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Constitutional Law - Prejudgement Attachment of Real Property: A Violation of Fourteenth Amendment Due Process - MPI, Inc. v. McCullough

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CONSTITUTIONAL LAW—PREJUDGMENT ATTACHMENT OF REAL PROPERTY: A VIOLATION OF FOURTEENTH AMENDMENT DUE PROCESS—*MPI, Inc. v. McCullough*, 463 F. Supp. 887 (N.D. Miss. 1978).

On November 17, 1978, the defendant Dupre', through the Chancery Court of the First Judicial District of Chickasaw County, Mississippi, caused a chancery writ of attachment to be issued on certain property on which MPI's manufacturing plant was located in Houston, Mississippi. The writ was obtained to secure payment of monies allegedly due Dupre' by MPI as a result of a prior employment contract between the parties.

A month later MPI applied to the United States District Court for the Northern District of Mississippi, Eastern Division, for a preliminary injunction to restrain state officials from issuing the chancery attachment, to restrain Dupre' from applying for a writ of attachment under the state chancery procedure, and to enjoin Dupré from prosecuting his action for damages in the chancery court. MPI also sought a declaratory judgment that the Mississippi chancery attachment procedure was unconstitutional. MPI based its cause of action on 42 U.S.C. § 1983.[1]

The district court quashed the chancery attachment issued against MPI and held, that "the chancery statute procedure as to the realty of a nonresident debtor (no less than the seizure of personalty) is violative of the Due Process Clause of the fourteenth amendment both facially (as the Mississippi statutes are presently written) and as applied to the facts of this particular case."[2]

In reaching its conclusion the district court addressed three issues; whether it should abstain from hearing the case out of considerations of comity and federalism; the constitutionality of the chancery attachment procedure as to real property; and whether injunctive relief was an appropriate remedy under the circumstances. The scope of this note will be limited to the issue of the constitutionality of the Mississippi chancery attachment procedure as applied to real property.

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[1]Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[2]MPI, Inc. v. McCullough, 463 F. Supp. 887 (N.D. Miss. 1978). Both MPI and Dupré are non-residents of Mississippi. MPI Inc. is a corporation created under Texas law. Even though MPI is registered to do business in Mississippi and has a registered agent for service of process, it is nonetheless deemed a non-resident for purposes of chancery attachment.

DUE PROCESS AND THE SEIZURE OF PROPERTY

Under the fourteenth amendment states are forbidden from depriving any person of life, liberty or property without due process of law.[3] The term "due process" is admittedly obscure and thus defies definition in a broad sense. It has been said that by its very nature due process disallows inflexible procedures which are universally applicable to any imaginable situation and that it is not a technical conception unrelated to time, place and circumstances.[4] Because of the vagueness of the term it is sometimes difficult to specify precisely what procedure is required in order to comport with the requirements of due process.

One of the purposes of due process is to safeguard against arbitrary or unjustified deprivations of property.[5] Consequently, due process has been said to be satisfied when the deprivation has been preceded by notice and an opportunity for a hearing appropriate to the nature of the case.[6]

Based, in part, on the forgoing propositions the Supreme Court decided the cases of *Sniadach v. Family Finance Corp.*[7] and *Goldberg v. Kelly.*[8] In *Sniadach*, the Court held unconstitutional the Wisconsin prejudgment garnishment procedure in which summons was issuable at the request of the creditor's lawyer. By the issuance of the summons the debtor's wages were frozen until the trial of the main case. The Court held that such a temporary non-final deprivation of property is nonetheless a deprivation worthy of due process protection. It was further stated that absent prior notice and opportunity for a hearing, such a procedure violated the principles of due process.[9] In *Goldberg*, the Court similarly determined that New York's procedure for terminating welfare benefits violated procedural due process in that no pretermination hearing was held prior to cessation of benefits.[10]

As a result of *Sniadach* and *Goldberg* it appeared that the rule relating to deprivation of property was that property could not be taken without the procedural safeguards of preseizure notice and hearing. Several lower courts felt that such a rule was too restrictive and consequently read *Sniadach* and *Goldberg* narrowly holding that due process required preseizure notice and hearing only when the

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[3]U.S. CONST. amend. XIV.

[4]Cafeteria and Restaurant Workers Local 473 v. McElroy, 367 U.S. 886 (1961).

[5]*See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975); Fuentes v. Shevin, 407 U.S. 67 (1972); Jonnet v. Dollar Savings Bank, 392 F. Supp. 1385 (W.D. Penn. 1975). *See also* Washington *ex rel* Seattle Title Trust Co. v. Roberage, 278 U.S. 116 (1928).

[6]*See* Boddie v. Conn., 401 U.S. 371, 379 (1971); Armstrong v. Manzo, 380 U.S. 545, 550 (1965); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314-16 (1950).

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

[8]397 U.S. 254 (1970).

[9]Sniadach v. Family Fin. Corp., 395 U.S. at 342.

[10]397 U.S. at 264.

property deprived was considered a "necessity" such as wages or welfare benefits.[11]

In *Fuentes v. Shevin*[12] the Supreme Court dispelled the necessity notion. The Court held unconstitutional the prejudgment replevin statutes of Florida and Pennsylvania because they allowed the seller of goods under a conditional sales contract to have the goods seized without prior notice or hearing.[13]

Focusing on the purpose of due process, the Court noted that "[t]he requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision-making that it guarantees works, by itself, to protect against arbitrary deprivation of property."[14]

While holding that property cannot be taken without a prior opportunity to be heard, the Court pointed out that there are circumstances under which notice and opportunity for hearing can be delayed.

> There are 'extraordinary situations' that justify postponing notice and opportunity for a hearing. . . .These situtations, however, must be truly unusual. Only in a few limited situations has this court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the state has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute that it was necessary and justified in the particular instance.[15]

For nearly two years the *Fuentes* decision stood unshaken, until the Court handed down *Mitchell v. W. T. Grant Co.*[16] *Mitchell* involved an attack on Louisiana's sequestration statute on the grounds that it allowed seizure of goods without prior notice and opportunity for hearing. The goods in question were purchased under an installment sales contract and the seller had a vendor's lien on them.

In upholding the constitutionality of the Louisiana procedure the Court placed much emphasis on the fact that the creditor, by way of his vendor's lien, also had an interest in the property siezed.

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[11] *See* Black Watch Farms, Inc. v. Dick, 323 F. Supp. 100, 102 (D. Conn. 1971); Young v. Ridley, 309 F. Supp. 1308, 1312 (D. D.C. 1970); Termplan, Inc. v. Superior Court of Maricopa County, 105 Ariz. 270, 463 P.2d 68 (1969).

[12] 407 U.S. 67 (1972).

[13] *Id.* at 96.

[14] *Id.* at 81.

[15] *Id.* at 90-91.

[16] 416 U.S. 600 (1974).

> Plainly enough, this is not a case where the property sequestered by the court is exclusively the property of the defendant debtor. The question is not whether a debtor's property may be seized by his creditors, *pendente lite*, where they hold no present interest in property sought to be seized. The reality is that both seller and buyer had current, real interests in the property, and the definition of property rights is a matter of state law. Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well.[17]

In addition to recognizing the creditor's rights in the property, the Court also noted the other procedural safeguards which were written into the Louisiana procedure. Under the statutes the writ would not issue on mere conclusory allegations of ownership or possessory right.[18] The writ could only be issued by a judge, and only after the creditor seeking the writ had filed a sufficient bond to protect the debtor against any damages should the action be resolved in the debtor's favor. Furthermore, the statute entitled the debtor to seek immediate dissolution of the writ, which must be ordered unless the creditor proves the grounds upon which the writ was issued, that is the existence of the debt, the lien, and the delinquency.[19]

Based on these safeguards the Court distinguished *Fuentes*. "[W]e are convinced that *Fuentes* was decided against a factual and legal background sufficiently different from that now before us and that it does not require the invalidation of the Louisiana sequestration statute, either on its face or as applied in this case."[20] The Court reasoned that the Louisiana procedure effected "a constitutional accommodation of the conflicting interests of the parties."[21]

In summarizing, the Court stated:

> the Louisiana system seeks to minimize the risk of error of a wrongful interim possession by the creditor. The system protects the debtor's interest in every conceivable way, except allowing him to have the property to start with, and this is done in pursuit of what we deem an acceptable arrangement *pendente lite* to put the property in the possession of the party who furnishes protection against loss or damage to the other pending trial on the merits.[22]

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[17] *Id.* at 604.

[18] *Id.* at 605. "Article 3501 provides that the writ of sequestration shall issue 'only when the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts' shown by a verified petition or affidavit." *Id.*

[19] *Id.* at 606. Upon failure to prove the grounds the court may order the property returned to the debtor and assess damages against the creditor including attorney's fees. *Id.*

[20] *Id.* at 615.

[21] *Id.* at 607.

[22] *Id.* at 618.

Since *Mitchell* the only case decided by the Supreme Court pertaining to the requirements of procedural due process when a deprivation of property takes place was *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[23] In that case the Georgia garnishment statute was held unconstitutional as a violation of procedural due process.[24] A corporation's bank account was garnished under a procedure which permitted the writ to be issued by a court clerk without participation by a judge. The writ would issue on an affidavit by the plaintiff or his attorney containing only conclusory allegations. The procedure made no provision for early hearing.

The Court stated that the Georgia procedure was vulnerable for the same reasons that the procedure in *Fuentes* had been vulnerable,[25] a lack of notice and opportunity for hearing prior to the seizure. Furthermore, it was noted that the Georgia procedure had none of the procedural safeguards of the Louisiana statute. "The affidavit . . .need only contain conclusory allegations. The writ is issuable . . . by the court clerk, without participation by a judge . . . . [and] there is no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment."[26]

SNIADACH AND ITS PROGENY — A GENERAL RULE

In analyzing the preceding cases it is somewhat difficult to determine, as a general rule, precisely what is required to satisfy due process in any particular situation. *Sniadach*, *Goldberg* and *Fuentes* appear to stand for the proposition that *any* deprivation of a significant property interest prior to notice and hearing is violative of due process and consequently unconstitutional.[27] However, the effect that *Mitchell* and *North Georgia Finishing* have on this rule is questionable.[28]

There seems to be two possible means of interpreting *Mitchell* and *North Georgia Finishing* in conjunction with *Fuentes*. Under the first, which will be referred to as the strict interpretation, the general rule in regard to meeting the requirements of due process advocated in *Fuentes* is: deprivation of a significant property interest is unconstitutional if not preceded by notice and hearing, unless it falls into the category of "extraordinary situations."

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[23]419 U.S. 601 (1975).

[24]*Id.* at 606-08.

[25]*Id.* at 606.

[26]*Id.* at 607.

[27]The only exceptions being the "extraordinary situations" espoused in *Fuentes*. See note 15 and accompanying textural material, *supra*.

[28]It is important to note that *Mitchell* did not overrule *Fuentes* and that *North Georgia Finishing* did not overrule *Mitchell*. Therefore, all of these decisions must be read in conjunction with each other.

Mitchell is compatible with this interpretation if it is read to involve an extraordinary situation excepted by the *Fuentes* general rule. The exceptional situation would involve the *real interest* of the creditor in the seized property,[29] the issuance of the writ by a judge, under strict statutory guidelines, and the availability of an immediate post-seizure hearing.[30] *North Georgia Finishing* fits into this scheme nicely because the Court in that decision relied primarily on *Fuentes* and invalidated the Georgia statute for the same reasons it had invalidated the Florida and Pennsylvania statutes in *Fuentes*. Consequently, *Fuentes* and *North Georgia Finishing* are general rule and *Mitchell* is the exception.

Under the second possible interpretation, which will be referred to as the liberal interpretation, *Mitchell* may be viewed as cutting back on the strictness of the *Fuentes* rule requiring notice and hearing *prior* to deprivation of a significant property interest. The only way this interpretation is conceivable is to overlook the fact that the court in *Mitchell* placed a great deal of emphasis on the creditor's *real interest* in the property. However, it may be argued that the liberal interpretation is reinforced by *North Georgia Finishing*. In dicta the Court in *North Georgia Finishing* implied that the Georgia procedure may have been valid had the writ been issued by a judge, based on an affidavit going beyond mere conclusory allegations, and had the procedure provided for an immediate post-seizure hearing and for dissolution of the writ absent proof by the creditor of the grounds upon which it was issued.[31] While the Court in *North Georgia Finishing* did mention that the creditor had a real interest in the property it did not place emphasis on the fact as it had done in *Mitchell*.

Under the liberal interpretation the general rule might be stated as the rule espoused in *Mitchell* without the requirement that the attaching party have a *real interest* in the property attached. In other words, as long as a judge could be shown that there is probable cause for the writ to issue and such a showing goes beyond conclusory allegations and there is a provision for an immediate post-seizure hearing where the creditor has the burden of sustaining the writ under the penalty of monetary damages, due process would be met.

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[29]Mitchell v. W. T. Grant Co., 416 U.S. at 604. A *real interest* is something, such as a vendor's lien or a mechanic's lien, which gives the creditor a right to possession of the property attached upon default. There must be a direct connection between the property attached and the underlying claim.

[30]It appears that one court has adopted some of the reasoning of this strict interpretation. In Johnson v. Am. Credit Co. of Ga., 581 F.2d 526 (5th Cir. 1978), after American Credit financed Johnson's automobile a dispute arose and Johnson stopped payments. American Credit attached the car. In a suit challenging the constitutionality of the procedure the Fifth Circuit held "that due process requires that a prejudgment seizure be authorized by a judge who has discretion to deny issuance of the appropriate writ." The court went on to hold that the procedure was "facially unconstitutional." *Id.* at 534.

[31]*See* N. Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. at 606-07.

The acceptability of the liberal interpretation is buttressed by the fact that it tends to prevent arbitrary and unjustified deprivations; one of the primary purposes of due process. However, based on language from *Sniadach*, *Goldberg*, *Fuentes*, and *North Georgia Finishing*, coupled with the distinguishing factor present in *Mitchell*, that the creditor have a *real interest* in the property, it would appear that the case law more substantially favors the strict interpretation.[32] While the liberal interpretation could be a viable alternative for meeting due process at some future date it presently does not have ample support.

DOES AN ATTACHMENT OF REAL PROPERTY WARRANT FOURTEENTH AMENDMENT PROTECTION?

Having reviewed the requirements necessary to meet due process standards it becomes necessary to ascertain when those standards should apply. Not all forms of property are subject to the protections afforded by the fourteenth amendment. "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property."[33] In light of the contentions of the defendants in *MPI, Inc.*, the inquiry becomes whether an attachment of real property constitutes a "taking" sufficient to warrant fourteenth amendment protection.[34] Even though an attachment does not affect the owner's possession of the property it creates a lien[35] which acts to severely restrict his ability to convey clear title to the land.[36]

Several courts have held that placing a lien on property is not a

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[32]While the dicta in *North Georgia Finishing* implied that the liberal interpretation would have been sufficient, the decision was expressly based on *Fuentes* which is the basis for the strict interpretation.

[33]Board of Regents v. Roth, 408 U.S. 564, 569 (1972).

[34]The defendants in *MPI, Inc.* urged that *Sniadach*, *Fuentes*, and *North Georgia Finishing* involved the attachment of only personalty, which caused the debtor to be deprived of the use and possession of the attached property during the period it was frozen by the attachment proceeding. The defendants sought

> to distinguish those cases by asserting that they involved a significant taking of such a nature as to implicate the due process clause, while an attachment upon realty is no deprivation of use or possession during the interval of the attachment. . . . [A]n attachment of real estate which is left in the hands of the debtor who has the right to use and enjoy it until the chancery court orders otherwise, is not such a significant taking or burden as to be protected by the Due Process Clause and that, therefore, the Mississippi chancery statute is constitutional as to realty, even though it may be constitutionally infirm as to personalty.

MPI, Inc. v. McCullough, 463 F. Supp. at 897.

[35]*See generally* Ryals v. Douglas, 205 Miss. 695, 39 So. 2d 311 (1949).

[36]*See generally* Gunter v. Merchants Warren Nat'l Bank, 360 F. Supp. 1085 (S. D. Me. 1973).

"taking" which warrants fourteenth amendment protection.[37] In most of these cases, the courts seem to place considerable emphasis on the fact that the land owner was never deprived of possession of the land. Such treatment by the courts indicates that they were balancing the gravity of the deprivation suffered by the property owner against the creditor's right to secure an obligation due him. The use of a balancing test has been recognized by several courts for determining that process which is due in a particular situation.[38] However, a balancing test has not been recognized for determining whether or not due process applies.

> [A] weighing process has long been a part of any determination of the *form* of hearing required in particular situations by procedural due process. But, to determine whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake. . . . We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property. (footnote omitted).[39]

The nature of the interest at stake is that of property rights. Property rights have always warranted protection under the constitution.[40] Included in the bundle of property rights is, among other things, the right to dispose of the property as one sees fit.[41] Consequently, if the right to dispose of the property has been infringed there has been a deprivation of that property.[42]

Applying the forgoing propositions to attachment of real property, it is obvious that such an attachment is a "taking" worthy of fourteenth amendment protection. The attachment places a lien or cloud

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[37]*See, e.g.*, Hansen v. Weyerhaeuser Co., 526 F.2d 505 (9th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976); *In re* the Oronoka, 393 F. Supp. 1311 (D. Me. 1975); Central Security Nat'l Bank v. Royal Homes, Inc., 371 Supp. 476 (E. D. Mich. 1974); Spielman-Fond, Inc. v. Hansons, Inc., 379 F. Supp. 997 (D. Ariz. 1973), *aff'd*, 417 U.S. 901 (1974); Cook v. Carlson, 364 F. Supp. 24 (S.D.S.D. 1973); Black Watch Farms, Inc. v. Dick, 323 F. Supp. 100 (D. Conn. 1971).

[38]*See generally* Boddie v. Connecticut, 401 U.S. 371 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970).

[39]Board of Regents v. Roth, 408 U.S. at 570-71.

[40]"It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property." Shelley v. Kraemer, 334 U.S. 1, 10 (1948); *See also* United States v. Causby, 328 U. S. 256 (1946).

[41]Property is more than the mere thing which a person owns and includes the right to acquire, use and dispose of it. These essential attributes of property are protected by the Constitution. Buchanan v. Warley, 245 U.S. 60 (1917); Kass v. Lewin, 104 So. 2d 572 (Fla. 1958).

[42]McInnes v. McKay, 141 A. 699 (1928), aff'd 279 U.S. 820 (1928). "[T]he power of disposition at the will of the owner is property. Deprivation does not require actual physical taking of the property or the thing itself. It takes place when the free use and enjoyment of the thing or the power to dispose of it at will is affected." *Id.* at 702.

upon the title of the property which unquestionably infringes the property owner's right to dispose of the property.[43]

There is only one case which appears to be in discord with the concept that a lien on real property constitutes a "taking" which requires fourteenth amendment protection. That case is *Spielman-Fond, Inc. v. Hansons, Inc.*, which was summarily affirmed by the Supreme Court.[44] The Arizona mechanic's and materialmen's lien statute was challenged for violating the due process clause of the fourteenth amendment. In upholding the statutory procedure the Arizona District Court said the filing of such a lien failed to amount to a taking of a significant enough property interest to warrant the notice and hearing requirements of due process.[45]

Since *Spielman-Fond* was affirmed by the Supreme Court it is possible to argue that the Court has upheld the idea that a lien on real property does not constitute a "taking" sufficient to warrant due process protections. The validity of such an argument is determined by the significance of a summary affirmance. In *Hicks v. Miranda*[46] it was stated that a summary affirmance by the Supreme Court is a decision on the merits.[47] Based on this it might appear that the Court has adopted the language and reasoning of the Arizona District Court and agreed that the filing of a lien does not amount to a taking of a significant property interest. However, in the more recent case of *Mandel v. Bradley*,[48] the Court said:

> [b]ecause a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below.
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> 'When we summarily affirm, without opinion, . . . we affirm the judgment but not necessarily the reasoning by which it was reached. An unexplicated summary affirmance settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument.' *Fusari v. Steinberg*, (cite omitted) (concurring opinion of the chief justice).[49]

The Court in *Mandel* went on to state that "[s]ummary affirmances . . . do prevent lower courts from coming to opposite conclu-

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[43]It is possible to argue that the placing of a lien on real property does not warrant fourteenth amendment protection because it is not a *total* deprivation of the right to dispose of the property but only a factor which makes alienation more difficult. However, such an argument is tenuous because for all practical purposes a lien such as attachment would restrict alienability to the point where it would act as a total deprivation.

[44]379 F. Supp 997 (D. Ariz. 1973), *aff'd*, 417 U.S. 901 (1974).

[45]*Id.* at 999.

[46]422 U.S. 332 (1975).

[47]*Id.* at 344.

[48]432 U.S. 173 (1977).

[49]*Id.* at 2240.

sions on the precise issues presented and necessarily decided by those actions. . . . Summary actions, however, . . . should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved."[50]

In light of the Court's language in *Mandel*, the decision of *Spielman-Fond* should be limited to the precise facts and issues before the Court in that case, that is, whether Arizona's mechanic and materialmen's lien statute met due process requirements. By summarily affirming the district court's decision, the Supreme Court held merely that the procedure in question had adequate procedural safeguards and therefore did not violate the fourteenth amendment. The Court in no way passed upon the question of whether the lien was a "taking" of property sufficient to warrant fourteenth amendment protection. Consequently, the Supreme Court has not ruled that the placing of a lien on real property is unworthy of fourteenth amendment protections. The lack of such a decision coupled with the fact that the right to dispose of one's property is protected leads to the conclusion that any procedure pertaining to an attachment or the placing of a lien on real estate must be accorded due process protections.

In summary, before any significant property interest can be taken from someone under color of state law, procedural due process must be met. Provisions must generally be made for notice and a hearing *prior* to the seizure of the property. However, there are "extraordinary situations" where postponement of notice and hearing is justified.[51] In addition to these extraordinary situations, notice and hearing may also be postponed in situations where the creditor has a *real interest* in the property being seized, provided that other procedural safeguards are inherent in the statute that authorized the seizure.[52] Finally, when determining whether due process requirements are applicable the nature of the deprivation should be the focal point and not the gravity of the deprivation.

ANALYSIS OF THE COURT'S DECISION IN *MPI, INC.*

In reaching its decision on the constitutionality of the Mississippi chancery attachment laws the district court began by reviewing the statutory procedure. Among the characteristics of the Mississippi procedure noted by the federal court were the following:

—Jurisdiction of attachments is lodged in chancery court.[53]

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[50] *Id.*

[51] Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (to protect the public from mishandled drugs); Fahey v. Mallonee, 332 U.S. 245 (1947) (to protect against the economic disaster of a bank failure); Phillips v. Commissioner, 283 U.S. 589 (1931) (to collect the internal revenue of the United States); Ownbey v. Morgan, 256 U.S. 94 (1921) (the use of attachment to secure jurisdiction in state court); Central Union Trust Co. v. Garvan, 254 U.S. 554 (1921) (to meet the needs of a national war effort).

[52] *See* notes 29, 44-46 and accompanying textual material, *supra.*

[53] MISS. CODE ANN. § 11-31-1 (1972).

—A foreign corporation, though qualified to do business in the state is considered a nonresident.[54]

—It is immaterial to the validity of the attachment that personal judgment can be obtained against a "nonresident" foreign corporation having a resident agent for service of process.[55]

—The complainant seeking the attachment is not required to post a bond for the issuance of the writ.[56]

—A summons is sufficient to bind the property under the attachment.[57]

—Real estate is expressly covered.[58]

—The property remains subject to the attachment unless and until the nonresident debtor appears and gives satisfactory security for the performance of the decree, thus discharging the lien; but if the debtor fails to appear or fails to give security, the court has the power to make any necessary orders.[59]

In addition the court stated:

> It is apparent that once the property has been attached, the nonresident debtor may dissolve the attachment only by posting a satisfactory bond to be approved by the court or chancellor in vacation, § 11-31-9. 'The principal defendant [nonresident debtor] cannot discharge the attachment by challenging the validity of the attachment itself, even on grounds of procedural irregularity, excessiveness, or lack of merit of the underlying claim. By prevailing at the trial on the merits, the principal defendant [nonresident debtor] can obtain the release of the [attached property], but he cannot recover damages, interest or attorney's fees based on wrongful attachment unless he successfully institutes a separate action for malicious prosecution. *Burt v. Roberts*, 212 Miss. 576, 55 So. 2d 164 (1951).' *Mississippi Chemical Corp. v. Chemical Construction Corp.*, 444 F. Supp. 925, 932 (S.D. Miss. 1977).[60]

In expounding further on the characteristics of the Mississippi procedure the district court quoted once more from the decision of *Mississippi Chemical Corp.*:[61]

> Chemico [the nonresident debtor] had neither notice of plaintiff's intention unilaterally to invoke the Attachment in Chancery procedure nor the opportunity to contest the propriety of the attachments either before or after they were imposed. The plaintiff was not required to apply to

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[54]Clark v. Louisville & N.R.R., 158 Miss. 287, 130 So. 302 (1930).

[55]Aetna Ins. Co. v. Robertson, 126 Miss. 387, 88 So. 883 (1921).

[56]I. B. Rowell & Co. v. Sandifer, 129 Miss. 167, 91 So. 899 (1922).

[57]MISS. CODE ANN. § 11-31-3 (1972).

[58]MISS. CODE ANN. § 11-31-5 (1972).

[59]MISS. CODE ANN. § 11-31-9 (1972).

[60]MPI, Inc. v. McCullough, 463 F. Supp. at 891-92.

[61]444 F. Supp. 925 (S.D. Miss. 1977). In this case the court declared the Mississippi chancery attachment statute, as to the attached choses in action or indebtedness then under consideration, unconstitutional as violative of procedural due process based on *Sniadach*, *Goldberg*, *Fuentes*, and *North Georgia Finishing*.

> any disinterested common neutral judicial officer in order to bind the attached sums, nor to demonstrate the probable validity of its underlying claims, nor even to make any particularized showing that attachments were needed either in order for this Court to acquire jurisdiction over Chemico or in order to prevent the removal of the attached funds from this jurisdiction. The Plaintiff was able to avail itself of the statutory machinery of Attachment in Chancery without the posting of any security, although Chemico can dissolve the attachments only by the posting of adequate security. . . .[62]

In what appears to be the district court's summary of the procedure it stated:

> As we examine the Mississippi chancery statute, it is obvious that attachment may be invoked by any person against a nonresident without any showing of a particularized need, such as an immediate danger that the nonresident debtor will convey away, destroy or conceal the disputed property, or that satisfaction of the underlying claim is dependent upon seizure of the specific property because of an impending fraudulent transfer by the nonresident, depreciation or spoilation of property, or other special equity which the attaching plaintiff may have in the particular property seized, such as a constructive trust or wrongful conversion of assets. Manifestly, the statutory procedure is not limited to instances where seizure is 'directly necessary to secure an important governmental or general public interest.' Nor can it be asserted that in this case there was such a public or governmental interest, as securing jurisdiction over a res when no other means of acquiring jurisdiction exists . . . , the integrity of state controlled programs. . . . Next, the statutes are not aimed at meeting a special need for very prompt action and Dupre fails to make a showing that prompt action is necessary to preserve his rights. Finally, the Mississippi scheme for chancery attachment is neither initiated nor monitored by a responsible judicial officer of the state, but is invoked by a private party and carried out by the state's ministerial agents, the chancery clerk and county sheriff. The state is truly kept in the dark; and Dupre was the prime and sole movant for invoking the state's chancery attachment against MPI's real property. . . . [T]he Mississippi chancery statute can be invoked upon the sole condition that the alleged defendant debtor is a nonresident of the state; no more need be alleged. (footnote omitted).[63]

Little analysis of the district court's findings is necessary. There can be but one conclusion to be drawn about the chancery scheme; it is a summary procedure, instituted by the plaintiff's lawyer and completely lacks judicial supervision. As measured by the due process requirements of *Sniadach* and its progeny, the procedure appears unconstitutional no matter how *Fuentes*, *Mitchell*, and *North Georgia Finishing* are interpreted in conjunction with one another.

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[62] *Id.* at 932-33, *quoted in* MPI, Inc. v. McCullough, 463 F. Supp. at 892.

[63] MPI, Inc. v McCullough, 463 F Supp. at 895-96.

In its examination of the applicable case law relating to due process, the district court reviewed *Sniadach*, *Goldberg*, *Fuentes*, *Mitchell*, and *North Georgia Finishing*. In accord with what appears to be the general rule the court relied on *Fuentes* and *North Georgia Finishing* for the rule that due process requires notice and hearing prior to the seizure of property. Moreover, the court noted the "extraordinary situations" of *Fuentes* which justify postponing notice and hearing and correctly concluded that the present case does not belong in that category.

Mitchell was distinguished from *Fuentes* and properly interpreted by the district court as not undermining the due process requirements of *Fuentes* and *North Georgia Finishing*. In distinguishing *Mitchell* the court relied on what has been previously referred to as the dicta in *North Georgia Finishing*. The court said *Mitchell* was different from *Fuentes* and *North Georgia Finishing* because the procedure in *Mitchell* required issuance of the writ by a judge and called for an immediate postseizure hearing. Contrary to such an interpretation, *Mitchell* appears to be distinguishable, because it is based on the fact that the creditor in *Mitchell* had a *real interest* in the property seized.

In its analysis of whether an attachment of real estate warrants fourteenth amendment protection the district court noted that the Supreme Court had not decided any cases involving attachments against real property beyond the summary affirmance in *Spielman-Fond*.[64] Based on *Hicks* the district court determined that it was bound by the decision of *Spielman-Fond*. As a result the court was forced to distinguish *Spielman-Fond* from the case sub judice. In doing so the court recognized that in *Spielman-Fond* the claim of the attaching party was based on a mechanic's lien and hence insured "a direct connection between the res and the underlying claim."[65] Also, *Spielman-Fond* was distinguished because the filing of a mechanic's lien does nothing more than cloud the title of the reality whereas an attachment creates more than a mere nonpossessory lien because the property was put into the chancery court's constructive possession.[66]

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[64]McKay v. McInnes, 279 U.S. 820 (1928) (per curiam) is another decision by the Supreme Court dealing with an attachment of real property. However, as stated in Fuentes at 91, n. 23, it is unclear what interests were involved in that case. "As far as essential procedural due process doctrine goes, *McKay* cannot stand for any more than was established in the *Coffin Bros.* and *Ownbey* cases on which it relied completely." *Id.* The *Coffin Bros.* and *Ownbey* cases concerned important governmental interests, and therefore seizure prior to notice and hearing was justified. Since we are not dealing with an important governmental interest in the case sub judice *McKay* is of no significance.

[65]MPI, Inc. v. McCullough, 463 F. Supp. at 898.

[66]It cannot be argued that Spielman-Fond is distinguishable on the basis that there was a direct connection between the res and the underlying claim. (See *Mitchell*: rights of creditors who have a *real interest* in the property are protected.) However, the distinction by the court between a lien and an attachment is questionable. Both produce the same effect: a cloud upon the title which acts to restrict alienability.

The court's reliance on *Hicks*, in determining the significance of a summary affirmance was misplaced. The controlling decision is that of *Mandel* and thus *Spielman-Fond* is stripped of its precedential value in all cases except those involving the same issue.

Having determined that it was not bound by *Spielman-Fond*, the court cited several cases in which courts have struck down real estate attachment procedures which lacked prior notice and hearing.[67] The court stated,

> [w]e agree with their rationale that encumbering realty during the life of the attachment is a burden on the right of alienation, interferes with the ability to obtain necessary financing for the enjoyment of the property, and creates a cloud upon the title and a reflection upon the owner's credit in the business community."[68]

Based on *Sniadach*, its progeny, and the district court cases cited herein, the court held the chancery attachment procedure violative of the due process clause of the fourteenth amendment in its application to realty of nonresident debtors.[69]

CONCLUSION

The decision reached by the court in *MPI* was a proper one, although its interpretation of the applicable case law varied from that of the author. It appears that the Mississippi chancery attachment procedure, as it now stands, is unconstitutional because it lacks procedural due process. Even if viewed in light of the "liberal interpretation," the procedure falls short of due process requirements since it completely lacks judicial supervision, and does not provide for any of the other safeguards of the Louisiana procedure upheld in *Mitchell*.

Furthermore, the Mississippi procedure lacks other necessary safeguards. The procedure can be invoked by any person against a nonresident. The attaching party need not file a bond in order to invoke the procedure. Should the attachment ultimately be shown to have been wrongfully or mistakenly issued, the party whose property was attached has no statutory entitlement to damages, interest, or attorney's fees other than through a separate action for malicious prosecution.[70] In short, the procedure provides no legal protection from irresponsible and impartial evaluations of the need to resort to the remedy.

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[67]Terranova v. Avco Financial Services of Barre, Inc., 396 F. Supp. 1402 (D. Vt. 1975); Bay State Harness Horse Racing and Breeding Ass'n v. PPG Indus., 365 F. Supp. 1299 (D. Mass. 1973); Clement v. Fourth N. State St. Corp., 360 F. Supp. 933 (D. N.H. 1973); Gunter v. Merchants Warren Nat'l Bank, 360 F. Supp. 1085 (S.D. Me. 1973).

[68]MPI, Inc. v. McCullough, 463 F. Supp. at 899.

[69]*Id.* at 28.

[70]*See* notes 60-63 and accompanying textual material, *supra*.

Any efforts to correct the present procedure would have to begin, first, by differentiating between situations where attachment is the only means by which the state can obtain jurisdiction over the non-resident defendant, and those situations where the state has other valid means of obtaining process over the defendant. The former situation should be regarded as an "extraordinary situation," such as that found in *Fuentes*, and as such, notice and prior hearing may be postponed, but the procedure would have to be carried out by a judge under strict statutory guidelines.

Provision would then have to be made to cover the situation where the creditor has a *real interest* in the property attached. Here also the procedure would have to be carried out by a judge under strict statutory guidelines. The statutes would have to provide for an immediate post-seizure hearing at which the party attached could seek dissolution of the writ. Other safeguards which should be required in this situation are the posting of a bond by the party seeking the attachment and a provision for damages to be awarded the party whose property is wrongfully or mistakenly seized.

Finally, in situations other than where the attachment is in response to an "extraordinary situation" or where the creditor has a *real interest* in the property, the only way the writ should issue is if it is preceded by notice and a hearing.

In light of *Sniadach*, *Fuentes*, and their progeny, the Mississippi chancery attachment procedure fails to meet the due process requirements of the fourteenth amendment and is therefore unconstitutional. This deficiency can be eradicated only through the addition of safeguards which eliminate the arbitrary nature in which the writ is procured.

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