Down to the Seas Again

Herbert R. Baer

DOWN TO THE SEAS AGAIN

HERBERT R. BAER*

In an earlier article, At Sea With The United States Supreme Court,** *the author discussed recent significant decisions of the Supreme Court which dealt with personal injury or death claims arising out of illness or injury to seamen and harbor workers. Limitations of space did not permit a discussion of the Court's recent decisions in other areas of maritime law of vital concern to the admiralty lawyer. Thus questions of marine insurance; limitation of liability; collision claims of cargo owners; rights of shipowners against stevedoring companies to recoup funds paid to injured longshoremen; etc., were left for consideration at a later date. It is the function of this paper to complement the earlier article by discussing the action of the Supreme Court in these other areas of maritime law.*

OUTLINE OF CONTENTS

* Alumni Distinguished Professor of Law, University of North Carolina.

** 38 N.C.L. REV. 307 (1960).

MARINE INSURANCE

What Law is Applicable?

The origin of marine insurance is obscured in antiquity.[1] The marine insurance policy is obscurity itself.[2] But, if after painstaking

[1] Legal historians have found no direct evidence of the use of marine insurance policies by the ancient Greeks or Romans. Those people were, however, well acquainted with the practice of general average and the use of bottomry and respondentia bonds. In these practices may be found the germ of marine insurance. Then, as now, under general average, if the goods of one of several cargo owners were jettisoned to save the cargo of others appropriate contribution was made by the owners of the saved cargo to equitably distribute the loss. The shipowner, who gave a bottomry bond to secure a loan which he was obliged to repay only if his vessel completed the contemplated voyage in safety, was in effect buying hull insurance. The same was true of the cargo owner who in consideration of a loan gave a respondentia bond which likewise obligated repayment only if the cargo arrived in good order.

Grotius, in discussing the nature of the insurance contract, wrote that it was "a species of contract scarce known to the ancients, but now forming a very important branch in all mercantile and maritime concerns." GROTIUS, DE JURE BELLI AC PACIS 146 (Campbell transl. 1901). Sir James Allan Park (later Justice Park of the English Court of Common Pleas), in his eminent work on marine insurance, said, "the *Romans* had no knowledge of insurances; . . . both *Grotius* and *Bynkershoek* have expressly declared, that among the ancients this contract was unknown . . . ." PARK, A SYSTEM OF THE LAW OF MARINE INSURANCES, at xxi-xxii (2d ed. 1799). For more recent accounts of the history of marine insurance, see GOW, MARINE INSURANCE 2 (4th ed. 1909); 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 98 (1909); VANCE, INSURANCE 7 (3d ed. 1951); WINTER, MARINE INSURANCE 1 (3d ed. 1952).

[2] Interesting comments on the obscurity of the marine insurance policy by common law judges will be found in Brough v. Whitmore, 4 T.R. 206, 208-09, 100 Eng. Rep. 976, 977 (K.B. 1791), where Chief Justice Lord Kenyon said, "I remember it was said many years ago that, if Lombard Street had not given a construction to policies of insurance, a declaration on a policy would have been bad on a general demurrer; but that the uniform practice of merchants and underwriters had rendered them intelligible." In the same case, Justice Buller said, "Without commenting on the words of the policy, it is sufficient to say that a policy of assurance has at all times been considered in Courts of Law as an *absurd and incoherent instrument;* but it is founded on usage, and must be governed and construed by usage." *Id.* at 210, 100 Eng. Rep. at 978. (Italics added.)

More recently in referring to the marine insurance policy in suit in Calmar S.S. Corp. v. Scott, 345 U.S. 427, 432 (1953), Justice Frankfurter said, "Construing such conglomerate provisions requires a skill not unlike

effort the admiralty lawyer has properly discovered the contract out of the "labyrinth of verbiage"[3] in which it lurks, he still is in the unenviable position of not being able to predict with any real assurance what law the Supreme Court will apply in interpreting the contract and in giving effect to the warranties contained therein. Conceivably the Court will find English law controlling; perhaps some overriding federal maritime law will be applied; or the Court may decide the case on the basis of the law of the state in which the loss may have occurred. It is with this problem of selecting the appropriate law that the Supreme Court has had difficulty in recent years. As a result the marine insurance lawyer, for whom there is no legal radar, finds himself in the position of the mariner who must proceed in the densest of fog with a compass whose needle darts about in all directions due to the prevalence of shifting magnetic forces over which he has no control.

"[T]he contract of marine insurance is an exotic in the common law."[4] When Justice Bradley wrote these words he was using "exotic" as designating something "foreign" although he could, just as fittingly, have used the term in its other Websterian sense of "excitingly strange."[5] Not only was the contract of insurance foreign, but the law and the tribunals established in England to declare the rights of parties under marine as well as other types of insurance contracts were strangers to the common law.

---

that called for in the decipherment of obscure palimpsest texts." In the *Calmar* case the Lloyd's form of policy on which had been superimposed war risk riders was involved. The district court, sitting in admiralty, had held the underwriters liable; the court of appeals found no liability and the Supreme Court divided six to three with the majority vacating the court of appeals decision and remanding the case to it for further proceedings in light of the Court's opinion.

As a matter of fact, it would have been surprising, indeed, to have found uniformity in judicial opinion when it is appreciated that in the particular case the "basic adventures and perils" clause would render the underwriters liable if the policy were in effect, while the "capture and seizure warranty" would relieve the underwriters unless the "war-risk riders" reimposed liability and it must also be borne in mind that the "free of British capture warranty" might well in turn absolve the underwriters, unless the "savings clause" in the latter warranty again imposed liability.

[3] This is the language chosen by Judge Learned Hand in describing the marine insurance policy involved in Calmar S.S. Corp. v. Scott, 197 F.2d 795, 796 (2d Cir. 1952), and which policy was commented on in the footnote just preceding.

[4] Insurance Co. v. Dunham, 78 U.S. (11 Wall.) 1, 32 (1870).

[5] See the opinion of Chief Justice Mansfield in Le Cheminant v. Pearson, 4 Taun. 367, 380, 128 Eng. Rep. 372, 377 (C.P. 1812), where in speaking of a marine insurance policy he said, "this policy of insurance is a very strange instrument, as we all know and feel . . . ."

The first known extensive use of mercantile insurance was during the middle ages when the Italian republics of Venice, Florence and Genoa flourished as maritime powers.[6] It was during this period that enterprising merchants of northern Italy developed the marine insurance policy.[7] In the thirteenth century these Italian merchants, known as Lombards, came to England and brought with them their practice of insuring risks. They established their residences and businesses on what was later to become known as Lombard Street, London, and there they also set up their own courts composed of merchants whose function was to settle such disputes as might arise between the insurer and the insured.[8] These courts, although lacking in enforcement powers, were most effective in disposing of insurance controversies. However, in due course, certain insureds became

[6] See Justice Bradley's opinion in Insurance Co. v. Dunham, 78 U.S. (11 Wall.) 1, 33 (1870); 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 105 (1909); VANCE, *op. cit. supra* note 1, at 10.

[7] VANCE, *op. cit. supra* note 1, at 11. Vance states that the earliest policy form known to exist was written in Genoa in 1347 and a statutory form was prescribed in Florence in 1523.

[8] PARK, *op. cit. supra* note 1, at xlii. Park calls specific attention to the fact that to "this day" there is inserted in all policies of insurance a clause "'that this writing or policy of assurance shall be of as much force and effect as any writing heretofore made in *Lombard-Street* . . .'" Park was writing as of 1799 but he could have said the same as to the presence of these words were he writing today as will appear later in this note.

It is interesting to note that it was to Lombard Street that *Edward Lloyd* moved his famous coffee house in 1691. And it was in Lloyd's that it became the custom for individuals to gather over their coffee cups and underwrite marine risks, each underwriter indicating the share of the risk he assumed until the total insurance applied for was covered. It was at Lloyd's also where ships were auctioned off "by Inch of Candle" pursuant to which at the opening of the sale an inch of candle was lighted and bidding continued until the flame expired, the last bid just before the going out of the candle securing the property. See WRIGHT & FAYLE, A HISTORY OF LLOYD'S 15, 19 (1928).

Lloyd's became and still is the most important marine insurance concern of the commercial world. The Lloyd's policy was never drafted as a single instrument but gradually evolved through the centuries, a great deal of its terminology going back to the sixteenth century. In 1779 the desirability of having a standard printed policy form resulted in the adoption of the much judicially maligned Lloyd's form of marine insurance policy by the underwriters doing business at Lloyd's. This was not a drafting of a new form of policy but rather the preservation of the common form then in use. In 1795 this Lloyd's policy was made the standard form by act of parliament in 35 Geo. 3, c. 63. And, despite much interim criticism of the form of the policy, it was again adopted by parliament with little change in the Marine Insurance Act of 1906, 6 Edw. 7, c. 41, § 30. This statutory form still has retained in it the clause which was referred to by Park and mentioned at the beginning of this note, namely, that the policy shall be of as much force and effect as any writing heretofore made in Lombard Street.

disgruntled with the Merchants' Courts and looked for relief in more formal tribunals.

The common law courts, due to their tedious delays and technical procedure, were unsuited for insurance litigation. For a time, litigants sought relief in the court of admiralty but for reasons which are not clear that court never developed as a repository of insurance litigation.[9] In 1601 parliament passed the first insurance act, chapter 12 of 43 Elizabeth, and by that statute established a special court for the trial of marine insurance litigation.[10] The composition of the court was unique consisting of the judge of admiralty, the recorder of London, two doctors of the civil law, two common lawyers and eight "grave and discreet merchants."[11] Any five of these had authority summarily to try insurance cases.

Unfortunately, however, the insurance court so created had little success due in part to the fact that the statute creating it limited its jurisdiction to causes arising on policies issued in London and was construed to apply only to insurance on merchandise. In addition, the court could be resorted to only by the insured and not by the underwriter. At the time Park wrote his work on marine insurance in 1799 he noted that "the court erected by the statute of *Elizabeth* . . . has now fallen into disuse . . . ."[12] Despite the demise of the insurance court through lack of use, it is to be noted that prior to Lord Mansfield's appointment as Chief Justice in 1756 insurance litigants had not resorted in any great number to the common law courts, for up to that time, no more than sixty cases on insurance

[9] 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 112 (1909); VANCE, *op. cit. supra* note 1, at 15. See also note 20 *infra.*

[10] The preamble to this statute in subdivision (4) is both explanatory of the past practices of the Merchants' Courts and of the reason for legislative action. It reads: "And whereas heretofore such assurers have used to stand so justly and precisely upon their credits, as few or no controversies have arisen thereupon, and if any have grown, the same have from time to time been ended and ordered by certain grave and discreet merchants appointed by the lord mayor of the City of London, as men by reason of their experience fittest to understand, and speedily to decide those causes, until of late years that divers persons have withdrawn themselves from that arbitrary course, and have sought to draw the parties assured to seek their monies of every several assurer, by suits commenced in her Majesty's courts, to their great charges and delays."

[11] Since, as we see by a reading of the preamble of this statute, 1601, 43 Eliz., c. 12, "grave and discreet" merchants made up the personnel of the Merchants' Courts, parliament doubtless assumed there would be no difficulty in finding merchants of this character for the insurance court and so provided in paragraph I(6) of the statute.

[12] PARK, *op. cit. supra* note 1, at xlvii.

are to be found in the common law reports.[13] Thus, for more than one hundred and fifty years after the establishment of the insurance court, the bulk of insurance litigation continued to be initiated and disposed of in the Merchants' Courts.

It was through the diligent efforts of Lord Mansfield that the common law courts equipped themselves to handle insurance litigation. This judge, to whom is credited the development of commercial law in England, brought insurance into the common law system. He recognized the customs of the merchants, honored the decisions and laws of foreign maritime nations, and in the trial of insurance cases would empanel as jurors merchants and underwriters.[14] Referring to the thirty years that Lord Mansfield was on the bench, Park wrote, "It is the boast of this age, that in it the great foundations of marine jurisprudence have been laid, by clearly developing the principles on which policies of insurance are founded, and by happily applying those principles to particular cases."[15] At the time of Mansfield's retirement from the bench in 1788, insurance litigation had greatly increased in volume in the common law courts as merchants recognized that they now had in those courts an appropriate and adequate forum in which to dispose of their controversies.

With this brief historical account of the treatment of marine insurance litigation in England and the nature of the law applied by the various tribunals, let us now see what action the United States Supreme Court took in determining the jurisdictional power of the federal courts over marine insurance litigation and the character of the law to be applied.

Under the Constitution the judicial power of the courts of the United States extends to "all cases of admiralty and maritime jurisdiction."[16] By the Judiciary Act of 1789, Congress specifically granted to the federal district courts 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 . . . ."[17] In 1851, Justice Story, then sitting on the United States Circuit Court in Massachusetts, held

[13] *Id.* at xlviii. The oldest known action in a common law court on a marine policy was in 1588 before Chief Justice Wray at Nisi Prius in London. Our knowledge of this case is by reason of reference to it in Lord Coke's report on Dowdale's Case, 6 Co. Rep. 46b, 77 Eng. Rep. 323 (K.B. 1606).

[14] 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 116 (1909).

[15] PARK, *op. cit. supra* note 1, at liii. [16] U.S. CONST. art. III, § 2.

[17] Judiciary Act of 1789, § 9, REV. STAT. § 563(8) (1875).

that a policy of marine insurance was within (although not exclusively within) the admiralty and maritime jurisdiction of the United States courts.[18] However, it was not until 1870 that the Supreme Court passed upon the question. Then, in *Insurance Company v. Dunham*,[19] the Court adopted the view of Justice Story.[20] That an action brought on a marine insurance policy is a controversy within the admiralty and maritime jurisdiction of the federal courts has been consistently maintained by the Court and reaffirmed from time to time.[21] Accordingly, it is settled law that an action on a marine insurance policy may be brought, not only in a state court, or, in a diversity case, on the law side of a federal district court, but also in the federal court sitting as a court in admiralty.

Having found jurisdictional power in the federal admiralty courts, the next question to be answered is: what law should the admiralty courts apply as determinative of the rights of the parties to a marine insurance policy? It is the Supreme Court's recent action in this field that has left the marine insurance lawyer insecure.

Suggestions as to what should be the applicable law are to be found in the old *Dunham* case. Although Justice Bradley, when speaking for the Court in that case, was only concerned with the question of jurisdiction, it is worth while to note some of his comments. Thus he said,

> Perhaps the best criterion of the maritime character of a contract is the system of law from which it arises and *by which is is governed.* And it is well known that the contract of insurance sprang from the law maritime, and derives all its material rules and incidents therefrom.[22]

---

[18] De Lovio. v. Boit, 7 Fed. Cas. 418 (No. 3776) (C.C.D. Mass. 1815).
[19] 78 U.S. (11 Wall.) 1 (1870).
[20] Justice Bradley, speaking for the Court, pointed out that marine insurance contracts had historically been subject to the jurisdiction of admiralty courts in the maritime countries of Europe. Also, he noted that it was only because the common law courts of England prevailed in their conflict for jurisdictional power that the English admiralty courts were denied jurisdiction of suits on insurance contracts except in the unlikely situation where the contract had been made on the high seas.
[21] See for example the language of the Court in Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 313 (1955), where the Court in citing *Dunham* said, "Since the insurance policy here sued on is a maritime contract the Admiralty Clause of the Constitution brings it within federal jurisdiction."
[22] 78 U.S. (11 Wall.) at 31. (Emphasis added.)

Speaking further of the character of marine insurance law, Justice Bradley said,

> It is, in fact, a part of the general maritime law of the world; slightly modified, it is true, in each country, according to the circumstances or genius of the people.[23]

Then, quoting from the Italian writer, Roccus, Justice Bradley went on to say,

> "These subjects of insurance and disputes relative to ships are to be decided according to maritime law, and the usages and customs of the sea are to be respected."[24]

Some fifty years later the Supreme Court was called upon to construe the phrase "all consequences . . . of hostilities or warlike operations"[25] appearing in the marine policies involved in the case of *Queen Insurance Co. v. Globe & Rutgers Fire Insurance Co.*[26] As frequently happens, two insurance policies had been issued—one was an ordinary marine insurance policy and the other a marine war risk policy. Losses attributable to "warlike operations" were excluded from the former and covered by the latter policy. In determining that a loss resulting from a collision of ships traveling in convoys without lights in time of war was not a loss due to "warlike operations" the court of appeals[27] felt obliged to follow the construction placed on those words by the English courts. In affirming the court of appeals, Justice Holmes, speaking for the Supreme Court, said,

> There are special reasons for keeping in harmony with the marine insurance laws of England . . . . We repeat that we are dealing not with general principles but only with the construction of an ancient form of words which always have been taken in a narrow sense . . . .[28]

In 1938, when discussing the subrogation rights of hull insurers on a valued marine insurance policy, Justice Stone, speaking for the

[23] *Id.* at 34.
[24] *Ibid.*
[25] For a collection of English and American cases construing this phrase, see Derby, *What Are Warlike Operations under the F. C. & S. Clause in Marine Policies,* 33 CALIF. L. REV. 128 (1945).
[26] 263 U.S. 487 (1924).
[27] 282 Fed. 976 (2d Cir. 1922).
[28] 263 U.S. at 493.

Court, said, "We recognize that established doctrines of English maritime law are to be accorded respect here . . . ."[29] He then proceeded to apply what he found to be "established principles of maritime insurance law"[30] and refused to follow an English decision[31] of the Court of Queen's Bench which had never been adopted by an English appellate court and which had been later questioned by eminent English judges.

In 1950 the Supreme Court was again called upon to interpret the phrase "all consequences of hostilities or warlike operations" in *Standard Oil Co. of New Jersey v. United States.*[32] A collision had occurred between a Standard Oil tanker and a Navy mine sweeper then engaged in sweeping mines outside New York harbor. It was agreed that faulty navigation on the part of both vessels contributed to the collision. Standard's vessel was covered by a government war risk policy. Standard contended that under English case law the government, as war risk insurer, was liable for the loss as a matter of law. The district court[33] disagreed with Standard but found that as a matter of fact the "warlike operation" of the navy vessel was a proximate cause of the loss. The court of appeals[34] reversed. Although it conceded that language in English cases might make the government liable as a matter of law it refused to follow such cases and contrary to the district court found that the warlike phase of the minesweeper's operation was not a proximate cause of the collision.

On certiorari the Supreme Court divided six to three. The majority, in affirming the court of appeals, refused to follow decisions of the House of Lords which would impose liability on the war risk insurer as a matter of law. Speaking for the Court, Justice Black said,

> It is true that we and other American courts have emphasized the desirability of uniformity in decisions here and in England in interpretation and enforcement of marine insurance

[29] Aetna Ins. Co. v. United Fruit Co., 304 U.S. 430, 438 (1938).
[30] *Id.* at 439.
[31] North of England Iron S.S. Ins. Ass'n v. Armstrong, L.R. 5 Q.B. 244 (1870).
[32] 340 U.S. 54 (1950), discussed in Note, 37 CORNELL L.Q. 99 (1951). On the same date the Court decided a companion case of Libby, McNeill & Libby v. United States, 340 U.S. 71 (1950), and declared its opinion in *Standard* was dispositive of *Libby,* a case comparable on its facts.
[33] 81 F. Supp. 183 (S.D.N.Y. 1948).
[34] 178 F.2d 488 (2d Cir. 1949).

> contracts. . . . But this does not mean that American courts must follow House of Lords' decisions automatically. Actually our practice is no more than to accord respect to established doctrines of English maritime law.[35]

Justice Black then pointed out that the particular English cases relied on by Standard had produced such an unfavorable reaction among English underwriters that the policy provision in question was revised so as to avoid the injurious effects of those decisions.

Justice Frankfurter, writing a dissent in which Justice Jackson concurred, was of the opinion the court of appeals should be reversed and the district court affirmed. Speaking of the law to be applied, he said,

> The clause that is our concern, "all consequences of hostilities or warlike operations," was not derived from the American "war risk" charter term and therefore is not to draw its meaning from the cases construing that term. It is a clause evolved by English maritime insurers. . . . And the language has often been construed in English courts. . . . It is only natural that American courts have looked to the English cases for illumination just as courts look to the decisions of another State for aid in determining the meaning of a statute adopted from that State.[36]

Justice Douglas filed a separate dissent and contended that the English decisions construing the phrase in question should be regarded as stating the standards for interpretation. After citing English cases in point, he said,

> Adherence to British precedents in this field was early admonished. *Queen Ins. Co. v. Globe Ins. Co.*, 263 U.S. 487, 493. The rule of the foregoing English cases is for me the most authentic standard for interpreting the present contract.[37]

---

[35] 340 U.S. at 59.

[36] *Id.* at 65.

[37] *Id.* at 70. The language of Justice Douglas and his reference to the *Queen Ins. Co.* case was echoed by Justice Frankfurter three years later when speaking for the Court in Calmar S.S. Corp. v. Scott, 345 U.S. 427, 442-43 (1953). Although the court of appeals had found no English cases precisely in point, the district court, in holding the underwriter liable on a war risk policy, had relied on the English case of Rickards v. Forrestal Land, Timber & Ry., [1942] A.C. 50. Justice Frankfurter cautiously stated that the case "may support the position of the District Court." Then, in the only reference to the weight to be given English decisions which is to be found

Whether, in determining the rights of parties to marine insurance policies, the Court was to follow the English case law or to merely accord respect to the decisions of the English courts in molding its own law, it is clear from the above cases that the Court did not contemplate applying a rule based on the law of some individual state of the United States. It remained for the two cases of *Maryland Casualty Co. v. Cushing*[38] and *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*[39] to raise these questions, and, unfortunately, to leave the marine insurance bar in a state of uncertainty if not outright confusion.

The *Cushing* case involved the right of representatives of deceased seamen to sue a marine liability insurer under a Louisiana direct action statute. The *Wilburn Boat* case was an action on a marine fire insurance policy. It presented the question of whether a statute of Texas, which declared that a breach of warranty in a policy of insurance was not to prevent recovery unless the breach contributed to the loss, was to prevail over the generally accepted rule applied to maritime insurance that a breach of warranty relieved the insurer irrespective of the causal connection between the breach and loss. Although the *Cushing* case was decided in 1954 and the *Wilburn Boat* case in 1955, the nature of the problems involved merits consideration of the *Wilburn Boat* case first.

Glenn, Frank and Henry Wilburn were the owners of a small houseboat, the *Wanderer,* which they insured against fire loss and other perils with Fireman's Fund Insurance Company. The policy contained the following terms or warranties:

> It Is Also Agreed that this insurance shall be void in case this Policy or the interest insured thereby shall be sold, assigned, transferred or pledged without the previous consent in writing of the Assurers.
>
> Warranted by the Assured that the within named vessel shall be used solely for private pleasure purposes during the currency of this Policy and shall not be hired or chartered unless permission is granted by endorsement hereon.[40]

in the case, Justice Frankfurter, citing *Queen Ins. Co.,* said, "It is persuasive authority, since '[t]here are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business . . . .'"

[38] 347 U.S. 409 (1954).

[39] 348 U.S. 310 (1955).

[40] *Id.* at 311 n.1.

While moored on Lake Texoma, an inland lake between Texas and Oklahoma, the *Wanderer* was destroyed by fire of unknown origin. Claim was made against the insurer but it refused to pay because of violations of the above stated conditions and warranties in the policy. Those violations were that the three Wilburns, without the consent of the insurer, had sold the vessel to Wilburn Boat Company, a corporation of which they were sole owners; that the vessel had been chattel mortgaged; and that instead of being solely used for private pleasure purposes it had been chartered and used for hire.

Suit was brought against the insurer in a Texas state court by the three Wilburns and the Wilburn Boat Company. The case was transferred to the federal district court by reason of diversity and trial was had before the district judge sitting without a jury. Plaintiffs contended that the policy had been delivered in Texas and that Texas law should control in determining the effect to be given to the breaches of the policy provisions. Under Texas law breaches of the policy provisions would afford the insurer no defense unless the breach contributed to the loss. Without determining whether the policy had been delivered in Texas, the district judge held that state law was immaterial because the policy was a maritime contract and, as such, was "governed by the general admiralty law and not by the law of Texas."[41] The district judge found that Lake Texoma was a part of the navigable waters of the United States and that finding was not questioned. He then held that the plaintiffs could not recover because he found the established admiralty rule requires literal fulfillment of every policy warranty and that a breach of any warranty bars recovery even though the breach in no way contributes to the loss.

The court of appeals affirmed the district judge in all respects.[42] The liability of the insurer was to be measured by the maritime law

> even though the proceeding was instituted in a common law court[43] . . . . Under the general maritime law, contracts of

[41] This portion of the district court's unreported opinion is found in *id.* at 312 n.4.

[42] 201 F.2d 833 (5th Cir. 1953).

[43] *Id.* at 835. The court of appeals at this point quite properly cited Carlisle Packing Co. v. Sandanger, 259 U.S. 255 (1922), and Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918). Thus in *Carlisle Packing Co.*, the Court said, "The general rules of the maritime law apply whether the proceeding be instituted in an admiralty or common law court." 259 U.S.

> insurance must be enforced as written . . . . [A]nd . . . "a breach of the warranty releases the company from liability regardless of the fact that a compliance with the warranty would not have avoided the loss. . . ."[44]

That both the district court and court of appeals properly expounded the general maritime law as to the effect of a breach of warranty cannot be questioned.[45]

On certiorari the Supreme Court divided three ways. The majority reversed and remanded the case to the trial court with

---

at 259. This view has also been accepted by textwriters. See 1 BENEDICT, ADMIRALTY 55 (6th ed. 1940), where the author states, "The view now is that maritime rights are to be determined according to maritime law not only whenever the parties seek a maritime remedy in the admiralty court but also whenever they seek a common law remedy under the 'saving clause' of the Judiciary Act of 1789."

[44] 201 F.2d at 836.

[45] In view of the importance of this basic proposition, we deem it not amiss to quote pertinent remarks by recognized authorities on the subject of maritime insurance in the 18th, 19th and 20th centuries.

PARKS, A SYSTEM OF THE LAW OF MARINE INSURANCE 318-19 (2d ed. 1799): "A warranty in a policy of insurance is a condition or a contingency, that a certain thing shall be done or happen, and unless that is performed, there is no valid contract. It is perfectly immaterial for what view the warranty is introduced; or whether the party had any view at all: but once inserted, it becomes a binding condition on the insured: and unless he can shew that he has literally fulfilled it, or that it was performed, the contract is the same, as if it had never existed. . . . We have said that a warranty must be strictly and literally performed; and therefore whether the thing, warranted to be done, be or be not essential to the security of the ship; or whether the loss do or do not happen, on account of the breach of the warranty, still the insured has no remedy . . . ."

HUGHES, INSURANCE 308-09 (1828): "A warranty in a policy of insurance is regarded as a condition; that is, as a stipulation upon the strict compliance or non-compliance with which the validity of the policy depends. . . . It is immaterial whether the purpose intended by the warranty has been answered or not; whether the loss was attributable to a violation of the warranty, or to any other cause . . . . So if a ship be warranted to sail with a certain number of men, and she sail with a less number, the condition of the policy is broken, although the jury find that the number of men with which the ship sailed rendered her as safe as she would have been with the number specified."

GOW, MARINE INSURANCE 263 (4th ed. 1909): "*Penalty for Breach.*— In these cases it is evident that there is no hardship to the assured in demanding the exact fulfillment of the very words of the warranties; to pass any less strict application of them as permissible would be to deprive the warranties of the most of their value. To prevent any misuse of warranties the penalty attaching to their non-fulfillment has been made severe; if the statement is false or the promise broken, the party to whom it is made is entitled to rescind the contract, and is discharged and exonerated."

And finally, MULLINS, MARINE INSURANCE DIGEST 274 (1959): "In case of a breach of an express warranty, the underwriter may avoid all losses occurring thereafter even though there is no connection between the breach and the loss."

instructions to apply "appropriate state law."[46] Although it found the policy was a maritime contract this did not mean that the contract was controlled by some federally defined admiralty rule. The national government, we are told, has left much regulatory power in the states.[47] Congress has not dealt with the effect to be given to breaches of warranties in marine insurance policies.[48] Neither has there been declared by the Supreme Court a judicial rule governing warranties in such policies.[49] Consequently, the majority concludes that since Congress has not spoken on the subject and the Court has not pronounced a controlling federal admiralty rule, the state law relative to warranties must control unless the Court should now proceed to fashion a federal admiralty rule of law defining the effect of breaches of warranty which have not contributed to the loss.[50]

This task the majority refused to do. After recognizing the opposing views taken in various state jurisdictions, some requiring a literal interpretation of the warranty, others, like Texas, requiring that the breach contribute to the loss in order to avoid an insurer's liability, Justice Black, speaking for the Court, said,

> Thus there are a number of . . . possible rules from which this Court could fashion one for admiralty. But such a choice involves varied policy considerations and is obviously one which Congress is peculiarly suited to make. And we decline to undertake the task.[51]

Justice Frankfurter wrote a separate opinion in which he concurred with the result reached by the majority but disagreed with its reasoning. Under the majority's opinion Justice Frankfurter says state law would apply whether the vessel were the *Queen Mary* or the *Wanderer*. Such a result he finds intolerable.

> Is it to be assumed that were the *Queen Mary,* on a world pleasure cruise, to touch at New York City, New Orleans and Galveston, a Lloyd's policy covering the voyage would be subjected to the varying insurance laws of New York, Louisiana and Texas? Such an assumption, I am confident, would not prevail were decision necessary. The business of marine insurance often may be so related to the success of

[46] 348 U.S. at 321.
[47] *Id.* at 313.
[48] *Id.* at 314.
[49] *Id.* at 316.
[50] *Ibid.*
[51] *Id.* at 320.

> many manifestations of commercial maritime endeavor as to demand application of a uniform rule of law designed to eliminate the vagaries of state law and to keep harmony with the marine insurance laws of other great maritime powers.[52]

It is Justice Frankfurter's opinion that as to certain vessels, such as the *Wanderer,* the court should leave the interpretation of warranties in the marine policy to state law, but as to other vessels, such as the *Queen Mary,* the Court should not abdicate its power to formulate a federal admiralty rule. Put very simply, if Justice Frankfurter's view were to be adopted, counsel would, as to a great number of vessels, be left in doubt as to what law would be applied to the warranty terms of the policy. The *Wanderer* would be a precedent for houseboats with rather limited range of travel. The *Queen Mary* would under Justice Frankfurter's view require the Court to formulate a federal admiralty rule. But where the line is to be drawn between vessels of lesser tonnage and cruising radius than the *Queen Mary* but greater than the *Wanderer* would be left open. It is submitted that the law of marine insurance should be accorded greater certainty than would be derived by applying Justice Frankfurter's views.

Justice Reed wrote the dissenting opinion concurred in by Justice Burton. Contrary to the majority he finds that there is an established federal admiralty rule governing warranties in marine policies. That rule is that the warranty must be strictly enforced and a breach of it relieves the insurer although the breach did not contribute to the loss. It is the rule we acquired from England and has never been changed by act of Congress or decision of the Supreme Court. Thus he says,

> Our admiralty laws, like our common law, came from England. As a matter of American judicial policy, we tend to keep our marine insurance laws in harmony with those of England. *Queen Ins. Co. v. Globe Ins. Co.,* 263 U.S. 487, 493; *Calmar Steamship Corp. v. Scott,* 345 U.S. 427, 442-443. Before our Revolution, the rule of strict compliance with maritime insurance warranties had been established as the law of England. That rule persists. While no case of this Court has been cited or found that says specifically that

[52] *Id.* at 323.

> the rule of strict compliance is to be applied in admiralty and maritime cases, that presupposition has been consistently adopted as the basis of reasoning from our earliest days. Other courts have been more specific. No case holds to the contrary.[53]

An examination of the many lower federal court cases cited by Justice Reed fully confirms his conclusion. But, the Justice continues, if Congress or the Supreme Court wished to modify the strict maritime rule as to warranties that could be done. Since the majority does not wish to formulate a federal rule, Justice Reed states that he would follow the established rule and hold the insured to his warranty.[54]

Commenting on a statement made by the majority to the effect that regulation of marine insurance has been left to the states, Justice Reed stresses that all courts, state and federal, which have jurisdiction to enforce "maritime or admiralty substantive rights must do so according to federal admiralty law."[55] Further, the "issue of an insurer's liability upon an insured's broken warranty is clearly a matter of substantive law."[56] Although a state may provide a remedy the state's authority "does not extend to changing the general substantive admiralty law."[57]

Justice Reed emphasizes the uniform nature of admiralty law and says, "If uniformity is needed anywhere, it is needed in marine insurance. It is like the question of seaworthiness which must be controlled by one law."[58] Insurers certainly should know the risks they are assuming when they fix the premiums. And if the majority view is to be followed, Justice Reed asks, "What law is to govern—that of the state where the insurance contract was issued, the state of the accident, or the state of the forum?"[59] To permit the many states to declare the substantive law of marine insurance seems to Justice Reed to be "an unreasonable interference with maritime activity."[60]

As to Justice Frankfurter's concurring views permitting state law to be applied to the *Wanderer,* Justice Reed points out that the *Wanderer* had navigated the waters of five states and he disapproves

[53] *Id.* at 325-26.
[54] *Id.* at 327.
[55] *Ibid.*
[56] *Id.* at 328.
[57] *Id.* at 332.
[58] *Id.* at 333.
[59] *Id.* at 334.
[60] *Ibid.*

a rule which is predicated on the size of the vessel or the number of states in which it navigates.[61]

The *Wilburn Boat* case has left the admiralty bar in a state of utter confusion.[62] We have a situation in which Congress has not acted. If the majority had found a Supreme Court decision passing upon the effect of a breach of warranty in a marine policy it presumably would have stated that federal admiralty law exists and is applicable. It might then have followed its former decision, or overruled it, but in any event it would have been declaring federal admiralty law. Finding no such decision, the issue in *Wilburn Boat* is disposed of by applying state law. Does this mean that whenever Congress has not legislated and the Court has not already spoken and declared federal admiralty law state law shall determine the issue? Such a situation has been aptly described as "nightmarish!"[63]

The Supreme Court has held that, whether the forum be state or federal, rights of seamen to maintenance and cure are to be determined by federal admiralty law;[64] that the placing of the burden of proof when a seaman's release is attacked for fraud is determined by federal admiralty law;[65] that the effect of contributory negligence is governed by the comparative negligence rule of admiralty and not the common law rule of the state in which the cause of action arose.[66] The rule that rights of parties to a marine insurance policy are to be determined by the law of some state instead of by a federal admiralty rule, either declared by Congress or, in the absence of congressional action, by the Court, is so revolutionary in character that one cannot help but venture the prediction that *Wilburn Boat*

[61] *Ibid.*

[62] For a few of the many law review criticisms of the case, see *The Supreme Court, 1954 Term*, 69 HARV. L. REV. 119, 169 (1955); 54 MICH. L. REV. 277 (1955); 40 MINN. L. REV. 168 (1956).

[63] GILMORE & BLACK, ADMIRALITY 62 (1957).

[64] Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918).

[65] Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942).

[66] Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953). It is interesting to note that Justice Black when speaking for the Court in *Wilburn Boat* permitted state law to determine the substantive rights of parties to a marine insurance policy. But two years earlier, when also speaking for the Court in *Hawn*, just cited, he expressed quite a different attitude. He then said, "Nor can we agree that Hawn's rights must be determined by the law of Pennsylvania, under which, it is said, any contributory negligence would bar all recovery in this personal injury action. True, Hawn was hurt inside Pennsylvania . . . . [But] the basis of Hawn's action is maritime tort . . . . His right of recovery . . . is rooted in federal maritime law." *Id.* at 409.

in time will be whittled away by future decisions of the Court so as to become barely recognizable.

Maryland Casualty Co. v. Cushing[67] involved marine liability insurance, limitation of liability and a Louisiana state statute giving injured parties a direct action against a liability insurance company. The case is unique in that the Supreme Court divided 4-4-1. In order to break the deadlock, one group of four accepted the opinion of the solitary Justice.

Despite the legal complexities, the facts were simple. The *Jane Smith,* a towboat under charter, was proceeding on a Louisiana River when she collided with a concrete pier and capsized. As a result five seamen were drowned. The owner and charterer filed consolidated petitions in admiralty to limit liability under the federal limitation act.[68] The district court issued an injunction prohibiting suit against the owner and charterer other than in the limitation proceeding. Later the personal representatives of the deceased seamen brought a consolidated action under the Louisiana direct action statute[69] in the same federal court against the liability insurance underwriters of the owner and charterer. Jurisdiction was based on the Jones Act and diversity. One of the policies sued on was an employer's liability policy and had been issued by the Maryland Casualty Company to the charterer of the vessel in the amount of $10,000. The other policy was a "protection and indemnity" policy issued to both the owner and charterer of the vessel in the amount of $170,000. Under the terms of both policies the insurer assumed no liability until the insured had been held liable to pay damages.[70]

The district court granted a motion for summary judgment dismissing the direct action.[71] It held that to permit the action to lie would contravene the purpose of the federal limitation of liability act. The court of appeals reversed and ordered the action reinstated.[72] On certiorari four Justices, headed by Justice Frankfurter, were of the opinion that the district court was correct in dismissing the action. Not only would maintenance of the action encroach

[67] 347 U.S. 409 (1954), discussed in *The Supreme Court, 1953 Term,* 68 HARV. L. REV. 157 (1954); Note, 33 N.C.L. REV. 464 (1955); 103 U. PA. L. REV. 263 (1956).
[68] 49 Stat. 1479 (1936), 46 U.S.C. § 183 (1958).
[69] LA. REV. STAT. ANN. § 22:655 (1959).
[70] 347 U.S. at 411 n.3.
[71] 99 F. Supp. 681 (E.D. La. 1951).
[72] 198 F.2d 536 (5th Cir. 1952).

"upon the federal statutory system for bringing all claims into concourse, the direct action statute is in conflict with the congressional policy of limited liability."[73] Justice Frankfurter pointed out that the damages sought in the direct action totalled $600,000 and that the maximum insurance provided by the policies was $180,000. Although the towboat had not been finally valued, a stipulation had been filed in the limitation proceeding putting her value at $25,000.

If the charterer and owner of the vessel were found to be entitled to limitation their maximum liability would be $25,000. This liability would be amply covered by the $180,000 liability insurance. But, Justice Frankfurter pointed out, if a judgment against the insurers is recovered in the direct action for an amount equal to, or more than $180,000, the liability of the insurers would be fully complied with by the payment of $180,000; the insurance fund would have been exhausted and the shipowner and charterer "would then have to face whatever claims may be presented stripped of their insurance protection."[74]

Another group of four Justices, headed by Justice Black, were of the opinion the direct action should be permitted to continue. In Justice Black's opinion, permitting insurance companies to obtain a dismissal of these actions would be giving those companies the benefit of the federal limitation of liability act which was designed to protect shipowners and charterers and not insurance companies.[75] Enforcing the Louisiana statute would not, he said, impair the uniformity of maritime law. As to destroying the rights of the shipowner and charterer under the limitation act, Justice Black finds that "it was conceded at the bar . . . that the ship here is without value—a total loss. If this is true there would be no fund in the limitation proceedings and no possibility of any recovery at all against the shipowner."[76] But, even if the ship had some value, Justice Black says, the liability insurance was bought to protect the injured persons. Such insurance, he says, is not like hull insurance which cannot be reached by injured claimants.[77]

---

[73] 347 U.S. at 417-18.
[74] *Id.* at 418.
[75] *Id.* at 427.
[76] *Id.* at 433.
[77] *Id.* at 435, citing The City of Norwich, 118 U.S. 468 (1886). It was in *The City of Norwich* that a divided Supreme Court held hull insurance proceeds could not be reached by claimants in a limitation proceeding. See LIMITATION OF LIABILITY, *infra* at note 12. Both Justices Frankfurter and Clark deemed the rule of *The City of Norwich* applicable to liability insurance. Justice Clark said, "Though the holding in *The City of Norwich* does not control, I think that the reasoning of that case is pertinent; in other

Further, the policies were written after the enactment of the Louisiana statute. Justice Black sees no reason for holding that states cannot "assure seamen that they instead of the shipowner can get the full benefit of liability polices bought in order to pay their just claims for injuries caused by the ship."[78] Justice Black is in no way concerned that judgments of $180,000 or more in the direct action would exhaust the insurance fund and leave the shipowner to bear whatever might be determined to be his liability in the limitation proceeding. In fact, Justice Black in some manner, by no means clear to the writer, is of the opinion that if the shipowner is to receive the benefit of the liability insurance he purchased he may make money on the deal. Thus he says, "The result of holding that the Act gives the shipowner this insurance benefit is, at least in some circumstances, to leave him with more money after a wreck if he injures people than if he does not."[79]

Justice Clark wrote a separate opinion in which he stated he saw no reason for invalidating Louisiana's law by dismissing the direct actions. He would direct the district court to first conclude the limitation proceeding. Under his view, if in that proceeding the value of the vessel were established at $25,000 and the charterer and shipowner were held entitled to limitation, the maximum liability of the charterer and shipowner would not exceed $25,000. The insurance companies would be required to pay into the limitation fund, in discharge of their obligation to the insured, the amount of any judgment against the insured up to $25,000. After that, Justice Clark would let the direct actions continue against the insurance companies. Whether they would be liable for the remaining balance of the $180,000, or any portion thereof, he said, would be a matter of Louisiana state law.[80] This procedure, he pointed out, would not

words, the owner of the ship has the same right to protect his investment in the ship by insurance against damage claims arising in its operation and which are chargeable to it as he has to protect his investment from damage to the ship itself." 347 U.S. at 424 (concurring opinion).

[78] *Id.* at 435.

[79] *Ibid.*

[80] *Id.* at 425. Justice Clark does not suggest what the liability under state law would be. It is not amiss to note that the Louisiana direct action statute in question, LA. REV. STAT. ANN. § 22:655 (1959), says in part: "It is also the intent of this Section that all liability policies within their terms and limits are executed for the benefit of all injured persons, his or her survivors or heirs, *to whom the insured is liable . . .*" (Italics supplied.) Further, the insurance policies issued contained the clause, "Liability hereunder shall in no event exceed that which would be imposed on the assured by law in the absence of contract." These clauses would not necessarily

enable the shipowner to make money, as Justice Black suggested, but would merely enable him to get the protection for which he paid.

The four Justices headed by Justice Frankfurter "in order to break the deadlock"[81] and to dispose of the litigation accepted Justice Clark's solution, vacated the judgment of the court of appeals and ordered the case remanded to the district court to be continued until after the completion of the limitation proceeding.

It is obvious that the *Cushing* case is weak authority indeed. It must be recognized as expressing really the opinion of only one Justice. But it is submitted that the result reached is admirable. It protects both the shipowner and the injured. It gives sway to both the federal limitation act and the state direct action statute. If, in the long run, the insurers are held responsible for the balance of the insurance over and above the liability fixed on the insured in the limitation proceeding there may be pressure to increase the insurance premiums. But, since those premiums are normally estimated on the amount of coverage purchased, and since, in no event would the liability of the insurers exceed the face amount of their policies, it does not seem likely that a material increase, if any, would be made.

LIMITATION OF LIABILITY

"[M]en would be deterred from employing ships, if they lay under the perpetual fear of being answerable for the acts of their masters to an unlimited extent." Thus wrote the renowned Dutch jurist, Hugo Grotius, in 1625.[1] To impose liability on shipowners for acts of their masters would be "neither consonant to natural equity . . . nor . . . conducive to the public good."[2] Referring to the law of his own nation, Grotius continued, "[I]t is an established rule that no action can be maintained against the owner for any greater sum than the value of the ship and cargo."[3]

relieve the insurers under Louisiana law. The state has held that personal defenses of an insured, such as a plea of coverture, cannot be pleaded in a direct action against the insurer. See Louisiana authorities collected in Harvey v. New Amsterdam Cas. Co., 6 So. 2d 774 (La. App. 1942), and in a discussion of the *Cushing* case in 103 U. PA. L. REV. 263 (1956).

[81] 347 U.S. at 423.

[1] GROTIUS, DE JURE BELLI AC PACIS 139 (Campbell transl. 1901).

[2] *Ibid.*

[3] *Ibid.* When Grotius here refers to "cargo" he is speaking of the shipowner's interest in the cargo, namely, the freight charges and it is in that sense that he has been understood by the commentators and the courts. See Norwich Co. v. Wright, 80 U.S. (13 Wall.) 104, 116 n.† (1871).

Although by no means uniform, some sort of rule of limited liability on the part of the shipowner has been the law of the leading maritime nations of continental Europe since the middle ages.[4] And while not a part of the common law of England, limitation in one form or another has been the law of that country since the enactment of 7 Geo. 2, c. 15, in 1734.[5] Originally, our own American courts

[4] For an excellent historical survey of the maritime law of limitation of liability from the middle ages to the nineteenth century, see the opinions of the following jurists: Judge Ware in The Rebecca, 20 Fed. Cas. 373 (No. 11619) (C.C.D. Me. 1831); Justice Woodbury in New Jersey Steam Nav. Co. v. Merchants' Bank, 47 U.S. (8 How.) 344, 434 (1848); Justice Bradley in Norwich Co. v. Wright, *supra* note 3; Justice Brown in The Main v. Williams, 152 U.S. 122 (1894).

[5] It is interesting to note that under the early limitation of liability statutes adopted in England the liability of the shipowner was limited to the value of the vessel and freight immediately *before* the damage was inflicted. Thus under those statutes, if the act causing the injury also caused a complete loss of the vessel, the shipowner was liable in an amount equal to the value of the vessel and freight *before* the loss. This was in direct conflict with the then general maritime law and the interpretation given to our American statute as first enacted, namely, that liability was limited to the value of the vessel and freight *after* the injury. See the collection of English cases and the comment by Justice Bradley discussing this distinction in Norwich Co. v. Wright, 80 U.S. (13 Wall.) 104, 118 (1871). In later years English law provided for a limitation fund based on the tonnage of the vessel.

In 1924 several leading nations adopted the International Convention for the Unification of Certain Rules Relating to the Limitation of Liability of Owners of Seagoing Vessels. This is commonly referred to as the Brussels Convention of 1924. The United States was not a party to that Convention.

In 1957 thirty two nations, including the United States, sent delegations to the Tenth Conference on Private Maritime Law convened at Brussels. A new Convention on Limitation of Liability was drafted designed to replace the Brussels Convention of 1924. The new Convention, commonly referred to as the Brussels Limitation Convention of 1957, was signed by many leading maritime nations of the world. It was not signed by the United States and is as yet not the law of this country.

Without going into detail (copy of the Convention can be found in 6 BENEDICT, ADMIRALTY (Supp. 1961, at 46-51)) the Convention fixes the limit of liability on the basis of the tonnage of the vessel with no regard to the vessel's value. The limit of liability where only property damage claims are involved is $67 per ton. If only personal injury or death claims result from the occurrence the limit is $207 per ton. If both property damage and personal injury or death claims result the maximum liability is $207 per ton, the first $140 to be applied to the personal injury and death claims and the balance of $67 to be applied ratably to property damage claims and any unpaid balance on personal injury or death claims.

Among the nations signing the 1957 Convention are Argentina, Australia, Austria, Belgium, Brazil, Canada, Denmark, Egypt, Finland, France, West Germany, Great Britain, Greece, Italy, Japan, Netherlands, Norway, Portugal and Spain. A complete list will be found in 6 BENEDICT, ADMIRALTY (Supp. 1961, at 46).

There is a conflict among the members of the admiralty bar as to whether the United States should become a party. In October 1961, a committee of the Maritime Law Association of the United States filed a divided report on the question of whether the 1957 Convention should be adopted by this

refused to accept the principle of limitation as a part of the general maritime law they would enforce.[6] But it has been a most significant aspect of the maritime law of this country since the enactment by Congress of the Limitation of Liability Act of 1851.[7] Under that act the liability of the owner of a vessel for any loss which was occasioned without the *privity or knowledge*[8] of the owner was limited to the value of his interest in the vessel and pending freight.[9]

The Act of 1851 has been amended from time to time and has been supplemented by Admiralty Rules adopted by the United States Supreme Court which spell out the limitation process and procedure.[10]

By far the most important amendment to the act was made in 1935 following the great loss of life in the *Morro Castle*[11] disaster.

---

country. The majority of the committee recommended adoption and noted that legislation was currently before committees of Congress looking to that end. A minority membership of the committee opposed the adoption of the Convention. For a copy of the majority and minority reports, see THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, REPORT OF THE COMMITTEE ON SHIPOWNERS' LIMITATION OF LIABILITY AND THE COLLISION AND ARREST OF SHIPS CONVENTIONS No. 450 (Oct. 23, 1961). Those opposing the adoption of the 1957 Convention assert that it favors shipowners and is unfavorable to claimants. Those supporting the Convention state that its adoption will further international uniformity on the subject of Limitation of Liability.

At the annual fall meeting of the Maritime Association held in New York City on November 3, 1961, that association by a vote of 157 to 111 adopted a resolution approving "the basic principles of the Brussels Limitation of Liability Convention of 1957 and the legislation proposed to carry it into effect." See THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, REPORT No. 452, at 4852-53 (Feb. 1962).

[6] See the opinion of Justice Woodbury in New Jersey Steam Nav. Co. v. Merchants' Bank, 47 U.S. (6 How.) 344, 434 (1848).

[7] See REV. STAT. § 4283 (1875), for the original act, and 49 Stat. 1479 (1936), 46 U.S.C. §§ 181-89 (1958), for the act as now amended.

[8] There has been much litigation involving the interpretation to be placed on these italicized words. Suffice it to say at this time that when a vessel is owned by an individual and his own negligence causes the loss there will be no right of limitation. If the vessel is owned by a corporation, liability may not be limited "where the negligence is that of an executive officer, manager or superintendent whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred. . . ." See opinion of Justice Douglas speaking for the Court in Coryell v. Phipps, 317 U.S. 406, 410 (1943). For an extended discussion of the construction placed on the words "privity or knowledge," see 3 BENEDICT, ADMIRALTY §§ 489-90 (6th ed. 1940).

[9] Justice Holmes expressed the limitation idea as follows: "The notion as applicable to a collision case seems to us to be that if you surrender the offending vessel you are free, just as it was said by a judge in the time of Edward III, 'If my dog kills your sheep and I freshly after the fact tender you the dog you are without recourse against me.' Fitz. Abr., Barre, 290." Liverpool, Brazil & River Plate Steam Nav. Co. v. Brooklyn E. Dist. Terminal, 251 U.S. 48, 53 (1919).

[10] ADMIRALTY RULES 51-55.

[11] In the early morning of September 8, 1934, the $5,000,000 luxury cruise

Under the amendment the minimum liability of the shipowner of a seagoing vessel, as defined in the amending act, for personal injury or loss of life is fixed at $60 per ton of the vessel's gross tonnage. Thus, even though the vessel may be a total loss, personal injury and death claimants have the benefit of a certain limitation fund, provided, of course, that the shipowner is solvent. Property damage claimants are not protected by the tonnage limitation fund and, in the event of a total loss of the vessel and freight, have no recourse, unless there has been such privity or knowledge on the part of the shipowner as would deny him the right of limitation as to all types of claimants.

Except for the $60 per ton provision, the liability of the owner in an appropriate case is limited to his *interest* in the vessel and pending freight. In one of its early five to four decisions in the admiralty field the Supreme Court held that hull insurance recovered by the owner of a vessel which had been lost was not an interest in the vessel reachable by claimants in a limitation proceeding.[12] There

ship, *Morro Castle,* after completing a Caribbean cruise, was but a few hours sailing distance from New York when it was swept by a totally devastating fire which resulted in the loss of 134 lives. (Tragedy had already struck the steamer the night before by the sudden death of her master, Captain Robert T. Wilmot.) For weeks the charred hulk of the *Morro Castle* lay beached on the sands off of Asbury Park, New Jersey. There was no value in the burned out hulk and on a limitation petition the vessel's owners sought to limit their liability to $20,000 which represented passenger fares and freight after deducting expenses of caring for persons who had reached shore. Claims totalling $13,500,000 were filed and the right to limitation was contested. Prior to trial the litigation was settled by the ship's owners paying into a settlement fund $890,000. This amount was then apportioned among the claimants all, except three who were separately settled with, having approved the settlement agreement. Valuations of the claims were fixed by a committee provided for in the settlement and the total claims as finally valued amounted to $1,450,000. As a result, claimants received approximately 60% of the valuations put on their claims. For further details, see Morro Castle (Settlement), 17 Am. Mar. Cas. 895 (S.D.N.Y. 1939).

[12] The City of Norwich, 118 U.S. 468 (1886). The majority were of the opinion that "insurance which a person has on property is not an interest in the property itself, but is a collateral contract, personal to the insured, guaranteeing him against loss of the property by fire or other specified casualty, but not conferring upon him any interest in the property." The dissenters deemed it eminently unjust that the shipowner be made whole by collecting the full value of the vessel through hull insurance while the claimants received little or nothing.

It is of interest to note that the *Morro Castle's* hull was insured for $4,200,000. Of that insurance $2,600,000 went to the United States as mortgagee. This left $1,600,000 of the hull insurance which, if it had been available to the claimants, would have fully taken care of their claims which were finally valued at $1,450,000, as set out in note 11 *supra.*

It also is not amiss to observe that the owners of the *Morro Castle* were

has been no departure from that view either by way of judicial decision or legislation.

The original act of 1851 made no special reference to foreign as distinguished from domestic shipowners. It simply conferred the right of limitation on the "owner or owners of any ship or vessel."[13] However, the Supreme Court, both prior to and in the litigation arising out of the fateful voyage of the *Titanic,* held that a foreign shipowner who is sued in the American courts may invoke the limitation provisions of the American statute even though the extent of his liability under the law of the ship's flag would be greater.[14]

---

fully reimbursed for the $890,000 they had placed in the settlement fund by the insurance carrier that covered them for personal injury and property damage. See Morro Castle (P. & I. Insurance), 18 Am. Mar. Cas. 366 (S.D.N.Y. 1940).

[13] Note 7 *supra.*

[14] The Scotland, 105 U.S. 24 (1881). A British vessel, *The Scotland,* collided with an American vessel, *The Kate Dyer,* and both sank as a result of the collision. In an *in personam* suit against the owners of *The Scotland* limitation was permitted under the American statute.

La Bourgogne, 210 U.S. 95 (1908). On July 4, 1898, the French vessel *La Bourgogne* sank at sea following a collision with a British ship. Most of the passengers and crew on board were lost. A multiplicity of suits against the owners of the *La Bourgogne* followed in both federal and state courts. In line with the rule declared in *The Scotland,* the owners of the *La Bourgogne* were allowed to limit their liability in accordance with the American act. The litigation in this case lasted over a period of ten years.

The landmark decision in this area is the opinion of Justice Holmes in The Titanic, 233 U.S. 718 (1914). In the early morning hours of April 15, 1912, that much heralded "unsinkable" vessel was lost at sea while making her maiden voyage. At 11:40 P.M. of the 14th the pride of the White Star Line collided with an iceberg. In less than three hours, she and over 1,500 of the 2,200 persons who had sailed with her lay beneath the chill waters of the Atlantic. The roster of passengers included a veritable social register. Colonel John Jacob Aster, Benjamin Guggenheim, Washington Roebling, II, George Widener and J. B. Thayer were but a few of those elite who went to their graves with the most modern and luxurious vessel of the times. For a fascinating and most vivid account of the *Titanic* disaster, see LORD, A NIGHT TO REMEMBER (1955).

Death claims arising out of the *Titanic* disaster amounted to $22,000,000. The law of England, under whose flag the *Titantic* sailed, at that time provided for a limitation fund based upon the tonnage of the vessel (15 pounds per ton for personal injury and death claims) similar to the limitation fund provided for in the 1935 amendment of the American statute.

But under the American law, *as then in force,* the interest of the owner in the vessel and pending freight *after* the disaster formed the basis of the limitation fund. In the case of the *Titanic* this amounted to $98,000 for pending freight, the vessel being a total loss. The limitation fund under the English law for personal injury and death would have been about $3,750,000.

Justice Holmes, speaking for the Court, held that when a claimant seeks relief in American courts he must accept as controlling the American law of limitation. Thus, for all practical purposes, recovery was denied the claimants. Curiously enough, however, it is interesting to note that had the claimants sued in England they also would not have recovered any

And when the $60 per ton amendment was enacted in 1935 for personal injury and death claims it was specifically made applicable to both American and foreign shipowners.[15]

Meanwhile, in 1920, Congress had enacted the Death on the High Seas Act.[16] That statute creates a cause of action for a wrongful death caused on the high seas more than a marine league distant from the shore of any state, the District of Columbia, or any territory of the United States. However, the statute specifically provides that if a right of action for such wrongful death is granted by the law of any foreign state such right may be maintained in an admiralty court of the United States but *without abatement* in respect to the amount for which recovery is authorized notwithstanding any statute of the United States to the contrary. By virtue of the last stated provision, it has been held in the second circuit that claimants suing for death resulting from the sinking of a British vessel on the high seas in a single ship disaster were not subject to the limitation provisions of the American Limitation Act.[17]

---

substantial sums because the passenger tickets contained clauses relieving the shipowners from all but nominal liability which stipulations British courts enforced. See 3 BENEDICT, ADMIRALTY § 486 (6th ed. 1940).

[15] 49 Stat. 960 (1935). In the following year the amendment was further clarified and procedural steps indicated. See 49 Stat. 1479 (1936), 46 U.S.C. § 183(b) (1958).

As appears from the cases referred to in note 14 *supra,* when a petition for limitation of liability was filed in an American admiralty court the Supreme Court has applied the American act. Nevertheless, despite those cases and the 1935 amendment, when foreign vessels are involved, or the damage is sustained in foreign waters, the careful proctor does not merely invoke the American limitation act in his petition but pleads foreign statutes or conventions which might conceivably be held applicable. Thus, for example, at the time of the litigation following the *Andrea Doria-Stockholm* disaster in 1956, proctors for the Swedish line prayed for limitation under the American statutes, the Brussels Convention of 1924 and the Swedish law using the "and/or" terminology. Proctors for the Italian line in their petition prayed for limitation as provided in the American statutes "or in any applicable Convention or Foreign law." Settlement of the litigation forestalled a court ruling but it was generally assumed the American law of limitation would apply in line with the authorities cited in the footnote just preceding.

[16] 41 Stat. 537 (1920), 46 U.S.C. §§ 761-67 (1958).

[17] The Vestris, 53 F.2d 847 (S.D.N.Y. 1931). There is no Supreme Court decision on this point. However, it would appear that if the Death on the High Seas Act had been in force at the time of the *Titanic* litigation the death claimants would not have been barred under the then limitation provisions of the American act but would have had the benefit of the tonnage provisions of the English statute limiting the liability of shipowners. See note 14 *supra.* Whether the Supreme Court would have enforced the stipulation contained in passenger tickets which relieved the shipowner of all but nominal liability, see note 14 *supra,* is a matter of conflicts of law. Much

In connection with the possible effect of foreign law on limitation under our American statute, reference should be made to a five to four decision rendered by the Supreme Court in 1949.[18] The American vessel *Norwalk Victory* was proceeding down the Schelde River in Belgium when it collided with and sank the British ship, *Merganser*. Owners of cargo lost on the *Merganser* sued in a federal court in New York. A limitation petition was filed and although the admitted value of the *Norwalk Victory* was $1,000,000 the petitioner deposited a bond in the amount of only $325,000. This was done on the theory that under the law of Belgium where the tort occurred the petitioner's maximum limit of liability was $325,000. Cargo owners claimed the bond filed was inadequate and the district court, without determining the nature of the Belgian law, dismissed the limitation petition. The court of appeals affirmed the dismissal.

On certiorari the Supreme Court, speaking through Justice Frankfurter, reversed the lower courts and remanded the case to the district court with instructions that it determine the nature of the Belgian law applicable. If on so doing the district judge found that under Belgian law the substantive limit of liability was $325,000, then a bond in that amount should be accepted. If, on the other hand, he found the Belgian limitation of $325,000 was merely procedural, then he should exact a bond for $1,000,000 in accordance with the American statute. As Justice Frankfurter saw it, if Belgian law created no greater liability than $325,000, to require a larger bond would disregard the principle that "the right to recover for a tort depends upon and is measured by the law of the place where the

would have depended on the theory the Court chose to adopt, *i.e.*, place of contract, intention of parties, law of forum, etc. Such stipulations in passenger contracts which either exempt the shipowner of all liability for negligence or limit the extent of his liability have been deemed contrary to the public policy of the United States but have been enforced in England. In 1936 Congress expressly provided that any such stipulation was against public policy and null and void. 49 Stat. 1479 (1936), 46 U.S.C. § 183(c) (1958). This provision has been enforced by the lower courts in cases involving foreign shipowners. See Hawthorne v. Holland-American Line, 160 F. Supp. 836 (D. Mass. 1958). For a discussion of the conflicts of law problem raised in this type of case, see ROBINSON, ADMIRALTY § 78 (1939).

While the decision in *The Vestris* denying the British owner the benefit of the American limitation act as to death claims was affirmed, 57 F.2d 176 (2d Cir. 1932), the question became moot because the district court then rendered an opinion that the right to limit should be denied anyway by reason of the owner's privity or knowledge. 60 F.2d 273 (S.D.N.Y. 1932). Thereupon the claims were settled and further litigation eliminated.

[18] Black Diamond S.S. Corp. v. Robert Stewart & Sons, Ltd., 336 U.S. 386 (1949).

tort occurred."[19] In the meantime, since the Belgian law has not yet been determined, a bond for $1,000,000 should be required in case the Belgian limitation be found to be merely procedural.

The four dissenting Justices took the position that when a petition for limitation is filed in American courts the American statute should be complied with and under that statute the bond or limitation fund in this case should have been $1,000,000. Although resort to Belgian law might later reveal that the claimants' substantive right to recovery does not exceed $325,000, that, said the minority, is no justification for rewriting the fund provisions of the American statute so as to permit limitation upon filing a bond for less than one third of the vessel's value. There are no subsequent reports of the case; so in all likelihood the parties negotiated a settlement.

In spelling out the limitation procedure, the Supreme Court provided in Admiralty Rule 53 that in a limitation proceeding the shipowner can set up in his petition facts and circumstances by reason of which he claims exoneration from liability as well as limitation of liability. Persons claiming damages and who file their claims under oath as provided in Rule 52 are given the right to file an answer contesting either the right of the shipowner to exoneration or limitation or both. Thus it is normal procedure for the shipowner to file one petition in Admiralty in which he sets out all relevant facts and prays that he be exonerated from liability but that if the court find him liable that he then be accorded the right of limitation.[20]

Formerly there was no time limit for the filing of the petition and it could be filed after judgment had been obtained by a claimant in any court. Since the 1936 amendment, a petition to limit liability must be filed by the shipowner within six months after the claimant has given the shipowner written notice of the claim.[21]

If a claimant wishes to sue the shipowner *in personam* he may do so either in admiralty where there is no jury, or he may proceed under the "saving to suitors"[22] clause in a common law court where

[19] *Id.* at 396.

[20] Following the *Andrea Doria-Stockholm* catastrophe in 1956 both the Swedish owners of the *Stockholm* and the Italian owners of the *Andrea Doria* filed independent petitions for exoneration and limitation in the United States District Court for the Southern District of New York. The voluminous text of the Swedish petition is set out verbatim in N.Y. Times, Aug. 8, 1956, § 1, p. 16, and makes most interesting reading for any student of admiralty law.

[21] 49 Stat. 148 (1936), 46 U.S.C. § 185 (1958).

[22] Section 9 of the Judiciary Act of 1789, while granting exclusive original

he will have the benefit of a jury trial. When a shipowner files a petition for limitation, he also prays for an injunction restraining the prosecution of claims against him in all courts except the admiralty court where the limitation petition has been filed. The granting of such an injunction results in a concursus of claims in admiralty. Multiplicity of suits is eliminated and the right of claimants to a jury trial is lost. Such concursus is usually desired by shipowners. It is normally unwanted by claimants who, at least in most cases, appear with personal injury or death claims and much prefer the largesse of jurors to the well considered appraisal of an admiralty judge.

In the light of this conflict of interests, it is not surprising to find the Supreme Court endeavoring to favor the shipowner in one instance and the claimant in another. Nor is it surprising to find that the Supreme Court Justices disagree as to which party's wishes are to prevail in a given situation.

Conceivably, the Supreme Court could have declared that in any case when a petition for limitation is filed by a shipowner all claims must be prosecuted in the admiralty court and all actions by claimants in other courts are to be perpetually enjoined. Had the Court done so, every shipowner could have effectively deprived a claimant of his common law remedy with its jury trial by merely filing the limitation petition in every case. But this one sided approach has not been adopted by the Court despite some very broad language in some cases which would seem to indicate complete and sole jurisdiction in admiralty once the shipowner files for limitation.

Various situations may arise. In some it will seem in order to let admiralty proceed. In others the Court, or at least some of its members, would forbid admiralty from being the sole arbiter of a claimant's rights. For example: if limitation is allowed and the fund is inadequate to take care of all claims is the same procedure to be followed when the fund is adequate? Suppose limitation is denied the shipowner because of his privity or knowledge? What if there is only one claimant? In the following pages we will con-

jurisdiction of civil causes in admiralty and maritime jurisdiction to the federal district courts, expressly saved to suitors the right of a common law remedy where the common law is competent to give it. The section was rewritten in the Judiciary Code of 1948, 28 U.S.C. § 1333 (1958), and the "saving" clause now reads, "saving to suitors in all cases all other remedies to which they are otherwise entitled." The rewrite was intended to cover equitable as well as common law remedies, but it must be conceded that more apt language could have been used.

sider the action of the court in the different situations indicated by the sub-titles.

1. Multiple Claims, Limitation Allowed and Limitation Fund Inadequate

In respect to this situation there is no difficulty. The Limitation Act speaks in terms of plurality of claimants. Thus the fund is for the benefit of "claimants" and "all claims and proceedings against the owner" elsewhere are to be enjoined.[23] Claimants are to receive compensation out of the fund "in proportion to their respective losses."[24] The concursus is had; claimants must prove their claims in the limitation proceeding; the admiralty court makes the necessary adjudications and then distributes the fund pro rata. It is this sort of situation the majority is speaking of when in the fairly recent case of *Lake Tankers Corp. v. Henn*[25] the Court said, "It is, therefore, crystal clear that the operation of the [Limitation] Act is directed at misfortunes at sea where the losses incurred exceed the value of the vessel and pending freight."[26]

To deny a concursus in such a situation, the Court said, would be to frustrate the purpose of the act, for "only in this manner may there be a marshalling of all the statutory assets [limitation fund] remaining after the disaster and a concourse of claimants."[27] Where the fund is less than the total claims "*concursus* is vital to the protection of the offending owner's statutory right of limitation."[28] Since there is no disagreement as to this type of case we will proceed with other situations.

2. Multiple Claims—Limitation Denied Because of Privity or Knowledge of Shipowner

If the shipowner does not file a petition for limitation, claimants are free to press their claims in law actions. There is no concursus. If the shipowner does file a petition for limitation and the admiralty court finds limitation should be denied because of the shipowner's privity or knowledge, are the claimants free to proceed with law actions or must they now have their claims adjudicated in admiralty?

This question was first presented to the Supreme Court in 1927. Chief Justice Taft rendered the Court's opinion in the now much

[23] 49 Stat. 148 (1936), 46 U.S.C. § 185 (1958).
[24] 19 Stat. 251 (1877), 46 U.S.C. § 184 (1958).
[25] 354 U.S. 147 (1957).
[26] *Id.* at 151.
[27] *Id.* at 151-52.
[28] *Id.* at 154.

cited case of *Hartford Accident & Indemnity Co. v. Southern Pacific Co.*[29] The shipowner had filed a petition for limitation. A stipulation on which the Hartford Accident & Indemnity Company appeared as surety was filed by the shipowner for the value of the vessel and pending freight. Claims were filed in the limitation proceeding. The district court took proof as to the claims and allowed some in full, others in part. However, the court denied the shipowner's petition to limit on the ground of his privity or knowledge. It then ordered that the stipulated fund be paid into court for pro rata distribution among the successful claimants. The circuit court of appeals affirmed on appeal by Hartford.

On certiorari the contention was made in behalf of Hartford that once the district court had disallowed the limitation petition the power of admiralty was at an end and claimants would have to proceed with their claims in such law courts as might have jurisdiction. It is to be noted that the claimants were content to abide by the action of the admiralty court in adjudicating their claims and it is the surety for the shipowner who objects. This fact should not be lost sight of as we shall point out later on.

In holding that the admiralty court could proceed and fully adjudicate all claims even though limitation had been denied, Chief Justice Taft said,

> It would be most inequitable if parties and claimants, brought in against their will and prevented from establishing their claims in other courts, should be unable to perfect a remedy in this proceeding promptly, and should be delayed, until after the possible insolvency of the petitioner, to seek a complete remedy in another court, solely because the owner can not make his case of personal immunity.[30]

In commenting on the equitable aspects of an admiralty court's power in limitation proceedings, the Chief Justice said,

> It is quite evident . . . that this Court has by its rules and decisions given the statute a very broad and equitable construction for the purpose of carrying out its purpose and for facilitating a settlement of the whole controversy over such losses as are comprehended within it, and that all the ease with which rights can be adjusted in equity is intended to be

[29] 273 U.S. 207 (1927). [30] *Id.* at 217.

> given to the proceeding. It is the administration of equity in an admiralty court.[31]

In concluding the Chief Justice said that the litigation pending in admiralty "may properly be carried to a complete settlement of all claims, without regard to whether the prayer for limitation of liability is denied or not."[32]

Five years later the Supreme Court decided *Spencer Kellogg & Sons, Inc. v. Hicks.*[33] Several workmen had lost their lives by reason of the sinking of the *Linseed King* in the Hudson River. Various actions at law had been instituted as well as workmen's compensation suits. The shipowner filed a petition to limit liability. All other actions were enjoined. Claims were filed in the admiralty court. Limitation was denied. On the power of the admiralty court to adjudicate the rights of claimants the Supreme Court, citing the *Hartford* case, said, "[W]e think that the admiralty court, having taken jurisdiction and brought all claimants into concourse, should have given complete relief."[33a]

Again, as in *Hartford,* the claimants were agreeable that their claims be disposed of in the limitation proceeding and it was the shipowner, whose limitation petition had been denied, that contended certain claimants should be remitted to prosecuting their claims in a state workmen's compensation tribunal rather than in the limitation proceeding.

In 1940 the Court decided *Just v. Chambers.*[34] There were several claimants and limitation sought by the shipowner had been denied by the admiralty court. The particular issue involved was whether a tort action survived against the tortfeasor in admiralty. The district court held it did. The circuit court of appeals was of the opinion it did not. The Supreme Court reversed the circuit and upheld the action. Then in referring to the question of disposition of claims in admiralty when limitation has been denied, the Court, again citing the *Hartford* case, said,

> When the jurisdiction of the court in admiralty has attached through a petition for limitation, the jurisdiction to determine claims is not lost merely because the shipowner fails to establish his right to limitation. . . . There is thus

[31] *Id.* at 215-16.
[32] *Id.* at 220.
[33] 285 U.S. 502 (1932).
[33a] *Id.* at 512.
[34] 312 U.S. 383 (1941).

> jurisdiction to fulfill the obligation to do equity to claimants by furnishing them a complete remedy although limitation is refused.[35]

It should be noted again that in the *Chambers* case, as in *Hartford* and the *Linseed King,* it was the shipowner who was opposing recovery in admiralty. The claimants, having been brought into admiralty, now desired that court to give relief.

Whether, in a case where the shipowner's limitation petition is denied, the individual claimants will be free to prosecute their actions at law has not as yet been determined by the Supreme Court. It is one thing to say that a shipowner who has invoked the jurisdiction of admiralty through his limitation petition must abide by the action of that court in disposing of the many cornered controversy even if limitation is denied. It is quite another to say that a shipowner, by invoking admiralty's jurisdiction through a petition to limit liability which is found without merit, may deny to claimants their own desire to proceed at common law. Particularly would this be true if the vessel were a total loss and no freight was pending. In such a "no fund" case the second circuit has suggested that claimants ought to be free to proceed with their law actions.[36]

3. The Case of the Single Claimant

What is to be the rule if there is only one claimant? Concursus is out of the question. Yet, since one claim may be just as financially devastating to the shipowner as a number of smaller claims, he should have the right to have his liability limited to the value of his interest in the vessel and pending freight irrespective of what tribunal ultimately fixes the amount of the claimant's damages. As is so often the case in admiralty matters, the lower courts differed when confronted with this situation. Some denied the shipowner the right of limitation even though the single claim exceeded the

[35] *Id.* at 386.

[36] See *In re* Wood's Petition, 230 F.2d 197, 199-200 n.10 (2d Cir. 1956), where the court in referring to the *Hartford, Linseed King* and *Chambers* cases said, "However, they merely establish the continuing jurisdiction in admiralty to dispose of the remaining issues after denying limitation and the rights of the *claimants* to insist upon the exercise of such jurisdiction." (Emphasis is by the court.) See also Pershing Auto Rentals, Inc. v. Gaffney, 279 F.2d 546 (5th Cir. 1960), where the court states that when the shipowner is denied limitation the admiralty court may make certain that the claimants, should they so desire, shall be free to proceed with actions at law.

value of the vessel and freight; others allowed limitation.[37] In 1914 the Supreme Court decided the question in favor of the allowance of limitation in admiralty by its decision in the single claim case of *White v. Island Transportation Co.*[38]

In that litigation the claimant had instituted an action in a Washington state court in which she sought to recover $21,350 for personal injuries. In its petition to limit liability the shipowner claimed that the value of the vessel did not exceed $10,000. The claimant challenged the jurisdiction of the admiralty court to entertain a limitation proceeding when only one claimant was involved. She refused to take further steps in the cause. The district court then found the limitation petition was in order and adjudged that the claimant take nothing in the proceeding. The Supreme Court upheld the trial court's action specifically stating that even though there be but a single claim a limitation proceeding in admiralty is in order.

Since the decision in *White,* the Supreme Court has had only one other case before it which involved the question of how to handle the case of the single claimant when the shipowner has sought to limit his liability. That case is *Langnes v. Green*[39] which first appeared in the Supreme Court in 1931 and then reappeared in that Court in 1932 under the title *Ex parte Green.*[40]

Green had sued Langnes, the owner of the vessel *Aloha,* in a Washington state court and sought to recover $25,000 for personal injuries. Four months later, Langnes filed a petition in admiralty to limit his liability to $5,000, the conceded value of the vessel. The district court promptly enjoined Green's action at law and Green filed his claim in the limitation proceeding. There were no other claimants.

Green then moved in the district court for an order dissolving the injunction and urged that he be permitted to proceed in the state court for two reasons: (1) since he was the only claimant a concursus in admiralty was not involved, and (2) Langnes could take advantage of the limitation act by proper pleading in the state court. Green's motion was denied. The admiralty judge then stated that he would first take evidence on liability and, if liability were found, would then consider whether or not under the circumstances the

[37] See collection of cases in 79 U. PA. L. REV. 1103, 1107 (1931).
[38] 233 U.S. 346 (1914).
[39] 282 U.S. 531 (1931).
[40] 286 U.S. 437 (1932).

shipowner was entitled to limitation. On evidence presented by Green the district court found no liability and accordingly entered a decree in favor of the shipowner.

Green appealed to the circuit court of appeals where he also urged two grounds: (1) that since there was but a single claimant the shipowner should have sought limitation in the state court action, and (2) that the record disclosed the privity and knowledge of the shipowner which fact deprived the admiralty judge of jurisdiction. The circuit court of appeals rejected the first contention but held that the pleadings and evidence did establish the privity and knowledge of the shipowner and therefore the district court was without jurisdiction. Accordingly, it reversed.

On certiorari brought by the shipowner, the Supreme Court concluded in its first opinion that *both* lower courts had been in error. The Court set out the following conclusions:

1. Green, as claimant, could properly bring his action in the state court;[41]
2. This being a case of only one claimant, the shipowner, Langnes, could take advantage of the limitation statute by proper pleading in the state action;[42]
3. Notwithstanding this (No. 2 above) the shipowner could also invoke admiralty's jurisdiction by a petition to limit liability;[43]
4. Its jurisdiction having been invoked by the shipowner, the admiralty court could, in its discretion, proceed to dispose of the case or decline to exercise its jurisdiction;[44]
5. In the exercise of a sound discretion, the admiralty court should have dissolved the restraining order and permitted the cause to proceed in the state court;[45]
6. The admiralty court should now dissolve its restraining order BUT should retain the limitation petition as a matter of precaution to be dealt with by it in "the unlikely event that the right of petitioner [shipowner] to a limited liability might be brought into question in the state court, or the case otherwise assume such form in that court as to bring it within the exclusive power of a court of admiralty."[46]

[41] 282 U.S. at 539.
[42] *Id.* at 540-41.
[43] *Id.* at 539.
[44] *Id.* at 541.
[45] *Ibid.*
[46] *Id.* at 541-42.

The Supreme Court then reversed the decrees of both lower courts and remanded the case to the district court for further proceedings in conformity with its opinion.

That counsel and the admiralty judge might be confused by this opinion was a foregone conclusion. In the Court's conclusion numbered 2 above, we were told the shipowner could take advantage of the limitation act by proper pleading in the state court. Then in conclusion numbered 6 above, we are told that the admiralty judge should retain the limitation petition and act on it if by any chance the right to limit might be questioned in the state court.

Complying with the Court's mandate the district court judge dissolved the injunction and retained the limitation petition awaiting to see what would happen in the state court. In the latter court Green forthwith challenged the right of the shipowner to limitation and Langnes promptly called this to the district court judge's attention. That judge then in the light of the conclusions expressed by the Supreme Court (paragraph numbered 6 above), informed Green that if he persisted in attacking the shipowner's right to limit liability in the state court, the district court would reissue the restraining order.

Thereupon, Green applied to the United States Supreme Court for leave to file a petition for a writ of mandamus against the district judge compelling him to conform to the court's opinion. It is the decision of the Supreme Court on this application that is reported under the title of *Ex parte Green.*[47] The Court this time affirmed the action of the district court judge and suggested that the district court give Green further leave to withdraw from the state court his attack on the shipowner's right to limit his liability. Upon Green's failure to so do the admiralty court is to restrain the prosecution of the state court's action.

Following the two *Green* opinions it was still unclear to the lower courts whether in the single claim case the claimant, in order to stay in the state court, had to concede that the shipowner was in fact entitled to limitation or whether he only had to concede the right of the shipowner to litigate in admiralty the question of whether or not he was to be allowed limitation. The better view, which has been adopted by the second circuit, would seem to be that only the right to seek limitation in admiralty need be conceded.[48]

[47] 286 U.S. 437 (1932).

[48] Petition of Red Star Barge Line, Inc., 160 F.2d 436 (2d Cir.), *cert. denied,* 331 U.S. 850 (1947).

Since, in the trial at law, it is conceivable that issues would be determined in establishing negligence which would also deprive the shipowner of the right to limitation, the claimant if he wishes to be free to go on with the law suit should not only agree to the limitation issue being tried out in admiralty but should also agree that any judgment he might obtain in the law action is not to be given a res adjudicata effect in the limitation proceeding.

It must be conceded that the single claim situation is by no means one that can be safely called "settled." Almost thirty years have passed since the second *Green* opinion and in that interval a considerable change of personnel has taken place in the Supreme Court to say nothing of a change in attitudes. Whereas, at one time the Court was much concerned with protecting the interests of the shipowner, in recent years it is the personal injury claimant who has been the favored litigant.[49] The Supreme Court has conferred on jurors the right to call persons "seamen" who obviously are not such but who as "seamen" receive the blessings of jury verdicts.[50] It would not be too surprising to find that in the next single claim case appearing before the Supreme Court that tribunal also leaves to a common law jury the right to accord or deny a shipowner limitation of liability.

4. Multiple Claims—Limitation Petition Filed—Total Claims Less Than Limitation Fund

We have seen under the first sub-title that when a shipowner is entitled to limitation and the claims exceed the limitation fund a concursus in admiralty is necessary in order that the claimants may receive their pro rata shares out of the fund. Should admiralty require a concursus and enjoin actions by claimants at law if it appears that the limitation fund exceeds the possible claims? In 1956 the Supreme Court had this question before it in *Lake Tankers Corp. v. Henn.*[51]

One of Lake Tankers' tugs was pushing a Lake Tankers' barge when it collided with the *Blackstone,* a pleasure yacht. As a result one person on the *Blackstone* drowned and several were injured. Various actions at law were instituted, the demand in the death claim alone being for $500,000. Thereupon, Lake Tankers filed a

[49] See Baer, *At Sea With the United States Supreme Court,* 38 N.C.L. REV. 307 (1960).

[50] *Id.* at 371-78.

[51] 354 U.S. 147 (1956).

petition for limitation and deposited two bonds in the limitation proceedings, one for $118,542, representing its interest in the tug, and another for $165,000, its interest in the barge. These totalled $283,542, considerably less than the demands made in the law actions.

The death claimant then filed a claim in the limitation proceeding for only $250,000 and all other possible claimants filed claims in that proceeding totalling $9,525 so that the claims filed in admiralty were now less than the limitation fund. The claimants also expressly relinquished all right to damages in excess of the amount of their claims as filed in the limitation proceeding and the death claimant allocated $100,000 of her alleged damage to the tug and $150,000 to the barge. Stipulations were entered into assuring that these amounts would not be increased, that no judgment would be entered in excess of these claims, and that the judgment in the law actions would not be res adjudicata as to the right of Lake Tankers to limit its liability in the event the state court should pass upon facts determinative of that issue.

The district court then vacated the restraining order on the ground that the limitation fund exceeded the amount of the claims. The court of appeals affirmed and provided in its order for the appropriate protection of Lake Tankers in the event the jury found that either the barge or the tug was solely responsible.[52]

On certiorari the majority of the Supreme Court upheld the lower courts' action. After recognizing the rule that concursus is necessary where the fund is less than the total claims the court said,

> On the other hand, where the value of the vessel and the pending freight, the fund paid into the proceeding by the offending owner, exceeds the claims made against it, there is no necessity for the maintenance of the concourse.[53]

[52] The order of the court of appeals provided, "If the claimant obtains a judgment in her state court suit for an amount in excess of $100,000, an injunction will issue permanently enjoining her from collecting such excess unless the judgment rests on a special verdict allocating the amount as between the libellant as owner of the tug and as owner of the barge respectively. Thus, if the judgment exceeds $100,000 and the jury finds libellant liable solely as owner of the tug, she will be enjoined from collecting any excess. If the jury finds that the libellant is liable solely as owner of the barge, she will be enjoined from collecting any amount in excess of $150,000." 232 F.2d 573, 577 (2d Cir.), *reaffirmed on a rehearing by the court sitting in banc,* 235 F.2d 783 (2d Cir. 1956).

[53] 354 U.S. at 152. Conceivably there may be cases where there is honest doubt as to the adequacy of the limitation fund to take care of all claims. The Court in its next sentence following the quotation given in the text says,

The fact that the claims as initially filed in the state court exceeded the limitation fund was, to the majority, immaterial.

> While it is true that the claims as initially filed in the state court exceeded the fund created in the limitation proceeding, still when the admiralty court dissolved the injunction against the state suit these claims, as filed in and limited by stipulation and order of the admiralty court in the limitation proceeding, aggregated less than the fund.[54]

Since the state court proceedings could have no possible effect, under the circumstances, on the shipowner's right to limitation the majority sees no reason for depriving claimants of their right to a jury trial at law. Justice Clark, speaking for the Court, calls attention to the fact that an airline, a bus company, or a railroad cannot compel a concursus and deprive claimants of their right to jury trial but must suffer a multiplicity of suits. With the limitation right of the shipowner protected, he sees no reason why it should be treated more favorably than these other common carriers. Any language of the Court in other cases to the effect that "concursus is the heart of the limitation system" refers only, says Justice Clark, to "those cases where the claims exceed the value of the vessel and the pending freight."[55]

Justice Harlan spoke for the dissenters. His position is that at the time the limitation petition was filed the total claims asserted in the law actions far exceeded the value of both the tug and barge. Limitation therefore was in order. Subsequent steps taken by claimants to reduce their demands below the limitation fund should not defeat the full operation of the limitation proceeding any more than a subsequent reduction of the demand of a plaintiff, whose case has been removed to the federal court because of diversity, will result in a remand to the state court.

Summarizing the Court's action in regard to the situations which have been presented to it as set out in the above four sub-titles we may conclude:

"This is not to say that *concursus* is not available where a vessel owner in good faith believes the fund inadequate, but here there is no contention that there might be further claims; the value of the vessels is undisputed and the claims are fixed; it follows indubitably that the fund is sufficient to pay all claims in full." It would seem that, irrespective of the good or bad faith of the shipowner, wherever it is made to appear that the total claims may exceed the limitation fund a concursus in admiralty should be required.

[54] *Ibid.*

[55] *Id.* at 154.

1. The right to determine whether or not a shipowner is to be permitted to limit his liability to his interest in the vessel and pending freight is only to be determined by the admiralty court on petition filed by the shipowner.
2. If the total claims exceed or may exceed the limitation fund, suits at law are to be enjoined and the claims will be passed upon in a concursus by the admiralty court.
3. When because of his privity or knowledge a shipowner has been denied the right to limit his liability claimants may proceed to have their claims adjudicated in the limitation proceeding despite the wishes of the shipowner to the contrary.
4. Whether, when a shipowner has been denied limitation because of his privity or knowledge, claimants may proceed with their actions at law has not as yet been determined by the Supreme Court. It would seem that if claimants are free to proceed in their law actions when their claims do not exceed the limitation fund (sub-title 4) they should also be free to do so when the admiralty court has determined that the shipowner is not entitled to limitation at all.[56]
5. In the case of a single claimant admiralty will not enjoin claimant's action at law provided the right to limitation is conceded to the admiralty court and the judgment in the law action is not to be given a res adjudicata effect in the limitation proceeding.
6. When the amount in the limitation fund clearly exceeds the total claims possible claimants will be free to prosecute their actions at law upon the stipulation that judgments in the law actions are not to be given res adjudicata effect as to the right to limitation in the admiralty proceeding.

5. Are Cross-Claims by the Petitioner or by Claimants Permissible in Limitation Proceedings?

Prior to 1957 the lower federal courts had been in disagreement as to whether a limitation proceeding was purely defensive in character or whether in such a proceeding the party seeking limitation could obtain an affirmative judgment against a claimant and whether

[56] See court of appeals cases cited in note 36 *supra.*

one claimant could obtain affirmative relief against another claimant.[57] Irrespective of which view was taken, it was generally conceded that the decision of the limitation court on the issue of liability was res adjudicata in subsequent actions brought for affirmative relief.[58] In 1957 the question was first passed upon by the Supreme Court in *British Transport Commission v. United States.*[59] In a six to three decision the majority sustained the right to affirmative relief in each such instance. Because, in this case of first impression, affirmative relief was given against a foreign claimant in a limitation proceeding a detailed examination of the facts and the procedure followed is in order.

On May 6, 1953, a collision occurred in the English Channel between the United States navy transport, *Haiti Victory,* and a British owned ferry, the *Duke of York.* The latter vessel sank as a result and several persons lost their lives while many were injured. The value of the *Duke* before the collision was $1,500,000. The *Haiti,* which sustained damage to the extent of $65,000, returned to the United States and a petition for exoneration or limitation of liability was filed by the United States in a federal district court in Virginia. The British Transport Commission, which was the owner of the *Duke,* filed a claim in the limitation proceeding for $1,500,000 and denied any responsibility for the accident which it asserted was solely caused by the negligence of the *Haiti* with the privity or knowledge of her owner.

While the *Haiti* had sustained damage, as aforesaid, no claim was made in the limitation proceeding by the United States against the owner of the *Duke* initially because it was thought that the *Duke* was a British government vessel and that no claim could be made by virtue of the "Knock for Knock" agreement.[60] Subse-

[57] In support of the defensive theory, see The Steel Inventor, 24 Fed. 657 (2d Cir. 1928). Favoring affirmative relief for one claimant against another was Judge Dobie's opinion in British Transp. Comm'n v. United States, 230 F.2d 139 (4th Cir. 1956).

[58] See British Transp. Comm'n v. United States, *supra* note 57; Algomo Central & Hudson Bay Ry. v. Great Lakes Transit Corp., 86 F.2d 708 (2d Cir. 1937).

[59] 354 U.S. 129 (1957).

[60] This belated filing is explained by the Supreme Court: "The United States had not filed a cross-claim against the *Duke* for damage to its vessel because, as it alleges, its counsel felt that it had waived recovery of any claim against a vessel of the British Government by virtue of the 'Knock for Knock' Agreement, 56 Stat. 1780, E. A. S. 282, Dec. 4, 1942. Subsequently, while the appeal was pending, the British Government advised that it did not consider the *Duke* as a government vessel. Consequently, following the

quently, while an appeal was pending in the court of appeals the United States was informed the *Duke* was not a British government vessel and following the court of appeals decision the United States filed a cross-claim against the British Transport Commission in the limitation proceedings before the district court.

Various claimants filed against the United States in the limitation proceedings and at the same time filed cross-claims against the British Transport Commission as owner of the *Duke*. The district judge dismissed the cross-claims against the Commission on the ground that a limitation proceeding did not afford one claimant the right to seek affirmative relief against another claimant. In due course the district court found that the accident was solely due to the negligent operation of the *Duke*. On appeal by the Commission and other claimants to the court of appeals it was held that the district court's action in exonerating the *Haiti* should be affirmed, that the sole responsibility was on the *Duke* in traveling at excessive speed when in a fog bank, and that the cross-claims of other claimants filed against the Commission should not have been dismissed. The case was remanded by the court of appeals to the district court. Nothing was said by the court of appeals as to the right of the Commission to file a petition to limit its liability to the cross-claimants.

On certiorari the Supreme Court majority affirmed the action of the court of appeals. The basic theory of the Supreme Court is expressed in the following language of the majority:

> It appears to us, therefore, that fairness in litigation requires that those who seek affirmative recovery in a court should be subject therein to like exposure for damage resulting from their acts connected with the identical incident. The claimants here ask no more.[61]

Whether such recovery against a claimant in a limitation proceeding be permitted by analogy to Admiralty Rule 56 which allows cross-claims in libel proceedings, or whether by virtue of Admiralty Rule 44, a district court could provide for the allowance of cross-claims in limitation proceedings under its limited power to regulate practice in a manner not inconsistent with other Admiralty Rules,

Court of Appeals decision, the United States filed a cross-claim against the *Duke* in the proceedings before the District Court." 354 U.S. at 132.

[61] *Id.* at 142.

is not considered material. The Commission is held subject to cross-claims because it entered the limitation proceeding seeking affirmative relief. Jurisdiction to award a judgment in favor of the Commission is deemed to encompass jurisdiction to award a judgment against the Commission. Accordingly, the case is remanded to the district court where the cross-claims of claimants and the claim of the United States for damages to the *Haiti* are to be entertained. Although, like the court of appeals, nothing was said by the Supreme Court as to the right of the Commission to limit its liability, it is to be presumed that such procedure will be allowed and is probably contemplated in the closing words of the majority: "Other questions of procedural detail raised by petitioner we leave to the trial courts."[62]

Justice Brennan, writing for the three dissenters, notes that while Admiralty Rule 56 authorizes cross-claims in libel actions it does not purport to cover limitation proceedings. He accordingly is of the opinion that if cross-claims are to be allowed in limitation cases amendment to the Admiralty Rules is required. Further, he finds it most inequitable for the Supreme Court to *announce for the first time* in this case of a foreign claimant that because it filed in the limitation proceeding it now may have an affirmative judgment rendered against it. He sets out in detail the notice given advising claimants to file their claims in the limitation proceedings and stresses the fact that nothing in the notice indicated a possibility of an affirmative judgment against a claimant who filed in response to the notice. Further, he points out that under British law the Commission had defenses available against passengers which it would not have in an American court. Finally, the minority concludes that the majority "denies equity in the name of equity"[63] when it holds that the Commission, which had no notice it would have to defend cross-claims, must now litigate such claims in the limitation proceeding.

Although it is conceivable that had the Commission known it would have been subject to cross-claims it might not have filed in the limitation proceedings, one thing is certain—and that is that hereafter parties making claims in limitation proceedings will do so with the knowledge that affirmative judgments may be obtained against them either by other claimants or by the party who initiated the limitation proceeding. Whatever inequity one may find in the

[62] *Id.* at 143.

[63] *Id.* at 146.

case of the Commission, such inequity cannot be asserted by future claimants. It must be conceded that all claims between parties to a limitation proceeding which arise out of the same incident should be disposed of in one proceeding. The decision of the majority has cleared the way for such effective practice.

Indemnity Rights of Shipowners Against Stevedoring and Other Landbased Contractors

In 1946 the Supreme Court decided *Seas Shipping Co. v. Sieracki.*[1] As a result of that decision and those following it, a shipowner is liable to an employee of a stevedoring or ship refitting company who is injured on board the vessel by reason of the unseaworthiness of the vessel or the shipowner's negligence. Since the employee's injuries may well have been caused by both the negligence of his own employer, as well as the unseaworthiness of the vessel or negligence of the shipowner, the question of the shipowner's right to contribution or indemnity against the negligent employer was bound to arise.

In 1952 the problem was presented to the Court in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*[2] Baccile, an employee of Haenn, was injured while making repairs on board a vessel owned by Halcyon. He sued Halcyon in the federal district court alleging his injuries were due to Halcyon's negligence and the unseaworthiness of its vessel. On the theory that Haenn's negligence had contributed to the injuries, Halcyon brought in Haenn as a third party defendant and sought contribution. The district court allowed evidence as to the degree of negligence of the parties. The jury verdict established that Haenn was 75% at fault and Halcyon 25%. Baccile recovered a judgment of $65,000.

The district court[3] refused to apportion the damages on the basis of the percentage findings above but held that the damages should be shared equally by Haenn and Halcyon. The court of appeals[4] sustained the right of Halcyon for contribution but it held that Haenn's contribution could not exceed the amount for which it would be liable to Baccile under the Longshoremen's and Harbor

[1] 328 U.S. 85 (1946). For a discussion of this case and those following it, see Baer, *At Sea With The United States Supreme Court,* 38 N.C.L. Rev. 307, 352-65 (1960).
[2] 342 U.S. 282 (1952).
[3] 89 F. Supp. 765 (E.D. Pa. 1950).
[4] 187 F.2d 403 (3d Cir. 1951).

Workers' Act. On certiorari the Supreme Court divided seven to two. The majority held that in the absence of legislation providing for contribution the Court would not fashion such a rule. Justice Black, speaking for the majority, pointed out that common law courts have generally held they cannot on their own initiative create an enforceable right of contribution among joint tortfeasors. Further, the Court indicated that if contribution were to be awarded the question would arise whether contribution should be based on the percentage degrees of fault, on a fifty-fifty basis irrespective of differences in degree, or whether the employer's contribution should be limited to the amount he would be called upon to pay under the Longshoremen's and Harbor Workers' Act. Such a policy determination, the majority thought, should be left for legislative action. The result of the Court's decision was to make the shipowner, who was only 25% to blame, pay 100% of the loss. Dissenting Justices Reed and Burton believed the district court was correct in making Haenn and Halcyon each share one half of the loss.

The following year, 1953, the Supreme Court again refused to allow contribution under similar circumstances in *Pope & Talbot, Inc. v. Hawn.*[5] Hawn, a carpenter, employed by Haenn Ship Ceiling & Refitting Corporation was injured when he fell though an open hatch hole on board one of Pope & Talbot's vessels. He sued Pope & Talbot both on the grounds of unseaworthiness and negligence. Pope & Talbot brought in Haenn as a third party defendant against whom it sought contribution. A jury found that both Haenn and Pope & Talbot had been negligent, that the vessel was unseaworthy, and that Hawn had contributed 17½% of his damage by his own negligence. Hawn's total damage was found to be $38,000.

The district court[6] accordingly entered a judgment for Hawn in the amount of $29,700 making the necessary deduction for Hawn's own negligence. It also entered a judgment in favor of Pope & Talbot and against Haenn for contribution in the amount of $8,331 which was the extent of Haenn's liability under the Longshoremen's and Harbor Workers' Act. The court of appeals[7] reversed the judgment for contribution on the authority of the Supreme Court's decision in the Halcyon case discussed above. On certiorari the Supreme Court now divided six to three. The majority affirmed the court

[5] 346 U.S. 406 (1953).
[6] 100 F. Supp. 338 (E.D. Pa. 1951).
[7] 198 F.2d 800 (3d Cir. 1952).

of appeal's reversal of the contribution judgment on the authority of *Halcyon.* The dissenters did not discuss the contribution aspect. They were of the opinion that no recovery should have been allowed Hawn in the first instance on the ground that he was not the type of person entitled to the benefit of the *Sieracki* doctrine.

Despite the suggestion of the Court, Congress failed to take any action to relieve the inequitable results of the *Halcyon* and *Pope & Talbot* cases. The absolute liability of the shipowner for unseaworthiness and the fact that its vessel could easily be rendered unseaworthy without its knowledge by the acts of a land based contractor created a situation which cried out for relief. The old adage that "there is more than one way to skin a cat" was soon to make itself felt. If tort law was not to be modified so as to give the shipowner relief by way of contribution, there still remained the possibility of utilizing implied indemnity principles of contract law. The landbased operator, be it a stevedoring company or ship refitting company, normally enters into a contract with the shipowner for the performance of services. Conceivably the contract may include express terms whereby the landbased operator agrees to indemnify the shipowner for any damages he may be called upon to pay by reason of the acts of said operator. If the contract contains no such express terms, it is not too great a stretch of the imagination to read into it implied indemnity provisions.

That is exactly what was done three years later in 1956 by the Supreme Court in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*[8] By using the contract formula relief was given the shipowner which had been denied him when the problem was looked upon as one of contribution between joint tortfeasors. The change was effected by a narrow margin. The Court divided five to four. As might be expected the majority opinion is written by Justice Burton, one of the dissenters in *Halcyon,* while the dissenting opinion is written by Justice Black who had spoken for the majority in that case. A close analysis of the fact situation and the reasoning of the majority in *Ryan* is in order.

Pan-Atlantic Steamship Corporation operated the vessel *Canton Victory.* As evidenced by letters, but without a formal stevedoring contract or indemnity agreement, Pan-Atlantic engaged Ryan Stevedoring Company to load and unload its vessel. Part of the cargo

[8] 350 U.S. 124 (1956).

was a quantity of pulpboard rolls which were insufficiently secured when loaded by Ryan at Georgetown, South Carolina. There was little evidence as to just what took place during the loading although the normal procedure was for it to be done by Ryan's longshoremen under the immediate direction of Ryan's hatch foremen with Pan-Atlantic cargo officers supervising the loading of the entire ship and having authority to reject unsafe loading. When the vessel arrived in New York, Ryan's men proceeded to unload it. One of its longshoremen, Palazzolo, while working on the vessel was injured when one of the pulpboard rolls broke loose and struck him. Palazzolo was not negligent and the cause of the accident was the inadequate securing of the rolls when stowed by Ryan at Georgetown.

Ryan's insurance carrier paid Palazzolo compensation and medical expenses due under the Longshoremen's and Harbor Workers' Act without any formal award and Palazzolo then instituted an action at law against Pan-Atlantic in the New York Supreme Court. The case was removed to the federal district court where Pan-Atlantic filed a third party complaint against Ryan. Palazzolo recovered a verdict of $75,000. The district court[9] dismissed Pan-Atlantic's third party complaint. The court of appeals[10] affirmed the judgment in favor of Palazzolo against Pan-Atlantic. It found ample evidence that the ship was unseaworthy by virtue of improper stowage and also found negligence on the part of Pan-Atlantic in the failure of its cargo officers to properly supervise the safe and careful loading of the vessel. However, the hazardous condition had been produced by Ryan in improperly stowing the rolls and Ryan's negligence is found to be the "primary and active cause of the accident."[11] The court of appeals also found that Ryan was under an implied obligation to perform its work in a reasonably safe manner. This duty it had breached, as a result of which Pan-Atlantic suffered a loss. Accordingly, the court of appeals held Ryan must make good this loss and it ordered judgment entered in favor of Pan-Atlantic against Ryan on the third party complaint reversing the district court in this respect.

On certiorari the Supreme Court initially affirmed the court of appeals decision without opinion by a divided vote of four to four.[12] The case was restored to the docket for reargument before a full

[9] 111 F. Supp. 505 (E.D.N.Y. 1953).
[10] 211 F.2d 277 (2d Cir. 1954).
[11] *Id.* at 279.
[12] 349 U.S. 901 (1955).

Court and again affirmed by a five to four decision.[13] The first question discussed by Justice Burton, who spoke for the majority, was whether or not the language of section 5 of the Longshoremen's and Harbor Workers' Act, which states that the liability of the employer to pay compensation "shall be exclusive and in place of all other liability of such employer to the employee . . . and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death,"[14] prevented a liability against the employer in favor of the shipowner under an indemnity contract. The Court held that this language of the Longshoremen's Act was designed to make the statutory liability of the employer to pay compensation on account of the injury to its employee or anyone claiming under or through him exclusive. It found nothing in the act that prevented a shipowner from enforcing indemnity rights he might have *under a contract* with the employer. Certainly the employer could expressly agree to indemnify the shipowner against loss by reason of the employer's negligence. Had there been such an expressed formal indemnity agreement it would be clear that the shipowner's action against the employer would be bottomed on contract and not founded on tort.

Consequently, the Court then considered the question of whether or not an implied contract of indemnity could be found in the absence of an express indemnity provision. It answered in the affirmative, finding that an agreement to load a vessel necessarily includes an agreement to load it properly and safely. This obligation, the Court said, "is of the essence of petitioner's stevedoring contract."[15] There is in effect a warranty given by the stevedoring company.

> It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product. The shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service.[16]

The last question considered by the Court was whether or not the fact that the shipowner had an obligation to supervise stowage and had the right to reject unsafe stowage should bar recovery by

[13] 350 U.S. 124 (1956).
[14] 44 Stat. 1426 (1927), 33 U.S.C. § 905 (1958).
[15] 350 U.S. at 133. [16] *Id.* at 133-34.

it on the aforesaid indemnity agreement. In holding that there was no bar, the Court declared that the stevedoring company, which had itself been negligent, could not use as a defense to its indemnity obligation the fact that as between the injured longshoreman and the shipowner the latter was liable for failing to discover and correct the improper stowage performed by the stevedoring company.

As to the *Halcyon*[17] case, in which the shipowner failed to get contribution, the Court said that decision was no barrier to the shipowner's right to indemnity because the attempted recovery in *Halcyon* had been predicated on the theory of contribution between joint tortfeasors, whereas *Ryan* is prosecuted and decided on the theory of a right of contractual indemnity residing in the shipowner.

In his dissent, Justice Black, speaking for the Chief Justice and Justices Douglas and Clark, stressed the fact that the liability without fault which is imposed by the Longshoremen's Act was intended to relieve the employer from any other liability by reason of injuries to his employee. He pointed out that under section 33 of that act the employer was to be reimbursed the compensation paid by him out of any recovery the employee might make against a third party. But, he concluded, the end result of the majority's decision is that the "employer is actually mulcted in damages because its employee successfully prosecuted a third-party action."[18]

Justice Black agreed that if the employer had made an express contract, oral or written, in which he had agreed to indemnify the shipowner against payments which it would be called upon to make to the injured employee, the Court would enforce such indemnity agreement because nothing in the Longshoremen's Act forbids the employer from making such an agreement with the shipowner. But there was no such express agreement and, said Justic Black, none was to be implied.

Of further concern to the dissent was the fact that the majority decision not only, according to Justice Black, expunged the employer's limited liability under the Longshoremen's Act, but also made the employee's right to recover against the third party shipowner "a barren promise."[19] Justice Black pointed out that, if the employee accepted compensation under an award, only the employer had the right to sue the third party as statutory assignee of the employee's claim. Under such a proceeding, if the employer, as

[17] 342 U.S. 282 (1952).
[18] 350 U.S. at 141.
[19] *Id.* at 144.

assignee, recovered against the third party, he would first be reimbursed the compensation he had paid plus the costs of the litigation and the excess of the recovery would be paid to the employee. Now, under *Ryan,* if the employer were to bring such third party action against the shipowner he would know that "every dime of the judgment will have to be paid by the employer himself."[20]

It is quite obvious, as Justice Black pointed out, that the employer would not be eager to finance suits against himself. If the employer, out of a sense of duty toward the employee, did sue the shipowner, Justice Black noted that counsel for the employer prosecuting that case would know that, if he happened to win the jury verdict his own client would be the loser, and conversely, if he lost the case his own client would be the winner.

Since under the Longshoremen's Act, as it was at the time of *Ryan,* the employer only had control of the action against the third party if he had paid the employee under an award made under that statute, the employer would tend not to make voluntary payments of compensation but would insist on a formal award. If he should make payments without a formal award he would know that the employee could proceed against the shipowner and a recovery by him would eventually, under *Ryan,* have to be paid by the employer. The net result of the *Ryan* case, according to the dissent, was that employees such as Palazzolo, Sieracki and Hawn would find it practically impossible to have their claims against the third party shipowners prosecuted.[21]

It is very important to note at this point, that Justice Black was writing his dissent in *Ryan* in 1956. In 1959 section 33 of the Longshoremen's Act was amended[22] and the plight of the employee which Justice Black foresaw does not now exist. Under the statute, as it was at the time of *Ryan,* the acceptance of compensation under an award made by the deputy commissioner operated as an assignment to the employer of all right of the person entitled to compensation to proceed against the third party. Out of a recovery by the employer against the third party the employer was first to be secured his payments under the Longshoremen's Act plus the expenses of

[20] *Id.* at 145.

[21] *Id.* at 146.

[22] 73 Stat. 391 (1959), 33 U.S.C. § 933 (Supp. II, 1961). The amendment is a rewrite of section 33. In addition to making the changes indicated in the above text the statute now expressly states in section 933(a) that the person entitled to compensation need not elect whether to receive compensation or to recover damages against the third party.

the third party action and any excess went to the party entitled to compensation.

Today, section 33 of the Longshoremen's Act provides that if compensation is accepted under an award made by the deputy commissioner, the person taking compensation has a period of six months after the award within which to sue the third party if he chooses. If at the end of the six months no suit has been brought by the party getting compensation the third party claim is assigned to the employer. The new statute also provides that out of any recovery made by the employer, the employer is to be secured his payments under the Longshoremen's Act and the expenses of the third party litigation. Any excess in the recovery is to be divided, one fifth to the employer and four fifths to the party entitled to compensation.

Before considering the cases involving suits by shipowners for indemnity against stevedoring companies which followed *Ryan* certain observations are pertinent. *First,* in *Ryan* recovery is predicated on implied terms of indemnity which the Court found existed in a contract between the shipowner and stevedoring company. *Second,* the dangerous condition in *Ryan* which brought about the unseaworthiness of the vessel and the ultimate injury to the employee was all due to the active performance of the employer stevedoring concern in improperly stowing cargo. The negligence on the part of the shipowner which led to its liability to the employee was its failure to discover and have corrected the improper stowage performed by the employer. In this situation, it hardly lay in the employer's mouth to say by way of defense to the indemnity action, "Yes, I carelessly performed the stowage which caused the injury and the resultant liability on your part to my employee, but you should not have let me get by with that negligent sort of work!"

Conceivably an employee of the landbased operator may be injured on board the vessel by reason of a dangerous situation created (1) solely by his employer, (2) solely by the shipowner and (3) jointly by the acts of his employer and the shipowner. It is in the third category that we might reasonably expect the courts to have difficulty.

In 1958 *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*[23] followed *Ryan* to the Supreme Court. Weyerhaeuser had

[23] 355 U.S. 563 (1958).

engaged Nacirema to unload its vessel at both New York and Boston. When the vessel arrived at New York longshoremen employed by Nacirema went on board and erected a temporary shelter of scrap lumber and tarpaulin to protect the winch drivers. Unloading at New York was without mishap and in due course the vessel proceeded to Boston where further cargo was to be unloaded. While customarily winch shelters of the type in question are torn down by the ship's crew before proceeding to sea because they are considered a hazard in the winds at sea, the particular shelter was not taken down but remained on the vessel and was available to Nacirema's longshoremen when the vessel arrived at Boston. Ship officers of Weyerhaeuser admitted that it was carelessness to let the shelter remain up when the ship put to sea.

At Boston Nacirema's employees utilized the shelter. Connolly, one of Nacirema's employees, was injured on board the vessel by reason of a piece of wood falling from the top of the shelter. He sued the shipowner for his injuries basing recovery in one count on negligence and in another count on unseaworthiness of the vessel. The shipowner, Weyerhaeuser, in turn filed a third party complaint against Nacirema alleging that Connolly's injuries were due to Nacirema's negligence and that Nacirema's contract required Nacirema to indemnify Weyerhaeuser if Connolly recovered against it.

The case was tried before a jury which rendered a verdict in favor of Weyerhaeuser on the unseaworthy count and against it on the negligence count. Although the trial judge had told the jury in submitting Connolly's case to them that he would later submit to them the cross action by Weyerhaeuser against Nacirema, he did not do so. Instead, on the coming in of the verdict against Weyerhaeuser on the negligence count, he directed a verdict in favor of Nacirema on the third party complaint. Weyerhaeuser paid the Connolly judgment and took an appeal from the judgment against it in the third party action.

The court of appeals affirmed the trial judge.[24] The theory of that court was that Weyerhaeuser's negligence consisted in failing to remove the shelter on going out to sea from New York and then offering the use of the shelter to Nacirema's workers on arrival in Boston. It said that this negligence on the part of the shipowner was not foreseeable by Nacirema.

[24] 236 F.2d 848 (2d Cir. 1956). Judge Lumbard dissented.

On certiorari the Supreme Court in an unanimous opinion reversed the court of appeals and sent the case back for retrial on the issue of Nacirema's liability to the shipowners. A verdict in favor of Connolly against the shipowner did not, ipso facto, said the Court, mean that the stevedoring company was entitled to a directed verdict in the third party action. Nacirema's contractual obligation to Weyerhaeuser to perform its duties with reasonable safety did not only apply to the handling of cargo, as in *Ryan,* but also to the use of equipment such as the winch shelter. "If in that regard respondent [Nacirema] rendered a substandard performance which led to foreseeable liability of petitioner [Weyerhaeuser], the latter was entitled to indemnity absent conduct on its part sufficient to preclude recovery."[25] Justice Clark, speaking for the Court, proceeded,

> The evidence bearing on these issues—petitioner's action in making the shelter on its ship available to respondent's employees in Boston although it apparently was unsafe, as well as respondent's continued use of the shelter for five days thereafter without inspection—was for jury consideration under appropriate instruction.[26]

The Supreme Court did not reveal to the trial court what kind of instruction should be given to the jury when it submitted the shipowner's claim to them. "Appropriate instructions" were to be given. Judge Lumbard in dissenting in the court of appeals had used such terms as "active" and "passive" negligence. The Supreme Court in concluding its opinion said,

> In view of the new trial to which petitioner is entitled, we believe sound judicial administration requires us to point out that in the area of contractual indemnity an application of the theories of "active" or "passive" as well as "primary" or "secondary" negligence is inappropriate.[27]

Just what negligence on the part of the shipowner would defeat its recovery against the stevedoring company? Some aid may be gathered from the following portion of the Court's opinion,

> While the jury found petitioner "guilty of some act of negligence," that ultimate finding might have been predicated,

[25] 355 U.S. at 567. [26] *Ibid.*
[27] *Id.* at 569.

> *inter alia,* on a failure of petitioner to remove the shelter when the ship left New York, or a failure to correct or warn respondent of a latent dangerous condition known to petitioner when respondent began the Boston unloading. Likewise, the finding might have been predicated on a failure of petitioner during the five days in Boston to inspect the shelter, detect and correct the unsafe condition. Although any of these possibilities could provide Connolly a basis of recovery, at least the latter would not, under *Ryan,* prevent recovery by petitioner in the third party action.[28]

Apparently, the Supreme Court did not wish to declare what conduct on the part of the shipowner would bar recovery on the third party complaint. This task it left to the district judge, advising him only, that if the negligence of the shipowner, as found by the jury, was only the failure to inspect the shelter, detect and correct the unsafe condition during the five days the vessel was at Boston, it could recover against the stevedoring company.

It is clear from the Court's action in *Weyerhaeuser* that certain conduct on the part of the shipowner will preclude it from recovering in an indemnity action against the stevedoring concern. Just what that conduct may be is the unanswered question. Fact situations are rarely the same, and we shall have to await the adjudication of future cases by the Court before generalization can be attempted. It will be interesting to observe if the Court continues to consider the use of such terms as "passive" or "active" as well as "primary" or "secondary" negligence inappropriate as guides for decision. Meanwhile, we pass to a consideration of a further development of the law of shipowners' third party indemnity actions as evidenced by the most recent action of the Court in this field.

Both in *Ryan* and in *Weyerhaeuser* considerable emphasis was placed upon the direct contractual relationship between the shipowner and the stevedoring concern. The obligation to indemnify was implied in the contract entered between the parties. Since *Weyerhaeuser,* and up to the date of this writing, two more shipowner's indemnity cases have been passed upon by the Supreme Court. In neither of these later cases was there a contract existing between the shipowner and the stevedoring company. In the first, *Crumady v. The Joachim Hendrik Fisser,*[29] the vessel had been

[28] *Id.* at 568.

[29] 358 U.S. 423 (1959).

chartered and the contract for stevedoring services was made between the charterer and the stevedoring concern. In the second, *Waterman Steamship Corp. v. Dugan & McNamara, Inc.*,[30] the stevedoring company had been engaged by the consignee of cargo. In both cases the Supreme Court held the indemnity rights recognized in *Ryan* and *Weyerhaeuser* were available to the vessel or its owner despite the lack of contract between it and the stevedoring company.

In *Crumady*, the charterer of the vessel, *Joachim Hendrik Fisser*, had engaged Nacirema Operating Company, a stevedoring concern, to unload the cargo. In the process of unloading, Crumady, one of Nacirema's employees, was injured by the falling of a boom then being operated by Nacirema. Crumady brought a libel *in rem* in admiralty against the vessel. The vessel in turn impleaded Nacirema seeking thereby to obtain indemnification for any loss it might suffer through the suit.

The district court[31] held the vessel liable to Crumady. It found the winch supplied by the vessel and used in unloading was unseaworthy, having been set to cut off at an operating load of six tons when the safe load was three tons. The district court also found that the negligence of Nacirema in operating the unloading equipment was the active and primary cause of the falling of the boom and that its negligence had brought into play the unseaworthy condition of the vessel's equipment. It then held that Nacirema was liable to indemnify the vessel even though there was no contract between Nacirema and the vessel's owners. This right of indemnity, the district court found, arose from a duty Nacirema owed to the vessel to unload it with due care. The court of appeals[32] reversed the judgments of the district court. This reversal was based on a fact finding made by the court of appeals that the ship's equipment was seaworthy and that the falling of the boom was caused entirely by the negligence of Nacirema's employees.

On certiorari the Supreme Court[33] divided six to three. The majority reversed the court of appeals and ordered the judgment of the district court reinstated. While the Supreme Court did not use the terms "active" or "primary," which were used by the district court, it found there was ample evidence that Crumady's injury had

[30] 364 U.S. 421 (1960).
[31] 142 F. Supp. 389 (D.N.J. 1956).
[32] 249 F.2d 818 (3d Cir. 1957).
[33] 358 U.S. 423 (1959).

been caused by an unseaworthy condition of the vessel which had been brought into play by the stevedoring concern. The Court concurred in the district court's judgment for indemnity against Nacirema notwithstanding the absence of a contract between Nacirema and the owners of the vessel. Justice Douglas, speaking for the Court, pointed out that the contract between Nacirema and the charterer had named the vessel to be unloaded and that Nacirema had agreed with the charterer to "faithfully furnish such stevedoring services."[34] The vessel is said by the Court to be a third party beneficiary of that contract. The pertinent language of the court is,

> We think this case is governed by the principle announced in the *Ryan* case. The warranty which a stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not. That is enough to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries.[35]

Justice Harlan wrote the dissenting opinion.[36] He concurs in the finding of facts as made by the court of appeals and sees no basis to reverse that finding. As to the indemnity rights accorded the vessel against the stevedoring concern, Justice Harlan also dissents. He interprets *Ryan* as affording the shipowner an indemnity right only if the unseaworthy or dangerous condition was caused by the stevedoring concern. Since, under the majority's own view in *Crumady,* the shipowner was itself responsible for the unseaworthy condition which Nacirema merely brought into play, Justice Harlan does not believe the rule of *Ryan* applies and concludes no indemnity award should be given.

In *Waterman Steamship Corp. v. Dugan & McNamara, Inc.*[37] a stevedore employed by Dugan was injured while engaged in unloading Waterman's vessel, the *Afoundria.* The injury was caused by a vertical column of sugar bags falling on the stevedore because of lack of collateral support. The stevedore sued Waterman in a federal district court. Waterman settled the stevedore's claim and filed a third party complaint against Dugan. It alleged that improper stowage of the sugar cargo, which had been loaded by an-

[34] *Id.* at 428.
[35] *Ibid.*
[36] Justices Frankfurter and Whittaker joined in the dissent.
[37] 364 U.S. 421 (1960).

other stevedoring concern, had created an unseaworthy condition which imposed absolute liability on Waterman for injuries sustained by the stevedore. This unseaworthy condition, Waterman further alleged, had been brought into play by Dugan, in that Dugan failed to perform the unloading services in a safe and careful manner. This neglect on the part of Dugan, contended Waterman, was the direct, proximate, active and substantial cause of the stevedore's injuries.

The district court gave judgment for Dugan on the third party complaint because the contract with Dugan to unload had been made by the consignee of the cargo and not by Waterman. The case was argued three times before the court of appeals, twice when it was sitting in banc. The majority of that court affirmed the district court.[38] It distinguished *Crumady* by pointing out that there the contract with the stevedoring concern had been made by the charterer who operated the vessel. That contract was deemed to enure to the benefit of the vessel in an *in rem* proceeding. It refused to extend *Crumady* to cover the Waterman situation where the contract was neither made by the vessel's owner nor her operator.

On certiorari the Supreme Court was unanimous in reversing the court of appeals. Justice Stewart in speaking for the Court said that *Crumady* was controlling. After referring to the *Ryan* and *Weyerhaeuser* cases, which he said had placed emphasis on the contractual relationship between the shipowner and stevedore, Justice Stewart concluded,

> If those decisions stood alone, it might well be thought an open question whether such contractual privity is essential to support the stevedore's duty to indemnify. But the fact is that this bridge was crossed in the *Crumady* case.[39]

Justice Stewart quoted the Court's language in *Crumady* in which the Court had referred to the vessel as a third party beneficiary of the contract between the charterer and the stevedoring concern. This reasoning he said was also applicable in *Waterman.* In short, the shipowner is deemed to be a third party beneficiary of a contract to unload cargo made between the consignee of the cargo and a stevedoring concern.

---

[38] 272 F.2d 827 (3d Cir. 1959).
[39] 364 U.S. at 423.

Is the Contract Theory Essential to the Shipowner's Recovery?

As a result of the ingenuity of shipowners' counsel, recovery which was denied in *Halcyon* and *Pope & Talbot* is granted in *Ryan* and *Weyerhaeuser* by utilizing the contract existing between the stevedoring concern and shipowner and reading into that contract provisions for indemnity. When, in *Crumady* and *Waterman,* it is found the contract for stevedoring services was not made by the shipowner, relief is obtained by relying on the contract made with the stevedoring concern by the charterer of the vessel or the consignee of cargo and applying to that contract the third party beneficiary doctrine.

Is the contract theory necessary to the shipowner's recovery? It is the writer's opinion that it is not, and that absent a contract the shipowner is entitled to indemnity in the appropriate case. Let us illustrate by taking an imaginary situation. Assume that Shipowner is asked by Acme Motion Picture Company for permission to come on board and take pictures of the loading of the vessel. Shipowner grants permission and Acme comes on board. While Acme is in the process of removing its equipment from the vessel, it negligently creates a dangerous condition on a stairway of the vessel as a result of which a longshoreman employed by the stevedoring company which is unloading the vessel is injured. The longshoreman recovers from Shipowner on the ground that the stairway as left by Acme rendered that portion of the vessel unseaworthy. Has Shipowner no rights against Acme merely because there was no contract?

It is submitted he has a right to be reimbursed the loss which was occasioned to him as a result of the negligent acts of Acme. If Acme had negligently damaged the vessel to the extent of $10,000 while removing its equipment, no one would deny Shipowner's right to recover. If Acme by its negligence imposes a liability on the part of Shipowner to the longshoreman for $10,000, it is submitted that Shipowner is equally entitled to recover. In both instances failure of Acme to exercise due care has imposed a financial loss on Shipowner. In both instances the same relationship exists between the parties. In neither instance is a contract present. There is no sound reason for imposing liability on Acme in the one instance and not in the other.

It is the relationship of Acme to the shipowner and the ship which creates a duty on Acme's part to use due care. That duty is

recognized by law irrespective of contract. The same duty rests on the part of the stevedoring concern which unloads the vessel. It owes an obligation to the shipowner to use due care irrespective of any contract that it may have with the shipowner, charterer or consignee of cargo. If it breaches that duty and thus causes the shipowner to suffer a foreseeable loss, the latter is "entitled to indemnity absent conduct on its part sufficient to preclude recovery."[40]

TOWAGE AND PILOTAGE CONTRACTS

Effect of Exculpatory and Fictitious Employment Clauses

Local state laws may require that vessels maneuvering in state waters be put in charge of pilots licensed by the state.[1] When a vessel is being operated by such a compulsory pilot and it causes damage due to the pilot's negligence the vessel is liable in an action *in rem* but there is no personal liability on the owner.[2] When, however, a vessel is being towed by a tug and due to the sole negligence of the tug the vessel collides with another vessel or otherwise causes damage, neither the towed vessel nor its owners are liable. The sole liability is that of the tug and its owners or operators.[3]

In this state of the law, proctors for tug owners have for many years inserted in towage contracts provisions designed to release the tugs and their owners or operators from liability for negligence and to shift the risks of the operation on the vessel towed. These clauses frequently did not specifically refer to the negligence of the tug or its operators but were in the form of provisions that the towage was done at the "sole risk" of the tow. Conflict occasionally arose in the courts as to whether such a "sole risk" clause should be construed to include losses due to the tug's negligence.[4] Various forms of verbiage were used to overcome this difficulty and to clearly cover loss occasioned by negligence of the tug. Clauses were also inserted in towage contracts which provided that the employees of

[40] We have here used the words of the Court in *Weyerhaeuser* when it was speaking of the consequences of a breach by the stevedoring concern of the duty arising out of the contract between it and the shipowner. See text at note 25 *supra*.

[1] The validity of such pilotage statutes was early established in Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851).

[2] The China, 74 U.S. (7 Wall.) 53 (1868).

[3] Sturgis v. Boyer, 65 U.S. (24 How.) 110 (1860).

[4] See the majority and dissenting opinions in The Oceanica, 170 Fed. 893 (2d Cir. 1909), and the dissenting opinion of Justice Frankfurter in Bisso v. Inland Waterways Corp., 349 U.S. 85, 101 (1955).

the tug became the employees of the tow during the operation and that if the master of the tug went on board the tow and piloted it during the towage he became the servant of the tow.

However, even when there was no question of construction involved and the exculpatory intent of the clauses was clear, the lower federal courts differed as to whether they were valid.[5] The court of appeals of the second circuit consistently upheld such provisions.[6] It stressed the fact that a tug is not a common carrier.[7] The Court of Appeals of the Ninth Circuit declared the exculpatory clauses invalid as against public policy.[8] In 1955 the question of the validity and effect of various kinds of provisions seeking to shift the burden of loss on the tow irrespective of the acts of the tug or its employees was presented to the Supreme Court for decision in a series of three

[5] This conflict arose by reason of contradictory interpretations being placed by lower federal courts on the Supreme Court's decision in The Steamer Syracuse, 79 U.S. (12 Wall.) 167 (1870). Some courts construed the decision as declaring that all contracts exempting the tug from liability are invalid. Other courts took the position that the contract provision in *The Steamer Syracuse* imposed risk of loss on the tow *provided* the tug was navigated with due care, and since the tug was found to have been navigated negligently, the risk of loss provision was of no avail to the tug.

Confusion as to the validity of exculpatory clauses in towage contracts was further fostered by two later decisions of the Supreme Court. In the first of these, Compania de Navegacion Interior, S. A. v. Fireman's Fund Ins. Co., 277 U.S. 66 (1928) (commonly referred to as *The Wash Gray*), the Court held that a clause in a towing contract declaring that the towing boat shall not be responsible in any way for loss or damage to the tow did not release the tower from liability for damage done to the tow by the tower's negligence. In the second case, Sun Oil Co. v. Dalzell Towing Co., 287 U.S. 291 (1932), the towing contract provided that when the captain of the tug goes on board the tow to pilot it, he becomes the servant of the tow and neither the tug nor its owners or operators shall be liable for damage resulting from said pilotage. The Court held that the provision barred the tow from recovering damages sustained by it occasioned by the negligence of the tug captain who had gone on board and was piloting the tow.

The lower courts were not alone in conflict as to what the decisions of the Supreme Court, especially that in *The Steamer Syracuse*, stood for. Thus in Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955), the majority and dissenting Justices differ as to the interpretation to be placed on the Court's holding in that case.

[6] The Oceanica, 170 Fed. 893 (2d Cir.), *cert. denied*, 215 U.S. 599 (1909), is the lead-off case for later decisions in the second circuit. See also Nielson v. United States, 209 F.2d 958 (2d Cir. 1954), *affirming* 112 F. Supp. 730 (E.D.N.Y. 1953); The Cutchogue, 10 F.2d 671 (2d Cir. 1926).

[7] Citing The Margaret, 94 U.S. 494 (1876), in which the Supreme Court said "The tug was not a common carrier, and the law of that relation has no application here. She was not an insurer." *Id.* at 496-97.

[8] Sacramento Nav. Co. v. Salz, 3 F.2d 759 (9th Cir. 1925); Mylroie v. British Columbia Mills Tug & Barge Co., 268 Fed. 449 (9th Cir. 1920); Alaska Commercial Co. v. Williams, 128 Fed. 362 (9th Cir. 1904). See collection of cases in Annot., 54 A.L.R. 104, 252 (1928).

cases. These are *Bisso v. Inland Waterways Corp.*,[9] *Boston Metals Co. v. The Winding Gulf*,[10] and *United States v. Nielson.*[11] We take them up in order.

In *Bisso* the towing contract provided that the towing was to be done "at the sole risk" of the tow and that the masters, crews and employees of the tug would become the "servants of the craft to be towed" irrespective of whether they were aboard the tow or "in command thereof."[12] On the occasion in question, the tug, *Cairo,* was towing the barge, *Bisso No. 9,* on the Mississippi River. The barge had no motive power, steering apparatus, officers or crew and its movements were completely controlled by the tug. Negligent towage by those operating the tug caused the barge to collide with a bridge pier as a result of which it sank. Suit was brought in admiralty against the owners of the tug to recover for the loss of the barge. The district court[13] held that the "sole risk" clause in the towing contract did not exonerate the tug from liability for its negligence.[14] But that court further held that the clause making the employees of the tug the servants of the tow evidenced a clear intent that the tug be released from liability for negligence. It held such provision valid and accordingly dismissed the libel.[15] The court of appeals[16] affirmed the dismissal. However, it declared that both the "sole risk" clause and the clause making the personnel of the tug the servants of the tow (which it referred to as the "pilotage clause") required dismissal of the action.

On certiorari the Supreme Court divided five to three. Justice Harlan did not sit on any of the three cases. The majority reversed the court of appeals. Speaking through Justice Black, the Court stated that "the question presented is whether a towboat may validly contract against all liability for its own negligent towing."[17] It noted the disagreement that had existed in the federal courts and referred to the varying interpretations that had been placed upon *The Steamer Syracuse.*[18] It declined to accept the view expressed by

[9] 349 U.S. 85 (1955). [10] 349 U.S. 122 (1955).
[11] 349 U.S. 129 (1955).
[12] The terms of the towing contract will be found in the district court's opinion. 114 F. Supp. 713, 714 (E.D. La. 1953).
[13] 114 F. Supp. 713 (E.D. La. 1953).
[14] *Id.* at 714, citing The Steamer Syracuse, 79 U.S. (12 Wall.) 167 (1871).
[15] *Id.* at 718, citing Sun Oil Co. v. Dalzell Towing Co., 287 U.S. 291 (1932).
[16] 211 F.2d 401 (5th Cir. 1954). [17] 349 U.S. at 85.
[18] 79 U.S. (12 Wall.) 167 (1871).

the second circuit in *The Oceanica*[19] and stated that both *The Steamer Syracuse* and *The Wash Gray*[20] "strongly point to the existence of a judicial rule, based on public policy, invalidating contracts releasing towers from all liability for their negligence."[21] Then, in an attempt to dispel all doubts, the Court said, "Because of this judicial history and cogent reasons in support of a rule outlawing such contracts we now, despite past uncertainty and difference among the circuits, accept this as the controlling rule."[22]

The Court found two main reasons for the adoption of a rule preventing towers from contracting out of liability for their own negligence. These were "(1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of . . . services from being overreached by others who have power to drive hard bargains."[23] The opinion continues,

> And both reasons apply with equal force whether tugs operate as common carriers or contract carriers. The dangers of modern machines make it all the more necessary that negligence be discouraged. And increased maritime traffic of today makes it not less but more important that vessels in American ports be able to obtain towage free of monopolistic compulsions.[24]

It will be recalled that in *Sun Oil Co. v. Dalzell Towing Co.*[25] the Supreme Court had upheld the validity of a pilotage provision in a towing contract which barred the tow from recovering against the tug if the loss was occasioned by the negligence of the tug's captain who had come on board the tow and was in the process of piloting it. The majority in *Bisso* did not dispute the holding in *Sun Oil.* Instead, that decision is distinguished and held inapplicable to either of the provisions in the *Bisso* contract. In *Bisso* no pilot was on the barge. Loss was occasioned by negligence of the employees of the tug in the act of towing. The opinion of the Court continues,

> It is one thing to permit a company to exempt itself from liability for the negligence of a licensed pilot navigating another company's vessel on that vessel's own power. That was the *Sun Oil* case. It is quite a different thing, however, to permit

[19] 170 Fed. 893 (2d Cir. 1909).
[20] 277 U.S. 66 (1928).
[21] 349 U.S. at 90.
[22] *Ibid.*
[23] *Id.* at 91.
[24] *Ibid.*
[25] 287 U.S. 291 (1932), discussed in note 5 *supra.*

> a towing company to exempt itself by contract from all liability for its own employees' negligent towage of a vessel. Thus, holding the pilotage contract valid in the *Sun Oil* case in no way conflicts with the rule against permitting towers by contract wholly to escape liability for their own negligent towing.[26]

The Court concludes its opinion by stating that,

> The rule against contractual exemption of a towboat from responsibility for its own negligence cannot be defeated by the simple expedient of providing in a contract that all employees of a towboat shall be employees of the towed vessel when *the latter "employment" is purely a fiction.*[27]

Justice Douglas wrote a concurring opinion in which he assumed that under the rule of *The Steamer Syracuse*[28] and *The Wash Gray*[29] a tug may not contract against her own negligence. He stated he did not know enough of the economics of the towing business to determine whether or not the rule of those cases as understood by him should be changed, and therefore he concurred with the majority.

Justice Frankfurter spoke for the dissent.[30] In an opinion covering twenty-two pages he carefully analyzed the prior decisions of the Supreme Court as well as those in the various circuits. He concluded, as we have seen the judges in the second circuit did, that *The Steamer Syracuse* is not authority for holding invalid a clause which clearly releases the tower from liability for negligence. He referred to the fact that, under English law,[31] towers may contract against their own negligence and he noted that several text authorities[32] in this country had concluded that exculpatory clauses which are clear in intent are valid. He is of the opinion that the majority has abandoned the doctrine of stare decisis in an area of commercial affairs where such doctrine "has strong justification."[33] In short, Justice Frankfurter objects to the Court making new law and misreading former decisions.

---

[26] 349 U.S. at 94.
[27] *Id.* at 95. (Emphasis added.)
[28] 79 U.S. (12 Wall.) 167 (1871).
[29] 277 U.S. 661 (1928).
[30] He was joined by Justices Reed and Burton.
[31] *E.g.*, The Albion, [1953] 2 All E.R. 679 (C.A.).
[32] Although Justice Frankfurter cited and quoted from 1 BENEDICT, ADMIRALTY (5th ed. 1925), we find the same language contained in 1 BENEDICT, ADMIRALTY 307-08 (6th ed. 1940), to wit: "The towage contractor . . . may by contract limit or disclaim liability for negligence . . . ."
[33] 349 U.S. at 99.

Whether the majority or the dissent was correct in its reading of former law, it appeared, *for a while at least,*[34] that exculpatory clauses in towing contracts which sought to release the tug from liability for loss occasioned to the tow by reason of negligent towing[35] were invalid.[36]

In *Boston Metals,*[37] the second of the 1955 triumvirate, an obsolete destroyer owned by Boston Metals Company was being towed by the tug *Pete Moran* when it collided with a third vessel, the *Winding Gulf.* At the time the destroyer was without power or crew. As a result of the collision the destroyer sank and the *Winding Gulf* sustained damage. The towage contract contained provisions to the effect that the towing was done at the sole risk of the tow; that the tug company would not be responsible for any negligence of the master or crew of the tug; that the master and crew of the tug company became the servants of the tow and that the tow would indemnify and hold harmless the tug company for any damages or other loss that might arise out of the towing operation.[38] Boston Metals, owner of the destroyer, brought suit in admiralty against the *Winding Gulf* and her owners seeking damages for the loss of the destroyer. The owners of the *Winding Gulf* filed a cross libel and charged that the collision was due to the unseaworthiness of the destroyer.

The district court[39] found that the collision was due to the negligent navigation of the *Winding Gulf* and to inadequate lights on the destroyer plus the absence of a crew on it to keep the lights burning. Failure to adequately man and light the destroyer was found by the

[34] The reason for the italics at this point will appear later herein when the author discusses Southwestern Sugar & Molasses Co. v. River Terminals Corp., 360 U.S. 411 (1959). See text at note 60 *infra.*

[35] It should be noted that the cause of the loss was negligent *towing* and not negligent piloting of the tow by an employee of the tug placed on board the tow under a contract declaring him to be the servant of the tow as in the *Sun Oil* case.

[36] It was on the strength of *Bisso* that textwriters in 1957 declared, "The Supreme Court, in Bisso v. Inland Waterways, has settled the invalidity of such clauses." GILMORE & BLACK, ADMIRALTY 426 (1957).

[37] 349 U.S. 122 (1955).

[38] The pertinent terms of the towing contract will be found in the concurring opinion of Justice Frankfurter. 349 U.S. at 124-25. Where "tow" is used in the text above it refers to Boston Metals as owner of the destroyer being towed.

[39] 72 F. Supp. 50 (D. Md. 1947). After long and unsuccessful efforts on the part of the parties to stipulate the amount of the damages further hearing was held by the district court on this question and final determination thereof made in 85 F. Supp. 806 (D. Md. 1949).

district court to be the fault of the master of the tug. By reason of the terms of the towage contract mentioned above, the district court held that the negligence of the tug captain constituted the negligence of the owners of the tow and made them responsible. He then proceeded to apply the American admiralty rule and divided the damages between the *Winding Gulf* and the owners of the destroyer. The court of appeals[40] affirmed on the same basis. It found no reason to require the *Winding Gulf* to first go against the tug and then to have the tug seek indemnity against the tow. Admiralty could, said Judge Soper, speaking for the court of appeals, "skip the by-ways and head direct for the goal."[41]

On certiorari the Supreme Court, now divided six to two, reversed. Justice Black wrote the opinion for the Court which consisted of only two paragraphs. On the basis of *Bisso,* the contract provisions by which the tow would be responsible for the negligence of the tug were held invalid. The material portion of the court's opinion reads,

> In *Bisso v. Inland Waterways Corp.*, . . . decided today, we held invalid a contract designed to shift responsibility for a towboat's negligence from the towboat to its innocent tow. That holding controls this case. For whatever this contract said, here as in the *Bisso* case, the persons who conducted these towing operations were in fact acting as employees of the towing company, not as employees of the owner of the tow. Under these circumstances it was error to hold petitioner liable for negligence of the towing company's employees.[42]

It will be recalled that in *Bisso* the dissentors were Justices Frankfurter, Reed and Burton with Justice Frankfurther writing the opinion. Now in *Boston Metals* Justice Frankfurter writes a concurring opinion and the only dissentors are Justices Reed and Burton.

In his concurring opinion Justice Frankfurter says,

> The issue before us in this case is not the bare question whether the tow has contracted away its right to recover damages caused by the negligence of the tug. It is whether in addition the tow has undertaken to become directly liable

[40] 209 F.2d 410 (4th Cir. 1954). [41] *Id.* at 414.
[42] 349 U.S. at 123.

to all third parties injured as a consequence of the negligence of the tug.[43]

Upon analyzing the provisions of the towing contract, which he sets out in detail, Justice Frankfurter finds that by those provisions the tow agreed to "indemnify the tug against liability in the circumstances here involved."[44] But, he continues, "a promise to indemnify is a promise running to the indemnitee, here the tug, and is not ordinarily construed as a contract for the benefit of a third party."[45] In short, Justice Frankfurter does not strike down the clause as invalid (as did the Court) but concludes that the clause is not to be construed as giving the *Winding Gulf,* or her owners, the rights of a third party beneficiary. He is not impressed with the argument of the court of appeals that circuity of action will be avoided by holding the tow directly responsible to the *Winding Gulf* in the present suit. The joint dissent, written by Justice Burton and joined in by Justice Reed, upholds the validity of the contract provisions making the master and crew of the tug the servants of the tow. This provision, says the dissent, "is sufficient to make the tow owners directly liable to third parties for the acts of the Master and crew [of the tug] who thus become their servants."[46]

The third and last of the 1955 series is the *Nielson* case.[47] The Dauntless Towing Line contracted to use two of its tugs in assisting in moving the *Gale,* a vessel owned by the United States, from Hoboken to a Brooklyn pier. The *Gale* was being moved under its own power and lines of the two assisting tugs were attached to it. One of the tugboat captains was on board the *Gale* and directing the movements of the tugs and vessel. Due to negligent pilotage orders, given by the said tug captain while on board the *Gale,* one of the tugs was crushed between the *Gale* and a pier. Suit in admiralty was then brought against the United States by Dauntless Towing Line to recover for the damages thus sustained by its tug.

The contract involved contained a pilotage clause which provided that, when the captain of any tug engaged in the assisting services of a vessel which is operating under her own motive power goes on board the vessel, he becomes the servant of the owners of the vessel assisted in respect to his giving orders and handling the

[43] *Id.* at 124.
[44] *Id.* at 126.
[45] *Ibid.*
[46] *Id.* at 128.
[47] United States v. Nielson, 349 U.S. 129 (1955).

vessel; and that neither the tugs nor their owners shall be liable for any damage resulting therefrom.[48]

The district court[49] held the pilotage provision was valid and that by reason thereof the tug owners could recover damages against the United States as owners of the assisted vessel. The court cited in support of its ruling *Sun Oil Co. v. Dalzell Towing Co.*[50] The court of appeals[51] affirmed on the basis of the district court's opinion.

The Supreme Court reversed,[52] again dividing six to two. Justice Black, as in the other cases, spoke for the Court. He neither expresses approval nor disapproval with the *Sun Oil* decision relied upon by the lower courts. He concedes that the pilotage contract in that case was "substantially the same as the one here."[53] But in *Sun Oil* the provision was held to bar recovery by the tow from the tug when damage was done to the tow by reason of the negligence of the tug captain who had boarded the tow and was piloting it. In *Nielson,* it is the tug that seeks to recover against the tow for damages caused to it by the negligence of the tug captain on board the tow. To say that the tow may not recover damages against the tug is one thing. To say that the tow under these circumstances must pay damages to the tug is quite another.

Justice Black sees no reason to stretch the contract language so as to impose this liability on the tow. "A person supplying his own employees for use by another in a common undertaking cannot usually collect damages because of negligent work by the employee supplied."[54] But, and this would appear significant, Justice Black concludes, "Clear contractual language *might* justify imposition of such liability. But the contractual language here does not meet such a test and we do not construe it as authorizing respondent to recover damages from petitioner."[55]

Justices Burton and Reed filed a brief dissent. They stressed the language in the pilotage clause by which it was agreed that, in the circumstances of this case, the tugboat captain became the servant of the vessel assisted. They found the provision valid and

[48] Provisions of the contract are set out in the trial court's opinion. 112 F. Supp. 730, 731 (E.D.N.Y. 1953).
[49] 112 F. Supp. 730 (E.D.N.Y. 1953).
[50] 287 U.S. 291 (1932), discussed in note 5 *supra.*
[51] 209 F.2d 958 (2d Cir. 1954).
[52] 349 U.S. 129 (1955). As in the other two cases, Justice Harlan took no part in the decision.
[53] *Id.* at 131.
[54] *Ibid.*
[55] *Id.* at 131-32. (Emphasis added.)

would give it the same force and effect as did the lower courts, namely, hold the assisted vessel responsible to the tug for the damage sustained by the latter.

Summary of the Bisso, Boston Metals and Nielson Cases

It would, indeed, be heartening to those who are obliged to engage towing services, if one could say that by its action in *Bisso, Boston Metals* and *Nielson,* the Supreme Court struck down as invalid all clauses in towage contracts which seek to transfer the risk and responsibility for loss to the tow and its owners irrespective of whether the cause of the loss be negligent towing or negligent pilotage by the tug captain who has boarded the tow for that purpose. But no such all out victory was achieved.

Most significant is the fact that the Court, not only did not disturb its ruling in *Sun Oil,*[56] but on the contrary, expressly declared it was not rejecting that decision, saying, "There are distinctions between a pilotage and a towage exemption clause which make it entirely reasonable to hold one valid and the other invalid."[57] Summarizing the action of the Court in *Bisso, Boston Metals* and *Nielson* we can say:

1. *Bisso* and *Boston Metals* struck down all exculpatory clauses including fictitious employment clauses, which seek to shift the risk of loss and responsibility for negligent towing[58] from the tug to the tow.[59]
2. *Nielson reaffirmed* the rule of *Sun Oil* that a pilotage clause, which provides that the tug captain is the servant of the tow when he boards the tow and pilots it and that the tug is not liable for any damage caused by his negligence in so piloting, absolves the tug from all liability to the tow for damages suffered by the tow as a result of said tug captain's negligence in piloting the tow.
3. *Nielson* actually *held* that such a pilotage clause as referred to in paragraph 2 above was not to be construed as giving

[56] Sun Oil Co. v. Dalzell Towing Co., 287 U.S. 291 (1932), discussed in note 5 *supra.*

[57] Bisso v. Inland Waterways Corp., 349 U.S. 85, 93 (1955).

[58] As distinguished from negligent piloting of the tow by the tug's captain who had boarded the tow.

[59] In this connection the word "tow" refers not only to the vessel being towed but also to its owners and operators. Similarly, the word "tug" refers to the tug, its owners and operators.

the tug a right of action against the tow for damages occasioned to the tug by reason of negligent pilotage of the tug captain on board the tow.

4. Although under the contractual language used in *Nielson* and set out in paragraph 2 above, the Court held the tow was not liable to the tug for damages sustained by it (paragraph 3 above), the court expressly said, "Clear contractual language might justify imposition of such liability."

Whatever might be the rights and liabilities of the parties under the terms of a particular pilotage provision when the tug captain boards and pilots the tow, it was apparently settled by *Bisso* that no exculpatory clause could shift responsibility from the tug to the tow for negligent towage, as distinguished from pilotage. But certainty in that limited area alone was not to last for long. In 1959, a bare four years after *Bisso,* the "settled invalidity" of exculpatory towage clauses was distinctly unsettled by the action of the Supreme Court in *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*[60] as to those towers who are operating under certificates of public convenience and necessity issued by the Interstate Commerce Commission and who, in accordance with the requirements of the Interstate Commerce Act,[61] have filed tariffs with the Commission containing exculpatory clauses.

River Terminals Corporation (hereinafter referred to as River) was a water carrier engaged in operating tugboats and duly certificated under the Interstate Commerce Act.[62] As such certificated carrier it was required by the statute to file tariff schedules with the Interstate Commerce Commission.[63] River complied with the filing requirements and the tariff filed by it contained the following provision:

> "When shipments are transported in barges furnished by owner, shippers, consignees or parties other than the carrier, such barges and (or) cargoes will be handled at owner's risk only, whether the loss or damage is caused by negligence or otherwise."[64]

---

[60] 360 U.S. 411 (1959).

[61] 54 Stat. 929 (1940), as amended, 49 U.S.C. §§ 901-23 (1958), as amended, 49 U.S.C.A. §§ 903, 908-09 (Supp. 1961).

[62] 54 Stat. 941 (1940), as amended, 49 U.S.C.A. § 909 (Supp. 1961).

[63] 54 Stat. 935 (1940), 49 U.S.C. § 906 (1958).

[64] The exculpatory provision will be found in the district court's opinion. 153 F. Supp. 923, 925 (E.D. La. 1957).

Southwestern Sugar & Molasses Company was the charterer of a barge which was towed by River from Reserve, Louisiana to Texas City, Texas and there berthed. The barge sank at its berth and Southwestern filed a libel against River seeking to recover damages for the loss of cargo and for expenses incurred in raising and repairing the barge. It alleged the sinking was due to River's negligence in the navigation and management of the towing operation.

The district court[65] held that the services rendered by River were those of towage and not carriage or affreightment. Relying on *Bisso*,[66] that court held the exculpatory provisions in the bill of lading (which were those set out in the tariff filed with the Interstate Commerce Commission) were invalid. The district court then found the sinking was due to the negligence of River in the course of the towage operation and accordingly held Southwestern was entitled to damages as charterer of the barge and owner of the cargo of molasses on board.

In the court of appeals River urged several grounds for reversal. One was that the district court had erred in failing to find that the cause of the loss was the sole negligence of Southwestern. Another was that the trial court had erred in holding that the exculpatory provisions were, under *Bisso*, invalid as a matter of law. The court of appeals[67] confined itself to a consideration of the validity of the exculpatory provisions and did not pass upon the other grounds of appeal. It noted that River could not, under the Interstate Commerce Act, charge more or less than provided for in the filed tariffs. It observed that the Commission could, of its own motion, or at the instance of an aggrieved party, inquire into the legality and reasonableness of the terms of the filed tariff. The record failed to disclose that any objections had been made concerning the provisions of the tariffs to the Commission which had permitted them to become effective.

The court of appeals observed that the Commission may find the rates charged in the tariff are lower than they would be if the tower could not absolve itself from liability. It concluded that before the courts should declare exculpatory provisions in the filed tariffs invalid, Southwestern should have an opportunity to attack those provisions before the Commission. It accordingly remanded the

[65] 153 F. Supp. 923 (E.D. La. 1957).
[66] Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955).
[67] 253 F.2d 922 (5th Cir. 1958).

case to the district court with instructions that a reasonable opportunity be afforded Southwestern to take appropriate proceedings before the Interstate Commerce Commission to test the validity of the exculpatory clause and, in the absence of such action, the district court should give full effect to said provision.

On certiorari the Supreme Court divided six to three and this time Justice Harlan, who had not taken part in *Bisso, Boston Metals* and *Nielson,* spoke for the Court.[68] At the outset, the Court held that the court of appeals erred in not deciding the other issues, including the issue of whose negligence caused the loss, when the case was before it. Disposition of one or more of those issues might have made unnecessary the litigation before the Interstate Commerce Commission suggested by the court of appeals. But, even if such disposition might render moot the question of the validity of the exculpatory clause in the circumstances of this case, the Court deemed it appropriate to review the determination of the court of appeals that the exculpatory clause was not invalid as a matter of law.

Southwestern urged before the Supreme Court that the exculpatory provision, inherently illegal under *Bisso,* gained nothing by being filed with the Commission. In overruling this argument the Court intimated the course of action it would pursue:

> We think that this reasoning begs the true question here presented, which is whether considerations of public policy which may be called upon by courts to strike down private contractual arrangements between tug and tow are necessarily applicable to provisions of a tariff filed with, and subject to the pervasive regulatory authority of, an expert administrative body. In *Bisso* the clause struck down was part of a contract over the terms of which the I. C. C., the body primarily charged by Congress with the regulation of the terms and conditions upon which water carriers subject to its jurisdiction shall offer their services, had no control. In the present case the courts below have assumed, and petitioner does not challenge, the applicability to the transportation which resulted in loss to petitioner of a duly filed tariff containing this exculpatory clause.[69]

[68] 360 U.S. 411 (1959). The three dissentors were Chief Justice Warren and Justices Black and Douglas.

[69] *Id.* at 416-17.

To automatically extend the rule of *Bisso* to the circumstances of this case, continued the Court, "would be moving too fast."[70] Conceivably the "rate specified in the relevant tariff is computed on the understanding that the exculpatory clause shall apply . . . and is a reasonable rate so computed."[71] If such is the case the Court found it "might be hard to say that public policy demands that the tow should at once have the benefit of a rate so computed and be able to repudiate the correlative obligation of procuring its own insurance."[72]

As long as the rates charged by the tug are subject to regulatory control by the Interstate Commerce Commission, the possibility of the tug overreaching through charging high rates in addition to disclaiming liability can be prevented by action of the Commission. In the light of this fact the Court said, "The rule of *Bisso,* however applicable where the towboat owner has 'the power to drive hard bargains,' may well call for modification when that power is effectively controlled by a pervasive regulatory scheme."[73]

The Court noted that several factors might influence the Commission in approving the exculpatory clause in the tariff filed. Thus, the fact the barge was delivered loaded to River might have a bearing in that River could not inspect it thoroughly. Also, it might be material if River offered a higher rate under which it assumed responsibility. In any event, those matters the Court left for consideration by the Commission.

But the Court emphasized that, in the absence of action by Congress, the question whether the exculpatory clause "offends against public policy is one appropriate *ultimately* for judicial rather than administrative resolution."[74] Nevertheless, even though ultimate responsibility for ruling on the validity of the exculpatory clause will be on the courts, that does not mean that they should deny themselves the benefit which may be derived "from a consideration of the relevant economic and other facts which the administrative agency charged with regulation of the transaction . . . is peculiarly well equipped to marshall and *initially* evaluate."[75]

Accordingly, the Court upholds the action of the court of appeals in refusing to declare the exculpatory clause invalid as a matter of law. It remands the case to that court with instructions that it pass

[70] *Id.* at 417.
[71] *Id.* at 418.
[72] *Ibid.*
[73] *Ibid.*
[74] *Id.* at 420. (Emphasis added.)
[75] *Ibid.* (Emphasis added.)

upon the other matters presented by the appeal and that, if resolution of those matters does not dispose of the case, it should then remand the case to the district court "with instructions to hold it in abeyance while the parties seek the views of the I.C.C., in any form of proceeding which that body may deem appropriate, as to the circumstances bearing on the validity of . . . [the] exculpatory clause in the context of this litigation."[76]

Although there is no written dissenting opinion, the report notes that the Chief Justice and Justices Black and Douglas "believe that the rule of law announced in *Bisso* should not be changed by the Interstate Commerce Commission, and would therefore reverse this judgment."[77]

On remand the court of appeals[78] considered the basic question of negligence which had been raised by the tug operator in its appeal from the district court. After detailed analysis of the evidence, the court of appeals, contrary to the district court, found that the loss occasioned was in no way attributable to negligence of River Terminals Corporation, the operator of the tug, and accordingly entered a judgment in favor of that corporation of no liability. In this situation, the question of the validity of the exculpatory clause in the filed tariff did not have to be, and in fact was not,[79] referred to the Interstate Commerce Commission.

What Is the Status of Exculpatory Towage Provisions Today?

In answering this question we must bear in mind that the Court in the *River Terminals* case, just discussed, did not reverse *Bisso*. It merely refused to extend, *as a matter of law,* the rule of *Bisso* to those cases where the tug operator was subject to the regulatory control of the Interstate Commerce Commission and, pursuant to statute, had filed its tariffs with that Commission. Accordingly, the following conclusions would seem to be in order:

1. Exculpatory provisions relieving the tug from liability to the tow for negligent towage are still invalid as to those tug operators who are not subject to regulatory control and who accordingly have not filed tariffs with the I.C.C.

[76] *Id.* at 421-22.
[77] *Id.* at 422.
[78] 274 F.2d 36 (5th Cir. 1960).
[79] Letters from Carl G. Stearns and Charles Kohlmeyer, Jr., of Lemle & Kelleher, proctors for River Terminals Corporation, to author, January 9 and 17, 1962.

2. Exculpatory provisions in tariffs filed pursuant to law with the I.C.C., which relieve the tug from liability to the tow for negligent towage, may or may not be valid. Determination of their validity will in the last instance be made by the courts after receiving the views of the I.C.C. in regard thereto.
3. The determination referred to in paragraph 2 above will be based on the various circumstances involved in the case, as well as on the views of the I.C.C., but the courts shall not be bound to follow the conclusions of that Commission.
4. Since different circumstances may exist in various cases in which the tug was required to and did file its rates with the I.C.C., it is possible that in some instances the exculpatory provisions will not be found to be against public policy while in others they will.

Thus we see that the invalidity of exculpatory towage clauses is, *as of now,* only settled as to those tug operators who are not subject to the regulatory provisions of the Interstate Commerce Act. As to those that are so regulated, each case, under the rule of the *River Terminals* decision, will have to be decided upon a consideration of the specific fact situation presented. And, in these latter cases, the exculpatory towage clause will, *in the final analysis be held valid, or invalid,* depending upon whether the majority of the Supreme Court conclude that giving effect to the clause is consonant with or violates public policy.

Cargo Claims Arising out of Collision and Otherwise

1. Demise of the "Both-To-Blame" Clause

One of the most important admiralty decisions of the Supreme Court in the past decade is *United States v. Atlantic Mutual Ins. Co.*[1] In that case the majority of seven Justices declared the customary "both-to-blame" clause found in bills of lading to be invalid.[2] In order to understand the significance of the decision and

[1] 343 U.S. 236 (1952).

[2] The clause reads as follows, "If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability repre-

the theories of the majority and dissenting Justices it is necessary that we review the development of the law in this country relating to the carrier's liability for negligence to the owner of cargo.

Prior to the passage of the Harter Act[3] in 1893, a carrier in this country was liable to the owner of cargo for any loss or damage occasioned to cargo by reason of the carrier's negligence. Stipulations in bills of lading absolving the carrier for his negligence were held invalid by the American courts although they were sustained in England. The Harter Act provided that if the carrier had exercised due diligence to make its vessel seaworthy, properly manned, equipped and supplied, it would not be liable to its cargo for negligence in the navigation or management of the vessel. Hence, if due to carelessness on the part of the navigator, a seaworthy vessel was wrecked on a reef and cargo lost, the cargo owner had no recourse against the carrier.

If, however, the wreck which caused the loss of cargo was the result of a collision between two vessels which were both to blame, the owner of the cargo on one vessel could recover against the other non-carrying vessel for his full loss. He could recover nothing from his own carrier.

Under the American rule applicable to the division of damages where both vessels are at fault, each vessel is liable for one half of the total damages. This results in the carrier suffering the smallest loss paying to the other carrier one half of the difference between its loss and that of the other carrier. In arriving at this amount, any damages paid by the non-carrying vessel to the owners of cargo aboard the carrying vessel are included as a part of the non-carrier's damages. As a result, the carrying vessel is thus indirectly liable for one half of the damages sustained by its own cargo owners. But, as we have seen, it was the purpose of the Harter Act to absolve the carrier from any obligation to reimburse its cargo owners by reason of loss through its negligence in navigation.

This conflict was presented to the Supreme Court six years after the passage of the Harter Act in *The Chattahoochee*.[4] In that case,

sents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and setoff, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or Carrier."

[3] 27 Stat. 445 (1893), 46 U.S.C. §§ 190-96 (1958).

[4] 173 U.S. 540 (1899).

the carrier claimed that by virtue of the policy enunciated by the Harter Act it should not be held liable to contribute half the cargo damages payable by the non-carrying vessel. A majority of the Court held that the Harter Act was not intended to affect the liabilities as between the two vessels at fault. It accordingly sustained a decree requiring the carrying vessel to contribute as its share of the total loss one half of the loss sustained by its cargo owners for all of which the non-carrier was initially liable. The result of *The Chattahoochee* decision was to place the carrying vessel in a worse position as to its cargo if it was only partly responsible for the loss than it would be if it were the sole vessel at fault.

It was to correct this anomalous situation that led carriers to insert the "both-to-blame" clause in bills of lading. This clause in substance provided that where both vessels are at fault the cargo owner will reimburse his carrier for any amount the carrier has had to pay to the non-carrying vessel, or has had set off against it by said vessel, by reason of the non-carrier having paid the cargo owner's loss. This clause, while taking care of the carrier, produced an equally anomalous situation for the cargo owner in that if only one vessel, the non-carrier, was at fault, cargo could recover its full loss, but if two vessels were at fault and one was the carrier, cargo could recover only half its loss.

The Carriage of Goods by Sea Act,[5] enacted by Congress in 1936, adopts essentially the same provisions of the Harter Act in that it relieves the carrier from liability to its cargo by reason of negligence in the navigation of the vessel. When its enactment was contemplated by Congress it was suggested by some shippers that a provision should be inserted specifically invalidating the both-to-blame clause. That proposal was rejected.[6]

The first reported decision ruling on the validity of the both-to-blame clause was rendered in 1936 by the Federal District Court for the Eastern District of New York.[7] It upheld the clause. To do otherwise, the court said, would "destroy the apparent purport and intention of the Harter Act . . . passed to relieve cargo carrying

[5] 49 Stat. 1207 (1936), 46 U.S.C. §§ 1300-15 (1958).

[6] See reference to committee hearings in Judge Medina's opinion when the *Atlantic Mutual* case was before him in the district court under the name of United States v. The Esso Belgium, 90 F. Supp. 836, 839 (S.D.N.Y. 1950).

[7] The W. W. Bruce, 14 F. Supp. 894 (E.D.N.Y. 1936), *reversed on other grounds,* 94 F.2d 834 (2d Cir. 1938).

ships of responsibility for damages to owners of cargo."[8] The next reported decision was in 1950 when the problem was again presented to a federal district court in New York in *United States v. Atlantic Mutual Ins. Co.*[9] mentioned at the beginning of this section. Judge Medina sat in the trial court. He upheld the validity of the both-to-blame clause, found nothing offensive in it, and on the contrary, found that it carried out the intent and purpose of the Harter Act and the Carriage of Goods by Sea Act. However, Judge Medina was reversed by a divided court of appeals.[10]

On certiorari the Supreme Court divided seven to two with the majority affirming the court of appeals and declaring the both-to-blame clause invalid. Compared to the opinions of both lower courts the opinion of the Supreme Court majority is very short. In order to understand the rationale of the majority and the dissenting opinions in *Atlantic Mutual* it is necessary that we step back a bit and consider *The Irrawaddy*[11] and *The Jason*[12] as well as *The Chattahoochee*[13] heretofore mentioned.

Prior to the Harter Act, when a sacrifice had been made or expenses incurred by the vessel to relieve it from a disaster due to negligence in navigation, and as a result of which cargo was saved, there was no right on the part of the vessel to a general average contribution by cargo. In 1898, five years after the enactment of Harter, the *Irrawaddy* case came up. The vessel had been stranded by reason of the master's negligent navigation. It was conceded that by virtue of the Harter Act the carrier was not liable for direct damage done to cargo by the stranding. The vessel was relieved from the strand as a result of jettisoning some of its cargo and certain sacrifices and expenditures incurred by the vessel. Upon arrival in New York, the carrier claimed to be entitled to contributions from the remainder of the cargo on principles of general average. There was no provision in the bills of lading providing for such general average and the contention was made by the carrier that it was entitled thereto by virtue of the Harter Act. The Supreme Court ruled against the carrier declaring that while Harter

[8] 14 F. Supp. at 897.
[9] 90 F. Supp. 836 (S.D.N.Y. 1950).
[10] 191 F.2d 370 (2d Cir. 1951). Judges Clark and Swan declared the clause invalid. Judge Augustus N. Hand upheld the clause for the reasons expressed by Judge Medina below.
[11] 171 U.S. 187 (1898).
[12] 225 U.S. 32 (1912).
[13] 173 U.S. 540 (1899).

was designed to relieve the carrier from liability to its cargo for loss occasioned by its negligence in navigation, it was not intended to give the carrier the right to claim general average contributions from its cargo where the loss was occasioned by the negligent navigation of the vessel.

Sixteen years after *The Irrawaddy* the Court had before it *The Jason.*[14] The vessel *Jason* had been stranded due to the negligence of its navigator. As in *Irrawaddy* certain cargo had been jettisoned and the ship had incurred losses and expenditures which enabled it to complete the voyage. Upon arrival the vessel claimed general average against cargo saved. No difference in the facts existed between the two cases of significance except that the bills of lading in *The Jason* contained a clause (hereinafter referred to as the *Jason* clause) which, among other things, provided that if the carrier had used due diligence to make his vessel seaworthy and properly manned, equipped and supplied, both the consignee of cargo and the shipowner shall contribute in general average in case of loss resulting from negligent navigation just as if the loss had not resulted from such negligence.[15]

The Supreme Court held that the *Jason* clause was valid and that the Harter Act did not forbid a reciprocal general average agreement in the bill of lading. *Irrawaddy* had merely decided that the Harter Act *of its own force* did not create the right of general average where there was negligent navigation. But the Court found nothing in the policy of the Harter Act which forbids the parties from contracting for such general average even though there has been negligence in navigation which rendered the sacrifice necessary for the common good.

It is in the light of this background that we must consider the action of the Court in *Atlantic Mutual.* Just as *Irrawaddy* had de-

[14] 225 U.S. 32 (1912).

[15] The full text of the clause is as follows, "If the owner of the ship shall have exercised due diligence to make said ship in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or negligence of the pilot, master or crew, in the navigation or management of the ship, or from latent or other defects, or unseaworthiness of the ship, whether existing at time of shipment or at beginning of the voyage, but not discoverable by due diligence, the consignees or owners of the cargo shall not be exempted from liability for contribution in General Average or for any special charges incurred, but with the shipowner shall contribute in General Average, and shall pay such special charges, as if such danger, damage or disaster had not resulted from such fault, negligence, latent or other defect or unseaworthiness."

cleared that the Harter Act of its own force did not give rise to general average where there was negligence in navigation, so did *Chattahoochee* declare that of its own force the Harter Act did not entitle the carrier to recover from its cargo half of the damages the cargo had recovered from the non-carrier in a collision situation where both vessels were at fault. While *Jason* upheld a provision in the bill of lading providing for general average, not allowed under *Irrawaddy, American Mutual* declared invalid a both-to-blame provision in the bill of lading which sought to give the carrier the relief denied it in *Chattahoochee.* As might be expected the dissenting Justices in *Atlantic Mutual* stress what appears to them to be a controlling parallel between *Irrawaddy-Jason* and *Chattahoochee-American Mutual.* The majority makes no mention of *Jason* in the body of its opinion but by way of footnote states it has not overlooked that case.

Justice Black spoke for the Court in *Atlantic Mutual.* He conceded that invalidating the both-to-blame clause would result in imposing liability on the carrier for half the cargo loss when another vessel was jointly guilty of negligence with the carrier while the carrier would be completely absolved under the Harter Act if it were solely at fault. But he stressed the fact that to uphold the clause would result in a cargo owner recovering his full loss from the non-carrying vessel if it alone was at fault but being required to share his recovery with the carrier if both vessels were to blame. No matter how the decision went there would be an anomalous result either as to the carrier or the cargo owner. Justice Black found no indication in the Harter Act that it was designed to change the American rule that when both vessels are at fault the total loss is shared equally. The both-to-blame clause, if given effect, would violate this American principle and shift a burden that rests on the carrying vessel to its cargo.

Justice Frankfurter in speaking for the dissent said that the both-to-blame clause actually effectuated the purpose of the Harter Act. Under that act the vessel is to be held harmless for any loss to cargo occasioned by negligent navigation when the vessel was solely at fault. A contract provision which results in holding the vessel harmless when the loss to cargo results from the joint negligence of the carrying vessel and another is in harmony with the purpose of the act.

It is obvious that persuasive arguments can be made in support, as well as against, the both-to-blame clause. While one would be presumptious to predict the future, since *Atlantic Mutual* the both-to-blame clause has been a dead letter. Whether, at some later date, an act of Congress, or a realignment of the Nine, will result in bringing the clause back to life one cannot tell. Meanwhile, efforts are being made by shipowners to have Congress enact legislation which would adopt the principles of the Brussels Collision Convention of 1910.[16] That Convention which has been ratified and is adhered to by the leading maritime nations of the world has never been adopted by the United States. Under the Convention, if cargo or vessels are damaged as a result of the fault of two or more vessels the liability of each vessel is proportioned according to its degree of fault. In addition there is no joint and several liability on the part of the vessels to cargo.

On October 23, 1961, a committee appointed by the Maritime Law Association of the United States filed a report in which the majority recommended that Congress enact legislation which would adopt as law for this country the basic principles of the Brussels Collision Convention of 1910. Adoption of the Convention was said by the majority to be desirable both from the viewpoint of domestic law as well as international uniformity. Several vigorous minority reports were filed opposing adoption. Minority members of the committee pointed out that adoption of the Convention would merely be for the benefit of shipowners and that cargo would be the loser in that it would no longer have available to it the joint and several liability of shipowners existing under present American law when damage to cargo results from the fault of two or more vessels. The minority also pointed out that in recommending the adoption of the Brussels Collision Convention of 1910, the majority was reversing the position that had been adhered to by the Maritime Law Association of the United States for more than fifty years.[17] One

[16] The text of this Convention and a list of the countries adhering thereto will be found in 6 BENEDICT, ADMIRALTY 39 (7th ed. 1957).

[17] For a copy of the majority and minority committee reports, see THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, REPORT OF THE COMMITTEE ON SHIPOWNERS' LIMITATION OF LIABILITY AND THE COLLISION AND ARREST OF SHIPS CONVENTIONS No. 450 (Oct. 23, 1961). As a part of that document there will be found a copy of H.R. 7911, which was introduced in the House of Representatives on June 28, 1961. A similar bill was also introduced in the Senate on July 29, 1961. Neither of these bills was

thing is certain: any effort to change the present American law of joint and several liability of shipowners to cargo will be bitterly fought by cargo interests in this country.

2. Validity of Bill of Lading Provision Restricting Suits for Loss or Damage to Cargo to Courts of Genoa

We have just discussed the invalidation of the "both-to-blame" clause in bills of lading. Counsel for shipowners as draftsmen of bills of lading have from time to time inserted clauses under which the owner of cargo agrees that no legal action may be brought for loss or damage to cargo except in the courts of a given city or country. The validity of such a clause, and whether or not it applied to *in rem* as well as *in personam* actions, was presented to the Supreme Court for the first time in the recent case of *The Monrosa v. Carbon Black Export, Inc.*[18]

Carbon Black Export, a Delaware corporation, had shipped cargo on the *SS Monrosa* at Houston and New Orleans for delivery to Italian ports. On arrival of the *Monrosa* in Italy a portion of the cargo was delivered in damaged condition and some was not delivered at all. On return of the *Monrosa* to Houston, Carbon Black Export brought a libel *in rem* against the vessel and another libel *in personam* against the owner, Navigazione Alta Italia, a corporation of Italy. Damages were claimed in the amount of $110,000. The shipowner filed an appearance in response to the libel *in personam* and in the *in rem* proceeding put up a bond to abide by the decree of the court.

Three months later the shipowner asked the trial court to decline jurisdiction by reason of clause No. 27 in the bill of lading which read as follows,

> "ALSO, that no legal proceedings may be brought against the Captain or Shipowners or their Agents in respect to any loss

enacted. Both would have adopted the principles of the Brussels Convention of 1910.

At the annual fall meeting of the Maritime Law Association held in New York City on November 3, 1961, that association by a vote of 166 to 84 adopted a resolution approving "the basic principles of the Brussels Collission Convention of 1910 and the legislation proposed to carry it into effect." The passage of the resolution was vigorously contested and charges of the use of "steamroller" tactics were levied at the chairman by a member of the minority group opposing the resolution. See THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, REPORT No. 452, at 4854-57 (Feb. 1962).

[18] 359 U.S. 180 (1959), *rehearing denied,* 359 U.S. 999 (1959).

> of or damage to any goods herein specified except in Genoa, it being understood and agreed that every other Tribunal in the place or places where the goods were shipped or landed is incompetent, not withstanding that the ship may be legally represented there."

In a memorandum opinion, the district court declared that it did not find the foregoing provision unreasonable and therefore declined to take jurisdiction.[19] The court of appeals reversed.[20] It held that clause 27 merely referred to suits against the captain, shipowners or their agents and did not cover *in rem* proceedings against the vessel. It also held that the trial judge erred in failing to take jurisdiction of the *in personam* action. It found that the motion for dismissal based on clause 27 was in effect bottomed on the doctrine of *forum non conveniens.* It declared that "the universally accepted rule is that agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced."[21] It failed to find the balance of interests so strongly in favor of the defendant so as to cause the court to disturb the plaintiff's choice of forum.

On certiorari the Supreme Court divided five to four.[22] The majority agreed with that portion of the court of appeals decision which had held that clause 27 did not encompass libels *in rem.* Accordingly, it found there was no contract prohibition to the *in rem* action. The Court pointed out that if the shipowner in drafting the clause had intended it to apply to *in rem* proceedings, it could have easily so provided. It also noted that in another portion of the bill of lading, which dealt with the time in which actions might be brought by the owner of cargo, the shipowner had referred to both *in rem* and *in personam* proceedings. Justice Brennan, speaking for the majority, declared the writ of certiorari should be dismissed as improvidently granted.

As to the second aspect of the court of appeals decision dealing with the validity of clause 27 relating to *in personam* actions, the Court declined to make a ruling.

---

[19] Copy of the district court's language on this point will be found in Carbon Black Export v. The SS Monrosa, 254 F.2d 297, 299 n.2 (5th Cir. 1958).

[20] 254 F.2d 297 (5th Cir. 1958).

[21] *Id.* at 300.

[22] 359 U.S. 180 (1959).

> We do not believe that this case affords us an appropriate instance to pass upon the extent to which effect can be given to such stipulations in ocean bills of lading not to resort to the courts of this country.[23]

Justice Harlan, writing for the dissent,[24] disagreed with the majority's action in both respects. He is of the opinion that clause 27 applied both to *in rem* as well as *in personam* actions. There would, he finds, have been no purpose on the part of the parties in having the shipowner free from suit but his vessel suable. But apart from that, he sees no justification for the majority refusing to rule on the validity of clause 27 in regard to *in personam* actions. He states that it was the question of the validity of the clause as applied to such actions which led the court to grant certiorari. To avoid decision now, he concludes, "serves only to leave the lower federal courts in confusion and uncertainty and to make it necessary for us to mortgage our future and constantly mounting calendars with a question which we could and should decide today."[25]

Since the majority refused to decide the question of the validity of clause 27 as applied to *in personam* suits, Justice Harlan says, "it would be inappropriate for me to express my own view upon it."[26]

While we agree with the majority that clause 27 of the bill of lading should not be construed to include *in rem* proceedings, it is indeed unfortunate for both the admiralty bench and bar that the Court refused to rule upon the validity of clauses which provide that litigation be brought only in certain tribunals.

3. Availability of Carrier's $500 Limitation of Liability Per Package of Cargo to Negligent Stevedore

Article 4(5) of the Carriage of Goods By Sea Act[27] provides for the limitation of the liability of the carrier and ship to $500 per package of cargo unless the nature and value of the goods have been declared by the shipper before shipment and inserted in the bill of lading. Parallel limitation provisions are found in bills of lading.

---

[23] *Id.* at 182.

[24] He was joined by Justices Frankfurter, Whittaker and Stewart.

[25] 359 U.S. at 186. [26] *Ibid.*

[27] 49 Stat. 1211 (1936), 46 U.S.C. § 1304(5) (1958). The pertinent language is, "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States . . . unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. . . ."

Does a stevedore who is engaged as agent of the carrier to load cargo have the benefit of this limitation of liability provision in the event he negligently damages the cargo?

The lower federal courts have reached contrary conclusions on this question. Thus in *A. M. Collins & Co. v. Panama R.R.*,[28] the Court of Appeals of the Fifth Circuit declared that the limitation provision was not intended to be personal to the carrier, but extended to any agency by means of which the carrier performed his contract of transportation and delivery. Accordingly, it held a stevedore, whose negligence had caused loss to cargo, was entitled to the benefit of the limitation when acting as agent for the carrier. On the other hand, in *Robert C. Herd & Co. v. Krawill Machinery Corp.*,[29] the Court of Appeals of the Fourth Circuit, in a similar case, held that neither the Carriage of Goods By Sea Act nor the terms of the bill of lading were intended to give the benefit of the limitation to the stevedore. That court deemed the limitation provision to be strictly confined to the carrier and the ship.

In 1959 the conflict was resolved in favor of the view taken by the fourth circuit when the Supreme Court affirmed that court's judgment in the *Krawill* case.[30]

Krawill Machinery Corporation had arranged for the carriage of sixty-two cases of goods on the *SS Castillo Ampudia* from Baltimore to Spain. Loading was to be done by the carrier or its agent. The carrier orally engaged Robert C. Herd & Company, a stevedoring concern, to load the cargo. In so doing, employees of Herd & Company negligently dropped one of the cases in the harbor causing extensive damage. The bill of lading carried the usual $500 limitation clause[31] and no value of the goods had been declared by the

[28] 197 F.2d 893 (5th Cir), *cert. denied,* 344 U.S. 875 (1952).

[29] 256 F.2d 946 (4th Cir. 1958).

[30] 359 U.S. 297 (1959). The Court was unanimous!

[31] The pertinent language of the clause is, "In consideration of a choice of freight rates having been offered to the shipper by the Carrier, it is agreed that in case of loss of, or damage to . . . goods of an actual value exceeding $500 . . . per package . . . the value of such goods, shall be deemed to be $500 per package . . . and the Carrier's liability, if any, shall be determined on the basis of a value of $500 per package . . . unless the nature of such goods and a value higher than $500 per package . . . shall have been declared in writing by the shipper upon delivery to the Carrier and noted on the face hereof and unless payment of the extra freight charge incident thereto shall have been made or promised . . . , in which case such declared value, or the actual value if less, shall be the basis for computing damages and any partial loss or damage shall be adjusted pro rata. . . .

"'37. This bill of lading shall have effect subject to the Carriage of Goods

shipper or inserted in the bill. Herd & Company sought to limit their liability to $500 by invoking the provisions of the Carriage of Goods By Sea Act and the terms of the bill of lading. The district judge held that while the carrier's liability was limited to $500 the stevedore's was not. He accordingly entered judgment for Krawill in the sum of $47,992 which was the full amount of the damage. The court of appeals affirmed.[32] It acknowledged that a contrary result had been reached by the majority of the court in the *Collins*[33] case. However, it concluded that the sounder view was that expressed by Judge Holmes who had dissented in *Collins* and it adopted his view.

In affirming *Krawill* the Supreme Court also expressly rejected the theory of the majority in *Collins*. It found nothing in the legislative history of the Carriage of Goods By Sea Act which indicates in the slightest that stevedores are to have the benefit of the statutory limitation. As to the limitations in the bill of lading, the Court stressed the principle that contract stipulations which grant immunity or limit liability "must be strictly construed"[34] and confined to "intended beneficiaries."[35] If the parties intended the stevedore to have the benefit of the contract limitation, the Court said, "it must be presumed that they would in some way have expressed it in the contract."[36] In declaring the *Collins* decision to be contrary to the common law and the law as declared by the Supreme Court, Justice Whittaker, speaking for the Court, said,

> From its early history this Court has consistently held that an agent is liable for all damages caused by his negligence, unless exonerated therefrom, in whole or in part, by a statute or a valid contract binding on the person damaged.[37]

And thus the uncertainty as to the right of a stevedore to have the benefit of the $500 limitation extended to him in the absence of further statutory or contractual provisions is brought to an end. It remains for future litigation to determine what valid means may be used to afford the stevedore, who loads the carrier's vessel as its agent, the same limitation of liability the carrier would have if it did the loading itself.

---

by Sea Act of the U.S.A. and the Carrier and the ship shall be entitled to all of the rights and immunities set forth in said Act.'"

[32] 256 F.2d 946 (4th Cir. 1958).
[33] 197 F.2d 893 (5th Cir. 1952).
[34] 359 U.S. at 305.
[35] *Ibid.*
[36] *Id.* at 302.
[37] *Id.* at 303.

PARTITIONING OF VESSEL—MAY IT BE DONE IN STATE COURT AND WHAT LAW IS APPLICABLE?

In *Madruga v. Superior Court of California*[1] the question presented was whether a state court had jurisdictional power to order a sale of a vessel and a division of the proceeds in a partitioning proceeding. Further, if the state court had such power, could it apply state law or was it controlled by some national admiralty law relative to partitioning. A majority of seven Justices held the state court could partition and in so doing apply state law. Two dissenting Justices deemed the partitioning proceeding to be, for all practical purposes, *in rem* and therefore not within the jurisdiction of the state court.

Eight co-owners representing 85% interest in the *Oil Screw Vessel Liberty* filed a suit for partition by sale and distribution of the proceeds of the vessel in the superior court in San Diego County, California. The defendant was Manuel S. Madruga who owned the remaining 15% interest. The vessel at the time was docked at San Diego, its home port. Madruga demurred to the complaint stating that the superior court had no jurisdiction of the subject matter and that exclusive jurisdiction was in the federal court sitting as a court of admiralty. The state court overruled the demurrer and announced it would take jurisdiction. Madruga then sought a writ of prohibition from the state supreme court. An alternative writ was issued, but after a hearing the state supreme court denied a peremptory writ and discharged the alternative writ. It held that the state superior court was competent to entertain the partition proceeding.[2]

In sustaining the action of the state court, the majority, speaking through Justice Black, considered four questions, to wit:

1. Does a federal admiralty court have jurisdiction to order a vessel sold in a partitioning proceeding?
2. If admiralty has such jurisdiction does a state court have concurrent jurisdiction?
3. Is there any national admiralty rule governing the partitioning of vessels?
4. If a state court has concurrent jurisdiction, may it apply its own law of partitioning if no national admiralty rule

[1] 346 U.S. 556 (1954).
[2] 40 Cal. 2d 65, 251 P.2d 1 (1952).

for partitioning has been declared by Congress or the Supreme Court?

In answering the *first* question, the Court reviewed cases in lower federal courts dealing with the partitioning of vessels. It found that considerable divergence of views existed in those courts as to when admiralty might entertain a partitioning proceeding. Some of the lower federal courts had held that admiralty had partitioning jurisdiction only if the dispute was between owners of equal shares. Others had held that admiralty could decree partitioning at the instance of either minority or majority interests. But, whatever the lower courts may have held, the Court found that the jurisdictional power of admiralty courts in partitioning proceedings had "never been squarely decided by this Court."[3] The Court now determines the existence of that power in the affirmative. "We think . . . that the power of admiralty, as Congress and the Courts have developed it over the years, is broad enough for United States district courts to order vessels sold for partition."[4]

In regard to the *second* question, the Court reaffirms the accepted rule that admiralty's jurisdiction is only exclusive as to those maritime causes of action which are begun and carried on as proceedings *in rem,* "that is, where a vessel . . . is itself treated as the offender and made the defendant by name or description . . . ."[5] The proceedings in the superior court of San Diego County were, says the majority, not *in rem* but *in personam* against Madruga. He, and "not the ship, was made defendant."[6] Accordingly, the state court is held to have concurrent jurisdiction under the Savings Clause.[7]

As to the *third* question, the defendant Madruga contended that there is a national admiralty rule to the effect that partitioning of vessels will only be permitted if the ownership interests are equal. He also asserted that any state court in partitioning proceedings relating to a vessel would be bound by this admiralty rule. Since the interests of the owners in the instant case were unequal, he claimed partitioning could not be had.

The Supreme Court conceded that a state court exercising concurrent partitioning jurisdiction would have to follow any nationally established admiralty rule. However, the Court found no such rule

[3] 346 U.S. at 558.
[4] *Id.* at 560.
[5] *Ibid.*
[6] *Id.* at 561.
[7] 28 U.S.C. § 1333 (1958).

had been established either by Congress or the Court. "But Congress has never seen fit . . . to adopt a national partition rule. Nor has any such rule been established by decisions of this court."[8]

The *fourth* and remaining question was whether the state court, in the absence of a national admiralty rule relating to partition, could apply its own law. In effect, the question before the Court was whether it should now establish a national admiralty rule relating to partition which state courts are to follow. Surely it was within the power of the Court to declare such a rule. The scarcity of reported cases involving partition, the Court said, "indicates that establishment of a national partition rule is not of major importance to the shipping world."[9]

The problem here presented is akin to that which was before the Court a year later in *Wilburn Boat*[10] where the majority of the Court found no federal admiralty law passing upon the effect of a breach of warranty in a marine insurance policy and, instead of fashioning such a rule, permitted the state court to apply its own law. Just as the Court refused to formulate an admiralty rule in *Wilburn Boat,* it refused to do it here.

> We do not think the circumstances call on us to add to congressional regulation by attempting establishment of a national judicial rule controlling partition of ships.[11] . . . Nor are we convinced that any theoretical benefits to shipping would justify us in restricting the partition jurisdiction of state courts by fashioning an exclusive national rule to govern quarreling shipowners.[12]

The result of the Court's decision is to leave state courts free to entertain partitioning proceedings of vessels and to apply their own law in regard to such actions.

Justice Frankfurter wrote the dissenting opinion.[13] The state court action, he says, sought no remedy *in personam* against Madruga. It sought merely to effect the sale of a *res* and a division of the proceeds of that *res.* Clearly, he notes, the state court would not have been permitted to entertain an action in which the ship

[8] 346 U.S. at 562. [9] *Ibid.*

[10] Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955), discussed at length in MARINE INSURANCE, *What Law Is Applicable?, supra* at 387-94.

[11] 346 U.S. at 562. [12] *Id.* at 562-63.

[13] He was joined by Justice Jackson.

were named defendant. That would have been promptly classified as *in rem* and in the sole jurisdiction of the admiralty court. To hold that the present partition proceeding is not *in rem* because of the formality of the pleading "is to make questions of jurisdiction in matters maritime, as between federal and state courts, turn on distinctions much too frail."[14]

Justice Frankfurter concedes that Congress might authorize states to exercise jurisdiction for the partition of vessels. He assumes that if Congress did so act, it would "differentiate between small craft plying within a limited area and ocean going vessels."[15] But, he says, "this Court cannot on its own initiative make such differentiations, regarding the power of State courts, as between small vessels and large."[16] He concludes by saying:

> Whatever power may be exercised by Congress in ceding national maritime jurisdiction to the States, it is not for this Court to allow State courts to have concurrent jurisdiction *in rem,* solely because the "establishment of a national partition rule is not of major importance to the shipping world."[17]

Whether or not the Supreme Court majority would adopt Justice Frankfurter's views if the vessel involved were a *Queen Mary,* or if repeated suits for the partitioning of vessels of commercial importance found their way into state courts, is a matter on which one may only conjecture. Certainly, if partitioning proved of considerable importance in the shipping world, the Court could and in all likelihood would assume the burden of fashioning a federal admiralty rule controlling the partitioning of vessels. Such rule would govern irrespective of whether or not the Court continued to permit state courts to exercise concurrent jurisdiction.

MARITIME CONTRACTS AND THE STATUTE OF FRAUDS

The judicial power of a United States district court sitting as a court of admiralty extends to all civil causes of admiralty and mari-

[14] 346 U.S. at 565.
[15] *Id.* at 567.
[16] *Ibid.* It is interesting to note that the following year, in his concurring opinion in *Wilburn Boat,* Justice Frankfurter did agree to the action of the majority in that case allowing the state court to apply its own law as to the effect of a breach of warranty in a marine insurance policy merely because the case involved a small houseboat and not a vessel such as the *Queen Mary.* See MARINE INSURANCE, *What Law Is Applicable?, supra* at 390-91.
[17] 346 U.S. at 567.

time jurisdiction.[1] Hence, if a tort can be classified as a maritime tort, the admiralty court has jurisdiction. If a contract is a maritime contract, admiralty again has jurisdiction. Generally speaking, a tort committed on navigable waters is a maritime tort. Justice Story in the oft cited case of *De Lovio v. Boit*[2] stated that as to torts the admiralty jurisdiction of the United States courts was "necessarily bounded by locality." Accordingly, when in *The Plymouth*[3] sparks from a burning ship set a wharf on fire, the Supreme Court held there was no admiralty jurisdiction, the tort having been committed on land where the injury took place. Congress, many years later, extended admiralty jurisdiction to those cases where a vessel causes damage or injury on land.[4] There is, therefore, not much difficulty in determining whether a cause of action for tort is within or without admiralty jurisdiction. Such is not true as to contracts.

Justice Story in *De Lovio* also declared that admiralty jurisdiction extended "over all contracts (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations) which relate to the navigation, business or commerce of the sea."[5] What contracts meet that test? It is in cataloging contracts as maritime or non-maritime that the courts have left us with a truly checkered slate of authorities. Thus it has been held that a contract to repair a vessel is maritime,[6] while a contract to build one is not.[7] A policy of insurance on a vessel is a maritime contract,[8] but a contract to obtain such a policy is not.[9] A charter party is a maritime contract,[10] but a broker's contract to procure one is not.[11] A contract

[1] This is by virtue of U.S. CONST. art. III, § 2, and section 9 of the Judiciary Act of 1789, REV. STAT. § 563 (1875), now carried over in modified form in the Judicial Code of 1948, 28 U.S.C. § 1333 (1958).

[2] 7 Fed. Cas. 418, 444 (No. 3776) (C.C.D. Mass. 1815).

[3] 70 U.S. (3 Wall.) 20 (1865).

[4] 62 Stat. 496 (1948), 46 U.S.C. § 740 (1958). The constitutionality of this statute has been upheld in lower courts. See United States v. Matson Navigation Co., 201 F.2d 610 (9th Cir. 1953).

[5] 7 Fed. Cas. at 444 (No. 3776). It was in this case that Justice Story held a policy of insurance on a vessel was within, though not exclusively within, federal admiralty and maritime jurisdiction.

[6] New Bedford Dry Dock Co. v. Purdy, 258 U.S. 96 (1922).

[7] Thames Towboat Co. v. The Schooner Francis McDonald, 254 U.S. 242 (1920); People's Ferry Co. v. Beers, 61 U.S. (20 How.) 393 (1857).

[8] Insurance Co. v. Dunham, 78 U.S. (11 Wall.) 1 (1870).

[9] Marquardt v. French, 53 Fed. 603 (S.D.N.Y. 1893). Not all kinds of contracts have been considered by the Supreme Court and accordingly reference is made to lower court decisions which point up the problem.

[10] Armour & Co. v. Fort Morgan S.S. Co., 270 U.S. 253 (1926).

[11] Rhederei Actien Gesellschaft Oceana v. Clutha Shipping Co., 226 Fed. 339 (D. Md. 1915).

to supply a vessel is maritime,[12] but contracts with agents to obtain crews, freight and passengers are non-maritime.[13] A contract to fumigate a ship is maritime,[14] but a contract to sell a vessel is non-maritime.[15]

Since jurisdiction of an admiralty court in contract cases depends on the contract being maritime, it is clear from the above recitation of what have been and have not been held to be maritime contracts that the existence of admiralty jurisdiction in any given contract action may not be easy to predict. As in other areas, the Supreme Court Justices disagree among themselves as to what contracts are maritime and non-maritime. *In brief, admiralty jurisdiction will attach if a majority of the Court chooses to classify the contract as maritime.*

However, classification of the contract as maritime or non-maritime can materially effect the rights of the parties even though the action is brought under the savings clause in a state court or on the law side of the federal court in a diversity case. This was recently illustrated in *Kossick v. United Fruit Co.*[16] Kossick, through no fault of his employer, United Fruit Company, had suffered a thyroid ailment while employed as a chief steward on one of United's vessels. He was entitled to maintenance and cure. United wanted him to be treated at a United States Public Health Service Hospital. Kossick wanted to be treated by his own physician who demanded $350 for his treatment. United refused to accede to Kossick's request but, alleged Kossick, orally agreed that if Kossick would enter a Public Health Service Hospital, United would assume responsibility for all consequences of improper or inadequate treatment. Kossick said he relied on this promise, that he went to the Public Health Service Hospital, and that there he received injuries due to improper treatment. He demanded damages against United in the sum of $250,000.

Kossick brought his action in a federal district court in New York basing jurisdiction on diversity of citizenship. The defendant

[12] The J. E. Rumbell, 148 U.S. 1 (1893).
[13] The Retriever, 93 Fed. 480 (W.D. Wash. 1899).
[14] Luckenbach S.S. Co. v. Ruddy Fumigant Co., 11 F. Supp. 390 (W.D. Wash. 1935).
[15] The Ada, 250 Fed. 194 (2d Cir. 1918). For a further collection of cases illustrating what contracts have been classified as maritime and non-maritime, see 1 BENEDICT, ADMIRALTY 133 (6th ed. 1940).
[16] 365 U.S. 731 (1961).

moved for a dismissal on the ground that the alleged contract was one to answer for the debt, default or miscarriage of another person, and that under the statute of frauds of the state of New York, where the contract was allegedly made, it was void for want of a writing. The district court granted defendant's motion.[17] Without considering the question of whether the contract was maritime or non-maritime, the court found that under the law of New York the action was barred by the state statute of frauds. Since the action in the federal court was based on diversity of citizenship, the district court judge deemed himself controlled by *Erie Railroad v. Tompkins*[18] and obliged to follow state law.

The court of appeals affirmed the dismissal.[19] Judge Magruder, speaking for the court, specifically held that the contract "was not a maritime contract since it was merely a promise to pay money on land if the former seaman should suffer injury at the hands of the United States Public Health Service personnel, on land, in the course of medical treatment."[20] He acknowledged that in *Union Fish Co. v. Erickson*[21] the Supreme Court had held that when an action is brought on a maritime contract in an admiralty court the contract cannot be nullified by a state statute of frauds.[22] Whether or not *Erickson* would be applicable in a diversity action, or whether or not the rule of that case may have been modified by later decisions, Judge Magruder said was immaterial because *Erickson* applies only to maritime contracts. Since Judge Magruder found the contract in *Kossick* was not maritime, *Erickson* and admiralty law have nothing to do with the case. The dismissal, he held, was proper because of the operation of the state statute of frauds on a non-maritime contract.

On certiorari the Court divided six to three.[23] The majority reversed the lower courts and ordered the action reinstated. Justice Harlan, speaking for the Court, said the case presented two questions: "*First,* was this alleged contract a maritime one? *Second,* if so, was it nevertheless of such a 'local' nature that its validity should be judged by state law?"[24]

Answering the first question, Justice Harlan classified the contract as maritime because he found the consideration for United's

[17] 166 F. Supp. 571 (S.D.N.Y. 1958).
[18] 304 U.S. 64 (1938).
[19] 275 F.2d 500 (2d Cir. 1960).
[20] *Id.* at 502.
[21] 248 U.S. 308 (1919).
[22] 275 F.2d at 502.
[23] 365 U.S. 731 (1961).
[24] *Id.* at 735.

alleged promise was Kossick's "good faith forebearance to press what he considered—perhaps erroneously—to be the full extent of his maritime right to maintenance and cure."[25] "So viewed," Justice Harlan continued, "we think that the alleged agreement was sufficiently related to peculiarly maritime concerns as not to put it, without more, beyond the pale of admiralty law."[26]

The controlling question, Justice Harlan stated, was the second one, namely: "whether the alleged contract, though maritime, is 'maritime and local' . . . in the sense that the application of state law would not disturb the uniformity of maritime law . . . ."[27] In answering this question Justice Harlan comments on a series of cases such as *Southern Pacific Co. v. Jensen,*[28] *The Tungus v. Skovgaard,*[29] *Just v. Chambers,*[30] *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*[31] and others.

In *Jensen,* recovery was not permitted under a state workmen's compensation act when a stevedore employed by the shipowner was killed on the vessel in state waters. To permit the application of state law, the Court then held, would interfere with the uniformity essential in maritime matters. In *Skovgaard,* suit in admiralty was brought for a wrongful death occurring on the navigable waters of New Jersey. Although no death action was afforded in such case by maritime law, the Court permitted the plaintiff to maintain his action basing it on the New Jersey wrongful death statute. In *Chambers,* the plaintiff brought suit in admiralty against the estate of a deceased tortfeasor for a maritime tort committed by the decedent on the navigable waters of Florida. Under maritime law, actions do not survive the death of the tortfeasor. Under the statutory law of Florida, actions do survive the tortfeasor's death. The Court held that the action could be maintained on the basis of the Florida statute. And, as we have seen earlier in this paper, in *Wilburn Boat* the state law as to the effect of a breach of warranty was permitted to determine the rights of the parties to a maritime contract of insurance on a houseboat.

In considering the past action of the Court, Justice Harlan finds that the cases illustrate a process of accommodation favoring either the application of state law or the adherence to maritime law.

[25] *Id.* at 738.
[26] *Ibid.*
[27] *Ibid.*
[28] 244 U.S. 205 (1917).
[29] 358 U.S. 588 (1959).
[30] 312 U.S. 383 (1941).
[31] 348 U.S. 310 (1955).

Various factors influence the acceptance by the Court of state law. Thus, in cases such as *Skovgaard* and *Chambers,* permitting the operation of state law made recovery possible for a wrong committed when maritime law afforded no remedy. *Wilburn Boat* permitted state law to operate in an area where the majority then found no controlling maritime authority. *Jensen* preserved uniformity in an area where the Court deemed uniformity of paramount importance.

Now in *Kossick* the Court must determine whether an alleged oral maritime contract, enforceable under maritime law, shall be held unenforceable in a federal diversity action[32] by reason of a state statute of frauds. This is not a situation of the plaintiff seeking relief for a tortious act committed by the defendant. If the plaintiff's allegations are true, he is seeking to enforce an obligation which the defendant voluntarily assumed. In this situation, Justice Harlan holds that the maritime law should control. He finds nothing of a peculiarly local nature in the contract. Neither does he find any interest of the state of New York which would call for the application of state law.[33]

Justice Frankfurter, who was joined by Justice Stewart, wrote a brief dissent. He would affirm the lower courts. He does not classify the contract in question as either maritime or non-maritime. He refers to it as a "limited and essentially local transaction" and concludes that allowing the contract to be governed by the state statute of frauds would not "disturb the uniformity of maritime law."[34] But primarily, Justice Frankfurter criticizes the majority because he finds it is relying on *Jensen* and "reinvigorating that 'ill-starred decision.' "[35]

Justice Whittaker filed a separate five-line dissent in which he

[32] Whether Kossick filed his suit in an admiralty court, or a state court, or, as here, on the law side of the federal court, the same rule of law should determine the rights of the parties when once it is conceded that Kossick was seeking to enforce a maritime cause of action. See text at notes 55, 64-66, in MARINE INSURANCE, *What Law Is Applicable?, supra* at 392-93. See also Madruga v. Superior Court of California, 346 U.S. 556, 561 (1954), discussed in PARTITIONING OF VESSEL—MAY IT BE DONE IN STATE COURT AND WHAT LAW IS APPLICABLE?, *supra* at 462-65.

[33] If New York state has any interest in the outcome of the litigation, it presumably would be that Kossick not become a public charge on that state. While not urged as a basis for decision, it may be noted that this interest of New York is served by permitting maritime law to operate under which, with the blessings of a jury in the diversity action, Kossick may be amply provided for.

[34] 365 U.S. at 743.

[35] *Ibid.*

stated he agreed with the court of appeals that the contract was non-maritime and therefore controlled by the New York statute of frauds.

Basically, the claimant's right to maintain his action must, in the first instance, rest on the contract being classified as maritime. In concluding that the contract was maritime the majority would appear to be on sound ground. The obligation of the shipowner to supply maintenance and cure is wholly predicated on maritime law. If the shipowner were to furnish such cure himself and to do it negligently, it is clear that the seaman would have a cause of action rooted in the obligation imposed by maritime law.[36] When the shipowner has some third party supply the cure and agrees to indemnify the seaman for negligence of that third party, it is submitted that the nexus between the original maritime obligation and the contract of indemnity is so close as to warrant the latter being classified as maritime.

In the absence of controlling precedent, the Court had to make the choice of calling the contract maritime or non-maritime. Not only does the Court's selection seem legally sound but it also had the advantage (or disadvantage depending on the point of view) of leaving the plaintiff free to have his "day in court" to prove, if he can, his case. Even if we were to assume that in some instances the interest of a state in a maritime contract would call for the application of state law, Justice Harlan again appears to be on sound ground when he finds no interest of the state of New York which would call for the application of New York law.[37]

Finally, as to Justice Frankfurter's concern that the majority is reinvigorating the *Jensen* case, it is clear from Justice Harlan's opinion that his reference to *Jensen,* which did not apply state law, and the other cases mentioned by him which did apply state law, is merely to illustrate the process of accommodation the Court has used in determining whether state law should be permitted to operate.

FORUM NON CONVENIENS

Transferrability of Admiralty Action in Which Both in Rem and in Personam Claims Are Joined

Application of the doctrine of *forum non conveniens* in the federal courts prior to the Judicial Code of 1948 led to the dismissal

[36] Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367 (1932).
[37] See note 33 *supra.*

of an action which had been brought in an inconvenient one of two or more legally available forums.[1] To relieve against the harshness of this rule Congress, in 1948, provided in section 1404(a) of the Judicial Code that, "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

In *Continental Grain Co. v. Barge FBL-585*[2] the question presented for decision by the Supreme Court was whether a district court, sitting as a court of admiralty in New Orleans, could transfer an action to the district court in Memphis, Tennessee, by virtue of section 1404(a), above quoted, when the action contained both a libel *in rem* as well as a libel *in personam.*

The vessel which had been the subject of the *in rem* libel was a barge owned by Federal Barge Lines. Continental was the owner of a cargo of soybeans which it loaded on the barge while it was located on the Wolf River at Memphis. During the loading process the barge partially sank and both barge and cargo were damaged. Continental claimed the barge sank because it was unseaworthy and Federal said the sinking was caused by reason of the negligent manner in which Continental did the loading.

In due course the barge was raised and continued in use. In the latter part of June 1958, Federal filed suit in a Tennessee state court against Continental and sought to recover for the damages to the barge. This action was in due course transferred to the federal district court sitting in Memphis.

On July 2, 1958, Continental filed a libel *in rem* against the barge[3] in a federal district court in New Orleans at which port the barge was then located. It joined in the same complaint a libel *in personam* against Federal as owner and supplier of the barge. In this action Continental sought to recover damages occasioned to its cargo by reason of the sinking. Federal made a motion predicated on section 1404(a), aforesaid, to the district court in New Orleans and

[1] Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

[2] 364 U.S. 19 (1960).

[3] The barge was not actually seized but, in accordance with the practice in New Orleans and other major seaports of maritime litigation, the usual letter of undertaking was given by Federal providing that in consideration of the barge not being seized, Federal would pay any final decree that might be rendered in the proceedings and that the rights of the parties shall be precisely the same as they would have been had the vessel been seized by the marshal under *in rem* process and released upon the shipowner putting up a bond.

asked that the action be transferred to the federal district court in Memphis where Federal's action against Continental was pending. The court granted the motion finding that the convenience of witnesses and efficient administration of justice required the cargo owner's claim to be disposed of by the same court in which the barge owner's claim was awaiting trial. The court of appeals affirmed the order of transfer.[4]

On certiorari a Supreme Court majority of seven Justices affirmed the court of appeals.[5] Two dissenting Justices were of the opinion that the transfer of the *in rem* libel was not permissible because such libel could not have been brought in the transferee court at Memphis at the time of the filing of the libel action since the barge at that time was at New Orleans. The dissent also contended that the transfer was invalid under the Court's decision, handed down just two weeks earlier, in *Hoffman v. Blaski* and *Sullivan v. Behimer,*[6] which, although not admiralty cases, construed section 1404(a) of the Judicial Code. In the *Blaski* and *Behimer* cases[7] the majority of the Court had held that the words "where it might have been brought" in section 1404(a) meant in that district where the plaintiff at the time he instituted his action had a *right* to bring it. The phrase was held not to mean in the district where the action might now be brought with defendant's consent.

It is important that we keep in mind this very recent pronouncement of the Court when we are dealing with the libel *in rem.* Clearly, a vessel cannot be libeled except it be in the jurisdiction of the district court where the libel is instituted. Physical presence is the basic essential to any libel *in rem.* Consequently, had the cargo owner merely brought a libel *in rem* against the barge in New Orleans and caused the seizure of the vessel under the *in rem* process, no one could possibly claim that the same action could have been brought in Memphis where there was no barge to seize. On the other hand, if the owner of the cargo had merely brought an *in personam* action in the federal district court in New Orleans, transfer could properly be made to some other district where the plaintiff would have had a legal right to bring his action in the first instance.

Assuming that Continental could have brought its action *in*

[4] 268 F.2d 240 (5th Cir. 1959). [5] 364 U.S. 19 (1960).
[6] 363 U.S. 335 (1960).
[7] *Ibid.* The Court rendered one opinion covering both the *Blaski* and *Behimer* cases.

personam against Federal in the first instance in the district court of Memphis (actually it should have counterclaimed in Federal's action there pending),[8] and assuming, as we must, that the *in rem* action could not be brought in Memphis, what is to be the effect of the joinder of both *in personam* and *in rem* actions in the same complaint in the district court at New Orleans? Several possibilities present themselves:

1. The district court in New Orleans might separate the two causes of action and order only the *in personam* action to be transferred to Memphis;
2. The district court in New Orleans might declare the actions set out in the one complaint are not to be separated for purposes of transfer and since the *in rem* action could not have been brought in Memphis it must stay in New Orleans and keep with it the *in personam* action;
3. The district court in New Orleans might declare the actions set out in the one complaint are not to be separated for the purpose of transfer and since the *in personam* action is transferable to Memphis it will be so transferred and carry with it the *in rem* action.

The Supreme Court adopted the third course just set out. Justice Black, speaking for the Court, referred to the long standing admiralty fiction that a vessel may be assumed to be a person for the purpose of filing a lawsuit and enforcing a judgment. This fiction, he said, was to enable a claimant to bring an action in any port where the vessel might be found although the owner was not amenable to process. It was designed to afford a convenient forum. To apply the fiction now for the very purpose of defeating a transfer to a convenient forum would, as he sees it, be using the fiction contrary to the very purpose for which it was created.

Further, while it is true that the judgment in an *in rem* action

[8] Why Continental did not counterclaim is explained by the court of appeals. 268 F.2d at 242 n.2: "How the left hand knew nought of the right in this multi-state, multi-forum amphibious litigation is explained in the briefs. The underwriters on Federal's hull loss and cargo liability, as were those on Continental's cargo loss and its public liability, were different. Each was apparently anxious to manage its own litigation with a seeming indifference to the strong likelihood that under F.R.Civ.P. 13(a), 28 U.S.C.A. concerning compulsory counterclaims, or general principles of estoppel by judgment, res judicata, or the like, trial of one case would inevitably affect, if not control, the other."

is against the vessel and technically enforceable against it, practically, says Justice Black, the money will be paid out of the owner's pocket. If transfer is not to be permitted in a case of this nature, a claimant could prevent transfer of an *in personam* action under section 1404(a) by joining with it a libel *in rem*. This, of course, could only be done if the claimant sued in the district where the vessel was located. The action in question, even though it contains *in rem* and *in personam* claims, should be considered as a single "civil action" within the meaning of section 1404(a). "The crucial issues about fault and damages suffered were identical, whether considered as a claim against the ship or its owner."[9] The majority opinion concludes by saying that to construe section 1404(a) to sanction a transfer in this case to the district where the *in personam* action might have legally been brought, "merely carries out its design to protect litigants, witnesses and the public against unnecessary inconvenience and expense, not to provide a shelter for *in rem* admiralty proceedings in costly and inconvenient forums."[10]

Justice Whittaker wrote the dissenting opinion. He stresses the personality of the ship which is looked upon as the debtor. An *in rem* action in admiralty is not an attachment device to force the appearance of the owner, nor is it a means of providing security for the payment of a judgment obtained against the owner. This fact, Justice Whittaker says, the Court's opinion endeavors to sweep "under the rug."[11] Since the barge at the time of the libel was at New Orleans the *in rem* action could not have been brought in Memphis. Consequently, Justice Whittaker says, the *Blaski* and *Behimer* cases must control. Consent by the barge owner to have the *in rem* action transferred to Memphis cannot result in transferrability of the *in rem* action any more than consent of a person defendant to be sued in a more convenient forum can effect transferrability if the plaintiff at the time of institution of suit had no legal right to bring it in the proposed forum.

The dissent also points out that the giving of the letter undertaking[12] to avoid the seizure of the barge "did not convert the *in rem* action into one *in personam*."[13] The letter undertaking, like a bond releasing the vessel after it has been seized by the marshal in an *in*

[9] 364 U.S. at 26.
[10] *Id.* at 27.
[11] *Id.* at 28.
[12] See note 3 *supra*.
[13] 346 U.S. at 39.

rem proceeding, "*is substituted for* and stands as the vessel in the custody of the court."[14]

No matter how technically logical Justice Whittaker's dissent may be, it must be conceded that efficient and economical administration of justice is attained by sanctioning the transfer. And while the transfer was effected in this case in which an *in rem* claim was joined with a concededly transferable *in personam* claim, one may well ask what would have been the action of the Court if there had been no such joinder and only an *in rem* action had been filed in New Orleans.

Practically all that is said in the majority opinion in attacking the fictional personality of the vessel and in support of the transfer of the New Orleans action would be equally applicable if that action were solely a libel *in rem*. The following language of the Court is indicative of its attitude:

> It is relevant that the law of admiralty itself is unconcerned about the technical distinctions between *in rem* and *in personam* actions for purposes of transferring admiralty actions from one court to a more convenient forum. . . . [Justice Black here referred to Admiralty Rule 54 which relates to the transfer of proceedings seeking to limit the liability of the shipowner.] And it may be further observed that courts have not felt themselves bound by this fiction when confronted with the argument that because *in rem* and *in personam* actions involve different parties, therefore *res judicata* does not apply from an *in personam* action against an owner to an *in rem* action against his ship.[15]

Conceivably, the Court would have approved the transfer of the action had it been solely *in rem*. If it had done so, however, it would have been flying in the face of its decision in *Blaski* and *Behimer*. The rule of those cases is clear and definitely stated. Only if the plaintiff had a legal right to sue in the proposed transferee court at the time his action was instituted could the transfer be made. The Court in *Blaski* and *Behimer* had rejected Justice Frankfurter's view (expressed in his dissent in *Behimer*) that transfer should be made to the convenient forum whenever the defendant *consents* to going forward in the transferee court irrespective of whether the

[14] *Id.* at 38. (Emphasis is Justice Whitaker's.)
[15] *Id.* at 25.

plaintiff had the right to sue defendant in that court in the first instance.[16]

When the Court in *Continental* approved a transfer of an *in rem* libel which had been coupled with an admittedly transferable libel *in personam* it effectuated the purpose of the *forum non conveniens* doctrine as expressed in section 1404(a). It was assisted by the presence of the *in personam* claim. It was also cognizant of the fact that although one cause of action was designated as a libel *in rem*, the vessel, itself, not only was not in the marshal's custody, but had never been seized. The responsible source out of which any judgment for Continental would be paid was the undertaking or bond furnished by Federal.

The Continental Case and Suggested Congressional Action

Effective administration of justice would not have been attained by denying the transfer in *Continental*. Neither will effective administration of justice be afforded if, in an action solely *in rem* against a vessel which is released upon the owner putting up a bond, the court is unable to transfer to the convenient forum. In the absence of a change in the language of section 1404(a) which would incorporate the views of Justice Frankfurter, heretofore mentioned,[17] it is suggested that congressional action be taken which would provide that in all libels *in rem* when the vessel is released or in fact never seized by reason of the defendant putting up a bond, transfer may be made, under *forum non conveniens* principles, to any other federal district court where the defendant might have been sued *in personam* at the time when the libel *in rem* was brought.

ADMIRALTY'S POWER TO GIVE EQUITABLE OR QUASI-CONTRACT RELIEF

1. Equitable Relief

"While the court of admiralty exercises its jurisdiction upon equitable principles, it has not the characteristic powers of a court of equity. It cannot entertain a bill or libel for specific performance, or to correct a mistake . . . or declare or enforce a trust or an equitable title . . . ." This statement was made by Chief Justice Fuller in 1890, when he spoke for the Court in *The Eclipse*.[1] Sixty

[16] 363 U.S. at 369 (dissenting opinion).
[17] *Ibid.*

[1] 135 U.S. 599, 608 (1890).

years later, in 1950, Justice Frankfurter when speaking for the Court in *Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A.*,[2] cited *The Eclipse* and said, "Unquestionably a court of admiralty will not enforce an *independent* equitable claim merely because it pertains to maritime property."[3]

Although admiralty has no power to enforce an independent equitable claim, may it afford an equitable remedy as an incident to and in support of its exercise of jurisdiction over a matter exclusively maritime? This question was answered in the affirmative by the Court in the *Swift & Co. Packers* case. Specifically the problem was whether an admiralty court had the power to set aside the fraudulent transfer of a vessel which was the subject of a foreign attachment in an *in personam* libel to recover damages for loss of cargo. Libelants named as defendants the carrier and transferee of the vessel and alleged the transfer had been made to defraud libelants of their rights.

On motion of the transferee, the district court[4] vacated the attachment on the ground that only property of the contracting carrier could be attached and admiralty was without jurisdiction to determine whether the transfer was fraudulent. "The reasoning of the District Court was based on the view that a claim of fraud in the transfer of a vessel was a matter for determination by a court of equity and therefore outside the bounds of admiralty jurisdiction."[5] The court of appeals affirmed the vacation of the attachment.[6]

In reversing, the Supreme Court held admiralty had power, in the circumstances of this case, to determine whether or not the transfer of the vessel was fraudulent and that its power should be exercised. In referring to the action of the district court the Supreme Court said,

> The reasoning of the District Court would be pertinent if the libellants, as creditors of Transmaritima [the carrier], had gone into admiralty by way of a creditor's bill to set aside a pretended sale of the *Caribe* [the vessel attached] as a fraudulent transfer. But that is not the case before us.[7]

---

[2] 339 U.S. 684 (1950). For an excellent interim article on the equitable and quasi-contract powers of admiralty, see Morrison, *The Remedial Powers of Admiralty*, 43 YALE L.J. 1 (1933).

[3] 339 U.S. at 690. (Emphasis added.)

[4] 83 F. Supp. 273 (D. Canal Zone 1948).

[5] 339 U.S. at 689-90.

[6] 175 F.2d 513 (5th Cir. 1949).

[7] 339 U.S. at 690-91.

As we have stated, the case before the Court was a suit in admiralty to collect damages for non-delivery of cargo. "As an incident to that claim, in order to secure respondents' appearance and to insure the fruits of a decree"[8] the libelants had made the attachment pursuant to general Admiralty Rule 2. "The issue of fraud," said the Court, arose "in connection with the attachment as a means of effectuating a claim incontestably in admiralty."[9]

> To deny an admiralty court jurisdiction over this subsidiary or derivative issue in a litigation clearly maritime would require an absolute rule that admiralty is rigorously excluded from all contact with nonmaritime transactions and from all equitable relief, even though such nonmaritime transactions come into play, and such equitable relief is sought, in the course of admiralty's exercise of its jurisdiction over a matter exclusively maritime.[10]

The Court found no basis in precedent to so "hobble"[11] the admiralty courts. It found no restriction upon admiralty by chancery "so unrelenting as to bar the grant of any equitable relief even when that relief is subsidiary to issues wholly within admiralty jurisdiction."[12] Finally, in upholding the admiralty court's power to set aside the fraudulent transfer, the Court said,

> If colorable transfers of property were immune to challenge in a court of admiralty when a libel *in personam* has been brought in a District where the respondent cannot be personally served, admiralty jurisdiction would be sacrificed to a sterile theory of judicial separatism.[13]

The Court was careful to confine its holding as to the equitable powers of admiralty to the suit before it. "We would be passing on situations not before us were we to attempt now to define when the power which we recognize should be withheld."[14] It remains to be seen whether the Court will in later cases find that admiralty has power to give the equitable relief of injunction, reformation or specific performance when "that relief is subsidiary to issues wholly within admiralty jurisdiction."[15]

---

[8] *Id.* at 691.
[9] *Ibid.*
[10] *Ibid.*
[11] *Ibid.*
[12] *Id.* at 690.
[13] *Id.* at 693-94.
[14] *Id.* at 695.
[15] *Id.* at 692.

2. Quasi-Contract Relief

Over a period of years considerable controversy has raged on the question of whether or not admiralty courts have jurisdiction in causes of action based upon quasi-contract or unjust enrichment. In 1939, Professor Robinson in his well known text on admiralty categorically stated, "There is no admiralty jurisdiction in quasi-contract even when the claim arises out of a maritime contract."[16] Several years later, Professors Gilmore and Black in their work on Admiralty were more cautious and listed quasi-contractual claims arising out of maritime transactions as being in a "doubtful area" of admiralty jurisdiction "where generalization is dangerous."[17]

In 1956, the Supreme Court directly tackled the question in *Archawski v. Hanioti*[18] and removed certain doubts. The *City of Athens* was a passenger vessel owned by Hanioti.[19] Libelants brought suit in admiralty against Hanioti seeking to recover passage money they had paid him for a trip to Europe on the *City of Athens.* The scheduled voyage never took place.[20] The libel alleged that Hanioti had wrongfully and deliberately applied the moneys received by him to his own use in reckless disregard of his obligation to refund the same. The district court[21] held the action was on a maritime contract and within admiralty jurisdiction. The court of appeals reversed.[22] It held that the suit was not within admiralty jurisdiction because it was an action "in the nature of the old common law *indebitatus assumpsit,* for money had and received, based upon the wrongful withholding of moneys."[23] The court of appeals relied on decisions in its own circuit which had held that admiralty has no jurisdiction to grant relief in such cases "because the implied promise to repay the moneys which cannot in good conscience be retained—necessary to support the action for money had and received—is not a maritime contract."[24]

---

[16] ROBINSON, ADMIRALTY 197 (1939).

[17] GILMORE & BLACK, ADMIRALTY 25 (1957).

[18] 350 U.S. 532 (1956). The Court was unanimous!

[19] Nominal ownership was in a corporation wholly controlled by Hanioti. See opinion of Judge Walsh in Archawski v. Hanioti, 129 F. Supp. 410 (S.D.N.Y. 1955).

[20] This was because creditors seized the vessel which was sold to pay claims existing at the time the passage moneys were received by Hanioti.

[21] 129 F. Supp. 410 (S.D.N.Y. 1955).

[22] 223 F.2d 406 (2d Cir. 1955).

[23] *Id.* at 407.

[24] United Transp. & Lighterage Co. v. New York & Baltimore Transp. Line, 185 Fed. 386, 391 (2d Cir. 1911).

On certiorari the Supreme Court reviewed the authorities in which lower federal courts had held admiralty has no jurisdiction to entertain quasi-contract claims based upon unjust enrichment.[25] The Court noted that the duty to pay is, as in the instant case, often referable to a breach of a maritime contract. "The problem," said the Court, "is to prevent unjust enrichment from a maritime contract."[26] For admiralty to prevent such unjust enrichment "does not reach beyond the domain of maritime affairs."[27] The Court continued, "We conclude that, so long as the claim asserted arises out of a maritime contract, the admiralty court has jurisdiction over it."[28]

In upholding quasi-contract relief in the instant case the Court pointed out that the philosophy of *indebitatus assumpsit* is not foreign to admiralty. Analogous conceptions of rights are found, said the Court, in the recognized maritime rights of salvage and general average, both of which do not arise out of any express agreement. In concluding his opinion, Justice Douglas, speaking for the Court, said,

> How far the concept of quasi-contracts may be applied in admiralty is unnecessary to decide. It is sufficient this day to hold that admiralty has jurisdiction, even where the libel reads like *indebitatus assumpsit* at common law, provided that the unjust enrichment arose as a result of the breach of a maritime contract.[29]

It thus appears that, given the necessary nexus with a maritime contract, admiralty has jurisdiction of causes of action based upon the concept of unjust enrichment which in common law courts are denominated as actions in quasi-contract. So today, instead of repeating the language of Professor Robinson quoted above,[30] we must now say exactly the opposite, namely, "There *is* admiralty jurisdiction in quasi-contract when the claim arises out of a maritime contract."

---

[25] 350 U.S. at 534.
[26] *Id.* at 535.
[27] *Ibid.*
[28] *Ibid.*
[29] *Id.* at 536.
[30] See text at note 16 *supra.*