1-2003

EXHIBIT #2

Effect on shut-in status of Grace-Atlantic No. 1 using the redistribution of under production in June, 1973 to determine the shut-in status.

Current Allowable April thru August, 1973		697,663 MCF
Redistribution June, 1973		388,190 MCF
	Total	1,085,853 MCF
1,085,853 ÷ 5 = 217,171 x 6	=	1,303,026 MCF
Over Production Status August, 1973	-	1,061,302 MCF
	Difference	241,724 MCF

L-2003

Exhibit IV

South Carlsbad Field

Proration Schedule using Marginal Reclassification and not classifying new wells non-marginal until their monthly production justifies a non-marginal classification.

Month	Acreage Factor Marginal	Acreage Factor Non-Marg.	Pool Allocation OCC SCHEDULES	Marginal Allocation	Non-Marg. Allocation	Non-Marg. Allocation Per Well
Jan	14.06	4.94	1,800,000	551,444	1,248,556	252,744
Feb	13.06	4.94	1,600,000	551,444	1,048,556	212,258
Mar	12.06	4.94	1,500,000	551,444	948,556	192,015
Apr	14.04	4.94	1,500,000	474,176	1,025,824	207,657
May	13.05	3.96	1,900,000	714,232	1,185,768	299,436
Jun	17.06	3.96	2,250,000	999,912	1,250,008	315,679
Jul	24.03	3.96	3,658,000	2,036,663	1,621,337	409,429
Aug	25.02	2.00	3,020,000	2,051,268	968,732	484,366
Sep	26.02	2.00	3,200,000	2,036,480	1,163,520	581,760
Oct	28.00	2.00	2,529,400	1,941,107	588,293	294,147

Quarterly proration periods and how

ILLEGIBLE

L-Zee-3

[illegible] District Court adopted [illegible] master's recommendation.

Despite the District Court's findings, however, the Court of Appeals reversed without opinion and adopted the attorney general's alternative division of New Orleans. The petitioners are the original plaintiffs and they now seek review of this summary reversal.

An examination of the record in this case suggests that the Court of Appeals may have believed that benign [illegible] by federal judges is itself [illegible] gerrymandering even [illegible] it is employed to overcome [illegible] effects of past state dilution [illegible] strength and (b) [illegible] alternative is to leave intact [illegible] "safe" white districts.[2] If [illegible] in fact the reasoning of [illegible], then this petition would [illegible] federal question [illegible] to which the broad equi[illegible] federal court, Swann [illegible] Board of [illegible] U.S. 1, 15, 91 S.Ct. 1267, 28 [illegible] by the color[illegible] v. Lightfoot, [illegible] 110, and Wright v. Rockefeller, 376 U.S. 52, 57, 67, 84 S.Ct. 603, 11 L.Ed.2d 512.[3] In reapportionment cases, Justice Stewart has observed "the federal courts are often going to be faced with hard remedial problems" in minimizing friction between their remedies and legitimate state policies. Sixty-seventh Minnesota State Senate v. Beens, 405 U.S. [illegible], 92 S.Ct. 1477, [illegible] 31 L.Ed.2d [illegible] (dissenting opinion).

[1, 2] Because this record does [illegible] fully inform us of the precise nature [illegible] the litigation and because we have [illegible] had the benefit of the insight of [illegible] Court of Appeals, we grant the petition for writ of certiorari, vacate the judgment below and remand the case to [illegible] Court of Appeals for proceedings [illegible] conformity with this opinion.[4]

Vacated and remanded.

Mr. Justice BLACKMUN concurs [illegible] the Court's judgment.

Mr. Justice REHNQUIST, with whom The CHIEF JUSTICE and Mr. Justice POWELL join, dissenting.

The short recitation of specific [illegible] in the Court's opinion makes clear [illegible] [illegible] developed in the record. The federal questions adverted to by the Court [illegible] opinion are undoubtedly important [illegible]. They are either presented by [illegible] proceedings below on this record, or [illegible] are not; this Court, in exercising [illegible] certiorari jurisdiction, may wish to [illegible] such problems as are presented [illegible] at this time, or it may not. [illegible] opinion from the Court of [illegible] explaining the [illegible] for [illegible] of the District Court would [illegible] be of assistance to our exercise [illegible] of certiorari jurisdiction here, [illegible] no means essential. I do not [illegible] that the Court's vacation of [illegible] judgment below with a [illegible] directive to the Court of Appeals [illegible] that it write an opinion [illegible] an appropriate exercise of this Court's authority.

[illegible] courts of appeals are statutory [illegible], having the power to prescribe [illegible] for the conduct of their own business [illegible] long as those rules are consistent [illegible] with applicable law and rules of [illegible] and procedure [illegible] by [illegible] Court, 28 U.S.C. § 2071. [illegible] or rule of procedure [illegible] Fifth Circuit from [illegible] and order, as it has done [illegible] deciding [illegible] without [illegible] all. Cf. [illegible] Court of Appeals for the [illegible] Circuit. The [illegible] of appeals, and particularly the [illegible] Circuit, which has [illegible] of all the circuits [illegible] possible [illegible] to deal [illegible] of appeals which [illegible]

[illegible] STARR v. [illegible] ers, 420 F.2d 956 (CA5 1970).[5]

If there [illegible] federal question [illegible], this [illegible] In[illegible], it calls upon the [illegible] decisions as [illegible] opinions [illegible] judgments of the courts of appeals [illegible] the [illegible] of the [illegible] opinions are matters best left to [illegible] judges of the courts of appeals. [illegible] therefore dissent from the order of [illegible] and remand.

[illegible]

v.

[illegible]

v.

[illegible] et al.

[illegible], 71-5133.

Argued Nov. 9, 1971.

Decided June 12, 1972.

Actions challenging constitutionality of Florida and Pennsylvania [illegible] judgment replevin statutes. A three-judge [illegible]

2. It [illegible] that the Court of Appeals [illegible] district [illegible] was achievable [illegible] to the parish's [illegible] lines. But had that [illegible] the Court would [illegible] for the construction of a [illegible] alternative rather than simply [illegible] the adoption of the attorney [illegible] plan.

3. [illegible] in some respects, this [illegible] controlled by Whitcomb v. Chavis, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363. To be sure, in both [illegible] District Courts were writing on clean slates in the sense that they were fashioning court-imposed reapportionment plans. And, in each case the equitable remedy of the court conflicted with a state policy. (There the state policy favored multi-member districts whereas here the policy favors maintenance of traditional boundaries.) The important difference, however, is that in *Whitcomb* it was conceded that the State's preference for multi-member districts was not rooted in racial discrimination, 403 U.S., at 49, 91 S.Ct. 1858. Here, however, there has been no such concession [illegible] indeed, the District Court found a long "history" of bias and franchise dilution in the State's traditional drawing of district lines. Cf. *id.*, at 155, 91 S.Ct. 1858.

4. We, of course, agree that the courts of appeals should [illegible] decisions of [illegible] opinions. [illegible] 21, Court of Appeals [illegible] Circuit; [illegible] n. 6, 92 S.Ct. 619, 623, 30 L.Ed.2d 618. But here the lower court summarily reversed without any opinion on a point which had been considered at length by the District Judge. Under the special circumstances of this case, we are loathe to impute to the Court of Appeals reasoning which would raise a substantial federal question when it is plausible that its actual ground of decision was of more limited importance.

[illegible] Lego v. Twomey, 404 U.S. [illegible] S.Ct. 619, 623, 30 L.Ed.2d [illegible] (1972).

[illegible] year 1971, 2,246 new matters were docketed in the Fifth Circuit, [illegible] more than any of the other circuits. This represented a 120% increase in a [illegible] period, although the number of circuit judges was increased by only 50%. Annual Report of the Director of the Administrative Office of the United States Courts 103 (1971). [illegible] of the courts of appeals [illegible] exponential [illegible] the Fifth Circuit [illegible] 4 (CA5 [illegible]).

Supp. ... and a three-judge United States District Court for the Eastern District of Pennsylvania, 326 F.Supp. 127, upheld constitutionality of the statutes, and the Supreme Court noted probable jurisdiction. Mr. Justice Stewart delivered the opinion of the Supreme Court that the prejudgment replevin statutes worked a deprivation of property without procedural due process of law insofar as they denied the right to prior opportunity to be heard before chattels were taken from their possessor.

Judgments of District Courts vacated and cases remanded for further proceedings.

Mr. Justice White filed a dissenting opinion in which Mr. Chief Justice Burger and Mr. Justice Blackmun joined.

Mr. Justice Powell and Mr. Justice Rehnquist took no part in the consideration or decision of the case.

1. Constitutional Law ⇐251

Central meaning of "procedural due process" is that parties whose rights are to be affected are entitled to be heard and, in order that they may enjoy that right, they must be notified. U.S.C.A. Const. Amend. 14.

See publication Words and Phrases for other judicial constructions and definitions.

2. Constitutional Law ⇐251

Procedural due process includes right to notice and opportunity to be heard at meaningful time and in meaningful manner. U.S.C.A.Const. Amend. 14.

3. Constitutional Law ⇐278(1)

Constitutional right to be heard is basic aspect of duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions; purpose of requirement is not only to ensure abstract fair play to the individual but to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the state seizes goods simply upon application of and for benefit of private party. U.S.C.A.Const. Amend. 14.

4. Constitutional Law ⇐278(1)

Prohibition against deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference. U.S.C.A.Const. Amend. 14.

5. Constitutional Law ⇐278(1)

Right to notice and hearing as to seizure of person's goods must be granted at time when deprivation can still be prevented inasmuch as, even though at later hearing his possessions can be returned to him or damages may be awarded for wrongful deprivation, no later hearing and no damage award can undo fact that arbitrary taking that was subject to right of procedural due process has already occurred. U.S.C.A. Const. Amend. 14.

6. Constitutional Law ⇐278(1)

Whatever its form, opportunity for hearing must be provided before deprivation of property interest takes effect, although procedural due process tolerates variances in form which are appropriate to nature of case and which depend upon importance of interest involved and nature of subsequent proceedings, if any. U.S.C.A.Const. Amends. 5, 14.

7. Constitutional Law ⇐305
Replevin ⇐2

Facts that Florida and Pennsylvania prejudgment replevin statutes require that party seeking writ must first post bond, allege conclusorily that he is entitled to specific goods and open himself to possible liability and damages if he is wrong do not obviate right to a prior hearing that is the only truly effective safeguard against arbitrary deprivation of property. F.S.A. §§ 78.01, 78.07, 78.08, 78.10, 78.13; 12 P.S. Pa. § 1821; Pa.R.C.P. Nos. 1073(a, b), 1076, 1077.

12 P.S. Appendix; U.S.C.A.Const. Amend. 14.

8. Constitutional Law ⇐278(1)

Right to prior hearing attaches only to deprivation of interest encompassed within Fourteenth Amendment's protection. U.S.C.A.Const. Amend. 14.

9. Constitutional Law ⇐278(1)

A temporary, nonfinal deprivation of property is nonetheless a "deprivation" in terms of the Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

See publication Words and Phrases for other judicial constructions and definitions.

10. Constitutional Law ⇐278(1)

Any significant taking of property by state is within purview of the due process clause. U.S.C.A.Const. Amend. 14.

11. Constitutional Law ⇐278(1)

While length and consequent severity of a deprivation of property by state may be factor to weigh in determining appropriate form of hearing needed prior to the deprivation, it is not decisive of basic right to prior hearing of some kind. U.S.C.A.Const. Amend. 14.

12. Constitutional Law ⇐277(1)

Fourteenth Amendment's protection of property does not safeguard only rights of undisputed ownership but extends to any significant property interest including statutory entitlements. U.S.C.A.Const. Amend. 14.

13. Constitutional Law ⇐277(1)

Where, under conditional sales contracts, buyers were entitled to possession and use of chattels before transfer of title to them, buyers, in exchange for immediate possession, agreed to pay a major financing charge beyond basic price of the merchandise and, by time goods were summarily repossessed, they had made substantial installment payments, buyers' possessory interest in goods was sufficient to invoke protection of due process clause. U.S.C.A.Const. Amend. 14.

14. Constitutional Law ⇐277(1)

Where there was dispute between wife and her estranged husband over which of them had legal right to custody of child and to possession of the child's clothes, furniture and toys, wife's interest in such chattels was protected by ordinary property law and her interest was sufficient to invoke due process safeguards with respect to seizure under writ of replevin. U.S.C.A.Const. Amend. 14.

15. Constitutional Law ⇐305

Even if buyers had fallen behind in their installment contracts and had no other valid defenses to repossession of the property, they were still entitled, under due process clause, to hearing before the property was repossessed. U.S.C.A. Const. Amend. 14.

16. Constitutional Law ⇐305

Right of party in possession of property to be heard before he is deprived of it does not depend upon an advance showing that he will surely prevail at the hearing and it is enough to invoke procedural safeguards of Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing on the contractual right to continued possession and use of the goods. U.S.C.A.Const. Amend. 14.

17. Secured Transactions ⇐228

With respect to rights of buyers under conditional sales contracts to hearing before repossession of chattels purchased, it was enough that the right to continued possession of goods was open to some dispute at hearing since sellers of goods had to show, at the least, that buyers had defaulted in their payments. U.S.C.A.Const. Amend. 14.

18. Secured Transactions ⇐228

Simplicity of issue of ultimate right of conditional buyers to continued possession of chattels purchased might be relevant to formality or scheduling of a hearing before repossession, but it would not preclude right to prior hearing of some kind. U.S.C.A.Const. Amend. 14.

ILLEGIBLE

19. Constitutional Law ⇐277(1)

Due process requirement of hearing before deprivation of property takes effect is not limited to protection of only a few types of property interests. U.S.C.A.Const. Amend. 14.

20. Constitutional Law ⇐277(1)

A stove, stereo, table, bed and other household goods for which buyers had contracted and paid substantial sums were within protection of procedural due process of law, whether or not they were absolute necessities of life. U.S.C.A. Const. Amend. 14.

21. Constitutional Law ⇐277(1)

It is not business of court in adjudicating due process rights with respect to deprivation of goods chosen by individual to make its own critical evaluation of individual's choices and to protect only the ones which, by its own lights, are "necessary." U.S.C.A.Const. Amend. 14.

22. Constitutional Law ⇐278(1)

Relative weight of liberty or property interests is relevant to form of notice and hearing required by due process before deprivation of such liberty or interest, but some form of notice and hearing, formal or informal, is required before deprivation of property interests that cannot be characterized as de minimis. U.S.C.A.Const. Amend. 14.

23. Constitutional Law ⇐278(1)

To justify postponing notice and opportunity for a hearing before deprivation of property interest on basis of an extraordinary situation, the situation must be truly unusual. U.S.C.A.Const. Amend. 14.

24. Constitutional Law ⇐278(1)

The rather ordinary costs in time, effort and expense resulting from hearing held prior to deprivation of property interest cannot outweigh the constitutional right to such a hearing. U.S.C.A.Const. Amend. 14.

25. Constitutional Law ⇐278(1)

Procedural due process is not intended to promote efficiency or accommodate all possible interests; it is intended to protect the particular interests of the person whose possessions are about to be taken. U.S.C.A.Const. Amend. 14.

26. Constitutional Law ⇐278(1)

Outright seizure of property interest without opportunity for prior hearing is justified only when a seizure is directly necessary to secure an important governmental or general public interest, there is a special need for very prompt action and the state keeps strict control over its monopoly of legitimate force, that is, the person initiating the seizure has been a government official responsible for determining, under standards of a narrowly drawn statute, that it is necessary and justified in the particular instance. U.S.C.A.Const. Amend. 14.

27. Constitutional Law ⇐305

Procedural due process does not require that hearing be held before repossession of property sold under conditional sales contract unless buyer, having received notice of his opportunity for such a hearing prior to repossession, takes advantage of it. U.S.C.A.Const. Amend. 14.

28. Replevin ⇐2

Broadly drawn Florida and Pennsylvania replevin statutes which do not limit summary seizure to special situations demanding prompt action, under which private parties may unilaterally invoke state power to replevy goods without any state official participating in decision to seek writ, reviewing basis for claim to repossession or evaluating need for immediate seizure and which do not even require that plaintiff provide any information to court on such matters did not serve an important state interest such as might justify summary seizure. U.S.C.A.Const. Amend. 14; F.S.A. §§ 78.01, 78.07, 78.08, 78.10, 78.13; 12 P.S. Pa. § 1821; Pa.R.C.P. Nos. 1073(a, b), 1076, 1077, 12 P.S. Appendix.

29. Constitutional Law ⇐43(1)

In civil, no less than criminal area, courts indulge every reasonable presumption against waiver of procedural due process rights. U.S.C.A.Const. Amend. 14.

30. Constitutional Law ⇐43(1)

Waiver of constitutional rights in any context must, at the very least, be clear and any contractual language relied upon must, on its face, amount to a waiver.

31. Constitutional Law ⇐43(1)

Where conditional sales contracts simply provided that upon default the seller "may take back," "may retake" or "may repossess" merchandise, contracts included nothing about waiver of prior hearing before the taking or repossession and contract did not indicate how or through what process, whether final judgment, self-help, prejudgment replevin with a prior hearing, or prejudgment replevin without prior hearing, seller could take back the goods the purported waiver provisions did not waive buyers' constitutional right to a preseizure hearing of some kind. U.S.C.A.Const. Amend. 14.

32. Constitutional Law ⇐305
Replevin ⇐2

Florida and Pennsylvania prejudgment replevin statutes work a deprivation of property without procedural due process of law insofar as they deny right to prior opportunity to be heard before chattels are taken from their possessor. U.S.C.A.Const. Amend. 14; F.S.A. §§ 78.01, 78.07, 78.08, 78.10, 78.13; 12 P.S. Pa. § 1821; Pa.R.C.P. Nos. 1073(a, b), 1076, 1077, 12 P.S. Appendix.

33. Constitutional Law ⇐70(1), 312

State has power to seize goods before final judgment to protect security interests of creditors so long as the creditors have tested their claim to goods through process of a fair prior hearing, thereby affording procedural due process, but nature and form of such prior hearings are legitimately open to many potential variations and are subject for legislation, not adjudication. U.S.C.A.Const. Amend. 14.

34. Constitutional Law ⇐278(1)

Essential reason for requirement of prior hearing before depriving person of property interest is to prevent unfair and mistaken deprivations of property; the hearing must provide a real test and 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. U.S.C.A.Const. Amend. 14.

Syllabus *

Appellants, most of whom were purchasers of household goods under conditional sales contracts, challenge the constitutionality of prejudgment replevin provisions of Florida law (in No. 70–5039) and Pennsylvania law (in No. 70–5138). These provisions permit a private party, without a hearing or prior notice to the other party, to obtain a prejudgment writ of replevin through a summary process of *ex parte* application to a court clerk, upon the posting of a bond for double the value of the property to be seized. The sheriff is then required to execute the writ by seizing the property. Under the Florida statute the officer seizing the property must keep it for three days. During that period the defendant may reclaim possession by posting his own security bond for double the property's value, in default of which the property is transferred to the applicant for the writ, pending a final judgment in the underlying repossession action. In Pennsylvania the applicant need not initiate a repossession action or allege (as Florida requires) legal entitlement to the property, it being sufficient that he file an "affidavit of the value of the property"; and to secure a

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

ILLEGIBLE

(1) Private party w/o hearing or prior notice applies to clerk for prejudgment writ of replevin
(2) posts double bond
(3) Seizure reigns

post-seizure hearing the party losing the property through replevin must himself initiate a suit to recover the property. He may also post his own counterbond within three days of the seizure to regain possession. Included in the printed-form sales contracts that appellants signed were provisions for the sellers' repossession of the merchandise on the buyers' default. Three-judge District Courts in both cases upheld the constitutionality of the challenged replevin provisions. *Held*:

1. The Florida and Pennsylvania replevin provisions are invalid under the Fourteenth Amendment since they work a deprivation of property without due process of law by denying the right to a prior opportunity to be heard before chattels are taken from the possessor. Pp. 1994–2000.

(a) Procedural due process in the context of these cases requires an opportunity for a hearing *before* the State authorizes its agents to seize property in the possession of a person upon the application of another, and the minimal deterrent effect of the bond requirement against unfounded applications for a writ constitutes no substitute for a pre-seizure hearing. Pp. 1994–1996.

(b) From the standpoint of the application of the Due Process Clause it is immaterial that the deprivation may be temporary and nonfinal during the three-day post-seizure period. Pp. 1996–1997.

(c) The possessory interest of appellants, who had made substantial installment payments, was sufficient for them to invoke procedural due process safeguards notwithstanding their lack of full title to the replevied goods. Pp. 1997–1998.

(d) The District Courts erred in rejecting appellants' constitutional claim on the ground that the household goods seized were not items of "necessity" and therefore did not require due process protection, as the Fourteenth Amendment imposes no such limitation. Pp. 1998–1999.

(e) The broadly drawn provisions here involved serve no such important a state interest as might justify summary seizure. Pp. 1999–2000.

2. The contract provisions for repossession by the seller on the buyer's default did not amount to a waiver of the appellants' procedural due process rights, those provisions neither dispensing with a prior hearing nor indicating the procedure by which repossession was to be achieved. D. H. Overmyer Co. v. Frick Co., 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124, distinguished. Pp. 2000–2002.

No. 70–5039, 317 F.Supp. 954, and No. 70–5138, 326 F.Supp. 127, vacated and remanded.

C. Michael Abbott, Atlanta, Ga., for appellants Margarita Fuentes and others, pro hac vice, by special leave of Court.

Herbert T. Schwartz for appellee Robert L. Shevin, Atty. Gen., of the State of Fla.

George W. Wright, Jr., Miami, Fla., for appellee Firestone Tire and Rubber Co.

David A. Scholl, Philadelphia, Pa. for the appellants Paul Parham and others, pro hac vice, by special leave of Court.

Robert F. Maxwell for appellees Americo V. Cortese and others.

Mr. Justice STEWART delivered the opinion of the Court.

We here review the decisions of two three-judge federal district courts that upheld the constitutionality of Florida and Pennsylvania laws authorizing the summary seizure of goods or chattels in a person's possession under a writ of replevin. Both statutes provide for the issuance of writs ordering state agents to seize a person's possessions, simply upon the *ex parte* application of any other person who claims a right to them and posts a security bond. Neither statute provides for notice to be given to the possessor of the property, and neither statute gives the possessor an opportunity to challenge the seizure at any kind of prior hearing. The question is whether these statutory procedures violate the Fourteenth Amendment's guarantee that no State shall deprive any person of property without due process of law.

455

I

The appellant in No. 5039, Margarita Fuentes, is a resident of Florida. She purchased a gas stove and service policy from the Firestone Tire and Rubber Company (Firestone) under a conditional sales contract calling for monthly payments over a period of time. A few months later, she purchased a stereophonic phonograph from the same company under the same sort of contract. The total cost of the stove and stereo was about $500, plus an additional financing charge of over $100. Under the contracts, Firestone retained title to the merchandise, but Mrs. Fuentes was entitled to possession unless and until she should default on her installment payments.

For more than a year, Mrs. Fuentes made her installment payments. But then, with only about $200 remaining to be paid, a dispute developed between her and Firestone over the servicing of the stove. Firestone instituted an action in small claims court for repossession of both the stove and the stero, claiming that Mrs. Fuentes had refused to make the remaining payments. Simultaneously with the filing of that action and before Mrs. Fuentes had even received a summons to answer its complaint, Firestone obtained a writ of replevin ordering a sheriff to seize the disputed goods at once.

In conformance with Florida procedure,[1] Firestone had only to fill in the blanks on the appropriate form documents and submit them to the clerk of the small claims court. The clerk signed and stamped the documents and issued a writ of replevin. Later the same day, a local deputy sheriff and an agent of Firestone went to Mrs. Fuentes' home and seized the stove and stereo.

Shortly thereafter, Mrs. Fuentes instituted the present action in a federal district court, challenging the constitutionality of the Florida prejudgment replevin procedures under the Due Process Clause of the Fourteenth Amendment.[2] She sought declaratory and injunctive relief against continued enforcement of the procedural provisions of the state statutes that authorize prejudgment replevin.[3]

The appellants in No. 5138 filed a very similar action in a federal district court in Pennsylvania, challenging the constitutionality of that State's prejudgment replevin process. Like Mrs. Fuentes, they had had possessions seized under writs of replevin. Three of the appellants had purchased personal property—a bed, a table, and other household goods—under installment sales contracts like the one signed by Mrs. Fuentes; and the sellers of the property had obtained and executed summary writs of replevin, claiming that the appellants had fallen behind in their installment payments. The experience of the fourth

[1] See p. 1990–1992 of the text, *infra*.

[2] Both Mrs. Fuentes and the appellants in No. 5138 also challenged the prejudgment replevin procedures under the Fourth Amendment, made applicable to the States by the Fourteenth. We do not, however, reach that issue. See n. 32, *infra*.

[3] Neither Mrs. Fuentes nor the appellants in No. 5138 [illegible] any pending or future court proceedings as such. Compare Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669. Rather, they challenged only the summary extra-judicial process of prejudgment seizure of property to which they had already been subjected. They invoked the jurisdiction of the federal district courts under 42 U.S.C. § 1983 and [illegible]

ILLEGIBLE

appellant, Rosa Washington, had been more bizarre. She had been divorced from a local deputy sheriff and was engaged in a dispute with him over the custody of their son. Her former husband, being familiar with the routine forms used in the replevin process, had obtained a writ that ordered the seizure of the boy's clothes, furniture, and toys.[4]

In both No. 5039 and No. 5138, three-judge district courts were convened to consider the appellants' challenges to the constitutional validity of the Florida and Pennsylvania statutes. The courts in both cases upheld the constitutionality of the statutes. Fuentes v. Faircloth, 317 F.Supp. 954 (S.D.Fla.); Epps v. Cortese, 326 F.Supp. 127 (E.D.Pa.).[5] We noted probable jurisdiction of both appeals. 401 U.S. 906, 91 S.Ct. 893, 27 L.Ed.2d 804; 402 U.S. 994, 91 S.Ct. 2185, 29 L.Ed.2d 159.

II

Under the Florida statute challenged here,[6] "[a]ny person whose goods or chattels are wrongfully detained by any other person . . . may have a writ of replevin to recover them . . . ." Fla.Stats. § 78.01, F.S.A. There is no requirement that the applicant make a convincing showing before the seizure that the goods are, in fact, "wrongfully detained." Rather, Florida law automatically relies on the bare assertion of the party seeking the writ that he is entitled to one and allows a court clerk to issue the writ summarily. It requires only that the applicant file a complaint, initiating a court action for repossession and reciting in conclusory fashion that he is "lawfully entitled to the possession" of the property, and that he file a security bond

> ". . . in at least double the value of the property to be replevied conditioned that plaintiff will prosecute his action to effect and without delay and that if defendant recovers judgment against him in the action, he will return the property, if return thereof is adjudged, and will pay defendant all sums of money recovered against plaintiff by defendant in the action." Fla.Stats. § 78.07, F.S.A.

On the sole basis of the complaint and bond, a writ is issued "command[ing] the officer to whom it may be directed to replevy the goods and chattels in possession of defendant . . . and to summon the defendant to answer the complaint." Fla.Stats. § 78.08. If the goods are "in any dwelling house or other building or enclosure," the officer is required to demand their delivery; but if they are not delivered, "he shall cause such house, building or enclosure to be broken open and shall make replevin according to the writ . . . ." Fla. Stats. § 78.10, F.S.A.

Thus, at the same moment that the defendant receives the complaint seeking repossession of property through court action, the property is seized from him. He is provided no prior notice and allowed no opportunity whatever to challenge the issuance of the writ. *After* the property has been seized, he will eventually have an opportunity for a hearing, as the defendant in the trial of the court action for repossession, which the plaintiff is required to pursue. And he is also not wholly without recourse in the meantime. For under the Florida statute, the officer who seizes the property must keep it for three days, and during that period the defendant may reclaim possession of the property by posting his own security bond in double its value. But if he does not post such a bond, the property is transferred to the party who sought the writ, pending a final judgment in the underlying action for repossession. Fla.Stats. § 78.13, F. S.A.

The Pennsylvania law[7] differs, though not in its essential nature, from

4. Unlike Mrs. Fuentes in No. 5039, none of the appellants in No. 5138 was ever sued in any court by the party who initiated seizure of the property. See pp. 1992–1993 of the text, *infra*.

5. Since the announcement of this Court's decision in Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 summary prejudgment remedies have come under constitutional challenge throughout the country. The summary deprivation of property under statutes very similar to the Florida and Pennsylvania statutes at issue here has been held unconstitutional by at least two courts. Laprease v. Raymours Furniture Co., 315 F.Supp. 716 (N.D.N.Y.); Blair v. Pitchess, 5 Cal.3d 258, 96 Cal. Rptr. 42, 486 P.2d 1242. But see Brunswick Corp. v. J. & P., Inc., 424 F.2d 100 (CA10); Wheeler v. Adams Co., 322 F.Supp. 645 (D.Md.); Almor Furniture & Appliances, Inc. v. MacMillan, 116 N.J. 65, 280 A.2d 862. Applying *Sniadach* to other closely related forms of summary prejudgment remedies, some courts have construed that decision as setting forth general principles of procedural due process and have struck down such remedies. *E. g.*, Adams v. Egley, 338 F.Supp. 614 (S.D.Cal., 1972); Collins v. Viceroy Hotel Corp., 338 F.Supp. 390 (N.D.Ill.1972); Santiago v. McElroy, 319 F.Supp. 284 (E.D.Pa.); Klim v. Jones, 315 F.Supp. 109 (N.D.Cal.); Randone v. Appellate Dept., 5 Cal.3d 536, 96 Cal. Rptr. 709, 488 P.2d 13; Larson v. Fetherston, 44 Wis.2d 712, 172 N.W.2d 20; Jones Press, Inc. v. Motor Travel Services, Inc., 286 Minn. 205, 176 N.W. 2d 87. See Lebowitz v. Forbes Leasing & Finance Corp., 326 F.Supp. 1335, 1341–1348 (E.D.Pa.). Other courts, however, have construed *Sniadach* as closely confined to its own facts and have upheld such summary prejudgment remedies. [illegible] Reeves v. Motor Contract Co., [illegible] F.Supp. 1011 (N.D.Ga.); Black Watch Farms v. Dick, 323 F.Supp. 100 (D. Conn.); American Olean Tile Co. v. Zimmerman, 317 F.Supp. 150 (D.Hawaii); Young v. Ridley, 309 F.Supp. 1308 (D.C.); Termplan, Inc. v. Superior Court, 105 Ariz. 270, 463 P.2d 68; 300 West 154th Street Realty Co. v. Department of Buildings, 26 N.Y.2d 538, 311 N.Y.S.2d 899, 260 N.E.2d 534.

6. The relevant Florida statutory provisions are the following:
"Florida Statutes, § 78.01 [F.S.A.]
"*Right to replevin.*—Any person whose goods or chattels are wrongfully detained by any other person or officer may have a writ of replevin to recover them and any damages sustained by reason of the wrongful caption or detention as herein provided. Or such person may seek like relief, but with summons to defendant instead of replevy writ in which event no bond is required and the property shall be seized only after judgment, such judgment to be in like form as that provided when defendant has retaken the property on aforthcoming bond. . . .
"Florida Statutes, § 78.07
"*Bond; requisites.*—Before a replevy writ issues, plaintiff shall file a bond with surety payable to defendant to be approved by the clerk in at least double the value of the property to be replevied conditioned that plaintiff will prosecute his action to effect and without delay and that if defendant recovers judgment against him in the action, he will return the property, if return thereof is adjudged, and will pay defendant all sums of money recovered against plaintiff by defendant in the action.
"Florida Statutes, § 78.08
"*Writ; form; return.*—The writ shall command the officer to whom it may be directed to replevy the goods and chattels in possession of defendant, describing them, and to summon the defendant to answer the complaint.
"Florida Statutes, § 78.10
"*Writ; execution on property in buildings, etc.*—In executing the writ of replevin, if the property or any part thereof is secreted or concealed in any dwelling house or other building or enclosure, the officer shall publicly demand delivery thereof and if it is not delivered by the defendant or some other person, he shall cause such house, building or enclosure to be broken open and shall make replevin according to the writ; and if necessary, he shall take to his assistance the power of the county.
"Florida Statutes, § 78.13
[illegible] the Officer executing the [illegible] deliver the property to plaintiff after the lapse of three (3) days from the time the property was taken unless within the three (3) days defendant gives bond with surety to be approved by the officer in double the value of the property as appraised by the officer, conditioned to have the property forthcoming to abide the result of the action, in which event the property shall be redelivered to defendant."

7. The basic Pennsylvania statutory provision regarding the issuance of writs or replevin is the following:
"12 P.S. § 1821. Writs of replevin authorized
[illegible] justices of the county in this

ILLEGIBLE

that of Florida. As in Florida, a private party may obtain a prejudgment writ of replevin through a summary process of *ex parte* application, although a prothonotary rather than a court clerk issues the writ. As in Florida, the party seeking the writ may simply post with his application a bond in double the value of the property to be seized. Pa. Rule Civ.Proc. 1073(a). There is no opportunity for a prior hearing and no prior notice to the other party. On this basis, a sheriff is required to execute the writ by seizing the specified property. Unlike the Florida statute, however, the Pennsylvania law does not require that there *ever* be opportunity for a hearing on the merits of the conflicting claims to possession of the replevied property. The party seeking the writ is not obliged to initiate a court action for repossession.[8] Indeed, he need not even formally allege that he is lawfully entitled to the property. The most that is required is that he file an "affidavit of the value of the property to be replevied." Pa.Rule Civ.Proc. 1073(a). If the party who loses property through replevin seizure is to get even a post-seizure hearing, he must initiate a lawsuit himself.[9] He may also, as under Florida law, post his own counterbond within three days after the seizure to regain possession. Pa.Rule Civ.Proc. 1076.

grant writs of replevin, in all cases whatsoever, where replevins may be granted by the laws of England, taking security as the said law directs, and make them returnable to the respective courts of common pleas, in the proper county, there to be determined according to law."

The procedural prerequisites to issuance of a prejudgment writ are, however, set forth in the Pennsylvania Rules of Civil Procedure, 12 P.S. Appendix. The relevant rules are the following:

"Rule 1073. Commencement of Action

"(a) An action of replevin with bond shall be commenced by filing with the prothonotary a praecipe for a writ of replevin with bond, together with

"(1) the plaintiff's affidavit of the value of the property to be replevied, and

"(2) the plaintiff's bond in double the value of the property, with security approved by the prothonotary, naming the Commonwealth of Pennsylvania as obligee, conditioned that if the plaintiff fails to maintain his right of possession of the property, he shall pay to the party entitled thereto the value of the property and all legal costs, fees and damages sustained by reason of the issuance of the writ.

"(b) An action of replevin without bond shall be commenced by filing with the prothonotary

"(1) a praecipe for a writ of replevin without bond or

"(2) a complaint.

"If the action is commenced without bond, the sheriff shall not replevy the property but at any time before the entry of judgment the plaintiff, upon filing the affidavit and bond prescribed by subdivision (a) of this rule, may obtain a writ of replevin with bond, issued in the original action, and have the sheriff replevy the property.

"Rule 1076. Counterbond

"(a) A counterbond may be filed with the prothonotary by a defendant or intervenor claiming the right to the possession of the property, except a party claiming only a lien thereon, within seventy-two (72) hours after the property has been replevied, or 72 hours after service upon the defendant when the taking of possession of the property by the sheriff has been waived by the plaintiff as provided by Rule 1077 (a), or within such extension of time as may be granted by the court upon cause shown.

"(b) The counterbond shall be in the same amount as the original bond, with security approved by the prothonotary, naming the Commonwealth of Pennsylvania as obligee, conditioned that if the party filing it fails to maintain his right to possession of the property he shall pay to the party entitled thereto the value of the property, and all legal costs, fees and damages sustained by reason of the delivery of the replevied property to the party filing the counterbond.

"Rule 1077. Disposition of Replevied Property. Sheriff's Return

"(a) When a writ of replevin with bond is issued, the sheriff shall leave the property during the time allowed for the filing of a counterbond in the possession of the defendant or of any other person if the plaintiff so authorizes him in writing.

"(b) Property taken into possession by the sheriff shall be held by him until the expiration of the time for filing a counterbond. If the property is not ordered to be impounded and if no counterbond is filed, the sheriff shall deliver the property to the plaintiff.

"(c) If the property is not ordered to be impounded and the person in possession files a counterbond, the property shall be delivered to him, but if he does not file a counterbond, the property shall be delivered to the party first filing a counterbond.

"(d) When perishable property is replevied the court may make such order relating to its sale or disposition as shall be proper.

"(e) The return of the sheriff to the writ of replevin with bond shall state the disposition made by him of the property and the name and address of any person found in possession of the property."

III

Although these prejudgment replevin statutes are descended from the common law replevin action of six centuries ago, they bear very little resemblance to it. Replevin at common law was an action for the return of specific goods wrongfully taken or "distrained." Typically, it was used after a landlord (the "distrainor") had seized possessions from a tenant (the "distrainee") to satisfy a debt allegedly owed. If the tenant then instituted a replevin action and posted security, the landlord could be ordered to return the property at once, pending a final judgment in the underlying action.[10] However, this prejudgment replevin of goods at common law did *not* follow from an entirely *ex parte* process of pleading by the distrainee. For "[t]he distrainor could always stop the action of replevin by claiming to be the owner of the goods; and as this claim was often made merely to delay the proceedings, the writ *de proprietate probanda* was devised early in the fourteenth century which enabled the sheriff to determine summarily the question of ownership. If the question of ownership was determined against the distrainor the goods were delivered back to the distrainee [pending final judgment]." 3 Holdsworth, History of English Law 284 (1927).

Prejudgment replevin statutes like those of Florida and Pennsylvania are derived from this ancient possessory action in that they authorize the seizure of property before a final judgment. But the similarity ends there. As in the present cases, such statutes are most commonly used by creditors to seize goods allegedly wrongfully detained—not wrongfully taken—by debtors. At common law, if a creditor wished to invoke state power to recover goods wrongfully detained, he had to proceed through the action of debt or detinue.[11] These actions, however, did not provide for a return of property before final judgment.[12] And, more importantly, on the

8. Pa.Rule Civ.Proc. 1073(b) does establish a procedure whereby an applicant may obtain a writ by filing a complaint, initiating a later court action. See n. 7, *supra*. In the case of every appellant in No. 70–5138, the applicant proceeded under Rule 1073(a) rather than 1073(b), seizing property under no more than a security bond and initiating no court action.

9. Pa.Rule Civ.Proc. 1037(a) establishes the procedure for initiating such a suit: "If an action is not commenced by a complaint [under Rule 1073(b)], the prothonotary, upon praecipe of the defendant, shall enter a rule upon the plaintiff to file a complaint. If a complaint is not filed within twenty (20) days after service of the rule, the prothonotary, upon [illegible] shall enter a judgment of non pros." None of the appellants in No. 70–5138 attempted to initiate the process to require the filing of a post-seizure complaint under Rule 1037(a).

10. See Plucknett, A Concise History of the Common Law 367–369 (1956); 3 Holdsworth, History of English Law 284–285 (1927); 2 Pollock & Maitland, History of English Law 577 (1909); Cobbey, Replevin 19–29 (1890).

11. See Plucknett, *supra*, n. 10, at 362–365; Pollack & Maitland, *supra*, n. 10, at 173–175, 203–211.

12. The creditor could, of course, proceed without the use of state power, through self-help, by "distraining" the property before a judgment. See n. 10, *supra*.

ILLEGIBLE

occasions when the common law did allow prejudgment seizure by state power, it provided some kind of notice and opportunity to be heard to the party then in possession of the property, and a state official made at least a summary determination of the relative rights of the disputing parties before stepping into the dispute and taking goods from one of them.

IV

[1, 2] For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be notified." Baldwin v. Hale, 68 U.S. 223, 1 Wall. 223, 17 L.Ed. 531. See Windsor v. McVeigh, 93 U.S. 274, 23 L.Ed. 914; Hovey v. Elliott, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215; Grannis v. Ordean, 234 U.S. 385, 34 S.Ct. 779, 58 L.Ed. 1363. It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62.

The primary question in the present cases is whether these state statutes are constitutionally defective in failing to provide for hearings "at a meaningful time." The Florida replevin process guarantees an opportunity for a hearing after the seizure of goods, and the Pennsylvania process allows a post-seizure hearing if the aggrieved party shoulders the burden of initiating one. But neither the Florida nor Pennsylvania statute provides for notice or an opportunity to be heard *before* the seizure. The issue is whether procedural due process in the context of these cases requires an opportunity for a hearing *before* the State authorizes its agents to seize property in the possession of a person upon the application of another.

[3, 4] The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference. See Lynch v. Household Finance Corp., 405 U.S. —, —, 92 S.Ct. 1113, 1122, 31 L.Ed.2d 424.

The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision-making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when 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. It has long been recognized that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170–172, 71 S.Ct. 624, 647, 95 L.Ed. 817 Frankfurter, J., concurring).

[5] If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if it was unfairly or mistakenly taken in the first place. Damages may be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." Stanley v. Illinois, 405 U.S. —, —, 92 S.Ct. 1208, 1210, 31 L.Ed.2d 551.

[6] This is no new principle of constitutional law. The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments. Although the Court has held that due process tolerates variances in the *form* of a hearing "appropriate to the nature of the case," Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 313, 70 S.Ct. 652, 657, 94 L.Ed. 865, and "depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any]," Boddie v. Connecticut, 401 U.S. 371, 378, 91 S.Ct. 780, 786, 28 L.Ed.2d 113, the Court has traditionally insisted that, whatever the form, opportunity for that hearing must be provided before the deprivation and issue takes effect. *E. g.*, Bell v. Burson, 402 U.S. 535, 542, 91 S.Ct. 1586, 1591, 29 L.Ed.2d 90; Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515; Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287; Armstrong v. Manzo, *supra*, 380 U.S. at 551, 85 S.Ct. at 1191; Mullane v. Central Hanover Tr. Co., *supra*, 339 U.S. at 313, 70 S.Ct. at 656; Opp Cotton Mills v. Administrator, 312 U.S. 126, 152–153, 61 S.Ct. 524, 535–536, 85 L.Ed. 624; United States v. Illinois Cent. R. Co., 291 U.S. 457, 463, 54 S.Ct. 471, 473, 78 L.Ed. 909; Londoner v. City & County of Denver, 210 U.S. 373, 385–386, 28 S.Ct. 708, 713–714, 52 L.Ed. 1103. Cf. In re Ruffalo, 390 U.S. 544, 550–551, 88 S.Ct. 1222, 1225–1226, 20 L.Ed.2d 117. "That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." Boddie v. Connecticut, *supra*, 401 U.S., at 378–379, 91 S.Ct., at 786 (emphasis in original).

The Florida and Pennsylvania prejudgment replevin statutes fly in the face of this principle. To be sure, the requirements that a party seeking a writ must first post a bond, allege conclusorily that he is entitled to specific goods, and open himself to possible liability in damages if he is wrong, serve to deter wholly unfounded applications for a writ. But those requirements are hardly a substitute for a prior hearing, for they test no more than the strength of the applicant's own belief in his rights.[13] Since his private gain is at stake, the danger is all too great that his confidence in his cause will be misplaced. Lawyers and judges are familiar with the phenomenon of a party mistakenly but firmly convinced that his view of the facts and law will prevail, and therefore quite willing to risk the costs of litigation. Because of the understandable, self-interested fallibility of litigants, a court does not decide a dispute until it has had an opportunity to hear both sides—and does not generally take even tentative action until it has itself examined the support for the plaintiff's position. The Florida and Pennsylvania statutes do not even require the official issuing a writ of replevin to do that much.

[7] The minimal deterrent effect of a bond requirement is, in a practical

[13] They may not even test that much. For if an applicant for the writ knows that he is dealing with an uneducated, uninformed consumer with little access to legal help and little [illegible] legal

procedures, there may be a substantial possibility that a summary seizure of property—however unwarranted—may go unchallenged, and the applicant may find that he can act with impunity

sense, no substitute for an informed evaluation by a neutral official. More specifically, as a matter of constitutional principle, it is no replacement for the right to a prior hearing that is the only truly effective safeguard against arbitrary deprivation of property. While the existence of these other, less effective, safeguards may be among the considerations that affect the form of hearing demanded by due process, they are far from enough by themselves to obviate the right to a prior hearing of some kind.

V

[8] The right to a prior hearing, of course, attaches only to the deprivation of an interest encompassed within the Fourteenth Amendment's protection. In the present cases, the Florida and Pennsylvania statutes were applied to replevy chattels in the appellants' possession. The replevin was not cast as a final judgment; most, if not all, of the appellants lacked full title to the chattels; and their claim even to continued possession was a matter in dispute. Moreover, the chattels at stake were nothing more than an assortment of household goods. Nonetheless, it is clear that the appellants were deprived of possessory interests in those chattels that were within the protection of the Fourteenth Amendment.

A

[9] A deprivation of a person's possessions under a prejudgment writ of replevin, at least in theory, may be only temporary. The Florida and Pennsylvania statutes do not require a person to wait until a post-seizure hearing and final judgment to recover what has been replevied. Within three days after the seizure, the statutes allowing him to recover the goods if he, in return, surrenders other property—a payment necessary to secure a bond in double the value of the goods seized from him.[14] But it is now well settled that a temporary, nonfinal deprivation of property is nonetheless a "deprivation" in the terms of the Fourteenth Amendment. Sniadach v. Family Finance Corp., *supra*; Bell v. Burson, *supra*. Both *Sniadach* and *Bell* involved takings of property pending a final judgment in an underlying dispute. In both cases, the challenged statutes included recovery provisions, allowing the defendants to post security to quickly regain the property taken from them.[15] Yet the Court firmly held that these were deprivations of property that must be preceded by a fair hearing.

[10, 11] The present cases are no different. When officials of Florida or Pennsylvania seize one piece of property from a person's possession and then agree to return it if he surrenders another, they deprive him of property whether or not he has the funds, the knowledge and the time needed to take advantage of the recovery provision. The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause. While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind.

B

[12] The appellants who signed conditional sales contracts lacked full legal title to the replevied goods. The Fourteenth Amendment's protection of "property," however, has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to "any significant property interest," Boddie v. Connecticut, *supra*, 401 U.S., at 379, 91 S.Ct., at 786, including statutory entitlements. See Bell v. Burson, *supra*, 402 U.S., at 539, 91 S.Ct., at 1589; Goldberg v. Kelly, *supra*, 397 U.S., at 262, 90 S.Ct., at 1017.

[13, 14] The appellants were deprived of such an interest in the replevied goods—the interest in continued possession and use of the goods. See Sniadach v. Family Finance Corp., *supra*, 395 U.S., at 342, 89 S.Ct., at 1823 (Harlan, J., concurring). They had acquired this interest under the conditional sales contracts that entitled them to possession and use of the chattels before transfer of title. In exchange for immediate possession, the appellants had agreed to pay a major financing charge beyond the basic price of the merchandise. Moreover, by the time the goods were summarily repossessed, they had made substantial installment payments. Clearly, their possessory interest in the goods, dearly bought and protected by contract,[16] was sufficient to invoke the protection of the Due Process Clause.

[15–18] Their ultimate right to continued possession was, of course, in dispute. If it were shown at a hearing that the appellants had defaulted on their contractual obligations, it might well be that the sellers of the goods would be entitled to repossession. But even assuming that the appellants had fallen behind in their installment payments, and that they had no other valid defenses,[17] that is immaterial here. The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." Coe v. Armour Fertilizer Works, 237 U.S. 413, 424, 35 S.Ct. 625, 629, 59 L.Ed. 1027. It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at

14. The appellants argue that this opportunity for quick recovery exists only in theory. They allege that very few people in their position are able to obtain a recovery bond, even if they know of the possibility. Appellant Fuentes says that in her case she was never told that she could recover the stove and stereo and that the deputy sheriff seizing them gave them at once to the Firestone agent, rather than holding them for three days. She further asserts that of 442 cases of prejudgment replevin in small claims courts in Dade County, Florida, in 1969, there was not one case in which the defendant took advantage of the recovery provision.

15. Bell v. Burson, *supra*, 402 U.S., at 536, 91 S.Ct., at 1587. Although not mentioned in the *Sniadach* opinion, there clearly was a quick recovery provision in the Wisconsin prejudgment garnishment statute at issue. Wis.Stat.Ann. § 267.21(1) (Supp.1970–1971). Family Finance Corp. v. Sniadach, 37 Wis.2d 163, 173–174, 154 N.W.2d 259. Mr. Justice Harlan adverted to the recovery provision in his concurring opinion. 395 U.S. 337, at 343, 89 S.Ct. 1820, at 1823, 23 L.Ed.2d 349.

These sorts of provisions for recovery of property by posting security are, of course, entirely different from the security requirement upheld in Lindsey v. Normet, 405 U.S. 56, 65, 92 S.Ct. 862, 870, 31 L.Ed.2d 36. There, the Court upheld a requirement that a tenant wanting a continuance of an eviction hearing must post security for accruing rent during the continuance. The tenant did not have to post security in order to remain in possession before a hearing; rather, he had to post security only in order to obtain a *continuance* of the hearing. Moreover, the security requirement in *Lindsey* was not a *recovery* provision. For the tenant was not deprived of his possessory interest even for one day without opportunity for a hearing.

16. The possessory interest of Rosa Washington, an appellant in No. 5138, in her son's clothes, furniture, and toys was no less sufficient to invoke due process safeguards. Her interest was not protected by contract. Rather, it was protected by ordinary property law, there being a dispute between her and her estranged husband over which of them had a legal right not only to custody of the child but also to possession of the chattels.

17. Mrs. Fuentes argues that Florida law allows her to defend on the ground that Firestone breached its obligations under the sales contract by failing to repair serious defects in the stove it sold her. We need not consider this issue here. It is enough that the right to continued possession of the goods was open to some dispute at a hearing since the sellers of the goods had to show, at the least, that the appellants had defaulted in their payments.

stake, whatever the ultimate outcome of a hearing on the contractual right to continued possession and use of the goods.[18]

C

Nevertheless, the district courts rejected the appellants' constitutional claim on the ground that the goods seized from them—a stove, a stereo, a table, a bed, and so forth—were not deserving of due process protection, since they were not absolute necessities of life. The courts based this holding on a very narrow reading of Sniadach v. Family Finance Corp., *supra*, and Goldberg v. Kelly, *supra*, in which this Court held that the Constitution requires a hearing before prejudgment wage garnishment and before the termination of certain welfare benefits. They reasoned that *Sniadach* and *Goldberg*, as a matter of constitutional principle, established no more than that a prior hearing is required with respect to the deprivation of such basically "necessary" items as wages and welfare benefits.

[19] This reading of *Sniadach* and *Goldberg* reflects the premise that those cases marked a radical departure from established principles of procedural due process. They did not. Both decisions were in the mainstream of past cases, having little or nothing to do with the absolute "necessities" of life but establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect.[19] *E. g.*, Opp Cotton Mills v. Administrator, 312 U.S. 126, 152–153, 61 S.Ct. 524, 535–536, 85 L.Ed. 624; United States v. Illinois Cent. R. Co., 291 U.S. 457, 463, 54 S.Ct. 471, 473, 78 L.Ed. 909; Southern Ry. Co. v. Virginia ex rel. Shirley, 290 U.S. 190, 54 S.Ct. 148, 78 L.Ed. 260; Londoner v. City & County of Denver, 210 U.S. 373, 28 S.Ct. 708, 52 L.Ed. 1103; Central of Georgia R. Co. v. Wright, 207 U. S. 127, 28 S.Ct. 47, 52 L.Ed. 134; Security Trust & Safety Vault Co. v. Lexington, 203 U.S. 323, 27 S.Ct. 87, 51 L.Ed. 204; Hibben v. Smith, 191 U.S. 310, 24 S.Ct. 88, 48 L.Ed. 195; Glidden v. Harrington, 189 U.S. 255, 23 S.Ct. 574, 47 L.Ed. 798. In none of those cases did the the Court hold that this most basic due process requirement is limited to the protection of only a few types of property interests. While *Sniadach* and *Goldberg* emphasized the special importance of wages and welfare benefits, they did not convert that emphasis into a new and more limited constitutional doctrine.[20]

Nor did they carve out a rule of "necessity" for the sort of nonfinal deprivations of property that they involved. That was made clear in Bell v. Burson, *supra*, holding that there must be an opportunity for a fair hearing before mere suspension of a driver's license. A driver's license clearly does not rise to the level of "necessity" exemplified by wages and welfare benefits. Rather, as the Court accurately stated, it is an "important interest," 402 U.S., at 539, 91 S.Ct., at 1589, entitled to the protection of procedural due process of law.

[20] The household goods, for which the appellants contracted and paid substantial sums, are deserving of similar protection. While a driver's license, for example, "may become [indirectly] essential in the pursuit of a livelihood," *ibid.*, a stove or a bed may be equally essential to provide a minimally decent environment for human beings in their day-to-day lives. It is, after all, such consumer goods that people work and earn a livelihood in order to acquire.

[21, 22] No doubt, there may be many gradations in the "importance" or "necessity" of various consumer goods. Stoves could be compared to television sets, or beds could be compared to tables. But if the root principle of procedural due process is to be applied with objectivity, it cannot rest on such distinctions. The Fourteenth Amendment speaks of "property" generally. And, under our free enterprise system, an individual's choices in the marketplace are respected, however unwise they may seem to someone else. It is not the business of a court adjudicating due process rights to make its own critical evaluation of those choices and protect only the ones that, by its own lights, are "necessary."[21]

VI

[23–27] There are "extraordinary situations" that justify postponing notice and opportunity for a hearing. Boddie v. Connecticut, *supra*, 401 U.S., at 379, 91 S.Ct., at 786. These situations, however, must be truly unusual.[22] Only in a few limited situations has this Court allowed outright seizure[23] without

18. The issues decisive of the ultimate right to continued possession, of course, may be quite simple. The simplicity of the issues might be relevant to the formality or scheduling of a prior hearing. See Lindsey v. Normet, 405 U.S. 56, 64, 92 S.Ct. 862, 869, 31 L.Ed.2d 36. But it certainly cannot undercut the right to a prior hearing of some kind.

19. The Supreme Court of California recently put the matter accurately: "*Sniadach* does not mark a radical departure in constitutional adjudication. It is not a rivulet of wage garnishment but part of the mainstream of the past procedural due process decisions of the United States Supreme Court." Randone v. Appellate Department, 5 Cal.3d 536, 96 Cal.Rptr. 709, 718, 488 P.2d 13, 22.

20. Sniadach v. Family Finance Corp., *supra*, 395 U.S., at 340, 89 S.Ct., at 1822; Goldberg v. Kelly, *supra*, 397 U.S., at 264, 90 S.Ct., at 1018. Of course, the primary issue in *Goldberg* was the form of hearing demanded by due process before termination of welfare benefits; the importance of welfare was directly relevant to that question.

21. The relative weight of liberty or property interests is relevant, of course, to the form of notice and hearing required by due process. See, *e. g.*, Boddie v. Connecticut, 401 U.S. 371, 378, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 and cases cited therein. But *some* form of notice and hearing—formal or informal—is required before deprivation of a property interest that "cannot be characterized as *de minimis*." Sniadach v. Family Finance Corp., *supra*, 395 U.S., at 342, 89 S.Ct., at 1823 (Harlan, J., concurring).

22. A prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right. See Bell v. Burson, *supra*, 402 U.S., at 540–541, 91 S.Ct., at 1589–1590; Goldberg v. Kelly, *supra*, 397 U.S., at 261, 90 S.Ct., at 1016. Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken.

"The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." Stanley v. Illinois, 405 U.S. —, —, 92 S.Ct. 1208, 1215, 31 L.Ed.2d 551.

23. Of course, outright seizure of property is not the only kind of deprivation that must be preceded by a prior hearing. See, *e. g.*, Sniadach v. Family Finance Corp., *supra*. In three cases, the Court has allowed the attachment of property without a prior hearing. In one, the attachment was necessary to protect the public against the same sort of immediate harm involved in the seizure cases—a bank failure. Coffin Brothers & Co. v. Bennett, 277 U.S. 29, 48 S.Ct. 422, 72 L.Ed. 768. Another case involved attachment necessary to secure jurisdiction in state court—clearly a most basic and important public interest. Ownbey v. Morgan, 256 U.S. 94, 41 S.Ct. 433, 65 L.Ed. 837. It is much less clear what interests were involved in the third case, decided with an unexplicated *per curiam* opinion simply citing *Coffin Brothers* and *Ownbey*. McKay v. McInnes, 279 U.S. 820, 49 S.Ct. 344, 73 L.Ed. 975. As far as essential procedural due process doctrine goes, *McKay* cannot stand for any more than was established in the *Coffin Brothers* and *Ownbey* cases on which it relied completely. See Sniadach v. Family Finance Corp., *supra*, 395 U.S., at 340, 89 S.Ct., at 1822; *id.*, at 344, 89 S.Ct. 1823 (Harlan, J., concurring).

opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. Thus, the Court has allowed summary seizure of property to collect the internal revenue of the United States,[24] to meet the needs of a national war effort,[25] to protect against the economic disaster of a bank failure,[26] and to protect the public from misbranded drugs[27] and contaminated food.[28]

[28] The Florida and Pennsylvania prejudgment replevin statutes serve no such important governmental or general public interest. They allow summary seizure of a person's possessions when no more than private gain is directly at stake.[29] The replevin of chattels, as in the present cases, may satisfy a debt or settle a score. But state intervention in a private dispute hardly compares to state action furthering a war effort or protecting the public health.

Nor do the broadly drawn Florida and Pennsylvania statutes limit the summary seizure of goods to special situations demanding prompt action. There may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods. But the statutes before us are not "narrowly drawn to meet any such unusual condition." Sniadach v. Family Finance Corp., *supra*, 395 U.S. at 339, 89 S.Ct. at 1821. And no such unusual situation is presented by the facts of these cases.

The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark.[30]

VII

Finally, we must consider the contention that the appellants who signed conditional sales contracts thereby waived their basic procedural due process rights. The contract signed by Mrs. Fuentes provided that "in the event of default of any payment or payments, Seller at its option may take back the merchandise . . . ." The contracts signed by the Pennsylvania appellants similarly provided that the seller "may retake" or "repossess" the merchandise in the event of a "default in any payment." These terms were parts of printed form contracts, appearing in relatively small type and unaccompanied by any explanations clarifying their meaning.

[29] In D. H. Overmyer Co. v. Frick Co., 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed. 2d 124, the Court recently outlined the considerations relevant to determination of a contractual waiver of due process rights. Applying the standards governing waiver of constitutional rights in a criminal proceeding[31]—although not holding that such standards must necessarily apply—the Court held that, on the particular facts of that case, the contractual waiver of due process rights was "voluntarily, intelligently and knowingly" made. *Id.*, at 187, 92 S.Ct. at 783. The contract in *Overmyer* was negotiated between two corporations; the waiver provision was specifically bargained for and drafted by their lawyers in the process of these negotiations. As the Court noted, it was "not a case of unequal bargaining power or overreaching. The Overmyer-Frick agreement, from the start, was not a contract of adhesion." *Id.*, at 186, 92 S.Ct. at

In cases involving deprivation of other interests, such as government employment, the Court similarly has required an unusually important governmental need to outweigh the right to a prior hearing. See, *e. g.*, Cafeteria and Restaurant Workers v. McElroy, 367 U.S. 886, 895–896, 81 S.Ct. 1743, 1748–1749, 6 L.Ed.2d 1230.

Seizure under a search warrant is quite a different matter, see n. 30, *infra*.

24. Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 51 S.Ct. 608, 75 L.Ed. 1289. The Court stated that "[d]elay in the judicial determination of property rights is not uncommon where it is *essential* that governmental needs be *immediately* satisfied." *Id.*, at 597, 51 S. Ct., at 611 (emphasis supplied). The Court, then relied on "the need of the government promptly to secure its revenues." *Id.*, at 596, 51 S.Ct., at 611.

25. Central Union Trust Co. v. Garvan, 254 U.S. 554, 566, 41 S.Ct. 214, 215, 65 L.Ed. 403; Stoehr v. Wallace, 255 U.S. 239, 245, 41 S.Ct. 293, 296, 65 L.Ed. 604; United States v. Pfitsch, 256 U.S. 547, 553, 41 S.Ct. 569, 571, 65 L.Ed. 1084.

26. Fahey v. Mallonee, 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed. 2030.

27. Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 1088.

28. North American Cold Storage Co. v. Chicago, 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed. 195.

29. By allowing repossession without an opportunity for a prior hearing, the Florida and Pennsylvania statutes may be intended specifically to reduce the costs for the private party seeking to seize goods in another party's possession. Even if the private gain at stake in repossession actions were equal to the great public interests recognized in this Court's past decisions, see nn. 24–28, *supra*, the Court has made clear that the avoidance of the ordinary costs imposed by the opportunity for a hearing is not sufficient to override the constitutional right. See n. 22, *supra*. The appellees argue that the cost of holding hearings may be especially onerous in the context of the creditor-debtor relationship. But the Court's holding in Sniadach v. Family Finance Corp., *supra*, undisputably demonstrates that ordinary hearing costs are no more able to override due process rights in the creditor-debtor context than in other contexts.

In any event, the aggregate cost of an opportunity to be heard before repossession should not be exaggerated. For we deal here only with the right to an *opportunity* to be heard. Since the issues and facts decisive of rights in repossession suits may very often be quite simple, there is a likelihood that many defendants would forgo their opportunity, sensing the futility of the exercise in the particular case. And, of course, no hearing need be held unless the defendant, having received notice of his opportunity takes advantage of it.

30. The seizure of possessions under a writ of replevin is entirely different from the seizure of possessions under a search warrant. First, a search warrant is generally issued to serve a highly important governmental need—*e. g.*, the apprehension and conviction of criminals—rather than the mere private advantage of a private party in an economic transaction. Second, a search warrant is generally issued in situations demanding prompt action. The danger is all too obvious that a criminal will destroy or hide evidence or fruits of his crime if given any prior notice. Third, the Fourth Amendment guarantees that the State will not issue search warrants merely upon the conclusory application of a private party. It guarantees that the State will not abdicate control over the issuance of warrants and that no warrant will be issued without a prior showing of probable cause. Thus our decision today in no way implies that there must be opportunity for an adversary hearing before a search warrant is issued. But cf. Quantity of Books v. Kansas, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809.

31. See Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 1468, 25 L.Ed.2d 747; Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461. In the civil area, the Court has said that "we do not presume acquiescence in the loss of fundamental rights," Ohio Bell Tel. Co. v. Public Utilities Comm'n, 301 U.S. 292, 307, 57 S.Ct. 724, 731, 81 L.Ed. 1093. Indeed, in the civil no less than the criminal area, "courts indulge every reasonable presumption against waiver." Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393, 57 S.Ct. 809, 812, 81 L.Ed. 1177.

o2. Both parties were "aware of the significance" of the waiver provision. *Ibid.*

The facts of the present cases are a far cry from those of *Overmyer*. There was no bargaining over contractual terms between the parties who, in any event, were far from equal in bargaining power. The purported waiver provision was a printed part of a form sales contract and a necessary condition of the sale. The appellees made no showing whatever that the appellants were actually aware or made aware of the significance of the fine print now relied upon as a waiver of constitutional rights.

[30] The Court in *Overmyer* observed that "where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the [waiver] provision, other legal consequences may ensue." *Id.*, at 188, 92 S.Ct. at 783. Yet, as in *Overmyer*, there is no need in the present cases to canvass those consequences fully. For a waiver of constitutional rights in any context must, at the very least, be clear. The contractual language relied upon must, on its face, amount to a waiver.

[31] The conditional sales contracts here simply provided that upon a default the seller "may take back," "may retake" or "may repossess" merchandise. The contracts included nothing about the waiver of a prior hearing. They did not indicate *how or through what process*—a final judgment, self-help, prejudgment replevin with a prior hearing, or prejudgment replevin without a prior hearing—the seller could take back the goods. Rather, the purported waiver provisions here are no more than a statement of the seller's right to repossession upon occurrence of certain events. The appellees do not suggest that these provisions waived the appellants' right to a full post-seizure hearing to determine whether those events had, in fact, occurred and to consider any other available defenses. By the same token, the language of the purported waiver provisions did not waive the appellants' constitutional right to a preseizure hearing of some kind.

VIII

[32–34] We hold that the 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.[32] Our holding, however, is a narrow one. We do not question the power of a State to seize goods before a final judgment in order to protect the security interests of creditors so long as those creditors have tested their claim to the goods through the process of a fair prior hearing. The nature and form of such prior hearings, moreover, are legitimately open to many potential variations and are a subject, at this point, for legislation—not adjudication.[33] Since the essential reason for the requirement of a prior hearing is to prevent unfair and mistaken deprivations of property, however, it is axiomatic that the hearing must provide a real test. "[D]ue 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 . . .." Sniadach v. Family Finance Corp., *supra*, 395 U.S. at 343, 89 S.Ct. at 1823 (Harlan, J., concurring). See Bell v. Burson, *supra*, 402 U.S. at 540, 91 S.Ct. at 1589; Goldberg v. Kelly, *supra*, 397 U.S. at 267, 90 S.Ct. at 1020.

For the foregoing reasons, the judgments of the district courts are vacated and these cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Vacated and remanded.

Mr. Justice POWELL and Mr. Justice REHNQUIST did not participate in the consideration or decision of these cases.

Mr. Justice WHITE, with whom THE CHIEF JUSTICE and Mr. Justice BLACKMUN join, dissenting.

Because the Court's opinion and judgment improvidently, in my view, call into question important aspects of the statutes of almost all the States governing secured transactions and the procedure for repossessing personal property, I must dissent for the reasons which follow.

First: It is my view that when the federal actions were filed in these cases and the respective District Courts proceeded to judgment there were state court proceedings in progress. It seems apparent to me that the judgments should be vacated and the District Courts instructed to reconsider these cases in the light of the principles announced in Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); Samuels v. Mackell, id., at 66, 91 S.Ct. 764, 27 L.Ed.2d 688; Boyle v. Landry, id., at 77, 91 S.Ct. 758, 27 L.Ed.2d 696; and Perez v. Ledesma, id., at 82, 91 S.Ct. 674, 27 L.Ed.2d 701.

In No. 70-5030, the Florida statutes provide for the commencement of an action of replevin, with bond, by serving a writ summoning the defendant to answer the complaint. Thereupon the sheriff may seize the property, subject to repossession by defendant within three days upon filing of a counterbond, failing which the property is delivered to plaintiff to await final judgment in the replevin action. Fla.Stat. § 78.01 et seq. (1969), F.S.A. This procedure was attacked in a complaint filed by petitioner Fuentes in the federal court, alleging that an affidavit in replevin had been filed by Firestone Tire & Rubber Company in the Small Claims Court of Dade County, that a writ of replevin had been issued pursuant thereto and duly served, together with the affidavit and complaint, and that a trial date had been set in the Small Claims Court. Firestone's answer admitted that the replevin action was pending in the Small Claims Court and asserted that Mrs. Fuentes, plaintiff in the federal court and appellant here, had not denied her default or alleged that she had the right to possession of the property. Clearly, state court proceedings were pending, no bad faith or harassment was alleged and no irreparable injury appeared that could not have been averted by raising constitutional objections in the pending state court proceeding. In this posture, it would appear that the case should be reconsidered under Younger v. Harris and companion cases, which were announced after the District Court's judgment.

In No. 70-5138, Pennsylvania Rule of Civil Procedure 1073 expressly provides that an "action of replevin with bond shall be commenced by filing with the prothonotary a praecipe for a writ of replevin with bond . . . ." When the writ issues and is served, the plaintiff has three days to file counterbond and should he care to have a hearing he may file his own praecipe, in which event the plaintiff must proceed further in the action by filing and serving his complaint.

In the cases before us, actions in replevin were commenced in accordance

32. We do not reach the appellant's argument with the Florida and Pennsylvania statutory procedures violate the Fourth Amendment, made applicable to the States by the Fourteenth. See n. 2, *supra*. For 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. There is no need for us to decide that question at this point.

33. Leeway remains to develop a form of hearing that will minimize unnecessary cost and delay while preserving the fairness and effectiveness of the hearing in preventing seizures of goods where the party seeking the writ has little probability of succeeding on the merits of the dispute.

ILLEGIBLE

with the rules, and appellee Sears, Roebuck and Company urged in the District Court that plaintiffs had "adequate remedies at law which they could pursue in state court proceedings which are still pending in accordance with the statutes and rules of Pennsylvania." App. 60. Under Younger v. Harris and companion cases, the District Court's judgment should be vacated and the case reconsidered.

Second: It goes without saying that in the typical installment sale of personal property both seller and buyer have interests in the property until the purchase price is fully paid, the seller early in the transaction often having more at stake than the buyer. Neither is it disputed that the buyer's right to possession is conditioned upon his making the stipulated payments and that upon default the seller is entitled to possession. Finally, there is no question in these cases that if default is disputed by the buyer he has the opportunity for a full hearing and that if he prevails he may have the property or its full value as damages.

The narrow issue, as the Court notes, is whether it comports with due process to permit the seller, pending final judgment, to take possession of the property through a writ of replevin served by the sheriff without affording the buyer opportunity to insist that the seller establish at a hearing that there is reasonable basis for his claim of default. The interests of the buyer and seller are obviously antagonistic during this interim period: the buyer wants the use of the property pending final judgment; the seller's interest is to prevent further use and deterioration in his security. By the Florida and Pennsylvania law the property is for all intents and purposes placed in custody and immobilized during this time. The buyer loses use of the property temporarily but is protected against loss; the seller is protected against deterioration of the property but must undertake by bond to make the buyer whole in the event the latter prevails.

In considering whether this resolution of conflicting interests is unconstitutional, much depends on one's perceptions of the practical considerations involved. The Court holds it constitutionally essential to afford opportunity for a probable cause hearing prior to repossession. Its stated purpose is "to prevent unfair and mistaken deprivations of the property." But in these typical situations, the buyer-debtor has either defaulted or he has not. If there is a default, it would seem not only "fair," but essential, that the creditor be allowed to repossess; and I cannot say that the likelihood of a mistaken claim of default is sufficiently real or recurring to justify a broad constitutional requirement that a creditor do more than the typical state law requires and permits him to do. Sellers are normally in the business of selling and collecting the price for their merchandise. I could be quite wrong, but it would not seem in the creditor's interest for a default occasioning repossession to occur; as a practical matter it would much better serve his interests if the transaction goes forward and is completed as planned. Dollar and cents considerations weigh heavily against false claims of default as well as against precipitate action that would allow no opportunity for mistakes to surface and be corrected.* Nor does it seem to me that creditors would lightly undertake the expense of instituting replevin actions and putting up bonds.

The Court relies on prior cases, particularly Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971) and Stanley v. Illinois, 405 U.S. —, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). But these cases provide no automatic test for determining whether and when due process of law requires adversary proceedings. Indeed, "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. . . . [W]hat procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." Cafeteria and Restaurant Workers v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). See also Stanley v. Illinois, 405 U.S. —, —, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972); Goldberg v. Kelly, 397 U.S. 254, 263, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287 (1970). Viewing the issue before us in this light, I would not construe the Due Process Clause to require the creditors to do more than they have done in these cases to secure possession pending final hearing. Certainly, I would not ignore, as the Court does, the creditor's interest in preventing further use and deterioration of the property in which he has substantial interest. Surely under the Court's own definition, the creditor has a "property" interest as deserving of protection as that of the debtor. At least the debtor, who is very likely uninterested in a speedy resolution that could terminate his use of the property, should be required to make those payments, into court or otherwise, upon which his right to possession is conditioned. Cf. Lindsay v. Normet, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972).

Third: 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 would appear that creditors could withstand attack under today's opinion simply by making clear in the controlling credit instruments that they may retake possession without a hearing, or, for that matter, without resort to judicial process at all. Alternatively, they need only give a few days' notice of a hearing, take possession if hearing is waived or if there is default; and if hearing is necessary merely establish probable cause for asserting that default has occurred. 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.

None of this seems worth the candle to me. The procedure which 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. The Uniform Commercial Code, which now so pervasively governs the subject matter with

* Appellants Paul and Ellen Parham admitted in their complaints that they were delinquent in their payments. They stipulated to this effect as well as to receipt of notices of delinquency prior to institution of the replevin action, and the District Court so found.

Appellant Epps alleged in his complaint that he was not in default. The defendant, Government Employees Exchange Corp., answered that Epps was in default in the amount of $311.25 as of August 9, 1970, that the entire sum due had been demanded in accordance with the relevant documents and that Epps had failed and refused to pay that sum. The District Court did not resolve this factual dispute. It did find that Epps earned in excess of $10,000 per year and that the agreements Epps and Parham entered into complied with the provisions of Pennsylvania's Uniform Commercial Code and its Services and Installment Sales Act.

As for appellant Rosabelle Andrews Washington, the District Court, based on the allegations of her complaint, entered a temporary restraining order requiring that the property seized from her be returned forthwith. At a subsequent hearing the order was dissolved, the court finding "that the representations upon which the temporary restraining order of September 18, 1970, issued were incorrect, both as to allegations contained in the complaint and representations made by counsel." (App. 29.)

It was stipulated between appellant Fuentes and defendants in the District Court that Mrs. Fuentes was in default at the time the replevin action was filed and that notices to this effect were sent to her over several months prior to insti-

ILLEGIBLE

which it deals, provides in Art. 9, § 9–503, that:

"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 peace or may proceed by action . . ."

Recent studies have suggested no changes in Art. 9 in this respect. See Permanent Editorial Board for the Uniform Commercial Code, Review Committee for Article 9 of the Uniform Commercial Code, Final Report, § 9–503 (April 25, 1971). I am content to rest on the judgment of those who have wrestled with these problems so long and often and upon the judgment of the legislatures that have considered and so recently adopted provisions that contemplate precisely what has happened in these cases.

Jon Richard ARGERSINGER, Petitioner,

v.

Raymond HAMLIN, Sheriff, Leon County, Florida.

No. 70–5015.

Argued Dec. 6, 1971.

Reargued Feb. 28, 1972.

Decided June 12, 1972.

A state prisoner brought an original habeas corpus proceeding in the Florida Supreme Court, which discharged the writ, 236 So.2d 442. Certiorari was granted. The Supreme Court, Mr. Justice Douglas, held that absent knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by counsel at his trial.

Reversed.

Mr. Chief Justice Burger concurred in result and filed opinion.

Mr. Justice Brennan filed a concurring opinion in which Mr. Justice Douglas and Mr. Justice Stewart joined.

Mr. Justice Powell concurred in result and filed opinion in which Mr. Justice Rehnquist joined.

1. Constitutional Law ⇐265, 267, 268(5,6)

With respect to rights of public trial, jury trial, confrontation and compulsory process and right to be informed of nature and cause of accusation, Sixth Amendment, by reason of Fourteenth Amendment, is applicable to the states. U.S.C.A.Const. Amends. 6, 14.

2. Criminal Law ⇐641.1

Sixth Amendment extended right to counsel beyond its common-law dimensions. U.S.C.A.Const. Amend. 6.

3. Criminal Law ⇐641.1

Absent knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by counsel at his trial. U.S.C.A. Const. Amends. 6, 14; 18 U.S.C.A. § 3006A(b); Fed.Rules Crim.Proc. rule 44(a), 18 U.S.C.A.; Const.Or. art. 1, § 9.

4. Courts ⇐399(1)

It was not function of United States Supreme Court to direct state courts how to manage their affairs, but only to make clear federal constitutional requirements.

5. States ⇐4.5

How state criminal offenses should be classified is largely a state matter. U.S.C.A.Const. Amends. 6, 14.

ILLEGIBLE

General Powers of O.C.C.

ILLEGIBLE

65-3-10. POWER OF COMMISSION TO PREVENT WASTE AND PROTECT CORRELATIVE RIGHTS.

The Commission is hereby empowered, and it is its duty, to prevent the waste prohibited by this act and to protect correlative rights, as in this act provided. To that end, the Commission is empowered to make and enforce rules, regulations and orders, and to do whatever may be reasonably necessary to carry out the purposes of this act, whether or not indicated or specified in any section hereof.

65-3-11. ENUMERATION OF POWERS.

Included in the power given to the Commission is the authority to collect data; to make investigations and inspections; to examine properties, leases, papers, books and records; to examine, check, test and gauge oil and gas wells, and tanks, plants, refineries, and all means and modes of transportation and equipment; to hold hearings; to provide for the keeping of records and the making of reports and for the checking of the accuracy thereof; to limit and prorate production of crude petroleum oil or natural gas, or both, as in this act provided; to require either generally or in particular areas certificates of clearance or tenders in connection with the transportation of crude petroleum oil or natural gas or any products thereof, or both such oil and products, or both such natural gas and products.

Apart from any authority, express or implied, elsewhere given to or existing in the Commission by virtue of this act or the statutes of this state, the Commission is hereby authorized to make rules, regulations and orders for the purposes and with respect to the subject matter stated herein, viz.:

(1) To require dry or abandoned wells to be plugged in such a way as to confine the crude petroleum oil, natural gas, or water in the strata in which they are found, and to prevent them from escaping into other strata; the Commission may require a bond of not to exceed ten thousand ($10,000.00) dollars conditioned for the performance of such regulations;

(2) To prevent crude petroleum oil, natural gas, or water from escaping from strata in which they are found into another stratum or other strata;

(3) To require reports showing locations of all oil or gas wells, and for the filing of logs and drilling records or reports;

(4) To prevent the drowning by water of any stratum or part thereof capable of producing oil or gas, or both oil and gas, in paying quantities, and to prevent the premature and irregular encroachment of water, or any other kind of water encroachment, which reduces or tends to reduce the total ultimate recovery of crude petroleum oil or gas, or both such oil and gas, from any pool;

(5) To prevent fires;

(6) To prevent "blow-outs" and "caving" in the sense that the conditions indicated by such terms are generally understood in the oil and gas business;

(7) To require wells to be drilled, operated and produced in such manner as to prevent injury to neighboring leases or properties;

(8) To identify the ownership of oil or gas producing leases, properties, wells, tanks, refineries, pipelines, plants, structures, and all transportation equipment and facilities;

General Powers — p.2.

(9) To require the operation of wells with efficient gas-oil ratios and to fix such ratios;

(10) To fix the spacing of wells;

(11) To determine whether a particular well or pool is a gas or oil well, or a gas or oil pool, as the case may be, and from time to time to classify and reclassify wells and pools accordingly;

(12) To determine the limits of any pool or pools producing crude petroleum oil or natural gas or both, and from time to time to redetermine such limits;

(13) To regulate the methods and devices employed for storage in this state of oil or natural gas or of any other substance into any pool in this state for the purpose of repressuring, cycling, pressure maintenance or secondary recovery operation; or

(14) To permit the injection of natural gas or of any other substance into any pool in this state for the purpose of repressuring, cycling, pressure maintenance or secondary recovery operation; or

(15) To regulate the disposition of water produced or used in connection with the drilling for or producing of oil or gas, or both, and to direct surface or subsurface disposal of such water in a manner that will afford reasonable protection against contamination of fresh water supplies designated by the state engineer.

(16) To determine the limits of any area containing commercial potash deposits and from time to time redetermine such limits.

(17) To regulate and where necessary prohibit drilling or producing operations for oil or gas within any area containing commercial deposits of potash where such operations would have the effect unduly to reduce the total quantity of such commercial deposits of potash which may reasonably be recovered in commercial quantities or where such operations would interfere unduly with the orderly commercial development of such potash deposits.

65-3-11.1 ADDITIONAL POWERS OF COMMISSION - HEARINGS BEFORE EXAMINER - HEARINGS DE NOVO.

In addition to the powers and authority, either express or implied, granted to the Oil Conservation Commission by virtue of the statutes of the State of New Mexico, the Commission is hereby authorized and empowered in prescribing its rules of order or procedure in connection with hearings or other proceedings before the Commission to provide for the appointment of one (1) or more examiners to be members of the staff of the Commission to conduct hearings with respect to matters properly coming before the Commission and to make reports and recommendations to the Commission with respect thereto. Any member of the Commission may serve as an examiner as provided herein. The Commission shall promulgate rules and regulations with regard to hearings to be conducted before examiners and the powers and duties of the examiners in any particular case may be limited by order of the Commission to particular issues or to the performance of particular acts. In the absence of any limiting order, an examiner appointed to hear any particular case shall have the power to regulate all proceedings before him and to perform all acts and take all measures necessary or proper for the efficient and orderly conduct of such hearings, including the swearing of witnesses, receiving of testimony and exhibits offered in evidence subject to such objections as may be imposed and shall cause a complete record of the proceeding to be made and transcribed and shall certify the same to the Commission for consideration together with the report of the examiner and his recommendations in connection therewith. The Commission shall base its decision rendered in any matter or proceeding heard by an examiner, upon the transcript of testimony and record made by or under the supervision of the examiner in connection with such proceeding, and such decision shall have the same force and effect as if said hearing had been conducted before the members of said Commission. When any matter or proceeding is referred to an examiner and a decision is rendered thereon, any party adversely affected shall have the right to have said matter heard de novo before the Commission upon application filed with the

General Powers - p. 3.

Commission within 30 days from the time any such decision is rendered.

65-3-10 - TO PREVENT WASTE AND PROTECT CORRELATIVE RIGHTS

65-3-11 - ENUMERATION OF POWERS

CORRELATIVE RIGHTS DEFINED:

<RULES - PAGE A-2>

WASTE DEFINED:

<RULES - PAGE A7 →>

Due Process — 1.

General Powers:

65-3-10. POWER OF COMMISSION TO PREVENT WASTE AND PROTECT CORRELATIVE RIGHTS.

The Commission is hereby empowered, and it is its duty, to prevent the waste prohibited by this act and to protect correlative rights, as in this act provided. To that end, the Commission is empowered to make and enforce rules, regulations and orders, and to do whatever may be reasonably necessary to carry out the purposes of this act, whether or not indicated or specified in any section hereof.

65-3-11. ENUMERATION OF POWERS.

Included in the power given to the Commission is the authority to collect data; to make investigations and inspections; to examine properties, leases, papers, books and records; to examine, check, test and gauge oil and gas wells, and tanks, plants, refineries, and all means and modes of transportation and equipment; to hold hearings; to provide for the keeping of records and the making of reports and for the checking of the accuracy thereof; to limit and prorate production of crude petroleum oil or natural gas, or both, as in this act provided; to require either generally or in particular areas certificates of clearance or tenders in connection with the transportation of crude petroleum oil or natural gas or any products thereof, or both such oil and products, or both such natural gas and products.

(7) To require wells to be drilled, operated and produced in such manner as to prevent injury to neighboring leases or properties;

Definition of Correlative Rights:

CORRELATIVE RIGHTS shall mean the opportunity afforded, as far as it is practicable to do so, to the owner of each property in a pool to produce without waste his just and equitable share of the oil or gas, or both, in the pool, being an amount, so far as can be practically determined, and so far as can be practicably obtained without waste, substantially in the proportion that the quantity of recoverable oil or gas, or both, under such property bears to the total recoverable oil or gas, or both, in the pool, and for such purpose to use his just and equitable share of the reservoir energy (See: Sec. 26 (h), Chapter 168, Session Laws 1949).

Sec. 2 — 1. EQUITABLE ALLOCATION OF ALLOWABLE PRODUCTION —

Proration — Units.

(b) The Commission may establish a proration unit for each pool, such being the area that can be efficiently and economically drained and developed by one well, and in so doing the Commission shall consider the economic loss caused by the drilling of unnecessary wells, the protection of correlative rights, including those of royalty owners, the prevention of waste, the avoidance of the augmentation of risks arising from the drilling of an excessive number of wells, and the prevention of reduced recovery which might result from the drilling of too few wells.

Due Process -2.

Traditional elements of Procedural Due Process:

1. notice
2. hearing

Notice and Hearing Required:

65-3-20. HEARINGS ON RULES, REGULATIONS AND ORDERS - NOTICE - EMERGENCY RULES.

Except as provided for herein, before any rule, regulation or order, including revocation, change, renewal or extension thereof, shall be made under the provisions of this act, a public hearing shall be held at such time, place and manner as may be prescribed by the Commission. The Commission shall first give reasonable notice of such hearing (in no case less than ten days, except in an emergency) and at any such hearing any person having an interest in the subject matter of the hearing shall be entitled to be heard....

More Specific Notice Provision:

65-3-6. RULES OF PROCEDURE IN HEARINGS - MANNER OF GIVING NOTICE - RECORD OF RULES, REGULATIONS AND ORDERS.

The Commission shall prescribe its rules of order or procedure in hearing or other proceedings before it under this act. Any notice required to be given under this act or under any rule, regulation or order prescribed by the Commission shall be by personal service on the person affected, or by publication once in a newspaper of general circulation published at Santa Fe, New Mexico, and once in a newspaper of general circulation published in the county or each of the counties if there be more than one, in which any land, oil or gas or other property which may be affected shall be situated. Such notice shall issue in the name of "the State of New Mexico" and shall be signed by at least a majority of the members of the Commission or by the Secretary of the Commission, and the seal of the Commission shall be impressed thereon, and it shall specify the number and style of the case, and the time and place of hearing, shall briefly state the general nature of the order or orders, rule or rules, or regulation or regulations contemplated by the Commission on its own motion or sought in a proceeding brought before the Commission, the name of the petitioner, or applicant, and, unless the order, rule or regulation is intended to apply to and affect the entire state, it shall specify or generally describe the common source or sources of supply that may be affected by such order, rule or regulation. Personal service thereof may be made by any agent of the Commission or by any person over the age of eighteen years, in the same manner as is provided by law for the service of summons in civil actions in the district courts of this state. Such service shall be complete at the time of such personal service or on the date of such publication, as the case may be. Proof of service shall be the affidavit of the person making personal service, or of the publisher of the newspaper in which publication is had, as the

Due Process — 3.

case may be. All rules, regulations and orders made by the Commission shall be entered in full by the Secretary thereof in a book to be kept for such purpose by the Commission, which shall be a public record and open to inspection at all times during reasonable office hours. A copy of any such rule, regulation or order, certified by the Secretary of the Commission under the seal of the Commission, shall be received in evidence in all courts of the state with the same effect as the original.

Statutory Basis for Shut-in:

65-3-13 (e)

gas, or both, in the pool, and for this purpose to use his just and equitable share of the reservoir energy.

(b) The Commission may establish a proration unit for each pool, such being the area that can be efficiently and economically drained and developed by one well, and in so doing the Commission shall consider the economic loss caused by the drilling of unnecessary wells, the protection of correlative rights, including those of royalty owners, the prevention of waste, the avoidance of the augmentation of risks arising from the drilling of an excessive number of wells, and the prevention of reduced recovery which might result from the drilling of too few wells.

(c) When two (2) or more separately owned tracts of land are embraced within a spacing or proration unit, or where there are owners of royalty interests or undivided interests in oil and gas minerals which are separately owned or any combination thereof, embraced within such spacing or proration unit, the owner or owners thereof may validly pool their interests and develop their lands as a unit. Where, however, such owner or owners have not agreed to pool their interests, and where one such separate owner, or owners, who has the right to drill has drilled or proposes to drill a well on said unit to a common source of supply, the Commission, to avoid the drilling of unnecessary wells or to protect correlative rights, or to prevent waste, shall pool all or any part of such lands or interests or both in the spacing or proration unit as a unit.

All orders effecting such pooling shall be made after notice and hearing, and shall be upon such terms and conditions as are just and reasonable and will afford to the owner or owners of each tract or interest in the unit the opportunity to recover or receive without unnecessary expense his just and fair share of the oil or gas, or both. Each order shall describe the lands included in the unit designated thereby, identify the pool or pools to which it applies and designate an operator for the unit. All operations for the pooled oil or gas, or both, which are conducted on any portion of the unit shall be deemed for all purposes to have been conducted upon each tract within the unit by the owner or owners of such tract. For the purpose of determining the portions of production owned by the persons owning interests in the pooled oil or gas, or both, such production shall be allocated to the respective tracts within the unit in the proportion that the number of surface acres included within each tract bears to the number of surface acres included in the entire unit. The portion of the production allocated to the owner or owners of each tract or interest included in a well spacing or proration unit formed by a pooling order shall, when

Due Process — 4

Pursuant to above provisions —

PRORATIONING

hearing _____
<examiner or OCC>
to consider prorating the South Carlsbad Morrow Gas Pool
notice to Graces
hearing — appearance by MPG
order pursuant to 65-3-10

1670 - L.

hearing _____
before OCC <FULL COMMISSION>
to consider rule changes
notice + hearing
Appearance
material damage to well — less than shut-in

SIX TIMES RULE

hearing _____
before
notice + hearing
appearances _____

Due Process - 5.

This case:

1. Pool prorated _____
2. stay by MPG in ex parte proceeding _____
3. stay quashed _____
4. confusion as to prorationing back to Sept. 1972 or from date of order by Snead
5. prorationing started _____
6. moratorium until Sept. 30, 1973.

Notice to MPG:

*Memos — offer certified

*monthly schedule — shows production.

* EPNG letters — they had notice.

HEARING → OPPORTUNITY TO HAVE HEARING - Rule 15(d)

pursuant to this + other provisions — MPG made application hearing set for Oct. 25, 1973.

- NO PROVISION FOR OCC TO STAY THE SIX TIMES RULE. — CONTRARY TO DUTY TO PROTECT CORRELATIVE RIGHTS.

Due Process 6

STAY – QUESTION FOR QT.
<MORATORIUM – not applicable 15(g)>

MPG – here has had:
1. notice of shut in and
   – months advance notice.
2. opportunity for hearing under
   15(d)
   (15(d) does not stay shut
   in or would be a
   built-in method
   by which to violate
   correlative rights of
   off set operators.)

NOW TURN TO:

FUENTES et al. V. SHEVIN
92 S. Ct. 1983 (1972)

Pa. + Fla. replevin statutes
extensive discussion of due process –
broad definition

W/ EXCEPTIONS;

at pp. 1999 – 2001

In extraordinary situations [illegible] seizure

less than that here — requiring only reasonable use of property.

ILLEGIBLE

Only in a few limited situations has this Court allowed outright seizure [23] without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force; the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. Thus, the Court has allowed summary seizure of property to collect the internal revenue of the United States,[24] to meet the needs of a national war effort,[25] to protect against the economic disaster of a bank failure,[26] and to protect the public from misbranded drugs [27] and contaminated food.[28]

[28] The Florida and Pennsylvania prejudgment replevin statutes serve no such important governmental or general public interest. They allow summary seizure of a person's possessions when no more than private gain is directly at stake.[29] The replevin of chattels, as in the present cases, may satisfy a debt or settle a score. But state intervention in a private dispute hardly compares to state action furthering a war effort or protecting the public health.

Nor do the broadly drawn Florida and Pennsylvania statutes limit the summary seizure of goods to special situations demanding prompt action. There may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods. But the statutes before us are not "narrowly drawn to meet any such unusual condition." Sniadach v. Family Finance Corp., *supra*, 395 U.S. at 339, 89 S.Ct. at 1821. And no such unusual situation is presented by the facts of these cases.

The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark.[30]

VII

Finally, we must consider the contention that the appellants who signed conditional sales contracts thereby waived their basic procedural due process rights. The contract signed by Mrs. Fuentes provided that "in the event of default of any payment or payments, Seller at its option may take back the merchandise . . . ." The contracts signed by the Pennsylvania appellants similarly provided that the seller "may retake" or "repossess" the merchandise in the event of a "default in any payment." These terms were parts of printed form contracts, appearing in relatively small type and unaccompanied by any explanations clarifying their meaning.

[29] In D. H. Overmyer Co. v. Frick Co., 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed. 2d 124, the Court recently outlined the considerations relevant to determination of a contractual waiver of due process rights. Applying the standards governing waiver of constitutional rights in a criminal proceeding [31]—although not holding that such standards must necessarily apply—the Court held that, on the particular facts of that case, the contractual waiver of due process rights was "voluntarily, intelligently and knowingly" made. *Id.*, at 187, 92 S.Ct. at 783. The contract in *Overmyer* was negotiated between two corporations; the waiver provision was specifically bargained for and drafted by their lawyers in the process of these negotiations. As the Court noted, it was "not a case of unequal bargaining power or overreaching. The Overmyer-Frick agreement, from the start, was not a contract of adhesion." *Id.*, at 186, 92 S.Ct. at

In cases involving deprivation of other interests, such as government employment, the Court similarly has required an unusually important governmental need to outweigh the right to a prior hearing. See, *e. g.*, Cafeteria and Restaurant Workers v. McElroy, 367 U.S. 886, 895–896, 81 S.Ct. 1743, 1748–1749, 6 L.Ed.2d 1230.

Seizure under a search warrant is quite a different matter, see n. 30, *infra*.

24. Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 51 S.Ct. 608, 75 L.Ed. 1289. The Court stated that "[d]elay in the judicial determination of property rights is not uncommon where it is *essential* that governmental needs be *immediately* satisfied." *Id.*, at 597, 51 S.Ct., at 611 (emphasis supplied). The Court, then relied on "the need of the government promptly to secure its revenues." *Id.*, at 596, 51 S.Ct., at 611.

25. Central Union Trust Co. v. Garvan, 254 U.S. 554, 566, 41 S.Ct. 214, 215, 65 L.Ed. 403; Stoehr v. Wallace, 255 U.S. 239, 245, 41 S.Ct. 293, 296, 65 L.Ed. 604; United States v. Pfitsch, 256 U.S. 547, 553, 41 S.Ct. 569, 571, 65 L.Ed. 1084.

26. Fahey v. Mallonee, 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed. 2030.

27. Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 1088.

28. North American Cold Storage Co. v. Chicago, 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed. 195.

29. By allowing repossession without an opportunity for a prior hearing, the Florida and Pennsylvania statutes may be intended specifically to reduce the costs for the private party seeking to seize goods in another party's possession. Even if the private gain at stake in repossession actions were equal to the great public interests recognized in this Court's past decisions, see nn. 24–28, *supra*, the Court has made clear that the avoidance of the ordinary costs imposed by the opportunity for a hearing is not sufficient to override the constitutional right. See n. 22, *supra*. The appellees argue that the cost of holding hearings may be especially onerous in the context of the creditor-debtor relationship. But the Court's holding in Sniadach v. Family Finance Corp., *supra*, undisputably demonstrates that ordinary hearing costs are no more able to override due process rights in the creditor-debtor context than in other contexts.

In any event, the aggregate cost of an opportunity to be heard before repossession should not be exaggerated. For we deal here only with the right to an *opportunity* to be heard. Since the issues and facts decisive of rights in repossession suits may very often be quite simple, there is a likelihood that many defendants would forgo their opportunity, sensing the futility of the exercise in the particular case. And, of course, no hearing need be held unless the defendant, having received notice of his opportunity takes advantage of it.

30. The seizure of possessions under a writ of replevin is entirely different from the seizure of possessions under a search warrant. First, a search warrant is generally issued to serve a highly important governmental need—*e. g.*, the apprehension and conviction of criminals—rather than the mere private advantage of a private party in an economic transaction. Second, a search warrant is generally issued in situations demanding prompt action. The danger is all too obvious that a criminal will destroy or hide evidence or fruits of his crime if given any prior notice. Third, the Fourth Amendment guarantees that the State will not issue search warrants merely upon the conclusory application of a private party. It guarantees that the State will not abdicate control over the issuance of warrants and that no warrant will be issued without a prior showing of probable cause. Thus our decision today in no way implies that there must be opportunity for an adversary hearing before a search warrant is issued. But cf. Quantity of Books v. Kansas, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809.

31. See Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 1468, 25 L.Ed.2d 747; Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461. In the civil area, the Court has said that "we do not presume acquiescence in the loss of fundamental rights." Ohio Bell Tel. Co. v. Public Utilities Comm'n, 301 U.S. 292, 307, 57 S.Ct. 724, 731, 81 L.Ed. 1093. Indeed, in the civil no less than the criminal area, "courts indulge every reasonable presumption against waiver." Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393, 57 S.Ct. 809, 812, 81 L.Ed. 1177.

proceedings for review, and any appeal therefrom to the Supreme Court of this state, to the extent such rules are consistent with provisions of this act.

65-3-23. TEMPORARY RESTRAINING ORDER OR INJUNCTION - GROUNDS - HEARING - BOND.

(a) No temporary restraining order or injunction of any kind shall be granted against the Commission or the members thereof, or against the attorney general, or against any agent, employee or representative of the Commission restraining the Commission, or any of its members, or any of its agents, employees or representatives, or the attorney general, from enforcing any statute of this state relating to conservation of oil or gas, or any of the provisions of this act, or any rule, regulation or order made thereunder, except after due notice to the members of the Commission, and to all other defendants, and after a hearing at which it shall be clearly shown to the court that the act done or threatened is without sanction of law, or that the provision of this act, or the rule, regulation or order complained of, is invalid, and that, if enforced against the complaining party, will cause an irreparable injury. With respect to an order or decree granting temporary injunctive relief, the nature and extent of the probable invalidity of the statute, or of any provision of this Act, or of any rule, regulation or order thereunder involved in such suit, must be recited in the order or decree granting the temporary relief, as well as a clear statement of the probable damage relied upon by the court as justifying temporary injunctive relief.

(b) No temporary injunction of any kind, including a temporary restraining order against the Commission or the members thereof, or its agents, employees or representatives, or the attorney general, shall become effective until the plaintiff shall execute a bond to the State with sufficient surety in an amount to be fixed by the court reasonably sufficient to indemnify all persons who may suffer damage by reason of the violation pendente lite by the complaining party of the statute or the provisions of this act or of any rule, regulation or order complained of. Any person so suffering damage may bring suit thereon before the expiration of six months after the statute, provision, rule, regulation or order complained of shall be finally held to be valid, in whole or in part, or such suit against the Commission, or the members thereof, shall be finally dismissed. Such bond shall be approved by the judge of the court in which the suit is pending, and shall be for the use and benefit of all persons who may suffer damage by reason of the violation pendente lite of the statute, provision, rule, regulation or order complained of in such suit, and who may bring

(a) notice to members of the Commission

must recite in the order - what they are declaring to be invalid - and probable damage

(b) bond required for TRO to become effective. — MUST BE APPROVED BY JUDGE

— NO PROVISION FOR A.G., JUDGE, OCC OR ANYONE TO WAIVE THIS BOND.

ILLEGIBLE

suit within the time prescribed by this section; and such bond shall be so conditioned. From time to time, on motion and with notice to the parties, the court may increase or decrease the amount of the bond and may require new or additional sureties, as the facts may warrant.

65-3-24. ACTIONS FOR VIOLATIONS.

Whenever it shall appear that any person is violating, or threatening to violate, any statute of this State with respect to the conservation of oil, or gas, or both, or any provision of this act, or any rule, regulation or order made thereunder, the Commission, through the attorney general, shall bring suit against such person in the county of the residence of the defendant, or in the county of the residence of any defendant if there be more than one defendant, or in the county where the violation is alleged to have occurred, for penalties, if any are applicable, and to restrain such person from continuing such violation or from carrying out the threat of violation. In such suit the Commission may obtain injunctions, prohibitory and mandatory, including temporary restraining orders and temporary injunctions, as the facts may warrant, including, when appropriate, an injunction restraining any person from moving or disposing of illegal oil or illegal oil product, or illegal gas or illegal gas product, and any or all such commodities, or funds derived from the sale thereof, may be ordered to be impounded or placed under the control of an agent appointed by the court if, in the judgment of the court, such action is advisable.

65-3-25. ACTIONS FOR DAMAGES - INSTITUTION OF ACTIONS FOR INJUNCTIONS BY PRIVATE PARTIES.

Nothing in this act contained or authorized, and no suit by or against the Commission, and no penalties imposed or claimed against any person for violating any statute of this state with respect to conservation of oil and gas, or any provision of this act, or any rule, regulation or order issued thereunder, shall impair or abridge or delay any cause of action for damages which any person may have or assert against any person violating any statute of this state with respect to conservation of oil and gas, or any provision of this act, or any rule, regulation or order issued thereunder. Any person so damaged by the violation may sue for and recover such damages as he may be entitled to receive. In the event the Commission should fail to bring suit to enjoin any actual or threatened violation of any statute of this state with respect to the conservation of oil and gas, or of any provision of this act, or of any rule, regulation or order made thereunder, then

65-3-24. Actions for violations.—Whenever it shall appear that any person is violating, or threatening to violate, any statute of this state with respect to the conservation of oil or gas, or both, or any provision of this act, or any rule, regulation or order made thereunder, the commission, through the attorney general, shall bring suit against such person in the county of the residence of the defendant, or in the county of the residence of any defendant if there be more than one [1] defendant, or in the county where the violation is alleged to have occurred, for penalties, if any are applicable, and to restrain such person from continuing such violation or from carrying out the threat of violation. In such suit the commission may obtain injunctions, prohibitory and mandatory, including temporary restraining orders and temporary injunctions, as the facts may warrant, including, when appropriate, an injunction restraining any person from moving or disposing of illegal oil or illegal oil product, or illegal gas or illegal gas product, and any or all such commodities, or funds derived from the sale thereof, may be ordered to be impounded or placed under the control of an agent appointed by the court if, in the judgment of the court, such action is advisable.

History: Laws 1935, ch. 72, § 19; 1949, ch. 168, § 21; 1941 Comp., § 69-225.

Compiler's Notes.

"This act" refers to 65-3-2 to 65-3-15, 65-3-18 to 65-3-31.

Amendment.

The 1949 amendment deleted "in the district court of Santa Fe County or" after "suit against such person" and inserted "or illegal gas or illegal gas product" and "or funds derived from the sale thereof."

Cross-References.

Forfeiture and sale of oil or gas, 65-3-28.

Collateral References.

Mines and Minerals⇐92.84, 92.85, 94.
58 C. J. S. Mines and Minerals § 242.

65-3-25. Actions for damages—Institution of actions for injunctions by private parties.—Nothing in this act contained or authorized, and no suit by or against the commission, and no penalties imposed or claimed against any person for violating any statute of this state with respect to conservation of oil and gas, or any provision of this act, or any rule, regulation or order issued thereunder, shall impair or abridge or delay any cause of action for damages which any person may have or assert against any person violating any statute of this state with respect to conservation of oil and gas, or any provision of this act, or any rule, regulation or order issued thereunder. Any person so damaged by the violation may sue for and recover such damages as he may be entitled to receive. In the event the commission should fail to bring suit to enjoin any actual or threatened violation of any statute of this state with respect to the conservation of oil and gas, or of any provision of this act, or of any rule, regulation or order made thereunder, then any person or party in interest adversely affected by such violation, and who has notified the commission in writing of such violation or threat thereof and has requested the commission to sue, may, to prevent any or further violation, bring suit for that purpose in the district court of any county in which the commission could have brought suit. If, in such suit, the court holds that injunctive relief should be granted, then

General Statutory Provision on TRO

plicable to temporary injunction. 12 A. L. R. 1165.

Compensation, right of invalidly appointed receiver to compensation as such. 34 A. L. R. 1356.

Consent of court to tax sale of property in custody of receiver appointed by court. 3 A. L. R. 2d 893.

Contempt, criticism of court's appointment of receiver as. 97 A. L. R. 903.

Estate, costs and other expenses incurred by receiver whose appointment was improper as chargeable against. 4 A. L. R. 2d 160.

Liability apart from bond and in absence of elements of malicious prosecution for wrongfully suing out injunction. 45 A. L. R. 1517.

Mandatory injunction prior to hearing of case. 15 A. L. R. 2d 213.

Minimizing damages for wrongful injunction. 66 A. L. R. 2d 1131.

Mortgage foreclosure, propriety of appointing receiver, at behest of mortgagee, to manage or operate property during. 82 A. L. R. 2d 1075.

Necessary parties defendant to independent action on injunction bond. 55 A. L. R. 2d 545.

Partnership, ex parte appointment of receiver for. 169 A. L. R. 1127.

Restitution as remedy for wrongful injunction. 131 A. L. R. 878.

State court's injunction against action in court of another state. 6 A. L. R. 2d 896.

(b) **Temporary restraining order; Notice; Hearing; Duration.** A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. TRO → Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed ten [10] days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period, except that, if a party adverse to the party obtaining a restraining order shall disqualify the judge who would otherwise have heard the matter, then the order shall be deemed extended until ten days after the designation of another judge or until such earlier time as may be fixed by the judge so designated. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On two [2] days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event, the court shall proceed to hear and determine such motion as expeditiously as

EXTENSION OF TRO

TRO –

the ends of justice
1, 1969.]

Compiler's Notes.

This division of t
from Rule 65 (b) of t
Civil Procedure and is
except for the inser
the second sentence
* * * so designated."

Collateral References

Injunctions⇐14, 1
176.

43 C. J. S. Injunct
seq., 224-235.

42 Am. Jur. 2d 74
seq., 1129, 1130, Injur
247 et seq., 327, 328.

(c) Security.
pointment of a re
security by the a
the payment of su
by any party wh
strained, or whose
fully placed in th
ever, that for goo
the court or judg
April 22, 1969. Ef

Compiler's Notes.

This division of
from Rule 65 (c) of
Civil Procedure and i
except for the insert
ning of this division,
appointment of a re
cur"; the insertion o
lowing "wrongfully e
ed"; and the deletio
no such security sh
the United States
agencies and that F
sureties under this

Collateral Reference

Injunctions⇐148;
43 C. J. S. Injunc
C. J. S. Receivers § 6

Temporary Restrain
Security.

The giving of s
rules is not mandat
failure of trial cour

(d) Security;
require or perm

the ends of justice require. [As added April 22, 1969. Effective October 1, 1969.]

Compiler's Notes.

This division of the rule is derived from Rule 65 (b) of the Federal Rules of Civil Procedure and is identical therewith except for the insertion, at the end of the second sentence, of "except that * * * so designated."

Collateral References.

Injunctions⇐14, 132 et seq., 150, 163-176.

43 C. J. S. Injunctions §§ 8, 23, 162 et seq., 224-235.

42 Am. Jur. 2d 742, 787-790, 1036 et seq., 1129, 1130, Injunctions, §§ 14, 48, 49, 247 et seq., 327, 328.

Also see 9 Am. Jur. 2d 270, Bankruptcy, § 317.

Appealability of order granting, extending, or refusing to dissolve temporary restraining order. 19 A. L. R. 3d 403.

Appealability of order refusing to grant or dissolving temporary restraining order. 19 A. L. R. 3d 459.

Constitutionality of statute or practice requiring or authorizing temporary restraining order or injunction without notice. 152 A. L. R. 168.

(c) Security. No restraining order, preliminary injunction or appointment of a receiver shall issue or occur except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained, or whose property may be found to have been thereby wrongfully placed in the hands of a receiver so appointed; Provided, however, that for good cause shown and to be recited in the order made, the court or judge may waive the furnishing of security. [As added April 22, 1969. Effective October 1, 1969.]

Compiler's Notes.

This division of the rule is derived from Rule 65 (c) of the Federal Rules of Civil Procedure and is identical therewith except for the insertion, near the beginning of this division, of the phrases "or appointment of a receiver" and "or occur"; the insertion of the language following "wrongfully enjoined or restrained"; and the deletion of provisions that no such security should be required of the United States and its officers and agencies and that Rule 65.1 applied to sureties under this rule.

Collateral References.

Injunctions⇐148; Receivers⇐42.

43 C. J. S. Injunctions §§ 165, 166; 75 C. J. S. Receivers § 62.

42 Am. Jur. 2d 1110-1116, Injunctions, §§ 310-316; 45 Am. Jur. 86, Receivers, § 97.

Also see 9 Am. Jur. 2d 1086, Bankruptcy, § 1541.

Court's lack of jurisdiction of subject matter in granting injunction as a defense in action on injunction bond. 82 A. L. R. 2d 1064.

Partial dissolution of injunction as breach of injunction bond. 40 A. L. R. 990.

Penalty as limit of liability on injunction bond. 70 A. L. R. 62.

Receiver's personal liability for negligence in failing to care for or maintain property in receivership. 20 A. L. R. 3d 967.

DECISION UNDER FORMER LAW

Temporary Restraining Order without Security.

The giving of security under these rules is not mandatory and though the failure of trial court to recite its reason for failing to require it might be erroneous, its temporary restraining order is not void. Rhodes v. State ex rel. Bliss, 58 N. M. 579, 273 P. 2d 852.

(d) Security; Proceedings against sureties. Whenever these rules require or permit the giving of security by a party, and security

(1)

Motion to dissolve – this and case [illegible]

TP#2

improperly granted –
no notice to the commission
as required under 65-3-23(A):

read this section into record.

notice to "members of Commission" –
no such ~~them~~ notice of the TRO
was given — position of
the Commission that merely contacting
the AG is not sufficient.

1. ESPECIALLY SINCE THE
LEGISLATURE SAW FIT
TO MAKE <u>SPECIFIC</u>
<u>AND SEPARATE</u> ~~REFERENCE~~
<u>TO THE AG</u> ELSEWHERE
<u>IN THIS SECTION</u>

2. <u>members</u> of the Commission
not just the Commission
constructive notice
to Commission
— none to the members
themselves

NATURE OF CONTROVERSIES w/ Oil + Gas
great consequences of decisions
in this area
legislature require actual notice to
<u>members</u> of the commission.

NOT GIVEN HERE

¶ 3 the TRO Never became effective by failure of ¶'s to post a bond as is required by sec 65-3-23(b) which requirement is non waivable.

read section (b)

no bond was posted
none was approved by the judge of this court
none was waived — and in fact cannot be waived.

THE TRO NEVER BECAME EFFECTIVE

¶ 4. defective on its face — does not make requisite findings as required by Section 65-3-23 (a)
(i. read sub sec. (a))

1. failure to state
   A. nature of propable invalidity of statute, rule, regulation, or Commission order.
   B. clear statement of probable damage.

Must be recited in the order

Assumed the π proceeded under this statute — even if they proceeded under the general statute for obtaining a TRO — it was defective on its face for it fails to set out an hour and time obtained — either way it is defective.

Fed R CP 65+66

= Summary

TRO - shall expire by its terms within such time after entry, not to exceed 10 days; ... unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period of time.

York + Bauman on Remedies at 167

21-1-1 (Rules 65+66 - (b) — impose 10 day limit

1. improperly granted (notice)
2. never became effective (no bond posted as approved by ct.)
3. defective on face — no requisite findings as to what statute rule or order being restrained.
   — no clear statement of damage.

pray ct. to grant Δ's motion to dissolve TRO

other questions now moot — go to another equitable relief question not before the court

TP #1 #5 call witnesses

damage to well

TP #1 – equitable relief.

= Summary —

P.1 EQUITABLE RELIEF
- monthly production figures
- no good faith —
  - daily allowable — 6,979.37
  - 2 days under allowable
  - many days — 3 times allowable
- resultant drainage.

not entitled to equitable relief —
- have not done equity —
- do not have requisite clean hands.

P.5 damage to well will not result.
1. Question on production of water
2. others have " " " & have been shut in
3. other wells in pool shut in.
4. this well has been shut in.

(2.) 54(b) permissive intervention

STATE FOR THE RECORD WHETHER OR NOT

John F. Magruder

1. State your name and position for the record please.

2. Mr. Magruder, are you appearing here today pursuant to a subpoena duces tecum issued at the instance of the New Mexico Oil Conservation Commission.

3. Have you brought with you the material sought in the subpoena duces tecum?

4. I hold in my hand a summary of the daily production from the Grace Atlantic Well #1 which was prepared by El Paso Natural Gas Co - the purchaser of gas from this well - and ask that it be marked for identification. (Defendant's exhibit #1)

(mail show to counsel)

5. Mr. Magruder, do you recognize this summary?

6. Will you explain what it reflects?

7. How was it prepared?

8. was the preparation under your supervision

SR-10A-80, MW80J005LX Foxboro Co Charts
(Microfish)

and control?

9. Please describe, generally, the books and/or records you examined in preparing this compilation?

<volumes, pages, hours etc.>

graph — microfish — rule

10. To your own knowledge, is this a true and accurate summary of the data on file with El Paso Natural Gas?

11. ~~I move~~ Your Honor, we offer this Summary into evidence

=

12. I hold IN my hand, copies of two letters written by El Paso Natural Gas to Michael P. Grace II and Corrine Grace dated July 19, 1973, and September 7, 1973, and ask that they be marked for identification as Defendants exhibits 2 and 3.

13. Mr. Magruder, could you identify these copies of letters and explain to the court where the originals are?

Duplicates admissible under Rule 1003 — unless question of authenticity or unfair to admit copy in lieu of original

14. properly addressed, mailed, return address, never returned to EPNG?

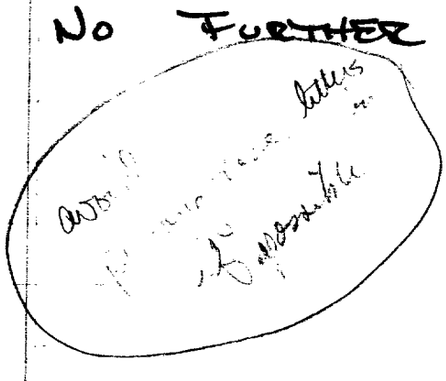
15. Is this a true + correct copy of the letters which you wrote to Mr. Grace this past summer and fall.

16. WE OFFER THESE LETTERS INTO EVIDENCE

If ~~you~~ to present recollection refreshed
Q. Do you recall the content of these letters?
Q Would it refresh your present recollection to have a copy to refer to.
<read it>
Q. has your memory been refreshed.
Q. can you now testify from your present knowledge.
Q —— as used
1. over produced status — shows notice
2. curtailment requested — to meet high demand periods

17. refer to the letters and generally summarize
A. over produced status
B. curtailment requested

NO FURTHER QUESTIONS.



El Paso Natural Gas Company

El Paso, Texas 79978

July 19, 1973

Michael P. Grace II and Corrine Grace
1141 East Bethany Home Road
Phoenix, Arizona 85017

Re: Grace Atlantic #1 Well
South Carlsbad-Morrow Pool

Dear Mr. and Mrs. Grace:

We have just completed a review of the wells in the South Carlsbad-Morrow Pool which are connected to our pipeline system. From this review we have determined that your Atlantic #1 Well will be overproduced approximately 1.1 billion cubic feet by the end of July, 1973. This overproduction will amount to approximately eight times the well's monthly allowable set by the New Mexico Oil Conservation Commission. As you are aware, the Commission may shut in any well which is overproduced in an amount exceeding six times its monthly allowable. To enable us to rely upon production from your well during the upcoming winter season, it is imperative that the well enter the winter season in a balanced or underproduced status. Unless we are allowed to immediately curtail production from this well it may be shut in during this winter's period of peak demand.

The result of legal action surrounding the prorationing of the South Carlsbad-Morrow Pool is that such prorationing is effective from and after April 11, 1973. It is now appropriate for us to make every effort to comply with this legal mandate and to purchase gas from this pool only in compliance with the rules, regulations and orders of the New Mexico Oil Conservation Commission. These rules, regulations and orders are designed to prevent the waste of natural resources and to protect correlative rights. We spend considerable time and money establishing and maintaining operations which are designed to assure each individual well interest owner, whether he be a major company or a small producer, that we will purchase his fair share of gas from the pool.

A pipeline company experiences severe fluctuations in the demand for gas from its many customers, and these fluctuations necessitate considerable flexibility in the pipeline company's takes from its producers. The need to curtail production from your well has arisen and we would greatly appreciate your cooperation in allowing us to curtail our takes from your well. If commenced immediately, a conscientious program of curtailment will prevent your well from having to be shut in during the 1973-74 winter season.

Should you have any questions or care to discuss this matter, please contact us at your earliest convenience.

Very truly yours,

John B. Magruder

John B. Magruder, Director
Gas Proration Department

JBM:rvb

El Paso Natural Gas Company

El Paso, Texas 79978

September 7, 1973

Michael P. Grace II and Corrine Grace
1141 East Bethany Home Road
Phoenix, Arizona 85017

Dear Mr. and Mrs. Grace:

Grace Atlantic #1 Well
South Carlsbad-Morrow Pool

Reference is made to our July 19, 1973 letter concerning the subject well.

This well reflects a 851,242 MCF overproduced status as of July 31, 1973 in the September, 1973 NMOCC Gas Proration Schedule and is marked as being more than six times overproduced. During August, 1973, the well produced more than twice its current allowable, and at the end of August is approximately 1,080,000 MCF overproduced.

The well will be marked as being more than six times overproduced in the October, 1973 Gas Proration Schedule, and it is our understanding that the mandatory shut-in provisions by the NMOCC will commence on September 30, 1973 in this field.

In the meantime, we recommend your shutting-in the well now. This is essential when considering the level of current allowables if we are to be able to rely upon production from your well during the upcoming winter season.

Should you have any questions or desire to discuss this matter, please contact us at your earliest convenience.

Very truly yours,

John B. Magruder

JOHN B. MAGRUDER, Director
Gas Proration Department

JBM:bjs

Daniel S. Nutter

1. State your name and position for the record please

2. How long have you been with the NMOCC?

3. Summarize
   A. educational qualifications
   B. formal degrees
   C. special training
   D. additional jobs + positions
      NMOCC - How long - what
      EXAMINER
   E. experience
   F. previous ct. experience
      testify as expert.
   ~~G. professional organizations~~

4. Your Honor, We tender Mr. Nutter as an expert witness in petroleum engineering — or in the alternative we will tender him for voir dire on his qualifications as an expert

5 Are you familiar w/ the So. Carlsbad Morrow ~~Gas Pool~~

6. The Morrow formation

7. The Grace Atlantic Well? - when were you last on this site.

8. In your opinion are the wells in this pool of similar characteristics - can the experience of other wells be used to indicate ~~what~~ how the well in question would react to certain circumstances.

LLEGIBLE

9. Refer to what has been marked Defendant's exhibit #1 _____, tell the court, well by well how long each well was shut in.

10. what was that twice on the Grace Atlantic #1

11. In your opinion, would shuting in a well after it had been produced have a different effect on it than if there was an initial shut in?

12. In your opinion what are the possible causes of damage to ~~this~~ a well when it is shut in?

13. Refer to ~~the well file introduced into evidence and marked~~ what has been marked as defendants ex # 4 ~~from the court which it reflects as to production from this well~~ Identify it and explain to the court what it contains.

14. does the file reflect the production of any water. — condensate

15. Is there anything in the well file which would indicate it is in danger of ~~either~~ being damaged by water?
~~of the possible source of damage~~
~~which you mentioned earlier~~.

16. what forms are you refering to

17. who prepared them.

→ SEE NEXT PAGE →

9. Based on your professional opinion, your familiarity with the Morrow formation, the South Carlsbad Morrow Gas Pool and the subject well do you have an opinion as to whether or not this well would be damaged if shut in persuant to the OCC shut in order of Oct. 2, 1973 — YES OR NO?

10. What is that opinion?

— Has a tubing exception been granted for this well?

— What was the basis for granting this exception

— Are the conditions still the same in this well as at the time the tubing exception was granted? <water — now>

— What are the possible consequences to this well resulting from the tubing exception?

— What would remedy this situation? <avoid these consequences>

— What other damage could occur.

— Is water currently reported (C-115).

---

* — ALP Memo — dated June 18, 1972 marked as Δ #5

hold memo —
recognize it?
explain it?
prepared by you?
true + accurate
offer —

— to whom mailed
— why — Determine flow rate — prevent over produced sh

* shut in directive — certify
refer to p. -2-
read for record -
figures available to MPG?
how often?

* EPNG letters. —
DSN testify -
read into record.
same notice as MPG

* EPNG [redacted] Production for Sept.
what was total allowable.
209, 381 MCE

(3-1)

Admissability of summaries <EPNG SUMMARY / DCC SUMMARY>

Rules of Evidence 1006

Rule 1006 RULES OF EVIDENCE

Rule 1006. Summaries

<The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation.> The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The judge may order that they be produced in court.

Comment on rules

Q. Please describe the books and/or records you examined to prepare this compilation?

<volumes, pages, hours>

Q. Did you prepare a summary of the production from these records or was it prepared under your direction and supervision?

WE OFFER THE SUMMARY IN EVIDENCE

Admissability of letters (Rule 1004)

NON PRODUCTION OF ORIGINAL

1. LOSS DISTRUCTION
2. BEYOND JURISDICTION
3. IN THE ADVERSARIES POSSESSION

THEN SHOW:

Copies of letters or other documents must be offered through a witness from whom the following matters at least must first be developed: (1) the name of the addressee; (2) for how long the witness has known him; (3) whether on a certain date the witness wrote the addressee a letter, (4) whether the letter was enclosed in an envelope, sealed, stamped, and addressed to the addressee stating that address; (5) that it was deposited in a mailbox maintained by the Post Office; (6) whether the letter contained a return address; (7) that it was never returned.

COPY — produced and marked

XEROXED

KNOW TO BE TRUE AND CORRECT

WE OFFER THE LETTER INTO EVIDENCE.

go to present records for

RULES OF EVIDENCE **Rule 1003**

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Admissibility of Public Records:

Rule 1005. Public Records

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Rule 902 (4) -

(4.)

Grace v. O.C.C. <Grace Atlantic No. 1>

I. Procedural Questions:
- A. Defective on face
  <No time and date> 65-3-23
- B. Not Properly Obtained
  1. No notice to OCC
  2. No recitation of rule stayed— nor of probable damage
- C. Never became effective under 65-3-22
  1. bond — can't be waived
  2. approved by Judge

II. Equitable Relief —
1. drainage to offsets
2. "Good Faith"

EPNG - PRODUCTION

III. Damage to Well — Merits of entire case.

—12(f) energy crisis.

THIS MUST BE:
1. HEARING FOR TRO
2. PRELIMINARY INJUNCTION 21-1-1 (65-66)

trigger provisions of 65-3-23 (a)+(b)
- a. bond
- b. requisite matters re any order which might issue.

DAMAGES TO WELL Q.

Merits: <define issues – work from Grace Complaint>

1. background on prorationing –
   ALD MEMOS
   A. why shut-ins necessary
      1. pool
      2. offset operators

2. damage to Grace Atlantic –
   WELL FILE
   A. water? WATER
   B. shut-in in June for 18 days. FLARE
   EXHIBIT <KAP.>
   C. Other wells in the pool shut in.

3. professional opinion of D.S.D.

4. "absence" / abuse of discretion
   A. statutory provision to protect rights of all in the pool <DSN – cite statute>
   B. acted consistent therewith

5. Constitutional Question
   A. Due Process <FUENTES-exception>
   B. Equal protection
   EPNG LETTERS + PRODUCTION
   X✓ fed + N.M. Constitution

6. Redistribution of Allowables

EXHIBITS:

EPNG: <MACGRUDER>

1. 1. PRODUCTION FIGURES
2. 3. 2. TWO LETTERS

ALP <CARR>

4. 5. 6. 1. MEMOS

7. WELL FILE <CARR>

8. KADTEINA EXHIBIT <NUTTER>

O.C.C. WITNESSES:

1. DAN NUTTER
2. A. L. PORTER
3. BOB MACGRUDER
4. HERMAN BAUER

NUTTER TESTIMONY:

1. QUALIFY AS EXPERT
2. FOUNDATION
3. WELL FORM — INTO EVIDENCE
4. DANAGE TO WELL
   - A. WATER - NONE PRODUCED
   - B. SHUT IN OR FLARED
   - C. PRESSURE - RECHARGE WELL
5. OTHER WELLS IN POOL — SIMILAR CHARACTERISTICS — PROBABLE VALUE
   OFFER EXHIBIT — BSN SUMMARY
6. OCC DECISION — WHAT TRANSPIRED.

(3.)

Testimony — Redistribution of Allowables

Objection

1. The court lacks jurisdiction
   a. administrative remedies have not been exhausted.

DAVIS - ADMINISTRATIVE LAW TREATISE, VOL. 3 Sec. 20.03

DAVIS - CH. 20 - p. 380

Three key factors:

1. extent of injury - must be irreparable
2. degree of clarity or - manifest want doubt about of juris. administrative jurisdiction
3. "involvement of specialized admin. understanding in the Q. of jurisdiction."

   b. exceptions
      1. acting in excess of its jurisdiction
      2. irreparable injury — (NOT THE EXPENSE — this is not the type of injury against which the [illegible] act.)
      3. where there is no valid admin. remedy for the pty. to pursue.

2. Irrelevant —
   a. not properly applicable to a matter in issue between the parties.
   b. no matter what they can show — its not so related as to prove or disprove any question in issue.

ILLEGIBLE

Judicial notice

McCormick on Evidence — p. 759

"... that judges must judicially notice the law of their own forum."

FREV. - 201

FRCP - 44.1

ILLEGIBLE

(6)

Complaint

TP #1 — Carlsbad Grace #1 — wrong name. - admit

TP #2 — admit ⟨shut in issued⟩

TP #3 — admit application was filed.
STRIKE — deny refuse to grant stay
— state our interpretation of rules in question — ie: application does not work as a stay — the stay would be properly obtained in district court.

TP #4 — deny ⟨damage to well⟩

TP #5 — ⟨application for moratorium⟩ admit
INCORPORATED BY REFERENCE

TP #6 — deny ⟨damage to well⟩

TP #7 — deny — "absence" of discretion

TP #8 — deny — consistant w/ laws of NM + U.S. and valid.

TP #9 — deny — irreparable injury Q.

TP #10 — BOND — deny

TP #11 — deny — acted consistant w/ the law.

ILLEGIBLE

general reference to energy crisis

Application to Commission
Incorporated by reference

TP #1 — Rule 15(d) — seeking limited production

TP #2 — same

TP #3 — Hardship to Public — ENERGY CRISIS

TP #4 — Rule 15(e) — make up production at lesser rate to prevent damage to well

TP #5 — same as #2

TP #6 — requested hearing under 15(e)

TP #7 — requests moratorium of up to 3 mos. — 15(g)

TP #8 — Nixon's energy statement

TP #9 — redistribution of allowables sought

TP #10 — Go to Go — almost at six times figure.

TP #11 — request for moratorium

TP #12 — request for a stay

ILLEGIBLE

SUMMARY:

— EVIDENCE CONFLICTS

1. WATER DAMAGE - alleged to be result of
   A. too large tubing
   B. water produced from formation
      - evidence of water only after self serving
2. # Witnesses say no damage —
   - lower rate of production = higher pressure at Bottom of hole.

EQUITABLE RELIEF - CLEAN HANDS

1. Draining offset operators
2. Tubing exception - obtained on misrepresentation as to H_2O production
   - cause of problem - if problem exists
3. Notice to prevent shut in if reasonable proposal made -
   - Monthly notice from OCC
   — disregarded? - EPNG could tell what situation was.

4. table of EPNG — Sept production 346,307 V. Allowable of 209,381