NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION

Volume 4 | Number 3 Article 8

Spring 1979

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At Sea with *Schaffer v. Heitner*: Grand Bahama Petroleum Co. v. Canadian Transport Agencies

In 1966 the separate body of Admiralty Rules[1] was abolished and actions brought under admiralty and maritime jurisdiction were included under the Federal Rules of Civil Procedure. Since that merger, the problem of resolving questions in areas of the law where traditional admiralty procedures differed greatly from civil practice has persisted. In the process of unification, supplemental rules were promulgated to retain certain remedies unique to the Admiralty Rules which were not available under the civil rules.[2] The fundamental goal has been to preserve substantial rights based on the unique nature of the admiralty and maritime context while abolishing differences between admiralty and civil rules affecting only procedural matters. In *Grand Bahama Petroleum Co. v. Canadian Transport Agencies*,[3] the court had to determine whether the maritime attachment procedure authorized by Supplemental Rule B(1)[4] of the Federal Rules of Civil Procedure met constitutional due process requirements. The court held that the special considerations of admiralty allowed quasi-in-rem jurisdiction to be established by attachment of a defendant's property located within a district. However, the court went on to declare Supplemental Rule B(1) unconstitutional for failing to provide procedural safeguards against mistaken deprivation of property in violation of the defendant's due process rights.[5]

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[1] Admiralty Rules (1920) (amended 1966), *reprinted in* 7A MOORE'S FEDERAL PRACTICE ¶30, at 221 (2d. ed. 1978).

[2] FED. R. CIV. P. Supplemental Rules for Certain Admiralty and Maritime Claims [hereinafter cited as FED. R. CIV. P. SUPP. R.].

[3] 450 F. Supp. 447 (W.D. Wash. 1978).

[4] FED. R. CIV. P. SUPP. R. B(1) states:

> 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. 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.

[5] 450 F. Supp. at 459-60.

Plaintiff Grand Bahama Petroleum (GBP) alleged that it supplied the Soviet flag M/V KUIBSHEVGES with fuel and services worth $40,963.68 from GBP's terminal in Freeport, Bahamas. At the time, the vessel was allegedly under charter to the defendants, citizens of Canada. GBP alleged that the defendants had failed to make a required deposit for the fuel purchase or to pay the amount due. GBP therefore sought to garnish $8,851.38 in a Seattle bank account belonging to the defendants. The defendants sought dismissal for lack of jurisdiction. Relying on the Supreme Court decision in *Shaffer v. Heitner*,[6] the defendants claimed that attachment of their assest in a district was impermissible unless they had minimum contacts with that district.[7] The defendants also claimed that the procedure enumerated in Rule B(1) did not provide sufficient safeguards against mistaken deprivation of property.[8]

The court rejected the contention that the minimum contacts requirement set forth in *Shaffer* for actions in rem necessarily applied to admiralty. Granting that the only contact the defendant had with the district was the bank account, the court stated that the action against property was the keystone of admiralty jurisprudence and sought to distinguish the holding in *Shaffer* on constitutional and analytical grounds.[9] The court asserted that the historical autonomy of admiralty from the common law was of constitutional magnitude, citing the special recognition accorded admiralty in both the Constitution[10] and in the legislation by Congress establishing and empowering the Federal judiciary.[11]

The court, having established the constitutional autonomy of admiralty jurisdiction, proceeded to identify the special factors extant in the admiralty context that justified the separate treatment of admiralty disputes. One such factor was the transience of both individuals and property engaged in maritime pursuits. The court quoted from the opinion in *Re Louisville Underwriters*: "Courts of admiralty are established for the settlement of disputes between persons engaged in commerce and navigation, who, on the one hand, may be absent from their homes for long periods of time, and, on the other hand, often have property or credits in other places."[12] The nature of the interests involved, plus the interest in providing remedies without unnecessarily impeding commerce, provided sufficient analytical justification for special treatment of admiralty cases.

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6 433 U.S. 186 (1977).

7 *See* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945):

> [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

8 450 F. Supp. at 456.

9 *Id.* at 453.

10 U.S. CONST. art. III, § 2.

11 Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 76-77; Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93-94.

12 134 U.S. 488, 493 (1890).

In refusing to apply the minimum contacts requirement to admiralty, the court concluded, "the recognized autonomy of admiralty jurisprudence, although not absolute, and the long constitutional viability of maritime attachment compel me to conclude that *Shaffer* does not reach Rule B(1) attachment."[13]

The court next weighed the defendant's claim that the procedural safeguards enumerated in Rule B(1) were inadequate to protect against mistaken deprivation of property. Rule B(1) allows the writ of attachment to issue based on an affidavit signed by either the plaintiff or his attorney.[14] Specific facts which would allow the judicial officer to make an independent determination that the defendant is not in the district are not required.[15] Mere conclusory allegations, which may even be based on hearsay, will suffice.[16] Finally, the Rule allows the writ to issue from a clerk.[17] The court found the procedure established by Rule B(1) and followed by GBP to be substantially similar to the Georgia garnishment procedure[18] found unconstitutional by the U.S. Supreme Court in *North Georgia Finishing Inc. v. Di-Chem. Inc.*[19] Like the Georgia garnishment procedure, Rule B(1) fails to make any provision for an expeditious hearing that would allow the defendant to contest the validity of the attachment. Because of the lack of procedural safeguards, the court found the Rule B(1) attachment procedure to be unconstitutional as violative of the right of the defendant not to be deprived of property without due process of law.[20]

The court refused to accept GBP's contention that due process requirements are less stringent in the admiralty context, therefore requiring fewer procedural safeguards. GBP contended that the Rule B(1) procedure could be justified by language of the U.S. Supreme Court in *Fuentes v. Shevin*.[21] There the Court, in the process of invalidating the Florida and Pennsylvania prejudgment replevin statutes for their failure

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[13] 450 F. Supp. at 455.

[14] FED. R. CIV. P. SUPP. R. B(1).

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] GA. CODE ANN. § 46-102 allowed the affidavit requesting the writ of garnishment to be filed by the plaintiff, his agent, or his attorney. The statute did not require that specific facts be alleged in the affidavit; it required only a statement that a claimed amount was due and an apprehension of loss unless garnishment issued. The statute permitted the writ to issue from an officer authorized to issue an attachment or from the clerk of a court of record. The party seeking garnishment was required to post bond in double the amount claimed to be due, payable to the garnishee should the plaintiff fail to recover in the suit or should it be found that the amount claimed was not actually due.

Section 46-103 required only that the affidavit made by the agent or attorney of the plaintiff be "to the best of his knowledge and belief."

Section 46-401 allowed the defendant to dissolve the garnishment by posting a bond for an amount equal to the payment of any judgment that might be rendered on the garnishment.

[19] 419 U.S. 601 (1975).

[20] 450 F. Supp. at 456.

[21] 407 U.S. 67 (1972).

to provide for hearings prior to seizure, recognized that "extraordinary circumstances" might justify postponement of notice and opportunity for a hearing.[22] Three factors were enumerated that, together, would create such extraordinary circumstances. First, the seizure must be directly necessary to secure an important governmental or public interest. Second, there must be a special need for prompt action. And third, the State must keep strict control over its monopoly of legitimate force; the person initiating the seizure should be a judicial official responsible for determining, under the standards of a narrowly drawn statute, that prejudgment action was necessary and justified in the particular instance.[23] In the instant case, the court found that only a private interest was at stake in garnishing the bank account; no pretense of important government or public interest existed. Because the attachment failed to have a public purpose, the court did not bother to apply the other prongs of the *Fuentes* test.[24]

Finally, the court refused GBP's assertion that the special nature of maritime dealings justified dispensing with procedural safeguards. The interest of maritime plaintiffs in having a speedy remedy was not sufficient to justify denial of procedural due process rights to maritime defendants. Quoting *Fuentes*, the court stated: "Procedural due process is not intended to promote efficiency or accomodate all possible interests; it is intended to protect the particular interests of the person whose possessions are about to be taken."[25]

The challenges to Supplemental Rule B(1) raised in *Grand Bahama* represent a confluence of two streams of case law development expanding the protection accorded property rights by the due process clause. The first stream, commencing with *International Shoe Co. v. Washington*[26] and leading to *Shaffer v. Heitner*,[27] has developed the requirement that a defendant have certain minimum contacts within a district so that assertion of jurisdiction over his person or his property does not offend "traditional notions of fair play and substantial justice."[28] The second stream, emanating from the opinion in *Sniadach v. Family Finance Corp.*,[29] has expanded the range of procedural safeguards required to assure protection of the possessory interest in property in prejudgment proceedings instituted by creditors.

The minimum contacts requirement was first enunciated in *International Shoe*,[30] where the Supreme Court shifted its attention towards the rights of the defendant. The Court required that, in order for in per-

[22] *Id.* at 90.
[23] *Id.* at 91.
[24] 450 F. Supp. at 457.
[25] 407 U.S. at 90, n.22.
[26] 326 U.S. 310 (1945).
[27] 433 U.S. 186 (1977).
[28] 326 U.S. at 316.
[29] 395 U.S. 337 (1969).
[30] 326 U.S. 310 (1945).

sonam jurisdiction to be established over a defendant within a district, that defendant must be shown to have sufficient contacts or ties within that district to make the assertion of jurisdiction reasonable and just.[31] Emphasis was placed on the degree that such contacts would assure actual notice to the defendant[32] and the degree to which the defendant's presence would make it reasonable for him to defend a suit within the jurisdiction.[33]

In *Shaffer v. Heitner* the Supreme Court extended the minimum contacts requirement to apply also to suits brought in rem and quasi-in-rem.[34] Prior to that decision, attachment of a defendant's property located in a district could subject the defendant to quasi-in-rem jurisdiction there. Such jurisdiction could attach whether or not the defendant's activities had any relationship with the district. This practice received its clearest expression in *Pennoyer v. Neff*:[35]

> It is in virtue of the State's jurisdiction over the property of the the nonresident situated within its limits that its tribunals can inquire into that nonresident's obligations to its own citizens, and the inquiry can then be carried out only to the extent necessary to control the disposition of the property.[36]

The question posed in *Shaffer* was whether attachment of stocks in Delaware provided sufficient basis for the exercise of quasi-in-rem jurisdiction by a Delaware court. The situation was complicated by the fact that the actual certificates were not physically present in Delaware;[37] the stock was considered to be in Delaware by virtue of a state statute making Delaware the situs of ownership of all stock held in Delaware corporations.[38] None of the defendants resided in Delaware. The Supreme Court held that the Delaware statute authorizing sequestration of the stock was unconstitutional, ruling that assertions of both in rem and quasi-in-rem jurisdiction must be evaluated according to the minimum contacts standard.[39] The Court reasoned:

> The case for applying to jurisdiction in rem the same test of "fair play and substantial justice" as governs assertions of jurisdiction in personam is simple and straightforward. It is premised on recognition that "(t)he phrase 'judicial jurisdiction over a thing,' is a customary elliptical way of referring to jurisdiction over the interest of persons in a thing."[40]

The court in *Grand Bahama* refused to follow this reasoning and apply the minimum contacts standard to admiralty. The defendant in *Grand Bahama* admittedly lacked minimum contacts in the district where

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[31] 326 U.S. at 320.
[32] *Id.* at 316.
[33] *Id.* at 317.
[34] 433 U.S. at 212.
[35] 95 U.S. 714 (1877).
[36] *Id.* at 723.
[37] 433 U.S. at 192.
[38] DEL. CODE ANN., tit. 8, § 169 (Michie 1975).
[39] 433 U.S. at 212.
[40] *Id.* at 207. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 56, Introductory Note (1971).

jurisdiction was asserted. Its only contact with the district was the presence of the bank account. The court found, however, that the minimum contacts requirement would be inconsistent with traditional admiralty practice. Sovereignty, defined as the power over property, served as the historical basis for admiralty jurisdiction and was claimed necessary for the continued vitality of admiralty jurisprudence.[41] Hence the minimum contacts requirement would not be essential to establish quasi-in-rem jurisdiction in admiralty.

The court then proceeded to evaluate the procedure for attachment of the defendant's property provided in Rule B(1), which authorizes summary issuance of the writ by the clerk of court upon submission by the plaintiff or his lawyer of an affidavit which need recite only conclusory allegations.[42] The procedure did not accord prior notice to the defendant or provide for a prompt hearing in which the attachment could be challenged. It therefore was subject to challenge in light of the line of cases emanating from *Sniadach v. Family Finance Corp.*,[43] in which the Supreme Court declared Wisconsin's prejudgment garnishment procedure[44] unconstitutional. The Court emphasized that the in rem seizure of an employee's wages, without affording the employee prior notice and an opportunity to be heard, violated due process and could potentially impose a tremendous hardship on the wage earner.

In *Mitchell v. W.T. Grant Co.*,[45] however, the Supreme Court upheld the validity of the Louisiana sequestration procedure which provided for judicial control of the attachment process from beginning to end. The procedure also required the plaintiff to file bond equal to the value of the property sequestered. The Supreme Court held that the judicial supervision, bond requirement, and requirement that the plaintiff supply specific facts to justify the sequestration, combined to produce a constitutional accommodation of the conflicting interests of the parties.[46]

Soon after *Mitchell*, the Supreme Court, in *North Georgia Finishing Inc. v. Di-Chem Inc.*,[47] declared the Georgia garnishment procedure unconstitutional. In *Di-Chem* the defendant's corporate bank account had been attached by a creditor to secure its indebtedness. The Court dismissed the plaintiff's contention that the opinion in *Sniadach* should be narrowly construed to extend prejudgment safeguards only to situations in which wages are the object of the garnishment: "We are no more inclined now than we have been in the past to distinguish among different kinds of

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[41] 450 F. Supp. at 452-53.

[42] FED. R. CIV. P. SUPP. R. B(1).

[43] 395 U.S. 337 (1969).

[44] WIS. STAT. § 269.18(2)(a)(1957)(current version at WIS. STAT. ANN. § 803.10 (West 1977)). The Wisconsin statute provided that the clerk of the court would issue a summons at the request of the creditor's lawyers. The lawyer would then serve the garnishee, and, within ten days, the defendant. The wages of the defendant were thereby frozen.

[45] 416 U.S. 600 (1974).

[46] *Id.* at 607.

[47] 419 U.S. 601 (1975).

property in applying the Due Process Clause."[48]

The court in *Grand Bahama* concurred in the defendant's assertion that the case was almost completely on point with *Di-Chem*.[49] However, it then had to evaluate GBP's contention that the admiralty context constituted an extraordinary situation justifying postponing notice and opportunity for a hearing. The circumstances justifying special exceptions to the requirement of procedural safeguards are, as previously mentioned, the existence of an important government or general public interest, a special need for prompt action, and strict State control over the monopoly of necessary force.[50] GBP sought to invoke *Calero-Toledo v. Pearson Yacht Leasing Co.*[51] to bring its case within the exception. In *Calero-Toledo*, a pleasure yacht leased by Pearson to a Puerto Rican resident, was seized pursuant to a Puerto Rican statute providing for forfeiture of vessels used for illegal purposes. Marijuana was discovered aboard the vessel while it was in control of the lessee. The statute did not provide for notice and prior hearing for the lessor owners. In upholding the seizure, the Supreme Court held that the three requirements necessary to constitute an extraordinary situation were present. There was a significant government purpose in preventing continued illicit use of the property. Preseizure notice might frustrate this government interest by allowing time to remove the mobile property from the district. Finally, the seizure was made by government officials rather than self-interested private parties.[52] The court in *Grand Bahama* refused to treat *Calero-Toledo* as apposite; it was not merely the admiralty context, but the specific fact situation, which created the extraordinary circumstances and justified relaxation of due process procedural safeguards.[53]

Finding nothing in the facts of the instant case to merit GBP's claim that it presented an extraordinary situation permitting procedural safeguards to be dispensed with, the court held that the attachment of the defendant's bank account under Rule B(1) was an unconstitutional violation of due process rights.[54] The court thus concluded that the admiralty context alone did not provide sufficient grounds to distinguish the case from the procedurally similar *Di-Chem* case.

The problem confronting the court in *Grand Bahama* was to distinguish between the substantive and procedural aspects of traditional maritime law. In abolishing the separate body of Admiralty Rules, Congress intended to merge the procedural aspects with the rules of civil procedure, while preserving the substantive aspects. The analytical justification for maintaining in rem jurisdiction in admiralty is the frequency

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[48] *Id.* at 608.
[49] 450 F. Supp. at 456.
[50] Fed. R. Civ. P. Supp. R. B(1).
[51] 416 U.S. 663 (1974), *reh. denied* 417 U.S. 977 (1974).
[52] 416 U.S. at 679.
[53] 450 F. Supp. at 457.
[54] *Id.* at 459.

with which the property is the res, or subject matter, of the dispute. The presence of such property as a ship or cargo in a district provides an indication that the defendant enjoys some contacts there. Further, such property is likely to be related to the dispute and thus provide some further basis for jurisdiction to attach. The attachment of the bank account in *Grand Bahama*, however, is a quasi-in-rem rather than an in rem procedure. Sovereignty over property provides tenuous justification for assertion of jurisdiction when that property is unrelated to the dispute. In such a case, the factors which would serve to protect the defendant's rights in an admiralty proceeding in rem are absent.

Returning to the due process claim, the court held that the admiralty context of the dispute provided insufficient justification for dispensing with procedural safeguards. In *Techem Chemical Co. v. M/T Choyu Maru*,[55] the court took cognizance of the realities of maritime practice in the case of the in rem attachment of a tanker: "In practice, the owner almost always receives prompt notice of the seizure and employs an attorney who arranges for the release of the vessel upon the posting of a bond, letter of credit, or other undertaking."[56] Where the object of the attachment is not the res of the dispute, and is not under the immediate supervision and operation of the owner's agents as a ship would be, there is less guarantee that the owner will receive actual notice of attachment. Thus, the attachment of a bank account as in the instant case provides no assurance that the owner will be promptly notified.

The court's holding, which applied modern procedural safeguards to the process of maritime attachment, is supported by and consistent with the procedure by which the writ historically issued. As early as 1825, in *Manro v. Almeida*,[57] the Supreme Court said of the proceeding of maritime attachment:

> [T]o prevent the abuses to which it is liable, it is indispensably necessary that this process should only issue by an express order of the Court. There is no precedent for its issuing, of course, and as it cannot issue without an affidavit, the sufficiency of the matter contained in the affidavit, and the libel, are fit subjects for the determination of the Judge, and ought not to be confided to the discretion of a mere ministerial officer, such as the clerk.[58]

Through invalidating Rule B(1), the opinion in *Grand Bahama* is consistent in applying the most recent procedural safeguards to the admiralty

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[55] 416 F. Supp. 960 (D. Md. 1976).

[56] *Id.* at 968. Even given this general pattern of events, the defendant's rights may nonetheless be trampled. In *Techem Chemical* the affidavit supporting attachment listed damages claimed by the plaintiff at ten times their actual amount. This mistake, asserted in conclusory fashion, went unquestioned in the issuance of the writ. Though the shipowner received notice of the attachment almost immediately, a wrongful attachment of even short duration could cause signficant economic hardship in the cases of vessels with considerable operating expenses or those on strict schedules.

[57] 23 U.S. (10 Wheat.) 473 (1825).

[58] *Id.* at 483-84.

jurisdiction and upholding the historical emphasis in admiralty placed on procedural rights in issuing the writ of maritime attachment.

The decision in *Grand Bahama* represents an important step in the unification of the admiralty rules with the rules of civil procedure. It supports the reasonable premise that the unification was intended to provide procedural uniformity without altering substantive rights in admiralty.[59] In extending procedural rights to admiralty, the court recognized that the maritime context, without more, provided insufficient justification for dispensing with these rights entirely. The court did not determine that the safeguards applicable in admiralty need be identical to those required in civil cases.[60] Special conditions raised by the admiralty context must be considered in balancing the right of the plaintiff to a remedy with the right of the defendant not to be deprived of his property without due process of law. However, the court properly recognized that maritime exigencies do not justify dispensing with procedural safeguards to provide the maritime plaintiff a remedy.

The rejection of *Shaffer v. Heitner* in the admiralty context is more dubious. Here the court relied heavily on its observation of the unique characteristics of the maritime context. It underscored the constant mobility of individuals, the transience of property, and the distant situs of assets to justify the continued vitality of admiralty's traditional autonomy. This reasoning failed to recognize that such conditions are increasingly characteristic of other segments of human activity. In the nineteenth century travel and transience were virtually unique to admiralty; technological developments in transportation and communication and increased international business activity have made them applicable to other areas of society. As such, there is less justification to accord admiralty unique and autonomous status.

By dismissing the minimum contacts requirement in admiralty, *Grand Bahama* supports the contention that one engaged in maritime activities is vulnerable to jurisdiction in any locale where he possesses property which may be subject to attachment. Such a contention is potentially a source of considerable unfairness. *Grand Bahama* provides an illustrative example: the State of Washington, where the plaintiff sought to invoke jurisdiction, was a continent removed from the scene of the transaction which precipitated the dispute, and neither party was shown to have any ties with the locale except for the defendant's bank account. The minimum contacts requirement, applied to quasi-in-rem suits by *Shaffer*, prevents such a situation without forcing the defendant

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[59] Note, *Admiralty Practice After Unification: Barnacles on the Procedural Hull*, 81 YALE L.J. 1154, 1157 (1972).

[60] Judge Beeks speculated that the transitory nature of maritime property and the necessity for prompt action might justify issuance of the writ of attachment ex parte, based on a judicial determination and subject to a prompt hearing in which the defendant could require the plaintiff to show cause. 450 F. Supp. at 459, n. 84.

to resort to the difficult and limited remedy of challenging venue.[61] To litigate this dispute in Washington would have been inconvenient, impractical, and inefficient for both the parties and the courts. Because the court had clear due process grounds on which to reject the attachment of the defendant's bank account, it failed to recognize fully the independent significance of the minimum contacts requirement as a means of assuring fair play and substantial justice.

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[61] "Admiralty courts have jurisdiction of admiralty suits entirely between foreigners when proper service can be had or property attached, but it is discretionary with the court whether it will accept such jurisdiction or not." 1 BENEDICT ON ADMIRALTY § 216 (rev. 7th ed. 1974).

For a similar fact situation where the court refused to exercise jurisdiction, *see* Iberian Tanks Co. v. Terminales Maracaibo, C.A., 322 F. Supp. 73 (S.D.N.Y. 1971).