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Admiralty--Action Under Jones Act Survives Death of Tortfeasor (Cox v. Roth, 75 Sup. Ct. 242 (1955))

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RECENT DECISIONS

ADMIRALTY — ACTION UNDER JONES ACT SURVIVES DEATH OF TORTFEASOR.—An action was brought under the Jones Act [1] on behalf of the estate of a seaman who was lost at sea through the alleged negligence of the vessel's owner. Before the action was instituted the owner died. It was contended that, in the absence of any statutory enactment to the contrary, the action should abate under common-law principles. *Held:* Although the Jones Act makes no explicit provision for the survival of an action against the estate of a deceased tortfeasor, the history and purpose of the Act indicate that Congress intended such to be the rule; accordingly, an action was maintainable against the estate of the vessel's owner. *Cox v. Roth,* 75 Sup. Ct. 242 (1955).

At common law, under the maxim *actio personalis moritur cum persona,* tort actions affecting the person abated on the death of the tortfeasor.[2] Statutes today generally make specific provision for the survival of such actions.[3] However, in the absence of such a provision, the right of action still ceases upon the defendant's death.[4] This is also true in admiralty.[5]

When Congress, by the enactment of the Jones Act, granted a specific remedy at law to injured seamen,[6] it did not explicitly state that the right of action thus granted survived the death of the tortfeasor. However, Congress incorporated into the Act, by reference, whatever rights or remedies it had granted to railway employees under similar circumstances.[7] The remedies provided to such workers by

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[1] 41 STAT. 1007 (1920), 46 U.S.C. § 688 (1952).

[2] See POLLOCK, TORTS 52 (15th ed., Landon, 1951); RESTATEMENT, TORTS § 900, comment *a* (1939).

[3] *Ibid. E.g.,* N.Y. DEC. EST. LAW § 118. Forty-three states have such statutes. See Cox v. Roth, 75 Sup. Ct. 242, 244 (1955).

[4] Gorlitzer v. Wolffberg, 208 N.Y. 475, 102 N.E. 528 (1913).

[5] *See* Just v. Chambers, 312 U.S. 383, 387 (1941); Nordquist v. United States Trust Co., 188 F.2d 776, 777 (2d Cir. 1951).

[6] Prior to the passage of the Jones Act, the general maritime law gave no right of recovery for fatal injuries to a seaman. *See* Lindgren v. United States, 281 U.S. 38, 43 (1930); Western Fuel Co. v. Garcia, 257 U.S. 233, 240 (1921).

[7] ". . . [I]n such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law . . . , and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable." 41 STAT. 1007 (1920), 46 U.S.C. § 688 (1952).

the Federal Employers' Liability Act[8] were thereby made available to seamen.[9] That statute, which provided a right of action to railroad workers injured by the negligence of their employer, contained no provision for survival of the action in the event of the defendant's death. Such a clause was thought unnecessary since railroads are almost invariably owned by corporations.[10] Accordingly, no statutory provision applicable to seamen contains, by its terms, a right of action for personal injuries which survives the tortfeasor.

The precise question of whether actions under the Jones Act abated on the defendant's death has apparently been presented on only two previous occasions, both in the Second Circuit. The first time the issue arose it was held that the failure of Congress to provide for the survival of such actions indicated that the common-law rule of abatement should govern.[11] This point of view was recently overruled in this Circuit by *Nordquist v. United States Trust Co.*,[12] where the court employed the same reasoning which the Supreme Court adopted in the case at bar.

In the *Nordquist* case the court took into consideration Section 57 of the Federal Employers' Liability Act,[13] which gives to an injured railroad employee a cause of action against "receivers or other persons" charged with the management of the railroad. Reasoning that receivership in a corporation is analogous to the death of an individual,[14] the court felt that the congressional intent in incorporating that section into the Jones Act would be frustrated if a right of action under the latter statute were held to abate upon the death of the individual defendant.

In the *Cox* case the Supreme Court followed that reasoning, and abandoned the theory upon which the plaintiff had recovered in the court of appeals. The lower court had not recognized any implied provision for survival of actions in the Jones Act, but had permitted the action to continue because the law of the state where the tort occurred permits survival of such actions.[15]

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[8] 35 STAT. 65 (1908), 45 U.S.C. § 51 *et seq.* (1952).

[9] *See* De Zon v. American President Lines, Ltd., 318 U.S. 660, 665 (1943); The Arizona v. Anelich, 298 U.S. 110, 118 (1936).

[10] *See* Cox v. Roth, 75 Sup. Ct. 242, 243 (1955).

[11] See The Miramar, 31 F.2d 767 (S.D. N.Y. 1929), *aff'd mem.*, 36 F.2d 1021 (2d Cir.), *cert. denied*, 281 U.S. 752 (1930).

[12] 188 F.2d 776 (2d Cir. 1951).

[13] 35 STAT. 66 (1908), 45 U.S.C. § 57 (1952). Section 57 defines a common carrier, for the purpose of liability under the Act, to include persons charged with the management of the railroad.

[14] This is a somewhat questionable analogy; the death of an individual would seem more akin to the dissolution of a corporation than to mere receivership.

[15] Roth v. Cox, 210 F.2d 76 (5th Cir. 1954), 103 U. OF PA. L. REV. 119. It had previously been held that a maritime tort action brought in admiralty survives the death of the tortfeasor when it occurs within the waters of a state whose laws provide for the survival of such actions. Just v. Chambers, 312 U.S. 383 (1941), 29 CALIF. L. REV. 519.

Viewed pragmatically, the conclusion reached by the Supreme Court would seem preferable. It obviates the possibility that a seaman from another state may be deprived of a remedy under the Jones Act because of the failure of the local state legislature to provide for the survival of local tort actions, and assures him the relief which it was the purpose of the statute to extend.

BANKS—SUIT BY DEPOSITOR IN TORT FOR BREACH OF BANKER-DEPOSITOR RELATIONSHIP.—Defendant bank cashed four checks on which the names of the payees had been altered, and charged them to the plaintiff's account. Plaintiff sued in contract for the value of the checks. In addition, the plaintiff pleaded a cause of action in negligence, alleging that the bank's breach of the "duty" of care imposed by the depositor-banker relationship caused damage to the plaintiff's credit and business. The Court *held* [1] that, under the facts pleaded, no cause of action in tort arose separate from the contract obligations of the depositor-banker relationship. *Stella Flour & Feed Corp. v. National City Bank,* 285 App. Div. 182, 136 N.Y.S.2d 139 (1st Dep't 1954).

Basically the relationship between a bank and its depositor is that of debtor and creditor.[2] Under the implied contract between the parties, the bank's liability on the debt, or account, is discharged only to the extent that the bank pays out money pursuant to the depositor's order.[3] Consequently, a loss occasioned by the bank's paying a forged or altered check must be borne by the bank,[4] unless the depositor was negligent in preparing his checks [5] or in examining them on return.[6]

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[1] Three justices concurred in the opinion, two dissented.

[2] *See* Solicitor for the Affairs of His Majesty's Treasury v. Bankers Trust Co., 304 N.Y. 282, 291, 107 N.E.2d 448, 452 (1952); Irving Trust Co. v. Leff, 253 N.Y. 359, 361-362, 171 N.E. 569, 570 (1930); Critten v. Chemical Nat. Bank, 171 N.Y. 219, 224, 63 N.E. 969, 970 (1902); Woody v. National Bank, 194 N.C. 549, 140 S.E. 150, 152 (1927).

[3] Critten v. Chemical Nat. Bank, *supra* note 2; *see* Irving Trust Co. v. Leff, *supra* note 2; Shipman v. Bank of the State of New York, 126 N.Y. 318, 326-327, 27 N.E. 371, 372 (1891).

[4] See City of New York v. Bronx County Trust Co., 261 N.Y. 64, 184 N.E. 495 (1933); *see* Shipman v. Bank of the State of New York, *supra* note 3 at 327, 27 N.E. at 372-373; Screenland Magazine, Inc. v. National City Bank, 181 Misc. 454, 460, 42 N.Y.S.2d 286, 290-291 (Sup. Ct. 1943).

[5] See City of New York v. Bronx County Trust Co., *supra* note 4 at 71, 184 N.E. at 497; *see* Critten v. Chemical Nat. Bank, *supra* note 2.

[6] Critten v. Chemical Nat. Bank, *supra* note 2; Stumpp v. Bank of New York, 212 App. Div. 608, 209 N.Y. Supp. 396 (1st Dep't 1925); Screenland Magazine, Inc. v. National City Bank, *supra* note 4. *Contra:* Weisser's Adm'rs v. Denison, 10 N.Y. 68 (1854). See also N.Y. NEG. INST. LAW § 326 (which states that a bank shall not be liable for payment of a forged or raised check