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Admiralty Jurisdiction and State Compensation Acts

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court extinguishing the rights of a resident of California in an insurance policy, although the debtor company was before the Pennsylvania court. If this case be followed, the rule of *Harris v. Balk* will not be extended by the United States Supreme Court to other than garnishment cases. (But see the very recent case of *Hartford Life Insurance Co. v. Barber*, which requires the Supreme Court of Missouri to recognize a Connecticut decree extinguishing the rights of a Missouri beneficiary who was not before the Connecticut court.) Aside, however, from the statutory differentiation, which, it should be noted, has not been urged by the cases, is there any reason why such an extension would fail to be due process of law? Is there any valid ground, when the analogy of garnishment cases is considered, for holding the decree in *Perry v. Young* and that of the lower court in Minnesota so utterly unreasonable as to be not due process? It is somewhat difficult to see that there is.

M. S. B.

**ADMIRALTILITY JURISDICTION AND STATE COMPENSATION ACTS**

The Supreme Court of the United States, by that five to four division, unfortunately so usual in the determination of important constitutional questions, has ruled that state workmen's compensation acts cannot apply to any cases coming within the jurisdiction of admiralty. *Southern Pacific Co. v. Jensen* (1917) 37 Sup. Ct. 524. This decision was given upon the same day that another important limitation upon the extent of state compensation acts was announced

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in a decision elsewhere commented upon. The decision in the Jensen case is of great interest not only in its bearing upon compensation law, but also because of its importance upon the entire question of maritime law as well as the intrinsic interest of the opinions rendered. Mr. Justice McReynolds spoke for the majority of the court. Mr. Justice Holmes wrote a dissenting opinion containing an unusual number of the epigrammatic statements for which he is renowned, while Mr. Justice Pitney, concurring substantially with Mr. Justice Holmes, gave a dissenting opinion so full, so complete and so persuasive as seemingly to exhaust the subject. Mr. Justice Brandeis and Mr. Justice Clarke concurred in the dissent.

The New York Workmen’s Compensation Commission had made an award, sustained by the state courts, to the widow and children of one Jensen, who had been killed while in the employ of the Southern Pacific Company, a common carrier by railroad also owning and operating a steamship line between New York and Galveston, Texas. Jensen operated an electric truck from the steamship across a gangway to a pier in North River, New York City, and while thus assisting in unloading the cargo of lumber, sustained the accidental injury causing his death. The majority of the Supreme Court hold that, the matter being maritime and within the jurisdiction of admiralty, the state compensation act conflicts with the grant of admiralty jurisdiction to the federal courts by the United States Constitution and is to that extent invalid.

Article 3, Section 2, of the federal Constitution extends the judicial power of the United States “to all cases of admiralty

3 N. Y. Central R. R. Co. v. Winfield (1917) 37 Sup. Ct. 546 (Justices Brandeis and Clarke dissenting), holding that Congress, by enacting the Federal Employers’ Liability Act had excluded state action concerning injuries sustained during employment by employees of interstate railway carriers. As the Court in the Winfield case held that Congress had by this Act covered the field of such injuries, while in the Jensen case it held that the Act did not apply to injuries sustained upon an ocean going steamship not a mere adjunct of an interstate railway, the two cases present the distinction that in the one Congress had acted, while in the other it had not.

4 Thus he says "The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified." In another place he remarks "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.

5 See note 1, above.

6 The general constitutionality of the New York compensation statute was upheld in New York Central R. Co. v. White (1917) 243 U. S. 188, 37 Sup. Ct. 247.
and maritime jurisdiction.” In 1789 Congress enacted that the district courts of the United States should have “exclusive original cognizance of all civil cases 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.” This grant has been continued. The majority opinion holds that the saving clause does not here apply, as the remedy which the Compensation Act attempts to give was unknown to the common law. The court recognizes that certain state laws affecting maritime matters are upheld but attempts to formulate a test that no such legislation is valid “if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations.” A state statute exceeding these limitations is invalid even though Congress has not legislated upon the point covered by the state statute, just as in certain cases connected with interstate commerce, silence of Congress is equivalent to a declaration that commerce shall be free. Conflicting state compensation acts applicable to maritime matters would destroy that uniformity which the constitutional provision was designed to secure. And finally, this form of remedy is not in harmony with the policy of Congress to encourage investments in ships, manifested in the acts limiting the liability of ship owners to the amount of their investment.

It would seem that the case might have been decided otherwise under the authority of the saving clause of the Act of 1789, the constitutionality of which seems never to have been doubted. The framers of that act by their reference to the common law

Section 9, Judiciary Act of 1789 (1 Stat. at L. 76, 77, ch. 20, sec. 9).
*Comp. Stat., 1916, sections 8021–8023, 8028. In *State v. Daggett* (1915) 87 Wash. 253, 151 Pac. 648, L. R. A. 1916 A 446, the Washington Supreme Court had decided that the Compensation Act of that state could not apply to maritime injuries, as Congress, having legislated upon the matter in the limited liability statutes, had excluded state action. Most of the state decisions, however, were contrary to the ruling of the Jensen case. See the well considered cases of *Kennerson v. Thames Towboat Co.* (1915) 89 Conn. 367, 373, L. R. A. 1916 A 436, 94 Atl. 372; *Lindstrom v. Mutual S. S. Co.* (1916) 132 Minn. 328, L. R. A. 1916 D 935, 156 N. W. 669; *North Pacific S. S. Co. v. Industrial Acc. Com’n.* (1917, Cal.) 163 Pac. 199; the New York decisions, ante note 1; also *Keithley v. North Pacific S. S. Co.* (1916, D. Oreg.) 232 Fed. 255, 259; *Stoll v. Pacific Coast S. S. Co.* (1913, W. D. Wash.) 205 Fed. 169. *Schude v. Zenith S. S. Co.* (1914, N. D. Oh.) 216 Fed. 566 was in accord with the Jensen case.
apparently meant simply the system of law enforced in the ordinary courts as distinguished from the admiralty courts, and did not mean that restricted, though uncertainly limited, body of law which excludes both equity and statutory law. Moreover, the Supreme Court seems to have decided cases which, though not overruled by this case, are difficult of reconciliation with it, notably those cases which have applied state statutes creating a remedy for death by wrongful act—a remedy unknown to the common law—to maritime cases, both those brought in the state courts and those brought in the admiralty courts.

But broader grounds than the mere wording of the Act made it desirable that the state statute should have been sustained. Mr. Justice Pitney seems clearly right in pointing out that the framers of the Constitution in the provision concerning admiralty matters intended merely to establish jurisdiction and not to prescribe particular codes or systems of law; to enumerate rather than define the powers granted. This jurisdiction was not in terms made exclusive and, as the decisions of the Supreme Court show, it was not exclusive under the rules of admiralty law with two exceptions. These exceptions were prize cases and civil cases brought under the peculiar "in rem" proceedings of admiralty where a judgment against all parties in interest is obtained by process against the thing itself to enforce a maritime lien, which, unlike a common law lien, does not rest upon possession of the property. In all other cases the common law is competent to give a remedy and its jurisdiction is concurrent. Hence state statutes attempting to give maritime liens enforced by in rem proceedings are invalid, but other state statutes bear-

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12 Speaking of the saving clause of this statute, Mr. Justice Holmes, in The Hamilton (Old Dominion S. S. Co. v. Gilmore) (1907) 207 U. S. 398, 404, 52 L. Ed. 264, 28 Sup. Ct. 133, said: "And as the state courts in their decisions would follow their own notions about the law and might change them from time to time, it would be strange if the state might not make changes by its other mouthpiece, the legislature." See also American S. B. Co. v. Chase (1872) 16 Wall. 522, 21 L. Ed. 359.


14 The Hamilton (Old Dominion S. S. Co. v. Gilmore) (1907) 207 U. S. 398, 52 L. Ed. 264, 28 Sup. Ct. 133; La Bourgogne (Dehions v. La Compagnie Générale Transatlantique) (1907) 210 U. S. 95, 52 L. Ed. 973, 28 Sup. Ct. 664.


16 The Moses Taylor (1866) 4 Wall. 411, 18 L. Ed. 397; The Hive v. Trevor (1866) 4 Wall. 555, 18 L. Ed. 451; The Glide (1896) 167 U. S. 666, 42 L. Ed. 296, 17 Sup. Ct. 930. A state statute creating a lien for materials used in repairing a foreign ship is invalid. The Roanoke (1902) 185 U. S. 185, 47 L. Ed. 770, 23 Sup. Ct. 491. But not for repairs of a
ing upon maritime matters, including statutes aiding proceedings in personam by allowing attachments of the interest of owners in vessels, are upheld. Admixture courts have enforced state legislation in the absence of similar legislation upon the part of Congress. All the more then should the state act be enforced in the state court when the suitor has chosen the state tribunal rather than the admiralty court for the determination of his rights.

Moreover, there is no body of law forming a complete admiralty code. Mr. Justice Holmes, by an ingenious and pertinent argument, demonstrates that the wholly incomplete maritime law is supplemented by common law principles. If maritime law does thus include common law, and common law with its statutory changes such as the remedy for death by wrongful act, it is difficult to see how this common law is excluded from admiralty by the mere conferring of admiralty jurisdiction by the federal Constitution upon the federal courts.

The lack of uniformity which the majority feared would result from an enforcement of state compensation acts in maritime matters would be at least a difficulty no greater than the like lack of uniformity in the application of laws to interstate commerce before Congress partly covered the situation by the passage of the federal Employers' Liability Act. At most the matter is one for the legislative department to deal with, and it seems not to be doubted that Congress might act in this case and that state laws would then be superseded. Yet it is doubtful if an act in the nature of an admiralty compensation act is desirable. The state machinery of compensation commissions (which is


See notes 12 and 14, supra.

It is clear that different rules may apply accordingly as a case is brought in the state or in the admiralty court. Compare The Max Morris (1890) 137 U. S. 1, 34 L. Ed. 586, 11 Sup. Ct. and Atlee v. Northwestern Union Packet Co. (1874) 21 Wall. 389, 395, 396, 22 L. Ed. 619, as to the effect of contributory negligence in admiralty.

The argument in brief is that as the Supreme Court has permitted a recovery for a maritime tort upon common law principles, as in Atlantic Transport Co. v. Imbroeck (1913) 234 U. S. 52, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157, 34 Sup. Ct. 733, and as the judges without legislation could not engrat the common upon the maritime law, therefore the maritime law actually includes in part the common law.
necessary in view of the many purely local contracts of employment) ought not to be duplicated by federal machinery occupying much the same field. Moreover, as the risk resulting from the liability imposed by various state compensation acts may be transferred without difficulty to an insurance company, the practical hindrance to commerce would be small. Then, while a uniform act is desirable in some fields of law, such as bankruptcy, it is questionable whether compensation to dependents of injured employees—the real object of compensation acts—ought to be uniform in all parts of the country, no matter how the cost of living may vary. Local legislatures and tribunals are perhaps better fitted to determine the amount of the compensation. 19

The limited liability acts furnish no obstacle. They are, of course, paramount in both state and federal courts and would operate to place a maximum upon the amount allowable in certain cases, though only the worst forms of marine disaster ordinarily make an appeal to the benefits of the statutes of any aid to the ship owner. But this limitation of liability has been applied to claims for death damages based upon state statutes, 20 and may just as easily be applied to claims for compensation.

The practical results of the decision are unfortunate. The earlier cases are apparently not to be considered as overruled, but even if they were the situation would hardly be cleared. In either event it would be impossible to tell just what was included in the maritime law. The only test would be the nebulous one set forth by the majority in this case. How certain a test is may be imagined when we consider that here five justices thought the limitations were exceeded, while four justices thought the objections not well taken. The test hitherto applied certainly was more explicit. Then, too, it may be doubted whether freedom of commerce will be aided by the lack of a compensation act in admiralty, since modern experience tends to show the value and the necessity of compensation acts. To induce labor to turn to the sea, Congress will probably have to create some compensation remedy applicable to admiralty and thus perhaps uselessly duplicate state compensation organizations, thereby obtaining in maritime matters a uniformity of remedy which does not take into consideration the variations of local conditions. Hence, a policy which refuses state assistance in control of maritime affairs before Congress has shown that

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19 See dissenting opinion of Mr. Justice Brandeis, in New York Central R. Co. v. Winfield (1917) 27 Sup. Ct. 546.
20 See cases in note 12, above.
assistance undesirable may not be the most desirable policy under all circumstances.\textsuperscript{21}  

C. E. C.

THE DOCTRINE OF MUTUALITY IN SPECIFIC PERFORMANCE CASES

To Lord Fry, specific performance without "mutuality" was inconceivable.\textsuperscript{2} The supposed principle proves, however, on careful analysis to have so many exceptions as to be valueless as a generalization.\textsuperscript{2} Indeed when all the exceptions to Lord Fry's broad statement are considered, the true doctrine of want of mutuality as a defense to specific performance narrows down to this: Equity will not grant the plaintiff specific performance of a bilateral contract if, after the defendant's forced performance, the plaintiff's own obligation will remain unperformed and is of such a nature that, at the time for its fulfillment, equity would, on grounds independent of mutuality, refuse specific performance of it,—the one possible limitation to this rule being that equity might give the plaintiff specific performance if the defendant's assumed common law remedy for damages would be fully adequate.\textsuperscript{8} But some jurisdictions, following the lead of the federal Supreme Court, have carried the supposed broad doctrine of mutuality to the extreme extent of applying it to cases where there is no want of mutuality of remedy as such, but only a want of mutuality in the substantive rights and powers of the parties.\textsuperscript{4} Thus it has been held that covenants in leases

\textsuperscript{21} Since the above was written, it has been brought to the writer's attention that Congress, by an act approved October 6, 1917, has amended the Act of 1789, cited in notes 7 and 8 supra, by adding to the saving clause the words: "and to claimants the rights and remedies under the workmen's compensation law of any state." See 244 Fed. 420 (General and Permanent Acts of Congress). Does not this amendment lead to an interesting dilemma? If the Act of 1789 is constitutional—and it has always been so considered, and was so considered by the majority in the Jensen case—it would seem beyond question that the amendment is also constitutional. Yet the majority in the Jensen case hold that state compensation acts interfere with the grant of admiralty jurisdiction contained in the United States Constitution. Hence the amendment must be unconstitutional. Cf. Comment by Professor Wright, 6 Cal. L. Rev. 72, n. 18. The writer of this interesting comment states that the holding of the majority in the Jensen case that the saving clause of the act did not apply was merely a dictum. It is difficult to see how the majority in reaching their conclusion could have avoided a direct decision either that the statute was unconstitutional or that it did not apply.

\textsuperscript{1} Fry, Spec. Perf. (3d ed.) 225.

\textsuperscript{2} See 36 Cyc. 621.

\textsuperscript{3} Wakeham v. Barker (1887) 82 Cal. 46, 23 Pac. 1131 (exemplifying the true rule); cf. Jones v. Neuhall (1874) 115 Mass. 244 (inferentially supporting the suggested limitation).

\textsuperscript{4} Rutland Marble Co. v. Ripley (1869, U. S.) 10 Wall. 339.