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Tradition and Common Sense in Admiralty

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TRADITION AND COMMONSENSE IN ADMIRALTY

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WHERE a foreign vessel comes into American waters and on account of negligent or unskillful management collides with another ship, the federal courts may take jurisdiction to adjudicate damages, according to the principles and procedure of admiralty. They will, as a first step to do justice, take possession of such vessel, and not allow it to leave port until a proper bond has been given that the owners will return to the jurisdiction of the court and abide by whatever decree may be found against them. Suppose, however, that the ship collided, under similar circumstances, with a wharf, a bridge, or any other marine appliance located on the land. In that case, assuming that the master of the vessel is not over-conscientious, he may leave port, and the vessel may never return to the United States, leaving the owner of the damaged property to the slim chances of getting redress by the ordinary procedure of courts in some foreign country. For it is held that a tort committed upon a floating vessel, though the tortfeasor may be on the land while he commits the wrongful act, is within the jurisdiction of the admiralty courts; but that a wrongful act by a vessel is not within that jurisdiction, if the resulting damage is done upon the land.

This curious legal anomaly has become of considerable importance to the wharf owners, ports, and municipalities in this country; and the possibility of changing the rule has recently been discussed by the American Association of Port Authorities, and several committees of the American Bar Association.

THE RULE IN THE PLYMOUTH CASE

The rule of which complaint is made is that laid down in the case of *Hough et al.* v. *The Western Transportation Company,* more commonly known as *The Plymouth,* reported in 3 Wall. 20 (18 Lawy. ed. 125). The U. S. Supreme Court there held, in the year 1865, that the U. S. District Court had no jurisdiction in the matter for the reason that the injury, although originating on board of a floating vessel, was consummated on land, and therefor not of a maritime nature. The only

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ground on which this decision was based was the old English rule that in the case of torts admiralty jurisdiction depended on the locality, meaning that the tort must have been committed on navigable water; and an extension of this, that the injury must also have been consummated on the water. For the latter extension, no reason is given, except the tacit acceptance of its validity on the strength of some ancient English authorities cited by the respondent. The attitude of the latter is characterized by the statement in his brief that "we broke the Constitution by discarding the limit of tidewater and the sovereign arbitrament of the moon."

This insufficiently argued, and as we firmly believe, erroneous decision has been followed in a number of cases, not one of which reconsiders the basis on which the precedent was founded, so that now it establishes the accepted rule of jurisdiction exclusively on the principle of *stare decisis.*

Among the cases in the Supreme Court which form this line of precedent are the following:

Ex parte Phoenix, 118 U.S. 610.

Johnson v. *Ch. and Pac. Elevator Co.,* 119 U.S. 388.

Cleveland Term'l and Valley R'y. Co. v. *Cleveland Steamship Co.,* 208 U.S. 110.

The Troy, 208 U.S. 321.

The Panoil, 266 U.S. 432.

In Gonsalves v. *Dry Dock Co.,* 266 U.S. 171 the Court repeats with a little apparent show of irritation, "the fact that admiralty jurisdiction in tort matters depends on locality, is settled."

Under these circumstances few lawyers would care to attempt convincing the court that the rule in the *Plymouth* case is not the law; but that does not contradict the proposition that it ought not to be the law. If that assertion is true, obviously the proper step is to apply to Congress for an enactment conferring the necessary jurisdiction on the Courts of the United States. It is claimed, however, that under the Constitution, Congress has no power to do so. The question, accordingly, is whether the Constitution would authorize a statute giving to the District Courts jurisdiction over torts committed by floating vessels, if the damage is partly or entirely extending to property or persons on the land.

Before I attempt to answer this question however, I desire to analyze the present rule with a view of showing its double error, and the fine-spun argumentation by which it is upheld. The decision in the Plymouth case in the first place upholds once again the narrow rule of locality; and secondly attempts to divide the tort and its consequences, resulting in damages, by stating, without giving a reason, that although the tort

was committed under the jurisdiction of the U. S. District Court, if the consequences extend to the land, that jurisdiction is lost. One should think that commonsense would suggest precisely the opposite; that the tortious act was the principal thing, and that the damages, wherever they occurred, would of necessity follow the act, as the accessory everywhere else in law, logic, and commonsense follows the principal. It would seem that the court itself has felt that its position was untenable. For in a number of cases it has tried to modify its rule by finding excuses for taking a case out of it; as when it held that injury done to a cluster of piles, resting on the bottom, but not laterally connected with the land, was within the admiralty jurisdiction.[1]

Nature of Admiralty Jurisdiction

The reason why some lawyers hold that an act of Congress conferring upon courts of the United States jurisdiction in cases under contemplation would be unconstitutional is not a denial that the rule complained of is absurd. They might even admit the absurdity; but they hold that no power under the sun, short of three-fourths of all the states in the Union acting to amend the Constitution, can change that rule, however inconvenient to very great interests of shippers, wharf-owners, and municipalities. They hold in effect that the practice of common law courts in Great Britain, at the Declaration of Independence, is a part of the Constitution of the United States.

The federal courts have authority to deal with maritime cases by virtue of a clause in section 2, subsection 1, of Article III of the Constitution, which reads *"the judicial power shall extend* to all cases of admiralty and maritime jurisdiction." From the very beginning, a vigorous contest has raged about the interpretation of this clause. There have been those who held that under its text the jurisdiction which Congress may confer on any court must be strictly confined to cases of a character which, if occurring in England, would have been cognizable by the Court of the Admiral on the day when the thirteen colonies separated from the mother country. On the other hand, many eminent lawyers, headed by no less a person than Justice Story, have contended that the jurisdiction our federal courts may exercise extends potentially to all matters connected with the sea and the ships, in the sense of the maritime *"jus gentium."* Unfortunately it must be stated, with all due respect to the Supreme Court, that its decisions have oscillated from one side of this question to the other, in such a manner that the maritime and admiralty law of the United States, at least on the instance side, is now full of the most glaring inconsistencies.

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[1] *Doullub & Williams Co.* v. *U.S.*, 268 U.S. 33.

The true meaning of the constitutional grant of power may be approached conveniently by first analyzing the two terms, "admiralty and maritime." We cannot, of course, assume as is apparently done quite frequently, that the two words are mere synonyms. That would be charging the draftsmen of the Constitution with insufferable tautology. "Admiralty," if standing by itself, would indicate reasonably, that the draftsmen intended that the United States courts should exercise such jurisdiction as the British court of admiralty at that time possessed, and none other. No different interpretation would be possible. For "admiralty" is a specifically English term, referring to a peculiarly English institution, the court of the Lord High Admiral and his deputies, who under a grant from the King exercised as a personal and lucrative franchise the judicial power over certain causes. His court was jealously watched by the regular law courts, who were quick, by writs of prohibition and otherwise, to restrict his jurisdiction to the narrowest practicable limits. There was no analogous institution in other countries, at least not at the time of our Revolution. In England itself, it has since been abolished. If the makers of the Constitution had meant to give only this sort of jurisdiction to the courts, they would presumably have stopped after this word; but they added the word "maritime." This is, obviously, a term of much wider significance. It denotes the international law of the sea: the *"Seerecht,"* as the Germans, or the *"Droit de Mer,"* as the French denominate it. This body of law deals with all things that pertain to the sea or the ships. It was, in principle, adopted at a very early day by every civilized seafaring nation in the world, with such modification as they might deem appropriate under their specific conditions. The British admiralty law was such a local modification. Adding this broader term to the term "admiralty" could have but one purpose, that of guarding against that narrow construction which has so often been attempted in this country. It might be asked, however, why if the federal courts are to have jurisdiction of all cases arising under the international sea-law of the world, the Constitution adds the word "admiralty." The answer is obvious. The international maritime law lays down rules regarding rights and duties arising from the sea and navigation. It says nothing as to how these shall be adjudged. Admiralty law means the way in which the English are in the habit of administering so much of the sea law as they administer in that particular court. To add it to the constitutional clause is merely to say that our federal courts will follow, in their practice, the rules of the English admiralty courts, as was done by the vice-admirals exercising jurisdiction in the colonies, subject to such changes as Congress may from time to time enact. Admiralty law was the existing law of the

thirteen colonies, and consequently of the new independent states, until it was changed by constitution or statute.

This construction of the constitutional clause is substantially that for which Justice Story contended in his elaborate and learned treatment of the problem in *De Lovio* v. *Boit,* 2 Gall. 452, Fed. Cases No. 3776.

It is also implied in many of the leading cases in the Supreme Court of the United States.

Waring v. *Clark,* 5 Howard 441.
N.J. Steam Nav. Co. v. *Bank,* 6 How. 387.
The Vengeance, 3 Dallas 297.
The Betsey, 4 Cranch 443.
New Engl. Ins. Co. v. *Dunham,* 11 Wall. 1.
The Genesee Chief, 12 How. 443.
Jackson v. *The Magnolia,* 20 How. 296.

The Rule of "Within the Body of a County"

From the days of King Richard II until the final abolition of the court of the Lord High Admiral in 1872, there went on, in England, an embittered struggle for jurisdiction between the admiralty court and the common law tribunals, more particularly the Court of Exchequer Chamber. Acts of Parliament, resolutions of the Privy Council, and writs of prohibition issuing out of common law courts were the principal weapons. The war began with the attempts of the admiralty judges to extend their jurisdiction to all sorts of matters connected with the sea and the ships by the most tenuous threads only, for the purpose of harvesting fees, fines, and amercements, to be distributed between themselves and the holder of the feudal dignity of Admiral. To restrain this rapacity, the acts of 13 and 15 Rich. II and 2 Henry IV were passed in Parliament. These still left to the Admiralty Court substantially the jurisdiction growing naturally out of the international law of the sea, both on the instance and prize side of the Court. The common law courts, however, were not satisfied, in part because their judges and officers also coveted fees; but largely for the more respectable reason that the jurisdiction of the admiralty courts soon became entangled with the perennial struggle between the Crown and Parliament. The Admiralty shared in the favor bestowed upon special courts under the Tudor Kings. Like the Star Chamber, the High Commission, and the Chancery, they used procedure based on Civil Law principles; and the maritime law itself was more closely akin to the Roman than to the common law. When the quarrel between the Stuarts and the Parliament

broke, these special courts, as everybody knows, were considered as the particular bulwarks of arbitrary government, while the courts of common law were believed to be the special champions of popular liberty. They were not slow in taking advantage of their political position. By means of writs of prohibition, they made it hard for litigants who would have preferred to take advantage of the simple and efficient rules of the admiralty; on the other hand, they did their best to scare people by emphasizing the fact that in admiralty there was no jury; for at that time trial by jury was popular as one of the "bulwarks of liberty." The outcome was that by the middle of the eighteenth century the admiralty courts had ceased to take jurisdiction in many causes where it was certain that a prohibition would come from the common law courts, although they never, in principle, renounced their ancient powers of administering justice in all matters pertaining to the sea and the ships, just as the proper courts did in all other countries.

Out of this struggle, which at its best was purely political, and all too commonly degenerated into a mean and selfish battle for fees, grew the specifically English rule that the exclusive admiralty jurisdiction, so far as locality goes, is confined to the high seas, and that it extends to estuaries, bays, and rivers, "below the first bridge," only concurrently with the common law courts. When the tide was in, the Admiral's officers might function; when the tide was out, the common law had exclusive sway. As a common law judge expressed it frankly, in *Menetone* v. *Gibbons:* 3 Term Rep. 267. "If the common law can try the cause, the Admiralty shall not."

This principle was crystallized in the formula that admiralty had no jurisdiction *"intra corpus comitatus."* Even the English courts could not carry this out consistently, for the very reasons which have led all civilized nations to accept an international maritime law recognizing to a certain extent rights and duties, and practices, different from the ordinary law of the land, simply because the requirements of navigation demand this. The most conspicuous yielding of common law jealousies to these necessities is the case of contracts for seaman's wages, which have always been conceded to be maritime, even although they were entered into within "the body of a county" at home. In this country, the rule has to all intents and purposes been abandoned. The extension of admiralty jurisdiction to all navigable waters, whether the tide ebbs and flows therein or not, has settled that question.[2]

[2] *Waring* v. *Clark,* 5 Howard 448.
The Genesee Chief, 12 Howard 443.
Jackson v. *The Magnolia,* 20 Howard 301.

The Locality as Test in Torts

While it is now settled that admiralty may have jurisdiction, although the navigable water is within a county, the offspring or corollary of that rule is still being upheld by our courts. It is the well-known distinction that in cases of contract, admiralty has jurisdiction if the contract is maritime in its nature, but that it can take jurisdiction in torts only if the wrong, though maritime in its nature, was committed—no longer, to be sure, outside of any particular county—but on the water. There is no reason in the nature of maritime law for this rule. It was, apparently, conceived in England on no better pretext than the highly technical one that, if the tort, though maritime in its nature, started on land, the admiralty process could not be served; for the officers of the admiralty court were allowed to serve process only on the water, while the sheriff's officer, presumably, had no means of boarding a ship afloat.

We may admit, however, that for the present the accepted American rule is that locality determines admiralty jurisdiction in torts; we may even admit that, under the rule in the *Plymouth* case, the injury must also be consummated on the water, or the admiralty jurisdiction ceases; but if we agree that this is so, not because the general maritime law in its nature demands these rules, but merely on account of the history of admiralty law in England and the accident that our courts have, ill-advisedly, followed English precedents in the matter—then we must admit that the Congress may change the rule.

As Justice Bradley said, as far back almost as the *Plymouth* case itself, to-wit in 1870: "The admiralty and maritime jurisdiction is not limited by the statutes or judicial prohibition of England."[3]

If that is so in the matter of an insurance contract, why should it be different when an unskillful captain runs into the bridge across the river?

The Power of Congress to Legislate

The power of Congress to legislate as it sees fit regarding the jurisdiction of the federal admiralty courts, as long as it remains within the grant of the Constitution, will hardly be disputed. As was said by Justice Grier, in a case involving the assumption of jurisdiction in a collision occurring, above tidewater, in the Alabama River:

> Congress might give any of these courts the whole or so much of the admiralty jurisdiction as it saw fit. It might extend their jurisdiction over all navigable waters, and all ships and vessels thereon, or over some navigable waters and vessels of a certain description only. . . . .[4]

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[3] *New Engl. Ins. Co.* v. *Dunham,* 11 Wall. 1.

[4] *Jackson* v. *The Magnolia,* 20 How. 296.

The arguments have all turned on the question whether the power of Congress would still be within the constitutional grant, if it exceeded the powers of the English admiralty. Even as to that, there seems to have been no difficulty in the beginning. The first Congress, in the Judiciary Act of 1789, included in admiralty jurisdiction "seizures under laws of impost, navigation, or trade, where the seizures are made on waters navigable from the sea." This provision was upheld in the case of *La Vengeance,* and on the strength of that decision in numbers of other cases.[5]

Evidently, the Congress, in which there were men who had sat in the constitutional convention, did not think that American "admiralty and maritime jurisdiction" was identical with British admiralty. For seizures of this kind were clearly not within British admiralty jurisdiction. True, colonial vice-admirals had exercised such powers. That, however, was under the navigation laws, more particularly the Act of 7 and 8 Williams III, ch. 22, and not under admiralty law. See *Luke* v. *Lyde,* 2 Burr. 822.

Yet, on the strength of its being "pertaining to the sea and the ships," the matter of seizures was given to the federal courts.

Other early cases in which it is recognized that Congress is not bound by English admiralty restrictions are: *The Sandwich,* 1 Peters Adm. Dec., 233., and *The Schooner Volunteer,* 1 Sumner, 550, and the elaborate discussion by Justice Story, already mentioned, in *De Lovio* v. *Boit,* 2 Gall. 398.

Even at the present day, the Statutes of the United States contain provisions never to be reconciled with the British admiralty theory. Thus Sect. 500 of the Code of Laws of the United States directs that certain offenses committed on islands in the Pacific Ocean, on land, "shall be deemed committed on the high seas on board a merchant ship or vessel belonging to the United States." That certainly goes far beyond the rule we are contending for.

After some time, however, some voices were heard holding the contrary doctrine, and arguing for the strictest adherence to whatever limitation of admiralty jurisdiction the jealousy of English common law courts had conceived. One of the first of these was the case of *Ramsay* v. *Allegre,*[6] where Mr. Justice Johnson wrote an elaborate opinion on that side.

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[5] *La Vengeance,* 3 Dall. 297.
The Sally, 2 Cranch 406.
The Betsey and Charlotte, 4 Cranch 443.
The Samuel, 1 Wheaton 9.
The Octavia, 1 Wheaton 20.

[6] 12 Wheaton 611.

So did Justice Baldwin, in the case of *Boni* v. *The Schooner James and Catherine*[7]

A number of cases in which the Court held the more liberal doctrine of Story and the first Congress are accompanied by dissenting opinions. Thus, in the *Genesee Chief,* Mr. Justice Daniels argues elaborately, and with some feeling, against extending admiralty to the Great Lakes. It will be noted, in all those cases, that the justices of the Supreme Court who were on that side belonged to the extreme states' rights party. They aimed at preserving the Constitution of the United States against what they conceived to be the perversions of it by Chief Justice Marshall, Story, and others. Their opposition to a liberal construction was based on political rather than juridical grounds. Justice Johnson, in the *Allegre* case cited above, added to his strict construction theories a violent attachment to trial by jury. He says: "I am fortifying a weak point in the Constitution. Every advance of the admiralty is a victory over the common law, a conquest gained upon the trial by jury." In other words, his mind seemed to live in the atmosphere of English common law courts of the time of the Stuarts.[8]

Justice Daniels in the *Genesee Chief,* complains feelingly: "My opinions may be deemed to be contracted and antiquated, unsuited to the day in which we live, but they are founded upon deliberate conviction as to the nature and objects of limited government, and by myself at least cannot be disregarded."[9]

History has passed beyond the day of the strict constructionists and brushed away their artificial notions regarding the Constitution. Why retain relics of that age, such as the rule in the *Plymouth* case?

It seems to me that any fear that the Supreme Court, at the present day, may hold unconstitutional a statute giving to the federal admiralty courts jurisdiction over torts committed by vessels afloat, although the damage is to property on land, is quite fanciful. Aside from the rule of *stare decisis,* every argument logically pursued is in favor of such an act. Wharves, dockwalls, and similar facilities are certainly of a maritime nature. They would not exist unless they were necessary for navigation. Bridges, to be sure do exist also where there is nothing maritime; but in that case no ships pass through them, and the question of jurisdiction cannot arise. The particular character of a bridge which can be damaged by a ship is determined by the fact that there is navigable water and vessels afloat on it, as where the bridge is of the bascule or swinging types. The very reason why there is a special maritime law and

[7] 1 Baldewin 544.

[8] *Ramsay* v. *Allegre,* 12 Wheaton 640.

[9] *The Genesee Chief,* 12 How. 465.

an admiralty court, to-wit: the mobile nature of the ships that constantly enter and pass out again, affects injuries they do to the land just as much as those they do to other vessels in a collision.

The Need for Legislation

There does not seem to be much dispute about the desirability of legislation, in such form as Mr. Plunkett suggested in a paper before the American Association of Port Authorities, or some other appropriate form that may be devised.[10]

All vessels doing damage are not owned by financially responsible parties, easily located by process servers, and subject to jurisdiction of the common law courts. An opportunity for proceeding *in rem* is indispensable for obtaining redress in numerous cases. The vessel itself may be, and often is, the only property of her owner, subject to execution. Claims for torts of this kind are apt to run into high figures. To be sure, it has been suggested that the states might provide for attachments to take the place of libels in admiralty. Some states, including Wisconsin, have such laws; but there is a well-founded apprehension on the part of lawyers that they are inapplicable where interstate and foreign commerce are involved. The only effective remedy must come from the courts of the United States.

A number of ports on the Great Lakes have a special interest in this matter, in addition to that which they share with all ports. The harbors in many cities are in part composed of comparatively narrow and winding rivers, across which there are numerous bridges, usually of the bascule or swinging bridge type. Collisions with these bridges by vessels passing through them are of common occurrence, and the collection of damages for such injuries is a regular part of the duties of municipal law authorities. Their success in doing so is by no means conspicuous. It would be very much greater if they could compel the giving of a bond by the guilty vessel, before it could proceed on its voyage.

[10] See *World Ports*, vol. 16, p. 474 (1928).