

1975

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Recommended Citation

Constitutional Law-Due Process-Ex Parte Seizure of Secured Property Under Judicial Supervision Held Not to Violate Due Process, 9 U. Rich. L. Rev. 337 (1975).

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Constitutional Law—Due Process—EX PARTE SEIZURE OF SECURED PROPERTY UNDER JUDICIAL SUPERVISION HELD NOT TO VIOLATE DUE PROCESS—*Mitchell v. W.T. Grant Co.*, 94 S. Ct. 1895 (1974).

Summary creditor remedies have come under increasing attack in recent years.¹ The major question has been whether prejudgment seizures of secured property comport with procedural due process. The United States Supreme Court, in *Fuentes v. Shevin*,² had apparently settled the question by holding that procedural due process requires notice to the debtor and an opportunity to be heard before a state authorizes its agents to seize property from him on the application of another.³

Traditionally, prejudgment seizures withstood due process scrutiny because they were not viewed as a taking within the meaning of the Constitution.⁴ Arguments supporting this view often stressed either the historical antecedents of these procedures as justification,⁵ or, that the non-permanent nature of the deprivation rendered it outside the scope of due process inquiry.⁶ These arguments were dispensed with by the Supreme Court in *Sniadach v. Family Finance Corp.*⁷ Mr. Justice Douglas, writing

1. Some of the attacks which have succeeded in striking down summary remedies on due process grounds include: *Lynch v. Household Fin. Corp.*, 405 U.S. 538 (1972) (Connecticut garnishment statute); *Turner v. Colonial Fin. Corp.*, 467 F.2d 202 (5th Cir. 1972) (Mississippi replevin statute); *Sena v. Montoya*, 346 F. Supp. 5 (D.N.M. 1972) (New Mexico replevin statute); *Dorsey v. Community Stores Corp.*, 346 F. Supp. 103 (E.D. Wisc. 1972) (Wisconsin replevin statute); *Lapreas v. Raymours Furniture Co.*, 315 F. Supp. 716 (N.D.N.Y. 1970) (New York replevin statute); *Randone v. Appellate Dep't of Super. Ct.*, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971) (California attachment statute); *Blair v. Pitchess*, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971) (California claim and delivery procedure); *Thorp Credit, Inc. v. Barr*, 200 N.W.2d 535 (Iowa Sup. Ct. 1972) (Iowa replevin statute); *Inter City Motor Sales v. Szymanski*, 42 Mich. App. 112, 201 N.W.2d 378 (1972) (Michigan replevin statute).

2. 407 U.S. 67 (1972) (4-3 decision).

3. Because the requirements of the 14th amendment apply only to actions by state governments, prejudgment seizures effected solely by private means do not come within the scope of this rule and may be carried out without notice or hearing if done peaceably. See *Adams v. First Nat'l Bank*, 492 F.2d 324 (9th Cir. 1973).

4. See, e.g., *McInnes v. McKay*, 127 Me. 110, 141 A. 699 (1928), *aff'd per curiam*, 279 U.S. 820 (1929).

5. Because these procedures had been in effect since before the Constitution and continued unchallenged after it, some argued that it was obvious that the Founding Fathers did not consider them to be subject to due process. See *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 349-51 (1969) (Black, J., dissenting).

6. See note 4 *supra*. In *McInnes*, the Maine court viewed attachment as a lien, conditional and temporary in nature, conveying neither title nor any rights of ownership.

7. 395 U.S. 337 (1969). In *Sniadach*, the Court struck down the Wisconsin wage garnishment law. Mr. Justice Douglas focused intensely on the hardships imposed by the garnish-

for the Court, said that procedures acceptable under feudal circumstances did not automatically stand up under modern scrutiny.⁸ *Sniadach* also made it clear that the deprivation of the use of one's property is as much a taking of that property as any permanent physical removal.⁹ In *Fuentes*, the Court extended these principles to all summary creditor remedies, unless extraordinary circumstances are shown.¹⁰

Recently, in the case of *Mitchell v. W.T. Grant Co.*,¹¹ the Supreme Court restricted the scope of the *Fuentes* doctrine. The petitioner in *Mitchell* had purchased consumer appliances from the W. T. Grant Co. and later defaulted, Grant sued for judgment on the balance due, and at the same time alleged a vendor's privilege¹² on the goods. The Company also set forth a belief that Mitchell would "encumber, alienate or otherwise dispose" of

ment of wages, which seem to be a "specialized type of property," the deprivation of which would drive the wage earner "to the wall," giving the creditor undue leverage on the debtor. Because of this concentration on the effects of wage garnishment, it was unclear whether the decision was limited to situations of equal hardship to the debtor or applied to the whole range of prejudgment seizures. Both state courts and lower federal courts disagreed about the breadth of the decision. See, e.g., *Brunswick Corp. v. J & P Inc.*, 424 F.2d 100 (10th Cir. 1970) (narrow interpretation of *Sniadach*); *Randone v. Appellate Dep't of Super. Ct.*, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971) (*Sniadach* not confined to wage garnishment).

8. 395 U.S. at 340.

9. *Id.* at 342 (Harlan, J., concurring).

10. For the *Fuentes* Court due process required a hearing at a meaningful time and in a meaningful manner, i.e., at a time when the deprivation can still be prevented. The Court discussed five situations in which outright seizure had been permitted: (1) to protect the public from misbranded drugs, *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950); (2) to protect against the economic disaster of a bank failure, *Fahey v. Mallonee*, 332 U.S. 245 (1945); (3) to collect internal revenue of the United States, *Phillips v. Commissioner*, 283 U.S. 589 (1931); (4) to meet the needs of a national war effort, *Central Union Trust Co. v. Garvan*, 254 U.S. 554 (1921); (5) to protect the public from contaminated food, *North Am. Storage Co. v. Chicago*, 211 U.S. 306 (1908).

The Court analyzed these decisions as laying down a rule under which outright seizure would be permitted. The criteria were that: (1) the seizure must be directly necessary to secure an important interest of the government or general public; (2) there must be a special need for very prompt action; and (3) there must be strict maintenance of state control over the official acting under a narrowly drawn statute. 407 U.S. at 91, 92.

11. 94 S. Ct. 1895 (1974) (5-4 decision).

12. LA. CIV. CODE ANN. art. 3227 (West, 1952) provides:

He who has sold to another any movable property, which is not paid for, has a preference on the price of his property, over the other creditors of the purchaser, whether the sale was made on a credit or without, if the property still remains in the possession of the purchaser.

The vendor's privilege differs from the installment sales contract in that the rights of the seller may be defeated by the mere transfer of possession of the chattel. Comment, *Vendor's Privilege*, 4 TUL. L. REV. 239 (1930).

them, and asked that a writ of sequestration be issued to preserve the merchandise pending final judgment. Under Louisiana law, a creditor may have property seized under a writ of sequestration by *ex parte* application. In his application the creditor must claim ownership of the property in question and the power of the defendant-debtor to waste or dispose of the property.¹³ The Louisiana sequestration procedure is similar to replevin in common law states,¹⁴ although its roots bear no direct relation to this common law action.¹⁵ The judge approved the writ and authorized the

13. LA. CODE CIV. P. ANN. art. 3571 (West, 1961). Note that the debtor need only have the power to waste the property, and whether he is actually likely to do it or not is immaterial. Since anyone having the possession of the property has the power to waste it, this article will apply to every case of goods bought on credit. This is a change from the historical requirements for the writ. See note 15 *infra*.

The application must show clearly the grounds relied upon for seeking the writ and specific facts to support them. LA. CODE CIV. P. ANN. art. 3501 (West, 1961). The applicant must furnish security to protect the debtor in case of wrongful issuance of the writ. *Id.* The debtor may move to dissolve the writ and have the property returned to him. *Id.* art. 3506. Should the motion be denied, the debtor may post his own bond and have the property released. *Id.* art. 3507.

14. In Virginia the action is detinue. VA. CODE ANN. §§ 8-586 to -595 (Repl. Vol. 1957), as amended, (Cum. Supp. 1974). The Virginia law is very similar to that in Louisiana. The warrant must be issued by either a judge or magistrate and the application must be supported by affidavit showing (1) the description of the property, (2) a threat of loss or damage to the property, and (3) a substantial basis for the claim. The plaintiff is also required to post bond and he may be liable for damages should judgment go against him. Furthermore there is provision for the defendant to post his own bond and have the property released.

As a matter of strict derivation from the common law, detinue rather than replevin is the proper action because it would lie for goods wrongfully detained after a lawful taking, whereas replevin would lie for goods wrongfully taken. In all of the modern situations the initial taking from the seller is lawful and the allegedly wrongful detention does not arise until default. See 3 W. BLACKSTONE, COMMENTARIES *151.

15. Replevin was an action by which a tenant could recover a chattel that had been distrained by his landlord to enforce payment of rent allegedly in arrears. Typically the tenant had to furnish security as a pledge to prosecute the suit over the rightfulness of the distraint. Note that at common law, contrary to today's practice, it was the alleged debtor who sought the writ of replevin. 3 W. BLACKSTONE, COMMENTARIES *13-14, *145-50. See also T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 367 (5th ed. 1956); 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 574-78 (2d ed. 1968).

Sequestration was recognized in Roman law. It was a device ensuring definite preservation of property pending the final adjudication of ownership. In Louisiana it developed under the influence of the civil law of France and Spain. Historically, it was proper in an action when the possessor of the chattel was a *persona suspecta*, one open to the suspicion that he would waste or dispose of the property. The determination of the suspectness of the possessor was left to the judge, not the plaintiff in the action. It was also proper to sequester the property if it was likely to be wasted from a source other than the possessor. Thirdly, sequestration was allowed if a breach of the peace was likely due to self-help attempts by the parties involved. Millar, *Judicial Sequestration in Louisiana: Some Account of its Sources*, 30 TUL. L. REV. 201, 206, 211 (1956).

sheriff to seize the property upon Grant's posting bond.¹⁶ All this was accomplished without giving Mitchell notice or an opportunity for a hearing. After execution, Mitchell moved to dissolve the writ on the grounds that the particular goods were exempt under state law and that the seizure violated the due process clause of both the state and the federal constitutions. The trial judge denied the motion and the Supreme Court of Louisiana affirmed.¹⁷

The United States Supreme Court, affirming the decision, found the Louisiana sequestration procedure to be a "constitutional accommodation of the conflicting interests of the parties" concerned.¹⁸ The Court recognized that both parties had coexisting interests in the same property, and that only by weighing these interests could they decide what due process re-

16. LA. CODE CIV. P. ANN. arts. 282, 283 (West, 1961) allows the clerks of court to issue writs of sequestration, among their other duties. The official comments accompanying art. 282 recognize that while these acts delegated to the clerks are normally performed by a judge, they are also primarily ministerial in nature, not allowing the clerk any discretion in the matter.

Art. 281 exempts the Parish of Orleans from the coverage of arts. 282, 283, making it necessary for a judge to issue the writ in that parish. *Mitchell* arose in Orleans Parish and consequently a judge issued the writ. It should be noted that the Louisiana law affecting the rest of the state is technically not approved by *Mitchell* since it provides for different procedures.

17. *W.T. Grant Co. v. Mitchell*, 263 La. 627, 269 So. 2d 186 (1972). The Louisiana Supreme Court upheld the statute on two grounds. First, they held that the situation presented by the case fell within an exception recognized in *Fuentes*. The court viewed the situation as one in which the creditor's rights were in immediate danger because of the ease in defeating the vendor's privilege. Second, the Louisiana court held the debtor to have waived his rights to notice and hearing. The court attributed to all debtors an "implied in law" knowledge of the right of the creditor to sequester the property on default and by accepting the goods on credit to have consented to the creditor's potential exercise of this right.

Both of these grounds are questionable, and neither was relied on by the United States Supreme Court in its affirmance. *Fuentes* had declared that in extraordinary circumstances the creditor might show immediate danger to his security as justification for a prejudgment seizure. By its holding, the Louisiana court would bring all vendor-vendee relationships in the state within the exception, without any distinction being made between the debtor's ability to damage the property and an actual intent to do so. This would negate the rule's application to extraordinary situations. *Mitchell v. W.T. Grant Co.*, 94 S. Ct. 1895, 1911 n.1 (1974) (Stewart, J., dissenting).

The Louisiana court's reasoning that Mitchell had waived his constitutional rights is weak in light of cases holding that a waiver, to be valid, must be "voluntarily, intelligently, and knowingly" made. See *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 187 (1972). Similarly the Court stated in *Fuentes* that a waiver of constitutional rights would not be inferred. "[A] waiver of constitutional rights in any context must, at the very least, be clear." 407 U.S. 67, 95 (1972) (emphasis in original).

18. 94 S. Ct. at 1900.

quired.¹⁹ The Court found that the seller had a right to be paid for his goods or regain possession of them with their value unimpaired, noting that normal use impairs their value and that when payments cease the interests of the creditor are adversely affected. Furthermore, there is the danger of malicious waste or disposal of the property, particularly in view of the peculiarity of the Louisiana vendor's privilege,²⁰ which leaves the seller at the buyer's mercy because of his ability to defeat the seller's interests by transferring the property at the first sign of repossession.²¹ The Court also felt that the nature of the issues that would be raised in a hearing lent themselves to documentary proof and were particularly suited to *ex parte* presentation before a judge.²² In balancing, the Court found that the impact on the debtor created by the loss of his household goods was insufficient to overcome the impaired value of the chattel and the potential for waste or alienation. Finally, the Louisiana law provided an opportunity for the debtor to have an immediate post-seizure hearing thus reducing to a minimum the time of deprivation.²³

Petitioner relied on *Sniadach* and *Fuentes* as establishing his right to a hearing before he is deprived of possession. The Court responded by distinguishing *Sniadach* on the grounds that it "did not purport to govern the typical case of the installment seller who brings a suit to collect an unpaid balance,"²⁴ because there the creditor had no prior interest in the property being attached. The Court, however, is on less firm ground in distinguishing *Fuentes*. In *Mitchell*, the Court says the statutes were held unconstitutional in *Fuentes* because they allowed the seizure "without notice or hear-

19. *Id.* at 1898.

20. See discussion note 12 *supra*.

21. This seems to be one of the commonly used arguments in support of *ex parte* procedures. There is disagreement, however, about the real nature of the risk. Most defaulting debtors are stable people, whose delinquency is caused for reasons such as illness or loss of work, and not out of desire to maliciously hurt the creditor. Comment, *The Constitutional Validity of Attachment in Light of Sniadach v. Family Finance Corp.*, 17 U.C.L.A.L. Rev. 837, 846 n.60 (1970).

In *Blair v. Pitchess*, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971), the California Supreme Court faced this argument but found it was rebutted by the creditor's own evidence, which showed that the collection techniques used as the debtor becomes delinquent, *e.g.*, form notices, telephone calls, personal letters, visits and negotiations, all serve as sufficient warning to any debtor acting in bad faith.

22. 94 S. Ct. at 1901. "The issue . . . concerns possession pending trial and turns on the existence of the debt, the lien, and the delinquency."

23. Consideration of this factor seems to conflict with the sentiment expressed by the Court in *Stanley v. Illinois*, 405 U.S. 645, 647 (1972) where they said: "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone."

24. 94 S. Ct. at 1904.

ing and *without judicial order or supervision*”²⁵ In both jurisdictions the writ was issued by the court clerk, but there is no mention in *Fuentes* that this lack of judicial supervision was a fatal flaw and there is a strong argument that the decision would have been the same with or without such judicial overseeing.²⁶ However, the *Mitchell* Court used this qualification to distinguish *Fuentes* and save the Louisiana sequestration procedure, finding adequate protection for the debtor in the statutes providing “for judicial control of the process from beginning to end.”²⁷ At least one court, however, has found this distinction to be superficial because the function of the judicial officer is merely ministerial.²⁸

The Court views the Louisiana procedure as one minimizing the risks of a wrongful seizure because of the safeguards built into the system.²⁹ Reliance upon these same safeguards had been expressly rejected in *Fuentes*, where the Court took a strict approach, holding that only a hearing prior to seizure was adequate,³⁰ although it was proper to consider these safeguards in determining the form of the hearing.³¹ By resurrecting considera-

25. *Id.* (emphasis added).

26. *Fuentes v. Shevin*, 407 U.S. at 96:

We hold that the Florida and Pennsylvania prejudgment replevin provisions work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor. . . . We do not question the power of a State to seize goods before a final judgment in order to protect the security interests of creditors so long as those creditors have tested their claim to the goods through the process of a fair prior hearing.

27. 94 S. Ct. at 1904-05.

28. In *Shaffer v. Holbrook*, 346 F. Supp. 762 (S.D. W. Va. 1972), a three judge district court held the West Virginia landlord summary distress procedure to be unconstitutional. The West Virginia procedure did not require all the safeguards of the Louisiana sequestration law but the warrant did have to be issued by a justice of the peace. The court said of this procedure, “[T]he justice of the peace is performing a nonjudicial act . . . and his magisterial imprimatur on the warrant does nothing to ameliorate the unconstitutional seizure of the property.” *Id.* at 766.

Mr. Justice Stewart, in his dissent, takes the same position. “Whether the issuing functionary be a judge or a court clerk, he can in any event do no more than ascertain the formal sufficiency of the plaintiff’s allegations, after which the issuance of the summary writ becomes a simple ministerial act.” 94 S. Ct. at 1912 (footnotes omitted).

29. 94 S. Ct. at 1905.

30. In *Fuentes* the Court specifically considered the requirements of posting bond and alleging entitlement, and even the potential liability of the creditor in case of a wrongful seizure. But all of these safeguards were not enough to overcome the debtor’s due process rights to a hearing. “[N]o later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred.” 407 U.S. at 82.

31. In *Goldberg v. Kelly*, 397 U.S. 254, 268-71 (1970), the Court offered guidelines for the type of hearing required by due process before welfare benefits could be terminated. These

tion of these safeguards in its analysis, the Court implicitly overruled *Fuentes*, and although Mr. Justice White does not expressly say so in the Court's opinion, both Mr. Justice Powell³² and Mr. Justice Stewart³³ recognize that the broad sweep of *Fuentes* is being in fact overruled.

In taking this step the Court relies on precedents that had previously constituted extraordinary situations recognized in *Fuentes*.³⁴ For the most part they do not address themselves to the debtor-creditor relationship and those that do are dated.³⁵ Thus, while the Court is distinguishing the controlling case it is at the same time relying on those that do not control. The Court proceeds on the theory that due process is not inflexible and the circumstances of each case must be analyzed to determine what procedures are required.³⁶ This will, of course, prevent the Court from laying down a broad rule, as it did in *Fuentes*, and will require a case by case determination of the limits of due process.

The Court is apparently troubled by the perceived effect a different conclusion would have on commercial transactions, acknowledging its concern that the cost of credit and its availability may be affected by a rule imposing notice and hearing before every seizure.³⁷ The importance at-

guidelines could be adapted to other situations in which a hearing is necessary. According to *Goldberg*, the hearing must provide for (1) personal appearance before the decision maker, (2) confrontation of adverse witnesses, (3) oral presentation of evidence, (4) informal procedures, (5) counsel, if requested, and (6) the decision maker to state the reasons for his decision.

32. 94 S. Ct. at 1908 (concurring opinion).

33. *Id.* at 1913 (dissenting opinion). Mr. Justice Stewart, joined by Mr. Justice Douglas and Mr. Justice Marshall, is particularly upset over what he feels to be a "substantial departure from precedent." He expresses concern over the loss of respect the Court may suffer from failing to follow its own constitutional rulings and charges that the "only perceivable change that has occurred since the *Fuentes* case is in the makeup of this Court."

Roofing Wholesale Co. v. Palmer, 108 Ariz. 508, 502 P.2d 1327 (1972), cited by Mr. Justice Stewart, lends support to his contention. The Arizona Supreme Court refused to follow *Fuentes* since it had been decided by less than a majority of the full Court (4-3), and they were unwilling to declare the Arizona statute in question unconstitutional until at least a clear majority of the Court had reconsidered the *Fuentes* decision.

34. See note 10 *supra*. The Court ignores the extraordinary situation concept and discusses these cases as if they had not previously been distinguished.

35. The cases that do involve a creditor-debtor relationship between the parties can qualify under the criteria for extraordinary circumstances set forth in note 10 *supra* as exceptions to the rule. Thus, for example, attachment of property of a non-resident to secure jurisdiction, as in *Ownbey v. Morgan*, 256 U.S. 94 (1921), definitely protects the government interest in the efficient working of the court system.

36. See *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961).

37. 94 S. Ct. at 1905 n.13.

tached to these factors in balancing, however, is largely subjective and open to attack.³⁸

Mitchell cannot help but unsettle what was becoming a clearly defined area of the law. However, the *Fuentes* analysis of due process may still be valid where the facts of any particular case are distinguishable from *Mitchell*.³⁹ Essentially legislatures will only have to draft replevin laws to provide that the writ be issued by a judge, instead of by the court clerk, in order for them to be upheld.⁴⁰ Thus, it appears that the debtor once again will be subject to seizure of his household goods without notice or opportunity to be heard.

D.C.M.

38. The California Supreme Court in *Randone v. Appellate Dep't of Super. Ct.*, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), considered these contentions but found them unpersuasive. They concluded that it is an unproven assertion by the creditors that the cost of credit would rise, and indeed the point is in dispute. Furthermore, they reasoned, it is just as arguable that liberalized extensions of credit are not in the general public interest and the curtailment of easily available credit may not be a bad thing. For a general discussion of the economic arguments for and against prejudgment seizures see Brunn, *Wage Garnishment in California: A Study and Recommendations*, 53 CALIF. L. REV. 1214 (1965); Symposium, *Creditors' Rights*, 47 S. CAL. L. REV. 1 (1973); Note, *Self-Help Repossession: The Constitutional Attack, The Legislative Response, and the Economic Implications*, 62 GEO. L.J. 273, 312-23 (1973).

39. One distinction that will be present in cases arising outside of Louisiana will be the absence of the vendor's privilege as a factor in the case. Where the interests of the creditor are not as vulnerable as they were in *Mitchell*, because of different treatment under the UNIFORM COMMERCIAL CODE, there may not be justification for a summary seizure.

40. The Virginia statute already requires a judge or magistrate to issue the warrant in detinue and should be able to withstand constitutional attack without any changes being made. See note 14 *supra*.