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ARTICLES

THE SUPREME COURT'S CHANGING ATTITUDE TOWARD CONSUMER PROTECTION AND ITS IMPACT ON MONTANA PREJUDGMENT REMEDIES

John T. McDermott*

INTRODUCTION

Decisions of the United States Supreme Court are traditionally announced on Mondays, but none were announced on Monday, June 23, 1969, the last day of the 1968 term. Instead, the Court convened to pay tribute to its retiring Chief Justice and to welcome his successor. In addressing the Court President Nixon predicted that "when the historians write of this period and the period that follows, some with a superficial view will describe the last sixteen years as the 'Warren Court' and will describe the court that follows it as the 'Burger Court.'"¹ Although observers often compare the two courts by examining their decisions in the area of constitutional criminal law, the clearest evidence of fundamental differences in judicial philosophy between the two courts can be seen in the area of consumer law. This article examines the sharply changed attitudes of the new Court toward creditor remedies, analyzes the impact of these changing approaches on the traditional creditor protection statutes found in Montana, and suggests how Montana law may be altered to meet constitutional requirements not dependent on the changing composition of the Court.

* Associate Professor of Law, University of Montana. The author wishes to acknowledge the work of the following members of the 1975 class for their help in doing the background research for this article: Robert Jovick, James Nugent, Stephen Mackey, David Wing, Catherine Swift, Steve Harman, Jeffrey Sherlock, James Kommers, Charles Tornabene, James Benn, H. David Cogley, Angus Fulton, Phillip Grainey, Kenneth Green, Clarence Greenwood, Claren Neal, and Suzann Weiland.

1. Remarks of President Nixon, 395 U.S. IX (1969). Such designations undoubtedly overemphasize the importance of the Chief Justice while ignoring the importance of the Associate Justices on the Court who share his judicial philosophy. The solidarity of the "Warren Court" was based upon general agreement between Chief Justice Warren and Associate Justices Douglas, Brennan, Goldberg, Fortas, Marshall and in many instances, Black and Stewart. The strength of the "Burger Court" rests with the frequent majority composed of the Chief Justice and Justices White, Blackmun, Powell, and Rehnquist. It should be noted that the Warren Court functioned as a unit even after Earl Warren was replaced by Warren Burger. See footnote 11.

CONSUMER PROTECTION AND THE WARREN COURT

Sniadach

On June 9, 1969, just two weeks before the resignation of Chief Justice Warren took effect the Supreme Court handed down a momentous decision in *Sniadach v. Family Finance Corp. of Bayview*.² The decision was important because it broke with past precedent and established the principle that the Fourteenth Amendment protects not only individuals charged with crimes, but also those charged with not paying their debts.³

Mrs. Sniadach owed the Family Finance Corporation of Bayview \$420 on a promissory note. Acting pursuant to Wisconsin law, the finance company instituted a garnishment action against Mrs. Sniadach's employer. The employer responded, stating that it owed Mrs. Sniadach wages of \$63.18 and that it would, under Wisconsin law, withhold one-half of that amount subject to the order of the court.⁴ Mrs. Sniadach challenged the Wisconsin garnishment statute in state court on the ground that the Wisconsin statute was constitutionally invalid because it allowed the garnishment to be issued on an *ex parte* application without requiring any prior notice or hearing.⁵ Although unsuccessful in the state courts, Mrs. Sniadach did not abandon her \$30 claim. She filed a petition for a writ of certiorari with the United States Supreme Court, which it surprisingly granted.⁶

The Wisconsin procedure involved in this case can be briefly summarized. The statute gives the plaintiff ten days in which to serve the summons and complaint on the defendant after service on the garnishee. The issuing of the summons is routine upon the request of the creditor's lawyer, and the effect of the garnishment is to freeze the defendant's wages until a trial is held on the main suit.⁷

While recognizing that such a summary procedure might be valid in "extraordinary situations" Justice Douglas, writing for the Court, concluded:

The result is that a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall. Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice of the prior

2. *Sniadach v. Family Finance Corp. of Bayview*, 395 U.S. 337 (1969).

3. The decision was nearly unanimous. Justice Douglas wrote for the Court, Justice Harlan concurred and only Justice Black dissented.

4. *Sniadach*, *supra*, note 2 at 338.

5. *Family Finance Corp. of Bayview v. Sniadach*, 37 Wis. 2d 163, 154 N.W. 2d 259 (1968).

6. 393 U.S. 1078 (1969).

7. Wis. Stat §§267.04(1), 267.07(1).

hearing, this prejudgment garnishment procedure violates the fundamental principles of due process.⁸

Thus the Warren Court had invalidated a statute of the type which had been on the books for over a hundred years and which had been upheld by the Supreme Court less than 50 years before.⁹

Of course, the Supreme Court had emphasized that the *Sniadach* case dealt with "wages—a specialized type of property presenting distinct problems in our economic system,"¹⁰ and many wondered how far the Court would go in striking down other debt collection devices which failed to afford the debtor notice and hearing. The answer appeared to come three years later when, at the close of the 1971 term, the Court handed down its opinion in *Fuentes v. Shevin*.¹¹

Fuentes

The *Fuentes* case involved a typical debt collection technique. Margareta Fuentes, a resident of Florida, had purchased a gas stove and service policy under a conditional sales contract. A few months later she purchased a stereophonic phonograph from the same company under the same sort of contract. The total cost of the stove and stereo was about \$500, plus an additional financing charge of slightly over \$100. Under the contracts, the seller retained title to the merchandise, but Mrs. Fuentes was entitled to possession, unless and until she defaulted on her installment payments. Mrs. Fuentes made her payments regularly for more than a year until a dispute developed between her and the store concerning the servicing of the stove. She stopped making her monthly payments and the seller brought suit in Small Claims Court for the repossession of both the stove and the stereo. At the same time, and before Mrs. Fuentes had received a summons or complaint, the seller obtained a writ of replevin ordering the sheriff to seize the disputed goods at once. As had been the case in *Sniadach*, the issuing of the writ of replevin was virtually automatic. The plaintiff had only to fill in the blanks on the appropriate forms and submit them to the Clerk of the Small Claims Court who then signed and stamped them.¹²

8. *Sniadach*, *supra*, note 2 at 341, 342.

9. *Owindee v. Morgan*, 256 U.S. 94 (1921).

10. *Sniadach*, *supra*, note 2 at 340.

11. *Fuentes v. Shevin*, Attorney General of Florida, 407 U.S. 67 (1972). Although Warren Burger had become Chief Justice by this time, the Court could still be properly categorized as the "Warren Court" since Justices Douglas, Brennan, Stewart, and Marshall commanded a majority and since neither Justice Powell or Rehnquist participated in this or other decisions rendered during that term. See also, Note, *Fuentes v. Shevin* 34 MONT. L. REV. 178 (1973).

12. *Fuentes*, *supra* note 11 at 70, 71.

A companion case, *Parham v. Cortese*,¹³ involved a similar situation. The debtors had purchased personal property under an installment sales contract like the one signed by Mrs. Fuentes. The sellers of the property had obtained and executed summary writs of replevin, under Pennsylvania law, claiming that the debtors had fallen behind in their installment payments.¹⁴

In both cases, three-judge Federal District Courts were convened to consider the challenge to the constitutionality of the Florida and Pennsylvania statutes, and both courts upheld their constitutionality.¹⁵ The Supreme Court noted probable jurisdiction of both appeals¹⁶ and reversed both judgments.¹⁷

Writing for the four-judge majority, Justice Stewart first noted that:

Both statutes provide for the issuance of writs ordering state agents to seize the person's possessions, simply upon the *ex parte* application of any other who claims a right to them and posts a security bond. Neither statute provides for notice to be given to the possessor of the property, and neither statute gives the possessor an opportunity to challenge the seizure in any kind of prior hearing.¹⁸

But the Court also noted *differences* between the statutes. The Florida statute — but not the Pennsylvania law — required that there be a post-seizure hearing. In addition, Florida law provided that the officer who seized the property must keep it for three days and during that period defendant could reclaim possession by posting his own security bond for double the value.¹⁹ In spite of those differences the court held 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.²⁰

The Court, however, suggested a relatively simple method for avoiding the impact of *Fuentes*. A state could seize goods before a final judgment in order to protect the security interest of a creditor as long as the creditor had established his claim to the goods through the process of a fair prior hearing. The nature and form of

13. *Parham v. Cortese*, 407 U.S. 67 (1972).

14. *Id.* at 72.

15. *Fuentes v. Faircloth*, 317 F.Supp. 954 (S.D. Fla. 1970); *Epps v. Cortese*, 326 F.Supp. 127 (E.D. Pa. 1971).

16. 401 U.S. 906 (1970); 402 U.S. 994 (1970).

17. *Fuentes*, *supra*, note 11 at 96.

18. *Id.* at 69.

19. *Id.* 77, 78.

20. *Id.* at 96.

such proceedings were left to the state, and the Court indicated they would be acceptable as long as they were designed to establish the validity, or at least the probable validity, of the underlying claim before the debtor was deprived of his property.

A NEW DEFENSE — STATE ACTION

The New Tactic

Even after *Sniadach*, *Fuentes* came as quite a shock to many collection attorneys. The long established, and heavily relied on prejudgment attachment statutes were no longer available to the collection agency or the creditor's attorney. Collection attorneys and others with similar interests wondered where the next attack would come from. Two other areas now seemed threatened: rights of creditors under possessory liens and so-called "self-help" repossessions sanctioned by Article 9 of the Uniform Commercial Code.²¹

When these attacks came the defenders chose a different approach to urge the continued validity of such proceedings. They did not attempt to challenge the "fundamental fairness" of the self-help procedures used by banks, finance companies, department stores, and other creditors. Instead they argued that such actions did not violate any constitutional provision because they were not taken under the color of state law and involved no state action. At the same time, some states began to revise their garnishment, attachment, and claim and delivery statutes to provide for a pre-seizure hearing in all but extraordinary circumstances. Where there was a risk of damage or destruction of the property,²² others simply accepted the unavailability of prejudgment attachment and relied on the expeditious use of the standard legal process: namely, complaint, default judgment, and writ of execution.

The California Response

The question of the validity of the self-help provision of the Uniform Commercial Code was raised in a number of federal courts. Two California cases, *Adams v. Southern California First National Bank* and *Hampton v. Bank of California*,²³ dealt with the problem most dramatically. Adams, a California resident with a good credit

21. See, Hawkland, *The Seed of Sniadach, Flower or Weed*, 79 CASE AND COMMENT No.1 (1974).

22. Some courts modified their procedures to meet the *Fuentes* test where the legislature failed to act. See, e.g., *Berhnhardt v. Commodity Option Company, Inc.*, 528 P.2d 919, 921 (Colo. 1974).

23. The cases were consolidated and decided on appeals from summary judgments by the District Courts in *Adams v. Southern California First National Bank*, 492 F.2d 324 (9th Cir. 1973).

record, needed money for medical bills. He borrowed \$1,000 from the predecessor to the Southern California First National Bank and executed a promissory note and a security agreement giving the bank the security interest in his three Volkswagens. The security agreement provided that upon default the bank would have all of the rights and remedies of a secured party under the California Uniform Commercial Code, and that it would be entitled to take possession of the three vehicles. Adams experienced intermittent unemployment, and although he had repaid nearly \$900 of the loan, he became delinquent. A short time later, at the direction of the bank, a licensed reposessor took two of the three vehicles from Adams' possession. They were sold at a private sale, and the proceeds used to discharge the remaining balance of \$217.45.

Adams filed suit in the United States District Court for the Southern District of California in San Diego seeking damages and declaratory relief on the ground that the repossession violated his federally protected rights. The trial court concluded that the enactment of the California Uniform Commercial Code constituted sufficient state action under the Civil Rights Act, 42 U.S.C. §1983 and its jurisdictional counterpart, 28 U.S.C. §1343, and that the repossessions had violated Adams' constitutional rights.²⁴

Hampton's case was identical in almost all respects except that it occurred in the San Francisco area, and suit was brought in the United States District Court for the Northern District of California. That Court found no state action within the meaning of the Fourteenth Amendment and dismissed the suit for lack of jurisdiction.²⁵

Both cases were brought to the United States Court of Appeals for the Ninth Circuit and were consolidated. The Court of Appeals in the two-to-one decision affirmed *Hampton* and reversed *Adams*, holding that repossession under the Uniform Commercial Code did not constitute state action.²⁶

The court distinguished the principal case upon which the debtors relied for legal support, *Reitman v. Mulkey*.²⁷ There the Supreme Court had ruled that "Proposition 14," which provided that the state could not place any limitation on the right of a person to deal with his own real property, was state action because it created a constitutional right to discriminate on racial grounds in the sale and leasing of property and thus involved the state in private discrimination in violation of the United States Constitution. Although the Court of Appeals did find that the state was involved to

24. *Id.* at 326.

25. *Id.* at 327.

26. *Id.* at 338.

27. *Reitman v. Mulkey*, 387 U.S. 369 (1967).

a far greater degree in *Reitman* than it was in the cases at bar, its main reason for not following *Reitman* was its opinion that suits involving prejudgment self-help repossession of secured property should not be controlled by cases involving racial discrimination.²⁸ The court relied instead on other non-racial cases involving utility service terminations by privately-owned utility companies. By so doing, the court was able to find no significant state action and thus no violation of any federally-protected right.²⁹

In decisions similar to *Adams*, the Supreme Court of California held that a bank set-off of charge account debts against a depositor's checking account constituted private action — not state action — and was therefore not controlled by the requirements of procedural due process under the federal constitution.³⁰ The same court also upheld the validity of the California garageman's labor and materials lien to the extent that it permitted the garageman to retain possession of the debtor's automobile until the services performed had been paid for.³¹

Thus the law became, for a time, fairly clear, predictable, and apparently functional. Prejudgment attachments and garnishments were still valid if the state law provided for a preseizure hearing, or in the absence of such a hearing, if the statutes limited seizure without notice and hearing to certain extraordinary circumstances where there was evidence that the property would be destroyed, removed, or hidden. Creditors could also use the normal judicial process by filing suit as soon as the debt became due, often getting default judgments which could then be the basis for a writ of execution. Finally, creditors could rely on contractual, or statutory, rights to possession of collateral as long as there was no significant state action involved.

CREDITOR PROTECTION AND THE BURGER COURT

Then came *Mitchell v. W. T. Grant Co.*³² Justices Rehnquist and Powell had joined the Court, and the "Burger Court" was at full strength. The facts in the case seemed rather reminiscent of *Fuentes*.

Mitchell had purchased a refrigerator, range, stereo, and washing machine from the W. T. Grant Company and had an overdue

28. *Adams*, *supra* note 23 at 333.

29. *Id.* at 334-336.

30. *Kruger v. Wells Fargo Bank*, 11 Cal. 3d 352, 521 P.2d 441, 113 Cal. Repr. 449 (1974).

31. *Adams v. Dept. of Motor Vehicles*, 11 Cal. 3d 146, 520 P.2d 961, 113 Cal. Repr. 145 (1974).

32. *Mitchell v. W. T. Grant Co.*, ___ U.S. ___, 94 S.Ct. 1895 (1974). See also Note, *Mitchell v. W. T. Grant Co.: Return to Prejudgment Remedies?*, 36 MONT. L. REV. 103 (1975).

and unpaid balance of the purchase price in the amount of \$574.17. Judgment for the sum was demanded, but payment was not made. Grant filed suit in the city court in New Orleans, Louisiana, alleging that it had a vendor's lien on the goods and requesting a writ to sequester the merchandise pending the outcome of the suit. The affidavit prepared by Grant's credit manager also alleged that Grant had reason to believe that Mitchell would "encumber, alienate, or otherwise dispose of the merchandise described . . . during the pendency of these proceedings, and that a writ of sequestration is necessary in the premises."³³ Based on this petition and affidavit, the municipal judge signed an order that a writ of sequestration issue and directed the constable to take into his possession the articles of merchandise described in the petition if Grant furnished a bond in the amount of \$1,125.³⁴ Mitchell was not notified and was not given an opportunity to be heard. On the basis of *Fuentes* and *Sniadach* he moved to dissolve the writ of sequestration, claiming that the seizure violated the Due Process clauses of the state and federal constitutions. The Louisiana state courts rejected Mitchell's constitutional claims and once again, the Supreme Court granted certiorari.³⁵

The Louisiana sequestration procedures were clearly quite similar to the Florida and Pennsylvania procedures at issue in *Fuentes*, which did not afford the purchaser of the property any prior notice of the seizure or any opportunity to challenge the allegations of the creditor before the property was taken from him by officers of the state. All that was required to support the issuance of the writ and seizure of the property was the filing of a complaint and an affidavit asserting the creditor's rights in the property.

Justice Stewart — the author of *Fuentes* — in a dissenting opinion in which Justices Douglas and Marshall joined (Justice Brennan also dissented), noted the above similarities, and concluded that:

since the procedure in both cases is completely *ex parte*, the state official charged with issuing the writ can do little more than determine the formal sufficiency of the plaintiff's allegations before ordering the state agents to take the goods from the defendant's possession.³⁶

Justice Stewart believed that the deprivation of property in this

33. Mitchell, *supra* note 32 at 1897.

34. Although the applicable Louisiana Statute permits the court clerk to sign such writs, it requires the signature of a judge in Orleans Parish where the action arose. La. Code Civ. Proc., art. 281, 282, 283.

35. 411 U.S. 981 (1973).

36. Mitchell, *supra* note 32 at 1911 (Stewart, J. dissenting).

case was identical to that at issue in *Fuentes*, and that under *Fuentes*, due process of law would permit Louisiana to affect this deprivation *only* after notice to the possessor and an opportunity for a hearing. Since the Louisiana procedure did not provide for advance notice or a hearing of any kind it also violated the requirements of due process in Justice Stewart's view.³⁷

Mr. Justice White, writing for the majority, disagreed. In a belabored opinion he attempted, with little success, to distinguish *Mitchell* from *Fuentes*. (His task in distinguishing *Sniadach* was less difficult since *Sniadach* involved the prejudgment garnishment of wages — a specialized type of property presenting distinct problems.) The grounds for distinguishing *Fuentes* were threefold: (1) the factual bases for obtaining a writ of sequestration were narrowly confined and had to be supported by affidavit, (2) there was "judicial control of the process from beginning to end," and (3) Louisiana law expressly provided for an immediate hearing and dissolution of the writ unless the plaintiff could prove the grounds upon which the writ was issued.³⁸

Two of these distinctions do not even rise to the level of being "distinctions without differences", since under the Florida law involved in *Fuentes* similar affidavits were required, the creditor had to post a bond, and the debtor was entitled to a prompt hearing after seizure. The only real distinction between the procedures in Louisiana and Florida — and this may be a distinction without a difference — is that a judge, rather than a clerk, issued the writ. For as Mr. Justice Stewart pointed out, the writ was issued on the basis of *ex parte* affidavits, and unless the attorney erred in preparing the petition and the accompanying affidavit, the issuance of the writ was just as automatic under Louisiana law as it was under Florida law.

Does *Mitchell* overrule *Fuentes*? Justice White, writing for the majority, seems to say that it does not, while Justice Stewart, who authored the Court's decision in *Fuentes*, was convinced that the Court had overruled *Fuentes* and chided the Court for its fickleness:

The *Fuentes* decision was in a direct line of recent cases in this court that have applied the procedural due process commands of the Fourteenth Amendment to prohibited governmental action that deprives the person of a statutory or contractual property interest with no advance notice or opportunity to be heard. In the short time that has elapsed since the *Fuentes* case was decided (less than two years), many state and federal courts have followed

37. *Id.* at 1912-1914 (Stewart, J. dissenting).

38. *Id.* at 1904.

it in assessing the constitutional validity of state replevin statutes and other comparable state laws. No data had been brought to our attention to indicate that these decisions, granting to otherwise defenseless consumers, the simple rudiments of due process of law, have worked any untoward change in the consumer credit market or in any other commercial relationship. *The only perceptible change that has occurred since the Fuentes case is the makeup of this court.*³⁹ [Emphasis added.]

At least one member of the majority — Mr. Justice Powell — seemed to agree. In a concurring opinion Justice Powell wrote:

In sweeping language, *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 and 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.⁴⁰

Whether *Mitchell* does in fact overrule the earlier Warren Court decisions is a matter of conjecture. Since those decisions were not directly overruled, they present, at a minimum, a threat to the validity of similar statutes and necessarily result in uncertainty as to their constitutional validity. The conflict between the approaches of the Warren Court and the Burger Court to creditor remedies may be seen by examining, in light of the *Sniadach*, *Fuentes*, and *Mitchell* decisions, the rather commonplace attachment and replevin statutes found in Montana.

THE STATUS OF MONTANA LAW

Prejudgment Attachment

Prejudgment attachment is governed entirely by statute since there was no such remedy at common law.⁴¹ Under the present Montana attachment statute, R.C.M. 1947, §93-4301 *et seq.*, a writ of attachment may be obtained by a creditor simply on an *ex parte* affidavit stating that: (1) the defendant is indebted to the plaintiff creditor, (2) the amount of the indebtedness, and (3) that the attachment is not sought and the action is not prosecuted to hinder, delay, or defraud any creditor of the defendant.⁴²

Upon the filing of this affidavit the clerk of court issues a sum-

39. *Id.* at 1914 (Stewart, J. dissenting).

40. *Id.* at 1908 (Powell, J. concurring).

41. *Duluth Brewing and Malting Co. v. Allen*, 51 Mont. 89, 249 P. 494 (1915).

42. REVISED CODES OF MONTANA, §93-4302 (1947) [hereinafter cited as R.C.M. 1947].

mons to inform the defendant that the cause of action has been filed against him.⁴³ It is not necessary that the summons be issued prior to the writ of attachment, and in practice they are generally issued and served simultaneously. The writ of attachment which is issued *ex parte by the clerk* on application of the creditor, supported by a general affidavit, directs the sheriff to take custody of some, or all, of the defendant's assets in order to secure payment to the creditor of the debtor's obligation.⁴⁴

The sheriff then seizes, or levies upon the defendant's property if it is not subject to actual seizure, and the property is held by the sheriff until a judgment is entered in the action.⁴⁵ The debtor can obtain the release of the property seized by the sheriff prior to the resolution of the underlying dispute if he is able to have two sureties post a bond in his behalf.⁴⁶

The procedure described above, under *Fuentes*, is clearly constitutionally infirm. It, like the state procedures involved in *Fuentes*, permits a state official — the sheriff — to seize property belonging to the debtor without affording the debtor notice or an opportunity to be heard prior to the seizure. The actual involvement of the sheriff in this process certainly constitutes "state action" under the *Adams* approach.

If the Court in *Mitchell* did intend to distinguish the Louisiana sequestration procedure from those used in Pennsylvania and Florida, the only possible grounds are: (1) limited applicability, (2) judicial involvement, and (3) a prompt post-seizure hearing. None of these safeguards are present in the Montana statute. The writ of attachment is issued automatically by the clerk without any judicial supervision, control, or involvement, based on a general affidavit. There is no provision for an immediate hearing, and it is assumed that the property will remain in the hands of the sheriff until the underlying dispute is resolved, perhaps long after the seizure. Finally, the bonding provision, which even if similar to the one available in Louisiana would undoubtedly be insufficient by itself to validate the Montana procedure, is in fact greatly restrictive and burdensome. It requires the debtor to post two sureties, rather than one, an onerous task for the consumer-debtor.

There is, however, a more fundamental reason why *Mitchell* will not uphold the procedure authorized in the Montana attachment statute. The Louisiana sequestration statute covers situations where the creditor has a property right or interest or lien upon the

43. *Id.*

44. R.C.M. 1947, §93-4305.

45. R.C.M. 1947, §93-4307.

46. R.C.M. 1947, §93-4305.

property that is the subject of the sequestration procedure. In addition, the affidavit which the attaching creditor must file prior to the issuance of the writ of sequestration must establish that the creditor does have bona fide interest in the property which he is seeking to sequester. The Court, in emphasizing the creditor's interest in the property seized, clearly discouraged the application of *Mitchell* to cases where the creditor has no present interest in the property seized.⁴⁷ The Montana prejudgment statute does not require, nor even contemplate, that the petitioning creditor have any property right, interest, or lien upon the property which he seeks to seize and attach. For this reason alone there can be no doubt that the Montana prejudgment attachment statute, at least as applied to residents, is unconstitutional under either the Warren Court or Burger Court criteria.⁴⁸

The Montana Claim and Delivery Statute

Unlike the attachment statute, Montana's claim and delivery statute, R.C.M. 1947, §93-4101, is derived from common law, and can be traced back to the ancient writ of replevin, dating back as far as the twelfth century.⁴⁹ The claim and delivery statute contemplates the recovery of specific property in which the claimant has some type of property right.⁵⁰ For centuries the validity of the summary repossession by way of replevin or claim and delivery statutes like Montana's was not questioned. It was generally assumed that a vendor had the right to recover possession of property sold under a retail installment sales contract upon the default of the purchaser.⁵¹ If the vendor was not able to peacefully regain possession of the property through "self-help," he could resort to legal process to enforce his right of repossession.

Although the validity of such proceedings had gone unchallenged for many, many years, it is precisely the type of statute that was involved in *Fuentes*. There the Court was faced with a challenge to the constitutionality of the Florida and Pennsylvania statutes which permitted a summary replevin-type proceeding by which a creditor could obtain a prejudgment writ of replevin, thereby giving him custody of the debtor's property through an *ex parte* procedure which did not require that the debtor in possession be given notice or an opportunity to be heard prior to the seizure of the property.

The Florida and Pennsylvania statutes had two primary re-

47. *Mitchell*, *supra*, note 32 at 1898.

48. *Cf. Sugar v. Curtis Circulation Co.* 383 F.Supp. 643, 649 (S.D.N.Y. 1974).

49. 3 W. HOLSWORTH, A HISTORY OF ENGLISH LAW, 283—284 (3d Ed. 1927).

50. *Heiser v. Severy*, 117 Mont. 105, 158 P.2d 501 (1945).

51. Annot., 45 A.L.R. 3d 1243 (1972).

quirements for the issuance of the writ of replevin: (1) the creditor had to complete a form stating that the debtor was wrongfully detaining certain goods belonging to the creditor, and (2) a surety bond in double the value of the property to be seized had to be filed by the creditor. Upon compliance with these requirements the clerk of court automatically issued a writ of replevin which authorized the sheriff to seize the goods described in the affidavit. The debtor was given three days to seek the return of the goods by posting a counterbond, and if he failed to do so the sheriff was authorized to deliver the goods so seized to the creditor. The Supreme Court, of course, found this procedure to be constitutionally defective.

Then the Court in *Mitchell* determined that a slightly different replevin statute — the Louisiana sequestration statute — was valid. If one can assume the statutes like the Louisiana sequestration statute are constitutionally valid while statutes like the Florida and Pennsylvania statutes involved in *Fuentes* are still unconstitutional, it is necessary to compare the provisions of the Montana claim and delivery statute to these two sets of modes.

It is significant to note the factors which the majority in *Mitchell* stresses as being the bases for distinguishing the Louisiana procedure from the Florida and Pennsylvania procedures. In his concurring opinion, Mr. Justice Powell drew these distinctions between the applicable statutes:

The Louisiana statute . . . differs materially from the Florida and Pennsylvania statutes in *Fuentes*. Those statutes did not require an applicant for a writ of replevin to make any factually convincing showing that the property was wrongfully detained or that he was entitled to the writ. Moreover, the Florida statute provided only that a postseizure hearing be held eventually on the merits of the competing claims, and it required the debtor to initiate the debt proceeding. The Pennsylvania statute made no provision for a hearing at any time.

By contrast, the Louisiana statute applicable in Orleans Parish authorizes issuance of a writ of sequestration "only when the nature of the claim and the amount thereof, if any, and the ground relied upon . . . clearly appear from specific facts shown by the petition verified by, or the separate affidavit of, the petitioner, his counsel, or agent." 6 La. Code Civ. Proc. Art. 3501. The Louisiana statute also provides for an immediate hearing, and the writ is dissolved "unless the [creditor] proves the grounds upon which the writ was issued." Art. 3506.⁵²

In examining the Montana and Louisiana provisions, it is interesting to compare the requirements or criteria for the issuance of a

52. *Mitchell*, *supra*, note 32 at 1909 (Powell, J. concurring).

replevin-type writ. Under Louisiana law a person claiming ownership, the right to possession, or a lien upon property may have it seized under a writ of sequestration only if the defendant is in a position to conceal, dispose of, waste, or remove the property from the parish. Thus, to obtain such a writ the creditor must allege these facts, even if only in conclusionary terms, as was done in *Mitchell*. The corresponding Montana statute contains no similar limitation.⁵³

It should be noted that the Louisiana statute does not require the petitioning creditor to establish any objective, or even subjective, expectation or fear that the property will be removed from the jurisdiction, but merely needs to allege that it is in the power of the debtor to do so. Unless the debtor is not in possession of the property which is to be seized by the writ of replevin, it is hard to envision a situation in which the debtor does not have the *power* to conceal, dispose of, waste, or remove the property from the jurisdiction. Since the allegation is pro-forma, this difference between the Montana and Louisiana statutes would seem to be of little moment.

However, the Montana law does fail to compare satisfactorily with the Louisiana statute procedurally. Under Montana law there is no requirement that the writ be issued or authorized by an independent judicial officer or even a court functionary.⁵⁴ The Montana statute is a model of simplicity.⁵⁵ The creditor completes an affidavit in the required form, gives it to the sheriff along with a bond in double the value of the property to be seized, and the sheriff automatically seizes the property.⁵⁶ There is no pre-seizure notice or hearing of any kind.

There is a second critical difference. The Louisiana statute provides that the defendant may, apparently at any time, move to dissolve the writ of sequestration and the burden is then on the

53. R.C.M. 1947, §93-4101.

54. R.C.M. 1947, §93-4104.

55. R.C.M. 1947, §93-4102 provides:

Affidavit and its requisites. When a delivery is claimed, an affidavit must be made by the plaintiff, or someone in his behalf, stating:

1. That the plaintiff is the owner of the property claimed, particularly describing it, or is lawfully entitled to the possession thereof;
2. That the property is wrongfully detained by the defendant;
3. That the same has not been taken for a tax, assessment, or fine, pursuant to statute; or seized, under an execution or an attachment against the property of the plaintiff; or, if so seized, that it is by statute exempt from seizure; and
4. The actual value of the property.

56. In some counties in the state the sheriff will not seize property under claim and delivery without a court order. Commendable as this procedure may be, it cannot rescue the statute from constitutional defects not corrected by the legislature. *Wuchter v. Pizzutti*, 276 U.S. 13 (1927).

creditor to prove the grounds upon which the writ was issued. The Louisiana statute seems to require the court to award damages, including attorney fees, if the writ was improperly procured.⁵⁷ Although the defendant is permitted by Montana law to reclaim the property seized by the sheriff, he may do so only by posting a bond of twice the value of the property in question within five days of the seizure. If he fails to do so the property is turned over to the creditor.⁵⁸

Because the seizure of the property under the Montana statute and the issuance of the writ of replevin occur simultaneously, there is no real opportunity for a hearing. Even if such a hearing were held, the debtor in Montana faces burdens greater than those faced by a debtor in Louisiana, since the Montana debtor must post considerable bond and bear the burden of proof.

Whether compared to the strict criteria of the Warren Court in *Sniadach* and *Fuentes* or the less restrictive requirements imposed by the Burger Court in *Mitchell* the Montana claim and delivery statute as presently written is clearly invalid.

A. *Valid Montana Statute*

Since both Montana's attachment and claim and delivery statutes as presently drafted are both unconstitutional, the question becomes what can and should be done to the two statutes to remedy their constitutional defects.

With regard to the attachment statute, the only reasonable step that could be taken is to repeal those portions of Chapter 43 of Title 93 of the Revised Codes of Montana 1947 which cover prejudgment attachment of property belonging to Montana residents.⁵⁹ This conclusion is compelled by the probability that no statute could sustain constitutional challenge if it provided for the *ex parte* seizure without notice or hearing of property in which the creditor had no interest or property right. Thus, the only way that the prejudgment attachment could be justified would be to limit it to situations in which the creditor has a property right or interest in the property to be seized. In such cases, however, such seizure could be had under a properly rewritten claim and delivery statute.

57. LOUISIANA CODE OF CIVIL PROCEDURE, art 3506.

58. R.C.M. 1947 §93-4110.

59. The use of attachment or sequestration statutes to obtain jurisdiction over non-resident defendants was not challenged in either *Fuentes* or *Mitchell*. In *Maxwell v. Hixson*, 383 F.Supp. 320, 325 (E.D. Tenn. 1974) a three-judge district court refused to hold the Tennessee judicial attachment and garnishment statutes unconstitutional since they were "designed and authorized only as a means of acquiring jurisdiction over the property of a defendant whose whereabouts cannot be ascertained." But, *cf.*, *In re Law Research Services Inc.*, 386 F.Supp. 749, 754 (S.D. N.Y. 1974).

Some states have attempted to constitutionally rehabilitate attachment statutes by providing for conditions upon which such a writ could be issued, namely where there is a probability that the debtor would destroy, remove, or conceal the property. Such a revision, though, is simply not necessary in Montana for creditor's relief in such circumstances, since R.C.M. 1947, §93-4204(4) specifically allows an injunction to be issued to halt the removal, destruction or concealment of property, a remedy which would appear to be entirely adequate.

With regard to the claim and delivery statute, it may be that the only change mandated by the Supreme Court's decision in *Mitchell* would be to provide for an immediate post-seizure hearing.⁶⁰ However, to ensure that Montana's claim and delivery statute would withstand any constitutional challenge and thus not be dependent on the present composition of the United States Supreme Court, a major modification should be made in the claim and delivery statute along the lines proposed in Appendix A. The key provisions of this proposed statutory revision would be R.C.M. 1947, §93-4102(b), (c).⁶¹

Subsection (b)⁶² requires a judicial officer — not a ministerial officer — to examine the verified complaint and/or affidavits and if satisfied that they meet other statutory requirements, rather than issuing a writ of replevin, to issue an order to show cause why the property should not be taken from the defendant and delivered to the plaintiff. A mandatory hearing would be held no sooner than 10 days from the issuance of the show-cause order, and at the hearing the defendant could attempt to establish by affidavit or otherwise, that the plaintiff is not entitled to a writ of possession. Furthermore, under the proposed revision, the defendant could, prior to the hearing, file a sufficient surety to stay delivery of the property. This provision clearly satisfies the requirements of not only *Mitchell*, but also *Fuentes*, in that seizure cannot occur without notice to the debtor and a hearing.

60. In *Sugar v. Curtis Circulation Co.* 383 F.Supp. 643, 648 (S.D.N.Y 1974), prob. jur. noted ____ U.S. ____, 43 L.W. 3545, a three-judge district court found that the New York attachment statute, CPLR §6201 *et seq.*, contained all but one of the indices — the right to an immediate postseizure hearing at which the creditor-plaintiff must prove the grounds upon which the writ was issued — which led the *Mitchell* court to find the Louisiana statute constitutional, but concluded:

that the opportunity for such a hearing was critical to the holding in *Mitchell* and that its absence renders New York's statute fatally defective.

The similar absence of the requirement for an immediate postseizure hearing at which the merits of the underlying claims can be examined likewise renders the Montana claim and delivery statute unconstitutional.

61. See Appendix A.

62. See Appendix A.

For those extraordinary situations where the creditor has reason to believe that the collateral will be lost or destroyed if not seized immediately, he may rely on subdivision (c),⁶³ which permits a pre-hearing seizure if the court determines that there is probable cause to believe that any one of the three following conditions exist: (1) that the defendant gained possession of plaintiff's property by theft as defined in the Montana Criminal Code; (2) that the property to be replevied consists of negotiable instruments or credit cards; or (3) that the property is either perishable and will perish before notice or hearing could be held or is in immediate danger of destruction, serious harm, concealment, or removal from the state, or sale to an innocent purchaser, and that the defendant threatens to destroy, harm, conceal, or remove the property, or sell it to an innocent purchaser. Under these circumstances, the court can issue a summary writ of possession, but the proposed statute also mandates that the defendant be given a postseizure hearing on forty-eight hours notice to the plaintiff. Once again, this procedure not only satisfies the requirements of *Mitchell*, but also the requirements of *Fuentes* since extraordinary circumstances must be shown before an *ex parte* summary writ is issued, the determination is made by a judicial officer, and an immediate post-seizure hearing is provided for.

CONCLUSION

The Supreme Court's recent decisions in *Fuentes* and *Mitchell* epitomize the difference between the "Warren Court" and the "Burger Court" and demonstrate the present cleavage among the members of the Court on the issue of creditor remedies. The composition of the Court will, of course, change, possibly in the not-too-distant future, and it may not be possible to predict whether the Court's decision in *Mitchell* or its prior decision in *Fuentes* will be followed in the future. If the Montana legislature allows the present unconstitutional statutes to remain on the books they are, in effect, preventing Montana businessmen from effectively employing any state enforced creditor's remedy. If the legislature merely corrects the obvious defects in the two Montana statutes, it will be taking a chance that the United States Supreme Court, as presently constituted or as it may be constituted in the future, will repudiate *Fuentes* and follow *Mitchell*. But there is no need or reason to take such a risk. If, instead, the Montana legislature repeals the prejudg-

63. See Appendix A.

** This bill is adapted from 15 WEST'S ANNOTATED CALIFORNIA CODES, CODE OF CIVIL PROCEDURE, §§509-521 (1974) by Claren Neal and Suzann Weiland.

ment attachment provisions and adopts the claim and delivery statute set forth in Appendix A, the citizens of Montana, including businessmen and the consuming public, could rely on the unquestioned validity of the Montana law' and more importantly, know that the law protected the rights of both creditors and debtors alike.

APPENDIX A

*Proposed Montana Claim and Delivery Statute***

93-4101. **Claim for delivery; time.** The plaintiff in an action to recover the possession of personal property may, at the time of issuance of summons, or at any time before trial, claim the delivery of such property to him as provided in this chapter.

93-4102. **Complaint, affidavit or declaration; contents; order to show cause; restraining orders; hearing; writ of possession.**

(a) Where a delivery is claimed, the plaintiff, by verified complaint or by an affidavit or declaration under penalty of perjury made by plaintiff, or by someone on his behalf, filed with the court, shall show:

(1) That the plaintiff is the owner of the property claimed or is entitled to the possession thereof, and the source of such title or right; and if plaintiff's interest in such property is based upon a written instrument, a copy thereof shall be attached ;

(2) That the property is wrongfully detained by the defendant, the means by which the defendant came into possession thereof, and the cause of such detention according to his best knowledge, information, and belief;

(3) A particular description of the property, a statement of its actual value, and a statement to his best knowledge, information and belief concerning the location of the property and of the residence and business address, if any, of the defendant;

(4) That the property has not been taken for a tax, assessment, or fine, pursuant to a statute; or seized under an execution against the property of the plaintiff; or, if so seized, that it is by statute exempt from such seizure.

(b) The court shall, without delay, examine the verified complaint or affidavit or declaration, and if it is satisfied that they meet the requirements of subdivision (a), it shall issue an order directed to the defendant to show cause why the property should not be taken from the defendant and delivered to the plaintiff. Such order shall fix the date and time for the hearing thereon, which shall be no sooner than 10 days from the issuance thereof, and shall direct the time which service thereof shall be made upon the defendant. Such order shall inform the defendant that he may file affidavits on his behalf with the court and may appear and present testimony on his behalf at the time of such hearing, or that he may, at or prior to such hearing, file with the court a written undertaking to stay the delivery of the property, in accordance with the provisions of Section 93-4106, and that, if he fails to appear, plaintiff will apply to

the court for a writ of possession. Such order shall fix the manner in which thereof shall be made, which shall be by personal service, or in the manner provided for the service of summons and complaint by Rule 4D "Service" of the Montana Rules of Civil Procedure, or in such manner as the court may determine to be reasonably calculated to afford notice thereof to the defendant under the circumstances appearing from the verified complaint or affidavit or declaration.

(c) Upon examination of the verified complaint or affidavit or declaration and such other evidence or testimony as the court may, thereupon, require, a writ of possession may be issued prior to hearing, if probable cause appears that any of the following exists:

(1) The defendant gained possession of the property by theft, as defined by the Montana Criminal Code Sections 94-6-301 through 94-6-314.

(2) The property consists of one or more negotiable instruments or credit cards;

(3) By reason of specific, competent evidence shown, by testimony within the personal knowledge of an affiant or witness, the property is perishable and will perish before any noticed hearing can be had, or is in immediate danger of destruction, serious harm, concealment, or removal from this state, or of sale to an innocent purchaser, and that the holder of such property threatens to destroy, harm, conceal, remove it from the state, or sell it to an innocent purchaser.

Where a writ of possession has been issued prior to hearing under the provisions of this section, the defendant or other person from whom possession of such property has been taken may apply to the court for an order shortening the time for hearing on the order to show cause, and the court may, upon such application, shorten the time for such hearing, and direct that the matter shall be heard on not less than 48 hours' notice to the plaintiff.

(d) Under any of the circumstances described in subdivision (a), or in lieu of the immediate issuance of a writ of possession under any of the circumstances described in subdivision (c), the court may, in addition to the issuance of an order to show cause, issue such temporary restraining orders, directed to the defendant, prohibiting such acts with respect to the property, as may appear to be necessary for the preservation of rights of the parties and the status of the property.

(e) Upon the hearing on the order to show cause, the court shall consider the showing made by the parties appearing, and shall make a preliminary determination, which party, with reasonable probability, is entitled to possession, use, and disposition of the

property, pending final adjudication of the claims of the parties. If the court determines that the action is one in which a prejudgment writ of possession should issue, it shall direct the issuance of such writ.

93-4103. Writ of possession; entry on private premises; probable cause; undertaking by plaintiff.

(a) A writ of possession shall not issue to enter the private premises of any person for the purpose of seizure of property, unless the court shall determine from competent evidence that there is probable cause to believe that the property or some part thereof is located therein.

(b) A writ of possession shall not issue until plaintiff has filed with the court a written undertaking executed by two or more sufficient sureties, approved by the court, to the effect that they are bound to the defendant in double the value of the property, as determined by the court, for the return of the property to the defendant, if return thereof be ordered, and for the payment to him of any sum as may from any cause be recovered against the plaintiff.

93-4104. Writ of possession; seizure by sheriff; copy of writ and undertaking given defendant.

(a) The writ of possession shall be directed to the sheriff within whose jurisdiction the property is located. It shall describe the specific property to be seized and shall specify the location or locations where, as determined by the court from all the evidence, there is probable cause to believe the property or some part thereof will be found. It shall direct the sheriff to seize the same if it is found, and to retain it in his custody. There shall be attached to such writ a copy of the written undertaking filed by the plaintiff, and such writ shall inform the defendant that he has the right to except to the sureties upon such undertaking or to file a written undertaking for the redelivery of such property, as provided in Section 93-4106.

(b) Upon probable cause shown by further affidavit or declaration by plaintiff or someone on his behalf, filed with the court, a writ of possession may be endorsed by the court, without further notice, to direct the levying officer to search for the property at another location or locations and to seize the same, if found.

93-4105. Seizure of property; retention by sheriff; property in building or enclosure; breaking open building or enclosure; service upon defendant. The sheriff shall forthwith take the property, if it be in the possession of the defendant or his agent, and retain it in his custody, either by removing the property to a place of safekeeping or, upon good cause shown, by installing a keeper, provided that, when the property is used as a dwelling, such as a

housetrailer or mobile home, the same shall be taken by placing a keeper in charge of the property.

If the property or any part thereof is in a building or enclosure, the sheriff shall demand its delivery, announcing his identity, purpose and the authority under which he acts. If it is not voluntarily delivered, he shall cause the building or enclosure to be broken open in such manner as he reasonably believes will cause the least damage to the building or enclosure, and take the property into his possession. He may call upon the power of the county to aid and protect him, but if he reasonably believes that entry and seizure of the property will involve a substantial risk of death or serious bodily harm to any person, he shall refrain from seizing the property, and shall forthwith make a return before the court from which the writ issued, setting forth the reasons for this belief that such risk exists. The court shall make such orders and decrees as may be appropriate.

The sheriff shall, without delay, serve upon the defendant a copy of the writ of possession and written undertaking, the verified complaint or affidavit or declaration, by delivering the same to him personally, if he can be found, or to his agent from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either with some person of suitable age and discretion; or, if neither have any known place of abode, by mailing them to their last known address.

93-4106. Undertaking by defendant for return of property; service upon plaintiff; redelivery to defendant. At any time prior to the hearing of the order to show cause, or before the delivery of the property to the plaintiff, the defendant may require the return thereof upon filing with the court a written undertaking executed by two or more sufficient sureties, approved by the court, to the effect that they are bound in double value of the property, as stated in the verified complaint, affidavit, or declaration of the plaintiff, or as determined by the court for the delivery thereof to the plaintiff, if such delivery be ordered, and for the payment to him of such sum as may for any cause be recovered against the defendant. At the time of filing such undertaking, the defendant shall serve upon the plaintiff or his attorney, in the manner provided for service by Rule 5(b) "Service" of the Montana Rules of Civil Procedure, a notice of filing of such undertaking, to which a copy of such undertaking shall be attached, and shall cause proof of service thereof to be filed with the court. If such undertaking be filed prior to hearing of the order to show cause, proceedings thereunder shall terminate, unless exception is taken to such sureties. If, at the time of filing of such undertaking, the property shall be in the custody of the sheriff, such

property shall be redelivered to the defendant five days after service of notice of filing such undertaking upon the plaintiff or his attorney.

93-4107. Qualification of sureties; exceptions; waiver; justification for disposition of property. The qualification of sureties under any written undertaking referred to in this chapter shall be such as are prescribed by Sections 93-4001 to 93-4027 in respect to bail upon an order of arrest. Either party may, within two days after service of an undertaking or notice of filing an undertaking under the provisions of this chapter, give written notice to the court and the other party that he excepts to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objections to them. When a party excepts, the other party's sureties shall justify on notice within not less than two, nor more than five, days, in the same manner as upon bail on arrest. If the property be in the custody of the sheriff, he shall retain custody thereof until the justification is completed or waived or fails. If the sureties fail to justify, the sheriff shall proceed as if no such undertaking had been filed. If the sureties justify or the exception is waived, he shall deliver the property to the party filing such undertaking.

93-4108. Custody of seized property; delivery; fees and expenses. When the sheriff has taken property as provided in this chapter, he shall keep it in a secure place, in as good condition as it was when possession thereof was taken by him, and deliver it to the party entitled thereto, upon receiving his fees for taking and his necessary expenses for keeping the same, after expiration of the time for filing of an undertaking for redelivery and for exception to the sureties upon any undertaking, unless the court shall by order stay such delivery.

93-4109. Third party claims. In cases where the property taken is claimed by any person other than the defendant or his agent, such third party may join or shall be joined under Rule 19 or Rule 20 of the Montana Rules of Civil Procedure in the claim and delivery proceeding. Such third party must file with the court a verified answer, or affidavit or declaration under penalty of perjury, setting out the specific facts on which he bases his claim of title and right to possession of the disputed property. The court may stay any further action under this chapter or may grant such other orders as it deems necessary to effect a just accommodation of the conflicting interests until there is a final adjudication of the claims of all the parties.

93-4110. Return by sheriff. The sheriff shall return the writ of possession, with his proceedings thereon, to the court in which the action is pending, within 20 days after taking the property mentioned therein.

93-4111. **Delivery of Property or value to party; order protecting possession.** After the property has been delivered to a party or the value thereof secured by an undertaking as provided in this chapter, the court shall, by appropriate order, protect that party in the possession of such property until the final determination of the action.

93-4112. **Precedence over other civil actions.** In all proceedings brought to recover the possession of personal property, all courts, in which such actions are pending, shall, upon request of any party thereto, give such actions precedence over all other civil actions, except actions to which special precedence is otherwise given by law, in the matter of the setting of the same for hearing or trial, and in hearing or trial thereof, to the end that all such actions shall be quickly heard and determined.