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Federal Jurisdiction-Federal Civil Procedure-Right to Jury Trial of Seaman's Claim for Maintenance and Cure Where Joined with Claim Under Jones Act

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FEDERAL JURISDICTION—FEDERAL CIVIL PROCEDURE—RIGHT TO JURY TRIAL OF SEAMAN'S CLAIM FOR MAINTENANCE AND CURE WHERE JOINED WITH CLAIM UNDER JONES ACT—Plaintiff seaman, having been injured while in the employ of defendant shipowner, filed an action in federal district court. Plaintiff invoked the court's federal-question jurisdiction alone, under section 1331 of the federal *Judicial Code*.[1] He alleged claims for negligence under the Jones Act,[2] for unseaworthiness, and for maintenance and cure, and demanded jury trial of all three counts. The trial court sustained the demand as to the first two counts,[3] but ordered that the claim for maintenance and cure be tried to the judge alone, sitting as a court of admiralty. On appeal from the order denying jury trial of plaintiff's claim for maintenance and cure, *held*, affirmed. Sitting en banc, the nine judges of the Second Circuit handed down three separate opinions. Judge Friendly, with three colleagues, held that an award of jury trial of a maintenance and cure count would constitute reversible error, on the grounds that Federal Rule 38(a)'s grants of jury trial are exclusive[4]

1 28 U.S.C. § 1331 (1958). On appeal, plaintiff suggested that the evidence had presented sufficient facts to sustain diversity jurisdiction of the action under 28 U.S.C. § 1332 (1958). The court held, three judges dissenting, that the district court did not have diversity jurisdiction, plaintiff having failed to bring the possibility of its existence sufficiently to the attention of the district judge. Principal case at 468, 477.

2 "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury . . . . Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." Merchant Marine Act of 1920 (Jones Act), § 33, 41 Stat. 1007, 46 U.S.C. § 688 (1958).

3 The jury returned a verdict for defendant on the Jones Act and unseaworthiness counts. Principal case at 463.

4 "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." FED. R. CIV. P. 38(a). (The seventh amendment reads in part: "In Suits

and that the trial court did not have pendent jurisdiction on the law side of the maintenance and cure claim. Judge Smith, with Judge Waterman, concurring, held that, so long as plaintiff presented a Jones Act claim, neither an award nor a denial of jury trial of a joined count for maintenance and cure would be reversible error. Judge Clark, dissenting with the remaining two judges, argued that plaintiff should be entitled to jury trial of all claims arising from any single factual situation.[5] *Fitzgerald v. United States Lines Co.*, 306 F.2d 461 (2d Cir. 1962), *reversed*, 83 Sup. Ct. 1646 (1963).

Although jury trial of maritime claims may be had in state courts,[6]

at common law . . . the right of trial by jury shall be preserved . . . ." U.S. CONST. amend. VII, cl. 1.) No other grant of jury trial (leading to a binding verdict) without the consent of all parties litigant is found in the Federal Rules, though no provision of the Rules expressly forbids jury trial as of right in other situations. See generally Note, 111 U. PA. L. REV. 239, 240-41 (1962), and sources cited therein. Throughout this discussion it is assumed that Rule 38(a)'s grants are exclusive.

5 Thus, by a six-to-three vote the court of appeals held that the denial of jury trial was not reversible error. But evidently, had the trial court awarded jury trial of the maintenance and cure claim, the court of appeals would have upheld the award, five to four.

In reversing the decision of the court of appeals in the principal case, the Supreme Court, in an opinion by Mr. Justice Black, indicated that it was in substantial agreement with the views of Judge Clark. 83 Sup. Ct. 1646, 1650 (1963). Believing that the rule which the majority was announcing was one "entirely procedural in character," Mr. Justice Harlan dissented on the ground that "the manner in which such rules must be promulgated has been specified by Congress in 28 U.S.C. § 2073." 83 Sup. Ct. at 1651. Speaking for the Court, Mr. Justice Black stated: "Although remedies for negligence, unseaworthiness, and maintenance and cure have different origins and may on occasion call for application of slightly different principles and procedures, they nevertheless, when based on one unitary set of circumstances, serve the same purpose of indemnifying a seaman for damages caused by injury, depend in large part upon the same evidence, and involve some identical elements of recovery. Requiring a seaman to split up his lawsuit, submitting part of it to a jury and part to a judge, unduly complicates and confuses a trial, creates difficulties in applying doctrines of *res judicata* and collateral estoppel, and can easily result in too much or too little recovery. The problems are particularly acute in determining the amount of damages. . . . In the absence of some statutory or constitutional obstacle, an end should be put to such an unfortunate, outdated, and wasteful manner of trying these cases. Fortunately, there is no such obstacle. While this Court has held that the Seventh Amendment does not require jury trials in admiralty cases, neither that Amendment nor any other provision of the Constitution forbids them. Nor does any statute of Congress or Rule of Procedure, Civil or Admiralty, forbid jury trials in maritime cases. . . . Where, as here, a particular mode of trial being used by many judges is so cumbersome, confusing, and time-consuming that it places completely unnecessary obstacles in the paths of litigants seeking justice in our courts, we should not and do not hesitate to take action to correct the situation. Only one trier of fact should be used for the trial of what is essentially one lawsuit to settle one claim split conceptually into separate parts because of historical developments. . . . [Because of the Jones Act provision for jury trial] the jury, a time-honored institution in our jurisprudence, is the only tribunal competent under the present congressional enactments to try all the claims. Accordingly, we hold that a maintenance and cure claim joined with a Jones Act claim must be submitted to the jury when both arise out of one set of facts. The seaman in this case was therefore entitled to a jury trial as of right on his maintenance and cure claim." 83 Sup. Ct. at 1649-50.

6 State courts may take jurisdiction of maritime claims pursuant to the "saving"

the general rule with respect to federal courts is that, in the absence of diversity of citizenship,[7] there is no right to jury trial of claims arising under the general maritime law (*e.g.*, claims for unseaworthiness and maintenance and cure), over which the federal courts have jurisdiction by virtue of section 1333 of the *Judicial Code*.[8] This rule does not apply to actions for negligence arising under the Jones Act, which specifically provides for an action at law with jury trial as a matter of right. In a case recently decided by the Supreme Court, *Romero v. International Terminal Operating Co.*,[9] it was argued that section 1331 of the *Judicial Code*[10] gives federal district courts jurisdiction of claims arising under the general maritime law, just as it does of claims arising under the Jones Act;[11] however, this proposition was rejected by a majority of the Court. It was evidently assumed by the *Romero* dissenters that, if the seaman could get his maritime claim into a federal court under section 1331, the claim would be transformed into one at law, with an attendant right to jury trial on demand of either party.[12] But this assumption was erroneous. Section 1331 comprehends both actions which are, by tradition or statute, cognizable at law, and other civil actions not cognizable at law, while the

clause of 28 U.S.C. § 1333 (1958): "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled . . . ." In state courts maritime actions are common-law actions and are ordinarily entitled to jury trial. *Cf., e.g.*, Philadelphia & R. Ry. v. Berg, 274 Fed. 534, 538-39 (3d Cir.), *cert. denied*, 257 U.S. 638 (1921).

7 Jury trial may be had on the demand of any party to a maritime action where the federal court's jurisdiction is invoked on the ground of diversity of citizenship under 28 U.S.C. § 1332 (1958). *E.g.*, Philadelphia & R. Ry. v. Berg, *supra* note 6, at 538-39. Since the federal court is sitting in the stead of a state court, the seventh amendment preserves the right to a jury trial of what would be, in the state court, a common-law action to enforce a maritime right. The Supreme Court evidently approves of this practice [*e.g.*, Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 407-08 (1953)], although it has never had occasion to hold expressly in favor of the practice.

8 28 U.S.C. § 1333(1) (1958), quoted in note 6 *supra*. By statute, certain claims arising with respect to coastwise shipping on the Great Lakes may be tried to a jury as of right. 28 U.S.C. § 1873 (1958). Apparently, Congress envisioned no pro-jury policy in enacting this statute in 1845, but, rather, was under the erroneous impression that the seventh amendment required jury trial of maritime claims related to non-tidal waters. See 5 MOORE, FEDERAL PRACTICE ¶ 38.35[3], at 274-75 (2d ed. 1951).

9 358 U.S. 354, 359-80 (1959). Four Justices dissented.

10 "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy . . . arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331(a) (1958).

11 While the final sentence of the Jones Act, quoted in note 2 *supra*, purports to vest jurisdiction in an undeterminable court, the Supreme Court long ago decided that "jurisdiction" in that context meant "venue." Panama R.R. v. Johnson, 264 U.S. 375 (1924). Thus, a federal court has ordinary federal-question jurisdiction of a Jones Act claim, pursuant to 28 U.S.C. § 1331 (1958). Another consequence of the *Johnson* decision was concurrence of state-federal jurisdiction of actions prosecuted under the Jones Act. See, *e.g.*, Panama R.R. v. Vasquez, 271 U.S. 557 (1926); Engel v. Davenport, 271 U.S. 33 (1926).

12 See Romero v. International Terminal Operating Co., 358 U.S. 354, 388 (1959) (Black, J., dissenting).

seventh amendment and the Federal Rules "preserve" the right to jury trial solely in respect to actions at law.[13] Clearly, when the seventh amendment was adopted in 1791, there existed no common-law action in federal court, absent diversity, for recovery under the general maritime law; for the Judiciary Act of 1789 had already specificially given the district courts exclusive original cognizance of such actions as courts of admiralty.[14] Therefore, as Judge Wyzanski has pointed out,[15] even had *Romero* gone the other way, unseaworthiness and maintenance and cure would have been merely maritime claims over which the district court would have had jurisdiction by virtue of section 1331, but which would not have been triable to a jury as of right. Rather, the right to jury trial of a maritime claim could be justified only on the ground that the federal court had jurisdiction of it "pendent" to the court's jurisdiction of a claim under the Jones Act.[16]

The fountainhead of the pendent jurisdiction doctrine is the case of *Hurn v. Oursler*,[17] which held that a federal district court, having jurisdiction of a count for infringement of a copyrighted play,[18] also had jurisdiction of a joined count for unfair competition with respect to the same play,[19] which second count arose under state law. However, the district court was held not to have jurisdiction of a third count which alleged unfair competition with respect to an uncopyrighted revision of the play. The Court justified its decision by distinguishing between (a) two grounds of recovery—one a federal ground, the other a state ground—arising from the same cause of action, and (b) two separate causes of action, only one of which presented a federal question. The Court decided that the factual elements of the claims for infringement and for unfair competition with respect to the copyrighted play were virtually identical and so took the view that the district court had pendent jurisdiction of the latter.

The pendent jurisdiction doctrine has been widely accepted as a theoretical ground for according jury trial as of right to an unseaworthiness claim where joined with a Jones Act claim,[20] but on the wrong basis. The courts and textwriters seem to regard the situation as one where the Jones Act claim "pulls" the unseaworthiness claim out of section 1333 into the limbo of pendent jurisdiction, where the unseaworthiness claim mirac-

13 Including, of course, actions which are, by force of federal statute, triable to a jury as of right. FED. R. CIV. P. 38(a).

14 Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 76.

15 See Jenkins v. Roderick, 156 F. Supp. 299, 304 (D. Mass. 1957).

16 *Ibid.*

17 289 U.S. 238 (1933).

18 Under what is now 28 U.S.C. § 1338(a) (1958).

19 28 U.S.C. § 1338(b) (1958) had not, of course, been enacted at the time.

20 Bartholomew v. Universe Tankships, Inc., 263 F.2d 437 (2d Cir.), *cert. denied*, 359 U.S. 1000 (1959); Jordine v. Walling, 185 F.2d 662, 671 (3d Cir. 1950). *Cf.* Michalic v. Cleveland Tankers, Inc., 364 U.S. 325, 331 n.4 (1960) (dictum) (by implication).

ulously becomes entitled to jury trial as of right.[21] But this approach is open to an objection analogous to that directed at the pre-*Romero* principle that the district courts had section 1331 jurisdiction of rights and remedies provided by the general maritime law: the mere fact that the federal court has pendent jurisdiction of a claim does not make it a claim at law triable as of right to a jury. In order to command jury trial as of right, a claim must be on the "law side" before it arrives, so to speak, in a federal court. This theoretical defect is cured by the fact that in state courts an action involving a maritime personal injury is a common-law action,[22] ordinarily triable to a jury as of right. Therefore, applying the pendent jurisdiction doctrine, the Jones Act claim "pulls" an unseaworthiness claim from the state courts into the federal court. As in the case of diversity,[23] the seventh amendment forbids the district court to deny jury trial of the unseaworthiness claim, it having been a claim at common law in the state court.[24] The same theoretical apparatus is of course available to the seaman's claim for maintenance and cure.

The foregoing construct applies to the seaman's maritime claims, however, only if they meet *Hurn v. Oursler*'s single-cause-of-action test. As to unseaworthiness, no problem is presented. The Supreme Court long ago held, in *Baltimore S.S. Co. v. Phillips*,[25] that unseaworthiness and Jones Act negligence were but two grounds of recovery arising from the same cause of action—defendant's violation of plaintiff's right of bodily safety—and that a judgment for defendant on the issue of unseaworthiness barred plaintiff's subsequent action under the Jones Act.[26] The Court's conclu-

21 See Romero v. International Terminal Operating Co., 358 U.S. 354, 380-81 (1959); *cf.* cases cited in note 20 *supra*; GILMORE & BLACK, ADMIRALTY § 6-9, at 261-62 (1957) (*semble*); 5 MOORE, *op. cit. supra* note 8, ¶ 38.35[4], at 284. Thus, it has been mistakenly urged that, since an unseaworthiness claim is entitled to jury trial when joined with a Jones Act claim, a maintenance and cure claim should also be entitled to jury trial where joined with a Jones Act claim, for unseaworthiness is "as much a maritime cause of action as maintenance and cure . . . ." GILMORE & BLACK, *op. cit. supra*, § 6-9, at 262.

22 This conclusion would seem to flow from the language of the original "saving" clause: ". . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it . . . ." Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 77. The modern alterations of the clause's language, 28 U.S.C. § 1333(1), quoted in note 6 *supra*, were apparently not intended to effect any change in the clause's content. See GILMORE & BLACK, *op. cit. supra* note 21, § 1-13, at 33.

23 See note 7 *supra*.

24 *But see* principal case at 473-75 (opinion of Friendly, J.).

25 274 U.S. 316 (1927). Similarly, Pate v. Standard Dredging Corp., 193 F.2d 498, 501 (5th Cir. 1952), held that an unseaworthiness claim was not a "separate and independent claim or cause of action" from the Jones Act claim for purposes of removal under 28 U.S.C. § 1441(c) (1958).

26 *Phillips* defined "cause of action" as follows: "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show . . . . The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action. 'The facts are merely the means, and not the end. They do not constitute a cause of action, but they show its existence by making the wrong appear.'" 274 U.S. at 321. This definition was adopted in Hurn v. Oursler, 289 U.S. 238, 246 (1933).

sion that a single cause of action gives rise to both claims is borne out by an examination of their respective basic elements. The factual components of a claim for unseaworthiness are: a defect in the ship, her equipment, or her personnel; the defect's causal connection with plaintiff's injuries; and the extent of those injuries. To recover under the Jones Act, plaintiff ordinarily must prove all of the foregoing items, plus the fact that defendant knew, or should reasonably have known, of the defect and that defendant was negligent in failing to correct the defect.[27] Moreover, as a practical matter, it is obviously most efficient and convenient to send the unseaworthiness count to the jury along with the Jones Act count, since, in finding the facts bearing on the Jones Act count, the jury usually must also find all the facts bearing on unseaworthiness.[28]

A claim for maintenance and cure, however, does not so readily fit the requirements for pendency to a Jones Act claim. Shortly after the *Phillips* case, the Supreme Court held that a seaman's prior acceptance of maintenance and cure did not preclude his action against his employer for damages under the Jones Act.[29] The seaman's right to recover for unseaworthiness or negligence was held independent of his right to maintenance and cure which is "implied in law as a contractual obligation arising out of the nature of the employment . . . ."[30] Of the four federal circuits to which the issue raised in the principal case has been presented, two (and the chief opinion of the principal case) have held that a seaman's claim for maintenance and cure is a cause of action separate from his cause of action for Jones Act negligence and unseaworthiness, and, therefore, the district court does not have pendent jurisdiction of the maintenance and cure claim on the law side.[31] This relegates the claim for

27 See Jenkins v. Roderick, 156 F. Supp. 299, 300-01 (D. Mass. 1957). To make out the negligence element of a Jones Act claim, the seaman may, of course, rely on "operating negligence" in lieu of a negligent defect in ship, tackle, or personnel. The principle that neither notice nor negligence is an element of a claim for unseaworthiness was recently confirmed by the Supreme Court in Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960).

28 The rule of Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959), if extended to maritime cases, would require that the facts bearing on unseaworthiness be found by a federal jury which is hearing a joined claim under the Jones Act. *Beacon Theatres* held that, where two claims or a claim and counterclaim—one legal and the other equitable—are pressed in a single action in federal court, all issues of fact common to the two must, on demand of any party to the action, be resolved by a jury.

Observe, however, that the correspondence between the Jones Act elements and the unseaworthiness elements is not perfect. If the jury finds for defendant on the Jones Act count on the ground that defendant was not negligent, the jury would never reach, in its consideration of the Jones Act claim, any of the issues of fact common to both claims.

29 Pacific S.S. Co. v. Peterson, 278 U.S. 130 (1928).

30 *Id.* at 138. Similarly, a claim for maintenance and cure has been said to be a "separate and independent claim or cause of action" from a Jones Act claim within the meaning of 28 U.S.C. § 1441(c) (1958). Pate v. Standard Dredging Corp., 193 F.2d 498, 502 (5th Cir. 1952) (dictum) (*semble*).

31 Principal case at 466-75 (opinion of Friendly, J.); Mullen v. Fitz Simons & Connell Dredge & Dock Co., 191 F.2d 82 (7th Cir.), *cert. denied*, 342 U.S. 888 (1951); Jordine

maintenance and cure, in the absence of diversity, to the admiralty side, where it must be tried to the court, without a jury, under the Admiralty Rules.[32] Nonetheless, the factual elements of the maintenance and cure claim—the injury of the seaman in the service of his ship and the amount of his unpaid maintenance and cure—are included within the factual elements which make out a claim under the Jones Act.[33] A possible exception is that the maintenance and cure element, "in the service of the ship," may be just a little broader than the Jones Act element, "in the course of his employment." Thus, a finding for defendant on the scope of employment issue with respect to the Jones Act count might not preclude a verdict for plaintiff on the maintenance and cure count. However, the trend of the Jones Act cases[34] indicates that the "scope of employment" test under the act is about the same as that for maintenance and cure.[35] In particular, there would be no difference between the tests in the typical case where a seaman is injured aboard ship; most actions joining Jones Act and maintenance and cure claims will arise from shipboard accidents, since the negligence requirement for recovery under the Jones Act limits its operation principally to claims for injuries occurring on or near the ship. But, even if there does remain some small difference between the two scope of employment tests, so trifling a variance ought not to make the two claims separate causes of action within the context of the pendent jurisdiction doctrine;[36] *Hurn v. Oursler* is not, after all, a statute.

An evidently more important source of the courts' worries is the supposed convenience of trying maintenance and cure to the court. Since the Jones Act provides a cumulative remedy, the plaintiff's recovery of maintenance and cure will overlap his damages, if any, under the Jones Act; there exists, therefore, a theoretical risk of double recovery. Furthermore, certain findings of fact—such as the point of maximum cure and the amount of the allowance for board and lodging during convalescence—must be made in respect of the maintenance and cure recovery which

v. Walling, 185 F.2d 662 (3d Cir. 1950). *But cf.* Jenkins v. Roderick, 156 F. Supp. 299 (D. Mass. 1957). The *Jordine* case, despite opposing counsel's failure to object, reversed for the "jurisdictional" error of trying a maintenance and cure claim to the jury; instead of ordering the offending claim's dismissal, however, the court of appeals ordered that it be transferred to the district court's admiralty docket.

32 Such results have brought upon these courts the wrath of the commentators. See GILMORE & BLACK, *op. cit. supra* note 21, § 6-9, at 261-62 (*semble*); 5 MOORE, *op. cit. supra* note 8, ¶ 38.35[4], at 284-85; Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1, 63-64 (1959); Kurland, *The Romero Case and Some Problems of Federal Jurisdiction*, 73 HARV. L. REV. 817, 849-50 (1960).

33 On the other hand, such Jones Act elements as negligence are not part of a cause of action for maintenance and cure.

34 Jones Act recovery may be had for off-ship injuries, O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36 (1943), and even for shore-leave injuries, Marceau v. Great Lakes Transit Corp., 146 F.2d 416 (2d Cir.), *cert. denied*, 324 U.S. 872 (1945).

35 This is the conclusion reached by the authors of a leading admiralty text. GILMORE &. BLACK, *op. cit. supra* note 21, § 6-21, at 284-85.

36 Compare the difference between the elements of a claim under the Jones Act and those of a claim for unseaworthiness stated in note 28 *supra*.

have no direct bearing on Jones Act damages. And perhaps it would be difficult for the jury to remember that the seaman is entitled to his full measure of maintenance and cure despite his contributory negligence, but that contributory negligence does reduce the amount of his recovery under the Jones Act. It would seem, however, that proper instructions to the jury could readily and simply obviate these problems.[37] On the other hand, if the judge is to decide the maintenance and cure issue, the jury must render its verdict with respect to the Jones Act claim before the judge decides as to the claim for maintenance and cure.[38] Since all of the jury's material findings of fact are conclusive on the court,[39] either special verdicts or special interrogatories would be necessary in order to prevent double recovery or unjust denial of maintenance and cure to the plaintiff. For example, if the jury gave a general verdict for defendant on the Jones Act claim, the court, before finding on the maintenance and cure claim, would have to know whether the jury reached its decision because defendant was not negligent (which would have no effect on maintenance and cure) or because the jury did not believe that plaintiff was injured (which could have a substantial effect on maintenance and cure). Or, if the jury returned a general verdict for plaintiff on the Jones Act count, the court would need to know whether or not the jury had subtracted an amount representing maintenance and cure from the cumulative Jones Act damages. If the jury had subtracted an amount for maintenance and cure, the court would have to know that amount, which would conclude the court's findings as to the amount of the maintenance and cure award and defendant's liability therefor.[40] Because of the cumbersomeness of special-verdict or special-interrogatory machinery in this area, a jury verdict with respect to maintenance and cure would certainly be more promotive of trial convenience.

Probably the most damning factor bearing on the question of whether counts under the Jones Act and for maintenance and cure constitute one cause of action or two is the *Phillips* and *Hurn* view of a cause of action as a single invasion of a single legal right.[41] The seaman's right to bodily security under the Jones Act is invaded by defendant, if ever, at the time of the injury. But plaintiff's right to maintenance and cure, which is his right to receive medical care, board, and lodging *while* injured, is not invaded until the shipowner fails to provide the foregoing items.[42]

37 Judge Wyzanski has posited such a set of instructions, admirable for their lucidity, conciseness, and comprehensibility. Jenkins v. Roderick, 156 F. Supp. 299, 306 (D. Mass. 1957).

38 *Cf.* Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959). It is assumed that the *Beacon Theatres* rule (see note 28 *supra*), if not the express holding of that case, covers law-admiralty, as well as law-equity, situations.

39 *Cf. ibid.*

40 *Ibid.*

41 Hurn v. Oursler, 289 U.S. 238, 246 (1933); Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 321 (1927).

42 The courts have articulated this dichotomy—not very satisfactorily—in terms

Nevertheless, where the seaman has been involved in a single accident, all the rights which he may press in federal court arise in respect of that accident. Judge Clark, dissenting in the principal case, argued that the facts of an accident, rather than legal rights and the invasion thereof, should determine the scope of the cause of action.[43] This is, of course, the "transactional" definition of a "cause of action," familiar to readers of Judge Clark's textbook on pleading.[44] When the question is which trier shall find the facts, it seems singularly inappropriate to solve the question by way of the *Hurn* definition of a "cause of action," which expressly disavows any direct concern with the facts themselves. Interestingly enough, *Hurn v. Oursler*, in defining a "cause of action" as a single invasion of a single legal right, specifically stated that that definition was intended to be used solely for determining "the *bounds* between federal and state jurisdiction."[45] For "a 'cause of action' may mean one thing for one purpose and something different for another . . . ."[46] While the issue of the principal case has here been analyzed in terms of pendent jurisdiction, the "purpose" of the discussion is the determination, not of the bounds between federal and state jurisdiction, but of the seaman's right to have the facts of his maintenance and cure claim tried by a jury. The clarity and convenience which the trying of a maintenance and cure count to the jury promotes are unquestionably valuable to an injured seaman who is entitled to an accurate, speedy, and just remedy in the federal courts. These considerations would seem to justify the adoption of the "transactional" definition of a "cause of action" for purposes of the instant problem. For, under this definition, Jones Act and maintenance and cure claims arise from a single cause of action, the plaintiff's injury. And the

of claims arising *ex delicto* versus claims arising more or less *ex contractu*. See principal case at 472 (opinion of Friendly, J.); Jordine v. Walling, 185 F.2d 662, 670 (3d Cir. 1950). *Cf.* Pacific S.S. Co. v. Peterson, 278 U.S. 130, 138 (1928).

43 Principal case at 476 (dissenting opinion of Clark, J.). Judge Clark seems not to rely on the pendent jurisdiction doctrine, but rather on the proposition that all claims arising from an "identic factual situation" simply ought to go to the jury. See Note, 111 U. PA. L. REV. 239, 242-43 (1962). But surely Judge Clark would not argue that, except as to overlapping issues of fact within the rule of Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959), an equitable count arising from, illustratively, a contract should go to the jury along with a legal claim based on the same contract. The same should apply to a claim ordinarily cognizable in admiralty. Thus, even using Judge Clark's concept of a "cause of action," some sort of pendent jurisdiction formula is necessary to get maintenance and cure counts to the jury, so long as Rule 38(a) is read as making an exclusive grant of jury trial as of right, as has been assumed herein. As to the attitude of the Supreme Court in agreeing substantially with Judge Clark's views, and in reversing the Second Circuit's decision in the principal case, see note 5 *supra*.

44 See generally CLARK, CODE PLEADING § 69, at 452-56 (2d ed. 1947). A majority of the Supreme Court seems to accept the "transactional" definition of a "cause of action." See Romero v. International Terminal Operating Co., 358 U.S. 354, 413-14 (1959) (Brennan, J., dissenting); *cf. id.* at 380-81 (majority opinion of Frankfurter, J.) (by implication). See also note 5 *supra*.

45 Hurn v. Oursler, 289 U.S. 238, 247 (1933). (Emphasis added.)

46 *Ibid.*

adoption of the "transactional" definition completes the theoretical chain which secures to the seaman the right to jury trial of his claim for maintenance and cure.

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