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THE DUE PROCESS MANDATE AND THE CONSTITUTIONALITY OF ADMIRALTY ARRESTS AND ATTACHMENTS PURSUANT TO SUPPLEMENTAL RULES B AND C

I. INTRODUCTION

In the past decade, the area of procedural due process, including traditional doctrines of *in rem* and *quasi in rem* jurisdiction, has undergone a constitutional facelift. As a result, two of admiralty's most extraordinary features—maritime attachment and garnishment and actions in rem[1]—have been questioned from a constitutional standpoint.

The United States Supreme Court inaugurated the new era with its decision in *Sniadach v. Family Finance Corp.*[2] In that case, the Court first began changing its procedural due process philosophy by broadening its conception of constitutionally protected forms of property. Having narrowly addressed itself to the question of what constitute constitutionally protectible property interests, a further inquiry arose and demanded resolution. Given the existence of a protectible property interest, the particular form of protection due process demands would have to be determined.

The Court responded to this question in *Fuentes v. Shevin*[3] and *Mitchell v. W.T. Grant Co.*[4] In those and subsequent decisions, the Court struggled to define the parameters of procedural due process in the context of prejudgment attachment and garnishment and replevin statutes. None of the issues addressed in the *Sniadach—Mitchell* line, however, have arisen in a strictly admiralty context. The maritime prejudgment attachment procedure currently provided for in Supplemental Rule B[5] is, however, simi-

1. *See* FED. R. CIV. P., SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS, Supplemental Rules B and C.
2. 395 U.S. 337 (1969).
3. 407 U.S. 67 (1972).
4. 416 U.S. 600 (1974).
5. Supplemental Rule B provides as follows:

(1) When available; complaint, affidavit, and process. With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees named in the complaint to the amount sued for, if the defendant shall not be found within the district. Such a complaint shall be accompanied by an affidavit signed by the plain-

lar, if not identical in purpose, to those held unconstitutional in both *Sniadach* and *Fuentes*—it exists for purposes of facilitating a court's rightful assertion of jurisdiction over particular parties, and it provides potential security for the satisfaction of underlying claims. Further, both Supplemental Rules B and C,[6] covering ac-

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tiff or his attorney that, to the affiant's knowledge, or to the best of his information and belief, the defendant cannot be found within the district. When a verified complaint is supported by such an affidavit the clerk shall forthwith issue a summons and process of attachment and garnishment. In addition, or in the alternative, the plaintiff may, pursuant to Rule 4(e), invoke the remedies provided by state law for attachment and garnishment or similar seizure of the defendant's property. Except for Rule E(8) these Supplemental Rules do not apply to state remedies so invoked.

(2) Notice to defendant. No judgment by default shall be entered except upon proof, which may be by affidavit, (a) that the plaintiff or the garnishee has given notice of the action to the defendant by mailing to him a copy of the complaint, summons, and process of attachment or garnishment, using any form of mail requiring a return receipt, or (b) that the complaint, summons, and process of attachment or garnishment have been served on the defendant in a manner authorized by Rule 4(d) or (i), or (c) that the plaintiff or the garnishee has made diligent efforts to give notice of the action to the defendant and has been unable to do so.

(3) Answer.

(a) By garnishee. The garnishee shall serve his answer, together with answers to any interrogatories served with the complaint, within 20 days after service of process upon him. Interrogatories to the garnishee may be served with the complaint without leave of court. If the garnishee refuses or neglects to answer on oath as to the debts, credits, and effects that may be propounded by the plaintiff, the court may award compulsory process against him. If he admits any debts, credits, or effects, they shall be held in his hands or paid into the registry of the court, and shall be held in either case subject to the further order of the court.

(b) By defendant. The defendant shall serve his answer within 30 days after process has been executed, whether by attachment of property or service on the garnishee.

6. Supplemental Rule C provides as follows:

(1) When available. An action in rem may be brought:

(a) To enforce any maritime lien;

(b) Whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto.

Except as otherwise provided by law a party who may proceed in rem may also, or in the alternative, proceed in personam against any person who may be liable.

Statutory provisions exempting vessels or other property owned or possessed by or operated by or for the United States from arrest or seizure are not affected by this rule. When a statute so provides, an action against the United States or an instrumentality thereof may proceed on in rem principles.

tions *in rem,* arguably lack necessary constitutional safeguards discussed in *Mitchell* and subsequent decisions.

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(2) Complaint. In actions in rem the complaint shall be verified on oath or solemn affirmation. It shall describe with reasonable particularity the property that is the subject of the action and state that it is within the district or will be during the pendency of the action. In actions for the enforcement of forfeitures for violation of any statute of the United States the complaint shall state the place of seizure and whether it was on land or on navigable waters, and shall contain such allegations as may be required by the statute pursuant to which the action is brought.

(3) Process. Upon the filing of the complaint the clerk shall forthwith issue a warrant for the arrest of the vessel or other property that is the subject of the action and deliver it to the marshal for service. If the property that is the subject of the action consists in whole or in part of freight, or the proceeds of property sold, or other intangible property, the clerk shall issue a summons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment.

(4) Notice. No notice other than the execution of the process is required when the property that is the subject of the action has been released in accordance with Rule E(5). If the property is not released within 10 days after execution of process, the plaintiff shall promptly or within such time as may be allowed by the court cause public notice of the action and arrest to be given in a newspaper of general circulation in the district, designated by order of the court. Such notice shall specify the time within which the answer is required to be filed as provided by subdivision (6) of this Rule. This rule does not affect the requirements of notice in actions to foreclose a preferred ship mortgage pursuant to the Act of June 5, 1920, ch. 250, § 30, as amended.

(5) Ancillary process. In any action in rem in which process has been served as provided by this rule, if any part of the property that is the subject of the action has not been brought within the control of the court because it has been removed or sold, or because it is intangible property in the hands of a person who has not been served with process, the court may, on motion, order any person having possession or control of such property or its proceeds to show cause why it should not be delivered into the custody of the marshal or paid into court to abide the judgment; and, after hearing, the court may enter such judgment as law and justice may require.

(6) Claim and answer; interrogatories. The claimant of property that is the subject of an action in rem shall file his claim within 10 days after process has been executed, or within such additional time as may be allowed by the court, and shall serve his answer within 20 days after the filing of the claim. The claim shall be verified on oath or solemn affirmation, and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action. If the claim is made on behalf of the person entitled to possession by an agent, bailee, or attorney, it shall state that he is duly authorized to make the claim. At the time of answering, the claimant shall also serve answers to any interrogatories served with the complaint. In actions in rem interrogatories may be so served without leave of court.

Almost simultaneously, new concern about the constitutional validity of certain of the Supplemental Rules has arisen in another context, with the Supreme Court's more recent decision in *Shaffer v. Heitner.*[7] Under *Shaffer,* the mere presence of property within the territorial bounds of a court's jurisdiction is no longer a prima facie sufficient basis for the actual assertion of its jurisdiction. Again, while not decided in an admiralty context, the *Shaffer* decision could have a limiting effect on admiralty *quasi in rem* procedures as provided for in Supplemental Rule B, especially when a court asserts its jurisdiction based solely upon the fortuitous presence of property within the territorial bounds of its jurisdiction.

The constitutionality of Supplemental Rules B and C has been undoubtedly placed in issue. The more pertinent inquiry, and one less susceptible of a definitive response, is whether, Rules B and C can withstand constitutional challenge in light of decisions such as *Mitchell* and *Shaffer.*

II. BACKGROUND

Prior to 1966, admiralty cases were docketed and heard on a separate "side" of federal district court. Additionally, and based largely on tradition, special terminology and procedure were utilized. Particularly notable was the fact that admiralty libels[8] were of two types: *in personam* and *in rem.*[9]

An *in personam* suit is against a named individual or corporate person, asserting a personal liability.[10] When a plaintiff has an *in personam* claim enforceable within the admiralty jurisdiction, he is permitted to attach the defendant's goods or chattels, or credits and effects in the hands of garnishees.[11] The prerequisites to such an attachment are: (1) that the defendant cannot be found within the territorial bounds of the district in which the action is comm-

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7. 433 U.S. 195, 97 S. Ct. 2589 (1977).

8. He that has a maritime suit to prosecute, sets forth, in writing addressed to the court or the judge of the court, his cause of action circumstantially and intelligibly, with simplicity and conciseness, and closes with a prayer for the relief which he desires. This is called a libel, from the Latin *libellus,* a little book.

BENEDICT, THE LAW OF AMERICAN ADMIRALTY 48 (6th ed. 1940). The libel was the equivalent of today's complaint.

9. GILMORE & BLACK, THE LAW OF ADMIRALTY 35 (2d ed. 1975) [hereinafter cited as GILMORE & BLACK]. Even though the term "libel" has been dropped, the distinction, of course, remains.

10. *Id.*

11. *Id.* Supplemental Rule B governs this procedure.

enced;[12] (2) that goods or credits of the defendant are presently within the district, or alternatively, that they will soon be within the district; and (3) that there are no statutory or general maritime law proscriptions against the attachment.[13]

Maritime suits *in rem*, on the other hand, are virtually unknown outside admiralty jurisdiction.[14] Such actions may be brought to enforce maritime liens and "[w]henever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto."[15] Maritime liens can arise as a result of maritime tort, breach of maritime contract, act of salvage, and general average.[16] A plaintiff attempting to enforce such a lien may proceed directly against the vessel or other property in which it subsists.

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12. Plaintiff or his attorney attests to the fact that the defendant cannot be found within the district by filing, along with the complaint, "an affidavit . . . that, to the affiant's knowledge, or to the best of his information and belief, the defendant cannot be found within the district." *See* Supplemental Rule B, note 5 *supra*.

13. For example, actions under the Suits in Admiralty Act may not be commenced by arrest or seizure of property. In addition, since there is no personal liability in suits on bottomry bonds, such actions may be brought only *in rem*. *See* 7A MOORE'S FEDERAL PRACTICE ¶B.03 [hereinafter cited as 7A MOORE'S]; 16 U.S.C. § 741 *et. seq.* (1970); ADVISORY COMMITTEE ON ADMIRALTY RULES, PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, H.R. Doc. No. 391, 89th Cong., 2d Sess. 68-69 (1966) [hereinafter cited as ADVISORY COMMITTEE NOTES].

14. While the maritime action *in rem* is by far the more colorful of the lot, *in rem* actions will lie in other areas of the law, including: suits to quiet title, Empire Ranch & Cattle Co. v. Herrick, 124 P. 748 (Colo. 1912); actions to foreclose real estate mortgages, Pettis v. Johnston, 190 P. 681 (Okl. 1920); and suits in partition, Sandiford v. Town of Hempstead, 90 N.Y.S. 76 (1904). Actions *in rem* are generally said to give rise to judgments declaratory of the "status" of some subject-matter, whether this be a person or a thing.

15. Supplemental Rule C(1).

16. McCreary, *Going for the Jugular Vein: Arrests and Attachments in Admiralty*, 28 OHIO ST.L.J. 19, 25 n.45 (1967).

> The only common tort situation involving ships which does not give rise to a lien is injury to or death of a seaman caused by his employer's negligence. Then the only remedy is under the Jones Act, 46 U.S.C. § 688, 41 Stat. 1007 (1920), which does not support a lien. Plamals v. S.S. Pinar Del Rio, 277 U.S. 151 (1928). *Cf.* Gillespie v. U.S. Steel Corp., 379 U.S. 148 (1964). The only common contract situation involving ships which does not give rise to a lien for a breach is a shipbuilding contract which is not regarded as a maritime contract. . . . Speaking generally, a maritime lien does not depend on possession, nor on recording, and cannot be divested except by the giving of other security, by judicial sale, or by laches in enforcement.

Id.

This action constitutes the suit *in rem*—"against the thing."[17] Upon the filing of the complaint *in rem* in any district in which the ship[18] is found, the marshal is ordered to take the ship into custody. Notice of the *in rem* action must be given by publication so that other claimants may intervene;[19] and an owner whose ship is libeled *in rem* may procure her release on the posting of a substitution bond with approved surety. If plaintiff prevails on the merits of his action, the bond is forfeited in the amount of his claim. If the amount of the bond exceeds the value of plaintiff's claim, the additional proceeds go to other valid maritime lienholders who have intervened.[20] The balance, if any, goes to the owner. Of greater importance, however, is that judicial sales arising out of successful actions *in rem* confer a title *good against the world;* the title transferred is *not* merely that of the owner[21] and thereby subject to his creditors.[22]

The first real "codification" of the attachment and garnishment and *in rem* procedures occurred in 1844 with the promulgation of the Supreme Court Admiralty Rules.[23] Prior to 1844, circuit and district courts varied considerably in their treatment of these procedures. With the advent of the 1844 Rules, maritime practice was made uniform in this regard.[24]

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17. GILMORE & BLACK, *supra* note 9 at 36.

18. The tangible item attached is not always a vessel; for example, the ship's claim for freight creates a lien in the cargo carried. *See In re* One Hundred and Fifty-one Tons of Coal, 18 Fed. Cas. 702, No. 10,520 (C.C.S.D.N.Y. 1859).

19. Supplemental Rule C(4).

20. Priority among competing maritime liens of the same type is determined by the time of their attachment, but in inverse order: last in time is first in right. The inverse order rule has become riddled with exceptions, but it is still basic to maritime lien theory. There is also an involved system of priorities among different types of liens, some being of higher rank than others.

GILMORE & BLACK, *supra* note 9 at 588.

21. *Id.* at 37; *see also* The Trenton, 4 F. 657 (E.D.Mich. 1880).

22. In personam arrests and attachments, and subsequent executions pursuant to judgments obtained in such proceedings, do not extinguish valid maritime liens . . . . Proper in rem proceedings . . . do have the effect of extinguishing all other liens. It also seems necessarily to follow that in personam attachments or arrests create no priority over, nor extinguish, previously properly secured terrestrial liens.

7A MOORE'S, *supra* note 13 at ¶B.03, n.1.

23. Effective September 1, 1845. The Supreme Court Admiralty Rules of 1844 can be found in 44 U.S. (3 How.) ix-xix.

24. *See* 7A MOORE'S, *supra* note 13 at ¶B.02, n.8.

The 1844 Rules were revised and replaced by the Supreme Court in 1920,[25] without substantial change to the attachment and *in rem* provisions. In addition, admiralty practice during the first half of the twentieth century was also governed by statutes, written rules of practice formulated by each district court, and "settled admiralty practice," referring to practice decisions under the Civil law tradition which American admiralty courts had been following since 1789.[26]

Between 1920 and 1961, there were a number of additions to and revisions of the Rules by the Supreme Court.[27] By 1961, and at the instigation of the Court,[28] the Advisory Committee on the General Admiralty Rules of the Judicial Conference of the United States had recommended the adoption by the Court of eleven new Admiralty Rules, and several amendments to then current Civil Rules regarding depositions and discovery matters.[29]

The formal unification of the Civil and Admiralty Rules took place in 1966.[30] The Court extended the Civil Rules to cases in admiralty and added the six Supplemental Rules for Certain Admiralty and Maritime Claims that carried forward procedures unique to the admiralty practice.[31] "The admonition in 28 U.S.C. § 2073 that rules promulgated by the Supreme Court should 'not abridge or modify any substantive right,' and a proper desire to preserve unique features of the former admiralty practice, are the basis for the Supplemental Rules. . . ."[32]

25. Rules of Practice for the Courts of the United States in Admiralty and Maritime Jurisdiction, promulgated December 6, 1920, 254 U.S. 679 (1920).

26. Note, *Admiralty Procedure and Proposals for Revision,* 61 YALE L.J. 208-09 (1952).

27. For a detailed chronology of the changes, *see* 7A MOORE'S, *supra* note 13 at ¶.21[2].

28. In Miner v. Atlass, the Court held that a district court sitting in admiralty could not order the taking of an oral deposition for the purpose of discovery only, insofar as there were no express provisions to that effect in the Admiralty Rules in force at that time. In light of this, the Court, in its opinion, suggested that those who advised the Court with respect to the exercise of its rule-making powers should give attention to this matter. Miner v. Atlass, 363 U.S. 641, 651-52 (1960).

29. 7A MOORE'S, *supra* note 13 at ¶.21[3]; *see also* Preliminary Draft of Proposed Amendments, The Supervisory Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (1960).

30. Supreme Court Order of February 28, 1966, 383 U.S. 1029, 1071 (1966).

31. 7A MOORE'S, *supra* note 13 at ¶.01[1].

32. *Id.* at ¶.90. This statement is in accord with the Advisory Committee's Note, wherein it is stated:

[t]here is no disposition to inject into the civil practice as it now is the

It has been stated that "[w]here the identity of the responsible party is unkown to the party wronged, or where the responsible party is known to reside overseas, the maritime remedies of arrest *in rem* or attachment *in personam* are indispensible means of redress in United States courts."[33] For over one hundred years, these procedures were authorized by the Supreme Court Rules despite the lack of any specific statutory authorization. In *Atkins v. The Disintegrating Co.*,[34] the Court confirmed its authority to promulgate Admiralty Rule 2, the precursor of Supplemental Rule B, which allowed the acquisition of personal jurisdiction over a nonresident defendant by attachment of his property within the district. Seventy-seven years later, the Court reaffirmed the underlying purpose of the attachment remedy in *Re Louisville Underwriters*,[35] noting that "[t]he process of foreign attachment is known of old in admiralty. It has two purposes: to secure a respondent's appearance and to assure satisfaction in case the suit is successful. . . ."[36]

There have been no similar pronouncements in the case law regarding the right to the remedy of arrest of property in an *in rem* proceeding. This is because the right to an *in rem* remedy and the right under substantive maritime law to a maritime lien are interdependent and included within the constitutional grant of admiralty jurisdiction.[37] Nevertheless, where pronouncements have been made, they have been largely unequivocal.[38] Like the admi-

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> distinctively maritime remedies . . . . The unified rules must therefore provide some device for preserving the present power of the pleader to determine whether these historically maritime procedures shall be applicable to his claim or not . . . .

ADVISORY COMMITTEE NOTES, *supra* note 13 at 25.

33. McCreary, *Going for the Jugular Vein: Arrests and Attachments in Admiralty*, 28 OHIO ST. L.J. 19, 44 (1967).

34. 85 U.S. 272 (1873).

35. 134 U.S. 488 (1889).

36. *Id.* at 493.

37. *See* McCreary, *Going for the Jugular Vein: Arrests and Attachments in Admiralty*, 28 OHIO ST.L.J. 19, 22-23 (1967).

38. In Canadian Aviator, Ltd. v. United States, the Court, in reference to the *in rem* remedy, stated that "[s]uch personification of the vessel, treating it as a juristic person whose acts and omissions, although brought about by her personnel, are personal acts of the ship for which, as a juristic person, she is legally responsible, has long been recognized by this Court. . . ." 324 U.S. 215 (1945).

The *in rem* remedy has been discussed by the Court in many different contexts, but the underlying basis of the remedy—the maritime lien—has remained vir-

ralty attachment procedure, the maritime action *in rem* has remained a virtually unchallenged doctrine.[39]

The following discussion will place the issue of the constitutionality of Supplemental Rules B and C into perspective. Initially, the case law must be looked to for guidance—*Sniadach* and *Fuentes* in somewhat summary fashion because of their relatively longstanding constitutional notoriety, *Mitchell* and *Shaffer* in greater depth because of their more recent vintage and current standing as "good law." The final portion of this Note will be devoted to analyzing the current constitutional status of Supplemental Rules B and C, while highlighting potential problem areas.

III. The Case Law

A. *Sniadach v. Family Finance Corp. and Fuentes v. Shevin*

The contemporary scrutiny of the constitutionality of state statutes effecting the attachment and garnishment of assets prior to judgment began with *Sniadach v. Family Finance Corp.*,[40] arising out of a decision by the Wisconsin Supreme Court.[41] *Sniadach* was soon followed by *Fuentes v. Shevin.*[42] Together, these cases represent the early stand taken by the Court in its reexamination of procedural due process in the debtor-creditor arena.

In *Sniadach,* the defendant was indebted in the amount of $420 on a promissory note. Defendant's creditor filed a garnishment complaint alleging her delinquincy on the note, and demanded of her employer, the garnishee, payment of wages due the defendant. In accord with Wisconsin law, the employer-garnishee withheld, subject to order of the court, one-half of wages in its possession due the defendant.[43] The remaining one-half was paid over to defen-

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tually inviolate. *See, e.g.,* Continental Grain Co. v. Barge FBL-585, 364 U.S. 19 (1960).

39. *See* McCreary, *Going for the Jugular Vein: Arrests and Attachments in Admiralty,* 28 Ohio St.L.J. 19, 23-24 (1967).

40. 395 U.S. 337 (1969).

41. Family Finance Corp. of Bay View v. Sniadach, 37 Wis.2d 163, 154 N.W.2d 259 (1967).

42. 407 U.S. 67 (1972).

43. When wages or salary are the subject to garnishment action, the garnishee shall pay over to the principal defendant on the date when such wages or salary would normally be payable a subsistence allowance, out of the wages or salary then owing, in the sum of $25 in the case of an individual without dependents or $40 in the case of an individual with dependents; but in no event in excess of 50% of the wages or salary owing.

Wis. Stat. Ann. § 267.18(2)(a) (Supp. 1969).

dant as a "subsistence allowance."

Eventually reaching the United States Supreme Court on certiorari, defendant argued that the state prejudgment garnishment procedure violated the due process clause of the fourteenth amendment because notice and an opportunity to be heard were not afforded before the *in rem* seizure of the wages.[44] Under the state statute in effect at that time, the clerk of the court issued the summons at the request of the creditor's attorney, who, by serving the garnishee, was able to freeze the defendant's wages.

The Supreme Court struck down the Wisconsin prejudgment wage garnishment procedure as a deprivation of property without due process of law, noting that "the wage earner is deprived of his enjoyment of earned wages without any opportunity to be heard and to tender any defense he may have. . . ."[45] Calling wages "a specialized type of property,"[46] the Court opposed their prejudgment seizure without notice and a prior hearing because of the resulting imposition of hardship, and the significant amount of leverage a creditor may thereby bring to bear on a wage earner.

The *Sniadach* holding was arguably a narrow one. The Court, apparently, was merely creating an exception to otherwise lawful prejudgment seizures—specifically, the garnishment of wages when no adequate showing of a countervailing state or creditor interest is made.[47] While seemingly indicating continued approval of the doctrine that private property may indeed be summarily seized pending a hearing when necessary to effectuate a significant state interest, *Sniadach*'s actual effect on attachment and garnishment was more difficult to ascertain.[48]

The Supreme Court took a cautious step with its holding in *Sniadach* and consequently left two significant questions unanswered. First, was the issue of where the line should be drawn between property deserving of special protection and "traditional" property. The second question was under what circumstances may the more protected category be attached or garnished prior to judgment.

In *Fuentes v. Shevin*,[49] the Court made it clear that

44. 395 U.S. at 338.
45. *Id.* at 339.
46. *Id.* at 340.
47. Note, *Some Implications of Sniadach*, 70 COLUM. L. REV. 942, 949 (1970).
48. *Id.*
49. 407 U.S. 67 (1972).

> the necessity of an opportunity for a hearing prior to a taking was a constitutional requirement that did not depend upon the particular type of summary remedy sought, the particular type of property involved, the financial status of the debtor, the length of the deprivation, or the severity of collateral consequences.[50]

The *Fuentes* Court manifested its intent to include summary attachment procedures in general within the scope of the *Sniadach* rationale. The extraordinary circumstances under which summary attachment may be constitutionally achieved were specifically distinguished and labelled.

The defendants in *Fuentes* were delinquent in their payments on installment contracts entered into in Florida and Pennsylvania. Both states had statutes authorizing prejudgment replevin actions, and in both instances, defendants' property had been seized simultaneously with defendants' receipt of complaints seeking repossession of the property through court action.[51] As the Court stated, the primary question in *Fuentes* was whether the Florida and Pennsylvania statutes were constitutionally defective in failing to provide for hearings "at a meaningful time."[52] The Florida statute allowed a clerk of the court to issue a writ of replevin summarily, on the bare assertion of the party seeking the writ that he is "lawfully entitled to the possession" of the property.[53] In Pennsylvania, the

50. Comment, *Foreign Attachment After Sniadach and Fuentes,* 73 COLUM. L. REV. 342, 344 (1973); 407 U.S. at 82, 84-88.

51. Margarita Fuentes had purchased a gas stove and phonograph in Florida. After consistently making installment payments for more than a year, a dispute arose over servicing of the stove. The seller brought suit in small claims court seeking to repossess both the stove and the phonograph. Before Mrs. Fuentes received a summons to answer its conplaint, the seller obtained a writ of replevin ordering seizure of the goods at once. Subsequently, Mrs. Fuentes instituted an action in federal district court challenging the constitutionality of the Florida prejudgment replevin procedure under the due process clause of the fourteenth amendment.

Simultaneously in Pennsylvania, similarly situated plaintiffs had filed an analogous action in a federal district court, likewise challenging the constitutionality of that state's prejudgment replevin procedures. In separate proceedings, the district courts upheld the statutes. On appeal to the United States Supreme Court, the actions were consolidated for review. *See* Fuentes v. Faircloth, 317 F. Supp. 954 (S.D.Fla. 1970); Epps v. Cortese, 326 F. Supp. 127 (E.D.Pa. 1971).

52. 407 U.S. at 80, *quoting* Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

53. The applicant was also required to make this assertion in a complaint initiating a repossession action, and to file a security bond in an amount double the value of the property to be replevied. FLA. STAT. ANN. § 78.07 (Supp. 1972-1973).

applicant for the writ was not even obliged to initiate a court action for repossession.[54] In this regard, the Pennsylvania law did not require that there ever be opportunity for a hearing, before or after seizure. The most required was that an applicant file an "affidavit of the value of the property to be replevied."[55] The party against whom the writ was issued was required to initiate a lawsuit himself[56] in order to have his claim heard and adjudicated on the merits.

The Court held both the Florida and Pennsylvania replevin provisions invalid under the fourteenth amendment as working a deprivation of property without due process of law by denying the right to a prior opportunity to be heard before chattels are taken from the possessor.[57] According to the Court, summary procedures of the type contemplated in the Florida and Pennsylvania statutes are available in only a few limited situations: (1) when directly necessary to secure an important governmental or general public interest; (2) when there is a special need for very prompt action; and (3) when the State has kept strict control over its monopoly of legitimate force, *i.e.*, when the person initiating the seizure is a governmental official responsible for determining, under the standards of a narrowly drawn statute, that it is necessary and justified in the particular instance.[58] In allowing summary seizure when no more than private gain is directly at stake, the statutes in question served no such important governmental or general public interest.[59]

After *Sniadach* and *Fuentes*, it seems apparent that it is contrary to due process and federal policy to permit a state to attach first and hold a hearing later, even if release by bond can be obtained by the owner of the property.[60] Soon after *Fuentes*, however, the Supreme Court ushered in a new phase in its struggle to de-

54. 407 U.S. at 77-78, n.8.
55. *Id.* at 78.
56. *Id.*
57. 407 U.S. at 67-68.
58. *Id.* at 90-91. The Court cited Phillips v. Commissioner, 283 U.S. 589 (1931) (summary seizure allowed to collect the internal revenue of the United States); Central Union Trust Co. v. Garvan, 254 U.S. 554 (1921) (to meet the needs of a national war effort); Fahey v. Mallonee, 332 U.S. 245 (1947) (vital governmental interest); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (vital governmental interest); and North American Storage Co. v. Chicago, 211 U.S. 306 (1908) (to protect the public from contaminated food).
59. 407 U.S. at 92.
60. 7A MOORE'S, *supra* note 13 at E-454.

velop satisfactory constitutional standards to govern the debtor-creditor dispute resolution process.[61]

B. *Mitchell v. W.T. Grant Co.*

With the decision in *Fuentes,* it was clear that most creditors' summary remedies would be constitutionally suspect unless they could comply with the exception to the notice and hearing requirement stated in the "extraordinary situations" rule.[62] It was against this backdrop that *Mitchell v. W.T. Grant Co.*[63] was decided, and surprisingly, the Court sustained a Louisiana sequestration procedure allowing prejudgment seizure without prior notice or opportunity to be heard.

In *Mitchell,* petitioner had purchased consumer goods from W.T. Grant Company under an installment sales contract, subsequently defaulting in his payments. W.T. Grant Company filed suit upon petitioner's default, and in the interim, sought sequestration of the goods purchased by petitioner under the contract.[64] After W.T. Grant Company had posted bond in double the amount claimed in its complaint, the trial judge issued the writ, the actual seizure taking place several days later. At no time prior to seizure was petitioner given notice of the proceedings or afforded an opportunity to be heard.[65] Petitioner subsequently moved to have the writ dissolved on constitutional grounds, his challenge being rejected by the Louisiana Supreme Court.[66] There, the court distinguished sequestration from attachment. While attachment became available only when there was an act, actual or anticipated, by the debtor which would place the creditor at a subsequent disadvantage, sequestration was available on a lesser basis.[67] According to the court, fraud on the part of the debtor was not a prerequisite to sequestration.[68]

61. Pearson, *Due Process and the Debtor: The Impact of Mitchell v. W.T. Grant*—Part I, 28 OKLA. L. REV. 743, 791 (1975) [hereinafter cited as Pearson—Part I].

62. *Id.* at 744; *see also* Clark & Landers, *Sniadach, Fuentes and beyond: The Creditor Meets the Constitution,* 59 VA. L. REV. 355 (1973); Countryman, *The Bill of Rights and the Bill Collector,* 15 ARIZ. L. REV. 521 (1973).

63. 416 U.S. 600 (1974).

64. W.T. Grant Co. v. Mitchell, 263 La. 627, 269 So.2d 186 (1972). Petition for writ of sequestration filed by W.T. Grant Co., Feb. 2, 1972.

65. Pearson—Part I, *supra* note 61 at 747.

66. 263 La. 627, 269 So.2d 186 (1972).

67. 269 So.2d at 190-91.

68. *Id.* at 190.

The United States Supreme Court, Justice White writing for the majority, held that the Louisiana sequestration procedure reflected a constitutionally acceptable accommodation of the competing interests of buyers and sellers, whereby seizure without notice and a prior hearing did not deny the debtor due process of law.[69]

The terms of the sales contract and the Louisiana statutes were focal points for the Court in identifying the conflicting rights of buyer and seller. While the buyer in *Mitchell* did possess a property interest in the goods seized consistent with the holding in *Fuentes,* such interest was "conditional."[70] In other words, until the purchase price was paid in full, petitioner's interest in the property was no greater than the surplus remaining. When he defaulted in his payments, whatever interest he had at the time was subject to defeasance. Correspondingly, and marking Justice White's divergence from the *Fuentes* rationale, W.T. Grant's interest, as seller, was measured by the unpaid balance of the purchase price.[71] While *Fuentes* had isolated the right to use and possession, according it a preferred status among other types of property interests, Justice White chose to reduce property interests into abstract yet quantifiable terms.[72] In doing so, the emphasis was on insuring the ultimate vindication of each party's interest. This "ultimate vindication of interests" approach made it unnecessary to accord special protection to a right dubbed "use and possession" pending a hearing, since *all* rights would be considered and weighed in the balance by a court at some point.[73] In short, the right to use and possession in *Mitchell* was just another category of property interests.

Of additional concern to the *Mitchell* Court was the existence of a vendor's lien under Louisiana law, giving a seller a preference over all other creditors of the buyer for the price of the goods.[74] On

69. 416 U.S. at 607.
70. *Id.* at 604.
71. *Id.*
72. *See* Pearson—Part I, *supra* note 61 at 754.
73. *Id.*
74. Article 3227 of the Louisiana Civil Code provides in part:

> He who has sold to another any movable property, which is not paid for, has a preference on the price of his property, over the other creditors of the purchaser, whether the sale is made on a credit or without, if the property still remains in the possession of the purchaser . . . .

This privilege is to be distinguished from the common law vendor's lien, which the vendor loses when he delivers possession of the article sold to the vendee.

the basis of this fact, Justice White concluded that if a seller is to preserve his priority, "[i]t is imperative when default occurs that the property be sequestered in order to foreclose the possibility that the buyer will sell or otherwise convey the property to third parties . . . ."[75] While it has been ably argued that Justice White's concern with the issue of the vendor's lien was misplaced,[76] the fact of its existence was but one of several factors that, in the Court's view, served to distinguish the facts in *Mitchell* from those in *Fuentes*.

The truly distinguishing features in *Mitchell* were contained in the Louisiana statute. Their presence ultimately tipped the balance in favor of the creditor. Three characteristics of the statute were apparently determinative: (1) the statute provided for judicial supervision of the writ issuing procedure; (2) the statute provided for an immediate post-seizure hearing; and (3) the showing necessary to obtain sequestration was considerably more exacting than in *Fuentes*.[77] Because of these procedural protections built into the Louisiana statute, there was no requirement that an opportunity to be heard precede the actual deprivation. The balance of competing interests had been achieved. Justice White's flexible concept of due process, first espoused in his dissent in *Fuentes*,[78] had now achieved acceptance.

The decision in *Mitchell* was an apparent attempt to circumvent the earlier *Fuentes* holding; on the facts the cases are very similar. The Court seems to have been dissatisfied with *Fuentes*, choosing *Mitchell* to seriously undermine the precedential value of the earlier decision. Similarities between the facts in both cases, however, necessitated some analytical acrobatics on the part of Justice White. The net result was a complicated decision that did not provide the lower courts with that extra measure of guidance so

See Daggett, Louisiana Privileges and Chattel Mortgages 91 (1942).

75. 416 U.S. at 609.

76. A particularly good discussion, not only of the vendor's lien issue in *Mitchell*, but of the entire case and its ramifications, is to be found in Pearson—Part I, cited *supra* note 61 and throughout this note.

77. 416 U.S. at 605-06.

78. Justice White had filed a dissent in *Fuentes* noting: (1) that in practical terms, *Fuentes* would change little since creditors would now simply specify in contracts that they would have the right to retake possession upon default; and (2) that more than just the buyer's property rights were involved in installment sales contracts.
See Pearson—Part I, *supra* note 61 at 752-53; Fuentes v. Shevin, 407 U.S. 67, 97 (1972).

desperately needed in this changing area of the law.[79]

The mechanical litany of controls in the Louisiana statute underwritten by the Court in *Mitchell* ostensibly provided the "constitutionally acceptable accommodation of competing interests" now necessary to support a summary prejudgment attachment procedure. The economic analysis in *Mitchell,* however, while underscoring the Court's new concern with protecting creditors as well as debtors, still left the admiralty procedures in constitutional limbo. "[T]he admiralty's practice of near-automatically issuing process *in rem* and of attachment and garnishment is nontheless still vulnerable to attack."[80] This is largely because the *Mitchell* Court declined to note which combination of controls present in the Louisiana statute would suffice for constitutional purposes.

Sniadach, Fuentes, and *Mitchell* altered traditional notions of procedural due process and gave rise to doubts about the constitutionality of Supplemental Rules B and C. On the other hand, a second cloud on the availability of *in personam* attachment and arrest *in rem,* in the context of jurisdictional due process, has arisen as a result of the decision in *Shaffer v. Heitner.*[81]

C. *Shaffer v. Heitner*

Shaffer was a stockholder's derivative action brought in Dela-

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79. This fact was pointed up by the "fence-straddling" that took place in North Georgia Finishing, Inc. v. Di-Chem, 419 U.S. 601 (1975). In *Di-Chem,* the Supreme Court held a Georgia prejudgment garnishment statute unconstitutional, relying on both *Fuentes* and *Mitchell.* Justice White actually recharacterized the *Fuentes* holding, noting that a due process violation was found with respect to the Florida and Pennsylvania replevin statutes "because the official seizures had been carried out without opportunity for hearing or other safeguards against mistaken repossession." 419 U.S. at 606. The disjunctive phrase "or other safeguards against mistaken repossession" added something more to the *Fuentes* holding than was apparent from the reasoning contained therein. The safeguards were, of course, those same mechanical controls present in the Louisiana statute examined in *Mitchell.* Accordingly, *Di-Chem* indorsed the *Mitchell* rationale while giving lip-service to *Fuentes* principles. The problem is that after *Di-Chem* there is still no consistent understanding of what due process requires, when it is satisfied, and what purpose it serves.

See Pearson, *Due Process and the Debtor: The Impact of Mitchell v. W.T. Grant Co.*—Part II, 29 OKLA. L. REV. 277 (1976) [hereinafter cited as Pearson—Part II]; Scott, *Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process,* 61 VA. L. REV. 807, 809 (1975).

80. 7A MOORE'S, *supra* note 61 at E-456.

81. 97 S.Ct. 2569 (1977).

ware against the Greyhound Corporation, its subsidiary, and twenty-eight of its then present and former directors. Upon filing of the complaint, plaintiff simultaneously moved for a writ of sequestration[82] to attach the defendant directors' stock and options to purchase stock of the parent corporation,[83] all statutorily located in Delaware.[84] The purpose of the sequestration was to compel the defendants to enter a general appearance.[85] The defendant directors attempted to enter a special appearance to quash service of process and to vacate the sequestration, arguing that they had insufficient minimum contacts[86] in Delaware to support the exercise of jurisdiction over them without violating the fourteenth amendment guarantee of due process. The Delaware Chancery Court held that the statutory presence of the stock and stock options in Delaware constituted sufficient minimum contacts to permit the exercise of *quasi in rem* jurisdiction over the defendants.[87] The ruling was ultimately affirmed by the Delaware Supreme Court.[88] The United States Supreme Court, in an opinion by Justice Marshall, reversed.[89] In its decision the Court extended the minimum contacts test of *International Shoe Co. v. Washington,*[90]

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82. Under DEL. CODE ANN. Tit. 10, § 366 (1974), the court may compel the appearance of a defendant by seizure of his property, such property being subject to sale under order of the court to pay the demand of the plaintiff.

83. The value of the sequestered stock was approximately $1.2 million. *See* 97 S. Ct. at 2574, n.7.

84. *See* DEL. CODE ANN. Tit. 8, § 169 (1974).

85. The statute required a defendant to enter a general appearance or default. *See* DEL. CODE ANN. Tit. 10, § 366 (1974).

86. The only "contact" the directors had with the state was by virtue of the company's incorporation there and the fact that pursuant to Delaware law, the situs of stock, options, and warrants applicable thereto was in Delaware.

87. The court emphasized that the primary purpose of the sequestration statute was not to secure possession of property pending trial, but to compel the personal appearance of a nonresident defendant to answer and defend a suit brought against him in a court of equity.
See 97 S.Ct. at 2571.

88. Greyhound Corp. v. Heitner, 361 A.2d 225 (1976).

89. 97 S.Ct. at 2569 (1977).

90. 326 U.S. 310 (1945). *International Shoe* expanded the reach of *in personam* jurisdiction under the various state long-arm statutes, holding it appropriate for state courts to exercise jurisdiction over nonresident defendants only when the nonresident has such minimum contacts with the forum that *in personam* jurisdiction does not violate "traditional notions of fair play and substantial justice." 326 U.S. at 316. Prior to *International Shoe,* state power to exercise jurisdiction had been based on Pennoyer v. Neff, 95 U.S. 714 (1877). *Pennoyer* held that every state possessed exclusive jurisdiction over persons and property within its bor-

heretofore applicable only to *in personam* actions, to *in rem* and *quasi in rem* actions, holding that a state may not assert jurisdiction over nonresidents' property not related to the underlying cause of action unless there exist sufficient minimum contacts among the parties, the contested transaction, and the forum state.[91] "In short, state quasi in rem attachment statutes, even though . . . technically directed only at the property of defendants, will not confer personal jurisdiction on a basis that is distinguishable, on due process grounds, from that considered in *International Shoe* . . . ."[92]

In *Shaffer*, the Court recognized three distinct types of *in rem* actions: the basic *in rem* action which affects the interests of all persons in designated property (typical of actions under Rule C); *quasi in rem* actions in which the plaintiff seeks to secure a preexisting claim in the property or to extinguish or establish the nonexistence of similar interests of other particular persons; and *quasi in rem* actions in which the plaintiff seeks to apply what is conceded to be the property of the defendant to the satisfaction of a claim against the defendant unrelated to the attached property (typical of actions under Rule B).[93] According to the Court, all three types of *in rem* actions are subject to the same constitutional standards, since what is involved in each instance is not simply jurisdiction over a thing, but jurisdiction over the interests of *persons* in a thing.[94] Correspondingly, the principle of "fundamental fairness" requires that "all assertions of state court

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ders, and that no state could exercise jurisdiction over persons or property outside its territory. On the other hand, *Pennoyer* also stood for the proposition that a state could exercise jurisdiction over a nonresident citizen to the extent of his property within the state.

See 95 U.S. at 722-23; *see also* Green, *Jurisdictional Reform in California,* 21 HASTINGS L.J. 1219 (1970); Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois,* 1963 U. ILL.L.F. 533; Hazard, *A General Theory of State Court Jurisdiction,* 1965 SUP.CT.REV. 241; Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis,* 79 HARV.L.REV. 1121 (1966); Traynor, *Is This Conflict Really Necessary?,* 37 TEX.L.REV. 657 (1959); and Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens,* 65 YALE L.J. 289 (1956).

91. 97 S. Ct. at 2582-84.

92. Maritime Law Association of the United States, Doc. No. 610, Proceedings, Fall Meeting 6776 (November 4, 1977) [hereinafter cited as MLA—No. 610].

93. *See* 97 S.Ct. at 2577, n.17, *citing* Hanson v. Denckla, 357 U.S. 235, 246 n.12 (1958).

94. 97 S.Ct. at 2581.

jurisdiction" comport with *International Shoe*'s minimum contacts standard.[95]

In scrutinizing the *Shaffer* facts to determine whether minimum contacts sufficient to support Delaware jurisdiction existed, the Court noted that an individual buying securities in a forum-chartered corporation did not impliedly consent to that forum's jurisdiction on every potential cause of action.[96] In this case, not only was the sequestered property unrelated to the underlying cause of action, but neither did plaintiff allege, nor was there evidence in the record, that any of the defendant directors had even been to Delaware. Further, the sequestration statute was not so narrowly drawn as to indicate that its enactment was predicated on Delaware's overriding interest in supervising the management of Delaware corporations.[97]

Prior to *Shaffer*, assertions of state court jurisdiction over persons and property had been governed by different standards. The concept of state sovereignty as originally embodied in *Pennoyer v. Neff*[98] had sufficed with regard to *in rem* and *quasi in rem* jurisdiction. The *Pennoyer* state power theory envisioned every state as possessing exclusive jurisdiction over persons and property within its borders. Correspondingly, states could also exercise jurisdiction over non-resident citizens to the extent of their property within the state. With the advent of the decision in *International Shoe*, the *Pennoyer* state power "myth,"[99] as applied to *in personam* jurisdiction, was rejected in favor of minimum contacts. The minimum contacts test, however, had never been applied to *in rem* and *quasi in rem* jurisdiction prior to *Shaffer*.[100]

The procedural and jurisdictional due process mandates of the *Sniadach-Mitchell* line and the *Shaffer* decision represent substantial modifications of prior law. As is typical in common-law jurisdictions where change is often slowed by the doctrine of *stare decisis*, the law as applied in the courts, in many instances lags far behind the policy as enunciated in the legislatures and "public" forums of the day. *Sniadach, Fuentes, Mitchell,* and *Shaffer* are, therefore, attempts to bridge the gap between changes in policy and the actual effect of laws as applied. Courts, however, are

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95. *Id.* at 2584-85.
96. *Id.* at 2586.
97. *Id.* at 2585.
98. 95 U.S. 714 (1877).
99. *See* note 90 *supra.*
100. *Id.*

restricted to ruling on the facts before them in each case. As a result, changes in policy can be misconstrued, and thereby misapplied, in areas not contemplated under the limited facts of a particular case. This problem most certainly arises when attempting to apply the cases under discussion to admiralty law. An area of the law with so distinctive a practice should not easily be consumed in policy changes that, by and large, affect legal relations far removed from its concerns. On the other hand, while it is asserted here that the admiralty is indeed so "different" that it should be taken out of the purview of the decisions discussed, the constitutional analysis in light of these decisions must still take place. To be unprepared in the event there appears to be a serious challenge to the constitutionality of Supplemental Rules B and C would certainly indicate a complacency on the part of the admiralty bar concerning these extraordinary remedies. This should not be the case, for in many respects the remedies provided under Rules B and C are the lifeblood of admiralty practice.

IV. Current Constitutional Considerations

A. *The Procedural Due Process Mandate and Supplemental Rules B and C*

The *Sniadach-Mitchell* line of decisions arguably stand for five basic propositions in the context of procedural due process: (1) effective notice to property owners; (2) a meaningful and timely hearing; (3) avoidance of conclusory allegations in the complaint; (4) some type of bonding requirement; and (5) judicial supervision of the writ issuing procedure. It must now be determined whether the summary and *ex parte* nature of the procedures provided for under Supplemental Rules B, C, and E[101] comport with these minimum constitutional requirements.

1. Notice

In most instances, providing personal notice prior to the issuance of a writ of attachment or *in rem* arrest can be avoided altogether. Under Supplemental Rule B(2), however, before a default judgment can be entered and property sold to satisfy a plaintiff's claim,

101. Supplemental Rule E is supplementary to the express provisions of Rules B, C, and D, and is aimed at those commonly applicable procedures. It is therefore necessary to look at both the specific Rule aimed at the procedure involved and to the general provisions embraced within Rule E.

notice must be given to the defendant. The notice requirement seems geared to the concept of good faith.

> Thus, while it might in the ordinary case be unnecessary to check street directories of a large city to determine if a defendant not listed in that city's phone book is in fact situated therein, such would surely not be the case if the plaintiff knew of his own personal knowledge, or upon fairly reliable authority, that the defendant was carrying on a business on a particular street in that city.[102]

Whether such a standard is sufficiently stringent to comport with procedural due process requirements is difficult to determine. The tone of the Advisory Committee's Note pertaining to the notice provided for in Rule B(2) is ambivalent. Basing its position on principles enunciated in *Harris v. Balk*[103] and *Pennoyer v. Neff*,[104] decisions of decidedly questionable import after *Shaffer*, the Committee's Note ventures to say that *no* notice is required in attachment proceedings by the principles of due process "since it is assumed that the garnishee or custodian of property attached will either notify the defendant or be deprived of his right to plead the judgment as a defense in an action against him by the defendant."[105] The Committee, however, goes on to say that "modern conceptions of fairness" dictate that notice be given prior to the rendition of default judgments.[106]

On the other hand, that the notice contemplated in Rule B(2) may be constitutionally sufficient is indirectly implied by the decision in *Mitchell*. In that case, the favored exception to the prior notice requirement—*i.e.*, where the spectre of destruction, alienation, or transfer looms large—appears to have special application to the maritime field. *Mitchell*, however, was a "balancing-of-interests" decision where the absence of the necessity for prior notice was conditioned upon the presence of other safeguards arguably absent from the Rules.

As a matter of practice, most *in rem* arrests, as well as maritime attachments, arise from insured claims. The insurance underwriters are usually prepared to provide the necessary security to release the vessel, and in most instances a bond is not required. Instead, the underwriter furnishes a letter of guarantee without the

102. 7A MOORE'S, *supra* note 13 at ¶B.10, n.2.
103. 198 U.S. 215 (1905).
104. 95 U.S. 714 (1877).
105. ADVISORY COMMITTEE NOTES, *supra* note 13 at 67.
106. *Id.*

actual arrest ever taking place. If, however, the vessel or other property is not released pursuant to the filing of a bond or letter of guarantee, notice by publication is required in order that all persons, including unknown claimants, may appear and be heard.[107] Since the title conferred in a sale pursuant to a judgment *in rem* is "good against the world,"[108] it is especially important that potential claimants be notified in order that any judgment rendered be binding.[109] Accordingly, the nature of the *in rem* proceeding itself, and the fact that maritime liens are "secret,"[110] seems to militate against a more stringent notice requirement under Rule C. The notice by publication provision was designed only to insure "at least constructive notice to lienors and perhaps to owners in rare cases of neglected property."[111]

Vessels registered under the navigation laws of the United States usually, and in some instances must,[112] record liens thereon with the United States Coast Guard at the vessel's home port. In other instances, state law may require licensing of boats and the recording of sellers' security interests. As a result, in virtually all cases involving vessels, owners' interests are recorded with either federal or state authorities.[113] In light of this fact,

> [I]t has been held that the public records must be checked and the holders of such recorded interests notified before the default sale of a vessel in a proceeding *in rem,* in order to foreclose constitutionally the holder of the recorded interest, ...[114]

Standing alone, the notice provisions under Supplemental Rules

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107. Supplemental Rule C(4).

108. The Trenton, 4 F. 657 (E.D. Mich. 1880).

109. *See* ADVISORY COMMITTEE NOTES, *supra* note 13 at 69.

110. The validity of a maritime lien depends neither on possession nor (except for the preferred ship mortgage, which is statutory) on notice through filing. It is therefore often referred to as a "secret" lien. It is also said to be "indelible": that is, since the maritime lien can be executed only by the admiralty court acting in rem, it is, until that court has so acted, good "against the world," including the good faith purchaser of the ship without notice of the lien's existence.

GILMORE & BLACK, *supra* note 9 at 588; *see also* The Yankee Blade, 60 U.S. 19 (How.) 82, 89 (1857); Piedmont & George's Creek Co. v. Seaboard Fisheries Co., 254 U.S. 1, 11-12 (1920).

111. Maritime Law Association of the United States, Doc. No. 606, Annual Meeting 6684—May 6, 1977 [hereinafter cited as MLA—No. 606].

112. *E.G.,* in the case of ship's mortgages.

113. *See* MLA—No. 606, *supra* note 111 at 6684.

114. *Id.*

B and C, taking into consideration the circumstances of maritime attachments and *in rem* arrests, seem to suffice for procedural due process purposes. The overall constitutional problem, however, remains. This is due to the fact that the notice provisions cannot be read as if mutually exclusive of other provisions in the Rules.

2. Meaningful and Timely Hearings

The right to a hearing, like the right to notice, is a vital component of procedural due process. The fact that the *Mitchell* Court condoned, under certain limited circumstances, prejudgment attachments without *prior* notice and a hearing does not derogate the constitutional right itself. Instead, in *Mitchell* as in the case of Rules B and C, the ultimate issue is one of timeliness.

Under present practice, post arrest and attachment hearings are available on motion.[115] There are no explicit provisions in the Rules actually providing for hearings, however. The one type of hearing contemplated in the Rules is a hearing to fix the amount of security.[116] The *Fuentes* decision initially isolated three prerequisites to seizure without a prior hearing.[117] First, it must be necessary to secure an important governmental or public interest. Second, prompt action must be necessary under the circumstances. Third, the state must maintain control of the procedure. *Mitchell,* while on the whole limiting *Fuentes,* nevertheless echoed these same requirements.[118] In light of this continued endorsement by the Supreme Court of the constitutional right to notice and a hearing before final deprivations of property can occur, it seems necessary to explicitly provide for such in the Supplemental Rules. The Rules should at least provide a mechanism for determining, where appropriate, whether to allow an attachment or arrest to stand, and whether to grant a defendant or claimant some countersecurity from a plaintiff.[119]

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115. *Id.*

116. MLA—No. 610, *supra* note 92 at 6788; *see* Supplemental Rule E(5).

117. 407 U.S. at 90-91.

118. In upholding the Louisiana procedure, the *Mitchell* court noted that: (1) the resolution of conflicting property rights is an important state interest; (2) prompt action was necessary because the debtor, by transferring possession of the property, could defeat the vendor's lien of the seller; and (3) Louisiana required that a judge authorize the writ.

416 U.S. at 604-09; *see also* Morse, *The Conflict Between the Supreme Court Admiralty Rules and Sniadach—Fuentes: A Collision Course?,* 3 FLA. ST. L. REV. 1, 12 (1975).

119. *See* Note, *Maritime Attachment and Arrest: Facing a Jurisdictional and*

Amstar Corporation v. M/V ALEXANDROS T[120] is often cited for the proposition that sufficient opportunity for a hearing now exists in most districts.[121] In *Amstar,* a shipper brought an action *in rem* against the M/V ALEXANDROS T and *in personam* against the ship's owner to recover damages for losses sustained when a cargo of raw sugar was delivered in a damaged condition. Defendants moved to dismiss, contending that the procedures established by Rules A through F of the Supplemental Rules, pursuant to which the ship was arrested and attached, constituted unconstitutional deprivations of due process under the fifth amendment.[122] The court found defendants' argument unpersuasive since the owners of the vessel were entitled to immediate postseizure consideration by a judicial officer concerning the validity of the arrest.

The problem with *Amstar* is that the judicial officer in question, a Chambers Judge, is always available day and night in the District of Maryland.[123] While he would have had discretion to decide whether an immediate hearing was necessary, and if so, what standards should apply, procedures in the District of Maryland may not apply in other jurisdictions.[124]

The well-worn contention that the admiralty practice is so singular as to warrant that some things are "reasonable because they are necessary"[125] still retains some vitality. Nevertheless, it does not seem unreasonable that the Supplemental Rules should be amended to afford one who has been deprived of his property the type of postseizure hearing held sufficient in *Mitchell.*[126] Dependence upon the district courts for the promulgation of revised local

Procedural Due Process Attack, 35 WASH. & LEE L. REV. 153, 168-69 (1978).

120. 431 F.Supp. 328 (D.Md. 1977).

121. *See* MLA—No. 610, *supra* note 92 at 6789.

122. 431 F. Supp. at 329.

123. *See* MLA—No. 610, *supra* note 92 at 6789.

124. *Id.* The *Amstar* court did, however, take note of the decision in Techem Chemical Co. Ltd. v. M/T Choyo Maru, 416 F. Supp. 960 (D.Md. 1976), wherein general concern about the quantum of due process accorded under Rules B and C was evidenced.
See 431 F. Supp. at 332.

125. The Mary, 13 U.S. (9 Cranch) 126 (1815).

126. *See* 416 U.S. at 605-06. The sufficiency of the statute there in question was predicated on its inclusion of various safeguards, including: (1) judicial supervision; (2) immediate post-seizure hearings; and (3) a more exacting showing necessary to obtain sequestration.
See supra note 77 and accompanying text.

admiralty rules might well result in different standards in different districts. Due process should, of course, mean the same thing in every district.

3. Conclusory Allegations and Bonding Requirements

In *Jonnet v. Dollar Savings Bank of the City of New York,*[127] the court stated

> We read *Mitchell* and *Di-chem* to require, at a minimum, that the process cannot be instituted without an affidavit or other sworn document stating substantially facts on which the cause of action is predicated, the amount claimed, that the defendant is a nonresident, and that the defendant has specified property in the state.[128]

As written, Rule B(1) permits attachment or garnishment based on affidavit of plaintiff or his attorney. In turn, the affidavit may be based on information and belief.[129] In *Sugar v. Curtis Circulation Company,*[130] the court emphasized that motions for attachment may be "ill-suited" for preliminary *ex parte* determination where based on information and belief.[131] In practice, such complaints and motions are often based only on conclusory allegations. Especially in the case of cargo damage claims, plaintiffs frequently allege only that the cargo was loaded in good order and condition, but not so discharged, wherefore the plaintiff is damaged.[132] Rule E(2)(a) further complicates matters by requiring that pleadings state a cause of action with no greater precision than that required to survive a motion for more definite statement. The Advisory Committee Notes made no mention of these facts by way of justification or elaboration.

Again it would not seem to offend traditional notions of admiralty practice to require at least that the standard be up-graded to that present in the Louisiana statute scrutinized in *Mitchell.* By

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127. 530 F.2d 1123 (3d Cir. 1976) (Pennsylvania foreign attachment statutes serving the interests of potential plaintiffs only, and providing insubstantial protection to prospective defendants against wrongful attachment held unconstitutional).

128. *Id.* at 1129.

129. *See* MLA—No. 610, *supra* note 92 at 6787.

130. 383 F. Supp. 643 (S.D.N.Y. 1974) (New York attachment statute held unconstitutional to the extent that a New York defendant had no meaningful opportunity to vacate an order of attachment granted *ex parte* and without prior notice).

131. *Id.* at 650. *See* discussion in MLA—No. 610, *supra* note 92 at 6787.

132. MLA—No. 610, *supra* note 92 at 6787, n.4.

requiring a statement of the nature of the claim, its amount, and the grounds relied upon for the issuance of the writ,[133] a prophylactic against potential abuse will be provided that neither obscures nor detracts from the actual right to these extraordinary remedies.

In the area of bonding requirements, the admiralty practice is in a somewhat unusual circumstance. As noted previously, most arrests and attachments arise from insured claims where insurance underwriters are commonly prepared to provide the necessary security to release the vessel.[134] Over the years, the admiralty bar has developed its own unwritten rules and practices in this area that, because of the parties, issues, and amounts of money involved, generally adhere to the highest of standards. Further, procedures pertaining to the filing, execution, and relinquishment of bonds are largely uniform. Regardless of the "high state of the art" that the admiralty has achieved in this regard, defendants whose property has been attached or arrested are disadvantaged by the present wording in the Rules. Under Rule E(5), claimants of seized property must post bond or obtain plaintiffs' consent before property is released. Plaintiffs, of course, will usually decline to do so without security for their claims. In addition, the Rules lack any mechanism designed to insure that the property owner is indemnified in the event of wrongful seizure.[135]

4. Judicial Supervision of the Writ Issuing Procedure

In *Mitchell,* the Court viewed judicial control of the *ex parte* sequestration procedure as a necessary defense against the wrongful taking of a debtor's property. In effect, the Court read *Fuentes* as holding that if the functional equivalent of procedural due process protections had been present in the replevin statutes of Florida and Pennsylvania, then the prior notice and hearing requirements could have been omitted so long as the creditor had a cognizable interest in the property seized in his own right.[136] Judicial control, then, was one of the functional equivalents present in the Louisiana statute that swung the balance in favor of allowing the attachment prior to notice and an opportunity to be heard.

Judicial supervision or participation alone, however, does not

133. *I.e.,* a demonstration by the plaintiff of probable cause for the arrest or attachment.
See Mitchell v. W.T. Grant Co., 416 U.S. 600, 605 (1974).

134. *See* discussion in MLA—No. 606, *supra* note 111 at 6684.

135. *See* note 119 *supra.*

136. *See* Pearson—Part I, *supra* note 61 at 785.

compensate for a lack of notice and prior hearing. A more well-reasoned approach would be to tie in judicial supervision *directly* with the right to notice and a hearing. While this would certainly relegate any truly substantive role played by a judge to postseizure hearings, this is arguably where not only the hearing, but the judicial participation should occur. The following passage is indicative of the lack of real justification behind the requirement of prior judicial supervision of the writ issuing procedure:

> While judicial control of summary process is no doubt desireable as a check against mistake and creditor abuse, the procedure under review in *Mitchell* demonstrates why judicial control must be exercised on the basis of definite legal standards. It clearly cannot be regarded as a panacea for the array of due process problems in *Fuentes*. If the issuance of a summary writ is simply a matter of following a general formula, as is true in Louisiana, the judge is not, in fact, acting in a judicial capacity. True, his supervision is personal in a physical sense, but it is not meaningful for due process purposes unless the judge can inquire into or assess the reasons why summary seizure is necessary in each case. In the absence of such an inquiry, the benefits of judicial control are virtually nil and the issuance of summary process becomes more clerical in nature. . . . Given these shortcomings, the judge's role in the context of an *ex parte* proceeding becomes even more doubtful. . . . It is unrealistic to expect a judge—who has neither the time nor the perspective—to bring out facts favorable to the absent debtor's position.[137]

The concern with the parameters of procedural due process in the debtor-creditor area dictates some modification in the present Supplemental Rules regarding attachments and arrests *in rem*. As written, the Rules provide less than the requisite amount of procedural safeguards required to insure a constitutional accommodation of conflicting interests in every instance. With the present state of affairs, the door is open to radical change in the Rules because of their enunciated deficiencies. It would be far better to institute minor changes as a precautionary measure against later substantive changes that might possibly eradicate, for all intents and purposes, the right to these remedies peculiarly maritime in nature.

B. *Jurisdictional Due Process and Shaffer*

Maritime attachments and actions *in rem* can be readily distin-

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137. *Id.* at 789-90.

guished by the amount of jurisdictional power they vest in a court. In a proceeding begun by attachment, the ultimate judgment is conclusive only in reference to the defendant's interest in the property attached or in the obligation of the garnishee to the defendant.[138] Actions *in rem* vest a court with jurisdiction to issue a binding judgment affecting the interests of all persons in the property, not subject to collateral attack.[139] While significantly different in the extent of jurisdictional power conferred, both procedures, as a threshold matter, allow courts to assert jurisdiction over persons with interests in seized property, whether such persons are actually before the court or not.

> Admiralty has long held that an in rem action could be commenced in any district where the offending res was physically situated or into which it would come pending suit; and that an in personam attachment could be commenced in any district in which the defendant has goods, chattels, credits or effects. The propriety of the action did not depend upon the contacts the defendant or owner of the property had with the district, but was dependent only upon the physical presence of the affected property.[140]

The constitutionality of assertions of jurisdiction based on the presence of property is now arguably controlled by the Supreme Court's decision in *Shaffer v. Heitner.*[141] The question that must now be addressed is whether Supplemental Rules B and C as a means of asserting jurisdiction, exceed the limits of jurisdictional due process.

The *Shaffer* opinion, while containing general statements regarding *in rem* jurisdiction in a generic sense, has its greatest potential impact on certain *quasi in rem* actions of the type contemplated in Rule B. Specifically, these would be actions in which the plaintiff seeks to apply what is conceded to be property of the defendant to the satisfaction of a claim unrelated to the attached property. Also encompassed within the purview of *Shaffer* are basic *in rem* actions of the type contemplated in Rule C.

The *Shaffer* Court determined that in all instances "the basis for jurisdiction must be sufficient to justify exercising 'jurisdiction over the interests of persons in a thing.' "[142] The Court had, with this determination, acknowledged that, as Justice Holmes

138. *See* RESTATEMENT OF THE LAW OF JUDGMENTS § 76 (1942).
139. *Id.* at § 2, comment a (1942).
140. 7A MOORE'S, *supra* note 13 at E-456.
141. 97 S. Ct. 2569 (1977).
142. *Id.* at 2582.

had said at the turn of the century, "[A]ll proceedings, like all rights, are really against persons."[143] The consequence of the acknowledgment is that the *International Shoe* minimum contacts standard now applies in all assertions of jurisdiction—not only to *in personam* actions as before, but to *in rem* and *quasi in rem* actions as well.

In the final analysis, however, careful scrutiny reveals *Shaffer* to be a narrow holding premised on broad principles. Local registration of corporate stock provided defendants' only contact with the forum in *Shaffer.* In addition, plaintiff's use of the Delaware sequestration statute put defendants in the unenviable position of either coming into Delaware and defending on the merits, or suffering a default judgment to the extent of the value of the attached stock.[144] The facts are distinguishable from those usually operative in both *in rem* and attachment proceedings in admiralty. In *in rem* arrest situations, of course, the action lies against the physically present *res* itself. In addition, in attachment situations, Supplemental Rule E(8) provides for limited or restricted appearances. It is doubtful, however, whether these distinctions alone suffice to insure the continued constitutionality of the Rules from the standpoint of jurisdictional due process. In fact, it initially appears that they do not, for the Court in *Shaffer* specifically stated that "if a direct assertion of personal jurisdiction over the defendant would violate the Constitution, it would seem that an indirect assertion of that jurisdiction [*i.e.,* by attaching property of the defendant unrelated to the cause of action by virtue of its fortuitous presence within a court's territorial jurisdiction] should be equally impermissable."[145]

Language in *Shaffer* such as that quoted above has convinced some that Rule B and C procedures currently stand on tenuous constitutional grounds. While constitutional problems may exist with respect to these Rules, a close examination of *Shaffer* exposes several statements that, although not specifically addressed to admiralty and maritime procedures, evidence a continued regard for the efficacy of such summary *ex parte* actions under proper circumstances.

In announcing that the standard for determining whether the exercise of jurisdiction over interests of persons in a thing, consis-

143. Tyler v. Court of Registration, 175 Mass. 71, 76, 55 N.E. 812, 814 (1900), *appeal dismissed* 179 U.S. 405 (1900).

144. *See* note 85 *supra.*

145. 97 S. Ct. at 2583.

tent with the due process clause, is the minimum contacts standard, the Court immediately qualifies its holding, noting

> [t]his argument, of course, does not ignore the fact that the presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation.[146]

In *Shaffer,* the Court was contemplating true *in rem* actions of the type provided for pursuant to rule C, and *quasi in rem* actions where claims to the property itself are the source of the controversy.[147] Additionally, the Court noted that a state's interest in assuring a procedure for the peaceful resolution of disputes about the possession of property within its territory, as well as the fact that important records and witnesses may be found within its borders, would also support jurisdiction.[148] More importantly, however, in a footnote the Court states that its holding does not consider "the question whether the presence of a defendant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff."[149] The Court even felt compelled to add that while not decisive, "history must be considered as supporting the proposition that jurisdiction based solely on the presence of property satisfies the demands of due process. . . ."[150] The foregoing language should inure to the benefit of procedures under Rule B in the appropriate instance.

On the other hand, *quasi in rem* actions where the property attached is unrelated to the underlying cause of action precipitated the *Shaffer* decision. Nevertheless, it also appears that such actions are the root of equivocal language in the opinion. Landmark decisions are often rendered in this manner, revealing that such decisions do not generally attempt to change the course of the law in one stroke. As is more often the case, they reflect an underlying policy change in the law as applied. *Shaffer* tracks this customary procedure, leaving the way paved for further refinements in the law pursuant to the official change in policy. Because *Shaffer* is a reasonably sound opinion that studiously avoids blanket generalizations, *quasi in rem* procedures pursuant to Rule B may still be constitutionally vindicated.

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146. *Id.* at 2582.
147. *Id.*
148. *Id.*
149. *Id.* at 2584, n.37.
150. *Id.* at 2584.

In admiralty, the entity exercising jurisdiction is the United States, rather than an individual state. Conversely, *International Shoe* was concerned with constitutional limitations on the exercise of sovereign *state* power under the fourteenth amendment. *Shaffer* also deals with state court jurisdiction, and it is therefore necessary to translate its treatment of the state jurisdiction issue into federal terms.[151]

> Where the federal court's jurisdiction has been invoked upon the basis of federal question or admiralty jurisdiction, however, the substantive law is, of course, federal and the assertion of power is thus exclusively federal. Rule 4 still, however, imports state procedures for making service of process. Some courts have tended simply to apply *International Shoe* standards to such cases without attaching weight to the consideration that it is the Fifth Amendment due process clause which is relevant to federal question and admiralty cases rather than the Fourteenth Amendment due process clause under which *International Shoe* was decided.[152]

In *Holt v. Klosters Rederi A/S,*[153] an admiralty action against an alien corporation seeking pecuniary loss for the death of plaintiff's wife pursuant to the Death on the High Seas Act,[154] the court noted that although as applied to the states, the constitutional test for personal jurisdiction involves a determination of whether the defendant has certain minimal contacts with the forum state, the appropriate inquiry when suit is based upon a federally created right is whether the defendant has certain minimal contacts with the United States, in order to satisfy due process requirements under the fifth amendment.[155] Similarly, in *First Flight Company v. National Car Loading Corporation,*[156] the court stated:

> What has frequently been overlooked is that this same basic principle has long been applied to the United States itself, so that the United States is deemed to have personal jurisdiction over any defendant within the United States. Because of this oversight, and by analogy to the application of the basic principle to the states, there is a line of cases apparently denying the validity of an exercise of

151. MLA—No. 610, *supra* note 92 at 6777.
152. *Id.* at 6778.
153. 355 F. Supp. 354 (W.D. Mich. 1973).
154. 46 U.S.C. §§ 761 *et. seq.* (1920).
155. 355 F. Supp. at 357. *See also* Edward J. Moriarty & Co. v. General Tire & Rubber Co., 289 F. Supp. 381 (1967); Alco Standard Corp. v. Benalal, 345 F. Supp. 14 (E.D.Pa. 1972).
156. 209 F. Supp. 730 (E.D.Tenn. 1962).

> personal jurisdiction by a federal court over a defendant present within the United States unless the defendant is also present (or "doing business," etc.) within the district in which the court is held. In other words, the restrictions of the Fourteenth Amendment upon state jurisdiction have been applied by these cases to federal jurisdiction. The anomaly here lies not only in overlooking the principle that the United States may exercise personal jurisdiction over any defendant within the United States, but also in limiting federal action by a constitutional provision applicable only to state action.[157]

Where federal courts have seen fit to apply the fifth rather than fourteenth amendment, the result has been a less stringent minimum contacts standard. In these instances, courts have used an "aggregate contacts with the United States" approach, the assumption being that a foreign defendant has little reason to prefer one district over another.[158] The corollary of this assumption is that if a foreign defendant does have such a preference, he probably also has sufficient contacts with the United States in some particular district.[159] This is not to say, however, that "aggregate contacts" is so lenient a standard that it will foreclose the possibility of defeating a court's attempt at asserting jurisdiction on the basis thereof. *Grevas v. M/V Olympic Pegasus*[160] emphasizes this fact. In *Grevas,* a Greek seaman brought an action in Virginia against a vessel and its owner to recover for personal injuries sustained in an accident on board ship. The United States District Court for the Eastern District of Virginia dismissed the action for lack of *in personam* jurisdiction over the owner. In upholding the dismissal, the court of appeals noted that the few activities in which defendant engaged in Virginia were derived from a single visit not amounting "to contacts sufficient to subject defendant to in personam jurisdiction. . . ."[161] Accordingly, it can be assumed that federal courts can consistently apply an "aggregate contacts" test in the proper federal context without abusing principles of fundamental fairness. If so, the procedures contemplated in Supplemental Rules B and C can retain their constitutional validity while simultaneously adhering to the *Shaffer* mandate without any truly

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157. *Id.* at 736-37.
158. MLA—No. 610, *supra* note 92 at 6779.
159. *Id.*
160. 557 F.2d 65 (4th Cir. 1977).
161. *Id.* at 68.

substantive or radical changes being made in these historically maritime remedies.

V. Summary and Conclusions

While it cannot be unequivocally stated that Supplemental Rules B and C are unconstitutional in light of the *Sniadach-Mitchell* series of cases and the *Shaffer* decision, several problem areas have been isolated in the Rules. In the procedural due process context, the more critical problem areas seem to occur regarding the issues of timely hearings, and the propensity for conclusory allegations based on information and belief commonly found in pleadings filed pursuant to Rules B and C.

In the immediate aftermath of *Sniadach* and *Fuentes,* prejudgment attachments were arguably unconstitutional where defendants had no prior opportunity to be heard. "Moreover, *Fuentes* made clear that the fact the affected property or right could be regained pending ultimate resolution on the merits by the posting of a bond was not a sufficient cause to dispense with the pre-taking hearing or something akin thereto."[162] The only instance in which such a summary procedure was available was under the "extraordinary situations" rule, characterized by: (1) the presence of an overriding governmental or public interest; (2) a need for prompt action; and (3) state control of the procedure. The *Mitchell* decision abandoned the rigid *Fuentes* scheme in favor of a flexible due process concept, holding that seizures without notice and a prior hearing need not invariably deny a debtor due process of law.[163] While relaxing the overall due process standards from those enunciated in *Fuentes,* however, the *Mitchell* opinion indorsed the presence of certain safeguards in the Louisiana statute, which safeguards—judicial supervision of the writ issuing procedure, provision for immediate post-seizure hearings, and substantive pleading (*i.e.,* based on something more than conclusory allegations)—but *counterbalances* the need for a hearing prior to an actual deprivation of property. In other words, the right to a prior hearing may be dispensed with where adequate countermeasures are provided by statute, court rule, or, arguably, where extenuating circumstances would indicate a need for such summary action.

Under the Supplemental Rules, the absence of adequate provi-

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162. 7A Moore's, *supra* note 13 at E-454; *see* Fuentes v. Shevin, 407 U.S. 67, 84-85 (1972).

163. *See* Mitchell v. W.T. Grant Co., 416 U.S. 600, 607 (1974).

sions regarding hearings is made more conspicuous by a corresponding lack of other countermeasures provided in lieu thereof. There is no provision for judicial participation in the commencement of actions under Rules B and C, and conclusory allegations based on information and belief are the rule rather than the exception in pleadings. While justification for the former provision may be lacking,[164] the latter is a function of statutory direction, insofar as Rule E(2)(a) dictates that pleadings state a cause of action with no greater precision than that required to survive a motion for more definite statement.[165]

In the jurisdictional due process area, the *Shaffer* decision especially creates additional problems for Supplemental Rule B. Maritime prejudgment attachments, like the sequestration procedure in *Shaffer*, are most commonly instituted against property unrelated to the underlying cause of action, a situation which helped precipitate the *Shaffer* holding. In sum, if *Mitchell* and *Shaffer* were today held expressly applicable to admiralty actions commenced under Supplemental Rules B and C, it is likely that both Rules would be found contitutionally deficient not only as applied, but as written.

On the other hand, a persuasive argument in favor of the continued constitutionality of the Rules lies in the historical policy considerations underlying the admiralty practice.

> On the subject particularly under consideration, it appears from an English writer, that the practice of issuing attachments had been discontinued in the English courts of admiralty, while in some of our own courts it was still in use, perhaps not so generally as to sanction our sustaining it altogether on authority, were we not of opinion, that it has the highest sanction also, as well in principle as convenience.[166]

While ships and the shipping industry have grown immeasureably since these words were uttered by the Supreme Court in *Manro v. Almeida*, the underlying reasoning for the statement remains apropos.

The maritime prejudgment attachment provisions were preserved in the Supplemental Rules in order that due deference be given to the transient nature of the shipping industry. Rule B accordingly enables a claimant to obtain jurisdiction over credits

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164. *See infra* notes 128-133 and accompanying text.
165. *Id.*
166. Manro v. Almeida, 23 U.S. (10 Wheat.) 473, 489 (1825).

and effects of a defendant "in any number of places where these may be attached or garnished, although the defendant's residence or place of business may be halfway around the world,. . . ."[167] Claimants thereby circumvent many of the jurisdictional and venue problems confronting terrestrial plaintiffs.

Proceedings *in rem* were preserved in the Supplemental Rules for many of the same reasons, and additionally, because such actions are derived from the ancient maritime codes promulgated in the eastern Mediterranean before the rise of the Roman Empire. It was from such codes that the general maritime law of the United States, with, of course, an English influence, was derived.

Today, as in the distant past, a ship may be in one location for only a very short time. Those who provide services or who travel with the ship should be provided with a mechanism whereby they can have assurances that any legitimate claim inuring to their benefit can be resolved. Supplemental Rules B and C provide just such a mechanism. That the procedures contemplated thereunder are less than sound from a constitutional standpoint, where the constitutional standard is premised on "land-based" principles, begs the question. There would be no need for a separate body of admiralty law and procedure if the subject-matter contemplated was of the same nature as that involved in *Mitchell* and *Shaffer.* Of additional significance is the fact that the admiralty rules are to be, and always have been, promulgated by the Supreme Court. If the Court has the responsibility for mandating the procedures to be followed in admiralty actions, it would seem that it would have long since modified practice under the Supplemental Rules to comport with the holdings in the cases discussed. In the area of the Supplemental Rules, there are decidedly fewer constraints on Supreme Court action. For instance, there is no need to await the appropriate case before dictating change in the Rules. Likewise, there is no need to depend on Congressional action or inaction to precipitate a ruling by the Court. Finally, one is hardpressed to assume that the Court, in rendering its decisions in *Sniadach, Fuentes, Mitchell,* and *Shaffer,* was totally oblivious to the ramifications such holdings would have for the admiralty practice. It is correspondingly apparent that the Court deemed it necessary to mention the admiralty practice because the admiralty practice is "different."

On the other hand, there is room for improvement in the proce-

167. 7A MOORE'S, *supra* note 13 at ¶.90.

dures provided for under Rules B and C. Without detracting from the necessarily extraordinary maritime remedies, the Rules should be updated to eliminate argument regarding their constitutionality. Policy arguments espousing the peculiarity of the admiralty practice, while well founded and persuasive, may be insufficient in the eyes of many courts. Rather than taking the chance that a court may rule "erroneously" on the constitutionality of Rule B or C procedures, preventive measures seem to be in order.

Jon L. Goodman