

# Maritime Cases and the "Federal Question"

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and by special assignment providing more judges in district courts of confinement,<sup>145</sup> the burden on these courts would still be alleviated and the more compelling disadvantages of requiring the petitioner to file at the sentencing court would no longer exist.



### MARITIME CASES AND THE "FEDERAL QUESTION"

Exercise of the original jurisdiction of the lower federal courts on a "federal question" basis has been vexing the judiciary ever since the United States Supreme Court attempted to define the scope of the constitutional grant of power in *Osborn v. Bank of the United States*.<sup>1</sup> Except for an abortive attempt to authorize such jurisdiction in 1801,<sup>2</sup> the power given Congress by Article III of the Constitution to invest the inferior federal courts with jurisdiction to enforce rights arising under the Constitution and laws of the United States was not exercised until the vast expansion of federal power after the Civil War, in the Judiciary Act of 1875,<sup>3</sup> section 1 of which is the predecessor of the present section 1331 of Title 28 of the United States Code.<sup>4</sup>

Not the least vexatious of the problems surrounding the interpretation of section 1331 has been a recent controversy<sup>5</sup> as to its fundamental scope, and indeed as to the interpretation to be given Article III itself. The controversy has centered around the juris-

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District	habeas corpus cases filed	
	1945-48	1955-58
Pennsylvania	47	34
Georgia	321	201
Indiana	24	20
Kansas	314	532
California	161	89
Washington	116	64

<sup>145</sup> 28 U.S.C. § 292 (1958) dealing with assignment of judges would authorize such special assignments.

<sup>1</sup> *Wheat*, (22 U.S.) 738 (1824).

<sup>2</sup> Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 92, repealed by Act of March 8, 1802, ch. 8, § 1, 2 Stat. 132.

<sup>3</sup> Act of March 3, 1875, ch. 137, 18 Stat. 470.

<sup>4</sup> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331(a) (1958).

<sup>5</sup> It arose over a theory advanced in a dictum by Judge Magruder in *Jansson v. Swedish American Line*, 185 F.2d 212, 217 (1st Cir. 1950). Four days later the Third Circuit rejected the theory in *Jordine v. Walling*, 185 F.2d 662 (3d Cir. 1950).

dictional proposition that section 1331 empowers the district courts to entertain maritime cases on the law side<sup>6</sup> as cases "arising under" the Constitution or laws.<sup>7</sup>

The purpose of this note is to evaluate the constitutional, statutory and decisional principles advanced by courts and commentators as affecting the theoretical and practical validity of such jurisdiction.

How do maritime cases come to be put forward as arising under the Constitution or laws of the United States? Article III, section 2, of the Constitution provides, *inter alia*, that: "The judicial Power shall extend . . . to all Cases of admiralty and maritime jurisdiction. . . ." This power, unlike the grant over cases "arising under" the Constitution or laws, was early implemented by the Judiciary Act of 1789 which provided that the lower federal courts "shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, . . . saving to suitors, in all cases the right of a common law remedy, where the common law is competent to give it. . . ."<sup>8</sup>

The constitutional extension of the federal judicial power to admiralty and maritime cases has also been held to adopt the general maritime law<sup>9</sup> as the substantive law to be applied in such cases.<sup>10</sup> Federal maritime law is to be applied rather than the common law, even when brought in a state court via the saving to suitors clause.<sup>11</sup> The cases coming within the purview of this body of law, then, to

<sup>6</sup> Cases heard under the direct grant over "Any civil case of admiralty or maritime jurisdiction . . ." 28 U.S.C. § 1333 (1958), are tried on a separate admiralty "side" of the district court under special admiralty procedure and without a jury.

<sup>7</sup> As distinguished from their established power to do so when jurisdiction is invoked because of diversity of citizenship. 28 U.S.C. § 1332 (1958).

<sup>8</sup> Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 73, 76-77 (1789). The saving to suitors clause is now worded: ". . . saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333(1) (1958). The Reviser's Note to § 1333 explains that the new wording is simpler and more expressive of the original intent of Congress. The new form is held to have the same meaning as the old. *Romero v. International Term. Oper. Co.*, 358 U.S. 354, 361 (1959). See GILMORE & BLACK, *ADMIRALTY* 35 (1957). Another inference, more logically remote, drawn from the grant of judicial power over cases of admiralty and maritime jurisdiction is that Congress has the power, subject to well recognized limitations, "to alter, qualify or supplement [the general maritime law] . . . as experience or changing conditions might require." *Panama R.R. v. Johnson*, 264 U.S. 375, 386 (1924). It is pursuant to this constitutional power that legislation on maritime matters derives its validity. *Ibid.*

<sup>9</sup> The general maritime law may be roughly described as that body of usages and precepts commonly applied to maritime matters by the commercial nations of the world. It is operative in any country only insofar as it is adopted therein. *The Lottawanna*, 21 Wall. (88 U.S.) 558, 572-74 (1874).

<sup>10</sup> *E.g.*, *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Chelentes v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918); *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917).

<sup>11</sup> *Ibid.*

the extent they are truly "federal,"<sup>12</sup> are those presently sought to be absorbed into the jurisdictional authority of section 1331 as cases "arising under."<sup>13</sup>

*"Federal Question" Criteria and the General Maritime Law*

Before determination of the validity of federal question jurisdiction of admiralty and maritime cases is attempted in the light of those constitutional and statutory relationships unique to the specific issue, some of the criteria universally used to test federal question jurisdiction over cases of any sort will be applied, *arguendo*, to maritime cases.

Does the word "laws" in section 1331 refer to federal *legislation* only? An affirmative answer to that question would preclude federal question jurisdiction over the non-statutory<sup>14</sup> maritime cases such as unseaworthiness<sup>15</sup> and maintenance and cure<sup>16</sup> as arising under the

<sup>12</sup> There are areas of state competence in maritime law where a plaintiff's cause of action could not be said to arise under "federal" law. See *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955). See also Note, *State Wrongful Death Statutes as Applied in Maritime Actions*, 33 ST. JOHN'S L. REV. 355 (1959). In GILMORE & BLACK, *ADMIRALTY* 386 (1957), the authors feel that "personal injury cases are about the only ones which would come within the federal nonadmiralty, nondiversity jurisdiction. . . ." *Ibid.*

<sup>13</sup> *Doucette v. Vincent*, 194 F.2d 834 (1st Cir. 1952). The court found that maritime cases arose under the *Constitution* since Article III adopted the law to be applied in such cases. The possibility that they arise under the *laws* of the United States was discussed in *Paduano v. Yamashita Kisen Kabushiki Kaisha*, 221 F.2d 615 (2d Cir. 1955).

<sup>14</sup> Statutes dealing with maritime matters contain their own jurisdictional provisions. See, e.g., *Ship Mortgage Act*, 41 Stat. 1003 (1920), 46 U.S.C. § 951 (1952); *Death on the High Seas Act*, 41 Stat. 537 (1920), 46 U.S.C. § 761 (1952); *Public Vessels Act*, 43 Stat. 1112 (1925), 46 U.S.C. § 781 (1952). The terms "maritime case" and "saving clause action" as used in this note shall refer only to non-statutory maritime suits, unless the context clearly indicates otherwise.

<sup>15</sup> The warranty of seaworthiness imposes liability upon the vessel and her owner "for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship." *The Osceola*, 189 U.S. 158, 175 (1903). The duty is absolute and is not satisfied by the exercise of due diligence, and extends, not only to seamen, but to a broadened class of workmen who perform ship's work traditionally done by seamen. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 629 (1959).

<sup>16</sup> A seaman is entitled to medical expenses (cure) and a living allowance (maintenance) for illness or injury occurring while he is in the service of the ship. *Harden v. Gordon*, 11 Fed. Cas. 480 (No. 6047) (C.C.D. Me. 1823). Recovery is allowable until a point of maximum cure has been reached. *Farrell v. United States*, 336 U.S. 511 (1949). The right is analogous to workmen's compensation but is not subject to the limitations applicable to the latter. Maintenance and cure does not bar recoveries for unseaworthiness or negligence under the Jones Act, *Pacific S.S. Co. v. Peterson*, 278 U.S. 130 (1928), although but a single recovery is permitted for each element of damages,

laws of the United States. This conclusion was reached in *Jordine v. Walling*,<sup>17</sup> apparently the first case to deal extensively with the problem in a maritime controversy.

However, it has been pointed out that cases founded on the general maritime law are cases arising under the Constitution since Article III itself has been held to adopt, by inference, the substantive maritime law.<sup>18</sup>

The proponents of federal question jurisdiction over maritime cases, whether the key word be Constitution or laws, must nevertheless contend with the technical requirements concerning the presentation of the federal claim so that it "arises under" federal law as required by section 1331. The leading case dealing with the interpretation of the phrase "cases arising under" in the Constitution is *Osborn v. Bank of the United States*,<sup>19</sup> wherein Chief Justice Marshall laid down a broad grant of power. His expression of the requirement of a "construction" of federal law necessary to a valid exercise of federal power over federal questions did not require an actual dispute between the litigants as to the meaning and effect of the law. The fact that federal law is an "original ingredient" of a plaintiff's claim which could give rise to such a dispute was held sufficient to come within the grant of judicial power.<sup>20</sup>

Indeed, this liberal interpretation of the constitutional phrase is necessary if the federal courts are to act within their constitutional scope of authority when they handle litigation under legislative grants of jurisdiction to enforce rights created by federal statutes.<sup>21</sup> For in such cases the district courts entertain suits to enforce those rights

*Reardon v. California Tanker Co.*, 260 F.2d 369 (2d Cir. 1958). The phrase "in the service of the ship" does not require a causal connection between the illness or injury and the seaman's duties. *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525 (1938). Injuries received while off-duty on shore are compensable, *Aguilar v. Standard Oil Co.*, 318 U.S. 724 (1943), and recovery is barred only by the seaman's willful misconduct, *Warren v. United States*, 340 U.S. 523 (1951).

<sup>17</sup> 185 F.2d 662 (3d Cir. 1950); *accord*, *Railroad Co. v. Mississippi*, 102 U.S. 135, 141 (1880) (dictum). *But cf.* *Warren v. United States*, 340 U.S. 523, 526-27 (1951); *Mishkin, The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157 (1953).

<sup>18</sup> *Doucette v. Vincent*, 194 F.2d 834, 844-45 (1st Cir. 1952).

<sup>19</sup> 9 Wheat. (22 U.S.) 738 (1824).

<sup>20</sup> For detailed analyses of the case, see *Chadbourne & Levin, Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 646-49 (1942); *Forrester, The Nature of a "Federal Question"*, 16 TUL. L. REV. 362, 367-70 (1942).

<sup>21</sup> See, e.g., 62 Stat. 931 (1948), 28 U.S.C. § 1338(a) (1958). "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent and copyright cases." *Ibid.* and 62 Stat. 931 (1948), 28 U.S.C. § 1334 (1958). "The district courts shall have original jurisdiction, exclusive of the courts of the States, of all matters and proceedings in bankruptcy." *Ibid.*

though the dispute in a given case may be solely as to the facts, with complete agreement as to the meaning and effect of the law.

However, with regard to the "arising under" phrase in section 1331, much dispute has arisen over the efforts of the federal courts to restrict the volume of litigation by strict construction of the statute.<sup>22</sup> A requirement of controversy over the effect of the law,<sup>23</sup> together with a necessity that the face of the complaint show the federal question<sup>24</sup> without anticipation of defenses,<sup>25</sup> have combined to require the judiciary to do the logically impossible, *i.e.*, to determine the existence of a real and substantial controversy upon the face of the complaint.<sup>26</sup> Nevertheless, the "construction and controversy" test continues to appear in the cases.<sup>27</sup> If such standards are strictly adhered to, they would prevent any wholesale inclusion of suits founded on the general maritime law into the jurisdiction of section 1331, because the majority of such cases involve issues of fact alone rather than a controversy as to the effect of the law. A standard of "proximity," however, as stated by Mr. Justice Cardozo in *Gully v. First National Bank*,<sup>28</sup> with jurisdiction accepted if a claim is predicated directly and immediately on federal law, and rejected if "the most one can say is that a question of federal law is lurking in the background,"<sup>29</sup> would not bar the inclusion of maritime cases, for claims based on the national maritime law are founded directly rather than remotely on that law.

### *The Constitutional Grant and the Statutory Implementation*

The approach taken in this section may be distinguished from the considerations discussed in the preceding one by the observation that, if a fundamental examination shows that cases of admiralty and maritime jurisdiction, as a corpus, are not comprehended in the words

<sup>22</sup> *E.g.*, *Healy v. Ratta*, 292 U.S. 263 (1934). "The policy of the statute calls for its strict construction." *Id.* at 270; *accord*, *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 672-73 (1950).

<sup>23</sup> *Shulthis v. McDougal*, 225 U.S. 561, 569 (1912); *Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900).

<sup>24</sup> *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913); *Joy v. St. Louis*, 201 U.S. 332 (1906); *Minnesota v. Northern Sec. Co.*, 194 U.S. 48 (1904).

<sup>25</sup> *Skelly Oil Co. v. Phillips Petroleum Co.*, *supra* note 22; *The Fair v. Kohler Die & Specialty Co.*, *supra* note 24; *Devine v. Los Angeles*, 202 U.S. 313, 334 (1906); *Tennessee v. Union & Planters' Bank*, 152 U.S. 454 (1894).

<sup>26</sup> On the logical difficulty noted, see Mishkin, *The Federal "Question" in the District Courts*, 53 *COLUM. L. REV.* 157, 170 (1953); Chadbourn & Levin, *Original Jurisdiction of Federal Questions*, 90 *U. PA. L. REV.* 639, 666 (1942).

<sup>27</sup> In *Jordine v. Walling*, 185 F.2d 662 (3d Cir. 1950), the court disposed of the argument that a maritime case "arose under the Constitution" with the controversy and construction requirement.

<sup>28</sup> 299 U.S. 109, 117-18 (1936).

<sup>29</sup> *Id.* at 117.

"Constitution and laws of the United States" as used in section 1331, even a favorable outcome of the application of the technical federal question criteria would be unavailing to bring maritime cases within the ambit of that section.

The proposition that cases of admiralty and maritime jurisdiction do not fall within the grant of jurisdiction over cases "arising under" has its origin in a concept enunciated by Chief Justice Marshall in *American Ins. Co. v. Canter*,<sup>30</sup> wherein he considered the significance of the separate enumeration of the classes of cases to which the judicial power was extended by Article III: "The constitution certainly contemplates these as . . . distinct classes of cases; and if they are distinct, the grant of jurisdiction over one of them, does not confer jurisdiction over [the others]. . . . The discrimination made between them, in the constitution is, we think, conclusive against their identity."<sup>31</sup>

This was the accepted interpretation of Article III when the Judiciary Act of 1875<sup>32</sup> was enacted.<sup>33</sup> Thus, it logically follows that, as a matter of legislative intent, the words of the statute, taken as they were directly from clause 1 of Article III,<sup>34</sup> drew solely upon the reservoir of power present in that clause and not upon the whole of the authority of Article III.<sup>35</sup> Concrete evidence of congressional intent usually available from legislative histories and contemporary comment is notable by its absence.<sup>36</sup> However, a consideration of the forces that instigated the passage of the act<sup>37</sup> points to the conclusion that it was intended as an extension of federal power theretofore dormant rather than a *sub silentio* supplement to an already existing admiralty jurisdiction.

Note on this point the fact that in the various legislative expansions of maritime rights, Congress, when it has desired to provide an action at law or a jury trial, has deemed necessary a specific authorization of such right.<sup>38</sup>

<sup>30</sup> 1 Pet. (26 U.S.) 511 (1828).

<sup>31</sup> *Id.* at 545.

<sup>32</sup> Act of March 3, 1875, ch. 137, 18 Stat. 470. This was the predecessor of the present 28 U.S.C. § 1331(a) (1958).

<sup>33</sup> *Romero v. International Term. Oper. Co.*, 358 U.S. 354, 365-67 (1959).

<sup>34</sup> U.S. CONST. art. III, § 2, cl. 1: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States. . . ." *Ibid.* Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470: "[T]he circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity . . . arising under the Constitution or laws of the United States. . . ." *Ibid.*

<sup>35</sup> *Romero v. International Term. Oper. Co.*, 358 U.S. 354, 366-67 (1959).

<sup>36</sup> FRANKFURTER & LANDIS, *THE BUSINESS OF THE SUPREME COURT* 65 (1928).

<sup>37</sup> The act was the product of a desire of a strongly nationalistic post-Civil War era to provide a federal forum for the protection of newly created federal rights. See FRANKFURTER & LANDIS, *op. cit. supra* note 36, at 64-65.

<sup>38</sup> See the Jones Act, 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1952); Great

Against the theory of distinct classes of cases, jurisdiction over each of which has been separately preserved, is the analogy drawn by the case of *Doucette v. Vincent*.<sup>39</sup> The court reasoned that since a maritime right set up in a saving clause action brought in a state court is reviewable on certiorari by the Supreme Court<sup>40</sup> as a "right claimed under the Constitution or statutes of the United States,"<sup>41</sup> maritime claims should be comprehended by the similar wording of section 1331. However, the difference in the function of the certiorari jurisdiction of the Supreme Court and the original jurisdiction of the district courts<sup>42</sup> supports the conclusion that the language in the certiorari statute is to be read in a more generic sense than the language of section 1331, which draws solely from clause 1 of Article III of the Constitution.<sup>43</sup>

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Lakes Act, 28 U.S.C. § 1873 (1958). The effect of the "distinct classes of cases" theory stated by the Court in *American Ins. Co. v. Canter*, 1 Pet. (26 U.S.) 511 (1828), and adopted by *Romero v. International Term. Oper. Co.*, 358 U.S. 354 (1959), upon the theoretical basis of the jurisdictional provisions of the statutes cited above may be illustrated by the following observation: The holding of *Panama R.R. v. Johnson*, 264 U.S. 375 (1924), the leading case in the interpretation of the Jones Act, when read in conjunction with the "distinct classes of cases" theory affirmed by the *Romero* case, indicates that the federal law-side jurisdictional provision of the act is grounded solely upon the admiralty clause of Article III of the Constitution. The *Romero* holding indicates, by implication, that if the Jones Act did not itself authorize an action on the law side of the district court, § 1331 would not operate to sustain such jurisdiction as a case arising under the laws of the United States because, by the *Romero* holding, a Jones Act suit, being a case of admiralty and maritime jurisdiction, is not within the class of cases comprehended by § 1331. Conversely, the law-side jurisdictional provision of the Jones Act would be valid under the admiralty clause of Article III even if § 1331 did not exist; indeed this would be so if the "arising under" clause of Article III itself did not exist.

<sup>39</sup> 194 F.2d 834 (1st Cir. 1952).

<sup>40</sup> *E.g.*, *Garrett v. Moore-McCormack S.S. Co.*, 317 U.S. 239 (1942). The plaintiff lost in the Pennsylvania Supreme Court because he had failed to meet the state rule as to the burden of proof of one who asserts the invalidity of a release. In certiorari the Supreme Court reversed, holding "the right of the petitioner to be free from the burden of proof imposed by the Pennsylvania local rule inhered in his cause of action. Deeply rooted in admiralty as that right is, it was a part of the very substance of his claim and cannot be considered a mere incident of a form of procedure." *Id.* at 249.

<sup>41</sup> 28 U.S.C. § 1257(3) (1958).

<sup>42</sup> Note that a suit under § 1331 is of right while a petition for certiorari under § 1257(3) is, of course, permissive. The Supreme Court's role as expositor of national law is contrasted with the district court's function of enforcement of that law in *Mishkin, The Federal "Question" in the District Courts*, 53 *COLUM. L. REV.* 157, 170 (1953).

<sup>43</sup> The court in *Doucette v. Vincent*, *supra* note 39, had for its major premise the proposition that the content of a phrase found in two statutes is the same in both, without regard to the differences in legal and social purpose between the two. Such a position is in sharp contrast to that of Mr. Justice Holmes in *Towne v. Eisner*, 245 U.S. 418 (1918). "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary



*Romero v. International Terminal Operating Co.*

The approach suggested by the *Canter*<sup>44</sup> case, rather than an application of the general federal question criteria, was utilized by the Supreme Court in *Romero v. International Terminal Operating Co.*<sup>45</sup>

Plaintiff, a Spanish seaman, contended, *inter alia*, that his claims against the shipowner for unseaworthiness and maintenance and cure were cognizable on the law side of the district court under section 1331. In considering federal question jurisdiction of maritime cases, the Court recognized that such cases "arise under" the Constitution in the sense that the Constitution is the source of power by which the United States acts in a sovereign capacity, and wherein any exercise of judicial power must find its justification, but rejected the application of the phrase in a jurisdictional sense.<sup>46</sup> The Court emphasized the historical evidence surrounding the interpretation of section 1331 and the problems of judicial administration that would ensue if such jurisdiction were allowed.<sup>47</sup>

From the viewpoint of the litigant, the *Romero* Court found it doubtful that Congress intended to deprive the maritime suitor of his historic option under the saving to suitors clause to select a state remedy for the enforcement of his maritime right by classifying the right as one "arising under" and hence removable to the federal court at the option of the defendant.<sup>48</sup> Nor would this be the only restriction upon the freedom of the saving clause suitor. If a saving clause action is brought on the law side of the district court on the basis of diversity of citizenship, venue provisions allow the action to be brought where all the plaintiffs or all the defendants reside.<sup>49</sup> If section 1331 were a concurrent basis of jurisdiction, the plaintiff would be subject to the more restrictive venue provisions applicable to

greatly in color and content according to the circumstances and the time in which it is used." *Id.* at 425. See COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* ch. VI (1942).

<sup>44</sup> *American Ins. Co. v. Canter*, 1 Pet. (26 U.S.) 511 (1828).

<sup>45</sup> *Romero v. International Term. Oper. Co.*, 358 U.S. 354, *rehearing denied*, 359 U.S. 962 (1959).

<sup>46</sup> *Id.* at 368.

<sup>47</sup> The Court found significance in the fact that "no student of the federal courts or of admiralty, no judge, and none of the learned and alert members of the admiralty bar were able, for seventy-five years, to discern the drastic change now asserted to have been contrived in admiralty jurisdiction by the Act of 1875." *Id.* at 370.

<sup>48</sup> "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship of the parties." 28 U.S.C. § 1441(b) (1958).

<sup>49</sup> "A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside." 28 U.S.C. § 1391(a) (1958).

"arising under" actions.<sup>50</sup> It should be noted, however, that a plaintiff might feel the restriction of venue to be amply compensated by the availability of a federal jury trial offered him by the proposed jurisdiction.

From the viewpoint of the judiciary, the *Romero* Court felt that the free removability of saving clause actions that would attach if they were held within section 1331,<sup>51</sup> would disrupt a traditional federal-state inter-jurisdictional relationship, "a jurisdiction which it was the unquestioned aim of the saving clause of 1789 to preserve."<sup>52</sup>

In addition, the typically perplexing problems of source-of-law in maritime cases would constantly present themselves under section 1331, because jurisdiction would lie only if the governing law in a particular case were "federal." In adverting to this question the *Romero* Court remarked:

The necessity for jurisdictional determinations couched in terms of "state" or "federal law" would destroy that salutary flexibility which enables the courts to deal with source-of-law problems in light of the necessities illuminated by the particular question to be answered. Certainly sound judicial policy does not encourage a situation which necessitates constant adjudication of the boundaries of state and federal competence.<sup>53</sup>

### Conclusion

The section 1333 grant of admiralty jurisdiction is based upon the maritime nature of the claim.<sup>54</sup> The exclusiveness of the grant pre-empts all jurisdiction based upon the *nature* of the claim. The saving to suitors clause, being merely a permission for a suitor to

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<sup>50</sup> "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all the defendants reside, except as otherwise provided by law." 28 U.S.C. § 1391(a) (1958). See *Macon Grocery Co. v. Atlantic Coast Line R.R.*, 215 U.S. 501 (1910).

<sup>51</sup> The potential free removability of saving clause actions would seem to be minimal in the area of personal injury cases, because such suits usually contain a count under the Jones Act, 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1952), which communicates its own irremovability to counts not separate and independent, such as unseaworthiness. *Pate v. Standard Dredging Corp.*, 193 F.2d 498 (5th Cir. 1952). An attendant count of maintenance and cure, while independent of the others, would rarely meet the monetary minimum of \$10,000 necessary for removal.

<sup>52</sup> *Romero v. International Term. Oper. Co.*, 358 U.S. 354, 372 (1959). The competence of the states in certain admiralty matters antedates the Revolution. *Waring v. Clarke*, 5 How. (46 U.S.) 441, 454-55 (1847). For a discussion of the jurisdiction of state courts of admiralty under the Articles of Confederation, see 4 BENEDEICT, ADMIRALTY §§ 719-25 (6th ed. 1940).

<sup>53</sup> *Romero v. International Term. Oper. Co.*, *supra* note 52, at 376.

<sup>54</sup> 28 U.S.C. § 1333 (1958) gives to the district courts, sitting in admiralty, "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." *Ibid.*

go elsewhere for a common-law remedy,<sup>55</sup> does not affect the exclusiveness of the Admiralty Court's jurisdiction over maritime cases, *qua* maritime. The court to which the saving clause suitor goes must bottom its jurisdiction on some ground other than the maritime nature of the case.<sup>56</sup> A state court of general common-law jurisdiction bases its jurisdiction primarily on control over the parties;<sup>57</sup> all other matters, including the fact that the case may be a maritime one, bear upon the issue of whether or not the complaint states a cause of action. The district court may hear the case on the law side if jurisdiction can be based upon the diverse citizenship of the litigants. The independent ground of jurisdiction of the state court and the district court diversity case is apparent from the fact that, all other things being equal, jurisdiction would still lie even if the case were not maritime. Note that this cannot be said of the attempted assumption of jurisdiction under section 1331; take away the fact that the case is maritime and jurisdiction fails. It can thus be seen that the proposal under consideration is an attempt to usurp that which is exclusive under section 1333, *viz.*, jurisdiction based upon the maritime nature of the claim.

The cases that evolved the doctrine of federal primacy in maritime law did so in exposition of the admiralty clause of Article III.<sup>58</sup> They dealt solely with the problem of what substantive law should be uniformly applied to a maritime fact situation, jurisdiction over which had already been established.<sup>59</sup> It is felt that the *Romero* decision was a perceptive judicial rejection of a "mechanical jurisprudence" which would lift a doctrine bodily from the context in which it was formulated and apply it to a jurisdictional statute divorced from those considerations that gave validity to the doctrine in the first instance.

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<sup>55</sup> "It seems clear that the 'saving to suitors' clause makes no affirmative grant of jurisdiction but merely excepts from the exclusive admiralty or maritime jurisdiction of the United States District Courts all cases in which suits may be brought to obtain other than admiralty remedies. . . ." *Paduano v. Yamashita Kisen Kabushiki Kaisha*, 221 F.2d 615, 617 (2d Cir. 1955).

<sup>56</sup> *Accord*, *Jordine v. Walling*, 185 F.2d 662 (3d Cir. 1950). "[S]tate courts of general common-law jurisdiction may, if they acquire jurisdiction of the parties, entertain such actions for the enforcement of [maritime] . . . rights." *Id.* at 666 (dictum) (Emphasis added.); *Madruga v. Superior Court*, 40 Cal. 2d 65, 251 P.2d 1, 3 (1952), *aff'd*, 346 U.S. 556 (1954); *Fischer v. Carey*, 173 Cal. 185, 159 Pac. 577, 578 (1916).

<sup>57</sup> *Ibid.* See Mr. Justice Holmes' statement in *McDonald v. Mabee*, 243 U.S. 90, 91 (1917). "The foundation of jurisdiction is physical power. . . ." See also Ross, *The Shifting Basis of Jurisdiction*, 17 MINN. L. REV. 146-47 (1933).

<sup>58</sup> *Garrett v. Moore-McCormack S.S. Co.*, 317 U.S. 239 (1942); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918); *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917).

<sup>59</sup> *Ibid.*