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THE MARITIME LAW ASSOCIATION OF THE UNITED STATES

Committee on Practice and Procedure

Some Possible Amendments to the Admiralty Arrest and Attachment Rules to be Considered at the Annual Meeting, May 6, 1977.

The Practice and Procedure Committee of the Association has, for a number of months, had under consideration possible amendments to be proposed to the admiralty arrest and attachment rules to insure the rules' meeting constitutional requirements. It is hoped that the Committee will have a report for the May meeting, including a draft of proposed amendments to be submitted for consideration by the appropriate committee of the Judicial Conference as the proposal of this Association. The Practice and Procedure Committee is expected to submit with its report a detailed working paper on the legal background for any proposed amendments but neither the Committee's report nor its working paper will be available until the meeting May 6. In view of the importance of the subject, this notice is circulated to alert members to the topic and stimulate advance thought with respect to the issues.

Attached is a memorandum from the Chairman of the Practice and Procedure Committee, briefly describing the problem, some of the issues and considerations involved and some of the current thinking of Committee members involved in the drafting process. Also enclosed is a current working draft of possible amendments. It should be understood that neither the memorandum nor the draft is a Committee report and that both are submitted simply as aids to preliminary thought and discussion.

MEMORANDUM ON AMENDMENTS TO THE ARREST AND ATTACHMENT RULES

A series of Supreme Court decisions beginning in 1969 invalidated pre-judgment attachment and garnishment procedures under a

number of state statutes for lack of due process.[1] These decisions do not appear to provide complete guidance to constitutionality. They do, however, establish a standard of prior notice and hearing except in extraordinary situations involving important government or general public interests and a special need for very prompt action and, as to those extraordinary situations, they lay stress upon concrete sworn allegations by the plaintiff, an exercise of judgment by a judge or other official, security to respond in damages, and the availability of hearing promptly after attachment to test its validity. Although none of these Supreme Court decisions arose in the maritime field and important distinctions are no doubt available, the general terms of their holdings raise some serious doubts about the validity of the present arrest and attachment rules which have, as a result, now been called in question in a number of lower court cases.

Because of the possibility of the rules' being held unconstitutional and because of the cloud that now hangs over them as a result, the Committee on Practice and Procedure has undertaken as an urgent project the drafting of amendments to improve the rules and make them clearly constitutional under present standards. The Committee has so far approached the subject with the aims of proposing the narrowest possible changes in the rules to meet the threat of unconstitutionality, maintaining the simplicity and effectiveness of the remedies involved, and avoiding, so far as possible, additional sources of clouds upon judgments and on titles under judicial sales, as to which jurisdiction and consequently title may depend upon compliance with the rules as to notice and other procedures.

In considering the impact of the recent cases and the terms of possible amendments, we must recognize an important distinction between arrest and attachment cases. The *in rem* right which underlies arrest is, under the personification theory of American law, a substantive right of recovery out of the value of specific property. To deny arrest, therefore, is to deny recovery and bring the action to an end. Thus, arrest can probably only be denied at the outset of a case on the same basis upon which the complaint could properly be dismissed.

Maritime attachment, on the other hand, is for the purposes of jurisdiction and security where the property itself is not deemed

[1] *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *North Georgia Finishing Inc.* v. *Dichem*, 419 U.S. 601 (1975); *cf. Mitchell* v. *W. T. Grant & Co.*, 416 U.S. 600 (1974).

liable. It is available only where the defendant himself is not available in the district and, in contrast to arrest, of course, it does not deal with specific property but rather with whatever property may be found to belong to the defendant.

An important consequence of the distinction is that a marshal's sale in an *in rem* case disposes of specified property, while the marshal's sale in an attachment case is a sale only of the defendant's interest, and thus notice to the world is required in the former case while no notice to anyone but the defendant is required in the latter.

There are some practical considerations in the maritime field to be taken into account. Vessel turnarounds are now much quicker than they used to be, cargo moves faster through improvements in technology, and money moves with the speed of electricity. Not only are the subjects of maritime arrest therefore more fugacious than ever before, but they are subject to unusual perils and are governed by an unusual lien law which might itself be described as perilous. As these same properties are also the common subjects of maritime attachment, the same factors should weigh heavily in determining the standards for attachment procedure. It is probable also that there are very few instances of serious abuse in maritime arrest and attachment in contrast to the terrene field of creditors' rights from which problems have come to the attention of the Supreme Court.

Of the Supreme Court cases referred to above, two involved garnishments against resident defendants who were amenable to *in personam* process, and that circumstance was evidently of substantial weight in one of them. In another the court upheld a writ of attachment without prior notice where, under the laws of the state involved, the plaintiff's lien could be destroyed by a transfer of the property by the defendant and prompt action was therefore considered warranted to avoid destruction or alienation of the property. This exception from the requirement of prior notice and hearing would appear to have special application to the maritime field, although it would not relieve us from other criteria laid down by the court. Thus the court has probably pointed the way to avoidance of prior hearing in most maritime cases, so long as suitable procedures thereafter are available.

While personal notice prior to the writ may be avoided in most maritime cases, it nevertheless assumes great importance if default

is to be taken and the property sold. In the case of attachment, it is only the defendant's interest which is affected and notice is already provided for by Rule B(2). In the case of arrest, however, the interests of not only the owner but a number of other parties may be affected. The arrest itself is probably still perfectly good notice to those in possession who, if not the owners, are almost invariably in such relationship that owners' interests would be protected or owners notified to protect their own interests, and it will probably be hard to find cases where this is not so. The historic purpose of publication has been to provide at least constructive notice to lienors and perhaps to owners in rare cases of neglected property. The usual maritime lien is secret and it would seem that publication should still be found constitutionally adequate to the case of secret lien.

Where liens are recorded, however, the situation is otherwise and, in the case of vessels registered or enrolled under the navigation laws of the United States, liens can be, and in the case of ships' mortgages must be, recorded with the Coast Guard at the vessel's home port. Sellers' security interests are also recordable with certain state agencies in the case of small craft subject to state boating laws, and the owner's interest in almost every American vessel is thus recorded with either federal or state authorities. It has been held that the public records must be checked and the holders of such recorded interests notified before the default and sale of a vessel in a proceeding *in rem* in order to foreclose constitutionally the holder of the recorded interest, and this doctrine needs specific consideration in the amendments to the rules.

The Supreme Court has stressed the availability of prompt and appropriate judicial relief following attachment. Post-arrest or attachment hearings have always been available on motion. What appears to be needed is explicit provision in the rules with stress on promptness and some elaboration of the functions of the court in such a hearing. One such function is to determine the amount of security in the first instance, and another is to reduce it thereafter. What appears to be required in addition is to determine whether to allow the arrest or attachment to stand at all and whether to grant the defendant or claimant some counter-security from the plaintiff. The functions and standards of the court will necessarily differ between arrest and attachment cases in the post-arrest/attachment hearing and the consideration of counter-security from the plaintiff involves still other issues not arising under the present rules. For these and other reasons, it would appear desirable to provide

considerable detail for the guidance of courts and counsel in any new rule on post-arrest/attachment hearings.

Attached is a working draft of proposed amendments under consideration as of April 9, 1977. It includes amendments to Rules B, C and E, of which a brief discussion follows.

Rule B would be amended to require in any case that the supporting affidavit stating that the defendant cannot be found within the district also set forth the steps taken by the plaintiff to ascertain that fact. In order to avoid notice and hearing prior to issuance of the writ, it would also require that the affidavit state that the defendant's property expected to be found in the district and sought to be attached or garnished is such as may be removed from the jurisdiction, concealed or destroyed so as to frustrate jurisdiction. Doubtless most properties upon which writs are executed are of that character. But if the plaintiff contemplated proceeding against property of a different character, such as real estate, he would then be required to secure a hearing and give notice, if possible, to the defendant in advance of issuance of the writ. In the routine case, the draft would call for issuance of the writ by the clerk as at present and avoid the necessity of judicial review.

Rule C, with respect to actions *in rem,* would be amended by the addition of a new subsection requiring notice to be given prior to default, corresponding in theory and form to the long-standing requirement of notice to the defendant in attachment cases under Rule B(2). The change would require notice to owners or those claiming to be owners, so far as they were known to the plaintiff and, in any event, to the holders of interests recorded with the federal or state agency with which a vessel is documented.

Rule E would be amended by the addition of a new subsection on post-arrest or attachment hearings. In order not to suggest limitations upon such hearings which do not now exist, the provision takes explicit note of the existing power of the court under other rules to fix or reduce security. It would make clear that the plaintiff cannot be denied the right to arrest property unless he has failed to state a claim *in rem,* and establishes a standard of probable cause (a term used by the Supreme Court) for attachment or garnishment. It would also establish a procedure by which the owner of property, by showing good cause, could obtain security from the plaintiff to respond to any damages which might be recoverable against the plaintiff by reason of improper arrest, attachment or garnishment or

the requirement of excessive security, and would provide for the release of the property upon the failure to post such security. It is not contemplated that instances would be very numerous in which there were any prospect of such a recovery nor that there would be numerous instances of application for or grant of such security, the expense of which would presumably increase the costs in the case. The draft proposal would also make clear the availability of injunctive relief in aid of or supplemental to the other powers of the court, in order to shape more flexible remedies, and, finally, would authorize an award of the costs of the hearing.

PROPOSED AMENDMENTS TO THE SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS, WITH RESPECT TO ARREST AND ATTACHMENT

RULE B. ATTACHMENT AND GARNISHMENT: SPECIAL PROVISIONS.

(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 plaintiff 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, *and such affidavit shall set forth the steps taken to ascertain that the defendant could not be found within the district.* When a verified complaint supported by such an affidavit *also states that the defendant's property expected to be found in the district and sought to be attached or garnished is such as may be removed from the jurisdiction, concealed, or destroyed so as to frustrate jurisdiction,* the clerk shall forthwith issue a summons and process of *maritime* attachment and garnishment. *In all other instances, process of maritime attachment and garnishment shall issue only upon order of the court after hearing, upon reasonable notice to the defendant, by mail, telegraph or other reasonable means, except that such hearing and order shall not be required if the plaintiff or his attorney further shows by verified factual allegations that such notice cannot be given with reasonable diligence.* 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.

RULE C. ACTIONS IN REM: SPECIAL PROVISIONS.

* * *

(7) *Judgment by Default. No judgment by default shall be entered in any action in rem except upon proof, which may be by affidavit, (a) that the plaintiff has given notice of the action to the last person, if any, known or believed by the plaintiff to be an owner of the property arrested, to any person known to the plaintiff to claim to be an owner of such property and, if the property is a vessel, to every person having an interest in the vessel if such interest is recordable and recorded under the navigation laws of the United States, under the Ship Mortgage Act of 1920, as amended, 46 U.S.C. §§ 911-984, or under any state statute enacted pursuant to the Federal Boating Act of 1958, 46 U.S.C. § 527, by mailing* to him a copy of the complaint and warrant of arrest, using any form of mail requiring a return receipt, or (b) that the complaint and warrant of arrest have been served on such person in a manner authorized by Rule 4(d) or (i), or (c) that the plaintiff has made diligent efforts to give notice of the action to such person and has been unable to do so.

RULE E. ACTIONS IN REM AND QUASI IN REM: GENERAL PROVISIONS.

(8) *Restricted Appearance.* An appearance to defend against an admiralty and maritime claim with respect to which there has issued process in rem, or process of attachment and garnishment whether pursuant to these Supplemental Rules or to Rule 4(e), may be expressly restricted to the defense of such claim, and in that event shall not constitute an appearance for the purposes of any other claim with respect to which such process is not available or has not been served. *An appearance of a defendant at a hearing pursuant to Rule B(1) prior to the issuance of a writ of attachment or garnishment shall not be deemed an appearance for any other purpose.*

(10) *Hearing on Security or Release of Property. In any case where property is attached, garnished or arrested, the court, upon application of any party asserting an interest in such property, shall forthwith grant a hearing at which the court shall entertain motions for, and where appropriate grant, relief as follows:*

(a) *fixing the amount of security, pursuant to Rule E(5)(a);*

(b) *reducing the amount of security given, pursuant to Rule E(6);*

(c) *permitting the amendment of the complaint, pursuant to Rule 15;*

(d) *dismissing a complaint in rem and ordering the release of arrested property for failure of the complaint to state a maritime claim upon which relief can be granted against the arrested property, in compliance with Rule E(2)(a), subject to any prompt and adequate amendment of the complaint, or ordering the release of property illegally or mistakenly arrested;*

(e) *ordering the release of attached or garnished property for failure of the plaintiff to comply with Rules B(1) and E(2)(a), subject to any prompt and adequate amendment of the complaint, or for failure of the plaintiff, upon demand, to show probable cause for attachment or garnishment, or for illegal or mistaken attachment;*

(f) *ordering that the plaintiff forthwith give security adequate to respond to any damages recoverable by the owner or other parties having any right, title or interest in the property by reason of its improper arrest, attachment or garnishment or requirement of excessive security, upon good cause shown by such owner or other party, and that, upon failure to post such security, the property be released;*

(g) *granting a preliminary injunction to protect any party from irreparable injury, loss or damage;*

(h) *awarding the costs of the hearing.*