Procedure: Civil Procedure

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In *Imperial v. Hardy*, the Fourth Circuit Court of Appeal held it had no jurisdiction to render a judgment against a non-resident father for past due child support and to increase the amount of support for the future. The parties had been divorced in Michigan in 1965 by a judgment which granted the mother custody of the children and ordered the father to pay child support. Two years later, while the children were living with their mother in Louisiana, the Michigan court ordered the father, who was then living in Illinois, to pay the support payments which were in arrears and increased the amount of future support. The court also rendered a money judgment for the past due payments so that it could be executed in another state. In 1968, the father sued in Louisiana to obtain custody and the mother reconvened to make the Michigan judgment executory. By agreement, a judgment was entered continuing custody in the mother, establishing visitation rights for the father, fixing support payments in the same amount ordered by the Michigan judgment and making the Michigan money judgment executory. In 1973, the mother instituted the present action to increase child support and to obtain an executory judgment for past due child support.

On the issue of jurisdiction, the plaintiff argued that the defendant had submitted himself to the jurisdiction of the Louisiana court in the 1968 action to determine custody and that the Louisiana court has continuing jurisdiction to determine the issues of increased child support and past due payments. The court agreed that ordinarily the court which renders an order for child support incidental to a judgment of divorce continues to have jurisdiction to modify or enforce the order, but refused to follow that principle in this case. The majority reasoned that in the 1968 proceeding the Louisiana court had simply recognized a Michigan judgment rendered in a Michigan divorce proceeding and noted that applying the continuing jurisdiction principle in this kind of case would enable a mother who wanted to increase support payments to simply deny the father his visitation rights, thereby forcing him to submit to the jurisdiction of a court.

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which otherwise would have no basis for asserting authority over him.

The dissent disagreed with the majority's interpretation of the 1968 proceeding and contended that the father petitioned for a change of custody based on the living conditions of the children in Louisiana and that therefore the judgment was not simply a recognition of the Michigan judgment. The Louisiana court had jurisdiction over the issue of custody because the children were living in Louisiana and the question of child support was ancillary to the matter of custody. Both matters—custody and child support—are subject to modification and, as long as the children remain here, Louisiana courts have the obligation of insuring their best interests; therefore, they must have the power to provide for the support of the children by enforcing the obligation of the father to care for them. The dissent concluded that the court had jurisdiction in this case based on its jurisdiction over status—the question of custody—and because of the general appearance of the father in the prior action.

Both the majority and dissenting opinions agreed with the principle that there is continuing jurisdiction over issues of child support and custody but disagreed as to whether it should be applied in Imperial. The majority apparently would have been willing to apply it if a Louisiana divorce had been involved. The principle was applied in a later Fourth Circuit case, Anthony v. Anthony, where the wife obtained in Louisiana a divorce and custody of the children from her husband who was a non-resident at the time of the divorce. The divorce decree continued the alimony awarded in the separation proceeding, in which the husband had been served with process. Two months later, the wife moved for a judgment for past due alimony and the husband, through an attorney appointed to represent him, objected that the court had no jurisdiction over him. The court held there was jurisdiction because the proceeding was simply to determine how much was due under the old judgment and not a proceeding for a new judgment; therefore, the jurisdiction for the original judgment also supported the second proceeding.

But other courts have reached different conclusions. In Smith v. Smith, the wife instituted an action to obtain an executory money judgment for arrearages in alimony and child support payments and served process on the attorneys who had represented the defendant husband (a non-resident at the time of that action) in the original divorce proceeding. The First Circuit Court of Appeal ruled that the

2. 288 So. 2d 694 (La. App. 4th Cir. 1974).
action for a money judgment for past due alimony and support payments was not an action incidental to the divorce proceeding and service on the former attorneys was invalid. The action was therefore dismissed for lack of jurisdiction over the defendant. This decision was cited in Anthony v. Anthony and expressly rejected. In so doing, the court in Anthony relied on a 1947 Louisiana supreme court case, Williams v. Williams, in which the court stated that an action to obtain past due child support payments was not an action to obtain a money judgment but a procedure to implement the prior judgment determining the amount of child support owed by the father. Although this language seems to support the conclusions of the court in Anthony on the question of jurisdiction, i.e., that the second proceeding is simply a continuation of the original proceeding and not a new action, the issue in Williams was a procedural one—whether the wife could use a summary proceeding to obtain an executory judgment—and not a question of jurisdiction over the defendant.

The Louisiana supreme court granted writs in Imperial v. Hardy and reversed. The majority reasoned that service of process on defendant's prior attorney of record was proper if the court had jurisdiction over the defendant, and also if there were jurisdiction, the court could appoint an attorney to represent the defendant. On the issue of jurisdiction, the court stated that there must be personal jurisdiction over the defendant for a money judgment for alimony, that jurisdiction over the status of the children was not enough, but concluded that there was jurisdiction because the defendant had submitted to the court's jurisdiction in the 1968 proceeding in which he had sought custody and in which the wife had raised the issue of child support through her reconventional demand. To bolster its decision on jurisdiction, the court further reasoned that jurisdiction is power and that it would be meaningless if the court which ordered child support could neither modify nor enforce its decree. Therefore, once jurisdiction attached for an award of child support it continued for enforcement or modification of the award.

The dissenting justices tended to agree with the majority that the court which rendered the original decree retains personal jurisdiction to modify that decree and cited two cases which allowed a Louis-

7. See art. 5091.
8. See, e.g., Baker v. Jewell, 114 La. 726, 38 So. 532 (1905); de Lavergne v. de Lavergne, 244 So. 2d 698 (La. App. 4th Cir. 1971).
iana husband to obtain a reduction in the amount of alimony originally awarded to his non-resident wife. But they felt that an action to increase the amount might require a different rule. On the issue of rendering an executory judgment, the dissent concluded that there was no continuing jurisdiction—submission to jurisdiction on the question of rate of alimony did not carry with it submission to the further jurisdiction of the court to render an executory judgment as to the amount of past due payments. The dissent also disagreed that, assuming jurisdiction, service could be made on the attorney who had represented the defendant in the original proceeding because the judgment awarding alimony is in the nature of a final judgment, and normally, the attorney's services would then end; therefore, it would be a fiction to consider the relationship as continuing beyond that point. The dissent concluded that a proceeding to increase or decrease the amount of alimony awarded or to obtain an executory money judgment for past due alimony is a new proceeding and is not supported by the jurisdiction obtained in the original proceeding.

As a result of *Imperial*, if a Louisiana court has personal jurisdiction over the parties\(^\text{10}\) to render a judgment for child support, it will retain jurisdiction to modify the award or to enter a money judgment for past due payments even if the defendant is a non-resident at the time of the second proceeding. It is clear that a judgment for child support requires personal jurisdiction\(^\text{11}\) and so, as in other cases involving jurisdiction over non-residents, it is necessary to determine whether the assertion of jurisdiction under those circumstances is fair.\(^\text{12}\) The defendant will argue that it is unfair to require him to return to Louisiana to contest the question of liability for past due payments or of a modification of the award. But on the other hand, the Louisiana court will have jurisdiction over the children because they live in Louisiana and since the award of child support is clearly related to the court's general concern for the welfare of the children, it is appropriate that the courts have the power to not only determine the amount of child support but also to render executory judgments for unpaid support. In short, the Louisiana court is in a better position to determine the question and, on balance, it is better to require the non-resident to return to Louisiana than to require the spouse with custody to travel to the defendant's state.\(^\text{13}\) Even if the non-

\(^\text{10}\) See LA. Code Civ. P. art. 6.
\(^\text{11}\) See note 8 supra.
\(^\text{13}\) In many instances the parent with custody is unable to travel to defendant's
resident fails to appear and has no property in the state, the decision in *Imperial*, by upholding jurisdiction in Louisiana, makes it possible for the Louisiana judgment to be enforced under full faith and credit wherever the defendant has assets. On the issue of notice, it would be better to have the court appoint an attorney to represent the non-resident defendant. This could be done because the court would have jurisdiction over the defendant and it would avoid the issue of whether the defendant’s former attorney still represented him—a question on which the court in *Imperial* was sharply divided.

**Appeals—Alimony and Custody**

In *Malone v. Malone*, the ex-husband petitioned the court to terminate alimony payments to his ex-wife and, in a separate suit, she petitioned for a judgment for past due payments. The cases were consolidated for trial and in separate judgments the court dismissed the husband’s action and rendered a judgment in favor of the wife for past due alimony. The husband appealed from both judgments, filing the appeal bond on the thirty-sixth day after delays for an appeal had begun to run. Although the appeal would have been timely under the general ninety-day period for perfecting an appeal, the First Circuit Court of Appeal, on its own motion, dismissed the appeal as untimely under article 3943 which allows thirty days for taking an appeal from a judgment awarding custody or alimony. The appellant argued that this was a judgment refusing to terminate alimony and not a judgment awarding alimony and therefore article 3943 was not applicable. The court, however, concluded that a judgment refusing to terminate alimony was the same as a judgment awarding alimony and was governed by article 3943.

state and the support decree is thus not enforced. Although the majority in the Fourth Circuit decision pointed to the Uniform Reciprocal Enforcement of Support Law, La. R.S. 13:1641-99 (Supp. 1966), as a possible solution to the wife’s problem, the absence of cases applying this statute indicates that it is not considered an effective remedy.


15. LA. CODE Civ. P. art. 5091.


17. LA. CODE Civ. P. art. 2087.

18. Id. art. 3943 provides: “An appeal from a judgment awarding custody of a person or alimony can be taken only within the delay provided in Article 3942. Such an appeal shall not suspend the execution of the judgment in so far as the judgment relates to custody or alimony.” Article 3942 requires the appeal to be taken within thirty days from the applicable date provided in article 2087.
The Louisiana supreme court granted writs to review the dismissal of the appeal from the judgment refusing to terminate alimony and affirmed. As the court noted, the language in the article is unfortunate and has resulted in confusion in its application: "judgment awarding" seems to be restrictive, while the language in the next sentence, "judgment relates to," indicates a broader application. While there has been a uniform application of the article to judgments awarding custody and alimony, courts have been divided when the action was to terminate alimony or custody. Most applied article 3943, but some have ruled that judgments which either terminate or deny alimony or custody are not governed by article 3943. The court in Malone, reasoning that the legislature must have intended uniform treatment for all judgments pertaining to custody or alimony and that there are strong policy reasons for expediting appeals in these cases, ruled "that appeals from judgments awarding, denying, modifying or terminating alimony or custody are governed by the provisions of C.C.P. 3943." The court could have reached the same decision on narrower grounds; it could have held that a judgment refusing to terminate alimony is the same as a judgment awarding alimony and therefore controlled by the literal language of article 3943—"judgment awarding . . . alimony." Instead, the court interpreted the article as applying to all judgments affecting alimony—awarding, denying, modifying or terminating. The clear effect of this decision is to overrule King v. King, a case in which the First Circuit read article 3943 literally and held that it did not apply to a judgment terminating alimony. What is not as clear is whether article 3943 now also applies to a judgment for past due alimony. In Granger v. Granger, the Third Circuit held that a motion to have the amount of past due alimony determined and made executory under article 3943 is not a "judg-

23. 282 So. 2d 119, 121 (La. 1973).
24. 253 So. 2d 660 (La. App. 1st Cir. 1971).
25. 193 So. 2d 898 (La. App. 3d Cir. 1967).
ment awarding alimony" and is therefore not controlled by article 3943. A similar result was reached by the First Circuit in Picinich v. Picinich,24 in which the court held that article 3943 did not apply to that portion of the judgment awarding past due alimony but did govern the portion of the judgment rejecting the request to decrease alimony payments in the future. In Malone, the court of appeal dismissed the appeal with respect to termination of alimony as untimely but decided the other appeal on the merits.27 Since both judgments were rendered on the same day and the defendant apparently took an appeal from both at the same time, the different results indicate that the court did not apply article 3943 to the judgment for past due alimony. The Louisiana supreme court did not grant writs to review this judgment and it is unclear whether article 3943 should be considered applicable to these judgments as well. To apply article 3943 would be in accord with the legislative intent to have appeals from all judgments respecting alimony handled expeditiously, but there are cases to the contrary and a firm answer cannot be given at present.

Another aspect of article 3943 deserves comment in the light of Malone and that is the provision prohibiting suspensive appeals from judgments relating to custody and alimony. As the comments to the article make clear, the purpose was to codify the case law prohibiting suspensive appeals from judgments in custody matters and also to legislatively overrule cases allowing suspensive appeals from alimony judgments in order to prevent the wife from being deprived of support pending appeal.28 In Derussy v. Derussy,29 the Fourth Circuit Court of Appeal sought to carry out the intent by holding that article 3943 only applied to judgments awarding alimony and therefore the wife could take a suspensive appeal from a judgment terminating alimony. A similar result was reached in Pattison v. Pattison30 where the court allowed a suspensive appeal from a judgment suspending alimony payments. The supreme court in Malone was not concerned with the suspensive appeal provision in article 3943, but it did cite Derussy (along with King) as one of the cases holding article 3943 inapplicable in an alimony case. It might be that this fact, coupled

27. 265 So. 2d 258 (La. App. 1st Cir. 1972).
28. LA. CODE CIV. P. art. 3943, comment (a): “This article codifies the jurisprudence denying a suspensive appeal in custody cases . . . . However, it overtures the line of cases holding that a suspensive appeal may be taken from an alimony judgment . . . . Thus the wife will no longer be deprived of necessary support pending appeal.”
29. 173 So. 2d 544 (La. App. 4th Cir. 1965).
30. 196 So. 2d 289 (La. App. 4th Cir. 1967).
with the language concerning the intent of the legislature that there should be uniform treatment of judgments relating to alimony, means that Malone should be read as disapproving of Derussy. Although this is a supportable position, the better view would be to interpret Malone as requiring that article 3943 be applied uniformly on the time for taking an appeal, but not requiring uniform application on the question of suspensive appeals because the intent of the legislature to protect the wife from loss of support pending an appeal requires a distinction between judgments awarding alimony and judgments suspending or denying alimony.

**Appeals—City Courts**

Under article 5002 of the Code of Civil Procedure an appeal from a judgment rendered in a city court must be taken within ten days after either the expiration of the delay for applying for a new trial or the denial of a new trial. The delay for applying for a new trial is three days from the date of the judgment or from service of the notice of judgment, which need only be given when there has been no personal service on the defendant and he has failed to answer. In *Sublet v. United T.V. Rental, Inc.*, the judgment was signed on March 23, 1972 and the plaintiff's motion for an appeal was signed on April 11, 1972. The Fourth Circuit Court of Appeal, on its own motion, dismissed the appeal as untimely. In defense of his appeal the appellant argued that it was the custom of the clerk to mail notices of the judgment, that notice of the judgment did not reach him until April 10, and that his appeal should not be dismissed because he was entitled to rely on this custom. In support of his position, the appellant cited *Reid v. Blanke*, an earlier Fourth Circuit case, where the court allowed an otherwise untimely appeal because the appellant had relied upon the custom of the clerk to mail notice of the signing of the judgment and there had been a delay in the mailing of this notice. The majority in *Sublet* rejected the appellant's argument and expressly overruled *Reid* on the grounds that custom cannot prevail over the express provisions of the Code, that notice is not required and therefore delays in giving notice cannot affect the requirements for perfecting an appeal.

Because the case involved overruling a prior decision of that

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32. 284 So. 2d 783 (La. App. 4th Cir. 1973).
33. 215 So. 2d 406 (La. App. 4th Cir. 1968).
circuit it was decided en banc, and there were three separate dissenting opinions disagreeing with the majority on the issue of the effect of custom and also raising the issue of due process. On the question of custom, the dissent contended that Reid had been correctly decided and found support for this position in the Louisiana supreme court case of Messina v. Kock Industries.\textsuperscript{35} There an applicant for certiorari had filed his petition on the last day by leaving it at the home of the deputy clerk of court because he could not make it to New Orleans before the clerk’s office closed for the day. The court rules required filing in the office of the clerk of court and the opponent moved to vacate the order granting the writ because the petition had not been timely filed. But the court found that it was the custom of the clerk and his deputies to receive documents for filing at places other than at the clerk’s office and that attorneys had relied on this custom. The court concluded that it would be a great disservice to the attorneys to suddenly depart from this long established practice and upheld the granting of the writ. Messina and Sublet could be distinguished on the grounds that in the former, custom involved an interpretation of court rules—what is meant by filing “in the office of the clerk”—whereas in Sublet the custom of giving notice was contrary to the express legislation that no notice was required. But the cases are similar in that the attorneys in each case relied on the established practice of the clerk’s office. Moreover, the practice in Sublet had been approved by the court of appeal in Reid, and the supreme court in Messina had recognized the unfairness of departing from the custom without prior notice of its abolition. The dissent concluded it would have been fairer for the court in Sublet to allow the appeal, especially since appeals are strongly favored,\textsuperscript{37} and to overrule Reid and the custom prospectively, thereby giving adequate notice of the change. Other dissenting judges challenged on due process grounds the code articles\textsuperscript{38} providing that no notice was required, as a denial, in effect, of the right to an appeal. These judges argued that the statute which provides that an appeal must be taken within a certain period of time must also provide a reasonable procedure for giving notice of the event which begins running of the time for taking an appeal.

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\item \textsuperscript{35} 273 So. 2d 725 (La. 1973).
\item \textsuperscript{36} LA. SUP. CT. R. XII.
\item \textsuperscript{37} See, e.g., Fruehauf Trailer Co. v. Baillio, 252 La. 181, 210 So.2d 312 (1968); Kirkeby-Natus Corp. v. Campbell, 250 La. 868, 199 So. 2d 904 (1967); Emmons v. Agricultural Ins. Co., 245 La. 411, 158 So. 2d 594 (1963); King v. King, 253 So. 2d 660 (La. App. 1st Cir. 1971).
\item \textsuperscript{38} LA. CODE CIV. P. arts. 4898, 5002.
\end{itemize}
Although it is doubtful that the code articles in question are unconstitutional, the better rule would be to provide for notice of the signing of the judgment as done in district courts. The aim of the present provisions is to provide a more expeditious appellate procedure for cases tried in city courts, but not at the expense of the important right of appeal. The appellant has only ten days in which to take his appeal and because of this short period he should have the benefit of adequate notice. This is a question for the legislature and it is hoped that they will act promptly to provide greater protection for the appellant.

CREDITOR’S REMEDIES AND DUE PROCESS

In *Fuentes v. Shevin*, the United States Supreme Court struck down the replevin statutes of Florida and Pennsylvania as repugnant to the due process clause of the fourteenth amendment because, under these statutes, a creditor could seize property in the possession of his debtor without first giving the debtor notice and an opportunity to challenge the creditor’s claim to the property. This decision brought the requirements of procedural due process—prior notice and opportunity to be heard—to bear on the traditional creditor’s remedy of replevin in such sweeping terms that it raised doubts as to the continued validity of other statutes which, like replevin, allowed property to be seized without prior notice and a hearing. The impact of *Fuentes* was soon felt in Louisiana in two cases which challenged the constitutionality of the writ of sequestration and of executory process.

In the first case, *W.T. Grant Co. v. Mitchell*, the creditor filed suit in the First City Court of New Orleans to collect the unpaid balance on the sale of household appliances to the defendant. In its petition and supporting affidavit the plaintiff alleged that it had a vendor’s lien on the property and had reason to fear that the defendant would encumber, alienate, or otherwise dispose of the property and that a writ of sequestration was therefore necessary. The judge

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39. Id. arts. 1913, 1914, 1974.
42. LA. CODE CIV. P. arts. 3501, 3571.
signed the order for the writ on the basis of the petition and affidavit and on the condition that the plaintiff furnish a bond. The defendant moved to dissolve the writ on the grounds that the property was exempt from seizure under state law and that the seizure violated the due process clauses of the state and federal constitutions. These objections were overruled by the trial court, court of appeal and by the Louisiana supreme court. The United States Supreme Court granted a writ of certiorari and affirmed the constitutionality of Louisiana’s writ of sequestration.

The majority, in an opinion written by Mr. Justice White, recognized that both the debtor and the creditor had real interests in the property—the debtor had possession and title but the creditor had a lien on the property and, as a result, the debtor’s right to possession and title were subject to defeasance in the event of default in the payment of the purchase price. Accordingly, the resolution of the due process question had to take account of both interests and the majority concluded that Louisiana’s sequestration procedure achieved a constitutional accommodation of the conflicting interests of creditor and debtor. From the creditor’s point of view, the continued possession and use of the property by the debtor would necessarily lessen its resale value and, accordingly, its value as security. Ordinarily, this condition is offset by the debtor’s payments which reduce the amount of the debt secured by the property. But when the debtor ceases to make payments, the creditor loses his protection against further decline in the value of his security. It is appropriate, the Court reasoned, for the state to recognize this economic reality by providing a method whereby the creditor can receive protection through dispossession of the debtor. From the debtor’s point of view, he loses possession of the property but is protected from a wrongful seizure through recourse against the creditor’s bond for damages, including attorney’s fees. This is fair, reasoned the Court, because the creditor is prepared to compensate the debtor for a wrongful dispossession, but the debtor is not prepared to compensate the creditor if his continued possession, contingent on payment of the price, is unjustified. There is also the real risk that the debtor with control over the property will conceal or transfer it thereby endangering the creditor’s lien which

43. Id. art. 3574.
45. 263 La. 627, 269 So. 2d 186 (1972).
47. 94 S. Ct. 1895 (1974).
48. LA. CODE Civ. P. art. 3506.
requires continued possession in the debtor. The only adequate protection against this danger is dispossessing without prior notice, because such notice could serve as a warning to a bad faith debtor.

The Court was further convinced of the fairness of the sequestration procedure because not only were there strong reasons for dispossessing the debtor at the outset, but also because the statutory scheme reduced the risks of a wrongful seizure. The issue at this stage in the proceeding is whether the creditor is entitled to temporarily deprive the debtor of the property and this depends on the existence of the debt, the lien, and the debtor's default, matters which lend themselves to documentary proof and justify seizure based on the ex parte presentation of those documents to a judge. Moreover, the debtor is able to have a full hearing on the issue of possession by filing a motion to dissolve the writ of sequestration immediately after seizure. The majority concluded that Louisiana's sequestration procedure was therefore in accord with the requirements of procedural due process.

Since the attack on the constitutionality of sequestration was based primarily on *Fuentes v. Shevin*, does the decision in *Mitchell* mean that *Fuentes* has, in fact, been overruled? On this question the Court was divided. Mr. Justice White (joined by Chief Justice Burger and Justices Blackmun and Rehnquist) declared that *Fuentes* was distinguishable on factual and legal grounds and did not require the invalidation of the Louisiana sequestration statute. Mr. Justice Powell concurred in upholding the statute but joined the four dissenters (Justices Douglas, Marshall, Stewart, and Brennan) in arguing that *Fuentes* had been overruled.

The attempt to distinguish *Mitchell* from *Fuentes* was based on several differences between the Florida and Pennsylvania replevin procedures and Louisiana's sequestration statute. The replevin statutes authorized the issuance of the writ by a court clerk upon the bare assertion of the creditor that he was entitled to it. Under the Florida statute, the debtor would have a hearing at the trial of the creditor's action for repossession and, in Pennsylvania, the hearing would come only if the debtor instituted a suit to recover the goods. By contrast, the Louisiana statute authorized the issuance of the writ only when the grounds for it were shown by specific facts set out in

49. *Id.* art. 3227.
50. *Id.* art. 3506.
52. *Id.*
the creditor's petition or affidavit.\footnote{La. Code Civ. P. art. 3501.} Further, in the parish where the \textit{Mitchell} case arose, the showing must be made before a judge,\footnote{Id. art. 281.} thus insuring judicial control over the proceedings. Such control minimized the risk of wrongful dispossession so that the debtor was "not at the unsupervised mercy of the creditor and court functionaries."\footnote{Mitchell v. W.T. Grant Co., 94 S. Ct. 1895, 1904 (1974).} Another basis for distinction was that the issues in a sequestration proceeding (existence of the lien and default) were narrower than the wrongful detention issue in replevin and better suited to documentary proof in an ex parte proceeding.

The dissent claimed that the differences in the replevin and sequestration procedures were insufficient to distinguish \textit{Mitchell} from \textit{Fuentes}. \textit{Fuentes} had held the replevin statutes unconstitutional because they allowed a debtor to be temporarily dispossessed of his property without notice or hearing; the Louisiana procedure authorized the same result. Although the Louisiana statute requires more specific information, it was still an ex parte proceeding and, according to \textit{Fuentes}, an inadequate substitute for a prior hearing because it only tests the strength of the creditor's belief in his own case. The fact that the order is signed by a judge instead of a clerk is unimportant because either official can only determine the formal sufficiency of the plaintiff’s allegations concerning the existence of the debt, the lien and the debtor's default and the issuance of the writ thereafter is simply a ministerial act. The majority's reasoning that the wrongful detention issue in \textit{Fuentes} was not suited to an ex parte determination whereas the issues in \textit{Mitchell} were appropriate for such a proceeding was rejected by the dissent because the issues were, in fact, the same, \textit{i.e.}, the creditor's security interest in the property and the debtor's default. Moreover, \textit{Fuentes} had declared that the relative complexity of the issues may affect the formality or scheduling of a prior hearing but could not alter the debtor's right to a prior hearing. Nor did that right depend upon an advance showing that the debtor would be successful at the hearing. "It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing on the contractual right to continued possession and use of the goods."\footnote{407 U.S. at 87.}

Although the Court chose to speak of \textit{Fuentes} and \textit{Mitchell} as distinguishable cases, it seems more accurate to say that \textit{Mitchell}
marks a considerable departure from Fuentes. In Fuentes, the Court looked at the question from the point of view of the debtor's interest in the property and concluded that he could be deprived of his possession, even temporarily, only after prior notice and hearing. Mitchell declares that the requirements of due process are satisfied by a proper accommodation of the rights of the creditor and the debtor in the property. According to Mitchell, procedural due process is satisfied if state law requires the creditor to furnish adequate security, make a specific factual showing before a judicial officer that he is entitled to the relief sought and provides an opportunity for an adversary hearing promptly after seizure to determine the creditor's right to seize the property. As a result of this decision, many of the statutes that seemed in jeopardy under Fuentes will probably be able to survive a due process challenge, but both decisions were rendered by a closely divided Court and it may take more cases before the impact of the requirements of procedural due process on creditors' remedies is known. For Louisiana creditors, although Mitchell upheld sequestration, there is still an area of uncertainty in the future use of the statute. The Court placed great emphasis on the fact that the statute required the order to be signed by a judge. Such procedure is prescribed for Orleans Parish, but in other parishes the order can be signed by the clerk, thus bringing the procedure closer to that in Fuentes. Although sequestration outside of Orleans Parish would probably not be invalidated for this reason alone, prudent creditors should avoid the problem by having the order signed by the judge.

In the second case, Buckner v. Carmack, the defendant in an executory proceeding challenged the constitutionality of the procedure as a denial of due process relying primarily on the United States Supreme Court's interpretation of the requirements of procedural due process in Fuentes v. Shevin. The Louisiana supreme court rejected defendant's position, reasoning that executory process was distinguishable from replevin because the writ would issue only after a judge was satisfied from the authentic evidence presented that the creditor was entitled to it. Moreover, since the case involved immovable property, the seizure would be constructive and the debtor would

57. At the adversary hearing the creditor will bear the burden of proof. 94 S. Ct. at 1909.
receive notice\textsuperscript{42} and have at least thirty days\textsuperscript{43} to challenge the creditor’s claim to the property before the property could be sold. The majority was also satisfied that the debtor had waived his right to a prior adversary hearing through the confession of judgment. The decision was appealed to the United States Supreme Court and on May 28, 1974, almost two weeks after its decision in \textit{Mitchell}, the court dismissed the appeal for want of a substantial federal question.\textsuperscript{44} Although the court made no reference to \textit{Mitchell}, the timing of the decision makes it reasonable to conclude that, judged by the constitutional standard set forth on \textit{Mitchell}, there is no substantial federal question as to the constitutionality of executory process.

\textbf{EXECUTORY PROCESS}

Louisiana’s executory proceeding is a simple, quick and inexpensive in rem procedure\textsuperscript{65} through which a creditor may seize and sell property encumbered with a mortgage or privilege without first obtaining a judgment on the debt.\textsuperscript{66} However, to protect the debtor, the law insists that the creditor strictly comply with the requirements for an executory proceeding, \textit{i.e.}, that the right to use the remedy must be based on authentic evidence or its statutory equivalent.\textsuperscript{67} It is well settled that if these requirements are not met the debtor may prevent the sale through an injunction or suspensive appeal.\textsuperscript{68} If the debtor fails to prevent the sale, he may subsequently bring a direct action to annul the sale on the grounds of fraud or lack of notice if the property remains in the hands of the creditor-adjudicatee.\textsuperscript{69} These decisions seem fair because of the debtor’s inability to raise the defenses before sale. But on the broader question of whether a debtor may annul a sale to the creditor-adjudicatee on the same grounds that could have been used to prevent the sale, the courts of appeal have been in disagreement.

In \textit{Doherty v. Randazzo},\textsuperscript{70} heirs of the deceased mortgagor sued

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  \item \textsuperscript{62} LA. CODE CIV. P. art. 2721.
  \item \textsuperscript{63} \textit{Id.} art. 2331; LA. R.S. 43:203 (Supp. 1960), as amended.
  \item \textsuperscript{64} Carmack v. Buckner, \textit{appeal dismissed}, 94 S. Ct. 2594 (1974).
  \item \textsuperscript{65} Buckner v. Carmack, 272 So. 2d 326 (La. 1973).
  \item \textsuperscript{66} LA. CODE CIV. P. art. 2631.
  \item \textsuperscript{67} \textit{Id.} arts. 2635-37; Myrtle Grove Packing Co. v. Mones, 226 La. 287, 76 So. 2d 305 (1954); Miller, Lyon & Co. v. Cappel, 36 La. Ann. 264 (1884).
  \item \textsuperscript{68} LA. CODE CIV. P. arts. 2642, 2751.
  \item \textsuperscript{69} See, \textit{e.g.}, Reid v. Federal Land Bank, 193 La. 1017, 192 So. 688 (1939); McDonald v. Shreveport Mut. Bldg. Ass’n, 178 La. 645, 152 So. 318 (1933); Ring v. Schilkofsky, 158 La. 361, 104 So. 115 (1925).
  \item \textsuperscript{70} 128 So. 2d 669 (La. App. 4th Cir. 1961).
\end{itemize}
to annul the sale under executory process on the grounds of insufficient authentic evidence i.e., lack of certification by the clerk of court of the copy of the mortgage presented to the trial court. The Fourth Circuit Court of Appeal, relying on dictum in an earlier Louisiana supreme court case, held that the mortgagor could attack the sale on the grounds of insufficient authentic evidence since the property remained in the hands of the mortgagee-adjudicatee. The court reasoned that the mortgagee knew of the defect and was responsible for it. This result and reasoning was followed in Tapp v. Guaranty Finance Co., where the mortgagor was allowed to annul the sale on the grounds of lack of authentic evidence of the endorsement of the note to the defendant who had enforced it through executory process. In Powell v. Carter, the court allowed a third possessor to annul a sale under executory process on the grounds of a lack of authentic evidence of the transfer of the notes to the plaintiff in the executory proceeding. But in Jambois O. & M. Machine Shop Inc. v. Dixie Mill Supply Co., the Fourth Circuit refused to annul the sale under executory process, at least as to the property still in the hands of the mortgagee-adjudicatee, where the attack was based on the lack of evidence showing that the corporation had authorized its president to execute the note and mortgage which was the basis for the executory proceeding. The court based its decision, in part, on the fact that the corporation had unconditionally accepted proceeds from the sale and thus could not later attack it. But it also relied on the fact that the mortgagor had notice of the proceeding and had not tried to stop the sale through an injunction or suspensive appeal and it is this reasoning which puts the case in conflict with Tapp, Doherty and Powell. Finally, in Ford Motor Credit Co. v. Herron, the court reasoned that it was not necessary for the creditor in an executory proceeding to present evidence in the form of a verified petition or affidavit that the debtor has failed to pay the obligation, because there is a presumption that no payments have been made other than those shown by the pleadings. Any defense of payment must be asserted through an injunction proceeding or by a suspensive appeal to prevent the sale. If it is not, the defense is considered abandoned or waived. The court’s reasoning was dictum because the note showed on its face that it was past due and unpaid. However, the Herron

71. Viley v. Wall, 154 La. 221, 97 So. 409 (1923).
72. 158 So. 2d 228 (La. App. 1st Cir. 1963), noted in 24 La. L. Rev. 894 (1964).
73. 233 So. 2d 369 (La. App. 1st Cir. 1970).
74. 218 So. 2d 672 (La. App. 4th Cir. 1969).
75. 234 So. 2d 517 (La. App. 3d Cir. 1970).
decision implies that even if the note does not on its face reveal the unpaid debt and the creditor does not show the breach of the obligation by means of a verified petition or affidavit as required by article 2637, the debtor would not be able to use the defect to attack the validity of the executory proceeding after the sale of the property but would be limited to an injunction or suspensive appeal to prevent the sale.

To resolve this conflict the Louisiana supreme court granted certiorari in *Reed v. Meaux,*76 where the trial court and the Third Circuit Court of Appeal had dismissed the mortgagor's suit to annul the sale in executory process based on, among other grounds, the failure to show the proper party defendant and the necessity for appointing an attorney to represent the defendants through either a verified petition or affidavit. The supreme court, on rehearing, affirmed. The court drew a distinction between facts which must be shown by authentic evidence—the mortgage or privilege containing the confession of judgment, the amount of the indebtedness secured by the mortgage or privilege and the creditor's right to use executory process—and facts which may be shown by verified petition, supplemental petition or by affidavit. The former requirements are substantive; they must be shown by authentic evidence and a failure to do so renders the proceeding void. On the other hand, defects with respect to proof of the proper party defendant or of the necessity for the appointment of an attorney are defects of form which may be used to prevent the seizure and sale either through an injunction or a suspensive appeal but may not be used to annul a sale even if the property remains in the hands of the mortgagee-adjudicatee.

*Reed* makes it clear that a sale through executory process can be attacked only for defects which affect the fundamental nature of the executory proceeding, basically those matters which must be proven by authentic evidence.77 But the opinion necessarily raises the question whether the same distinction applies when the debtor attempts to use defects in the executory proceeding as a defense to an action by the creditor for a deficiency judgment. In *League Central Credit Union v. Montgomery,*78 the defendant argued that the executory proceeding, which was the basis for the plaintiff's action for a deficiency judgment, was null because the mortgage was not in authentic form but had merely been acknowledged by the mortgagee's agent. The defendant's position was that the creditor is entitled to a defi-

76. 262 So. 2d 570 (La. App. 3d Cir. 1972), aff'd 292 So. 2d 557 (La. 1974).
77. LA. CODE CIV. P. art. 2635.
78. 251 La. 971, 207 So. 2d 762 (1968), noted in 29 LA. L. REV. 405 (1969).
ciency judgment if the property has been sold with legal appraisement, but if the executory proceeding is null it cannot serve as the basis for a valid sale with appraisement. In support of this position, the defendant relied primarily on the Tapp decision, in which the court allowed the debtor to annul a deficiency judgment because there was no authentic evidence of the endorsement of the note on which the executory proceeding was based. The plaintiff argued it was too late for the defendant to question the validity of the executory proceeding because he had failed to raise his challenge through an injunction or suspensive appeal before the sale, relying on White Motor Co. v. Piggy Bak Cartage Corp. In White, the Fourth Circuit Court of Appeal refused to allow the debtor to annul a deficiency judgment on the ground of insufficient authentic evidence (no authentic evidence of the authority of the president of mortgagor corporation to execute the chattel mortgages), reasoning that to allow such attacks on the validity of an executory proceeding would affect the stability of all sales under executory process, even though the debtor was not seeking the return of the property. The Louisiana supreme court in League Central chose to follow Tapp, rejecting White Motor Co., on the ground that a decision to refuse a deficiency judgment because of an invalid executory proceeding will not affect the validity of the sale made under executory process. The defects in League Central and Tapp would be classified as substantive under Reed and so, under their facts, the cases are in harmony.

Thus, if there is a defect of a fundamental nature the defendant in an executory proceeding can sue to annul the sale where the property remains in the hands of the mortgagee-adjudicatee and can also defeat or annul an action for a deficiency judgment. But where there are only defects of form, the debtor cannot annul the proceedings and it is not altogether clear whether he can use these defects to defeat a deficiency judgment. The general reasoning is that a creditor is entitled to a deficiency judgment if the property has been sold with valid appraisement, but a null order for executory process cannot serve as the basis for a legal appraisal and sale. Therefore, it could be argued that if the executory proceeding were not null but only defective in form, it could serve as the basis for a valid sale with appraisement and it is reasonable to expect a debtor with notice to assert his defenses through a suspensive appeal or injunction before the sale. But in his concurring opinion Justice Tate reads the majority opinion in

79. See note 72 supra.
80. 202 So. 2d 294 (La. App. 4th Cir. 1967).
Reed as not intending "to modify the holding in League Central Credit Union v. Montgomery . . . that any defect in the executory proceedings can be used as a defense to a deficiency judgment (as contrasted with serving as a ground to set aside a sale)." This position finds support in the strong public policy in favor of protecting the debtor when the creditor employs the harsh remedy of executory process and later seeks a deficiency judgment.

81. Reed v. Meaux, 292 So. 2d 557, 574 (La. 1974) (Tate, J., concurring).