CREDITOR REMEDIES AND DUE PROCESS: COMPARING *MITCHELL* AND *FUENTES*

In February of 1972, W.T. Grant Co. brought suit against Lawrence Mitchell for $574.17 overdue on purchases of household goods,[1] claiming a vendor's lien on the goods.[2] Plaintiff sought a writ of sequestration to protect its interest in goods pending the outcome of the suit[3] and attached to the petition an affidavit by W.T. Grant's credit manager which verified the petition, asserting that there was reason to believe Mitchell would encumber, alienate or otherwise dispose of the property.[4] The city court judge issued the writ of sequestra-

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1. A refrigerator, stove, washing machine, and stereo were all purchased under installment contracts.

2. The lien was asserted pursuant to Article 3227 of the Louisiana Civil Code: "He who has sold to another any movable property, which is not paid for, has a preference on the price of his property, over the other creditors of the purchaser, whether the sale was made on a credit or without, if the property still remains in the possession of the purchaser. . . ." LA. CIV. CODE ANN. art. 3227 (West 1952). *Cf.* UNIFORM COMMERCIAL CODE § 9-306(2) (1972 version) (creditor's security interest not dependent on continual possession by the debtor).

3. Sequestration is a provisional remedy which allows the creditor to have property seized by court mandate prior to adjudication of the suit and is designed to preserve property pending the outcome of the action. *See generally* Johnson, *Attachment and Sequestration: Provisional Remedies Under the Louisiana Code of Civil Procedure,* 38 TUL. L. REV. 1 (1963); Millar, *Judicial Sequestration in Louisiana: Some Account of its Sources,* 30 TUL. L. REV. 201 (1956).

Article 3571 of the Louisiana Code of Civil Procedure provides the grounds for issuance of a writ of sequestration: "When one claims the ownership or right to possession of property, or a mortgage, lien, or privilege thereon, he may have the property seized under a writ of sequestration, if it is *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 pending of the action." LA. CODE CIV. PRO. ANN. art. 3571 (West 1961) (emphasis added). Formerly, the plaintiff was required to have "good reason to fear" that the defendant would do some act which would deprive the plaintiff of the property. *Id.* Comment (a). *See generally* No. 12, [1920] La. Acts 12 (repealed 1960; now LA. CODE CIV. PRO. ANN. art. 3571 (West 1961)). The fear of the plaintiff is no longer at issue; all that is required is that the defendant be "within the power" to do some act that would alienate the plaintiff's property. *See* LA. CODE CIV. PRO. ANN. art. 3571, Comment (a) (West 1961).

4. Article 3501 of the Louisiana Code of Civil Procedure required the petition to be verified: "A writ of attachment or of sequestration 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

tion[5] without either prior notice to Mitchell or an opportunity for a hearing. Mitchell's motion to dissolve the writ[6] on the ground that the sequestration of his goods deprived him of procedural due process was denied by the trial court[7] and the Louisiana Supreme Court affirmed.[8] In *Mitchell v. W.T. Grant Co.* the United States Supreme Court held that the Louisiana sequestration procedure, which allowed judicial sequestration of property upon alleged default without affording the debtor prior notice or an opportunity for a hearing, does not deny procedural due process under the fourteenth amendment.[9]

The Court in *Mitchell* refused to extend to sequestration the due process safeguards in garnishment and replevin. In *Sniadach v. Family Finance Corp.*[10] the Supreme Court held that Wisconsin's prejudgment

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verified by, or by the separate affidavit of, the petitioner, his counsel or agent." LA. CODE CIV. PRO. ANN. art. 3501 (West 1961).

W.T. Grant also furnished a bond of $1125 for damages the defendant might sustain if the writ was wrongfully issued. Mitchell v. W.T. Grant Co., 416 U.S. 600, 602 (1974); *see* LA. CODE CIV. PRO. ANN. art. 3501 (West 1961).

5. The Louisiana statute provides that the court clerk may issue the writ. LA. CODE CIV. PRO. ANN. arts. 282, 283 (West 1960).

6. The city court judge instructed Mitchell to file a pleading or to make an appearance in the city court within five days. Mitchell moved to dissolve the writ. 416 U.S. at 602. He also could have obtained release of the property seized by furnishing a release bond, LA. CODE CIV. PRO. ANN. art. 3507 (West 1961), in the amount of one-fourth the value of the property as determined by the court, or by one-fourth the amount of the claim, whichever is less. *Id.* art. 3508.

7. Mitchell also moved to dissolve the writ on the ground that the goods were exempt from seizure under Louisiana law. LA. REV. STAT. ANN. § 13:3881(4) (West 1968). The trial court denied the motion and the Louisiana supreme court affirmed, holding that the statutory exemption of certain goods from seizure could not prevent provisional seizure of such goods by writ of sequestration to preserve a vendor's lien. W.T. Grant Co. v. Mitchell, 263 La. 627, 632-42, 269 So. 2d 186, 187-89 (1972).

8. 263 La. 627, 269 So. 2d 186. Mitchell based his contention principally on Fuentes v. Shevin, 407 U.S. 67 (1972). In *Fuentes* the Supreme Court indicated that notice and an opportunity for a hearing may not be necessary in "cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods." *Id.* at 93. The Louisiana supreme court found this exception applicable in the circumstances presented in *Mitchell.* 263 La. at 640, 269 So. 2d at 190.

9. 416 U.S. 600 (1974).

10. 395 U.S. 337 (1969).

garnishment procedure[11] violated due process because it failed to provide for notice or an opportunity for a hearing before deprivation of wages.[12] Justice Douglas, writing for the majority, emphasized that "wages" are "a specialized type of property presenting distinct problems in our economic system."[13] The emphasis on the particular nature of the property involved in *Sniadach* fostered uncertainty as to whether prejudgment seizures of other kinds of property would be constitutional.[14] The Court, however, suggested that summary

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11. Under Wisconsin law, a writ of garnishment was issued by the court clerk upon filing of the complaint and application by the creditor. Law of Dec. 21, 1965, ch. 507, § 1, [1965] Wis. Laws 795, *as amended*, WIS. STAT. ANN. §§ 267.01 to .24 (Supp. 1974).

12. The Court did not directly address itself to what type of hearing would be necessary before a deprivation. Justice Harlan, concurring, suggested that "due process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use." 395 U.S. at 343. In Fuentes v. Shevin, 407 U.S. 67 (1972), the Supreme Court adopted the aims of the hearing described in Harlan's concurrence. *Id.* at 97 (quoting Justice Harlan's statement, 395 U.S. at 343). The Court did not explain the meaning of "probable validity" or the procedure to be observed at such a hearing. "The nature and form of such prior hearings . . . are a subject, at this point, for legislation—not adjudication." *Id.* at 96-97. In Goldberg v. Kelly, 397 U.S. 254 (1970), the Court held that a hearing is required before termination of welfare benefits and that the procedure must include the right to be represented by counsel, the right to confront and cross-examine witnesses, and a statement of reasons by an impartial decisionmaker. The Court's approach in *Goldberg*, however, may be due to the particular nature of the property involved.

State statutes have traditionally allowed prejudgment seizure of a defaulting debtor's property by means of a writ of attachment, replevin, garnishment or sequestration by filing an affidavit and posting a required bond. Prior notice or hearing to the debtor was not required. *See, e.g.*, CAL. CIV. PRO. CODE § 537(1) (Deering 1972); ILL. ANN. STAT. ch. 119, §§ 1-27 (Smith-Hurd 1954), *as amended*, §§ 1, 4-7, 10-14, 17-21a, 22a, 25, 28 (Supp. 1975); N.Y. CIV. PRAC. §§ 6201(3)-(7) (McKinney 1963); VA. CODE ANN. §§ 8-520(1), (2), (6) (1957). These creditor's remedies have been considered extremely harsh to the low-income consumer. D. CAPLOVITZ, THE POOR PAY MORE, 161-67 (1967). The Supreme Court considered this factor in *Sniadach* when it invalidated Wisconsin's prejudgment garnishment procedure, "The result is that prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall." 395 U.S. at 341-42.

13. 395 U.S. at 340.

14. Some courts have restricted the holding in *Sniadach* to wage garnishment. *See, e.g.*, Black Watch Farms v. Dick, 323 F. Supp. 100 (D. Conn. 1971); American Olean Tile Co. v. Zimmerman, 317 F. Supp. 150 (D. Hawaii 1970). A majority of jurisdictions, however, have applied the *Sniadach* due process requirement to invalidate other forms of summary procedures. *See, e.g.*, Swarb v.

seizure would meet the requirements of due process in certain "extraordinary situations."[15]

In *Fuentes v. Shevin*[16] the Supreme Court extended the *Sniadach* rationale[17] and held unconstitutional the Florida and Pennsylvania prejudgment replevin statutes, which allowed repossession of household goods without prior notice or opportunity for a hearing.[18]

Lennox, 314 F. Supp. 1091 (E.D. Pa. 1970), *aff'd*, 405 U.S. 191 (1972) (cognovit note replevin); Randone v. Appellate Dept., 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971) (attachment).

15. 395 U.S. at 339. The Court stated that no special situation was present: "Petitioner was a resident of this Wisconsin community and *in personam* jurisdiction was readily obtainable." *Id.*

16. 407 U.S. 67 (1972).

17. The Court rejected the contention that a hearing is required only with respect to the deprivation of wages or other *necessities* of life. 407 U.S. at 89.

18. The laws of both states allowed a private party to obtain a writ of replevin upon ex parte application to the clerk of the court and upon posting of bond in an amount double the value of the property to be taken; defendant could regain possession by posting a counter bond. Act of June 27, 1967, ch. 67-254, § 28 [1967] Fla. Laws 660 (now FLA. STAT. ANN. §§ 78.01-21 (Supp. 1975)); PA. STAT. ANN. tit. 12, §§ 1821, 1824, 1826 (1967). The Florida statute required the party seeking replevin to file a complaint and prosecute an action for possession, alleging in a conclusory fashion that he was "lawfully entitled" to possession. Law of June 27, 1967, ch. 67-254, § 28 [1967] Fla. Laws 660. The Pennsylvania statute merely required the filing of an affidavit stating the value of the property, without requiring the initiation of a lawsuit. PA. STAT. ANN. tit. 12, §§ 1821, 1824, 1826 (1967).

The *Fuentes* Court declared that the bond requirement was not a sufficient constitutional replacement of the right to a prior hearing. "The minimal deterrent effect of a bond requirement is, in a practical sense, no substitute for an informed evaluation by a neutral official." 407 U.S. at 83. The Court also rejected the safeguard of a release bond as insufficient to satisfy the requirements of due process. *Id.* at 85. For a discussion of the Florida replevin statute invalidated in *Fuentes* see Williams, *Creditors' Prejudgment Remedies: Expanding Strictures on Traditional Rights*, 25 U. FLA. L. REV. 60 (1972).

In *Fuentes* the purchases were made under conditional sales contracts that contained a provision allowing the seller to "take back" or "retake" the goods upon default. The Court concluded that these provisions did not waive appellant's constitutional right to a pretrial hearing. 407 U.S. at 95-96. "[A] waiver of constitutional rights in any context must, at the very *least*, be clear. . . . The conditional sales contracts here simply provided that upon a default the seller 'may take back,' 'may retake' or 'may repossess' merchandise." *Id.* at 95. The Court, however, did discuss the requirements of an effective waiver established in D.H. Overmeyer Co. v. Frick Co., 405 U.S. 174 (1972) (a contractual waiver of due process rights must be voluntarily, intelligently and knowingly made). *See also* Swarb v. Lennox, 405 U.S. 191 (1972) (applying *Overmeyer* in a consumer context); Gonzalez v. County of Hidalgo, 489 F.2d 1043 (5th Cir. 1973) (invalidating waiver of rights in lease).

Justice Stewart, writing for the majority, confirmed the Court's position that summary procedure may be allowed in "extraordinary situations"[19] and enumerated factors that would justify seizure without an opportunity for a hearing: (1) a need to secure an important governmental or public interest; (2) a special need for prompt action; or (3) state maintenance of strict control over use of its power.[20] Moreover, the Court declared that due process attaches even when the debtor lacks full title to the chattels and his claim to the property is in dispute and that opportunity for a hearing is required before one can be deprived of "any significant property interest."[21]

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19. 407 U.S. at 90. "These situations, however, must be truly unusual. Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing." *Id.* at 90-91.

20. *Id.* at 91. Under this analysis the Court has reconciled almost all prior cases allowing summary seizure of property without a hearing. *See* Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (seizure of misbranded food and drugs); Fahey v. Mallonee, 332 U.S. 245 (1947) (protection of public interest against bank failure); Phillips v. Commissioner, 283 U.S. 589 (1931) (seizure of property to collect federal taxes); Ownbey v. Morgan, 256 U.S. 94 (1921) (attachment necessary to secure jurisdiction in state court). *But see* McKay v. McInnes, 279 U.S. 820 (1929), *aff'g per curiam* 127 Me. 110, 141 A. 699 (1928). In *McKay* the Supreme Court upheld a general attachment statute, relying on Coffin Bros. v. Bennett, 277 U.S. 29 (1926). *Fuentes* limited the application of *McKay* to "extraordinary situations" by strictly analogizing it to *Coffin Bros.* 407 U.S. at 91 n.23.

21. 407 U.S. at 86. This hearing requirement for a "significant property interest" has caused other types of summary seizure procedures to be struck down as unconstitutional. *See* Morrow Elec. Co. v. Cruse, 370 F. Supp. 630 (N.D. Ga. 1974) (Georgia statutory garnishment scheme unconstitutional); Roscoe v. Butler, 367 F. Supp. 574 (D. Md. 1973) (Maryland attachment proceeding invalid); Bay State Harness Horseracing & Breeding Ass'n v. PPG Industries, Inc., 365 F. Supp. 1299 (D. Mass. 1973) (Massachusetts statute governing prejudgment real estate attachments invalid on its face); Gunter v. Merchants Warren Nat'l Bank, 360 F. Supp. 1085 (D. Me. 1973) (Maine prejudgment statute governing real estate attachment unconstitutional); Sena v. Montoya, 346 F. Supp. 5 (D.N.M. 1972) (New Mexico replevin statute unconstitutional); Walker v. Johnson County, 209 N.W.2d 137 (Iowa 1973) (summary nuisance abatement unconstitutional); Automotive Merchandise, Inc. v. Smith, 297 Minn. 475, 212 N.W.2d 678 (1973) (Minnesota replevin statute declared unconstitutional) (dicta); Bevan v. New York State Teachers' Retirement Sys., 74 Misc. 2d 443, 345 N.Y.S.2d 921 (Sup. Ct. 1973) (New York statute permitting forced retirement of tenured teacher without prior hearing unconstitutional); Trifaro v. Zoning Bd. of Appeals, 73 Misc. 2d 483, 342 N.Y.S.2d 95 (Sup. Ct. 1973) (New York Municipal Home Rule Law unconstitutional); Richman v. Richman, 72 Misc. 2d 803, 339 N.Y.S.2d 589 (Sup. Ct. 1972) (New York attachment statute unconstitutional); City of Everett v. Slade, 83 Wash. 2d 80, 515 P.2d 1295 (1973) (provision of Uniform Controlled Substances Act allowing seizure of property violates

Justice White, dissenting, argued that the due process clause did not contemplate inflexible procedures applicable to all situations.[22] He further declared that the procedural requirements provided in the replevin statutes were sufficient because of the seller's property interest in the goods, pending payment in full, and the procedural consideration favoring protection of the seller's interest by preventing further use and deterioration of his security, with protection afforded to the buyer against loss by the seller's posting a security bond.[23]

In *Mitchell* the Supreme Court upheld the constitutionality of Louisiana's sequestration procedure without explicitly overruling *Fuentes*.[24] Justice White, writing for the majority,[25] balanced the debtor's interest in the sequestered goods, measured by his title subject to the vendor's lien and his investment in the depreciated goods,[26] with the creditor's interest—the balance due on the goods and his

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due process); Olympic Forests Prods., Inc. v. Chaussee Corp., 82 Wash. 2d 418, 511 P.2d 1002 (1973) (prejudgment garnishment unconstitutional); Rogoski v. Hammond, 9 Wash. App. 500, 513 P.2d 285 (1973) (prejudgment attachment statute unconstitutional).

22. 407 U.S. at 101-02 (White, J., dissenting).

> . . . [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.

Id., *quoting* Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961).

23. 407 U.S. at 99-100 (White, J., dissenting).

24. 416 U.S. at 615-16.

25. Chief Justice Burger, Justices Blackmun and White, all dissenters in *Fuentes*, were joined by Justices Powell and Rehnquist, who did not participate in the *Fuentes* decision, to form the majority in *Mitchell*. Justice Stewart, dissenting in *Mitchell*, declared: "The only perceivable change that has occurred since the *Fuentes* case is in the makeup of this Court. A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government." *Id.* at 635-36 (Stewart, J., dissenting).

26. The debtor's interest in the property, "until the purchase price was paid in full, was no greater than the surplus remaining, if any, after foreclosure and sale of the property in the event of his default and satisfaction of outstanding claims." *Id.* at 604. *See* LA. CODE CIV. PRO. ANN. art. 2373 (West 1961) (debtor receives surplus remaining after payment of costs, payment of amount due to seizing creditor, and payment of inferior encumbrances).

need to protect the security value of the property.[27] He concluded, "with this duality in mind," that the Louisiana sequestration procedure constitutionally protects both interests.[28]

Mitchell argued that an opportunity for a hearing must precede *any* actual deprivation of private property.[29] The Court viewed the pre-*Sniadach* cases as requiring a hearing only before final deprivation of property and concluded that a predetermination hearing was not necessary.[30] Moreover, the Court distinguished *Sniadach* as dealing with a specialized type of property and applying to cases where the creditor had no prior interest in the property.[31]

The Court also distinguished the replevin laws considered in *Fuentes* from the Louisiana sequestration statute,[32] emphasizing that it would be unconstitutional to issue a writ of replevin merely on a conclusory claim of ownership and wrongful detention of the goods.[33] Sequestration, however, is available only upon an allegation of the specific facts of the claim and the grounds for the seizure,

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27. 416 U.S. at 608. "[T]he buyer in possession of consumer goods will undeniably put the property to its intended use, and the resale value of the merchandise will steadily decline as it is used over a period of time. . . . [T]he seller's interest in the property as security is steadily and irretrievably eroded." *Id.*

Justice White, in defining the creditor's interest in monetary terms, followed his dissent in *Fuentes*, but rejected his prior view of the debtor's interest as the continued use and possession of the goods. "The interests of the buyer and seller are obviously antagonistic . . . : the buyer wants the use of the property pending final judgment; the seller's interest is to prevent further use and deterioration of his security." Fuentes v. Shevin, 407 U.S. 67, 100 (1972) (White, J., dissenting).

28. 416 U.S. at 604.

29. Petitioner relied on numerous Supreme Court decisions, including *Sniadach* and *Fuentes*. *See id.* at 611 n.10 (citing cases).

30. For this principle Justice White relied on cases considered in *Fuentes* to be "extraordinary situations." *Id.* at 611-12. Justice White's refusal to categorize these decisions appears consistent with his view in *Fuentes* that procedural due process requires flexible tests. *See* note 22 *supra.*

31. "*Sniadach* involved the prejudgment garnishment of wages—'a specialized type of property presenting distinct problems in our economic system.' . . . The suing creditor in *Sniadach* had no prior interest in the property attached, and the opinion did not purport to govern the typical case of the installment seller . . . ." 416 U.S. 600, 614-15. *But see* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).

32. *See* notes 3, 4, 18 *supra.*

33. 416 U.S. at 616-18.

accompanied by a verified affidavit.[34] Thus the Court concluded that issuance of a writ of sequestration requires a showing by the creditor of the existence of a debt, a lien and a default in payment.[35] Replevin however, is available through application of a broad fault standard that is inherently subject to an adversary hearing.[36] Justice White also noted that the sequestration procedure minimized the risk of a

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34. It appears that the plaintiff need only allege that a debt is owed and that the debtor has the property. "The facts that the items are movable, that they belong to the lessee and are located on the leased premises, give rise to the conclusion that 'it is within the power of the defendant' to conceal, dispose of, etc. the property. To allege simply that 'it is within the power of the defendant' would be only a conclusion of fact." Montagne v. Tinker, 197 So. 2d 154, 156 (La. Ct. App. 1967).

35. 416 U.S. at 606-07, 618. Justice White stressed that these issues were well suited to documentary proof. The Court rejected petitioner's argument that a fair adversary hearing must be given on all of the issues before the deprivation. *Id.* at 607. Citing Grant Timber & Mfg. Co. v. Gray, 236 U.S. 133 (1915) (possessory action for real property), the Court stated that the issues can be limited in actions for possession. 416 U.S. at 607. The Court also relied on Lindsey v. Normet, 405 U.S. 56 (1972), and Bianchi v. Morales, 262 U.S. 170 (1923). In *Lindsey* a hearing was permitted under Oregon's Forceable Entry and Wrongful Detainer Statute to consider the issues of default on rent, breach of covenant, or holdover beyond the expiration of the lease, but the tenant was prevented from asserting his defenses. The Court found that this procedure accommodated due process, since the substantive property law of Oregon provided that the obligations of landlord and tenant were independent, thus requiring the tenant to file a separate action. When contractual obligations are mutually dependent, however, a full adversary hearing on all the issues, including the raising of defenses, may be required. 86 HARV. L. REV. 85, 91 n.34 (1972).

For a discussion of *Sniadach* and *Fuentes* and why *Lindsey* should not be used to limit the scope of the hearing required by these two decisions see Clark & Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355, 406-09 (1973).

36. "In Florida and Pennsylvania property was only to be replevied in accord with state policy if it had been 'wrongfully detained.' This broad 'fault' standard is inherently subject to factual determination and adversarial input." 416 U.S. at 617. Justice Stewart, however, considered the issues relevant to the issuance of a writ of replevin—the existence of a security interest and a default—the same as those relevant to the issuance of a writ of sequestration. *Id.* at 633 (Stewart, J., dissenting).

The issues in sequestration are subject to a fault standard that is deemed narrower than the fault standard in replevin. The requirement in sequestration that it be "within the power" of the debtor to conceal or damage the goods does not appear to be any narrower than the replevin requirement that the goods be "wrongfully detained." It seems that the specific facts alleged in sequestration to show that the debtor has the power to conceal or damage the goods would be the facts necessary to show his possession of the goods. It is elementary that when goods are in the debtor's possession it is "within the power" of the debtor to conceal or damage them.

wrongful taking by providing for judicial control[37] and by entitling the debtor to damages and attorney's fees if the writ is dissolved.[38]

Replevin and sequestration differ more in form than in the actual effects of the procedures on the parties.[39] It seems that the only

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37. "Mitchell was not at the unsupervised mercy of the creditor and court functionaries. The Louisiana law provides for judicial control of the process from beginning to end." *Id.* at 616. The Court noted that Louisiana sequestration "provides for an immediate hearing and dissolution of the writ"; the Pennsylvania replevin statute did not require that there ever be an opportunity for a hearing on the merits of the claim and the Florida statute merely provided for an eventual hearing. *Id.* at 618.

38. *Id.* at 617. *See* LA. CODE CIV. PRO. ANN. art. 3506 (West 1961).

39. "The Louisiana sequestration procedure now before us is remarkably similar to the statutory provisions at issue in *Fuentes* . . . ." 416 U.S. at 629 (Stewart, J., dissenting). That the sequestration affidavit in *Mitchell* called for more information than the replevin affidavit in *Fuentes*, and that a writ of sequestration is authorized by a judge rather than a clerk were considered by Justice Stewart to be of no constitutional significance. *Id.* at 631-33. Outside of the Orleans parish (where W.T. Grant's writ was issued), the issuance of a writ is performed by the court clerk. The provision which gives the function of authorization of the writ to a judge does not suggest that the nature of the duty was to change from a ministerial act. The comment to this section specifically states that no change in the law is intended. LA. CODE CIV. PRO. ANN. art. 281, Comment (West 1961).

In *Mitchell* the majority contended that the function of the judge is more than a ministerial act, that it is an act of evaluating the grounds for issuance from the specific facts. 416 U.S. at 616-17 n.12. To substantiate this point, the majority relied on Hancock Bank v. Alexander, 256 La. 643, 237 So. 2d 669 (1970), and Wright v. Hughes, 254 So. 2d 293, 296-97 (La. App. 1971). In *Hancock* the Supreme Court of Louisiana held that when a bank petition for sequestration simply alleged an indebtedness on a promissory note, a writ would not be issued. "[S]uch writ shall issue only when nature of claim and amount thereof and grounds relied on clearly appear from specific facts shown by petition or affidavit and sequestration should not have been maintained . . . ." 256 La. 643, 237 So. 2d 669. In *Wright* a writ of sequestration was issued by a judge on the movable property of a lessee upon the allegation that the lessor had good reason to believe the lessee would conceal or dispose of the movables subject to a lessor's privilege. The only evidence in support of this argument was a general statement of the rental manager that prior tenants had concealed or disposed of property. The Louisiana intermediate court held that "[s]ince a writ of sequestration issues without a hearing, specific facts as to the grounds relied upon for issuance must be contained in the verified petition in order that the issuing judge can properly evaluate the grounds." 254 So. 2d 293, 296-97. Justice Stewart interpreted these two cases as standing "only for the proposition that a writ should not issue unless sworn allegations are formally sufficient, which may mean nothing more than that the proper standardized form be completely filled in." 416 U.S. at 633 n.4 (Stewart, J., dissenting).

Apparently the judge or clerk ascertains the formal sufficiency of the plaintiff's allegations and if the necessary sufficiency is found, the writ is issued. The issuance of the writ of sequestration is based *solely* on the plaintiff's allegations. The *Mit-*

relevant factors distinguishing sequestration from replevin are judicial authorization, allegation of specific facts, a prompt lawsuit to obtain dissolution of the writ, and a provision for damages and attorney's fees.[40] Justice White, speaking for the majority, felt that the issues relevant to the issuance of a writ of sequestration are susceptible to documentation[41] and therefore an adversary hearing prior to deprivation of property is not necessary.[42] This, however, fails to take into account the fact that many "defenses are not documentary, such as deceptive selling practices, warranty violations and collection harassments."[43] Also, under Louisiana law the merits of the creditor's claim, the defenses of the debtor not relevant to the issues of default, and the existence of a lien may not be inquired into at the hearing on the motion to dissolve.[44] As a result, a debtor with a valid defense

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chell majority, considering these cases as establishing the "probability" that the creditor will succeed, *id.* at 609, ignores the situation of a "party mistakenly but firmly convinced that his view of the facts and law will prevail, and therefore quite willing to risk the cost of litigation." Fuentes v. Shevin, 407 U.S. 67, 83 (1972).

Justice White stressed that a risk of wrongful taking is minimized because a creditor would be subject to damages and attorney's fees. 416 U.S. at 617. This is certainly consistent with his dissent in *Fuentes*: "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 action and putting up bonds." 407 U.S. at 100-01. The Court in *Mitchell* looked at the "probability that case will succeed" before deprivation of property, whereas the *Fuentes* Court was concerned with the probable validity of the claim. In *Fuentes* Justice Stewart suggested that the debtor should be able to show valid defenses that could be examined in determining the probable validity of the creditor's claim. *Id.* at 87. In determining "probability of success" the creditor must show specific facts as to the issues of debt, lien and delinquency, but defenses of the debtor are not brought before the issuing judge.

40. *See* Hobbs, *Mitchell v. W.T. Grant Co.: The 1974 Revised Edition of Consumer Due Process*, 8 CLEARINGHOUSE REV. 182 (1974).

41. *See* note 35 *supra.*

42. 416 U.S. at 617-18.

43. Hobbs, *supra* note 40, at 184.

44. Article 3506 of the Louisiana Code of Civil Procedure provides for dissolution of the writ, whereby "only the grounds for the auxiliary remedy can be inquired into on the motion to dissolve, and not the merits of the main demand." LA. CODE CIV. PRO. ANN. art. 3506, Comment (c) (West 1961).

In *Sniadach* the Court suggested that at the hearing *before* deprivation, the debtor must be allowed "to tender any defense he may have, whether it be fraud or otherwise." 395 U.S. at 339 (1969). The Court in *Fuentes* considered as the

is forced to wait until a full trial. Moreover, if the debtor has a defense that can be asserted at the motion to dissolve, he still may be deprived of his property for a substantial time.[45] Clearly such debtors require an opportunity for a prompt hearing.

The *Mitchell* rationale, balancing the interests of the parties to determine whether those interests are adequately protected, introduces a flexible rule into procedural due process[46] that ignores the consumer's need for the use and possession of the particular goods.[47] Such a rule will appreciably frustrate the low-income consumer's desire to maintain a decent standard of living.[48]

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purpose of the hearing the determination of at least the probable validity of the claim and suggested that defenses should be raised at the hearing prior to deprivation. *See* note 39 *supra.* The Court in *Mitchell,* by upholding the Louisiana procedure and delaying considerations of these issues until after deprivation, retreated greatly from the *Sniadach* and *Fuentes* view.

> As a matter of substantive commercial law, . . . the buyer of goods is permitted to raise personal defenses such as breach of warranty, fraud, or failure of consideration in an action by the seller to recover the unpaid portion of the purchase price. In fact, resisting further payments is normally the only leverage a consumer debtor has. If the due process hearing is to mean anything, it must provide an opportunity to determine what caused the transaction to break down.

Clark & Landers, *supra* note 35, at 407.

45. In *Mitchell* the goods were sequestered on February 7, 1972, and the hearing on the motion to dissolve was held 36 days later on March 14. 416 U.S. at 602-03. A 36 day delay is significant if the debtor has a need for goods and is unable to afford a release bond. If the debtor cannot get a release of property through a bond, then the actual time of deprivation of the goods would be a function of the caseload of the court and the debtor's ability to retain counsel.

46. The requirement of due process, therefore, may vary with the manner in which the interests of the parties are defined and with the perceived adequacy of available procedural safeguards other than prior notice and hearing. *See* note 22 *supra.*

47. "The system protects debtor's interest in every conceivable way, except allowing him to have the property to start with . . . ." 416 U.S. at 618. In *Fuentes* the Court interpreted the fourteenth amendment as protecting "any significant property interest" and found that the continued use and possession of the goods by the debtor was a significant interest that must be protected. 407 U.S. at 86. By balancing the interests of the parties in solely monetary terms, the Court in *Mitchell* precludes consideration of the consumer's interest in the use and possession of the goods. Thus a property interest of this type may no longer be protected by the fourteenth amendment.

48. "Of course, the poor risks are always free to do without the goods that are available to them . . . . Americans in all walks of life are trained to consume *in order to win the respect of others and to maintain their self-respect.* These social pressures to consume are perhaps inevitable in a society characterized by a rising standard of living." D. CAPLOVITZ, THE POOR PAY MORE 180 (1967). The

Mitchell seems to overrule the holding in *Fuentes* that notice and a hearing are necessary before a temporary deprivation of an important property interest.[49] The Court, however, suggested that the replevin statutes in *Fuentes* would still be unconstitutional.[50] Thus a debtor's due process rights with respect to other types of provisional or default remedies are uncertain.[51] The courts will now be faced with the difficult task of determining whether a particular procedure falls under the *Mitchell* or the *Fuentes* analysis.[52] *Mitchell* nevertheless provides a guidepost to state legislatures devising constitutional prejudgment remedies. In *North Georgia Finishing, Inc. v. Di-Chem,*

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effect of depriving one of property such as a stove or refrigerator will be very harsh to a consumer who has not the money to obtain a release bond or to retain counsel to defend against the creditor.

49. In sweeping language, *Fuentes* . . . enunciated the principle that the constitutional guarantee of procedural due process requires an adversary hearing before an individual may be temporarily deprived of any possessory interest in tangible personal property, however brief the dispossession and however slight his monetary interest in the property. The Court's decision today *withdraws significantly from the full reach of that principle, and to this extent I think it fair to say that the Fuentes opinion is overruled.*
416 U.S. at 623 (Powell, J., concurring) (emphasis added).

50. *Id.* at 615-16.

51. "Our decision will not affect recent cases dealing with garnishment or summary self-help remedies of secured creditors or landlords." *Id.* at 620 n.14.

52. One week after *Mitchell* the Supreme Court used the *Fuentes* "extraordinary situations" test to uphold a Puerto Rico statute that provided for the forfeiture of vessels used for unlawful purposes. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974). The Court held that an "extraordinary situation" existed because seizure fostered the public interest by allowing the government to assert *in rem* jurisdiction. *Id.* at 679-80. The Court distinguished *Fuentes* on the grounds that in *Fuentes* seizure was initiated by self-interested private parties, not by government officials. *Id.* at 678. Justices White and Powell, concurring, cited *Mitchell* as one of those situations in which no prior hearing is required. *Id.* at 691. Apparently the Supreme Court will continue to apply the "extraordinary situation" test and limit *Mitchell* to cases involving self-interested private parties.

In Ruocco v. Brinker, 380 F. Supp. 432, 435-37 (S.D. Fla. 1974), the court upheld the Florida mechanics lien law, relying on *Mitchell* and distinguishing *Fuentes* and *Sniadach.* In Garcia v. Krausse, 380 F. Supp. 1254, 1257 (S.D. Tex. 1974), the court, relying on *Mitchell,* held unconstitutional the Texas sequestration procedure which did not provide for judicial supervision of issuance of the writ or provide the debtor an immediate hearing. *See also* Bert Randolph Sugar & Wrestling Revue, Inc. v. Curtis Circulation Co., 383 F. Supp. 643 (S.D.N.Y. 1974), *prob. juris. noted,* 421 U.S. 908 (1975) (New York law permitting prejudgment attachment held unconstitutional); Guzman v. Western State Bank, 381 F. Supp. 1262 (D.N.D. 1974) (North Dakota attachment statute held constitutional).

Inc.[53] the Supreme Court applied both *Mitchell* and *Fuentes* in striking down Georgia's garnishment statute as applied to commercial accounts.[54] Justice White, writing for the majority,[55] reiterated the *Mitchell* factors: the need for a judge, allegation of specific facts, the requirement of an immediate hearing to dissolve a writ, and a prompt hearing on the merits.[56] Thus it appears that a constitutional ex parte procedure can be devised that includes the factors that validated Louisiana's sequestration statute.

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53. 419 U.S. 601 (1975).

54. The Court also asserted that *Sniadach* is not limited to wages or necessities. *Id.* at 605-06. *See* note 31 and accompanying text *supra.*

55. Justice White joined the *Mitchell* dissenters. Justice Powell concurring, would invalidate the statute on *Mitchell* alone. 419 U.S. at 609-14.

56. *Id.* at 606-07.