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Ex Parte Garnishment Statute Held Invalid.

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hood, was found to be based on an "impermissible ground" because it was impossible to determine whether the basis of liability was intent to injure or intent to injure through falsehood.[53] There is absent in *Sprouse* clear evidence of intent to inflict harm through falsehood, in the light of knowledge of falsity or reckless and willful disregard of the truth, which must not be confused with mere adversity.

Failure to recognize this subtlety pervades the entire holding of *Sprouse* and explains the dependency of the scheme to injure by defamation on the departure from objective news reporting.[54] Thus, it is impossible for the evidentiary aspects in *Sprouse* to support a scheme to defame because the proposition is founded upon evidence of intent to injure.[55] The proposition of a scheme to defame as evidence of "actual malice" is, however, constitutionally sound, provided that it dissects this notion of impartiality and is sustained by evidence of intent to inflict harm through falsehood. Once a scheme to defame is proven, the addition of an unreasonable, exaggerated headline would be superfluous. The cumulative design is only necessary where evidence of knowledge or reckless and willful disregard is inadequate. Although *Sprouse* purports to operate within the confines of *New York Times*, acknowledging the standard of "actual malice,"[56] it neglects the constitutional principles underlying the privilege of "robustly" criticizing those who have chosen the political arena. *Sprouse* presents a constitutionally sound formula for proving "actual malice," yet manipulates the standard in fatal neglect of those commitments for which it was promulgated. This constitutional privilege will not condone cumulative evidence founded on a proposition of "temperate," uninvolved, inertly objective news-reporting to show "actual malice" where in fact there is only "malice."

John Powell Covington

CONSTITUTIONAL LAW—Due Process—Ex Parte Garnishment Statute Held Invalid

North Georgia Finishing, Inc. v. Di-Chem. Inc.,

____ U.S. ____, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975).

Di-Chem, Inc. filed suit against North Georgia Finishing, Inc. alleging indebtedness due for goods sold and delivered. Simultaneously with the filing of the complaint and prior to its service on North Georgia Finishing, Inc.,

53. *Id.* at 9-11.
54. Sprouse v. Clay Communication, Inc., 211 S.E.2d 674 (W. Va. 1975).
55. *Id.* at 691-92.
56. *Id.* at 681-82.

the clerk of the court issued a writ of garnishment on bank accounts of the corporation upon the sworn affidavit of Di-Chem, Inc., filed in accordance with Georgia garnishment procedure. After filing the required bond to dissolve the garnishment, North Georgia Finishing, Inc. filed a motion to dismiss the writ and discharge the bond alleging that the garnishment effected a violation of its right of due process under the fourteenth amendment. The trial court overruled the motion, and the Georgia Supreme Court affirmed.[1] North Georgia Finishing, Inc. appealed to the United States Supreme Court. Held—*Reversed and remanded.* The Georgia garnishment statute, permitting a court clerk to issue a writ of garnishment in pending suits upon an affidavit of the plaintiff containing only conclusory allegations and providing for the filing of a bond as the only method of dissolving the garnishment, deprives a debtor of the use of his property pending litigation and results in an unconstitutional denial of due process.[2]

The Due Process Clause of the fourteenth amendment of the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[3] Procedural due process requires that legal proceedings which may result in a deprivation of life, liberty, or property be conducted in accordance with those rules and principles established in our system of jurisprudence for the enforcement and protection of private rights.[4] Implicit in the meaning of procedural due process is the assumption that any person whose rights will be affected by an action is entitled to notice and an opportunity to be heard.[5] Such notice and hearing "must be granted at a meaningful time and in a meaningful manner."[6]

Until recently, creditors' prejudgment seizures have been free from constitutional attack.[7] Prejudgment remedies have long been accepted in commercial law as methods by which a creditor may protect himself from loss when a debtor defaults on a debt or threatens to destroy, conceal, or remove from the jurisdiction property in which the creditor has an interest.[8]

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1. North Georgia Finishing, Inc. v. Di-Chem, Inc., 201 S.E.2d 321 (Ga. 1973), *rev'd and remanded*, — U.S. —, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975).

2. North Georgia Finishing, Inc. v. Di-Chem, Inc., — U.S. —, —, 95 S. Ct. 719, 723, 42 L. Ed. 2d 751, 758 (1975).

3. U.S. CONST. amend. XIV, § 1.

4. Pennoyer v. Neff, 95 U.S. 714, 733 (1877); *see* New Orleans Waterworks Co. v. Louisana, 185 U.S. 336, 349-50 (1902); PA. STAT. ANN. tit. 12, § 1821 (1967); Note, *Summary Prejudgment Repossession and Procedural Due Process*, 12 HOUS. L. REV. 200, 201 (1974).

5. *E.g.*, Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 246 (1944); Shields v. Utah I. Cent. R.R., 305 U.S. 177, 182 (1938); Grannis v. Ordean, 234 U.S. 385, 394 (1914).

6. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

7. *See* North Georgia Finishing, Inc. v. Di-Chem, Inc., — U.S. —, —, 95 S. Ct. 719, 724, 42 L. Ed. 2d 751, 759 (1975) (Powell, J., concurring); Mitchell v. W.T. Grant Co., 416 U.S. 600, 611-14 (1974).

8. The purpose of a prejudgment seizure is to assure the availability of property for

Generally, prejudgment seizure statutes authorize a clerk, justice of the peace, or judge in an *ex parte* proceeding upon the sworn affidavit of a creditor to issue a writ directing a sheriff or constable to seize specified property belonging to a debtor.[9] Traditionally, notice and an opportunity for a hearing prior to such seizures have not been required, the view being that if the ultimate judicial determination of liability were adequate, postponement of such a determination would not be a denial of due process where only property rights were concerned.[10]

Prior to 1969, constitutional challenges of prejudgment seizures on due process grounds were believed to be precluded by the Supreme Court's holding in *McKay v. McInnes*.[11] In that case, the Court affirmed *per curiam* the decision of the Supreme Court of Maine declaring Maine's attachment statute constitutionally sound.[12] The Maine Court held that attachment—a temporary deprivation of property—was not within the scope of the deprivation contemplated by the Constitution. Even if it were, it was not without "due process" since it was a part of a legislatively established

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the satisfaction of the judgment which a plaintiff may obtain. Common prejudgment seizures include: (1) attachment—a proceeding whereby a defendant's property is taken into custody pending adjudication of the rights of the parties and usually issued in cases involving non-resident defendants, fraud, or attempts to conceal or dispose of property on the part of a defendant, Clark & Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355, 365 (1973); (2) garnishment— a proceeding in which a plaintiff seeks to claim property of a defendant in the hands of a third person or money owed by the third person to the defendant; generally available under the same circumstances as attachment of tangible personal property, Note, *Debtor and Creditor—Due Process—Sequestration of Property Without Prior Notice and Hearing to Debtor Does Not Violate the Fourteenth Amendment*, 6 SETON HALL L. REV. 150, 156 n.46 (1974); (3) replevin—a possessory action to determine a plaintiff's right to possession of property which a defendant has wrongfully taken or wrongfully retained against the plaintiff's demand, Ring v. Ring, 174 N.E.2d 58, 61 (Ind. Ct. App. 1961); and (4) sequestration—a proceeding in which a disinterested party retains possession of the property pending a final judgment in the litigation wherein the plaintiff's assertion of right to possession is based on a claim of ownership or a mortgage or lien on the sequestered property, Note, *Constitutional Law—Due Process—Supreme Court Moderates Prior Notice and Hearing Requirements for Provisional Seizures*, 49 TUL. L. REV. 467 n.1 (1975). *See generally* Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 46 S. CAL. L. REV. 1003 and 47 S. CAL. L. REV. 1 (1973); Krahmer, *Fuentes v. Shevin: Due Process and the Consumer, A Legal and Empirical Study*, 4 TEX. TECH. L. REV. 23, 30-41 (1972); Note, *Self-Help Repossession: The Constitutional Attack, The Legislative Response, and The Economic Implications*, 62 GEO. L.J. 273 (1973).

9. TEX. REV. CIV. STAT. ANN. arts. 275 (1973), 4076 (1966), 6840 (1960); TEX. R. CIV. P. 657-79. *See generally* 77 C.J.S. *Replevin* §§ 93-111 (1952); 38 C.J.S. *Garnishment* § 150 (1943).

10. Phillips v. Commissioner, 283 U.S. 589, 596-97 (1931).

11. 279 U.S. 820 (1928).

12. McInnes v. McKay, 141 A. 699 (Me.), *aff'd per curiam*, 279 U.S. 820 (1928). As authority for its decision, the Maine Supreme Court cited two earlier United States Supreme Court cases upholding the validity of prejudgment seizures on constitutional grounds. Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928) (establishing prejudgment

procedure during which notice and a hearing before an authorized tribunal were provided.[13]

In 1969, however, the Court departed from its previous decisions and in *Sniadach v. Family Finance Corp.*[14] held a Wisconsin garnishment statute[15] unconstitutional because it allowed wages to be frozen without any prior notice or opportunity for a hearing. The majority opinion described wages as "a specialized type of property presenting distinct problems in our economic system"[16] and thus raised doubts about the applicability of that decision to other prejudgment procedures and property other than necessities.[17] Three years later in *Fuentes v. Shevin*,[18] the Court dispelled such doubts by declaring Florida and Pennsylvania replevin statutes unconstitutional.[19] Relying on *Sniadach* and subsequent decisions,[20] the Court held that the protections of the fourteenth amendment applied to *any* deprivation of a significant property interest, whether final or temporary.[21] The Court concluded that the statutes in question resulted in a deprivation of property without due process of law "insofar as they [deny] the right to a prior opportunity to be heard before chattels are taken from their possessor."[22]

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liens on the property of insolvent banks); Ownbey v. Morgan, 256 U.S. 94 (1921) (upholding Delaware foreign attachment procedures).

13. McInnes v. McKay, 141 A. 699, 702-703 (Me.), *aff'd per curiam*, 279 U.S. 820 (1928).

14. 395 U.S. 337 (1969).

15. Wis. L. 1966, ch. 507, § 1.

16. Sniadach v. Family Fin. Corp., 395 U.S. 337, 340 (1969).

17. In other jurisdictions, some courts construed *Sniadach* to condemn only wage garnishment. *See, e.g.*, Reeves v. Motor Contract Co., 324 F. Supp. 1011 (N.D. Ga. 1971); Black Watch Farms, Inc. v. Dick, 323 F. Supp. 100 (D. Conn. 1971); Termplan, Inc. v. Superior Court, 463 P.2d 68 (Ariz. 1969). Others viewed *Sniadach* as conclusive on questions involving other summary creditor remedies. *See, e.g.*, Randone v. Appellate Dept. of Super. Ct., 96 Cal. Rptr. 709, *cert. denied*, 407 U.S. 924 (1972); Jones Press, Inc. v. Motor Travel Serv., Inc., 176 N.W.2d 87 (Minn. 1970); Larson v. Fetherson, 172 N.W.2d 20 (Wis. 1969). For a thorough review of this area of the law and its developments prior to the instant case see Clark & Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355 (1973); Gardner, *Fuentes v. Shevin: The New York Creditor and Replevin*, 22 BUFFALO L. REV. 17 (1972); Krahmer, *Fuentes v. Shevin: Due Process and The Consumer, A Legal and Empirical Study*, 4 TEX. TECH. L. REV. 23 (1972); Note, *Procedural Due Process—The Prior Hearing Rule and the Demise of Ex Parte Remedies*, 53 BOSTON U.L. REV. 41 (1973).

18. 407 U.S. 67 (1972).

19. FLA. STAT. ANN. §§ 78.01, 78.07, 78.08, 78.10, 78.13 (Supp. 1972-1973); PA. STAT. ANN. tit. 12 § 1821 (1967); PA. R.J.A. 1073, 1076, 1077 (1975).

20. 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).

21. Fuentes v. Shevin, 407 U.S. 67, 85-87 (1972).

22. *Id.* at 96. On the basis of the decision in *Fuentes*, courts across the country invalidated prejudgment remedies. *See, e.g.*, Morgan v. Wofford, 472 F.2d 822 (5th Cir. 1973); Hall v. Garson, 468 F.2d 845 (5th Cir. 1972); *In re* Law Research Serv., Inc., 386 F. Supp. 749 (S.D.N.Y. 1974); Thompson v. Keesee, 375 F. Supp. 195 (E.D. Ky. 1974); Morrow Elec. Co. v. Cruse, 370 F. Supp. 639 (N.D. Ga. 1974); State *ex rel.* Williams v. Berrey, 492 S.W. 2d 731 (Mo. 1973); Montoya v. Blackhurst, 500 P.2d 176

Two years later, in a surprising reversal, the Court in *Mitchell v. W.T. Grant Co.*[23] upheld the constitutionality of a Louisiana sequestration procedure which permitted seizure of a debtor's property without notice and a prior hearing. The Louisiana statutes authorized a judge to issue a writ of sequestration in an *ex parte* proceeding upon a creditor's application for the writ by verified affidavit.[24] The statutes provided that the affidavit must contain specific facts concerning the nature of the claim, the amount and the grounds relied upon for issuance of the writ.[25] Furthermore the creditor was required to furnish a bond sufficient to pay any damages the debtor might sustain.[26] The debtor could seek immediate dissolution of the writ unless the creditor proved the grounds for its issuance.[27] *Mitchell* distinguished *Sniadach* on the basis of the dissimilar nature of the respective creditors' interests involved, noting that the creditor in *Sniadach* had no prior interest in the garnished wages while the installment seller in *Mitchell* had a special interest in the sequestered property due to his security lien.[28] *Fuentes* was distinguished in terms of the requirements for issuance of a writ contained in the statutes involved.[29] Five specific debtor protection provisions within the Louisiana procedure were found to be lacking in the Pennsylvania and Florida statutes invalidated by *Fuentes*.[30] After weighing the interests of

(N.M. 1972). *Contra, e.g.*, McVay v. United States, 481 F.2d 615 (5th Cir. 1973); Velazco v. Minter, 481 F.2d 573 (1st Cir. 1973); Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973); Central Sec. Nat'l Bank v. Royal Homes, Inc., 371 F. Supp. 476 (E.D. Mich. 1974); Harrison v. Morris, 370 F. Supp. 142 (D.S.C. 1974).

23. 416 U.S. 600 (1974).

24. LA. CODE CIV. PROC. ANN. arts. 281-83 (1960), 3501 (1961).

25. LA. CODE CIV. PROC. ANN. arts 2501, 3571 (1961).

26. LA. CODE CIV. PROC. ANN. arts. 3501, 3506, 3574 (1961).

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

28. Mitchell v. W.T. Grant Co., 416 U.S. 600, 614-15 (1974). The Court also noted that there was no showing in *Sniadach* of how soon the debtor could have a hearing and that garnishments were subject to abuse by creditors without valid claims, a risk minimized in this case by the creditor's security interest in the property and the debtor protections furnished by the statute. *Id.* at 614-15.

29. *Id.* at 615. The Court also discussed the fact that the fault standard of "wrongful detention" required for issuance of a writ of replevin was peculiarly subject to factual determination and adversarial input while grounds for possession under a writ of sequestration could easily be shown in an *ex parte* proceeding by production of documentary proof of the debt, the default, and the vendor's lien. *Id.* at 617-18. This approach does not take into consideration any defenses which the debtor may have. Comment, *Prejudgment Remedies and Due Process Rights: A Question of Balance*, 6 TOLEDO L. REV. 185, 203 n.76 (1974).

30. The five protections are: (1) the affiant's personal knowledge of the facts contained in a "verified" affidavit; (2) "specific" facts contained in the affidavit supporting the allegations of entitlement to the property and reason to fear loss if the writ is not granted; (3) judicial determination of right to the relief requested; (4) filing of a bond by the creditor for protection of the debtor should the writ be shown to have been improvidently granted; and (5) an opportunity for an early hearing after seizure to determine the plaintiff's right to seizure on the merits of the case. Mitchell v. W.T. Grant Co., 416 U.S. 600, 616-18 (1974).

both buyer and seller in the disputed property[31] and considering the debtor protections furnished by the provisions of the Louisiana statutes, the Court concluded that the sequestration procedure was valid, and that it effected a "constitutional accommodation of the conflicting interests of the parties."[32]

In light of the unequivocal holding in *Fuentes* that notice and a prior opportunity for a hearing are due process requirements, it appears that *Mitchell* overruled *Fuentes*.[33] *Mitchell* did not, however, expressly overrule *Fuentes* although it certainly placed *Fuentes* in a questionable category.[34] Instead of the clear mandate of *Fuentes, Mitchell* substituted a less stringent test, a type of balancing of the opposing interests of buyer and seller coupled with a consideration of the degree of debtor protection furnished by the provisions of the statute in question. The Court failed to suggest guidelines to determine what or how many of the debtor protection elements enumerated must be contained in a statute meeting constitutional requirements. Finally, the opinion implies that it was limited solely to those situations where both buyer and seller had a prior interest in the property seized.

Thus, the judicial atmosphere surrounding prejudgment seizures was rather uncertain when *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[35] was decided. In that case, a writ of garnishment was obtained by a creditor on the basis of an affidavit containing conclusory allegations of a debt and reason to fear the loss of the garnished amount. The debtor, North Georgia Finishing, Inc., sought dissolution of the writ, asserting that the Georgia garnishment statute violated due process requirements.[36] The Supreme Court agreed with the debtor and reversed the decision of the Georgia Supreme Court, by relying on the holdings in *Sniadach, Fuentes* and *Mitchell*.[37]

The Georgia courts recognized that *Sniadach* invalidated a garnishment statute but they considered it applicable only to garnishment of wages, not

31. The Court placed considerable weight on the fact that the creditor had a prior interest in the property sequestered in the form of a vendor's lien on goods purchased under an installment sales contract. *Id.* at 604-605.

32. *Id.* at 607.

33. The concurring and dissenting Justices all felt that *Mitchell* was "constitutionally indistinguishable" from *Fuentes* and, therefore, overruled *Fuentes*. *Id.* at 623, 634, 636.

34. Both *Fuentes* and *Sniadach* recognized that occasionally there might be "extraordinary situations" which would justify postponing notice and an opportunity for a hearing. One such situation occurs when there is shown to exist a special need for prompt action. Fuentes v. Shevin, 407 U.S. 67, 90-91 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337, 339 (1969). It has been suggested that *Mitchell* could have avoided this potential conflict with *Fuentes* by holding that the creditor's interest in preventing the alienation, destruction, or further deterioration of the property by continued use created such a situation requiring prompt action. Note, *Constitutional Law—Due Process—Ex Parte Prejudgment Replevin Statute Held Valid*, 6 ST. MARY'S L.J. 742, 747 (1974).

35. — U.S. —, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975).

36. GA. CODE ANN. §§ 46-101-104 (1974).

37. North Georgia Finishing, Inc. v. Di-Chem, Inc., 201 S.E.2d 321 (Ga. 1973), *rev'd and remanded*, — U.S. —, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975).

other assets or properties.[38] The Supreme Court disagreed, arguing that such an application of *Sniadach* failed to recognize *Fuentes*.[39] Discussing *Fuentes*, the Court stated that the official seizures in that case were held to be in violation of the fourteenth amendment because they had been "carried out without notice and without opportunity for a hearing or other safeguard against mistaken repossession."[40] The Georgia statute was vulnerable for the same reasons.

The provisions of the Georgia statute were also compared with the provisions of the Louisiana sequestration statute considered constitutional in *Mitchell*, and were found devoid of the necessary debtor protection provisions.[41] Finally, the Court declared *Fuentes* and *Mitchell* applicable although based in an individual debtor-creditor context, since the due process clause applies to all types of property, the deprivation of which might lead to irreparable injury.[42]

North Georgia is unilluminating in that it contains no positive statements of the applicable law.[43] Apparently the intention of the Court was to reverse the Georgia courts while offering few reasons for doing so.[44] The comparisons drawn between the Georgia statute and those in *Fuentes* and *Mitchell* are mere suggestions of factors to be considered, and the opinion never indicates which provides the controlling authority for the invalidation of the statute.

What emerges from the Court's opinion is a test to ascertain whether or not due process requirements have been met. For example, a prejudgment seizure statute should first be compared with the holding in *Fuentes* to determine if the statute provides for the requisite notice and opportunity for a hearing prior to seizure. If it does, then any further consideration of due process questions would be unnecessary. If the requirements of *Fuentes* are

38. *Id.* at 323.

39. North Georgia Finishing, Inc. v. Di-Chem, Inc., — U.S. —, —, 95 S. Ct. 719, 722, 42 L. Ed. 2d 751, 756 (1975).

40. *Id.* at —, 95 S. Ct. at 722, 42 L.Ed. 2d at 757.

41. *Id.* at —, 95 S. Ct. at 722-23, 42 L. Ed. 2d at 757-58.

42. *Id.* at —, 95 S. Ct. at 723, 42 L. Ed. 2d at 758.

43. The one exception is the Court's ruling that the due process clause applies to deprivations of property belonging to corporations. *Id.* at —, 95 S. Ct. at 723, 42 L. Ed. 2d at 758.

44. The Court concluded its opinion by stating that "[e]nough has been said, we think, to require the reversal of the judgment of the Georgia Supreme Court." *Id.* at —, 95 S. Ct. at 723, 42 L. Ed. 2d at 758. This contention is supported by Justice Blackmun's dissenting opinion in which he states:

> One gains the impression . . . that the Court is endeavoring to say as little as possible in explaining just why the Supreme Court of Georgia is being reversed. And, as a result, the corresponding commercial statutes of all other States, similar to but not exactly like those of Florida or Pennsylvania or Louisiana or Georgia, are left in questionable constitutional status, with little or no applicable standard by which to measure and determine their validity under the Fourteenth Amendment.

Id. at —, 95 S. Ct. at 726, 42 L. Ed. 2d at 762 (Blackmun, J., dissenting).

not met, then another comparison of the specific provisions of the statute with those discussed in *Mitchell* should be made to determine the constitutionality of the statute. In other words, *Fuentes* represents an ideal standard while *Mitchell* should be used to judge those statutes falling below that standard.[45]

The mere suggestions in the *North Georgia* opinion fail to disburse the uncertainty surrounding the *Mitchell* decision. The fact that *Mitchell* was decided on issues concerning seizure of property in which both debtor and creditor had a prior interest is never discussed in *North Georgia,* yet the use of *Mitchell* as authority for the holding in *North Georgia* indicates that *Mitchell* is not limited solely to its circumstances. After *North Georgia* the status of *Fuentes* in light of *Mitchell* is still debatable.[46] More importantly, however, while *North Georgia* offers support for the "balancing test" of debtor and creditor interests adopted by the *Mitchell* court, there is no indication which debtor protection provisions are required to sustain a statute against constitutional attack.

In considering which of the "saving characteristics" of the Louisiana statute are necessary to meet the constitutional requirement of due process, three are suggested. First, a statute should require that a creditor post a bond sufficient to cover any damages, including expenses and attorney's fees, which the debtor may incur if the seizure is found to be error.[47] Second, the statute should require that the affidavit contain sufficient facts from which a determination could be made of probable cause for the seizure.[48] Third, such a statute should provide the debtor with an early opportunity to present

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45. This precise test was applied by a federal district court in Texas which declared the Texas sequestration statute unconstitutional. TEX. REV. CIV. STAT. ANN. art. 6840 (1960). In that case, the court said that "[t]he Texas Sequestration statute fails to comply with prior notice and hearing requirements of *Fuentes* and does not measure up to the standards approved by the Supreme Court in *Mitchell.* . . . [The sequestration procedure does] not meet constitutional muster . . . ." Garcia v. Krausse, 380 F. Supp. 1254, 1259 (S.D. Tex. 1974). *See also* Comment, *Prejudgment Remedies and Due Process Rights: A Question of Balance,* 6 TOLEDO L. REV. 185, 206-13 (1974).

46. Despite the fact that the concurring Justices and two of the dissenting Justices concluded that the majority opinion of *North Georgia* appeared to reinstate *Fuentes,* a closer reading of the majority opinion reveals that the notice and hearing requirements of *Fuentes* are never relied upon solely as controlling but are always coupled with a third factor such as the absence of judicial participation in the issuance of the writ. From a broader viewpoint, it can be seen that *Fuentes* is cited for its analysis of the replevin statutes and its discussion of property deprivations to which due process applies rather than for its holding regarding notice and hearing. It can hardly be said that *North Georgia* fully reinstates *Fuentes. North Georgia Finishing, Inc. v. Di-Chem, Inc.,* — U.S. —, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975).

47. Mitchell v. W.T. Grant Co., 416 U.S. 600, 608 (1974); *see* Fuentes v. Shevin, 407 U.S. 67, 101-102 (1972) (White, J., dissenting).

48. *Cf.,* Aguilar v. Texas, 378 U.S. 108 (1964). One article has suggested that a temporary restraining order with its requisite showing of irreparable harm to the plaintiff if the order is not issued would be an appropriate remedy when the need arises for complete summary creditor relief. Clark & Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution,* 59 VA. L. REV. 355, 404-405 (1973).

his defenses in a hearing on the merits.[49] Finally, the statute should not require the filing of a bond by the debtor before a hearing since that might constitute a denial of equal protection to persons of low income.[50]

The uncertainty of the Supreme Court on issues involving due process, evidenced by *North Georgia*, is indicative of a fundamental split among the members of the Court as to exactly what statutory procedures are required by "due process."[51] Apparently, the majority of the Court advocate a "balancing test" to resolve due process issues relating to prejudgment seizures—weighing the competing property interests of both debtor and creditor in the light of the surrounding facts and circumstances. It seems likely, therefore, that subsequent questions of due process based on statutory construction will conform to the rationale in *Mitchell* and *North Georgia*.[52] Hopefully, later decisions by the Supreme Court will settle the issues remaining unresolved in the decision in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[53]

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49. Parts of the *Mitchell* decision indicate that the Court might have considered judicial supervision to be the controlling factor in determining the constitutionality of the statute. Mitchell v. W.T. Grant Co., 416 U.S. 600, 616-17, 620 n.14 (1974). As noted in Justice Stewart's dissenting opinion in *Mitchell*, however, issuance of a writ quickly becomes a ministerial act after a determination of "the formal sufficiency of the plaintiff's allegations." *Id.* at 632 (Stewart, J., dissenting). For this reason, it is suggested that judicial determination would not be a requirement for compliance with due process. *Accord*, North Georgia Finishing, Inc. v. Di-Chem, Inc., — U.S. —, —, 95 S. Ct. 719, 725, 42 L. Ed. 2d 751, 760 (1975) (Powell, J., concurring).

50. North Georgia Finishing, Inc. v. Di-Chem, Inc., — U.S. —, —, 95 S. Ct. 719, 726, 42 L. Ed. 2d 751, 761 (1975) (Powell, J., concurring); *cf.*, Sniadach v. Family Fin. Corp., 395 U.S. 337, 347 (1969) (Black, J., dissenting). *But cf.* United States v. Kras, 409 U.S. 434 (1973).

51. Generally, Justices Brennan, Douglas, Marshall, and Stewart are in favor of a due process requirement of notice and prior hearing in questions relating to prejudgment seizures while the remaining Justices support the use of a balancing test. *E.g.*, Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972). It should be noted that the thrust of the dissenting opinion in *North Georgia* dealt not with the due process test to be used but with its applicability to commercial dealings between corporations. North Georgia Finishing, Inc. v. Di-Chem, Inc., — U.S. —, —, 95 S. Ct. 719, 728-29, 42 L. Ed. 2d 751, 764-65 (1975) (Blackmun, J., dissenting). The basic split may also be found in due process decisions in areas other than prejudgment seizures. *See e.g.*, Goss v. Lopez, — U.S. —, 95 S. Ct. 729, 42 L. Ed.2d 725 (1975); Arnett v. Kennedy, — U.S. —, 94 S. Ct. 1633, 40 L. Ed.2d 15 (1974); Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 (1973); Torres v. New York State Dept. of Labor, 410 U.S. 971 (1973); Ortwein v. Schwab, 410 U.S. 656 (1973); United States v. Kras, 409 U.S. 434 (1973); Bell v. Burson, 402 U.S. 535 (1971); Boddie v. Connecticut, 401 U.S. 371 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970).

52. *See* Comment, *Prejudgment Remedies and Due Process Rights: A Question of Balance*, 6 TOLEDO L. REV. 185, 206-13 (1974).

53. — U.S. —, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975).