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Admiralty -- Federal Question Jurisdiction

David P. Karcher

the admittance of the surviving witnesses' testimony. In adopting the more modern and liberal minority rule which allows such testimony into evidence the court said:

> Here we have a guest in an automobile, who is completely inactive as to the controls of the automobile in which he is riding, who in no way mutually participates in the ensuing collision, and who is merely the unfortunate victim of the actions of others which actions he observes as independent facts and not as part of a transaction between the decedent driver and himself.[17]

The holding in the instant case removes this state from the limbo of its prior intermediate position[18] and expressly adopts the more liberal minority view.

It is submitted that the result in the instant case is both proper and desirable. The exclusion of a survivor's testimony has been uniformly condemned by a great majority of the modern writers on the law of evidence[19] as a rule "unfounded in reason . . . which leads to more false decisions than it prevents and encumbers the profession with a profuse mass of barren quibbles over the interpretation of mere words."[20] The rule has been strongly condemned by the very courts which enforce it, such courts holding themselves bound to do so until the legislature repeals the statute.[21] If a court can construe a statute so as to exclude evidence, surely it is within the judicial power to construe the same statute to admit such evidence.

RICHARD E. RECKSON

ADMIRALTY — FEDERAL QUESTION JURISDICTION

A Spanish seaman injured aboard a ship on which he was a crew member, brought an action for personal injuries on the law side of a United States District Court against four separate corporate defendants. The claims against the vessel's Spanish owners and their agents, a New

17. Day v. Stickle, 113 So.2d 559, 563 (Fla. App. 1959).

18. Kilmer v. Gustafson, 211 F.2d 781 (5th Cir. 1954); Herring v. Eiland, 81 So.2d 645 (Fla. 1954).

19. 2 WIGMORE, EVIDENCE § 578 (3d ed. 1940); Report of the Legal Research Committee of the Commonwealth Fund cited in 2 WIGMORE, EVIDENCE, *supra*; MODEL CODE OF EVIDENCE rule 92 (1942); 5 CHAMBERNYE, MODERN LAW OF EVIDENCE § 3670 (1916).

20. 2 WIGMORE, EVIDENCE § 578 (3d ed. 1940).

21. Wright v. Wilson, 154 F.2d 616, 620 (3d Cir. 1946): "We reach the result without enthusiasm. The rule excluding a survivor's testimony seems to stand in the almost unique situation of being condemned by all of the modern writers on the law of evidence. It is said to be as unsound and undesirable as the rule excluding the testimony of parties of which the survivor rule is a part. But we believe this to be a case where a rule so thoroughly established through many generations of judicial history should be removed by legislative action or court rule which applies generally and not by judicial legislation against a party in a particular case."

York corporation, were asserted under the Jones Act[1] and general maritime law. The liability of the other two defendants, a New York and a Delaware corporation engaged in work aboard the ship, was founded upon general maritime law. On certiorari, the United States Supreme Court dismissed the claims under general maritime law against the Spanish corporation, holding that such claims did not give rise to a federal question and in the absence of diversity of citizenship a federal court sitting at law in maritime matters had no jurisdiction.[2] *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959).

The source of jurisdiction in litigation based on federal maritime law is article III, section 2 of the Constitution. This constitutional grant was implemented by the Judiciary Act of 1789[3] which gave to the federal district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."[4] The Act of 1789 did not grant the lower federal courts original jurisdiction over civil actions arising "under the Constitution, laws, or treaties of the United States." The distinction that the cases falling within the "arising under" clause were wholly different and thereby excluded from "admiralty and maritime jurisdiction" within the meaning of the Constitution, was enunciated by Justice Marshall in *American Insurance Co. v. Canter*.[5] Between the *Canter* case and 1875, there is no evidence of a rejection, either legislative or judicial, of Justice Marshall's language that "A case in admiralty does not in fact arise under the Constitution or laws of the United States."[6] During this period maritime controversies were continually treated as being founded upon an independent source of

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1. 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958) provides: "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply. . . ."

2. The Court declared that even though the Jones Act was inapplicable to the claim against the Spanish company as Spanish law provided the proper remedy, jurisdiction over the American corporations should be retained by the district court "pendent" to its jurisdiction over the Spanish company under the Jones Act.

3. 1 Stat. 77 (1789), as amended, 28 U.S.C. § 1333 (1958).

4. This latter phrase gave recognition to the fact that many causes of action cognizable in admiralty had been litigated prior to this enactment in the state courts of common law. The right to these remedies, by an action in personam, was preserved by this saving to suitor's clause. See The Hamilton, 207 U.S. 398 (1907); New Jersey Steam Nav. Co. v. Merchants Bank of Boston, 47 U.S. (6 How.) 465 (1848); 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1672 (1858). In the 1948 revision of the Judicial Code, this latter phrase was changed to read, ". . . saving to suitors in all cases all other remedies to which they are otherwise entitled." The Revisers Note, however, indicates that no substantive change was intended. See Madruga v. Superior Court of California, 346 U.S. 556, 560 n. 12 (1954).

5. 26 U.S. (1 Pet.) 510, 544 (1828): "The constitution certainly contemplates these as three distinct classes of cases; and if they are distinct, the grant of jurisdiction over one of them, does not confer jurisdiction over either of the other two. The discrimination made between them is, we think, conclusive against their identity."

6. *Id.* at 543.

jurisdiction requiring litigants in the federal courts to proceed, according to the historic admiralty procedure, by a judge without a jury.[7] If proceedings at law with a jury were sought, a wholly distinct basis of federal jurisdiction had to be established. An action at law could be brought under the "saving to suitors" clause in a state court[8]; if jurisdiction was founded upon diversity of citizenship, it could then be brought in a federal court.[9]

This view went unchanged notwithstanding the first grant[10] to the federal lower courts of jurisdiction over "all suits of a civil nature at common law or in equity . . . arising under the Constitution or laws of the United States" by the Judiciary Act of 1875.[11] Even with this broadened scope of power, it was not until 1950, in *Jansson v. Swedish American Line*,[12] that it was proposed that a claim in admiralty should be considered as "arising under" for purposes of federal jurisdiction. This proposal was a corollary to the doctrine of the supremacy of federal maritime law over state law which was enunciated by a line of cases[13] beginning with *Southern Pacific Co. v. Jensen*.[14]

These cases established the concept that "the Constitution itself adopted and established as part of the laws of the United States, approved rules of the general maritime law."[15] This has had the effect of establishing federal maritime law as the controlling substantive law in admiralty cases in any court, thus displacing conflicting state common and statutory law in matters which require a uniformity of decision.[16] An extension of this maritime supremacy doctrine led to a controversy among the circuit courts as to the basis of federal jurisdiction in seamen's personal injury actions

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7. The Sara, 21 U.S. (8 Wheat.) 644 (1823); The Betsy and Charlotte, 8 U.S. (4 Cranch) 673 (1808); The Sally, 6 U.S. (2 Cranch) 320 (1804); The Vengeance, 3 U.S. (3 Dall.) 610 (1796).

8. Norton v. Switzer, 93 U.S. 355, 356, (1876); Leon v. Galceran, 78 U.S. (11 Wall.) 74 (1871); The Belfast, 74 U.S. (7 Wall.) 266 (1868); Hine v. Trevor, 71 U.S. (4 Wall.) 555 (1867); The Moses Taylor, 71 U.S. (4 Wall.) 411 (1867).

9. The Judiciary Act of 1789, 1 Stat. 78 (1789), endowed the then Circuit Courts with diversity jurisdiction.

10. With the exception of the short lived Act of Feb. 13, 1801, 2 Stat. 89, 92 (1801), repealed by Act of March 8, 1802, 2 Stat. 132 (1802).

11. Act of March 3, 1875, 18 Stat. 470 (1875).

12. 185 F.2d 212, 217-218 (1st Cir. 1950). Authough decided on other grounds, there was strong dictum to the effect that admiralty law did give rise to a "federal question."

13. Pope & Talbot Co., Inc. v. Hawn, 346 U.S. 406 (1953); Garrett v. Moore-McCormack Co. 317 U.S. 239 (1942); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920); Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918).

14. 244 U.S. 205 (1917).

15. Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 160 (1920).

16. Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918): "And as a final bit of curiosa it may be noted that, while the Supreme Court was definitely establishing the supremacy of federal maritime law over state common law, it was simultaneously, under Erie R.R. Co. v. Tompkins, establishing the supremacy of state common law over the general federal common law." GILMORE AND BLACK, ADMIRALTY 377 (1957). See generally Stevens, *Erie R.R. Co. v. Tompkins and the Uniform General Maritime Law*, 66 HARV. L. REV. 246 (1950).

brought on the law side of the federal district courts. This difficulty is occasioned by the desire for a trial by jury, rather than the traditional admiralty action tried by a judge.

Conflict has arisen where claims under general maritime law are sought under the jurisdictional grant of section 1331[17] of the Federal Judicial Code as cases arising under the Constitution or laws of the United States. An action brought under the Jones Act has been held to come under the jurisdictional grant of section 1331.[18] It was not considered, however, that the nonstatutory traditional admiralty actions for unseaworthiness or for maintenance and cure should similarly give rise to a federal question.[19]

In *Doucette v. Vincent*,[20] the First Circuit held that the maritime supremacy doctrine in the *Jensen* line of cases gave rise to a constitutional principle which will support "federal question" jurisdiction. The Second and Third Circuits denied such jurisdiction,[21] basing their conclusions[22] on the historical background of nondiversity jurisdiction.

It is primarily this historical background coupled with what Justice Frankfurter calls "commonsensical and lawyer-like modes of construction"[23] which forms the basis for decision in the instant case. The "unquestioned" acceptance[24] until 1950 of the distinction between jurisdiction over admiralty matters and claims "arising under" as declared in the *Canter* case, both prior and subsequent to the Judiciary Act of 1875, is the mainstay of the majority opinion. It was noted that since 1789 Congress has specially provided for admiralty courts in which rights could be asserted under federal maritime law. In addition, to construe maritime claims as arising under the laws of the United States, within the framework of

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17. There are three jurisdictional routes by which an admiralty case can reach a federal district court under the present Judicial Code, 28 U.S.C. §§ 1331-33 (1958). First, jurisdiction may be founded on section 1331, under which the district courts have jurisdiction of "all civil actions wherein the matter in controversy . . . arises under the Constitution, laws or treaties of the United States." Second, where there is diversity of citizenship, the federal court has jurisdiction under section 1332. Thirly, an admiralty suit may be heard under section 1333, which does not contemplate a jury trial.

18. MOORE, COMMENTARY ON THE JUDICIAL CODE § 0.03 (22) (1949).

19. Jordine v. Walling, 185 F.2d 662 (3d Cir. 1950). *cf.* Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950); Bell v. Hood, 327 U.S. 678 (1946); Gully v. First Nat'l Bank, 299 U.S. 109 (1936); Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908). See generally London, *"Federal Question Jurisdiction"—A Snare and a Delusion*, 57 MICH. L. REV. 835 (1959).

20. 194 F.2d 834 (1st Cir. 1952).

21. Paduano v. Yamashita Kisen Kabushiki Kaisha, 221 F.2d 615 (2d Cir. 1955); Jordine v. Walling, 185 F.2d 662 (3d Cir. 1950). See also, Jesonis v. O. J. Olson & Co., 238 F.2d 307 (9th Cir. 1956); Troupe v. Chicago, Duluth & Georgian Bay Transit Co., 234 F.2d 253 (2d Cir. 1956).

22. Although on different lines of argument.

23. Romero v. International Terminal Operating Co., 358 U.S. at 278 (1959).

24. The City of Panama, 101 U.S. 453 (1879), is distinguished on the grounds that the court was interpreting a congressional statute to grant admiralty jurisdiction to territorial courts in light of the purposes of a particular statute.

section 1331, would result in a maritime cause of action being removable from a state court under section 1441[25] and thus would defeat the aim of the saving clause of 1789 to preserve the traditionally exercised concurrent jurisdiction of state courts in admiralty matters.

Although it is admitted that the doctrine of supremacy of federal maritime law had recently been greatly expanded, the Court rebutted the theory that a claim under maritime law gives rise to "federal question" jurisdiction, because such law had become part of the laws of the United States. It is said that the "federal nature" of maritime law has long been a part of maritime jurisprudence,[26] thus the view that federal maritime law has been adopted as part of the laws of the United States[27] cannot be considered a novel development warranting an inclusion of admiralty jurisdiction under section 1331.

To the considerations of history and policy, the Court adds its "deeply felt and traditional reluctance . . . to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes."[28]

Mr. Justice Brennan, with whom the Chief Justice joined, dissenting in part and concurring in part, contended that section 1331, which gives power to a federal court to administer common law remedies, which have their origin in federal law, is not subject to an exception for rights taking their origin in federal *maritime* law. To support this contention it is maintained that general maritime law, as enunciated by the courts, does constitute law which "arises under" within the meaning of section 1331, in accordance with the view expressed in *Doucette v. Vincent*[29] and the *Jensen* line of cases.[30] The dissent goes on to state that maritime matters are not exclusively within the jurisdiction of federal admiralty courts as certain causes of action in admiralty may be brought at law, either under the "saving to suitors" clause, or by virtue of a statute such as the Jones Act. Mr. Justice Brennan conceded that certain classes of cases, such as the traditional in rem, prize, and seizure cases, lay within the exclusive jurisdiction of admiralty courts, but all other suits of an in personam nature might be brought in the state courts or under diversity jurisdiction in the federal courts. Thus, it is argued that these actions *at law*, are not

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25. 28 U.S.C. § 1441 (b)(1958): "Any civil action of which the district courts have original jurisdiction founded on a claim or right arisng under the Constitution, treaties, or laws of the United States shall be removable without regard to the citizenship or residence of the parties."

26. The Western Maid, 257 U.S. 419, 432 (1922); The Lottawanna, 88 U.S. (21 Wall.) 654 (1874).

27. Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 160 (1920).

28. Romero v. International Operating Co., 358 U.S. at 379 (1959).

29. 194 F.2d 834 (1st Cir. 1952).

30. Cases cited note 13 *supra*.

to be excluded from the grant of section 1331, in that they arise under the laws[31] of the United States.[32]

The *Romero* case firmly settles the controversy between the circuits by overruling the contentions set forth by the First Circuit in *Doucette v. Vincent*.[33] while supporting the position taken by the Second and Third Circuits in the *Paduano*[34] and *Jordine*[35] cases. In so doing, the question, of whether a federal district court has the jurisdiction in maritime matters to hear a claim on its law side, in the absence of diversity of citizenship, is definitely answered in the negative. This position reaffirms a long period of judicial acceptance of the distinction between general maritime law and that of cases "arising under" and is clearly consistent with an understanding of the historical background of admiralty jurisdiction.

DAVID P. KARCHER

WORTHLESS CHECK STATUTE — PENALTY PROVISION

Petitioner sought release from the state prison by writ of habeas corpus on the ground that the worthless check statute under which he was convicted of a felony set forth a misdemeanor at most. The statute analogizes the punishment for uttering a bad check to that of larceny, the grade of which offense, whether grand (felony) or petit (misdemeanor), is established *according to the value of the property stolen*. But the information filed against petitioner failed to charge that he had received value for his check. *Held*, issuance of a bad check without receipt of value must be classified as a misdemeanor since it is not otherwise classified as a felony, either by definition or by penalty. *State ex rel. Shargaa v. Culver*, 113 So.2d 383 (Fla. 1959).

In addition to statutes in every jurisdiction which penalize the obtaining of property by worthless check,[1] forty-one states have also condemned

31. Here the dissent cites the *Erie* case in support of the contention that the word "laws" includes court decisions.

32. Mr. Justice Black, with whom Mr. Justice Douglas joined, dissented from the major question under discussion for the reasons stated by Mr. Justice Brennan and as set forth by Judge Magruder in *Doucette v. Vincent*. This dissent felt that the "real core of the jurisdictional controversy is whether a few more seamen can have their suits for damages passed on by federal juries instead of judges."

33. 194 F.2d 834 (1st Cir. 1952).

34. Paduano v. Yamashita Kisen Kabushiki Kaisha, 221 F.2d 615 (2d Cir. 1955).

35. Jordine v. Walling, 185 F.2d 662 (3d Cir. 1950).

1. A survey of statutes reveals that all states have protected themselves against the issuance of worthless checks when property is obtained thereby. Only in Oklahoma does this protection take the form of a standard false pretenses statute and nothing more. OKLA. STAT. ANN. tit. 21, § 1541 (1951) itemizes a bogus check as one of several "false pretenses." In all other states additional laws specifically cover obtaining property by bogus check. Florida's provisions are typical. A bad check passer might be indicted under a general false pretenses statute, FLA. STAT. § 811.021(1)(a) (1957), or a statute condemning the obtaining of property by issuance of a worthless check, FLA. STAT. § 832.05(3) (1957). (A third and separate charge might be pressed under a statute condemning the mere issuance of bogus checks, FLA. STAT. § 832.05(2) (1957)).