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NOTES

QUIET REVOLUTION: THE DEVELOPMENT OF NOTICE REQUIREMENTS IN ADMIRALTY IN REM ACTIONS

I. INTRODUCTION

The odysseys of seafaring men and their ships have given rise to the civil law's most unique and drastic remedy, the admiralty in rem action.[1] Because a ship is by nature a wanderer visiting many ports, local legal procedures used by one landlubber against another would provide little protection for victims of a captain's torts or for creditor suppliers of a ship's necessities. Furthermore, the ineffectiveness of these procedures would make it nearly impossible for an impecunious captain to obtain provisions or repairs for his ship on credit in a strange port. The law's answer to maritime commerce has been the creation of a nonpossessory maritime "lien" for torts and for necessaries supplied a ship and the development of a lien enforcement action against the ship itself, commenced by its seizure.[2] The "lien's" coverage is broad, and its enforcement quick and final.

Maritime and non-maritime liens have little in common: "A lien is a lien is a lien, but a maritime lien is not."[3] A maritime lien is conferred by law on parties to certain tortious and contractual relationships. Unlike a Uniform Commercial Code article IX security interest, for example, a maritime lien cannot be created by agreement of the parties in a relationship where the law confers none.[4] In general,[5] maritime liens arise out of maritime activities,

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

2. For an excellent general survey of the development of maritime liens see 2 BENEDICT ON ADMIRALTY §§ 21-27 (7th ed. I. Hall, A. Sann & S. Bellman 1975) [hereinafter cited as BENEDICT ON ADMIRALTY].

3. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 9-2 (2d ed. 1975).

4. *Id.*

5. Because the purpose of this note is to examine but one aspect of admiralty in rem actions, peripheral questions such as the sources and characteristics of maritime liens cannot be examined in any detail. For discussions of maritime liens, see generally, 2 BENEDICT ON ADMIRALTY, *supra* note 2, §§ 21-66; G. GILMORE & C. BLACK, *supra* note 3, at §§ 9-1 to 9-5. Older standard works are G. ROBINSON, HANDBOOK OF ADMIRALTY LAW IN THE UNITED STATES §§ 47-66 (1939); R. HUGHES,

such as: services provided a vessel[6] by the ship's crew, salvors, and others;[7] necessaries supplied to the crew;[8] injury caused through the vessel's instrumentality;[9] credit given upon its security;[10] or by statutes conferring maritime liens, such as the Ship Mortgage Act.[11] Unlike land liens, a maritime lien requires neither possession nor filing[12] and is thus said to be "secret." The lien endures until lost by laches[13] or destroyed by an in rem action. An in rem action on any lien destroys all liens—even those whose holders are unaware of the action—and the purchaser at the judicial sale thus takes title to the ship "good against all the world."[14]

Priority among maritime lienors is not "first in time, first in right" as it is among land lienors; later liens take first priority. There is also a complex system of ranking different types of liens.[15] This system of temporal priority and hierarchies of lien types attempts to reward diligence and award first payment to the claims of those whose services benefit the ship most. Thus, seamen's

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HANDBOOK OF ADMIRALTY LAW §§ 45-52 (2d ed. 1920).

6. It is often necessary to determine whether an object is a vessel for various aspects of maritime and admiralty law. For particular definitions see 1 BENEDICT ON ADMIRALTY, *supra* note 2, §§ 161-67; Note, *What is a "Vessel" in Admiralty Law?*, 6 CLEV. MAR. L. REV. 139 (1957).

7. 2 BENEDICT ON ADMIRALTY, *supra* note 2, § 32.

8. *Id.* §§ 34-37.

9. *Id.* §§ 44-45.

10. *Id.* § 33; G. GILMORE & C. BLACK, *supra* note 3, § 9-21.

11. Ship Mortgage Act of 1920, 46 U.S.C. §§ 911-984 (1970), as discussed in 2 BENEDICT ON ADMIRALTY, *supra* note 2, §§ 71-73 and G. GILMORE & C. BLACK, *supra* note 3, § 9-27 to 9-94. *See* G. GILMORE & C. BLACK, *supra* note 3, § 9-20.

12. Some statutorily created maritime liens, such as preferred ship mortgages under the Ship Mortgage Act of 1920, 46 U.S.C. §§ 911-94, require filing, unlike the traditional maritime lien. For secondary authority discussing the Act, see note 11 *supra*.

13. In determining the existence of laches in admiralty cases, courts place little reliance on common law or statutory limitation periods. Rather,

> [t]he inquiry on laches partakes of two parts—(1) the excuse for the delay and (2) prejudice to the pursued. [T]he emphasis is more and more on (2)—prejudice—than on (1). "A weak excuse may suffice if there has been no prejudice; an exceedingly good one might still do even where there has been some." . . . The delay aspect is extremely relative.

Fidelity & Casualty Co. v. C/B Mr. Kim, 345 F.2d 45, 50-51 (5th Cir. 1965). *See also* G. GILMORE & C. BLACK, *supra* note 3, § 9-80 to 9-89.

14. The classic statement of the law is *The Trenton*, 4 F. 657 (E.D. Mich. 1880). *See also* G. GILMORE & C. BLACK, *supra* note 3, § 9-85.

15. G. GILMORE & C. BLACK, *supra* note 3, § 9-61; Note, *Priorities of Maritime Liens*, 69 HARV. L. REV. 525 (1956).

wages and salvors' claims are paid before liens based on supply contracts.

One may think of a maritime lien as any claim for which a particular *ship* is liable as debtor or tortfeasor, regardless of any personal liability of its owner.[16] In essence, courts personify the ship, by saying that it is the ship herself that is "the offending thing," citing early prize cases in which the ship, rather than her owner or captain, was characterized as the guilty aggressor.[17] Under this theory, the ship herself is served as party defendant when found within the court's jurisdiction and taken into the marshal's custody. Consequently, a vessel owner joins an in rem action not as defendant but as claimant "to defend his *res* as a guardian would to defend his ward . . . ."[18] In light of the doctrine of personification, a bona fide purchaser of a ship may discover his ship remains liable for events that occurred while it was in the hands of a previous owner.[19] The liability limit in an in rem action is the value of the ship after the voyage.[20]

English courts reject the personification theory. Rather, in English admiralty law, the in rem action is a procedural device designed to coerce the owner into appearing and defending a claim arising out of the operation of his vessel.[21] In Great Britain, an in rem action "is in substance an action against the owner of the

16. "The lien and the proceeding *in rem* are, therefore, correlative—where one exists, the other can be taken, and not otherwise." The Rock Island Bridge, 73 U.S. (6 Wall.) 213, 214 (1867). *See also* Supplemental Rule C, FED. R. CIV. P.: "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." *See* G. GILMORE & C. BLACK, *supra* note 3, § 9-19.

17. The Brig Malek Adhel, 43 U.S. (2 How.) 209, 233 (1844) (piracy) ("It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offense has been done as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof"); The Palmyra, 25 U.S. (12 Wheat.) 1 (1827) (condemnation for piracy); U.S. v. The Little Charles, 26 F. Cas. 979 (C.D. Va. 1819) (No. 15,612) (forfeiture for violation of 1807 Embargo Act).

18. F. WISWALL, THE DEVELOPMENT OF ADMIRALTY JURISDICTION AND PRACTICE SINCE 1800 at 163 (1970).

19. G. GILMORE & C. BLACK, *supra* note 3, § 9-5.

20. *Id.* § 10. *See also id.* § 9-90, which asserts that this rule is breaking down, *citing* The Fairisle, 76 F. Supp. 27 (D. Md. 1947), *aff'd*, 171 F.2d 408 (4th Cir. 1949); Mosher v. Tate, 182 F.2d 475 (9th Cir. 1950); 64 HARV. L. REV. 164 (1950).

21. F. WISWALL, *supra* note 18, at 156-207. *See generally* Hebert, *The Origin and Nature of Maritime Liens*, 4 TUL. L. REV. 381 (1930).

vessel and the vessel is not liable unless the owners are personally liable . . . ."[22] Furthermore, an in rem judgment in an English admiralty action may exceed the value of the seized res if the owner appears and defends. A claimant appearing in a similar action in the United States is in no similar danger.[23]

The personification theory has declined in acceptance in the United States since the turn of the century. It is now largely discredited, and has been labeled a mere "literary theme" whose disappearance is "to be welcomed."[24] The personification theory maintains vitality, however, because it provides a rationale for concluding that a ship, and not her owner, may be liable—a result many courts find difficult to justify without the theory.[25]

If the personification theory is taken to its logical extreme, the constitutional due process requirement of notice and opportunity to defend is satisfied by pasting a summons to the vessel's bridge. Just who the owner is and whether and how he receives notice of the action is irrelevant under this theory because the "defendant" has been served.[26] Under present standards of due process, the shipowner must be given notice and an opportunity to defend, since he is the real potential loser in an in rem action.

The purpose of this note is to examine the constitutional due process requirement of notice as applied in admiralty in rem proceedings, developments since the early prize cases, and portents of future change.

II. Notice Requirements in Admiralty In Rem Cases

A. *Early Cases*

A fundamental principle of Anglo-American jurisprudence is that a man is to be warned of any legal action in which his life, personal liberty, or property might be directly affected.[27] Notice of legal proceedings was required, both within as well as outside of

22. Hebert, *supra* note 21, at 385.

23. *Id.* at 385-86. On the other hand, an in personam suit initiated by attachment may culminate in the owner's personal liability with the seized vessel being primary security.

24. G. Gilmore & C. Black, *supra* note 3, § 9-18.

25. *Id.* § 9-18(a).

26. *See* note 17 *supra.*

27. W. McKenchnie, The Magna Carta 83 (2d ed. 1914). For this reason, the courts in Anglo-Saxon and Norman times showed extreme reluctance to enter a default for failure to appear when no summons to notify the parties of the action had been issued.

the admiralty, by fundamental fairness and simple justice long before it was part of "due process" under the fifth and fourteenth amendments. Citing no constitutional due process or case law authority, Chief Justice Marshall stated:

> [I]t is a principle of natural justice, of universal obligation, that before the rights of an individual be found by judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. Where these proceedings are against the person, notice is served personally, or by publication; where they are *in rem*, notice is served upon the thing itself. This is necessarily notice to all those who have any interest in the thing, and is reasonable, because it is necessary, and because it is the part of common prudence for all those who have any interest in it, to guard that interest by persons who are in a situation to protect it.[28]

Thus Marshall emphasized that notice by seizure satisfied the requirements of fundamental justice because it was practically necessary, and because it was reasonable to assume that shipowners will themselves watch over their property or will appoint someone who will.

The personification theory was firmly established by 1815 when *The Mary* was decided, and Marshall often used it to justify the exercise of in rem jurisdiction. Three years after *The Mary,* in a ship forfeiture action for a captain's failure to report a stop at a foreign port—both the stop and the failure to report it being a violation of the 1807 Embargo Act[29]—Marshall wrote in *The Little Charles:*

> [T]his is not a proceeding against the owner; it is a proceeding against the vessel, for an offense committed by the vessel, which is not less an offense, and does not the less subject her to forfeiture, because it was committed without the authority, and against the will of the owner. It is true that inanimate matter can commit no offense. The mere wood, iron, and sails of the ship, cannot, of themselves, violate the law. But this body is animated and put into action by the crew, who are guided by the master. The vessel acts and speaks by the master. She reports herself by the master. It is, therefore, not unreasonable, that the vessel should be affected by this report.[30]

28. The Mary, 13 U.S. (9 Cranch) 126, 144 (1815) (prize case).
29. Embargo Act of 1807, ch. 5, 2 Stat. 451 (1807) (repealed 1809).
30. U.S. v. The Little Charles, 26 F. Cas. 979, 982 (C.D. Va. 1819).

The Mary and *The Little Charles* typify early in rem actions in that they are not maritime lien cases.[31] Most of the early cases were prize cases or condemnation actions for piracy or breach of customs laws. Only in customs forfeiture cases was there any notice other than seizure. In 1799 Congress had provided, as part of import duty legislation, that prior to judicial sale of a forfeited vessel an advertisement of the sale directed to the shipowner must be published in a local newspaper.[32] In most early in rem cases, however, tacking the summons to the mast was the only notice.

It has been suggested that while simple seizure and service on the vessel might be justifiable under prize and customs cases, the practice should not have been allowed in lien enforcement actions:

> [I]t is possible to conceive of a valid distinction between protection of the public interest against piracy or breach of the customs laws, out of which the condemnation cases grew, and protection of a private right against injury. Appropriation of an innocent owner's property as a means of protecting the revenue is perhaps easier to accept than a similar action to protect a private claim.[33]

Nevertheless the in rem procedures used in condemnation cases were extended to private parties' claims in admiralty jurisdiction, including contract and tort claims.[34] This extension may have resulted from increasing pressure to protect suppliers of necessities for the rapidly developing maritime trade and to unify the various state statutes giving such suppliers maritime liens.[35]

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31. Tay, *Introduction to the Law of Maritime Liens*, 47 TUL. L. REV. 559, 561 (1973).
32. Act of March 2, 1799, ch. 22, 1 Stat. 627 (1799).
33. Tay, *supra* note 31, at 561.
34. *Id.* at 560.
35. The role of state-law created liens in admiralty law is one of the most conceptually confusing areas of maritime jurisprudence. For a summary see G. GILMORE & C. BLACK, *supra* note 3, § 9-24 to 9-30. In The General Smith, 17 U.S. (4 Wheat.) 438 (1819), the Court held that no lien is given by the general maritime law for supplies and repairs furnished a vessel in her home port. In dicta, however, the Court implied that such liens could be created by state statutes. This led to passage in all the states of various statutes giving liens for various services and goods supplied to ships. Typical of the cases decided in federal courts under these statutes is The Globe, 10 F. Cas. 480 (N.D.N.Y. 1850) (No. 5484). The dictum in The General Smith was confirmed in The Planter, 32 U.S. (7 Pet.) 324 (1833) and incorporated into the first admiralty rules in 1844. Rules of Practice, 44 U.S. (3 How.) ix (1844). In 1858 the Court changed the rules to eliminate in rem actions based on state-created liens. Admiralty Rule, 62 U.S. (21 How.) iv (1858). The Court reversed itself in 1872, but only after it had ruled in The Moses Taylor, 71 U.S. (4 Wall.) 411 (1866), that, because exclusive admiralty jurisdiction was given to the federal government by U.S. CONST. art. III, § 2,

B. *Establishment and Construction of Publication Requirements*

As the extension of condemnation procedures to private claims was taking place, the first additional, although admittedly meager, notice requirement was added. In 1844, the United States Supreme Court promulgated its first admiralty rules.[36] Among them was Rule IX, requiring publication in all in rem actions.

> In all cases of seizure and in other suits and proceedings in rem, the process, unless otherwise provided for by statute, shall be by a warrant of arrest of the ship, goods or other things to be arrested, and the marshal shall thereupon arrest and take the ship, goods or other thing into his possession for safe custody; and shall cause public notice thereof and of the time assigned for the return of such process and the hearing of the cause to be given in such newspaper within the district as the District Court shall order, and if there is no newspaper published therein, then in such other public places in the district as the court shall direct.[37]

The Rule remained unchanged until the merger of admiralty and civil actions in 1966 when the Supplemental Rules for Certain Admiralty and Maritime Claims were promulgated.

As might be expected, little time elapsed between the promulgation of the 1844 rules and a challenge to a judicial sale on grounds of defective notice. In 1845, Nathaniel Finney libeled[38] *The Hornet* for wages due for his services as a pilot.[39] The court rules of the southern district of New York, adopted pursuant to Rule IX, required daily publication for six days in the same manner as for customs forfeiture under the 1799 act. The marshal published for only five days. *The Hornet* was sold and Finney received his money. The vessel's former owners, however, moved the court to set aside the sale on grounds of irregularity of publication. The court ruled that where publication is irregular, the sale will be set aside so long as all parties can be returned to their original financial postures and the libellant will suffer no delay or injury beyond that which he would suffer had the claimants promptly defended. As a result, the court set aside the judicial sale of *The Hornet.*

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federal courts alone could enforce such liens. The picture has been clouded further by federal legislation.

36. Rules of Practice, 44 U.S. (3 How.) ix (1844).

37. 44 U.S. (3 How.) at xi.

38. A libel is the method by which a maritime lienor arrests a ship. G. GILMORE & C. BLACK, *supra* note 3, § 9-85.

39. The Hornet, 12 F. Cas. 528 (S.D.N.Y. 1847) (No. 6,704).

Thirty-five years later in *Daily v. Doe,*[40] the same court refused to set aside a judicial sale because of a minor error in the listing of the vessel's name in the newspaper publication. The court did, however, clarify the effects of such defects. It first noted that any decree of sale is valid if the court had jurisdiction over the vessel. Jurisdiction is obtained by seizure within the court's district and is not affected by lack of proper publication. Court rules requiring publication were described as:

> precautionary measures, of the greatest value and importance as such, to prevent possible injustice, and to secure, as far as is consistent with the speedy action of the court in hearing and determining the cause, an actual notice to the parties who have already, by seizure, constructive notice of the proceedings . . . . But the rules, though obligatory, are obligatory only as rules of practice. Their non-observance is only error, for which the remedy is by appeal, or on application for opening the decree.[41]

Thus, the court made it clear that a judicial sale could not be collaterally attacked so long as the ship was subject to the seizing court's jurisdiction. The court justified its views by citing traditional admiralty practice, which "has grown out of the necessities and interests of commerce."[42] It further noted "the utmost importance" of maintaining "the absolute validity of titles to vessels made under decrees of admiralty courts."[43]

In a landmark case decided the same year, *The Trenton,*[44] a United States district court in Michigan refused to reject recognition of a judicial sale by a Canadian admiralty court. American lienors had filed the in rem suit, alleging that because the Canadian court had excluded their claims, the liens survived the Canadian sale. Rejecting that argument, the court held that, "the doctrine that the sale of a vessel by a court of competent jurisdiction discharges her from liens of every description, is the law of the civilized world."[45] Local procedural requirements are therefore irrelevant, according to the court. To sustain an attack on a judicial sale, the owner or some other interested party must show:

40. 3 F. 903 (S.D.N.Y. 1880).
41. *Id.* at 919.
42. *Id.* at 921.
43. *Id.*
44. 4 F. 657 (E.D. Mich. 1880).
45. *Id.* at 661.

(1) that the court or officer making the sale had no jurisdiction of the subject-matter by actual seizure and custody of the thing sold . . .; [or]
(2) that the sale was made by a fraudulent collusion, to which the purchaser at such sale was a party; [or]
(3) that the sale was contrary to natural justice.[46]

As it developed, then, the "seizure is notice" concept in in rem practice was modified, first by federal law requiring publication in customs forfeiture cases, and subsequently by the Supreme Court's 1844 rules requiring publication in all in rem actions. Failure to respect those procedures was never allowed to affect the court's jurisdiction, however, and the first case discussing defective procedure, which allowed upsetting a sale simply if no party would be prejudiced thereby, gave way to later cases that allowed the decree to be set aside only if the court lacked jurisdiction, if fraud was committed, or if the sale was unjust.

C. *Changes in Notice Requirements in the Due Process Revolution*

Since 1940 when the United States Supreme Court decided in *Milliken v. Meyer*[47] that any method of notifying the interested parties of *any kind* of action must be "reasonably calculated to give . . . actual notice of the proceedings . . .,"[48] the "seizure is notice" concept has been perceptibly eroded. Further elucidation of the notice required to satisfy due process was set out by the Court in *Mullane v. Central Hanover Trust Co.*[49] The plaintiffs in *Mullane* challenged the constitutional sufficiency of notice by publication to the beneficiaries of a common trust fund of a final judicial settlement by the trustee. The only notice given to the beneficiaries of the application for a settlement, which, under New York Banking Law, would be binding and conclusive upon everyone having any interest in the common trust, was publication once each week for four successive weeks in a local newspaper of general circulation. Holding that this notice did not satisfy due process requirements, the Supreme Court stated that, "[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of

46. *Id.*
47. 311 U.S. 457 (1940). Although this is a fourteenth amendment case dealing with substituted service under a state statute, it has been widely interpreted as a statement of due process under the fifth amendment as well.
48. 311 U.S. at 463.
49. 339 U.S. 306 (1949).

actually informing the absentee might reasonably adopt to accomplish this."[50] Such publication is inadequate, the Court said, especially where the beneficiaries are known and can be easily contacted by mail.[51]

Mullane is to be distinguished from other kinds of actions where tangible property is seized in connection with the action:

> The ways of an owner with tangible property are such that he usually arranges means to learn of any direct attack on his possessory or proprietary rights . . . . As phrased long ago by Chief Justice Marshall in *The Mary*, . . . "It is the part of common prudence for all those who have any interest in [a thing], to guard that interest by persons who are in a situation to protect it."[52]

Thus, the Court intimated, notice by publication may meet constitutional standards in an in rem proceeding. But the Court also emphasized the need to examine the facts of each situation, so that "within the limits of practicability, notice [will] be such as is reasonably calculated to reach interested parties."[53]

In two admiralty decisions since *Mullane*, courts have decided that under this standard nothing less than actual notice will suffice. In *New v. The Yacht Relaxin*,[54] plaintiff shipyard had performed labor on and provided services for *The Relaxin*, a small yacht registered to one Williams under the California registration act for undocumented vessels.[55] Williams had borrowed against the vessel and a bank held a $17,500 mortgage on it. Under the California registration act for small vessels, a mortagee is included within the definition of "legal owner."[56] Plaintiff shipyard filed an action against *The Relaxin* and Williams entered into a stipulation for her release. Neither Williams nor his attorney appeared at the trial and a default judgment was entered. Before the yacht was sold,

50. *Id.* at 315.
51. *Id.* at 318.
52. *Id.* at 316.
53. *Id.* at 318.
54. 212 F. Supp. 703 (S.D. Cal. 1962).
55. The Ship Mortgage Act, 46 U.S.C. § 911-84 (1970), gives preferred status to holders of liens on "documented vessels" who register their liens. A "documented vessel" must be a commercial one of more than five tons. In 1958, in the Federal Motorboating Act, 46 U.S.C. § 527 (1970), Congress relinquished much of the federal jurisdiction over undocumented vessels to states that enact a comprehensive system of numbering and regulation conforming to prescribed standards. California had enacted such a statute. *See* CAL. HARB. & NAV. CODE §§ 650-755 (West).
56. CAL. HARB. & NAV. CODE § 651(g) (West).

plaintiff's attorney learned of the mortgage and telephoned the bank to inform them of the default judgment. However, no one had any actual notice of the time and place of the sale and the yacht was sold for a fraction of its worth. Plaintiff, Williams, and the bank all moved to set aside the sale. The court granted the motion, holding first that seizure only raises a *presumption* of notice: "The in rem process of the Admiralty Court is based on the presumption that the fact of seizure of a vessel alone will result in prompt actual notice to all interested parties, without the necessity of formal personal notice."[57] This presumption is usually valid in the case of a large commercial vessel, the court noted, but may not be valid for a small yacht. The owner of a large commercial vessel is more likely to keep a close watch over his ship and will usually require that someone remain on board at all times. Thus, because of the type of ship involved in this case, the presumption of notice was easily rebutted.

Furthermore, the court noted that Local Admiralty Rule 125, which provides that "no decree [of default] will be entered unless proof be furnished of actual notice of the suit to an owner or agent . . . or to the master," had been violated.[58] Under the rule, the

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57. 212 F. Supp. at 704.

58. Rule 125 of the Southern District of California provides:

RULE 125—Default

On proclamation, after due return of process in rem, if there are no appearances, the libelant shall be entitled to a decree of default or contumacy according to the nature of the case, but no decree will be entered unless in addition to proof of publication of the notice of arrest, proof of notice to the following be furnished:

1. The master of the vessel, or if the master cannot be personally served, the vessel's agent if there be one and if such agent be known to libelant;

2. The owner or, if more than one, the managing owner of any documented vessel of the United States;

3. A charterer if there be one and if such charterer be known to libelant;

4. The mortgagee of any documented vessel of the United States if a mortgage is recorded with the Collector of Customs at the home port of any such vessel;

5. Any person who has recorded a claim of lien upon a documented vessel of the United States pursuant to Section 925 of the Title 46 U.S.C.;

6. The owner, and legal owner if any, of any undocumented vessel where a certificate of ownership has been issued by the California Division of Small Craft Harbors pursuant to Section 681(a) of the California Harbors and Navigation Code;

bank, as a "legal owner" under the small vessels registration statute, as well as Williams, was entitled to actual notice of the default judgment. The court said the harm was multiplied by the marshal's failure to inform any of the parties of the sale. The violation of the local rule required the sale to be set aside. Undoubtedly the court also considered the inadequate sale price and the period of time—only ten weeks—between the judicial sale and the entry of the decree setting it aside.

Another recent case in which a judicial sale was set aside is *United States v. Steel Tank Barge # 1651.*[59] The United States filed the action against the barge under the Oil Pollution Act,[60] which assesses a penalty of $2500 for illegal oil spills. The United States Attorney for the district where the defendant's spill occurred sent a letter to the barge owner demanding the full penalty and giving notification that an in rem action would be filed if the penalty was not immediately paid. No reply was received. Eleven months after the first letter was sent, a similar letter was mailed to the owner, this time by certified mail, and the return receipt showed that it was received by the owner company. Again there was no reply.

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7. If the court in its discretion should so determine, the owner and legal owner, if any, of any undocumented vessel which is registered with the Secretary of the Department under which the Coast Guard is operating pursuant to Sec. 527 et seq. of Title 46 U.S.C., or of any undocumented vessel which is registered in a State other than California pursuant to an Act adopted in accordance with Sec. 527 et seq. of Title 46 U.S.C.

The notice to the master or the vessel's agent shall be by personal service. In event the master or the agent cannot be personally served, notice shall be by any form of mail requiring return receipt to their last known address.

Notice to all others specified herein shall be by personal service or by using any form of mail requiring a return receipt. In the case of a documented vessel, notice shall be sufficient if mailed to the address of the person entitled to notice appearing upon a current certificate of ownership issued by the Collector of Customs at the home port of such vessel. In the case of a California numbered vessel, to the addresses appearing upon a certificate of ownership issued by the Division of Small Craft Harbors. Certified copies of certificate of ownership, and of any certificate issued by the Division of Small Craft Harbors shall be filed in the proceedings.

Failure to give notice as required by this rule shall not constitute a jurisdictional defect but shall only constitute grounds for setting aside the default under General Admiralty Rules or such other Rules which may hereafter be made applicable, or for damages resulting from the failure to give notice. Nothing herein contained shall effect the title to the vessels if said vessel has been sold in accordance with a decree of court. (April 8, 1964).

59. 272 F. Supp. 658 (E.D. La. 1967).

60. Pub. L. No. 89-753, 80 Stat. 1253 (1966) (repealed 1970).

Nine months after this second letter was mailed, an in rem libel was filed and a copy sent by certified mail to the owner. The mail was returned "unclaimed," as was a similar letter mailed three weeks later. Meanwhile, an FBI agent assigned to locate the barge visited the owner and found that the barge had been leased to an oil company and was being used as an overflow oil storage tank on Lake Pagie, Louisiana. The barge was then served, but since it was no longer being towed, the marshal allowed the oil company to continue using it under the eyes of a keeper stationed at a nearby oil company facility. Because of the 26-month delay since the original demand letter and the mounting expenses of the keeper, the court entered an interlocutory order for the barge's sale two and a half months after its seizure. The publication and sale were conducted pursuant to local rules and, a month after the sale, it was confirmed by the court. Soon thereafter, the oil company wrote the barge company that it would no longer make lease payments because the company no longer owned the barge. This letter was the first actual notice to the barge company of the seizure and sale of the barge. The company quickly moved to vacate the sale.

The court first noted that the suit and sale had been conducted in complete compliance with all applicable statutes, rules of procedure, and orders of the court and that "the scheme provided therein for interlocutory sales of vessels generally satisfies the constitutional requirement of notice" under *Mullane v. Hanover Trust.*[61] Unfortunately, the court said, "through the fault of no one, the normally sufficient scheme operated inadequately"[62] and therefore unconstitutionally in this particular case.

The court cited a number of factors contributing to this result. The most important was that the barge was in the hands of a lessee who was permitted to continue his normal use of it after the "seizure." Because the post-seizure treatment of the barge had no practical effect on the lessee, he was not induced to take action that might notify the owner of the impending suit. Where, because of unusual circumstances, seizure does not operate effectively to bring actual notice to the owner, further efforts to notify the owner are required, the court said.[63] What further actions may be required depends first on how seriously the circumstances reduce the likelihood of actual notice reaching the owner and secondly on the plaintiff's resources:

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61. 272 F. Supp. at 662.
62. *Id.*
63. *Id.* at 663.

> We believe that a judgment as to the adequacy of the measures employed must turn, to some extent, on the resources available to the parties employing them. Here the resources included an FBI agent who discussed with the absentee [owner] the locale of the barge—at that time he could have given actual notice of the pending proceedings to the barge owner. Certainly no considerations of secrecy were involved, as the United States was at that time attempting other means to effect such notification. Where the vast resources and facilities of the United States are involved, the giving of actual notice to at least a known owner is not an unreasonable requirement.[64]

Considering the resources of the government and knowledge of the owner's whereabouts, the court said that at least a telephone call to the owner was mandatory. That was especially true where the claim against the barge was, at most, about one-eighth of its worth.

Upon a further finding that the purchaser of the barge could be restored to his original position, the court set aside the sale. The court emphasized:

> that our holding herein depends solely on the peculiar facts and circumstances involved whereby a number of factors, each insufficient to require setting the sale aside, combine to result in a lack of adequate notice: the claimant's identity being known, the effect of the seizure made, the failure of the letters to be claimed, the plaintiff being the United States, the FBI agent's communication with the owner, and the sale being made prior to judgment. All these factors in combination made it imperative that the United States use whatever additional means it would reasonably adopt to actually notify the owner of the pendency of these proceedings.[65]

Recognizing that such combinations of factors are rare but obviously do occur, the court in *Steel Tank Barge # 1651* said that it would no longer order interlocutory sales without inquiring into the owner's receipt of notice and, where actual notice appeared unlikely, ordering that notice be given by telephone.

Several district courts have adopted court rules that go further, even to the point of requiring actual notice before any decree of default will be entered. For example, the Hawaii District Court has adopted the following local rule:

> RULE 70—DEFAULT—WHEN ACTUAL NOTICE TO VESSEL OWNER, ETC. REQUIRED
>
> In any admiralty proceeding *in rem* where no proctor has ap-

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64. *Id.*
65. *Id.*

> peared for any claimant, a *venditioni exponas* will not be issued, nor a decree entered, unless proof be furnished of actual notice of the action to an owner or agent of the vessel proceeded against, or to the master in command thereof, in addition to the proof of publication of the notice of arrest of the vessel or unless it be made to appear on special application to the court that such actual notice is unnecessary.[66]

Rule 125 of the Southern District of California,[67] mentioned in *The Yacht Relaxin,* states that no decree of default will be entered until there is furnished, in addition to proof of publication, proof of actual notice to the master, the vessel owner, any charterer, a registered mortgagee of any documented vessel, and the legal owner of an undocumented vessel registered under the California statute cited in *The Yacht Relaxin* (or any similar statute). Only the Ninth Circuit has adopted this kind of local rule.

III. SUMMARY

A. *Notice Requirements*

While the in rem action remains a harsh remedy, articulation and subsequent development of fifth amendment due process standards have made it increasingly unlikely that a vessel owner will have his ship seized and sold without actual notice. Furthermore, because courts are expecting in rem plaintiffs to use effective methods of notification where seizure might be ineffective, owners not actually informed of a judicial sale are now more likely to have the sale set aside.

Plaintiff's counsel should be wary, therefore, of assuming that seizure and publication are adequate to satisfy due process requirements. Rather, a plaintiff in an in rem action would be wise to follow certain guidelines:

1. Careful adherence to Supplemental Admiralty Rules C and E and to all local rules regarding notice.[68]

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66. Local Rule 70, United States District Court for the District of Hawaii.

67. *See* note 58 *supra.*

68. Especially pertinent is Supplemental Rule C94, Fed. R. Civ. P.:

> (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

2. Investigation into the circumstances of the case sufficient to determine whether seizure is likely to result in actual notice to the owner. Factors to be considered include:
   a. the kind and size of the vessel;
   b. the presence of a master or keeper permanently on board;
   c. whether the vessel is being used, and if so, the actual use;
   d. the existence of a charter party, lease, or other contractual relationship between the possessor and the owner;
   e. the existence of a contractual relationship between the owner and a third party, such as a registered ship mortgage or, in the case of an undocumented vessel, a deed of trust or chattel mortgage.
3. If in light of these factors there is doubt that the seizure and publication according to all applicable rules will be effective, plaintiff's attorney should take additional measures to notify the owner and other interested parties. Personal service is of course always acceptable. A certified letter is probably sufficient in most cases. Where there may be difficulty with these two methods, plaintiff's counsel should choose an alternative method, balancing against the probable effectiveness of that method the following factors:
   a. the degree of difficulty in discovering the owner(s) or other financially interested parties;
   b. the resources at plaintiff's command;
   c. the value of plaintiff's claim.

If these procedures are followed and no claimant appears, both plaintiff and the purchaser at a subsequent judicial sale can be relatively assured that the sale will not be set aside. If, however, a claimant should later petition the court to set the sale aside, the court procedure would probably be as follows:

1. There will be a rebuttable presumption that seizure operated to give actual notice.
2. When the claimant alleges that he received no actual no-

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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.

tice, the court will first check to see that the applicable rules of publication were followed and to see that the seizure was procedurally regular. The court will then weigh the factors in (2) and (3) above to determine whether the standards of *Mullane* were satisfied.

3. If the rules and the *Mullane* standard are satisfied, the court should not set aside the sale.
4. If the rules have been followed and it is questionable whether *Mullane's* requirements have been met, the court may consider other factors:
   a. the promptness of the motion to set aside;
   b. whether the purchaser can be restored to his pre-sale condition;
   c. any knowledge by the purchaser of deficiencies in notice and any facts that might suggest collusion between the plaintiff and purchaser;
   d. the reasonableness of the sale price;
   e. whether the sale was decreed as a final judgment or upon interlocutory order.
5. Where the seizure is regular and the claimant had actual notice sufficiently in advance of the sale to appear in the action, the policy of protecting the title of purchasers at judicial sales should prevent the sale from being overturned, even where the rules regarding publication and other kinds of notice have not been satisfied.

B. *The Definition of Due Process*

These due process developments in admiralty law show noteworthy changes on a more general plane: the manner in which due process is defined. Seizures in admiralty were originally accepted out of necessity prior to any construction of the fifth amendment, although the amendment clearly applies to admiralty proceedings. Even after the fifth amendment's due process clause was construed, no admiralty case ever defined it in terms of admiralty practice. Nor did any non-admiralty due process case ever seriously affect in rem procedure until *Milliken v. Meyer* and its extension in *Mullane v. Central Hanover Bank & Trust.* At that point, however, due process cases setting standards for non-admiralty in rem actions intruded into settled admiralty practice. Courts have not hesitated to apply those standards to admiralty cases; *The Yacht Relaxin* and *Steel Tank Barge 1651* are unmistakable evidence of that proposition.

Admiralty practitioners must constantly be aware of non-admiralty cases construing due process. For example, there has been in recent years increasingly strong attempts to apply *Sniadach v. Family Finance Corp.*,[69] *Fuentes v. Shevin*,[70] and their progeny[71] to admiralty in rem actions.

In *Sniadach* the Supreme Court ruled that garnishment of a debtor's wages without notice and an opportunity to be heard violated due process. In *Fuentes*, the Supreme Court invalidated two pre-judgment replevin statutes because, by failing to provide for notice and an opportunity to be heard prior to seizure, they violated due process. *Fuentes* held that notice and an opportunity to be heard may be omitted only in certain "extraordinary situations" characterized by these factors: (1) the seizure is necessary to secure an important governmental or general public interest; (2) prompt action is necessary; and (3) the state maintains control through a governmental agent who initiates the seizure under the standards of a narrowly drawn statute.[72] Text writers[73] and several courts[74] have suggested that Supplemental Admiralty Rules C and E, which allow in rem seizure without prior notice and opportunity to be heard, violate the *Sniadach-Fuentes* standards. It has been further suggested that these rules could not come within the "extraordinary situations" exception because, by allowing a plaintiff to initiate a seizure or writ of attachment, condition (3), requiring that the seizure be initiated by a governmental official, is not met.[75] No court has yet held that these rules are unconstitutional, however, and the most recent case finds in rem seizure an "extraordinary situation."[76]

69. 395 U.S. 337 (1969).

70. 407 U.S. 67 (1972).

71. *See* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974).

72. 407 U.S. at 91.

73. Morse, *The Conflict Between the Supreme Court Admiralty Rules and Snaidach-Fuentes: A Collision Course?*, 3 FLA. ST. U. L. REV. 1 (1975).

74. "The recent Supreme Court cases indicate that there is a serious question whether the provisions in the Supplemental Rules for proceedings in rem . . . provide due process to owners of the vessels seized." Techem Chemical Co. v. M/T Choyo Maru, 416 F. Supp. 960, 969-70 (D. Md. 1976).

75. Morse, *supra* note 73, at 12-20.

76. Central Soya Co. v. Cox Towing Corp., 417 F. Supp. 648 (N.D. Miss. 1976); Calero-Todedo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974); Owenby v. Morgan, 256 U.S. 94 (1921). Morse argues that no admiralty cases have directly considered the point and that, therefore, a case such as *Central Soya* is without support in case law. Morse, *supra* note 73, at 14.

Whether present admiralty rules violate due process for lack of pre-seizure notice and opportunity to be heard is difficult to say. The problem well illustrates, however, the way in which non-admiralty due process decisions, which are usually rendered without consideration of their effect on admiralty law by judges with little knowledge of maritime affairs, may affect admiralty procedure. The problem also shows that the careful admiralty practitioner must pay close attention to due process issues and actions of the federal bench.

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