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Constitutional Law - Due Process - Prejudgment Seizure of Property

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COMMENT

CONSTITUTIONAL LAW—DUE PROCESS— Prejudgment Seizure of Property *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974)

INTRODUCTION

Lawrence Mitchell purchased a refrigerator, range, stereo, and washing machine from W. T. Grant Company under an installment sales contract which, by state law,[1] provided Grant with a vendor's lien to secure the unpaid balance of the purchase price. Because of a delinquency in payments by Mitchell and based on its lien, Grant filed suit to recover the unpaid purchase price. In addition to the suit, Grant applied to the court under the Louisiana sequestration statute[2] for a writ authorizing the

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[1] 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.

So that although the vendor may have taken a note, bond or other acknowledgement from the buyer, he still enjoys the privilege.

LA. CIV. CODE ANN. art. 3227 (West 1952).

By operation of the law of Louisiana, title may pass to the purchaser, but the vendor retains preference on the purchase price over other creditors. Wallace Lincoln-Mercury Co. v. Gentry, 469 F.2d 396 (5th Cir. 1972). The vendor's privilege is referred to as a "statutory lien" on the property. *In re* Trahan, 283 F. Supp. 620, *aff'd per curiam*, 402 F.2d 796 (5th Cir. 1968), *cert. denied*, 394 U.S. 930 (1969).

[2] The important sections of the Louisiana statute are:

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 verified by, or by the separate affidavit of, the petitioner, his counsel or agent.

The applicant shall furnish security as required by law for the payment of the damages the defendant may sustain when the writ is obtained wrongfully.

LA. CODE CIV. PRO. ANN. art. 3501 (West 1961).

The defendant by contradictory motion may obtain the dissolution of a writ of attachment or of sequestration, unless the plaintiff proves the grounds upon which the writ was issued. If the writ of attachment or of sequestration is dissolved, the action shall then proceed as if no writ had been issued.

The court may allow damages for the wrongful issuance of a writ of attachment or of sequestration on a motion to dissolve, or on a reconventional demand. Attorney's fees for the services rendered in connection with the dissolution of the writ may be included as an element of damages whether the writ is dissolved on motion or after trial on the merits.

Id. art. 3506.

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.

seizure of the household goods pending the litigation. In support of its application for the writ, Grant's credit manager swore in an affidavit that the seller had reason to believe that the buyer 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."[3] Based on this *ex parte* application by the creditor, and without notice to the buyer or hearing before seizure of the property, the judge authorized issuance of a writ of sequestration. A surety bond was filed by the creditor, and Mitchell's goods were seized.

Mitchell challenged the seizure by motion, arguing that his rights to due process under the fourteenth amendment had been violated by a seizure of his property without prior notice or a hearing. Mitchell's motion to dissolve the writ was denied by the state court, and this action was affirmed by the Supreme Court in *Mitchell v. W. T. Grant Co.*[4]

Only 2 years prior to *Mitchell*, in *Fuentes v. Shevin*,[5] the Supreme Court found the Florida and Pennsylvania replevin statutes[6] unconstitutional as a denial of due process because the stat-

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Id. art. 3507.

> The security for the release of property seized under a writ of attachment or of sequestration shall exceed by one-fourth the value of the property as determined by the court, or shall exceed by one-fourth the amount of the claim, whichever is the lesser.

Id. art. 3508.

> 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 pendency of the action.

Id. art. 3571.

> An applicant for a writ of sequestration shall furnish security for an amount determined by the court to be sufficient to protect the defendant against any damage resulting from a wrongful issuance, unless security is dispensed with by law.

Id. art. 3574.

> If the defendant does not effect the release of property seized under a writ of sequestration, as permitted by Article 3507, within ten days of the seizure, the plaintiff may effect the release thereof by furnishing the security required by Article 3508.

Id. art. 3576.

[3] Mitchell v. W.T. Grant Co., 416 U.S. 600, 602 (1974).

[4] 416 U.S. 600 (1974).

[5] 407 U.S. 67 (1972).

[6] Sequestration, replevin, and attachment are prejudgment remedies. A writ of sequestration issued by the court allows property which is in the possession of the defendant

utes allowed prejudgment seizure of property without prior notice or a hearing.

This comment examines case law interpretations of *Fuentes* to show that courts acknowledged that the case required notice and a hearing prior to seizure. Analysis of the *Mitchell* opinion reveals that exceptions to the due process requirement of notice and a hearing were used to support the *Mitchell* holding; that a new right, that of the interest of the creditor under the fourteenth amendment, was created; and that the statutes at issue in *Mitchell* and *Fuentes* are so procedurally similar as to be indistinguishable. Thus, it appears that the Court in *Mitchell* overruled the due process requirements of *Fuentes*. Consequently, it is necessary to discuss what statutory procedures will be upheld under *Mitchell*.

I. *Fuentes v. Shevin*: Its Interpretation By the Courts

A. *The* Fuentes *Line of Cases*

Until 1969 courts upheld the constitutionality of prejudgment provisional remedies which provided for the seizure of property without prior notice and a hearing.[7] In 1969, however, in *Sniadach v. Family Finance Corp.*[8] the Supreme Court reversed the trend. The Court held that a prejudgment garnishment procedure by which an employee's wages could be withheld before trial violated the due process clause of the fourteenth amendment as a taking or property without prior notice or a hearing.[9] After *Sniadach* the Supreme Court held in *Goldberg v. Kelly*[10] that the due process clause required prior notice and a hearing before the state could terminate welfare payments. Next, in *Bell v. Burson*,[11]

to be taken by the sheriff and held by the court pending outcome of the suit. Replevin is an action to recover possession of goods unlawfully taken and entails a redelivery to the owner. Attachment involves taking defendant's property into legal custody as security for a judgment against the defendant. Attachment, unlike replevin, involves no claim of ownership on the property seized. Louisiana statutes provide only for the prejudgment remedies of attachment and sequestration. However, in Louisiana, sequestration involves a claim of ownership or possession of the property seized and is very similar to replevin statutes of other states.

[7] Johnson v. Chicago & Pac. Elevator Co., 119 U.S. 388 (1886); Robinson v. Loyola Foundation, Inc., 236 So. 2d 154 (Fla. 1970); Shell Oil Co. v. Milne, 127 Vt. 249, 246 A.2d 837 (1968), *cert. denied*, 395 U.S. 965, 396 U.S. 916 (1969); McInnes v. McKay, 127 Me. 110, 141 A. 699 (1928), *aff'd per curiam*, 279 U.S. 820 (1929).

[8] 395 U.S. 337 (1969).

[9] *Id.* at 342.

[10] 397 U.S. 254 (1970).

[11] 402 U.S. 535 (1971).

the Court held that the due process clause required a hearing before the state could deprive an uninsured motorist of his driver's license. A significant trend appeared to be developing, and the courts began to proscribe the more severe creditors' remedies.[12]

Then, in 1972 the Supreme Court in *Fuentes* found the Florida and Pennsylvania replevin statutes unconstitutional as a denial of due process because the statutes allowed prejudgment seizure of property without prior notice or a hearing. Because lack of a hearing and prior notice could cause unfair, arbitrary, or mistaken deprivation of the use or possession of property,[13] this procedural deficiency was a violation of the fourteenth amendment. The statutes in *Fuentes*, like the statute in *Mitchell*, required a hearing before *final* deprivation of property[14] and the posting of a bond by the creditor before the writ was issued.[15] Yet, while these provisions were adjudged insufficient to adequately protect the debtor under the fourteenth amendment in *Fuentes*, they were upheld in *Mitchell*. Moreover, in *Fuentes*, retention of the title by the vendor[16] or probable success at trial[17] did not affect the basic right to a prior hearing before seizure of the property from the debtor.

Fuentes recognized "extraordinary situation" exceptions where certain governmental or public interests outweigh the requirement of prior notice and a hearing before prejudgment deprivation of property.[18] For example, in order to collect revenue, the state has been permitted to seize its citizen's property without prior notice or a hearing.[19] Additionally, in order to protect the public health,[20] to meet the needs of a national war effort,[21] to

[12] *See* Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970); Randone v. Appellate Dep't of Sup. Ct., 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), *cert. denied*, 407 U.S. 924 (1972); Jones Press, Inc. v. Motor Travel Serv., Inc., 286 Minn. 205, 176 N.W.2d 87 (1970). *But see* Black Watch Farms, Inc. v. Dick, 323 F. Supp. 100 (D. Conn. 1971); Reeves v. Motor Contract Co., 324 F. Supp. 1011 (N.D. Ga. 1971); Termplan, Inc. v. Superior Ct., 105 Ariz. 270, 463 P.2d 68 (1969).

[13] 407 U.S. at 81-82.

[14] *Id.* at 82-83.

[15] *Id.* at 83.

[16] *Id.* at 86.

[17] *Id.*

[18] 407 U.S. at 90-92. *See* Fahey v. Mallonee, 332 U.S. 245 (1947); Yakus v. United States, 321 U.S. 414 (1944); North Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908); Milliken v. Gill, 211 F.2d 869 (4th Cir. 1954).

[19] Milliken v. Gill, 211 F.2d 869 (4th Cir. 1954).

[20] Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950); North Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908).

protect the public from bank failure,[22] and to secure jurisdiction in court,[23] the state is allowed a post-seizure adjudication. The Court in *Fuentes*, however, held that because the replevin statutes at issue served only private interests, not a compelling governmental or public interest which would allow post-seizure adjudication,[24] a hearing was required prior to seizure.

As a result of *Fuentes*, courts struck down prejudgment provisional remedies which did not provide for prior notice and a hearing before deprivation of property.[25] Further, of the 34 states that had statutes similar to the replevin statutes held unconstitutional in *Fuentes*, 15 have repealed or amended their statutes since the case was decided.[26] Moreover, courts interpreted the due process requirements of *Fuentes* very broadly, and applied them to situations unrelated to a creditor-debtor relationship.[27]

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[21] Bowles v. Willingham, 321 U.S. 503 (1944); Yakus v. United States, 321 U.S. 414 (1944).

[22] Fahey v. Mallonee, 332 U.S. 245 (1947); Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928).

[23] Ownbey v. Morgan, 256 U.S. 94 (1921); Steele v. G.D. Searle & Co., 483 F.2d 339 (5th Cir. 1973); Rintala v. Shoemaker, 362 F. Supp. 1044 (D. Minn. 1973); United States Indus., Inc. v. Gregg, 348 F. Supp. 1004 (D. Del. 1972); Standard Oil Co. v. Superior Ct., 44 Del. 538, 62 A.2d 454, *appeal dismissed*, 336 U.S. 930 (1949).

[24] 407 U.S. at 92.

[25] Western Coach Corp. v. Shreve, 475 F.2d 755 (9th Cir. 1973) (garnishment); Turner v. Colonial Fin. Corp., 467 F.2d 202 (5th Cir. 1972) (replevin); Hammond v. Powell, 462 F.2d 1053 (4th Cir. 1972) (claim and delivery); Bay State Harness Horse Racing & Breeding Ass'n v. PPG Indus., Inc., 365 F. Supp. 1299 (D. Mass. 1973) (attachment); *In re* Northwest Homes of Chehalis, Inc., 363 F. Supp. 725 (W.D. Wash. 1973) (attachment); Yates v. Sears, Roebuck & Co., 362 F. Supp. 520 (M.D. Ala. 1973) (detinue); Gunter v. Merchants Warren Nat'l Bank, 360 F. Supp. 1085 (D. Me. 1973) (attachment); Lynch v. Household Fin. Corp., 360 F. Supp. 720 (D. Conn. 1973) (attachment and garnishment); Higley Hill, Inc. v. Knight, 360 F. Supp. 203 (D. Mass. 1973) (attachment); Trapper Brown Constr. Co. v. Electromech, Inc., 358 F. Supp. 105 (D.N.H. 1973) (attachment); Mitchell v. Tennessee, 351 F. Supp. 846 (W.D. Tenn. 1972) (replevin); McClellan v. Commercial Credit Corp., 350 F. Supp. 1013 (D.R.I. 1972) (attachment); Schneider v. Margossian, 349 F. Supp. 741 (D. Mass. 1972) (attachment); Miloszewski v. Sears, Roebuck & Co., 346 F. Supp. 119 (W.D. Mich. 1972) (search and seizure of personal property); Sena v. Montoya, 346 F. Supp. 5 (D.N.M. 1972) (replevin).

[26] The states which repealed or amended their statutes are: Colo., Hawaii, Idaho, Ill., Iowa, Kan., Mich., Neb., Nev., N.H., N.D., Okla., S.D., Tenn., and Wyo.

[27] For cases which require broad due process procedures in employee discharge proceedings, *see* McNeill v. Butz, 480 F.2d 314 (4th Cir. 1973); Silar v. Smith, 361 F. Supp. 1187 (E.D. Pa. 1973); Skehan v. Board of Trustees, 358 F. Supp. 430 (M.D. Pa. 1973); Buggs v. City of Minneapolis, 358 F. Supp. 1340 (D. Minn. 1973); Pennsylvania *ex rel.* Rafferty v. Philadelphia Psychiatric Center, 356 F. Supp. 500 (E.D. Pa. 1973); Kennedy v. Sanchez, 349 F. Supp. 863 (N.D. Ill. 1972).

For cases which require broad due process procedures in search and seizure proceedings, *see* Jondora Music Publishing Co. v. Melody Recordings, Inc., 362 F. Supp. 494 (D.N.J. 1973), *rev'd on other grounds*, 506 F.2d 395 (3d Cir. 1974); Fell v. Armour, 355 F. Supp. 1319 (M.D. Tenn. 1972).

B. *Cases Interpreting* Fuentes

The reasoning of *Fuentes* was subsequently applied to determine the constitutionality of attachment statutes.[28] It is indicative of the broad interpretation given to *Fuentes* that attachment statutes which did not deprive owners of *actual possession* of their property[29] were found unconstitutional.[30] For example, in *Gunter v. Merchants Warren National Bank*[31] a statute allowing attachment of real estate was found unconstitutional. The court in *Gunter* held that while a real estate attachment does not disturb possession, it creates a lien on the property and deprives the owner of his ability to convey a clear title—a significant property interest. Thus, according to interpretations of *Fuentes*,[32] property which cannot be deprived without notice and a hearing includes both possessory and non-possessory interests.[33]

Fuentes was also applied to determine the constitutionality of materialmen's and mechanics' liens.[34] In *Mason v. Garris*[35] a Georgia statute was challenged which allowed a mechanic, who had worked on a vehicle and had not been paid, to foreclose by levy and sale of the vehicle without notice or a hearing. The statute was held unconstitutional, and the rights of one with a security interest similar to the one held by Grant in *Mitchell* were

[28] Unlike sequestration and replevin statutes which provide for seizure of property by one with an interest in the property, attachment statutes allow seizure of property in which the creditor has no prior interest.

[29] Bay State Harness Horse Racing & Breeding Ass'n v. PPG Indus., Inc., 365 F. Supp. 1299 (D. Mass. 1973); *In re* Northwest Homes of Chehalis, Inc., 363 F. Supp. 725 (W.D. Wash. 1973); Higley Hill, Inc. v. Knight, 360 F. Supp. 203 (D. Mass. 1973); Gunter v. Merchants Warren Nat'l Bank, 360 F. Supp. 1085 (D. Me. 1973); Schneider v. Margossian, 349 F. Supp. 741 (D. Mass. 1972).

[30] In addition to attachment and replevin, other summary creditors' remedies were struck down, including, for instance, landlord lien statutes which allow the landlord in the event of a rent default to seize the property of the tenant without prior notice or hearing. Hall v. Garson, 468 F.2d 845 (5th Cir. 1972); Barber v. Rader, 350 F. Supp. 183 (S.D. Fla. 1972); Gross v. Fox, 349 F. Supp. 1164 (E.D. Pa. 1972); Macqueen v. Lambert, 348 F. Supp. 1334 (M.D. Fla. 1972); Shaffer v. Holbrook, 346 F. Supp. 762 (S.D.W. Va. 1972); Dielen v. Levine, 344 F. Supp. 823 (D. Neb. 1972).

[31] 360 F. Supp. 1085 (D. Me. 1973).

[32] Hammond v. Powell, 462 F.2d 1053 (4th Cir. 1972); Lynch v. Household Fin. Corp., 360 F. Supp. 720 (D. Conn. 1973); Trapper Brown Constr. Co. v. Electromech, Inc., 358 F. Supp. 105 (D.N.H. 1973); McClellan v. Commercial Credit Corp., 350 F. Supp. 1013 (D.R.I. 1972); Miloszewski v. Sears, Roebuck & Co., 346 F. Supp. 119 (W.D. Mich. 1972).

[33] *See* cases cited note 29 *supra*.

[34] Hernandez v. European Auto Collision, Inc., 487 F.2d 378 (2d Cir. 1973); Mason v. Garis, 360 F. Supp. 420 (N.D. Ga. 1973); Straley v. Gassaway Motor Co., 359 F. Supp. 902 (S.D.W. Va. 1973).

[35] 360 F. Supp. 420 (N.D. Ga. 1973).

discussed in light of *Fuentes*: "It is the vehicle owner—not the mechanic—who, under the current statutes, is deprived of the use of his vehicle without the protections of procedural due process. The mechanic's interest is only a security interest."[36] In cases dealing with creditors' rights, "deprivation" has always referred to the use and possession by the debtor, never to the security interest of the creditor, and post-*Fuentes* cases consistently so hold.[37] The cases that upheld lien statutes after *Fuentes* did not involve the execution of the lien. In these cases the courts reasoned that no dispossession of property had occurred[38] or that the deprivation was *de minimus*.[39] However, even these cases recognized that in the absence of extraordinary circumstances, prior notice and hearing were required before any significant deprivation of property.

Thus, case law interpretation has held *Fuentes* to require some form of notice and a hearing *prior* to the deprivation of the use or possession of property, with the exception of an extraordinary governmental or public interest. Clearly, the holding in *Mitchell* that *Fuentes* required a hearing only before final deprivation of property[40] is inconsistent with case law analysis of *Fuentes*.

II. THE EFFECT OF *Mitchell*

A. *Rationale of the Majority Opinion*

As support for its argument that post-seizure adjudication satisfies the due process clause of the fourteenth amendment, the Supreme Court cites cases widely recognized as exceptions to the requirement of prior notice and hearing.[41] Further, the Court in *Mitchell* creates a right of the creditor heretofore unrecognized under the fourteenth amendment which is "measured by the unpaid balance of the purchase price."[42] Finally, the Court distin-

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[36] *Id.* at 424.

[37] *See* cases cited note 25 *supra*.

[38] Spielman-Fond, Inc. v. Hansons, Inc., Civil No. 72-417PHXWEC (D. Ariz. Sept. 12, 1973), *cert. denied*, 417 U.S. 901 (1974).

[39] Cook v. Carlson, 364 F. Supp. 24 (D.S.D. 1973).

[40] 416 U.S. at 611.

[41] Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950); Phillips v. Commissioner, 283 U.S. 589 (1931); McInnes v. McKay, 127 Me. 110, 141 A. 699 (1928), *aff'd per curiam*, 279 U.S. 820 (1929); Coffin Bros. v. Bennett, 277 U.S. 29 (1928); Ownbey v. Morgan, 256 U.S. 94 (1921); Scottish Union & Nat'l Ins. Co. v. Bowland, 196 U.S. 611 (1905); Springer v. United States, 102 U.S. 586 (1880).

[42] 416 U.S. at 604. *See* text accompanying notes 64-70 *infra*.

guishes the statutes at issue in *Mitchell* and *Fuentes* on a procedural basis. However, the replevin statutes in *Fuentes* and the sequestration statute in *Mitchell* are so similar as to be indistinguishable. Therefore, the Court in *Mitchell* has, in essence, overruled *Fuentes* and has effected a change in present day requirements of prejudgment due process.

1. Exceptions to the Requirement of Notice and Hearing Used as Support for the *Mitchell* Holding

The Court in *Mitchell* states that *Sniadach* and *Fuentes* stand for the proposition that "a hearing must be had before one is finally deprived of his property and [they] do not deal at all with the need for a pretermination hearing where a full and immediate post-termination hearing is provided."[43] To substantiate this position, the *Mitchell* opinion cites three cases: *Phillips v. Commissioner of Internal Revenue*,[44] *Scottish Union & National Insurance Co. v. Bowland*,[45] and *Springer v. United States*.[46] Each case involves the enforcement of a tax lien by summary proceedings with subsequent opportunity for the determination of legal rights. As noted above,[47] the collection by the government of its revenue has consistently been recognized as an exceptional situation of compelling state interest allowing post-seizure adjudication.[48] *Fuentes*[49] and cases subsequent[50] have also recognized this exception.

The majority in *Mitchell* relies most heavily on *Ewing v. Mytinger & Casselberry, Inc.*[51] to substantiate its argument that case law merely requires "a full and immediate post-termination hearing."[52] *Ewing* involved a prehearing seizure of articles in order to protect the public from misbranded goods. Again the Court cites an acknowledged exception—protection of public health[53]—to support its proposition that only post-seizure adjudi-

[43] 416 U.S. at 611.

[44] 283 U.S. 589 (1931).

[45] 196 U.S. 611 (1905).

[46] 102 U.S. 586 (1880).

[47] *See* text accompanying notes 18-24 *supra*.

[48] Milliken v. Gill, 211 F.2d 869, 871 (4th Cir. 1954).

[49] 407 U.S. at 92 n.24.

[50] Commonwealth Dev. Ass'n v. United States, 365 F. Supp. 792, 795 (M.D. Pa. 1973); Catoor v. Blair, 358 F. Supp. 815, 817 (N.D. Ill. 1973); Parrish v. Daly, 350 F. Supp. 735, 737 (S.D. Ind. 1972).

[51] 339 U.S. 594 (1950).

[52] 416 U.S. at 611.

[53] *See* cases cited note 20 *supra*.

cation is required. Situations of compelling public interest were noted as exceptions in *Fuentes*[54] and cannot be analogized to a creditor-debtor situation as done by the Court in *Mitchell*.

Finally, the Supreme Court notes its unanimous approval in *Coffin Brothers v. Bennett*,[55] *Ownbey v. Morgan*,[56] and *McInnes v. McKay*[57] of prejudgment attachment liens effected without notice or hearing. *Coffin* challenged a Georgia statute which gave the state power to issue an attachment which acted as a lien on the property of shareholders of a defunct bank. Protecting the public from the consequences of bank failure is a public interest exception recognized as allowing seizure without notice or a hearing[58] and is not analogous to a creditor-debtor situation.

Ownbey upheld a foreign attachment law which provided a basis for jurisdiction in a state court. By obtaining *quasi in rem* jurisdiction a creditor may subject the tangible property of the debtor to the payment of a debt even though he is unable to secure in personam jurisdiction over the debtor. Historically, attachments to secure jurisdiction in a state court have been upheld[59] and are a recognized public interest exception not requiring prior notice and a hearing. The reliance on this exception provides no support for the Court's holding since the trial court had personal jurisdiction over Mitchell.

In *McKay* the Maine Supreme Court upheld a prejudgment attachment of the debtor's real estate and stock without prior notice or a hearing. However, the statute in *McKay* differed from the statute in *Mitchell* because it did not provide for prejudgment seizure nor did it prevent the debtor from disposing of the property prior to judgment.[60] The statute in *McKay* merely permitted a lien to be placed upon the property, allowing the creditor to seize and levy upon the property only in the event he was successful in a later suit against the property owner.[61] The court upheld the statute on the basis that the procedure did not constitute a deprivation of property, stating, "[deprivation] takes place when the free use and enjoyment of the thing or the power to

[54] 407 U.S. at 90-92.
[55] 277 U.S. 29 (1928).
[56] 256 U.S. 94 (1921).
[57] 127 Me. 110, 141 A. 699, *aff'd per curiam*, 279 U.S. 820 (1929).
[58] *See* cases cited note 22 *supra*.
[59] *See* cases cited note 23 *supra*.
[60] 127 Me. at 114, 141 A. at 702.
[61] *Id.*

dispose of it at will is affected."[62] The court upheld the statute in *McKay* because there was no deprivation of property and did not address the question of notice and hearing. Thus, the *McKay* holding is not applicable to *Mitchell* where there was actual dispossession of property.

2. Balancing the Interests of Buyer and Seller

In *Mitchell* and *Fuentes* the debtors were deprived of identical property, household goods. In *Fuentes* the debtor's interest protected by the fourteenth amendment was characterized as the use and possession of this property. However, in *Mitchell* the debtor's interest was characterized as "no greater than the surplus remaining, if any, after foreclosure and sale of the property."[63]

The interests of the vendor-seller in the property of the vendees in *Mitchell* and *Fuentes* were also similar. In *Mitchell* the vendor retained a lien on the goods;[64] in *Fuentes* the vendor retained the title to the merchandise. Under the fourteenth amendment protected property includes vested rights,[65] and a lien once acquired has been held to be a vested property right.[66] Additionally, the possession of title has been held to allow recovery of a property interest in an action of replevin.[67] Yet, the substantive property right protected by the fourteenth amendment is the right to retain the lien or title until the debt is paid.[68] There is no case law holding, as the Court in *Mitchell* does, that the creditor-vendor has a right in the property other than his title or lien. However, the Court in *Mitchell* characterizes the interest of

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[62] *Id.* at 116, 141 A. at 702. The concept of "deprivation" under the fourteenth amendment is the same in *McKay* and *Fuentes*. 407 U.S. at 86.

[63] 416 U.S. at 604.

[64] In Louisiana a conditional sales contract vests absolute title in the buyer, and a vendor's lien is automatically created which secures the vendor for the unpaid puchase price of the property so long as the property remains in the possession of the vendee. Cristina Inv. Corp. v. Gulf Ice Co., 55 So. 2d 685, 687 (La. Ct. App. 1951).

[65] Gibbes v. Zimmerman, 290 U.S. 326 (1933); Grunbaugh v. City of St. Johns, 384 Mich. 165, 180 N.W.2d 778 (1970).

[66] Bass v. Stodd, 357 F.2d 458 (9th Cir. 1966); United States v. One 1962 Ford Thunderbird, 232 F. Supp. 1019 (N.D. Ill. 1964); White v. White, 129 So. 2d 148 (Fla. 1961).

[67] Brennan v. W.A. Wills, Ltd., 263 F.2d 1 (10th Cir. 1959); Harlan & Hollingsworth Corp. v. McBride, 69 A.2d 9 (Del. 1949); Long v. Burnside, 295 Ill. App. 82, 14 N.E.2d 660 (1938); Berry v. Adams, 71 S.W.2d 126 (Mo. Ct. App. 1934); Hays v. Bashor, 108 Wash. 491, 185 P. 814 (1919).

[68] *See* Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935); Security-First Nat'l Bank v. Rindge Land & Navigation Co., 85 F.2d 557 (9th Cir. 1936), *cert. denied*, 299 U.S. 613 (1937); White v. White, 129 So. 2d 148 (Fla. Dist. Ct. App. 1961).

the creditor as "measured by the unpaid balance of the purchase price."[69] This heretofore unrecognized property interest is elevated to a protected right under the fourteenth amendment by the *Mitchell* Court. The *Fuentes* line of cases[70] recognized only the debtor's interest in the use and possession of his property as protected by the fourteenth amendment. Clearly, the concept of property interests protected by the fourteenth amendment according to *Fuentes* has been expanded by *Mitchell.*

3. The Majority's Argument that *Fuentes* is Procedurally Distinguished

The Court in *Mitchell* emphasizes the differences between the Pennsylvania and Florida replevin statutes which were struck down in *Fuentes* and the Louisiana sequestration statute. Although the names differ, the Louisiana sequestration and the Pennsylvania and Florida replevin statutes permit the same thing: prehearing seizure initiated by one who claims ownership or right to possession.[71]

The Supreme Court in *Mitchell* emphasizes that the writ in *Fuentes* was issued on the mere "bare assertion of the party seeking the writ that he is entitled to one,"[72] whereas, the Louisiana statute requires "specific facts" showing the debt, lien, and delinquency.[73] In reality, there is no true distinction between the statutes. As noted by the *Mitchell* dissent,[74] even though the Louisiana writ requires more information than that required by Pennsylvania and Florida, the application for the writ is still an *ex parte* pro forma allegation on the part of the creditor acting in his own interest. This is the same procedure that was struck down in *Fuentes*, and therefore, the cases are indistinguishable on this basis.

The Court in *Mitchell*[75] emphasized that the bond requirements in the Louisiana statute are protective of the interests of

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[69] 416 U.S. at 604.

[70] Bell v. Burson, 402 U.S. 535 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969); Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970); Randone v. Appellate Dep't of Sup. Ct., 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), *cert. denied*, 407 U.S. 924 (1972); Jones Press, Inc. v. Motor Travel Serv., Inc., 286 Minn. 205, 176 N.W.2d 87 (1970).

[71] LA. CODE CIV. PRO. ANN. art. 3571 (West 1961); PA. R. CIV. P. 1073 (1967); Act of March 11, 1845, ch. 78, § 1, Fla. Laws [1845] (repealed 1973).

[72] Fuentes v. Shevin, 407 U.S. 67, 74 (1972).

[73] LA. CODE CIV. PRO. ANN. art. 3501 (West 1961).

[74] 416 U.S. at 629.

[75] *Id.* at 608.

the debtor, but, in fact, a comparison of the statutes shows that the bond requirements of the statutes struck down in *Fuentes* were more protective of the debtor because they required a larger bond from the creditor.[76] The statutes at issue in *Mitchell* and *Fuentes* also have provisions for counterbond, allowing the debtor to effect the return of his property.[77] Likewise, in this instance, the Florida and Pennsylvania statutes required a larger counterbond from the debtor than the Louisiana statute, thus more adequately protecting the creditor's interest. Therefore, the statutes struck down in *Fuentes* provided greater protection for both the creditor through the bond and the debtor through the counterbond than the statute upheld in *Mitchell*. Yet, the Court holds that the bond requirement is adequate protection for the debtor, thus overruling *Fuentes* which holds a bond no substitute for prior hearing.[78]

The Court in *Mitchell* approves of the fact that the writ of sequestration is issued by a judge, not a court clerk as in *Fuentes*.[79] In essence, the procedure is indistinguishable because, as noted by the *Mitchell* dissent, all either a judge or clerk does based on this procedure is pass upon the "formal sufficiency" of the pleadings.[80]

Finally, the Court in *Mitchell* distinguishes *Fuentes* on the basis that the Louisiana statute provides for an immediate hearing, which was not required by the statutes in *Fuentes*.[81] First, the hearing under the Louisiana statute is not automatic but may be had only upon motion of the debtor.[82] Secondly, the Louisiana statute does not set any time limits within which the debtor's motion must be heard.[83] Under *Fuentes*, any deprivation of property would require a prior hearing. Matters such as bond,[84] length

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[76] Both statutes required a bond of at least double the value of the property. PA. R. CIV. P. 1073 (1967); Act of March 11, 1845, ch. 78, § 7, Fla. Laws [1845] (repealed 1973).

[77] LA. CODE CIV. PRO. ANN. art. 3508 (West 1961); PA. R. CIV. P. 1076 (1967); Act of March 11, 1845, ch. 78 § 13, Fla. Laws [1845] (repealed 1973).

[78] 407 U.S. at 83.

[79] Outside the Orleans Parish a clerk issues the writ. However, the validity of issuance in these areas is not at issue. 416 U.S. at 606-07.

[80] 416 U.S. at 629.

[81] The Pennsylvania statute contained no time requirement for a hearing. However, under the Florida statute the plaintiff was required to prosecute his action "without delay." Act of March 11, 1845, ch. 78 § 7, Fla. Laws [1845] (repealed 1973).

[82] LA. CODE CIV. PRO. ANN. art. 3506 (West 1961).

[83] *Id.*

[84] 407 U.S. at 83.

and severity of deprivation,[85] the necessity of the goods,[86] and probable success at trial[87] were specifically held not to affect the right to a prior hearing. Clearly, then, the requirement of a prior hearing has been overruled.

As a result of the *Mitchell* opinion, the due process requirements of *Fuentes* have been overruled and a new balancing of the rights of the creditor and the debtor has been introduced. The immediate question raised by *Mitchell* is what kind of prejudgment provisional remedies will withstand a due process challenge.

III. Statutory and Judicial Approach to *Mitchell*

Prejudgment seizures of property will predictably be upheld under *Mitchell* if the statute requires: (1) an affidavit or verified petition showing the debt, the security interest, and delinquency;[88] (2) that the affidavit or verified petition be examined by a court official, not a clerk, who will then authorize issuance of the writ;[89] (3) notice at the time of seizure;[90] (4) a bond on the part of the creditor in an amount that may be determined by the court;[91] (5) a counterbond payable within 10 days by the debtor wishing to effect the return of his property exceeding by one-fourth the value of the property or claim;[92] (6) a hearing which

[85] *Id.* at 86.

[86] *Id.* at 89.

[87] *Id.* at 87.

[88] In order to protect the debtor, the Court in *Mitchell* will not allow issuance of any writ on demand, as allowed by the statutes in *Fuentes*. There must be a showing of "specific facts" on the part of the creditor going beyond conclusory allegations.

[89] The Court in *Mitchell* emphasized that the writ is not to be issued perfunctorily. The Louisiana statute requires that before a writ is issued, cause must be shown to a judge, not a clerk. Because of the problem of overcrowded dockets, a referee or hearing officer, rather than a judge, would probably be permitted under *Mitchell* to pass on the adequacy of the petition as long as there was sufficient scrutiny of the pleadings and as long as the writ was not merely issued on request.

[90] Notice is received by the debtor at the time of seizure, and the debtor, according to *Mitchell*, is protected by the right to an immediate hearing.

[91] The Florida and Pennsylvania statutes which were found unconstitutional in *Fuentes* required a bond in an amount at least double the value of the property. However, the Louisiana statute only requires "security as required by law," and in fact, Grant was required to furnish a bond in the amount of $1,125, just less than twice the amount of the alleged unpaid purchase price.

[92] The statutes declared unconstitutional in *Fuentes* gave the debtor 3 days within which to effect the return of his property by paying a bond in an amount double the value of the property. The statute upheld in *Mitchell* provided that the debtor's bond shall exceed by one-fourth the value of the property or the claim, whichever is the lesser. Under *Mitchell* the debtor is allowed 10 days to file a counterbond before the creditor may effect the release of the property.

may be had upon motion of the debtor wherein the plaintiff must prove the grounds upon which the writ was issued.[93] It must be emphasized that it is unclear whether the statutory provisions in *Mitchell* comprise minimum due process requirements or whether the lack of one or more of these elements render a statute unconstitutional. Three cases decided since *Mitchell* illustrate the inconsistent standards of due process which have resulted from the Court's confusing treatment of *Fuentes* and inexact statement of due process requirements. Furthermore, the situation is not clarified by the Supreme Court in the recent case of *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[94]

The first court to apply the Supreme Court ruling in *Mitchell* was a three-judge district court in *Ruocco v. Brinker*.[95] Under the Florida mechanic's lien law, a lien was filed against the property of homeowners for labor and materials. The court held that *Mitchell* overruled the *Fuentes* requirement of a hearing prior to deprivation of any significant property interest, stating that the "once ominous spectre of the *Sniadach-Fuentes* doctrine has faded into the past."[96] The court viewed *Mitchell* as effectuating " 'constitutional accommodation of the conflicting interests of the parties.' "[97] However, the court notes that it would have upheld the statute under *Fuentes* because the deprivation of property was de minimus, and no actual property was dispossessed.[98] Therefore, the court in *Ruocco* did not have to struggle with the inexact due process guidelines of *Mitchell*.

The court in *Garcia v. Krausse*[99] compared the Texas sequestration statute to the sequestration statute in *Mitchell* and found that the Texas statute did not provide the constitutional safeguards provided in the Louisiana statute. The *Garcia* court indicated that the instant case would have been easily disposed of

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[93] According to the Court in *Mitchell* the fourteenth amendment rights of the debtor are protected by the debtor's right to move for a hearing. The Louisiana statute requires no specific time limit within which the motion must be heard, and in *Mitchell* the defendant's motion was heard in 11 days. At the hearing, according to the Louisiana statute, the burden of proof is on the plaintiff to prove the grounds upon which the writ was issued.

[94] 95 S. Ct. 719 (1975).

[95] 380 F. Supp. 432 (S.D. Fla. 1974).

[96] *Id.* at 432.

[97] *Id.* at 437.

[98] *See* text accompanying notes 34-39 *supra*. The *Ruocco* court admits that if realty or personalty had been dispossessed, the outcome might have been different. 380 F. Supp. at 437.

[99] 380 F. Supp. 1254 (S.D. Tex. 1974).

under *Fuentes* because no prior notice and hearing was required by the Texas law.[100] However, in *Mitchell*, according to the *Garcia* court, the Supreme Court overruled the requirement of prior notice and a hearing and "balanced the interests of both parties in their application of due process of law."[101] The *Garcia* court found that the Texas statute did not provide for judicial supervision of the issuance of the writ, nor were adequate facts required to be alleged in the petition, nor was there an immediate opportunity for dissolution of the writ.[102] Like the *Ruocco* court, the *Garcia* court was not forced to define what the Court in *Mitchell* considered minimal due process. However, both *Garcia* and *Ruocco* noted that the *Fuentes* requirement of prior notice and hearing had been overruled and that in *Mitchell* the Court had balanced the interests of the creditor and the debtor in applying due process.

In *Sugar v. Curtis Circulation Co.*[103] a three-judge court did define the constitutional limits of *Mitchell* and found the New York attachment statute unconstitutional. The *Sugar* court's analysis confined *Mitchell* narrowly to its facts. The court implied that *Mitchell* presented minimum due process requirements by stating that if a statute did not meet all the specific statutory provisions upheld in *Mitchell*, it did not "squeeze through the narrow door of constitutionality" of *Mitchell* and thus remained "out in the unconstitutional territory charted in *Fuentes*."[104] Thus, unlike *Garcia* and *Ruocco*, the court in *Sugar* did not view *Fuentes* as overruled but regarded *Mitchell* as insisting "on the continued vitality of [the *Fuentes*] rule."[105] The court acknowledged that the New York law substantially paralleled the Louisiana statute upheld in *Mitchell*[106] except for what the court considered two significant differences. First, the post-seizure hearing, although available, did not place the burden of proof upon the plaintiff. Secondly, the attachment would be vacated only if the attachment was "unnecessary to the security of the plaintiff,"[107] not when the grounds upon which the writ is issued were

[100] *Id.* at 1257.
[101] *Id.*
[102] *Id.* at 1259.
[103] 383 F. Supp. 643 (S.D.N.Y. 1974).
[104] *Id.* at 647.
[105] *Id.* at 650.
[106] *Id.* at 648.
[107] *Id.*

not proven. Additionally, the *Sugar* court limited the *Mitchell* holding, indicating that *Mitchell* could not be applied to attachment statutes because the plaintiff in *Sugar* had no creditor's interest in the property attached such as Grant did in *Mitchell*.[108]

This confusion is not clarified by the Supreme Court's comments on *Mitchell, Fuentes*, and *Sniadach* in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[109] In this case the Georgia garnishment law allowed the garnishment of a corporation's bank account pending the outcome of a suit against it. The Court held that *Fuentes* stood for the proposition that any significant taking of property by the state, even if temporary, is within the purview of the due process clause and there existed the right to a hearing "of some sort."[110] This is the same account of *Fuentes* that was given in *Mitchell*,[111] and therefore, the conclusion that *Mitchell* overruled the *Fuentes* requirement of *prior* notice and hearing is consistent with *North Georgia Finishing*.[112] Thus, after holding that *Fuentes* required a hearing "of some sort," the Court applied the specific statutory procedures upheld in *Mitchell* to the Georgia statute. The Court found that the Georgia law required only conclusory allegations in the affidavit, no participation by a judge and no provision for an early hearing at which the creditor would be required to demonstrate probable cause.[113] Thus, in *North Georgia Finishing, Fuentes* was applied to require a hearing "of some sort" and *Mitchell* was applied to determine what specific procedural safeguards will withstand a due process challenge. It should be noted that the application of *Mitchell* is not limited here, as it was by the court in *Sugar*, to a situation in which the creditor has an interest in the property seized, nor to a specific kind of property such as a consumer's household goods. However, the extent to which statutes must parallel the requirements in *Mitchell* is still unclear. As Justice Blackmun comments in his dissent the "commercial statutes of all other States . . . are left in questionable constitutional status, with little or no applicable

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[108] *Id.* at 649.

[109] 95 S. Ct. 718 (1975). Justice White wrote the majority opinion in *Mitchell* and *North Georgia Finishing*. Justices Douglas, Marshall, and Brennan, who dissented in *Mitchell*, voted with the majority in *North Georgia Finishing*. Justices Burger, Blackmun, and Rehnquist, part of the majority in *Mitchell*, dissented in *North Georgia Finishing*.

[110] 95 S. Ct. at 722.

[111] 416 U.S. at 611.

[112] Justices Stewart and Powell in their concurring opinions indicate that they view the majority opinion as "resuscitating" *Fuentes*.

[113] 95 S. Ct. at 722-23.

standard by which to measure and determine their validity under the Fourteenth amendment."[114]

CONCLUSION

In *Mitchell* the Supreme Court has reversed the trend of the *Fuentes* line of cases which required notice and a hearing prior to any deprivation of property. The majority's holding that a hearing is required only before *final* deprivation of property is supported by cases widely recognized as exceptions to the requirement of prior notice and a hearing, and cannot be used as valid authority. The Court expands the rights of the creditor protected by the fourteenth amendment. The result is that now the test of due process requirements under the fourteenth amendment is a procedural balancing of the interests of the creditor and the debtor.

Yet, the Court in *Mitchell* leaves unclear the extent to which the opinion is a retreat from the due process requirements of *Fuentes*. Likewise, which statutory provisions will fulfill due process requirements is uncertain. Cases have already inconsistently interpreted the holdings of *Mitchell*, and to ensure uniformity among the circuits the Supreme Court must clarify the ambiguities surrounding prejudgment seizure of property under the fourteenth amendment.

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[114] *Id.* at 726.