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Contracts

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CONTRACTS

I. ATTACHMENT

Harrison v. Morris\(^1\) involved a proceeding on a motion by defendant to vacate a warrant of attachment\(^2\) issued by the clerk of the district court at the request of plaintiff. Harrison had instituted an action to recover monies due on a promissory note issued in March 1973 by Morris to consolidate the balance owed to the plaintiff on the purchase of thirty railroad car cabooses. Morris claimed that the dismissal of attachment should be forthcoming on the grounds that the bond required by South Carolina law in attachment proceedings was defective, that the attachment in this case served only to harass the defendant, and that there was no prejudgment hearing on the merits of the attachment proceeding,\(^3\) thereby constituting a denial of due process of law. The district court held that the cash bond filed by the plaintiff met the statutory requirement,\(^4\) that the issuance of the warrant of attachment was warranted by the facts,\(^5\) and that since the merits of the defendant's claims would be heard in the main suit, due process was not denied by the absence of a prejudgment hearing on the merits of the attachment.\(^6\)

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2. S.C. Code Ann. § 10-932.1 (1962) provides:
   Motion by owner to discharge attachment.—In all cases the defendant or any person who establishes a right to the property attached may move to discharge the attachment.
3. S.C. Code Ann. § 10-905 (1962) provides in part:
   Affidavit required.—The warrant may be issued whenever it shall appear by affidavit that a cause of action exists against the defendant, specifying the amount of the claim and the grounds thereof, and that the defendant is: (1) A foreign corporation or not a resident of this State; ... or (3) ... (b) has removed or is about to remove any of his property from this State with intent to defraud his creditors. ... 
   Minimum bond required before obtaining attachment.—Before issuing the warrant, the judge, clerk or magistrate shall require a written undertaking on the part of the plaintiff, with sufficient surety, to the effect that if the defendant recover judgment or the attachment be set aside by order of the court the plaintiff will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which shall be at least two hundred and fifty dollars, except in case of a warrant issued by a magistrate when it shall be at least twenty-five dollars.
5. 370 F. Supp. at 146.
6. Id. at 146-49.
7. S.C. Code Ann. § 10-901 (1962) provides in part:
In two contracts of sale entered into in May 1969, Harrison agreed to sell and Morris agreed to buy thirty cabooses located in Greenville, South Carolina for a price of $39,050.00. Morris intended to renovate the cabooses for use in his restaurant business as novelty items. In March 1973, Morris issued a promissory note to Harrison in the amount of $16,406.55, such amount representing the balance owed by Morris on the May 1969 purchase. Morris failed to make payments on the note and Harrison brought an action for judgment thereon in November 1973. The clerk of the district court issued a warrant of attachment preventing the removal of the cabooses from South Carolina based upon allegations that Morris had made arrangements for the transportation of the cabooses from Greenville, South Carolina to New Jersey where he intended to dispose of them, thereby hindering collection of the debt owed by Morris. The defendant made a motion for an order dismissing the warrant of attachment which the court treated as one alleging failure to state a claim upon which relief could be granted under Federal Rule 12(b)(6).

South Carolina law requires persons seeking an attachment to post a bond of at least $250 in order to provide for damages that might be incurred should the defendant prevail in the main suit or should the attachment be set aside. Harrison posted the cash bond when seeking attachment of Morris' property. The court found that such cash bond was sufficient to satisfy the terms of the statute and that the section does not require that a surety bond also be acquired from the plaintiff before a warrant of attachment will issue. The court, therefore, held that the defendant failed to establish grounds for dismissal of the attachment on the grounds of a defective posting of bond.

The second claim supporting Morris' motion for dismissal of

Grounds for attachment generally.—In any action:

. . . .

(8) When any person or corporation is about to remove any of his or its property from this State . . . with intent to defraud creditors as mentioned in this chapter;

The plaintiff at the time of issuing the summons or any time afterwards may have the property of such defendant or corporation attached, in the manner prescribed in this chapter, as a security for the satisfaction of such judgment as the plaintiff may recover.

8. Id.
9. See note 2 supra.
10. See note 4 supra.
11. 370 F. Supp. at 146.
the attachment was that he owned other property within South Carolina sufficiently valuable to satisfy Harrison’s claim with respect to the March 1973 note and that the district court had personal jurisdiction over Morris in the action for recovery on the note. Attachment of the two railroad cars, therefore, was unnecessary. Morris further alleged that Harrison was aware of the foregoing facts but that attachment was sought to harass the debtor. As a factual matter, however, the court was not satisfied that Morris’ other property in South Carolina would satisfy his debt to Harrison. Section 10-901(8) of the South Carolina Code of Laws, moreover, provides that removal of one’s property from the state for the purpose of defrauding a creditor is grounds for attachment. With respect to Morris’ allegation of harassment by Harrison, the court pointed to the fact that in the hearing on the motion for dismissal of attachment, the defendant admitted that arrangements were underway to transport the attached property to New Jersey. Coupled with the plaintiff’s allegation that such removal would prevent satisfaction of the debt due him, the intention of Morris to take the property out of South Carolina prompted the court to hold that the attachment was necessary to protect Harrison’s interests and was not designed merely to harass the defendant.

Under South Carolina law, no notice of attachment or judicial hearing on the merits is necessary prior to the issuance of a warrant of attachment. Morris asserted that under the principles laid down by the Supreme Court of the United States in Fuentes v. Shevin and Sniadach v. Family Finance Corp., the failure of South Carolina law to provide for notice and hearing prior to seizure of the defendant’s property constitutes a denial of due process of law. The court, however, found both Fuentes and Sniadach to be “clearly distinguishable” from a case involving attachment.

In Fuentes, the appellants challenged the constitutionality of

12. The defendant owned 28 other railroad cars located in South Carolina.
13. The South Carolina long-arm statute was used to secure personal jurisdiction over the defendant. S.C. Code Ann. §§ 10.2-801 et seq.
14. See note 7 supra.
16. S.C. Code Ann. § 10-932.1 (1962) provides that “[i]n all cases the defendant or any person who establishes a right to the property attached may move to discharge the attachment” and obtain the property.
the prejudgment replevin provisions of Florida and Pennsylvania law. The Supreme Court held that before property which is alleged-ly wrongfully detained may be transferred to another person claiming right to possession of such property, a hearing must be held at a "meaningful time" with adequate notice thereof given to the affected parties.\(^9\) The \textit{Harrison} court distinguished \textit{Fuentes} by noting that the creditors in \textit{Fuentes} wished to recover goods "wrongfully detained" by debtors and not to prevent the removal of such goods from the state and their possible conver-sion as was the case in \textit{Harrison}.\(^9\) The court also pointed out that before the clerk of court may issue a warrant of attachment, there must exist a cause of action duly filed to which attachment may be considered collateral or provisional.\(^21\) The hearing on the mer-its of the main cause of action satisfied the "meaningful time" requirement and the fourteenth amendment due process require-ments delineated by the Supreme Court in \textit{Fuentes}.\(^22\)

The court also rejected the proposal by the defendant in \textit{Harrison} that the attachment of the property without a prior hearing constituted a denial of "fundamental principles of due process" as the Supreme Court had found in the prejudgment garnishment of wages in \textit{Sniadach v. Family Finance Corp.}\(^23\) In \textit{Sniadach}, the severe hardship for the wage earner resulting from garnishment of his wages by a creditor led the Supreme Court to hold that a prior hearing was essential in such cases.\(^24\) Although the court in \textit{Harrison} held generally that attachment proceedings are not subject to the prior hearing requirements of actions seek-ing garnishment of wages, the court specifically pointed to the failure of the defendant to allege a threat to his livelihood as the result of the deprivation of the use of his property.\(^25\) The court further held that there was in fact no deprivation of defendant's

\(^9\) 407 U.S. at 80.
\(^21\) See Plowden \textit{v.} Mack, 217 S.C. 226, 60 S.E.2d 311 (1950). In \textit{Plowden}, the defen-dant was not served with a summons or complaint until four days after the seizure of his property by the sheriff. The court dismissed the attachment on the ground that without a main suit, there were no interests of the plaintiff which were protected by the attachment statute and that under the statute, attachment could not constitute an independent action.
\(^24\) \textit{Id.}
\(^25\) 370 F. Supp. at 149.
property in that a redelivery bond could be posted to regain the use and enjoyment thereof until a judgment on the main suit was handed down.

In light of the Fuentes holding, however, it no longer appears to be of great significance to the Supreme Court that a person, whose property is seized without a hearing, must allege a threat to his livelihood as a result of such seizure or that the property seized be classified as an absolute necessity of life. It was also stated by the Court in Fuentes that the opportunity to post a recovery bond to regain possession of the property does not change the nature of the seizure into something less than a deprivation of property. As the court in Harrison noted, however, in the case of replevin, possession of the property seized is transferred from the alleged debtor to his creditor. The creditor is allowed through such summary replevin proceedings not only to bind his alleged debtor's property but also to gain actual possession of that property with no prior hearing. In applying the Fuentes "meaningful time" test, the Harrison court held that the hearing on the merits of the claimant's main cause of action provided a prior hearing because a judgment must be had before the property is actually taken from one person and delivered to another.

The court's reasoning in Harrison is open to attack on two points. First, it could be argued that the prior hearing required

26. Id.
27. S.C. Code Ann. § 10-931 (1962) provides:
Undertaking on part of defendant.—Upon application for an order to discharge the attachment, the defendant shall deliver to the court or officer an undertaking executed by at least two sureties who are residents and freeholders or householders in the State, approved by such court or officer, to the effect that such sureties will, on demand, pay to the plaintiff the amount of judgment that may be recovered against the defendant in the action, not exceeding sum specified in the undertaking which shall be at least double the amount claimed by the plaintiff in his complaint. If it shall appear by affidavit that the property attached be less than the amount claimed by the plaintiff the court or officer issuing the attachment may order the property to be appraised and the amount of the undertaking shall then be double the amount so appraised.
28. In Fuentes, the Supreme Court specifically held that although the relative weight of a property interest would be taken into consideration to determine the form of prior hearing necessary to meet due process requirements, the Court did not wish to "get into the business" of deciding whether a particular item of property was sufficiently "necessary" to require some form of hearing. 407 U.S. at 90 & n.21.
29. 407 U.S. at 84-85.
30. 370 F. Supp. at 149.
31. 407 U.S. at 80.
by *Sniadach* and *Fuentes* must be held prior to any action which has a binding effect upon a person's property. The court in *Harrison* relied on the following language of *Fuentes* to justify the "temporary possession" of a person's property by the state in an attachment proceeding: 33

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. 34

The language of the Court in *Fuentes* to the effect that the creditor must have tested his claim to property prior to the state's seizure of such property could be interpreted as including prejudgment attachment, especially in light of the holding in *Fuentes* that hardship resultant from the seizure of property is not the important consideration in cases where property is taken without a prior hearing. 35 In *Harrison*, as in *Sniadach*, the property of a person is placed in the "temporary possession" of the state at the request of a claimant without a prior hearing on the merits of the claim, thus depriving the person whose property is taken of due process of law.

Secondly, the court distinguished *Fuentes* from *Harrison* on the ground that the actual possession of the property in *Fuentes* was transferred from the alleged debtor to the claimant prior to the instigation of any action by the latter, whereas under the attachment provisions of South Carolina law, 36 a suit must be begun in regular form 37 and the proper grounds alleged before attachment 38 with the transfer of possession of the property not taking place until after the main suit has been reduced to judgment. 39 Such an argument ignores the holding in *Sniadach* that a prejudgment holding of property by the state can amount to a deprivation of property, 40 and the holding in *Fuentes* that "a temporary, nonfinal deprivation of property is nonetheless a 'dep-
rivation' in the terms of the Fourteenth Amendment."  

It should be noted, however, that two recent Supreme Court decisions, both written subsequent to the Harrison decision, applied the Sniadach-Fuentes tests. In Mitchell v. W.T. Grant Co., the Court upheld Louisiana's sequestration statutes which resemble the South Carolina attachment provisions involved in Harrison. In North Georgia Finishing, Inc. v. Di-Chem, Inc., however, the Court emphasized that any deviation from the rules set out in Mitchell would cause a statute authorizing the initial seizure of an alleged debtor's property without a prior adversarial hearing to fail.

In Mitchell, the W.T. Grant Company filed suit in a Louisiana trial court alleging non-payment of the balance outstanding on the installment purchase of several household appliances which had been sold to Mitchell. Grant also alleged in the complaint the existence of a vendor's lien on the items. In a signed affidavit affirming the truth of the allegations in the complaint, Grant's credit manager stated that the firm had reason to believe that Mitchell would "encumber, alienate or otherwise dispose of the merchandise described in the foregoing petition during the pendency of these proceedings, and that a writ of sequestration is necessary in the premises." Grant filed the required bond ($1,125) and the writ was issued, accompanied by a citation to Mitchell to file a pleading or to make an appearance before the court within five days.

In denying Mitchell's motion to suppress the writ of sequestration, the Supreme Court recognized a duality of interests in the property involved. The Court stated that while Mitchell held title to the sequestered merchandise, such title was encumbered by the vendor's lien held by Grant. The Court further stated:

Plainly enough, this is not a case where the property sequestered by the court is exclusively the property of the defendant debtor.

41. 407 U.S. at 85.
42. 416 U.S. 600 (1974).
43. LA. CODE CIV. PROC. ANN. arts. 3571 et seq. (West 1960).
44. 419 U.S. 601 (1975).
46. 416 U.S. at 601.
47. Id. at 602.
48. Id.
49. Id. at 604.
The question is not whether a debtor's property may be seized by his creditors, *pendente lite*, where they hold no present interest in the property sought to be seized. The reality is that both seller and buyer had current, real interests in the property, and the definition of property rights is a matter of state law. Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well.  

The Court in *Mitchell* found the interest of the seller in installment sales of consumer goods, where the buyer fails to make timely payments, to consist of the right to protect such goods from conversion or deterioration resulting from its sale or continued use. The Court further noted the possibility of the destruction of the vendor's lien through the sale of the encumbered property to third parties. The original seller would then be on an equal footing with other creditors in attempting to satisfy his claim against the original consumer. In light of such contingencies, the Court held that sequestration of Mitchell’s property was proper without prior notice of the taking because “[t]he notice itself may furnish a warning to the debtor acting in bad faith.”

It is now clear that the *Fuentes* requirement that a “fair prior hearing” be held to test a creditor’s claim to goods held by another does not necessarily call for a hearing before the property is actually taken. The Court in *Mitchell* interpreted the language of *Fuentes* to mean that an “immediate” hearing must be available to the party whose property is seized. At such a hearing, the court need only consider the matter of possession. It should be noted, however, that the Court in *Mitchell* scrutinized each of the provisions of the Louisiana sequestration statutes and found the sections distinguishable from the constitutionally infirm statutes in *Sniadach* and *Fuentes*. There is a strong indication that the Court desired to offer other states with similar statutes specific standards by which existing laws could be brought within the hearing requirements of fourteenth amendment due process. It is important to note that the Court included the applicable

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50. *Id.*
51. *Id.* at 608.
52. *Id.* at 609.
53. *Id.*
54. *See* text accompanying note 34 *supra*.
55. 416 U.S. at 610.
56. *Id.*
provisions of the Louisiana sequestration law in the Appendix to its opinion, perhaps as a model for other states to follow.

As the Court observed in *Mitchell*, before a writ of sequestration will issue in Louisiana, a person must file an affidavit or a verified complaint stating specific facts which establish some possessory interest in the defendant’s property. It also must be "within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action." Based on the language of the Louisiana statute, the Court stated that conclusory statements made in the affidavit or in the verified complaint would not provide the requisite facts deemed necessary for the issuance of the writ.

The *Mitchell* Court also observed that, although the writ could be issued on the *ex parte* application of a claimant with no notice to the defendant, the defendant is entitled to have the writ dissolved immediately "unless the plaintiff proves the grounds upon which the writ was issued." This provision requires the plaintiff to bear the burdens of proceeding and proof. If the plaintiff fails to establish the existence of a valid possessory interest in the sequestered property, the writ must be dissolved and damages may be awarded to the defendant. Should the plaintiff prove such an interest, the action will proceed to the merits and the defendant may post a bond to recover his property.

Finally, the Court in *Mitchell* noted that, in Louisiana, "[t]he approval of a writ of sequestration is not . . . a mere ministerial act" in that the "law provides for judicial control of

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57. *Id.* at 620-23.
58. *Id.* at 605.
61. *Id.*
62. *See* text accompanying note 59 supra.
64. 416 U.S. at 606.
66. *Id.* at comment a.
67. *Id.*
68. *Id.*; art. 3507 provides:
A defendant may obtain the release of the property seized under a writ of attachment or of sequestration by furnishing security for the satisfaction of any judgment which may be rendered against him.
69. 416 U.S. at 616 n.12.
the process from beginning to end."  

It should be noted, however, that in state courts outside of Orleans Parish, Louisiana, where the Mitchell case originated, the clerk of a district court may issue a writ of sequestration.  

The Court in Mitchell did not address itself to the legality of such an issuance. In North Georgia Finishing, Inc. v. Di-Chem, Inc., the failure of the Georgia garnishment statute to require participation by a judge in the issuance of a writ of garnishment served as one of the factors considered by the Court in declaring the statute unconstitutional.

North Georgia Finishing involved an action filed by Di-Chem to recover an alleged indebtedness of $51,279.17 for goods sold and delivered. At the time the suit was filed, Di-Chem secured a writ of garnishment against the defendant's bank account by filing an affidavit with the clerk of court alleging the existence of the debt and that the affiant had "reason to apprehend the loss of said sum or a part thereof unless process of Garnishment issues." In declaring the Georgia garnishment statute to be violative of due process, the Court noted the absence of all of the characteristics which saved the Louisiana sequestration statute construed in Mitchell. Personal knowledge of the facts sworn to in the affidavit is unnecessary under Georgia law. The requirement of the Louisiana statute to provide the specific facts supporting the plaintiff's request to seize a defendant's property and

70. Id. at 616.
72. 416 U.S. at 606 n.5.
73. 419 U.S. 601 (1975).
The plaintiff, his agent, or attorney at law shall make affidavit before some officer authorized to issue an attachment, or the clerk of any court of record in which the said garnishment is being filed or in which the main case is filed. . . .
75. 419 U.S. at 607.
76. See note 74 supra.
The plaintiff, his agent, or attorney at law shall make affidavit . . . stating . . . that he has reason to apprehend the loss of . . . [the amount due in the main suit] or some part thereof unless process of garnishment shall issue. . . .
When the affidavit shall be made by the agent or attorney at law of the plaintiff, he may swear according to the best of his knowledge and belief, and may sign the name of the plaintiff to the bond, who shall be bound thereby in the same manner as though he had signed it himself.
to hold it as security is not present in the Georgia statute. Judicial participation in the issuance of a writ of garnishment is not required under Georgia law. Finally, the Court in North Georgia Finishing noticed that

the only method discernible on the face of the statute to dissolve the garnishment was to file a bond to protect the plaintiff creditor. There is no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment. Indeed, it would appear that without the filing of a bond, the defendant debtor's challenge to the garnishment will not be entertained, whatever the grounds may be.

In short, the procedural safeguards present in Mitchell were absent in North Georgia Finishing; consequently, the Georgia garnishment statute could not withstand constitutional scrutiny.

In light of the holdings in Mitchell and North Georgia Finishing, the South Carolina attachment provisions applied in Harrison v. Morris are of questionable constitutional validity. Several defects are present in the South Carolina attachment law which are somewhat similar to those found in Georgia's garnishment statute. First, both Mitchell and North Georgia Finishing emphasize the importance of a statutory requirement making it mandatory for a claimant in attachment proceedings to allege specific facts which would entitle him to a writ of attachment. The relevant portion of South Carolina law applied in Harrison provides that

[the warrant [of attachment] may be issued whenever it shall appear by affidavit that a cause of action exists against the defendant, specifying the amount of the claim and the grounds thereof, and that the defendant . . . has removed or is about to remove any of his property from this State with intent to defraud his creditors. . . .

80. LA. CODE CIV. PRO. ANN. art. 3501 (West 1960).
81. See note 77 supra.
83. 419 U.S. at 607.
84. S.C. CODE ANN. §§ 10-901 (1962) et seq.
The requirement that "it shall appear by affidavit that a cause of action exists against the defendant"88 before a writ will issue is more general in terms than the requirement found in the Louisiana sequestration statute that such writs shall issue only when the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts shown by the petition verified by, or by the separate affidavit of, the petitioner, his counsel or agent.89

On the other hand, establishing by affidavit that a cause of action exists against the defendant requires greater specificity in factual allegations than does a mere statement by the affiant that there is an "amount claimed to be due in such [an] action"90 as the Georgia garnishment law provides. It would appear that stating facts sufficient to show the existence of a cause of action, as required by South Carolina law, meets the "specific fact" requirement set out by the Mitchell court.91

A closer examination of the South Carolina attachment provisions applied in Harrison, however, clearly demonstrates that a creditor must show that an alleged debtor "has removed or is about to remove any of his property from [South Carolina] with intent to defraud his creditors"92 before a writ of attachment will issue. The Court in Mitchell pointed specifically to the absence in the Louisiana sequestration statute of a "'broad 'fault' standard,"93 such as the showing of an intent to defraud, which "is inherently subject to factual determination and adversarial input."94 The Court further noted that

[t]he issue at [the time of application for a writ of sequestration] concerns possession pending trial and turns on the existence of the debt, the lien, and the delinquency. These are ordinarily uncomplicated matters that lend themselves to documentary proof.95

88. Id.
91. This conclusion is supported by the holding in Kania v. Atlas Wire & Cable Co., 214 S.C. 232, 51 S.E.2d 762 (1949), where the court refused to uphold a writ of attachment that contained mere conclusions of law without sufficient factual allegation to establish a cause of action.
94. 416 U.S. at 617.
95. Id. at 609.
The language in *Mitchell*, therefore, strongly suggests that the existence of a "fault" standard establishes a need for an adversarial hearing prior to the initial seizure of a defendant's property rather than mere submission by a claimant of documentary proof.

One of the foremost considerations of the Court in *Mitchell* was the existence of a duality of possessory interest in the sequestered goods that the Louisiana statute sought to protect.96 No such interest need be established under the attachment provisions of South Carolina law.97 A claimant may obtain attachment of property in which he has no possessory interest merely by filing suit against the person to whom the property belongs. In the absence of some possessory interest, such as a vendor's lien, the interest, if any, that a claimant possesses in the property of the one being sued depends upon his ability to establish the defendant's liability. The Court in *Fuentes* recognized the "self-interested fallibility of litigants" which often leads a party to pursue honest though unfounded claims.98 Such proceedings certainly are "inherently subject to factual determination and adversarial input."99 Cases in which the plaintiff seeks attachment of the defendant's property on grounds other than assertion of some possessory interest in the property itself, therefore, may require an adversarial hearing prior to the initial taking of the property.

Although the hearing in cases where the plaintiff owns no possessory interest in the property to be attached need only be immediate and not prior to the actual seizure, the provision of South Carolina law allowing for such immediate hearing100 may not meet the *Mitchell* standards. The Louisiana law applied in *Mitchell* provided that once a defendant had filed a motion for dismissal of the writ of sequestration, the plaintiff, at whose request the writ issued, must immediately prove the grounds supporting such issuance.101 Although it is possible under South Carolina law for a defendant to have an immediate hearing on his motion for dismissal of a writ of attachment, the burden is on such defendant to prove that the attachment was improvidently
issued.\(^{102}\) Again the South Carolina statute deviates from the rules applied in *Mitchell*.\(^{103}\)

One final factor that weakens the constitutional strength of the South Carolina attachment law is the authority given to the clerks of state courts to accept the plaintiff’s affidavit and issue a writ of attachment based thereon.\(^{104}\) In *Mitchell* and *North Georgia Finishing*, much importance seems to have been placed upon judicial participation in proceedings which allow for the taking of property without a prior hearing.\(^{105}\) Although judicial participation is available under the South Carolina statute, it is not mandatory. As the *Mitchell* decision implied, it is possible that so long as a writ is issued by a judge, the fact that a nonjudicial officer could have issued the writ under the provisions of the statute will not render the entire statute void.\(^{106}\)

In light of the Supreme Court’s application of the *Sniadach-Fuentes* principles in *Mitchell* and *North Georgia Finishing*, the reasoning of the court in *Harrison v. Morris*\(^{107}\) is not applicable to situations involving the prejudgment attachment of property. For those seeking to distinguish cases involving commercial contracts, as in *Harrison*, from cases involving consumer goods, the Supreme Court in *North Georgia Finishing* issued the following reminder:

> It may be that consumers deprived of household appliances will

\(^{102}\) S.C. Code Ann. § 10-932.1 (1962), *supra* note 16. See Kerchner & Calder Bros. v. McCormac, 25 S.C. 461 (1885), where the court held that the question of whether the writ issued irregularly may be determined by mere examination of the affidavit filed seeking the writ, and failure of such affidavit to show facts adequate to state a cause of action will require immediate dismissal. On the other hand, where the grounds for the motion attacking the writ are that it was improvidently issued, the defendant must negative the allegations of the plaintiff’s affidavit by a preponderance of the evidence before dismissal may be granted. See also Cooke v. McCants, 214 S.C. 534, 53 S.E.2d 651 (1949), where the court stated that the defendant’s right to challenge any irregularities in the writ is waived once bond is posted pursuant to what is now S.C. Code Ann. § 10-931 (1962).

\(^{103}\) Since the Georgia garnishment statute which was applied in *North Georgia Finishing* did not provide for an early hearing, the Court was not faced with the issue of which party would be required to bear the burdens of pleading and proof at such hearing. The Court did seem to recognize that if there were an opportunity for an early hearing, “the creditor would be required to demonstrate at least probable cause for the garnishment.” 419 U.S. at 607.

\(^{104}\) S.C. Code Ann. § 10-904 (1962) provides:

A warrant of attachment must be obtained from a judge, clerk of the court or magistrate in which or before whom the action is brought or from a circuit judge.

\(^{105}\) See text accompanying notes 71-75 supra.

\(^{106}\) 416 U.S. at 606, n.5.

more likely suffer irreparably than corporations deprived of bank accounts, but the probability of irreparable injury in the latter case is sufficiently great so that some procedures are necessary to guard against the risk of initial error. We are no more inclined now than we have been in the past to distinguish among different kinds of property in applying the Due Process Clause. 108

It is now clear that the district court's decision in Harrison is not an accurate application of current law. In light of the language in North Georgia Finishing, there can be little doubt that the initial fear that Mitchell represented a complete reversal of the reasoning in Sniadach and Fuentes was premature and exaggerated. 109 Due process considerations still apply. Courts must insure that the procedural safeguards provided for in Sniadach and Fuentes, as qualified and applied in Mitchell and North Georgia Finishing, are satisfied before prejudgment seizure of property is allowed.

II. SPECIFIC PERFORMANCE

In Carolinas Cotton Growers Assn., Inc. v. Arnette, 110 a North Carolina agricultural cooperative 111 brought suit against four of its South Carolina grower members 112 who refused to perform under certain "forward contracts" 113 which provided for the production and purchase of the defendants' 1973 cotton crops. 114 The Associa-

108. 419 U.S. at 608.
110. 371 F. Supp. 65 (D.S.C. 1974). Carolinas Cotton Growers Association filed four separate actions involving basically the same allegations against Arnette and three other defendants. The issues of law being the same in each case, the court consolidated the cases for trial.
111. Carolinas Cotton Growers Association was organized under the nonprofit marketing association law of North Carolina. N.C. GEN. STAT. §§ 54-129 et seq. (1965). In 1961, the Association received its charter from the State of South Carolina to conduct business within the state as an agricultural cooperative. 371 F. Supp. at 67.
112. Membership in the Growers Association is required before a farmer may participate in the programs and sell his products through the organization. 371 F. Supp. 65, 69.
113. "Forward contracts" are contracts of sale for a given crop, made prior to the farmer's planting such crop and providing a certain price to be paid to the farmer regardless of the price level in the open market. As the court in Arnette noted, such contracts remove the element of market instability from the grower's consideration so that he may calculate the possible profits that may be made from a given crop. Id. at 66.
114. The defendants' refusal to fulfill their contract with the plaintiff can be attrib-
tion sought specific performance of the contracts but the growers asserted that the liquidated damages provision of the contract of sale controlled the form of the remedy:

It is agreed between Producer and Association that the sum of $25 per bale shall be taken to be the liquidated damages of the Association in the event that Producer shall fail to perform his promises and covenants faithfully under this Contract, that sum being hereby agreed upon by Producer and Association as being as nearly as possible the actual damage which Association will suffer in the event of Producer's failure to perform. It is further agreed that said sum expressly is liquidated damages and not a penalty.  

In ordering specific performance, the court held that under South Carolina law, damage provisions which are included in contracts do not comprise the only remedy for the victim of a breach unless such intent is expressly provided for in the agreement. The court further held that the South Carolina Cooperative Marketing Act, which provides for specific performance of marketing contracts in the case of breach by a member of a growers association, applies to foreign corporations qualified to do business in South Carolina.

The growers attempted to void their contracts by paying the amount stipulated in the contracts as liquidated damages. In so doing, a substantial profit could have been realized by them as a result of their breach. In requiring the defendants to “deliver in the fall that which they sold in the spring,” the court cited the official comment to section 10.2-719(1)(b) which provides:

Subsection (1)(b) creates a presumption that clauses prescribing remedies are cumulative rather than exclusive. If the parties

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115. Id. at 67-68.
116. S.C. CODE ANN. § 10.2-719(1)(b) (Spec. Supp. 1966) provides: [R]esort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.
118. S.C. CODE ANN. § 12-973 (1962) provides: In the event of any such breach or threatened breach of such marketing contract by a member the association shall be entitled to an injunction to prevent the further breach of the contract and to a decree of specific performance thereof.  
120. Id. at 70.
121. See note 116 supra.
intend the term to describe the sole remedy under the contract, this must be clearly expressed.122

The court found no such express agreement and therefore refused to accept the growers' argument that the Association's recovery was limited to the liquidated damage provision of the sales contract.123

If there had existed an express provision in the sales contract limiting the Association's available remedies to the liquidated damages clause, there would have been available to the Association the argument that changed circumstances caused the specified remedy to "fail of its essential purpose," thus allowing other remedies to be sought.124 The Arnette court noted that in any given year, the price of cotton ordinarily fluctuates no more than a few cents per pound.125 In light of the typically slight changes in price, it is probable that the liquidated damages provision of the contract was designed to reflect the parties' estimate of damages should a breach of contract occur under ordinary circumstances. During the 1973 growing season, however, the price of cotton nearly tripled126 and the liquidated damages provision would prove to be grossly inadequate as a measure of the Association's damages should the growers refuse to perform. Since the essential purpose of the liquidated damages provision was, arguably, to reflect as nearly as possible the damages which would be sustained should a breach occur under ordinary circumstances,127 other remedies should be available to the Association in light of the substantial change in circumstances that took place during 1973.128

Perhaps the most significant aspect of the holding in Arnette is the court's application of the South Carolina Cooperative Marketing Act129 to a foreign corporation. The growers argued that the Association must have been organized under the Act in order for

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123. 371 F. Supp. at 70.
   Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this act.
125. 371 F. Supp. at 69. The court looked to evidence showing the average price of cotton over a period of approximately thirteen years to support its conclusion.
126. Id.
127. See text accompanying note 125 supra.
128. See note 124 supra.
129. See note 117 supra.
the Act to apply.\textsuperscript{130} The growers also contended that because Carolinas Cotton Growers Association was a North Carolina corporation and could not have been organized under the South Carolina Cooperative Marketing Act, the court was precluded from applying the specific performance provisions\textsuperscript{131} in this instance.\textsuperscript{132} The court held, however, that to follow such reasoning with regard to the nonapplicability of the Act to a foreign corporation would be to construe the Act as to deny such a corporation equal protection of the laws of the state, in violation of the fourteenth amendment to the United States Constitution.\textsuperscript{133} The court concluded that once a foreign corporation has become domesticated and is qualified to do business in South Carolina, the corporation has a right to equal protection of the laws of the state, including the specific performance provisions of the Cooperative Marketing Act.\textsuperscript{134}

III. ESTOPPEL

In South Carolina Steel Corp. \textit{v. Southern Ry.},\textsuperscript{135} the South Carolina Supreme Court interpreted a bill of lading\textsuperscript{136} which required timely notice of damage to goods during shipment to include instances of substantial compliance where timely notification of damage was received by a third party.\textsuperscript{137} The court also held that the carrier railroad was estopped from denying liability when a claim was filed beyond the specified time period as a result of oral instructions given by the carrier's agent.\textsuperscript{138}

South Carolina Steel shipped fabricated steel beams by rail from Greenville to its consignee, Commonwealth Edison, in Illinois. Southern, the carrier, transferred the shipment to a receiv-

\textsuperscript{130} S.C. Code Ann. § 12-902(3) provides that "[t]he term 'association' means any corporation organized under this chapter."
\textsuperscript{131} See note 118 supra.
\textsuperscript{132} 371 F. Supp. at 71.
\textsuperscript{133} Id.
\textsuperscript{134} Id.; see note 118 supra.
\textsuperscript{135} 262 S.C. 543, 208 S.E.2d 828 (1974).
\textsuperscript{136} The bill of lading complied with the Interstate Commerce Act, 49 U.S.C. § 20(11) (1970) which states in part:
\textsuperscript{137} 262 S.C. at 548-49, 206 S.E.2d at 831.
\textsuperscript{138} Id.
ing railroad\(^\text{139}\) which subsequently completed delivery. Shortly after delivery, Southern received written damage reports from the receiving railroad. Six months later, South Carolina Steel received copies of the same reports from its consignee and immediately contacted Southern, discussed the contents of the damage reports, and requested instructions for filing a claim. Southern’s agent replied that a claim could not be processed until completion of the appropriate forms supplied by Southern, which required inclusion of the exact amount of loss. A year later, South Carolina Steel received the consignee’s invoice showing the precise amount of damages and immediately gave that information to Southern, which refused to pay the claim because of South Carolina Steel’s failure to file a written claim within nine months after delivery as specified in the bill of lading which governed the shipment.\(^\text{140}\)

South Carolina Steel brought suit in Greenville County Court for the amount of damages and, subsequently, moved for summary judgment. The trial court granted the motion and Southern appealed. The South Carolina Supreme Court, affirming the lower court and indicating that federal law applied,\(^\text{141}\) held

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139. The receiving railroad was the Chicago & Illinois Midland Railway.
140. The Uniform Domestic Straight Bill of Lading found in the applicable Uniform Freight Classification, section 2(b) states:
   As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property . . . or in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed. . . . Where claims are not filed . . . in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.
141. In Adams Express Co. v. Croninger, 226 U.S. 491 (1913), Croninger shipped a diamond ring valued at $137.52 from Cincinnati to Augusta, Georgia but the package was never delivered. The carrier refused to pay the claim and suit followed. According to the schedule filed with the Interstate Commerce Commission, the rate between these two points was 25 cents if the value of the shipment was $50 or less, and 55 cents if the value was $125. Claiming that Croninger knew that charges were based on value and that the package was delivered to the carrier sealed and with no mention of valuation, the express company claimed the package would not have been carried for less than 55 cents if it had been informed of its value. Moreover, the bill of lading contained an agreement that the value of the shipment was limited to $50 unless specifically stated otherwise. The issue of liability depended upon whether Kentucky or federal law applied. The Supreme Court, reversing the Kentucky court’s application of state law, noted that the [Interstate Commerce Act] supersedes all the regulations and policies of a particular State upon the same subject. . . . It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation or contract. Almost every detail of
that the notice was sufficient and that Southern was estopped from denying liability.\textsuperscript{142}

The purpose of notice requirements has been previously outlined by the supreme court:

The principal ground upon which such a stipulation [that written claims be made promptly] is held to be reasonable and valid is that carriers usually handle great numbers of shipments which are liable for various reasons to be lost or misplaced or injured in transporting them; and if part of a shipment has been lost or misplaced, unreasonable delay in informing the carrier of the fact tends to defeat an effort to trace the shipment and find and deliver the part lost or misplaced; if a shipment has been damaged in transportation, unreasonable delay in notifying the carrier tends to defeat any effort to ascertain the character and extent of the damage, and, therefore, subjects the carrier to the greater possibility of having to pay fraudulent or exhorbitant claims for damages. Therefore, the carrier is entitled to reasonably prompt notice of the loss or damage for its own protection. . . .\textsuperscript{143}

\textsuperscript{142} The subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it.

\textsuperscript{143} Deaver-Jeter Co. v. Southern Ry., 91 S.C. 503, 505, 74 S.E. 1071, 1072 (1912).
In the present action, Southern had obviously received written notification of damage to the shipment from the receiving railroad. Since the information was exactly the same given by South Carolina Steel seven months later, the purpose of the notice requirement had been substantially met. The court clearly noted that “[a]t no time within the nine month period could the plaintiff-shipper have furnished the carrier any more information than it already had in writing even if it had proceeded to timely file a formal written claim.” 144

The validity of the court’s holding is further strengthened by recognition that, upon receiving notice of the damage and loss, South Carolina Steel immediately contacted Southern and followed the latter’s instructions. The court observed that “[u]nder these circumstances we know of no reason why the carrier should not be estopped to deny liability, simply because the claim was not completely formalized in writing until after the expiration of the nine month period.” 145

Prominent authority indicates that a shipper may not invoke estoppel to excuse his failure to file a timely claim. 146 This prohi-

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144. 262 S.C. at 549, 206 S.E.2d at 831. Deaver-Jeter is clearly distinguishable: We are not called upon to pass upon the reasonableness of the time allowed for filing the claim under the stipulation in this case, because there can be no reason for requiring the filing of the claim if the defendant already knew of the loss, and that it occurred while the goods were in its possession. . . . [D]efendant could not have been prejudiced by the failure to file the claim within the time provided in the stipulation; hence the failure shall not be allowed to defeat plaintiff’s action.

91 S.C. 503, 506, 74 S.E. 1071, 1072 (1912). Notice was not required in Kelly v. Southern Ry., 84 S.C. 249, 66 S.E. 198 (1909), where the railroad’s agent was informed of, and had examined, the damage to the goods transported. See also Hopper Paper Co. v. Baltimore & O.R.R., 178 F.2d 179, 182 (7th Cir. 1949), cert. denied, 339 U.S. 943 (1950), where a shipper notified the carrier by wire eight days after the loading of the goods and two days after their destruction in a train wreck. Actual written claim for the loss was not made until ten months later. The circuit court, affirming the lower court’s judgment for the shipper, said:

[It is undisputed that defendant and its agents were fully aware and cognizant of the existence of all the facts concerning the wreck and destruction of the carload of paper. In such a situation a formal notice by plaintiff to the defendant could not have accomplished anything more. Hence, we conclude that the carrier may not use the provisions of the bill of lading to shield itself from the liability imposed upon it by the statutes and the common law for its negligent destruction of the shipper’s property. To hold otherwise would not be construing the bill of lading “in a practical way.”]

145. 262 S.C. at 549, 206 S.E.2d at 831. But see note 146 infra.

bition, however, appears to apply only to estoppel based on the carrier's conduct which resulted in the liability in the first instance. In Chesapeake and Ohio Ry. v. Martin, the United States Supreme Court declined to determine whether the shipper may rely upon estoppel to avoid time limitation clauses in bills of lading. In South Carolina Steel Corp., the court determined that the applicability of estoppel depended upon whether the use of the doctrine would allow carriers to discriminate among shippers.

If the carrier be not estopped by its conduct in this case, it is readily apparent that a carrier could discriminate by giving correct information to one shipper as to proper procedure for timely filing of a claim, but give to a shipper, which it did not wish to pay, incorrect information thereabout misleading such shipper claimed that the carrier, in taking back the damaged flour and selling it, had converted the flour and had abandoned the contract. The shipper claimed that it was no longer bound by the contract's terms and that the release acted to relieve it from the requirements in filing a claim of loss. The Court, rejecting this view, stated:

[T]he parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed.

Id. at 187.

Chesapeake & Ohio Ry. v. Martin, 283 U.S. 209 (1931), involved a shipment of potatoes which was delivered to the wrong warehouse. The shipper, which did not discover that the potatoes were misplaced until four days after the filing period had expired, argued that since the carrier had made the misdelivery and the shipper had filed the claim immediately upon discovery of the error, the carrier should be estopped to deny liability. The Court relied on Blish to reject this argument:

[T]he fact that delivery was made contrary to instructions, due to the misunderstanding or negligence of the carrier, cannot successfully be set up as an estoppel against the claim of a failure to comply with the requirement of the bill of lading here involved. To allow it would be . . . to open the door for evasion of the spirit and purpose of the [Interstate Commerce Act] to prevent preferences and discrimination in respect of rates and service.

283 U.S. at 222. In Allen v. Davis, 125 S.C. 256, 262, 118 S.E. 614, 616 (1923), the South Carolina Supreme Court cited Blish in its dictum:

[T]he Supreme Court of the United States would seem to be clearly committed to the doctrine that the prohibitions of the Federal law against unjust discriminations relate not only to inequality of charges and inequality of facilities, but also to the giving of preference by means of consent judgments or the waiver of defenses to the carrier.

147. See note 146 supra.
148. 283 U.S. at 222.
149. 282 S.C. at 548, 206 S.E.2d at 831.
into failing to file a formal written complaint until it was too late.\textsuperscript{150}

In permitting the doctrine of estoppel to be invoked, the supreme court sought to prevent, not promote, discrimination among shippers.

A second justification for recognizing estoppel in the present case is that the late claim resulted from misinformation given to South Carolina Steel by Southern’s agent who stated that the exact amount of the claim must be included when such was filed.\textsuperscript{151} In \textit{Kelly v. Southern Ry.},\textsuperscript{152} the carrier allowed a shipment of flour to become contaminated. The carrier’s agent examined the flour, told the shipper to dispose of it as best he could, and said that the carrier would “make it all right with him.”\textsuperscript{153} The shipper and carrier exchanged several letters in which carrier’s agent stated that the matter would be taken care of as soon as the necessary investigations were complete. Subsequently, the carrier tried to avoid liability by claiming that written notice of the claim was not timely filed, but the court held the time requirement had been waived by the carrier’s instructions:

[W]here the agent, after examination and ascertainment of the injury, directs the disposition of the goods, or promises to adjust the claim, the stipulation is waived. The plaintiff could not tell for what amount to make his claim, until he had disposed of the goods, according to the agent’s directions.\textsuperscript{154}

Although the federal circuit courts have reached differing results,\textsuperscript{155} the South Carolina Supreme Court has adopted an

\textsuperscript{150} Id. at 549, 206 S.E.2d at 831.

\textsuperscript{151} Id. at 546, 206 S.E.2d at 829.

\textsuperscript{152} 84 S.C. 249, 66 S.E. 198 (1909). See note 144 supra.

\textsuperscript{153} Id. at 251, 66 S.E. at 199.

\textsuperscript{154} Id. at 252, 66 S.E. at 199-200. In the present case, the court also cited Lehigh Valley R.R. v. State of Russia, 21 F.2d 396, 404 (2d Cir. 1927), cert. denied, 275 U.S. 571 (1927), where

the railroad company’s agent . . . wrote . . . the defendant . . . advising [it] to file its claim with the freight claim agent of the [carrier] at Philadelphia, giving the name and address. . . . The claim was subsequently filed, in accordance-with the instructions. . . . It is now argued that, pursuant to the bill of lading, it was required to file the claim at the point of delivery or at the point at which the shipment originated. These letters estop the railroad company, because they misled the consignee.

\textsuperscript{155} A review of the federal circuit courts shows a predilection to distinguish factual situations of earlier cases. The First Circuit requires that a claim shall be a written document, however informal in expression, indicating an intention
terpretation of the notice provisions that fulfills the basic purposes of the notice requirement. Substantial compliance provides carriers with an opportunity to investigate damage claims but does not require the claimant to provide such notice to the carrier. The court also recognized that estoppel may be employed to attack refusals to pay late claims when delay was occasioned by adherence to the carrier's instructions.

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on the shipper's part to claim reimbursement from the carrier for a loss asserted to have occurred in the past, and sufficiently identifying the shipment in question either on the face of the document or by reference to previous correspondence between the parties.

Insurance Co. of North America v. Newtowne Mfg. Co., 187 F.2d 675, 681 (1st Cir. 1951). The Fifth and Sixth Circuits indicate that a written claim is required and an oral notice of claim is unacceptable. Atlantic Coastline R.R. v. Pioneer Prods., Inc., 256 F.2d 431 (5th Cir. 1958); B.A. Walterman Co. v. Pennsylvania R.R., 295 F.2d 627 (6th Cir. 1961). The Sixth Circuit additionally requires that the written claim must be made by the claimant or his agent and not by a third party. Delphi Frosted Foods Corp. v. Illinois Cent. R.R., 188 F.2d 343 (6th Cir.), cert. denied, 342 U.S. 833 (1951). (Certiorari was denied because application was not made within the time provided by law.) The Sixth Circuit has held that the carrier's actual knowledge of the damaged condition of the goods does not alleviate the requirement to file a claim in writing. In Walterman, the carrier was given oral notice and the carrier's agent inspected the damage and filed his own written report. The shipper filed no written claim. The court held that the oral notice alone, even with the carrier's knowledge, did not constitute compliance with the filing requirement in the bill of lading. In another Sixth Circuit decision, business records submitted to the carrier were permitted to serve as the written claim; in its decision the court carefully pointed out that it continued to adhere to the Walterman standard requiring some form of written claim. American Synthetic Rubber Corp. v. Louisville & Nashville R.R., 422 F.2d 462 (6th Cir. 1970).

The position of the Seventh Circuit differs from the preceding cases. In Hopper Paper Co. v. Baltimore & O.R.R., 178 F.2d 179 (7th Cir. 1949), cert. denied, 339 U.S. 943 (1950), the circuit court excused compliance with the requirements of the bill of lading because of the carrier's actual knowledge of the damage. Accord, American Synthetic Rubber v. Louisville & Nashville R.R., 422 F.2d 462 (6th Cir. 1970); Loveless v. Universal Carloading & Dist. Co., 225 F.2d 637 (10th Cir. 1955) (damages noted on freight bill and carrier acknowledged in writing that damages were sustained by carelessness in transit); Stearns-Roger Corp. v. Norfolk & West. Ry., 356 F. Supp. 1238 (N.D. Ill. 1973) (communications and actual knowledge by carrier apprised it of the claim for damages and a formal claim was not necessary). But see Northern Pac. Ry. v. Mackie, 195 F.2d 641 (9th Cir. 1952); Insurance Co. of North America v. Newtowne Mfg. Co., 187 F.2d 675 (1st Cir. 1951) (carrier denied having knowledge of the shipment entirely, as well as any notice of damage); Delaware L. & W. Ry. v. United States, 123 F. Supp. 579 (S.D.N.Y. 1954) (recovery by the shipper allowed where the carrier had received notice that a claim was being made).