" to the debtor before the debtor signs. The creditor can even explain the clause if necessary. As to the third, contracts of adhesion are falling into disrepute in some courts and a waiver clause may or may not be upheld. But the creditor can at least attempt to meet the requirement of equality of bargaining power by offering to give a discount to the debtor for the inclusion of any waiver clause.

SELF-HELP

"At present, creditors may not utilize statutory procedures for summary taking which have been enforced through the use of sheriffs or marshals, yet creditors may effect the same type of summary taking through 'self-help.' "[46] The Supreme Court, in *Fuentes,* clearly stated that only interests protected by the fourteenth amendment were encompassed in its holding.[47] The protection of the fourteenth amendment

44. Santiago v. McElroy, 319 F. Supp. 284, 294 (E.D. Pa. 1970) (tenant did not waive his rights to notice and hearing prior to a distress sale). *Accord,* Laprease v. Raymours Furniture Co., *supra* note 18, at 724.

45. Adams v. Egley, *supra* note 19, at 621.

46. Ordin, *Summary Creditor Remedies: A Thing of the Past?* 47 LOS ANGELES BAR BULL. 230, 240 (1972).

47. Fuentes v. Shevin, *supra* note 2, at 1996.

extends to any deprivation of life, liberty or property without due process by any *state.* Thus, a citizen is not protected by the fourteenth amendment from a deprivation of "due process" by another citizen. A private party may repossess, if the contract so states and he can do so without breach of the peace, although the sheriff, acting for the party may not, without giving notice or a prior hearing.

However, even a private repossession may come within the purview of the fourteenth amendment under some circumstances. In *Adams v. Egley,*[48] the court applied the reasoning of the United States Supreme Court in *Reitman v. Mulkey*[49] to a case of private repossession. In doing so, the court held that California's statutory equivalent of Uniform Commercial Code Sections 9-503 and 9-504 violated the due process clause.[50]

Involved in *Adams* were two instances of private repossession under secured contracts. In one contract, the creditor was given "all the rights and remedies . . . under the California Uniform Commercial Code." In the other, the creditor merely had the right to "immediate possession" in the event of default.[51] The court held that both repossessions were executed under color of state law and were illegal.[52] The court found that the presence of Sections 9-503 and 9-504 had a significant impact on the contracts' provisions and was state encouragement of a deprivation of due process.[53] In closing, the court felt that the statute was not "exempt from constitutional scrutiny merely because its operation [was] confined to situations involving the presence of a contract."[54] It would

48. *Supra* note 19.
49. 387 U.S. 369 (1967). The Court held that a statute giving people an absolute discretion to sell and rent real property to whomever they chose violated the equal protection clause. The Court reasoned that the statute "significantly encourage[d] and involve[d] the State in private discriminations." *Id.* at 381.
50. CAL. COMM. CODE §§ 9503, 9504 (West 1964). Wyoming has a similar provision. WYO. STAT. §§ 34-9-503, -504 (Supp. 1971). UCC 9-503 reads: "Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace. . . ."
51. Adams v. Egley, *supra* note 19, at 616.
52. "In cases under [42 U.S.C.] § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment." United States v. Price, 383 U.S. 787, 794 n.7 (1966).
53. Adams v. Egley, *supra* note 19, at 617.
54. *Id.* at 620.

appear a ruling of this kind is available only once: The first creditor who takes "immediate possession" of secured property is acting "under color" of a state law which is unconstitutional and thus his repossession is illegal. In this first action, the statute is declared unconstitutional and void. Shortly thereafter, another creditor takes "immediate possession" of secured property. Since the prior statute is void, he is not acting "under color of state law" and his repossession is legal because it is for a private action not falling within the scope of the fourteenth amendment.

NECESSARY STATUTORY REVISION

The ordinary creditor, as a result of the *Fuentes* decision, is indeed in a difficult position. In all likelihood, he has not met the criteria for an effective waiver of notice and a prior hearing, set forth *supra*. He would probably submit to a hearing if there was a procedure for one, but at this time there is none.[55] Any attempt to institute a hearing and either require or compel the presence of the defendant would be met by the claim that the hearing is *ultra vires* and void. As *Fuentes* points out, the solution to this problem rests squarely with the legislature.[56]

In revising the present replevin statutes, the legislature must provide for notice and hearing prior to seizure, for a hearing that will establish "at least the probable validity" of the creditor's claim,[57] and for the "extraordinary circumstances" in which seizure before a hearing are thought to be necessary. The United States Supreme Court has on more than one occasion stated that the procedural requirements of due process are flexible and that the requirements of a hearing will vary depending on the weight of the interests involved.[58] The pre-seizure hearing need not take the form of a

55. The Wyoming replevin statutes do not provide for a hearing prior to seizure. WYO. STAT. §§ 1-693 to -707, -1000 to -1017 (1957). Nor do the constitutional or statutory grants of authority to the district judges, clerks of court or justices of the peace provide for authority to hold a prejudgment hearing in a replevin action. WYO. CONST. art. 5, §§ 1, 10, 13. WYO. STAT. §§ 5-53, -91, -139, -140 (1957).
56. Fuentes v. Shevin, *supra* note 2, at 2002.
57. *Id.* at 2003; Bell v. Burson, *supra* note 23, at 540.
58. Fuentes v. Shevin, *supra* note 2, at 1999 n.21; Bell v. Burson, *supra* note 23, at 540; Boddie v. Connecticut, *supra* note 34, at 378.

judicial proceeding.[59] The hearing is only concerned with the probable validity of the plaintiff's claim or the reasonable possibility of judgment for the plaintiff. If the hearing determines the probable validity of the plaintiff's claim, the prejudgment seizure is then constitutionally valid.

The Supreme Court has stated the basic requirements of a hearing if it is to satisfy the requirements of due process:[60] *First,* there must be timely and adequate written notice of the allegations against the defendant. *Second,* there must be a disclosure of adverse evidence. *Third,* there must be an opportunity to be heard in person and to present witnesses and documentary evidence. *Fourth,* there must be the right to confront and cross examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation). *Fifth,* there must be a neutral official in charge of the hearing who need not be a judicial officer nor a lawyer. *Sixth,* there must be written findings as to the evidence relied upon and action taken. In *Goldberg,* it was additionally stipulated that the right to have counsel present, if desired, must also be afforded.[61] In Wyoming, the requirement of a neutral state official could be easily handled by the present justices of the peace. Notwithstanding their present jurisdictional limit of $200,[62] they would not be rendering a final judgment, but only making a preliminary finding as to the "probable validity" of the plaintiff's claim.

The *Fuentes* decision also requires that if the legislature desires to permit any type of summary seizure of property, it must narrowly draw the statute to meet only extraordinary or unusual circumstances. The Court noted two general areas when summary seizure would be constitutionally allowed: (1) If there was an important governmental or general public interest[63] or (2) in "cases in which a creditor could make a showing of immediate danger that a debtor will destroy or

59. Goldberg v. Kelly, *supra* note 20, at 266.
60. *Id.* at 267-68 (this case involved termination of welfare benefits without a prior hearing); Morrissey v. Brewer, *supra* note 25, at 2604 (this case involved revocation of parole without a prior hearing).
61. Goldberg v. Kelly, *supra* note 20, at 270.
62. WYO. STAT. § 1-693 (1957).
63. See note 36 *supra.*

conceal disputed goods.'"[64] A replevin statute would concern only the latter category. In drafting a replevin statute to meet unusual situations in which pre-hearing seizure is desirable, the legislature should look to the Wyoming attachment statute[65] which delineates special circumstances as grounds of attachment and has served the state since 1886.

In light of the decision of *Laprease v. Raymours Furniture Company,*[66] the legislature should also consider our statutes which allow the officer executing the writ to break into any building, upon refusal of entry, in order to seize the property.[67] The district court, in *Laprease,* held that an entry and seizure in execution a writ of replevin violated the fourth amendment's prohibition of unreasonable searches and seizures. The court said, "If the Sheriff cannot invade the privacy of a home without a warrant when the state interest is to prevent a crime, he should not be able to do so to retrieve a stove or refrigerator about which the right to possession is disputed."[68]

CONCLUSION

Although these added requirements of procedural due process appear extensive and would be a great economic burden should all defendants demand a hearing, the Supreme Court is probably correct in its forecast that most debtors, sensing the futility of appearing, will fail to appear at any hearing.[69] These procedures afford only an *opportunity* for a hearing prior to seizure. Following statutory revision, the result will be that, in the vast majority of cases, replevin actions will proceed as before. The only difference will be that the writ of replevin will be executed a few days after the creditor files his application for a writ, rather than the same afternoon.

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64. Fuentes v. Shevin, *supra* note 2, at 2000-01.
65. WYO. STAT. § 1-226 (1957).
66. *Supra* note 18.
67. WYO. STAT. §§ 1-704, -1015 (1957).
68. Laprease v. Raymours Furniture Co., *supra* note 18, at 722.
69. Fuentes v. Shevin, *supra* note 2, at 2000 n.29.

