Mitchell v. W. T. Grant Co.: Procedural Due Process Reexamined

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sought by the 1971 revisions\textsuperscript{3} and it is hoped that the holding of Ehmig will not be extended to apply to these other steps in the disciplinary procedure.

David R. Burch

MITCHELL v. W.T. GRANT CO.: PROCEDURAL DUE PROCESS REEXAMINED

A seller filed suit for the overdue balance of the price of goods purchased under an installment sales contract, and upon his ex parte application, the trial judge ordered a sequestration of the goods without affording the buyer notice or an opportunity for a prior hearing. The lower courts denied the buyer's motion to dissolve the writ, and the Louisiana supreme court affirmed.\textsuperscript{1} On certiorari, the United States Supreme Court held that the Louisiana writ of sequestration is not violative of procedural due process, as it effects a "constitutional accommodation" of the conflicting interests of buyer and seller. Mitchell v. W.T. Grant Co., 94 S. Ct. 1895 (1974).

Close scrutiny of traditional creditors' remedies generated by an increased awareness of the rights of consumers underlies two recent United States Supreme Court decisions: Sniadach v. Family Finance Corp.\textsuperscript{2} and Fuentes v. Shevin.\textsuperscript{3} In Sniadach the Court held unconsti-

\textsuperscript{37} Such a delay could be as long as five years from date of conviction until final disciplinary action. In Louisiana St. Bar Ass'n. v. Funderburk, 284 So. 2d 564 (La. 1973), the grounds for disbarment were conviction of a felony and professional misconduct, thus the procedure for professional misconduct was used. The defendant pleaded guilty on November 12, 1970; he received notice of the disciplinary hearing in May, 1971. The formal hearing was held October 13, 1972. Thereafter, a petition was filed with the supreme court for disbarment and a commissioner was appointed on December 6, 1972. The commissioner's hearing was held on March 22, 1973, and his report filed with the court on July 22, 1973. He was disbarred on December 29, 1973, a delay of thirty-five months. Had Funderburk not pleaded guilty there would have been further delays. In Louisiana St. Bar Ass'n. v. Ponder, 263 La. 743, 269 So. 2d 228 (1972), the defendant was convicted on December 29, 1969. His conviction became final upon the United States Supreme Court's denial of writ of certiorari on February 22, 1972, a delay of twenty-five months.

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  \item \textsuperscript{1} W.T. Grant Co. v. Mitchell, 263 La. 627, 269 So. 2d 186 (1972).
  \item \textsuperscript{2} 395 U.S. 337 (1969).
  \item \textsuperscript{3} 407 U.S. 67 (1972). Fuentes was decided with a companion case, Parham v. Cortese. Id.
\end{itemize}
stitutional as a violation of procedural due process a Wisconsin statute which allowed prejudgment garnishment of wages without prior notice to the wage-earner. Emphasizing the specialized nature of wages, even temporary deprivation of which might impose tremendous hardship, the *Sniadach* Court felt compelled to depart from previous decisions which had declared prejudgment garnishment and other similar provisional remedies valid under due process. Some subsequent lower federal and state court decisions read *Sniadach* as a limited exception to the prior jurisprudence, applicable only when wages and other specialized types of property were involved, while others extracted from the case a broad constitutional mandate.


5. In *Ownbey v. Morgan*, 265 U.S. 94 (1921), the Supreme Court upheld the constitutionality of Delaware’s foreign attachment law which required that the defendant post security in the amount of the value of the property attached before he could even appear and defend on the merits. The Court in *Coffin Bros. & Co. v. Bennett*, 277 U.S. 29 (1928), upheld a Georgia statute that authorized the superintendent of banks to issue an execution against the property of stockholders of defunct banks who had failed to pay stock assessments, rejecting the contention of the petitioners that they were deprived of due process because the execution and the creation of a lien on their property came before and without any judicial proceedings. It found that “nothing is more common than to allow parties alleging themselves to be creditors to establish in advance by attachment a lien dependent for its effect upon the result of the suit.” *Id.* at 31. In *McInnes v. McKay*, 127 Me. 110, 141 A. 699 (1928), *aff’d per curiam*, 279 U.S. 820 (1928), the constitutionality of a Maine statute which permitted attachment without affidavit or bond in advance of judgment was upheld. In his dissent in *Sniadach*, Justice Black referred to *McInnes* and *Ownbey* and said, “I can only conclude that the Court is today overruling a number of its own decisions and abandoning the legal customs and practices in this country with reference to attachments and garnishments wholly on the ground that the garnishment laws of this kind are based on unwise policies of government which might some time in the future do injury to some individuals.” *Id.* at 350. But see *Randone v. Appellate Dept.*, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), where the California supreme court found that “*Sniadach* does not mark a radical departure in constitutional adjudication. It is not a rivulet of wage garnishment but part of the mainstream of the past procedural due process decisions of the United States Supreme Court.” *Id.* at 550, 488 P.2d at 22, 96 Cal. Rptr. at 718. For an excellent discussion of the role of *Sniadach* as a jurisprudential catalyst see Hawkland, *The Seed of Sniadach: Flower or Weed?*, 79 CASE & COM. 3 (1974).


The Court in \textit{Fuentes} ended the speculation that \textit{Sniadach} was limited to specialized property when it struck down Florida and Pennsylvania prejudgment replevin statutes which allowed the seizure of a debtor's property without first giving him notice.\footnote{The two Supreme Court decisions which dealt with due process requirements of notice and hearing between \textit{Sniadach} and \textit{Fuentes} did not help in clearing the uncertainty created by the former decision. In \textit{Goldberg v. Kelly}, 397 U.S. 254 (1969), the Court held that notice and a prior hearing were required before a state could terminate welfare benefits. In \textit{Bell v. Burson}, 402 U.S. 535 (1971), the Court held that a prior hearing on the question of possible liability was required before the state could revoke the license of an uninsured motorist who had not provided security out of which claims arising from an accident could be paid. Since both decisions dealt with specialized types of property, the question of whether \textit{Sniadach} extended to all property interests was left unanswered. Moreover, both cases dealt with actions by state agencies against private individuals and not with conflicting interests of private parties.} Intensifying the impact of the case was the Court's ruling that although the buyers under the conditional sales agreement lacked full legal title to the seized property, their possessory interest in the goods was sufficient to bring them under the protection of the due process clause.\footnote{Noting that the Florida law operated automatically upon a party's 'bare assertion' that he was entitled to the writ of replevin,\footnote{Id. at 85.} and that the Pennsylvania statute required even less,\footnote{Id. at 74.} the Court stressed that such unilateral invocation of state power\footnote{Id. at 74.} was inconsistent with the opposing}
party’s constitutional right to be heard and that the debtor was not sufficiently protected by the requirement that the creditor post bond. In establishing a sweeping and rigid standard for testing the constitutionality of prejudgment creditor remedies, the Court negated any distinction between property that was “necessary” and that which was not and held that, absent a “truly unusual” situation or a clear contractual waiver, the debtor had to be given notice

14. Id. at 80-81: “The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantially unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party.”

15. Id. at 83. The Court found the bond requirement no substitute “for the right to a prior hearing that is the only truly effective safeguard against arbitrary deprivation of property.”

16. Id. at 90: “The Fourteenth Amendment speaks of ‘property’ generally. And, under our free-enterprise system, an individual’s choices in the marketplace are respected, however unwise they may seem to someone else. It is not the business of a court adjudicating due process rights to make its own critical evaluation of those choices and protect only the ones that, by its own lights, are ‘necessary.’”

17. “Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. Thus, the Court has allowed summary seizure of property to collect the internal revenue of the United States [Phillips v. Commissioner, 283 U.S. 589 (1931)], to meet the needs of a national war effort [Central Union Trust Co. v. Garvan, 254 U.S. 554, 566 (1921)], to protect against the economic disaster of a bank failure [Fahey v. Mallonee, 332 U.S. 245 (1947)], and to protect the public from misbranded drugs [Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950)] and contaminated food [North American Storage Co. v. Chicago, 211 U.S. 306 (1908)].” Fuentes v. Shevin, 407 U.S. 67, 90-92 (1972).

18. In an earlier decision, Overmeyer v. Frick, 405 U.S. 174 (1972), the Court upheld a contractual waiver of due process rights because it found that the waiver had been voluntarily, knowingly, and intelligently made. However, in Fuentes, the Court found no showing that the petitioners were aware of the significance of the fine print in the contract relied upon as a waiver, nor was it shown that the language of the contractual waiver actually constituted a waiver of a prior hearing. The Court stressed
and an opportunity for a hearing before property in which he had any substantial interest could be seized.

With few exceptions, the lower courts applied the Fuentes rationale to invalidate numerous state statutes which allowed provisional seizure without the requisite notice and hearing, a development which made questionable the validity of several Louisiana provisional remedies, including the writ of sequestration. Under the Louisiana sequestration procedure, the clerk of court has the power to sign an order for the issuance of a writ upon the ex parte application of the claimant, except in Orleans Parish where the judge must

that "a waiver of constitutional rights in any context must, at the very least, be clear." 407 U.S. at 95. See generally Anderson, A Proposed Solution for the Commercial World to the Sniadach-Fuentes Problem: Contractual Waiver, 79 CASE & COM. 24 (1974).

19. For example, the Arizona supreme court refused to follow Fuentes and to overthrow Arizona's prejudgment garnishment and attachment statutes because it felt that a mere four to three decision was not sufficient authority to justify declaring long-established laws unconstitutional. Roofing Wholesale Co., Inc. v. Palmer, 108 Ariz. 508, 502 P.2d 1327 (1972). Contra, Western Coach Corp. v. Shreve, 475 F.2d 754 (9th Cir. 1973).


21. LA. CODE Civ. P. art. 3541 (attachment); Id. art. 2631 (executor process); Id. art. 3571 (sequestration). See Anderson & L'Enfant, Fuentes v. Shevin: Procedural Due Process and Louisiana Creditor's Remedies, 33 LA. L. Rev. 62 (1972); Comment, 47 Tul. L. Rev. 806 (1973).

22. "Sequestration is a mesne process by which a writ is issued at the commencement of or pending an action, enabling the claimant to have property in the possession of the defendant or a third person taken into legal custody until after judgment so that the property may be delivered to the party adjudged to be entitled to it, where the defendant has the power to place the claimant in a disadvantageous position and the claim is against the particular property. The remedy of sequestration derives from French and Spanish law and rests on principles originating in Roman Law. The remedy has remained in Louisiana law in substantially the same form from the beginning . . . ." Johnson, Attachment and Sequestration: Provisional Remedies Under the Louisiana Code of Civil Procedure, 38 Tul. L. Rev. 1, 4 (1963).

23. LA. CODE Civ. P. art. 281: "The provisions of Articles 282 through 286 [which allow the clerks of district courts to sign an order for the issuance of a writ of sequestration] do not apply to the clerk and the deputy clerks of the Civil District Court for the Parish of Orleans."
sign the order. If the plaintiff furnishes the appropriate security\textsuperscript{24} and claims ownership, a right to possession, or a security interest in the property, it then may be taken into legal custody without prior notice or hearing.\textsuperscript{25} The defendant remains dispossessed of the property during the pendency of the action unless he files a motion to dissolve the writ, and proves at a subsequent contradictory hearing that the plaintiff is not entitled to the provisional remedy,\textsuperscript{26} or until he posts bond for the satisfaction of any judgment which may be rendered against him.\textsuperscript{27} Since the procedure requires neither notice nor hearing, it seemed unlikely that it would withstand constitutional scrutiny under the test prescribed by \textit{Fuentes}.

In the instant case,\textsuperscript{28} however, the United States Supreme Court upheld the procedure as applied in Orleans Parish and distinguished \textit{Fuentes} by pointing to four major differences in the creditors' remedies challenged in the two cases. First, in contrast to the replevin statutes, which required only "bare conclusionary claims of ownership or lien," the Louisiana statutes authorize the issuance of a writ of sequestration only upon specific factual allegations.\textsuperscript{29} Next, the Court contrasted the Florida and Pennsylvania procedures, which allowed issuance of the writ by a court clerk, with Orleans Parish

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\item \textit{La. Code Civ. P. art. 3574.}
\item \textit{La. Code Civ. P. art. 3571:} "When one claims the ownership or right to possession of property, or a mortgage, lien, or privilege thereon, he may have the property seized under a writ of sequestration, if it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action." It is not necessary that the plaintiff have reasonable grounds to believe that the defendant intends to conceal or destroy the property as long as it is within his power to do so. \textit{Gueydan v. T.P. Ranch Co.}, 156 La. 397, 100 So. 541 (1924). The grounds relied upon for issuance of the writ must be shown by specific factual allegations of the claimant. \textit{La. Code Civ. P. art. 3501}. Louisiana courts have strictly enforced this provision. See, e.g., \textit{Hancock Bank v. Alexander}, 256 La. 643, 237 So. 2d 669 (1970); \textit{Wright v. Hughes}, 254 So. 2d 293 (La. App. 4th Cir. 1971).
\item \textit{La. Code Civ. P. art. 3506.}
\item \textit{Id. arts. 3507, 3508.}
\item \textit{The Louisiana supreme court had upheld the sequestration statute based on two premises. First, the court found the instant case came within the exception provided by \textit{Fuentes} that where the creditor can show that there is immediate danger that the debtor will destroy or conceal the goods, seizure before notice and hearing may be justified. Second, the court held that a buyer takes possession of the property with an implied-in-law knowledge of the vendor's privilege, thus consenting to the seller's repossession without notice when a default in payments occurs. \textit{W.T. Grant Co. v. Mitchell}, 263 La. 627, 269 So. 2d 186 (1972). For a critical evaluation of the opinion, see \textit{The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Procedure}, 34 \textit{La. L. Rev.} 379, 391 (1974).
\end{itemize}
procedure requiring the applicant for the writ to make the requisite showings to a judge.\textsuperscript{39} Third, while the statutes at issue in \textit{Fuentes} had permitted replevy of the property only if it had been “wrongfully detained,” thereby erecting a broad fault standard inappropriate for preliminary \textit{ex parte} determination, Louisiana limits the preliminary issues to a factual determination of the existence \textit{vel non} of the vendor’s privilege and a default by the debtor.\textsuperscript{31} Since documentary proof is especially suited for this determination, it was reasoned that there is little danger of mistaken seizure and “a corresponding decrease in the utility of an adversary hearing which will be immediately available in any event.”\textsuperscript{32} Finally, the Court found that the express provision for a contradictory hearing to dissolve the writ, at which the creditor must prove he is entitled to the writ, prevents the Louisiana debtor from being “left in limbo to await a hearing that might or might not ‘eventually’ occur,” as was the debtor’s fate under the statutory schemes involved in \textit{Fuentes}.\textsuperscript{33} Based on these comparisons, the Court was convinced that \textit{Fuentes} was decided against a factual and legal background sufficiently different from that now before us and that it does not require the invalidation of the Louisiana sequestration statute, either on its face or as applied in this case.\textsuperscript{34}

Despite the Court’s careful attempts to distinguish rather than overrule \textit{Fuentes}, a close examination of \textit{Mitchell} reveals a significant departure from the \textit{Fuentes} standard of procedural due process and a return to the rule that where only property rights are involved, postponement of judicial enquiry does not necessarily violate due process.\textsuperscript{35} The debtor’s right to a prior hearing that compelled the decision in \textit{Fuentes} was now eclipsed by the Court’s renewed recogni-

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\item[30.] \textit{Id.} at 1904-05: “[I]n the parish where the case arose, the requisite showing must be made to a judge and judicial authorization obtained. Mitchell was not at the unsupervised mercy of the creditor and court functionaries. The Louisiana law provides for judicial control of the process from beginning to end. This control is one of the measures adopted by the State to minimize the risk that the \textit{ex parte} procedure will lead to a wrongful taking.”
\item[31.] \textit{Id.} at 1905.
\item[32.] \textit{Id.}
\item[33.] \textit{Id.}
\item[34.] \textit{Id.}
\item[35.] While \textit{Fuentes} had stressed that any significant property interest is entitled to procedural due process protections in the form of a prior hearing, the Court concluded in \textit{Mitchell} that “[t]he usual rule has been ‘where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate.’” \textit{Id.} at 1902. As authority for this general proposition, the Court cited the case of \textit{Ewing v.}
tion of the creditor’s strong interest\textsuperscript{36} in protecting the property from action by the debtor which might erode\textsuperscript{37} or destroy\textsuperscript{38} that interest. Safeguards other than notice and hearing were deemed sufficient to satisfy due process, and the requirement that the creditor post bond, rejected in \textit{Fuentes} as inadequate, was cited by the \textit{Mitchell} Court as one factor which saved the Louisiana procedure from being unconstitutional.\textsuperscript{39} In contrast to the \textit{Fuentes} conceptualization of procedural due process as a provision designed “to protect the particular interest of the person whose possessions are about to be taken,”\textsuperscript{40} the Court in the instant case applied a balancing of interests test sensitive to the realities of the creditor-debtor relationship.\textsuperscript{41} Searching for a “constitutional accommodation” of the conflicting interests,\textsuperscript{42} the Court found that the creditor’s strong interest coupled with the lim-

\textit{Mytinger & Casselberry, Inc.}, 339 U.S. 594 (1950). The \textit{Fuentes} majority had cited this same case as an example of an extraordinary situation, \textit{i.e.}, protecting the public from misbranded drugs, that justified seizure without a prior hearing. 407 U.S. at 92 & n.27.

36. The Court emphasized the fact that although the buyer no doubt owned the goods he had purchased under the installment sales contract, his title was heavily encumbered by the existence of a vendor’s privilege (\textit{LA. CiV. CODE art. 3227}) on the goods. 94 S. Ct. at 1898. This security interest of the seller, measured by the unpaid balance of the purchase price, was deemed sufficient for the state to protect. By contrast, the \textit{Fuentes} Court found that an even stronger interest, legal title, did not justify depriving the debtor of his right to a prior hearing. It was on this point of creditor interest that \textit{Sniadach} was summarily disposed of, the Court finding that the “suing creditor in \textit{Sniadach} had no prior interest in the property attached, and the opinion did not purport to govern the typical case of the installment seller who brings a suit to collect an unpaid balance and who does not seek to attach wages pending the outcome of the suit but to repossess the sold property on which he had retained a lien to secure the purchase price.” \textit{Id.} at 1904. Thus, in its assessment of \textit{Sniadach} the Court seemingly adopted the view of those pre-\textit{Fuentes} decisions which had read \textit{Sniadach} as a limited exception for wages and other specialized types of property. See cases cited at note 6 \textit{supra}.

37. “Clearly, if payments cease and possession and use by the buyer continue, the seller’s interest in the property as security is steadily and irretrievably eroded until the time at which the full hearing is held.” 94 S. Ct. at 1900.

38. Noting that the vendor’s privilege expires if the buyer transfers possession of the property, the Court found that “[t]he danger of destruction or alienation cannot be guarded against if notice and a hearing before seizure are supplied. The notice itself may furnish a warning to the debtor acting in bad faith.” \textit{Id.} at 1901.

39. \textit{Id.} at 1900.

40. 407 U.S. at 90 n.22.

41. The entire decision is based on the premise that “[r]esolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well.” 94 S. Ct. at 1898.

42. \textit{Cf.} The court’s language in \textit{Fuentes}: “Procedural due process is not intended to promote efficiency or accommodate all possible interests. . . .” 407 U.S. at 90 n.22 (emphasis added).
ited hardship to the debtor as well as the presence of judicial supervision and the ultimate protection of the prevailing party against all loss, justified its new position with regard to creditors’ remedies.\textsuperscript{43}

The Court’s limited distinction of \textit{Fuentes} seems accurate to the extent that it found the Florida and Pennsylvania statutory schemes less protective of the interests of the debtor than the Louisiana procedure. However, a critical reading of the opinion leads to the inescapable conclusion that it goes much further than it purports to. In fact, to the extent that \textit{Fuentes} required prior notice and opportunity for a hearing in every case in which “no more than private gain is directly at stake,”\textsuperscript{44} it is probably overruled.\textsuperscript{45}

Although \textit{Mitchell} is clear in its “reaffirmation of the traditional meaning of procedural due process,”\textsuperscript{46} its treatment of the writ of sequestration leaves questions unanswered. For instance, it is uncertain whether the emphasis placed on judicial supervision limits the holding of constitutionality only to the sequestration procedure as effected in Orleans Parish.\textsuperscript{47} The fact that a clerk of court rather than a judge issues the writ would seem to be a narrow reason for holding

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\item \textsuperscript{43} 94 S. Ct. at 1906.
\item \textsuperscript{44} 407 U.S. at 92.
\item \textsuperscript{45} Justice Powell’s analysis of the holding in his concurring opinion is probably accurate in its assessment of the implications of the \textit{Mitchell} decision: “In sweeping language, \textit{Fuentes} . . . enunciated the principle that the constitutional guarantee of procedural due process requires an adversary hearing before an individual may be temporarily deprived of any possessory interest in tangible personal property, however brief the dispossession and however slight his monetary interest in the property. The Court’s decision today withdraws significantly from the full reach of that principle, and to this extent I think it is fair to say that the \textit{Fuentes} opinion is overruled. . . . It seems to me . . . that it was unnecessary for the \textit{Fuentes} opinion to have adopted so broad and inflexible a rule, especially one that considerably altered settled law with respect to commercial transactions and basic creditor-debtor understandings. Narrower grounds existed for invalidating the replevin statutes in that case.” 94 S. Ct. at 1908 (concurring opinion). The dissent also agrees with Justice Powell in finding that “this case is constitutionally indistinguishable from \textit{Fuentes v. Shevin}, and the Court today has simply rejected the reasoning of that case and adopted instead the analysis of the \textit{Fuentes} dissent.” Id. at 1913 (Stewart, Douglas & Marshall, J.J., dissenting).
\item \textsuperscript{46} Id. at 1910 (Powell, J., concurring). The entire majority opinion is predicated on a flexible concept of due process. “The requirements of due process of law are not technical, nor is any form of procedure necessary. . . . Due process of law guarantees no particular form of procedure; it protects substantial rights. . . . The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.” Id. at 1901 (citations omitted).
\item \textsuperscript{47} The Court specifically stated: “The validity of procedures obtaining outside of Orleans Parish is not at issue.” Id. at 1899 n.5. In addition, the Court predicted that its decision in the instant case would not affect past decisions invalidating replevin or similar statutes, since in those cases it wasn’t clear that “there was judicial supervision of seizure or foreclosure from the outset.” Id. at 1906 n.14 (emphasis added).
\end{itemize}
the sequestration procedure used elsewhere in the state violative of due process, since the debtor's interests are still protected by his right to an immediate hearing and the creditor's security bond. Similarly, the finding by the Court that the debtor's interests are adequately protected by this security bond leaves questionable the validity of using the writ of sequestration in those situations where no security is required, e.g., enforcement of a lessor's privilege.

Whatever the specific limitations of *Mitchell*, the decision is indicative of a new attitude in the Supreme Court toward creditors' remedies. No longer will per se application of a requirement of prior

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48. In his dissent, Justice Stewart found that "the fact that the official who signs the writ after the ex parte application is a judge instead of a court clerk is of no constitutional significance. Outside of Orleans Parish, this same function is performed by the court clerk . . . . Whether the issuing functionary be a judge or a court clerk, he can in any event do no more than ascertain the formal sufficiency of the plaintiff's allegations, after which the issuance of the summary writ becomes a simple ministerial act." *Id.* at 1912. There may be some support for the argument that the clerk does perform a judicial function in signing the order, thus complying with the standard of judicial supervision stressed in *Mitchell*. "It is uniformly held that clerks of court have no judicial authority except by constitutional or legislative provisions." *Hicks v. Hughes*, 223 La. 290, 296, 65 So. 2d 603, 605 (1953) (emphasis added). *La. Code Civ. P.* art. 283 provides in part that a district court clerk may sign "[a]n order for the issuance . . . of a writ of attachment or of sequestration . . . . ." *La. Code Civ. P.* art. 282, comment (b) states that "[t]his article and Art. 283 . . . confer on the clerk of a district court the power and authority to do certain acts, and render and sign certain orders and judgments, which normally are done by the judge himself." Finally, it is significant that "[t]he order authorizing the issuance of the writ and the writ itself are distinct; the order is a judicial act while the writ is a ministerial one." *Johnson, Attachment and Sequestration: Provisional Remedies Under the Louisiana Code of Civil Procedure*, 38 Tul. L. Rev. 1, 20 (1963) (emphasis added).


50. This change of attitude is probably not so much a result of a change in policy or ideology as it is a reflection of a change in the membership of the Court. The same ideas that were expressed in *Fuentes* were expressed in *Mitchell*. However, the majority of four in *Fuentes* became a dissent of four in *Mitchell*, with Justice Stewart remaining the spokesman. With the addition of Justices Powell and Rehnquist to the Court, the three man dissent in *Fuentes*, per Justice White, became a five man majority in *Mitchell*. Aware of this numerical shift, the dissent remarked that "the only perceivable change that has occurred since the *Fuentes* case is in the makeup of this court." *94 S. Ct.* at 1914 (dissenting opinion).

notice or hearing be the norm where a creditor seeks to employ the legal processes of a state to protect his valid interests. *Mitchell* presents a more realistic approach to the problems encountered in the typical creditor-debtor relationship than did the narrow standard espoused in *Fuentes*. The prior hearing, which in the majority of cases is never utilized by the defaulting debtor, was unnecessarily given sacrosanct constitutional status. The *Mitchell* "accommodation" test recognizes that mutual property interests deserve more than one-sided protection and prevents invalidation of efficient creditors' remedies.

*Greg Guidry*

**The Nuncupative Testament by Public Act: A Dying Declaration?**

When a nuncupative testament by public act, executed by Mrs. Freddie Robertson Killingsworth, was challenged by certain of her legal heirs not named as beneficiaries, the legatees under the will brought an action seeking a declaration of its validity. On original hearing, the Louisiana supreme court declared the will invalid, basing its decision on evidence which indicated that the notary's secretary had typed the will, thereby violating the codal requirement that the testament be written "by the notary." On rehearing, the court

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52. "Offering the debtor an opportunity to be heard does not guarantee the debtor will avail himself of the opportunity. The Survey [Collection Practices and Creditors' Remedies Survey] showed that in approximately 65 percent of all court cases the consumer failed to appear and judgment was entered by default for the creditor-plaintiff." *REPORT OF THE NATIONAL COMMISSION ON CONSUMER FINANCE, CONSUMER CREDIT IN THE UNITED STATES* 30 (1972).

53. "Indeed, depending on the number of installments which have been paid, the creditor's interest may often be greater than the debtor's. Thus we deal here with mutual property interests, both of which are entitled to be safeguarded. *Fuentes* overlooked this vital point." *Mitchell v. W.T. Grant Co.*, 94 S. Ct. 1895, 1910 n.3 (1974) (Powell, J., concurring).

2. The will was executed on October 7, 1955.
3. These legal heirs would have inherited nothing under the will, but would have received 5/8's of Mrs. Killingsworth's estate had the will been declared invalid.
4. The legatees under the will enjoyed almost the entire estate of Mrs. Killingsworth. They were also legal heirs, however, and would have enjoyed approximately 3/8's of Mrs. Killingsworth's estate had the will been declared invalid.
5. *La. Civ. Code* art. 1578: "The nuncupative testaments by public act must be received by a notary public, in presence of three witnesses residing in the place where the will is executed, or of five witnesses not residing in the place."