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ADMIRALTY-POWER OF CONGRESS TO EXTEND JURISDICTION CONSTITUTIONAL LIMITATIONS

COMMENTS

ADMIRALTY — POWER OF CONGRESS TO EXTEND JURISDICTION — CONSTITUTIONAL LIMITATIONS — "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction." [1]

"The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution . . . Powers vested by this Constitution in the Government of the United States." [2]

These clauses of the Constitution of the United States provide the foundation for the exercise of jurisdiction in admiralty causes by the federal courts. The recent decision of the United States Supreme Court in the case of *The Thomas Barlum*,[3] upholding the constitutionality of

[1] United States Constitution, Art. III, sec. 2, cl. 1.

[2] United States Constitution, Art. I, sec. 8, cl. 18.

[3] Detroit Trust Co. v. The Thomas Barlum, 293 U. S. 21, 55 Sup. Ct. 31 (1934).

The Ship Mortgage Act, 1920, 41 Stat. 1000-1006, U. S. C. tit. 46, secs.

the Ship Mortgage Act, 1920,[4] provokes inquiry into the question of how far Congress may extend the admiralty jurisdiction of the federal courts without running afoul of the inherent limitations of the Constitution.

I.

The problem of determining the scope of the jurisdiction over "admiralty and maritime" causes which Congress is empowered by the Constitution to confer upon the federal courts has always been considered a problem for judicial determination.[5] However, the generality of the grant coupled with the relatively small amount of information preserved with respect to the debates of the Constitutional Convention on this clause has rendered the intent of the framers of the Constitution vague and comparatively unknown.[6] Four possible meanings were recognized by the early cases, namely, that the jurisdiction intended was: (1) that exercised by the English courts at the time of the Revolution; (2) that exercised by the English courts at the time of the emigration of our ancestors; (3) that exercised in the colonies at the time of the Revolution; and (4) that "ancient and original jurisdiction inherent in the admiralty of England by virtue of its general organization."[7] It will be readily observed that all of these tests were historical. In applying them the court looked to historical precedent and granted or denied jurisdiction over a given cause, dependent upon whether jurisdiction over such a cause was exercised by admiralty

911-984, granted jurisdiction in admiralty to enforce liens created by "preferred mortgages" drawn in conformity with the Act. No provision was made limiting the application of the funds received from the grant of such a mortgage. A mortgage was given on the libeled vessel and the proceeds were partially applied to non-maritime purposes. The suit to enforce the lien was contested on the ground that either the statute contemplated that the proceeds of a "preferred mortgage" were to be applied to maritime purposes or the statute was unconstitutional on the authority of Bogart v. The Steamboat John Jay, 17 How. (58 U. S.) 399, 15 L. ed. 95 (1854), as granting a right beyond the jurisdiction of admiralty to enforce. *Held*, first, that no condition was to be implied to limit the application of proceeds derived from a "preferred mortgage"; second, that Congress had the authority to enact this legislation and was not limited by previous decisions as to the extent of the admiralty jurisdiction.

[4] 41 Stat. 1000-1006, U. S. C. tit. 46, secs. 911-984.

[5] The St. Lawrence, 1 Black (66 U. S.) 522 at 527, 17 L. ed. 180 (1861); Detroit Trust Co. v. The Thomas Barlum, 293 U. S. 21, 55 Sup. Ct. 31 (1934).

[6] For an account of the proceedings and records of the Constitutional Convention with respect to the grant of jurisdiction in admiralty to the federal courts, see Putnam, "How the Federal Courts Were Given Admiralty Jurisdiction," 10 CORN. L. Q. 460 (1925).

[7] DeLovio v. Boit, 2 Gall. 398, 7 Fed. Cas. No. 3776, p. 418 at 442 (1815); Waring v. Clarke, 5 How. (46 U. S.) 441, 12 L. ed. 226 (1847); The Belfast, 7 Wall. (74 U. S.) 624, 19 L. ed. 266 (1868). See also the dissent of Clifford, J., in The Lottawanna, 21 Wall. (88 U. S.) 558, 22 L. ed. 654 (1874).

courts at that time and place in history which they selected as the test of jurisdiction. It was not long before all of these tests were found to be either inadequate to meet the conditions existing in this country or impractical because of the lack of adequate historical data, so that the ultimate meaning which has been ascribed to the constitutional grant is that it comprehended the general maritime law as it was known in the colonies at the time of the Revolution.[8] This test has gradually broadened the type of reasoning pursued in determining jurisdictional questions in that the attitude of the Court has changed from one involving a search for precise historical precedent to one involving a search for those fundamental principles which inhere in the nature and purpose of the admiralty jurisdiction. Thus in determining the extent of the admiralty jurisdiction over torts, the locus was at first restricted to torts occurring within the ebb and flow of the tide in accordance with the jurisdiction exercised by the courts of admiralty in England.[9] Later, however, with the aid of an act of Congress,[10] the Court, reasoning from principle rather than precedent, extended the scope of its jurisdiction to navigable waters even though above the tidewaters.[11] Still later the Court reached the same result in the absence of statute.[12]

Another example of this tendency to swing from precedent to principle in determining jurisdiction is found in the marine insurance cases. The historical approach taken by Mr. Justice Story in an early case [13] upholding the jurisdiction over insurance was barely referred to when the decision of that question reached the Supreme Court,[14] and the jurisdiction was upheld in an opinion reasoning from principle and analogy.

It has long been settled that admiralty has jurisdiction to enforce liens for necessary repairs and supplies.[15] But it is equally well settled that in the absence of statute no action for enforcement of a domestic

[8] The Lottawanna, 21 Wall. (88 U. S.) 558, 22 L. ed. 654 (1874); Detroit Trust Co. v. The Thomas Barlum, 293 U. S. 21, 55 Sup. Ct. 31 (1934).

[9] Waring v. Clarke, 5 How. (46 U. S.) 441, 12 L. ed. 226 (1847). The test of jurisdiction adopted in this decision was not that of the English admiralty at the time of the Revolution in this country, but rather the jurisdiction of the English admiralty before the restrictive interpretations of 13 Rich. II, c. 5, and 15 Rich. II, c. 3, by Lord Coke. See DeLovio v. Boit, 2 Gall. 398, Fed. Cas. No. 3776 (1815).

The Thomas Jefferson, 10 Wheat. (23 U. S.) 428, 6 L. ed. 358 (1825), was the leading case denying the jurisdiction of admiralty above the ebb and flow of the tide.

[10] 5 Stat. 726 (1845).

[11] The Genesee Chief, 12 How. (53 U. S.) 443, 13 L. ed. 1058 (1851).

[12] The Magnolia, 20 How. (61 U. S.) 296, 15 L. ed. 909 (1857).

[13] DeLovio v. Boit, 2 Gall. 398, Fed. Cas. No. 3776 (1815).

[14] Insurance Co. v. Dunham, 11 Wall. (78 U. S.) 1, 20 L. ed. 90 (1870).

[15] The St. Jago de Cuba, 9 Wheat. (22 U. S.) 409, 6 L. ed. 122 (1824).

lien would be entertained by admiralty.[16] This latter rule, however, is not inflexible, and when a state statute existed declaring that such a lien should be given and prescribing a proceeding for enforcement similar to that of the admiralty courts in enforcing the foreign lien, the federal courts took exclusive jurisdiction over the enforcement of such liens under the Twelfth Rule of Admiralty.[17] That a state cannot enlarge the admiralty jurisdiction is also well settled.[18] It would seem that the real question involved is one of substantive law.[19] However, the Court has often quoted from decisions of these lien cases, in determining jurisdictional questions. It is in *The J. E. Rumbell,* one of the later decisions of the Court on this question, that the real significance of the scope of the admiralty jurisdiction with respect to the enforcement of domestic liens becomes apparent. Therein it is said: [20]

> "The admiralty and maritime jurisdiction is conferred on the courts of the United States by the Constitution, and cannot be enlarged or restricted by the legislation of a State. No State legislation, therefore, can bring within the admiralty jurisdiction of the national courts a subject not maritime in its nature. But when a right, maritime in its nature, and to be enforced by process in the nature of admiralty process, has been given by the statute of a State, the admiralty courts of the United States have jurisdiction, and exclusive jurisdiction, to enforce that right according to their own rules of procedure."

From the tenor of this statement it may be fairly inferred that the court is reiterating that enlarged view of the admiralty jurisdiction which comprehends all rights arising out of general principles inherent in the admiralty.

[16] The General Smith, 4 Wheat. (17 U. S.) 438, 4 L. ed. 609 (1819); The Lottawanna, 21 Wall. (88 U. S.) 558, 22 L. ed. 654 (1874).

[17] The St. Lawrence, 1 Black (66 U. S.) 522, 17 L. ed. 180 (1861); The Lottawanna, 21 Wall. (88 U. S.) 558, 22 L. ed. 654 (1874); The J. E. Rumbell, 148 U. S. 1, 13 Sup. Ct. 498 (1892).

[18] The J. E. Rumbell, 148 U. S. 1, 13 Sup. Ct. 498 (1892).

[19] The controversy growing out of the application of the Twelfth Rule to the enforcement of liens created by state statutes led to the passage of the Act of 1910 [36 Stat. 604] by Congress. This statute provided uniformly for a maritime lien for repairs or supplies furnished to a vessel in her home port, to be enforced by a proceeding *in rem* in admiralty. The effect of the statute was merely to create a change in the substantive law by creating a presumption that one who repaired or furnished supplies to a ship was dealing with the ship on her own credit. Previously the presumption had been that one repairing or supplying a ship in her home port dealt with the owner on his credit rather than on the credit of the ship. Ergo, no lien was implied. See Piedmont, etc., Coal Co. v. Seaboard Fisheries Co., 254 U. S. 1, 41 Sup. Ct. 1 (1920).

[20] 148 U. S. 1 at 12, 13 Sup. Ct. 498 (1892).

2.

With one exception [21] the opinions of the Court which have been discussed up to this point were rendered in the absence of any act of Congress. However, they are invaluable as furnishing a background for interpretation of the attitude with which the Court attacked the jurisdictional problems presented when Congress finally ventured to grant new rights to suitors in the admiralty courts.[22]

In discussing the validity of the various acts of Congress the Court often indulges in two expressions. The first of these is that the scope of the admiralty jurisdiction is exclusively a matter for judicial determination.[23] The other is that Congress has the power to qualify or amend the existing law as changing conditions may require.[24] These expressions certainly cannot be said to be conflicting, for it is not infrequent that both are used in the same opinion. Thus it must be that Congress is restricted to changes in the substantive law and that the courts are to determine whether these acts of Congress creating new rights are within the general principles underlying the admiralty jurisdiction. On the other hand, the Court has often referred to some of these acts as extensions of the admiralty jurisdiction.[25] This calls for

[21] The Genesee Chief, 12 How. (53 U. S.) 443, 13 L. ed. 1058 (1851).

[22] These acts are as follows: The Limitation of Liability Act of 1851, 9 Stat. 635, which limited the liability of the owners of ships for torts committed by the ship without the owner's privity or knowledge. See Norwich Co. v. Wright, 13 Wall. (80 U. S.) 104, 20 L. ed. 585 (1871); Hartford Accident & Indemnity Co. v. Southern Pac. Co., 273 U. S. 207, 47 Sup. Ct. 357 (1927).

The Act of June 26, 1884, sec. 18, 23 Stat. 57, 58, which gave admiralty jurisdiction over proceedings for the limitation of liability so as to include damages by a vessel to a land structure. See The Plymouth, 3 Wall. (70 U. S.) 20, 18 L. ed. 125 (1865); Richardson v. Harmon, 222 U. S. 96, 32 Sup. Ct. 27 (1911).

The Act of 1910, 36 Stat. 604. See note 19, supra.

The Act of March 30, 1920, 41 Stat. 537, providing for jurisdiction in admiralty of suits for damages from death caused by wrongful act upon the high seas.

The Seamen's Act of 1915, sec. 20, 38 Stat. 1185, as amended by the Merchant Marine Act of 1920, 41 Stat. 1007, providing for the application by admiralty to seamen of rules drawn from the Federal Employer's Liability Act. See Panama R. R. v. Johnson, 264 U. S. 375, 44 Sup. Ct. 391 (1923).

The Longshoremen's and Harbor Workers' Compensation Act of 1927, 44 Stat. 1424. See Crowell v. Benson, 285 U. S. 22, 52 Sup. Ct. 285 (1931).

The Ship Mortgage Act of 1920, 41 Stat. 1000-1006. See Detroit Trust Co. v. The Thomas Barlum, 293 U. S. 21, 55 Sup. Ct. 31 (1934).

[23] The St. Lawrence, 1 Black (66 U. S.) 522, 17 L. ed. 180 (1861).

[24] The Lottawanna, 21 Wall. (88 U. S.) 558, 22 L. ed. 654 (1877); Butler v. Boston & S. Steamship Co., 130 U. S. 527, 9 Sup. Ct. 612 (1888); Panama R. R. v. Johnson, 264 U. S. 375, 44 Sup. Ct. 391 (1923); Crowell v. Benson, 285 U. S. 22, 52 Sup. Ct. 285 (1931); Detroit Trust Co. v. The Thomas Barlum, 293 U. S. 21, 55 Sup. Ct. 31 (1934).

[25] Thus in Detroit Trust Co. v. The Thomas Barlum, 293 U. S. 21 at 48, 55 Sup. Ct. 31 (1934), the Court, in referring to the authority of Congress to alter the

a distinction between various uses of the word "jurisdiction." The Court may be using the word in a theoretical sense as distinguishing between limited and general jurisdiction, or it may be using the term in the practical sense in reference to the granting or withholding of a substantive right which is in its nature cognizable by a court of general jurisdiction but which has never been enforced in practice. Since the federal courts are invested with general jurisdiction in admiralty, it is rational to deduce that when the Court speaks of acts of Congress as extending the admiralty jurisdiction they are using the term in its practical rather than its theoretical significance, and that no act which transcended the bounds of the general jurisdiction would be upheld. Support for these conclusions is found in the case of *Panama Railroad Co. v. Johnson* where, in reference to the scope of the constitutional grant with respect to the admiralty jurisdiction, it is said: [26]

> "Although containing no express grant of legislative power over the substantive law, the provision was regarded from the beginning as implicitly investing such power in the United States. . . . After the Constitution went into effect, the substantive law theretofore in force was not regarded as superseded or as being only the law of the several States, but as having become the law of the United States, subject to the power in Congress to alter, qualify or supplement it as experience or changing conditions might require. When all is considered, therefore, there is no room to doubt that the power of Congress extends to the entire subject and permits of a wide discretion. But there are limitations which have come to be well recognized. One is that there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing falling clearly without."

The Court thus clearly outlines the nature of the problem with which it is faced in passing upon the validity of acts of Congress, but it has never undertaken to state just what the general principles inherent in the admiralty jurisdiction are, having been content to decide each question as it came before the Court. Consequently it is difficult

maritime law with respect to ship mortgages, says "thus to extend the admiralty jurisdiction, 'as experience or changing conditions might require' " and immediately adds "while keeping within a proper conception of maritime concerns." From these phrases, used in the same sentence, it must be quite clear that the Court is using the word "jurisdiction" in the practical sense of conferring a new right which is nevertheless within the general nature of the admiralty jurisdiction.

[26] 264 U. S. 375 at 386 (1923).

to frame a test by which to judge the validity of future acts. The fact that the Court has not as yet had occasion to declare an act of Congress invalid for the reason that it extended beyond the limitations of the Constitution in this respect renders the problem the more uncertain, and the limits of a jurisdictional test must be derived from the dicta of the Court rather than from its express negative rulings.

The observation in the quotation above from *Panama Railroad Co. v. Johnson* to the effect that "the power of Congress extends to the entire subject and permits of a wide discretion" has enjoyed a great deal of citation in the more recent opinions of the Court, and gives a clue to the breadth of interpretation of the Constitution with respect to the extent of the admiralty jurisdiction. It is upon this basis that the writer offers the suggestion that the standard which the Court is employing in arriving at its decisions is very similar to that which it uses in the determination of constitutional questions arising under the Fourteenth Amendment and particularly the "due process" clause. In short, it is suggested that an act of Congress creating a new right to be enforced in admiralty will be upheld if the purpose sought to be accomplished bears a reasonable relation to those purposes which inhere in the nature of admiralty and if the means employed bear a reasonable relation to the purpose sought to be accomplished.[27] And, as in applying the "due process" test, the word "reasonable" must be given a broad interpretation. In order to say that an act is unconstitutional, the Court must find that it excludes a thing "falling clearly within" or includes a thing "falling clearly without" the inherent boundaries of admiralty.

The suggested test is perhaps open to the objection that it begs the question in that it depends upon those illusory "purposes which inhere in the nature of admiralty." This much may be said for the suggested test, however, that it is intended to be used as a yardstick, not as a micrometer; and, if it compares unfavorably with other rules of law in the exactness with which the limits of the field which it purports to cover are defined, the difference is a matter of degree. Moreover, in spite of the fact that the Court has not yet had occasion to define the outer limits of Congress' power to affect the rights of suitors in admiralty, it has often had occasion to indicate affirmatively the nature of some of the general purposes of admiralty which Congress may validly act to aid, protect and control.

Thus, in addition to those purposes of the admiralty jurisdiction

[27] When the validity of the Ship Mortgage Act of 1920 was before a lower court in The Oconee, (D. C. E. D. Va. 1922) 280 Fed. 927, the court said at page 932: "But in neither respect was there anything more than a reasonable recognition of the characteristics and attendants of a maritime subject."

which the federal courts have recognized in the absence of statute,[28] we find that sanction is given to such purposes as encouraging investments in ships and shipping,[29] protecting against civil [30] and criminal [31] acts aboard ship, and protection of those employed in the operation of vessels both at sea [32] and in port.[33] Another factor which has influenced the federal courts in accepting admiralty jurisdiction over new rights created by Congress is the structure and theory of our government set out in the Constitution. Thus the fact that the Constitution contemplates equal rights in and, to an extent, equal benefits of the law had considerable weight in aiding the Court in arriving at the conclusion that the admiralty jurisdiction extended to all navigable rivers and lakes;[34] and, although it has been strenuously denied that Congress' power to regulate interstate and foreign commerce can be a sole basis for conferring jurisdiction on the admiralty court,[35] yet it is the opinion of this writer that the presence of that power of Congress in the background has been of some effect in influencing the Court to decide that the purpose of aiding, protecting and encouraging investments in vessels fell within those valid "purposes which inhere in the nature of admiralty."

It is also worthy of note that the mere fact that the Court has in the past denied jurisdiction over a certain cause of action is not conclusive of the invalidity of an act of Congress conferring jurisdiction over

[28] It is, perhaps, inaccurate to speak of purposes recognized in the absence of statute, for it is the legislative purpose to which we refer when we speak of purposes recognized in enforcing rights created by statute. What is meant in this case is illustrated by the purpose which lies behind the enforcement of liens for necessary repairs and supplies, namely, the purpose of furnishing "wings and legs to the . . . hull, to get back for the benefit of all concerned." The St. Jago de Cuba, 9 Wheat. (22 U. S.) 409, 6 L. ed. 122 (1824).

[29] Richardson v. Harmon, 222 U. S. 96, 32 Sup. Ct. 27 (1911); Detroit Trust Co. v. The Thomas Barlum, 293 U. S. 21, 55 Sup. Ct. 31 (1934).

[30] The Act of March 30, 1920, 41 Stat. 537, providing for jurisdiction in admiralty for damages from death caused by wrongful act occurring on the high seas.

[31] United States v. Flores, 289 U. S. 137, 53 Sup. Ct. 580 (1933).

[32] Panama R. R. v. Johnson, 264 U. S. 375, 44 Sup. Ct. 391 (1923).

[33] Crowell v. Benson, 285 U. S. 22, 52 Sup. Ct. 285 (1931).

[34] The Genesee Chief, 12 How. (53 U. S.) 443, 13 L. ed. 1058 (1851); Panama R. R. v. Johnson, 264 U. S. 375 at 386, 44 Sup. Ct. 391 (1923).

[35] In The Thomas Jefferson, 10 Wheat. (23 U. S.) 428, 6 L. ed. 358 (1825), it was suggested that Congress might give jurisdiction in admiralty for causes arising above the ebb and flow of the tide under the commerce clause, but this was strenuously denied in The Genesee Chief, 12 How. (53 U. S.) 443, 13 L. ed. 1058 (1851), wherein it was said that the statute conferring jurisdiction above the tidewaters could not be supported on the commerce power but rested solely upon the grant of admiralty jurisdiction. But see The Lincoln Land, (D. C. Mass. 1923) 295 Fed. 358, where the Ship Mortgage Act of 1920 was upheld as a valid exercise of the commerce power.

the same or a similar cause of action.[36] Explanation for this fact may be found in the argument that the admiralty courts are invested with general jurisdiction; that the denial of jurisdiction in the first instance may have been nothing more than a refusal to enforce a substantive right — a refusal based either on precedent or upon the policy of the admiralty law at the time of the decision; that the exercise of Congressional power has changed this precedent or policy; and, therefore, the right is one properly enforceable in admiralty.[37] This much, at least, may be said with certainty. The decisions have constantly failed to distinguish "jurisdiction" in the general theoretical sense from "jurisdiction" in the practical sense of granting or refusing the enforcement of an alleged substantive right for reasons of policy or precedent. No analysis of the cases in this field can be complete or accurate without keeping this distinction well in mind.[38]

C. M. N.

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[36] Thus in Detroit Trust Co. v. The Thomas Barlum, 293 U. S. 21 at 48, 55 Sup. Ct. 31 (1934), although the Court had previously refused to enforce ship mortgages on the ground that there was nothing maritime in the contract [Bogart v. The Steamboat John Jay, 17 How. (58 U. S.) 399, 15 L. ed. 95 (1854)], it was said: "The fact that mortgages on ships had not been considered to be maritime contracts was not conclusive as to the constitutional authority of the Congress to alter or supplement the maritime law in this respect, and thus to extend the admiralty jurisdiction, 'as experience or changing conditions might require,' while keeping within a proper conception of maritime concerns."

[37] An analysis of the theory upon which the Acts of Congress conferring new rights to suitors in admiralty is predicated is well set out in Miller, "The Foreclosure of Vessel Mortgages in Admiralty," 70 UNIV. PA. L. REV. 22 (1921).

[38] For a general discussion of the Ship Mortgage Act of 1920 see Canfield, "The Ship Mortgage Act of 1920," 22 MICH. L. REV. 10 (1923).

For a thorough treatment of the problem in The Thomas Barlum, see Morrison, "The Constitutionality of the Ship Mortgage Act of 1920," 44 YALE L. J. 1 (1934). This article was written in anticipation of the decision of the Supreme Court. See also 83 UNIV. PA. L. REV. 524 (1935).