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NOTES

Navigable Waters and Admiralty Jurisdiction

Of the jurisdictional facts which one must establish in order to claim the attention of an admiralty court, none is more important than water. Certain waters must be involved before a party can avail himself of a maritime remedy whether his claim be in contract or tort. When two vessels collide in the North Atlantic, few problems are encountered in this respect; but when the collision occurs on one of our domestic waterways, a jurisdictional question often is present.

Admiralty is the *corpus juris maris* — the code of the law of the sea. As such, it is justly interested in anything which relates to travel by water. In general, any transaction which more concerns the sea than it does the land should fall within maritime jurisdiction. But, as in other areas of human conduct, progress, politics and a quest for expediency have intervened and have sometimes distorted what might otherwise have been easily-defined boundaries.

THE BEGINNINGS

The law of admiralty began with the Phoenicians three thousand years before the Birth of Christ. Through the centuries it developed as an independent system of jurisprudence which owed allegiance to no one country. After the fall of the Roman Empire the merchants of Western Europe established their own consular courts throughout the known

world to adjudicate under this international law of the sea. These consular courts were the product of the business mind, and the apparent simplicity and fairness of their proceedings soon brought them to the attention of national courts.

The consular courts were replaced with admiralty courts in England at a very early date, perhaps during the reign of Henry I (1100-1135) At this point admiralty law began to lose its international flavor and take on some of the characteristics of a national system of jurisprudence.[1]

Originally all torts, contracts and crimes occurring on or relating to waters within the ebb and flow of the tide were the subject of maritime jurisdiction. As Britain became a world leader in international commerce the volume of admiralty litigation began to increase. And the vigorous manner in which the English admirals exercised their judicial powers soon led to jurisdictional conflicts with the common law courts. As usual the common law courts—"history's first pressure group"—prevailed.[2]

In 1391 statutes were enacted which limited English admiralty jurisdiction to torts and crimes committed "on the high seas or on the great rivers below the first bridges."[3] Bays and inlets even though washed by the waters of the tide were excluded from admiralty dominion as being within the *fauces terrae*.[4] Further encroachments, chiefly by judicial decision, followed, until during the reign of William IV (1830-1837) English maritime courts were excluded from all but the high seas.[5]

THE AMERICAN EVOLUTION

The United States Constitution[6] grants to the federal courts judicial power in "all cases of admiralty and maritime jurisdiction." The ink had hardly dried on that celebrated document when questions as to the scope of that jurisdiction began to arise. Justice Story apparently resolved this problem in 1815, when, in an exhaustive opinion, he concluded that the Constitutional grant gave the federal courts the jurisdiction "which originally and inherently belonged to admiralty, before any statutory restrictions." Federal courts, he said, were not bound by the artificial restraints which had been placed on the English maritime courts.[7] Tide waters had once again become the touchstone of admiralty jurisdiction.

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[1] I HALSBURY, LAWS OF ENGLAND 80 (2d ed. 1931).

[2] MCFEE, THE LAW OF THE SEA 155 (1st ed. 1950)

[3] 13 Ric. 2, st. 1, c.5 and 15 Ric. 2, c.3.

[4] See Note, 16 YALE L. J. 471 (1906).

[5] Rex v. 49 Casks of Brandy, 3 Hagg. Admir. Cases 257, 283 (1836).

[6] Art. III, Sec. 2.

[7] De Lovio v. Boit, 2 Gall. 398 (C.C.D. Mass. 1815)

But the black smoke which belched forth from "Fulton's Folly" soon beclouded this rejuvenated rule. The *Clermont* heralded a new era of water transportation, and before long steamboats went into operation on most of the major rivers of this country. For the first time in history waters *infra corpus commitatus* became channels for extensive navigation. The tide water test was on its deathbed in 1847 when Justice Wayne (this time in an off-hand manner) solemnly ruled that waters ninety-five miles from the mouth of the Mississippi River were within the ebb and flow of the tide.[8]

The extent to which steam power had made the inland seas navigable soon came to the attention of Congress. In an effort to grant the traditional maritime remedies to vessels operating on those waters, Congress passed the Act of February 26, 1845.[9] This statute gave the federal courts admiralty jurisdiction over certain causes of action arising on the Great Lakes. *The Propeller Genesee Chief v. Fitzhugh*[10] saw the Supreme Court uphold this act and resolve its apparent conflict with the tide test by rejecting the latter as being unreasonable, archaic, unfair and arbitrary. Henceforth, navigable waters would be the test of maritime jurisdiction. Since the Court held that admiralty jurisdiction extended to navigable waters by virtue of the original constitutional grant, the act in question was soon declared superfluous[11] and subsequently was repealed.[12]

The test of navigable waters was broadly set forth by the Supreme Court in *The Daniel Ball*[13] as follows:

> Those rivers are navigable in law which are navigable in fact. They are navigable in fact when they are used or susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and commerce are to be conducted by the usual modes of travel by water.

This test has been so often quoted that no case involving navigable waters seems complete without it. In any event it has withstood the passage of time and is as applicable today as when it was promulgated in 1870.

THE LAW TODAY

It is the waters themselves rather than the commerce upon them that is the jurisdictional element. If the water in question is a highway for interstate or foreign commerce, it matters not what the vessel was doing on it. As long as the waters meet the test, the vessel need not be en-

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[8] Waring v. Clarke, 5 How. 441 (U.S. 1847).

[9] 5 STAT. 726 (1845)

[10] 12 How. 443 (U.S. 1851).

[11] The Robert W Parsons, 191 U.S. 17, 31 (1903)

[12] 28 U.S.C. § 1873 (1948)

[13] 10 Wall. 557, 563 (U.S. 1870).

gaged in commerce at all.[14] Navigable capacity is a question of fact of which the courts will take judicial notice.[15] But if the actual status of the waterway is open to question, evidence upon that point will be heard.[16]

The waters can be fresh or salt, natural or artificial, tidal or non-tidal[17] and it is of no consequence that part of them be within the jurisdiction of another sovereign.[18] Rivers have been adjudged navigable even though portages were necessary and though only certain types of shallow draft vessels could be used on them.[19] Streams can be navigable even when rapids, shallows, sandbars or waterfalls render navigation extremely difficult.[20]

Public[21] and private canals,[22] inland lakes,[23] rivers[24] and slips[25] can all be within maritime jurisdiction if they meet the test set forth above. An inland lake, not itself a highway for interstate commerce, may become one when linked to other waters by an artificial canal.[26] Often only part of a waterway will be navigable or else the whole thing will be navigable only certain times of the year. In such cases admiralty jurisdiction is limited accordingly in time and space.[27]

A vessel moored to a dock which in turn juts out into navigable waters is within maritime jurisdiction.[28] Likewise, a vessel which is inside a drydock meets the test when the latter is afloat on a navigable body of water.[29] In all cases the fact that the waters are not presently used as a highway for interstate commerce is immaterial as long as they are capable of being so used.[30]

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[14] *Ex parte* Boyer, 109 U.S. 629 (1884).

[15] Montello, 11 Wall. 411 (U.S. 1870).

[16] U.S. v. Appalachian Electric Power Co., 311 U.S. 377 (1940).

[17] *Ex parte* Boyer, 109 U.S. 629 (1884).

[18] The Eagle, 8 Wall. 15 (U.S. 1868).

[19] The Montello, 20 Wall. 430 (U.S. 1874).

[20] Economy Light & Power Co. v. U.S., 256 U.S. 113 (1920).

[21] Marine Transp. Co. v. Dreyfus, 284 U.S. 263 (1932); The Robert W Parsons, 191 U.S. 17 (1903).

[22] The Lucky Lindy, 76 F.2d 561 (5th Cir. 1935).

[23] The Propeller Genesee Chief v. Fitzhugh, 12 How. 443 (U.S. 1851).

[24] The Montello, 20 Wall. 430 (U.S. 1874).

[25] La Casse v. Great Lakes Engineering Works, 242 Mich. 454, 219 N.W 730 (1928).

[26] The Wheeler-Shipyard Hull, 1 F. Supp. 402 (E.D. N.Y. 1932).

[27] U.S. v. Utah, 283 U.S. 64 (1931).

[28] Egan v. Morse Dry Dock Co., 214 App. Div. 226; 212 N.Y. Supp. 56 (1925).

[29] Danielson v. Morse Dry Dock Co., 235 N.Y. 439, 139 N.E. 562 (1923).

[30] Economy Light & Power Co., v. U.S., 256 U.S. 113 (1920).

Generally speaking, admiralty jurisdiction extends to the high water mark.[31] But flood waters which make navigation over land possible for a short time are not within maritime power.[32] Of course, if the floods occur frequently and regularly enough to be used by vessels, a different result would follow.[33] Between the high and the low watermarks the common law and admiralty courts have *imperium divisum,* the one when the land is not and the other when it is covered by water.[34]

From the foregoing it would appear that the incident set forth in *Rumpleheimer v. Haddock*[35] is truly a "misleading case." In that unique situation plaintiff was driving his auto along Chismick Mall near the North bank of the River Thames. An unusually severe spring flood had covered the roadway to a depth of two feet. While proceeding in a reasonable and diligent manner, he was startled to see the defendant paddling toward him in a small boat. Trying to avoid a collision plaintiff yelled, "Out of the road, you fool!" But the defendant merely shouted back, "Port to port, you ———!"[36] Plaintiff following rules of the highway swerved to the left. Defendant, in obedience to the law of the sea, pulled hard a'starboard. The inevitable happened. *Held*: for defendant because plaintiff was navigating on tide waters without complying with the Regulations for the Prevention of Collision at Sea.

Professor Herbert would have us believe that this was properly an admiralty matter.[37] However, without a showing that the Thames frequently and regularly overflowed on Chismick Mall his position would be untenable in this country today.

A waterway to be navigable must also be a highway for interstate or foreign commerce. But courts have construed this rule as implying that it be a highway for substantial commerce. The mere fact that a stream, which can float a small skiff, empties into an ocean does not make it a navigable waterway. There must first be a showing that it could be used for substantial interstate or foreign commerce.[38] Therefore it seems likely that a cause of action arising upon Doan Creek[39] would not be within the dominion of admiralty courts. In all probability

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[31] Dailey v. New York, 128 Fed. 796 (S.D. N.Y. 1904).

[32] Nelson v. Leland, 22 How. 48 (U.S. 1859)

[33] Frazie v. Orleans Dredging Co., 182 Miss. 193, 180 So. 816 (1938)

[34] U.S. v. Coombs, 12 Pet. 72 (U.S. 1838).

[35] HERBERT, UNCOMMON LAW 237 (2d ed. 1936).

[36] The appropriate nautical expression has been deleted by the editor.

[37] HERBERT, *op. cit. supra,* note 35, at 239.

[38] Leovy v. U.S., 177 U.S. 621 (1900).

[39] A small stream which flows beside the Western Reserve University campus in Cleveland, Ohio. It empties into Lake Erie.

that stream, which primarily serves as an arena for fraternity initiations, could not qualify under the above rule.

On the other hand, waters which are not capable of navigation by conventional vessels, still may be within maritime jurisdiction. Streams, which, when swollen by spring floods, are capable of floating logs from timber areas to saw mills are considered navigable by the better-reasoned cases.[40]

Admiralty jurisdiction in one sense is limited by the commerce clause.[41] And so we must have constant reference to the field of constitutional law to determine the definition and scope of that clause. Up to this point courts have not considered fishing boats, excursion boats or yachts operating on small inland lakes to be within that definition.[42] A different conclusion might some day be possible in the light of our expanding concepts of interstate commerce.

Most case law relating to navigable waters concerns the proprietary rights in rivers or river beds or the power of the Federal Government under the commerce clause to regulate the building of dams and bridges.[43] Often courts in deciding an admiralty question will use such cases in support of a contention they wish to establish. Some say caution should be used in this practice because a point of substantive property law is of little persuasive value in a maritime matter. Yet it seems that navigability is an objective quality, and a river which is navigable for one purpose should be navigable for all purposes.

Courts have spoken, especially in property cases, of an "indelible test" which should be applied to any waters once found to be navigable.[44] Under this theory the subsequent construction of artificial barriers will not deprive a waterway of its navigable character. This argument is based on the fact that proper public authority can remove the barriers and return the waterway to its natural state. As a principle of property law this rule may have merit, but its application to maritime matters is questionable. Yet some writers continue to espouse it and assert that admiralty courts should have jurisdiction over a river even when dams and bridges make navigation impossible.[45] The better rule would seem to be that waters permanently encumbered by dams or bridges should meet the test of navigability without the aid of any presumption.

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[40] Gaston v. Mace, 33 W Va. 14, 10 S.E. 60 (1889); Lamphrey v. Metcalf, 52 Minn. 181, 53 N.W 1139 (1893).

[41] Leovy v. U.S., 177 U.S. 621 (1900).

[42] Putnam v. Kinney, 248 Mich. 410, 227 N.W 741 (1929)

[43] ROBINSON, ADMIRALTY 39 (1939).

[44] Economy Light & Power Co., v. U.S., 256 U.S. 113, 123 (1920)

[45] ROBINSON, ADMIRALTY 40 (1939).