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Courts, Creditors' Rights; Debtors' Protection; Sequestration; Mitchell v. W.T. Grant Co.

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CONSTITUTIONAL LAW

Courts • Creditors' Rights • Debtors' Protection • Sequestration

Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974).

SINCE 1969, AND THE DECISION in *Sniadach v. Family Finance Corp.*,[1] the confrontation between the creditor and the constitution has continued apace.[2] *Sniadach* began an expansion of the measure of due process applicable to creditors' prejudgment remedies, and heralded a new era of protection for the property interests of vendee-debtors under the cloak of the fourteenth amendment.[3] However, the most recent decision of the Supreme Court on summary prejudgment remedies, *Mitchell v. W. T. Grant Co.*,[4] appears to have abruptly halted that expansion and has returned judicial thinking to a concept of due process prevalent in the pre-*Sniadach* era.[5] Accordingly, a new analysis of the role of due process in the context of secured transactions and prejudgment remedies is in order.

Mitchell v. W. T. Grant Co.—A NEW TREND

Petitioner Mitchell had purchased from the W. T. Grant Co. a refrigerator, range, stereo, and washing machine. In February, 1972, the seller found Mitchell's account overdue, with an unpaid balance of $574.14.[6] In accordance with the Louisiana statutes, the seller filed in the First City Court of New Orleans for judgment in the amount owed and an ex parte writ of sequestration.[7] Based upon the vendor's allegations that the vendee-debtor would seek to alienate, encumber, or dispose of the merchandise in question, the writ was issued and the property seized[8] under the prejudgment remedies permitted under the Louisiana statutes.[9]

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1 395 U.S. 337 (1969).

2 Clark and Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 U. VA. L. REV. 355 (1973) [hereinafter cited as Clark and Landers]; McDonnell, *Sniadach, The Replevin Cases and Self-Help Repossession*, 14 B.C. IND. & COMM. L. REV. 437 (1973).

3 Post-Sniadach decisions extending due process requirements in summary prejudgment situations include at the Supreme Court level: Fuentes v. Shevin, 407 U.S. 67 (1972); Lynch v. Household Finance Corp., 405 U.S. 538 (1972); Randone v. Appellate Dept. of Super Ct., 5 Cal. 3d 536, 96 Cal. Rptr. 709, 488 P.2d 13 (1971), *cert. denied* 407 U.S. 924 (1972); Schwarb v. Lennox, 405 U.S. 191 (1972); Bell v. Burson, 402 U.S. 535 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970).

4 Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974).

5 Pre-Sniadach decisions upheld the proposition that the requirements of due process do not compel notice and opportunity for a hearing prior to a summary taking. *See*, McKay v. McInnes, 279 U.S. 280 (1928); Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1927); Ownbey v. Morgan, 256 U.S. 94 (1920).

6 416 U.S. at 601.

7 LA. CODE CIV. PRO. ANN. art. 281, 3501, 3510, 3571 (West 1960).

8 416 U.S. at 601.

9 LA. CODE CIV. PRO. ANN. art. 3501, 3571 (West 1960). Art. 3571 reads in pertinent part:

One month later, Mitchell filed for dissolution of the writ, claiming that the property was exempt from seizure under state law and that the ex parte sequestration was violative of the due process clause of the fourteenth amendment.[10] Both claims were denied in the state court system; upon certiorari, the United States Supreme Court affirmed the lower court decisions.[11]

The question considered by the Court was whether the sequestration violated the requirements of due process, as it was ordered ex parte without prior notice or opportunity for a hearing.[12] In a five-to-four decision, the Court held that Louisiana's sequestration procedure committed no violation of due process.[13]

Speaking for the majority, Justice White relied on several theories to uphold the sequestration. The primary concern of the Court was striking a balance between the property interests of the debtor and creditor as delineated by state law.[14] Weighing both interests, the Court found it necessary to tip the balance in favor of the seller on the basis that the seller's interest in the property was constantly eroding. Although the debtor holds possession and an encumbered title which is subject to defeasance upon default, the seller's interest is even more precarious. Not only is the money value of the secured property depreciating with normal use, but the creditor's money interest in the property is also decreasing.[15] The Court held that the state is permitted to recognize these considerations and provide a protectional advantage to the seller.[16] Additionally, the vendee-debtor is afforded protection by the statute: A bond must be filed to protect the vendee against damages, the nature and amount of the vendor's claim must be specified to guard against error, an immediate hearing is available to the vendee for the dissolution of the writ, and the vendee may file his own bond to have the property returned.[17] Secondly,

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> ...When one claims the ownership or right to possession of property, or a mortgage, lien, or privilege thereon, he may have the property seized under a writ of sequestration, if it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish during the pendency of the action.

[10] U.S. CONST. amend. XIV, § 1, which reads: "...No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[11] 416 U.S. at 603.

[12] *Id.*

[13] *Id.*

[14] *Id.* at 604.

[15] *Id.* at 606.

[16] *Id.* at 608.

[17] *Id.* at 607; LA. CODE CIV. PRO. ANN. art. 3507, 3508 (West 1960). It is interesting to note that even though provisions for the release of the secured property are available to the vendee-debtor, it is unlikely that he would be able to furnish the

there was an allegedly exceptional and emergent need that arose out of the doctrine of property law which permits a vendor's lien to be defeated by transfer of the property to a bona fide purchaser.[18] Notice to the vendee of a pending hearing would afford him with the opportunity to make such a transfer and thus defeat the creditors' claims entirely.[19] Third, the Court dealt with the question of a need for determination of entitlement prior to a deprivation. Deciding that case law did not indicate any mandate for an adversary proceeding prior to deprivation, it was held that establishing the probable success of the seller in a subsequent hearing would be sufficient basis for seizure of the property.[20]

Thus, the majority concluded that the impact of a deprivation on the buyer did not override the potential problems of the seller in collecting his judgment.[21] As the requirements of due process are general, not technical or procedural, the Louisiana statute was held to have reached a constitutional accommodation of the interests of both parties,[22] as the creditor rather than the debtor had a more pressing need for the protections of the fourteenth amendment.[23]

The decision is a radical departure from what has gone before. To understand the problems of the *Mitchell* decision, and the implications it has for the future, one must first consider the due process clause itself and the role it has played in the field of secured transactions.

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required bond. In most situations, if the cash were available, the time payment purchase method would not have been used. When viewed in this light, Arts. 3507 and 3508 provide questionable protection. *See generally,* Dreyfuss, *Due Process Denied: Consumer Default Judgments in New York City,* 10 COLUM. J.L.& SOC. PROBS. 370 (1974), for a sociological approach to the realities of consumer default proceedings; *see also* White, *Representing the Low Income Consumer in Repossessions, Resales, and Deficiency Judgment Cases,* 64 NW. U.L. REV. 808, 810-812 (1970).

[18] 416 U.S. at 608-609.

[19] *Id.* at 609.

[20] *Id.* Cases relied upon by the petitioner as *contra* the proposition stated by the Court are listed at 416 U.S. 611, n. 10, and include Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Covy v. Town of Somers, 351 U.S. 141 (1956); New York v. N.Y., N.H. & H. Ry. Co., 344 U.S. 293 (1953); Mullane v. Central Hanover Bank and Trust Co., 399 U.S. 306 (1950); Griffin v. Griffin, 327 U.S. 220 (1946); Opp Cotton Mills v. Administrator, 312 U.S. 126 (1941); West Ohio Gas Co. v. P.U.C. of Ohio, 294 U.S. 63 (1935); United States v. Illinois Central R.R. Co., 291 U.S. 457 (1934); Southern Ry. Co. v. Virginia, 290 U.S. 190 (1933); Goldsmith v. U.S. Board of Tax Appeals, 270 U.S. 117 (1926); Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915); Londoner v. Denver, 210 U.S. 373 (1908); Central of Georgia Ry. Co. v. Wright, 207 U.S. 127 (1907); Roller v. Holly, 176 U.S. 398 (1900); Hovey v. Elliott, 167 U.S. 409 (1897); Scott v. McNeal, 154 U.S. 34 (1894); Windsor v. McVeigh, 93 U.S. (3 Otto) 274 (1876); Ray v. Norseworthy, 90 U.S. (23 Wall.) 128 (1875); Rees v. City of Watertown, 86 U.S. (19 Wall.) 107 (1874); Baldwin v. Hale, 68 U.S. (1 Wall.) 223 (1864).

[21] 416 U.S. at 610.

[22] *Id.*

[23] *Id.*

THE BACKGROUND FOR THE MITCHELL DECISION— DUE PROCESS AND PREJUDGMENT REMEDIES

Traditionally, due process is held to mandate proper procedure; this was the import intended by the authors of the Bill of Rights.[24] However, it soon became apparent that the protection extending only to compliance with proper procedures would still permit injustices to occur under arbitrary and capricious statutes.[25] Therefore, the meaning of due process was extended to cover substantive concerns also. The substantive-procedural duality has been accepted as valid since 1887.[26] The due process clause has thus evolved as a barrier against any state action that is arbitrary and unreasonable.[27]

In accordance with these concepts, the decisions in *Sniadach* and *Fuentes* were handed down, and interpreted by many jurisdictions, as a broad indictment of creditors' remedies against the strictures of due process.[28] Doubt was cast upon the accepted and customary practices of repossession and garnishment that sent shock waves through the entire field of secured transactions; it appeared that closely related summary remedies were destined to perish of similar constitutional infirmity.[29]

In *Sniadach*, Family Finance Corporation instituted a prejudgment garnishment action against Sniadach and her employer to collect on a defaulted promissory note. The petitioner complained that the prejudgment garnishment was violative of the fourteenth amendment in that neither notice nor opportunity for a hearing was provided. The majority, basing its holding on congressional investigations, law review commentaries, and the traditional concept of due process, found that garnishment gave the creditor tremendous leverage over the debtor and concluded that a taking of property which was so obvious clearly violated due process absent notice and a prior hearing.[30]

Shortly thereafter, *Fuentes* was decided and broadly extended the doctrines laid down in *Sniadach*. The petitioners in *Fuentes* challenged the constitutionality of the Pennsylvania and Florida replevin statutes, which permitted issuance of a prejudgment writ of replevin upon ex parte application to a court clerk. Seizure followed, without notice or opportunity for a hearing.[31] The statutes were held unconstitutional in that they worked "a deprivation of property without due process of law

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[24] *See*, STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1783 (1833).

[25] *See*, Poe v. Ullman, 367 U.S. 497, 518 (1961) (Douglas, J., dissenting).

[26] Allgeyer v. Louisiana, 165 U.S. 578 (1897).

[27] Hurtado v. California, 110 U.S. 516 (1884).

[28] *See*, Clark and Landers, *supra* note 2, at 357, for indexing and discussion of such holdings.

[29] *See*, Clark and Landers, *supra* note 2, at 355-56.

[30] 395 U.S. at 340.

[31] 407 U.S. at 77-78.

insofar as they denied the right to a prior opportunity to be heard before chattels are taken from their possessor."[32] Additionally, the court rejected the gradient concept of property interest which is a basis of the balancing theory used by the *Mitchell* court, stating that a deprivation was a deprivation regardless of duration.[33]

With such an expansive spirit being manifested in invalidating summary prejudgment remedies, most jurisdictions began to follow suit.[34] At that point, the controversy shifted to the constitutionality of self-help remedies which did not involve state action. In *Adams v. Egley* and *Adams v. Southern California First National Bank*,[35] the courts turned their attention to self-help repossession as typified by sections 9-503 and 9-504 of the Uniform Commercial Code.[36] In a decision that caused a favorable stir among creditors, the district court held that there was no state action involved in self-help repossession under the Code,[37] and any such action was therefore immune from the requirements of the fourteenth amendment.[38] The Supreme Court let the decision stand by denying certiorari.[39]

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[32] 407 U.S. at 96.

[33] 407 U.S. at 84-85.

[34] *See* notes 3 and 28, *supra.*

[35] Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972), *rev'd sub nom,* Adams v. Southeern California First National Bank, 492 F.2d 324 (9th Cir. 1973), *cert. denied* 43 U.S.L.W. 3281 (1974).

[36] UNIFORM COMMERCIAL CODE § 9-503 provides:

> Secured Party's Right to Take Possession After Default. Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession, a secured party may proceed without judicial process if this can be done without a breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal, a secured party may render equipment unusuable, and may dispose of collateral on the debtor's premises under Section 9-504.

UNIFORM COMMERCIAL CODE § 9-504 provides in pertinent part: "Secured Party's Right to Dispose of Collateral After Default; Effect of Disposition. (1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing."

[37] 492 F.2d at 328-38.

[38] *Id.*

[39] 43 U.S.L.W. 3281 (1974). However, in spite of the *Adams* decision, the constitutionality of self-help repossession will continue to be debated. *Compare,* Brodsky, *Constitutionality of Self-Help Repossession Under the U.C.C.: The Eighth and Ninth Circuits Speak,* 19 S. DAK. L. REV. 295 (1974) (which contains an excellent discussion of the practical aspects of self-help repossession); Mentschikoff, *Peaceful Repossession Under the Uniform Commercial Code: A Constitutional and Economic Analysis,* 14 WM. & MARY L. REV. 767 (1973); *and Security Interests: Self-Help Still an Available Method of Repossession,* 28 U. MIAMI L. REV. 231 (1973); *with* Hughes, *Creditors Self-Help Remedies Under U.C.C. § 9-503: Violative of Due Process in Texas,* 5 ST. MARY'S L.J. 701 (1974) (which contains an interesting discussion of the "encouragement" theory as state action); Yudof, *Reflections on Private Repossessions, Public Policy and the Constitution,* 122 U. OF PA. L. REV. 954 (1974); *and Adams v. Southern California First National Bank—The End of a Notable Beginning?* 35 U. PITT. L. REV. 882 (1974).

Thus, the law on summary prejudgment remedies was left in a peculiar state of flux. The Supreme Court was invalidating the remedies conducted under the auspices of state authority, while self-help remedies were being upheld by the lower courts. This surely will move most creditors toward the vigilante remedies outlined in section 9-503 and 9-504 of the U.C.C., which are less complex, less expensive, more efficient, and have survived the constitutional infirmities that have afflicted state action remedies.[40]

A synthesis and clarification of standards for prejudgment remedies was needed; *Mitchell* provided the court with opportunity. However, the *Mitchell* decision only further muddied the waters, by adopting a questionable rationale and failing to either uphold or overrule *Fuentes* and *Sniadach*. The only clear indication one can draw from *Mitchell* and its precedents is that the issue of summary prejudgment remedies is ripe for relitigation.

THE PROBLEMS POSED BY THE MITCHELL DECISION

Both Justice Stewart's[41] and Justice Brennan's dissents[42] and Justice Powell's concurring opinion[43] indicate the pressing need for the Court to deal with *Fuentes* in some manner other than distinguishing it on the facts. Justice Powell points out that the Court in *Fuentes:*

> ... enunciated the principle that the constitutional guarantee of procedural due process requires an adversary hearing before an individual may be temporarily deprived of any possessory interest in tangible personal property, however brief the dispossession and however slight his monetary interest in the property. The court's decision today withdraws significantly from the full reach of that principle and to this extent I think it fair to say that the Fuentes' opinion is overruled.[44]

Had the majority so held, matters would be simpler and the needed

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[40] The state action question itself remains far from settled. In Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), the court commented upon the impossibility of devising a formula for determining the presence or absence of state action, and reiterated the point in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). Few cases provide any guidelines. *See, e.g.*, Jackson v. Metropolitan Edison Co., 43 U.S.L.W. 4110 (Dec. 23, 1974); Evans v. Abbey, 396 U.S. 435 (1970); Reitman v. Mulkey, 387 U.S. 369 (1967); Shelley v. Kraemer, 334 U.S. 1 (1948); The Civil Rights Cases, 109 U.S. 3 (1883). *Compare* Comment, *State Action and the Burger Court,* 60 VA. L. REV. 840 (1974) (a discussion of the Court's refusal to find a basis for state action, and for support of the theory that individual rights should be balanced against asserted government obligations on a case by case basis); *with* Elkind, *State Action: Theories for Applying Constitutional Restrictions to Private Activity,* 74 COLUM. L. REV. 656 (1974) (which suggests evaluating underlying policies to determine presence or absence of state action). *See also,* Note, *Constitutional Restrictions on Termination of Services by Privately Owned Public Utilities,* 39 MO. L. REV. 205 (1974).

[41] 416 U.S. at 629.

[42] *Id.* at 636.

[43] *Id.* at 623.

[44] *Id.*

clarification provided.[45] Justice Stewart's dissenting opinion also admonished the Court for playing fast and loose with the principle of stare decisis;[46] a terse dissent by Justice Brennan also digs at the majority's position on *Fuentes,* stating only that the Louisiana statutes should be overturned on the basis of that decision.[47]

The majority's factual distinction is weak. The statutes involved are remarkably similar.[48] In either case, all that is required to support issuance of an ex parte writ for seizure is the filing of a complaint and an affidavit containing pro forma allegations of the seller's entitlement.[49] Justice White relies on the fact that in *Fuentes* the writ was issued by the court clerk rather than by a judge, as was the established procedure in Orleans parish;[50] upon that distinction White rested the conclusion that in Louisiana the entire procedure leading to the deprivation was accomplished under judicial supervision and therefore comported with the requirements of due process.[51]

Such a distinction relies too heavily on form as opposed to substance. Although there is admittedly a difference in status between a court clerk and a judge, the requirements and intents of the statutes are identical. The proceedings are merely pro forma, facilitating a final determination prior to any actual adversary proceeding. Neither requires more than a "bare bones" allegation of entitlement and default;[52] neither offers an opportunity for the vendee-debtor to present available defenses as required by *Fuentes.*[53] One would not expect a creditor to advise the magistrate that a default had occurred as a result of a controversy over a service contract or a breach of warranty question; nor is such information required. The writ is issued. Whether the writ is issued by a judge or clerk is not relevant, the information required is far too one-sided to permit an adequate determination of whether a prejudgment deprivation applicable under state law should be authorized.[54] The court's failure to overrule *Fuentes* has

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45 At this point, the only thing that is clear is that secured creditors are currently safe in moving with self-help repossession under the Uniform Commercial Code, rather than relying upon the state action remedies which would involve state action and could be contested on that basis in spite of the *Mitchell* holding.

46 416 U.S. at 634-636.

47 *Id.* at 636.

48 The Florida and Pennsylvania replevin statutes required that allegations of entitlement be made before a court clerk, while the Louisiana statute required that it be made before a judge. The posting of a security bond in any of the states gives the defendant the right to regain possession. None require prior notice of prejudgment seizure.

49 *Compare* LA. CODE CIV. PRO. ANN. art. 281, 3501, 3510 (West 1960) *with* FLA. STAT. ANN. § 78.01, 78.07, 78.08 (Supp. 1972-73); PA. STAT. ANN., tit. 12 § 1821 (1901); *and* Pa. R. Civ. P. 1073.

50 LA. CODE CIV. PRO. ANN. art. 281 (West 1960).

51 416 U.S. at 616.

52 *See* note 49, *supra.*

53 407 U.S. 73-79.

54 *Id.* at 83, 94.

thus resulted in two exactly opposite holdings on parallel fact situations.

There are other internal problems in the *Mitchell* rationale. The court is unable to synthesize any standard as to when notice and hearing will be required; instead a negative approach is taken that results in a determination that such procedures are not essential in the instant fact situation. This negative determination does little to establish clear and predictable standards. The majority rests the "non-notice" concept of due process on a line of special circumstances cases which upheld a denial of formal procedural due process in particular circumstances.[55] An example is found in *Cafeteria Workers v. McElroy*,[56] in which a union member's security badge was revoked without notice or opportunity for a hearing; consequently, she was denied her employment at a lunch counter on a military base. The court held that the revocation without notice and hearing did not violate due process, due to the well-established principle of the government's power to manage the internal operations of a federal military establishment, and the traditional extent of governmental control for military security reasons excused the government from applying typical fourteenth amendment formalisms.[57] The case turns on an exception—an overriding military security interest—rather than a rule. The other cases cited suffer the same weaknesses; all turn on some exceptional overriding governmental interest in a sense other than that of a secured transaction.[58]

No such exceptional need or overriding governmental or creditor interest that would suffice to overrule the requirements of due process was advanced by the Burger Court in *Mitchell*. Rather, the majority appeared frightened by the phantom that notice would afford the vendee-debtor an opportunity to alienate the security and defeat the creditor's claim.[59] The argument that due process would be abused by some, so therefore, will be awarded to none is an anomaly that would shock any student of constitutional law. Too, in *Fuentes* the Court espoused the proposition that only in exceptional circumstances could the deprivation of a property interest encompassed by the fourteenth amendment be accomplished without notice and/or opportunity to be heard.[60] It was additionally made clear that the ordinary interest of a creditor in collecting his judgment is not sufficient to justify overriding the fourteenth amendment.[61] A hearing prior to deprivation is founded on strong precedents.[62] The Court itself

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[55] 416 U.S. at 610.

[56] Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961).

[57] *Id.*

[58] Stanley v. Illinois, 405 U.S. 645 (1972) (the overriding governmental interest in protecting children); Inland Empire Council v. Millis, 325 U.S. 697 (1945) (questioned only the proper time for the hearing); N.L.R.B. v. MacKay Co., 304 U.S. 333 (1938) (concerned with governmental interest in facilitating the end of a strike).

[59] 416 U.S. at 609.

[60] 407 U.S. at 82. *See also*, Boddie v. Connecticut, 401 U.S. 371 (1971).

[61] 407 U.S. at 91-94.

[62] *Id.* at 82.

indicates its hesitancy and strictly limits its holdings.[63]

The *Mitchell* decision also fails to resolve other constitutional questions presented by summary prejudgment remedies. Even if constitutional strictures of due process are held inapplicable in the future, summary prejudgment remedies could still stumble over fourth amendment prohibitions against unreasonable search and seizure. The idea has already found some supporters.[64]

The departure from *Fuentes* and the notice and opportunity concept espoused therein only two years after the decision was made is a startling departure from the principle of stare decisis and perhaps can only be explained by Justice Stewart's comment:

> The only perceivable change that has occurred since the *Fuentes* case is in the makeup of this court.
>
> A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the government. No misconception could do more lasting injury to this court and to the system of law which it is our abiding mission to serve.[65]

It is difficult to find other grounds for the transition in the style of application of due process.

There is no clear indicia at this time whether the Court will continue to extend its narrow view that due process does not require notice or a hearing. It is possible that the *Mitchell* decision could be narrowly construed on the basis that a judge issues a writ in Orleans parish; most statutes delegate the responsibility to court clerks. Also, *Fuentes* remains on the books as good law and supplies strong precedent for invalidating summary prejudgment remedies clearly conducted under the auspices of the state.

In any respect, it is clear from the *Mitchell* decision that the role of the due process clause in the field of secured transactions is by no means settled.[66] Only a relitigation will clarify the matter.

SANDRA J. PICKUT

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[63] 416 U.S. 618, n.13, in which the court sets limitations on its holdings.

[64] *See,* Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970), which held that the fourth amendment is available to prevent intrusions in both civil and criminal matters as well as prehearing seizures without the intervention or order of a judicial officer. This holding would provide a valid tactical weapon against summary prejudgment remedies that did not involve judicial action and could provide a means for establishing a more extensive factual inquiry prior to a deprivation.

[65] 416 U.S. at 635-36. Justices Powell and Rehnquist did not participate in the Fuentes decision. *See* 407 U.S. at 97. For the standard operation of stare decisis, *see generally,* GOLDBERG, EQUAL JUSTICE 65-99 (1971); LLEWELLYN, THE COMMON LAW TRADITION (1960).

[66] The Supreme Court's most recent confrontation with the prejudgment remedy issue came in North Georgia Finishing, Inc. v. Di-Chem, Inc., 43 U.S.L.W. 4192 (Jan. 22, 1975). The opinion serves only to emphasize the Court's own confusion on the status of prejudgment remedies. In the instant case, a corporate bank account

was garnisheed; the garnishment was invalidated on the basis of *Fuentes* and *Sniadach* in that there was no opportunity for early hearing and no participation in the obtaining of an affidavit by a judicial officer. The *Mitchell* case was used as a buttress for the *Fuentes* and *Snaidach* holdings, upon which the decision rested. 43 U.S.L.W. at 4194. Justice Stewart concurred at 43 U.S.L.W. 4194, celebrating the reincarnation of *Fuentes*. Also concurring was Justice Powell, 43 U.S.L.W. at 4194-4195, who stated that prejudgment remedy statutes should contain (1) posting of adequate security bond by the creditor, (2) establishment before a neutral officer of a factual basis for resorting to prejudgment seizure, (3) prompt post-garnishment judicial hearing, and (4) provisions for the debtor to post security bond for return of the goods seized.

However, a bitter dissent by Justices Blackmun and Rehnquist, 43 U.S.L.W. at 4196, complains that this matter has been before the Court three times in the past three years and no adequate standard has been set. The Justices contend that *Fuentes* was decided by a "bob-tailed court" and should have been reargued, rather than leaving the apparent standard of a case-by-case determination. Justice Burger also objected, 43 U.S.L.W. at 4198, to the case-by-case determination.

CONSTITUTIONAL LAW

Marriage Rights · Homosexuals and Transsexuals

B. v. B., 78 Misc. 2d 112, 355 N.Y.S.2d 712 (1974)

WHAT IS A MARRIAGE? Although there are several definitions,[1] they all contain one common element: the union of one man and one woman. However, if a particular state had no statute which specifically required that marriage be between a man and a woman would the courts uphold a marriage between members of the same sex? The New York Supreme Court, in *B. v. B.*,[2] answered that question in the negative. In that case the wife brought an action for annulment on the ground that her husband was a female,[3] and the husband attempted to amend his answer and counterclaim for a divorce on the ground of abandonment.[4] The court

1 "... the civil status, condition, or relation of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent upon those whose association is founded on the distinction of sex." BLACK'S LAW DICTIONARY 1123 (4th rev. ed. 1968); "The institution whereby men and women are joined in a special kind of social and legal dependence for the purpose of founding and maintaining a family." WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 518 (1966).

2 78 Misc. 2d 112, 335 N.Y.S.2d 712 (Sup. Ct. 1974).

3 *Id.*

4 *Id.*