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JURY—DETERMINATION OF DAMAGES BY APPELLATE COURT AS DENIAL OF RIGHT TO TRIAL BY JURY GIVEN BY FEDERAL LAW—Plaintiff's cause of action arose under the federal Merchant Marine Act,¹ which grants a right to trial by jury. Plaintiff recovered judgment and on appeal defendant asked the court to determine the damages pursuant to provision in the Oregon Constitution vesting in the supreme court the power to determine from the evidence the extent of a plaintiff's damages and to direct the entry of a final judgment for the amount thereof, on appeal from a jury's verdict awarding damages claimed by the defendant to be excessive.² *Held*, the provision is inapplicable in cases arising under the federal Merchant Marine Act because it would affect plaintiff's right to trial by jury controlled by federal law. *Hust v. Moore-McCormack Lines*, (Ore. 1947) 177 P. (2d) 429.

The common law recognizes only two means for securing a reexamination of issues of fact once decided by a jury, namely, the granting of a new trial by the court in which the issue was tried and the awarding of a *venire facias de novo* by an appellate court because of some error of law appearing in the record.³ The extent to which the provision in question has authorized changes in the

¹ 41 Stat. L., c. 250, § 33 (1920), 46 U.S.C. (1940) § 688.

² Constitution of Oregon, Art. VII, § 3. “. . . If the Supreme Court shall be of opinion [that] . . . the judgment appealed from should be changed, and the supreme court shall be of opinion that it can determine what judgment should have been entered in the court below, it shall direct such judgment to be entered in the same manner and with like effect as decrees are now entered in equity cases on appeal to the supreme court;”

³ *Capital Traction Co. v. Hof*, 174 U.S. 1, 19 S.Ct. 580 (1899).

common law is self-evident. It is clear that in the federal courts where the guarantees of jury trial according to the course of the common law obtain, the Oregon practice would violate the Seventh Amendment.⁴ The Oregon court's reasons for abandoning in this case the line of demarcation between the functions of judge and jury which was authorized by the state constitution and substituting, in part at least,⁵ the federal conception of these functions, are not compelling. Recognizing itself bound by federal decisions as to substantive law in cases under the federal act, with the right to follow its own procedure, the court concluded that the constitutional provision in question was substantive and hence inapplicable. Authority for this conclusion was found in certain federal cases in which supposedly analogous state rules were held to be substantive.⁶ Without discussion of the merits of these decisions, it is submitted that they are not controlling authority for the decision in the principal case, and that the nature of the constitutional provision should be determined pragmatically. If we accept Professor Cook's argument⁷ that there is no clearly defined boundary between substance and procedure and that a rule may be procedural in one context and substantive in another, depending on the use to be made of it, it becomes necessary to ascertain the effect of the label before applying it to the constitutional provision. If it were held to be procedural, the court could apply it, determine the just amount of plaintiff's damages, and direct the entry of a judgment that would end the litigation. However, if the provision were held to be substantive, the cause would have to be remanded for a retrial of the issue of damages by a jury, and there is no assurance that a sustainable verdict would materially differ from the court's determination of damages. On this analysis, considerations of convenience and economy should incline a court toward calling the provision procedural. Is there then any consideration of policy which should impel the court to one result rather than the other? Unquestionably it might be argued that the inclusion of a right to trial by jury in the federal act itself indicates the policy Congress intended, and that this should be followed.

⁴ *Kennon v. Gilmer*, 131 U.S. 22, 9 S.Ct. 696 (1889), federal court of the Territory of Montana reduced the jury's verdict on the ground that it was excessive and entered judgment for the smaller amount without giving the prevailing party an election of taking the smaller verdict or submitting to a new trial; this was held to be a violation of the guarantee of trial by jury according to the course of the common law in the Seventh Amendment.

⁵ While the court professed to be bound in these cases by federal decisions which interpret jury trial as "according to the course of the common law," the court recognized that in the trial of cases under the Merchant Marine Act, state law "prescribing that less than a unanimous jury may return a verdict or forbidding the court to comment on the evidence" may be applied. Principal case at 438.

⁶ *Central Vermont Ry. Co. v. White*, 238 U.S. 507, 35 S. Ct. 865 (1915) (rule shifting the burden of proof of contributory negligence); *New Orleans & Northeastern R. Co. v. Harris*, 247 U.S. 367, 38 S. Ct. 535 (1918) (statute providing that the mere happening of an accident would constitute prima facie evidence of negligence); *Herron v. Southern Pacific Company*, 283 U.S. 91, 51 S. Ct. 383 (1931) (constitutional provision declaring the defenses of contributory negligence and assumption of risk to be fact questions to be left to the jury in all cases).

⁷ COOK, *THE LEGAL AND LOGICAL BASES OF THE CONFLICT OF LAWS* 154 et seq. (1942).

Since, however, the federal guarantee of trial by jury does not prevent the states from either modifying or abolishing the common law jury,⁸ it would seem that Congress intended no more than to grant a right to that form of trial by jury used in the state whose court takes cognizance of the action. To ascribe a broader intent to Congress would be to assume that it intended by legislative act to extend the scope of the Seventh Amendment to the states, hardly a tenable conclusion. No policy argument appears to impel the court to call what seems to be procedural a substantive provision. It is submitted that the principal case is not satisfactory authority that in actions arising under the federal Merchant Marine Act federal views of the function of judge and jury are binding on the state courts.

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⁸ Chicago, R.I. & P. Ry. Co. v. Cole, 251 U.S. 54, 40 S. Ct. 68 (1919).