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The Supreme Court's Still Changing Attitude toward Consumer Protection and Its Impact on the Integrity of the Court

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THE SUPREME COURT'S STILL CHANGING ATTITUDE TOWARD CONSUMER PROTECTION AND ITS IMPACT ON THE INTEGRITY OF THE COURT

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In the light of *Sniadach, Fuentes, W. T. Grant*, and *North Georgia Finishing* this member of the Georgia Supreme Court still acts largely in the dark.

Justice Gunter concurring
in *Doran v. Home Mart Building Centers, Inc.*[1]

I. INTRODUCTION

In the last issue of the MONTANA LAW REVIEW, I attempted to analyze the effect of two relatively recent Supreme Court decisions, *Fuentes v. Shevin*[2] and *Mitchell v. W. T. Grant Co.*,[3] on the existing prejudgment attachment remedies in Montana.[4] I asserted that anyone who examined the Montana statutes after *Fuentes* but before *Mitchell* would undoubtedly have concluded that both the attachment[5] and the claim and delivery[6] statutes were facially unconstitutional, but that after *Mitchell* such a conclusion was somewhat less certain.

After the article was written, but before it was published, the United States Supreme Court rendered a third decision[7] concerning a prejudgment attachment statute: *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[8] Alas, I cannot report that this decision resolves the

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1. 233 Ga. 705, 213 S.E.2d 825, 828 (1975).

2. 407 U.S. 67 (1972).

3. 416 U.S. 600, (1974).

4. McDermott, *The Supreme Court's Changing Attitude Toward Consumer Protection and Its Impact on Montana Prejudgment Remedies*, 36 MONT. L. REV. 165 (1975).

5. REVISED CODES OF MONTANA (1947), [hereinafter cited as R.C.M. 1947] § 93-4301 *et seq.*

6. R.C.M. 1947, § 93-4101 *et seq.*

7. Actually this is the fourth recent decision in the area of creditor's rights. The first, *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), involves prejudgment garnishment of the debtor's wages said by the court to be "a specialized type of property presenting distinct problems in our economic system." 395 U.S. at 340. Most subsequent opinions, including the Supreme Court's most recent decision in *Di-Chem*, have limited the applicability of *Sniadach* to wage garnishment cases. For this reason *Sniadach* is not included in this analysis.

8. 419 U.S. 601 (1975). The Supreme Court's decision was rendered on January 22, 1975, but did not come to my attention in sufficient time to refer to it in the earlier article. In

confusion and perplexity caused by the court's inconsistent decisions in *Fuentes* and *Mitchell*.

II. The Impact of Di-Chem

As pointed out in the prior article, it was uncertain as to whether *Mitchell* overruled *Fuentes*. Justice White, the author of *Mitchell*, tried valiantly to reconcile the two decisions; Justice Powell, in a concurring opinion, and Justice Stewart (the author of *Fuentes*), in a dissenting opinion, agreed that *Fuentes* had been overruled.[9] Since the composition of the court did not change between *Mitchell* and *DiChem*, as it had between *Fuentes* and *Mitchell*, one might have assumed that the Court would use *Di-Chem* as an opportunity to establish clearly that *Fuentes* was overruled by *Mitchell*. Instead, Justice White, writing for the majority, tried to use *Di-Chem* to reenforce his view that *Fuentes* was not overruled and that *Mitchell*, *Fuentes*, and now *Di-Chem* can all stand together as the law to be applied in suits challenging state prejudgment creditor's remedies.

Even a cursory glance at the cases outlined in the appendix should reveal why a majority of the members of the Court, numerous lower courts,[10] the author, and undoubtedly a score of creditor's attorneys concluded that *Mitchell* must be read as overruling *Fuentes*. Admittedly there are differences between the Florida and Pennsylvania statutes held unconstitutional in *Fuentes* and the Louisiana statute upheld in *Mitchell* but the differences, on analysis, became insignificant and, to some degree, nonexistent.

III. The Joint Interest Doctrine

Perhaps the most compelling argument presented in *Mitchell* for upholding the Louisiana statute is the Court's emphasizing that

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mitigation of my failure to do so, it seems that this decision failed to attract much attention and was also overlooked by others. *Federal National Mortgage Assoc. v. Howlett*, 521 S.W.2d 428 (Mo. 1975) was decided almost two months after *Di-Chem* but the Supreme Court of Missouri overlooked this important decision until it was brought to its attention in a petition for rehearing. 521 S.W.2d at 439.

9. Justices Douglas and Marshall joined in Justice Stewart's opinion and Justice Brennan, also dissenting, agreed that *Fuentes* required reversal of the lower court judgment in *Mitchell*. Thus a majority of the Court seemed to agree that *Mitchell* overruled *Fuentes*.

10. One federal district court went so far as to *overrule* an earlier three judge district court opinion, *Gunter v. Merchants Warren National Bank*, 360 F. Supp. 1085 (D. Maine 1973), holding unconstitutional the Maine law permitting the prejudgment attachment of real estate without prior notice and hearing. *In re the Oranoka*, 393 F. Supp. 1311 (D. Maine 1975), Judge Gignoux, a frequently mentioned candidate for one of the recent vacancies on the Supreme Court, concluded that *Mitchell* and the summary affirmance by the Supreme Court of a three judge district court in *Spielman-Fond, Inc. v. Hanson's Inc.*, 379 F. Supp. 997 (D. Ariz. 1973), aff'd, 417 U.S. 901 (1974) "have significantly vitiated the scope of *Fuentes* and cast substantial doubt on the continued vitality of *Gunter* . . ." 393 F. Supp. at 1313.

both the creditor and the debtor have a property right, or at least a joint interest, in the property subject to the seizure or attachment: the creditor has a vendor's lien based on an installment sales contract, while the debtor has a right to possession under the same agreement.

> Plainly enough, this is not a case where the property sequestered by the Court is exclusively the property of the defendant debtor. The question is not whether a debtor's property may be seized by his creditors, *pendente lite*, where they hold no present interest in the property sought to be seized. The reality is that both seller and buyer had current, real interests in the property, and the definition of property rights is a matter of state law. 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.[11]

The existence of joint interests persuaded the majority that the Louisiana statute, by requiring the creditor to put up a bond to protect the debtor from damages or expenses resulting from an improvident attachment, and by permitting the debtor to regain possession by putting up his own bond to protect the seller or, absent the bond, to demand an immediate hearing, provided "a constitutional accommodation of the conflicting interests of the parties."[12]

As the Court indicated, the continued possession by the debtor during the litigation of the controversy would impair the creditor's rights in the property, either by diminution in value resulting from normal use, or, at the extreme, by the destruction or transfer of the property by the debtor. In the Court's view, the statute succeeds in protecting the rights of both the creditor and the debtor. It insures the creditor will be able to protect his interests by seizing the property, while the debtor will be protected by the creditor's bond. Alternatively, the debtor can retain possession and use of the property by posting a bond which will serve to protect the creditor.

Unfortunately the joint property interests, stressed so emphatically in *Mitchell*, cannot be used to distinguish *Mitchell* from *Fuentes* because both the Florida and Pennsylvania statutes stricken in *Fuentes* involved prejudgment attachment of property in which the creditor retained significant property rights under conditional or installment sales contracts valid under applicable state law.

Apparently overlooking this distinction, some courts have treated the attachment of the creditor's interest to the property as a crucial factor in determining the constitutionality of a state statute which permits a prejudgment seizure or attachment without

11. Mitchell v. W. T. Grant Co., *supra* note 3 at 1898.
12. *Id.* at 1900.

prior notice and hearing. Thus, both a federal district court and the state supreme court held the Michigan prejudgment garnishment statute unconstitutional partly because the property seized under the Michigan statute was "most unlike that before the Court in *Mitchell* where both debtor and creditor had current, real interests in the sequestered property."[13] This approach seems consistent with the facts of *Di-Chem*, since the Georgia statute declared unconstitutional was utilized to garnish a bank account in which the creditor had no interest or property right. But Justice White was apparently unwilling to base the decision in *Di-Chem* on this very important difference, for in so doing, he would have had to concede what he has consistently attempted to deny: *Mitchell* overruled *Fuentes*. As a result, the Court's opinion in *Di-Chem* has convinced other courts that the existence of a property right in the merchandise or property being seized is not significant in determining the constitutionality of an attachment or garnishment statute.[14]

To uphold the Louisiana statute in *Mitchell*, while not overruling *Fuentes*, Justice White had to find some other grounds for distinguishing the statutes involved. He found three. First, he noted the content of the affidavits required under the state laws of Florida, Pennsylvania and Louisiana was somewhat different. The Florida and Pennsylvania statutes did not require a detailed statement of the basis for the plaintiff creditor's claim, while the Louisiana statute did. Second, the Louisiana statute was applicable in Orleans Parish but not throughout the state. It required the judge, rather than the clerk of the court, to issue a writ of attachment. Finally, the Louisiana statute permitted the debtor to seek an immediate hearing at which he could challenge the basis for the attachment.

IV. Judicial Supervision

While the Louisiana statute seems to require more detailed and specific allegations in the petition seeking the writ of garnishment or attachment than do either the Florida or Pennsylvania statutes, and that a judge rather than a court clerk is the official empowered by statute to issue the writ, when analyzed neither factor supports the conclusion that the Louisiana statute affords due process while the Florida and Pennsylvania statutes do not. Justice White seems to overlook the most important aspect of the decision-making pro-

13. Douglas Research & Chemical Inc., v. Soloman, 388 F. Supp. 433, 436 (E. D. Mich. 1975); *Cf.* Cochrane v. Westwood Wholesale Grocery Co., 394 Mich. 164, 229 N.W.2d 309 (1975).

14. Hutchinson v. Bank of North Carolina, 392 F. Supp. 888, 898 (M.D. N. Car. 1975); Doran v. Home Mart Bldg. Centers, Inc., *supra* note 1 at 828 (concurring opinion of Gunter, J.).

cess employed under all three statutes: the decision to issue the writ is made *ex parte* based only on affidavits submitted by the creditors.[14.1] Whether the affidavit requirements are simple or complex and whether the decision is made by a judicial officer or a ministerial official has little significance when the decision is made by a person who only hears one side of the story. The availability of "forms" for affidavits that satisfy the Louisiana requirements persuaded Justice Stewart that:

> the Louisiana affidavit requirement can be met by any plaintiff who fills in the blanks on the appropriate form documents and presents the completed forms to the court. Although the standardized form in this case calls for somewhat more information than that required by the Florida and Pennsylvania statutes challenged in *Fuentes*, such *ex parte* allegations "are hardly a substitute for a prior hearing, for they test no more than the strength of the applicants own belief in his rights."[15]

Thus the person who issues the writ, be he judge or clerk, is simply performing a ministerial task; if the affidavit satisfies the statutory requirements, and the required bond is posted, the official apparently has no choice and must issue the writ of attachment.

Furthermore, the contents of the affidavit emphasized in *Mitchell* lose their significance in *Di-Chem*. The Georgia statute required the plaintiff to state not only the amount claimed to be due but also "that he has reason to apprehend the loss of the same or some part thereof unless process of garnishment shall issue."[16] In compliance with the requirements of this statute, the president of Di-Chem, Incorporated, signed and submitted his affidavit stating:

> that North Georgia Finishing, Inc., defendant, is indebted to said plaintiff (Di-Chem, Inc.) in the sum of $51,279.17 DOLLARS . . . and that affiant has reason to apprehend the loss of said sum or some part thereof unless process of garnishment issues.[17]

The affidavit in *Mitchell* established an unpaid and overdue balance of $574.17 and that the plaintiff believed the defendant would:

14.1. The California Supreme Court has recently pointed out some of the inherent defects in *ex parte* proceedings:

> The first is a shortage of factual and legal contentions. Not only are facts and law from the defendant lacking, but the moving party's own presentation is often abbreviated because no challenge from the defendant is anticipated at this point in the proceeding.

United Farm Workers v. Superior Court of Santa Cruz City, ___ Cal. 3d ___, 537 P.2d 1237, 1241, 122 Cal. Rptr. 877 (1975).

15. Mitchell v. W.T. Grant Co., *supra* note 3 at 1912.

16. GEORGIA CODE ANNOTATED, § 46-102, cited in *North Georgia Finishing, Inc. v. Di-Chem Inc.*, *supra* note 8 at 602.

17. North Georgia Finishing, Inc. v. Di-Chem, Inc., *supra* note 8 at 604.

> encumber, alienate or otherwise dispose of the merchandise . . . during the pendency of these proceedings, and that a writ of sequestration is necessary in the premises.[18]

Although there are slight differences between the language of the Louisiana and Georgia statutes and between the affidavits actually filed in the two cases, the differences are clearly too insignificant to serve as standards for determining the constitutionality of similar state statutes.

There is one factual difference which might be a basis for reconciling these three decisions. The three state statutes found unconstitutional in *Fuentes* and *Di-Chem* permitted a clerk or prothonotary to issue the writ while the Louisiana statute upheld in *Mitchell*, as it applies in Orleans Parish,[19] requires the writ to be issued by a judge. It is doubtful this fact will be controlling in the future. As one court has recently pointed out, "there are suggestions in the concurring and dissenting opinions [in *Di-Chem*] that some justices do not believe that supervision of the *ex parte* proceedings by a judicial officer is required."[20] Additionally, one three-judge district court has determined the court clerk can, for the purpose of satisfying *Mitchell*, be treated as a judicial officer.[21] Furthermore, the Supreme Court has held a court clerk in Florida is a "judicial officer" and therefore can issue arrest warrants.[22] Unfortunately for Justice White, it was also a court clerk in Florida who issued the writ in *Fuentes*, thus making it impossible to distinguish *Fuentes* and *Mitchell* on the basis that to be valid the writ must be issued by a "judicial officer."

V. The Immediate Post Seizure Hearing

Only one basis exists for trying to distinguish *Di-Chem* from *Mitchell* and *Mitchell* from *Fuentes*. In *Mitchell* the Court emphasized that the Louisiana statute permitted an *immediate* hearing, on motion of the debtor, to determine whether there was in fact a basis for the attachment or seizure of the debtor's property. In *Di-Chem*, the Court noted there was no similar provision for a hearing, and this alone has been the basis for determining a statute's constitutionality.[23] While it was unclear that the Florida procedure under

18. Mitchell v. W.T. Grant Co., *supra* note 3 at 1897.

19. Since the Louisiana statute permits a clerk to issue the writ throughout the rest of the state, the statute must be unconstitutional in every parish in Louisiana except Orleans Parish where, ironically, the *Mitchell* case arose.

20. Guzman v. Western State Bank, 516 F.2d 125, 131 n. 7 (8th Cir. 1975).

21. Hutchinson v. Bank of North Carolina, *supra* note 14 at 896.

22. Shadwick v. City of Tampa, 407 U.S. 345, 351 (1972).

23. For example, the North Carolina statute was upheld primarily because it provides for an immediate post-seizure hearing. *Hutchinson v. Bank of North Carolina, supra* note 21

attack in *Fuentes* permitted an immediate post-seizure hearing[24] it appears that a debtor in Pennsylvania can, by motion, seek to vacate the attachment order at any time, thereby giving him the same right to an immediate hearing that the debtor has in *Mitchell*. But, more important than a comparison of the nature or timing of the post-seizure hearings involved in these three cases, is the fact that the majority in *Fuentes* in no uncertain terms emphasized that *any type* of post-seizure hearing would, on constitutional grounds, be *totally inadequate* to preserve the constitutionality of a statute[25] which deprived a person of his property without prior notice and hearing. The Court stated:

> The Florida replevin process guarantees an opportunity for a hearing after the seizure of goods, and the Pennsylvania process allows a post-seizure hearing if the aggrieved party shoulders the burden of initiating one. But neither the Florida nor Pennsylvania statute provides notice or an opportunity to be heard before the seizure.[26]

The Court in *Fuentes* emphasized that, to satisfy due process, the right to notice and hearing "must be granted at a time when the deprivation can still be prevented."[27] Clearly then, the availability of an immediate post-seizure hearing cannot serve as the basis for reconciling *Fuentes* and *Mitchell*, since the *Fuentes* Court considered that factor irrelevant.

What then are the real differences between the Florida, Pennsylvania, Louisiana and Georgia statutes? The differences are apparently intentionally obscured:

> One gains the impression, particularly from the final paragraph of its opinion, that the Court is endeavoring to say as little as possible in explaining just why the Supreme Court of Georgia is being reversed.[28]

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at 897. A North Dakota statute was stricken down because an immediate post-seizure hearing was only available if the debtor posted a bond. *Guzman v. Western State Bank, supra* note 20 at 131.

24. It seems that in Florida the debtor must await the trial of the underlying controversy to attack the attachment.

25. The requirement for a preseizure hearing may be relaxed where a strong government interest is involved such as the protection of the public from contaminated food or misbranded drugs and to "safeguard the integrity of the public purse." *Harverhill Manor, Inc. v. Commissioner of Public Welfare*, 330 N.E.2d 180, 188 (Mass. 1975); Cf. *Dupuy v. Superior Court*, 123 Cal. Rptr. 273, 538 P.2d 729 (1975).

26. Fuentes v. Shevin, *supra* note 2 at 80.

27. *Id.* at 81.

28. North Georgia Finishing, Inc. v. Di-Chem, Inc., *supra* note 8 at 64 (dissenting opinion of Justice Blackmun).

VI. The Vague and Hazy Guidelines of Stare Decisis[29]

To understand the real cause of this perplexing state of affairs one must look beyond the statutes involved to other factors. It was Mr. Justice Stewart, the author of *Fuentes*, who pointed out that the difference between *Fuentes* and *Mitchell* was the composition of the Court which decided the cases.[30]

He also expressed grave concern over the impact that these two inconsistent decisions would have on the nation's respect for the Court.

> A basic change in the law on a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this court and to the system of law which it is our abiding mission to serve.[31]

As the Supreme Judicial Court of Massachusetts has pointed out: "Certainly constitutional interpretation must respond to social change but this duty does not explain speedy overruling of new doctrines."[32]

As Justice Stewart chides the Court for its fickleness in *Mitchell*, Justice Blackmun criticizes the Court for its inconsistent behavior in all three cases. He attributes the vacillation to the fact that *Fuentes* was decided by the Court while it was not at full strength.[33]

> The admonition of the great Chief Justice [that the Court, except in cases of "absolute necessity", should not decide a constitutional question unless there is a majority of the whole court." *Briscoe v.*

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29. State judges like Justice Gunter (*supra* p. 1) are not the only ones confused by these cases. One federal judge has recently commented: "A review of the cases . . . makes clear that the guidelines of *stare decisis* have long since grown hazy and vague." *Jonnet v. Dollar Savings Bank*, 392 F. Supp. 1385, 1387 (W. D. Penna 1975). This may explain, in part, the unusual situation now existing in Pennsylvania. On February 12, 1975, Judge Bechtle sitting in Philadelphia upheld the Pennsylvania foreign attachment procedures. *Simkins Industries Inc. v. Fuld & Co.*, 392 F. Supp. 129 (E.D. Pa. 1975). Less than two months later Judge Teitelbaum, sitting in Pittsburgh, found those procedures unconstitutional. 392 F. Supp. at 1393.

30. Mitchell v. W.T. Grant Co., *supra* note 3 at 1914.

31. *Id.* Justice Stewart does not improve the Court's image by paraphrasing Samuel Clemens in referring to the impact of *Di-Chem* on *Fuentes*:

> It is gratifying to note that my report of the demise of *Fuentes v. Shevin* . . . [in his dissenting opinion in Mitchell] seems to have been greatly exaggerated.

North Georgia Finishing, Inc. v. Di-Chem, Inc., *supra* note 8 at 723.

32. McIntyre v. Associates Financial Services Company of Mass., Inc., 328 N.E.2d 492, 494 n.2 (1975).

33. *Fuentes* was argued on November 9, 1971 and decided on June 12, 1972. Mr. Justice Powell and Mr. Justice Rehnquist joined the court on January 7, 1972 after the case had been argued but before the decision was announced.

> *Bank of Kentucky*, 8 Pet. 118, 122 (1834)], in my view, should override any natural, and perhaps understandable, eagerness to decide. Had we bowed to that wisdom when *Fuentes* was before us, and waited a brief time for reargument before a full court, whatever its decision might have been, I venture to suggest that we would not be immersed in confusion, with *Fuentes* one way, *Mitchell* another, and now this case decided in a manner that leaves counsel in the commercial communities and other states uncertain as to whether their own established and long accepted statutes pass constitutional muster with the waivering tribunal off in Washington D. C. This court surely fails in its intended purpose when confusing results of this kind are forthcoming and are imposed upon those who owe and those who lend.[34]

Justice Blackmun's concerns about the effect and confusion created by constitutional interpretations supported by less than a majority of the full court should not be limited to situations where the court was undermanned but should be considered whenever there is no majority opinion.[35] Perhaps the Court's most egregious decision occurred in *National Mutual Insurance Co. v. Tidewater Transfer Co., Inc.*,[36] in which the Court decided the United States District Court for the District of Maryland had jurisdiction over a suit between a citizen of Virginia and a citizen of the District of Columbia, in spite of a determination by a strong majority of the Court that the District of Columbia was not a state within the meaning of Article III of the Constitution and that a federal district court could not exercise jurisdiction over suits that were not between citizens of different states. As a result, this perplexing case stands for the proposition that, although a federal district court can exercise jurisdiction over suits between a citizen of the District of Columbia and a citizen of one of the several states, it cannot do so under either of the theories advanced to support such jurisdiction.[37]

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34. North Georgia Finishing, Inc. v. Di-Chem, Inc., *supra* note 8 at 618-619.

35. The Arizona Supreme Court carried this concern to the extreme of refusing to declare a state prejudgment garnishment statute unconstitutional on grounds established in *Fuentes v. Shevin*, *supra* note 2, because the United States Supreme Court hearing that case was not a full court. The Arizona court noted that when "we have doubts that once the full court hears the case that the opinion will stand, we are reluctant to declare unconstitutional Arizona statutes based upon a decision by less than a clear majority." *Roofing Wholesale Co., Inc. v. Palmer*, 502 P.2d 1327, (1972).

36. 337 U.S. 582 (1949).

37. Three justices (Jackson, Black & Burton) were of the opinion that the District of Columbia was not a "state" as that term is used in Article III but that federal court jurisdiction over such suits could be found in Article I; two justices (Rutledge and Murphy) were of the opinion that the District of Columbia was a "state" but "strongly dissented" from the idea that constitutional courts could exercise Article I jurisdiction; the remainder of the court (Chief Justice Vinson and Justice Douglas, Frankfurter and Reed) agreed that neither Article I nor Article III could support jurisdiction over the case at bar.

Justice Blackmun may have been correct in suggesting this confusion and uncertaintly could have been avoided by ordering reargument of *Fuentes* after Justices Powell and Rehnquist joined the court. But it is possible a *Tidewater* situation still could have developed and the present confusion and perplexity would not have been avoided.

The real problem seems to emerge from a careful reading of Justice White's opinions in all three cases. It is clear from his dissenting opinion in *Fuentes*[38] that he disagreed with the holding of the Court. *Mitchell* gave him an opportunity to repudiate the holding in *Fuentes* and establish as "the law" in this area his dissenting opinion in *Fuentes*. But he and several other members of the Court, perhaps chided by Justice Stewart's remarks, were unwilling to ignore the doctrine of *stare decisis* and overrule the very recent *Fuentes* decision. So in *Di-Chem* he tried once again to show that *Mitchell* does not overrule *Fuentes*, thereby paying homage to the doctrine of *stare decisis*. Torn between his view as to the correct decision in this area of the law and his duty to uphold the Court as an institution by applying the doctrine of *stare decisis*, Justice White tried to accomodate both. It is the opinion of at least two of his colleagues that in so doing, Justice White did a disservice to the Court and to the public.

VII. Conclusion

The blame for this unfortunate situation lies on neither Justice White nor the four justices who formed the majority in *Fuentes*. The real fault lies in the Court's failure to heed Chief Justice Marshall's admonition and the Court's resultant misuse of the doctrine of *stare decisis*. Of course Justice Stewart is correct in suggesting that recent decisions of the Court should be followed by *it* as well as by lower courts, but he misses the point. A decision not supported by five or more justices may decide the case before the Court but is not a "decision of *the* Court" and should not be given *stare decisis* recognition.

However, Justice Blackmun was wrong in suggesting that the Court should have postponed its decision in *Fuentes* to await its new members. The decisional process should have continued in its normal course, but, when the Court reached its decision and found it was not supported by five or more justices, it should have announced its decision[39] but filed no opinion "for the Court." Individ-

38. Fuentes v. Shevin, *supra* note 2 at 97-103.

39. As it does when the Court is evenly split ("the judgment below is affirmed by an equally divided court."), the Court should announce: "the judgment below is affirmed (or reversed) by a divided court."

ual justices could, of course, file concurring or dissenting opinions, but they would be considered merely the personal views of individual members of the *Court*, not in themselves *precedents*.

Then, Justice White would have found no dilemma in *Mitchell*. If four of his colleagues had supported the views he expressed in *Fuentes*, those views would have become "the law" and the present confusion would never have existed. The doctrine of *stare decisis*, when properly employed, provides "an element of continuity in the law" and "the psychologic need to satisfy reasonable expectations."[40] Its strained and unnecessary application in these cases does neither.

40. Helvering v. Hallock, 309 U.S. 106, 119 (1939).

APPENDIX A

CASE	STATE	PREJUDGMENT TYPE OF PROCEEDING	PROPERTY INVOLVED	CREDITOR'S INTEREST IN PROPERTY	PERSON ISSUING WRIT	POST SEIZURE HEARING	RESULT
Sniadach v. Family Finance Corp. 395 U.S. 337 (1969)	Wisconsin	Garnishment	Wages	None	Clerk	None	Unconstitutional
Fuentes v. Shevin 407 U.S. 67 (1972)	Pennsylvania	Replevin	Household Goods	Title Under Conditional Sales Contract	Prothonotary	On Demand	Unconstitutional
	Florida	Replevin	Household Goods	Title Under Conditional Sales Contract	Clerk	At Trial	Unconstitutional
Mitchell v. W.T. Grant Co. 416 U.S. 600 (1974)	Louisiana	Sequestration	Household Goods	Vendor's Lien	Judge	On Demand	Constitutional
North Georgia Finishing Inc. v. Di-Chem Inc. 419 U.S. 601 (1975)	Georgia	Garnishment	Bank Account	None	Clerk	None	Unconstitutional
Hutchinson v. Bank of North Carolina 392 F. Supp. 888 (M.D. N.Car. 1975) (3 Judge Court)	North Carolina	Attachment	Real Property	None	Clerk	On Demand	Constitutional
Douglas Research & Chemical Inc. v. Solomon 388 F. Supp. 433 (E.D. Mich. 1975) (3 Judge Court)	Michigan	Garnishment	Bank Account	None	Clerk	Limited-On Demand	Unconstitutional
In Re The Oronoka 393 F. Supp. 1311 (D. Maine 1975)	Maine	Attachment Liens	Real Property	None	Clerk	On Demand	Constitutional
Guzman v. Western State Bank 516 F. 2nd 125 (8th Cir. 1975)	North Dakota	Attachment	Mobile Home	Lien	Clerk	Only if Debtor Posts Bond	Unconstitutional
Thornton v. Carson 533 P. 2nd 657 (Ariz. 1975)	Arizona	Replevin	Industrial Machinery	Title Under Conditional Sales Contract	Clerk	Only at Trial	Unconstitutional