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Removal of Obstructions from Navigable Waters: Shipowners' Liability and the Wreck Act

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COMMENTS

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I. INTRODUCTION

The history of the rivers and harbors found in the United States reveals their vulnerability to obstruction by refuse, soil deposits, man-made structures, and the discards of navigation—abandoned shipwrecks. As do the roads and rails that connect centers of population and commerce, these rivers and harbors play the role of "highways"[1] of commerce, and the public interest demands that they be kept free of obstruction. Obstructions occur even through normal use by shipping. In addition, there is the problem caused by the careless discharge of waste and industrial residue. In *Gibbons v. Ogden*,[2] the Supreme Court found the commerce clause of the Constitution[3] sufficient authority to give Congress regulatory power over navigable rivers. Congress has exercised that authority by various regulatory statutes[4] in an effort to give the executive branch sufficient power to keep those rivers and harbors free of hazards to navigation.

There has been from the days of the Magna Charta[5] a recognition of

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[1] Georgetown v. Alexandria Canal Co., 37 U.S. (12 Pet.) 91 (1838); People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 147, 4 P. 1152, 1155 (1884).

> A vast inland waterway . . . is a national highway in which all the people have an interest. It is a national asset. . . . The national character of this natural resource gives the Government an essential federal interest in it as a national artery of commerce.

United States v. Cargill, Inc., 367 F.2d 971, 978 (5th Cir. 1966).

[2] 22 U.S. (9 Wheat.) 1 (1824). *See also* Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713 (1865).

[3] U.S. CONST., art. I, § 8.

[4] The principle legislation in the field is the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1121, *as amended*, 33 U.S.C. §§ 401-466(k) (1964). See notes 20-24 *infra*.

[5] Clause 33 of the Magna Charta provided for the removal of "kydells, or weirs, from the Thames and the Medway and throughout all England except the sea-coasts, so as to clear the streams for the free passage of both people and fish." 25 Edw. 3, c. 4 (1350) as quoted in Stone, *Public Rights in Water Uses and Private Rights in Land Adjacent to Water*, in 1 WATERS AND WATER RIGHTS 181 (R. Clark ed. 1967).

Early maritime codes reflected the industry's concern over such obstructions causing hazards to shipping.

> Item, lett inquiry be made of all those whoe doe in the great streames and

the interest of the public in keeping navigable rivers open to traffic and commerce. Those causing obstructions were generally forced to pay damages to injured parties if the obstruction could be classified as a "public nuisance" under the common law,[6] although removal was sometimes ordered by injunction.[7]

Unlike other obstructions to navigation, abandoned wrecks have historically presented a special problem. It would seem logical that a shipowner should bear the financial responsibility for damages caused by his wrecked vessel or for removal expenses should it cause a hinderance to traffic upon a river. However, the general maritime law has by tradition allowed a shipowner to escape all liability caused by his ship if he abandons his vessel.[8]

> The theory of the law was that if the sunken vessel is a menace to to navigation its disposition is a matter of public concern, and that the owner has suffered sufficient loss in the loss of the craft and no further loss will be imposed upon him by way of damages for subsequent accident, provided always that he has abandoned it.[9]

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channells of the havens or ports keepe upp weres, kiddles, blindestakes, watermills, or other instruments, to the annoyance of ports, whereby ships or boates have been lost or man killed.

XXVI INQUISITION TAKEN AT QUEENBORO (1375) in THE BLACK BOOK OF THE ADMIRALTY, 55 RERUM BRITANNICARUM MEDII ÆVII SCRIPTORES (CHRONICLES AND MEMORIALS OF GREAT BRITAIN AND IRELAND DURING THE MIDDLE AGES) 153 (1965).

[6] *See, e.g.*, Woodman v. Kilbourn Mfg. Co., 30 F. Cas. 503 (No. 17,978) (C.C. Wis. 1867); People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 4 P. 1152 (1884); Boston & Hingham Steamboat Co. v. Munson, 117 Mass. 34 (1875); Board of Water Comm'rs v. Detroit, 117 Mich. 458, 76 N.W. 70 (1898); Viebahn v. Board of County Comm'rs, 96 Minn. 276, 104 N.W. 1089 (1905).

[7] *See, e.g.*, United States v. Duluth, 25 F. Cas. 923 (No. 15,001) (C.C. Minn. 1871); People v. St. Louis, 10 Ill. (5 Gilm.) 351 (1848); People v. Vanderbilt, 26 N.Y. 287 (1863). *See also* Attorney-General v. Forbes, 40 Eng. Rep. 587 (Ch. 1836); Attorney-General v. Johnson, 37 Eng. Rep. 240 (Ch. 1819).

[8] *See* The South Shore, 35 F.2d 110, 113 (3d Cir. 1929); Winpenny v. Philadelphia, 65 Pa. 135, 139 (1871). *See also* White v. Crisp, 156 Eng. Rep. 463 (Ex. 1854). What acts constitute an abandonment of a vessel depends, in large part, upon the circumstances involved. But there are general standards interpreted in the light of those circumstances that have to be met. *See* The Port Hunter, 6 F. Supp. 1009 (D. Mass. 1934); Gulf Coast Transp. Co. v. Ruddock-Orleans Cypress Co., 17 F.2d 858 (E.D. La. 1927).

[9] The Manhattan, 10 F. Supp. 45, 49 (E.D. Pa. 1935), *aff'd* 85 F.2d 427 (3d Cir.), *cert. denied sub nom.*, United States v. The Bessemer, 300 U.S. 654 (1936). *See also* The King v. Watts, 170 Eng. Rep. 493 (Assizes 1798). *But see* Board of Water Comm'rs v. Detroit, 117 Mich. 458, 76 N.W. 70 (1898). The basis for the argument protecting the small shipowner has been challenged today as without merit since single boat incorporation and insurance are both available as alternative methods of financial protection. Morreale, *The Federal Wreck Act and*

By taking advantage of the privilege of abandonment, shipowners were able to escape common law liability for their obstructions. Thus they stood in a preferred position among those who through their enterprise caused obstruction to navigation. Reflecting the conflict at the turn of the century, the court deciding *Missouri River Packet Co. v. Hannibal & St. J. R.R.*[10] summarized the existing law.

> Those navigating the river are under no obligation to remove wrecks which may be made in the ordinary and proper course of navigation . . . [I]t is also the law that he who, for his own benefit, and not for the purpose of navigation or commerce, uses any navigable part of a river, is liable in damages to the party injured if such use . . . increases the difficulty and danger of navigation, and injury results therefrom.[11]

Whether the courts were allowing a rightful subsidy to the shipping industry is, of course, a point of conjecture.[12] But the fact remained that for shipping, abandonment precluded liability for subsequent injury to navigation.

If a shipowner could thereby shield himself from liability to the users of these navigable waters, could he be forced to remove his sunken wreck from the river? Before Congress enacted appropriate legislation, state courts (and federal courts following the state law) managed to exercise some authority over those who blocked navigable waterways.[13] But beginning in 1880, congressional pre-emption[14] placed the bulk of the responsibility in the hands of the federal courts. While recognizing the clear congressional prerogative to regulate the navigation of rivers among

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the Maritime Industry: An Archaic Subsidy, 21 RUTGERS L. REV. 478, 487-88 (1967).

[10] 2 F. 285 (W.D. Mo. 1880).

[11] *Id.* at 292.

[12] In relation to abandonment under the Rivers and Harbors Act, note 4 *supra*, see Morreale, *supra* note 9. This point has also been made with reference to statutory limitation discussed in notes 112-13 and accompanying text *infra*. Comment, *Shipowners' Limited Liability*, 3 COLUM. J.L. & SOC. PROB. 105, 112-13 (1967).

[13] *See, e.g.*, Piscataqua Nav. Co. v. New York, N.H. & H.R.R., 89 F. 362 (D. Mass. 1898); Omslaer v. Philadelphia Co., 31 F. 354 (W.D. Pa. 1887); Ball v. Berwind, 29 F. 541 (E.D.N.Y. 1886); DeBardeleben Coal Co. v. Cox, 16 Ala. App. 172, 76 So. 409 (1917); Board of Water Comm'rs v. Detroit, 117 Mich. 458, 76 N.W. 70 (1898).

[14] A series of acts relating to obstructions to navigable waters was passed by Congress, the first of these being the River and Harbor Act of June 14, 1880, 21 Stat. 180. Concerning pre-emption of the area by the federal government, see United States v. Mississippi & Rum River Boom Co., 3 F. 548 (C.C. Minn. 1880).

the several states under the commerce clause, the Supreme Court in *Willametta Iron Bridge Co. v. Hatch*[15] refused to allow the federal judiciary to impose liability for the removal of any obstructions by virtue of any federal common law right.

> The power of Congress to pass laws for the regulation of the navigation of public rivers, and to prevent any and all obstructions therein, is not questioned. But until it does pass some such law, there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers, unless it be maritime law . . . . No precedent, however, exists for the enforcement of any such law . . . .[16]

The language of *Hatch* limited relief for removal liability to that given by statute despite some earlier indications from the Court that it would allow equitable relief in the proper circumstances.[17] Even though the strictness of the language its emphatic, *Hatch* has been mollified somewhat by subsequent decisions.[18] The case, however, stands for the proposition that relief must come by way of statute.[19]

II. The Wreck Statute[20]

Using its power to regulate commerce, Congress did enact a series of laws to provide statutory authority for federal action to keep rivers and harbors free from obstructions to navigation.[21] The most significant of these is the Rivers and Harbors Act of 1899.[22] This Act at its passage was purportedly a codification of the law as it existed at that time[23]

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[15] 125 U.S. 1 (1888).

[16] *Id.* at 8. *See generally* Note, *The Federal Common Law*, 82 Harv. L. Rev. 1512 (1969); Comment, *Swift v. Tyson Exhumed*, 79 Yale L.J. 284 (1969).

[17] *See* Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1851). *See also* United States v. Mississippi & Rum River Boom Co., 3 F. 548 (C.C. Minn. 1880); United States v. Duluth, 25 F. Cas. 923 (No. 15,001) (C.C. Minn. 1871).

[18] *See* Sanitary Dist. v. United States, 266 U.S. 405 (1924).

[19] The history of federal control over obstructions to the navigable capacity of our rivers and harbors goes back to *Willametta Iron Bridge Co. v. Hatch* . . . where the court held "there is no common law of the United States" which prohibits "obstructions" in our navigable rivers.

United States v. Republic Steel Corp., 362 U.S. 482, 485-86 (1960). See Morreale, *supra* note 9, at 486.

[20] A short-hand phrase referring to that part of the Rivers and Harbors Act dealing with shipping. 33 U.S.C. §§ 409, 414-15 (1964).

[21] River and Harbor Act of June 14, 1880, ch. 180, 21 Stat. 180; River and Harbor Act of 1890, ch. 907, 26 Stat. 426; Rivers and Harbors Act of 1899, 30 Stat. 1121, *as amended*, 33 U.S.C. §§ 401-466(k) (1964).

[22] 30 Stat. 1121, *as amended*, 33 U.S.C. §§ 401-466(k) (1964).

[23] 32 Cong. Rec. 2923 (1899).

and stands today as the principle statutory "scheme"[24] for dealing with obstructions to navigation upon the nation's rivers.

Section 10 of the Act[25] prohibits "[t]he creation of any obstruction not affirmatively authorized by Congress." In addition to obstructions, that section also prohibits the creation of "structures" such as wharves, piers, booms, etc., that would occlude navigable waters. Criminal penalties for violating section 10 are found in section 12 of the Act.[26] That section also gives the courts power to issue injunctions providing for removal of "structures" erected in violation of section 10.[27] The failure of Congress to provide for injunctions ordering removal of all obstructions, instead of limiting injunctive power to removal of "structures," became signfiicant in later years.[28]

Conspicuously, shipping is treated separately from other obstructions. Section 15 of the Act[29] prohibits the intentional or careless sinking of vessels in navigable waters, and places the responsibility for marking the wreck on the owner.

> It shall not be lawful . . . to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels . . . . And whenever a vessel, raft, or other craft is wrecked and sunk in a

[24] Ray, *The Removal of Obstructions from Navigable Waters—Who Pays?*, 34 INS. COUNSEL J. 28, 29 (1967).

[25] The creation of any obstruction not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same. 33 U.S.C. § 403 (1964).

[26] 33 U.S.C. § 406 (1964).

[27] [T]he removal of any structures or part of structures erected in violation of the provisions of the said section may be enforced by the injunction of any district court exercising jurisdiction in any district in which said structures may exist . . . . 33 U.S.C. § 406 (1964).

[28] *See* United States v. Republic Steel Corp., 362 U.S. 482 (1960); United States v. Wilson, 235 F.2d 251 (2d Cir. 1956).

[29] 33 U.S.C. § 409 (1964).

> navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it . . . until the sunken craft is removed or abandoned.[30]

The Act creates an affirmative duty on the part of the owner either to remove the wreck *or* to abandon it for removal by the government.

> [A]nd it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States . . . .[31]

It is important to note that section 15 makes negligent or intentional sinking of a vessel unlawful, but this section does not prescribe any absolute duty to remove upon the owner. That duty is phrased in the alternative, for instead of removal, the owner may abandon his vessel. This option appears very similar to the maritime right of abandonment discussed earlier.[32] Several courts inferred from the option that Congress intended to preserve the privilege of abandonment when it enacted the statute.[33]

There is, then, no affirmative statutory duty to remove a wreck that has become an obstruction to navigation once the owner abandons his vessel even though the intentional or negligent sinking of such vessel is labeled as "unlawful." There are penalties listed in section 16 of the Act[34] for the violation of section 15, but their application is limited to pilots and masters and does not apply to owners.

The contention that the Rivers and Harbors Act did not change the traditional maritime privilege of abandonment was strengthened further by the remedial provisions found in section 19.[35] It provides that upon

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[30] *Id.*

[31] *Id.*

[32] *See* p. 553-54 *supra*. *See also In re* Highland Navigation Corp., 24 F.2d 582, 584 (S.D.N.Y. 1927).

[33] *See, e.g.*, United States v. Moran Towing & Transp. Co., 374 F.2d 656, 667-68 (4th Cir. 1967); United States v. Bethlehem Steel Corp., 319 F.2d 512, 521-22 (9th Cir. 1963); The Manhattan, 10 F. Supp. 45, 49 (E.D. Pa. 1935).

[34] 33 U.S.C. § 412 (1964).

[35] 33 U.S.C. § 414 (1964)

> So far as I know the right of recoupment against a tortfeasor who causes a sinking has never been asserted by the government in case the wreck was privately owned, and I can find nothing in the statute which creates such a right . . . . In fact, the rights in rem which are conferred would seem to negative that intent.

The Manhattan, 10 F. Supp. 45, 50 (E.D. Pa. 1935).

abandonment of the vessel by the owner, the Secretary of the Army is authorized to remove the vessel and to use the sale proceeds from the salvaged wreck to set off expenses incurred. There is thus an affirmative legislative remedy given in case of abandonment by the owner. Not only does that provision provide for removal by the government, but also states a method of reimbursement to the government for its expenses, *i.e.* to proceed in rem against the wreck itself.

The lack of explicit wording evidencing an intent by Congress either to exonerate shipowners abandoning their vessels or, conversely, to hold them liable in personam for removal expenses through remedies available outside the Act (or implicit within its provisions) has provided the principle difficulty.[36] It will be remembered that in the midst of the formative era of federal statutory regulations concerning obstructions to navigation, the Supreme Court in *Hatch* refused to find any federal common law or maritime law that would, in the absence of statute, compel anyone to remove obstacles that endangered navigation.[37]

When vessels were sunk by accident, and without negligence on the part of the owner or master, the courts have seemed very willing to allow the owner to escape liability by abandonment. This situation, in fact, seems to fit all the equities and justifications previously set forth[38] for allowing abandoning owners to escape in personam liability under the general maritime law; *i.e.*, the owner who has lost his vessel without fault on his part should not be forced to remove it and thereby incur an even greater loss. The courts have found no evidence that the Act would demand a contrary result in such a situation.[39]

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[36] *See* United States v. Moran Towing & Transp. Co., 374 F.2d 656 (4th Cir. 1967); United States v. Bethlehem Steel Corp., 319 F.2d 512 (9th Cir. 1963); United States v. Zubik, 295 F.2d 53, 56-57 (3d Cir. 1961); The Manhattan, 10 F. Supp. 45, 49-50 (E.D. Pa. 1935); United States v. Bridgeport Towing Line, Inc., 15 F.2d 240 (D. Conn. 1926). *See generally* Morreale, *supra* note 9, at 481.

[37] United States v. Bethlehem Steel Corp., 319 F.2d 512, 519-20 (9th Cir. 1963). See p. 555 *supra.*

[38] *See* note 9 & accompanying text *supra.*

[39] *See, e.g.*, The Demand, 174 F. Supp. 668 (D. Mass. 1959); *In re* Highland Nav. Corp., 24 F.2d 582 (S.D.N.Y. 1927).

> It is well settled that a shipowner whose vessel has been wrecked and sunk without his fault has a right to abandon it, and that after abandonment he is not under any obligation whatsoever to raise or remove it, and is not personally liable for the expense of removal. This is so, though an act of Congress . . . authorizes the secretary of War to remove obstructions to navigation, and provides that expense shall be charged upon the vessel raised by the government . . . . The exemption from liability after abandonment arises under general maritime law.

Id. at 584.

However, an intentional sinking by the owner does not seem to possess the requisite equities that apparently are evident in the case of an accidental sinking. Not only is the act willful, but it causes the government the expense of removal under section 19 of the Act.[40] In *United States v. Hall*,[41] the government sought an injunction for the removal of a vessel intentionally sunk in Rockland Harbor on the Maine coast. At the time of the action, the River and Harbor Act of 1890[42] was the most recent legislation in force dealing with removal-liability. Section 10 of that Act provided injunctive relief for the removal of all obstructions. (It will be remembered that the successor to section 10 of the Act of 1890, section 12 of the Act of 1899, limits the injunctive relief to removal of those obstructions classified as "structures.")[43] The Court of Appeals for the First Circuit noted that obstructions in navigable rivers were considered nuisances at common law, but recognized the right of shipowners under general maritime law to abandon their vessels to escape liability for obstruction.[44] However, the court limited the privilege of abandonment to those cases in which there was "inevitable accident or misfortune. . . ."[45] Since a vessel sunk on purpose by the owner was not one lost due to inevitable accident or misfortune, the court held that the privilege of abandonment would not be granted and that the vessel, instead, would be classified as an obstruction subject to removal under section 10 of the Act of 1890.

> [I]t follows from this construction that hulls of vessels sunk in harbors not through perils of the sea, but by voluntary act of owners or their authorized agents, are obstructions, within the meaning of this section of the statute.[46]

Although there was subsequent disagreement as to whether section 12 of the Act of 1899 repealed section 10 of the Act of 1890,[47] *Hall* was continually cited as authority for finding that abandonment could not shield the owner from responsibility of removal if the vessel had been sunk intentionally.[48]

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[40] 33 U.S.C. § 414 (1964). See p. 557 *supra*.
[41] 63 F. 472 (1st Cir. 1894).
[42] 26 Stat. 426.
[43] See note 27 *supra*.
[44] 63 F. at 474.
[45] *Id.*
[46] *Id.* at 475.
[47] See note 28 & accompanying text *supra*.
[48] *See, e.g.*, United States v. Bethlehem Steel Corp., 235 F. Supp. 569 (D. Md.

Courts after *Hall*, however, were reluctant to extend its holding beyond cases of intentional sinking despite the broad language of the decision.[49] Therefore, owners of vessels sunk by negligence were not compelled to remove or to pay the cost of removal. The government found itself compelled to remove the wreck under section 19 or 20 of the Act of 1899,[50] but was unable through any part of the Act either to demand that the negligent owner remove at his own expense or to recoup expenses incurred in its own removal operations[51] beyond earnings from the sale of the salvaged vessel.

Since the Act provided an in rem right against the abandoned wreck, many courts refused to find any Congressional intent to provide further relief in personam against the owner.[52] That section 15 of the Act seems to preserve the privilege of abandonment by framing the shipowner's duty in the alternative added weight to the contention,[53] despite the language of earlier cases limiting the traditional maritime abandoment privilege supposedly adopted by the Act to "accidental" sinkings,[54] *i.e.* to those in which the owner was not at fault.

There were, of course, instances in which the government recovered most of its costs by the sale of the removed vessel under authority granted in section 19 of the Act.[55] But in several instances the costs of removal were disaproportionate to the amount realized on the sale.[56]

1964); *In re* Eastern Transp. Co., 102 F. Supp. 913 (D. Md. 1952); United States v. Bridgeport Towing Line, Inc., 15 F.2d 240 (D. Conn. 1926).

[49] *See, e.g.*, United States v. Bridgeport Towing Line, Inc., 15 F.2d 240, 241 (D. Conn. 1926).

[50] See note 35 *supra*.

[51] *See, e.g.*, United States v. Zubik, 295 F.2d 53, 56 (3d Cir. 1961); Loud v. United States, 286 F. 56 (6th Cir. 1923); The Manhattan, 10 F. Supp. 45, 50 (E.D. Pa. 1935).

[52] *See* China Union Lines, Ltd. v. A. O. Andersen & Co., 364 F.2d 769, 792 (5th Cir. 1966); United States v. Bethlehem Steel Corp., 319 F.2d 512, 520 (9th Cir. 1963); United States v. Zubik, 295 F.2d 53, 57 (3d Cir. 1961); Loud v. United States, 286 F. 56, 59 (6th Cir. 1923); The Manhattan, 10 F. Supp. 45, 49 (E.D. Pa. 1935).

[53] *See*, United States v. Moran Towing & Transp. Co., 374 F.2d 656, 667-68 (4th Cir. 1967); *In re* Highland Navigation Corp., 29 F.2d 37, 38 (2d Cir. 1928). *But see In re* Eastern Transp. Co., 102 F. Supp. 913, 917 (D. Md. 1952).

[54] *See, e.g.*, Winpenny v. Philadelphia, 65 Pa. 135 (1871).

[55] *See, e.g.*, China Union Lines, Ltd. v. A. O. Andersen & Co., 364 F.2d 769 (5th Cir. 1966); Zubik v. United States, 190 F.2d 278 (3d Cir. 1951); The Manhattan, 10 F. Supp. 45 (E.D. Pa. 1935).

[56] United States v. Moran Towing & Transp. Co., 374 F.2d 656 (4th Cir. 1967) (163,000 dollars for removal); United States v. Bethlehem Steel Corp., 319 F.2d 512 (9th Cir. 1963) (336,000 dollars); United States v. Zubik, 295 F.2d 53 (3d Cir.

When the loss was occasioned by the negligence of the owner, the inability of the government to hold the owner responsible for its costs of removal proved inequitable to say the least.

Beginning in 1960, the Supreme Court began to evidence a change in attitude toward the heretofore narrow interpretation of the Rivers and Harbors Act. In *United States v. Republic Steel Corp.*[57] the government sought an injunction for violation of section 10 of the Act of 1899 to prohibit the deposit of industrial waste in the Calumet River, which flows out of Lake Michigan. Speaking for the Court, Mr. Justice Douglas recognized that a literal reading of section 12 of the Act of 1899 gave injunctive relief for the removal of "structures" only.[58] However, he felt compelled to construe the problem in light of the purpose of the Act: to provide a statutory scheme for keeping rivers and harbors free of obstructions. Quoting language by Mr. Justice Holmes that "[a] river is more than an amenity, it is a treasure,"[59] he saw a frustration of the congressional intent should the courts be limited to the injunctive power in section 12, which applied solely to those obstructions that could be classified as structures. The logical result was to extend the injunctive power to other obstacles made unlawful in section 10 despite the limiting language of section 12.[60]

Republic Steel signaled a "fresh reappraisal"[61] of the Rivers and Harbors Act. Subseqeuent decisions relying on the opinion did not limit the liberalized interpretation solely to section 10, but injected the precedent into other sections of the Act as well.[62] There was even some evidence that the reappraisal would spill over into the troublesome area of ship-

1951) (3,273.83 dollars); *In re* Eastern Transp. Co., 102 F. Supp. 913 (D. Md. 1952) (6,000 dollars).

[57] 362 U.S. 482 (1960).

[58] *Id.* at 491.

[59] New Jersey v. New York, 283 U.S. 336, 342 (1931).

[60] 362 U.S. at 491-92. The Court relied heavily on Sanitary Dist. v. United States, 266 U.S. 405 (1925), in which the Court had enjoined the diversion of water flowing into Lake Michigan by interpreting the Act as "a broad expression of policy in unmistakable terms." 266 U.S. at 429.

[61] United States v. Moran Towing & Transp. Co., 374 F.2d 656, 667 (4th Cir. 1967).

[62] *See, e.g.*, United States v. Standard Oil Co., 384 U.S. 224 (1966) (discharge of commercially valuable gasoline into a river violative of section 13 of the Rivers and Harbors Act (33 U.S.C. § 407 (1964), which prohibited discharge of refuse matter into navigable waters). *See also* United States v. Perma Paving Co., 332 F.2d 754 (2d Cir. 1964); Lauritzen v. Chesapeake Bay Bridge & Tunnel Dist., 259 F. Supp. 633 (E.D.. Va. 1966); United States v. New York Cent. R.R., 252 F. Supp. 508 (D. Mass. 1965).

owner liability for wreck removal. Judge Browning of the Ninth Circuit, dissenting in *United States v. Bethlehem Steel Corp.*,[63] felt that after *Republic Steel*, sections 15 and 19 (dealing with sunken vessels)[64] should not be so narrowly construed as in the past.[65] Judge Sobeloff of of the Fourth Circuit, dissenting in *United States v. Moran Towing & Transportation Co.*,[66] could not "accept the view that Congress meant to bestow a beneficence on careless owners by nullifying the statutorily declared obligation of such persons to remove obstructions caused by them."[67] Although these voices of judicial dissent were given their due respect, it took a near disaster to pave the way for the reassessment of a negligent shipowner's liability to remove his sunken vessel from navigable waters.

III. UNITED STATES v. 2,200,000 POUNDS OF CHLORINE[68]

In March of 1961, a barge owned by Wyandotte Transportation Company, the *Wychem 112*, was loaded with 2,200,000 pounds of liquid chlorine at Geismar, Louisiana. On March 23, while on its way up the Mississippi River to South Charleston, West Virginia, the barge sank near Vidalia, Louisiana. Unable to raise the barge, the owners notified the Army Corps of Engineers "that it believed further efforts to raise the barge would be unsuccessful" and that it was abandoning the vessel.[69] Government investigators were sent to the scene and determined that there was a potential danger of leakage from the storage tanks of liquid chlorine that remained intact at the bottom of the Missisippi River. If a leakage occurred, the lives of local inhabitants would be endangered

[63] 319 F.2d 512, 522 (9th Cir. 1963).

[64] 33 U.S.C. §§ 409, 414 (1964). See pp. 557-58 *supra*.

[65] There is nothing in their language or purpose to suggest that Congress intended Sections 414 and 415 [sections 19 and 20 of the Act] to affect in any way the civil liability of a wrongdoer . . . who caused the wreck in violation of section 409 [section 15].

319 F.2d at 524-25.

[66] 374 F.2d 656, 669 (4th Cir. 1967).

[67] 374 F.2d at 670.

But nowhere has Congress manifested such unrestrained benevolence towards owners so as to warrant the implication of immunity from responsibility for the negligent sinking of vessels. It is an unwarranted extension of these policies for courts to dilute the clear congressional condemnation in section 409 [section 15 of the Act] of carelessness causing obstructions to navigation and the equally clear command to remove.

Id. at 672.

[68] Companion case to United States v. Cargill, Inc., 1964 A.M.C. 1742 (E.D. La.) (the district court's decision was not officially reported).

[69] Wyandotte Transp. Co. v. United States, 389 U.S. 191, 194 (1967).

by the lethal gas. At the request of the governors of Mississippi and Louisiana,[70] the President proclaimed the site a major disaster area so that emergency federal relief could be made available.[71] Elaborate safety precautions were taken to protect local inhabitants.[72] After removal of the barge and chlorine by the government (under removal provisions found in section 19 of the Act of 1899), they were sold for $85,000.[73] This sum was hardly enough to compensate the government for its expenditures of $3,081,000[74] for removal and safety measures.

The United States charged the owners with negligence and sought reimbursement in personam for the expenses in excess of the amount realized on the sale of the raised barge and chlorine. Full disclosure of the particular facts was not made before the defendants moved to dismiss the action. Citing prior cases holding that negligence was no bar to the privilege of abandonment by shipowners, the court dismissed the government's charges.[75] The Fifth Circuit, however, did not agree. Using *Republic Steel* as a springboard, it found that abandonment by the negligent shipowner would not shield him from liability under the Rivers and Harbors Act.[76] The reasoning of the court was remarkably similar to that used in *United States v. Hall*[77] some 70 years earlier to find an intentionally sunk vessel an obstruction under the Act of 1892. The court concluded that section 15 of the Act, which gave the owner the right to abandon as an alternative to removal, applied only to owners of ships sunk without fault.[78] The court viewed a submerged wreck endangering

[70] Ray, *supra* note 24, at 33.

[71] The declaration was made pursuant to the Disaster Relief Act, 42 U.S.C. §§ 1855-1855g (1964). 389 U.S. at 195.

[72] 389 U.S. at 195. Approximately 2,000 federal troops were moved into the area in case evacuation became necessary. In addition, 30,000 gas masks were issued to the population in the vicinity of the wreck site. Ray, *supra* note 24, at 33. The cost of these preventive measures was put at 1,516,000 dollars. 389 U.S. at 196 n.4.

[73] 389 U.S. at 195 n.2.

[74] *Id.* at 196 n.4.

[75] This Court is unable to find any authority of any kind which would support the proposition that the Government, under these circumstances, has a right to recover the cost of raising such vessels from the owners or operators thereof. The jurisprudence is clear and unequivocal to the effect that the only right in such a case that the United States Government has to recover its expenses is a right *in rem* against the vessels themselves. There is no right *in personam* against the owners of the vessels where the owners of the vessels have abandoned them to the Government.
United States v. Cargill, 1964 A.M.C. 1742, 1743-44 (E.D. La.).

[76] United States v. Cargill, Inc., 367 F.2d 971 (5th Cir. 1966).

[77] 63 F. 472 (1st Cir. 1894). See note 41 & accompanying text *supra*.

[78] 367 F.2d at 977-78.

navigation as an obstruction to traffic just as much as a prohibited structure or other occlusion in the river. The court found, therefore, that the wreck was subject to removal under section 10 of the Act of 1899, which prohibits obstructions.[79] *Republic Steel* had widened the injunctive power in section 12 to cover removal of all obstructions made unlawful under section 10.[80] Since the defendants had refused to remove the *Wychem 112*, the court concluded that the government could recover damages for its removal operations if Wyandotte was found negligent. The case was remanded for a finding on the issue of negligence.[81]

The Supreme Court affirmed the circuit court in *Wyandotte Transportation Co. v. United States*,[82] but used a different approach to the problem of liability. Instead of finding the proper remedy in section 10 of the Act, as the circuit court had done, the Court held that the government was not limited to the remedies found in the Act and that if the Act made a negligent sinking unlawful, the courts could look to proper remedies even though they were not specified within the Act itself.[83] Given the purpose of the statutory scheme as interpreted in *Republic Steel*, the Court argued that it could not have been the intent of Congress to limit the remedies available to the government to those enumerated since they are obviously inadequate to cope with sinkings caused by negligence. "[O]ur reading of the Act does not lead us to the conclusion that Congress must have intended the statutory remedies and procedures to be exclusive of all others."[84] The Court concluded that the government could proceed in personam on a negligence theory to enforce section 15 of the Act, which makes it unlawful to "voluntarily or carelessly sink" a vessel in navigable waters covered by the Act.[85]

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[79] The history of the various acts demonstrates an intent of Congress to provide a method of government removal of vessels, not to limit the liability of those causing the sinking. It is illogical to conclude that a vessel is not an obstruction solely because it is given separate treatment. *Hall* bears this out.
Id. at 975.

[80] See note 57 & accompanying text *supra*.

[81] Even though the remedy in section 12 of this Act is by way of injunction, the court ordered damages for raising the *Wychem 112*. The actual removal costs were not to be taken as conclusive proof of damages, but were to be used as evidence in that determination. 367 F.2d at 979.

[82] 389 U.S. 191 (1967).

[83] 389 U.S. at 200-01. *See generally* Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963).

[84] 389 U.S. at 200.

[85] The Government may, in our view, seek an order that a negligent party

The difference in the approach to shipowners' liability in the Supreme Court's decision and that of the circuit court is significant. It must be admitted that a careful reading of the Act does not support a finding that would classify negligently-sunken ships under section 10 when they are specifically covered in section 15. The circuit court was obviously influenced by the interpretation in *Republic Steel* of section 10,[86] and no doubt the lack of precedent for finding liability outside the statute due to the holding in *Hatch* gave added impetus to the finding of liability within some section of the Act. If liability was to be placed on the shipowner in *Wyandotte* (and the equities of the situation seemed to compel such a finding), the means apparently had to come from within the statute. It was a logical step from *Republic Steel* to hold that a vessel obstructing navigable rivers due to negligence was an obstruction just as any other navigational hazard.

But the Supreme Court chose the alternate course by finding remedies independent of the statute to enforce the provisions within it. Whether *Wyandotte* will be taken as a sub silentio repudiation of *Hatch*'s prohibition of indepndent remedies is unclear.[87] The conflict with *Hatch* was not discussed in the Court's opinion. Instead, the holding centered around the intent of the framers of the Rivers and Harbors Act. The illegality of sinkings caused by negligence under section 15 was crucial. The Court reasoned that Congress could not have intended to make sinking due to negligence illegal without some means of recovering compensation from those who violated the prohibition.[88]

Some members of Congress[89] have viewed the courts' dilemma sympathetically. The response has been a proposed amendment to the Rivers and Harbors Act to expressly charge negligent owners with liability for

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> is responsible for rectifying the wrong done to maritime commerce by a § 15 violation. Denial of such a remedy to the United States would permit the result, extraordinary in our jurisprudence, of a wrongdoer shifting responsibility for the consequences of his negligence onto his victims . . . . We do not believe that Congress intended to withhold from the Government a remedy that ensures the full effectiveness of the Act.

389 U.S. at 204.

[86] See note 60 & accompanying text *supra*.

[87] See p. 555 *supra*.

[88] "We therefore hold that the remedies and procedures specified by the Act for the enforcement of § 15 were not intended to be exclusive." 389 U.S. at 200-01.

[89] Representative John S. Monagan has sponsored an amendment to section 16 of the Rivers and Harbors Act since the 88th Congress. The first proposed amendment was H.R. 12374, reintroduced in the 90th Congress as H.R. 10593. The bill has since been introduced again.

removal expenses (and for other damaging side effects of sinkings). The amendment would add the following language to section 16 of the Act.

> (b) Any person (i) who violates section 10, 11, 13, or 15 of this Act, or (ii) who is the owner of any boat, ship, vessel, barge, raft, or other watercraft or other similar obstruction which is subject to removal or destruction under section 19 or 20 of this Act . . . or (iii) who is the owner of any cargo on any such [craft] . . . shall be liable to the United States . . . for all reasonably necessary costs incurred . . . in removing the obstruction . . . . *Provided, however,* That such violation, obstruction, sinking, or grounding (1) resulted from such person's violation of the aforesaid sections of this Act or from his willful act or negligence, and also (2) resulted in impeding or endangering navigation . . . [and] any amounts covered into the Treasury of the United States under section 19 or 20 of this Act . . . shall be set off against any reimbursement . . . .[90]

The amendment would, in effect, give statutory sanction to the decision in *Wyandotte.* Moreover, it would expand the class of those subject to removal-liability to include cargo-owners. How useful such an inclusion would be depends upon how much responsibility the cargo-owner can be said to have over the actual movement of his cargo.

IV. Limitation of Liability

When negligence was discussed previously in the context of shipowner's removal-liability, the question of whose negligence, or what types of negligent acts, would raise such liability was not put to test. Of course, negligence by the master or pilot subjects him to penalties under section 16 of the Act.[91] The fact that negligence was not otherwise a basis for liability until *Wyandotte* forestalled any real consideration of what types of conduct would be required for the owner to be classified as a "negligent" owner rather than an "innocent" one.

Even though *Wyandotte* has cleared the way for actions in negligence against shipowners, another barrier still has not beeen clearly defined: Can a shipowner claim the privilege of limitation of liability to place a ceiling on his liability for removal costs?[92] Before *Wyandotte,* owners who

[90] H.R. 10593, 90th Cong., 1st Sess. (1967).

[91] 33 U.S.C. § 412 (1964). See note 34 & accompanying text *supra.*

[92] In general, the privilege allows the shipowner to surrender his vessel or its value to a competent court. There is then a pro rata distribution of the funds from

found themselves charged by the government for removal expenses often petitioned for limitation of their liability to the value of the vessel after the sinking as an alternative defense to the right of abandonment under the Rivers and Harbors Act.[93] But the issue was never reached because abandonment was held to preclude liability. *Wyandotte*, of course, has changed that result.

The concept of limitation of liability is deeply rooted in general maritime law.[94] The privilege of limitation was adopted by statute in this country in the Limitation of Liability Act of 1851.[95] This Act allows the shipowner's liability for damages occasioned by fault in the operation of his vessel to be limited to his interest in the vessel and the pending freight[96] if the loss was caused without his "privity or knowledge."[97]

> The liability of the owner of any vessel . . . for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not [except in cases of personal injury] . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.[98]

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the vessel, but there is no further liability against the owner even if the value of the vessel is insufficient to meet all claims in full. The owner's liability is thereby "limited" to his interest in the vessel. *See generally* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 663-748 (1957).

[93] *See, e.g.*, United States v. Moran Towing & Transp. Co., 374 F.2d 656 (4th Cir. 1967); China Union Lines, Ltd. v. A. O. Andersen & Co., 364 F.2d 769 (5th Cir. 1966); *In re* Highland Navigation Corp., 24 F.2d 582 (S.D.N.Y. 1927).

[94] *See* Norwich Co. v. Wright, 80 U.S. (13 Wall.) 104, 116-22 (1871); New Jersey Steam Navigation Co. v. Merchants' Bank, 47 U.S. (6 How.) 344, 434-37 (1848); The Rebecca, 20 F. Cas. 373, 375-76 (No. 11,619) (D. Me. 1831); H. BAER, ADMIRALTY LAW OF THE SUPREME COURT 230 (2d ed. 1969); G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 663-67 (1957).

[95] 9 Stat. 635 (1851), *as amended*, 46 U.S.C. §§ 181-89 (1964).

[96] "Freight" for purposes of limitation of liability is defined generally as the earnings of the ship during a particular voyage. *See, e.g.*, La Bourgogne, 210 U.S. 95, 136 (1908); *In re* Baracuda Tanker Corp., 281 F. Supp. 228, 232-33 (S.D.N.Y. 1968) (the Torrey Canyon litigation).

[97] *See* Coryell v. Phipps, 317 U.S. 406 (1943); La Bourgogne, 210 U.S. 95 (1908); Providence & N.Y.S.S. Co. v. Hicks Mfg. Co., 109 U.S. 578 (1883); The concept of "privity" is amorphous, and the courts' applications defy definition. However, where the owner has exercised due care in fitting out the vessel and has no knowledge of any defects, there has been a reluctance on the part of the courts to find privity. *See, e.g., In re* Canadian Pac. Ry., 278 F. 180 (D. Wash. 1921). But beyond the clear lack of privity, the course of the decisions is hard to define. *See, e.g.*, States S.S. Co. v. United States, 259 F.2d 458 (9th Cir. 1957); The Severance, 152 F.2d 916 (4th Cir. 1945); Oregon v. Tug Go-Getter, 299 F. Supp. 269 (D. Ore. 1969).

[98] 46 U.S.C. § 183 (1964).

Limitation under the statute and the privilege of abandonment under the general maritime law are closely related. They are, in fact, merely alternative forms of invoking the general limitation privilege found in the maritime law.[99]

Since a shipowner now faces the possibility of liability under *Wyandotte* for a sinking caused by neligence, the privileges in the Limitation Act become significaint. An essential question that the Court in *Wyandotte* did not answer is whether removal-liability for the owner is to be limited to those cases in which he himself is negligent, or is it to be extended to include cases of negligence by a master or pilot?[100] Only in the context of the latter alternative will the question of limitation arise since under no circumstances does the Limitation Act allow the privilege to a negligent owner.

It seems unlikely, at least in view of the law as it has developed in the field of agency, that an interpretation of the Court's decision should be adopted that would restrict removal-liability to occasions when the owner is personally at fault.[101] In fact, the exceptions of privity and knowledge in the Limitation Act were included precisely because of the principal-agent relationship existing between an owner and his master or pilot.[102] Negligence in the area of removal-liability certainly should not alter that relationship.

Another problem is whether removal expenses incurred by the government are includable among those liabilities that can be limited under the Limitation Act. There is little case law on the application of limitation of

[99] *See, e.g.*, Wyandotte Transp. Co. v. United States, 389 U.S. 191, 208-09 (1967); The Scotland, 105 U.S. 24, 29 (1881); Newark v. Mills, 35 F.2d 110, 113 (3d Cir. 1929); *In re* Highlands Navigation Corp., 29 F.2d 37, 38 (2d Cir. 1928).

[100] *In re* Midland Enterprises, Inc., 296 F. Supp. 1356, 1364-65 (S.D. Ohio 1968).

[101] *See* RESTATEMENT (SECOND) OF AGENCY § 216 (1957).

> The common law, as well as the civil law, holds the owners responsible for all the obligations of the master, contracted within the scope of his authority as master, to their full extent, whether they result from contract or tort. But, by the general maritime law of Europe, their responsibility for his obligations, arising out of his wrongful acts, is limited to the amount of their interest in the ship and freight. By abandoning these they exempt themselves from all personal liability. . . . [I]n this state, by statute in conformity with the principles of the general maritime law, their liability is restricted to their interest in the ship and freight.

Stinson v. Wyman, 23 F. Cas. 108, 109 (No. 13,460) (D. Me. 1841).

[102] *See, e.g.*, Norwich Co. v. Wright, 80 U.S. (13 Wall.) 104, 109-10 (1871); New Jersey Steam Navigation Co. v. Merchants' Bank, 47 U.S. (6 How.) 344, 435 (1848).

liability for removal expenses. This gap is due mainly to the absence of any real need to claim limitation under pre-*Wyandotte* decisions.[103] But there are some cases that have considered various aspects of the problem.

In the *Stonedale No. 1*,[104] the House of Lords presented the general English view, which refuses limitation for removal expenses when such recovery is granted by statute.[105] The court reasoned that limitation covers only physical damages caused by the sinking and that recovery for removal expenses is not recovery for physical damages, but rather for a debt raised by statute. However, the court said that limitation could be maintained if the liability stemmed from an independent action on negligence and not from a statute.

An implication that may be drawn from the English decisions dealing with statutory recovery is that limitation of liability in cases of removal expenses may become a question of proximate cause; *i.e.*, limitation was not intended to apply to those damages incurred indirectly from the loss of the vessel. This proposition is supported by a 1931 American case. In *The Snug Harbor*,[106] damages from a collision with the unmarked wreck thirty days after the vessel went down were held not subject to limitation.[107] The court concluded that "limitation of liability is limited to limitation for disasters occurring on a particular voyage . . . and for such loss or damage as occurs on the last voyage . . . or on the voyage on which the vessel is lost."[108]

But liability for a collision caused by failure to mark a wreck can readily be distinguished from the liability arising out of removal costs. The former is due to a subsequent negligent omission, whereas the latter arises as a direct result of the initial loss. Moreover, the court that decided *The Snug Harbor* only four years later found removal expenses incurred under state law subject to limitation. In *The Central States*,[109] limitation was allowed for the costs of removing the defendant's vessel from the Erie Canal. The removal charge was based on state law. Holding the Limitation Act applicable, the district court reasoned that the federal law allowing limitation took precedence over the state law allowing recovery

[103] *See In re* Midland Enterprises, Inc., 296 F. Supp. 1356, 1364-65 (S.D. Ohio 1968). *But see* Wong v. Utah Home Fire Ins. Co., 167 F. Supp. 230 (D. Hawaii 1958); The Central States, 9 F. Supp. 934 (E.D.N.Y. 1935).

[104] [1955] 2 All E.R. 689 (H.L.).

[105] *See, e.g.*, The Millie, 55 T.L.R. 972 (1939).

[106] 53 F.2d 407 (E.D.N.Y. 1931).

[107] *Id.* at 412.

[108] *Id.*

[109] 9 F. Supp. 934 (E.D.N.Y. 1935).

for removal expenses.[110] If the case is taken as authority, the question is then not whether removal expenses in general are a proper subject of limitation of liability, but whether the Rivers and Harbors Act in some way precludes limitation when removal is exercised under its provisions. The question may turn on how well the Act can be subjected to limitation and at the same time fulfill the expectations as outlined in *Republic Steel* and *Wyandotte*.

This distinction has so far lain dormant beneath the *Wyandotte* decision. Moreover, the question may have already been resolved. Since the abandonment privilege, as pointed out previously, stemmed from the same maritime tradition that gave birth to the Limitation Act, it must be asked whether the Court, while abolishing the abandonment privilege (formerly held to be included under section 15 of the Rivers and Harbors Act),[111] would still allow the spirit of *Wyandotte* to be thwarted by the same principle dressed in the cloak of the Limitation Act. Rejection of the abandonment privilege in *Wyandotte* could be viewed as a rejection of the privilege of limitation of liability altogether in the field of removal liability.

The attitude of the courts in recent years has not been entirely favorable toward the limitation privilege of shipowners.[112] It has been labeled

[110] 9 F. Supp. at 936. *Accord,* Hagan v. Richmond, 104 Va. 723, 52 S.E. 385 (1905). In Wong v. Utah Home Fire Ins. Co., 167 F. Supp. 230 (D. Hawaii (1958), limitation was not allowed on other grounds, and the substantive issue was never reached as to the proper inclusion of removal expenses in limitation petitions.

[111] *See, e.g.,* United States v. Moran Towing & Transp. Co., 374 F.2d 656 (4th Cir. 1967); United States v. Bethlehem Steel Corp., 319 F.2d 512, 518-19 (9th Cir. 1963); The South Shore, 35 F.2d 110, 113 (3d Cir. 1929); The Nassau, 29 F.2d 37, 38 (2d Cir. 1928).

Mr. Justice Fortas in *Wyandotte,* while noting that the two privileges are very much alike, rejected at least the interpretation that Congress intended to give statutory sanction to limitation of removal costs under the Rivers and Harbors Act.

> Petitioners also claim that a substantial body of non-statutory law establishes the rule that a shipowner who has negligently sunk a vessel may abandon it and be insulated from all but *in rem* liability. They argue that Congress must have intended to codify this rule in the Rivers and Harbors Act. We do not accept petitioner's claim . . . We do not believe Congress intended the Rivers and Harbors Act to embody this illusory non-statutory law.

389 U.S. at 208-09.

[112] *See* Comment, *Shipowners' Limited Liability, supra* note 13, at 107-08. For an overview of the changing concepts of the Supreme Court in the maritime field, *see generally* Mendelsohn, *Public Interest and Private International Maritime Law,* 10 WM. & MARY L. REV. 783 (1969); Comment, *High Tide: Public Policy Decisions in Admiralty Law,* 49 ORE. L. REV. 76 (1969).

as a subsidy of the shipping industry supported by those suffering the actual injury.[113] This attitude has also been reflected in decisions holding the shipowner liable either by stretching the concept of privity or by expanding the concept of negligence.[114] Recognition of such trends becomes important when predictions about the future course of the Court are being made.

The first case to consider the problem since *Wyandotte* illustrates the uncertainties that have resulted in the application of limitation of liability to removal expenses. In *In re Midland Enterprises, Inc.*,[115] barges owned by the defendant collided with portions of the Markland Dam on the Ohio River. Some of the barges sank and obstructed the river and locks of the dam. Removal was accomplished by the government at a cost of 240,000 dollars. The owners petitioned for limitation of their liability in response to the government's claim for recovery of removal costs. Although the court considered the implications of limitation of liability as applied to removal expenses, the question remained unsettled since the court declined to decide the issue until in personam liability for negligence had been determined at trial.[116] The decision on the merits was not available at the time of this writing.

But the discussion in the court's opinion is valuable in that it illustrates the judicial dilemma now faced in respect to liability for removal. Even though the court admitted that *Wyandotte* had not answered all crucial questions concerning limitation, it was able to reach one important conclusion. The court rejected the contentions that the liability for removal expenses stemmed from events occuring after the voyage and that for

[113] Maryland Cas. Co. v. Cushing, 347 U.S. 409, 437 (1953).

[114] *See, e.g.*, States S.S. Co. v. United States, 259 F.2d 458 (9th Cir. 1957); *In re* Republic of France, 171 F. Supp. 497 (S.D. Tex. 1959), *rev'd on other grounds*, 290 F.2d 395 (5th Cir. 1961), *cert. denied*, 369 U.S. 804 (1962); The Linseed King, 24 F.2d 967 (S.D.N.Y. 1928), *aff'd sub nom. In re* Spencer Kellogg & Sons, Inc., 52 F.2d 129 (2d Cir. 1931), *rev'd on other grounds sub nom.*, Spencer Kellogg & Sons, Inc. v. Hicks, 285 U.S. 502 (1932). *But see* Coryell v. Phipps, 317 U.S. 406 (1943).

In 1957 the Tenth Conference on Private Maritime Law saw the adoption of the International Convention on the Limitation of Shipowners' Liability (The Brussells Limitation Convention of 1957). Article I(1)(c) of that convention would allow removal liability to be included as a proper claim subject to limitation. See H. BAER, ADMIRALTY LAW OF THE SUPREME COURT 562 (2d ed. 1969). Despite support from the shipping industry, the convention was not signed by the United States and is not law. *Id.* at 231 n.5; Comment, *Shipowners' Limited Liability*, *supra* note 13, at 109.

[115] 296 F. Supp. 1356 (S.D. Ohio 1968).

[116] *Id.* at 1366.

this reason there was no proper claim for limitation.[117] It is the general rule that claims arising after the termination of a voyage cannot be a subject of the limitation proceeding because to make them so would allow the owner to incur new liabilities without personal loss while at the same time diminishing the limitation fund for prior claimants.[118] The court in *The Snug Harbor* relied on the rule to deny limitation to the claim for a collision occurring thirty days after the sinking.[119] The reason for the rule, however, does not present itself in removal cases even if removal claims could be held to stem from events occurring after the voyage terminated.[120] But the court in *Midland* found that removal expenses were products of events occurring while the vessels were "en voyage," and therefore, limitation could not be denied for that reason.[121] If, as *Midland* indicates, removal expenses are claims arising during the last voyage, there would seem to be no barrier other than the implications of *Wyandotte* standing between the Rivers and Harbors Act and the Limitation of Liability Act.

V. Conclusion

Whether subsequent cases under *Wyandotte*[122] will shed more light on the problem of limitation of liability can only be speculated upon. But the course of the Supreme Court in *Republic Steel* and *Wyandotte* is clear. The momentum of these two decisions as applied to obstructions in navigable waters must be given proper respect not only for what they have changed, but for what they portend for the future. Viewed in the context of the modern problems facing the country's waterways, the decisive language of each indicates that the Supreme Court would be loath to make future decisions that would dampen the revived spirit of the Rivers and Harbors Act.

Thomas B. Anderson, Jr.

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[117] *Id.* at 1365.

[118] The Pelotas, 21 F.2d 236 (E.D. La. 1927). See G. Gilmore & C. Black, The Law of Admiralty 741-48 (1957).

[119] 53 F.2d 407, 412 (E.D.N.Y. 1931). See text at note 106 *supra.*

[120] *See* G. Gilmore & C. Black, The Law of Admiralty 747-48 (1957).

[121] 296 F. Supp. at 1365.

[122] Another case involving a chlorine barge, this one sunk near Baton Rouge, Louisiana, during hurricane Betsy in 1965, is in the trial stage at this writing. *In re* Marine Leasing Serv., Inc., No. 869 (E.D. La. filed — 1968).