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Note

WHAT LAW OF EVIDENCE GOVERNS IN ADMIRALTY?

The purpose of this article is to relate the history of the law governing the rules of evidence applied in admiralty. Particular attention will be paid to the federal statutes making certain state rules of evidence apply in admiralty. Consideration will also be given to Dean Wigmore's ideas concerning those statutes.

Before 1789, the procedure and practice of Colonial admiralty courts was a modified form of British admiralty practice. The British practice, and consequently Colonial practice, was based on civil practice in many ways.¹ At the beginning of our national government a departure from the English and Colonial rules of admiralty practice was made by the Process Act of September 29, 1789. This act provided that "the forms and modes of proceedings in causes of equity, and of admiralty and maritime jurisdiction, shall be according to the course of the civil law."² Under this statute it is clear that state rules and practices were to have no application in admiralty proceedings.

"This adoption, however, of the course of the civil law, without modification or exception, could not fail to be somewhat embarrassing, by keeping the courts fettered by many rules and proceedings, which in the admiralty and maritime courts of other countries, to which ours were to be assimilated, had, long before, been directly abrogated or allowed by tacit neglect to give place to simpler and less technical proceedings, and might, in a measure, defeat the very unity and uniformity which it was intended to establish. Accordingly, on May 8, 1792, Congress passed the act 'For Regulating Processes in the courts of the United States,' now Section 913 *et seq.* of the Revised Statutes, which provided that the forms of writs, execution and other process, except their style, and the forms and modes of proceeding in suits of admiralty and maritime jurisdiction, should be *according to the principles, rules and usages which belong to courts of admiralty, as contradistinguished from courts of common law*; subject, however, to such alterations and additions as the said courts should in their discretion deem expedient, or to such regulations as the Supreme Court of the United States should think proper, from time to time, by rule to prescribe to any circuit or district court concerning the same."³

The practice and mode of proceeding in the admiralty courts of our

¹ Grayson v. Virginia (1796) 3 U. S. (3 Dall.) 320, 1 L. Ed. 619; Manro v. Almeida (1825) 23 U. S. (10 Wheat.) 473, 6 L. Ed. 369; The St. Lawrence (1861) 66 U. S. (1 Black) 522, 17 L. Ed. 180.

² 1 STAT. 93 (1789).

³ 1 BENEDICT, ADMIRALTY (5th ed. 1925) 827. He cites Act of May 8, 1792, 1 STAT. 275, 276; Grayson v. Virginia, Manro v. Almeida, The St. Lawrence, *supra* n. 1.

own country as engrafted upon the British practice was the mode of proceeding referred to in this statute.⁴ Again there is no provision that any state rules of procedure or practice were to apply in admiralty.

From the point of view of one interested in tracing the influence of state rules of evidence upon the federal courts the year 1862 is a milestone. July 16th of that year Congress passed an act in relation to the competency of witnesses. It provided "That the laws of the State in which the court shall be held shall be the rules of decision as to the competency of witnesses in the courts of the United States, in trials at common law, in equity, and admiralty."⁵ Thus in 1862 for the first time state rules were to be applied in admiralty. The state rules to be applied were those governing the competency of witnesses. This broad taking over of the state rules regarding the competency of witnesses, while not departed from in principle, was affected by statutes of the years 1864 and 1865.

The act of July 2, 1864, presented a queer bit of legislative caprice. To a statute making an appropriation of \$100,000 for the purpose of meeting any expenses in detecting and bringing to trial and punishment persons engaged in counterfeiting treasury notes, and for other purposes, was added the proviso, "That in the courts of the United States there shall be no exclusion of any witness on account of color, nor in civil actions because he is a party to, or interested in, the issue tried."⁶

The phrase "civil action" as used in this statute was soon construed to include action at law, suits in chancery, and proceedings in admiralty, and all other judicial controversies in which rights of property are involved whether between private parties or such parties and the government. In other words "civil action" was used in contradistinction to prosecutions for crime.⁷

The act of March 3, 1865, provided "that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court."⁸ Cases in which this statute would be applied in admiralty would be rare.

In 1878 these statutes were consolidated and became Revised Statutes, Section 858 which reads: "In the courts of the United States no witness shall be excluded in any action on account of color nor in any civil action, because he is a party to or interested in the issue tried. Provided that in actions by or against executors, administrators, or

⁴ *Manro v. Almeida*, *supra* n. 1.

⁵ 12 STAT. 588, c. 189, § 1 (1862).

⁶ 13 STAT. 351, c. 210, § 3 (1864).

⁷ *United States v. 10,000 Cigars* (C. C. D. Iowa, 1867) Fed. Cas. No. 16,451.

⁸ 13 STAT. 533, c. 113 (1865).

guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify by the opposite party, or required to testify thereto by the court. In all other respects the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in courts of the United States in trials at common law, and in equity and admiralty."

In 1906 Section 858 of the Revised Statutes was amended to read as follows: "The competency of a witness to testify in any civil action, suit, or proceeding in the courts of the United States shall be determined by the laws of the State or Territory in which the court is held."⁹ This statute will be discussed later. Here it may be said that the statute does not appear to affect the rule that in admiralty proceedings the competency of witnesses is determined by state rules.

Dean Wigmore divides into three periods the history of the law governing evidence applied by the courts of admiralty. He says, "In *admiralty* proceedings, the Federal Courts originally had their own rules of Evidence; in 1862 a statute directed the adoption of the local State rules; but in the Revision of 1878 the original plan was restored."¹⁰ It would seem that he has not gone into the matter with his usual thoroughness.

We assent to Dean Wigmore's statement that admiralty courts had their own rules of evidence from 1789 to 1862. Our previous discussion of the statutes of 1789 and 1792 shows this. This is true despite a statute in 1789 providing that the laws of the several states except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States in cases where they apply.¹¹ It was held that a proceeding in admiralty was not a trial at common law.¹²

His next proposition is that in 1862 state rules were adopted. The statute of 1862,¹³ only provided that the state rules as to the *competency of witnesses* should be applied in admiralty. It was an exceedingly broad statement to say that in 1862 state rules were taken over. The support for this statement seems to rest in the fact that there are equity and common law holdings to the effect that the term "competency of witnesses" as used in these statutes meant the whole law of evidence.¹⁴ There are four reasons which the writer believes conclusively prove that admiralty courts between 1862 and 1878 did not give

⁹ Act of June 29, 1906, 34 STAT. 618, c. 3608.

¹⁰ 1 WIGMORE, EVIDENCE (1923) 79, 80.

¹¹ Judiciary Act of 1789, 1 STAT. 92, § 34, now REV. STAT. § 721 (1875), 28 U. S. C. § 725 (1926).

¹² The William Jarvis (D. Mass. 1859) Fed. Cas. No. 17,697.

¹³ *Supra* n. 5.

¹⁴ Mutual Benefit Life Ins. Co. v. Robison (C. C. A. 8th, 1893) 58 Fed. 723.

the broad interpretation to the statute of 1862 for which Dean Wigmore contends: (1) There are admiralty cases between the years 1862 and 1878 holding, as they held before 1862 and have held since 1878, that a court of admiralty is not bound by the common law rules of evidence.¹⁵ (2) The writer has not been able to find a single admiralty case during the period in question giving the suggested broad interpretation to the term "competency of witnesses." (3) A 1910 admiralty case expressly says, "Section 858 of the Revised Statutes relates to the competency of witnesses and not to the admissibility of evidence."¹⁶ (4) It is the opinion of distinguished admiralty proctors interviewed that no admiralty court would give so broad an interpretation to the term "competency of witnesses."

Thus it appears that from 1862 to 1878 admiralty courts are to be governed by state rules as to the competency of witnesses, and that there was no broad taking over into admiralty of all state rules of evidence in that period.

The final statement by Dean Wigmore was that in 1878 the original plan was restored. In support of this statement he cited a case construing Revised Statutes, Section 866. This statute provided that the mode of taking depositions should be according to "common usage." It was held that, although in cases at common law this "common usage" was taken to mean according to state laws, an admiralty court need not conform to the state practice.¹⁷ If between 1862 and 1878 admiralty courts had been bound to follow all state rules of evidence, then this case would probably show a change. But since during that period only state rules as to competency were applied in admiralty, this case as to the mode of taking depositions indicates no more than a continuance of the *status quo*.

Dean Wigmore also cites Revised Statutes, Sections 862¹⁸ and 914¹⁹ in support of his proposition that in 1878 the original plan of admiralty courts having their own rules of evidence was restored. Revised Statutes, Section 862 provided that "the mode of proof in causes of equity and admiralty and maritime jurisdiction shall be according to the rules now or hereafter prescribed by the Supreme Court, except as herein specially provided." It will be noticed that this section is merely a rewording of a statute passed in 1842 and in effect in 1862 when state rules concerning the "competency of witnesses" were taken over. It is difficult to see how a mere restatement of this old provision of 1842 in the revision of 1878 could have any substantive effect. Also this same section, 862, states that it was to apply "except as herein specially pro-

¹⁵ The *J. F. Spencer* (D. N. Y. 1869) Fed. Cas. No. 7,315; The *Vivid* (D. N. Y. 1870) Fed. Cas. No. 16,978.

¹⁶ *Downs v. Wall* (C. C. A. 5th, 1910) 176 Fed. 657, 100 C. C. A. 209.

¹⁷ The *Titanic* (D. N. Y., 1913) 206 Fed. 500, and see cited therein *The Westminster* (D. Pa. 1899) 96 Fed. 766.

¹⁸ Act of Aug. 23, 1842, 5 STAT. 518, c. 188.

¹⁹ Act of June 1, 1872, 17 STAT. 197, c. 255, § 5.

vided." It would seem clear that Revised Statutes, Section 858 fell within the exception and that state rules still govern the "competency of witnesses." It may also be noticed that the Supreme Court has never made a rule purporting to restore to admiralty courts their own rules of evidence or to abolish their obligation to follow state rules as to competency of witnesses. Without such a rule, even if Revised Statutes, Section 858 did not fall within the exception, it could hardly be said that the original plan had been restored.

Revised Statutes, Section 914,²⁰ the other one relied upon by Dean Wigmore for his final statement, reads as follows: "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts shall conform as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding." This section by its own terms does not concern admiralty procedure at all. It would have been more appropriate had he cited Revised Statutes, Section 913 which specifically regulated mesne process and proceedings in equity and admiralty. It provided: "The forms of mesne process, and the forms and modes of proceeding in suits of equity and admiralty and maritime jurisdiction in the circuit and district courts, shall be according to the courts of equity and admiralty, respectively, except when it is otherwise provided by statutes or by rules of court in pursuance thereof; but the same shall be subject to addition by the said courts, respectively, and to regulation by the Supreme Court, by rules prescribed, from time to time, to any circuit or district court, not inconsistent with the laws of the United States." As will be remembered, Revised Statutes, Section 858 specifically provided that in admiralty courts, with certain exceptions, the state laws as to the "competency of witnesses" should govern. Since Revised Statutes, Section 913 expressly excepts from its operation prior statutory regulations, Section 858 remains untouched, and under the express provision of Section 913 the Supreme Court could not make a rule inconsistent with it. As before stated, the Supreme Court has not attempted to make any such rule.

It is, then, the writer's opinion that admiralty courts are no less bound by state rules after 1878 than they were between 1862 and 1878. They are bound by state rules as to the competency of witnesses but are not bound by other state rules of evidence.

In 1906 Section 858 of the Revised Statutes was amended. It remains to be seen whether this amendment brings about any change concerning the application of state rules of evidence in admiralty. The amended section reads: "The competency of a witness to testify in any civil action, suit, or proceeding in the courts of the United States shall be determined by the laws of the State or Territory in which the court

²⁰ See *supra* n. 19.

is held."²¹ Although courts of admiralty are not expressly mentioned, the statute clearly applies to them. An admiralty case has applied it;²² a District Court Judge interviewed said that it would be applied in the proper case; and the leading admiralty text writer says: "The laws of the State in which the court is held furnish the rules of decision as to the competency of witnesses."²³ It seems that this amended section rather enlarges than restricts the application of state rules regarding the competency of witnesses in admiralty. The qualifications of Revised Statutes, Section 858, as enacted in 1878, concerning color, interest, and suits by or against executors, administrators, or guardians are left out.

To sum up the criticism of Dean Wigmore's statement that in admiralty proceedings the Federal Courts originally had their own rules of evidence; that a statute in 1862 directed the adoption of local state rules, but in the revision of 1878 the original plan was restored. It has been shown (1) that in 1862 state rules as to the competency of witnesses alone were taken over into admiralty, (2) that the original plan was not restored in 1878. A third proposition may be added: (3) the rules regarding the competency of witnesses in admiralty today are the same as those prescribed by the statute of 1862.²⁴

A summary of the history of the law governing the rules of evidence applied in admiralty reveals that, (1) before 1789 the rules applied by Colonial Admiralty Courts were the rules of those courts as engrafted upon the British, (2) between 1789 and 1792 admiralty rules and procedure were according to the course of the civil law, (3) from 1792 to 1862 the admiralty courts had their own rules of evidence, (4) from 1862 to the present time admiralty courts have had their own rules of evidence except for state rules, with certain modifications, determining the competency of witnesses.

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²¹ REV. STAT. § 858, amend. Act of June 29, 1906, 34 STAT. 618, c. 3608.

²² *DOWNS v. Wall*, *supra* n. 16.

²³ 1 *BENEDICT, ADMIRALTY* (5th ed. 1925) 454.

²⁴ See Act of July 16, 1862, *supra* n. 5.