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The Law of Admiralty—A Primer

Robert C. Bensing and Harold E. Friedman

THE ST. LAWRENCE SEAWAY opens a new era of commerce in the midwestern United States. With increased trade and navigation must be anticipated an increased emphasis upon the law which deals with the problems inherent in the carriage of goods and passengers by water, *i.e.*, the law of admiralty.

The legal problems associated with expanded maritime commerce will involve many segments of the legal profession and will not be limited to a small group of admiralty lawyers. Yet, while the law

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of admiralty has some similarities to the land law, it differs fundamentally from the common-law traditions with which most attorneys are familiar because of its connection with a single industry and its peculiar historical development. It is, therefore, the objective of this article to summarize the history and basic principles of maritime law in order to acquaint the non-admiralty lawyer with some of the problems in this area.

HISTORICAL ANTECEDENTS

To some, a study of admiralty law without allusion to its historical antecedents would be as deficient as a treatise on equity without consideration of the role of the chancellor. Although a familiarity with the ancient sea codes would add polish to the admiralty lawyer's performance, this knowledge is no longer a pre-requisite to an understanding of the present law. However, in order to appreciate the development of admiralty law, a brief historical survey is necessary.

The origin of water transportation may be traced to early times in recorded history.¹ The Mediterranean became the cradle of maritime development as the Egyptians, Phoenicians, and Greeks established vast commercial empires. During this period, 3000 years before Christ, there developed a body of customs which became the foundation of an international sea law.

From its inception maritime law was independent of the will of sovereign states, but dependent upon the customs and experiences of

1. "The earliest picture of a boat, found on an Egyptian vase, has been dated at some 6000 years B.C." WIGMORE, PANORAMA OF THE WORLD'S LEGAL SYSTEMS 875 (1936).

the merchants and mariners. As maritime courts developed alongside "land" courts, rules emerged which were then codified in the leading commercial centers. The pre-eminence of the commercial centers with their independent merchant courts subsided as great nation-states arose. The international law of the sea was absorbed by authoritative codifications.²

In England, the jurisdiction of the local maritime courts, which sat in port towns, was annexed to the office of the Lord High Admiral, and, by 1391, Parliament defined that jurisdiction as "a thing done upon the sea."³ As the admiral's court increased in stature, it aroused the jealousy of the common-law courts. The latter, literally interpreting the admiral's jurisdictional grant, issued writs of prohibition which kept "admiralty" matters within extremely narrow limits. Despite this action, the common-law courts were unable to completely exterminate the admiralty, and, having survived, admiralty jurisdiction was vastly enlarged by nineteenth century parliaments.⁴

Courts of general maritime jurisdiction were established in the English colonies unhampered by the common-law writs. Thus, the tradition of a specialized court to handle a wide scope of maritime problems became fixed in America. Today, since the federal constitution places admiralty jurisdiction within the federal judicial system, it is necessary to bring actions on the admiralty side of federal court in order to have the benefit of the unique aspects of admiralty law, which aspects will be considered later.

It had long been thought that the rise of nationalism would spell doom for a common law of the sea; to a limited extent it did. However, technology has now made the world smaller, and the development of international trade has been enormous. Thus, the need for uniformity and consistency, so vital to commerce, has overridden sovereign supremacy in certain areas. Standard navigation rules (rules of the road) have been adopted by all shipping nations. International committees have also played a dominant role in influencing uniform legislation in the various nations. Once more, the trend is toward a common law of the sea.⁵

JURISDICTION

Admiralty jurisdiction in the United States today is the product of the Constitution, the Congress, and the Supreme Court. Under the Constitution, judicial power in "all cases of admiralty and mari-

2. The most influential of the incorporations of established customs of the sea into the laws of a sovereign nation was the Ordinance de la Marine of France, promulgated under Louis XIV in 1681.

3. 13 Rich. II c. 5 (1389) and 15 Rich. II c. 3 (1391).

4. 3 & 4 Vict. c. 65 (1840); 13 & 14 Vict. c. 26 (1850); 24 Vict. c. 10 (1861).

5. See GILMORE AND BLACK, ADMIRALTY 782 (1957).

time jurisdiction" is given to the federal courts.⁶ In the Judiciary Act of 1789, by which Congress established the inferior federal courts and defined their jurisdiction, "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction" was placed in the federal district courts, "saving to suitors, in all cases," however, "the right of a common law remedy, where the common law is competent to give it."⁷

Jurisdiction of Federal Courts

While the "saving clause" presents problems for future discussion, at this point it is sufficient merely to observe that it in no way deprives the federal courts of the right to hear and determine with binding results any maritime cases presented to them. Thus, from the very beginning, the federal courts sitting as courts of admiralty, and not as common-law courts, assumed jurisdiction over maritime causes of action.⁸ This jurisdiction is general; there is no requirement of diversity of citizenship or of a minimum amount in controversy, as there is in federal civil cases.⁹ If a non-maritime action is involved, admiralty has no jurisdiction over the case. The suitor wrongfully filing his petition in admiralty must begin again, either in a state court or on the civil side of the federal district court, providing the jurisdictional requisites exist.¹⁰

Jurisdiction Over Substantive Law of Admiralty

The constitutional grant has been interpreted as giving to the federal government judicial and legislative supremacy over the substantive law of admiralty. It is recognized that it is for the federal government, by judicial decision or by legislation, to determine what causes are admiralty and maritime and what are not, and to formulate the rules of law to be applied to such causes.¹¹ While federal legislation has played an important part in the shaping of this law, most of it is the result of judicial decision.

In developing the content of admiralty, the Supreme Court selected what it considered suitable from the maritime law of the international community of seafaring nations and refused to adopt the law of England or of any other single country.¹² Where problems peculiar to the United States arose, the Court either altered an estab-

6. U.S. CONST. art. III, § 2.

7. 1 Stat. 76 (1789). For the present section see 28 U.S.C. § 1333 (1952).

8. A separate docket is maintained in the district courts for admiralty cases.

9. 1 BENEDICT, ADMIRALTY § 2 (6th ed. 1940).

10. GILMORE & BLACK, ADMIRALTY 30 (1957).

11. See *Lindgren v. United States*, 281 U.S. 38 (1930); *Detroit Trust Co. v. Steamer Thomas Barlum*, 293 U.S. 21 (1924); *Panama R. R. Co. v. Johnson*, 264 U.S. 375 (1924).

12. *Hough, Admiralty Jurisdiction of Late Years*, 37 HARV. L. REV. 529 (1924).

lished maritime rule to fit the particular need or devised a new one. By the start of the twentieth century the basic rules of American admiralty had been developed. Consequently, references to foreign rules became less frequent and in the last few years have all but disappeared.¹³

Extent of Jurisdiction

Waters

That the federal courts' domain over "all cases of admiralty and maritime jurisdiction"¹⁴ extends to the seven seas has never been questioned. As to lesser waters, however, there has been considerable doubt. Early American courts did not confine themselves within the limitations imposed upon the jurisdiction of English admiralty courts,¹⁵ but adopted instead a "tide-water" test to determine the extent of the waters covered.¹⁶ With the advent of the steamboat, jurisdiction was extended to include all waters which are in fact navigable in interstate or foreign commerce,¹⁷ and it is "navigable water" which is the touchstone of admiralty jurisdiction in America today. Thus, it has been clear for many years, even in the absence of congressional authority, that navigable rivers and the Great Lakes fall within federal maritime jurisdiction.¹⁸

Furthermore, the jurisdictional element is the "water" itself; if it is a highway for interstate or foreign commerce, it makes no difference that the vessel is not engaged in such commerce.¹⁹ Whether a particular water has navigable capacity is a question of fact of which the courts take judicial notice,²⁰ although should the point be in doubt, evidence may be introduced and considered.²¹

13. GILMORE & BLACK, ADMIRALTY 41 (1957).

14. U.S. CONST. art. III, § 2.

15. For a discussion of the English tradition, which in effect excluded maritime jurisdiction from all but the high seas, see 7 WEST. RES. L. REV. 72 (1956).

16. In *De Lovio v. Boit*, 7 Fed. Cas. 418 (No. 3776) (C.C.D. Mass., 1815), Justice Story held that the Federal courts were not bound by the artificial restraints which had been placed on the English maritime courts.

17. The first breach in the "tidewater" test occurred in *Waring v. Clarke*, 46 U.S. (5 How.) 441 (1847), where the Supreme Court held a point 95 miles above New Orleans, on the Mississippi, to be within the tide. The Supreme Court, however, completely rejected the "tide-water" test in the *Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851), and promulgated the "navigable water" test in *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870).

18. In 1845, Congress passed a statute extending Federal maritime jurisdiction to the Great Lakes. 5 Stat. 726. The Supreme Court, however, through the *Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851); *Fretz v. J. C. Bull & Co.*, 53 U.S. (12 How.) 466 (1851) (involving a collision on the Mississippi, not covered by the statute); *Jackson v. The Magnolia*, 61 U.S. (20 How.) 296 (1857); and other cases made it clear that the jurisdiction extended to bodies of navigable water as such, and not merely because Congress said so. Ultimately the act was recognized as superfluous.

19. *Ex Parte Boyer*, 109 U.S. 629 (1884).

20. *Montello*, 78 U.S. (11 Wall.) 41 (1870).

21. *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940).

Vessels

The juridical personification of a "vessel," granting to it rights and liabilities distinct from those of its owners, is a distinguishing factor of maritime law. For this reason, in addition to the fact that admiralty courts generally exercise jurisdiction only where vessels, their cargoes, or personnel are involved, it is necessary to know just what is a "vessel."

In the vast majority of cases, the conclusion that a vessel is or is not involved is obvious. Federal statutes define the word "vessel" as including "every description of water-craft or other artificial contrivance used or capable of being used as a means of transportation on water."²² There is, however, a marginal area wherein hair-splitting distinctions are drawn.

A ferryboat,²³ a barge,²⁴ a raft of timber,²⁵ and a hydroplane while on the water²⁶ have been considered vessels within admiralty jurisdiction; while a floating derrick anchored near a seawall,²⁷ a sailor's floating meeting house,²⁸ and a ferry bridge chained to a wharf²⁹ have not. Although size of the craft is not the key to the determination, its purpose may very well be.³⁰

Likewise, the point at which a vessel becomes a vessel is important. It is generally held that for tort purposes a vessel is born when launched;³¹ whereas for contract purposes it does not become one until all of the construction work is completed, both ashore and afloat.³²

Contracts

From the foregoing, it is seen that admiralty jurisdiction is related to "vessels" and "navigable waters." Thus, suits in tort for collision, for damage to cargo, and for injuries to seamen and passengers, if occurring upon such vessels and waters, are clearly within the admiralty domain.

However, to establish jurisdiction over suits based on contracts, it is necessary that the nature and character of the transaction be in substance maritime. If the agreement relates to the "navigation, business, or commerce of the sea," the contract is maritime. And

22. 1 U.S.C. § 3 (1928).

23. *United States v. Burlington & Henderson County Ferry Co.*, 21 Fed. 331 (S.D. Ia. 1884).

24. *The Robert W. Parsons*, 191 U.S. 17 (1903).

25. *Muntz v. A Raft of Timber*, 15 Fed. 555 (E.D. La. 1883).

26. *Reinhardt v. Newport Flying Service Corp.*, 232 N.Y. 115, 133 N.E. 371 (1921).

27. *Heikkila v. S. Rich Steers, Inc.*, 1941 Am. Mar. Cas. 578 (N.Y. App. Div.).

28. *Cope v. Vallette Dry Dock Co.*, 119 U.S. 625 (1887).

29. *Ibid.*

30. 1 BENEDICT, ADMIRALTY 109-12 (6th ed. 1940).

31. *Taylor v. United States Casualty Co.*, 64 F.2d 521 (4th Cir. 1933), *cert. denied*, 290 U.S. 639 (1933).

32. *Tucker v. Alexandroff*, 183 U.S. 424 (1901).

it is no less maritime because it is to be performed on land, for unlike admiralty jurisdiction in tort, subject matter, and not locality, is the criterion for contract jurisdiction.³³ Contracts for the chartering of ships,³⁴ for repairs and supplies furnished to vessels,³⁵ for carriage of goods³⁶ and passengers,³⁷ for towage,³⁸ pilotage,³⁹ and wharfage⁴⁰ are all of such a nature.

A policy of maritime insurance is within admiralty jurisdiction, but an agreement to make such a contract has been held not to be.⁴¹ Other areas which might be thought to be within admiralty, but which are not, include contracts for the building⁴² and sale of vessels,⁴³ and for services to a vessel laid up and out of navigation.⁴⁴

Although there are hazy areas, such as quasi-contract claims arising out of maritime transactions and mixed contracts,⁴⁵ for practical purposes the outlines of contract jurisdiction are well-enough defined.

In Rem v. In Personam Proceedings

Admiralty proceedings may be divided into two categories: proceedings in personam and proceedings in rem. An admiralty suit in personam corresponds to an ordinary suit in a common-law court: The suit is against a named individual or corporate defendant; a personal judgment is rendered against the defendant if he loses; and execution issues against his property, generally without regard to its relation to the matter in issue.⁴⁶ A suit in rem, however, is a proceeding against the thing itself, which is treated as being responsible for the claim asserted by the libellant (plaintiff). The property is

33. It is interesting to note the English view, which conceded admiralty jurisdiction only to contracts made and to be performed upon navigable water. 1 BENEICT, ADMIRALTY 127 (6th ed. 1940).

34. *Morewood v. Enequist*, 64 U.S. (23 How.) 491 (1860).

35. *North Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co.*, 249 U.S. 119 (1919); *The General Smith*, 17 U.S. (4 Wheat.) 438 (1819).

36. *Brittan v. Barnaby*, 62 U.S. (21 How.) 527 (1859); *New Jersey Steam Navigation Co. v. Merchants' Bank*, 47 U.S. (6 How.) 344 (1848).

37. *The Moses Taylor*, 71 U.S. (4 Wall.) 411 (1867).

38. *The Knapp, Stout & Co. v. McCaffrey*, 177 U.S. 638 (1900).

39. *Ex Parte McNiel*, 80 U.S. (13 Wall.) 236, 242-43 (1871).

40. *Ex parte Easton*, 95 U.S. 68 (1877).

41. For a discussion of this aspect of maritime v. non-maritime agreements, see 1 BENEICT, ADMIRALTY 127 (6th ed. 1940).

42. See note 38, *supra*. The problem in this area is that of distinguishing the building of a vessel from the repairing of one.

43. *The Ada*, 250 Fed. 194 (2d Cir. 1918); *Grand Banks Fishing Co. v. Styron*, 114 F. Supp. 1, (D. Me. 1953).

44. *Murray v. Schwartz*, 175 F.2d 72 (2d Cir. 1949); *The Andrew J. Smith*, 263 Fed. 1004 (E.D.N.Y. 1920).

45. Mixed contracts are those, part of which would be, if standing alone, within the jurisdiction, and part without. GILMORE & BLACK, ADMIRALTY 26 (1957).

46. 2 BENEICT, ADMIRALTY § 226 (6th ed. 1940); see ADMIRALTY R. 2.

the defendant and is proceeded against by name.⁴⁷ Thus, the style of the libel (petition): *The Libel of C. DeWitt v. The Propellor Carib Prince*, or against *4,855 Bags of Linseed*. After the libel in rem is filed, the property is taken into custody by the federal marshal, who then gives notice (usually by newspaper publication) to the world at large of the fact of seizure upon libel, and of the time and place for the return of process and the hearing of the cause.⁴⁸ Notice need not be served on the owner of the property.

If the owner does not intervene and defend the action, the property is sold, and the proceeds are used to satisfy the judgment. Since the power and process of the court are against the thing itself, the judgment binds only the property seized. If the proceeds are insufficient to satisfy the claim, no personal judgment can be had against the owner for the deficiency.⁴⁹ However, so far as the property itself is concerned, a sale under a proceeding in rem transfers not merely the title or interest of the owner, but a clear and indefeasible title good against the whole world.⁵⁰

When the owner appears and defends a suit in rem, he is called a "claimant." If he wants possession of his property he may — and usually does where a ship is involved — "bond" the claim, in which event the property is released, and the bond becomes for the purpose of the suit a substitute for the property libelled.⁵¹

In most instances, in rem and in personam actions may be joined in one suit.⁵² The Supreme Court has not yet determined whether the owner of the property submits himself to the court's jurisdiction, so as to permit a personal judgment against him for any deficit, by appearing to protect his interest in an action in which the libellant has sued only in rem, but could also have sued in personam. Lower courts have generally refused to grant personal judgments against the owners in these instances.⁵³ In several recent cases, however, judgments have been granted in amounts greater than the bonds posted for the release of the property.⁵⁴

47. See *Freeman v. Alderson*, 119 U.S. 185 (1886).

48. ADMIRALTY R. 10.

49. 2 BENEDICT, ADMIRALTY § 226 (6th ed. 1940).

50. *The Trenton*, 4 Fed. 657 (E.D. Mich. 1880); GILMORE & BLACK, ADMIRALTY 33 (1957).

51. *Ibid.* For the methods of bonding the property, see 62 Stat. 974 (1948), 28 U.S.C. § 2464 (1952), and ADMIRALTY R. 12. See also GILMORE & BLACK, ADMIRALTY 649 (1957).

52. See ADMIRALTY R. 13-19. All suits for assaults are maintainable only in personam. ADMIRALTY R. 15. All suits on bottomry bonds are maintainable only in rem, except where a personal fraud is involved. ADMIRALTY R. 17. See also 2 BENEDICT, ADMIRALTY § 228 (6th ed. 1940).

53. See *Logue Stevedoring Corp. v. The Dalzellance*, 198 F.2d 369 (2d Cir. 1952), and cases cited therein.

54. *Mosher v. Tate*, 182 F.2d 475 (9th Cir. 1950); *The Fair Isle*, 76 F. Supp. 27 (D. Md. 1947), *aff'd sub nom. Watermann S.S. Corp. v. Dean*, 171 F.2d 408 (4th Cir. 1948). Also

Maritime Liens

In order to succeed in a suit in rem, it is necessary that the libellant establish the existence of a maritime lien. "The only object of the proceeding in rem, is to make this right [the lien], where it exists, available . . . [and] to carry it into effect. It subserves no other purpose. The lien and the proceedings in rem are, therefore, correlative. . . . Where one exists, the other can be taken, and not otherwise."⁵⁵

Maritime liens arise only out of claims that are themselves maritime. Thus, it is necessary in the first instance to determine what is within admiralty jurisdiction: "what types of structures qualify as 'vessels'; which contracts are maritime contracts; when a tort is a maritime tort."⁵⁶ Although *most* maritime claims give rise to liens, no formula exists, in the absence of a statute, for determining whether a lien attaches to a *particular* claim.⁵⁷ Among the many claims which have been given lien status are: seamen's claims for wages;⁵⁸ salvage claims;⁵⁹ tort claims, including both collision and personal injury claims;⁶⁰ preferred ship mortgages;⁶¹ contract claims for repairs, supplies, towage, wharfage, and other necessities furnished to a vessel;⁶² and the claim of the ship against the cargo for unpaid freight and demurrage.⁶³

Maritime liens are of two types. The first is possessory and is lost by unconditional delivery.⁶⁴ Such is the lien of the ship against the cargo for unpaid freight and demurrage, or for damage done to a vessel by its cargo.⁶⁵ With respect to their dependency upon pos-

see *The Minnetonka*, 146 Fed. 509 (2d Cir. 1906). For an excellent discussion of these cases and of the entire problem, see GILMORE & BLACK, ADMIRALTY 652-54 (1957).

55. *The Rock Island Bridge*, 73 U.S. 213 (1867).

56. GILMORE & BLACK, ADMIRALTY 512 (1957). See discussion under WATERS and VESSELS, *supra*.

57. *Ibid.*

58. A master, however, has no lien for wages due. *Walker v. Woolsey*, 186 F.2d 920 (5th Cir. 1951).

59. *The Sabine*, 101 U.S. 384 (1879).

60. Seamen's actions for personal injury brought under the Jones Act, 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1952), and suits for an assault or beating on the high seas or elsewhere within admiralty jurisdiction (see ADMIRALTY R. 15) can only be brought in personam. They are the only maritime tort claims which do not give rise to liens. See GILMORE & BLACK, ADMIRALTY 514 (1957).

61. See 41 Stat. 1003 (1920), 46 U.S.C. § 951 (1952), as amended, 46 U.S.C. § 951 (Supp. V, 1958).

62. Most liens in this category are covered by the Maritime Lien Act, 41 Stat. 1005, 1006 (1920), 46 U.S.C. §§ 971-75 (1952). No lien arises from the breach of an executory contract. See GILMORE & BLACK, ADMIRALTY § 9-22 (1957).

63. *Jepsen v. A Cargo of Hemp*, 228 Fed. 143 (D. Mass. 1915).

64. *Easter Transp. Co. v. United States*, 159 F.2d 349 (2d Cir. 1947).

65. See HUGHES, ADMIRALTY 95 (2d ed. 1920); GILMORE & BLACK, ADMIRALTY 516 (1957).

session, these liens are similar to common-law liens and involve nothing new to the land lawyer.

The second type of maritime lien, however, is so radically different that it “. . . is not a lien at all in the common-law sense of the term.”⁶⁶ Its most important characteristic is that it is independent of possession of the property against which it exists — independent not only in that the lienor does not have to retain possession of the property, but in that he has no right to its possession.⁶⁷ Further, its existence is not dependent upon the personal liability of the owner of the property, for, as will be remembered, in American admiralty jurisprudence the thing itself is considered a legal entity.⁶⁸

The maritime lien is often a truly secret one, for, with the exception of the preferred ship mortgage,⁶⁹ it does not have to be recorded. Once the lien attaches, unless the owner of the property satisfies it by payment, it can be discharged only by an admiralty court proceeding in rem.⁷⁰ It prevails even over a bona fide purchaser, and no common-law court, federal or state, can abrogate it.⁷¹ It is not completely indelible, however, for it may be lost by laches.⁷²

A sale under a decree in rem frees the property sold of all liens, including those of lienors who neither intervened nor had knowledge of the suit, and, as previously stated, the sale transfers a clear and indefeasible title to the purchaser.⁷³ Furthermore, the decree “is given international recognition.”⁷⁴ Thus, an Englishman who has repaired an American ship, and holds a lien thereon, may discover that his lien has been discharged by an American admiralty court in a suit in rem of which he had no knowledge. However, if the shipowner is personally obligated to the English supplier the obligation is not discharged by the decree in rem, which acts only upon the thing itself.

After sale of property under a decree in rem, whatever liens existed are transferred to the proceeds of the sale. The court then distributes the proceeds among the original libellant and the intervenors⁷⁵ according to the priorities of their claims.⁷⁶ Except for ex-

66. GILMORE & BLACK, ADMIRALTY 480 (1957).

67. HUGHES, ADMIRALTY 95 (2d ed. 1920). The lienor may, of course, have the property arrested on process issuing from the admiralty court pursuant to the commencement of a suit in rem.

68. *The China*, 74 U.S. (7 Wall.) 53 (1868).

69. See 49 Stat. 2016 (1936), as amended, 46 U.S.C. § 911 (1952); 41 Stat. 1000 (1920), as amended, 46 U.S.C. § 921 (1952); 49 Stat. 424 (1935), as amended, 46 U.S.C. § 922 (1952).

70. GILMORE & BLACK, ADMIRALTY 482 (1957).

71. ROBINSON, ADMIRALTY 363 (1939).

72. See *The Key City*, 81 U.S. (14 Wall.) 653 (1871).

73. *The Trenton*, 4 Fed. 657 (E.D. Mich. 1880).

74. GILMORE & BLACK, ADMIRALTY 482, 641 (1957).

75. On the matter of intervention, see ADMIRALTY R. 34 and 42. Also see 2 BENEDICT, ADMIRALTY §§ 346-48 (6th ed. 1940); HUGHES, ADMIRALTY 397 (2d ed. 1920).

76. Upon sale pursuant to a proceeding in rem of a vessel covered by a preferred ship mort-

penses connected with operating and maintaining a vessel when it is in legal custody,⁷⁷ and possibly federal and state tax claims,⁷⁸ maritime lien claims are superior to all other claims.⁷⁹ However, once maritime lien claims have been satisfied any surplus will be distributed to non-maritime, or common-law, lien claimants, such as common-law mortgagees.⁸⁰ Whether maritime but non-lien claimants may share at all in the surplus held by the admiralty court is a matter upon which the cases are so inconclusive that it must be regarded as an open question.⁸¹ However, non-maritime non-lien claimants, with one exception,⁸² have not been permitted to share in the surplus.⁸³

More difficult questions arise as to the priority of maritime liens among themselves. Considerations of time and space, however, permit the making of only the broadest generalizations.⁸⁴ Thus qualified, maritime lien claims rank by class in the following order of priority:⁸⁵

- (1) Liens of seamen based upon claims for wages.
- (2) Salvage liens.
- (3) Tort liens based upon collision and personal injury claims.
- (4) Contract liens for repairs, supplies, towage, wharfage, and other necessities.

gage, the vessel is sold free of all pre-existing claims, including such mortgage, but upon the request of the mortgagee, the libellant, or any intervenor, the court ". . . shall . . . require the purchaser at such sale to give and the mortgagor to accept a new mortgage of the vessel for the balance of the term of the original mortgage." The terms of the new mortgage shall be the same as those of the original, so far as is practicable. "If such new mortgage is given, the mortgagee shall not be paid from the proceeds of the sale, and the amount payable as the purchase price shall be held diminished in the amount of the new mortgage indebtedness." 49 Stat. 1987 (1936), as amended, 46 U.S.C. § 961 (1952).

77. See *New York Dock Co. v. Steamship Poznan*, 274 U.S. 117 (1927).

78. The Supreme Court has not litigated this question, and the few lower court decisions are in conflict. See GILMORE & BLACK, *ADMIRALTY* §§ 9-73 to -90 (1957).

79. See *The Guiding Star*, 18 Fed. 263 (C.C.S.D. Ohio 1883). Also see Beach, *Relative Priority of Maritime Liens*, 33 *YALE L.J.* 841 (1924).

80. *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1874); *The Trenton*, 4 Fed. 657 (E.D. Mich. 1880).

81. GILMORE & BLACK, *ADMIRALTY* 641 (1957). For an excellent analysis of the cases, see *id.* at §§ 9-87, -88.

82. In *The Duchess*, 201 Fed. 783 (E.D.N.Y. 1912), seller of vessel was allowed to collect amount due upon certain notes from surplus after sale of vessel which had been libelled in hands of buyer and sold.

83. The surplus is turned over to the owner, or to his trustee if he is bankrupt. See the two appeals in *The Lottawanna*, 87 U.S. (20 Wall.) 201 (1873), and 88 U.S. (21 Wall.) 558 (1874). Also see GILMORE & BLACK, *ADMIRALTY* 644-47 (1957).

84. On this matter of priorities, Professors Black and Gilmore state: "General statements of doctrine . . . should be on the whole lightly regarded. Nine times out of ten, what seems fair to the trial judge will be the law of the case for all time." GILMORE & BLACK, *ADMIRALTY* 594 (1957).

85. See *The William Leishear*, 21 F.2d 862 (D. Md. 1927). Also see Willard, *Priorities Among Maritime Liens*, 16 *CORNELL L.Q.* 522 (1931).

(5) Bottomry and respondentia liens.⁸⁶

It is an admiralty maxim that liens of the same class rank in inverse order to the order of their creation.⁸⁷ That is, the last is first and the first is last. In practice, this proposition has always been subject to various limitations. Historically, liens of the same class accruing on the last voyage were superior to those of a prior voyage.⁸⁸ At present, the "voyage" rule has for the most part been superseded⁸⁹ by rules based upon periods of time such as the 40-day New York harbor rule,⁹⁰ the 90-day Puget Sound area rule,⁹¹ the "season" rule applied to Great Lakes shipping,⁹² and the "year" or "calendar year" rule applied in areas where navigation continues uninterrupted throughout the year.⁹³ For example, under the Great Lakes "season" rule, suppose *A* furnished fuel oil to the vessel *City of Cleveland* in March of 1958, and *B* furnished fuel oil to the same ship in September of 1958. Coming within the same shipping season, these liens would rank equally. They would outrank, however, a fuel oil lien, or any other lien of the same class, which accrued during a prior shipping season.

The matter of priority is also affected by the Ship Mortgage Act of 1920.⁹⁴ Under the act, a so-called "preferred" mortgage has priority over subsequent liens, with the exception of liens based upon the following: damages arising out of tort, wages of a stevedore when employed by the vessel, wages of the crew, general average, or salvage.⁹⁵

86. "This [bottomry] is an obligation executed generally in a foreign port by the master of a vessel for repayment of advances to supply the necessities of the ship, together with such interest as may be agreed upon, which bond creates a lien on the ship enforceable in admiralty in case of her safe arrival at the port of destination, but becoming absolutely void . . . in case of her loss before arrival." HUGHES, ADMIRALTY 94 (2d ed. 1920). Respondentia is a hypothecation of cargo similar to the hypothecation of the vessel by bottomry. *Id.* at 97. Bottomry and respondentia bonds are almost never used today.

87. See *The St. Jago de Cuba*, 22 U.S. (9 Wheat.) 409 (1824); *The America*, 168 Fed. 424 (N.D.J. 1909).

88. See *The Proceeds of the Gratitude*, 42 Fed. 299 (D.N.Y. 1890); *The Fanny*, 8 Fed. Cas. 993 (No. 4,638) (D. Mass. 1876). See ROBINSON, ADMIRALTY § 61 (1939).

89. But see *Todd Shipyard Corp. v. The City of Athens*, 83 F. Supp. 67 (D. Md. 1949).

90. See *The Interstate No. 1*, 290 Fed. 926 (2d Cir. 1923); *The Proceeds of the Gratitude*, 42 Fed. 299 (S.D.N.Y. 1890).

91. See *The Edith*, 217 Fed. 300 (W.D. Wash. 1914).

92. See *The City of Tawas*, 3 Fed. 170 (E.D. Mich. 1880). On the Great Lakes, the shipping season, due to ice, consists of approximately eight months.

93. *Norton v. The Evan N.*, 109 F. Supp. 505 (D.R.I. 1952) ("calendar year" rule). Also see *Todd Shipyard Corp. v. The City of Athens*, 83 F. Supp. 67 (D. Md. 1949) (court said "year" rule contemplated priority on basis of calendar year, not on basis of twelve-month period preceding filing of the initiating libel). *The Fort Gaines*, 24 F.2d 438 (D. Md. 1928) ("year" rule).

94. Ship Mortgage Act, 41 Stat. 1000 (1920), as amended, 46 U.S.C. §§ 911-84 (1952). For the status of mortgages on foreign vessels, see 41 Stat. 1003 (1920), 46 U.S.C. § 951 (1952), as amended, 46 U.S.C. § 951 (Supp. V, 1958).

95. See 41 Stat. 1004 (1920), 46 U.S.C. § 953(a) (1952).

Saving Clause

As set forth earlier, Congress, through the Judiciary Act of 1789,⁹⁶ granted "exclusive" jurisdiction in all civil admiralty cases to the federal district courts, yet saved "to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."⁹⁷ This "saving clause" has been uniformly interpreted as giving to the state courts, and to the federal courts on the common-law side if federal requirements are fulfilled,⁹⁸ jurisdiction in personam over maritime causes of action concurrent with the federal admiralty courts.⁹⁹

The saving clause, however, does not contemplate the administration of admiralty remedies in common-law courts; these remedies are the exclusive prerogative of the federal courts sitting in admiralty.¹⁰⁰ The effect of the Judiciary Act, therefore, is to deny to common-law courts that remedy which subjects the property itself to the suitor's claim — the action in rem.¹⁰¹ In 1867 in *The Moses Taylor*,¹⁰² the first Supreme Court decision on this issue, it was stated that "a proceeding in rem, as used in the admiralty court is not a remedy afforded by the common-law; it is a proceeding under the civil law."

In *Knapp, Stout & Co. v. McCaffrey*,¹⁰³ the Supreme Court drew this distinction between proceedings which invade the exclusive jurisdiction of admiralty and those which do not:

If the cause of action be one cognizable in admiralty, *and* the suit be *in rem* against the thing itself, though a monition be also issued to the owner, the proceeding is essentially one in admiralty. If, upon the

96. Ch. 20, § 9, 1 Stat. 76. For the present provision see 28 U.S.C. § 1333 (1952).

97. *Ibid.*

98. The minimum amount required to be in controversy is \$10,000. See 28 U.S.C. § 1332, as amended, 28 U.S.C. § 1332 (Supp. V, 1958). Except where a federal statute provides otherwise, in the absence of diversity of citizenship, a suitor may not sue on the common-law side in federal court on the ground that a maritime claim is one that "arises under the Constitution, laws, or treaties of the United States." See *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959). See also 28 U.S.C. § 1331, as amended, 28 U.S.C. § 1331 (Supp. V, 1958): "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

99. *Rounds v. Cloverport Foundry & Machine Co.*, 237 U.S. 303 (1915); *Knapp, Stout & Co. v. McCaffrey*, 177 U.S. 638 (1900); *Leon v. Galceran*, 78 U.S. (11 Wall.) 185 (1871); *Taylor v. Carryl*, 61 U.S. (20 How.) 583 (1857).

100. To the generalization that a judgment in rem is not a common-law remedy, there is an exception. Forfeiture of the offending object by a procedure in rem, because it has been used in violation of law, was a practice familiar in the common-law courts of England, the Colonies, and the states during the period of Confederation. *C. J. Hendry Co. v. Moore*, 318 U.S. 133 (1943) (forfeiture of fish net; use of in rem proceeding upheld).

101. 1 BENEDICT, ADMIRALTY § 23 (6th ed. 1940).

102. 71 U.S. (4 Wall.) 411 (1867).

103. 177 U.S. 638 (1900).

other hand, the cause of action be not one of which a court of admiralty has jurisdiction, or if the suit be *in personam* against an individual defendant, with an auxiliary attachment against a particular thing, or against the property of the defendant in general, it is essentially a proceeding according to the course of the common law, and within the saving clause of the Statute . . . of a common law remedy.¹⁰⁴

Once it is determined that the action is in personam, it seems that "common law remedy" is to be broadly construed to include:

. . . remedies in pais, as well as proceedings in court; judicial remedies conferred by statute, as well as those existing at common law; remedies in equity, as well as those enforceable in a court of common law.¹⁰⁵

Thus, in the absence of a federal statute to the contrary, where the action is in personam, it appears that suit on a maritime right may be brought in admiralty or in a common-law court, state or federal. However, where the claim is based on a maritime case and the proceeding is in rem, only the federal admiralty court has jurisdiction.¹⁰⁶

In 1949, Congress changed the language of the saving clause¹⁰⁷ apparently in an attempt to simplify it, to make it more expressive of its intent, and to bring it in conformity with Rule 2 of the Federal Rules of Civil Procedure abolishing the distinction between law and equity.¹⁰⁸

The words "saving to suitors in all cases all other remedies to which they are otherwise entitled," were substituted for "saving to suitors, in all cases, the right of a common law remedy where the common law is competent to give it." It is believed, however, that the new language will be interpreted the same as the old.¹⁰⁹

104. *Id.* at 648.

105. *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 124 (1924) (specific enforcement by state court of agreement to arbitrate upheld). An equitable action to enforce a common-law possessory lien by a state court was involved in *Knapp, Stout & Co. v. McCaffrey*, 177 U.S. 638 (1900). Workmen's compensation, however, was held not a common-law remedy in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917).

Admiralty, on the other hand, is said to lack the powers of a court of equity in the absence of specific federal statute. It has denied itself the right to issue injunctions, grant specific performance of contracts, or, in most instances, to order the reformation of instruments. GILMORE & BLACK, *ADMIRALTY* 37-39 (1957).

106. ROBINSON, *ADMIRALTY* § 4 (1939). By federal statute, however, the suitor may be limited as to the forum for his action. See *Death on the High Seas By Wrongful Act*, 41 Stat. 537 (1920), 46 U.S.C. § 761 (1952) (suit must be brought in admiralty). Also see the *Ship Mortgage Act*, 41 Stat. 1003 (1920), 46 U.S.C. § 951 (1952), as amended, 46 U.S.C. § 951 (Supp. V, 1958) (mortgage cannot be foreclosed in a state court), and comments thereon in GILMORE & BLACK, *ADMIRALTY* 659 (1957).

107. 28 U.S.C. § 1333 (1952).

108. These are the reasons given in the Reviser's Note to 28 U.S.C.A. § 1333 (1949).

109. This view appears to have been accepted in *Madruga v. Superior Court*, 346 U.S. 556 (1954), and in *Jordine v. Walling*, 185 F.2d 662 (3d Cir. 1950). See comment in GILMORE & BLACK, *ADMIRALTY* 35 (1957). Also see Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259 (1950).

Maritime Law Applied in Land Courts

While the saving clause gives the suitor the right to choose a land court for the trial of his case, this does not mean that shore law will be applied. Rather, land courts, state or federal, must apply the same substantive rules that would have been applied had the suit been brought in admiralty.¹¹⁰

COLLISION

Collision between ships is a relatively common occurrence — far more so than most would imagine. Although the development of radar may ultimately reduce the accident toll resulting from the perils of night traffic, fog, and other adverse weather conditions, as yet the use of such electronic devices has not been so perfected nor so widely adopted as to eliminate collision cases from the dockets.

Basis of Liability — Fault

Collision liability is predicated upon “fault.”¹¹¹ As a corollary, it follows that where an accident is “inevitable,” there can be no fault and therefore no liability. “Inevitable” accidents obviously encompass, but are not limited to, those which are a result of an Act of God. A typical example arises where one vessel in a storm is driven against another. The test applied is whether the collision could have been prevented by the exercise of ordinary care, caution, and maritime skill. On the other hand, if fault was present, but the court is unable to locate it, so that it cannot be said which vessel is to blame, there is a case of what is known as “inscrutable” fault. In such instance there likewise can be no recovery.¹¹²

“Fault” connotes falling below an accepted standard. Where collision is concerned, the standard may be that of the reasonably prudent navigator, the statutory Rules of Navigation, or occasionally, the established custom or usage of navigation.¹¹³

Historically, navigation was governed by a common law of the sea. Today, however, most collision cases arise out of a violation of one of the statutory Rules of Navigation — commonly called the “Rules of the Road.” These rules are as necessary to navigators of vessels on the high seas as the rules governing the operation of motor vehicles are to drivers on shore. They prescribe, for example, the proper use of lights, how approaching ships are to maneuver in order to avoid contact, and the signals of communication to be used when

110. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918).

111. *The Java*, 81 U.S. (14 Wall.) 189 (1872).

112. *The Jumna*, 149 Fed. 171 (2d Cir. 1906); *The Worthington & Davis*, 19 Fed. 836 (E.D. Mich. 1883).

113. GRIFFIN, *THE AMERICAN LAW OF COLLISION* (1949).

navigating at night or in fog. In the United States, maritime traffic is regulated by four such sets of rules. The International Rules¹¹⁴ govern navigation on the high seas. The Great Lakes Rules,¹¹⁵ the Western Rivers Rules¹¹⁶ (applicable to the Mississippi and its tributaries), and the Inland Rules¹¹⁷ (applicable to all other navigable waters) govern navigation on inland waterways.

In Extremis

Compliance with the Rules of the Road and standards of prudent navigation are considered so essential that any deviation resulting in a collision may be construed as fault per se. In mitigation of this harsh rule there developed the doctrine of *in extremis*. Under this doctrine, if a vessel, through no fault of her own, is placed in a position where collision is imminent, an error such as a violation of a Rule of the Road or failure to meet the standards of prudent navigation is excused.¹¹⁸ The application of *in extremis*, however, is, of necessity, as vague as the analogous common-law concept of "emergency."¹¹⁹

Divided Damages Rule

If a collision occurs and neither vessel is at fault each must pay its own loss.¹²⁰ On the other hand, if only one vessel is at fault, it must bear its loss and pay the other's damage as well.¹²¹ In situations where both vessels are at fault, there developed in admiralty a doctrine peculiar by common-law standards. Whereas under the common law neither vessel could recover, in admiralty the damages are divided equally in such instances, so that each bears half of the total damage.¹²² Thus, the less damaged vessel is required to pay the difference to the vessel which is more damaged.

If, however, an action is brought in a common-law court under the saving clause and both vessels are at fault, and if the court applies the common-law doctrine of contributory negligence instead of the admiralty divided damages rule, neither vessel can recover from the other.¹²³ Common-law courts would appear free to adopt the

114. 6A BENEDICT, ADMIRALTY 827-42 (7th ed. 1958).

115. 6 BENEDICT, ADMIRALTY 430-36 (6th ed. 1941).

116. 6 BENEDICT, *op. cit. supra* note 115, at 449-54.

117. GRIFFIN, *op. cit. supra* note 113, at 645-84.

118. The *Stifinder*, 275 Fed. 271 (2d Cir. 1921).

119. Pacific-Atlantic S.S. Co. v. United States, 175 F.2d 632, 640 (4th Cir. 1949).

120. The *Clara*, 102 U.S. 200 (1880); The *Lepanto*, 21 Fed. 651 (S.D.N.Y. 1884).

121. The *Clara*, 102 U.S. 200 (1880); *Oaksmith v. Garner*, 205 F.2d 262 (9th Cir. 1953); The *Mayflower*, 94 F. Supp. 574 (D. Alaska 1951).

122. The *Catherine v. Dickinson*, 58 U.S. (17 How.) 170 (1855).

123. *Belden v. Chase*, 150 U.S. 674 (1893). Although the question of whether the divided damage rule or the doctrine of contributory negligence is to be used appears to be a matter of

divided damages rule if they wish, and at least one state¹²⁴ and a federal court of appeals¹²⁵ have done so.

Major-Minor Fault

Some jurisdictions, such as England, have adopted a division of damages based upon comparative fault. If one vessel is 80 per cent at fault and the other is only 20 per cent at fault, the former must bear 80 per cent of the loss and the latter only 20 per cent.

Under American law, there is no consideration of comparative fault. This would result in extreme inequities if it were not for the "major-minor" fault rule. Under this rule, where one vessel is grossly negligent and the other is at fault in a technical sense only, the court may close its eyes to the conduct of the latter. In application, however, the "major-minor" fault rule varies from case to case, and in many instances is ignored, even though the fault of one vessel appears out of proportion to that of another.¹²⁶

Causation — The Pennsylvania Rule

In admiralty, as at common law, there must be a causal connection between fault and the resulting injury. However, unlike the common law, admiralty does not operate on an all-or-nothing philosophy. Whereas contributory negligence will bar a common-law negligence suit, the equivalent set of facts in admiralty may well result in divided damages. In order for the divided damages rule to come into play, both vessels must be at fault. Thus, the admiralty courts give special attention to the question of causation. It is from this situation that the "Pennsylvania" rule¹²⁷ evolved.

Under the "Pennsylvania" rule, once it is shown that a vessel was guilty of statutory fault, as, for example, failure to comply with the Rules of Navigation, a presumption arises that the guilty vessel "caused" the injury. Once the presumption arises, the vessel charged with fault has the onerous burden of proving that it *could not* have been a cause of the collision. In practice, however, if the other vessel has been grossly at fault, this burden is generally surmountable.

substance rather than procedure, the *Belden* case held otherwise. There is reason to believe that the Supreme Court will overturn the *Belden v. Chase* doctrine and require the common-law courts to apply the admiralty divided damages rule. See *Pope & Talbot v. Hawn*, 346 U.S. 406 (1953). Also see GILMORE & BLACK, *ADMIRALTY* § 7-6 (1957).

124. *Intagliata v. Shipowners & Merchants Towboat Co.*, 26 Cal.2d 365, 159 P.2d 1 (1946).

125. *Cf. Hedger Transp. Corp. v. United Fruit Co.*, 198 F.2d 376 (2d Cir. 1952), *cert. denied*, 344 U.S. 896 (1952). The case did not involve collision, but the court's language is comprehensive enough to include collision cases.

126. *Tide Water Associated Oil Co. v. The Syosset*, 203 F.2d 264 (3d Cir. 1953).

127. *The Pennsylvania*, 86 U.S. (19 Wall.) 125 (1874).

SALVAGE

No segment of maritime law evokes more excitement and brings to mind more adventure and romance than the subject of salvage. "Salvage is a reward for saving property at sea."¹²⁸ The idea of salvage is an invention of admiralty. On land, one who goes to the rescue of his neighbor's property receives no remuneration for his efforts. The contrary development in maritime law is the result of a strong underlying policy aimed at aiding men and ships in distress.¹²⁹ When one realizes the expense involved in a ship's deviating from course and the dangers frequently encountered in rescue operations, this bounty given by law is better understood.

Historically, life saving was regarded as a moral duty, and no award was granted life salvors.¹³⁰ Since 1912, however, life salvors "who have taken part in the services rendered on the occasion of the accident giving rise to salvage" are, by statute, "entitled to a fair share of the remuneration awarded to the salvors of the vessel, her cargo, and accessories."¹³¹ There is, however, no award for saving lives absent property salvage.

Essentially there are three elements to a valid salvage claim. *First*, the ship or property must have been so imperiled that without the salvor's aid it could not have been rescued. *Second*, a voluntary act on the part of the salvors is essential. There must be no pre-existing duty to render assistance, as there might be, for example, under a contract, or as there is between a vessel and its own crew. *Third*, the salvor must successfully save, or assist in the saving of, the property at risk.¹³²

It is also interesting to note that salvage is the factor which often compels captains to remain on board their imperiled vessels, for once a ship is abandoned anyone may salvage her, and, if not under a pre-existing duty, such salvor will thus be entitled to a bounty. Remaining steadfast, the captain may be able to overcome the peril or negotiate a reasonable salvage contract.¹³³ He may also be awaiting assistance from his own company, which assistance he knows to be on the way.

The traditional view, adopted early by the Supreme Court, was that property, to be the subject of salvage, had to be found on water and had to be maritime in nature. The phrase, "maritime in nature," was limited to the ship, her equipment, and her cargo. However,

128. ROBINSON, ADMIRALTY 709 (1939).

129. See *The Blackwall*, 77 U.S. (10 Wall.) 1, 14 (1870); *Kimes v. United States*, 207 F.2d 60, 63 (2d Cir. 1953).

130. GILMORE & BLACK, ADMIRALTY § 8-1 (1957).

131. 37 Stat. 242 (1912), 46 U.S.C. § 729 (1952).

132. GILMORE & BLACK, ADMIRALTY § 8-2 (1957).

133. *Cope v. Valette Dry-Dock Co.*, 119 U.S. 625 (1887).

modern American courts have deviated from the foregoing position and have held that any objects rescued from navigable waters may be the subject of a salvage claim.¹³⁴

As previously stated, the doctrine of salvage was founded upon a public policy of rewarding the saving of lives and property. Therefore, it is more than mere compensation for services. The factors which were weighed as early as 1869 in *The Blackwall*¹³⁵ are still those used in determining the amount of a salvage award. They include such considerations as labor expended by salvors, value of the property employed by the salvors, value of the property saved, and, in addition, such intangibles as skill and energy displayed, risk incurred, and the degree of danger from which the property was rescued. Where such nebulous items are considered, judicial discretion cannot help but play a dominating role.¹³⁶

Today, salvage awards are generally shared by the owner of the salvaging vessel and its crew. Under an old rule, the crew received the entire award. The new rule, however, is based upon the recognition that a salvage operation may place in jeopardy a valuable piece of property, *i.e.*, the owner's ship, and may result in additional expense to the owner because of the detour from course. Today, the tendency is toward granting the shipowner the bulk of the award.

GENERAL AVERAGE

A ship caught in a storm may be in danger of sinking. If by jettisoning a part of the cargo or by destroying a part of the vessel, the ship and remaining cargo are saved, it would be unfair to make the owners of the sacrificed property bear the entire loss with no right of contribution from the owners of the property saved. Consequently, from the earliest of times, admiralty has required that ". . . the loss occasioned for the benefit of all must be made good by the contribution of all."¹³⁷ This is the basis of the doctrine of general average.

In 1850, the United States Supreme Court in *Barnard v. Adams*¹³⁸ stated that three things must concur in order to constitute a case for general average:

134. *Colby v. Todd Packing Co.*, 77 F. Supp. 956 (D. Alaska 1948). In *Broere v. \$2,133*, 72 F. Supp. 115 (E.D.N.Y. 1948), salvage was awarded to a boatman who fished a dead body from the waters of N. Y. Harbor, the body containing a wallet. The contents of the wallet, as can be seen from the title of the case, were made the subject of a libel in rem. See dictum in *Lambros Seaplane Base v. The Batory*, 215 F.2d 228 (2d Cir. 1954), to the effect that a seaplane when on the sea is subject to salvage.

135. 77 U.S. (10 Wall.) 1, 14 (1869).

136. Except where the property saved is of small value, an "award of anywhere near 50% would be exceptional. Where large values are involved no recent case awards more than about 20%." GILMORE & BLACK, ADMIRALTY 465 (1957).

137. This quotation from the Digest of Justinian is set forth in GILMORE & BLACK, ADMIRALTY 220 (1957).

138. 51 U.S. (10 How.) 270 (1850).

1. A common danger; a danger in which ship, cargo and crew all participate; a danger imminent and apparently "inevitable," except by voluntarily incurring the loss of a portion of the whole to save the remainder.

2. There must be a voluntary jettison, *jactus*, or casting away of some portion of the joint concern for the purpose of avoiding the imminent peril, *periculi imminenti evitandi causa*, or, in other words, a transfer of the peril from the whole to a particular portion of the whole.

3. The attempt to avoid the imminent common peril must be successful.¹³⁹

In addition to losses which arise from physical sacrifices of the ship or cargo, losses arising out of extraordinary expenses incurred for the benefit of the ship and cargo are compensable by general average contribution.¹⁴⁰ These are known as "general average expenditures," and include such expenses as wages and provisions for the crew while the vessel is in a port of refuge,¹⁴¹ salvage payments,¹⁴² and payments for repairs made in a port of refuge to the extent that the repairs are reasonably necessary to enable the ship to continue the voyage.¹⁴³

As to the theory of general average, it must be noted that while the property sacrificed is entitled to contribution from the property saved, it is not entitled to be made whole, but must bear its proportionate share of the loss.¹⁴⁴ Further, all interests benefited by the voluntary sacrifice of a part of the property must contribute. With respect to the latter proposition, the interests which may be benefited by a sacrifice are the ship, the cargo, and the freight pending at the time of the sacrifice ("freight" means what the ship earns for carrying the cargo).

Unless the contract of carriage provides otherwise, a shipowner can collect freight only upon delivery of the cargo to its agreed destination.¹⁴⁵ Consequently, a sacrifice of part of the cargo benefits the earning capacity of the ship, as well as the remaining cargo and the ship itself.¹⁴⁶

The calculation or "adjustment" of general average claims is highly complicated and is performed by specialists known as "ad-

139. *Id.* at 303. In the absence of an agreement to the contrary, one who is at fault cannot recover a general average contribution. See, GILMORE & BLACK, ADMIRALTY 243-46 (1957).

140. See GILMORE & BLACK, ADMIRALTY §§ 5-2, -11 (1957).

141. *The Star of Hope v. Annan*, 76 U.S. (9 Wall.) 203 (1870).

142. *Magdala S.S. Co. v. H. Baars Co.*, 101 Fed. 303 (2d Cir. 1900).

143. *The Queen*, 28 Fed. 755 (S.D.N.Y. 1886).

144. GILMORE & BLACK, ADMIRALTY § 5-1 (1957).

145. See *The Tornado*, 108 U.S. 342 (1883).

146. Contracts of carriage frequently provide that the freight is to be paid in advance, and is not to be recovered by the shipper in any event; or that freight is payable even if the vessel or goods were lost or the voyage broken up. In such instances, it is the cargo owner who must contribute when a sacrifice saves the goods upon which such freight is paid or payable. See 2 ARNOULD, MARINE INSURANCE 906 (13th ed. 1950).

justers." The example which follows illustrates in the most elemental manner the calculations involved.

Assume a maritime venture involving a ship worth \$500,000; a cargo, all of which is owned by A, worth \$300,000; and pending freight of the value of \$200,000. The total venture is \$1,000,000. If it is assumed that in a situation of peril, goods of A to the extent of \$80,000 were jettisoned, and that the freight on these goods would have been \$20,000, had they reached their destination, there is a total sacrifice of \$100,000. In figuring the value of the contributory interests, the shipowner's interest is \$700,000 (value of ship plus freight), and the cargo owners' interest is \$300,000. Thus, the total of the contributory values is \$1,000,000, and the total amount of loss is \$100,000, or ten percent of the total venture. The \$100,000 loss is adjusted so as to be borne equally by all parties in proportion to their interests at risk. Ten percent of the cargo interest at risk is \$30,000. Ten percent of the shipowner's interest at risk equals \$70,000. Since the shipowner, by the jettison, has suffered only a \$20,000 loss of freight — a sum less than his proper share of the loss — he recovers nothing from the cargo owner. However, the cargo has sustained a loss of \$80,000, which is \$50,000 more than its proper share. Consequently, the shipowner must pay \$50,000 to the cargo owner. This payment, when added to his \$20,000 loss of freight, makes the shipowner's total contribution \$70,000, or ten percent of the value of his interest in ship and freight. Similarly, after receipt of the \$50,000 payment, the cargo owner has contributed \$30,000, and properly so, for this sum is his own contribution, *i.e.*, ten percent of his \$300,000 interest.¹⁴⁷

The exact losses included in the general average, their calculation, and the interests which shall bear them vary from country to country. Further, the law of general average in great commercial nations, such as the United States and England, can only be ascertained after the consideration of a multitude of court decisions.¹⁴⁸

In an attempt to obviate these difficulties, representatives of the shipping industry from all parts of the world met in Liverpool in 1890, and promulgated a set of general average rules known as the York-Antwerp Rules. Revisions of these rules were made in 1924, and again in 1950. While these rules have never been enacted into law, parties are free to incorporate them into marine insurance policies, or other maritime contracts, and today, almost without exception, they are incorporated by reference into bills of lading.

Since the York-Antwerp Rules do not cover every situation which may arise in general average, it is also commonly stated in maritime contracts that as to matters not provided for by the rules, the laws and usages of the place where the adjustment is to be drawn up shall govern, and that the adjustment shall be drawn up either at a speci-

147. For other examples of adjustments, see GILMORE & BLACK, ADMIRALTY 222-23 (1957); ROBINSON, ADMIRALTY 788 (1939); ARNOULD, MARINE INSURANCE 911 (13th ed. 1950).

148. LOWNDES & RUDOLPH, GENERAL AVERAGE AND THE YORK-ANTWERP RULES 343 (8th ed. 1955).

fied port or place, or at any place selected by the shipowner or carrier.

LIMITATION OF LIABILITY

Nations have generally found it in their best interests to promote strong merchant marines. Within this perspective it was not difficult for shipowners throughout the world to convince their governments of the advantages in protecting them from liabilities which result from marine disasters. In 1851, American shipowners demanded and obtained the Limitation of Liability Act,¹⁴⁹ which was patterned primarily after that of the English with whom they had to compete. Briefly, this act limited the liability of the shipowner to the value of the ship after the disaster.

In 1935, with respect to claims based on bodily injury and loss of life, Congress extended the liability of owners of seagoing vessels.¹⁵⁰ As amended, the shipowner in certain instances is obliged to contribute up to an amount equal to \$60.00 per ton of the vessel's gross tonnage.¹⁵¹ In order to bring this amendment into play, however, the following circumstances must exist: (1) the total claims must exceed the owner's normal limit of liability — the value of his vessel, and (2) after the property claims have been paid pro rata, the amount applicable to the payment of losses based on bodily injury and loss of life must be less than an amount equal to \$60.00 per ton of the vessel's tonnage. If these requisites are met, the owner must make up the difference.¹⁵²

The protection afforded under the limitation statute is available to the owner only if he lacks "privity and knowledge"¹⁵³ of the fault or wrongful act causing the injury or death. If the shipowner fails to exercise proper care in the selection of a competent master and crew, or fails to provide a seaworthy vessel, "privity and knowledge" may be present and the limitation will not obtain. "Privity and

149. 9 Stat. 635 (1851).

150. REV. STAT. §§ 4283, 4285 (1875), as amended, 46 U.S.C. §§ 183, 185 (1952).

151. Gross tonnage does not include space occupied and used by the crew. REV. STAT. § 4283 (1875), 46 U.S.C. § 183 (c) (1952).

152. Thus, if a 1,000 ton ship were valued at \$100,000, and the claims against her were \$300,000 for property damage and \$100,000 for bodily injury and loss of life, then \$75,000 (the proportion of the property damage claims to the total claims times the gross tonnage of the vessel) would be available to pay the property damage claimants on a pro rata basis, and only \$25,000 would be available to satisfy the bodily injury and death claimants. Inasmuch as the latter fund is less than \$60,000 (\$60 times 1,000 gross tons), the shipowner would be obliged to contribute \$35,000. The bodily injury and death claimants would then share the \$60,000 on a pro rata basis. If, however, the property damage claims were \$100,000 and the bodily injury and death claims were \$300,000, then \$75,000 would be available to pay the latter claims. Since this fund is in excess of \$60,000, the shipowner would be relieved of any further obligation of payment.

153. REV. STAT. § 4283 (1875), as amended, 46 U.S.C. § 183 (1952). The standard in case of fire is absence of "design or neglect" of the owner. REV. STAT. § 4282 (1875), 46 U.S.C. § 182 (1952).

knowledge," however, are vague concepts, and their meaning in each instance "turns on the facts of particular cases."¹⁵⁴

Invoking the protection of the Limitation Act raises considerable confusion because of the conflict between the act and the "saving clause." In addition to setting up the Limitation Act by way of answer, the shipowner may invoke the act on his own motion. He will then have to pay into court an amount equivalent to the value of the ship plus pending freight, post bond, or turn his vessel over to a trustee. If the aggregate of claims against him clearly exceeds the limitation of his liability the district court will assume jurisdiction and will enjoin further prosecution of claims in other courts, state or federal.

If, however, there is but a single claim, or if the aggregate of all claims will not exceed the value of the ship, the district court will give recognition to the saving clause and will refuse to enjoin the prosecution of the claims in state courts.¹⁵⁵

SEAMEN'S RIGHTS

In 1823, Mr. Justice Story wrote that:

Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour. They are generally poor and friendless and acquire habits of gross indulgence, carelessness, and improvidence. . . .

. . . Every court should watch with jealousy an encroachment upon the rights of seamen. But courts of maritime law have been in the constant habit of extending towards them a peculiar, protecting favor and guardianship. They are emphatically the wards of admiralty. . . .¹⁵⁶

That modern American seamen are poor, friendless, and improvident is questionable. But the safeguards which have been built around them indicate that they are still wards of the courts and of Congress, for no other class of workers is treated more solicitously.¹⁵⁷

Federal statutes regulate the form and content of shipping articles¹⁵⁸ (the contract of employment between the master and the seaman), and provide for supervision by a Coast Guard official where the signing on for a voyage to a foreign port takes place in the United States,¹⁵⁹ and by a consular officer where it occurs in a foreign

154. *Coryell v. Phipps*, 317 U.S. 406, 411 (1943) (The Seminole).

155. A state court, however, does not have jurisdiction to determine the question of limitation of liability. Such determination is exclusively within the domain of the federal admiralty court. See GILMORE & BLACK, *ADMIRALTY* § 10-19 (1957). For an extensive discussion of the various sections of this statute, as well as caustic criticism, see GILMORE & BLACK, *ADMIRALTY* 663 (1957).

156. *Harden v. Gordon*, 11 Fed. Cas. 480, 483-85 (No. 6047) (C.C. Me. 1823).

157. See Ray, *Wards of the Admiralty*, ANNUAL REPORT, GREAT LAKES PROTECTIVE ASSOCIATION 58 (1952).

158. 29 Stat. 689, 691 (1897), as amended, 46 U.S.C. §§ 563-64; 38 Stat. 1168 (1915), as amended, 46 U.S.C. § 713 (1952).

159. REV. STAT. § 4512 (1875), as amended, 46 U.S.C. § 565 (1952).

port.¹⁶⁰ Discharge of seamen is also meticulously regulated.¹⁶¹ For example, seamen discharged in the United States from merchant vessels engaged in voyages from an American port to any foreign port must be given their wages in the presence of a Coast Guard official, who is required to give the seaman a certificate of discharge.¹⁶² Attachment or garnishment of a seaman's wages is prohibited, except that he may be ordered by a court to pay a part of his wages for the support of his wife or minor children. If he assigns his wages, the assignment is not binding.¹⁶³

Food and water schedules are set forth (meat every day);¹⁶⁴ medicines and antiscorbutics must be provided;¹⁶⁵ clothing and heat are regulated;¹⁶⁶ size (in both square and cubic feet) and condition of living quarters are prescribed;¹⁶⁷ and, except in cases of extraordinary emergency, seamen are prohibited from working more than eight hours in one day.¹⁶⁸

Maintenance and Cure

It is only since the enactment of workmen's compensation acts¹⁶⁹ that the shore worker has had any form of job insurance. Seamen, however, with their right to maintenance and cure, have enjoyed such insurance from medieval times.

Maintenance and cure is an obligation imposed by the general maritime law upon the shipowner and the vessel — independent of fault — and arises out of the employment relationship.¹⁷⁰ The lia-

160. 34 Stat. 100 (1906), as amended, 46 U.S.C. § 570 (1952).

161. REV. STAT. §§ 4549-53 (1875), as amended, 46 U.S.C. §§ 641-45 (1952); 25 Stat. 80 (1886), as amended, 46 U.S.C. § 646 (1952).

162. REV. STAT. §§ 4549, 4551, 4612 (1875), as amended, 46 U.S.C. §§ 641, 643, 713 (1952). This serves as evidence of the seaman's service. If the seaman carries a book known as a continuous discharge book, his record of service is entered in this book and he is not given a certificate of service. REV. STAT. § 4551 (1875), as amended, 46 U.S.C. § 643 (1952).

163. 38 Stat. 1169 (1915), 46 U.S.C. § 601 (1952).

164. 38 Stat. 1168 (1915), 46 U.S.C. § 713 (1952). Any three or more of the crew may complain as to the quantity or quality of the food and water, or for the failure to keep medicines and antiscorbutics. REV. STAT. §§ 4565-70, (1875), as amended, 46 U.S.C. §§ 662-67 (1952).

165. REV. STAT. §§ 4569-70 (1875), 46 U.S.C. §§ 666-67 (1952).

166. REV. STAT. § 4572 (1875), as amended, 46 U.S.C. § 669 (1952); 23 Stat. 56 (1884), 46 U.S.C. § 670 (1952).

167. 49 Stat. 1380 (1936), as amended, 46 U.S.C. §§ 660-1 (1952).

168. 52 Stat. 944 (1938), 46 U.S.C. § 673 (1952). *Mutiny on the Bounty* type discipline is not permitted. Flogging and the infliction of any corporal or cruel and unusual punishment is prohibited. If, however, a seaman disobeys any lawful order given at sea, he may be placed in irons. See 18 U.S.C. § 2191 (1946); 53 Stat. 1147 (1939), 46 U.S.C. § 701 (1952); 38 Stat. 1167 (1915), as amended, 46 U.S.C. § 712 (1952).

169. New York passed the first act in 1910.

170. *Farrell v. United States*, 336 U.S. 511 (1949). That the seaman cannot contract away this right, see *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367 (1932); *Harden v. Gordon*, 11 Fed. Cas. 480 (No. 6047) (C.C. Me. 1823).

bility begins when the seaman signs his articles and lasts until he is discharged.¹⁷¹ Under the doctrine, the seaman who falls ill or is injured without gross or willful misconduct on his part is entitled to wages to the end of the period for which he was hired, food and lodging (maintenance), and proper care, including nursing and medical treatment (cure), until the point of maximum cure is attained.¹⁷² The obligation is owed only to seamen. However, for the purposes of maintenance and cure, the term "seamen" includes all members of the ship's crew, or company, whatever their duties: the master, the deck hands, the bartender, and the musicians.¹⁷³

The illness or injury, however, does not have to "arise out of and in the course of"¹⁷⁴ the seaman's employment or otherwise be related causally to his duties aboard the vessel; for with the exception of injury and illness

. . . caused by the seaman's gross and willful misconduct or existing at the time the seaman signed on and knowingly concealed by him, the shipowner is liable for any injury which occurs or any illness which manifests itself while the seaman is under articles.¹⁷⁵

In *Farrell v. United States*,¹⁷⁶ a seaman was injured while returning to his ship from shore leave. He had overstayed his leave two hours, and, at about eight o'clock, in rain and darkness, started back to his ship. He became lost in the waterfront area and fell over a guard chain into a dry-dock which was lighted sufficiently for night work then in progress. In *Warren v. United States*,¹⁷⁷ a seaman went ashore on leave in Naples. He and two other crew members did some sightseeing. The three of them drank one bottle of wine and then went to a dance hall. A room adjoining the dance hall overlooked the ocean. French doors opened onto an unprotected ledge which extended from the building a few feet. Warren stepped to within six inches of the ledge and leaned over to take a look. As he did so, he took hold of an iron rod which appeared to be attached

171. See *Calmar Steamship Corp. v. Taylor*, 303 U.S. 525 (1938); *Cortes v. Baltimore Insular Line*, 287 U.S. 367 (1932); *The Progress*, 21 F. Supp. 572 (D. Wash. 1937). Since the obligation is imposed upon both the employer and the vessel, the seaman may proceed in rem against the ship or in personam against the employer. *The Osceola*, 189 U.S. 158 (1903).

172. See 2 NORRIS, *THE LAW OF SEAMEN* §§ 535-605 (1952). There is no time limit on the duration of the shipowner's liability so long as there is a chance for improvement in the seaman's condition. Once maximum cure is reached, maintenance and cure ends. However, if by reason of subsequent medical advances the seaman's condition can be improved, the right to maintenance and cure will be revived. GILMORE & BLACK, *ADMIRALTY* 265 (1957).

173. See GILMORE & BLACK, *ADMIRALTY* 255 (1957); 2 NORRIS, *THE LAW OF SEAMEN* § 549 (1952). Harbor workers, who for some other purposes are regarded as "seamen," are not entitled to maintenance and cure. GILMORE & BLACK, *op. cit. supra* at 255.

174. Most workmen's compensation acts require that to be compensable, the injury must arise out of and in the course of employment. See PROSSER, *TORTS* 528 (1st ed. 1941).

175. GILMORE & BLACK, *ADMIRALTY* 254 (1957).

176. 336 U.S. 511 (1949).

177. 340 U.S. 523 (1951).

to the building. The rod came off, Warren lost his balance and fell, breaking a leg. Both Farrell and Warren were held entitled to maintenance and cure.

That the seaman by his own fault may forfeit his right to maintenance and cure has never been questioned. However, to work a forfeiture, his conduct must have an element of willfulness about it. Illness or injury resulting from venereal disease or intoxication are the traditional examples of willful misconduct, "though on occasion the latter has been qualified in recognition of a classic predisposition of sailors ashore."¹⁷⁸ Concepts such as contributory negligence,¹⁷⁹ the fellow servant doctrine, and assumption of risk, however, have no relevance insofar as maintenance and cure is concerned.¹⁸⁰

The shipowner may discharge his liability to provide maintenance and cure by tendering the seaman a certificate of admission into a United States Marine Hospital and by providing, or offering to provide, him with transportation thereto. If the seaman refuses to enter the Marine Hospital and enters another hospital, or consults private physicians, he cannot, by the weight of authority, recover such expense from the shipowner.¹⁸¹

If the shipowner fails to provide adequate maintenance and cure, the seaman may sue in personam or in rem in admiralty,¹⁸² or in a land court under the "saving to suitors" clause.¹⁸³ He may recover whatever reasonable expenses he has actually sustained, plus "such amounts as may be needful in the immediate future for the maintenance and cure of a kind and for a period which can be definitely ascertained."¹⁸⁴

178. *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 731 (1943); GILMORE & BLACK, ADMIRALTY 260 (1957).

179. Negligence, whether ordinary or gross, does not defeat the seaman's claim. The standard of conduct prescribed as a forfeiture is not one of due care, but of willful misbehavior. In the eyes of the law, willful misbehavior need not be conduct intended to produce the identical result which caused the injury, but may be conduct which is intentionally heedless and reckless of ordinary consequences. Driving a car at a speed of 90 miles an hour down Times Square in New York City on New Year's eve, without the intention of hitting anyone, is willful misconduct. Some of the admiralty cases refer to such conduct as gross negligence, but it is apparent that they really mean willful misbehavior. 2 NORRIS, THE LAW OF SEAMEN 229 (1952).

180. See *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 731 (1943). In both the *Farrell* and *Warren* cases the seamen were found to have been negligent. Indeed, anyone who falls into a lighted dry dock, as the plaintiff did in the *Farrell* case, would appear to be grossly negligent.

181. *Benton v. United Towing Co.*, 120 F. Supp. 638 (N.D. Cal. 1954); *The Bouker No. 2*, 241 Fed. 831 (2d Cir. 1917). Also see GILMORE & BLACK, ADMIRALTY 266 (1957). "When the man is put on out-patient status the duty to maintain continues ordinarily until the man is certified by the U. S. Public Health Service as fit for duty." ROBINSON, ADMIRALTY 295, n. 71 (1939).

182. *The Osceola*, 189 U.S. 158 (1903). If the suit is against the United States, it can only be brought in personam. 41 Stat. 525 (1920), 46 U.S.C. § 741 (1952).

183. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942).

184. *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525 (1938). GILMORE & BLACK, ADMIRALTY 266 (1957). In 1939, the Shipowner's Liability Convention, which contains a detailed treatment of the liability for maintenance and cure, became effective in the United States by presidential proclamation. However, *Warren v. United States*, 340 U.S. 523 (1951), scuttled the

In addition, the failure of the master or the shipowner to provide proper maintenance and cure may entitle the seaman to damages for personal injury.¹⁸⁵ Thus, if the failure causes or aggravates an illness, the seaman has a right of action for the injury sustained by him. The recovery in such instances includes not only increased expenses, but also compensation for pain and suffering and for loss of future earnings.¹⁸⁶

Unseaworthiness

Historically, maintenance and cure marked the limit of the ship and shipowner's liability to an injured seaman. By the early 1900's, however, it was recognized under the general maritime law that the ship and her owner were liable for injuries sustained by seamen in consequence of the unseaworthiness of the vessel, or of a failure to supply and keep in order the proper appliances appurtenant to the ship.¹⁸⁷ In addition to the ship's structure and appliances, the fitness of the crew has been made a condition of the seaworthiness of the vessel.¹⁸⁸ A duty is imposed upon the shipowner to man the vessel with seamen "equal in disposition and seamanship to the ordinary men in the calling."¹⁸⁹ Therefore, when one crew member assaults another, if the assault was within the usual and customary standards of the calling — a normal sailor's brawl — the shipowner is not liable. On the other hand, if ". . . it is a case of a seaman with a wicked disposition, a propensity to evil conduct, a savage and vicious

convention and it has not been mentioned since. For a detailed explanation, see GILMORE & BLACK, ADMIRALTY § 6-19 (1957).

185. Recovery may be had either in an action for maintenance and cure or in an action for negligence under the Seaman's Act of 1920 (Jones Act), 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1952). *Cortes v. Baltimore Insular Line*, 287 U.S. 367 (1932) (death resulting from neglect of illness held within Jones Act). That recovery may be had against the master if he fails to fulfill his obligations to the seaman, see *Tomlinson v. Hewitt*, 24 Fed. Cas. 29 (No. 14087) (D. Cal. 1872). Also see 2 NORRIS, THE LAW OF SEAMEN §§ 579-85 (1952).

186. *Cortes v. Baltimore Insular Line*, 287 U.S. 367 (1932); *Sims v. United States of America War Shipping Admin.*, 186 F.2d 972 (3d Cir. 1951), *cert. denied*, 342 U.S. 816 (1951) (Fact shipowner in good faith refuses maintenance and cure to seaman because of belief that seaman's claim is fraudulent does not relieve shipowner).

187. See *The Osceola*, 189 U.S. 158 (1903) (dictum); also see *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255 (1922) (gasoline put in can marked coal oil which was customarily used to pour over wood in cook stove to start fire. In so using it, Sandanger's clothes caught fire; his injuries were aggravated during time spent searching for non-existent life preserver before he jumped into water and extinguished flames); *Krey v. United States*, 123 F.2d 1008 (2d Cir. 1941) (no handles on shower stall sides. Seaman slipped and fell); *Henry Gillen's Sons Lighterage, Inc. v. Fernald*, 294 Fed. 520 (2d Cir. 1923) (seaman's foot caught in a hole in deck sheathing; struck by a load of copper before he could get free).

188. See *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336 (1955) (shipowner liable when seaman assaulted with a bottle by a crew member found to be a person of violent character, disposed to fighting, etc.); *Jones v. Lykes Bros. S.S. Inc.*, 204 F.2d 815 (2d Cir. 1953) (shipowner liable to seaman struck with meat cleaver by cook); *Keen v. Overseas Tankship Corp.*, 194 F.2d 515 (2d Cir. 1952), *cert. denied*, 343 U.S. 966 (1952) (assault with fists; no evidence assailant had a reputation for brutality, fighting, etc.; shipowner not liable).

189. *Keen v. Overseas Tankship Corp.*, 194 F.2d 515, 518 (2d Cir. 1952), *cert. denied*, 343 U.S. 966 (1952).

nature . . . ,"¹⁹⁰ then the ship is unseaworthy, whether or not the owner or officers knew, or ought to have known of the vicious character of the assailant.¹⁹¹

Thus, it is obvious that the doctrine of unseaworthiness has developed into a species of absolute liability — a liability without fault.¹⁹² No amount of care or diligence on the part of the shipowner relieves him of his obligation to provide a seaworthy ship, appliances, and crew. Lack of notice or knowledge of such defects on the part of the owner, the master, or ship's officers is not a defense. Also, the common-law rules under which either assumption of risk or contributory negligence wholly bar an injured person from recovering have never been recognized in unseaworthiness actions. Exercising its traditional discretion, admiralty developed its own more flexible rule, which allows the damages to be mitigated, or diminished, in proportion to the amount of negligence attributable to the injured seaman.¹⁹³

Prior to the case of *Mahnich v. Southern S.S. Co.*,¹⁹⁴ decided in 1944, many actions for unseaworthiness failed because the proximate cause of the injury was found to have been negligence on the part of the master or some other crew member, rather than a defect in the equipment or appliance furnished the injured seaman. Since *Mahnich*, however, negligence of the ship's personnel does not bar the action of unseaworthiness, provided the plaintiff can "find some handhold of unseaworthiness to cling to."¹⁹⁵ Mahnich was injured by a fall from a staging, which gave way when a piece of defective rope supporting it parted. The rope was supplied by the mate when there was ample sound rope available for use in rigging the staging. "If the owner is liable for furnishing an unseaworthy appliance even when he is not negligent," wrote Mr. Chief Justice Stone for the majority of the court, "*a fortiori* his obligation is unaffected by the fact that the negligence of the officers of the vessel contributed to its unseaworthiness."¹⁹⁶

190. *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336, 340 (1955). "A vessel bursting at the seams might well be a safer place than one with a homicidal maniac as a member." *Ibid.*

191. *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336 (1955); *Keen v. Overseas Tankship Corp.*, 194 F.2d 515 (2d Cir. 1952), *cert. denied*, 343 U.S. 966 (1952).

192. *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336 (1955); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). Also see statement to this effect in *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944). Just how far this "absolute liability" doctrine extends is not clear. For example, several lower courts have questioned its applicability to conditions arising *after* the vessel has begun her voyage. See *Dixon v. United States*, 219 F.2d 10 (2d Cir. 1955); *Casbon v. Stockard Steamship Corp.*, 173 F. Supp. 845 (E.D. La. 1959). For a detailed discussion of the problem, see GILMORE & BLACK, *ADMIRALTY* §§ 6-42 to -44 (1957).

193. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953); *The Seelandbee*, 102 F.2d 577 (6th Cir. 1939). Also see statement to this effect in *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424 (1939); *The Arizona v. Anelich*, 298 U.S. 110 (1936).

194. 321 U.S. 96 (1944).

195. GILMORE & BLACK, *ADMIRALTY* 320 (1957).

196. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 100 (1944).

Thus, as a result of the evolution of unseaworthiness, the only case which is today clearly outside its scope “. . . is the almost theoretical construct of an injury whose only cause is an order improv-idently given by a concededly competent officer on a ship admitted to be in all respects seaworthy.”¹⁹⁷

Negligence and the Jones Act

Earlier, it was indicated that by 1920 seamen were entitled to both maintenance and cure and to indemnity for injury resulting from unseaworthiness. Although maintenance and cure provided care for the seaman during the period of his injury or illness, it did not compensate him for the wrong done. Further, “unseaworthiness” at this time was essentially confined to defects in the structure of the vessel and its equipment. It did not include negligence on the part of the seaman’s officers or fellow crew members.¹⁹⁸ To remedy this situation, Congress, in 1920, passed the Jones Act.¹⁹⁹

The Jones Act incorporates by reference the Federal Employers’ Liability Act of 1908,²⁰⁰ which applies in cases of personal injury to railway workers. In substance, these acts have been interpreted as giving a seaman injured during the course of his employment a right of action against the shipowner if: (a) he is injured by the negligence of the shipowner, master, or fellow crew members,²⁰¹ or (b) his

197. GILMORE & BLACK, ADMIRALTY 320 (1957). See *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 418 (1953), for the remark by Justice Frankfurter in his concurring opinion that “. . . it will be rare that the circumstances of an injury will constitute negligence but not unseaworthiness.”

198. See note 196 *supra* and accompanying text.

199. In 1915, Congress had passed an act abolishing the fellow-servant rule as to seamen. Act of March 4, 1915, ch. 153 § 20, 38 Stat. 1164. In *Chelentis v. Luckenbach S.S. Co.*, 243 Fed. 536 (2d Cir. 1917), *aff’d.*, 247 U.S. 372 (1918), in denying recovery to an injured seaman, it was held that under the general maritime law — independent of the fellow-servant rule — there was no recovery for negligence of master or crew, and that § 20 of the 1915 Act was, therefore, irrelevant. Congress then passed the Jones Act, amending § 20 of the Act of 1915. The Jones Act provides: “Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law . . .” 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1952).

200. 35 Stat. 65-66 (1908), 36 Stat. 291 (1910), 53 Stat. 1404 (1939), 45 U.S.C. §§ 51-60 (1952). Section 51 of the FELA provides that an employee of an interstate railway carrier may recover damages from the carrier for “. . . injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery . . . or other equipment.”

201. *Panama R.R. Co. v. Johnson*, 264 U.S. 375 (1924); *Corella v. McCormick Shipping Corp.*, 101 So. 2d 903 (Fla. App. 1958). For the liberal meaning given “negligence,” see *Alpha Steamship Corp. v. Cain*, 281 U.S. 642 (1930), wherein it was held that an assault on a seaman by superior officer committed in course of the discharge of his duties and in furtherance of work of the employer’s business is negligence within meaning of the Jones Act. Also see *Jamison v. Encarnacion*, 281 U.S. 635 (1930).

injury is the result of the violation of a statutory duty, even though the injury is not of the type the statute sought to guard against.²⁰²

Except for the almost theoretical case of unseaworthiness for which the shipowner is in no way chargeable with fault, "negligence" under the Jones Act logically would appear to cover all forms of unseaworthiness.²⁰³ In any event, it has been held to include conduct such as the negligent failure of the shipowner to supply and maintain a seaworthy ship and appliances,²⁰⁴ and the continued employment by the ship's officers of a man who was or should have been known by them to have a vicious character.²⁰⁵

Under the Federal Employers' Liability Act, and therefore under the Jones Act, the fact that an injured employee has been guilty of contributory negligence does "... not bar a recovery, but the damages . . . [are] diminished by the jury in proportion to the amount of negligence attributable to such employee . . ."²⁰⁶ And by judicial decision, assumption of risk as a defense to a Jones Act suit has also been abolished. In *Socony-Vacuum Oil Co. v. Smith*,²⁰⁷ Mr. Justice Stone, for the majority, said: "Any rule of assumption of risk in admiralty, whatever its scope, must be applied in conjunction with the established admiralty doctrine of comparative negligence and in harmony with it."²⁰⁸ It would be "inconsistent and an impractical refinement" to apply assumption of risk "in a system of law which maintains the comparative negligence rule to the fullest extent."²⁰⁹

The act applies only to injuries suffered by "seamen." As the term is interpreted at present, it means "a man who goes to sea, a member of a ship's company (including the master), a person employed upon a floating structure which is a vessel."²¹⁰ Further, it

202. *Kernam v. American Dredging Co.*, 355 U.S. 426 (1958), *reversing sub nom. In re American Dredging Co.*, 235 F.2d 618 (3d Cir. 1956), *affirming* 141 F. Supp. 582 (E.D. Pa. 1956). Seaman lost his life when open-flame kerosene lamp, which was on deck of tug and which was not more than three feet above water, when navigation rule required it to be eight feet above water, ignited vapors above accumulation of petroleum products on river surface. Held: recovery granted even though rule violated was not passed for protection of seamen and even though tug owner was not otherwise at fault.

203. GILMORE & BLACK, ADMIRALTY 313 (1957).

204. *Koehler v. United States*, 187 F.2d 933 (7th Cir. 1951); *Larsen v. United States*, 72 F. Supp. 137 (E.D.N.Y. 1947).

205. *Kyriakos v. Goulandris*, 151 F.2d 132 (2d Cir. 1945); *Koehler v. Presque-Isle Transport Co.*, 141 F.2d 490 (2d Cir. 1944).

206. 35 Stat. 66 (1908), 45 U.S.C. § 53 (1952).

207. 305 U.S. 424 (1939). Also see *The Arizona v. Anelich*, 298 U.S. 110 (1936); *Beadle v. Spencer*, 298 U.S. 124 (1936). For an excellent discussion of the matter, see GILMORE & BLACK, ADMIRALTY § 6-26 (1957).

208. *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 431 (1939).

209. *Id.* at 432.

210. Harbor workers, such as longshoremen, are not seamen under the Jones Act. GILMORE & BLACK, ADMIRALTY 282 (1957). A foreign seaman on a foreign flagship cannot sue under the Jones Act in an American court, even though he had signed articles in the United States, or was injured in American territorial waters. See *Romero v. International Terminal Operating*

appears that the act could be used by the seaman only in a suit against his employer.²¹¹ To recover against one not his employer, the seaman must use a remedy other than the Jones Act.

The Jones Act provides that the injured seaman ". . . may, at his election, maintain an action for damages at law, with a trial by jury . . ." ²¹² This has been construed as giving the seaman an option to sue either on the common-law side²¹³ or the admiralty side (where there is no jury)²¹⁴ of a federal district court, or in a state court.²¹⁵ If, however, suit is brought in a common-law court, the federal admiralty interpretations of the act govern, for in any maritime cause of action, the substantive law which must be applied is the maritime law.²¹⁶

In *Plamals v. The Pinar Del Rio*,²¹⁷ the Supreme Court held that the Jones Act does not create a maritime lien in favor of an injured seaman. Since a maritime lien is essential to an action in rem, proceedings in rem are not maintainable in Jones Act suits.²¹⁸ Therefore, even if suit is on the admiralty side of the federal district court, only an action in personam can be brought.

It seems safe to conclude that today an injured seaman may, in the same suit, join counts for maintenance and cure, unseaworthiness, and negligence under the Jones Act.²¹⁹ He may go to trial on all

Co., 358 U.S. 354 (1959); *Lauritzen v. Lauritzen*, 345 U.S. 571 (1953); 2 NORRIS, *THE LAW OF SEAMEN* §§ 670-81 (1952).

211. *Southern Shell Fish Co. v. Plaisance*, 196 F.2d 312 (5th Cir. 1952). See also *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783 (1949) (dictum). Seamen employed by the United States who are covered by the Federal Employees' Compensation Act cannot sue under the Jones Act. See GILMORE & BLACK, *ADMIRALTY* § 6-21 (1957). For rights of such seamen when not covered by the Compensation Act, see 2 NORRIS, *THE LAW OF SEAMEN*, § 700 (1952).

212. 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1952).

213. If the minimum amount in controversy exceeds \$10,000, the district court has jurisdiction regardless of whether there is diversity of citizenship, since the action involves the application of a law [the Jones Act] of the United States, and is, therefore, within 28 U.S.C. § 1331, as amended, 28 U.S.C. § 1331 (Supp. V, 1958). See *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36 (1943). See note 98 *supra*.

214. *Panama R.R. Co. v. Johnson*, 264 U.S. 375 (1924) (dictum); *Brown v. C. D. Mallory Co.*, 122 F.2d 98 (3d Cir. 1941). Also see 2 NORRIS, *THE LAW OF SEAMEN* § 668 (1952).

215. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942); *Engel v. Davenport*, 271 U.S. 33 (1926). Except where a shipowner is able to bring himself within the Limitation of Liability Act, he cannot effect the removal of a suit based wholly on the Jones Act from a state to a federal court. See *Pate v. Standard Dredging Corp.*, 193 F.2d 498 (5th Cir. 1952). Also see GILMORE & BLACK, *ADMIRALTY* § 6-28 (1957).

216. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942).

217. 277 U.S. 151 (1928).

218. The *Plamals* case, *supra* note 217, involved a suit in rem in admiralty. In *Panama R.R. Co. v. Vasquez*, 271 U.S. 557 (1926), an in personam action begun in a state court, it was stated by way of dictum that the saving clause does not include suits in rem in common-law courts.

219. It has long been settled that the seaman could join a count for maintenance and cure with either a Jones Act count for negligence or an unseaworthiness count. See *Calmar Steamship Corp. v. Taylor*, 303 U.S. 525 (1938); *Pacific S.S. Co. v. Peterson*, 278 U.S. 130 (1928).

three and, under separate instructions for each count, may go to the jury on all three. If a jury verdict for the plaintiff is supportable on the maintenance and cure count, and on either the unseaworthiness or the Jones Act count, the judgment for the plaintiff will not be overturned.²²⁰

Recovery for Seaman's Death

In the United States, there is, independent of statute, no right of action under the maritime law for wrongful death, and an action for personal injuries does not survive the death of the injured person.²²¹ Thus, if a seaman is instantly killed, or if he is injured and subsequently dies (as a result of such injuries or from another cause) before he receives judgment, there can be no recovery, either for the death or for personal loss and pain and suffering resulting from his injuries prior to death.

Before the passage of the Jones Act²²² in 1920, and the Death on the High Seas Act²²³ in the same year, the courts — including federal courts of admiralty — alleviated this situation by resorting to the various state death acts to give a remedy for wrongful death.²²⁴

The Jones Act creates a right of action for the wrongful death of a seaman based upon the statutory action under the Federal Employers' Liability Act.²²⁵ The Jones Act-FELA combination also provides for the survival of any right of action given by FELA.²²⁶

In *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958), the Court said in a footnote dictum: "Recent authorities have effectively disposed of suggestions in earlier cases that an injured seaman can be required to exercise an election between his remedies for negligence under the Jones Act and for unseaworthiness." Lower court authority to the effect that no election is required has become overwhelming. See *Nunes v. Farre Lines, Inc.*, 227 F.2d 619 (1st Cir. 1955) (counts for maintenance and cure, Jones Act, and unseaworthiness joined).

220. See GILMORE & BLACK, *ADMIRALTY* 289 (1957).

221. *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367 (1932); *Lindgren v. United States*, 281 U.S. 38 (1930); *The Harrisburg*, 119 U.S. 199 (1886); *Amoth v. United States*, 3 F.2d 848 (D. Ore. 1925).

222. 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1952).

223. 41 Stat. 537-38 (1920), 46 U.S.C. §§ 761-68 (1952).

224. *Magruder & Grout, Wrongful Death Within The Admiralty Jurisdiction*, 35 *YALE L. J.* 395, 396 (1926). Also see *The Hamilton*, 207 U.S. 398 (1907). But when a plaintiff sued under a state death act, whether at common law or in admiralty, he was subject to any state-recognized defenses, such as the applicable state statute of limitations or contributory negligence. See *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921); *O'Brien v. Luckenbach Steamship Co.*, 293 Fed. 170 (2d Cir. 1923).

225. 35 Stat. 65 (1908), as amended, 45 U.S.C. § 51 (1952). The personal representative is given the right under § 51 to sue "for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then next of kin dependent upon such employee. . . ."

226. 36 Stat. 291 (1910), 45 U.S.C. § 59 (1952). If the seaman is instantly killed, there can be no recovery under this section. If he is injured and subsequently dies from such injuries, there can be a claim under this section for loss and suffering before his death, and a claim under § 51 of FELA for the death. For a discussion of the differences between these sections, see *Holliday v. Pacific Atlantic S.S. Co.*, 117 F. Supp. 729 (D. Del. 1953), *aff'd*, 212 F.2d 206 (3d Cir. 1954).

This enables the personal representative to sue for pain and suffering and for any pecuniary loss sustained by the seaman before he died.²²⁷

In *Lindgren v. United States*,²²⁸ the Supreme Court held that the Jones Act remedy for wrongful death was exclusive and precluded any remedy based upon state death acts, even though the injuries resulting in death occur within the territorial waters of the state. As a result, there is no recovery for death if the claim is based upon unseaworthiness, because there is no recovery for death under the general maritime law; and unseaworthiness, without proof of negligence or the violation of a statutory duty, does not bring the claim within the Jones Act.²²⁹ On the other hand, the Supreme Court, in a recent footnote dictum, said that claims based upon unseaworthiness for loss and suffering of a seaman prior to his death "presumably" would survive, ". . . at least if a pertinent state statute is effective to bring about a survival of the seaman's rights."²³⁰

Where death is "caused by wrongful act, neglect or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States . . .," the personal representative of the deceased may recover under the Death on the High Seas Act.²³¹ State death statutes are superseded whenever the fatal injuries occur on the high seas beyond the distance set forth in the act.²³²

The act permits recovery only for death, and contains no provision for the survival of the decedent's cause of action. Therefore, the personal representative, who may bring suit for the relatives,²³³ cannot recover damages for the loss and suffering of the decedent between the time of injury and death.²³⁴

227. He sues for the benefit of the same class of relatives set forth in § 51. See note 225, *supra*.

228. 281 U.S. 38 (1930).

229. *Lindgren v. United States*, 281 U.S. 38 (1930). For an excellent discussion of the problem, see *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958).

230. *Kernan v. American Dredging Co.*, 355 U.S. 426, 430 (1958). The court in the same footnote also stated that "claims for maintenance and cure survive the death of the seaman. *Sperbeck v. A. L. Burban & Co.*, 2 Cir., 190 Fed.2d 449." This, too, was dictum. Death resulting from neglect of an illness (failure to provide proper maintenance and cure) is within the Jones Act. *Cortes v. Baltimore Insular Line*, 287 U.S. 367 (1932).

231. 41 Stat. 537 (1920), 46 U.S.C. § 761 (1952). The act is not restricted to seamen, but includes anyone, unless the decedent is covered by a federal statute which restricts suit to such statute. See 2 NORRIS, *THE LAW OF SEAMEN* § 642 (1952). Also see *Lacey v. L. W. Wiggins Airways, Inc.*, 95 F. Supp. 916 (D. Mass. 1951) (act applied to airplane accident on high seas).

232. *Echavarria v. Atlantic & Caribbean Steam Nav. Co.*, 10 F. Supp. 677 (E.D.N.Y. 1935). The act does not supersede state death acts where the death injuries occurred on shore or within a marine league from shore. Nor does it apply to the Great Lakes, to water within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone. 41 Stat. 538 (1920), 46 U.S.C. § 767 (1952).

233. The personal representative may sue "for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative." 41 Stat. 537 (1920), 46 U.S.C. § 761 (1952).

234. *Decker v. Moore-McCormack Lines, Inc.*, 91 F. Supp. 560 (D. Mass. 1950); 2 NORRIS, *THE LAW OF SEAMEN* § 640 (1952).

Although never passed upon by the Supreme Court, the lower courts have permitted the personal representative to sue the deceased seaman's employer, the shipowner, under either the Jones Act or the Death on the High Seas Act, and, under proper circumstances, to recover under both.²³⁵

Unlike the Jones Act, the Death on the High Seas Act does not restrict the personal representative to suit against the seaman's employer. Thus, in a collision between an American vessel and a foreign vessel on the high seas, the personal representative of a seaman on the American vessel, killed as a result of the fault of the foreign vessel, has been allowed to recover under the act against the foreign vessel or its owner.²³⁶

Recovery under the act is based upon "wrongful act, neglect or default."²³⁷ Consequently, a claim founded on unseaworthiness will fail unless there is also proof of negligence.²³⁸

CONCLUSION

With the exception of specialists in admiralty, maritime law has been a subject of which most attorneys have not had even a working knowledge. It should now be evident that the principles of admiralty law differ considerably from those areas of the law with which most lawyers are conversant. Although the purpose of this article has been to give only a glimpse of the general field, it is hoped that the reader has been made aware of some of the problems and possibilities of admiralty law and has been prompted to become more familiar with it — for it is certain that admiralty law will become increasingly important in the days ahead.

235. GILMORE & BLACK, ADMIRALTY 304 (1957): "The availability of the alternative remedy under the High Seas Act can become of importance because, although like FELA the High Seas Act limits the recovery to a list of named beneficiaries, the lists in the two statutes are not the same." See *The Four Sisters*, 75 F. Supp. 399 (D. Mass. 1947) (recovery for father under Jones Act; recovery for decedent's sister under High Seas Act).

236. *The Buenos Aires*, 5 F.2d 425 (2d Cir. 1924) (American and Spanish ship collided).

237. 41 Stat. 537 (1920), 46 U.S.C. § 761 (1952). Contributory negligence of the deceased does not bar a recovery, but the court shall consider the degree of negligence attributable to the decedent and reduce the recovery accordingly. 41 Stat. 537 (1920), 46 U.S.C. § 766 (1952).

238. See *Bugden v. Trawler Cambridge*, 319 Mass. 315, 65 N.E.2d 533 (1946). Also see GILMORE & BLACK, ADMIRALTY 315 (1957).