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The Constitutionality of Real Estate Attachments

THE CONSTITUTIONALITY OF REAL ESTATE ATTACHMENTS

Attachment,[1] garnishment,[2] and mechanic's liens[3] are remedies which creditors often use to enforce their rights against debtors. With increasing

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[1] Attachment has traditionally served the purpose of obtaining jurisdiction over a defendant who is otherwise outside the jurisdiction of a court and insuring that there will be property available to satisfy the judgment if the plaintiff prevails in an action. Historically, there was no need for special circumstances in order to obtain a writ of attachment. Today attachment, if available, is often used as a tactical maneuver to put pressure on a defendant to reach an expeditious settlement of a legal dispute. *See* NEW YORK JUDICIAL COUNCIL, SEVENTH ANNUAL REPORT 391-93 (1941) [hereinafter cited as SEVENTH ANNUAL REPORT]. *See also* R. WAPPLES, A TREATISE ON GARNISHMENT AND ATTACHMENT 18 (1895) [hereinafter cited as GARNISHMENT AND ATTACHMENT] (predominant rationale for use of attachment is inadequacy of process). Attachment statutes are either limited or unlimited. Unlimited attachment statutes allow attachment of property without showing the existence of special circumstances. *See, e.g.*, CONN. GEN. STAT. ANN. § 52-279 (West Supp. 1979); ME. REV. STAT. ANN. tit. 14, § 4151 (1964). *See also* SEVENTH ANNUAL REPORT, *supra* at 397-98. Limited attachment statutes allow attachment only upon the showing of a special circumstance, such as non-residence of the defendant, fraudulent concealment of the defendant or his property or the defendant's anticipated departure from the jurisdiction. *See, e.g.*, ILL. ANN. STAT. ch. 11, § 1 (Smith-Hurd Supp. 1979); KY. REV. STAT. § 425.301 (Supp. 1978); WYO. STAT. § 1-15-101 (1977). *See also* J. CRIBBETT, CASES AND MATERIALS ON JUDICIAL REMEDIES 675-77 (1954). Two different attachment statutes may apply in the same state, depending on whether the property belongs to a resident or a non-resident. *Id.* at 675. Prior to 1971, all states, except Connecticut, Delaware, Maine, Massachusetts, New Hampshire and Vermont had limited attachment statutes. Two states, Hawaii and Montana, permitted attachment in any action based on express or implied contracts. *See* S. MORGANSTERN, LEGAL PROTECTION IN GARNISHMENT AND ATTACHMENT 70-89 (1971) [hereinafter cited as MORGANSTERN]. *See also* Pennoyar v. Kelsey, 150 N.Y. 77, 79-81, 44 N.E. 788, 789 (1896) (comparison of attachment under common law and statutory attachment in New York); SEVENTH ANNUAL REPORT, *supra* at 393-95 (origin of attachment); J. DANIEL, LAW AND PRACTICE OF ATTACHMENT UNDER THE CODE OF VIRGINIA 20-26 (1869) (historical development of attachment in Virginia); Comment, *Due Process and Prejudgment Attachment in California*, 10 SANTA CLARA LAW. 99, 99-100 (1969) (account of historical development of attachment).

In England, attachment, especially attachment without a prior hearing, seems to have fallen into disfavor and attachment of the property of an absent owner has been completely abolished. Attachment is not used often in the United States and the remedy has followed the pattern of England in the late nineteenth century before foreign attachment was abolished. Levy, *Attachment, Garnishment and Execution: Some American Problems Considered in Light of the English Experience*, 5 CONN. L. REV. 399, 453 (1972). *See also* C. DRAKE, A TREATISE ON THE LAW OF SUITS BY ATTACHMENT IN THE UNITED STATES §§ 4-5 (1891) (attachment much less available in England as opposed to United States because division of the United States into many political subdivisions created need to secure property of debtors within each subdivision).

[2] Garnishment is a specialized form of attachment in which funds held for or owed to the defendant by another are attached. *See* MORGANSTERN, *supra* note 1, at 2. *See also* GARNISHMENT AND ATTACHMENT, *supra* note 1 at 256-336 (traditional grounds for garnishment); Comment, *Wage Garnishment: Still Driving the Wage-Earning Family to the Wall*, 17 SANTA CLARA LAW. 631, 633-36 (1977) (historical development of garnishment). Garnishment is often utilized to put pressure on a debtor to make other arrangements with his creditors, such as an agreement to pay the amount of a debt or judgment in installments. MANITOBA LAW REFORM COMMISSION, REPORT ON THE ENFORCEMENT OF JUDGMENTS, PART 1:

frequency, however, creditors are attacking these remedies as violative of rights to due process of law guaranteed under the fifth[4] and fourteenth[5] amendments. The resultant litigation has created uncertainty as to the constitutional safeguards required for attachment, garnishment and mechanic's lien proceedings. Judicial uncertainty is particularly acute in the area of real estate attachments. Real estate attachment seldom deprives the owner of actual possession, use or enjoyment of his land. The owner's continuing possession of attached land raises the question of whether attachment of real estate is actually a deprivation of property and therefore subject to the same due process requirements that pertain to attachment of chattels and the garnishment of obligations.[6]

The Supreme Court first addressed the constitutionality of attachment and garnishment statutes in *Sniadach v. Family Finance Corp.*[7] In *Sniadach,* the Court held a statute[8] providing for the pre-judgment garnishment of wages without notice to the garnishee or a pre-attachment hearing unconstitutional.[9] In 1972, the Court greatly broadened the scope

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EXEMPTIONS UNDER THE GARNISHMENT ACT 26-27 (1979). A number of common law jurisdictions, most notably New Brunswick, South Australia and New Zealand, prohibit the garnishment of wages. *Id.* at 6.

[3] The word "lien" generally is used to denote a claim which one person has upon the property of another for some debt or charge. *See* E. WALKER, F. WALKER AND T. ROHDENBURG, LEGAL PITFALLS IN ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS 204 (2d ed. 1979). Mechanic's liens are statutory. *Id.* at 205. Generally, a mechanic's lien is a security interest granted to one whose labor has improved property. The security interest exists only in the specific property improved and only to the extent of any debt owed the improver by the owner of the improved property or someone who has authority to bind the owner. *See* J. SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS 81-82 (2d ed. 1977).

[4] U.S. CONST., amend. V reads in relevant part: "No person shall be deprived of life, liberty or property, without due process of law . . ."

[5] U.S. CONST. amend. XIV reads in relevant part: ". . . nor shall any state deprive any person of life, liberty or property without due process of law . . ." Generally, the rights guaranteed by the fifth amendment have been incorporated into the fourteenth amendment and are thus binding on the states. *See* Benton v. Maryland, 395 U.S. 784, 794 (1969) (fifth amendment prohibitions of double jeopardy binding on states); Gideon v. Wainwright, 372 U.S. 335, 341-42 (1963) (fifth amendment "no deprivation of property" without due process clause applicable to states through fourteenth amendment) (dictum); Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 236 (1897) (fifth amendment restraint on exercise of eminent domain binding on states).

[6] The Supreme Court has not addressed the question of the constitutionality of real estate attachment statutes. Lower federal courts usually cite decisions by the Court dealing with attachment of chattels and garnishment to support analogous arguments concerning the constitutionality of real estate attachments. *See, e.g.,* MPI, Inc. v. McCullough, 463 F. Supp. 887, 901 (N.D. Miss. 1978); Terranova v. Avco Finc'l Servs., 396 F. Supp. 1402, 1407 (D. Vt. 1975); Hillhouse v. City of Kan. City. 221 Kan. 369, _ , 559 P.2d 1148, 1152-53 (1977); McIntyre v. Associates Finc'l. Servs., 367 Mass. 708, _ , 328 N.E.2d 492, 494 (1975). *See* text accompanying notes 29-60, *infra.*

[7] 395 U.S. 337 (1969).

[8] WIS. STAT. § 267.04(1), .07(1), .18(2) (1965). *See also* WISC. LEGISLATIVE REFERENCE BUREAU, INFO. BULL. No. 64-2, GARNISHMENT IN WISCONSIN (1964) (detailed account of utilization and applicability of Wisconsin garnishment statutes at time of *Sniadach* decision).

[9] 395 U.S. at 342. Under the Wisconsin garnishment statute, the court clerk issued a

of *Sniadach* in *Fuentes v. Shevin.*[10] The Court declared statutes[11] providing for pre-judgment attachment of chattels unconstitutional, except where there is a special need for very prompt action, the seizure is necessary to further an important public interest, and the person initiating the seizure is a government official.[12] Arguably, *Fuentes* implied that an attachment statute is unconstitutional unless the owner of the attached property has an opportunity for a pre-seizure hearing.[13]

In *Mitchell v. W.T. Grant Co.*,[14] however, the Supreme Court upheld the constitutionality[15] of a Louisiana attachment statute which permits attachment without a prior hearing.[16] The Louisiana attachment procedure under scrutiny in *Mitchell* differs significantly from the attachment

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summons to the garnishee at the request of the creditor's attorney. Issuance of the summons effected the garnishment. *Id.* at 338-39. Apparently, there was no opportunity for a hearing under the Wisconsin statute until the trial of the case on which the garnishment was based. *Id.* at 339. The Supreme Court observed that the Wisconsin garnishment statute gave defendants no opportunity to tender any defense that they might have prior to the trial date. *Id.* In the latter portion of the *Sniadach* opinion, the Court relied heavily on Congressional materials dealing with the effects of wage garnishment on the poor. *Id.* at 340-41.

After *Sniadach* several lower federal courts held attachment and garnishment procedures unconstitutional. *See, e.g.*, Collins v. Viceroy Hotel Corp., 338 F. Supp. 390, 392, 396-98 (N.D. Ill. 1972) (attachment of personal property by hotel proprietor); Laprease v. Raymors Furniture Co., 315 F. Supp. 716, 718-20, 722-24 (N.D.N.Y. 1970), *cert. denied*, 401 U.S. 991 (1971) (attachment of furniture purchased from plaintiffs on installment contract without opportunity for prior hearing); Swarb v. Lennox, 315 F. Supp. 1091, 1094, 1100-01 (E.D. Pa. 1970) (denial of notice and hearing prior to attachment of property invalidates attachment in absence of valid confession of judgment).

[10] 407 U.S. 67 (1972).

[11] FLA. STAT. ANN. §§ 76.01, .07, .08, .10, .13 (West 1964 & Supp. 1979) (§ 76.08 amended 1978); PA. STAT. ANN. tit. 12, § 1821 (Purdon, 1967) (repealed 1978). The Florida and Pennsylvania attachment statutes differed only in that the Florida statute required the plaintiff to institute a legal action for recovery of the property attached in order for the attachment to remain in effect. Under the Pennsylvania statute, the attachment could remain in effect indefinitely since the person requesting the attachment was under no obligation to initiate legal action for possession of the attached property.

[12] 407 U.S. at 96-97.

[13] *See* Young, *Supreme Court Report*, 58 A.B.A.J. 858, 863 (1972); Comment, *Foreign Attachment After Sniadach And Fuentes*, 73 COLUM. L. REV. 342, 343-44 (1973); Note, *The Supreme Court, 1971 Term, Due Process*, 86 HARV. L. REV. 1, 94-95 (1972); Note, *Recent Developments*, 6 IND. L. REV. 523, 605 (1973); Note, *Constitutional Law—Due Process—Pre-hearing Seizures of Property under Pennsylvania and Florida Replevin Statutes is a Taking of Property without Due Process of Law*, 48 NOTRE DAME LAW. 733, 736 (1973); Comment, *Quasi in Rem Jurisdiction—Due Process Requirements*, 82 YALE L.J. 1023, 1026-31 (1973). *But see* Note, *Constitutional Law—Debtor-Creditor Relations*—Fuentes v. Shevin: *Due Process for Debtors*, 51 N.C. L. REV. 111, 121 (1972).

[14] 416 U.S. 600 (1974).

[15] *Id.* at 619-20.

[16] LA. CODE CIV. PRO. ANN. art. 281-283, 325, 2373, 3501, 3504, 3506-3508, 3510, 3576 (West 1960). Although Louisiana law provided that a writ of attachment could be issued by a clerk of court, the authority to issue writs of attachment was limited to judges in the parish in which the defendant in *Mitchell* resided. 416 U.S. at 605-06, 606 n.5. Consequently, in *Mitchell* the Supreme Court did not rule on the validity of writs of attachment

statutes involved in *Fuentes*. The Louisiana procedure provides for judicial approval of applications for attachment and provides for an immediate post-seizure hearing at which the owner of the attached property may seek dissolution of the attachment. The Court held that such safeguards satisfy the requisites of due process.[17] *Mitchell* was thought by some commentators to overrule *Fuentes* and to limit the effect of *Sniadach* to garnishment,[18] but this view proved erroneous.[19] In *Calero-Toledo v. Pearson Yacht Leasing Corp.*,[20] the Supreme Court sustained the constitutionality of Puerto Rican statutes[21] providing for forfeiture, without prior notice or hearing, of vessels used for unlawful purposes.[22] The extraordinary circumstances exception of *Fuentes* formed the basis for the Court's decision.[23] In 1975, in *North Georgia Finishing Inc. v. Di Chem*,[24] the Supreme Court held a Georgia garnishment procedure[25] unconstitutional.[26]

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issued by court clerks. *Id.* at 606 n.5. At the time of the decision, *Mitchell* marked a retreat from the Supreme Court's holding in *Fuentes* that an opportunity for a hearing is required before every attachment. *See* Anderson and Guidry, *Recognition of Creditor's Rights*, 80 COM. L.J. 63, 65 (1975); Note, Mitchell v. W.T. Grant Co.: *Procedural Due Process Reexamined*, 35 LA. L. REV. 221, 229 (1974). The *Mitchell* decision also has been interpreted as implying that a balancing of the interests of the debtor and creditor should take place as opposed to having a checklist of specific procedural features which are necessary in order for an attachment statute to be constitutional. *See* Comment, *Debtor and Creditor Due Process: Applying the Balancing Standard*, 29 U. FLA. L. REV. 554, 559-60 (1977).

[17] 416 U.S. at 616-20.

[18] *See, e.g.*, Pearson, *Due Process and the Debtor: The Impact of* Mitchell v. W.T. Grant, 28 OKLA. L. REV. 743, 753-57 (1975).

[19] *See* Jonnet v. Dollar Sav. Bank, 530 F.2d 1123, 1127, 1130 (3d Cir. 1976) (*Fuentes* analysis continued to retain some vitality after *Mitchell; Di-Chem*, to a certain extent, resuscitated *Fuentes*).

[20] 416 U.S. 663 (1974).

[21] P.R. LAWS ANN. tit. 24, §§ 2512(a)(4), 2512(b) (Supp. 1978), tit. 34, § 1722 (1971).

[22] In *Calero-Toledo*, the plaintiff had leased a yacht to alleged drug traffickers and the yacht was seized by Puerto Rican police following the discovery of marijuana on board. 416 U.S. at 665. The government conceded that the owners of the yacht were completely innocent of any wrongdoing. *Id.* at 668. Nevertheless, the Supreme Court held the seizure constitutional on grounds that such seizures might induce persons to prevent the use of their property for criminal purposes by exercising greater care in leasing and otherwise transferring their property. *Id.* at 686-88. Obviously, the policies behind the pre-hearing seizures involved in *Calero-Toledo* (crime prevention) differ significantly from those which underlie pre-judgment attachments. *See* note 1 *supra*.

[23] 416 U.S. at 677-68. *See* text accompanying notes 11-12 *supra*.

[24] 419 U.S. 601 (1975). The facts in *Di-Chem* differ significantly from those in *Sniadach, Fuentes* and *Mitchell*. *Di-Chem* involved a corporate defendant, while in the latter cases the defendants were consumers whose individual property had been attached or wages garnished. This distinction diepels any notion that due process requirements apply only to attachments involving a great disparity in bargaining power between plaintiff and defendant, as in a finance company action against an impoverished consumer.

[25] *See* GA. CODE ANN. §§ 46-101 to -104 (1933).

[26] 419 U.S. at 606-07. The effect of *Di-Chem* on the validity of attachment statutes is uncertain. *Di-Chem* arguably requires that attachment statutes provide either for notice and an opportunity for a hearing before pre-judgment seizure of property or compliance with various procedural safeguards, such as those which the Supreme Court discussed in *Mitch-*

Thus, on the basis of *Sniadach* and its progeny, due process imposes two requirements in regard to the constitutionality of attachment statutes. The owner of the attached property must be afforded a prompt, post-seizure hearing. Approval of the attachment by a judicial officer is also required.[27] Whether these procedural requirements apply to attachments of real estate is unclear. The Supreme Court has never specifically considered the constitutionality of real estate attachment, and lower federal courts have reached divergent conclusions.

The most important question in regard to the attachment of real estate is whether the attachment of land is the taking of a significant property interest within the meaning of the fifth and fourteenth amendments.[28] In *In re Northwest Homes of Chehalis,*[29] the Ninth Circuit relied heavily on the Supreme Court's summary affirmation of the decision of a federal district court in *Spielman-Fond, Inc. v. Hanson's Inc.*[30] in holding that real estate attachments do not constitute the taking of a significant

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ell. See Hansford, *Procedural Due Process in the Creditor-Debtor Relationship: The Impact of* Di-Chem, 9 GA. L. REV. 589, 608-09 (1975). Perhaps the most significant requirement of *Di-Chem* is that an affidavit of facts must accompany a request for attachment. Consequently, creditors may no longer use the attachment process to gain leverage against debtors since judges will have broad discretion in the issuance of attachments. *Di-Chem* will probably result in fewer attachments. *See* Note, North Georgia Finishing v. Di-Chem: *Prejudgment Due Process Redefined,* 48 TEMP. L.Q. 1013, 1022-23 (1975). Given *Di-Chem*'s heavy reliance on *Fuentes,* the Supreme Court may have wanted to retain a requirement for pre-seizure hearings when property in which the creditor has no security interest is attached. *See* Zaretsky, *Attachment without Seizure: A Proposal for a New Creditor's Remedy,* 1978 U. ILL. L.F. 819, 830-33 [hereinafter cited as ZARETSKY].

Di-Chem arguably injected even more confusion into the law of attachments, *See* Steinheimer, *Summary Pre-Judgement Creditor's Remedies and Due Process of Law's Continuing Uncertainty After* Mitchell v. W.T. Grant Co., 32 WASH. & LEE L. REV. 79, 95 n.49 (1975). However, *Di-Chem* may have clarified the status of attachment statutes. The different results in *Mitchell* and *Di-Chem* are justified in light of the specific fact situations in the two cases. For instance, a post-seizure hearing was immediately available in *Mitchell,* while the *Di-Chem* garnishment statute provided no such remedy. Also, in *Mitchell,* unlike *Di-Chem,* a judicial officer issued the writ of attachment. *See* note 16 *supra.*

Attempts have been made to reconcile *Sniadach, Fuentes, Mitchell* and *Di-Chem* by asserting that the Supreme Court used a balancing of interests test in deciding these cases. In *Mitchell,* the creditor sold the attached property to the debtor under an installment payment plan. Since the debtor allegedly had not completed payment and the creditor had a financial interest in the attached property, the balance was arguably in his favor. In *Sniadach* and *Di-Chem,* however, the creditors did not have a direct financial interest in the attached property. Thus the court found the property owners' right to be more compelling than the creditors' interest in attachment. *See* ZARETSKY, *supra* at 831.

[27] Following *Di-Chem,* state and lower federal courts held various attachment statutes unconstitutional. *See, e.g.,* Johnson v. American Credit Corp., 581 F.2d 526, 534 (5th Cir. 1978) (GA. CODE ANN. §§ 8-109, -114 (1933)); Mississippi Chemical Corp. v. Chemical Constr. Corp., 444 F. Supp. 925, 945 (S.D. Miss. 1977) (MISS. CODE ANN. § 11-31-1 (1972)); Aaron Ferer and Sons Co. v. Berman, 431 F. Supp. 847, 852-53 (D. Neb. 1977) (NEB. REV. STAT. §§ 25-1001, 1002 (1975)); Briere v. Agway, Inc., 425 F. Supp. 654, 661 (D. Vt. 1977) (VT. R. CIV. PRO. 4.1 (1958), VT. STAT. ANN. tit. 12, §§ 3351, 3352 (1964)); Unique Caterers, Inc. v. Rudy's Farm Co., 338 So. 2d 1067, 1071 (Fla. 1976) (FLA. STAT. ANN. §§ 76.01-.37 (West 1964)).

[28] *See* notes 4 & 5 *supra* & note 36, *infra.*

[29] 526 F.2d 505 (9th Cir. 1975), *cert. denied,* 425 U.S. 907 (1976).

[30] 379 F. Supp. 997 (D. Ariz. 1973), *aff'd mem.,* 417 U.S. 901 (1974).

property interest.[31] In *Spielman*, the Arizona mechanic's lien statute[32] was held constitutional on the grounds that the placing of a mechanic's lien on real property is not such a significant deprivation of property as to invoke the protection of the fifth and fourteenth amendments.[33]

Spielman however, no longer appears to be strong precedent because the case predates *Mitchell v. W.T. Grant Co.*[34] The *Spielman* court possibly faced the choice of ordering cumbersome prior hearings or failing to provide procedural safeguards for the imposition of mechanic's liens on real property.[35] Thus, the court avoided requiring hearings prior to the imposition of mechanic's liens by deciding that the imposition of a mechanic's lien on real property does not represent the taking of a constitutionally significant property interest.

The district court's holding in *Spielman* is further weakened by the expanded definition of property entitled to fifth and fourteenth amendment protection.[36] *Spielman* ignores this expanded definition of prop-

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[31] 526 F.2d at 506.

[32] ARIZ. REV. STAT. ANN. §§ 33-981 to -1006 (1974 & Supp. 1979-80).

[33] 379 F. Supp. at 999.

[34] Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974). The date of the *Spielman* decision is September 12, 1973.

[35] *See* Comment, *Constutitionality of Mechanic's Lien Statutes*, 34 WASH. & LEE L. REV. 1067, 1079-81 (1977) [hereinafter cited as *Constitutionality of Mechanic's Liens*].

[36] Property has always been a nebulous concept. Traditional definitions of property emphasize the owner's exclusive right of possession of anything physical and tangible. *See* Note, *Statutory Entitlement and the Concept of Property*, 86 YALE L.J. 695, 700 n.31 (1977) [hereinafter cited as *Statutory Entitlement*]. Various objects, rights and privileges presently are considered to be property. *See* Libling, *The Concept of Property—Property Intangible*, 94 L.Q. REV. 103, 111-13, 118-19 (1978) (person who creates commercial value of any entity, tangible or intangible, through expenditure of time, labor, effort or money, has proprietary interest in such entity); Weinberg, *Tort Claims as Intangible Property: An Explanation from an Assignee's Perspective*, 64 KY. L.J. 49, 50-53, 98 (1975) (property related torts are intangible property which can be transmitted by assignment); Comment, *The Right of Publicity—Protection for Public Figures and Celebrities*, 42 BROOKLYN L. REV. 527, 530 (1976) (celebrities have a property right in their names and likenesses).

During recent years, the most dramatic expansion of the definition of property in the U.S. has occurred in regard to statutory entitlements or privileges granted by the government, such as welfare payments, driver's licenses, etc. *See* Reich, *The New Property*, 73 YALE L.J. 733, 734-37, 783-84 (1964) (suggesting that as individuals come to rely on various types of government largesse, rights to this largesse should be afforded the same protection as private property rights). *See also* Reich, *Indiviaul Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 733 (1964). The Supreme Court expanded the definition of property to include various types of government largesse. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 573-74 (1975) (students have property right to public education protected by fourteenth amendment); Bell v. Burson, 402 U.S. 535, 539 (1971) (implying that retention of driver's license is property right protected by fourteenth amendment); Goldberg v. Kelley, 397 U.S. 254, 262 (1970) (property rights exist in welfare benefits, requiring notice and opportunity for hearing prior to termination of benefits). Two definitions of property, that to which a person has a right, and things on which people rely, can be discerned from recent Supreme Court decisions. *See Statutory Entitlement, supra* at 695.

erty[37] and overlooks the economic realities of the finance industry.[38] Finally, summary affirmations by the Supreme Court of lower court opinions, particularly opinions dealing with questions of constitutional law, are of limited precedential value.[39]

Spielman's applicability to real estate attachments is doubtful since mechanic's lien statutes require at least an allegation that the person seeking the lien has improved the property in question. Real estate, however, can be attached on many other grounds and in a few states can be attached on almost any pretext.[40] The mechanic's lien is foreseeable and is less burdensome to the property owner than unforeseeable real estate attachments. Consequently, real estate attachments should be subject to tighter constitutional safeguards than are applicable to the imposition of mechanic's liens on real estate.

The majority of United States courts have not followed the *Chehalis* holding that attachment of real estate does not involve significant property rights. Most courts have simply taken judicial notice of the fact that land attachments amount to deprivation of a constitutionally significant property right.[41] If the validity of this premise is accepted, the issues

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[37] The reluctance of some American courts to recognize the right of property ownership as including the right to dispose of one's property free of outstanding attachments or mechanic's liens appears anomalous when considered in light of the civil law definition of property. The civil law concept of property is the substantial equivalent of ownership in fee simple absolute under the common law. *See, e.g.*, LA. CIV. CODE ANN. art. 491 (West, 1952). *See also* O. BROWDER, R. CUNNINGHAM AND J. JULIN, BASIC PROPERTY LAW 79 (2d ed. 1973) [hereinafter cited as BROWDER, CUNNINGHAM & JULIN]. Perhaps the reluctance of courts to consider the right of alienability as an interest subject to fifth and fourteenth amendment protection stems from the fact that the common law concept of property is still much closer to the primitive view of property. Under the primitive view, property is that which one physically possesses. In contrast the more sophisticated civil law conception of property extends beyond mere physical possession. *See* BROWDER, CUNNINGHAM & JULIN, *supra* at 76. *See also* J. BENTHAM, THE THEORY OF LEGISLATION (6th ed. R. Hildreth trans. 1890) 112 (property denotes an established expectation of being able to draw an advantage from the thing possessed).

[38] *See Constitutionality of Mechanic's Liens, supra* note 35, at 1077-79. The existence of a mechanic's lien on real estate often prevents the sale of the property involved and curtails full enjoyment of the property by preventing the owner from obtaining the financing necessary to make improvements. *Id.* at 1079.

[39] *Id.* at 1081 n.84. *See also* Tully v. Griffin, 429 U.S. 68, 74 (1976); Fusari v. Steinburg, 419 U.S. 379, 391-92 (1975) (Burger, C.J., concurring); Edelman v. Jordan, 415 U.S. 651, 671 (1974); Sniadach v. Family Finance Corp., 395 U.S. 337, 343-44 (1969) (Harlan, J., concurring). *But see* Bounds v. Smith, 430 U.S. 817, 829 (1977); Hicks v. Miranda, 422 U.S. 332, 343-45 (1975).

[40] *See, e.g.*, CONN. GEN. STAT. ANN. § 52-279 (West 1958), § 52-285 (West Supp. 1979); DEL. CODE ANN. tit. 10, §§ 3501, 3508 (1974); ME. REV. STAT. ANN. tit. 14, §§ 4101, 4451, 4452 (1964).

[41] *See, e.g.*, Hutchison v. Bank of N.C., 392 F. Supp. 888, 894 (M.D.N.C. 1975); Clement v. Four N. State St. Corp., 360 F. Supp. 933, 935 (D.N.H. 1973); Gunter v. Merchant's Warren Nat'l. Bank, 360 F. Supp. 1085, 1090 (D. Me. 1973). Courts have advanced several reasons for the assumption that real estate attachments effect the deprivation of a significant property interest. The existence of an attachment impairs, if not inhibits, the ability to sell real estate. Also, attachment of real estate harms the owners's credit rating in the community. Finally, real estate attachments restrict the owner's ability to utilize and enjoy the land by making it impossible to obtain the necessary financing to make improvements to the

relevant to the constitutionality of real estate attachment statutes are much the same as issues concerning the constitutional validity of statutes providing for attachment of personal property.

The Washington real estate attachment statutes[42] involved in *Chehalis* provide that an attachment is initiated by filing with the clerk of court an affidavit containing conclusory allegations that the defendant is indebted to the plaintiff in the amount stated in the affidavit; that the action is not sought to hinder, delay or defraud any creditor of the defendant; and that the defendant or cause of action falls into one of ten specified categories.[43] The defendant may move to discharge the attachment anytime after appearing in the action. Under the Washington statute, however, there is no requirement for an immediate hearing following the filing of a motion for dissolution of the attachment. In *Chehalis*, the Ninth Circuit relied on the statement in *Mitchell* that an immediate post-seizure hearing will satisfy due process requirements for attachment of personal property.[44] Under the Washington attachment statute, however, a post-seizure hearing could be delayed for months. Such delay clearly would not comport with due process requirements. Also, the Ninth Circuit ignored the fact that under the Washington statute, a writ of attachment for real estate may be issued upon mere conclusory allegations without participation of judicial officers. In addition, the Washington statute fails to require that the plaintiff post bond if the real estate attached belongs to a non-resident corporation.[45]

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property. *See* MPI v. McCullough, 463 F. Supp. 887, 901 (N.D. Miss. 1978) (noting substantial economic effects resulting from attachment); Terranova v. Avco Finc'l Servs., 396 F. Supp. 1402, 1406 (D. Vt. 1975) (attachment places economic burden on real estate owner).

[42] WASH. REV. CODE ANN. §§ 7.12.010-.330 (1961) & Supp. 1978-79).

[43] *Id.* § 7.12.020 (1961).

[44] 526 F.2d at 506-07.

[45] *See* text accompanying notes 31-36 *supra*. In First Recreation Corp. v. Amoroso, 26 Ariz. App. 477, 549 P.2d 257 (1976), the Arizona Court of Appeals upheld real estate attachment statutes, ARIZ. REV. STAT. ANN. §§ 12-1521 to -1539 (1956). Employing a method of analysis similar to that used by the *Chehalis* court, the *Amoroso* court relied principally on *Spielman* for finding that attachment of real estate does not constitute the taking of a significant property interest. 26 Ariz. App. at _ , 549 P.2d at 259-60. The Arizona attachment statute provides that attachments must be issued by a judge, but there is no provision for an early post-seizure hearing. In fact, in the situation under scrutiny in *Amoroso*, a hearing was not held on the validity of the attachment until more than two months after a hearing had been requested. 26 Ariz. App. at _ , 549 P.2d at 258-59.

The Montana Supreme Court also has held the Montana attachment statute constitutional as applied to real estate. MONT. REV. CODES ANN. 93-4301 to -4347 (1973). *See* Bustell v. Bustell, 170 Mont. 457, 555 P.2d 722 (1976). The court relied primarily on *Chehalis* and *Spielman*, implying that the attachment of real estate does not constitute the taking of a significant property interest. 170 Mont. at _ , 555 P.2d at 724. The *Bustell* court also relied on the fact that the Montana statute provides for an early post-seizure hearing, and requires that the plaintiff post bond prior to the issuance of a writ of attachment. The writ of attachment, however, was issued by the clerk of the court upon conclusory allegations without the participation of a judicial officer. 170 Mont. at _ , 555 P.2d at 722-23. *See* MONT. REV. CODES ANN. §§ 93-4302, -4304, -4329 (1973) (§ 93-4301 amended 1977, § 93-4302 repealed 1977). Montana's attachment statutes, as applied to garnishment of wages, were later de-

In *Hutchison v. Bank of North Carolina*,[46] the court held North Carolina's attachment statute[47] constitutional as applied to real estate. The North Carolina attachment statute permits issuance of a writ of attachment by the clerk of court. In North Carolina, however, the clerk of court is a judicial officer as opposed to an administrative functionary. The North Carolina statute requires more than mere conclusory allegations for the issuance of a writ of attachment.[48] The *Hutchison* court further noted that North Carolina law provides that the owner of attached property can move at any time for a dissolution of the attachment and receive an early hearing on such a motion.[49] The North Carolina attachment statute is narrow enough that attachment can only be obtained when necessary to afford quasi-in-rem jurisdiction over property which might otherwise be unavailable to satisfy a judgment because of assignment or removal by the defendant. Finally, the court noted with approval the provisions of the statute which require that the plaintiff post a bond for the defendant's protection.[50] Unlike the *Chehalis* court, the district court in *Hutchison* carefully analyzed each provision of North Carolina's attachment statute in light of the constitutional guidelines delineated by the four Supreme Court decisions dealing with garnishment and attachment.[51]

The statutes dealt with in *Chehalis* and *Hutchison* were limited attachment statutes.[52] Additional problems arise in assessing the constitutionality of general attachment statutes. *Terranova v. Avco Financial Services*[53] illustrates some of these difficulties. Under Vermont's general attachment statute, real estate attachment is initiated by delivery of a completed writ to the sheriff of the county in which the real estate is located.[54] The defendant is not provided with notice of the attachment or

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clared unconstitutional in Williams v. Matovich, 172 Mont. 109, 560 P.2d 1338 (1977), on grounds that writs of attachment were issuable by clerks of court upon conclusory allegations and that under the Montana statutes, the burden of proving that the writ of attachment was improperly issued was placed on the defendant. The court also found the fact situation in *Williams* very similar to that in *Sniadach*. 172 Mont. at _ , 560 P.2d at 1341. The *Williams* court did not refer to *Bustell*. Apparently the *Williams* court felt that *Bustell* was not controlling solely because of the *Bustell* court's implication that *Bustell* did not involve the attachment of a significant property interest. *See also* Central Security Nat'l Bank v. Royal Homes, 371 F. Supp. 476 (E.D. Mich. 1974). The *Royal Homes* case held that although an invalid attachment may represent an unwarranted intrusion on one's property rights, such an intrusion is necessary to reach the merits of the underlying issue of liability, *id.* at 480, and is no greater than necessary to protect the creditor's legitimate interests. *Id.* at 482.

[46] 392 F. Supp. 888, 896 (M.D.N.C. 1975).

[47] N.C. GEN. STAT. §§ 1-440.10 to .57 (1969).

[48] *Id.* at 897.

[49] *Id.*

[50] *Id.* at 898.

[51] *Id.* at 894, 898, *see* text accompanying notes 8-29, *supra.*

[52] *See* note 1 *supra.*

[53] 396 F. Supp. 1402 (D. Vt. 1975).

[54] *Id.* at 1403-1404; VT. STAT. ANN. tit. 12, §§ 3291-3292 (1973).

with an opportunity for a hearing at any time prior to the filing of the suit which forms the basis of the attachment. At no time is a judicial officer involved in the attachment proceedings prior to the trial of the case.[55] The *Terranova* court held the attachment statute unconstitutional, reasoning that the *Sniadach* line of cases requires judicial participation in the issuance of writs of attachment. The *Terranova* court observed that after the *Fuentes* decision, Vermont's attachment statute was amended to provide for a hearing prior to the attachment of personal property, but that the hearing requirement was inapplicable to attachments of real estate. The court proscribed pre-judgment attachment of real estate belonging to Vermont residents except when the owner is given notice and the opportunity for a hearing before a judicial officer.[56] At the hearing, the judicial officer must find that the plaintiff is likely to recover a judgment which, including interest and court costs, is equal to the value of the attached property. The prior hearing requirement is inapplicable, however, when there is a possibility of fraudulent transfer, substantial damage to, or depreciation of the property to be attached.[57]

The *Terranova* decision presents two problems. First, the requirement of a prior hearing appears to be anomalous in light of the *Mitchell* and *Di-Chem* decisions dispensing with the requirement of a prior hearing where the attachment statute provides for a prompt post-seizure hearing.

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[55] 396 F. Supp. at 1403-04, 1403 nn.1&2.

[56] *Id.* at 1407.

[57] *Id.* at n.8. Prior to the *Terranova* decision, two general attachment statutes had been declared unconstitutional as applicable to real estate attachments. The Maine attachment statutes invalidated in Gunter v. Merchants Warren Nat'l Bank, 360 F. Supp. 1085, 1086 & n.3 (D. Me. 1973), required that the plaintiff's attorney complete a writ of attachment and give the writ to a sheriff in order to effect an attachment. ME. REV. STAT. ANN. tit. 14, §§ 4451, 4454 (1965); ME. R. CIV. P. 4A(b), 4A(c). The statute further provided that the defendant could obtain a dissolution of the attachment prior to the termination of the underlying action only by furnishing a surety bond. 260 F. Supp. at 1087 n.5. The *Gunter* court decided that real estate attachment involves the taking of a significant property interest because it prevents owner from conveying a clear title to the attached property. *Id.* at 1090. The federal district court held Maine's attachment statute unconstitutional on several grounds. First, the statute did not apply only to those special situations where the plaintiff proved that the defendant was about to encumber or otherwise alienate the property in question. Second, no judicial officer was involved in the decision to issue an attachment. Finally, the statute did not provide for a pre-attachment hearing. *Id.* at 1090-91.

Eight days after the *Gunter* decision, the same three judge district court invalidated a New Hampshire attachment statute, N.H. REV. STAT. ANN. §§ 5114.48, .53 (1955), which, like the Maine statute considered in *Gunter*, provided for the issuance of a writ of attachment without judicial participation. Clement v. Four N. State St. Corp., 360 F. Supp. 933, 935 (D.N.H. 1973). Although the New Hampshire statute provided for a post-seizure hearing at which the defendant could move for a release of the attachment, there was no guarantee that such a hearing would be promptly provided. *Id.* Relying principally on *Gunter*, the court found the New Hampshire statute unconstitutional. *Id. See also* United States Gen. Inc. v. Arndt, 417 F. Supp. 1300, 1312-13 (E.D. Wis. 1976) (real estate attachment unconstitutional since neither approval of attachment by judicial officer nor opportunity for immediate post-seizure hearing required); McIntyre v. Associates Finc'l. Servs. Co., 367 Mass. 708 _ , 328 N.E.2d 492, 494 (1975) (real estate attachment unconstitutional without opportunity for hearing and prior notice to debtor) (dictum).

However, *Terranova*'s requirement of a prior hearing is an attempt to reconcile Vermont's general attachment statute with the *Sniadach* line of cases dealing with limited attachment statutes.[58] The court attempted to save Vermont's general real estate attachment statute by mandating a preattachment hearing absent the extenuating circumstances which must be present to secure an attachment of real estate under the laws of most other states. *Terranova* implies that a prompt post-seizure hearing is required when extenuating circumstances exist.

A second problem posed by the *Terranova* decision is what extraordinary circumstances will dispense with the requirement of a post-seizure hearing. Obviously, merely alleging the existence of such circumstances in the request for attachment is insufficient. Such a broad exception would swallow the *Terranova* rule since such allegations are easily made. Requiring all persons seeking an attachment without a prior hearing to appear before a judicial officer and present documentary evidence as to the alleged extraordinary circumstances may solve this problem. The judicial officer would then determine whether the circumstances are sufficiently extenuating to warrant attachment without prior notice and hearing.

Thus, although it is impossible to devise a checklist of features which will assure the constitutionality of a given real estate attachment statute, certain broad principles can be derived from the cases which are useful in analyzing the constitutionality of such statutes. Generally, there must be a post-seizure hearing at which the owner of the attached property may contest the attachment. A judicial officer must review applications for writs of attachment, and he must be satisfied of a genuine need for the attachment. Also, writs of attachment may not issue on mere conclusory allegations. In certain circumstances, a requirement that a plaintiff post bond covering the attached property's value or that the defendant can remove the attachment by posting bond will weigh in favor of the statute's constitutionality.[59] A bond requirement, however, will not in itself save a real estate attachment statute which is otherwise defective.[60]

The real estate attachment staututes of states within the Fourth Circuit range from thorough compliance with due process requirements to probable unconstitutionality. Virginia's attachment statutes[61] require the

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[58] *See* text accompanying notes 7-25 *supra*. The Supreme Court and lower federal court decisions do not affect the continuing validity of general attachment statutes. In those states in which general attachment statutes are in effect, attachment may still be had in any type of legal action provided that the attachment statute complies with due process requirements.

[59] *See generally* Hillhouse v. City of Kan. City, 221 Kan. 369, _ , 559 P.2d 1148, 1153-54 (1977) (statement of constitutionally required provisions for real estate attachment statutes).

[60] *Compare* Hutchison v. Bank of N.C., 392 F. Supp. 888, 897-898 (M.D.N.C. 1975) (bond requirement one of several desirable features causing federal district court to hold attachment statute constitutional) *with* MPI v. McCullough, 463 F. Supp. 882, 891-92 (N.D. Miss. 1978) (bond requirement alone will not save attachment statute which is radically deficient in other respects).

[61] VA. CODE §§ 8.01-533 to -576 (1950).

filing of an application for attachment before the clerk of court. The clerk must review the application immediately. The party seeking the writ must propertly attest the petition and must allege at least one ground for attachment. A clerk of court or magistrate may issue a writ of attachment.[62] A defendant may obtain dissolution of an attachment by posting a bond in an amount at least double the amount in controversy in the suit which forms the basis of the attachment.[63] A defendant may also move to quash an attachment which appears to have been issued without sufficient cause.[64] Since under Virginia law a clerk of court is an administrative functionary[65] and the statute does not expressly provide for an expeditious hearing on a motion to dissolve, Virginia's attachment statute is of doubtful constitutionality.[66]

In West Virginia, a writ of attachment is issuable only when the underlying action or suit has been initiated.[67] The plaintiff is required to include in the affidavit a statement of the material facts necessitating attachment.[68] The defendant may have the attachment removed by posting a bond equal to the amount of the attachment or the value of the property attached.[69] West Virginia law also permits contest of an attachment by filing an answer.[70] The post-seizure hearing provision appears constitutionally suspect in that there is no requirement of an immediate hearing following a request. In 1976, however, a West Virginia court held that by proper compliance with the hearing provision, an immediate hearing is available concerning the sufficiency of the facts underlying an attachment.[71] Except for the fact that the clerk of court may be acting in a ministerial capacity when the writ of attachment is issued,[72] the West Virginia attachment statute is constitutionally sound. The provision that an attachment is issued only in connection with the initiation of a lawsuit

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[62] *Id.* § 8.01-540.

[63] *Id.* § 8.01-553.

[64] *Id.* § 8.01-568.

[65] *See* Town of Falls Church v. Myers, 187 Va. 110, 119, 46 S.E.2d 31, 36 (1948). However, clerks of circuit courts, but not clerks of lower courts, may appoint guardians and admit wills to probate. VA. CONST. art. VI, § 8; VA. CODE §§ 31-4, 64.1-67, -75 (1950).

[66] Requirements that a judge approve applications for writs of attachment and that the defendant be given an opportunity for a prompt post-seizure hearing would place Virginia's attachment statute on a sounder consitutional footing.

[67] W. VA. CODE § 38-7-1 (1966).

[68] *Id.* §§ 38-7-2, -3.

[69] *Id.* §§ 38-7-10, -11, -20. In West Virginia and Virginia, statutes provide for two different types of defendant's bonds, forthcoming bonds and performance of judgment bonds. A performance of judgment bond discharges the lien on the property and becomes a substitute for the res. In contrast, a forthcoming bond merely permits the defendant to retain physical possession of the attached property while not affecting the attachment.

[70] W. VA. CODE § 38-7-33 (1966).

[71] Persinger v. Edwin Associates, _ W. Va. _ , _ , 230 S.E.2d 460, 464 (1976).

[72] There is scant authority as to whether the clerk of court is considered a judicial officer in West Virginia. The one relevant decision implies that the clerk of court is a ministerial official. *See* Starcher v. South Penn Oil Cor., 81 W.Va. 587, 593-94, S.E. 28, 30-31 (1918) (when court is not in session, clerks can appoint administrators, etc., but such appointments are subject to review by the court at next regular session).

is especially desirable in that the potential use of attachment as a tool of harassment and the possibility of an attachment remaining in force indefinitely without the landowner's knowledge is virtually eliminated.

Under Maryland law, a petition for a writ of attachment must include sworn, certified or photostatic copies of all relevant papers which constitute the basis for the claim unless the absence of such documents is explained in the affidavit requesting attachment.[73] A writ of attachment is issuable only at the direction of a court following a review of the documents substantiating the petition.[74] Maryland law also provides that if the defendant cannot be served with a summons and does not voluntarily appear at the trial of the case on the merits, the plaintiff must make a reasonable effort to bring the attachment to the attention of the defendant.[75] The owner can move to quash an attachment, and upon notice to the plaintiff, a hearing on the motion will be held.[76] The defendant may also obtain dissolution of the attachment by posting a bond in an amount equal to the value of the attached property as determined by the court or in the amount of the plaintiff's claim, whichever is less.[77] The Maryland attachment statutes, extensively revised in 1974 following *Mitchell,* afford maximum procedural safeguards to the owner of attached property. The statutes closely follow the due process requirements delineated by the federal courts.[78]

In contrast to the Maryland statutes, the South Carolina attachment provisions are clearly inadequate. In South Carolina, a writ of attachment is issuable by a circuit judge, or the judge, clerk of court or magistrate of the court in which the underlying action is brought.[79] The plaintiff must file a bond for damages in case of wrongful attachment.[80] The defendant may secure a release of the attachment by posting a bond of twice the amount claimed by the plaintiff or twice the value of the attached property, whichever is lesser.[81] In regard to dissolution of the attachment, the statute merely provides that the defendant may move to dissolve the attachment.[82] However, how soon a hearing must take place following such a motion is unclear.[83] Since participation of a judicial officer is not al-

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[73] MD. R.P. G42c (1977).

[74] *Id.* G44. *See also* Overmyer v. Lawyers Title Ins. Corp., 32 Md. App. 177, 185, 359 A.2d 260, 265 (1976) (issuance of writ of attachment reserved to court).

[75] MD. R.P. G48 (1977).

[76] *Id.* G51.

[77] *Id.* G57.

[78] *See* text accompanying notes 58-60 *supra.*

[79] *See* S.C. CODE § 15-19-70 (1977).

[80] *Id.* at 15-19-80.

[81] *Id.* § 15-19-310.

[82] *Id.* § 15-19-340.

[83] In Harrison v. Morris, 370 F. Supp. 142 (D.S.C. 1974), which involved an attachment under the South Carolina attachment statute, a federal district court held that due process requirements are satisfied by the preliminary hearing in the main action on which the attachment is based. *Id.* at 148. The *Harrison* holding, however, certainly does not comport with the great bulk of decisions in regard to attachment, which hold that at a minimum, due

ways required,[84] a writ seemingly is issuable upon conclusory allegations. Additionally, a prompt, post-seizure hearing is not guaranteed. Thus, South Carolina's attachment statute appears especially vulnerable to attack.

In evaluating the constitutionality of real estate attachment statutes, both plaintiffs and defendants have interests which deserve protection. The plaintiff has an interest in insuring that a judgment in his favor could be enforced. The availability of the remedy of attachment historically has not been limited to those situations in which extraordinary circumstances exist, such as probable destruction or encumbrance of the property in question. The statutes of most states, however, limit the use of the remedy to these extraordinary situations.[85] Traditionally attachment has been available to any plaintiff who simply desires the peace of mind which results from knowing that there will be property sufficient to satisfy his claim.[86] On the other hand, the defendant has an interest in holding clear and unencumbered title to real property and in preventing interference with his property rights through abuse of the attachment remedy. During recent years, the federal courts have articulated standards which prescribe the minimum safeguards necessary to provide adequate protection against abuses of the attachment process. The degree to which property owners are protected against potential abuse of the remedy of attachment appears to be determinative of the constitutionality of real estate attachment statutes.

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process requires a prompt, post-seizure hearing following attachment. *See* text accompanying notes 26-27 & 58-60 *supra*.

[84] South Carolina statutes do not specifically provide that a clerk of court is a judicial officer. There is virtually no South Carolina authority on the question of whether a clerk of court is a judicial or ministerial official.

[85] *See* M. ROSENBERG, J. WEINSTEIN, H. SMIT & H. KORN, ELEMENTS OF CIVIL PROCEDURE 152 (3d ed. 1976).

[86] *See* note 1 *supra*.