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THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES

SECOND PRELIMINARY REPORT OF THE COMMITTEE ON THE REVISION OF TITLE 28, U. S. CODE

TO THE MARITIME LAW ASSOCIATION:

We refer to our first preliminary report, Document No. 322, October, 1948.

Several communications have now been received, and on November 22, 1948 we attended in conference with Judges Maris (3CA), Galston (EDNY) and Smith (DNJ) (a sub-committee of the Judicial Conference), Chas. J. Zinn, Esq. (Law Revision Counsel of the House Judiciary Committee), Wm. W. Barron, Esq. (of the Thompson-West staff) and President Thompson of the Edw. Thompson Co. Our committee was represented by Messrs. Byrnes, Estabrook, Merritt and Knauth. Consequently we have revised our Preliminary Recommendations and Questions as follows:

PRELIMINARY RECOMMENDATIONS:

1. R. S. 863, 864, and 865 as to the right to take depositions *de bene esse* and the method of taking such depositions are NOT repealed. They are in effect today as prior to September 1, 1948, although no longer restated in the U. S. Code. They should be retained in effect.

2. To minimize the inconvenience of relying on a statute which cannot be cited from the U. S. Code, the sub-committee of judges propose to suggest to the Chief Justice that a corresponding General Admiralty Rule should be filed with Congress at the opening of the next regular session—January 4, 1949—to go into effect when that session adjourns, which will likely occur in July, 1949.

3. This course, while not necessary because the old R. S. sections are still in force, seems unobjectionable, and we have drafted a text, which is annexed hereto and marked III.

4. Nothing will be done to repeal or otherwise affect R. S. 863, 864, 865 (formerly 28 U. S. Code old section numbers 639, 640, 641). But the proposed new General Admiralty Rule, if adopted,

will after it goes into effect supersede the old statute insofar as there are any differences between the Rule and the statute. (See new section 2073.)

5. The *right* to an appeal from an interlocutory decree in an admiralty case is adequately restated in new section 1292.

6. The *time for appeal* from an interlocutory decree has been lengthened from the former 15 days (old section 227) to 90 days plus an additional possible 30 days (new section 2107). This change, while unexpected, should be accepted.

7. The restatement of the grant of admiralty jurisdiction to the district courts was discussed. The sub-committee of judges and Law Revision Counsel Zinn, who are drafting a Bill to correct various other details, will provide an amending passage in that Bill so that new section 1333 will read as follows (words to be deleted in brackets; new words *italicized*):

§ 1333. ADMIRALTY, MARITIME AND PRIZE CASES

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 [the libellant or petitioner] *suitors* in every case any other remedy to which [he is] *they are* otherwise entitled.

A party in a non-admiralty court is never a libellant, but is a plaintiff, complainant, etc. It is incorrect to preserve a non-admiralty remedy for a libellant.

FURTHER REMARKS:

The amending Bill will be pressed soon after Congress convenes, for the reason that at least two other important corrections are desired. These deal with Removal of Causes and Appeal Bonds.

Removal. As stated in Document 322, page 3230, the new Removal provisions—new sections 1441-1450—are simply not apt for numerous states where actions may be "commenced" without prompt revelation of enough facts to the defendant to enable counsel to know or decide within 20 days whether the cause is removable or not. Such states include Massachusetts, New York, California. Some radical change in the Removal sections is required to accommodate the situation in the states where the new federal practice does not fit the local practice. In the meantime it seems that judges will accept a removal affidavit made on information and belief.

Appeal Bonds. Former R. S. 1000 (former 28 U. S. Code 869), requiring appeal bonds, was omitted because, as the Revisor's comment states in the House Report (No. 308) at page A 240, the "provisions relate to a subject more appropriate for regulation by rule of court". However, there is no rule of court, admiralty, civil, or criminal. Hence appeals taken since September 1, 1948 have not required the bond. Whether the rule as to bonds should be (a) restored as statute or (b) restored by rules of court or (c) intentionally abolished or (d) limited to cases where the appellee shows cause why a bond is necessary or proper is now under consideration by other sections of the bar. Your committee makes no recommendations, but suggests that in admiralty attachment (in personam) and arrest (in rem) cases, the district court bond usually extends to all appellate proceedings. Hence the appeals bond is important only in litigation in personam without a foreign attachment. Views of members are desired.

8. The former rules and practices as to commissions to take testimony (dedimus potestatem) and as to letters rogatory are now thought to rest adequately on the rule-making powers of courts.

9. Judge Denman advises that the 9th Circuit judicial conference at Seattle recently adopted a resolution urging that the Federal Civil Rules as to use of depositions for discovery should be adopted as Admiralty Rules. Your chairman is on record in favor of that course; see Benedict, 6th edition, sec. 386 (vol. 3, page 34). Some members have a different view. Expressions of opinion are desired. This is not urgent.

10. In redrafting new section 1333, the words "common-law remedy" and the workmen's compensation amendments of 1917 and 1922 were cut away. The new language saves "to (the libellant or petitioner) (suitors) in every case *any other remedy* to which (he is) (they are) otherwise entitled".

The sub-committee of judges does not favor a restoration of the wording of 1789 for the reason that numerous states no longer offer "common-law remedies", but offer substituted code remedies. The words "common-law remedy" are either archaic or require interpretation.

Nor do they favor restoring the language or equivalent of the 1917-1922 workmen's compensation amendments which were successively declared unconstitutional by the Knickerbocker Ice case, (1920) 253 U. S. 149, and the Dawson case, (1924) 264 U. S. 219. The thought was expressed that a restatement of the workmen's

compensation amendments of 1917-1922 would be a new enactment, and not merely the maintenance of the congressional position in the face of Supreme Court invalidation in 1920-1924. The contrary thought is of course that the new words "any other remedy" are a new Act, with new seeds of unconstitutionality. The Jensen doctrine of uniformity, (1917) 244 U. S. 205, might be so modified or abandoned by future court decisions as to have revived the effectiveness of either or both of the 1917-1922 amendments to old section 41(3).

It might be remarked that the original codifiers of 1925 inserted the 1917-1922 amendments in the U. S. Code, 28-41(3), although their provisions were at that date freshly declared invalid and unconstitutional by the Supreme Court. However, Title 28 as enacted in 1925 was only prima facie the law, whereas Title 28 as enacted in 1948 is positive law.

It may also be remarked that the reservation of "any other remedy" may be regarded as broad enough to include not only common-law and code remedies, but also workmen's compensation, old-age pensions, unemployment allowances, etc., both federal and state.

11. An eventual overhauling of all the General Admiralty Rules seems to be in contemplation. However, such a labor will not be undertaken now nor could it be completed in time to present to Congress on January 4 next. Such a task is beyond the purview of this committee.

12. The views of members on these and any other questions connected with new Title 28 are requested. Please send 8 copies of any communication, so as to expedite distribution to the committee members.

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III

General Admiralty Rule No. 58 (Proposed)

Statement: The following proposed General Admiralty Rule to be numbered 58 is the substance of R. S. 863, 864 and 865 which are presently the law in effect (although inadvertently not reproduced in the new Title 28, U. S. Code as enacted on June 25, 1948 and effective September 1, 1948), and is reported by the Attorney-General to the 81st Congress of the United States, 1st regular session, at the beginning thereof, pursuant to the provisions of Title 28 U. S. Code section 2073, to become effective after the close of said session, at and from which time this Rule shall supersede R. S. 863, 864 and 865 insofar as its provisions may differ from the provisions of said R. S. 863, 864 and 865. Passages are also taken from Federal Civil Practice Rules 28 and 32, namely, (3), (4), (13), (14), (15), (16), (17).

Text of Rule: *Depositions de bene esse*

(1) *When Depositions May Be Taken*

The testimony of any witness may be taken in any [civil] *admiralty* cause pending in a district court by deposition de bene esse, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm.

(2) *Use of Depositions*

Such deposition shall not be used in the cause unless it appears to the satisfaction of the court that the witness is then dead, or has gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that, by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear in court.

(3) *Persons Before Whom Depositions May Be Taken*

The deposition may be taken

(a) *Within the United States*

Within the United States or within a territory or insular possession subject to the dominion of the United States before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or by a person appointed by the court in which the action is pending.

(b) *In Foreign Countries*

In a foreign state or country before a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or before such person or officer as may be appointed by commission or under letters rogatory.

(4) *Powers of Appointed Person*

A person so appointed has power to administer oaths and take testimony.

(5) *Disqualification for Interest*

No deposition shall be taken before a person who is a relative or employee of any attorney or counsel, or is financially interested in the action.

(6) *Notice of Examination: Time and Place*

Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney, as may be nearest to the place of taking the deposition, which notice shall state the name of the witness and the time and place of taking his deposition.

(7) *Notice to Agent or Custodian of Property*

In all cases in rem, the person having the agency or possession of the property at the time of the seizure shall be deemed the adverse party, until a claim shall have been put in.

(8) *Notice Authorized by a Judge*

Whenever, by reason of the absence from the district and want of an attorney of record or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such district shall think reasonable and direct.

(9) *Subpoena*

Any person may be compelled to appear and depose as provided by this rule in the same manner as witnesses may be compelled to appear and testify in court.

(10) *Oath and Examination*

Every person deposing as provided in this rule shall be cautioned and sworn to testify the whole truth, and carefully examined.

(11) *Record of Examination*

The testimony shall be reduced to writing or typewriting by the officer taking the deposition, or by some person under his personal supervision, or by the deponent himself in the officer's presence, and by no other person, and shall, after it has been reduced to writing or typewriting, be subscribed by the deponent.

(12) *Custody of Record: Certificate: Filing*

Every deposition taken under this rule shall be retained by the officer taking it until he delivers it by his own hand into the court for which it is taken; or shall, together with a certificate of the reasons as aforesaid of taking it, and of the notice if any given to the adverse party, be by him sealed up and delivered to such court, and remain under his seal until opened in court.

(13) *Effect of Errors as to Notice*

All errors and irregularities in the notice for taking a deposition under this rule are waived unless written objection is promptly served upon the party giving the notice.

(14) *Objection to Qualification of Officer*

Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(15) *Objection to Competency of Witness or Testimony*

Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the deposition, unless the ground of objection is one which might have been obviated or removed if presented at the time.

(16) *Objections at Oral Examination*

Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of questions or answers, in the oath or affirmation, or in the conduct of the parties and errors of any kind which might be obviated, removed or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(17) *Errors in Completion and Return of Deposition*

Errors and irregularities in the manner in which the testimony is transcribed, or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under this rule are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.