

## ADMIRALTY

### THE NAVIGABILITY REQUIREMENT FOR ADMIRALTY JURISDICTION

Among the admiralty cases decided by the Eighth Circuit during this survey period, one case dealing with the scope of admiralty jurisdiction is particularly significant.

Several considerations make admiralty jurisdiction potentially important to the practicing attorney. The most obvious advantage is that admiralty offers another avenue of access to the federal courts separate from diversity of citizenship and federal question jurisdiction without having to satisfy an amount in controversy requirement.<sup>1</sup> Once into the admiralty courts, most of the differences from other federal jurisdictions are rather minor. There are, however, some significant differences; for instance, trial is always to the judge as the trier both of law and of fact.<sup>2</sup> The most significant difference is that the admiralty claimant has not only a cause of action *in personam* against a natural or corporate person, but also a cause of action *in rem*. That is, admiralty may give to the aggrieved party a right in the tangible thing involved in the suit, whether it is a ship's cargo or the vessel itself.<sup>3</sup> This right, referred to as a maritime lien, is quite valuable to an admiralty claimant insofar as it is non-consensual, is entirely independent of possession, is not generally extinguished by a bona fide purchaser without notice, and may arise even though the owner of the vessel is not personally liable.<sup>4</sup> Any case which either limits or expands the jurisdiction of the admiralty courts has an impact upon a claimant with a potentially admiralty-related suit.

#### BACKGROUND

The question of whether present navigability as opposed to past navigability of waters is required for admiralty jurisdiction was answered affirmatively in a recent case of first impression in the Eighth Circuit, *Livingston v. United States*.<sup>5</sup> That same inquiry has met with similar responses from the Ninth and Seventh Circuits in other recent decisions,<sup>6</sup> indicating a possible trend to-

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1. G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 19 (1957).

2. *Id.* at 31.

3. *Id.* at 31-32.

4. *Id.*

5. 627 F.2d 165, 168, 170 (8th Cir. 1980).

6. See *Chapman v. United States*, 575 F.2d 147, 151 (7th Cir.) (en banc), cert.

ward a reversal of previous federal case law.

Haldon Livingston drowned in the Norfolk River in north central Arkansas on June 13, 1974, while fishing downstream from a hydroelectric dam owned by the United States. Livingston and his boat were forced underwater when the boat slipped beneath a cable which angled into the riverbed from a post onshore. The cable remained from construction by the United States of the hydroelectric dam, which was completed in 1945.<sup>7</sup>

Livingston's wife brought two wrongful death actions against the United States in the District Court for the Western District of Arkansas, one in admiralty<sup>8</sup> and the other under the Federal Tort Claims Act (FTCA).<sup>9</sup> Mrs. Livingston's FTCA claim was dismissed when she failed to prove the degree of negligence required to make the United States liable.<sup>10</sup> The suit in admiralty, however, was sustained and eventually decided in her favor.<sup>11</sup> On appeal by the United States, the Eighth Circuit reversed the lower court's decision and remanded the case to be dismissed for want of admiralty jurisdiction because the Norfolk River was not currently navigable in fact.<sup>12</sup>

#### ANALYSIS

In reaching its decision, the Court of Appeals rescinded intimations in two previous Eighth Circuit cases that a river once navigable is always so.<sup>13</sup> This seemingly well-established "once navigable, always navigable" concept has lately suffered in other Federal Courts of Appeal as well.<sup>14</sup> To understand this development, a brief examination of admiralty jurisdiction as it has changed during American history is helpful.

The source of all admiralty powers is contained in Article III, section 2 of the United States Constitution. "The judicial power shall extend . . . to all cases of admiralty and maritime jurisdic-

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*denied*, 439 U.S. 893 (1978); *Adams v. Montana Power Co.*, 528 F.2d 437, 440-41 (9th Cir. 1975).

7. 627 F.2d at 166.

8. *Id.* Jurisdiction was invoked under 28 U.S.C. § 1333(1) (1976) and liability claimed pursuant to 46 U.S.C. § 742 (1976).

9. 627 F.2d at 166; 28 U.S.C. §§ 1346(b), 2671-2680 (1976).

10. 627 F.2d at 166-67.

11. *Id.* at 167.

12. *Id.* at 170.

13. *See id.* at 168.

14. *See Chapman v. United States*, 575 F.2d 147, 151 (7th Cir.) (en banc), *cert. denied*, 439 U.S. 893 (1978); *Adams v. Montana Power Co.*, 528 F.2d 437, 440-41 (9th Cir. 1975). *See text accompanying notes 33-37 infra.*

tion."<sup>15</sup> This grant is also the source of continuing controversy over the scope of admiralty jurisdiction.<sup>16</sup>

The earliest American cases followed the lead of English Admiralty cases by proclaiming that only those waters within the ebb and flow of the oceans' tide—the tidewaters—lie within the jurisdiction of admiralty.<sup>17</sup> However, the mid-nineteenth century saw the demise of the tidewaters test.<sup>18</sup> In its stead the Supreme Court ruled that "navigable waters" were to be the subject of admiralty jurisdiction.<sup>19</sup> The seminal definition of navigable waters came not long thereafter when the Supreme Court decided that:

Those rivers [are] navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel may be conducted in the customary modes of trade and travel on water.<sup>20</sup>

Although subsequent cases further refined the extent of navigability,<sup>21</sup> the next major refinement came in the early twentieth century. Faced with a river which was clearly unnavigable in its then-present condition, the Supreme Court held that:

[A] river having actual navigable capacity in its natural state, and capable of carrying commerce among the states, is within the [realm of navigability], even though it be not at present used for such commerce, and be incapable of such use according to present methods, either by reason of

15. U.S. CONST. art. III, § 2.

16. See, e.g., *Chapman v. United States*, 575 F.2d 147, 149-51 (7th Cir. 1978); *Adams v. Montana Power Co.*, 528 F.2d 437, 440 (9th Cir. 1975). Justice Story had apparently foreclosed any such controversy when he concluded, in a lengthy opinion, that this constitutional grant gave to the federal courts the jurisdiction "which originally and inherently belonged to the admiralty." *De Lovio v. Boit*, 7 F.Cas. 418, 443 (C.D. Mass. 1815) (No. 3776). However, note that Justice Bradley in *The Lot-tawanna*, 88 U.S. (21 Wall.) 558 (1874), contended that the controversy has continued. *Id.* at 574-75.

17. *Waring v. Clarke*, 46 U.S. (5 How.) 441, 462-64 (1847); *The Thomas Jefferson*, 23 U.S. (10 Wheat.) 428, 429 (1825).

18. Note, *Navigable Waters and Admiralty Jurisdiction*, 7 WEST. RES. L. REV. 72, 74 (1955). The tidewaters test has been referred to as "unreasonable, archaic, unfair, and arbitrary." *Id.* The last case in which there was more than token dissent from the proposition that admiralty jurisdiction extends to all navigable waters was *Jackson v. The Steamboat Magnolia*, 61 U.S. (20 How.) 296, 322-43 (1957) (Campbell, J., dissenting).

19. *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 457 (1851).

20. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870). G. GILMORE & C. BLACK, *supra* note 1, at 28 refers to this and other similar definitions of admiralty as the "test by waters."

21. See, e.g., *In re Garnett*, 141 U.S. 1, 12-18 (1890); 87 U.S. (20 Wall.) 430, 441-43 (1874).

changed conditions or because of artificial obstructions.<sup>22</sup>

The final landmark amplification of the test of navigability by the Supreme Court came in a Commerce Clause case, *United States v. Appalachian Electric Power Co.*<sup>23</sup> In that case the Court mandated that "in determining the navigable character of the [waters in question] it is proper to consider the feasibility of interstate use after reasonable improvements which might be made."<sup>24</sup> Subsequent federal court cases have rounded out these piecemeal elaborations on the Supreme Court's navigability definition. In summation, the federal test of navigability has been characterized as a three-pronged inquiry into the past, present, or future susceptibility to commercial use of the river in question.<sup>25</sup>

The first alternative, inquiring into the waters' past navigability, necessarily entails a historical reconnoitering of the waters subjected to the test; it further requires that once a waterway is found to be navigable, it remains so.<sup>26</sup> For purposes of this comment, two cases are particularly significant as both were seemingly implied endorsements by the Eighth Circuit of the historical navigability analysis and the concomitant "once navigable, always navigable" rubric.

In *Loc-Wood Boat & Motors, Inc. v. Rockwell*,<sup>27</sup> the Court of Appeals held that the body of water in question was navigable for admiralty jurisdiction despite the fact that the lower court specifically found that it was physically impossible for commerce to operate freely thereon.<sup>28</sup> As the district court had stated, the impossibility of navigation "does not destroy the legal concept of navigability" where the stream has been navigable in the past.<sup>29</sup> This historical analysis was again used in *George v. Beavark, Inc.*,<sup>30</sup> where the Eighth Circuit ruled that if the river in question was navigable in the past, it continues to be considered as a navi-

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22. *Economy Light & Power Co. v. United States*, 256 U.S. 113, 123 (1920).

23. 311 U.S. 377 (1940).

24. *Id.* at 409.

25. *United States v. White's Ferry Inc.*, 382 F. Supp. 162, 165 (D. Md. 1974). *See, e.g., United States v. Crow, Pope & Land Enterprises*, 340 F. Supp. 25, 34-35 (N.D. Ga. 1972), *appeal dismissed*, 474 F.2d 200 (5th Cir. 1973); *Rochester Gas and Electric Corp. v. Federal Power Comm'n*, 344 F.2d 594, 596 (2d Cir.) *cert. denied*, 382 U.S. 832 (1965); *United States v. Cannon*, 363 F. Supp. 1045, 1050 (D. Del. 1973).

26. *See United States v. Lewis*, 355 F. Supp. 1132, 1139 (S.D. Ga. 1973); *United States v. Stoeco Homes, Inc.*, 359 F. Supp. 672, 676-77 (D.N.J. 1973), *vacated and remanded*, 498 F.2d 597 (3d Cir. 1974), *cert. denied*, 420 U.S. 927 (1974); G. ROBINSON, *HANDBOOK OF ADMIRALTY LAW IN THE UNITED STATES* 39-40 (1939).

27. 245 F.2d 306 (8th Cir. 1957).

28. *In re Wood*, 145 F. Supp. 848, 854 (W.D. Mo. 1965).

29. *Id.* at 854.

30. 402 F.2d 977 (8th Cir. 1968).

gable stream.<sup>31</sup>

However, in recent decisions some federal courts have begun to limit the expanding concept of navigability.<sup>32</sup> In *Adams v. Montana Power Co.*,<sup>33</sup> the Ninth Circuit Court decided that admiralty jurisdiction need and should extend only to those waters presently traversed or susceptible of being so traversed by commercial craft.<sup>34</sup> *Adams* was closely followed, both in time and in reasoning, by the Seventh Circuit's holding in *Chapman v. United States*.<sup>35</sup> *Chapman* held that a river once actually used by commercial vessels, but which is not now usable for commercial shipping, is not to be deemed navigable for the exercise of admiralty jurisdiction.<sup>36</sup> In so doing, the Seventh Circuit adopted in its entirety the Ninth Circuit's reasoning in *Adams*, quoting with approval the core of that decision.<sup>37</sup>

The opinions state that the purpose behind the constitutional grant of admiralty jurisdiction is the fostering by impartial federal courts of the maritime shipping industry through the development and application of a specialized and uniform body of law.<sup>38</sup> Considering this as the *raison d'être* for admiralty, it is logical that its jurisdiction should only extend to those waters utilized or capable of being utilized for commercial activity.<sup>39</sup> Without such present or potential utilization, there does not appear to be a legitimate federal interest capable of outweighing any individual state's interest in applying its own laws with respect to waters within its own borders.<sup>40</sup>

The Eighth Circuit has now seen fit to join the maverick ranks of the Seventh and Ninth Circuits in this matter.<sup>41</sup> Espousing a logic quite similar to that of the *Adams* decision,<sup>42</sup> the Eighth Cir-

31. *Id.* at 978.

32. See notes 33-37 *infra*. This has occurred with the conspicuous absence of the Supreme Court, which has not yet considered the matter.

33. 528 F.2d 437 (9th Cir. 1975).

34. *Id.* at 439.

35. 575 F.2d 147 (7th Cir. 1978).

36. *Id.*

37. *Id.* at 149-50.

38. *Id.* at 149; *Adams v. Montana Power Co.*, 528 F.2d 437, 439 (9th Cir. 1975).

39. See G. GILMORE & C. BLACK, *supra* note 1, at 26-28.

40. 528 F.2d at 439. See generally G. GILMORE & C. BLACK, *supra* note 1, at 26-28, 43-46.

41. In so doing, avoiding prior contrary precedent within the Eighth Circuit was one obstacle in the court's path. The court accomplished this circumlocution in *Livingston* by claiming never to have been "squarely faced with the question of whether current navigability in fact is required for admiralty jurisdiction." *Livingston v. United States*, 627 F.2d 165, 168 (8th Cir. 1980). But see notes 27-31 and the accompanying text *supra*.

42. See 627 F.2d at 169-70 and note 33 and accompanying text *supra*.

cuit in *Livingston v. United States* resorted to an analysis based on the genesis of federal admiralty jurisdiction from the need to govern intra-national navigation and commercial maritime activity.<sup>43</sup> That is why the Eighth Circuit feels justified in limiting the concept of navigability in admiralty to a present capability of waters to sustain some shipping.<sup>44</sup>

#### CONCLUSION

Although some courts may continue to apply the historical use analysis corollary that any water once adjudicated navigable or actually used so is indelibly within the admiralty jurisdiction, the better rule seems to be that which is newly gaining hold in the circuit courts, for the very reason put forth in the recent opinions of the Seventh, Ninth, and now Eighth Circuits. As in any caste system,<sup>45</sup> the legacy of the admiralty jurisdiction may eventually be confined by its birthright, which is the settling of disputes in contemporary commercial navigation. Inasmuch as the present decision seems to be a thoughtful reflection on the functions and nature of admiralty law, it may be worthy to serve in the vanguard of a new and limiting trend. Until the Supreme Court decides to do so, the lower federal courts will have to continue to chart the future course of admiralty's waters.

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43. 627 F.2d at 169.

44. Although the court does not explicitly state that the third prong of the navigability test, providing that the future potential of a river's use will bring those waters within admiralty's jurisdiction, is left intact by the *Livingston* decision, this may fairly be assumed. The exact question the court negatively answers is whether past navigability alone will serve as a basis for present admiralty jurisdiction. Therefore, when the court states that present navigability is the test, this is to be understood only in contradistinction to past navigability. In dictum the court tells us that potential, as well as present, navigability will still satisfy the jurisdictional test. "Both the Ninth Circuit and the Seventh Circuit, addressing the precise question before us, have reached the same conclusion . . . that, absent some present or potential commercial activity, there is no [admiralty jurisdiction]." 627 F.2d at 170 (emphasis added).

45. The caste analogy is properly invoked when one considers that admiralty cases are generally docketed and heard on a separate "side" of the federal district courts, where a special terminology and procedure are used. See G. GILMORE & C. BLACK, *supra* note 1, at 30-31.