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Constitutional Law - Fourteenth Amendment - Due Process - State Prejudgment Garnishment Statute

R. Jeffrey Behm

ratory judgment in *Jersey Central* suggests it faced such a dilemma.

A court that refuses to limit its perception of employment discrimination by unqualifiedly accepting an employment or plant-wide system as bona fide raises the spectre of preferential treatment. Minority protection and affirmative actions as expressed in Title VII were designed to facilitate the development of an integrated, equally protected workforce. Until the Supreme Court prescribes the limits of these minority safeguards, the scope of the commitment to root out effects of past discrimination to accomplish this end will remain unclear.

Phoebe Haddon Northcross

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—DUE PROCESS—STATE PREJUDGMENT GARNISHMENT STATUTE—The Supreme Court of the United States has held the due process requirements of the United States Constitution were not satisfied by a state statute which permitted issuance of a prejudgment writ of garnishment on the basis of conclusory allegations made in an ex parte proceeding without judicial participation and which afforded the alleged debtor's interest in the property no protection other than provisions for posting bond and counterbond.

North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).

Respondent Di-Chem, Inc. filed suit in the Superior Court of Whitfield County, Georgia, alleging an indebtedness due for goods sold and delivered to petitioner. The same day, respondent filed a

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shutting down plants on certain days. Where layoffs represented the only feasible option, the guidelines suggested employers seek volunteers to take temporary leave on a rotating basis. 88 BNA LAB. REL. REP. 216-17 (1975). Further reports, however, indicated the EEOC had postponed its decision to issue guidelines until they were evaluated by other federal civil rights enforcement agencies. *Id.* at 253. In April, 1975, commissioners of the EEOC voted to defer action on the proposed guidelines since, according to EEOC sources, other agencies had opposed the EEOC approach. *Id.* at 313.

bond[1] and affidavit[2] with the clerk of court, stating the amount of the debt and apprehension of loss of the amount unless garnishment proceedings were begun.[3] Before service of respondent's complaint, summons of the garnishment was served on the garnishee. The procedure froze a substantial bank account used to meet the petitioner's payroll and other obligations before the petitioner had knowledge of the filed claim for indebtedness. The petitioner subsequently filed bond[4] in court to dissolve the garnishment[5] and moved to dismiss the writ on the basis that the statute, which did not provide notice and a prior opportunity to be heard, violated the due process clause of the fourteenth amendment to the United States Constitution. When the motion was denied, petitioner appealed to the Supreme Court of Georgia.[6] This court rejected petitioner's claim that the case presented issues similar to those in the United States Supreme Court's decision in *Sniadach v. Family Finance*

1. Bond was filed pursuant to a statutory provision which authorized any joint creditor to make an affidavit and give bond in the name of the plaintiff whenever garnishment was sought to recover a debt owed a partnership or firm. GA. CODE ANN. § 46-104 (1974). The plaintiff was required to give bond in an amount at least double the sum sworn due. The sum was payable to the defendant if the plaintiff failed to recover in the suit, the money or property sought to be garnished was not subject to garnishment or the stated amount was not actually due. *Id.* § 46-102.

2. The affidavit named as garnishee The First National Bank of Dalton, with which the petitioner had deposited a bank account in the sum of $51,279.17. The affidavit alleged only that the petitioner owed respondent the above amount, which respondent had reason to believe would be lost unless the garnishment issued. The affidavit is reproduced in full in North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 604 n.2 (1975). The statute allowed the plaintiff's agent or attorney to execute the affidavit. The agent's personal knowledge of the facts was not required. GA. CODE ANN. § 46-103 (1974).

3. The Georgia statute made the process of garnishment available whenever suit was pending or judgment was obtained. Wages were exempt until after final judgment. GA. CODE ANN. § 46-101 (1974).

4. The statute permitted the defendant to dissolve the garnishment by filing a bond with good security. If the plaintiff prevailed in the primary suit, judgment could be entered upon the bond and security. *Id.* § 46-401.

5. The bond was also filed to attain standing; until bond was made, Georgia courts viewed the action as between the plaintiff-garnishor and the garnishee, and would not hear an attack by the defendant. Brief for Petitioner at 11, North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).

6. The Georgia Supreme Court originally transferred the case to the Georgia Court of Appeals, which ruled the record on appeal was insufficient because it did not show what statute had been challenged, which specific constitutional provisions were involved, and whether the trial court had ruled the statute constitutional. North Georgia Finishing, Inc. v. Di-Chem, Inc., 127 Ga. App. 593, 194 S.E.2d 508 (1972). The Georgia Supreme Court, concluding the court of appeals had erred, granted certiorari so the constitutional issues could be heard. North Georgia Finishing, Inc. v. Di-Chem, Inc., 230 Ga. 623, 198 S.E.2d 284 (1973).

Corp.,[7] on grounds that *Sniadach* represented an exception, limited to wages, to the general rule upholding garnishment statutes. The denial of petitioner's motion to dismiss was affirmed.[8] The United States Supreme Court granted certiorari.[9]

The Supreme Court reversed,[10] noting the Georgia court had disregarded the Supreme Court's earlier decision in *Fuentes v. Shevin*,[11] which invalidated state ex parte replevin procedures. *Fuentes* was not, as the respondent contended, inapposite because the two corporations in the instant case bargained from equal positions;[12] regardless of relative bargaining strengths, a party was entitled to some type of due process protection whenever it was deprived of a significant property interest.[13] Respondent also claimed the statutory requirement that the affiant file a bond[14] sufficiently protected the alleged debtor from a wrongful determination as to whether the writ should issue.[15] Examining the procedure utilized by the state to guard against wrongful issuance of the writ, the Court compared the Georgia statute to the statutory scheme in *Mitchell v. W. T. Grant Co.*[16] and concluded the Georgia statute had none of the "saving characteristics" of the latter.[17] The statute in the instant case provided for issuance of the writ without judicial

7. 395 U.S. 337 (1969). *See* text at notes 39-43 *infra*.

8. North Georgia Finishing, Inc. v. Di-Chem, Inc., 231 Ga. 260, 201 S.E.2d 321 (1973). Approximately three months later, a federal court found the same Georgia statute violated the due process clause of the fourteenth amendment. Morrow Elec. Co. v. Cruse, 370 F. Supp. 639 (N.D. Ga. 1974).

9. North Georgia Finishing, Inc. v. Di-Chem, Inc., 417 U.S. 907 (1974).

10. North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 605-06 (1975).

11. 407 U.S. 67 (1972). *See* text at notes 44-47 *infra*.

12. Brief for Respondent at 8, North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975). The respondent distinguished *Sniadach* and *Fuentes* because they involved adhesion contracts. The respondent further contended a corporation's bank account was of a character needing less protection than wages or household goods. *See generally* Swarb v. Lennox, 405 U.S. 191 (1972) (contractual waiver of due process rights between parties of equal bargaining power in an arm's length agreement); D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972).

13. Although individuals deprived of necessities were more likely to suffer irreparably than corporations deprived of bank accounts, the Court considered the probability of irreparable injury to a corporation sufficient to require some procedures to decrease the initial risk of error. The likely severity of the deprivation was a factor in determining the form of, but not the right to, due process protection. 419 U.S. at 608.

14. GA. CODE ANN. § 46-102 (1974).

15. Brief for Respondent at 11.

16. 416 U.S. 600 (1974). *See* text at notes 48-61 *infra*.

17. 419 U.S. at 607.

participation upon an affidavit containing only conclusory allegations[18] by the creditor or his agent, whose personal knowledge of the facts was not required.[19] Further, the statute afforded the defendant no prompt post-writ hearing at which the writ could be dissolved upon a factual showing. In contrast, the *Mitchell* statute provided for issuance of a writ by a judge only after the creditor had made allegations beyond mere conclusions; the alleged debtor could have the writ dissolved at a post-writ hearing. The Court concluded that the Georgia procedure, which deprived the defendant of the use of its property before the main suit was resolved on the merits, violated the due process clause.[20]

Justice Stewart concurred and expressed his gratification with the result, which he construed as a revival of *Fuentes*.[21] In a separate concurrence, Justice Powell felt the majority relied too heavily upon *Fuentes*, which in his mind had been significantly narrowed by *Mitchell*.[22] He felt the most compelling deficiency of the Georgia statute was its failure to provide an early post-writ hearing. The debtor had no opportunity to challenge the garnishment until he had assumed the additional burden of filing a bond. In Justice Powell's view, procedural due process would be satisfied if a statute required that the garnishor provide adequate security after establishing factually[23] before a neutral officer[24] that garnishment was

18. *See* note 2 *supra*.

19. GA. CODE ANN. § 46-103 (1974).

20. 419 U.S. at 607. Under the statute, the alleged debtor could dissolve the writ only by filing his own bond. The Court noted another unattractive feature of the procedure: apparently, the defendant had no standing to challenge the garnishment action on any grounds until he filed a bond. *Id.*

21. *Id.* at 608 (Stewart, J., concurring).

22. *Id.* at 609 (Powell, J., concurring). Justice Powell believed *Fuentes* failed to strike a proper balance between the respective interests of the creditor and debtor. In his view, *Mitchell* had severely limited the scope of *Fuentes*. He feared its apparent resuscitation in *Di-Chem* would have an unsettling effect on the law controlling commercial transactions. *See* Mitchell v. W.T. Grant Co., 416 U.S. 600, 629 (1974) (Stewart, J., dissenting).

23. This requirement need not be elaborate. Where, as in Georgia, garnishment is available to the creditor only if suit is pending or judgment has been obtained, the issuing officer need not inquire further into the allegation of the existence of a debt. The creditor's apprehension of eventual inability to collect the debt would be sufficient to justify the garnishment until the post-writ hearing if the affidavit averred that no assets less transitory than a nonresident's bank account were available in the state to satisfy a prospective judgment. 419 U.S. at 612-13 n.5 (Powell, J., concurring).

24. Justice Powell did not feel the due process clause required that a judicial officer issue the writ. In light of other procedural safeguards, a clerk or other court officer could issue the writ upon the filing of the proper affidavit. *Id.* at 611 n.3.

necessary to preserve the garnishor's interest in the property; the procedure should include a prompt post-writ hearing at which the debtor could demonstrate that the garnishment was unfounded.

In a six-point dissent joined by Justice Rehnquist[25] and in part by Chief Justice Burger,[26] Justice Blackmun argued that *Fuentes* was inadequate authority because it was not decided by a full court,[27] and improper precedent in view of *Mitchell*.[28] He would have limited *Sniadach* to situations involving garnishment of wages. He felt the Georgia statute afforded adequate protection to a corporation, which could easily cope with garnishment in its ordinary daily commercial transactions.[29] Finally, the dissent objected that the Court had cast into doubt the constitutionality of corresponding state garnishment statutes. This uncertainty could only be dispelled through a long, unrewarding case-by-case analysis which Justice Blackmun predicted would favor *Fuentes* and minimize *Mitchell*.[30]

Traditionally, the due process clause has been construed as requiring notice and an opportunity to be heard at a "meaningful time

25. *Id.* at 614 (Blackmun & Rehnquist, JJ., dissenting).

26. Chief Justice Burger joined in paragraph five of Justice Blackmun's dissent, which stated that *Sniadach* was inapplicable because the petitioner was not a wage earner but a commercial entity already afforded all the protection required by due process. *Id.* at 620 (Burger, C.J., dissenting).

27. Although Justices Powell and Rehnquist had joined the Court by the time *Fuentes* was decided, they did not participate because they had not been members when the case was argued. Justice Blackmun felt the case should have been reargued before a full Court. In his view, a constitutional question should not be decided by less than the whole Court except when absolutely necessary. He felt adherence to this principle could have averted the confusion in commercial communities certain to result from the Court's decisions in *Fuentes*, *Mitchell* and *Di-Chem*. *Id.* at 616-19. *See* Briscoe v. Commonwealth Bank, 33 U.S. (8 Pet.) 118, 122 (1834) (Court deferred the decision of a constitutional question until the following term, when it was more likely a majority of the whole Court would concur).

28. 419 U.S. at 615-16. Justice Blackmun cited the dissenting and concurring opinions in *Mitchell*: Justice Stewart wrote in his dissent that the Court had unmistakably overruled *Fuentes*, which he had authored. 416 U.S. at 635 (Stewart, J., dissenting); Justice Brennan felt *Fuentes* required a result opposite to that reached by the majority in *Mitchell*. *Id.* at 636 (Brennan, J., dissenting); Justice Powell thought it fair to say that *Fuentes* had been overruled by *Mitchell*. *Id.* at 623 (Powell, J., concurring). *See* note 61 *infra*.

29. 419 U.S. at 614-15.

30. Under the Georgia statute, the writ was obtainable only after the main suit had been filed and the creditor had posted double bond. The debtor could free his garnished property by filing his own bond, but his only opportunity for a full hearing occurred at the trial of the primary suit. Although these provisions differed from those in *Mitchell*, Justice Blackmun presumably thought the Georgia statute would withstand the analysis used by the Court in *Mitchell*. He accused the majority of arbitrarily resurrecting *Fuentes* without convincingly distinguishing *Mitchell*. *Id.* at 619-20.

in a meaningful manner" when one was deprived of a significant property interest.[31] The form of the proceeding was not prescribed,[32] but was determined by balancing the conflicting interests of the parties.[33] Where property rights alone were concerned and it was essential that state needs be satisfied immediately, postponement of notice and hearing until after the taking was not considered a denial of due process.[34] Thus in a number of cases involving the emergency exercise of the state's police power, the Supreme Court held that notice and a hearing were not necessary prior to government seizure of private property.[35] The states reserved the authority to protect creditors with provisional remedies in actions of replevin, attachment and garnishment, and until recently the Supreme Court was reluctant to disturb this exercise of state power.[36] State courts sustained summary procedures on the grounds that the deprivations

31. *See, e.g.*, Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (a natural parent must be given an opportunity to be heard before his silence may be interpreted as a waiver of the statutory requirement that he consent to his child's adoption).

32. Stanley v. Illinois, 405 U.S. 645, 650 (1972) ("the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation"); Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961) (in considering what procedures due process may require under given circumstances, a court must determine the precise nature of the governmental function involved and the private interest affected).

33. *See, e.g.*, Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950) (trustee to notify by mail beneficiaries whose addresses were readily accessible, but notice by publication was sufficient for those whose addresses would be difficult to obtain).

34. Phillips v. Commissioner, 283 U.S. 589, 596-97 (1931) (notice and hearing postponed to insure prompt collection of internal revenue).

35. *See, e.g.*, Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (to protect the health and welfare of the public); Fahey v. Mallonee, 332 U.S. 245 (1947) (to protect the public from the economic consequences of a bank failure); Stoehr v. Wallace, 255 U.S. 239 (1921) (to meet the needs of a national war effort).

36. Jackman v. Rosenbaum Co., 260 U.S. 22 (1922) (long practiced state creditor remedies not easily affected by the fourteenth amendment); Rothschild v. Knight, 184 U.S. 334 (1902) (state courts and legislatures should determine attachment procedures).

In three cases challenging summary state procedures on due process grounds, the Supreme Court upheld the statutes. McKay v. McInnes, 279 U.S. 820 (1929) (affirmed per curiam a state court holding that temporary deprivations of property were not the deprivations contemplated by the Constitution); Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928) (allowed the execution of liens without prior notice or hearing on the property of stockholders of insolvent banks who had failed to pay assessments on the par value of their stock); Ownbey v. Morgan, 256 U.S. 94 (1921) (permitted attachment of property before notice or hearing when necessary to secure jurisdiction in a state court).

caused were not of the kind[37] or quality[38] protected by the due process clause.

In *Sniadach v. Family Finance Corp.*,[39] the Supreme Court held that a state statute permitting prejudgment garnishment of wages without prior notice and hearing violated the due process clause. The procedure, which deprived the employee of wages from the issuance of the writ until the resolution of the main suit, was deficient due to the great burden it imposed upon the wage earner.[40] *Sniadach* stressed the nature of the property seized and the hardship to the defendant; among lower courts there were diverse interpretations as to the scope of the decision. Some courts restricted *Sniadach* to wages.[41] Others held a prior hearing was mandatory only when the deprivation would cause undue hardship to the defendant.[42] A third approach required a hearing before a taking of any significant property interest.[43]

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37. *E.g.*, Byrd v. Rector, 112 W. Va. 192, 163 S.E. 845 (1932) (summary deprivation of only the use and possession of property technically not a deprivation of property requiring prior notice or hearing).

38. *E.g.*, McInnes v. McKay, 127 Me. 110, 141 A. 699 (1928), *aff'd mem.*, 279 U.S. 820 (1929) (the conditional and temporary deprivation effected by such procedures was not the deprivation of property contemplated by the fourteenth amendment).

39. 395 U.S. 337 (1969).

40. *Id.* at 341-42. Language in the opinion indicated the holding applied only to wages, which present "distinct problems in our economic system." *Id.* at 340.

41. *E.g.*, American Oil Co. v. McMullin, 433 F.2d 1091, 1096 (10th Cir. 1970) (*Sniadach* did not require prior notice or hearing unless wages were garnished or business property attached); Epps v. Cortese, 326 F. Supp. 127, 133 (E.D. Pa. 1971) (limited *Sniadach* to wages in upholding the Pennsylvania replevin statute); Reeves v. Motor Contract Co., 324 F. Supp. 1011, 1015-16 (N.D. Ga. 1971) (found no constitutional objection to Georgia's statutory garnishment scheme as applied against property other than wages); Black Watch Farms, Inc. v. Dick, 323 F. Supp. 100, 102 (D. Conn. 1971) (due process satisfied by the subsequent plenary hearing in the main action when real property was attached); American Olean Tile Co. v. Zimmerman, 317 F. Supp. 150, 152 (D. Hawaii 1970) (state statute which allowed garnishment of a corporate bank account without prior notice or hearing was not contra *Sniadach*, which applied only to wages).

42. *E.g.*, Dorsey v. Community Stores Corp., 346 F. Supp. 103, 104 (E.D. Wis. 1972) (must be notice and hearing before one is deprived of basic household furniture); Aaron v. Clark, 342 F. Supp. 898, 900 (N.D. Ga. 1972) (college tuition in a bank account was "specialized property" within the meaning of *Sniadach*); Jones Press, Inc., v. Motor Travel Servs., Inc., 286 Minn. 205, 210, 176 N.W.2d 87, 91 (1970) (for a self-employed person, accounts receivable were sufficiently similar to wages that notice and hearing were necessary before garnishment).

43. *E.g.*, Klim v. Jones, 315 F. Supp. 109, 122 (N.D. Cal. 1970) (invalidated a state statute which permitted imposition of an innkeeper's lien on a boarder's property without providing a prior hearing); Larson v. Fetherston, 44 Wis. 2d 712, 718, 172 N.W.2d 20, 23 (1969) (whether there has been a due process violation should not depend on the type of property subject to seizure).

The Court appeared to clear the post-*Sniadach* confusion in *Fuentes v. Shevin*.[44] In *Fuentes*, the Court invalidated Florida and Pennsylvania laws permitting replevin upon ex parte application to a court clerk and filing of bond for double the value of the property to be seized. The defendant could regain possession of the property by posting his own security bond for double the value within three days of the execution of the writ; if he did not, the property was transferred to the party seeking the writ.[45] Under neither state law could the defendant challenge the issuance of the writ.[46] The Court denounced both state procedures for failing to balance the competing interests of the parties and announced the broad rule that, except in extraordinary situations, a defendant must have notice and a prior opportunity for a hearing before he may be deprived of any significant property interest by state action.[47]

In *Mitchell v. W. T. Grant Co.*[48] the Court faced a factual situation arguably controlled by *Fuentes*. In *Mitchell*, respondent filed suit against the petitioner alleging an overdue unpaid balance on a

44. 407 U.S. 67 (1972).

45. In the three day interim, the property was held under the supervision of the court. *See* FLA. STAT. ANN. § 78.13 (Supp. 1976); PA. R. CIV. P. 1076(a), 1077(b).

46. The Florida appellant had purchased a stereo and stove for approximately six hundred dollars, including financing, under an installment sales contract. The vendor retained title to the merchandise, but the vendee was entitled to possession unless he defaulted in the installment payments. The appellant met his payments for over a year; a dispute arose over the servicing of the stove when the due balance was only two hundred dollars. The vendor instituted an action for repossession, claiming appellant had refused to make the remaining payments. Simultaneously, the vendor applied for and obtained a writ of replevin under which the sheriff seized the property before appellant had notice of the complaint. The Florida statute provided no hearing until the trial of the main action for repossession. 407 U.S. at 70-71.

The Pennsylvania rule did not grant a hearing at any time, since the party seeking the writ was not obliged to initiate an action for repossession. The writ would issue solely on an affidavit stating the value of the property to be replevied. The party from whom the property was taken could obtain a post-seizure hearing by initiating a lawsuit. Three of the four appellants challenging the Pennsylvania law bought personal property under installment sales contracts and were dispossessed of the goods when the vendors, claiming appellants had defaulted, obtained and executed writs of replevin. The other appellant was divorced from a local deputy sheriff, with whom she was in dispute over the custody of their son. The husband obtained a writ ordering seizure of the son's clothing, furniture and toys. *Id.* at 71-72.

47. While the length and severity of the deprivation was a factor weighed in determining the appropriate form of hearing, it was not decisive of the right to a prior hearing. *Id.* at 86. *Fuentes* allowed postponement of the required notice and hearing under three conditions. The deprivation must be directly necessary to secure an important governmental or general public interest, prompt action must be imperative, and the state must strictly control its exercise of legitimate force. The Court emphasized that such situations are truly unusual. *Id.* at 90-92 & nn.23-28.

48. 416 U.S. 600 (1974).

sale of goods.[49] At the same time, the respondent claimed a vendor's lien in the property and obtained a writ of sequestration. The statute provided for issuance of the writ by a judge[50] on adequate security[51] and an affidavit establishing more than conclusory allegations,[52] followed by a prompt post-writ hearing at which the debtor could dissolve the writ upon a factual showing.[53] The Louisiana statute might have violated due process as delineated in *Fuentes* by failing to provide notice and a prior opportunity to be heard. The Court effectively narrowed the scope of *Fuentes*, however, by holding that *Mitchell* was a case where alternative procedural safeguards which satisfied due process requirements had been built into the statute. The Court's decision was based upon a recognition and balancing of the concurrent interests of buyer and seller in the property.[54] Aside from the sequestration statute, the seller had no protection against the steady erosion of his security interest while the property remained in the buyer's possession.[55] Conversely, the seller would compensate the buyer in the event he was wrongfully deprived of possession.[56] The Court distinguished *Fuentes* as involving

49. The sale involved a refrigerator, range, stereo and washing machine; the amount claimed due was $574.17. *Id.* at 601.

50. In the Parish of Orleans, where the events in *Mitchell* took place, judicial authorization for issuance of a writ of sequestration was necessary. In the other parishes of Louisiana the writ could be issued by a clerk of court. LA. CODE CIV. PRO. ANN. art. 281 (West 1961). A writ of sequestration was available where the applicant claimed ownership of, right to possession of, or a lien on property, and the defendant had the power to waste, alien or remove the property from the parish during the pendency of the action. *Id.* art. 3571.

51. The applicant was required to furnish security in an amount the court determined was sufficient to protect the defendant against any damage resulting from a wrongful issuance, unless security was dispensed with by law. *Id.* art. 3574. The defendant could obtain the release of the property seized under the writ by furnishing security to satisfy any judgment which might be rendered against him. *Id.* art. 3507.

52. The writ would issue only when the amount and nature of the claim and the grounds for issuance clearly appeared from specific facts shown by a petition verified by the petitioner or his agent. *Id.* art. 3501.

53. The writ would be dissolved upon a motion by the defendant unless the plaintiff proved the grounds upon which the writ issued. The court was authorized to allow damages and attorney's fees in case of a wrongful issuance. *Id.* art. 3506.

54. In the Court's view, the seller's interest extended to the unpaid balance of the purchase price while the buyer's interest was limited to the surplus after foreclosure and sale of the property. 416 U.S. at 604.

55. The Court explained that normally the buyer's installment payments protect the seller from the deterioration of his security interest by reducing the seller's interest with each installment payment. Once the payments cease, the seller loses this protection. *Id.* at 608.

56. The Court emphasized that notice of the sequestration would give the buyer the opportunity to waste or alien the property, thus making the seller's interest even more

issues which could be resolved only at an adversary hearing;[57] the issues in *Mitchell* could be properly determined at an ex parte hearing.[58] By reducing the likelihood of a wrongful determination[59] and minimizing the risk the buyer would suffer a severe deprivation,[60] the statutory procedure offered a constitutional accommodation of the conflicting interests of the buyer and seller.[61]

Mitchell seemed to narrow the scope of *Fuentes*, although it was not clear to what extent.[62] The question remained whether alternative statutory procedures of the type in *Mitchell* which were upheld

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tenuous. In Louisiana a vendor's lien is extinguished if the buyer aliens the property. LA. CIV. PRO. ANN. arts. 3217(7), 3227 (West 1961); 416 U.S. at 609.

57. The *Mitchell* Court took the view that the issue of wrongful detention, which was determined according to a fault standard, required an adversary hearing. 416 U.S. at 617. In his dissent, Justice Stewart persuasively argued that the issues involved in replevin and sequestration actions were identical. *Id.* at 633.

58. The Court felt the issues at this stage of the proceeding could be narrowed to the determination of the existence of a debt, a lien and a delinquency. *Id.* at 607, *cert. denied*, 422 U.S. 1049 (1975). *See* Lindsey v. Normet, 405 U.S. 56 (1972) (where a tenant fails to pay rent the litigable issues may be limited to whether there was payment; other defenses or counterclaims may be segregated from the action for possession); Bianchi v. Morales, 262 U.S. 170 (1923) (under a statute the defenses to a summary mortgage foreclosure may be limited to payment); Grant Timber & Mfg. Co. v. Gray, 236 U.S. 133 (1915) (all claims of ultimate right may be eliminated from a possessory action).

59. The Court considered judicial supervision over the procedure an additional safeguard for the buyer. 416 U.S. at 619.

60. The opportunity for a prompt post-garnishment hearing shortened the length of the deprivation. *Id.* at 618.

61. *Id.* at 607. Justice Powell concurred in the decision; he believed *Mitchell* overruled the *Fuentes* principle, which was too broad and inflexible. *Id.* at 623. In the primary dissent, Justice Stewart noted the Louisiana affidavit form offered the defendant no real protection, because it could be filed by anyone. Whether the issuing functionary was a judge or a clerk, he could do no more than ascertain the formal sufficiency of the affidavit; the issues in the sequestration proceeding no more lent themselves to documentary proof than the issues in a replevin action. According to *Fuentes*, the additional procedural safeguards in the Louisiana statute were relevant in determining the form of the required hearing, but they did not obviate the constitutional necessity for a prior hearing of some sort. This requirement should not be qualified by the creditor's ability to show in advance that he would surely prevail in the primary suit. Justice Stewart felt that since *Fuentes* and *Mitchell* were constitutionally indistinguishable, *Fuentes* had been overruled. He believed the result in *Mitchell* reflected a change in the composition of the Court rather than a valid distinction from *Fuentes*. *Id.* at 635 (Stewart, J., dissenting). Justice Brennan agreed that *Fuentes* required an opposite result in *Mitchell*. *Id.* at 636 (Brennan, J., dissenting).

62. *See, e.g.*, Peacock v. Board of Regents, 510 F.2d 1324 (9th Cir.), *cert. denied*, 422 U.S. 1049 (1975) (interpreted *Mitchell* as indicating the traditional balancing test is to be applied without a presumption that a prior hearing is required); Turner v. Impala Motors, 503 F.2d 607 (6th Cir. 1974) (assumed *Fuentes* had been overruled by *Mitchell*); Guzman v. Western State Bank, 381 F. Supp. 1262 (D.N.D. 1974), *vacated*, 516 F.2d 125 (8th Cir. 1975) (relied on *Mitchell* to uphold a state procedure allowing attachment of personal property without prior notice or hearing).

by balancing the conflicting interests in the property would be tested the same way where the creditor had no coexisting security interest. *Mitchell* could be viewed as merely an exception to the *Fuentes* rule for cases in which both creditor and debtor had a present identifiable interest in the property.[63] It might also herald a return to the traditional balancing approach. Similarly, *Di-Chem* could be interpreted two ways, each with a corresponding effect upon the meaning of *Mitchell*. *Di-Chem* could indicate the *Fuentes* rule is still effective and *Mitchell* an exception;[64] or that *Mitchell* established a new standard setting the minimum level which satisfies due process.[65]

Despite its apparent reliance on *Fuentes*, *Di-Chem* clearly abandoned the absolutist position that a defendant, except in extraordinary situations, must have a prior opportunity for a hearing before he may be deprived of a significant property interest by state action. The provisions of the Georgia statute were judged against those of the sequestration statute in *Mitchell*; the due process requirements articulated in *Fuentes* were not applied. The Court made a limited return to balancing with respect to the timing of the proceedings: its reliance on *Mitchell* implicitly acknowledged the respective rights of the parties. Moreover, the Court treated the procedures in *Mitchell* as the minimum required to satisfy due process. This approach is a compromise between the great flexibility of the traditional balancing analysis and the rigid protection debtors received under the *Fuentes* prior notice and hearing requirement. The enhancement of *Mitchell* and demise of *Fuentes* are illustrated by the the *Di-Chem* Court's complete disregard of the respondent's *Fuentes*-oriented argument, by the use of *Fuentes* to determine only whether the due process clause applied, and by the Court's incorporation of the *Mitchell* holding into its interpretation of what *Fuentes* required in the way of due process.

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63. It has been suggested that *Mitchell* and *Fuentes* could be entirely consistent if the facts of *Mitchell* were considered within the "extraordinary situations" exception of *Fuentes*. A majority of the Court, however, believed that *Mitchell* overruled *Fuentes*. Newton & Timmons, *Fuentes "Repossessed,"* 26 BAYLOR L. REV. 469, 493-94 (1974).

64. *Cf.* 419 U.S. at 608 (Stewart, J., concurring); *Id.* at 609 (Powell, J., concurring).

65. There is a practical need for clarification of the correct interpretation. *See* Doran v. Home Mart Bldg. Centers, Inc., 233 Ga. 705, ____, 213 S.E.2d 825, 827 (1975) (Gunter, J., concurring) (expressing uncertainty in light of *Sniadach*, *Fuentes*, *Mitchell* and *Di-Chem* as to whether a preseizure hearing is constitutionally required).

In *Di-Chem*, the respondent contended an extraordinary situation existed, since the petitioner could remove the property upon prior notice of the garnishment and thereby frustrate the respondent's interest in collecting its debt.[66] Had the Court wished to fully revive *Fuentes*, the case could have been concluded at this stage of the argument; *Fuentes* clearly established that a creditor's interest in collecting his debt and the possibility that the debtor would remove his property if provided notice did not fall within the exception allowing postponement of notice and a hearing.[67] Rather than addressing the respondent's argument, however, the Court focused on the procedure by which the state controlled the taking and timed the hearing. This approach was consistent with *Mitchell*. Under this analysis the Court might allow postponement of notice and hearing until after the taking if, under adequate state supervision, the creditor shows a debt, default, and that notice may defeat the remedy.[68] This result seems inevitable, since the Court "misquoted" the *Fuentes* rule by incorporating the *Mitchell* standard:

> Because the official seizures had been carried out without notice and without an opportunity for a hearing *or other safeguard* against mistaken repossession, they were held to be in violation of the Fourteenth Amendment.[69]

Addition of the phrase "or other safeguard" removed prior notice and hearing from its position as exclusive due process protection and made available the alternative *Mitchell* approach.[70]

Nor does it seem the Court has limited *Mitchell* to situations in which the creditor has an existing security interest in the property

66. Brief for Respondent at 9.

67. 407 U.S. at 92-93 n.29 (statutes which allow summary seizure of a person's possessions merely to advance a private gain or reduce the costs of a private party serve no important governmental or general public interest justifying postponement of notice and hearing).

Fuentes required the creditor show a special need for prompt action because of immediate danger in the particular case that the debt would not be satisfied unless notice and hearing were postponed. If the creditor could meet these criteria because alienation of the property by the vendee would destroy the vendor's lien, the *Fuentes* "extraordinary situations" requirement would be obliterated. 416 U.S. at 629 n.1 (Stewart, J., dissenting).

68. While such a showing should not be difficult, it may not be possible in every case. *See* Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975) (affording notice and hearing to a mortgagor prior to foreclosure on real property would result in no prejudice to the mortgagee since there was no need for prompt action).

69. 419 U.S. at 606 (emphasis added).

70. Under *Fuentes*, less effective alternative safeguards could affect the type of hearing required but did not obviate the necessity of a prior hearing, which was viewed as "the only truly effective safeguard against arbitrary deprivation of property." 407 U.S. at 83-84.

subject to summary seizure. In distinguishing *Mitchell* and *Di-Chem*, the Court did not acknowledge the different character of the individual interests involved in each case. The difference was only noted peripherally when the Court cited *Fuentes* as authority that the type of property or length of deprivation was irrelevant in determining the right to due process.[71] The Court found the Georgia statute deficient for its failure to reduce the possibility of an initial wrongful determination or to minimize the hardship of such a determination to the defendant. Had the Georgia statute provided procedural safeguards similar to those in the Louisiana statute, it would likely have been upheld. Although the Court has enlarged the scope of *Mitchell*, it has not returned to the traditional balancing approach. In *Di-Chem*, the Court has suggested the alternative procedural safeguards ratified in *Mitchell* are a minimum standard designed to accommodate the competing interests in a prototypal creditor/debtor situation. This insures the debtor a certain level of protection, but significantly diminishes the protection he received under *Fuentes*.[72] In expanding the application of *Mitchell*, the Court has eliminated a possible distinction on the basis of the kinds of interests involved and has, notwithstanding the doubts expressed by Justices Blackmun and Rehnquist,[73] given the states greater flexibility in fashioning the form and timing of prejudgment remedies.

Many potential issues were not before the Court in *Di-Chem*. Hence the decision does not precisely define what evidence would justify issuance of the writ; presumably, evidentiary standards will be formulated by the lower courts and state legislatures. Nor did the Court state the form the post-writ hearing should take. Clearly the creditor must bear the burden of proving the probable validity of his claim; the question remains whether this should occur at a full scale adversary hearing or a procedure limited to establishing the existence of a debt, default and the necessity for the writ. The *Di-Chem* holding brings unanswered questions with its flexibility, and remains to be developed as it is applied in subsequent cases.

R. Jeffrey Behm

71. 419 U.S. at 608.

72. The *Di-Chem* dissenters did not attack the Court's application of *Mitchell*, but were disturbed by what they perceived as a revival of *Fuentes*. *Id.* at 614, 615-16 (Blackmun, J., dissenting).

73. *Id.* at 614.