#39.90 10/17/74

Memorandum 74-65

Study 39.90 - Creditors' Remedies (Claim and Delivery Statute)

The Commission requested Professor Warren, our consultant, to prepare an analysis of Mitchell v. W.T. Grant Company. We wanted to determine if any changes should be made in the California Claim and Delivery Statute (adopted on recommendation of the Commission).

Attached is Professor Warren's memorandum. If we receive any comments on his memorandum from interested persons or organizations, we will forward those comments in a supplement to Memorandum 74-65.

Attached as Exhibit I is a copy of the opinions in Mitchell v. W.T. Grant Company.

Respectfully submitted,

John H. DeMoully
Executive Secretary

DATE: July 12, 1974

TO : California Law Revision Commission

FROM : W.D. Warren

SUBJECT: Mitchell v. W.T. Grant Company, No. 72-6160, U.S. Sup. Ct., May 13, 1974

Holding of the Court

In this case the Supreme Court upheld the Louisiana sequestration statute and, in doing so, overruled in spirit if not in fact Fuentes v. Shevin, 407 U.S. 67 (1972).

Creditor had made an installment sale to buyer of a refrigerator, range, stereo, and washing machine; buyer owed $574.17. Creditor had a "vendor's lien," which is apparently the Louisiana equivalent of a security interest, and repossessed the goods by a writ of sequestration under a statute stating the grounds for sequestration to be: "When one claims ownership or right to possession of property, or a mortgage, lien, or privilege thereon, he may have the property seized under a writ of sequestration, if it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish, during pendency of the action." The procedure called for creditor to submit an affidavit stating the grounds for issuance of the writ, for a judge to sign the order for issuance of a writ, for creditor to post a bond, and for buyer to be notified to file a pleading or make an appearance in five days. Buyer can regain possession of

the goods by successfully moving to dissolve the sequestration --the creditor apparently has the burden of proof in showing that grounds for issuance of the writ exist--or by filing his own bond.

Buyer challenged the legality of this procedure as a deprivation of due process owing to the fact the property was taken from him without opportunity for a hearing. His reliance was on Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) and on Fuentes, supra. In the majority opinion, White, J., purported to distinguish the case from Fuentes on two major grounds. First, the state laws invalidated in that case did not require judicial participation while the Louisiana law required that the order for issuance of the writ be signed by a judge. Second, Louisiana has the rule that an installment buyer of goods can resell the goods and cut off the secured party's interest; hence, the risk of resale by a buyer may be enough to justify ex parte seizure under the "extraordinary circumstances" rule of Fuentes. But Justice White's opinion can more realistically be viewed as saying that courts should have more concern about creditors' property rights than they have been showing in the Sniadach line of case and that it is constitutional for creditors to deprive buyers of even necessities of life pendente lite so long as they do so under a procedure that bonds the buyer against loss, gives the buyer prompt right to challenge the taking, and requires judicial participation in the procedure.

Justice Powell's strong concurring opinion makes this explicit. He states that Fuentes is overruled, and that creditors can deprive buyers of property temporarily under a statute which strikes a fair balance between the creditor's interest in getting his goods back, undiminished in value, and the buyer's interest in retaining the goods pending conclusion of the suit. Powell would apparently not even require that a judge participate, for he would sanction a "factual showing before a neutral officer or magistrate of probable cause to believe that he is entitled to the relief requested." (Emphasis added.) Stewart, J., speaking for Douglas and Marshall in dissent, stated that Fuentes is overruled. Brennan, J., dissented in a separate opinion, saying only that Fuentes required reversal.

Meaning of the Holding

We can conclude that a replevin or claim and delivery statute would meet the Court's constitutional standards if it provides for ex parte issuance of a writ upon a showing of specific facts leading to a reasonable belief that the debtor may transfer, conceal, or injure the property so long as the creditor is required to post bond, the debtor is given an opportunity for prompt hearing, and a judge participates in issuing the writ. But the holding may go even further in that it is not clear what the court would require to be shown at the ex parte stage by way of extraordinary circumstances. Under

Louisiana law, the writ of sequestration can only be issued upon a showing of those facts quoted in the second paragraph of this memorandum. Since a buyer can always cut off the seller's interest by resale in Louisiana, the Court seems to be saying that in all cases there is sufficient risk of imminent loss that the writ should issue upon a showing of default and existence of the creditor's security interest. It is quite possible that if a state statute allowed the creditor to retake possession of goods in which he had a security interest merely by showing ex parte the validity of his interest and the debtor's default, the court might approve this statute even though it required no showing of any threat of transfer, concealment, or damage, so long as the statute met the other requirements--bonding, opportunity for prompt hearing by debtor, and judicial participation. Justice White evidences concern about the deterioration in value of security while in the possession of a defaulting debtor and gives reason to believe that so long as the debtor is adequately protected against a wrongful taking, the creditor should have the right to possession pending trial without giving the debtor a hearing. In short, the Court may be telling us that in a secured transaction the creditor is entitled to possession pending suit without any showing of extraordinary circumstances so long as he makes an ex parte showing regarding default and his right to take possession.

California Implications

As you recall, Blair v. Pitchess, 5 Cal. 3d 283, 96 Cal. Rptr. 42 (1971), invalidated the old claim and delivery law on the basis not only of the Due Process and Searches and Seizures clauses of the Federal Constitution but also the comparable provisions in Article 1 of the California Constitution. In Blair the California Supreme Court indicated that the debtor must receive a hearing prior to seizure unless extraordinary circumstances are shown which would justify seizure upon ex parte hearing. It may be that Blair now imposes a higher standard of due process than that espoused by the Supreme Court in Mitchell; certainly there is no reason to believe that the California Supreme Court would allow a secured creditor to take possession of his collateral upon ex parte hearing without a showing of extraordinary circumstances. Moreover, the "necessities of life" doctrine stated in Randone v. Appellate Department of Superior Court, 5 Cal. 3d 536, 96 Cal. Rptr. 709 (1971), with respect to attachment proceedings was also based on the California Constitution and has not as yet found support in U.S. Supreme Court cases, though the appropriate issue has not presented itself there.

I presume that to the extent that the California Supreme Court in Blair and Randone states a higher constitutional standard than that required by the United States Supreme Court, that standard is the law of this State so long as it is based

on the California Constitution. The Law Revision Commission, as I see it, should follow Blair and Randone until they are revised. It is likely that Mitchell, signaling as it does the beginning of the Sniadach backlash, will in time have an effect on the California Supreme Court's views. It is noteworthy that in Blair the court purported to rely on Sniadach. I see no reason at this time to revise the Claim and Delivery Act.

Mitchell has no direct bearing on attachment or self-help repossession. White specifically draws a distinction between cases in which the creditor has a security interest as in Mitchell and those in which he does not, as would be the situation in attachment. Then, too, if state action were found to exist in the self-help repossession area, the Court could very well find a violation of due process because of the lack of safeguards present in Mitchell. However, the real message of Mitchell is that the two new judges who did not vote in Fuentes probably would have voted the other way in that case, and one cannot help but surmise that Court is less likely to find state action in private debtor-creditor controversies now that Justices Powell and Rehnquist are participating members.