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SNIADACH THROUGH DI-CHEM AND BACKWARDS: AN ANALYSIS OF VIRGINIA'S ATTACHMENT AND DETINUE STATUTES

B. J. Brabham*

I. INTRODUCTION

Few cases in debtor-creditor relations have been discussed as much as *Sniadach v. Family Finance Corp.*,¹ *Fuentes v. Shevin*,² *Mitchell v. W. T. Grant Co.*,³ and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*⁴ Despite the volume already written, however, the commentary appears destined to continue for some time to come. Thanks largely to this outpouring of attention, most lawyers and students are acutely aware of the fundamental issue involved in that line of cases, namely: is it constitutional to seize a debtor's property without notice and a hearing? Before *Sniadach* the answer of most lawyers and students even remotely conversant with this aspect of debtor-creditor relations would have been a simple "yes." *Sniadach*, however, overturned Wisconsin's provisional remedy statutes,⁵ the

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1. 395 U. S. 337 (1969).

2. 407 U. S. 67 (1972).

3. 416 U. S. 600 (1974).

4. 419 U. S. 601 (1975).

5. Provisional remedies is a term frequently used to cover a broad range of pre-judgment remedies available to creditors. See, S. RIESENFELD, *CASES AND MATERIALS ON CREDITORS' REMEDIES AND DEBTORS' PROTECTION*, 177-203 (2d ed. 1975) [hereinafter cited as RIESENFELD]. This term, as well as the term summary seizure (which means the same thing, since a debtor's property is seized without notice or hearing) will be used interchangeably throughout this article.

There are several terms used to denote the process whereby the creditor seizes or freezes (this latter meaning that the debtor's property may not actually be seized but is still placed beyond the debtor's reach; the debtor is barred from its use) the debtor's property. The term most commonly used to describe the actual seizure of the debtor's property is attachment. This term is used in Virginia when property in the debtor's possession is seized. It is also used when the debtor's property is in the possession of a third party (usually a principal debtor) and is taken from that party or that party is ordered to withhold the property from the debtor pending the outcome of the creditor's underlying cause of action against the debtor. This latter process is called garnishment in most jurisdictions. In Virginia the term garnishment describes the same process *after* judgment.

Detinue and replevin are used interchangeably throughout this article. In the common law

kind of statutes that were commonplace in most states but, as it turned out, unconstitutional. Since most lawyers and students would have routinely answered "yes" to the issue posed above, the surprise following the *Sniadach* decision can be easily imagined. For example, some four years after *Sniadach*, Professor William D. Hawkland wrote that not only were many surprised at the way the court had decided the case but were surprised that "the action was brought in the first place."⁶

The surprise has long since worn off and been replaced by dismay in many quarters. Prior to the *Sniadach* line of cases there was stability and certainty, and even though the existing provisional remedies were recognized as harsh they were at least of ancient origin.⁷ Indeed, Justice Holmes, in one of his less celebrated opinions,⁸ observed that "nothing is more common than to allow parties alleging themselves to be creditors to establish in advance by attachment a lien dependent for its effect upon the result of the suit."⁹ He added that this provisional remedy is a "familiar method . . . and is open to no objection."¹⁰

there was a clear line separating the two, and the line still exists in a number of states. Broadly speaking, though, they refer to the action whereby the creditor seizes property in which he (the creditor) has a pre-existing interest; generally a consensual interest, a U.C.C. Article 9 security interest in most instances. For a full account of these last four terms, see Levy, *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 YALE L.J. 52 (1968); Riesenfeld, *Collection of Money Judgments in American Law—A Historical Inventory and a Prospectus*, 42 IOWA L. REV. 155 (1957).

6. Hawkland, *The Seeds of Sniadach: Flower or Weed?*, 78 COMM. L.J. 245 (1973) [hereinafter cited as Hawkland].

7. Professor Riesenfeld traces the origin and development of provisional remedies. A means of reaching a debtor's property without a judgment originated early in the law. The ease with which creditors could reach a debtor's property and the variety of conditions under which this could be done evolved in relatively recent times and was something of an American innovation. See RIESENFELD, *supra* note 5, at 244-53.

8. *Coffin Bros. & Co. v. Bennett*, 277 U.S. 29 (1928). The case upheld a Georgia statute which allowed attachment of a debtor's property prior to notice and a hearing.

9. *Id.* at 31.

10. *Id.* Before appeal to the U. S. Supreme Court, the provisional remedy in *Sniadach* was upheld by the Wisconsin Supreme Court. The lower court dissenters in the *Sniadach* case, however, were quite critical of Justice Holmes' reasoning in the *Coffin Bros.* case, calling it "specious." *Family Finance Corp. v. Sniadach*, 37 Wis.2d 163, 154 N.W.2d 259, 268 (1967). It was this dissent that was ultimately proved correct. In point of fact the majority in *Sniadach* was openly impressed with the dissenters in the Wisconsin Court. Harlan, in his concurring opinion, directs the reader to compare the majority and dissenting opinions in the lower court. 395 U.S. at 343 (Harlan, J., concurring).

Objection came from Ms. Christine Sniadach several decades later, an objection that was to prove successful. Twice since her case, and the line of cases that was to follow, the Virginia House of Delegates has revised parts of the state's provisional remedies statutes. The purpose of this article is to examine those legislative efforts¹¹ in order to see if they will pass constitutional muster in the event they are tested by a latter day Sniadach. Implicit is the thought that the *Sniadach* line of cases has in fact provided a standard for judges to evaluate existing statutes and for draftsmen to see and follow. The dismay that this line of cases has generated has caused a number of writers to doubt that such standards exist. They seem to be of the opinion that the Supreme Court was given the opportunity in the '70's to expand due process protection of property interests, not unlike the opportunity presented the Warren Court in the criminal area in the '60's; but, unlike the Warren Court, this Court, these writers feel, has created a state of flux due to the inconsistency and obscurity of its opinions from *Sniadach* through *Di-Chem*.¹²

In spite of the imposing volume of criticism wrought by this flux, there is general agreement that outlines,¹³ dim as they may be, are beginning to emerge, and they are discernible enough to act as guidelines for testing the constitutionality of state provisional remedy statutes. To see these outlines more clearly, one must be familiar with the uneven course taken by the Court from *Sniadach* to *Di-Chem*. *Sniadach* and *Fuentes*, the first of the line, stunned the creditor community,¹⁴ but after they were decided, everyone knew the rules of the game, new though they were. Even if problems were

11. There are many pre-judgment remedies, e.g., mechanics liens, landlord liens, et cetera. This article will analyze the constitutionality only of Virginia's attachment and detinue statutes.

12. In addition to those law review writers whose works are cited elsewhere and discussed at length and who agree that standards are discernable, other commentators are, for the most part, highly critical of the Court's failure, in their view, to provide sound doctrine for this line of cases. See, e.g., Newton, *Procedural Due Process and Pre-judgment Creditor Remedies: A Proposal for Reform of the Balancing Test*, 34 WASH. & LEE L. REV. 65, 68-79 (1977); *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 71-83 (1974); Weisman, *Mitchell v. W. T. Grant - Prehearing Seizure - To Be or Not to Be*, 30 MO. B.J. 474; Note, *Sniadach, Fuentes, and Mitchell: A Confusing Trilogy and Utah Prejudgment Remedies*, 1974 UTAH L. REV. 536, 542-47.

13. See, e.g., text accompanying notes 101 through 136 *infra*.

14. See, e.g., Hawkland, *supra* note 6.

left unresolved following them, *Sniadach* and *Fuentes* were logically consistent; property rights under the fourteenth amendment were established with nearly the same clarity that prevailed before. This clarity, however, was quickly replaced by an opaqueness through which constitutional guidelines were at first hardly discernible. It was *Mitchell* that clouded the relatively clear vista opened by *Sniadach* and *Fuentes*. But *Mitchell* proved to be a step, not at first recognized, in a new—and some would say wrong—direction. New departures by their very nature generally create initial confusion. *Mitchell* did this. When the direction *Mitchell* was moving in became more obvious, the case, in retrospect, became more meaningful. But first there was *Sniadach* and *Fuentes*, and *Sniadach* had an opaqueness of its own, the first in its line as *Mitchell* was to be the first in its.

II. THE DEVELOPMENT OF SUPREME COURT AUTHORITY

A. *Sniadach and Fuentes*

Sniadach is a familiar enough story—the more so for being a pathfinder—and may thus be retold with scant attention to details. Pursuant to Wisconsin statutes,¹⁵ Family Finance garnished the wages of one of its debtors, Christine Sniadach. Ms. Sniadach attempted to have the garnishment set aside, claiming that the statute allowed a creditor to freeze her wages before the trial that would determine the validity of Family Finance's underlying claim.¹⁶ She claimed she had thus been deprived of her property without due process of law. To the surprise of practically no one at the time, the Wisconsin Supreme Court upheld the statutes.¹⁷ On certiorari, however, the United States Supreme Court reversed.¹⁸

Like the Georgia statutes Justice Holmes had referred to, nothing was more commonplace than the Wisconsin statutes tested in *Sniadach*. Thus, following the decision, most states were on notice that their long standing provisional remedy statutes were constitu-

15. WIS. STAT. §§ 267.04(1), .07(1), .18(2)(a) as cited in 395 U.S. at 338-39.

16. As the Court points out in *Sniadach*, the creditor could garnish the wages before serving a summons on the debtor. 395 U.S. at 338. Debtors would typically learn of the suit upon discovering that their property had already been seized or otherwise frozen.

17. *Family Finance Corp. v. Sniadach*, 37 Wis. 2d 163, 154 N.W.2d 259 (1967).

18. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

tionally suspect. Justice Douglas, writing for the majority, and Justice Harlan, in a concurring opinion, made it clear, however, that such statutes would not necessarily be struck down wholesale; some provisional remedies might be constitutionally available to creditors. Justice Douglas said that property might validly be seized prior to trial and judgment in "extraordinary situations" and he cited a number of cases supporting this position.¹⁹ He went on to observe that there was no state or creditor interest in the *Sniadach* case that deserved special protection.²⁰ It was the debtor in this case that deserved special protection since wages, "a specialized type of property,"²¹ had been garnished.

Since Justice Douglas said that a creditor's as well as a state's interest might be deserving of special protection, a large question was left open: what creditor interest(s) should be protected? Of particular concern was the position of the secured creditor. Was a security interest the kind of interest deserving special protection? Was a statute that gave a *secured* creditor the power to seize property constitutional?

Other questions remained unanswered. Two were of particular importance. First, the majority in *Sniadach* was of the opinion that, as was above noted, even general creditors might summarily seize or freeze property in *extraordinary situations* and still not violate the due process clause of the fourteenth amendment. Exactly what these extraordinary situations might be remained unclear. Second, Justice Douglas stressed the point that wages were a special type of property. He was concerned about the potential economic disaster that faced a working person whose wages were garnished. It appeared from the opinion that the debtor's other property, except for wages, was still subject to summary seizure. But language surrounding this portion of the opinion was broad enough to support the view

19. *Id.* at 339. J. Harlan, concurring, agreed; "special situations," he notes, referring to the same case Douglas had cited, might justify prehearing seizure. *Id.* at 343. Some of the cases cited and the full meaning of the "extraordinary situations" exception to the requirement of a hearing prior to seizure or freezing of property will be discussed at points elsewhere in the article. It might be said that the "extraordinary situations" exception has proven to be one of the most puzzling of the many problems in the *Sniadach* line of cases. See, e.g., notes 37-40 *infra*, and accompanying text.

20. 395 U.S. at 339.

21. *Id.* at 340.

that the majority did not intend to limit the new due process protection to wages. Justice Harlan's concurrence lent support to this interpretation.²² Nonetheless, the view persisted, and persists to this day, that the pre-seizure protection announced in *Sniadach* should be limited to wages.²³

Fuentes, responding to most of these questions, broke like a thunder clap over the creditor community. Hopes that wages might be the only property immune from summary pre-judgment seizure; that secured creditors had an interest worthy of special protection; that there might be a broad number of extraordinary situations under which creditors could summarily seize a debtor's property—all these hopes were dashed when the *Fuentes* decision was handed down.

Fuentes differed in many respects from *Sniadach*. The most obvious of these was that the creditor seizing the property had a security interest in it, unlike the general unsecured creditor in *Sniadach*. The stage was set to answer at least one of the major issues left unanswered in *Sniadach*. Firestone, the creditor in *Fuentes*, seized, under a typical replevin statute, a stereo and gas stove in the possession of Ms. Fuentes in which it (Firestone) had a security interest. Firestone filed suit against Ms. Fuentes when, following a dispute with Firestone, she failed to pay an installment due on the goods. The replevy of her goods took place at once and her first notice of the action occurred when the goods were seized. Before a three-judge federal district court, the statute under which Firestone had replevied Ms. Fuentes' goods was held constitutional.²⁴ On appeal, the Supreme Court vacated and remanded.

Sniadach, Justice Stewart said in writing for the majority of the Court, should not be read as protecting only certain types of property interests, such as necessities.²⁵ The fourteenth amendment, he

22. Justice Harlan took no notice of the *kind* of property seized. Whatever its nature, he implied, *no* property can be seized unless a hearing, at which an inquiry will be made into the creditor's underlying claim, is provided the debtor *prior* to seizure. See 395 U.S. at 342-43.

23. See, e.g., *North Georgia Finishing, Inc. v. Di-Chem*, 419 U.S. 601, 614-15 (1975) (Blackmun, J., dissenting).

24. The statutes tested in the case were FLA. STAT. ANN., §§ 78.01, .07, .08, .10, .13. See 407 U.S. at 73-74.

25. 407 U.S. at 88-90.

continued, makes no such fine distinctions; property generally is protected.²⁶ So it was that in a brief span of an otherwise rather lengthy opinion the hope was shattered of having *Sniadach* interpreted as requiring a pre-seizure hearing only where necessities—or even more narrowly, wages—were concerned.

Other hopes were likewise dashed. Justice Douglas, recall, had written in *Sniadach* that there could be unusual conditions “requiring special protection to a state or creditor interest,”²⁷ and this had given rise to the thought that secured creditors might have an interest worthy of special protection. Firestone, in the *Fuentes* case, was just such a secured creditor. Nevertheless, Justice Stewart, writing for the majority in the case, was ill-disposed to provide such protection. His reading of past decisions in which pre-hearing seizures had been allowed was much narrower than Douglas’. There are, to be sure, situations in which seizing property summarily will be constitutional. In Justice Stewart’s opinion, however, these situations must be “truly unusual.”²⁸ He adds that in each instance in which the Court has upheld pre-judgment seizure of property with no notice or hearing “the seizure has been directly necessary to secure an important governmental or general public

26. *Id.* at 89-90.

27. 395 U.S. at 339 (emphasis added). The following cases were cited instances of situations requiring special protection to a state or creditor interest: *Ewing v. Mytinger and Casselberry, Inc.*, 339 U.S. 594 (1950); *Fahey v. Mallonee*, 332 U.S. 245 (1947); *Coffin Bros. v. Bennett*, 277 U.S. 29 (1928); and *Ownbey v. Morgan*, 256 U.S. 94 (1921). Of these four cases only the *Ownbey* case involved a general interest, namely, attaching a nonresident debtor’s property in order to get quasi-in-rem jurisdiction (a procedure found constitutional in the case). All the others involved state or public interests. In *Fahey* the Federal Home Loan Bank Board appointed a conservator (in accordance with a statute empowering the Board to do so) for a mismanaged bank; in the *Ewing* case, misbranded articles were condemned and seized by the authority granted under the Federal Food, Drug, and Cosmetic Act; in the *Coffin Bros.* case a state superintendent of banks levied upon a shareholder of an insolvent bank in order to meet creditor claims. So, while using somewhat broad language that special circumstances might dictate protecting a creditor’s interest, the only instance Douglas points to is that in which the Court upheld a state’s foreign attachment statute. See notes 8-10 *supra*, and accompanying text. Employing attachment statutes for this latter purpose has recently been declared unconstitutional. See note 147 *infra*.

28. 407 U.S. at 90. Justice Stewart cites those cases used by Justice Douglas in *Sniadach*. See note 27 *supra*. But, as the text discloses, he puts a different reading on them. He also cites *McInnes v. McKay*, 279 U.S. 820 (1929). This involved a general creditor in Maine attaching a Maine debtor’s property summarily. It is difficult to see what public or governmental interest was being served in that case. Nonetheless it is there.

interest.”²⁹ Seizing property prior to judgment to secure quasi-in-rem jurisdiction is seen by Justice Stewart as “clearly a most basic and important *public* interest.”³⁰ This, in his opinion, is not the case where property is summarily seized in order to protect a creditor’s prior contractual interest in the property, the kind of interest which Firestone had. What public interest would be served by giving Firestone summary seizure power? While one might think of an answer (e.g., contractual stability), Justice Stewart takes the position that a creditor’s claim, even a pre-existing consensual claim, to goods in the possession of the debtor can hardly rise to the level of a general *public* interest. There is here nothing more than private gain at stake. A state’s summary seizure statutes accomplish nothing more exalted than allowing a creditor to satisfy a debt or settle a score. And so Justice Stewart concludes: “[b]ut state intervention in a private suit dispute hardly compares to state action furthering a war effort or protecting the public health.”³¹ In the same cases in which Justice Douglas (in *Sniadach*) had spotted a creditor interest that was protected, Justice Stewart could spot none. Justice Douglas, part of the majority in *Fuentes*, evidently underwent a change of opinion, now that he had another opportunity to survey the cases. So much then for the possibility that a secured creditor’s interest in goods might have been an interest elevated to the level of a public interest deserving special protection.

The fact of the matter is that Justice Stewart makes no distinction between secured and unsecured creditors in *Fuentes*. This was no mere oversight. The dissent, written by Justice White, saw the difference as crucial. He urged the Court to throw this obvious difference into the balance. A secured creditor had as much right in having the property protected as the debtor who had possession. To protect this interest, the property could be seized and held pending

29. 407 U.S. at 91.

30. *Id.* n.23 (emphasis added). This appears to be the only instance where a private creditor could seize property summarily in Justice Stewart’s opinion. In any event, irrespective of whether Justice Douglas’ opinions in *Sniadach* are any longer authoritative, using summary seizure to obtain quasi-in-rem jurisdiction is no longer valid. See note 147, *infra*, and accompanying text. Justice Stewart, unsupported by citations to cases, adds that imminent danger that the debtor will destroy or conceal the goods might justify summary seizure. 407 U.S. at 93.

31. 407 U.S. at 93.

outcome of the main suit.³² But it was Justice Stewart's opinion, and that of the majority for which he wrote,³³ that it is the continued peaceful possession of property that is covered by the due process clause, as long as the one in possession has a significant interest in the thing possessed.³⁴ Notice and hearing *before* the taking, irrespective of how promptly the deprived party might by statute get the goods returned,³⁵ is, in his view, the only way to protect this absolute right to continued peaceful possession. Secured and general creditors, one must conclude from Stewart's opinion, are on the same footing. General creditors, in a prior hearing, would have to establish default and thus the right to *some* piece(s) of the debtor's property; a secured creditor would have to establish default and thus the right to a *specific* piece(s) of the debtor's property.³⁶ In either case, private gain, as was seen above, is all that is at stake. Creditors, therefore, may not summarily seize their debtor's property, whatever the contractual arrangement concerning the property may have been.

There remained only the final hope that the *Fuentes* Court would, like the Court in *Sniadach*, recognize that there are extraordinary situations in which a creditor might validly seize a debtor's property without notice and hearing. Justice Douglas, in *Sniadach*, cited a few instances in which the Court in the past had validated summary seizure. But this part of his opinion was singularly opaque, giving rise to several questions. Were the cases he cited³⁷ to support the proposition that the Court had, on occasion, validated seizure of

32. *Id.* at 97, 99-102.

33. The majority was a slim one. Only seven judges participated in the *Fuentes* decision. This was to create some bitterness on the Court. See *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 615-17 (1975) (Blackmun, J., dissenting). And its precedential quality was questioned openly in at least one case. In *Roofing Wholesale Co. v. Palmer*, 108 Ariz. 508, 502 P.2d 1327, 1330-31 (1972), the Arizona court felt it was not bound by the 4-3 decision in *Fuentes*!

34. 407 U.S. at 86-87.

35. *Id.* at 80-82. Under the Florida statutory scheme, the only way the defendant could get the seized property returned was by posting a bond, double in amount of the value of the property. FLA. STAT. ANN. § 78.13 (Supp. 1972-73).

36. "Establish" default is used guardedly. The exact nature of the pre-seizure hearing was nowhere spelled out in either *Sniadach* or *Fuentes*. Broadly speaking, it would appear that the requirement would be that the plaintiff would have to prove the "probable validity of the underlying claim." See 395 U.S. at 343 (Harlan, J., concurring).

37. See notes 27 and 29 *supra*, and accompanying text.

property prior to notice and hearing to be seen as the *sole* grounds for such seizure? Or were the cases to be seen as merely suggestive? Might not analogous situations arise, thus giving breadth to "extraordinary" situations? If this latter view were taken, the argument that upon default by the debtor a *secured* creditor's right to the protection of his interest in the property is such an extraordinary situation deserving special protection might well carry the day. Justice Stewart, though, put what appeared to be a very narrow reading on the extraordinary situations cases. The bypassing of elementary due process (*i.e.*, notice and a hearing prior to seizure of property) had been endorsed by the Court, he observed, only in truly special situations. In Justice Stewart's opinion the cases cited by Justice Douglas when discussing this point in *Sniadach* disclosed the following:

First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.³⁸

The passage itself is not free of ambiguity, which is why it was said above that he "appeared" to be narrowing the extraordinary situations idea raised by Justice Douglas. If all three things must be present before there is an extraordinary situation under which the court would approve summary seizure, then the right to this process would be rare indeed. The better view, however, is that any one of the three will constitute an extraordinary situation.³⁹ In any event,

38. 407 U.S. at 91.

39. See, *e.g.*, Kay & Lubin, *Making Sense of the Prejudgment Seizure Cases*, 64 Ky. L.J. 705, 709-11 (1976) [hereinafter Kay & Lubin]; Catz & Robinson, *Due Process and Creditor's Remedies: From Sniadach and Fuentes to Mitchell, North Georgia and Beyond*, 28 RUTGERS L. REV. 541, 555-56 (1975) [hereinafter Catz & Robinson]. Both articles point out that the cases Justice Stewart cites in support of his threefold test indicates that each of the cases had all three factors present, in which event summary seizure would be allowed in very few instances. But as Catz and Robinson explain, Justice Stewart himself casts doubt on the proposition that all three must be present in order to validate summary seizure. Immediately following the threefold test Justice Stewart observes that immediate danger of a debtor destroying goods could be an instance in which summary seizure will come into play. A

Justice Stewart observed that the statutes in *Fuentes*—broadly drawn, serving private interests only, with no state official deciding the need for seizure—fell far short of minimal due process standards.⁴⁰

With *Fuentes*, a great deal of certainty returned to the area of provisional creditor remedies. Creditors generally may not have liked the decision,⁴¹ but they knew where they stood. Local statutes that failed to provide for notice and a hearing prior to seizure were unconstitutional. Only in extraordinary instances—narrowly spelled out in the statute—could notice and hearing be bypassed.

B. *Mitchell and Di-Chem*

These two cases revived somewhat the flagging hopes of creditors. At the same time, however, these are the very cases that have created the most confusion. The two are filled with obscurities and inconsistencies. Nonetheless, some writers, as was pointed out earlier, feel that discernible guidelines are emerging in spite of the difficulties the cases present.

If there is confusion not capable of being clarified, it can be readily accounted for. *Mitchell* was startlingly similar to *Fuentes*, but the Louisiana statutes⁴² being tested in *Mitchell* were upheld while those in *Fuentes* were struck down.⁴³ In accordance with the Louisiana Code, the creditor in *Mitchell* seized property in which he had a security interest. There was no notice nor a hearing prior to the seizure. Now, if the statutes in *Mitchell* were to be upheld—and, of course, they were—then *Mitchell* and *Fuentes* would be irreconcilable, for *Fuentes*, and its rule requiring pre-seizure notice and hearing except in truly extraordinary situations, applied whether the creditor seizing disputed property had an interest in it or not.

fraudulent type act, in other words, would justify bypassing notice and hearing even if public or governmental interests are absent. Kay & Lubin reach the same conclusion on different, more involved grounds.

40. 407 U.S. at 90-93.

41. See note 12 *supra*.

42. These statutes appear as an appendix to Justice White's opinion, 416 U.S. at 620-23. They are, by the way, the only statutes upheld in the *Sniadach/Di-Chem* line of cases.

43. Justice Stewart's dissent in *Mitchell* underscores the point that the two cases, the statutes in both cases, were alike. He concluded that the Louisiana statute was indistinguishable from that overturned in *Fuentes*. 416 U.S. at 634.

Fuentes, it would seem to follow, must be reversed. Yet, Justice White, writing for a plurality of the Court, steadfastly refused to overturn *Fuentes*. The two cases were reconcilable, in the eyes of the majority, on their facts. Even though in both *Fuentes* and *Mitchell* the creditors had a similar security interest in the property seized, the statutory scheme under which the creditor seized the property in *Mitchell* provided minimum due process protection for the debtor that was lacking in *Fuentes*. In Justice White's words: "[W]e are convinced that *Fuentes* was decided against a factual and legal background sufficiently different from that now before us and that it does not require the invalidation of the Louisiana sequestration statute, either on its face or as applied in this case."⁴⁴

Justice White distinguished *Fuentes* on four grounds: (1) The statutes in *Mitchell* required the creditor to allege under oath the facts entitling him to the writ, whereas in *Fuentes* the creditor had merely to make a bare assertion that he was entitled to a writ. (2) The Louisiana statutes in *Mitchell* provided judicial control of the summary seizure process from beginning to end; in *Fuentes* the orders could be issued by a clerk of the court.⁴⁵ (3) The statutes in *Mitchell* were narrowly drawn. That is, the creditor, in order for the judge to issue the writ by which the debtor's property could be seized, had to assert only the fact that he had a lien on certain described property. Such assertions are susceptible to documentary proof, whereas in *Fuentes*, in order for the described property to be replevied, the creditor had to allege that the property was being *wrongfully* withheld, the kind of allegation that almost demands an adversarial rather than an *ex parte* proceeding.⁴⁶ (4) Unlike the

44. 416 U.S. at 615.

45. Concerning these first two grounds, the authors of a recent article had this to say:

It is interesting to note that both of these grounds for distinction have close analogies in the criminal field: the validity of warrants for arrest or search has long been held to depend not only on their issuance by a judicial officer but also on whether the facts have been presented to that officer from which he can independently judge whether or not probable cause exists. It is almost as if the *Mitchell* Court is carrying into the due process clause the very special requirements of the fourth amendment.

Catz & Robinson, *supra* note 39, at 560-61 (footnote omitted).

46. See 416 U.S. at 617. As Catz and Robinson point out in their article, this third ground of distinction has a "first-blush rationality about it . . ." Catz & Robinson, *supra* note 39, at 560. In point of fact, however, the Louisiana statutes required a person seeking the sequestration of property to allege facts hardly susceptible to documentary proof. For instance, if

statutes in *Fuentes*, the Louisiana Code provided the defendant with an opportunity for an immediate post-seizure hearing at which the burden is placed on the plaintiff to prove the grounds upon which the writ was issued.

A statutory scheme, then, with these protective features will pass constitutional muster, but there is one major proviso: even with these protective features a *pre-seizure* hearing can be dispensed with *only* if the creditor has a pre-existing interest in the property. This is clearly the rationale of the case, a point concerning which writers on this topic are in general agreement. For instance, Catz and Robinson observe: "[t]he whole thrust of the *Mitchell* majority opinion is merely an elaboration of his [White's] dissent in *Fuentes*."⁴⁷ In that dissent Justice White had argued that a creditor's secured interest in property held by an alleged defaulting debtor was an interest deserving protection. This could be accomplished by seizing the property and keeping it in custody pending the outcome of the preliminary hearing that would follow. The creditor's interest, therefore, could justify by-passing pre-seizure notice and hearing requirements if the debtor is provided the other safeguards, *i.e.*, fact pleading, judicial control and so on. The creditor's pre-existing interest in the property is the crucial factor in the dissent.⁴⁸ If the creditor has no pre-existing interest in the debtor's property and is merely a general unsecured creditor, the debtor is entitled to notice and hearing *prior* to seizure.

If the creditor has a special interest in the property the process due the debtor undergoes change. The dissenter in *Fuentes* writes this in *Mitchell*:

one were proceeding under some theory other than a lien theory to sequester property an allegation had to be made that ". . . 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." LA. CODE CIV. PRO. ANN. art. 3571 (West 1961). Surely these are the kind of allegations the proof of which require adversary rather than *ex parte* proceedings. It is true enough that in *Mitchell* the creditor, proceeding under a lien theory, had only to show the existence of the lien and default. Still, other proceedings are *possible* under the statute. But Justice White said that the statute *on its face* and the facts *as applied* in the case provided defendants with the minimum protection required under the Constitution. This result is achieved, as Catz and Robinson observe, ". . . only at the expense of serious constriction of the statute." Catz & Robinson, *supra* note 39, at 560.

47. Catz & Robinson, *supra* note 39, at 558.

48. See 407 U.S. at 100-01.

Plainly enough, this is not a case where the property sequestered by the court is exclusively the property of the defendant debtor. The question is not whether a debtor's property may be seized by his creditors, *pendente lite*, where they hold no present interest in the property sought to be seized. The reality is that both seller and buyer had current, real interests in the property, and the definition of property rights is a matter of state law. Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well.

With this duality in mind, we are convinced that the Louisiana sequestration procedure is not invalid, either on its face or as applied.⁴⁹

In sum, it seemed clear after *Mitchell* that, assuming other safeguards are available to the debtor, a creditor with a prior interest in property could have it summarily seized. There being no such interest, *Sniadach* and *Fuentes* would apply to prohibit summary seizure. All of this put the status of *Fuentes* in doubt. Justice White had distinguished *Fuentes*, but Justice Stewart was unable to do so. Even though Justice White steadfastly refused to overturn *Fuentes*, the case, as one writer recently put it, may have been alive but the state of its health was serious.⁵⁰

Nathaniel Hansford, one of the principals in the *Di-Chem* case and the author of a recent article about it,⁵¹ intimates that the Supreme Court's decision in the *Di-Chem* case was "curious."⁵² Indeed. Striking similarities to earlier cases were present once more as *Di-Chem* and *Sniadach* bore strong resemblances to one another in almost every major regard save one. In *Di-Chem*, as in *Sniadach*, a creditor (*Di-Chem*) had effectively frozen a debtor's (Northern Georgia's) property by garnishment in accordance with Georgia statutes which had no pre-garnishment notice or hearing provisions, much like those in Wisconsin. The major regard, then, in which the two cases differed is that in *Sniadach* a consumer's wages were

49. 416 U.S. at 604-05.

50. Scott, *Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process*, 61 VA. L. REV. 807, 832 (1975) [hereinafter cited as Scott].

51. Hansford, *Procedural Due Process in the Debtor-Creditor Relationship: The Impact of Di-Chem*, 9 GA. L. REV. 589 (1975) [hereinafter cited as Hansford].

52. *Id.* at 597-609 (for a more detailed account of the course of events from the filing of the case in the Georgia state courts to its resolution).

garnished, whereas in *Di-Chem* it was a business' (Northern Georgia's) commercial bank account that was garnished.

When Northern Georgia's problems began, *Sniadach* and *Fuentes* had been decided. *Mitchell* had not. Which is to say that statutes failing to provide for pre-seizure notice and hearing except in extraordinary situations were unconstitutional. Surprisingly, however, the Georgia Supreme Court found the statutes constitutional.⁵³ *Fuentes* was ignored⁵⁴ and, the court reasoned, *Sniadach* applied only to wages: all other property, as had always been the case, was subject to summary seizure.⁵⁵ By ignoring *Fuentes*, the Georgia Supreme Court found a critical difference between wage earners and commercial debtors. Meanwhile, in another case,⁵⁶ a three-judge federal district court held the same Georgia statutes unconstitutional. Certiorari was subsequently granted the petitioners in *Di-Chem*, as could be expected under the circumstances.⁵⁷

Before the case was heard, the *Mitchell* decision was handed down. Nevertheless, a favorable judgment for the petitioning debtor in *Di-Chem* could still be reasonably expected.⁵⁸ The *Mitchell* decision may have represented a retreat from *Fuentes* in that pre-seizure notice and a hearing were no longer required in *all* cases:⁵⁹ a creditor

53. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 231 Ga. 260, 263-64, 201 S.E.2d 321, 324 (1973).

54. There was precedent for ignoring *Fuentes*, or at any rate giving it the figurative back of the hand. See note 33 *supra*.

55. The Georgia court's view that *Sniadach* should apply to wages only was not without precedent. Other courts refused to extend *Sniadach* beyond that narrow limit. 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); *First Nat'l Bank & Trust Co. v. Pomona Mach. Co.*, 107 Ariz. 286, 486 P.2d 184 (1971); *Robinson v. Loyola Foundation, Inc.*, 236 So.2d 154 (Dist. Ct. App. Fla. 1970); *Michael's Jewelers v. Handy*, 6 Conn. Cir. 103, 266 A.2d 904 (1969).

56. *Morrow Elec. Co. v. Cruse*, 370 F. Supp. 639 (N.D. Ga. 1974).

57. The circumstance other than this open split between the federal and state courts was that the Supreme Court had, up to *Di-Chem*, dealt with *consumer* attachments and garnishments, the apparent major distinction between *Di-Chem* and *Sniadach* at that time. See Hansford, *supra* note 51, at 598-99. Should the property of a *commercial* debtor be given different, perhaps *lesser* protection, was a question yet to be answered by the Court. *Di-Chem*, of course, presented that issue directly to the Court. But it must be kept in mind that *Mitchell* still had not been decided.

58. See Hansford, *supra* note 51, at 603-04.

59. Pre-seizure notice and a hearing were previously not required except in extraordinary situations. See notes 37-40 *supra*, and accompanying text. This issue was not raised, however, in *Di-Chem*.

with a secured interest in particular property might validly seize it prior to judgment. The creditor in *Di-Chem*, however, had no such interest.⁶⁰ Therefore, *Sniadach* and the now narrowed *Fuentes* applied—notice and a hearing had to be provided the debtor prior to seizing property, providing of course the debtor had a cognizable interest in the property.⁶¹ Since there were no provisions for notice or a hearing prior to seizure, it followed, so the appellants argued,⁶² the Georgia statutes were unconstitutional.

The Supreme Court was destined to agree. It did so in a manner that was to create the storm of criticism referred to earlier.

Again writing for the majority, Justice White began by citing both *Sniadach* and *Fuentes* favorably, but the latter only to support the proposition that deprivation of property, even though the length and severity may vary, is still a taking. Quoting *Fuentes*, the Court again stated that “[t]he Fourteenth Amendment draws no bright lines around a three-day, ten-day, or fifty-day deprivation of property. Any significant taking of property by the state is within the purview of the Due Process Clause.”⁶³ Justice White also cited *Fuentes* and *Sniadach* to support the proposition that deprivation of the property of commercial as well as consumer defendants falls within the purview of the fourteenth amendment.⁶⁴ Having such arguments at its disposal, the conclusion of the Court would seem readily predictable. But Mr. Hansford describes the surprising route the Court chose to take. “After citing *Fuentes* with approval,” he writes, “the Court curiously failed to take the further step of declaring the Georgia procedure unconstitutional on the ground that it lacked the pre-seizure notice and hearing demanded by *Fuentes*. Instead, the Court compared the Georgia statutes with the Louisiana sequestration procedure upheld in *Mitchell* and struck down the Georgia scheme because it lacked the adequate safeguards found in *Mitchell*.”⁶⁵

60. In addition, the Georgia statutes under attack in *Di-Chem* did not have the other protective features provided an aggrieved debtor under the Louisiana statutes. See notes 45 and 46 *supra*, and accompanying text.

61. See text accompanying note 34 *supra*.

62. See Hansford, *supra* note 51, at 603.

63. 419 U.S. at 606.

64. *Id.* at 608.

65. Hansford, *supra* note 51, at 603-04.

Fuentes, narrowed and even thought dead in many quarters, was definitely alive, but barely, standing evidently only for limited principles. More importantly, *Mitchell*, thought to apply only if the plaintiff had a pre-existing interest in property summarily seized, was applied in *Di-Chem*, where the plaintiff was a general unsecured creditor.

As has been indicated several times, the statutes in *Fuentes* were struck down because they failed to provide defendants with pre-seizure notice and hearing—or so most everyone thought. Referring to *Fuentes* in *Di-Chem*, however, Justice White stated that “[b]ecause the official seizures had been carried out without notice and without opportunity for a hearing or other safeguards against mistaken repossession they [the statutes challenged in *Fuentes*] were held to be in violation of the Fourteenth Amendment.”⁶⁶ Other safeguards? If there were any safeguards other than pre-seizure notice and hearing that would satisfy due process, the *Fuentes* decision neglected to mention them. Justice White, in *Di-Chem*, obviously meant those safeguards found in *Mitchell* because immediately following the passage quoted above he repeats the *Mitchell* safeguards and finds that the Georgia statute has none of them. The *Mitchell* safeguards, then, are such that will serve the same purpose as pre-seizure notice and hearing, even if the plaintiff is a general unsecured creditor.⁶⁷ But, Justice White observed, the Georgia statutes had “none” of the safeguards.⁶⁸

The Louisiana statutes in *Mitchell* were found to have four safeguards against mistaken seizure,⁶⁹ the presence of which justified by-passing pre-seizure notice and hearing. Justice White, for reasons he left unexplained, recounts only three in *Di-Chem*, leaving out the requirement that the statute be narrowly drawn to the extent that a plaintiff’s claim is susceptible to documentary proof.⁷⁰

66. 419 U.S. at 606 (emphasis added).

67. Justice White observed that the *Mitchell* statutes, the ones that provided the other safeguards that were valid substitutes for pre-seizure notice and hearing, “permitted the seller-creditor holding a vendor’s lien to seize summarily the debtor’s property.” 419 U.S. at 606-07. The *Mitchell* statutes did indeed permit a limited kind of creditor to use the summary process. But Justice White, for whatever reason, chose not to pursue the distinction, even after mentioning it. He would now have the safeguards apply to unsecured creditors.

68. 419 U.S. at 607.

69. See text accompanying notes 44-45 *supra*.

70. 419 U.S. at 607.

An oversight? Or might a statute have the other three and not this latter and still pass constitutional muster?

Catz and Robinson suggest the possibility that not only may the requirement Justice White failed to include be dispensed with but that the presence of any of *one* of the *Mitchell* safeguards may make a statute constitutionally sufficient.⁷¹ Justice White had, after all, said that the Georgia statutes failed for the same reasons as those in *Fuentes* and that they were not saved by the *Mitchell* test because they contained *none* of the safeguards found in the Louisiana statutes.⁷² None? Can it be inferred that had the Georgia statutes provided the defendant with even *one* safeguard the statutes would thereby have been upheld? Catz and Robinson suggest that it is possible to make such an inference. But taking Justice White's "none of the savings characteristics" language in context, the inference suggested seems invalid. After making the assertion Justice White identifies the three areas in which the Georgia statute fails. The Georgia statute simply fails on all counts to provide minimal due process protection. In addition, Justice White in reinterpreting *Fuentes* said that pre-seizure notice and a hearing or other safeguards (plural) were needed to guard against mistaken seizure.⁷³ Something *more* than simply an early hearing following seizure would be needed before a statutory scheme of provisional remedies could pass constitutional muster.

Justice White wrote that the Georgia statute had "no provision for an *early* hearing."⁷⁴ In *Mitchell* he had stressed the fact that the Louisiana statutes provided the defendant with the right to a hearing *immediately* following seizure.⁷⁵ Does this mean, for example, a statute is constitutional if it requires a hearing seven days after the seizure of property, assuming of course that other safeguards are present? This may be *early* but it certainly is not immediate, at least not in the sense in which the right to a hearing was provided in Louisiana. It could be argued that such a statute would be valid,

71. See Catz & Robinson, *supra* note 39, at 563-64.

72. See note 68 *supra*, and accompanying text.

73. See text accompanying note 66 *supra*.

74. 419 U.S. at 607 (emphasis added).

75. 416 U.S. at 610.

that the *Mitchell* requirement of an *immediate* hearing had been modified.⁷⁶

On the other hand, "early" rather than "immediate" more aptly describes the realities of *Mitchell*. This is the way the "immediate" hearing events unfolded in *Mitchell*. On February 2, 1972, W. T. Grant Co. filed suit against Mitchell. On February 7 the sheriff executed the writ of sequestration.⁷⁷ Although Mitchell could have filed a motion to have the writ dissolved at once, he waited until March 3 to do so. The motion was heard on March 14 and was denied on March 16. In short, eleven days elapsed from the time the motion was filed until it was heard (presumably the same amount of time would have expired had Mitchell filed his motion immediately). And yet Justice White said the Louisiana statute was "not invalid, either on its face or as applied."⁷⁸ Apparently, a statute may provide for an immediate hearing, and if it takes eleven days it is still considered "immediate." An early hearing, quite obviously, is all that is required and is in reality what took place in *Mitchell*; the statute as it was applied was constitutionally adequate.

On the whole, then, *Di-Chem* could justifiably be portrayed as a singularly unsatisfactory performance. Justice Blackmun in dissent felt the Court gave an insufficient explanation of the standards used in striking down the Georgia statutes. As a result, doubts were cast over the constitutionality of similar statutes in other states.⁷⁹ Many critics agreed that the *Di-Chem* decision only added to the confusion in the field of creditor's remedies.⁸⁰

76. It has been so argued. "[N]otice and opportunity for an early hearing, is less stringent than the 'immediate' hearing requirement of the *Mitchell* statute . . ." 63 Geo. L. Rev. 1337, 1346 (1975) (emphasis added).

77. There was some doubt about the actual date of execution. February 7 was settled upon. See 416 U.S. at 603 n.2.

78. 416 U.S. at 605 (emphasis added).

79. Justice Blackmun, with whom Justice Rehnquist joined, said:

One gains the impression . . . that the Court is endeavoring to say as little as possible in explaining just why the Supreme Court of Georgia is being reversed. And, as a result, the corresponding commercial statutes of all other states . . . are left in questionable constitutional status, with little or no applicable standard by which to measure and determine their validity under the Fourteenth Amendment. This, it seems to me, is an undesirable state of affairs

419 U.S. at 614.

80. One writer's conclusion was that "[*Di-Chem*] increased the confusion surrounding the constitutional standard by which creditor's remedies are to be measured. [*Di-Chem*] will

Another disturbing aspect of the case is that the appellants' victory in *Di-Chem* may be pyrrhic from the viewpoint of debtors generally. If the *Mitchell* standards are to be applied even when the creditor has no pre-existing rights in the property seized, then rights of creditors to provisional remedies are not too dissimilar from those available prior to *Sniadach*.⁸¹ The majority seemed mindful of the fact that it was willing to protect the interests of unsecured creditors, for Justice Powell in the lone concurring opinion wrote:

Garnishment and attachment remedies afford the actual or potential judgment creditor a means of assuring, under appropriate circumstances, that the debtor will not remove from the jurisdiction, encumber, or otherwise dispose of certain assets then available to satisfy the creditor's claim. Garnishment may have a seriously adverse impact on the debtor, depriving him of the use of his assets during the period that it applies. But this fact alone does not give rise to constitutional objection. The State's legitimate interest in facilitating creditor recovery through the provision of garnishment remedies has never been seriously questioned.⁸²

This may obscure⁸³ the real differences of interests between secured and unsecured creditors, but the point is the Court appears to have determined that the interests of unsecured creditors are

produce chaos and confusion for those lawyers, judges and others who must work with the numerous pre-judgment seizure statutes." 1975 Wis. L. Rev. 860, 873-74. After making similar observations, however, most thoughtful critics saw *Di-Chem* as not being totally without merit; it does have certain guidelines. This, of course, is the position taken in this article. Mr. Hansford agrees, even after sharply attacking *Di-Chem*, that guidelines are available for legislative draftsmen to safely follow. See Hansford, *supra* note 51, at 608-09.

81. It has been suggested that there is an entirely different way to look at *Di-Chem*. The majority may have been saying that the Georgia statutes offered so little protection against mistakingly depriving a debtor of property that they not only failed the strict *Fuentes* standards (applicable where the creditor has no prior interest in the property) but also failed to pass even the much more liberal *Mitchell* standards (normally applicable only where a creditor has a prior interest in the property). "It may be that the [*Di-Chem*] majority takes the position that certain minimal procedural requirements must be fulfilled before any balancing of interests is necessary But if this is the case, the Court should have made it explicit." 1975 Wis. L. Rev. 860, 872-73. There is little in *Di-Chem*, however, to justify a claim that the majority even implicitly takes this position.

82. 419 U.S. at 610.

83. Catz & Robinson say that Powell's opinion puts secured and unsecured creditors on the same footing. Both interests, in his view, are worth protecting. See Catz & Robinson, *supra* note 39, at 565. See note 115 *infra*, for a fuller discussion of this point.

sufficient to warrant protection⁸⁴—if minimum safeguards are provided the defendant. The minimum safeguards were absent in Georgia. Had they been present, the Court seems to say clearly enough, the garnishment would have withstood the challenge. There would have been no balancing of the debtor's and creditor's interest in the property. The property would have been frozen pending the outcome of the early hearing or ultimate resolution of the main suit. In short, *Di-Chem* expanded the scope of *Mitchell*, thought to encompass only secured creditors, and at the same time modified the *Mitchell* safeguards by requiring an "early" rather than an "immediate" hearing.

Carey v. Sugar,⁸⁵ a case following closely upon the heels of *Di-Chem*, seems to support such a reading of *Di-Chem*. *Carey*, a *per curiam* decision, is no monument to clarity, but it does cast needed light on the shadowy outlines that can be perceived dimly in *Di-Chem*. In *Carey* the plaintiff garnished, in accordance with New York statutes, a debt owed by a third party to the defendant—a fact situation akin to that in *Di-Chem*. The statutory scheme the plaintiff employed gave plaintiffs seeking a money judgment the right to garnish (or attach) any time prior to judgment, and the plaintiff did not need to have any pre-existing interest in the property garnished or attached.⁸⁶ Unlike the Georgia statutes in *Di-Chem*, the grounds bestowing upon the plaintiff the right to attach or garnish were quite limited. Broadly speaking, the defendant must have fraudulently conveyed the garnished property, or have hidden it, or have commit-

84. Justice White does not give these or any similar *reasons* why an unsecured creditor should be due the *Mitchell* test. He appears content, as the text will subsequently demonstrate, to let the *Mitchell* safeguards substitute for pre-seizure notice and hearing.

85. *Carey v. Sugar*, 425 U.S. 73 (1976) (decided together with *Curtis Circulation Co. v. Sugar*, also on appeal from the same court).

86. The plaintiff employed the New York Attachment Statute, which provided the following:

An order of attachment may be granted without notice, before or after service of summons and at any time prior to judgment. It shall specify the amount of the plaintiff's demand, be indorsed with the name and address of the plaintiff's attorney and shall be directed to the sheriff of any county or of the city of New York where any property in which the defendant has an interest is located or where a garnishee may be served. The order shall direct the sheriff to levy within his jurisdiction, at any time before final judgment, upon such property in which the defendant has an interest and upon such debts owing to the defendant as will satisfy the plaintiff's demand together with probable interest, costs, and sheriff's fees and expenses.

N.Y. CIV. PRAC. LAW § 6211 (McKinney 1963).

ted similar quasi-criminal acts before the writ giving the plaintiff the right to summarily seize would issue.⁸⁷ The scheme, as will be seen, differed from the Georgia statutes in other respects as well.

A three judge district court,⁸⁸ using *Fuentes* and *Mitchell* as authority,⁸⁹ found the New York statutes unconstitutional. The court noted that the New York statutes were similar in some respects to the statutes upheld in *Mitchell*.⁹⁰ Nevertheless, the court concluded that the hearing provision was improper because it placed the burden of proof on the defendant to show the attachment was not necessary, rather than requiring the plaintiff to prove his underlying claim.⁹¹ The New York statute also failed, said the court, because it allowed summary seizure by a creditor who had no pre-existing

87. Section 6201, in its relevant parts, provided the following:

An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when: . . .

4. the defendant, with intent to defraud his creditors, has assigned, disposed of or secreted property, or removed it from the state or is about to do any of these acts; or

5. the defendant, in an action upon a contract, express or implied, has been guilty of a fraud in contracting or incurring the liability; or . . .

8. there is a cause of action to recover damages for the conversion of personal property, or for fraud or deceit.

N.Y. CIV. PRAC. LAW § 6201 (McKinney 1963 & Supp. 1976-77).

88. *Sugar v. Curtis Circulation Co.*, 383 F. Supp. 643 (S.D.N.Y. 1974).

89. *Sniadach*, the three-judge court felt, was unnecessary to the decision. *Sugar v. Curtis Circulation Co.*, 383 F. Supp. at 646. *Di-Chem*, of course, had yet to be decided, though it was to be argued within a month following the lower court's decision.

90. At the outset, the court compared the New York statutes to those tested in *Mitchell* and concluded that the New York statutes were unconstitutional; there were, however, several points at which the statutes compared favorably with those upheld in *Mitchell*. For instance, before the writ would issue the plaintiff had to provide bond that would indemnify the defendant in the event the plaintiff lost the suit; a judge, based on affidavits filed by plaintiff, determined if the writ would issue; and defense motions to dismiss would be heard promptly. 383 F. Supp. at 648.

91. The New York law did provide the defendant the right to a post-seizure hearing in which to move to dismiss the attachment. The district court concluded, however, that the New York statutes failed to provide the *right kind* of hearing. The Louisiana statutes in *Mitchell* required the plaintiff to prove his underlying claim and put the burden of proof on the plaintiff, whereas the New York statutes required a hearing in which the defendant was required to prove that the attachment was unnecessary to the security of the plaintiff. Proof of the validity of the underlying claim was not at issue, and the burden of proof of the issue being heard was shifted to the defendant. 383 F. Supp. at 648-49. These two grounds were enough to invalidate the New York statutes. The court, however, found the statutes deficient for two additional reasons. See notes 92 & 93 *infra*, and accompanying text.

interest in the property.⁹² Finally, the statute failed because the grounds upon which an attachment order was granted were not subject to documentary proof.⁹³ All of which put the *Carey* case more "within the *Fuentes* rather than the *Mitchell* zone."⁹⁴ That, of course, is to say that unless there are truly extraordinary situations present, and these specified in a narrowly drawn statute, property may not be seized prior to notice and hearing. Thus, on four separate grounds the New York statutes were defective, at least in the eyes of the three-judge court.

On appeal the Supreme Court vacated and remanded, ordering the court to abstain from a decision until New York state courts construed the statutes. The abstention doctrine may have been employed but the *per curiam* decision is instructive all the same.

About the decision below, the Court said:

As we understand it, the District Court found the New York pre-judgment attachment provisions unconstitutional because it concluded that the opportunity to vacate the attachment provided by CPLR § 6223 was inadequate, under this Court's cases, to justify the property deprivation involved. In its view, the hearing available on a motion to vacate the attachment was inadequate principally because the hearing would only be concerned with the question whether the "attachment is unnecessary to the security of the plaintiff," § 6223, and would not require the plaintiff to litigate the question of the likelihood that it would ultimately prevail on the merits.⁹⁵

92. *Mitchell's* scope, *i.e.*, the right to seize property summarily, was limited to instances in which the creditor had a pre-existing interest in the property seized. There was, the court noted, no such interest in the property seized by the creditor in the *Carey* case, and no such interest was required to be shown before a writ would issue. 383 F. Supp. at 649. By and large this is the case with most attachment and garnishment writs. Replevin or detinue, usually so called, are used when one hopes to seize property in which there is a pre-existing interest. See note 5 *supra*.

93. The court noted that in *Mitchell* the facts needed to be established before the writ of sequestration was granted were evident and subject to documentary proof. In New York, however, attachment was ordered in the event of fraud, deceit or conversion—difficult issues best handled in adversary proceedings and not susceptible to documentary proof. 383 F. Supp. at 649-50. *Fuentes* had statutes with similar defects.

94. 383 F. Supp. at 649.

95. *Carey v. Sugar*, 425 U.S. 73, 77 (1976). Relegated to footnote status were two other grounds the three-judge court had found for overturning the New York statutes. About these grounds, the Court said, "The court [three-judge court below] also concluded that the burden of proof at the hearing would be on the defendant, and noted that the plaintiff unlike

The Supreme Court chose to send the case back to await state court interpretation, feeling that the New York courts might very well hold that the early hearing will go to the merits of the underlying claim.

Would such a finding alone, however, be enough to save the statutes? That is, may a pre-seizure hearing be dispensed with even if the plaintiff has no special interest in the property? Must the burden of proof be on the plaintiff that he will ultimately prevail on the merits? Must allegations in the original motion for a writ be those easily subject to documentary proof? None of these provisions were in the New York statute. The answer to each of these seems clearly to be "no." The Court, in the following, provided the answer:

The precise nature of any inquiry into the merits which will be made under this rubric [that an attachment may be vacated in New York if it clearly appears that the plaintiff must ultimately fail on the merits—an earlier holding by the New York Court of Appeals] is unclear, but an inquiry consistent with the constitutional standard is by no means automatically precluded. Indeed, two New York trial courts have expressly held, subsequent to the decision below, that where fact issues are raised, on a motion to vacate an attachment,

the plaintiff in *Mitchell v. W. T. Grant Co.* . . . has no special property interest in the property attached." *Id.* at 77 n.2. Ignored altogether was the lower courts' holding that the New York statute allowed writs to issue in an *ex parte* proceeding even though the allegations made by plaintiffs were those normally thought best decided by adversary proceedings because such issues are not susceptible to documentary proof. Likewise ignored was the fact that the three-judge court found several points concerning which the New York statutes met the *Mitchell* standards. Specifically, the lower court approved of the following requirements found in the New York statutes: (1) that there must be judicial approval of an affidavit showing that there is a cause of action and grounds for issuing an order of attachment (or garnishment) before the writ will be granted; (2) that the plaintiff must post an indemnifying bond; and (3) that the defendant can regain possession of the property by posting bond. 383 F. Supp. at 648. These protective features were not enough to save the statutes. But since the Supreme Court, in its preoccupation with the prompt post-seizure hearing issue failed to mention these constitutionally laudatory features, it is reasonable to ask if their absence, even though a prompt hearing at which the underlying cause of action is litigated is provided, would be fatal to an attachment statute. The best that can be said is that their presence along with a prompt hearing will create a statutory scheme that is certain to pass a test of its constitutionality. But in *Di-Chem*, decided after the three-judge decision below, the Court had ignored the *Mitchell* distinction of special interest in the property seized, the burden of proof problem, and the problem of the narrowly drawn statute, although, as previously remarked upon, exactly what was to be made of these gaps in *Di-Chem* was cause for debate. See text accompanying notes 65-78 *supra*.

with respect to the merits of the underlying claim, a preliminary hearing will be held on those issues Under these circumstances, it would be unwise for this Court to address the constitutionality of the New York attachment statutes, for decision on that issue may be rendered unnecessary by a decision of the New York courts as a matter of state law⁹⁶

In short, if the New York courts read into the statute that at the post-seizure hearing the merits of the plaintiff's underlying cause of action will be litigated, the Supreme Court will be satisfied, if the other minimal safeguards that both the Louisiana and New York statutes had in common are present.⁹⁷ The Court will be satisfied with a statutory scheme that favorably matches the *Mitchell* requirements as modified in *Di-Chem*. The plaintiff need have no special interest in the property in order to have access to summary seizure; the burden of proof need not necessarily be on the plaintiff to prove the ultimate validity of the underlying claim; the allegations necessary for securing a writ need not be those peculiarly suited to documentary proof. But both the Louisiana and New York statutes required that a judge issue the writ and that, before the writ would issue, a bond be posted that would indemnify the defendant in the event the plaintiff ultimately failed in the suit.

Carey, therefore, has brought more sharply into focus the dim outlines that emerged from *Di-Chem* and *Mitchell*. Given certain other minimal safeguards,⁹⁸ it now appears that an early hearing—at which the merits of the underlying claim will be litigated—following the seizure of disputed property is a statutory scheme that will pass constitutional muster. The Supreme Court in *Carey* saw this early hearing as crucial, as did the federal district court (keeping in mind that the district court saw other grounds for striking down the statutes, grounds unheeded by the Supreme Court on appeal).

Near the end of the *Carey* opinion, the Court makes this observation: "The court below has declared unconstitutional the statute of a state the continued utilization of which is undoubtedly of import-

96. 425 U.S. at 78 (footnotes and citations omitted).

97. See note 95 *supra*.

98. *Id.*

ance to that state."⁹⁹ Well, it hardly needs saying but the court below declared the New York statutes unconstitutional on the strength of *Mitchell*. The fact that a state may have long utilized such creditor's remedies would seem to have been of little importance, even after *Mitchell*. Be that as it may, the quoted passage carries echoes of Holmes' opinion in the *Bennett* case cited earlier. And well it might, for as Professor Robert E. Scott has remarked, "The path from *Sniadach* to *Di-Chem* is circular."¹⁰⁰ True, and *Carey* underscores this.

III. SOME THEORIES: CLARIFICATION OF THE EMERGING GUIDELINES¹⁰¹

A. *Professor Rendleman and the Multistep Analysis Theory*

Recently Professor Doug Rendleman wrote that Mr. Justice Blackmun's dissent in the *Di-Chem* case was, at least in part, entirely correct. That part is Justice Blackmun's statement that the "sparse comparison"¹⁰² test, which the Court seemed to adopt in *Di-Chem*, destroyed doctrinal purity and cast statutory remedies for creditors into a constitutional netherworld. In spite of this, Professor Rendleman's position is that the decisions from *Sniadach* through *Di-Chem* "can be reconciled and . . . systematic due process adjudication is not only possible, but, if a rational and socially responsive jurisprudence is to be created, necessary."¹⁰³ General agreement with this statement has produced a number of theories through which it can be seen that though the path the Court has taken has been circular it has not been aimlessly wandering as some critics suggest.

99. 425 U.S. at 79.

100. Scott, *supra* note 50, at 833.

101. The writers chosen, needless to say, by no means constitute an exhaustive list of those whose theories have been put forth in the hope of constructing some sort of rational underpinning for the *Sniadach* line of cases. The list is indeed an imposing one. See note 5 *supra*. Consequently, the views discussed in this portion of the text were chosen for highly subjective reasons. It is urged therefore that the works chosen be read in full. In any event, the theories presented are felt to be representative of that lengthy and imposing list, and offer special qualities beyond being merely representative. There is, of course, always the danger that the theories have been misunderstood and consequently presented in a distorting light. If that happens to be the case, apologies are due and are, hereby, given.

102. 395 U.S. at 726.

103. Rendleman, *Analyzing the Debtor's Due Process Interest*, 17 WM. & MARY L. REV. 35 (1975) [hereinafter cited as Rendleman].

Professor Rendleman's article, written after *Di-Chem* but prior to *Carey*,¹⁰⁴ puts forth the proposition that in the *Sniadach* line of cases the Court devised a "multistep analysis."¹⁰⁵ In *Sniadach* and *Fuentes* the Court employed only a two-step analysis; *Mitchell* added the third step.

In the *Sniadach/Fuentes* two-step analysis the debtor first had to show a constitutionally cognizable interest in the property. At the second level an inquiry was made into the process due such a debtor. Except in emergencies, due process consisted of a pre-seizure hearing at which the creditor had to establish the probable validity of his underlying claim.¹⁰⁶

Mitchell and *Fuentes*, Professor Rendleman concludes, are reconcilable: in fact the two cases are in his hands fused in such a fashion as to form the very substance of the multistep analysis.¹⁰⁷ In addressing this problem of reconciliation he says, "*Mitchell* merely refines the due process multistep analysis by inserting an inquiry as to the nature of the interest, sole or dual, between the determinations of the existence of the constitutionally cognizable interest and of the process due."¹⁰⁸ Once there is a determination that interests in the seized property are dual (which of course implies that both debtor and creditor have cognizable interests) the process due undergoes a fundamental change. Dual interests bring into play the application of the more relaxed *Mitchell* protective features.¹⁰⁹ If the debtor alone has an interest in the disputed property, the process due is different and the *Fuentes* rule will apply.¹¹⁰

Up to this point Professor Rendleman makes a persuasive argument, but then came *Di-Chem*, a case analytically unsound in his opinion. The Court, Professor Rendleman says, "failed satisfactorily

104. At the time Professor Rendleman was writing his article *Carey v. Sugar* had been granted review by the Supreme Court. He notes the potential this case carried for fleshing out the theory offered in his article. His hopes, however, as the text of his article demonstrates, were left unfulfilled. See Rendleman, *supra* note 103.

105. Rendleman, *supra* note 103, at 41-44. This multi-step analysis is also referred to by Rendleman as a three step due process analysis. *Id.*

106. Rendleman, *supra* note 103.

107. *Id.* at 41.

108. *Id.* at 40.

109. See the text accompanying notes 45-46 *supra*, for the *Mitchell* standards.

110. Rendleman, *supra* note 103, at 41.

to integrate [Di-Chem] with prior decisions,"¹¹¹ when presented with the perfect opportunity to do so. The Court need not have even brought up the *Mitchell* factors, for these are applicable only if interests are dual, and the interests in *Di-Chem* were sole, *i.e.*, only the debtor had an interest in the property.¹¹² Consequently, Professor Rendleman concludes, courts may now allow plaintiffs with *no* interest in the seized property to get *Mitchell* treatment as if they had an interest.¹¹³ *Fuentes*, in short, if the Court continues to ignore the multistep analysis, is narrowed if not destroyed entirely.

Professor Rendleman's exposition aside for the moment, Justice Powell, in his concurring opinion in *Di-Chem*, seems to be using the multistep analysis in that he appears to find an "interest" possessed by the creditor (who, it will be recalled, was a mere general unsecured creditor) that deserved protection; therefore, the *Mitchell* test would be applicable.¹¹⁴ Catz and Robinson point out that this "papers over" the real differences between secured and unsecured creditors, and perhaps, more importantly, places no real limit on analysis.¹¹⁵ That is, *every* creditor has an interest in wanting property ready at hand for the satisfaction of a judgment, assuming a judgment is obtained. Thus every creditor would be on the same footing as the one in *Mitchell* and thus come under the *Mitchell* rule. Multistep is reduced to dual step; in effect there would be a return, on a modified level, to a pre-*Sniadach* posture.

Carey v. Sugar, as Professor Rendleman points out, afforded the Court the opportunity of clarifying the multistep analysis, because the plaintiff in the case had no prior interest in the garnished prop-

111. *Id.* at 41.

112. *Id.* at 42.

113. *Id.* at 43-44.

114. 419 U.S. at 609-10.

115. Catz & Robinson, *supra* note 39, at 565-66. Secured and unsecured creditors have genuinely different interests. The latter's deserve protection, *a la Mitchell*.

The most significant differences for due process purposes are that, in the case of the secured transaction: (1) the debtor has given up rights in the property through his voluntary action and therefore may be said to have consented to the subsequent interruption of his possession; (2) the rights are in specific property, so that the chances of wrongful or mistaken seizure are reduced; and (3) the creditor's rights in the collateral are normally spelled out in the security agreement, making them, according to the *Mitchell* rationale, more susceptible of documentary proof.

Id. at 565.

erty. The Court, of course, failed to take advantage of the opportunity, preferring instead to invoke *Mitchell*, and *Mitchell* as modified by *Di-Chem* at that.

So *Carey v. Sugar*, instead of returning to the multistep analysis, stands for its demise. But, oddly, the demise of this analysis, once so clear and promising, has helped shed light on the path the Court is now taking. The question of there being a sole or dual interest in disputed property is one no longer to be thrown onto the scales—that much seems clear. Clear also is the resemblance of the present state of the law to the situation prior to *Sniadach*.

B. *Kay and Lubin and Validation by Means of Extraordinary Situations*

Richard S. Kay and Harold M. Lubin have offered another theory aimed at reconciling and providing a rational underpinning to the *Sniadach* line of cases.¹¹⁶ Not an easy task, they admit: “These cases have been cited as an arch-example of inconsistency, even irrationality, in constitutional doctrine.”¹¹⁷ *Mitchell* and *Di-Chem*, they argue, can be seen as consistent with *Fuentes*, if it is kept in mind that *Fuentes* did not call for pre-seizure notice and hearing in *all* cases. Justice Stewart in *Fuentes* said that in extraordinary situations summary seizure would be valid.¹¹⁸ The statutory scheme being tested in *Mitchell* passed because the statutes dealt with an extraordinary situation—the third of the three that Justice Stewart had spelled out in *Fuentes*. The Court, Justice Stewart opined, would tolerate dispensing with pre-seizure notice if “the state has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a governmental official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.”¹¹⁹

Kay and Lubin’s position is that this third exception is satisfied if, as in *Mitchell*, a neutral official (judge) determines, in accordance with a statute limiting his discretion, that summary seizure

116. Kay & Lubin, *supra* note 39.

117. *Id.* at 705.

118. 407 U.S. at 90-92; see note 39 *supra*.

119. 407 U.S. at 91.

may be allowed in a particular situation, provided that a prompt hearing be given the party whose property is seized. Secured creditors as well as general creditors can seize property if these protective features are present. *Sniadach* and *Fuentes* both recognized that in extraordinary situations any creditor might summarily seize property. The *Di-Chem* statutes failed for much the same reasons as those in *Sniadach* and *Fuentes*; there was no official overseeing the process. Consequently, no extraordinary situation was present. It follows that if statutes allow creditors to summarily seize property in the absence of extraordinary circumstances, the *Fuentes* rule must apply; the statutes must provide for pre-seizure notice and hearing. Since there was no such provision in the Georgia statutes, they were unconstitutional. And there was no such provision present in the statutes tested in *Carey v. Sugar*;¹²⁰ they, too, were unconstitutional for the same underlying reason as those in *Di-Chem*.¹²¹

It seems clear that, if the Kay and Lubin analysis is correct, the Court as a practical and theoretical matter has abandoned the dual interests idea in favor of giving debtors somewhat more protection than they had prior to *Sniadach* while assuring creditors access to some property in the event of a favorable judgment. The Court, it seems, has returned—in a modified sense—to a pre-*Sniadach* stance. Has it, however, taken this posture by using the *Fuentes* extraordinary situations exception as Kay and Lubin suggest? Catz and Robinson doubt this is the case. While in the process of analyzing Justice White's opinion in *Mitchell*, they turn to the problem of categorizing *Mitchell* within the *Fuentes* extraordinary situation exception:

Was Justice White [they ask] trying to say that this was somehow an "extraordinary situation" requiring "special protection to a state or creditor interest" as allows in *Sniadach*? Was he saying that this was a case where the creditor "could make a showing of immediate

120. Kay & Lubin, *supra* note 39, at 716-22.

121. Kay and Lubin are correct in noting that *Carey v. Sugar* was concerned with the kind of hearing that is to take place following seizure of property. The hearing must litigate the plaintiff's underlying claim, *not* the interest in maintaining property as security in the event of a favorable judgment. Of equal importance was the fact that *Carey v. Sugar* dealt a lethal blow to the dual interest idea. See Kay & Lubin, *supra* note 39, at 718-22; see also notes 91-93 *supra*, and accompanying text.

danger that a debtor will destroy or conceal disputed goods?" It would have been easy enough to attempt some such reconciliation of the rationales of these opinions, but *Justice White declined to do so*.¹²²

Catz and Robinson mention only the first two of the three extraordinary situations that would validate summary seizure, while it is the third that Kay and Lubin claim *Mitchell* falls into. But the point that Catz and Robinson are making is that *nowhere* in the *Mitchell* opinion does Justice White even mention that the case falls within *any* of the three extraordinary situations.

There are at least three reasons why the Court declined, from *Mitchell* onward, to bring up extraordinary situations as the only justification for bypassing pre-seizure notice and hearing. First, the majority in *Mitchell* may have been convinced that *all three* of the situations laid out by Justice Stewart must be present before pre-seizure notice and hearing can be bypassed. A strong argument could be made¹²³ that all three would indeed have to be present. If the Court in *Mitchell* felt that the *Fuentes* rule required the presence of all three before there was truly an extraordinary situation, the facts of *Mitchell* simply forestalled any validation of the Louisiana statutes on the ground that they met the extraordinary situations exceptions to the pre-seizure notice and hearing requirement.¹²⁴

Second, even granting that any *one* of the extraordinary situations validates summary seizure there is a serious question concerning the *meaning* of the third of the three, the one that Kay and Lubin offer as the key to reconciling *Sniadach* and *Fuentes* with *Mitchell* and *Di-Chem*. Kay and Lubin interpret Justice Stewart's words, "the person initiating the seizure has been a government official . . .,"¹²⁵ as meaning a *judge* issuing a writ of attachment or

122. Catz & Robinson, *supra* note 39, at 558 (footnotes omitted)(emphasis added).

123. See notes 38 & 39 *supra*, and accompanying text.

124. Justice Stewart, in his dissenting opinion in *Mitchell*, while arguing other points, effectively destroyed any notion that the first two elements were present. See 416 U.S. at 629, n.1. Thus, there could be no extraordinary situation validation of the statute. Of course the third element of the three-fold extraordinary situations test remained unaddressed by Justice Stewart. As the text discloses this really makes no difference. The presence of a judge empowered to issue or deny issuing writs does not create an extraordinary situation; even if it does, the Court appears indifferent to the proposition.

125. *Fuentes v. Shevin*, 407 U.S. 67, 91(1972); see note 121 *supra*, and accompanying text.

garnishment in accordance with a narrowly drawn statute.¹²⁶ Justice Stewart himself, however, seems not to have had this meaning in mind when he spoke on the point in *Fuentes*. When he gave the three-fold test for extraordinary situations, he supported the test by case examples. In each case governmental officials seized property under writs issued by clerks, pursuant to statutes directing them to do so. The governmental official made the determination, not the clerk. True enough, this was not like a civilian creditor settling a private score; the officials were protecting a vital public interest. But had the situation been reversed, that is to say, if an ordinary creditor was seeking a writ before a judge, under an appropriately, narrowly drawn statute, would Justice Stewart have agreed that this satisfies the third of his extraordinary situations? Possibly. But, to repeat, the cases he cited were not of this latter variety. A governmental official, the clerk, decided (and doubtless issued the writ, having little discretion one way or the other) if the writ was to be issued. The debtors were not at the mercy of a court functionary who aids *ordinary creditors* in settling private scores. In point of fact, in his *Fuentes* dissent Justice Stewart appears to feel that a judge, rather than a clerk, issuing a writ is of little consequences.¹²⁷

Finally, Justice White may have declined to classify *Mitchell* as an extraordinary situation case because, setting out on the new path described above, extraordinary situations escape routes will no longer be needed. What, for example, could be more ordinary than the *Di-Chem* fact situation?¹²⁸ A general creditor garnished a debtor's bank account. Yet the Court would have been satisfied if, added to its already existing protective features such as the bond requirement, the Georgia statutes had required that a judge deter-

126. Kay & Lubin, *supra* note 39, at 712-13.

127. See 416 U.S. at 632.

128. *Di-Chem* was, it is here suggested, an ordinary seizure situation; ordinary in that both debtors and creditors are *used* to this kind of thing. And, as the text goes on to point out, with additional protective procedures, the Georgia statutes would have passed constitutional muster. But this does not mean that, even with additional protective procedures, *every* sort of seizure would be tolerated. Kay and Lubin emphasize this point. They note, for instance, "[t]he equal protection clause and whatever substantive elements remain of the due process clause of the fourteenth amendment preclude takings which are arbitrary or entirely unrelated to permissible objects of state regulation." Kay & Lubin, *supra* note 39, at 717. Otherwise, the broadest possible grounds for seizure—*i.e.*, seizing merely for the creditor's security should the underlying suit be successful—would be constitutional.

mine if the writ should issue (with no more reason than to insure that property would be available to satisfy a judgment in the event the plaintiff's suit succeeded) and that a hearing, at which the plaintiff establishes the probable validity of the underlying claim, be promptly held. Extraordinary situations seem to have disappeared altogether. Even so, Kay and Lubin have no doubt about the true route the Court is taking: given proper procedural protection, summary seizures of property is constitutional.¹²⁹

Multistep analysis is abandoned. Now the Court appears disinclined to validate statutes only in the event they encompass truly extraordinary situations, preferring instead a more relaxed view. Nevertheless, the theorists agree that the Court has returned to the more traditional stance in the field of pre-judgment creditor's remedies.

C. *Professor Scott and Cost Analysis*

Professor Robert E. Scott, in a tightly reasoned, scholarly article that should be required reading for all those interested in this particular aspect of debtor-creditor relations, argues that the Court's "circular" route from *Sniadach* to *Di-Chem* is explainable on economic theory grounds.¹³⁰ He examines this line of cases by way of "cost analysis," of which he writes:

A cost analysis of legal procedure initially assumes that a fundamental goal of procedure is to produce an accurate resolution of disputes. In the particular context of debtor default, due process, to the extent that it requires additional procedures in *ex parte* situations, imposes significant "direct" or litigation costs on the enforcement process. These costs justify themselves in economic terms only if they contribute to at least a corresponding reduction in "error" costs—social costs that arise when the legal system fails to perform accurately its assigned function of dispute resolution. The goal of allocative efficiency is to minimize the sum of these costs.¹³¹

129. Kay & Lubin, *supra* note 39, at 717-18.

130. Scott, *supra* note 50.

131. *Id.* at 810, Professor Scott's article is, as the text points out, a long, tightly woven piece. Consequently, it hardly lends itself to summations such as is undertaken here. The attempt is certain to produce error and distortions. The article, therefore, should be read in its entirety. It is hoped that what has been attempted here does not do an injustice to Professor Scott's work.

Professor Scott's thesis is that in *Sniadach* and *Fuentes* the Court sought to redress what it perceived to be a constitutionally unconscionable situation. That is, in the Court's opinion, debtors were being deprived of their "expectation of just treatment because of a systematic imbalance permitting creditor overreaching."¹³² The way to redress this imbalance was obvious to the majority in the two cases: monitor the debtor-creditor bargaining process by requiring an adversarial type hearing *before* the creditor can get at the disputed property. By this means wrongful or erroneous takings can be forestalled.

It is precisely at this point that cost analysis plays a crucial role in the *Sniadach* line of cases. This new procedure obviously imposes additional costs on the enforcement of creditor's claims. Costs, however, are justifiable only if there is a corresponding reduction of social error. The majority in *Fuentes* and *Sniadach* ignored the cost, as it was compelled to do, having taken the position that market forces created a "constitutionally unconscionable" situation that could best be righted by imposing, independent of the bargaining process, procedural limitations on the right of creditors to call on the state for help in reaching a debtor's property.¹³³

The *Mitchell* and *Di-Chem* majority, Professor Scott shows,¹³⁴ were unwilling to continue the "constitutional unconscionability" posture. They saw no reduction in error¹³⁵ costs that would off-set the costs of the new procedural requirement. A prompt hearing following seizure (a return to the pre-*Sniadach* method with the *Mitchell* protective features added) would be just as effective, especially in light of the fact that debtors rarely take advantage of hearing rights, irrespective of *when* the hearing may be held. Furthermore, the traditional method would provide the creditor with security in the event of a favorable judgment. Thus, in the eyes of the *Mitchell/Di-Chem* majority, nothing is gained by requiring a pre-seizure hearing. A modified-traditional approach has at least some cost benefits. This thought has been expressed another way:

132. *Id.* at 811.

133. See generally Scott, *supra* note 50, at 811-12, 814-24.

134. *Id.* at 835-64.

135. The term "error" is used to mean the mistaken taking of a debtor's property.

[W]hile the *Fuentes* and *Sniadach* courts seem to regard the requirements of notice and a prior hearing as ends in themselves, [Justice White] looks beyond the hearing to the ends it serves. To Justice White, the only issue at such a hearing is the right to possession; if this issue can be resolved to a fair degree of certainty without one, a hearing is not constitutionally required.¹³⁶

IV. SUMMING UP

Pre-seizure notice and hearing is a costly mechanism that has shown no dividends. Perhaps it was destined for the legal junk heap. Nevertheless, consumer advocates have little to wring their hands over. Debtors received little from the *Fuentes* rule.¹³⁷ Had the rule remained, the costs would doubtless have been passed on to debtors who took advantage of the hearing as well as to those who did not. A variety of views has been presented; all seem to agree that the Court's position on summary seizure is now more conventional. The path it has trod has been circular. The guidelines that have emerged during this journey have been clarified. Statutes can be analyzed with some degree of confidence as a result.

V. THE CONSTITUTIONALITY OF THE VIRGINIA DETINUE AND ATTACHMENT STATUTES¹³⁸

In light of the above analysis it now seems clear that summary seizure will be allowed if certain minimal requirements are met. The

136. Catz & Robinson, *supra* note 39, at 558. In short, Justice White sees the prompt post-seizure hearing as a constitutionally acceptable substitute for the *Fuentes* rule.

137. Professor Scott points out that even the *Fuentes* majority recognized that most debtors ignore hearings, pre- or post-seizure. Consequently, the Court backed away from extending the *Sniadach* compulsory hearing requirement to all seizure cases and held that an opportunity to be heard would be sufficient. See Scott, *supra* note 50, at 823. Justice White of course saw this point as crucial. See note 136 *supra*, and accompanying text.

138. VA. CODE ANN. §§ 8.01-114 through -123 (Repl. Vol. 1977) (detinue); VA. CODE ANN. §§ 8.01-533 through -576 (Repl. Vol. 1977) (attachment). Virginia deeds of trust—specifically VA. CODE ANN. § 55-96 (Cum. Supp. 1977)—are being tested, insofar as they relate to notice prior to foreclosure. *Scott v. Benn*, 46 U.S.L.W. 3012 (July 12, 1977) (summarized) (no lower court opinion) was filed in the United States Supreme Court, October term, 1977. The Virginia Supreme Court affirmed a trial court's opinion that the statute was constitutional. But this and related statutes will not be examined in this article. Mechanics liens, trustee's power to foreclose, landlord liens—these and similar statutes granting powers to seize property without notice and a hearing are being challenged constantly. There is no reason to believe that standards different from those applied to attachment and detinue will be applied to these.

list of requirements is not long and may dwindle further as the Court continues to clarify its position. There is ground for belief that a statutory scheme could even lack one or more requirements and still meet the minimum standards of due process. Until such a statute is tested, however, it seems fair to assume that the absence of any of these requirements will be fatal.

One thing is certain, any statutory scheme that follows *Mitchell* will survive. The same may be said for the New York statutes in *Carey v. Sugar*, which met the *Mitchell* standards as modified by *Di-Chem*. The *Carey* statutes, being less stringent than those of *Mitchell*, mark, as of today, the bottom line of basic due process. In addition, according to *Di-Chem*, statutes may give summary seizure power to unsecured creditors as well as secured creditors. Summary seizure provisions, then, will pass constitutional muster if they meet the following:

1. the grounds upon which a writ will issue must not be capricious or arbitrary;
2. a judge must be the official charged with issuing the writ;
3. the plaintiff must, prior to the writ's being issued, post bonds that will indemnify the defendant in the event plaintiff loses the underlying cause of action; and
4. the defendant must have the opportunity to have a prompt post-seizure hearing at which the validity of the plaintiff's underlying cause of action will be litigated.

Virginia's attachment statute contains some but not all these features. Its validity is thus questionable. The detinue provision, on the other hand, should be able to withstand a constitutional challenge.

A. *Detinue*

Accompanying the new section 8.01-114¹³⁹ (the first section in the detinue Article) is the following Reviser's Note:

139. Detinue in Virginia is similar to the provisional remedies in other states called replevin or claim and delivery. Plaintiffs with a particular interest, a pre-existing interest in specific property, use this means of summarily getting the property. See BURKS, COMMON LAW AND STATUTORY PLEADING AND PRACTICE, §§ 125, 126 (4th ed. 1952). See also note 5 *supra*.

This section [the old section 8-586] and others in this article were amended in 1974 to make the procedure comply with the requirements set out in *Fuentes v. Shevin*, 407 U.S. 67 (1972); and *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969). These two cases were further discussed in a later case of *Mitchell v. W. T. Grant*, 416 U.S. 600 (1974) in which the Supreme Court restricted the scope of the two former cases. [The old section 8-586] meets the criteria of constitutionality set out in *Mitchell v. W. T. Grant*. Therefore no substantive changes have been made.¹⁴⁰

Careful examination of the various sections—8.01-114 through 8.01-130—forces agreement that changes were unnecessary.

Under the detinue provisions, property may be seized only upon grounds similar to those required in allegations in Louisiana and New York. When it is recalled that the Court in *Carey v. Sugar* gave its approval to the summary seizure of property in order that a creditor, secured or unsecured, could simply have property available as security in the event the main suit is successful, the grounds in section 8.01-114 are shown to be relatively restrictive. Furthermore, the required allegations appear to be the kind subject to documentary proof, at least insofar as was the case in *Mitchell*. It should be borne in mind that this later point faded away almost entirely in *Di-Chem* and *Carey v. Sugar*.¹⁴¹

Section 8.01-114A specifies that only a judge (or magistrate) may order the seizure of property, and paragraphs B and C indicate that he is given more latitude deciding if the property should be seized than was the judge under the Louisiana statutes in *Mitchell*. The defendant is not, at this *ex parte* point in the proceedings, at the mercy of a mere functionary who issues orders on conclusory pleadings.

A bond, according to section 8.01-115, at double the value of the property the plaintiff wants to seize, must be executed by the plaintiff *before* a seizure order can be issued. Costs and damages, in the event the plaintiff does not prevail in the main suit, will be awarded

140. VIRGINIA CODE COMMISSION, REPORT TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA ON REVISION OF TITLE 8 OF THE CODE OF VIRGINIA, H. DOC. NO. 14, at 108 (1977) [hereinafter cited as COMMISSION REPORT].

141. See note 93 *supra*, and accompanying text.

the defendant. This would seem to cover similar provisions in the Louisiana statutes relied on by the Court in *Mitchell*.¹⁴²

Section 8.01-119, which provides for a preliminary hearing, carries with it this Reviser's Note:

[This is old section 8-591.] The word "court" has been substituted for the word "judge." The 1973 Session of the Legislature altered this section in order to conform with the Supreme Court decisions previously mentioned in the Reviser's Note to § 8.01-114. The Revisers have concluded that the 1973 substantive changes conform with the present constitutional requirements of *Mitchell v. W. T. Grant*, 416 U.S. 600 (1974).¹⁴³

Again the reviser is entirely correct. There is a right to a prompt hearing—twenty-one days or earlier upon motion. Furthermore, this section goes beyond *Fuentes* and falls more within *Sniadach* since the defendant is *guaranteed* a hearing; *Fuentes* required only an *opportunity* to be heard. The probable validity of the plaintiff's cause of action can be litigated and the burden is on the plaintiff to show the substantial likelihood that he will prevail in his cause of action.¹⁴⁴

142. See 416 U.S. at 616-17, wherein it is noted that in the event it is determined that the sequestration order was wrongfully issued, the defendant will be awarded damages. The same provision does not appear in the Virginia section on detainee. Clearly, though, the bonding provisions of section 8.01-115 reach the same end at whatever point in the process the seizure is dissolved or the defendant prevails in the main suit. 70 Nw. U.L. REV. 349, n.102 (1975). (The suggestion is made therein that this provision could be fatal to the Virginia statute). Section 8.01-116 provides that by posting bond, the defendant may get his property returned. A like provision was in the Louisiana statutes. Such a provision apparently was unimportant to the Court in its later decisions. This is understandable; few debtor defendants can afford to post such bonds (though it was done in *Di-Chem*, which underscores the fact that such bonding provisions are widespread). More significantly, few debtors, even if they could afford to post bonds to get their property back, would actually do so if they are going to get a prompt hearing (no hearing was available to the debtor in *Di-Chem*). If they prevail at the hearing, they get the property returned *without* posting bond. If they lose, they could, of course, post bond then; but, are they really like to do so in that event? Probably not. If defendants lost at the preliminary hearing, odds are great that they will lose at the main trial. That being the case, why post bond? The property is going to be taken anyway. *Di-Chem* established that the presence of this provision will not save a weak statutory scheme. Its absence, if there is along with other standards a provision for a prompt post-seizure hearing, ought to do little harm. Be that as it may, Virginia has the provision in its detainee sections.

143. COMMISSION REPORT, *supra* note 140, at 110.

144. Paragraph B of section 8.01-119 does not use the words "probable validity;" it says that "if it . . . appears . . . that there is a *substantial likelihood* that the plaintiff's allega-

The detinue statutes, then, are constitutionally sound. They meet the four requirements, but the same may not be said for the attachment statutes.

B. *Attachment*¹⁴⁵

Unlike the detinue sections, nowhere in the attachment sections—8.01-533 through 8.01-576—can a reviser's statement be found that says that the statutes conform to the guidelines that emerged from the *Sniadach* line of cases.¹⁴⁶ This absence is understandable. The sections do not meet any of the constitutional requirements squarely.

The grounds which must be alleged before an attachment writ will issue are found in section 8.01-534. Subsection 1 of this section appears to be clearly unconstitutional. The recent case of *Shaffer v. Heitner*¹⁴⁷ seems to have struck down all such quasi in rem provisions. Assuming that the section will otherwise be unaffected by this decision, the other grounds are those typically found in other jurisdictions, fraudulent, quasi-criminal activity being the sole grounds justifying the drastic action of attachment. These grounds are not unlike those found in *Carey v. Sugar*. They are the kind of allegations, therefore, that seem to require adversarial determination. But *Carey v. Sugar* did not recognize this as a problem.

An attachment is commenced, as directed by section 8.01-537A, by filing a petition with the clerk of the court. The petition must state the cause of action "with such certainty as will give the adverse party reasonable notice of the particulars thereof . . ."¹⁴⁸

tions will be sustained . . ." then the seizure will stand (emphasis added). The Court in *Carey v. Sugar* was satisfied with not litigating the issue because "the plaintiff must ultimately fail." 425 U.S. at 78. This shifts the burden to the defendant! This was a matter once thought crucial; the *Mitchell* Court and the district court in *Carey v. Sugar* saw it as vital. The burden problem, thus, appears to have disappeared now that *Carey v. Sugar* has been decided.

In sum, litigating the substantial likelihood of the plaintiff's prevailing on his cause of action should satisfy this factor of due process, especially since the Court seems to care little where the burden of proof is placed at the preliminary hearing. And, in Virginia, it is on the plaintiff.

145. See note 5 *supra*.

146. VA. CODE ANN. §§ 8.01-533 through -576 (Repl. Vol. 1977).

147. 97 S.Ct. 2569 (1977).

148. VA. CODE ANN. § 8.01-537A (Repl. Vol. 1977).

Such fact pleading was present in *Mitchell* and insisted on by the Court. Its absence was one of the fatal weaknesses in the *Di-Chem* statutes, but conclusory pleadings were ignored altogether by the Court in *Carey v. Sugar*. The presence of fact pleading, therefore, is laudatory, but is its absence fatal? If it is, the attachment statutes may be unconstitutional, for this section requires only that the petition "set forth the existence of one or more of the grounds of attachment"¹⁴⁹ Merely copying one of the grounds (not the first, of course) would satisfy this requirement. The cause of action must be factually plead but not the grounds. But, again, is this fatal? More of this later. First, a look at the problem created by the power of a clerk to issue a writ of attachment.

The three-judge court in *Carey v. Sugar* found the New York statutes unconstitutional, but, as was seen earlier,¹⁵⁰ that court found that, in some areas, the statutes compared favorably with those in *Mitchell*. One of these was that a judge decided if a writ, based on plaintiff's affidavit, should issue. Section 8.01-537 says that a clerk, based on plaintiff's affidavit, shall issue the writ. Is this fatal? Is the presence of a judge essential at the *ex parte* stage? Justice White, in his *Di-Chem* opinion, placed considerable stress on this point, but as Justice Powell in his concurring opinion observed,¹⁵¹ the majority fell considerably short of making such a presence an absolute.¹⁵² In *Carey v. Sugar* the New York requirement that a judge issue the writ was silently passed over in the Court's *per curiam* decision.

It can be argued, as Professor Scott has done,¹⁵³ that the participation of a judge at the *ex parte* level is of little importance. Factual pleading with respect to the underlying cause of action is required by the statute in Virginia, and even were a judge prepared to embark on a wide-ranging, factfinding mission, little, Professor Scott's persuasive argument goes, would be gained; the facts are peculiarly within the creditor's knowledge. Usually, all that will be alleged is

149. *Id.*

150. See text accompanying note 90 *supra*.

151. 419 U.S. at 611.

152. Justice Blackmun, in a dissenting opinion, makes much the same observation. 419 U.S. at 619.

153. Scott, *supra* note 50, at 853-55.

the indebtedness and a failure to pay. Both allegations, obviously, are open to documentary, factual showings. If a creditor, wishing perhaps to settle a score or engage in a frivolous adventure, is willing to lie in his affidavit, he is as likely to do it with a judge as with a clerk. The penalties are the same. The avoidance of error in seizing property is thus the same whether a clerk or judge gets a "factual" statement that has been sworn to.¹⁵⁴

Grounds for attachment in section 8.01-537 may be established by conclusory allegations, the lack of factual support being a weakness, like the absence of a judge, Justice White found in the Georgia statutes tested in *Di-Chem*. However, the same argument given above applies here. If factual pleading *were* required, what would be gained? A fraudulent conveyance, for example, would be difficult to establish factually and, besides, what facts there are are those again peculiarly within the plaintiff's knowledge. Without adversarial input can fraudulent intent be established? It is doubtful. Conclusory pleadings would, therefore, as Professor Scott demonstrates,¹⁵⁵ serve the purpose. What is more, the grounds required to be alleged under section 8.01-537 are similar to those in New York. They, too, called for adversarial input, but the Court found them satisfactory. True enough, a judge issued the writ, but on conclusory allegations.¹⁵⁶

Whether the *grounds* may be established by conclusory or factual allegations seems today to be of little importance. *Di-Chem* and *Carey* allowed seizure so that the creditor could be secure in the event of a favorable judgment.¹⁵⁷ That is an interest worthy of protection; an interest on the same footing as a secured creditor's interest. The *grounds* for attachment, in short, are immaterial, so long as the statute is not arbitrary or capricious.¹⁵⁸ Thus it would seem to make no difference if grounds must be alleged to make the allegation conclusory rather than factual. Furthermore, a judge is no more capable than a clerk in issuing writs under these circumstances.

154. *Id.*

155. *Id.*

156. See N.Y. CIV. PRAC. LAW § 6212(E) (McKinney 1963).

157. *Di-Chem* statutes were struck down, but *not* because the creditor's interest in seeing that the bank account was frozen was not worthy of protection. This is an interest worthy of protection, as became clearer in *Carey v. Sugar*.

158. See note 128 *supra*, and accompanying text.

It is, in the final analysis, the right to a prompt post-seizure hearing that is critical. It is at *that* point that there will be adversarial input. If it is established that there is a debt and default, then the property can justifiably be kept in custody so that, if ultimately successful, the plaintiff can have guaranteed access to assets. The prompt post-seizure hearing is a sufficient substitute for pre-seizure notice and hearing.¹⁵⁹ Thus, if provisional remedy statutes are not arbitrary or capricious and, if they provide a prompt post-seizure hearing (which Virginia does in section 8.01-568) then for those reasons alone, remedies are very nearly within the constitutional guidelines.

Under section 8.01-568, the defendant may at any time before or following seizure move to have the writ quashed. At the hearing on the motion, the plaintiff's underlying claim may be litigated. If this issue is raised, the plaintiff has the burden of proving he is likely to succeed on the merits of his underlying claim. This squares exactly with the Court's requirement in *Carey*. Virginia's attachment statutes appear, therefore, to very nearly meet minimal due process standards. There remains, though, the bond problems.

Under section 8.01-551, bond is not required *before* an attachment writ is issued. It *is* required if the defendant's property is to be seized. Thus, the defendant will not be deprived of the *use* of property until a bond is posted. The bond must be for an amount double the value of the property seized. Equally important is the provision that the plaintiff is liable for damages suffered by the defendant (or anyone else) by reason of the plaintiff's suing out the attachment. Except for the technicality of being able to get a writ before posting bond, this section is like the Louisiana statute in *Mitchell*.

The bond requirement, like the problem of the judge at the *ex parte* proceeding and the problem of conclusory allegations, appears to be of no or at best secondary importance. If a pre-seizure hearing is required, of what use would a bond be? If the plaintiff prevails at the hearing, he may *afterwards* have to post bond. But at that stage, is the defendant going to care one way or the other? Conclusory allegation? What difference does it make if the property is not seized until *after* a hearing and only then if the plaintiff prevails? It is the

159. See note 136 *supra*, and accompanying text.

pre-seizure hearing, an adversary type hearing, that will determine facts and conclusions.

It follows therefore that if a prompt post-seizure hearing is an adequate substitute for the *Fuentes* rule, then bonds, judges and conclusory allegations, are relatively unimportant considerations if a prompt post-seizure is in fact provided by statute. Virginia, in its detinue and attachment statutes, has such a provision.

VI. CONCLUSION

The Virginia detinue statutes provide the required basic due process. The attachment statutes have areas that arouse suspicion about their constitutionality, but they appear capable of withstanding a challenge by a latter day Sniadach or Fuentes. After all, the Supreme Court has come full circle.

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