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# Admiralty -- Federal Limitation of Liability Act v. State "Direct Action" Statute

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# NOTES AND COMMENTS

## Admiralty—Federal Limitation of Liability Act v. State "Direct Action" Statute

In 1851 Congress amended the law of admiralty of the United States by the enactment of the Limitation of Liability Act[1] by which, in general, the liability of shipowners for loss or injury resulting from marine accidents is limited by the value of the interest of the owner in the ship. Prior to 1851 the rule of American law had been that the shipowner's liability was limited only by the amount of the loss or by his ability to pay the damages.[2] The United States was the last of the principal western maritime powers to abandon the rule of unlimited liability. While that rule had been part of the general English admiralty law (whence it came into American law), England had, by a series of acts of Parliament beginning in 1734, adopted the principle of limitation.[3] On the continent the rule of limited liability had, beginning with the Code Napoléon, become an established part of the civil codes of all maritime countries by the close of the Napoleonic era.[4] Thus, had Congress failed to act, American shipowners, required to bear the entire burden of the cost of disasters at sea, would have been at a fatal disadvantage in competition with foreign powers for the privilege of carrying the waterborne commerce of the world.

The provisions of the act of 1851, so far as they are pertinent to this discussion, have been amended only in minor particulars (with the single exception noted below), and are now found as §§ 183 (a), 185 and 186 of the United States Code.[5] Briefly, the act provides that the

[1] Act Mar. 3, 1851, ch. 43, 9 STAT. 635.

[2] Stinson v. Wyman, 23 Fed. Cas. 108 (D. Me. 1841). "The common law, as well as the civil law, holds the owners responsible for all the obligations of the master, to their full extent, whether they result from contract or tort." *Id.* at 109.

[3] English admiralty law was largely based on the Laws of Oléron, an early codification of the law of the sea taking its name from Ile d'Oléron, off the coast of France. This code was published first in France in 1485, and was translated into English during the reign of Henry VIII. The Laws of Oléron did not recognize the principle of limited liability. See 4 BENEDICT, THE LAW OF AMERICAN ADMIRALTY 352 (6th Ed. 1940-41).

[4] The law of admiralty of continental countries was founded on the Consolato del Mare, a code which was probably of Spanish origin and which was first published in Barcelona in 1494. See 4 BENEDICT, THE LAW OF AMERICAN ADMIRALTY 353 (6th Ed. 1940-41). For a comprehensive review of the history of the rule of limited liability, see The Rebecca, 20 Fed. Cas. 373 (D. Me. 1831).

[5] 46 U. S. C. §§ 183 (a), 185, 186 (1952): "183 (a). The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not . . . exceed

liability of the shipowner for loss or injury may be limited by the value of his interest in the ship and in the revenue from such freight as may be involved in the voyage, provided that the loss or injury has occurred without his knowledge or privity. Limitation proceedings in a federal district court are authorized, to which shall be summoned all claimants, and in which the owner is required to make available to the claimants, pursuant to court order, the value of his interest in the ship and freight, whereupon the court may enjoin all other actions against the owner based on the same accident. Should the court, in this proceeding, find knowledge or privity on the part of the owner, the petition for limitation will be dismissed. Otherwise, the court causes the interest of the owner in ship and freight to be appraised and the claims of claimants proved and evaluated. If the aggregate amount of the allowable claims is not in excess of the value of the owner's interest, each claimant receives his claim in full. If the owner's interest is less than the total of the claims allowed, each claimant receives a share pro rata.[6]

The constitutionality of the act was early established and has been consistently upheld over the years.[7]

Since 1886 the act has applied to every type of vessel whenever it is operating on navigable water.[8] While the act does not so state in terms,

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the amount or value of the interest of such owner in such vessel and her freight then pending.

185. The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter, and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease.

186. The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof."

[6] See Admiralty Rules of the Supreme Court, Rules 51-55.

[7] Wattson & Sons v. Marks *et al.*, 2 Am. Law Reg. 157 (E. D. Pa. 1853); Lord v. Steamship Co., 102 U. S. 541 (1880); Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578 (1883); Butler v. Boston S. S. Co., 130 U. S. 527 (1889); *In re* Garnett, 141 U. S. 1 (1891).

[8] As originally passed, it was provided that the act should not apply "to the owner or owners of any canal boat, barge, or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation." An act of 1886 (c. 421, § 4) substituted the following provision: "The provisions of the six preceding sections . . . shall apply to all sea-going vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters." 24 STAT. 80, 46 U. S. C. § 188 (1952).

it has been held to apply to cases of personal injury or death as well as to injury to or loss of property.[9] The interest of the owner in the ship is measured by the value of the ship at the end of the voyage, after the accident, even though the voyage ends in sinking, with resultant total loss; furthermore, the owner is not required to account in the limitation proceeding for the value or proceeds of any insurance he may have carried on the vessel.[10]

It is evident that the Limitation of Liability Act gives the shipowner a pronounced advantage over the claimant for damages, including, of course, the personal injury and wrongful death claimant. The reason for that advantage was initially, and remains, established national policy to encourge and protect investment in the shipping industry. That policy is founded on the convction, long widely held, that a flourishing merchant marine is both a vital element of national defense and an essential accessory to peace-time prosperity.[11] But whatever the purpose has been, the practical effect of the limitation act is to promote the interest of the owner-defendant in a damage suit.

In marked contrast to the purpose of the federal act limiting the liability of shipowners, there began, some forty years ago, a movement on the part of state legislatures to provide statutory protection for plaintiffs in damage actions for personal injury or wrongful death.[12] One of the most comprehensive of these laws was the so-called "direct action" statute of Louisiana, enacted in 1930. This act provided that, regardless of contract provisions to the contrary, the plaintiff in a personal in-

[9] Butler v. Boston S. S. Co., 130 U. S. 527 (1889).

[10] These rules were laid down first by the district court in Wattson & Sons v. Marks *et al.*, 2 Am. Law Reg. 157 (E. D. Pa. 1853). In respect to the time when the value of the vessel was to be taken, the court reasoned that the owner, in the limitation proceeding, was required to make available to the court his interest in the vessel, and he could not then make available more than he had. If the vessel were a total loss, the owner's interest, and his consequent liability, would be reduced to zero. In reference to the problem of insurance, the court said: "The policy of insurance is a distinct independent subject of property. No equity attaches upon the proceeds of it in favor of third persons unless there be some contract, agreement, or trust, to that effect. . . . The assignment of a ship passes no interest in an outstanding policy. . . ." *Id.* at 167.

The same conclusions were later arrived at by the Supreme Court. In respect to the rule that the value of the ship is to be measured after the accident: Norwich Co. v. Wright, 13 Wall. (80 U. S.) 104 (1871); The Scotland, 105 U. S. 24 (1881). In respect to the rule that the owner need not account for insurance proceeds: Place v. Norwich & N. Y. Transportation Co., 118 U. S. 468 (1886).

[11] See MAHAN, THE INFLUENCE OF SEA POWER UPON HISTORY, ch. I (Boston, Little, Brown & Co., 1895).

[12] Massachusetts led the way in 1914 by passing a statute which permitted recovery by the injured plaintiff from the liability insurance carrier of the tort-feasor, in case a judgment against the latter should be unsatisfied by reason of insolvency or bankruptcy, notwithstanding a clause in the contract making the insurer liable only for damages actually paid by the insured. Mass. Acts 1914, c. 464, §§ 1, 2; MASS. GEN. LAWS c. 175, §§ 112, 113; c. 214, § 3 (10) (1932). For a review of state legislation in this field, *see Legislation: Legislative Efforts to Make Insurance Guarantee the Payment of Tort Claims,* 46 HARV. L. REV. 1325; also *Leigh, Direct Actions Against Liability Insurers,* INS. LAW J. 1949, p. 633.

jury or wrongful death action might, at his option, sue the insurance carrier of the alleged tort-feasor directly. The law was amended in 1950 to include liability contracts written by foreign insurance companies and issued outside the state.[13] As originally passed, the act was held to be constitutional by the Circuit Court of Appeals in 1931,[14] and as amended, by the Supreme Court in 1954.[15]

The theory underlying this legislation has been judicially declared to be that a policy of liability insurance is issued primarily for the benefit of the public, not for the protection of the insured.[16] In any individual action, the public obviously means the injured plaintiff. In addition to giving the judgment creditor an action against the insurer of the insolvent or bankrupt tort-feasor (now a feature of the legislation of almost every state), the Louisiana statute reverses the general rule of the American law of evidence to the effect that testimony tending to show that the defendant in a damage action is or is not insured is not admissible.[17] Of course, the effectiveness of this rule is frequently nullified by permissible questions to jurors as to their connections with insurance companies, thus establishing the inference that an insurance carrier is concerned in the case.[18] Indeed, judicial notice has been taken of the fact that jurors will assume that a defendant is insured.[19] The Louisiana statute replaces indirection and inference with direct

[13] As amended the act now appears as LA. REV. STAT. 22: 655 and 983(E) (1950). "655. No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy. . . . The injured person or his or her heirs, at their option, shall have the right of direct action against the insurer within the terms and limits of the policy . . . , and said action may be brought against the insurer alone or against both the insured and the insurer, jointly and in solido. This right of direct action shall exist whether the policy of insurance sued upon was written and delivered in the State of Louisiana or not, and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana. . .

983 (E). No certificate of authority to do business in Louisiana shall be issued to a foreign or alien liability insurer until such insurer shall consent to being sued by the injured person or his or her heirs in a direct action as provided in Section 655 of this Title, whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not, and whether or not such policy contains a provision forbidding such direct action, provided that the accident or injury occurred within the State of Louisiana. . . ."

[14] Hudson v. Georgia Casualty Co., 57 F. 2d 757 (W. D. La. 1932).

[15] Watson v. Employers Liability Assurance Corp., 348 U. S. 66 (1954).

[16] West v. Monroe Bakery, Inc., 217 La. 189, 46 So. 2d 122 (1950); Davies v. Consolidated Underwriters, 199 La. 459, 6 So. 2d 351 (1942).

[17] Graves v. Harrington, 177 Okla. 448, 60 P. 2d 622 (1936); Kaplan *et al.* v. Loev, 327 Pa. 465, 194 Atl. 653 (1937); McLaughlin v. Shelton Auto Transportation Co., 139 Wash. 253, 246 Pac. 575 (1926). See also Beghtol, *The Present Rule Against Disclosure of Insurance*. 15 NEB. L. BULL. 327 (1936-37).

[18] See Annotation, 105 A. L. R. 1319 (1936), and cases cited thereunder.

[19] Brown v. Walter, 62 F. 2d 798 (2d Cir. 1933); Takoma Park Bank v. Abbott, 179 Md. 249, 19 Atl. 2d 169 (1941); Odegard v. Connolly, 211 Minn. 342, 1 N. W. 2d 137 (1941).

and open evidence of insurance. Thus, in theory at least, the balance is in part adjusted between the impecunious and inexperienced plaintiff and the wealthy corporate defendant with an imposing array of legal talent at his call.

In Louisiana, with one of the important seaports of the country, and many miles of navigable rivers, conflict between the direct action statute of the state and the limitation of liability act of the United States was almost inevitable. The conflict came about in 1951. In the previous year the towboat, *Jane Smith,* plying on the Atchafalaya River, had struck the abutment of a bridge, capsized and sunk. Five members of the crew were drowned. The owner and charterer[20] were covered by public liability insurance in the aggregate amount of $180,000.[21] Limitation proceedings were begun by the owner and charterer in the federal district court of Louisiana, and in the same court at the same time the representatives of the seamen who had lost their lives began a consolidated action for damages against the insurance carriers under the direct action statute.[22]

The issues may be summarized (1) from the standpoint of the owner and charterer, who, while not parties in the direct action, were vitally interested in the outcome; (2) from the standpoint of the insurance carriers; and (3) from the standpoint of the plaintiffs.

(1) It is evident that the owner and charterer purchased insurance not to protect their employees or the families of deceased employees (whatever the theory of liability insurance may be), but to protect themselves against liability in the event of an accident such as the one which actually occurred; that they assumed that, absent their knowledge or privity, their liability would be limited to the value of the vessel, and that, therefore, the total insurance coverage need not exceed that value; and that, since in the actual case the aggregate of the death claims exceeded $600,000, there was every likelihood that if the direct action against the insurance carriers was permitted to proceed to judgment, the whole of the insurance fund would be exhausted in satisfying such judgment, so that in the limitation proceeding they would be denied the insurance protection which they thought they had and for which they had paid.

(2) In the direct action the insurers contended that the direct action

[20] Neither owner nor charterer was a party to the direct action in this case; they are identified only by the fact that both were citizens of the state of Louisiana.

[21] Maryland Casualty Co. had issued an employers' liability policy to the charterer alone in the amount of $10,000; the Home Insurance Co. had issued a "protection and indemnity" policy in the amount of $170,000, in which both the owner and charterer were named.

[22] Cushing v. Texas & Pacific Railway Co. *et al.,* 99 F. Supp. 681 (E. D. La. 1951). The named defendant was the owner of the bridge; its interests are not discussed in any of the opinions handed down in the case.

statute did not apply to policies of marine insurance; that even if it did so apply, it would be inoperative in this case as in conflict with the federal limitation of liability act, and thus an infringement upon the exclusive admiralty jurisdiction of the United States.

(3) The plaintiffs insisted that the direct action statute was primarily a regulation of the business of insurance, enacted by the state in conformity with authority specifically conferred by the McCarran Act;[23] that the purpose of liability insurance was to protect the public, and that the direct action statute, in giving effect to that purpose, merely gave an added remedy to the injured parties, without affecting the uniformity of substantive admiralty law or the rights of shipowners under that law. It was pointed out that state legislation dealing, directly or indirectly, with a variety of admiralty matters had been upheld by the Supreme Court,[24] and that the Louisiana statute should not be denied application because of its incidental effect upon the remedies of parties in an admiralty case.

The district court rendered summary judgment for the defendants and dismissed the action. The judgment was based on the conclusion that the direct action statute did not apply to policies of marine in-

[23] 15 U. S. C. §§ 1011, 1012 (1952). "1011. Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
1012 (a). The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
(b). No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance."
This statute was passed to counteract the decision in United States v. South-Eastern Underwriters Association, 322 U. S. 533 (1944), in which it was held that the business of insurance was commerce within the meaning of the commerce clause of the federal Constitution, and that therefore, insofar as the insurance business crossed state lines it was within the regulatory power of Congress.

[24] 1 BENEDICT, THE LAW OF AMERICAN ADMIRALTY 79 (6th Ed. 1940-41). "In the absence of Congressional legislation, State legislation has been regarded in a wide variety of instances as effective to create rights, to establish principles of liability and even to create liens *in rem* enforceable in admiralty though not enforceable in State courts, which may not appropriate the distinctive character and effect of an admiralty proceeding *in rem*." Among the instances referred to are:
a. Right of action for death by wrongful act committed on navigable water: Steamboat Co. v. Chase, 16 Wall. (83 U. S.) 522 (1872); Sherlock v. Alling, 93 U. S. 99 (1876).
b. Municipal ordinances and local regulations respecting wharfage charges: Keokuk Packet Co. v. Keokuk, 95 U. S. 80 (1877); Parkersburg & Ohio River Transportation Co. v. Parkersburg, 107 U. S. 691 (1882); Ouachita Packet Co. v. Aiken, 121 U. S. 444 (1886).
c. Harbor pilotage regulations: Cooley v. Board of Wardens, 12 How. (53 U. S.) 299 (1851); Pacific Mail S. S. Co. v. Joliffe, 2 Wall. (69 U. S.) 450 (1864).
d. Inspection and quarantine laws: Morgan's S. S. Co. v. Louisiana Board of Health, 118 U. S. 455 (1885); Compagnie Française etc. v. State Board of Health, 186 U. S. 380 (1901).

surance,[25] and that if the state law were applied the rights of the owners would be so materially affected through the substantial denial of the proceeds of insurance that the purpose of Congress in passing the limitation act would be frustrated. The conclusion was that the state law interfered with a substantive admiralty right and was therefore inapplicable.

The Court of Appeals reversed.[26] That court held that since the state law was remedial it should be construed liberally, and that while the law made no specific reference to marine insurance it was proper to presume that the legislature intended to include all types of liability contracts. The court also relied on the provision of the United States Code conferring admiralty jurisdiction upon district courts in "any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."[27] On this point the court conceded that the state may not legislate in the field of substantive admiralty law, but insisted that the state had concurrent jurisdiction in respect to the "other remedies" referred to in the Code. "In no case has this court held void a state statute which neither modified the substantive maritime law nor dealt with the remedies enforceable in admiralty."[28] Finally, the court asserted that the federal act did not relate to the business of insurance, and that while it precluded injured parties from pursuing other remedies against the owner, it interposed no bar to the pursuit of legally permitted remedies against others.

The Supreme Court granted certiorari.[29] The decision of the Court[30] in this case is interesting, not only because of the judgment finally arrived at, but because of the method by which the Court reached its result. There were two opposing opinions, one written by Mr. Justice Frankfurter, with the concurrence of Mr. Justice Burton, Mr. Justice Jackson, and Mr. Justice Reed; the other by Mr. Justice Black, joined by the Chief Justice, Mr. Justice Douglas and Mr. Justice Minton. The Court was thus arrayed with four members on one side and four on the other. Mr. Justice Clark wrote a separate opinion, concurring in part,

[25] The direct action statute refers specifically to policies or contracts of liability insurance. Liability and "maritime protection and indemnity insurance" are defined in separate sections of the insurance code (LA. REV. STAT. 22:6 (4) and (13) (e) (1950). The court argued that since the legislature had differentiated liability from maritime insurance at one place in the Code, and in another had referred only to liability insurance, it must be presumed that in the latter instance it was the intention of the legislature to omit maritime insurance.

[26] Cushing *et al.* v. Maryland Casualty Co. *et al.*, 198 F. 2d 536 (5th Cir. 1952).

[27] 28 U. S. C. § 1333 (1952).

[28] 198 F. 2d 536, 538. In referring to "remedies enforceable in admiralty" the court has in mind characteristic admiralty proceedings *in rem* against the ship. Such proceedings are within the exclusive jurisdiction of the federal courts. The Moses Taylor, 4 Wall. (71 U. S.) 411 (1866).

[29] 345 U. S. 902 (1953).

[30] Maryland Casualty Co. *et al.* v. Cushing *et al.*, 347 U. S. 409 (1954).

but dissenting in important particulars from the opinion of Mr. Justice Frankfurter. The latter justice and his colleagues accepted the divergent views of Mr. Justice Clark in order "to break the deadlock resulting from the differences of opinion within the Court and to enable a majority to dispose of this litigation. . . ."[31] This is certainly one of the rare instances, if, indeed, it is not the only instance, in which the process of arriving at a prevailing opinion, normally conducted by the Court in the privacy of the conference room, has been spread upon the record.

Mr. Justice Frankfurther would have reversed the Court of Appeals and reinstated the judgment of the district court. In his view, the McCarran Act could not be relied upon as a source of new state power, because the purpose of that Act was not to confer new power, but to confirm power already vested. In discussing the effect of the direct action statute upon the limitation act, great stress was laid on the function of the latter act in assembling at one time in a single forum all those with claims against the shipowner. To quote the opinion:

> "Direct actions against the liability underwriter of the shipowner or charterer would detract from the benefit of a *concursus* and undermine the operation of the congressional scheme for the 'complete and just disposition of a many-cornered controversy.'[32] * * * The ship's company would be subject to call as witnesses in more than one proceeding, perhaps in diverse forums. Conflicting judgments might result. Ultimate recoveries might vary from the proportions contemplated by the statute. Moreover it is important to bear in mind that the *concursus* is not solely for the benefit of the shipowner. The elaborate notice provisions of the Admiralty Rules are designed to protect injured claimants. They ensure that all claimants, not just a favored few, will come in on an equal footing to obtain a pro rata share of their damages. To permit direct actions to drain away part or all of the insurance proceeds prejudices the rights of those victims who rely, and have every reason to rely, on the limitation proceeding to present their claims."[33]

The opinion expressed an equally positive conviction that the direct action statute was in fatal conflict with the limitation act because of the possible effect of the former on the insurance rights of the owner. It was assumed that the value of the ship would be found to be $25,000, "the amount for which we are advised a stipulation has been filed in

[31] *Id.* at 423.
[32] The quotation is from Hartford Accident & Indemnity Co. v. Southern Pacific Co., 273 U. S. 207, 216 (1926).
[33] 347 U. S. 409, 416, 417.

the limitation proceeding."[34] Should that prove to be the final figure, the owner's insurance would be adequate to indemnify him for the loss. This protection the direct action statute may well operate to destroy. The opinion said:

> "Thus, to permit direct actions under the State statute would require that shipowners become self-insurers for liability risks in order to be sure of getting the full protection of the limitation legislation. In view of the fact that 'substantially all marine risks are insured,'[35] . . . this sort of qualification would be completely inconsistent with the Limitation Act."[36]

As to the proper canons of construction of state legislation, this was said:

> "Of course, wholly apart from the respect to be accorded State legislation, this Court would be slow to find that even where Congress has exercised its legislative power it has not left room for State action. * * * But where, as in this case, the evident design of Congress can only be carried out by barring State action, it must be barred."[37]

As to the effect of the state law upon the uniformity of federal admiralty law, the position was stated as follows:

> "Of course, liability underwriters are not entitled to 'limitation of liability' as that phrase is used as a term of art in admiralty. To state the issue in these terms is to misconceive it. The question is whether the Court is to disregard the effect of a direct action on the federal proceedings. The Louisiana statute, as applied to authorize suits against the insurers of shipowners and charterers who have instituted limitation proceedings, is a disturbing intrusion by a State on the harmony and uniformity of one aspect of maritime law. It is accentuated by the fact that the federal law involved is not a more or less ill-defined area of maritime common law, incursion upon which need not be here considered, but an Act of Congress, well-defined and consciously designed, with detailed rules for its execution established by this Court."[38]

It will be noted that the opinion did not refer to the fact that here liability insurance was involved, whereas in the leading case holding

[34] *Id.* at 418.
[35] The quotation is from Keen v. Overseas Tankship Corp., 194 F. 2d 515, 518 (2d Cir. 1952).
[36] 347 U. S. 409, 419.
[37] *Id.* at 420.
[38] *Id.* at 421, 422.

that insurance need not be accounted for by the owner, the coverage in issue was hull insurance.[39] Mr. Justice Frankfurter apparently viewed the distinction as one not worthy of discussion. The district judge had referred to the point, but it was held by him to be immaterial.[40]

The opinion evidently gave some weight to the possibility that the effect of the direct action statute would be to increase liability insurance rates to shipowners. The dissenting opinion of Mr. Justice Black properly disposes of this point by noting that it was not the purpose of the limitation act "to impose a ceiling on premiums."[41] The question of the cost of insurance protection does not seem to be relevant to the legal issue.

Mr. Justice Black's opinion was, in important particulars, curiously unrelated to the other opinions in the case. Almost half of the opinion was devoted to the argument that the direct action statute was not unconsitutional. Mr. Justice Frankfurter had not referred to the question of constitutionality; by inference the statute was assumed to be valid except as to admiralty cases such as the one at bar.[42]

There was also revealed a strange misunderstanding as between Mr. Justice Black and Mr. Justice Frankfurter as to the probable value of the vessel. As noted, *supra,* p. 471, Mr. Justice Frankfurter assumed that the value of the vessel would be $25,000. But in rejecting the argument that the direct action statute would be inoperative because it would deprive the owners of the benefit of their insurance, Mr. Justice Black had this to say:

> "It was conceded at the bar, however, 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. Under these circumstances, the shipowner does not stand to lose a dime if the insurance companies are held liable for the full amount of their policies, and there is no reason for deferring trial of these lawsuits."[43]

Obviously, the value of the vessel in this particular instance can have no proper bearing upon the legal issue involved, whichever one of the learned justices was right. The legal question was clearly joined, however, when Mr. Justice Black insisted that neither the Congress in passing the limitation act nor the courts in construing it ever intended

[39] Place v. Norwich & N. Y. Transportation Co., 118 U. S. 468 (1886).
[40] 99 F. Supp. 681 (E. D. La. 1951).
[41] 347 U. S. 409, 435.
[42] In Watson v. Employers' Liability Assurance Corp., 348 U. S. 66 (1954), decided eight months later than the principal case, Mr. Justice Black wrote the leading opinion of a unanimous Court affirming the constitutionality of the Louisiana statute. Mr. Justice Frankfurter wrote a concurring opinion.
[43] 347 U. S. 409, 433, 434.

to give the shipowner the benefit of liability insurance. The following excerpt is pertinent to this point:

> "There is a vital difference between liability insurance and hull insurance with which The City of Norwich[44] dealt. The latter provides recovery for loss of the shipowner's property. But liability insurance is not bought to guarantee reimbursement for loss of a shipowner's property. Its purpose is to pay for damage done to others by the shipowner or his agents. The shipowner has an insurable 'interest' in his ship; if it is lost or damaged any insurance money collected is his own. I cannot believe he has an insurable 'interest' in his seamen which could possibly entitle him to reduce the already limited financial obligations the Act imposes by taking for himself insurance money which otherwise would go to compensate seamen or their families for injuries he inflicts. . . . It is a far cry from the decision in The City of Norwich that a shipowner is entitled to keep the insurance collected for loss of his ship to today's holding that states cannot assure seamen that they instead of the shipowner can get the full benefit of liability policies bought in order to pay their just claims for injuries caused by the ship."[45]

It is obvious that Mr. Justice Black assumed that liability insurance is, in fact, and is intended by the shipowner to be, for the benefit of seamen. It is also probable that the argument was based in part on the doctrine that the seaman is the "ward of admiralty" and entitled to the special and peculiar protection of the Court.[46] Whatever view one accepts in this particular case, it must be conceded that the effect of Mr. Justice Frankfurter's position in respect to liability insurance has resulted in a marked expansion of the insurance doctrine in limitation cases.

The final point made by Mr. Justice Black was that the McCarran Act substantially commands the application of the Louisiana statute. On this point he said:

> "Courts are pointedly told [by the McCarran Act] to leave states free to regulate 'the business of insurance' in the absence of some congressional act that 'specifically relates' to the same subject. The 'business of insurance' includes maritime insurance and by no stretch of the imagination can it be said that the 1851 Act 'specifically relates' to insurance. Thus the unambiguous

[44] 118 U. S. 468 (1886).
[45] 347 U. S. 409, 434, 435.
[46] See Mr. Justice Black's opinion in Garrett v. Moore-McCormack Co., Inc. *et al.*, 317 U. S. 239 (1942).

> language of the McCarran Act forbids courts to construe federal statutes such as the Limited Liability Act so as to impair a state law like Louisiana's. . . . I would not disregard its mandate."[47]

But surely since the McCarran Act was passed for the specific purpose of preventing possible conflict between the states and the federal government in the field of insurance regulation, it would be an unwarranted expansion of the meaning of the Act to hold that it mandates the courts to sustain state insurance statutes which conflict with federal admiralty jurisdiction.

It was Mr. Justice Clark who single-handedly made it possible for the Court to render a judgment. In his opinion he agreed with Mr. Justice Frankfurter that the direct action may not be permitted to interfere with the progress of the limitation proceeding. But he argued that, upon conclusion of the limitation proceeding, in which the claims of the plaintiffs would be filed and proved, and the extent of the liability of the owner and charterer determined, thus fixing the liability of the insurers to owner and charterer, the direct action should then be allowed to proceed against the insurers. Thus, if damages should be awarded in the latter action, there would be available for their satisfaction the balance of the insurance fund, not required to reimburse the owner and charterer.[48] Mr. Justice Frankfurter and his associates adopted as their own the solution of Mr. Justice Clark, who proposed that the district court be directed "to first conclude the limitation proceeding, after which the liability, if any, of the petitioners on their policies in the direct actions could be determined."[49]

This judgment established the shipowner as the preferred claimant on the insurance fund; so long as his liability is less than the liability of the inurer he will emerge without loss. But the injured plaintiffs will not be wholly without redress if there is a balance of unused insurance. Certainly in the case of any major disaster, with material damage to, or loss of, the ship, the chance that the liability of the shipowner would exhaust the insurance fund is not as great as that the damage actions would do so. Hence the likelihood that some recovery would be available to the damage claimants is by no means inconsiderable.

The insurers can interpose no legal objection to this solution. It is not their liability that is limited by the limitation proceeding. As Mr. Justice Frankfurter pointed out, "limitation of liability" is a phrase

[47] 347 U. S. 409, 437.

[48] The principle set out in Mr. Justice Clark's opinion was stated by Circuit Judge Rives, who, after concurring in the original decision of the Court of Appeals, 198 F. 2d 536 (5th Cir. 1952), changed his mind and dissented from the decision denying a re-hearing, 198 F. 2d 1021 (5th Cir. 1952).

[49] 347 U. S. 409, 427.

of art in admiralty (*supra,* p. 472), and operates solely for the benefit of the owner, not of his insurance carrier.

The result of this particular contest between plaintiff and defendant in the arena of personal injury and death actions was an unquestioned victory for the defendant-owner, but a limited measure of success was reserved also for the plaintiff. It was an example of reasoned judicial compromise, supported by the weight of both legal principal and common sense. This can be said in spite of the almost fortuitous manner in which the conclusion was reached.

As a practical matter, whatever advantage remains to the plaintiffs, it may well be short-lived. If, as suggested, marine liability insurance rates are increased, shipowners may decide to be self-insurers so far as their public liability is concerned, on the theory that they can normally make sure that they are free of the taint of "knowledge or privity." In that case insurance on the hull would fully protect them in any limitation proceeding, and even Mr. Justice Black has said that hull insurance belongs to the owner, not to the damage claimants. It is, of course, too early to say whether such a trend will develop in practice.

MILTON E. LOOMIS.

**Appeal and Error—Excluded Evidence on Cross-examination—Preservation for Appeal**

It is a generally accepted rule that an exception to a ruling of a trial court, complaining of an erroneous refusal to allow a witness to answer a question, will not be considered on appeal where the record does not set out what the answer of the witness would have been if he had been permitted to testify, or what the interrogating counsel expected to elicit or prove by the question asked.[1] The reasons for the

[1] Bridges v. Harold L. Schaefer, Inc., 207 Ark. 122, 179 S. W. 2d 176 (1944); Swearingen v. Dill, 21 Cal. App. 2d 151, 68 P. 2d 388 (1937); Read v. Micek, 105 Colo. 35, 94 P. 2d 452 (1939); Gilpin v. State Highway Board, 39 Ga. App. 238, 146 S. E. 651 (1929); Whyte v. Rogers, 303 Ill. App. 115, 24 N. E. 2d 745 (1940); Pearson v. Butts, 224 Iowa 376, 276 N. W. 65 (1937); Greenway Wood Heel Co. v. John Shea Co., 313 Mass. 177, 46 N. W. 2d 746 (1943); Anderson v. Anderson, 158 Miss. 116, 130 So. 91 (1930); State *ex rel.* State Highway Commission v. Baumhoff, 230 Mo. App., 1030, 93 S. W. 2d 104 (1936); Gugelman v. Kansas City Life Insurance Co., 137 Neb. 411, 289 N. W. 842 (1940); Whiteheart v. Grubbs, 232 N. C. 236, 60 S. E. 2d 101 (1950); Carolina Coach Co. v. Central Motor Lines, 229 N. C. 650, 50 S. E. 2d 909 (1948); Newbern v. Hinton, 190 N. C. 108, 111, 129 S. E. 181, 183 (1925) ("We are precluded from passing upon the merits of the defendant's objections to the evidence, since the record does not disclose what the witnesses would have said if the questions had been allowed. The burden is on the appellant to show error, and, therefore, the record *must show* the competency and materiality of the proposed evidence. This Court will not do the vain thing to send a case back for a new trial when it does not appear what the excluded evidence is, or even that the witnesses would respond to the questions in any way material to the issues. This is the established practice in this Court, in both civil and criminal cases."); Wallace v. Barlow, 165 N. C. 676,