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FEDERAL PROCEDURE-APPEAL UNDER FEDERAL FOOD, DRUG & COSMETIC ACT--SCOPE OF ADMIRALTY APPEAL COMPARED WITH APPEAL UNDER THE NEW FEDERAL RULES

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FEDERAL PROCEDURE—APPEAL UNDER FEDERAL FOOD, DRUG & COSMETIC ACT—SCOPE OF ADMIRALTY APPEAL COMPARED WITH APPEAL UNDER THE NEW FEDERAL RULES—Appellee, the United States government, by a proceeding in rem, sought to condemn two shipments of canned oysters packed by appellant, the C. C. Company, under the Federal Food, Drug and

Cosmetic Act,[1] on the ground that the oysters were wholly or partially decomposed. The district court found for the appellee on conflicting evidence of experts, and appellant appealed to the Circuit Court of Appeals for the Fifth Circuit. On the theory that procedure on appeal should conform to appeals in admiralty,[2] the circuit court of appeals reviewed the whole case de novo, reversed the district court on the ground that, while there was substantial evidence to warrant the findings of the trial court, the government had not proved its case by clear and convincing evidence as required in forfeiture cases. On rehearing, it was pointed out that the procedure on appeal for these cases should conform to the Federal Rules of Civil Procedure,[3] and on this basis,[4] the court held that since the district court's findings of fact were not "clearly erroneous" [5] they must be affirmed. *C. C. Company v. United States*, (C.C.A. 5th, 1945) 147 F. (2d) 820.

This case raises the question, which is very important in the application of the new federal rules, whether the procedure on appeal under the new rules should produce a different result than would have been reached under the old admiralty appeal; on the same findings of fact by the trial court. There is broad language in many cases saying that an admiralty appeal is a trial de novo.[6] In actual practice there never has been a trial de novo on appeal because the appeal court does not allow a completely new presentation of the evidence or a hearing of the same witnesses. And since this is so, the appeal courts have consistently avoided assuming burdens rightly belonging to the court of original jurisdiction.[7] The classic statement of admiralty appeal de novo included the idea that new

[1] 21 U.S.C. (1940), § 301.

[2] 21 U.S.C. (1940), § 334 (b), "the article shall be liable to seizure by process pursuant to libel, and the procedure in cases under this section shall conform, as nearly as may be, to procedure in admiralty; except that on demand of either party any issue of fact joined in any such case shall be tried by jury."

[3] As decided in 443 Cans of Frozen Egg Product v. United States, 226 U.S. 172, 33 S.Ct. 50 (1912).

[4] Also on the basis that, since this statute was enacted for the public good, the government should have to prove its case only by a mere preponderance of the evidence.

[5] Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C. (1940), following § 723c: "In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment. . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credability of the witnesses."

[6] Yeaton v. United States, 5 Cranch (9 U.S.) 281 (1809); The Lucille, 19 Wall. (86 U.S.) 73 (1873); The "Benefactor," 103 U.S. 239 (1880); Irvine v. The Hesper, 122 U.S. 256, 7 S.Ct. 1177 (1887); The Louisville, 154 U.S. 657, 14 S.Ct. 1190 (1883); Reid v. Fargo, 241 U.S. 544, 36 S.Ct. 712 (1916); Watts, Watts & Co., Ltd. v. Unione Austriaca, 248 U.S. 9, 39 S.Ct. 1 (1918); Duche & Sons, Ltd. v. The "John Twohy," 255 U.S. 77, 41 S.Ct. 251 (1921); Standard Oil Co. of New Jersey v. Southern Pacific Co., 268 U.S. 146, 45 S.Ct. 465 (1925); Coryell v. Phipps, (C.C.A. 5th, 1942) 128 F. (2d) 702; Pavlis v. Jackson, (C.C.A. 5th, 1942) 131 F. (2d) 362.

[7] The Saunders, (C.C. N.Y. 1885) 23 F. 303.

facts could be alleged and proved on appeal.[8] But, to be admissable, new evidence must be new or newly discovered,[9] it must be material and competent,[10] it cannot be merely repetitious,[11] and the party seeking to introduce it must show affirmatively that his failure to present it on trial is not due to his own laches.[12] Today, this conditional right to introduce new evidence is the only important difference between the admiralty appeal de novo and the civil appeal.[13] When it is said in the cases that the admiralty appeal is a completely new trial, and that the judgment below is regarded as though it never had been rendered,[14] you may be sure that the court is not deciding how much weight shall be given to the trial court's findings of fact, but is considering other differences between the civil appeal and the appeal in admiralty.[15]

Where the question of how much weight is to be given the trial court's findings has been important to the decision of the case, the circuit courts of appeals have almost invariably enunciated rules analogous to those prevailing in civil appeals. The Circuit Court of Appeals for the Ninth Circuit has said that a hearing on the trial court's findings will be controlled by a "rebuttable

[8] Yeaton v. United States, 5 Cranch (9 U.S.) 281 (1809); The Lucille, 19 Wall. (86 U.S.) 73 (1873); The "Benefactor," 103 U.S. 239 at 247 (1880).

[9] Cushman v. Ryan, (C.C. Mass. 1840) F. Cas. No. 3,515.

[10] The Sirius, (C.C.A. 9th, 1893) 54 F. 188; The Beeche Dene, (C.C.A. 5th, 1893) 55 F. 525.

[11] The Sirius, (C.C.A. 9th, 1893) 54 F. 188.

[12] The Sirius, id.; The Beeche Dene, (C.C.A. 5th, 1893) 55 F. 525; The Saunders, (C.C. N.Y. 1885) 23 F. 303; The Glide, (C.C.A. 4th, 1895) 68 F. 719; Luksich v. Mesetich, (C.C.A. 9th, 1944) 140 F. (2d) 812.

[13] See annotation, "Nature and Extent of Review upon Appeal of Causes in Admiralty," 103 A.L.R. 775 (1936).

[14] The Lucille, 19 Wall. (86 U.S.) 73 (1873); see also cases cited in note 5, supra.

[15] For instance: (1) If a law giving new rights is passed [United States v. Schooner Peggy, 1 Cranch (5 U.S.) 103 (1801)] or one giving rights has elapsed [Yeaton v. United States, 5 Cranch (9 U.S.) 281 (1809)] between the trial and appeal, the case on appeal will be considered entirely anew under the law as it exists at the time of appeal. See also, Watts, Watts & Co. v. Unione Austriaca, 248 U.S. 9, 39 S.Ct. 1 (1918) and see annotation, "Change of Law after Decision of Lower Court as Affecting Decision on Appeal or Error," 111 A.L.R. 1317 at 1328 (1937).

(2) The district court's decree is not final within the terms of admiralty rule 45 allowing new counts and "amendments in matters of substance" to be made "before the final decree." The Charles Morgan, 115 U.S. 69, 5 S.Ct. 1172 (1885).

(3) A party is not bound by the decree below, through failure to appeal, as an appeal de novo opens up the whole case as if both parties had appealed. See Irvine v. The Hesper, 122 U.S. 256, 7 S.Ct. 1177 (1887); Reid v. Fargo, 241 U.S. 544, 36 S.Ct. 712 (1916); Standard Oil Co. of New Jersey v. Southern Pacific Co., 268 U.S. 146, 45 S.Ct. 465 (1925); Gilchrist v. Chicago Insurance Company, (C.C.A. 7th, 1899) 104 F. 566; Munson S.S. Line v. Miramar S.S. Co., Ltd., (C.C.A. 2d, 1909) 167 F. 960; Pavlis v. Jackson, (C.C.A. 5th, 1942) 131 F. (2d) 362. Nor can a party appealing dismiss his appeal after the time limit for taking appeals has lapsed, when it would operate to leave the party not appealing, but depending on de novo practice, without a chance to be heard. Duche & Sons, Ltd. v. The "John Twohy," 255 U.S. 77, 41 S.Ct. 251 (1920).

prima facie presumption" that the findings are correct.[16] The Circuit Court of Appeals for the Second Circuit (the court handling the most admiralty cases) had, before the new federal rules were adopted, laid down the rule that findings of fact based on the credability of witnesses heard by the trial court would not be set aside unless "clearly erroneous," [17] and since those rules, has said in numerous cases that rule 52(a) is applicable to admiralty appeals, to the same extent as in civil appeals.[18] The circuit courts of appeals have always said that in damage and salvage actions, where the damages were necessarily uncertain, the trial court's discretion would not be overruled unless error was shown "beyond reasonable doubt." [19] It would seem that since substantially the same language is used by the courts sitting in admiralty appeals, regarding the weight to be given to the trial court's findings, as is used in the new federal rules, rule 52(a), an examination of the results in admiralty appeal would cast light on the proper interpretation of rule 52(a). While emphasizing the factors brought out above (that an admiralty appeal does not involve a complete rehearing on all the facts; nor an overruling of the district court's findings unless they are "clearly erroneous") appeal courts are careful to say that they have ". . . the final responsibility for the facts as well as the law, and findings of the District Court will not stand where it proceeded on an erroneous application of a rule of evidence which leads it to an incorrect conclusion [20] or its findings of fact are contrary to the clear weight of the evidence." [21] So it would seem that, in practice,

[16] The President Madison, (C.C.A. 9th, 1937) 91 F. (2d) 835; The Pennsylvanian, (C.C.A. 9th, 1943) 139 F. (2d) 478. But see concurring opinion in last case advocating application of federal rule 52(a); also followed in Doll v. Scott Paper Co., (C.C.A. 3d, 1937) 91 F. (2d) 860.

[17] The Perry Setzer, (C.C.A. 2d, 1924) 299 F. 586. See also Taylor v. Harwood, (C.C. Md. 1845) Fed. Cas. No. 13, 794; The Maggie P., (C.C. Mo. 1885) 25 F. 202.

[18] Commercial Molasses Corp. v. New York Tank Barge Corp., (C.C.A. 2d, 1940) 114 F. (2d) 248; Johnson v. Andrus, (C.C.A. 2d, 1941) 119 F. (2d) 287; Matton Oil Transfer Corp. v. The Dynamic, (C.C.A. 2d, 1941) 123 F. (2d) 999. And the court has criticized the bar for bringing appeals having no chance under this rule. See City of New York v. National Bulk Carriers, Inc., (C.C.A. 2d, 1943) 138 F. (2d) 826, where a penalty was threatened for future persistence. The Agnes A. Moran, (C.C.A. 2d, 1944) 143 F. (2d) 964; the rule has also been followed in the seventh circuit; see The Marguerite, (C.C.A. 7th, 1944) 140 F. (2d) 491.

[19] The Santa Rita, (C.C.A. 5th, 1922) 281 F. 760; The Mazatlan, (C.C.A. 9th, 1923) 287 F. 873; The Keekoskee, (C.C.A. 5th, 1928) 24 F. (2d) 159; The Nichigo Maru, (C.C.A. 4th, 1937) 89 F. (2d) 539; The Heranger, (C.C.A. 9th, 1939) 101 F. (2d) 953.

[20] See also Alioto v. Imahashi, (C.C.A. 9th, 1940) 115 F. (2d) 324.

[21] The Seeandbee, (C.C.A. 6th, 1939) 102 F. (2d) 577 at 581; see also The Ariadne, 13 Wall. (80 U.S.) 475 (1871); Brooklyn Eastern District Terminal v. United States, 287 U.S. 170, 53 S.Ct. 103 (1932), where it is said, at 176, "an assessment of damages may be corrected if erroneous in point of law, but also it may be corrected if extravagant in fact"; Browne v. Great Lakes Transit Corp., (C.C.A. 2d, 1925) 5 F. (2d) 58; Doll v. Scott Paper Co., (C.C.A. 3d, 1937) 91 F. (2d) 860; The President Madison, (C.C.A. 9th, 1937) 91 F. (2d) 835; The Ruth Kellogg, (C.C.A. 5th, 1942) 126 F. (2d) 18; and especially The Marguerite, (C.C.A. 7th,

the traditional admiralty appeal de novo should arrive at the same results as a civil appeal under federal rule 52(a), assuming the same findings of fact by the trial court.

If this is a true analysis of the situation, it must be apparent that the court in the principal case has made a mistake somewhere. If it was on the original appeal, the mistake must have been as to the scope of an admiralty appeal, the court believing, it would seem, that because the appeal is called "de novo," the trial court's findings must be completely reconsidered and reversed if the appeal court would not have arrived at the same conclusion. If it was on the rehearing, the mistake must have been in a too strict application of the federal rule, the judges believing, it would seem, that they were concluded by the findings of fact by the trial court.

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1944) 140 F. (2d) 491, where it is said, at 495, " . . . There is, of course, no reason nor justification for the appellate court's carrying this rule [52a] to a point where it abrogates or surrenders its function or obligation to review the findings of the lower court or administrative body (or jury) and uses the rule to hide behind or to avoid a plain duty which is its to exercise. We think it our plain duty to the party who appropriately and timely challenges the sufficiency of the evidence to support the verdict, finding or judgment, to study the evidence and ourselves investigate the weight of the evidence which the fact-finding body believed to be the facts back of the dispute or controversy."