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Ex Parte Prejudgment Replevin Statute Held Valid.

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CASE NOTES

CONSTITUTIONAL LAW—Due Process—Ex Parte Prejudgment Replevin Statute Held Valid

Mitchell v. W.T. Grant Co., — U.S. —,
94 S. Ct. 1895, — L. Ed. 2d — (1974).

W.T. Grant filed suit against Lawrence Mitchell for the overdue balance on certain household property. Mitchell had purchased the goods under an installment sales contract which provided for a vendor's lien. On Grant Company's application, the trial judge, in accordance with Louisiana procedure, ordered sequestration of the goods without prior notice or opportunity for a hearing, and denied Mitchell's motion to dissolve the writ on the ground that the sequestration violated his right of due process under the 14th amendment. The appellate court refused to reverse the rulings of the trial court, and the Supreme Court of Louisiana expressly rejected Mitchell's due process claim under the federal Constitution.[1] Mitchell appealed to the United States Supreme Court. Held--*Affirmed.* The Louisiana sequestration procedure is not invalid, either on its face or as applied, and it effects a constitutional accommodation of the conflicting interests of the buyer and seller.[2]

As Justice White stated in *Mitchell,* "[s]equestration under the Louisiana statute is the modern counterpart of an ancient civil law device to resolve conflicting claims to property."[3] Actually, the modern replevin statutes are strikingly different from the common law action of replevin of six centuries ago. Replevin at common law was an action for the return of specific goods wrongfully taken or "distrained," and was one of the most valued defenses of the feudal tenant against his lord.[4] The modern replevin statutes are most commonly used by creditors to seize goods allegedly wrongfully detained--not wrongfully taken--by debtors.[5] The result is a creditor oriented action

1. W.T. Grant Co. v. Mitchell, 269 So. 2d 186, *aff'd,* — U.S. —, 94 S. Ct. 1895, — L. Ed. 2d — (1974).

2. Mitchell v. W.T. Grant Co., — U.S. —, —, 94 S. Ct. 1895, 1899-1900, — L. Ed. 2d —, — (1974).

3. *Id.* at —, 94 S. Ct. at 1897, — L. Ed. 2d at —.

4. For a discussion of common law replevin see 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 284-85 (5th ed. 1942); T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 368 (1956); Krahmer, *Fuentes v. Shevin: Due Process and The Consumer, A Legal and Empirical Study,* 4 TEX. TECH. L. REV. 23, 30 (1972); 55 MINN. L. REV. 634, 635 (1971). *See generally* 77 C.J.S. *Replevin* §§ 1-3 (1952).

5. Fuentes v. Shevin, 407 U.S. 67, 79 (1972).

which allows the creditor to repossess such goods prior to any final hearing or judgment.

For decades creditors have effectively used the replevin procedure to their benefit, and until recent years had done so without question. It recently became apparent to the Supreme Court, however, that these procedures required re-examination on constitutional issues of due process.[6] Such due process issues usually appear when a debtor has been subjected to an *ex parte* prejudgment hearing where his creditor has been granted a writ of sequestration, attachment, or garnishment.

The initial impact on creditors' remedies began with the *Sniadach v. Family Finance Corp.*[7] decision in 1969. *Sniadach* involved an *ex parte* prejudgment procedure taken pursuant to a Wisconsin wage garnishment statute[8] which the petitioner contended violated her right to due process.[9] The Court agreed with this allegation,[10] and Justice Harlan, in a concurring opinion, stated that

> [a]part from special situations . . . I think that due process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use.[11]

This analysis of due process was used again by the Court in *Goldberg v. Kelly.*[12] *Goldberg* involved the validity of prejudgment procedures which permitted the termination of welfare payments without benefit of a prior evidentiary hearing.[13] Here the court reaffirmed the principle that "the funda-

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6. *Id.* at 79. The Supreme Court has examined similar problems of due process and the requirements of "notice" and "hearing" for over a century. *See* Bell v. Burson, 402 U.S. 535 (1971); Boddie v. Connecticut, 401 U.S. 371 (1971); Younger v. Harris, 401 U.S. 37 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Armstrong v. Manzo, 280 U.S. 545 (1965); Phillips v. Commissioner, 283 U.S. 589 (1931); Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928); Londoner v. Denver, 210 U.S. 373 (1908); Baldwin v. Hale, 68 U.S. (1 Wall.) 223 (1863). *See generally* 16 AM. JUR. 2d, *Constitutional Law* § 542-78 (1964).

7. 395 U.S. 337 (1969).

8. Wis. L. 1965, ch. 507, § 1, *as amended,* WIS. STAT. § 267.04(1) (Supp. 1974).

9. Prior to the *Sniadach* case, the Supreme Court had considered the constitutionality of prejudgment procedures in only three cases, holding in all three that there was no violation of due process by the prejudgment statutes in question. *See* McKay v. McInes, 279 U.S. 820 (1929); Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928); Ownbey v. Morgan, 256 U.S. 94 (1921).

10. Sniadach v. Family Fin. Corp., 395 U.S. 337, 341-42 (1969).

11. *Id.* at 343 (court's emphasis); *see* Mullane v. Central Hanover Tr. Co., 339 U.S. 306 (1950); Opp Cotton Mills v. Administrator, 312 U.S. 126 (1941); Londoner v. Denver, 210 U.S. 373 (1908).

12. 397 U.S. 254 (1970).

13. *Id.* at 261. The recipient could only have a post-termination hearing before an independent officer, at which he could offer oral evidence, confront witnesses, and have a record made of the hearing. This procedure was held inadequate; only a pretermination evidentiary hearing would satisfy due process requirements.

mental requisite of due process is the opportunity to be heard,"[14] and that the hearing must be "at a meaningful time and in a meaningful manner."[15]

The leading case dealing with the constitutional validity of prejudgment replevin procedures is *Fuentes v. Shevin*.[16] In separate actions before three-judge district courts, the prejudgment replevin statutes of Florida and Pennsylvania which authorized summary seizures of personal property upon an *ex parte* application by a creditor, were challenged on the grounds that no hearing was given prior to seizure. Both laws provided that the debtor could reclaim possession by posting a counterbond within 3 days after the seizure. The Florida statute relied on the bare assertion of the party seeking the writ that he was entitled to it, and required only that the applicant file a complaint initiating a court action for repossession, reciting in conclusory fashion that he was lawfully entitled to possession.[17] The Pennsylvania statute authorized the writ to be issued upon affdavit stating merely the value of the property to be replevied.[18] The statutes were upheld by the federal district courts.[19]

The main issue in the Supreme Court was whether procedural due process in the context of these cases required an opportunity for a hearing *before* the state authorized its agents to seize property in the possession of one person upon the application of another.[20] The Court noted that although due process is no barrier to the taking of a person's possessions, it does protect against arbitrary deprivation of property.[21] When a person has an opportunity to speak in his own defense, and when the state is required to listen, unfair and mistaken deprivations of property interests can usually be prevented.[22]

The law has allowed appropriate variances in the "form" of a hearing "depending on the importance of the interests involved and the nature of the subsequent proceedings."[23] The Court has long required that whatever the "form," the opportunity for that hearing must occur *before* the deprivation takes place,[24] and found in *Fuentes* that "[t]he Florida and Pennsylvania

14. Grannis v. Ordean, 234 U.S. 385, 394 (1914).

15. Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (adoption decree, issued without notification to the divorced father, violated the due process clause); *see* Bell v. Burson, 402 U.S. 535 (1971) (hearing required before termination of a driver's license).

16. 407 U.S. 67 (1972).

17. FLA. STAT. ANN. § 78.07 (Supp. 1972-73).

18. PA. STAT. ANN. tit. 12, Rule 1073(a) (1967).

19. Epps v. Cortese, 326 F. Supp. 127 (E.D. Pa. 1971), *rev'd sub nom.*, Fuentes v. Shevin, 407 U.S. 67 (1972); Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970), *rev'd sub nom.*, Fuentes v. Shevin, 407 U.S. 67 (1972).

20. Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (court's emphasis).

21. *Id.* at 81.

22. *Id.* at 81.

23. Boddie v. Connecticut, 401 U.S. 371, 378 (1971); *see* Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 313 (1950).

24. Bell v. Burson, 402 U.S. 535, 542 (1971); Goldberg v. Kelly, 397 U.S. 254, 261

prejudgment replevin statutes fly in the face of this principle."[25] The replevin statutes under attack violated the due process clause notwithstanding the fact that the debtor could regain possession by posting his own security bond, or that the taking was only temporary.[26] *Fuentes* also established that it is immaterial that the debtor did not have full legal title to the property replevied since the due process safeguards extend to "any significant property interest."[27]

The result of the *Sniadach* and *Fuentes* decisions was to place a burden on the creditor's remedy of replevin in the form of respect for consumers' constitutional rights.[28] In *Mitchell v. W.T. Grant Co.*[29] the Supreme Court has upheld a Louisiana replevin statute very similar to those challenged in *Fuentes*. The puzzling question is whether or not the *Mitchell* decision has overruled *Fuentes*, or whether it has merely left the constitutional status of *ex parte* prejudgment replevin statutes in a state of confusion.[30] The writ challenged in *Mitchell* was issued by a judge after Grant Company had submitted the necessary application and affidavit in which it asserted that it had reason to believe Mitchell would "encumber, alienate or otherwise dispose of the merchandise described in the foregoing petition during the pendency of the proceedings, and that a writ of sequestration is necessary in the premises."[31] Louisiana statutes provide for such writs when

> one claims the ownership or right to possession of property, or a mortgage, lien, or privilege thereon . . . 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.[32]

The writ shall issue "only when the nature of the claim and the amount

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(1970); Armstrong v. Manzo, 380 U.S. 545, 551 (1965); Opp Cotton Mills v. Administrator, 312 U.S. 126, 152-53 (1941); Londoner v. Denver, 210 U.S. 373, 385-86 (1908).

25. Fuentes v. Shevin, 407 U.S. 67, 83 (1972).

26. *Id.* at 85; *see* Bell v. Burson, 402 U.S. 535 (1971); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969). Both *Bell* and *Sniadach* involved takings of property prior to final judgment, and in both cases the challenged statutes included recovery provisions, allowing the defendants to post their own security bond to regain their property. The court held these deprivations had to be preceded by a fair hearing.

27. Fuentes v. Shevin, 407 U.S. 67, 86 (1972); *accord*, Bell v. Burson, 402 U.S. 535, 539 (1971); Boddie v. Connecticut, 401 U.S. 371, 379 (1971); Goldberg v. Kelly, 397 U.S. 254, 262 (1970).

28. For a general discussion of the effect of *Fuentes* see Krahmer, *Fuentes v. Shevrin: Due Process And The Consumer, A Legal and Empirical Study*, 4 TEX. TECH LAW REV. 23 (1972).

29. — U.S. —, 94 S. Ct. 1895, — L. Ed. 2d — (1974).

30. Justice Stewart in his dissent forcefully stated that the *Mitchell* decision actually overrules *Fuentes* even though not expressly done so in the majority opinion. *Id.* at —, 94 S. Ct. at 1913, — L. Ed. 2d at —.

31. Id. at —, 94 S. Ct. at 1897, — L. Ed. 2d at —. The fact that a judge issued the writ of sequestration had an important bearing on the majority's reasoning for upholding the Louisiana statute.

32. LA. CODE CIV. PROC. ANN. art. 3571 (1961).

thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts" in the verified petition or affidavit.[33] The writ is obtainable on the creditor's *ex parte* application; however, the statute allows the debtor to seek immediate dissolution of the writ.[34] Dissolution must be ordered unless the creditor "proves the grounds upon which the writ was issued," failing which the court may order return of the property and assess damages, including attorney's fees,[35] in favor of the debtor. The debtor may regain possession of the goods sequestered by filing his own counterbond as security for payment of the disputed debt.[36] The majority in *Mitchell* decided that this procedure provided sufficiently for a balancing of the conflicting interests of the parties.[37]

The Court emphasized that the Louisiana statutes are aimed at protecting the creditor's interest against possible waste or alienation until a full hearing is held on the merits.[38] Mitchell had asserted, however, that his right to a hearing *before* his possession was disturbed was nonetheless mandated by *Sniadach* and *Fuentes*, but the Court rejected this contention.[39] The majority did not expressly overrule *Fuentes* or expressly reject its principles, but attempted to distinguish the legal issues on the basis of three factors present in *Mitchell*:

> (1) the plaintiff who seeks the seizure of the property must file an affidavit stating specific facts that justify the sequestration; (2) the state official who issues the writ of sequestration is a judge instead of a clerk of the court; and (3) the issues that govern the plaintiff's right to sequestration are limited to "the existence of a vendor's lien and the issue of default . . . ."[40]

Justice Stewart found, however, that the deprivation of property in *Mitchell* was identical to that in *Fuentes*, noting that *Fuentes* explicitly rejected each of these three factors as a ground for a difference in decision.[41]

The first two of the majority's distinctions relate solely to the procedural

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33. LA. CODE CIV. PROC. ANN. art. 3501 (1961); *see* Hancock Bank v. Alexander, 237 So. 2d 669 (La. 1970) (a simple allegation on indebtedness for money due on an automobile, where no deed of trust was referred to or produced, did not satisfy the "specific facts" test).

34. LA. CODE CIV. PROC. ANN. art. 3506 (1961).

35. *Id.*

36. LA. CODE CIV. PROC. ANN. arts. 3507-08 (1961).

37. Mitchell v. W.T. Grant Co., — U.S. —, —, 94 S. Ct. 1895, 1900, — L. Ed. 2d —, — (1974).

38. *Id.* at —, 94 S. Ct. at 1901, — L. Ed. 2d at —. The Court explained: "The 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." *Id.* at —, 94 S. Ct. at 1901, — L. Ed. 2d at —.

39. *Id.* at —, 94 S. Ct. at 1902, — L. Ed. 2d at —.

40. *Id.* at —, 94 S. Ct. at 1904-05, — L. Ed. 2d at —. The third factor decreased the danger of mistaken seizure and the necessity for an adversary hearing.

41. *Id.* at —, 94 S. Ct. at 1911, 1912, — L. Ed. 2d at —.

aspects of the Louisiana statute.[42] The statute requires a plaintiff to state "specific facts" in his affidavit to justify the issuance of the writ. These affidavits usually consist of *pro forma* allegations that the debtor has wrongfully detained the property. The creditor may make whatever statements are necessary to obtain the writ since he is protected from challenge because of the procedure's *ex parte* nature. Justice Stewart found the affidavits in *Mitchell* and those in *Fuentes* were similar in effect, and were " 'hardly a substitute for a prior hearing, for they test no more than the strength of the applicant's own belief in his rights.' "[43] Justice Stewart also condemned the second distinction, that a judge instead of a court clerk is required to issue the writ, as this function is only a simple ministerial act, whereby the functionary does no more than ascertain the formal sufficiency rather than the merits of the creditor's allegations before issuing the writ of sequestration.[44] In fact, this requirement applies only to Orleans Parish, where the *Mitchell* case was originally filed, and the same function is performed by the court clerk in every other parish.[45] The dissent found the majority's third distinction, that the issues are limited to the existence of a vendor's lien and default, equally insubstantial, reasoning that the issues upon which replevin depended in *Fuentes* were no different; in both the creditor needed to show only his security interest or vendor's lien and the default by his debtor.[46]

It is interesting that the majority in *Mitchell* did not uphold the Louisiana statute as applied on the ground that the facts presented a situation which would come within one of the exceptions to *Fuentes*. *Fuentes* stated that "[t]here are 'extraordinary situations' that justify postponing notice and opportunity for a hearing," but that these situations must be truly unusual.[47] Exceptions would include situations where (1) the seizure has been directly necessary to secure an important governmental or general public interest; (2) there has been a special need for very prompt action; and (3) the state has kept strict control over its monopoly of legitimate force.[48] It seems the Court could have held that the facts in *Mitchell* established a special need for very prompt action to prevent the alienation, destruction, or deterioration of the property by Mitchell's continued use. The majority did not do so, but chose to rule on the validity of the statute on its face.

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42. *Id.* at —, 94 S. Ct. at 1912, — L. Ed. 2d at —.

43. *Id.* at —, 94 S. Ct. at 1912, — L. Ed. 2d at —, *quoting* Fuentes v. Shevin, 407 U.S. 67, 83 (1972).

44. *Id.* at —, 94 S. Ct. at 1912, — L. Ed. 2d at —.

45. LA. CODE CIV. PROC. ANN. art. 281 (1960). This statute was a revision and the official comments declared that it was intended to "make no change in the law." *Id.*

46. Mitchell v. W.T. Grant Co., — U.S. —, —, 94 S. Ct. 1895, 1912, — L. Ed. 2d —, — (1974). Justice White acknowledged in his *Fuentes* dissent that the essential issue at any hearing would be whether "there is reasonable basis for his [the creditor-vendor's] claim of default." Fuentes v. Shevin, 407 U.S. 67, 99-100 (1972).

47. Fuentes v. Shevin, 407 U.S. 67, 90 (1972).

48. *Id.* at 91.

Perhaps the Court intended to overrule *Futntes* by implication, at least in its practical application.[49] The refusal to frame the decision within the *Fuentes* exceptions could be interpreted as a change in policy or an attempt to break away from the strictly construed safeguards of due process announced in *Fuentes*. Thus, the majority in *Mitchell* introduced a "balancing of interests" test for the procedural safeguards required by due process.[50] This rationale effectively overrules the broad principles announced in *Fuentes* and leaves its mandate in an uncertain state,[51] especially considering the Court's use of the *Fuentes* "extraordinary situation" test in a case decided only 1 week after *Mitchell*.[52]

Another important question is what effect the *Mitchell* decision will have on state and federal courts in ruling on the constitutionality of replevin statutes. For example, *Fuentes* has been used by the Court of Appeals for the Fifth Circuit and the Houston Court of Civil Appeals as a basis for finding the Texas landlord lien and prejudgment garnishment statutes unconstitutional because of their *ex parte* nature,[53] but Texas courts have yet to deter-

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49. Mitchell v. W.T. Grant Co., — U.S. —, —, 94 S. Ct. 1895, 1913, — L. Ed. 2d —, — (1974).

50. *Id.* at —, 94 S. Ct. at 1898, — L. Ed. 2d at —.

51. *See* Hobbs, *Mitchell v. W.T. Grant Co.: The 1974 Revised Edition of Consumer Due Process*, 8 CLEARINGHOUSE REV. 182 (1974).

52. Calero-Toledo v. Pearson Yacht Leasing Co., — U.S. —, —, 94 S. Ct. 2080, 2088-90, — L. Ed. 2d —, — (1974); *see* Hobbs, *Mitchell v. W.T. Grant Co.: The 1974 Revised Edition of Consumer Due Process*, 8 CLEARINGHOUSE REV. 182 (1974).

53. The Texas Baggage Lien for Rent statute, TEX. REV. CIV. STAT. ANN. art. 5238a (1962), *as amended*, TEX. REV. CIV. STAT. ANN. art. 5236d (Supp. 1974) was held unconstitutional in Hall v. Garson, 468 F.2d 845 (5th Cir. 1972). The petitioner, Hall, brought a class action suit against her landlord, Garson. Hall was in arrears in her rent, and Garson's agent entered Hall's apartment and removed a television set. Subsequently, Garson notified Hall that her television set was being held as security for the past due rent and that it would be returned upon her paying the arrearage. The class action was brought on behalf of Hall and all other persons similarly situated, challenging the constitutionality of the landlord's lien statute under the due process clause. The Court of Appeals for the Fifth Circuit held the statute unconstitutional relying on *Fuentes*. In the words of the court:

> There is no requirement that the landlord first have the validity or the accuracy of his claim impartially determined, or that a need for immediate seizure be present. Those decisions are left to the operator himself to act upon with no prior opportunity for challenge by the possessor of the property.

Id. at 848; *accord*, Barber v. Rader, 350 F. Supp. 183 (S.D. Fla. 1972); Gross v. Fox, 349 F. Supp. 1164 (E.D. Pa. 1972); Shaffer v. Holbrook, 346 F. Supp. 762 (S.D.W. Va. 1972); Collins v. Viceroy Hotel Corp., 338 F. Supp. 390 (N.D. Ill. 1972); Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970); Blocker v. Blackburn, 185 S.E.2d 56 (Ga. 1971).

The Texas Court of Civil Appeals of Houston held the Texas prejudgment garnishment statute, TEX. REV. CIV. STAT. ANN. art. 4076 (1966), unconstitutional in Southwestern Warehouse Corp. v. Wee Tote, Inc., 504 S.W.2d 592 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ). The court concluded that the statute under which property was frozen after writ of garnishment is served, denied due process to the extent that it froze property without notice and hearing before judgment on the original claim was determined. This conclusion was based entirely on the rationale of the *Sniadach* and

mine the validity of the state's attachment statute.[54] Under that statute the creditor is required to submit an affidavit stating that a debt exists, the amount of the debt, and that the debtor is attempting to place his property permanently beyond the jurisdiction of the courts.[55] One author suggests that the narrowness of this statute, coupled with the fact that the circumstances which allow a writ of attachment to be issued, might bring it within the *Fuentes* exceptions ("extraordinary situations" or "immediate danger").[56] However, the statute provides for attachment after alleging a "general debt" and not on a creditor's legal interest in any particular goods. This aspect of the statute would present difficulty if challenged on due process grounds, as *Fuentes* held a prejudgment procedure unconstitutional even where a vendor's lien existed. It is also questionable whether the attachment statute would be held valid under *Mitchell.* One reason that the Supreme Court upheld the Louisiana sequestration statute was that it provided for uninterrupted judicial supervision. The Texas statute provides that a writ of attachment may be issued by a judge, clerk, or justice of the peace;[57] therefore the status of the procedure would be questionable even in the light of *Mitchell.*

This same problem exists with the Texas sequestration statute which also authorizes the issuance of the writ by a clerk.[58] If this fact does not affect the constitutionality of the statute, however, then it could arguably be held constitutional under the "extraordinary situations" or "immediate danger" exception in *Fuentes*,[59] since a writ will not issue unless the defendant is about to injure, waste, destroy, dispose, or remove property in which the plaintiff has a legal interest.[60]

Fuentes decisions. *Accord*, Western Coach Corp. v. Shreve, 475 F.2d 754 (9th Cir. 1973); Brunswick Corp. v. Galaxy Cocktail Lounge, Inc., 513 P.2d 1390 (Hawaii 1973); Olympic Forest Prods., Inc. v. Chaussee Corp., 511 P.2d 1002 (Wash. 1973); *see* Randone v. Appellate Dep't, 96 Cal. Rptr. 709 (1971), *cert. denied*, 407 U.S. 924 (1972); Jones Press, Inc. v. Motor Travel Servs., Inc., 176 N.W.2d 87 (Minn. 1970); Larson v. Fetherson, 172 N.W.2d 20 (Wis. 1969).

54. TEX. REV. CIV. STAT. ANN. art. 275 (1973).

55. *Id.*

56. Comment, *Fuentes v. Shevin: The Constitutionality of Texas' Landlord Laws and Other Summary Procedures*, 25 BAYLOR L. REV. 215, 239 (1973).

57. TEX. REV. CIV. STAT. ANN. art. 275 (1973).

58. TEX. REV. CIV. STAT. ANN. art. 6840 (1960).

59. Mitchell v. W.T. Grant Co., — U.S. —, —, 94 S. Ct. 1895, 1912, — L. Ed. 2d —, — (1974) (dissenting opinion). In Garcia v. Krausse, — F. Supp. — (S.D. Tex. 1974), the Texas sequestration statute, TEX. REV. CIV. STAT. STAT. ANN. art. 6840 (1960), was held unconstitutional on the basis of *Mitchell.* The court said the important distinguishing feature in the Texas and Louisiana statutes was that article 6840 authorizes issuance of a writ by a clerk, whereas the Louisiana statute authorized the writ to be issued only by a judge; thus providing judicial administration and supervision from the beginning of the process. The court stayed its order pending appeal, stating there was substantial ground for a difference of opinion on the questions of law presented by the case.

60. *See* TEX. REV. CIV. STAT. ANN. art. 6840 (1960).

Whether *Mitchell* will have a significant impact on untested prejudgment replevin statutes will soon be discovered.[61] Perhaps one court was correct when it suggested that when the full Supreme Court decided a case similar to *Fuentes*, that the outcome would be different.[62] If the Court's "policy" toward creditors' remedies has suddenly changed with the addition of Justices Powell and Rehnquist,[63] this "policy" was not clearly indicated by

61. Justice White, dissenting in *Fuentes*, suggested that the Court's decision in *Fuentes* would not affect self-help remedies available to creditors under the UNIFORM COMMERCIAL CODE § 9-503 which states:

> Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action . . . .

Fuentes v. Shevin, 407 U.S. 67, 103 (1972). Although the *Mitchell* opinion, written by Justice White, did not concern self-help remedies under the UCC, the fact that Justice White wrote the majority opinion gives more weight to the *Fuentes* dissent.

The major issue concerning state statutes similar to § 9-503 of the UCC is whether such self-help repossession of a debtor's property is action under the color of state law within the meaning of the Federal Civil Rights Act, 42 U.S.C. § 1983 (1970); 28 U.S.C. § 1343(3) (1970). The majority of cases have held such repossession does not constitute "state action," and thus is not violative of the due process clause. Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 329-38 (9th Cir. 1974); Kirksey v. Theilig, 351 F. Supp. 727, 732 (D. Colo. 1972); Pease v. Havelock Nat'l Bank, 351 F. Supp. 118, 120-21 (D. Neb. 1972); Greene v. First Nat'l Exch. Bank, 348 F. Supp. 672, 675 (W.D. Va. 1972); Oller v. Bank of America, 342 F. Supp. 21, 23 (N.D. Cal. 1972); *accord*, McCormick v. First Nat'l Bank, 322 F. Supp. 604, 607 (S.D. Fla. 1971). *See generally* Clark & Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355, 377-83 (1973); Hughes, *Creditors' Self-Help Remedies Under UCC Section 9-503: Violative of Due Process in Texas?*, 5 ST. MARY'S L.J. 701 (1973-74); Comment, *Self-help Repossession: Fuentes and Judicial Process*, 46 TEMP. L.Q. 540 (1973); Comment, *State Action and the Constitutionality of UCC § 9-503*, 30 WASH. & LEE L. REV. 547 (1973); Note, *Self-Help Repossession: the Constitutional Attack, the Legislative Response and the Economic Implications*, 62 GEO. L.J. 273 (1973); Note, *Constitutional Law: State Action: UCC Self-Help Repossessing Provisions (§§ 9-503, 9-504) Violate Due Process Requirements*, 57 MINN. L. REV. 621 (1973); Annot., 18 A.L.R. Fed. 223, 273-76 (1974).

62. In Roofing Wholesale Co., Inc. v. Palmer, 502 P.2d 1327 (Ariz. 1972), Arizona's Supreme Court held *Fuentes* was not authority for holding Arizona's prejudgment garnishment statute unconstitutional on due process grounds, as the procedure was *ex parte*, because *Fuentes* was decided by a seven-man court and "thus was advisory and non-binding." The reasoning was that in the opinion of the Court, a four-judge majority was not a "clear" majority, and a similar case would probably be decided differently when the full Supreme Court took part in such a case. *Id.* at 1329.

Such a decision was either a direct refusal to follow a Supreme Court mandate, or an indirect method to hold the Arizona statute valid despite its constitutional shortcomings. Without a doubt, the Arizona Supreme Court's concept of what constitutes a binding precedent from the Supreme Court has never been a part of the federal jurisprudence. *See* Carrington, *The Supreme Court: The Problem of Minority Decisions*, 44 A.B.A.J. 137 (1958).

Subsequent to the *Roofing Wholesale Co.* decision, the Court of Appeals for the Ninth Circuit declared the same garnishment statute unconstitutional in Western Coach Corp. v. Shreve, 475 F.2d 754 (9th Cir. 1973), thereby rejecting the Arizona Supreme Court's philosophy.

63. Justice Stewart emphasized in *Mitchell* that the majority had actually overruled *Fuentes* "without pointing to any change in either societal perceptions or basic constitu-