In the

Supreme Court of the United States

LAWRENCE MITCHELL, Petitioner,	)	
v.	)	No. 72-6160
W. T. GRANT COMPANY, Respondent.	)	

Washington, D.C.
December 4, 1973

Pages 1 thru 41

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

LAWRENCE MITCHELL, Petitioner	:	
v.	:	No. 72-6160
W. T. GRANT COMPANY, Respondent.	:	

Washington, D. C.

Tuesday, December 4, 1973

The above-entitled matter came on for argument at 10:29 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ROBERT J. HOBBS, ESQ., National Consumer Law Center, Inc., One Court Street, Boston, Massachusetts 02108, for the Petitioner.

THOMAS J. O'SULLIVAN, ESQ.,14 Wall Street, New York, New York 10005, for the Respondent.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 72-6160, Mitchell against Grant.

Mr. Hobbs, you may proceed whenever you are ready.

ORAL ARGUMENT OF ROBERT H. HOBBS

ON BEHALF OF THE PETITIONER

MR. HOBBS: Mr. Chief Justice, and may it please the Court, this matter is before the Court on a writ of certiorari to review the decision of the Louisiana Supreme Court upholding the Louisiana statutory procedure of sequestration. The issue presented by the decision of the Louisiana Supreme Court and by the arguments of respondent is whether the decision of this Court in Fuentes v. Shevin should be applied to the Louisiana procedure of sequestration, a procedure without any constitutionally significant differences from the procedures of Florida and of Pennsylvania of statutory replevin found unconstitutional in Fuentes v. Shevin.

Mitchell is not asking this Court for a novel holding. The key facts in this case are brief. On February 2, 1972, Grant filed a money claim in the First City Court in New Orleans. That claim alleged $574 against the purchase price of four appliances. In conjunction with that money claim Grant requested that a seizure by writ of sequestration be authorized. In support of that request for seizure by sequestration, Grant filed a short affidavit which verified

the petition and a surety bond.

The judge authorized the seizure. The seizure could take place immediately. As was true in Fuentes, the writ of sequestration issued upon the minimal showing of the verified petition and affidavit. As was true in Fuentes, it issued only with the filing of a surety bond. As was true in Fuentes, the issuance of the writ of sequestration was a ministerial act. It is the mandatory duty of the issuing official to issue the writ of sequestration if the documents presented to him are proper on their face. The document need only show on its face a claim, in this case the $574 money claim alleged to be due on four appliances purchased eleven to nineteen months prior to the initiation of the suit. The document need only show an interest of the claimant in the property to be seized; in this case an unrecorded statutory lien was asserted. And, third, the document need only show the defendant's power over the property to be seized; in this case delivery of the goods to Mitchell was alleged.

The procedure is broadly available to every plaintiff who is willing to make these averments. Once the writ of sequestration is authorized, the seizure may take place immediately. As in Fuentes, there are only post seizure procedures available to the dispossessed parties. As in Fuentes, those procedures come too late; the deprivation has already occurred.

However, to put this case in proper perspective, I will briefly go through the post seizure procedures which Mitchell pursued.

The dispossessed party may defend both against the money claim and against the seizure; in this case Mitchell sought to dissolve the seizure first. Mitchell alleged State grounds, a State exemption statute he argued applied to certain of the appliances. Mitchell also asserted that the due process clauses of the Louisiana and the United States Constitutions protected him against this seizure.

A hearing was held. Both parties appeared. No testimony was introduced --

QUESTION: Did he make any assertion there was not a balance due on the debt?

MR. HOBBS: No. He could do this in his defense to the underlying petition for stating a money claim, and that is his intent, what he intends to do.

QUESTION: You mean at the trial later.

MR. HOBBS: By pleadings and then at the trial --

QUESTION: You claim at this motion to dissolve the writ he may not challenge the averments that a balance is due?

MR. HOBBS: The Louisiana law is actually unclear on this. It does say he can attack --

QUESTION: I notice respondent's claim at this hearing to dissolve the writ, he may challenge anything that

is relevant to the issuance of the writ.

MR. HOBBS: I suggest that's not the law of Louisiana. What the law says and --

QUESTION: Let's assume that it was the law of Louisiana that he could challenge the writ, challenge the underlying facts on which the writ was based, namely, that there is a debt due and a balance due, would that make any difference to your argument?

MR. HOBBS: Well, respondent does make the argument -- he makes the argument that Mitchell could have raised defenses in that post seizure hearing,that he had to raise every defense, and because he did not raise defenses against the underlying claim, he only raised defenses against the seizure, that he has waived all his defenses. It makes a difference if you reach that conclusion. However, as to my constitutional argument, it makes no difference --

QUESTION: It still comes out right.

MR. HOBBS: -- because it comes too late; it comes after the deprivation.

After the City Court refused to dissolve the seizure, Mitchell sought immediate interlocutory relief at the appellate level. The intermediate appellate court refused to review. The Louisiana Supreme Court granted review on interlocutory writs of review, certiorari, mandamus, et cetera. And after hearing briefs and oral arguments of the parties, Louisiana

Supreme Court upheld the constitutionality of the Louisiana procedure of sequestration.

To uphold the decision below would be in effect to overrule Fuentes v. Shevin. However, the decision in Fuentes is not the only principle involved. To uphold the decision below would be to depart from the sound constitutional principles applied in a host of other decisions of this Court stretching over a period of more than one hundred years. That principle is the very fundamental principle that the State cannot seize a person's property without prior notice and hearing except in the most extraordinary of situations.

To uphold the decision below would be to cause a new and almost unlimited exception to that principle. To uphold the decision below would also cast out an uncertainty upon the decisions of more than 60 courts in more than 29 States which have struck down statutes similar to those involved in Fuentes and reliance upon this Court's decision in Fuentes v. Shevin and Sniadach v. Family Finance.

The basic purpose of the 14th Amendment is to protect the individual against the State. The keystone to this constitutional protection is the right to defend one's property prior to a State seizure. This can be accomplished effectively only by affording the individual notice and an opportunity for a hearing prior to the State seizure. This right to prior notice and hearing can be abridged only by the

most overriding of State interests.

The broadly available procedure of statutory sequestration abridges the constitutional rights of the individual without any overriding State justification for that abridgement.

QUESTION: I missed something you said. The courts of how many States declared similar laws unconstitutional?

MR. HOBBS: There have been more than 60 decisions in more than 29 States.

QUESTION: More than 29. And have the State legislatures done anything either in those States where the existing law was declared unconstitutional or in other States where the courts have not done so, but --

MR. HOBBS: There has been --

QUESTION: Have there been modifications of --

MR. HOBBS: I am aware of legislatures considering new legislation to give consumers prior notice in hearing. I believe that a few States have had sufficient time to enact such legislation. If it would aid the Court, I could prepare a supplemental memorandum on that point.

QUESTION: Do you have in your brief the judicial decisions to which you refer, more than the citations?

MR. HOBBS: No. When I was writing it I thought it would be to state the obvious in including those 60.

QUESTION: You say there are more than 60 in at least

29 States.

MR. HOBBS: Yes, your Honor.

QUESTION: Do I understand they were all since Fuentes?

MR. HOBBS: No. Those decisions are all since Sniadach and since Fuentes. Sniadach was decided in 1969. The cases that were based on Sniadach and pre-Fuentes, I suppose, would have been projecting this Court's decision in Fuentes v. Shevin.

The bases on which the Louisiana Supreme Court distinguished Fuentes are not entirely clear. However, none of those justifications evidenced the type of State interest necessary to overcome the constitutional protection of prior notice and hearing. The Louisiana Supreme Court's opinion made it abundantly clear that seizure by sequestration is available to every Louisiana credit seller who believes that there has been a default in a credit transaction. The Louisiana Supreme Court refused to confine the application of the sequestration statute to narrow extraordinary situations. The need for prompt action identified by the Louisiana court is the ordinary desire which any anxious creditor might feel while enforcing his claim. The procedure of sequestration is not confined to situations where a creditor can show the collateral is actually endangered. The creditor need only show that the owner has power over that property.

QUESTION: You think if it could be shown that collateral were actually endangered that that would be a legitimate exception to Fuentes?

MR. HOBBS: We then would have the problem of safeguards to insure whether that determination to -- safeguard that the determination is accurate once it is made. The usual safeguard is the adversary process, and that's why we say prior hearing.

QUESTION: But, of course, given notice and hearing is also an opportunity for the person who is the object of the writ to spirit the thing away.

MR. HOBBS: Well, if we presume that consumers do spirit things away or sitting in their house with a hatchet ready to destroy the goods, that would raise that presumption to a constitutional presumption of malice of consumers.

QUESTION: It's not a question of malice of consumers. But I think almost everyone who has had any experience in this type of practice knows that stuff frequently disappears if people have notice of the fact that it's the subject of sequestration.

QUESTION: They sometimes just sell it.

MR. HOBBS: That is a presumption which I am unwilling to indulge in. However, I think if there were adequate safeguards to determine the probability of consumer destruction, that then perhaps we would have a statute which would be

narrowly drawn and come within the exceptions of Fuentes.

QUESTION: What range of safeguards do you have in mind? I am not sure I --

MR. HOBBS: The traditional safeguard is the adversarial hearing in which both sides can assert their interest. Perhaps we could -- there are other traditional safeguards --

QUESTION: How does that help if the property has already been sold?

MR. HOBBS: It doesn't. I'm talking about a hearing prior.

QUESTION: Oh, I see.

MR. HOBBS: Those are the safeguards to protect, to make sure that the State is not engaging in an erroneous decision when it decides there is a need to seize this property, to take it from one individual and --

QUESTION: You didn't mean a safeguard for the creditor; you mean a safeguard for the debtor, purchaser.

MR. HOBBS: A safeguard for the State to insure that the State is not engaging in mistaken deprivation, and a safeguard for the debtor to insure that he is not deprived of his property through the State or inadvertence or otherwise.

QUESTION: There doesn't seem to be any question under Louisiana law that the seller in this case had a property

interest in the goods?

MR. HOBBS: No, there is no contest.

QUESTION: So you would make the same argument if there were a chattel mortgage on it or something the size of just a vendor's lien.

MR. HOBBS: That's correct.

QUESTION: So both parties have a property interest in the goods. And the question is who has possession pending litigation.

MR. HOBBS: Correct.

QUESTION: Let's assume there was a hearing, whatever kind of a hearing you think would be satisfactory. What would you think would have to be established at that hearing in order to change possession? Or is it your position that possession may not be changed until the entire litigation is over? Would you say that at the hearing all you would have to establish is probable cause to believe that there was a balance due on the debt?

MR. HOBBS: There is a --

QUESTION: Or would you have to try out the entire case and make final and conclusive findings?

MR. HOBBS: The Court in Fuentes suggested at that hearing that the underlying merits of the claim would be what the claimant must prove in order to obtain the seizure.

QUESTION: Not just probable cause to believe.

MR. HOBBS: When you get into probable cause, what you are getting into is the burden or the specific facts on which the creditor must show.

QUESTION: That's right.

MR. HOBBS: If we have the adversarial context, I suppose we could go in the traditional manner where he states his claim and tries to prove his claim and the defendant --

QUESTION: I know, but in effect you are saying that you must have a full adversarial hearing on all the issues in the case and decide them on the merits before possession may be changed.

MR. HOBBS: I don't think the Court has to reach that question to --

QUESTION: I think it's very much a part of the inquiry as to what kind of a hearing are you talking about as requiring before a change of possession.

MR. HOBBS: I think that perhaps one of the issues that could be involved is the necessity of the seizure, and if it is not shown necessary at that hearing, that is, if there is no danger to the goods to be seized, that then there would be no reason --

QUESTION: How do you show that? If he has put the burden on the creditor for that to show that, how does he show that?

MR. HOBBS: Well, if you indulge --

QUESTION: In effect, you are just saying let's wait until the trial is all over.

MR. HOBBS: That is the ordinary way that we test claims under our system. I think it is a good system. I would be reluctant to see this Court abandon that system. But I do believe State legislatures could come up with possibly new techniques. I think I would have to examine those new safeguards to protect the State and the defendant once they were drawn before I could defend them. I mean, possibly we could have a traditional investigation --

QUESTION: You also think that private repossessions would be illegal without any aid from the State?

MR. HOBBS: Well, let me make this clear, that self help repossession, as it is known under the UCC is not a part of the law of Louisiana. It presents different questions than are presented by this statute. I do not think the Court should reach that question in this case. The Court does not have to. It presents difficult questions of State action, and a number of the courts have been splitting on this issue.

QUESTION: No self-help remedies under Louisiana law are permissible?

MR. HOBBS: Not in the context of a credit sale. Under the law of Louisiana there are no conditional sales. Title vests in the buyer immediately upon the agreement of the

price and the goods and therefore --

QUESTION: Subject to the vendor's lien.

MR. HOBBS: Subject to the vendor's lien. And therefore, under that rationale, they do not allow self-help repossession.

QUESTION: Does Louisiana recognize the conditional sales type contract for personal property?

MR. HOBBS: No, it doesn't. It will give full faith and credit to one made out of the State, but it will not enforce one made within the State.

If the Louisiana Supreme Court's finding is read to mean that the creditor's interest in the property is superior to the debtor's right to have his property secure from arbitrary and unreasonable seizure, it is erroneous. There are no safeguards prior to the seizure except those minimal showings that were present in Fuentes. The Louisiana Supreme Court rules that none of those safeguards were necessary because it gave an unbridled preference to the interest of one litigant that was a security interest without even considering the full legal title of Mitchell or his right to be secure from arbitrary or unreasonable State seizures. Such a use of State power without proper safeguards is unconstitutional.

Mitchell requests that this Court reverse the decision of the Louisiana Supreme Court and reverse the

unconstitutional seizure of his property. To do so would be entirely consistent with this Court's prior decisions. To do so would be to vindicate the decisions of more than 60 lower courts in more than 29 States which have relied upon this Court's decisions in Fuentes v. Shevin, Sniadach v. Family Finance and a host of other decisions of this Court.

Unless there are any further questions, I would like to reserve the remainder of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Hobbs.

Mr. O'Sullivan.

ORAL ARGUMENT OF THOMAS J. O'SULLIVAN

ON BEHALF OF THE RESPONDENT

MR. O'SULLIVAN: Mr. Chief Justice, and may it please the Court, this is a case in which though the petitioner claims the denial of an opportunity for a hearing regarding the taking of his property, there has in fact already been a hearing in that regard. The petitioner has been heard and his contentions have been decided adversely to him.

One point I might make right off the bat, your Honor, is that this case arose prior to the time that the decision had been rendered in the Fuentes case, and the trial court's determination was made at a time prior to the decision in the Fuentes case.

In terms of the argument in the brief, I submit there are two basic areas of dispute between the parties with

respect to Louisiana law. The first of those areas is as to the nature and extent of the hearing which has been had in this case. And the second area of dispute is with respect to the role of the court which issues the writ of sequestration.

Now, in the argument that preceded, there has been no discussion of that role, and I think that there should be a fuller development.

But first I would like to turn to the question of the hearing that has been had in this case. We submit that the petitioner comes before this Court and is not in a position to assert an injury. The Fuentes case was designed to prevent mistaken, unjustified, or wrongful deprivation of property. And that has not happened in this case. The petitioner has had a hearing, albeit after the property was taken from his possession, and he has been heard in that regard.

Now, as to the nature of that hearing, it was a hearing that was brought on by the petitioner to set aside the writ of sequestration and an endeavor to obtain the return of the property.

Now, the petitioner in essence claims that he was not able to go into the merits of the case at that time, but in fact the petitioner was able to cause the court, the Louisiana court, to explore into the grounds for the issuance of what's referred to as the auxiliary remedy. There is a

comment that the petitioner has referred to in his brief to the effect that at that hearing the merits may not be inquired into. In fact, we submit that any significant defense can be raised at that hearing, and the cases that we have cited in our brief at pages 22 to 25 amply demonstrate that in cases in which a motion has been brought on to dissolve a writ of sequestration, the court has inquired into issues that go to the merits, and that is because the burden of proof at such a hearing has been placed on the party that caused the goods to be seized in the first instance. In short, the burden was on the respondent at that hearing to demonstrate that the property was properly seized.

Now, in addition, at that hearing, after the property had been taken, there was a stipulation entered into by the parties to the effect that there was a valid vendor's lien on the property.

Now, in short, this is a situation in which the petitioner purchased property and then, having gone into default, after the property was seized came into court and admitted that there was a valid vendor's lien on that property.

QUESTION: To have a lien there has to be a balance due, I take it?

MR. O'SULLIVAN: Yes, sir, I believe that's so. In the event that there was not a balance due, there would be no vendor's lien.

QUESTION: You may have a vendor's lien but not have the right to possess because the balance may not be due, may not be unpaid. Just conceding that there is a valid vendor's lien doesn't concede that it's unpaid.

MR. O'SULLIVAN: No, your Honor, I think that's so, but beyond that --

QUESTION: What about that in this case? Was there ever any concession that it was, that the balance was unpaid?

MR. O'SULLIVAN: Your Honor, the allegations in the petition in the initial affidavit pursuant to which this action was commenced were to the effect that the balance was unpaid and was due, and that has never been contested nor contradicted, and it could have been contested and contradicted.

QUESTION: It's never been admitted either, has it?

MR. O'SULLIVAN: No, sir, but I submit there has been a finding to that effect implicit in the decision of the court at the hearing to set aside the writ of sequestration.

QUESTION: There is always a vendor's lien under Louisiana law when personal property, when a chattel is sold and the full purchase price is not then and there paid, there is always a so-called vendor's privilege.

MR. O'SULLIVAN: Yes, sir, that is true.

QUESTION: And that's all the admission amounted to, wasn't it?

MR. O'SULLIVAN: No, I think that it goes to

something more than that, because it's the admission that it has not been extinguished, that it's still -- that it has not been extinguished, that it's still in existence as of the time that the case has come on for hearing before the court.

QUESTION: That would simply be an admission of no more than that the full purchase price has still not yet been paid, isn't that right?

MR. O'SULLIVAN: I think that it goes beyond that. I think implicitly that there aren't defenses of such a nature as would extinguish that vendor's lien.

QUESTION: And the only thing that would extinguish it, as I understand it at least under Louisiana law, of which I am generally very ignorant, is that until the full purchase price has been paid, plus whatever interest and service charges there may be, the vendor's lien remains and is not extinguished. Isn't that correct? The vendor's privilege it is called in Louisiana.

MR. O'SULLIVAN: No, sir, I would think that would not be so. I think that we have cited case law in our brief to the effect that, for example, with discharge or with renovation or with, in the past, giving of notes, a vendor's lien might be extinguished.

QUESTION: Your argument is, I take it, that at this hearing you had the burden of showing that your seizure was proper. That meant showing not only the vendor's lien but

that there was a default.

MR. O'SULLIVAN: Yes, sir.

QUESTION: And in order for the court not to set aside the writ and the sequestration and collect on your bond, if there was any damages, in order for the court to refuse to do that, it had to find, you argue, that there was a default.

MR. O'SULLIVAN: Exactly so, sir.

QUESTION: You and your brother are not in agreement as to that factual issue or as to that question of Louisiana law.

MR. O'SULLIVAN: That is a correct statement.

I think that my brother's argument goes a little bit further. I think that he takes the position that there was not a final determination on the merits as to the ultimate right of possession of the property.

With that argument, I am in agreement. There was no such final determination. The property, so to speak, is still in limbo. There has not been a final judgment in this case. But I would submit that the Fuentes case does not require an initial threshold preliminary ultimate determination of the right to the possession of --

QUESTION: What do you think the standard is under Louisiana law at the hearing to quash the seizure such as was held in this case? You have the burden of showing, you say, that the seizure was justified. Now, what standard does the

Court apply? Probable cause? Or is it sort of like a preliminary hearing to establish whether there is a reasonable basis for the claim?

MR. O'SULLIVAN: In essence, I would submit, your Honor, that at that hearing there is an inquiry into the probable validity of the claim, in a sense akin to the position asserted by Justice Harlan in the concurring opinion in the Sniadach case. That, I suggest, is implicit in that the burden of proof is on the party that has caused the goods to be seized in the first instance. The party has to come into court and prove at that time that there is a claim, that there is a default, that there is a valid vendor's lien or some other basis for having taken the property from the possession of the vendee.

QUESTION: Well, a vendor's lien standing alone would not justify it.

Let me ask you this question hypothetically. Suppose at this preliminary hearing the debtor had come in and tendered to the hearing officer receipts showing that he was paid right up to date. Would the court then be obliged to dissolve the writ of sequestration and return the property?

MR. O'SULLIVAN: Yes, sir, I think so. I think that Louisiana State Rice Milling Co. case cited in our brief is to that effect. And that case states that the mere coincidence that a fact is relevant both on the writ of

sequestration and on the merits does not preclude use of that fact on the hearing to dissolve the writ. And we would submit that if such a showing were made, and in fact we cited in our brief a number of cases in which a party has come into court with a meritorious defense and had the opportunity even before there need be a final determination on the merits to have that defense heard.

Now, that didn't happen in this case.

QUESTION: That's the basis for your saying there is an implicit judicial determination of a default here.

MR. O'SULLIVAN: Yes, sir.

Your Honor, we submit that in this case given the facts of this case and the posture of the case before this Court, that it makes no sense for the Court to order a new hearing, a new hearing as to the temporary deprivation of the petitioner's property. That hearing has already been held.

Now, I would like, if I could, to turn to the second area of relevant inquiry here, and that is as to the role of the judge who issues a writ of sequestration in the first instance. We contend that in this case there was a prior judicial determination as to the propriety of the taking of the petitioner's property before that property was taken.

QUESTION: If that's true, of course, then Fuentes in all its ramifications was fully satisfied, wasn't it, in

this case? Is that your point?

MR. O'SULLIVAN: No, sir, I don't think --

QUESTION: If it was a prior determination of all of the issues that had to do with who should have ultimate possession of the property before the property was taken, then I should suppose if Fuentes is broadly read, it was fully satisfied, wasn't it?

MR. O'SULLIVAN: No, I don't think that that's so, your Honor.

QUESTION: Well, then, what is your point?

MR. O'SULLIVAN: The reason for that is that the prior judicial determination was ex parte, and the question is whether or not the Louisiana ex parte prior judicial determination satisfies the rule that is set forth in Fuentes.

QUESTION: I see. You don't say there was a prior hearing in the sense of any kind of an adversary hearing.

MR. O'SULLIVAN: It was not an adversarial hearing, no, sir.

QUESTION: Right.

QUESTION: On page 23 of your brief, beginning at the middle of the page, you say, "In order to meet the burden of establishing that a writ of sequestration was properly issued, a vendor must establish," and then you list six elements. Now, are you speaking there of the burden that he must carry to sequester the property, or the burden that he must carry

at the hearing on the purchaser's motion to dissolve the writ?

MR. O'SULLIVAN: This is the burden that falls on him at the time of the purchaser's motion to dissolve the writ.

QUESTION: And is that an adversary hearing?

MR. O'SULLIVAN: Oh, yes, sir, it was. That was a hearing brought on by the petitioner at which both sides were present, and there was argument before the court.

I might say, your Honor, in regard to the record in this case, and we have had questions as to the nature of the stipulation and the extent of the stipulation as to the vendor's lien in this case. The record in this case is a very meager one, and though I here argue this morning as to the role of the court on the motion to dissolve the writ and the role of the judge as of the time that the writ is issued in the first instance, there has not been in the record in this case decisions below of the Louisiana court illuminating exactly what the functions of the courts are under both those circumstances.

QUESTION: I suppose, too, that since you're from New York and your opponent is from Boston, neither of you can contribute much personal knowledge of Louisiana practice.

MR. O'SULLIVAN: I recognize that problem and fear that that's so, your Honor. We have endeavored to make diligent inquiry into Louisiana law and we have done our best to break out the cases. But I do have some hesitancy in that

regard.

Coming back to the argument as to the prior ex parte judicial determination as to the issuance of the writ, we submit in this case there is a significant difference in Louisiana from the situation both in Florida and Pennsylvania as came up in the circumstances of the Fuentes case. Now, in Louisiana we submit that there is effective control by the State of the use of its power and that there is an official, an impartial government official,in this case the reviewing judge, who must consider the grounds that are presented in the application for the writ and that the court is entitled to inquire into those grounds and satisfy itself that there is a proper basis for the issuance of the writ.

QUESTION: What is that, the lien as existing?

MR. O'SULLIVAN: Yes, sir.

QUESTION: What else?

MR. O'SULLIVAN: And that there is a probable validity to the claim being asserted by the party commencing the lawsuit and seeking the taking of the property.

QUESTION: With the experience that some of us have with computers, if a computer made a mistake, that's it. Under Louisiana law is that it or not? Is that enough to get it?

MR. O'SULLIVAN: Your Honor, there is some question in my mind as to the answer to that question, because --

QUESTION: You have taken the burden of showing us

in your answer to Mr. Justice Stewart's question that this was a fully valid, complete ex parte hearing. You have taken on that. Now you say you don't know. Which one are you going to stand on?

MR. O'SULLIVAN: Sir, this is a situation in which the court has the opportunity to make the inquiry into the claim and the party seeking the issuance of the writ --

QUESTION: Did the court do it?

MR. O'SULLIVAN: Your Honor, I can't tell from the record in this case.

QUESTION: Then you can't say there was a full hearing. The most you can say, am I correct, is that there was an opportunity for an ex parte hearing.

MR. O'SULLIVAN: No, sir, there was an ex parte hearing. The application was made to the court, and under the Louisiana decisions that we have cited in our brief, it is the responsibility of the court to undertake an evaluation of the claim and look into the facts that are alleged in the petition, and make a determination as to the propriety of the issuing of the writ.

QUESTION: And the two facts are, one, that there is a lien and, two, that there is a default. That's all there is, isn't it?

MR. O'SULLIVAN: And that the property is in the possession of the vendee, yes, sir.

QUESTION: That's all there is.

MR. O'SULLIVAN: I think it is, but I'm not entirely clear on that, and the reason for that is because I do have some trouble in reading precisely what the Louisiana Supreme Court --

QUESTION: I have had some experience in reading Louisiana law's Supreme Court opinions. I think you should have gone down there and looked at them, because it's civil law.

MR. O'SULLIVAN: Yes, sir, and I appreciate some of the problems in the civil law, and in fact, Justice Holmes has addressed himself to the question of dealing with problems under the civil law, and he said,"When we contemplate such a system from the outside, it seems like a wall of stone, every part even with all the others, except so far as our own local education may lead us to see subordination to which we are accustomed. But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life may give rise to the different parts wholly new values that logic and grammar could never have gotten from the books."

I submit that that quotation may be appropriate.

QUESTION: You have taken the burden of showing that you got a full and fair hearing and you now say you don't know what it was.

MR. O'SULLIVAN. No, sir. What I am saying is that the Louisiana Supreme Court in this case held that on the facts the case fell within the exception to the rule in the Fuentes case.

QUESTION: Well, their reasoning was, as I understand it, and I have just reread it here on the bench, was that the vendee purchased the property with implied in law knowledge of what the law of Louisiana was.

MR. O'SULLIVAN: Your Honor, I submit there is an alternate ground --

QUESTION: Was that what it said?

MR. O'SULLIVAN: Yes, sir, it did. But I submit there is an alternate ground of decision in this case which would be appropriate to consider, and this is set forth on page 29 of the appendix. The court stated that this case fell within the exception to a rule announced in the Fuentes case that there may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods.

QUESTION: But now, what, if anything, in the record of this case justified the statement that this case comes within that language in Fuentes. There may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods?

MR. O'SULLIVAN: The answer to that question, your

Honor, is the uncontradicted allegations made in the petition in this case to the effect that the respondent had reason to fear that the petitioner would alienate or dispose of the property --

QUESTION: Is that part of the form used in every single one of these in Louisiana?

MR. O'SULLIVAN: Your Honor, I don't know the answer to that question, but I submit that in this case it was a fact. It was a sworn statement that was never contested.

QUESTION: What if it were part of the form used in every single one of these, or used routinely and traditionally in every single one of these in Louisiana, would you say that came within the exception? The exception then becomes the rule, doesn't it, in Louisiana?

MR. O'SULLIVAN: No, sir. I would think that it would be completely inappropriate. There must be a stronger showing than a merely pro forma showing. The suggestion here is that this is a pro forma showing. In that regard, I suggest that in part that may be attributable to the fact that this case arose before the Fuentes case was decided, and before the parties and, indeed, the country knew what was required for a showing that it had to be --

QUESTION: The Supreme Court of Louisiana after Fuentes obviously; they dealt with Fuentes.

MR. O'SULLIVAN: Sir?

QUESTION: By the time it got to the Supreme Court of Louisiana, Fuentes had been decided quite clearly.

MR. O'SULLIVAN: Yes, sir, it had.

Your Honor, one point I would like to make clear is that we believe we have cited the cases appropriately for the proposition that with respect to the threshold inquiry as to the issuance of the writ of sequestration, at the ex parte hearing there is considerable authority vested in the court and the judge to make inquiry as to the claim that is being asserted and to test that claim. And we have seen the petitioner in his reply brief endeavor to distinguish the cases on the basis that there is a difference between judicial sequestration--and these cases only apply to judicial sequestration--and some other cases. The claim is that in cases involving judicial sequestration there is discretion; in cases involving ordinary garden variety sequestration there is no discretion.

We submit that attention to prior law under which these cases were decided indicates that there is only one kind of sequestration, and that is the judicial sequestration. We set forth the definition of sequestration on page 30 of our brief, and that shows that sequestration applies to a mandate of the court to the sheriff to take property without regard to whether it's made at the request of one of the parties or both of the parties. So those cases, we submit, are applicable.

One further point that I think deserves to be made

in the context of this case, and that is the unusual feature of the civil law. Here the vendor's lien as the Louisiana Supreme Court has set forth in its opinion is thought to be an important creditor's right. At the same time it's a right that can easily be defeated by the debtor. In the event that the debtor transfers the property, the vendor loses the right as against the property. And so it was for this reason that the Louisiana Supreme Court, I believe, took the position that this was an important right that needed to be safeguarded and that there were circumstances in which it could be shown that there was an immediate need for action on the part of the creditor and that it would be appropriate for the government to lend its power to the taking of that action.

QUESTION: On the question that Mr. Justice Stewart gave you, in your Appendix C, the Supreme Court of Louisiana, is the affidavit which uses the language that they might run away with the material and it appears that it's a form that's just filled in.

MR. O'SULLIVAN: Your Honor, what page is that?

QUESTION: This is Appendix C in the petition for writ of certiorari to the Supreme Court of the State of Louisiana, which is on file here in this Court. It said the petition of W. T. Grant, all of it is just filled in, except that part, that's not filled in. So do you agree it's just a form?

MR. O'SULLIVAN: Yes, sir, I do. But we submit that in view of the circumstances in which the case has arisen, in view of the fact that initial determinations and initial proceedings took place prior to the time that the Fuentes decision was rendered and in view of the fact that there has been a hearing in this case in which it has been determined that under the facts of this case there has not been a mistaken or unjustified or wrongful taking of the property of the petitioner, we submit that it would be appropriate for this Court either to vacate the writ as having been improvidently granted or to affirm the decision of the court below.

If there are any further questions of the Court, I would be happy to entertain them. If not --

QUESTION: Mr. O'Sullivan, you are not asking, I take it, that Fuentes be overruled?

MR. O'SULLIVAN: No, sir, far from it. We would be contending that the Louisiana law and the facts of this case as well as the Louisiana Supreme Court decision are sufficiently different from the Fuentes case as to not require its application to the present case.

QUESTION: You are content to rely on those distinctions?

MR. O'SULLIVAN: Yes, sir.

QUESTION: If we don't agree with you, we should reverse?

MR. O'SULLIVAN: The decision of the court below.

QUESTION: If Fuentes governs this case, the decision should be reversed? I mean, if there is no real valid distinction between this case and the Fuentes case.

MR. O'SULLIVAN: That is correct, your Honor.

QUESTION: You don't advocate that we overrule or modify Fuentes in any respect.

MR. O'SULLIVAN: No, sir.

QUESTION: Mr. O'Sullivan, before you sit down, would you take page 36 of your appendix? Do you have it there?

MR. O'SULLIVAN: Yes, sir.

QUESTION: Can you tell me what that disposition is by the Supreme Court of Louisiana and of what?

MR. O'SULLIVAN: Your Honor, that is an application for rehearing that was made by the petitioner below after the decision had been rendered by the Louisiana Supreme Court. And the decision was --

QUESTION: Made by whom, by Grant or by Mitchell?

MR. O'SULLIVAN: By Mitchell, for rehearing, and the request for rehearing was denied.

QUESTION: Thank you.

QUESTION: As a further question along the lines of Mr. Justice White's inquiry, why you don't as an alternative take the position that Fuentes should be overruled? After all, it was a four to three decision by a bobtail court.

MR. O'SULLIVAN: Your Honor, I thought about that, and I feel disturbed, as Brother Hobbs does, about the fact that there had been so many other jurisdictions and courts that have passed upon and have acted upon the decision in the Fuentes case and concluded that it was an appropriate rule in the jurisdictions in which it applied and adopted it. I would be --

QUESTION: As a matter of Federal constitutional law.

MR. O'SULLIVAN: Yes, sir.

QUESTION: The decisions weren't necessarily voluntary, I wouldn't think.

MR. O'SULLIVAN: I detected some lack of enthusiasm in some of the decisions, including, I might add, the decisions, the many decisions that have recently been coming down in regard to self-help in which the courts seem to be reluctant to extend the rule in the Fuentes case to the self-help situation, admittedly on --

QUESTION: In the jurisdictions that have responded by legislation, I guess there have been some, haven't there?

MR. O'SULLIVAN: I, your Honor, am not aware of any States in which there has been legislation.

QUESTION: So the decisions have -- I suppose at issue has been a provision in the Uniform Commercial Code in some of the States, permitting repossession?

MR. O'SULLIVAN: Yes, sir.

QUESTION: That's Article 9, section 9503.

MR. O'SULLIVAN: Yes, sir.

QUESTION: It's that provision that has been at issue and has been held unconstitutional under Fuentes in these decisions.

MR. O'SULLIVAN: I would submit, your Honor, that the great number of the decisions involving an application of that section of the Uniform Commercial Code have held that action under that section was not unconstitutional on the ground that it didn't constitute State action. And just recently both the 8th and 9th Circuit have come down on the side of self-help as being not unconstitutional.

QUESTION: What State statutes have been at issue where Fuentes has been applied to forbid repossession? What provision of the Uniform Commercial Code?

MR. O'SULLIVAN: In the Uniform Commercial Code? I can't answer that question, your Honor. I don't know.

QUESTION: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Hobbs, do you have anything further?

MR. HOBBS: Yes, sir, I do.

MR. CHIEF JUSTICE BURGER: Let me ask you before you start whether at the hearing to dissolve the writ of sequestration there was either opportunity to prove absence of a default or whether there was an effort to prove the absence of a default? Did your client, in other words, try to snow that he

was paid up?

REBUTTAL ORAL ARGUMENT OF ROBERT J. HOBBS

ON BEHALF OF THE PETITIONER

MR. HOBBS: Yes. The law of Louisiana is not clear as to what is relevant at that post-seizure hearing. This was my position, one, that I had two good grounds to dissolve that sequestration -- the constitutional claim and an exemption statute. But what the Louisiana courts do say, in Louisiana Code of Civil Procedure, Article 3506 covers the dissolution of the writ of sequestration. Comment C to that article states: "This article retains the jurisprudential rule that only the grounds for the auxiliary remedy can be inquired into on the motion to dissolve and, significantly, and not the merits of the main demand."

QUESTION: As a practical matter if you could prove that you were not in default, that would end the whole matter and you would get your merchandise back, wouldn't you?

MR. HOBBS: Certainly. If the statutes had been declared unconstitutional, I would have gotten the property back. If the exemption statutes had been found applicable to this procedure, I would have gotten the property back. In fact, the court, the Louisiana Supreme Court, divided on the exemption issue. They did not divide on the constitutional issue.

I would like to point out -- Mr. Rehnquist directed

a question to Mr. O'Sullivan regarding my geographical preference. I would just like to point out that I have been in Boston for a year. I didn't realize I had lost my Louisiana accent so much, but my entire practice of law prior to that was in the city of New Orleans.

QUESTION: Were you in on this case in the beginning?

MR. HOBBS: I was in the case initially and I left Louisiana before it was argued in the Louisiana Supreme Court.

QUESTION: You were in at the --

MR. HOBBS: I was in at the outset.

QUESTION: What is the practice in the Parish of New Orleans about the issuance of this writ of sequestration? Is it strictly a pro forma thing, or does the judge who is asked to issue the writ review the affidavit to see that it complies with the statute?

MR. HOBBS: I think the practice is that a petition, which I characterize, and I think fairly so, as a pro forma, that is, it's a legal procedure used over and over again, is presented to the judge. He is bound by the statute, 3501 of the Civil Code of Procedure to the face .. document. Because the document is pro forma, because it is used over and over again, it does not tell him anything. It is not like an affidavit for a TRO under the Federal Rules of Civil Procedure or under the Louisiana rules to obtain an injunction. That requests detailed, specific facts on an affidavit. Perhaps

if we had such safeguards as is embodied in the Federal rules for an injunction, maybe we could say we will allow deprivations without the adversarial context. But those safeguards would have to be examined in the case in which they were used, because they are not the traditional methods of safeguarding one person's interest against the claim of another.

QUESTION: The hearing you would want before a seizure, would the standard that would be applied be one of probable cause or what? Or would the court have to find finally that the debt was due and unpaid, overdue and unpaid?

MR. HOBBS: I do not think that the issue should be finally resolved if we have a very short unihearing.

QUESTION: Do you think a standard like for a preliminary injunction would be satisfactory?

MR. HOBBS: Yes, I do.

QUESTION: How do you distinguish the standard in Bell v. Burson from the one you have in mind? Bell v. Burson, as I recall it, all that had to be established was a probable reason to believe that the jury might find the driver negligent, but no final determination of the --

MR. HOBBS: I think that would be sufficient. I am not saying that you have to reach what kind of --

QUESTION: That's sort of a probable cause tender, is it not?

MR. HOBBS: Yes. I am willing to concede any standard

at this point in that prior hearing if you will give me the prior hearing. But I would like to examine the statute --

QUESTION: With your probable cause standard, you think there must be not only notice, but an opportunity to appear personally. You can't just decide the probable cause issue on the basis of affidavit. Let's assume you had an opportunity to counter-affidavit and then argue if you wanted to, but no witnesses.

MR. HOBBS: Yes. If that affidavit was presented in an adversarial context, that is, where one party presents his side of the case, we are dealing with an affidavit on which a judge is acting on one side of the case.

QUESTION: Say for summary judgment --

MR. HOBBS: I would suggest if we had a requirement in Louisiana that there was a detailed showing of all that the creditor knows and the judge was given the discretion as a judge in Federal courts are given discretion in issuing a TRO, that we would have a very different situation, and it should be closely examined and determine whether those safeguards are accurate. But this is not the case.

QUESTION: Well, it seems to me awfully relevant as to what kind of a hearing they are talking about as to whether you are entitled to it. If you are talking about a final hearing on the merits before any transfer of possession is concerned, it might be one thing. If you are not, it's

something else maybe.

MR. HOBBS: I would also, in conjunction with the request on what is relevant at that post-seizure hearing, there is one case in which a judge at a post seizure hearing did enter a judgment on the merits against the dispossessed party. That case was reversed; it was held that that was not to be determined at that motion to dissolve. And I cite that in my reply brief, it's Tucker v. Schonekas.

The question, though, is what standards apply to the judge at the time he is presented with these documents and requested to issue the sequestration. The Louisiana courts make it clear that mandamus will lie to compel him to issue the writ of sequestration if the documents on their face are proper. He does not have the discretion to go beyond the face of those documents or even to question what they say on their face.

In this case there is simply no requirement of the detailed showing.

I think unless there is any further questions, that's my case.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:34 a.m., the oral argument in the above-entitled matter was concluded.)