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NOTES

MITCHELL v. W. T. GRANT COMPANY: RETURN TO PREJUDGMENT REMEDIES?

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INTRODUCTION

With the decision in 1969 of *Sniadach v. Family Finance Corp.*,[1] procedural due process became an important, although confusing, issue in the area of creditor prejudgment remedies. Subsequent decisions have extended the applicability of the *Sniadach* rationale, culminating in the decision of *Fuentes v. Shevin*[2] which held that, in general, statutes authorizing the seizure of property without providing for prior hearing are unconstitutional.[3] The recent decision of *Mitchell v. W. T. Grant Co.*,[4] however, casts doubt on the continued validity of this principle and opens the door to renewed confusion as to the constitutionality of statutory prejudgment remedies. *Mitchell* raises questions as to the scope of its application, the basis for its holding, and its potential effect on the holdings in previous cases. This note will analyze *Mitchell* in light of the principles set forth in *Sniadach* and *Fuentes*, and will discuss the probable effect of the decision, with particular regard to Montana law.

MITCHELL: THE DECISION

THE FACTS

Mitchell dealt with the issue of procedural due process in regard to the sequestration statute of Louisiana. Under the statutory scheme, a writ of sequestration may issue upon the filing, before a judge,[5] of a petition stating the nature of the petitioner's claim, the amount thereof, and the grounds relied upon for issuance of the writ,[6] accompanied by an affidavit swearing to the truth of the allegations.[7] Petitioner must also post bond as security for the payment of damages to the defendant should the writ be obtained wrongfully.[8] The judge, without giving

[1]Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) [hereinafter referred to as Sniadach].

[2]Fuentes v. Shevin, 407 U.S. 67 (1972) [hereinafter referred to as Fuentes].

[3]For an excellent discussion of these cases see Note, *Fuentes v. Shevin: Procedural Due Process v. Prejudgment Remedies*, 34 MONT. L. REV. 178 (1973).

[4]Mitchell v. W. T. Grant Co., ... U.S. ....., 94 S.Ct. 1895 (1974) [hereinafter referred to as Mitchell].

[5]LOUISIANA CODE OF CIVIL PROCEDURE, art. 281 (1961) [hereinafter cited L.C.C.P. 1961].

[6]L.C.C.P. 1961, art. 3571. Grounds for sequestration.

> 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 revenue therefrom, or remove the property from the parish, during the pendency of the action.

[7]L.C.C.P. 1961, art. 3501.

notice to the debtor or affording him an opportunity to be heard, may issue the writ of sequestration, authorizing the sheriff to seize the property from the debtor.[9] The debtor then has the option to seek immediate dissolution of the writ by contradictory motion,[10] or to recover his property by posting his own bond as security in the event the creditor should prevail.[11]

The facts in the case are straightforward. Grant sold a refrigerator, stove, stereo, and washing machine to Mitchell pursuant to a conditional sales contract, Grant retaining a vendor's lien in the merchandise. Mitchell owed an overdue balance of $574.17 on the purchase price of the goods, for which judgment was sought and for which a writ of sequestration was obtained by Grant, depriving Mitchell of the merchandise pending the outcome of the suit. Mitchell challenged the statutory procedure on due process grounds for failure to provide notice or an opportunity to defend the right to possession. The trial court rejected the challenge, holding that the provisional seizure enforced through sequestration was not a denial of due process, but rather that Grant had ensured Mitchell's right to due process by "proceeding in accordance with Louisiana law as opposed to any type of self-help seizure."[12] The Louisiana Supreme Court affirmed, expressly rejecting Mitchell's due process claims.[13]

THE DECISION

In a lengthy, unclear, and poorly reasoned argument, the Court held the Louisiana statutes to be constitutional, apparently overlooking or consciously disregarding the principles set forth in *Fuentes*. Mr. Justice White, who wrote the dissent in *Fuentes,* authored the majority opinion.

Attempting to deal with the due process questions involved, the Court noted that the resolution of those issues must take account of the seller's, as well as of the buyer's, interest in the property.[14] As to this requirement, the Court found that Louisiana had "reached a constitutional accommodation of the respective interests of buyer and seller."[15] This "constitutional accommodation" was to be found in the fact that: (1) the seller had a strong interest in the property by virtue of his vendor's lien, which could be defeated by the transfer of possession out of the debtor's hands; (2) the sequestration process proceeded under judicial supervision; (3) there was provision for a hearing for the debtor immediately after seizure; and (4) the prevailing party was protected against

[9]L.C.C.P. 1961, art. 3574.
[10]L.C.C.P. 1961, art. 3504.
[11]L.C.C.P. 1961, art. 3506.
[12]L.C.C.P. 1961, art. 3507.
[13]Mitchell, *supra* note 4 at 1898.
[14]W. T. Grant v. Mitchell, 263 La. 627, 269 So.2d 186 (1972).
[15]Mitchell, *supra* note 4 at 1899.
Id. at 1901.

all loss by the security bonds.[16] Of particular importance to the preceding conclusion was the fact that the impact of deprivation of the property on the debtor did not "override his inability to make the creditor whole for wrongful possession and the risk of destruction or alienation if notice and prior hearing are supplied."[17] The requirements of due process do not militate against temporary seizure of property pending final determination of the parties' rights therein, but demand only that an adequate hearing be afforded before *final* deprivation of property.[18]

Furthermore, the Court found that the possibility for mistake or abuse under this procedure was substantially reduced from that in *Fuentes* because of the issues involved. Sequestration concerns possession which turns on the existence of a debt, a seller's interest, and a default by the debtor. "These are ordinarily uncomplicated matters that lend themselves to documentary proof."[19] And the requirement of filing the petition before a judge, rather than merely a court clerk, further ensures issuance of the writ only in appropriate cases and provides for judicial supervision of the entire process.[20]

Thus, a prejudgment seizure of a debtor's property may meet the *Mitchell* requirements of due process of law where the creditor has a readily provable claim to possession or ownership, petition is made to a court judge, there is adequate protection of the debtor's interest by the posting of a bond by the creditor, and there is provision for prompt post-seizure hearing before the debtor's ownership of the property is terminated.

MITCHELL: POTENTIAL IMPACT

In General

The obvious question engendered by the preceding discussion is what effect *Mitchell* will have on the future application of *Sniadach* and *Fuentes*. Does it overrule *Fuentes* and again open the door to a flood of litigation questioning the constitutionality of prejudgment remedies? Or does *Mitchell* merely limit the application of the *Fuentes* rule to those cases where there is no provision for judicial supervision of the statutory procedure?

An answer to that inquiry may be found first by noting that the facts of *Mitchell* and *Fuentes* are distinguishable. Although both cases dealt with creditors having secured interests, and statutes providing for the seizure of property without notice, the statutes in *Fuentes* did not provide for judicial supervision of the procedure as did the statutes in *Mitch-*

[16] *Id.* at 1906.
[17] *Id.* at 1901.
[18] *Id.* at 1902, citing *Ewing v. Mytinger and Casselberry*, 339 U.S. 594, 598 (1950); *Phillipps v. Commissioner*, 283 U.S. 596, 597 (1931).
[19] *Id.* at 1901.
[20] *Id.* at 1904—1905.

ell.[21] Since the *Mitchell* rationale centered on the provision of judicial supervision as complying with constitutional due process requirements, it would seem that *Mitchell* is a factually narrow decision with limited application.

Another indication of the potential effect of the decision may be observed in the manner in which the Court disposed of the issues presented. First, in a footnote to the majority opinion, it was broadly asserted that the decision would have no effect on recent cases dealing with garnishment or other summary self-help remedies.[22] In addition, the Court later suggested that, with an exception or two, previous cases invalidating replevin and similar statutes had not dealt with situations involving judicial supervision of the procedure,[23] the logical implication being that this case presents a unique issue with limited application.

Such an interpretation is further substantiated by the Court's reference to *Fuentes* as being violative of due process because the replevin process therein was carried out without notice or opportunity to be heard and without judicial participation. As such, it was "decided against a factual and legal background sufficiently different" as not to require the invalidation of the Louisiana sequestration statute "either on its face or as applied in this case."[24]

Therefore, it appears that *Mitchell* leaves *Sniadach* unscathed and effects *Fuentes* only to the extent that where the replevin or other seizure process is subject to judicial supervision, it satisfies due process, provided that the debtor's interests are otherwise adequately protected by bond and a hearing before final adjudication. Judicial participation is thus established by the *Mitchell* decision as an alternative to prior notice and opportunity for hearing in the calculus of procedural due process. *Fuentes* remains an important force in the field of commercial law but with a more limited scope of application after *Mitchell.*

In Montana

Although the conclusion in *Mitchell* may permit some statutory prejudgment remedies to avoid the constitutional hatchet of *Fuentes,* it appears to pose little potential impact on the already questionable constitutionality of several Montana statutes. The decision in *Fuentes* had cast serious constitutional doubts on two sections of the Uniform Commercial Code adopted by Montana,[25] on Montana's claim and delivery

[21] *See* L.C.C.P. 1961, arts. 281, 3501, 3571--3576; and Fla. Stat. Ann. §§ 78.01--78.21 (1941).

[22] Mitchell, *supra* note 4 at 1906 n. 14.

[23] *Id.*

[24] *Id.* at 1904.

[25] Revised Codes of Montana, §§ 87A-9-503, 87A-9-504 (1947) [hereinafter cited R.C.M. 1947]. However, *Adams v. S. Cal. First Nat'l Bank, infra* note 42 has upheld these U.C.C. self-help provisions.

statutes,[26] and on several Montana lien statutes.[27] *Mitchell* fails to remove these constitutional doubts because none of the Montana statutes provides for judicial supervision, so as to fall within the ambit of the *Mitchell* holding. Legislative action thus remains the only viable means of conforming existing statutes to the requirements of due process.

It should be particularly noted that the Montana claim and delivery statute may require only minimal reformation in light of *Mitchell*. Addition of a provision for judicial supervision of the procedure may suffice since the statutes already provide for an affidavit of petitioner's claim,[28] for sufficient protection for the debtor in the form of petitioner's bond,[29] and for a hearing before final adjudication of the parties' rights.[30] The *Mitchell* decision thus alleviates the burden of statutory reformation which the legislature must bear.

MITCHELL: A CRITIQUE

Although *Mitchell* neither specifically nor impliedly overrules *Fuentes*, much of the Court's reasoning and many of its conclusions clearly disregard principles set forth in *Fuentes*. While attempting to distinguish the *Fuentes* facts and rationale, *Mitchell* fails to establish any forceful rationale of its own which would compel the final conclusion which the Court reached.

First, *Fuentes* had held temporary, non-final deprivation of property without a prior hearing to be violative of due process except in "extraordinary situations."[31] The *Mitchell* court, however, citing the case of *Phillips v. Commissioner*, declared that:

> 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 determination of liability is adequate.[32]

However, the cases cited by the Court in support of this proposition deal only with extraordinary situations as defined by *Fuentes*,[33] and make no such broad assertion, either openly or impliedly. The Court thus attempts to extend the "extraordinary situation" criteria of *Fuentes*, which require no pre-seizure notice, to the circumstances of *Mitchell*.

[26] R.C.M. 1947, §§ 93-4101 to 93-4119.

[27] R.C.M. 1947, §§ 34-103 to 34-111 (hotel keeper's lien); § 45-1106 (agister's liens and liens for services). *See* Note, *supra* note 3 at 183--185.

[28] R.C.M. 1947, § 93-4102.

[29] R.C.M. 1947, § 93-4104.

[30] R.C.M. 1947, § 93-4101.

[31] Fuentes, *supra* note 2 at 90--91. Extraordinary situations are those involving: (1) an important governmental or general public interest in immediate seizure of the property, (2) a special need for very prompt action, and (3) official supervision and execution of a narrowly drawn statute.

[32] *See* discussion, *supra* note 18.

[33] *Id. at* 1902--1903, citing *Ewing, supra* note 18 (federal seizure of misbranded articles in commerce); *Phillips, supra* note 18 (collection of taxes by the federal government); *Coffin Bros. & Co. v. Bennett*, 277 U.S. 29 (1928) (execution on stock assessment to prevent bank failure); *Ownbey v. Morgan*, 256 U.S. 94 (1921) (foreign attachment statute).

Such an attempt is, however, logically precluded by the holding in *Fuentes*. Although the facts of *Mitchell* may satisfy the "extraordinary situation" criteria of a special need by the creditor for prompt action and official supervision of the procedure, the third ingredient of an important governmental or general public interest in immediate seizure of the property is noticeably absent.[34] Thus, while the holding of *Mitchell* does not overrule *Fuentes*, neither does it find support in that decision.

Second, the *Mitchell* requirements of a petitioner's affidavit and judicial supervision relate solely to procedure and fail to overcome the substantive constitutional defect of failure to provide an opportunity to be heard before seizure of property. It has long been recognized that in determining what constitutes due process of law, regard must be given to substance, not merely to form.[35] Thus, the affidavit requirement, although requiring more information than the statutes challenged in *Fuentes*, provides no substitute for prior hearing because it tests only the strength of the applicant's own belief in his rights,[36] rather than presenting an objective statement of the circumstances of both parties.

Furthermore, the fact that the petition is made to a judge rather than to a court clerk likewise is of no constitutional significance. Outside Orleans Parish, in which *Mitchell* arose, the same function is performed by a court clerk.[37] And there is nothing to indicate that the nature of the duty was changed when the statute in that parish was amended to vest it in a judge rather than a court clerk. In fact, the official comments to the amendment state that the revision was intended to "make no change in the law."[38] As Justice Stewart points out in the dissent to *Mitchell*:

> 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 writ becomes a simple ministerial act.[39]

Therefore, it is difficult to comprehend how the requirements of due process can be made to depend upon the title of the official supervising the procedure.

Third, the ultimate resolution of the issue of the constitutionality of the Louisiana sequestration statute is accomplished through an exercise in verbal circuity. In effect, the rationale of the decision is that (1) the initial hardship to the debtor and risk of wrongful seizure are limited (2) because of the statutory procedure provided for, (3) which is constitutional because the initial hardship to the debtor is limited. Such

[34]Rather, all that is involved is the creditor's self-interest in securing his obligation.
[35]Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226, 235 (1896).
[36]Fuentes, *supra* note 2 at 83.
[37]L.C.C.P. 1961, art. 282.
[38]L.C.C.P. 1961, art. 281 (Official Comment).
[39]Mitchell, *supra* note 4 at 1912 (dissenting opinion).

circular reasoning provides at best a tenuous basis for any further diversion from the *Fuentes* doctrine.

Finally, it must be noted that the Court's holding may be explained to some extent by policy considerations favoring a retreat from exclusive emphasis on the rights of the debtor, which the *Sniadach* and *Fuentes* cases had seemed to indicate, to an attempted balancing of the rights of the creditor with those of the debtor. Evidence of this underlying current is readily apparent in the Court's statement that:

> Resolution 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.[40]

Also to be considered in the balancing calculation is the cost to creditors of mandatory preseizure hearings, namely the cost of the hearing itself, the depreciation in value of the security from its continued use by the debtor after default, and the possibility that the buyer may hide, vandalize or transfer the property if given prior notice.[41] Recent cases have also indicated a trend toward greater constitutional flexibility in regard to creditor remedies.[42]

Thus, whereas the holding in *Mitchell* cannot logically be supported by the rationale of *Fuentes,* it may to some extent be explained, perhaps justifiably, by the policy considerations of achieving a balance between the respective rights of creditor and debtor.

CONCLUSION

Mitchell is a case of indefinite scope, certain to cause renewed confusion in the field of commercial law. It represents a minor victory for creditors, who may now, through appropriate procedure, protect their security interest in a debtor's property without the necessity of a preseizure hearing. For debtors, it represents a retreat from the staunch support of constitutional rights present in *Fuentes,* and a return to the vagaries of prejudgment seizure. Finally, *Mitchell* represents an abrupt disregard of the constitutional due process principles established in *Fuentes,* a decision barely two years old, which can serve only to engender confusion among the legal profession as to the present course of the law. It is difficult to imagine that creditor convenience could be worth so much.

[40] *Id.* at 1899.

[41] Note, *Right to Hearing Before Taking of Property,* 86 HARV. L. REV. 85, 91 (1972).

[42] Adams v. S. Cal. First Nat'l. Bank, 492 F.2d 324 (9th Cir. 1973) (private repossession held not to be state action and not subject to due process requirements); Adams v. Department of Motor Vehicles, 11 Cal.3d 146, 520 P.2d 961, 113 Cal. Rptr. 145 (1974) (retention of car by mechanic under mechanic's lien held constitutional as long as mechanic did not sell car); Kruger v. Wells Fargo Bank, 11 Cal.3d 352, 521 P.2d 441, 113 Cal. Rptr. 449 (1974) (bank set-off of checking account held constitutional).