CONSTITUTIONAL LAW—DUE PROCESS—LOUISIANA *EX PARTE* SEQUESTRATION PROCEDURE HELD CONSTITUTIONAL

In *Mitchell v. W.T. Grant Co.*,[1] the United States Supreme Court in a 5 to 4 plurality decision upheld the Louisiana procedure which allows a mortgage or lien holder to obtain a writ of sequestration to forestall waste, concealment, disposal or removal of encumbered property.[2]

W.T. Grant filed suit against Mitchell in the First City Court of New Orleans alleging that an overdue balance of $574.17 was owed by Mitchell on the sale of several home appliances. Grant demanded judgment in the amount of the unpaid balance and alleged that it had a vendor's lien on the goods. Additionally, Grant requested that the goods be sequestered until the suit was settled. Upon Grant's satisfaction of the statutory prerequisites the trial judge issued the writ and ordered seizure of the property.[3]

Mitchell filed a motion to dissolve the writ of sequestration,[4] asserting that the seizure violated due process because it constituted a deprivation of property without notice and opportunity to defend possession of the goods prior to the seizure as required by *Sniadach v. Family Finance Corp.*[5] and *Fuentes v. Shevin.*[6]

The motion to dissolve the writ was denied and the decision of the trial judge was upheld by the appellate courts of Louisiana.[7] The Supreme Court of Louisiana specifically rejected Mitchell's claim and upheld the constitutionality of the sequestration procedure.[8]

In the four decades prior to the *Sniadach* decision the constitutionality of prejudgment creditor's remedies had been accepted almost without question. A line of Supreme Court cases, culminated by *McKay v. McInnes*,[9] had affirmed the validity of such summary remedies.[10] In

1. ___ U.S. ___, 94 S.Ct. 1895 (1974).

2. LA. STAT. ANN., CODE CIV. P. art. 3571 (1960).

3. LA. STAT. ANN., CODE CIV. P. arts. 3501, 3574 (1960). Louisiana allows issuance of the writ without notice or hearing upon a verified affidavit stating the nature and amount of the claim. Additionally, the creditor must furnish security against the wrongful issuance of the writ.

4. LA. STAT. ANN., CODE CIV. P. art. 3506 (1960).

5. 395 U.S. 337 (1969).

6. 407 U.S. 67 (1972). Mitchell also claimed that the goods involved were exempt from seizure under state law. This claim was rejected by the Louisiana courts and was not considered by the Supreme Court.

7. 263 La. 627, 269 So.2d 186 (1972).

8. *Id.* at ___, 269 So.2d at 190-191.

9. 279 U.S. 820 (1929).

10. The first case, Owenby v. Morgan, 256 U.S. 94 (1921), upheld a Delaware foreign attachment law which required a defendant to post security before he could appear and

McKay the Supreme Court in a *per curiam* decision affirmed without opinion the Supreme Court of Maine which had held that the attachment of goods pending final judgment was not violative of due process.[11] The Maine court reasoned that since the taking was conditional, temporary, and part of a legal remedy, it was not a "deprivation of property contemplated by the Constitution."[12]

These settled views on prejudgment remedies were shaken by *Sniadach* which struck down Wisconsin's wage garnishment procedure because it made no allowance for notice or a hearing before the garnishment order was executed. Such a procedure, it was held, "violates the fundamental principles of due process."[13] The opinion, however, discussed wages as "a specialized type of property presenting distinct problems," and this phrase left lower courts uncertain as to the breadth of the decision.[14] As a result, two lines of cases developed. Some courts interpreted *Sniadach* as being a broad application of the due process clause to all summary takings of property.[15] Other courts interpreted its application more narrowly.[16] This confusion was eliminated by *Fuentes*.

In declaring Florida and Pennsylvania replevin statutes unconstitutional, the Court in *Fuentes* definitively removed any doubts that due process considerations were to be applied only to "necessities" or "essential" property interests.[17] The taking by the state of any "significant property interest," even if the interest was less than full ownership, for the benefit of a private person was held to require notice and an opportunity to be heard at a "meaningful time," *i.e.*, before the taking occurs.[18] Further, the Court stated, even a "temporary, nonfinal deprivation of property

defend. In the second case, Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928), the Court upheld a Georgia statute which authorized the Superintendent of Banks to issue an execution against the property of stockholders of a defunct bank who failed to pay a stock assessment. Both cases were cited as authority in *McKay*.

11. 127 Me. 110, 141 A. 699 (1928).

12. *Id.* at ___, 141 A. at 702.

13. 395 U.S. at 342.

14. *Id.* at 340. This uncertainty was amplified by Goldberg v. Kelly, 397 U.S. 254 (1970), which held that due process requires notice and a hearing before the termination of welfare payments. Here again the implication was that welfare payments are a specialized type of property.

15. *See* Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970); Randone v. Appellate Dept. of Superior Ct., 5 Cal.3d 536, 96 Cal. Rptr. 709, 488 P.2d 13 (1971); Larson v. Fetherston, 44 Wis.2d 712, 172 N.W.2d 20 (1969).

16. *See* Reeves v. Motor Contract Co., 324 F. Supp. 1011 (N.D. Ga. 1971); American Olean Tile Co. v. Zimmerman, 317 F. Supp. 150 (D. Hawaii 1970); 300 W.154th St. Realty Co. v. Department of Bldgs., 26 N.Y.2d 538, 311 N.Y.S.2d 899, 260 N.E.2d 534 (1970).

17. 407 U.S. at 88-90.

18. *Id.* at 81-86. The purpose of a preseizure hearing is to prevent unfair and mistaken deprivations of property by the state. The theory of the Court was that no subsequent action, even the awarding of damages, can undo a violation of due process. *Id.* at 82. *See* Stanley v. Illinois, 405 U.S. 645 (1972).

is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment," the posting of bond and provisions for recovery of the goods notwithstanding.[19]

In considering the *Mitchell* case, the Court conceded that Mitchell did in fact have title to the sequestered property. The title, however, was heavily encumbered and Grant had a corresponding interest in the amount of the unpaid purchase price. In recognizing the duality of property interests, the Court opined that Louisiana was entitled to provide protection for the creditor as well as the debtor, and that the sequestration procedure was constitutional on its face and as applied.[20]

In reaching this conclusion, the Court reviewed the Louisiana procedure and observed that although the writ is obtainable on an *ex parte* application, the specific grounds for the claim must be sworn to before a judge and is thus subject to court supervision.[21] Additionally, it was noted that the debtor's interest is protected by the creditor's bond as well as by provisions allowing for immediate recovery of the property or dissolution of the writ if it is shown to have been improvidently issued.[22] The Court emphasized that the creditor has a security interest in the property and is entitled to have this interest protected against the depreciation which would occur if the debtor continued possession and use during the pendency of the suit.

The Court also recognized the risk that the buyer could conceal, destroy, or resell the goods while they are in his possession. Prevention of the resultant damage to the seller cannot be guarded against if a debtor, acting in bad faith, is forewarned by preseizure notice and hearing.[23] In this context the Court was not convinced that the cost to Mitchell of deprivation of his property outweighed the possible cost to Grant if the goods were wrongfully possessed, destroyed, or alienated.

The Court rejected Mitchell's contention that Grant's entitlement to the goods should have been judicially determined before the goods were seized. Citing *Bell v. Burson*[24] and *Ewing v. Mytinger and Casselberry, Inc.*,[25] the

19. 407 U.S. at 85. The holding in *Fuentes* was a narrow one, however, in that it only required notice and a preseizure hearing. It did not question the power of a state to seize goods prior to a final adjudication to protect the security interests of the creditor as long as the creditor's claim was tested by a prior hearing. *Id.* at 96. Moreover, the form of the hearing was left to the discretion of the state. *Id.* at 97.

20. ___ U.S. at ___, 94 S.Ct. at 1899.

21. The validity of procedures outside of Orleans Parish where this function is performed by a court clerk was not in issue. *Id.* at ___ n.5, 94 S.Ct. at 1899 n.5. *See* LA. STAT. ANN., CODE CIV. P. arts. 281-83 (1960).

22. LA. STAT. ANN., CODE CIV. P. arts. 3506-08 (1960).

23. In this regard the Court noted that in Louisiana a vendor's lien is destroyed if the vendee transfers possession of the goods. This was a major consideration in the Louisiana Supreme Court decision. For discussion of this point see Comment, *Fuentes v. Shevin: Its Treatment by Louisiana Courts and Effect Upon Louisiana Law*, 47 TUL. L. REV. 806 (1973).

24. 402 U.S. 535 (1971).

25. 339 U.S. 594 (1950).

Court stated that the only requirement necessary to justify seizure of the goods is that the seller establish a probability of success in the suit. Because the sole issue at this point in the dispute is possession of the property pending trial, only the existence of the debt, the lien, and the delinquency need be considered.[26] As viewed by the Court,

> [t]hese are ordinarily uncomplicated matters that lend themselves to documentary proof; and . . . it comports with due process to permit the initial seizure on sworn *ex parte* documents, followed by the early opportunity to put the creditor to his proof.[27]

The Court further supported its conclusion by distinguishing *Sniadach* and *Fuentes*. Mitchell had claimed that these decisions were in a line of cases which mandated an opportunity to be heard before any deprivation of property.[28] As interpreted by the Court, however, the cases merely stood for the proposition that a hearing is required only prior to final deprivation of property. This position was supported by reference to *Phillips v. Commissioner*[29] and the *Ewing* case where *ex parte* seizure was sustained based on the adequacy of final judicial determination. (The Court further cited *Coffin Brothers & Co. v. Bennett*,[30] *Owenby v. Morgan*,[31] and *McKay*[32] as instances of Court approval of traditional procedures.)

Because the sequestered property was not exclusively that of the debtor, *Sniadach* was distinguished. The Court took a narrow view of this decision as being one where the creditor

> had no prior interest in the property attached, and the opinion did not purport to govern the typical case of the installment seller who brings a suit to collect an unpaid balance. . . .[33]

The *Fuentes* case, which involved an installment seller, was distinguished because the replevin laws there allowed a court clerk to issue the writ of replevin on the naked assertion of the seller. Additionally, under the Florida and Pennsylvania laws there was doubt as to when, if ever, the buyer would have an opportunity to be heard. The Louisiana law, as perceived by the Court, did not have these shortcomings. Here the requirement of a verified affidavit, provisions for post-seizure hearings, and judicial control of the process would act to minimize the risk of a wrongful taking. Moreover, the replevin laws struck down in *Fuentes* allowed seizure if the property was "wrongfully detained," a "fault standard" which the

26. ___ U.S. at ___, 94 S.Ct. at 1901.
27. *Id.* at ___, 94 S.Ct. at 1901.
28. *Id.* at ___ n.10, 94 S.Ct. at 1902 n.10.
29. 283 U.S. 589 (1931).
30. 277 U.S. 29 (1928).
31. 256 U.S. 94 (1921).
32. 279 U.S. 820 (1929).
33. ___ U.S. at ___, 94 S.Ct. at 1904.

Court considered to be suited to adversary proceedings. Conversely, the narrow issues relevant to sequestration in Louisiana were found to be amenable to *ex parte* documentary verification.

A strong dissenting opinion argued that the Louisiana procedure is "remarkably similar" to those invalidated in *Fuentes* and should not have been distinguished. The distinctions upon which the Court based its opinion, said the dissent, are spurious and hence have no constitutional significance.[34] The dissent further asserted that the Court had merely rejected the reasoning of the *Fuentes* decision and applied the reasoning of the *Fuentes* dissent.[35]

Although *Fuentes* was not overruled in specific language, *Mitchell* is a significant reaffirmation of traditional prejudgment remedies as evidenced by the favorable citation of *Coffin Brothers*, *Owenby*, and *McKay*. Additionally, it is a decided change from post-*Sniadach* cases which recognized that any taking resulted in a deprivation and emphasized the substance of the seizure and not its form.[36] The implication is that a preseizure hearing is required only in situations involving the taking of "special" or "necessary" property interests.[37] According to *Mitchell*, all that a state must do to legitimize the *ex parte* seizure of "ordinary" property is to ensure that the taking is nonfinal by providing for the posting of bond and judicial control of the process, a no-fault standard to justify the seizure, and an allowance for early post-judgment hearing.

In supporting this conclusion the Court contends that the requirement for a preseizure hearing is outside the mainstream of past decisions and that "postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate."[38] This point is arguable,[39] and it is not strengthened by citation

34. *Id.* at ____, 94 S.Ct. at 1912-13. The first, that the creditor must file an affidavit citing specific facts, is of no consequence because even if it is more detailed than that required by the Florida and Pennsylvania replevin statutes, it is still no more than a *pro forma* allegation. In both cases the issuing official could do no more than determine the formal sufficiency of the charges without a probable cause hearing.

The fact that the authorizing official is a judge rather than a court clerk was also dismissed as inconsequential. After ascertaining that the allegations are in the proper format "the issuance of the summary writ becomes a simple ministerial act." *Id.* at ____, 94 S.Ct. at 1912.

As a third distinction the Court had claimed that the issues in *Mitchell* were more suited to *ex parte* determination than those in *Fuentes*. The dissent observed, however, that the issues were the same, the existence of the creditor's security interest and the debtor's default. *Fuentes* held that the complexity of the issues is pertinent only to the form of the hearing and is not determinative of whether or not a hearing is required. *Id.* at ____, 94 S.Ct. at 1913.

35. *Id.* at ____, 94 S.Ct. at 1913. Mr. Justice White wrote both the *Fuentes* dissent and the *Mitchell* decision.

36. *See* 407 U.S. 67 (1972); 402 U.S. 535 (1971); 397 U.S. 254 (1970).

37. Bell v. Burson, 402 U.S. 535 (1971) (driver's license); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare payments); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (wages).

38. ____ U.S. at ____, 94 S.Ct. at 1902, citing 283 U.S. at 596-97.

39. *See, e.g.*, Bell v. Burson, 402 U.S. 535 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970);

to *Phillips* and *Ewing* which involved fact situations wherein the state seized property in the public interest and not for a private person. Whether or not this is the case does not impeach the arguments presented by *Sniadach* and *Fuentes*. These decisions recognized the reality that any taking of property by the state on behalf of an individual is a deprivation and accordingly extended the protection of the due process clause based on the act of seizure rather than the nature or quality of the seizure.

Of course, there have always been exceptions to the requirements of due process. The test has been that these exceptions must be "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event."[40] Historically such seizures have been recognized and approved in order to protect the public interest when authorized by a government official in situations requiring immediate action.[41] It now appears that the *Mitchell* Court is moving toward the establishment of another exception wherein a creditor's interest alone will suffice to override due process considerations.

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Armstrong v. Manzo, 380 U.S. 545 (1965); Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950); Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126 (1941); United States v. Illinois Central Ry. Co., 291 U.S. 457 (1934); Londoner v. City & County of Denver, 210 U.S. 373 (1908).

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

41. *See, e.g.*, Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950); Fahey v. Malonee, 332 U.S. 245 (1947); Bowles v. Willingham, 321 U.S. 503 (1944); Phillips v. Commissioner, 283 U.S. 589 (1931); American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908).