

# ADMIRALTY JURISDICTION, UNIFICATION, AND THE AMERICAN LAW INSTITUTE

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## I. THE PROBLEM

### A. Meanings of "Jurisdiction"

"The precise scope of admiralty jurisdiction," Justice Holmes wrote in 1904, "is not a matter of obvious principle or of very accurate history."<sup>1</sup> Although the history has improved somewhat,<sup>2</sup> the principles remain cloaked in fog. Federal courts, as they have since the formation of the national government, exercise power of various sorts—shortly to be explored here—over cases of "admiralty and maritime jurisdiction."<sup>3</sup> Yet defining that handy phrase still troubles us. True, the other classifications of cases the district courts hear raise difficult definitional problems. But those problems seem to be marginal. No one has any trouble with the basic descriptions: a "diversity" case starts with parties from different states; a "federal question" case springs initially from a controversy regarding some federal law. Although these categories invite one down a bewildering path of casuistry concerning domicile, citizenship, and the metaphysics of "arising under," we all know basically what a diversity case or a federal question case is.

Now try to state the basics of an admiralty case. What is the quintessence of admiralty and maritime jurisdiction? About all one can honestly say is that the sea or navigable waters have something to do with it. Something, indeed. The fascination and the frustration of admiralty as an area of juridical contemplation is that until one reads treatises, statutes, and cases, one has nothing but a vague conception of the line which marks the jurisdictional boundary. No, Virginia, the line is not the three-

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1. *The Blackheath*, 195 U.S. 361, 365 (1904).

2. See, e.g., Putnam, *How the Federal Courts Were Given Admiralty Jurisdiction*, 10 CORNELL L.Q. 460 (1925).

3. U.S. CONST. art. III, § 2; The Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 77; 28 U.S.C. § 1333 (1964).

mile limit, low tide, or even high tide. A contract to sell the *Queen Elizabeth* is not within admiralty cognizance,<sup>4</sup> while an injury yards away inside the warehouse is.<sup>5</sup>

I emphasize this point early because I believe people do not always perceive that "jurisdiction" in the phrase "admiralty and maritime jurisdiction" means something quite different from the word in other contexts. For example, the phrase "equity jurisdiction," as applied to the federal courts since 1938, invites analysis not of the kinds of cases the courts may hear, but rather of the kinds of relief which a judge may award to fill certain fairly well-defined lacunae in the array of common-law remedies. The merger of law and equity meant merely that, once the court established the controversy as the sort it was empowered to hear (on diversity or arising-under grounds) the court could give the parties whatever relief was coming to them, without regard to whether the historical source of that relief was the Chancellor or the jury. The only remaining question was whether the proposed relief was lawful: The judge might order Wagner not to sing for Gye, he could not compel her to honor her contract with Lumley.

To see how different "jurisdiction" in the admiralty sense is, consider this case: The A Corporation sold a yacht to B, subsequently furnishing goods and services to the vessel. Upon B's failure to pay, A proceeded against the vessel *in rem* in the local United States District Court. There was no diversity. B's answer included a counterclaim for damages stemming from assorted misrepresentations in the original sale. A moved to dismiss the counterclaim, arguing that because it did not arise out of the transaction or occurrence which was the subject to the complaint, it was not "compulsory" within Federal Rule 13(a). If regarded as a permissive counterclaim under Federal Rule 13(b), it lacked an independent jurisdictional ground.<sup>6</sup>

At this point, the judge was asking himself: Does a court sitting in admiralty (which phrase I use, somewhat nervously,<sup>7</sup> as

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4. *Grand Banks Fishing Co. v. Styron*, 114 F. Supp. 1, 2-3 (D. Me. 1953).

5. *Casey v. California Stevedore and Ballast Co.*, 1968 A.M.C. 2721 (N.D. Calif. 1968). See *Manson v. Weyerhaeuser S.S. Co.* 229 F. Supp. 569 (E.D. Pa. 1964); compare *DiPaola v. Int'l Terminal Operating Co.*, 294 F. Supp. 736, 739 (S.D.N.Y. 1969).

6. 3 J. Moore, *Federal Practice* ¶ 13.19, at 53-54 (2d ed. 1968).

7. See B. Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1 (1959).

a convenient shorthand for “a United States District Court exercising the admiralty and maritime jurisdiction of the United States”) have the power to determine a dispute over the sale of a boat? The layman, perhaps even the uninitiate lawyer, might reasonably assume that vessels are the very core of maritime matters, and that any controversy concerning a vessel ought logically to be determinable by the admiralty courts. This assumption might be strengthened by the realization that the goods-and-services (which were unquestionably admiralty matters) had been furnished by the seller of the yacht. The suggestion is strong that, as is frequently the case ashore as well as afloat, the dealer and the buyer maintained a service type of relationship as an almost inevitable consequence of the sale. In other words, had B not purchased this vessel from A, he might well have not looked to A for his servicing.

Notwithstanding, the Court, following traditional doctrine, held: (1) the sale, having preceded the furnishing of goods and services, could not be said to have “arisen out of” the later transaction; (2) the counterclaim was therefore permissive; (3) because the parties lacked diversity, the court could hear the counterclaim only if there were an independent jurisdictional ground, namely, admiralty; (4) but suits involving sales of vessels and breaches of warranty incidental thereto are not cognizable in admiralty; and (5) therefore, the counterclaim must be dismissed.<sup>8</sup>

The case thus illustrates the essential meaning of “jurisdiction” in an admiralty context. If the dispute does not fall within a magic category of controversies, the court cannot even begin to hear the merits, no matter how close a connection the subject bears to maritime matters generally or to a transaction concededly within the circle. Some exceptions will further highlight the illogicality. Suppose the case were this: A charters a vessel to B for two months with the understanding that: (1) B will be entirely responsible for the upkeep; (2) B may, at his own expense, install any equipment he chooses; (3) Upon termination of the charter, B may purchase the vessel, a portion of the previously paid charter hire to be applied to the purchase price. During the charter period, B buys all his supplies and

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8. *Camper & Nicholsons, Ltd. v. The Yacht Fountainebleau II*, 292 F. Supp. 734 (S.D. Fla. 1968).

materials from A; at A's suggestion, he purchases on credit from A and has A install an automatic pilot manufactured by A which will enable him to use the vessel for sport fishing. Upon expiration of the charter period, B purchases the vessel from A. A week later, due to A's careless installation of the pilot, the vessel collides with a tanker. If A commences an action in admiralty against B for the price of the automatic pilot there will be no issue as to jurisdiction.<sup>9</sup>

And if B counterclaims for a breach of warranty on the sale of the vessel, a breach predicated on the improper installation, the counterclaim will be denominated compulsory, because it arose out of the same transaction.<sup>10</sup> Thus the absence of admiralty jurisdiction over the boat-sale part of the scenario<sup>11</sup> will not prevent the court from hearing the case.

Assume that as a result of the collision, the boat sinks. B therefore prefers to base his counterclaim upon a tort theory, viz, that A's faulty installation foreseeably led to the loss of the boat. Putting aside as presently irrelevant the issues of scope of the risk and causation, it is almost certain that B's counterclaim, whether compulsory or permissive for purposes of Federal Rule 13, would be cognizable by the district court. The only issue would be: Did the tort take place on navigable waters?<sup>12</sup>

The confusion into which the sad saga of A and B has plunged the reader can only partly be blamed on the turgidity of the description. Cloudiness predominates when one explicates "admiralty jurisdiction" in terms of the kinds of cases which the jurisdiction comprehends. Contract disputes are included if they pertain to maritime subjects; *except that* some logically includible contracts (shipbuilding and ship sales) are excluded.<sup>13</sup>

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9. The hypothetical is quite different from *The Boat La Sambra v. Lewis*, 321 F.2d 29 (9th Cir. 1963), where installation preceded launching. We need not tarry over the interesting question of whether A has an *in rem* right against the yacht now, if he arguably would not have had such a right when he furnished the supplies (a time at which he owned the boat).

10. *Contra*, *Brown v. Universal Marine Co.*, 317 F.2d 279, 280 (6th Cir. 1963), where the court held that the events underlying the libel did not give rise to the cross-libel.

11. Or over the straight breach of warranty counterclaim, *Grand Banks Fishing Co. v. Styron*, 114 F. Supp. 1, 3 (D. Me. 1953).

12. Arguably, the tort was completed ashore upon manufacture, rather than upon collision (afloat).

13. A good survey appears in G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 24-26 (1957).

Torts are included, if one of two conditions are met: (1) the tort took place—whatever that means—on—whatever that means—navigable waters—whatever that means;<sup>14</sup> (2) the tort (even if it took place on land) was caused—whatever that means—by—whatever that means—a vessel.<sup>15</sup>

Subject-matter (for contracts) and locality (for torts), are at least usable touchstones for identifying cases within the “admiralty jurisdiction.” They add nothing, however, to the definition of the phrase in another common connection. Suppose the case to be this: A state statute provides that any time a shipping company fails to properly perform a passage contract, the disgruntled passenger may obtain state court seizure and sale of the offending vessel. It is now well-settled that a state may not confer such *in rem* powers upon its courts, because to do so would be giving them “admiralty jurisdiction.”<sup>16</sup> Putting the point this way is not really accurate. The objection to state use of *in rem* procedure against vessels is not jurisdictional. After all, under the familiar saving clause<sup>17</sup> a state may empower its courts not merely to hear and determine disputes between passengers and shipowners, but to execute any judgment in a passenger’s favor against the shipowner’s property, including his ship. What the no-state-*in-rem* rule really means is that a proceeding against a ship (as opposed to a common-law attachment or execution) is available only in a court exercising admiralty jurisdiction. A state may adjudicate the underlying claim in its common-law courts; it may even create an *in rem* right for enforcement in the admiralty court, so long as such creation does not improperly impair the uniformity of national maritime substantive law.<sup>18</sup>

The final meaning of “admiralty and maritime jurisdiction” with which we need concern ourselves springs from this very issue of uniformity. At the beginning of the Republic, even the bitterest opponents of a strong national government agreed that a system of national maritime courts was essential for the

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14. Compare *Interlake S.S. Co. v. Nielsen*, 338 F.2d 879 (6th Cir. 1964) with *Wiper v. Great Lakes Engineering Works*, 340 F.2d 727 (6th Cir. 1965).

15. E.g. *Spann v. Lauritzen*, 344 F.2d 204, 206-07 (3rd Cir. 1965) cert. denied, 382 U.S. 938 (1965).

16. *The Moses Taylor*, 71 U.S. (4 Wall.) 411 (1866).

17. 28 U.S.C. § 1333 (1964).

18. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917). The current status of the uniformity rule will be discussed in detail. See text accompanying note 60 *et seq. infra*.

encouragement of shipping and international trade. Such a system, one might argue, necessarily demands a uniform set of substantive legal principles and a converse denial to the states of the right to impose their own rules of decision upon those federally-enunciated principles. It would be convenient for students and practitioners if over the years the developing maritime law had been made applicable in any case cognizable in admiralty, whether the court hearing the given case were a federal admiralty court, or a federal or state court entertaining the litigation under the saving clause.

Unfortunately, uniformity was not imposed in cases like deaths on territorial waters, where admiralty, lacking a remedy of its own, adopted, in its entirety, the local state wrongful death statute.<sup>19</sup> In other cases, such as *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*,<sup>20</sup> the Supreme Court, for one reason or another, found itself able to conclude that the state rule in question would have no substantial effect on the national fabric (the so-called "maritime but local" test)<sup>21</sup> or that the subject was one which did not require a national rule.<sup>22</sup>

In the latter instance, the net result was quite close to saying that: (1) the states will regulate the matter; (2) a district court hearing the case will apply the rule of the state in which it sits, and (3) the case is within the admiralty jurisdiction only in the sense that the court has authority to hear it despite a lack of diversity (or of the current jurisdictional amount).

In light of the rationale behind the establishment of the admiralty jurisdiction,<sup>23</sup> it seems to me constitutionally and statutorily illogical to say that a case is within the admiralty jurisdiction, concurrent though it may be, and yet subject to the substantive whims of fifty jurisdictions. Further, the inquiry which the existence of these exceptions requires sometimes leads the courts to the kind of unhappy convolutions typified by *Fireman's Fund American Insurance Company v. Boston Harbor Marina, Inc.*,<sup>24</sup> which held that an exculpatory contract

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19. *The Tungus v. Skovgaard*, 358 U.S. 588 (1959).

20. 348 U.S. 310 (1955).

21. *Western Fuel Co. v. Garcia*, 257 U.S. 233, 242 (1921).

22. 348 U.S. at 316.

23. See, e.g. C. Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259 (1950).

24. 285 F. Supp. 36 (D. Mass. 1968), and *rev'd*, 406 F.2d 917 (1st Cir. 1969).

for winter storage and repair—in a terrene hangar—was within the admiralty jurisdiction and was not one of those transactions which “are matters of special concern to the states, or reveal significant differences reflecting deep-dyed local practice, preference, and public policy.”<sup>25</sup>

Accordingly, the owner of the shore installation was allowed to escape liability for damage resulting from a fire on the premises. Without regard to the obvious inconsistency between this holding and that of *Wilburn Boat*,<sup>26</sup> the more recent opinion seems particularly illogical. What could be of more local interest than distribution, as between two local citizens, of loss from a fire in a waterfront building?

### B. *Equity Adrift*

#### 1. *Did the Woolsack Float?*

An unfortunate failure to distinguish between jurisdiction in its fundamental sense (that is, authority to consider the dispute in question) and power to administer a given type of relief has created unnecessary difficulty in defining the place of equity in admiralty. The classic view of the problem was that admiralty administered justice on equitable principles, without inordinate regard to form, but that admiralty lacked any equitable jurisdiction.<sup>27</sup>

Beginning with Morrison’s thoughtful survey in 1933,<sup>28</sup> a line of judges and scholars has clarified the inaccurate generalities in the classic view. As a result, by 1956, one could

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25. 285 F. Supp. at 40. The case also exemplifies the kind of micrometry the courts are put to in deciding whether a given contract is or is not maritime. Had the contract called exclusively for winter storage, without repairs, it would have been considered non-maritime from the start. *Id.* See the authorities collected in the opinion.

26. 348 U.S. 310.

27. G. ROBINSON, *ADMIRALTY LAW* 193 (1939) insisted that admiralty courts “do not, as equity courts do, dispose of the whole controversy, including its non-maritime aspects.” But 3 BLACKSTONE, *COMMENTARIES* 108 had said:

Where the admiral’s court hath not original jurisdiction of the cause, though there should arise in it a question that is proper for the cognisance of that court, yet that doth not alter nor take away the exclusive jurisdiction of the common law. And so, vice versa, if it hath jurisdiction of the original, it hath also jurisdiction of all consequential questions, though properly determinable at common law.

See also *Rigdon v. Hedges*, Judge of Admiralty, 88 Eng. Rep. 1295 (K.B. 1699); *Ridley v. Eggesfield*, 83 Eng. Rep. 436 (K.B. 1672).

28. Morrison, *The Remedial Powers of the Admiralty*, 43 *YALE L.J.* 1 (1933).

state the admiralty-equity relationship thus: Once an admiralty case was properly "in" the district court, the court could apply any equitable remedies which might be appropriate. However, before a district court could even consider the appropriateness of equitable relief, it must be certain that the underlying controversy was itself a matter within the "admiralty jurisdiction." A district judge sitting in admiralty could grant equitable relief by using the reverse of the equitable clean-up doctrine; but the equity claim must be ancillary or pendant to the admiralty claim. Thus, although an admiralty court has no jurisdiction over an action which seeks only to set aside a fraudulent transfer of a vessel, the court does have power to inquire into such a transfer if the transfer was sought to deprive the court of physical jurisdiction over a prospective action *in rem* for cargo damage (a matter unquestionably within the admiralty jurisdiction).<sup>29</sup>

But what of this case? A and B (citizens of the same state) sign a charter party covering A's unique yacht. Before the charter period commences, B learns that A intends to renounce the charter and demise the yacht to X. Can B obtain specific relief in the local United States District Court? Prior to 1966, the answer would be tolerably clear. B's prayer for equity is not ancillary to any recognized maritime claim. He is simply asking an admiralty court to grant merely barebones equitable relief in a case involving a maritime subject (a charter party). Therefore, the case would have been dismissed for lack of subject-matter jurisdiction.<sup>30</sup>

## 2. *Unification: Solution or Riddle?*

In 1966, however, the Supreme Court merged admiralty libels into that conglomerate "civil action" which heretofore covered only law and equity. Unification, the distinguished observers Charles Wright and Leavenworth Colby have assumed,<sup>31</sup> eliminated the last barrier to full-dress application of equitable remedies in admiralty. The courts are not so sure. In

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29. *Swift & Co. Packers v. Compania Colombiana del Caribe*, 339 U.S. 684 (1950).

30. See *Rice v. Charles Dreifus Co.*, 96 F.2d 80, 83 (2d Cir. 1938); *Commercial Metals Co. v. Int'l Union Marine Corp.*, 294 F. Supp. 570, 573 (S.D.N.Y. 1968).

31. Colby, *Admiralty Unification*, 54 GEO. L.J. 1258, 1268-70 (1966); I W. BARRON AND A. HOLTZOFF, *FEDERAL PRACTICE & PROCEDURE* § 32 (Wright ed. 1960).



*Thyssen Steel Corp. v. Federal Commerce & Navigation Co.*,<sup>32</sup> the plaintiff prayed an injunction to compel the defendant-shipowner to order a vessel into port. Fortunately, the court was able to find other grounds than lack of plenary equity power to deny the relief. Had an alternative basis for the decision not been available, the judge might have encountered serious difficulty. Evidence of his uncertainty appears in the footnote to which he was able to relegate the whole issue. Unification, he said there, "rendered the continuing effect of this long established doctrine [i.e., no plenary equity power in admiralty] unclear." Then he quoted the Note which the Advisory Committee on Civil Rules had appended to the amended Rule 1: "Just as the 1938 rules abolished the distinction between actions at law and suits in equity, this change would abolish the distinction between civil actions and suits in admiralty."<sup>33</sup>

In *Compania de Nevegacione Almirante S.A. Panama v. Certain Proceeds of Cargo, etc. of the vessel S.S. Searaven*,<sup>34</sup> an action for unpaid charter hire, the charterer-shipper's bank (which had been named as a defendant) was retaining under an asserted banker's lien the proceeds of the charterer's drafts on letters of credit issued by the consignees. The court correctly considered the proceeds as freight standing in lieu of cargo and thus subject to a maritime lien.<sup>35</sup> It then concluded that "it would be grossly inequitable if the Bank [which had encouraged the charterer to procure the vessel and had advanced funds to permit purchase of additional cargo to avoid dead freight] could avoid the payment of charter hire, i.e., reasonable freight."<sup>36</sup>

But enroute to its decision, the court—without even mentioning the Rules unification—felt constrained to emphasize that "a Court of Admiralty will not enforce an independent equitable claim merely because it pertains to maritime property."<sup>37</sup> The court could order the Bank to pay the funds over only after determining that the shipowner possessed a valid

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32. 274 F. Supp. 18 (S.D.N.Y. 1967).

33. *Id.* at 20 n.3.

34. 288 F. Supp. 77 (C.D. Cal. 1967).

35. *Id.* at 79. See *N.H. Shipping Corp. v. Freights of the S.S. Jackie Hause*, 181 F. Supp. 165, 170 (S.D.N.Y. 1960).

36. 288 F. Supp. at 80.

37. *Id.* at 81.

lien on them. Assume a similar dispute, with lack of diversity. Suppose also that the Bank had disbursed the proceeds before the shipowner seized them. Could the shipowner have obtained an accounting? The entire tenor of the court's opinion indicates it could not; that would be the sort of "independent equitable claim" which admiralty, in the opinion's language, will not enforce.

Thus I must diffidently demur from the Colby-Wright assumption; or, since demurrers are out of fashion, file what in the good old days of admiralty might be called exceptive allegations. Apart from whatever weight the judicial uncertainty portends, I believe there are valid arguments against assuming that the Revolution of 1966 worked so complete a change as my betters have suggested.

*a. The Possible.*

The absence of plenary power to grant barebones equitable relief was a deeply-rooted rule of admiralty jurisprudence. Emphatic language by Judge Learned Hand and Justice Frankfurter makes that clear.<sup>38</sup> The latter's position is particularly significant because he voiced it in the course of an opinion otherwise devoted to showing how silly it was for anyone to doubt that admiralty had *ancillary* equity power. I will note *en passant*, without undue emphasis, that the Hand-Frankfurter position comes close to conceding not merely the lack of plenary equity power, but the constitutional impossibility of giving that power to a district judge deciding an admiralty case. Even if we assume for the moment that such a change can indeed be effected, we still have to consider just how the change is to come about. Only three possibilities present themselves: (1) judicial fiat; (2) legislative enactment; or, more likely, (3) a combination of the two. The legal history of this country, from Story's day to the present, reveals that the contours of admiralty are changeable, and that no one is really certain whether the ultimate boundary-making power rests on Capitol Hill or across town. One example will sufficiently illustrate the point. Originally, mortgages on ships (as opposed to such money-raising obsolescences as bottomry bonds) were not enforceable in

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38. *Rice v. Charles Dreifus Co.*, 96 F.2d 80, 82 (2d Cir. 1938), *Swift & Co. Packers v. Compania Columbiana del Caribe*, 339 U.S. 684, 690 (1950).

admiralty.<sup>39</sup> In 1929, Congress passed a statute which openly authorized the district courts sitting in admiralty to foreclose such mortgages.<sup>40</sup>

In due course, a case involving the Ship Mortgage Act reached the Supreme Court, raising, as any similar controversy would, the following paradox: If power to change the admiralty jurisdiction reposes basically in the Court, then Congress cannot constitutionally alter the jurisdiction; if such power rests with Congress, then the Court (a) should not attempt to define the jurisdiction and (b) cannot overturn any admiralty jurisdiction statute absent some non-maritime reason such as lack of due process. The Court squarely faced the paradox and swallowed it whole: Congress, said Chief Justice Hughes, "has paramount power to determine the maritime law which shall prevail throughout the country . . . . But in amending and revising the maritime law, the Congress necessarily acts within a sphere restricted by the concept of the admiralty and maritime jurisdiction," a concept, it need hardly be added, which would be defined by the Supreme Court.<sup>41</sup>

Although a subservient paramountcy may offer inviting fields for theological speculation, it will not draw much applause for jurisprudential certainty. Perhaps we ought to comfort ourselves by noting that ordinarily, identification of the final maritime nay-sayer makes little difference. The last time the problem arose—with the Admiralty Extension Act,<sup>42</sup> which corrected a salt-encrusted anomaly<sup>43</sup> and brought into the admiralty jurisdiction any damage caused by a vessel, even if the damage occurred ashore—the Court did not bother to identify the difficulty. In fact, it did not even trouble to consider the Act directly. Holding that a longshoreman's case was within the admiralty jurisdiction when he slipped on loose beans on the dock, Justice White casually observed that "the case is within the maritime jurisdiction under [the Act],"<sup>44</sup> and went on to other things.

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39. *Bogart v. The S.S. John Jay*, 58 U.S. (17 How.) 399 (1854).

40. 46 U.S.C. § 951 (1964).

41. *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 43 (1934).

42. 46 U.S.C. § 740 (1964).

43. G. ROBINSON, *supra* note 27, at 50.

44. *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 210 (1963).

*b. Does Admiralty Live?*

Although the paradox does not usually cause serious trouble, the admiralty-equity problem does seem to require that the puzzle be re-examined. The Rules merger went forward under two sections of the Judicial Code. Section 2072, dealing with civil-rule promulgation, says that the Rules "shall not abridge, enlarge or modify any substantive right."<sup>45</sup> Section 2073, dealing with admiralty rules, says: "Such rules shall not abridge or modify any substantive right."<sup>46</sup>

I confess myself baffled at the omission from section 2073 of the verb "enlarge." Possibly, this meant that Congress intended the Supreme Court, in the exercise of its rule-making power, to be able to enlarge admiralty rights, but not legal or equitable ones. Are we then to assume that the unified Rules, insofar as they affect admiralty and maritime cases (and of course I am not here talking about the pure admiralty Supplemental Rules)<sup>47</sup> are "admiralty" rules? If so, does that not prove too much, viz, that there is still such a juridical entity as admiralty, which is somehow administered in a different way from law-and-equity? Although as an old admiralty practitioner, I would be pleased to keep the silver oar polished, it seems to me more sensible to assume that the verb "modify" sufficiently covers the problem at hand. If, solely as a result of the merger, our yacht-chartering friend B can obtain the specific performance which before 1966 he could have received only in a state court, his rights, and perhaps those of A, have been modified, within the meaning of either section 2072 or section 2073. Because the statute proscribes such modification, unification must not be taken to have given admiralty a plenary equity power. This reasoning, I hasten to add, is not inexorable. Shortly after merger, the First Circuit faced the following, in *Hansen v. Trawler Snoopy, Inc.*:<sup>48</sup> The losing party in a limitation of liability proceeding filed his appeal seventy days after judgment, relying on section 2107 of the Judicial Code<sup>49</sup> which read: "In any action, suit or proceeding in admiralty, the notice of appeal

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45. 28 U.S.C. § 2072 (1964).

46. 28 U.S.C. § 2073 has since been repealed as superfluous. Pub. L. 89-773, § 2, Nov. 6, 1966, 80 Stat. 1323; [1966] *U.S. Code Cong. Adm. News* 1546, 4175.

47. F.R.D. R. Civ. P. Supplemental Rules A-F.

48. 384 F.2d 131 (1st Cir. 1967).

49. 28 U.S.C. § 2107 (1964).

shall be filed within ninety days after the entry of the order, judgment, or decree appealed from.’<sup>50</sup>

Federal Rule 73(a) allows thirty days, enlargeable to sixty days. Which should control, the Rule or the statute? It hinged on whether admiralty is still admiralty, and on whether the merger “abridge[d] any substantive right.” One can hardly disagree with the court’s conclusion that a filing deadline is not substantive at all, and hence that the saving language of either section 2072 or section 2073 did not apply. But if there is anything left of a conceptually separate admiralty, then surely section 2107 should control. After all, this was no saving-clause action, fortuitously brought “in admiralty.” It was a limitation proceeding, which even after unification must still be governed by the “admiralty” Supplemental Rules.<sup>51</sup> In short, if ever there could be an “admiralty” action, this was it. Undaunted, the Court, *per curiam*, dismissed the appeal, citing the omnibus erasive language of both section 2072 and section 2073: “As of [the] date [that] the revised civil rules became effective . . . all laws in conflict with them became ineffective.’<sup>52</sup>

The short opinion does not discuss the point, so one cannot tell whether the court concluded that “admiralty” cases no longer exist, except as the Rules, numbered as well as lettered, may recognize them; or whether, on the other hand, the problem passed unperceived.

Whatever the reason, the result seems wrong. If either Congress or the Supreme Court meant unification to signal recognition that we need no longer afford admiralty cases—as the word is used in both the Rules and the statutes—different treatment on appeal, then one or the other should have said so. The idea of effecting major changes in the handling of judicial business merely by allowing proposed rules to lie on Congress’ table for ninety days<sup>53</sup> is, to say the least, unwise; and moreover, unfair. Resolving the inevitable interpretive problems in advance by abrogating “[a]ll laws in conflict with such rules” puts a litigant in dire peril if his attorney happens to guess wrong about

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50. *Id.*

51. F.I.D. R. CIV. P. Supplemental Rule F.

52. 384 F.2d at 132. The problem would not arise today. F.I.D. R. CIV. P. 73 has been superseded by F.I.D. R. APP. P. 4(a), which carefully defines “civil case” to include “a civil action which involves an admiralty or maritime claim.”

53. 28 U.S.C. §§ 2072-2075 (1964).

the existence of a conflict between statute and rule. And, because "laws" clearly includes decisions,<sup>54</sup> the lawyer must guess if the Supreme Court, without brief, argument, or consideration, has overruled every decision which may "conflict" with one of the new or revised Rules.

A careless assumption that for all purposes unification automatically converted "admiralty" actions into "civil" actions can create even more serious problems. The well-known Rules of Decision Act<sup>55</sup> now prescribes that: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."<sup>56</sup> If "civil actions" merely represents the plural of the phrase in Rule 2<sup>57</sup> then perhaps unwittingly unification has brought the *Erie* doctrine into maritime litigation.<sup>58</sup> If, as the Advisory Committee's Note to Rule 1 says, unification "would abolish the distinction between civil actions and suits in admiralty,"<sup>59</sup> presumably all statutory language using the words "civil action" now applies to what we used to call admiralty. I am afraid it will not do merely to dismiss the possibility as preposterous. The *Erie* doctrine itself may rest on constitutional grounds; the doctrine of maritime-law uniformity does not.<sup>60</sup> Justice Holmes, as one unsympathetic observer noted, found

in the saving clause a contemporaneous interpretation of the Constitution to the effect that except as to one institution, proceedings to enforce a maritime lien, the states had not only concurrent jurisdiction but power to apply whatever law they wished in the exercise thereof.<sup>61</sup>

Nothing would prevent Congress from requiring all maritime matters (except perhaps *in rem* procedure) to be determined by

54. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

55. 28 U.S.C. § 1652 (1964).

56. *Id.*

57. FED. R. CIV. P. 2: "There shall be one form of action to be known as 'civil action'."

58. *Cf. Pope & Talbot Inc. v. Hawn*, 346 U.S. 406 (1953).

59. FED. R. CIV. P. 1, Advisory Committee's Note (1966).

60. 304 U.S. at 77-78 (1938); see authorities cited in Stevens, *Erie R.R. v. Tompkins and the Uniform General Maritime Law*, 64 HARV. L. REV. 246, 251-52 (1950). Stevens himself takes the opposite view. See also Deutsch, *Development of the Theory of Admiralty Jurisdiction in the United States*, 35 TUL. L. REV. 117, 128 (1960).

61. Wright, *Uniformity in the Maritime Law of the United States*, 73 U. PA. L.

state law. This is particularly true in saving-clause cases. In fact, one of the earliest authoritative interpretations of the saving-clause insisted that the clause "has made a distinction between common and other law most material; for as the party 'in all cases,' is entitled to his common law remedy wherever it may be had; where this can be had, no other can be safely pursued."<sup>62</sup>

If uniformity in maritime cases is not constitutionally required, and Congress may therefore legislate a positive abrogation of *Southern Pacific Co. v. Jensen*<sup>63</sup> and *Pope & Talbot Inc. v. Hawn*,<sup>64</sup> who is to say that Congress' approval of the "civilizationizing" Rules did not work just such a change? Surely not those who believe, for example, that unification *ex proprio vigore* give admiralty plenary equity power; surely not the judges, for another example, who decided that unification automatically erased the "admiralty" appeal provisions of section 2107.

The best argument against my suggestion is the last phrase of section 1652: "in cases where they apply."<sup>65</sup> Those words could be interpreted to mean "except in cases where up to now the federal courts have used federal law as the rules of decision." But such a reading, while indeed plausible, flies in the teeth of the semantic equivalence between statute and rule: both refer to "civil action(s)." Further, the phrase, without the comma preceding, was part of the original Judiciary Act.<sup>66</sup>

Although state decisions, for almost one hundred years, had been held *not* to "apply" in diversity cases, the Court in *Erie* had no difficulty deciding that henceforth, they should indeed control such litigation. That is to say, it is the Court (and *a fortiori* Congress) which decides the circumstances under which

REV. 123, 223, 234 (1925), citing *The Hamilton*, 207 U.S. 398, 406 (1907). See also Holmes' dissent in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 223 (1917).

62. 6 N. DANE, ABRIDGMENT 353 (1823). The view that maritime-law uniformity is "designed to insure that litigants with the same kind of case have their rights measured by the same legal standards of liability", Friendly, *In Praise of Erie—and of the New Federal Common Law*, 19 RECORD, ASSOC. BAR, CITY OF NEW YORK 64, 79 (1964), quoting Black, J. in *Pope & Talbot Inc. v. Hawn*, 346 U.S. 406, 410 (1954), assumes its own conclusion. Is a saving clause controversy in the state court "the same kind of case" as either (1) a maritime diversity action in the federal court or (2) an admiralty action?

63. 244 U.S. 205 (1917).

64. 346 U.S. 406 (1954).

65. 28 U.S.C. § 1652 (1964).

66. The Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 92.

state decisions "apply." What *Erie* gave to the states in diversity actions, unification could give them in maritime matters. Congress does have that power.

Even the oracle of uniformity, Justice McReynolds, admitted that it was only "in the absence of some controlling statute" that "the general maritime law, as accepted by the Federal courts, constitutes part of our national law."<sup>67</sup> The question now is simply whether Congress has, unwittingly perhaps, overturned a line of judicial decisions. Once again until a court produces an apposite, opposite, opinion, the answer must remain doubtful.

The final argument against the idea that unification-cum-section 1652 abolished federal maritime-law supremacy is simply that the whole chimera is unthinkable. It certainly is. But then so was the idea in 1791 that a citizen could sue a state, even though the Constitution<sup>68</sup> and a statute<sup>69</sup> both gave the federal courts jurisdiction over suits between "a state and citizens of another state." Most lawyers of the time probably felt that they could not rationally believe either the framers or the Congress to have intended such an impossible result. Nonetheless that is precisely what the words in question *said*, and *allowed*;<sup>70</sup> and it took the eleventh amendment to set matters right again.<sup>71</sup>

### 3. *Can The Chancellor Sail?*

Thus, by a natural process of indignation, we return to the yacht sale between A and B. If either Congress, the courts, or both can enlarge the jurisdictional description of admiralty cases to include maritime matters praying bare, nonancillary

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67. 244 U.S. at 215 (1917).

68. U.S. CONST. art. III, § 2.

69. The Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 80.

70. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 363 (1793).

71. This paper is already so discursive that I must with regret eschew another admiralty-inspired construction puzzle: Can a citizen of New York bring a federal action *in rem* against a motorboat owned by the state of Massachusetts? Clearly, no *in personam* action, *Workman v. New York City*, 179 U.S. 552 (1900), nor even a quasi-*in personam* action, *In re of the State of New York*, 256 U.S. 490 (1921), *Ex parte Madrazo*, 32 U.S. (7 Pet.) 395 (1833), will lie; those are too close to the eleventh amendment's prohibition of actions "in law or equity". But what of a proceeding against a *thing*, albeit a thing owned by a state? The Supreme Court does not seem ever to have ruled on this. Perhaps the state by engaging in maritime commerce could be considered to have surrendered its sovereignty "*pro tanto* and *pro tempore*", *Chesapeake Bay Bridge and Tunnel District v. Lauritzen*, 404 F.2d 1001, 1003 (4th Cir. 1968). What law applies, state or Federal? See *In re M/T Alva Cape*, 405 F.2d 962, 969 (2d Cir. 1969).



equitable relief,<sup>72</sup> and if such an enlargement would pass constitutional muster,<sup>73</sup> then it seems reasonable to ask that we receive along those lines at least a positive inkling either statutory or decisional. Instead, all we have so far is continuing Congressional silence, and from the Supreme Court this: "Unquestionably a court of admiralty will not enforce an independent equitable claim merely because it pertains to maritime property."<sup>74</sup>

To compound the confusion, on its facts, *Swift & Co., Packers v. Compania Transmaritima Columbiana*<sup>75</sup> could be read as attributing plenary equity power to admiralty. The action was *in personam* for nondelivery of cargo shipped on the M/V *Cali*, which had sunk. A few days before the libel was filed, the respondent (former owner of the *Cali*) transferred to a dummy corporation another vessel, the *Alacran*. Upon filing of the libel, the libelants prayed and obtained attachment of the *Alacran* under an admiralty process known as writ of foreign attachment, whereby attachment of an absent respondent's chattels (including any vessel *not* involved in the controversy) confers personal jurisdiction.<sup>76</sup> The dummy transferee opposed the attachment (and thus the personal jurisdiction) on the plausible ground that the *Alacran* was not respondent's property.<sup>77</sup> Thus as the case came to the Supreme Court, if admiralty lacked jurisdiction (i.e., authority) to set aside the transfer, the respondent would never be properly before the court. Therefore, the issue of the fraudulent transfer, far from being ancillary or subsidiary to any admiralty issue, was rather precedent to it. If the district court could not negate the transfer, the court would have had no defendant against which to exercise its undoubted power to resolve the underlying cargo dispute. This seems very close to giving admiralty barebones equity jurisdiction. But the tenor of

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72. Morrison, *supra* note 28, at 32-33.

73. See *Rice v. Charles Dreifus Co.*, 96 F.2d 80, 83 (2d Cir. 1938) (L. Hand. J.).

74. *Swift & Co. Packers v. Compania Columbiana del Caribe*, 339 U.S. 684, 690 (1950) (Frankfurter J.).

75. 83 F. Supp. 273 (D.C.Z. 1948), *aff'd*, 175 F.2d 513 (5th Cir. 1949), *rev'd*, 339 U.S. 684 (1950).

76. See 2 BENEDICT, ADMIRALTY 352-53 (6th ed. 1940); *National Shipping & Trading Corp. v. Weeks Stevedoring Co.*, 252 F. Supp. 275, 276 (S.D.N.Y. 1966); SUPREME COURT ADMIRALTY RULE 2. The practice survived unification? See FED. R. CIV. P. Supplemental Rule B.

77. See 83 F. Supp. 273 (D.C.Z. 1948), *aff'd*, 175 F.2d 513 (5th Cir. 1949), *rev'd*, 339 U.S. 684 (1950). The original attachment was dissolved and a second obtained. This is

the opinion, as well as much of its language, go directly the other way. I know of no case—nor even a commentary—which has read *Swift* as authorizing full equity powers.

A feeling that my suggested reading of *Swift* is in every sense academic is strengthened by *Khedivial Line, S.A.E. v. Seafarers' International Union*.<sup>78</sup> Enraged at the blacklisting of American ships by the United Arab Republic, two unions established picket lines near the SS *Cleopatra*, thus preventing handling of her cargo. The shipowner sought federal relief. Its complaint did not allege diversity, although diversity existed.<sup>79</sup> Federal jurisdiction was asserted on three grounds: (1) an anti-trust violation;<sup>80</sup> (2) a tort against an alien violating international law;<sup>81</sup> and (3) a maritime tort.<sup>82</sup> Finding no substance to any of these, the court dismissed the action.

Chief Judge Lumbard and Judges Moore and Friendly decided *per curiam* that a district judge sitting in admiralty could not enjoin a maritime tort. Because the court assumed that the tort ("picketing which prevents a vessel's being unloaded when the owner is powerless to take action that will end the picketing [a tort whose] effect was felt on the navigable waters of New York harbor where the cargo continued to be held . . . .")<sup>83</sup> was indeed maritime, the case seems analytically similar to *Swift*. In both, the equitable relief is related to a controversy indubitably maritime: cargo loss in one instance, maritime tort in the other. *Khedivial Line* did not cite *Swift*; and it expressly declined to consider whether the injunctive relief might be made "pendent" to a related federal claim, since it determined that no such claim existed.<sup>84</sup>

Failure of the complaint to allege diversity permitted the court to avoid an interesting problem: If a case is maritime, but "saved" for disposition at plaintiff's option in a non-admiralty court, the controlling substantive principles remain maritime.

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proof that the only source of personal jurisdiction was the second attachment, since if respondent had answered before the second attachment was made, the appearance would have nullified the attachment. See BENEDICT, *supra* note 76, at 352.

78. 278 F.2d 49 (2d Cir. 1960).

79. 28 U.S.C. § 1332 (1964).

80. 28 U.S.C. §§ 1331, 1337 (1964).

81. 28 U.S.C. § 1350 (1964).

82. 28 U.S.C. § 1333 (1964).

83. 278 F.2d at 52.

84. *Id.* at 53.

That is, even when the plaintiff resorts to a state writ, the state judge will follow federally-enunciated maritime rules.<sup>85</sup> Should the case be brought in the federal court, but not in admiralty, the court will likewise take its law from federal decisions; the *Erie* doctrine does not apply.<sup>86</sup>

Suppose the Khedivial Line had brought a diversity action seeking to enjoin the Union's commission of a maritime tort. (Observe that the Second Circuit specifically held that anti-injunction provisions of the Norris-La Guardia Act<sup>87</sup> did not apply; the Union's feelings about Nasser did not constitute "a labor dispute.")<sup>88</sup> Could the court then have granted an injunction? Clearly, yes. The court has subject matter jurisdiction and the remedy is one the court is competent to give. But what if any effect does the saving clause have? I think none. Either the matter is within the maritime jurisdiction or it is not. If it is (which the opinion unequivocally denies), then certainly the remedy involved is one to which the plaintiff is "otherwise," i.e., elsewhere, "entitled."<sup>89</sup> If the matter is outside the maritime jurisdiction, then it is neither "saved" nor "savable."<sup>90</sup> Regardless of the saving clause, the plaintiff seeking an injunction against a maritime tort, or the plaintiff (like the disappointed charterer, B) seeking specific performance, may proceed in the state court<sup>91</sup> or, if diversity requirements are met, in the federal court.

The saving clause issue is more significant in the next phase of the problem. What law does the non-admiralty court apply? If the matter were savably within the maritime jurisdiction, a federally-enunciated maritime law would control,<sup>92</sup> because a saving-clause case is still maritime. But if, as the *Khedivial Line* opinion holds, admiralty has no jurisdiction over an application to enjoin a maritime tort, then the controversy is no longer maritime. The state court may apply whatever substantive

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85. *Pope & Talbot Inc. v. Hawn*, 346 U.S. 406 (1953).

86. *Id.*

87. 29 U.S.C. §§ 101-15 (1964).

88. 278 F.2d at 50.

89. 28 U.S.C. § 1333 (1964).

90. G. GILMORE & C. BLACK, *supra* note 13, at 34.

91. *The Knapp, Stout, & Co. Company v. McCaffrey*, 177 U.S. 638, 644-47 (1900).

92. *Pope & Talbot Inc. v. Hawn*, 346 U.S. 406 (1953).

rule it chooses; the federal court (if the case were brought there on diversity grounds) would likewise apply state law.<sup>93</sup>

By denying the admiralty court power to grant barebones equitable relief to a suitor, *Khedivial Line*, like *Swift*, expells cases involving application for such relief from maritime jurisdiction entirely. *Khedivial Line* thus relegates to the control of the states a range of subjects which logic and common sense might well suggest should be considered nationally. If uniformity in marine matters has any viability at all, surely it requires that the scope of permissible interference with international cargo operations be defined by the federal courts, not the states.<sup>94</sup>

If the no-barebones-equity rule is to be changed, as indeed it ought to be, one effect will be an increase in the number of non-diversity cases triable in federal courts. All the equity cases which are presently outside the admiralty jurisdiction<sup>95</sup> will be swept within it. I mention this not from a morbid interest in docket-clogging, but rather to emphasize in an additional context the unlikelihood of Congress' having intended to allow the 1966 merger to work such a significant jurisdictional change, meaning a change in the types and numbers of cases the federal courts can hear. Moreover, by making people like the picketing sailors and longshoremen in *Khedivial Line* amenable to injunctions obtained by co-citizens, such a change would work a clear modification of a substantive right, in flat violation of the Congressional intent so clearly expressed in the Rules Revision Act.<sup>96</sup> Mere desirability of a change does authorize anticipating its arrival. I say again, before we can be sure that a federal court will grant barebones equitable relief in a case not involving diversity or a federal question, Congress or the Supreme Court will have to tell us so directly.

Of course, even if I am correct in believing that unification did not automatically install plenary equity power in admiralty, I may still be incorrect in regarding the deficiency as jurisdictional. It may be that a complaint by someone like the

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93. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

94. *But see Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310 (1955).

95. G. GILMORE & C. BLACK, *supra* note 13, at 34.

96. 28 U.S.C. §§ 2072, 2073 (1964).

yacht-charterer, seeking specific performance, is defective simply because it fails to state a claim upon which the court can grant relief.<sup>97</sup>

This assumes, I think, that the case is similar to a diversity action in which the plaintiff alleges merely that the defendant winked at him. The *B v. A* matter seems more comparable to a diversity case dismissed for lack of the jurisdictional amount. If a court is asked to hear a marine-related claim lacking not merely an admiralty jurisdictional basis, but any other type of jurisdictional basis, only in a punning sense may the case be said to fail to state a claim upon which relief can be granted. In every other respect, the case is simply beyond the court's power to adjudicate.

## II. THE PROPOSAL

### A. *The Statute*

It is of course much easier to criticize the present state of admiralty jurisdiction and remedies than to explain them; and it is even easier to criticize ameliorating legislation than to draft it. Still, candor compels the reluctant conclusion that the Admiralty portion of the recently-completed American Law Institute *Study of the Division of Jurisdiction Between State and Federal Courts*<sup>98</sup> is unnecessarily incomplete and innovative. In light of the serious need for a comprehensive rationalization of the tangled juridical seine, the Devil's Own Mess, the shortcomings in the Study are indeed cause for sadness.<sup>99</sup>

The ALI scheme may be briefly stated:

1. It deliberately avoids setting guidelines, except for a partial disclaimer of the locality test for torts.
2. The district courts have exclusive jurisdiction only in: (1) limitation proceedings; (2) actions against the United States under the Public Vessels and Suits in Admiralty Acts;<sup>100</sup> (3) actions *in rem* either arising under the general maritime law or to enforce Congressional or state-created maritime liens.
3. A maritime case commenced in a state court, if it meets diversity or "arising under" criteria, or if the United States is a

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97. FED. R. CIV. P. 12(b)(6).

98. ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS §§ 1316-19 at 34-37, 225-54 (1969) [hereinafter cited as ALI STUDY].

defendant, may be removed (presumably by the defendant). If the case is one of exclusive maritime jurisdiction, it may be removed "by any party."

4. Venue lies where "a substantial part" of the underlying transaction took place or where the defendant or his property may be found. *In personam* service of "process may be made nationwide; *in rem* attachment only in the district of suit. Inter-district transfers are liberally permitted.

5. In any action *in personam* for "money damage for personal injuries or death," except limitation proceedings and actions against the United States, either party may request a jury. In any other actions (presumably including *in rem* actions) in which diversity or arising-under requirements are met, the parties, it seems, may likewise request a jury.

Before proceeding to a critique of the Study, it may be helpful to emphasize some matters which it omits to cover, or covers inadequately:

1. There is no useful indication of the boundaries of admiralty jurisdiction, either in tort or in contract.

2. The "equity" problem is untouched.

3. The position of state law in the resolution of maritime disputes is insufficiently worked out.

4. The right to jury trial is likewise inadequately rationalized.

#### B. *Jurisdiction: The Fog Remains*

This bill of particulars, it is apparent, expresses my strong feeling that the entire question of the admiralty jurisdiction badly needs statutory appraisal, and that the ALI revision did not begin to fill that need. The decision to treat "admiralty and maritime cases in a separate chapter"<sup>101</sup> ought to have committed the Study to a comprehensive review of admiralty's jurisdictional contours. Instead, the Institute talked itself into

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99. With appropriate recognition to Note, *The Tangled Seine: A Survey of Maritime Personal Injury Remedies*, 57 YALE L.J. 243 (1947), and D. Currie, *Federalism and the Admiralty: "The Devil's Own Mess."* 1960 SUP. CT. REV. 158. Professor Currie does not share my disapproval of what the ALI has done to admiralty. D. Currie, *The Federal Courts and the American Law Institute* (Part II), 36 U. CHI. L. REV. 268, 286-89 (1969).

100. 46 U.S.C. §§ 781-90 (1964); 46 U.S.C. §§ 741-52.

101. ALI STUDY at 226.

simultaneously overstating the complexity of the task and underestimating its significance.

For example, faced with a physical situation which would sweep into the admiralty jurisdiction pleasure boats as well as cargo liners, the Institute gave up before it fairly began:

It would be difficult to draft the jurisdictional statute in such a way as to exclude pleasure boating, and problems would arise in deciding what is a pleasure boat and what the jurisdictional consequences are of a collision between a pleasure boat and a commercial vessel.<sup>102</sup>

The difficulty thus described seems more apparent than real. An admiralty-jurisdiction statute could well be drawn in tonnage terms ("no vessel smaller than X tons will be considered within the jurisdiction for tort purposes," or, if you prefer, "for any purpose"). The yacht-freighter collision could be disposed of equally simply by a clause placing any such collision within the admiralty jurisdiction. A precedent for making half-admiralty collisions wholly justiciable in admiralty already exists: the Extension of Admiralty Jurisdiction Act.<sup>103</sup>

The Study shrinks from tasks which are the essence of jurisdictional definition. For instance: "Whether a pleasure boat should be regarded as a vessel for purposes of the Limitation of Liability Act . . . is hardly the sort of question a jurisdictional study can appropriately resolve."<sup>104</sup> With all respect, I believe that this is *precisely* the sort of question a jurisdictional revision must answer. Deciding what constitutes a vessel delimits *pro tanto* the contours of the admiralty jurisdiction. It is what the courts do now; there is no reason why a statute cannot or should not take over the task. Obviously, questions will remain for judicial resolution. The impossibility of producing a dictionary should not preclude an attempt at formulating a working glossary.

Recognizing the messy state of the jurisdictional lines as they have been illogically drawn by the courts, the ALI Study dismisses the irrationality as "of little practical significance . . . since so long as it is understood, as it is, by those who build

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102. *Id.* at 227.

103. 46 U.S.C. § 740 (1964).

104. *Id.* at 227-28.

ships and those for whom they are built, they are able to safeguard their interests."<sup>105</sup> And a little later: "The gloss that time has created on the traditional words may be puzzling to the neophyte, but it is well understood by the specialized bar and experienced judges who try admiralty cases."<sup>106</sup>

This is an unfortunate attitude. The entire thrust of modern law reform, as exemplified by the Federal Rules, has been away from the mumbo-jumbo theory of law practice. Some years ago, the late Professor Brainerd Currie, chief moral architect of the Rules unification, wrote that "the admiralty practice needs to be modernized and to be stated so that all may know it . . . . [Through unification] the mystery of that practice will have been largely dissipated."<sup>107</sup>

The Institute's position is a direct refutation of this philosophy. Either the jurisdictional aspects of admiralty are confused and arcane, in which case we had best take every opportunity to clarify them; or they are not, in which case we ought to stop treating them like latter-day mysteries of the Bona Dea. To say that an important branch of federal jurisdiction is to be left in a statutory fog simply because clearing the fog is difficult and because experienced legal hands know how to navigate without radar is, I submit, unfortunate.

What compounds the poignancy of the Institute's decision is the Reporters' clear realization that the entire problem could be largely resolved by saying:

The admiralty and maritime jurisdiction extends to and includes all claims arising out of any maritime transaction or occurrence irrespective of where the claim arose or the damage or injury occurred.<sup>108</sup>

But they spurned this solution because the "additional language, while helping on old problems, might well give rise to new ones."<sup>109</sup>

This again seems to be responsibility-ducking. Any statute gives rise to problems of interpretation. But the self-rejected

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105. *Id.* at 228.

106. *Id.* at 230.

107. B. Currie, *Unification of the Civil and Admiralty Rules: Why and How*, 17 U. ME. L. REV. 1, 13, 14 (1965).

108. ALI STUDY 230.

109. *Id.* at 231.



proposal, if coupled with language to indicate that "maritime transaction or occurrence" includes any contract for sale, construction, or service involving equipment used in marine commerce, would greatly clarify the jurisdictional boundaries in both tort and contract.

Ironically, the Institute did not feel similarly restricted in altering traditional tort jurisdiction. By saying that the admiralty jurisdiction "does not include a claim merely because it arose on navigable waters,"<sup>110</sup> the Institute commendably eliminated what was left of the so-called strict locality test for tort jurisdiction.<sup>111</sup> Why did not the Institute similarly polish off some of the obfuscations in the contract jurisdiction? Even the "specialized bar" argument fails here. Presumably the most venerable member of the Maritime Law Association would be unable to explain why, for example, sales of vessels are outside the admiralty jurisdiction.

### C. *Equity: An Incomplete Assumption*

In light of the uncertainty which has persisted despite merger, any revision of admiralty jurisdiction ought fairly to have faced the equity question. The Commentary, while recognizing the problem as jurisdictional, goes on to say that "today there should be no difficulty in a federal court [*sic*] giving equitable relief in a case of admiralty or maritime jurisdiction."<sup>112</sup>

The only case cited to support this assumption is *Guillot v. Cenac Towing Co.*,<sup>113</sup> in which Judge John R. Brown (the most authoritative maritime analyst in all the federal judiciary) said: "In the Admiralty the Chancellor now goes to sea and has equitable reserves."<sup>114</sup> Because Judge Brown cited only *Swift* and because the question at bar concerned only the court's power to

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110. *Id.* at 34.

111. The change is desirable, although the cases the COMMENTARY relies on to indicate the courts' willingness to abandon the test are not so conclusive as might first appear. In both *McGuire v. City of New York*, 192 F. Supp. 866 (S.D.N.Y. 1961), and *Chapman v. City of Grosse Point Farms*, 385 F.2d 962 (6th Cir. 1967), the injury resulted from contact with the bottom (or an object affixed thereto); arguably, therefore, the injury was not within the admiralty jurisdiction. Compare *Hastings v. Mann*, 340 F.2d 910, 912 (4th Cir. 1965) (erroneously cited in ALI STUDY at 230 as involving "wharfage services") with *Davis v. City of Jacksonville Beach, Florida*, 251 F. Supp. 327, 328 (M.D. Fla. 1965) (swimmer struck by surfboard is within admiralty jurisdiction).

112. ALI STUDY at 227.

113. 366 F.2d 898 (5th Cir. 1966).

114. *Id.* at 904. For an even earlier (and equally colorful) assertion by Judge Brown

issue injunctions in a limitation proceeding, the opinion hardly stands for a declaration of plenary equity power in admiralty. The case, like the Institute's assumption itself, does not apply to the soured charter party case we considered earlier. Naturally, since the point was unnecessary to its decision, the court did not consider the problem of power to grant equitable relief when such relief is itself the entire controversy. The Institute on the other hand, did not consider it because the Study consciously avoided the kind of jurisdictional overhaul that would have been required before the problem could even be approached. In order to allow a district judge to grant specific performance in a breach of charter-party case, where money damages are inadequate, someone (Congress or Court) must say that whenever a case involves maritime property, or a maritime transaction of a genre normally within the admiralty jurisdiction (e.g., a charter parties), the court can grant equitable relief without first assuring itself that the controversy requiring such relief is the sort ordinarily justiciable in admiralty. In other words, despite unification, we still lack a binding announcement that in admiralty cases equity need no longer be ancillary. Judge Brown himself has come close to enunciating such a rule, in a case, oddly enough, decided in 1961, long before unification. *Hadjipateras v. Pacifica, S.A.*,<sup>115</sup> concerned a dispute over a contract for the managing agency of a vessel. In the course of deciding that the controversy came within the admiralty jurisdiction, Judge Brown had occasion to discuss *Archawski v. Hanioti*<sup>116</sup> in which the Supreme Court had upheld admiralty jurisdiction over an effort by passengers to recover from a shipowner, on an unjust-enrichment theory, moneys paid for passage on a voyage which had been abandoned. Writing for the Court, Justice Douglas had said: "[S]o long as the claim asserted arises out of a maritime contract, the admiralty court has jurisdiction over it."<sup>117</sup> But the context clearly indicated that the real basis for admiralty jurisdiction was the Court's belief "that duty to pay is often referable, as here, to the breach of a maritime contract."<sup>118</sup> Judge Brown, however, read *Archawski*

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of the same point, see *Compania Anonima Venezolana v. A.J. Perez Export Co.*, 303 F.2d 692, 699 (5th Cir. 1962); the case however, involved an equitable defense, which had always been permissible. See *Rice v. Charles Dreifus Co.*, 96 F.2d 80 (2d Cir. 1938).

115. 290 F.2d 679 (5th Cir. 1961).

116. 350 U.S. 532 (1956).

117. *Id.* at 535.

118. *Id.* at 534.

much more expansively: "The test there announced," he said, "was the broad one of the inherent maritime character of the underlying transaction."<sup>119</sup>

The Fifth Circuit, in a case decided just about the time merger became effective,<sup>120</sup> carried Judge Brown's reading of *Archawski* a step forward, rejecting the argument that a suit to reform a ship mortgage would not be within the admiralty.<sup>121</sup> Nonetheless, as if to illustrate the uncertainty which still permeates this branch of admiralty, the court relied only upon *Archawski*, *Hadjipateras*, and surprisingly enough, *Swift*,<sup>122</sup> in which Justice Frankfurter had carefully limited admiralty's equity powers to "subsidiary" relief.<sup>123</sup> The Fifth Circuit did not even cite, much less distinguish, Learned Hand's strong assertion in *Rice v. Charles Dreifus Co.*<sup>124</sup> "It is true, no doubt, that the admiralty has no jurisdiction over a libel to reform a written instrument."<sup>125</sup> With the authorities in such evident disarray, it seems incumbent upon a statutory jurisdictional revision to resolve the problem definitively. This the Institute has not done.

#### D. State Courts: The Gap Continues

Because the saving clause permits maritime cases to be tried in state courts, those courts are theoretically open to all the litigation triable originally in admiralty, except for cases involving *in rem* procedure to execute a maritime lien,<sup>126</sup> limitation of liability proceedings, actions against the United States, action for death on the high seas, and salvage.

As a practical matter, the kinds of cases most likely to be pursued in state courts are small cargo claims and personal injury actions. The state court is supposed to be particularly attractive to personal injury plaintiffs, because of the availability of jury trial. If the amount in controversy does not exceed \$10,000, or if the parties are co-citizens, a state court is indeed

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119. 290 F.2d at 704.

120. *Tropicana Shipping, S.A. v. Empresa Nacional "Elcano" de la Marina Mercante*, 366 F.2d 729 (5th Cir. 1966).

121. *Id.* at 732.

122. Together with a hornbook appreciation of *Swift*. G. GILMORE & C. BLACK, *supra* note 13, at 37-38.

123. 339 U.S. at 692; *see also* text accompanying note 74, *supra*:

124. 96 F.2d 80, 82 (2d Cir. 1938).

125. *Id.* at 82.

126. *The Moses Taylor*, 71 U.S. (4 Wall.) 411 (1866).

the only forum where a maritime personal injury case can today be tried to a jury.<sup>127</sup>

Generally, the state administration of these cases raises few problems. The judges defer to federal decisions;<sup>128</sup> in fact it is possible to argue that the administration of all these claims could be left entirely to the state courts, with provisions, if deemed necessary, for trial of diversity-plus-\$10,000 cases in the federal courts. The Supreme Court could enforce uniformity—most of the substantive rules are pretty well worked out by now—via certiorari, just as it does in the criminal procedure field. There is no constitutional obligation to permit the trial of personal injury cases in admiralty; even assuming that the jurisdiction in 1789 included such cases, if Congress or the Supreme Court can constitutionally enlarge the scope of admiralty jurisdiction, presumably one or the other can likewise diminish it.

The real federal-state admiralty rub concerns the narrow question of death in state territorial waters.<sup>129</sup> Because the general maritime law affords no recovery for wrongful death, and because the federal Death on the High Seas Act,<sup>130</sup> by its terms, takes effect only beyond a marine league (three miles) from shore, admiralty affords no remedy for wrongful death on territorial waters. To fill this gap, the federal courts adopted a "borrowing" theory. Admiralty, it was said, borrows the state's wrongful death statute and makes it a part of the maritime law as it were *pro hac vice*. Thus, the administrator of someone not a seaman wrongfully killed on state territorial waters can bring an action in the state court (with a jury), in admiralty (without a jury), or, if diversity exists, in the federal court (with a jury). In either of these cases, the court applies state law; unlike the usual saving-clause case involving personal injury, cases of death in territorial waters are not controlled by federal maritime law, unless the state has chosen to follow that law.<sup>131</sup>

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127. The Jones Act, 46 U.S.C. § 688 (1964), has been omitted from this discussion, because Jones Act cases are non-removable. 28 U.S.C. § 1445(a) (1964); *Pate v. Standard Dredging Corp.*, 193 F.2d 498 (5th Cir. 1952).

128. See Stevens, *Erie R.R. v. Tompkins and the Uniform General Maritime Law*, 64 HARV. L. REV. 246, 264 (1950).

129. The one and only best treatment of this difficult subject (largely written when its author was still in law school) is D. Currie, *Federalism and the Admiralty: "The Devil's Own Mess."* 1960 SUP. CT. REV. 158.

130. 46 U.S.C. § 761 (1964).

131. See *Goett v. Union Carbide Corp.*, 361 U.S. 340 (1960).

Death actions arising beyond a marine league, however, are fully controlled by federal law. The Death on the High Seas Act authorizes "a suit for damages in the district courts of the United States, in admiralty . . . ." <sup>132</sup> Although authorities read the statute as conferring exclusive federal admiralty jurisdiction (which, as a matter of English grammar it does, especially in light of the absence of any such remedy before passage of the Act), a few courts have held actions under the statute to be subject to the saving clause. <sup>133</sup>

The Institute has adopted the minority view. <sup>134</sup> This is unobjectionable. The state courts will continue to apply federal substantive law, as they have for ordinary personal injury actions. Unfortunately, however, the Institute stopped short of the really necessary reform; indeed, it took a step backward. Instead of explicitly extending the admiralty jurisdiction to cover death in territorial waters, it carefully explained that the mere fact that an injury arises on navigable waters no longer invokes the admiralty jurisdiction. Thus, we will continue to have an undesirable split: Administrators of deceased crew members will be able to recover under the Jones Act, even for death in territorial waters, but only if they can prove negligence. <sup>135</sup> They can also recover for unseaworthiness under the Death on the High Seas Act, provided the fatal injury occurred over a marine league out. <sup>136</sup> High seas death actions involving non-crew members will be tried in either federal or state court, generally to a jury, <sup>137</sup> with federal substantive law controlling. But the representative of a longshoreman and of any non-crew member killed within the three-mile limit will be remitted to the state law, although regardless of diversity or amount, the case can be tried to a jury. <sup>138</sup>

It has always seemed the height of irrationality to say that one standard applies if the defendant's conduct wrongfully kills a man, and another applies if the victim is merely injured. Yet that

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132. 46 U.S.C. § 761 (1964).

133. *Compare, e.g.,* *Bergeron v. K.L.M.*, 188 F. Supp. 594 (S.D.N.Y. 1960) *with e.g.,* *Safir v. C.G.T.*, 241 F. Supp. 501 (E.D.N.Y. 1965).

134. ALI STUDY at 237.

135. *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964).

136. *Chermesino v. Vessel Judith Lee Rose, Inc.*, 211 F. Supp. 36 (D. Mass. 1962), *aff'd*, 317 F.2d 927 (1st Cir.), *cert. denied*, 375 U.S. 931 (1963).

137. ALI STUDY at 37.

138. *Id.*

is what the present law invites, since under it, the federal court applying the state death statute must do so "*cum onere*," which latinism includes differing standards of care<sup>139</sup> and presumably dollar limitations. The Institute would have served its aim much better by writing into Section 1316 a clause explicitly extending coverage under the Death on the High Seas Act to territorial waters and making jurisdiction concurrent. The argument that the Institute was engaged in drafting jurisdictional legislation, not in amending a remedial statute, does not withstand scrutiny. By making jurisdiction concurrent in death cases arising on the high seas, the Institute has already committed itself to amending the Act. It should have finished the job properly, making all death cases arising on any navigable waters triable by federal substantive rules before a jury.

An unnecessarily complicated arrangement for death cases is one deficiency in the Institute's treatment of the state courts' role in the administration of maritime cases. Another is its curious provision concerning removal of cases from the state courts to the federal courts. Logically, the concept of removal is designed to afford a defendant access to a federal court, despite the in-state plaintiff's efforts to hold the litigation in the state court system.<sup>140</sup>

But before a matter can be removed *from* a state court, it must have been properly brought *in* that court. The federal court's jurisdiction over removed cases is wholly derivative: if the state court is without jurisdiction, so too, is the federal court.<sup>141</sup> The Institute's proposal in part abandons both logic and principle. It permits removal of maritime disputes when an independent basis for federal jurisdiction exists. This merely declares present law;<sup>142</sup> there can be no serious objection. But section 1317(b) authorizes either plaintiff or defendant, at any time, to remove to the district court an action within the exclusive federal maritime jurisdiction.<sup>143</sup> If plaintiff commences a limitation of liability proceeding, or an action against the

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139. *Hess v. United States*, 361 U.S. 314 (1960).

140. See generally 1A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 0.157[7], at 262-63 (2d ed. 1965).

141. C. WRIGHT, FEDERAL COURTS 112 (1963).

142. 1A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 0.167[3.-3], at 945 (2d ed. 1965).

143. Allowing a plaintiff the right of removal reverts to an abandoned experiment.

United States, or any kind of *in rem* proceeding, all of them actions over which the state courts ordinarily do not have jurisdiction, not merely the defendant, but the plaintiff himself, may remove. Because by definition none of these actions may properly be brought in state courts, the Institute's proposal would abolish the present derivative-jurisdiction rule. If that were the only change, the section would not require comment. But the statute goes considerably farther.

Of the three exclusive-yet-removable classes, the statute works the least change with respect to claims against the government. These can and should be tried in federal court. However, the statute would permit an action to be commenced in the state court (which cannot be done at present) and then removed *by the plaintiff*—the party responsible for the improper choice of courts. Why should the United States be liable to suit in any court but that which Congress has specified in the legislation authorizing suits in the first place?<sup>144</sup>

At most, however, this is basically an argument of sovereign's convenience; perhaps we ought not to worry too much about it. The same might be said concerning the alteration the revision would cause in the presently existing scheme of limitation. The statute and Rules<sup>145</sup> are geared to a federal-court proceeding, but there seems to be no reason why the action could not be commenced in a state court (if the state court were willing to entertain it) and then removed to the federal court. In many limitation situations, state courts today are permitted to adjudicate cases falling within the Limitation Act.<sup>146</sup>

The proposal for treatment of state-commenced *in rem* proceedings, however, seriously affects a hitherto settled doctrine of admiralty law. For a century, the federal courts have insisted that no state may afford *in rem* admiralty relief.<sup>147</sup> Any state court seeking to enforce a state-created maritime lien by means

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<sup>144</sup>During the period from 1875 to 1887 the statute governing removals, 18 Stat. 470 specifically gave to 'either party' to the suit the privilege of removal." *Shamrock Oil & Gas Co. v. Sheets*, 313 U.S. 100, 104-05 (1941).

<sup>144</sup>. 46 U.S.C. §§ 742, 782 (1964).

<sup>145</sup>. 46 U.S.C. § 185 (1964); F.R.D. R. Civ. P. Supplemental Rule F.

<sup>146</sup>. *Ex Parte Green*, 286 U.S. 437 (1932); *Lake Tankers Corp. v. Henn*, 354 U.S.

<sup>147</sup> (1957); *Petition of Trawler Weymouth, Inc.*, 223 F. Supp. 161 (D. Mass. 1963).

<sup>147</sup>. *The Moses Taylor*, 71 U.S. (4 Wall.) 411 (1866).

of a state-created *in rem* procedure would be obliged "to dismiss the action for want of jurisdiction."<sup>148</sup>

The lack of jurisdiction may or may not be of constitutional proportions; for present purposes, it does not matter. Assuming that the lack of jurisdiction is merely statutory—that is, that an *in rem* state proceeding is not one of those "common law remedies" saved to suitors, and hence is reserved to the federal courts simply by the language of the jurisdictional statute<sup>149</sup> (either the original Judiciary Act<sup>150</sup> or the revision<sup>151</sup>)—the Institute has nonetheless hoist itself by its own legislative petard. In one section it codifies the federally-exclusive nature of *in rem* proceedings, whether "arising under the general maritime law or to enforce maritime liens given by an Act of Congress or by a statute of a state."<sup>152</sup> If this intends, as it does, to follow the line that the courts have developed in construing the saving clause,<sup>153</sup> then section 1317(b) controverts its purpose; it permits a state not merely to create a maritime lien, but to enforce it as well.

Section 1317(b) has other faults. (1) By permitting the plaintiff to effect removal, it enables him to make use of any divergent state *in rem* procedure and still, as I have just indicated, avoid dismissal of his improperly-brought action. (2) By not setting a time limit for removal, it distinguishes, without apparent justification, a class of admiralty cases from any other "civil action or proceeding," which (a) may be removed only by the defendant and (b) cannot be removed later than thirty days after the defendant receives a pleading indicating that the case is in fact removable.<sup>154</sup> (By treating some admiralty cases as something other than "civil action(s) or proceeding(s)," the Institute invites more of the verbal confusion which I have discussed earlier.<sup>155</sup>) (3) By allowing removal at the plaintiff's pleasure, the statute encourages the knowledgeable maritime lawyer representing a potential plaintiff to gamble, if he believes

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148. *Id.*

149. *Id.* at 431.

150. The Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 77.

151. 28 U.S.C. § 1333 (1964).

152. *ALI STUDY* at 34.

153. *Id.*

154. Compare 28 U.S.C. § 1446(b) (1964) with *ALI STUDY* at 35.

155. See text accompanying notes 55-66 *supra*.



state procedure more favorable to his client; he commences his *in rem* action in the state court, running it as far as he can until his perhaps less-sophisticated opponent wakes up. Then he merely removes to the district court and continues without losing a figurative stroke.

The statute text nowhere indicates that the privilege of removal ever expires, or that it has any connection with the *bona fides* of the plaintiff's attorney. Originally, the section explicitly permitted removal "at any time."<sup>156</sup> Elimination of that phrase, without replacement, has only emphasized the problem; if the Institute meant to make section 1316(b) subject to the requirements of the general removal statute<sup>157</sup> it should have inserted specific language to that effect. The text of section 1316(b) likewise does not limit itself to mistaken (as opposed to intentional) mis-commencement. The appended Note (but not the Commentary) indicates that the section applies "if the action is mistakenly brought in a state court." The statute, however, which is the authority, contains no such limitation. At the Institute's Annual Meeting in May 1968, it was suggested from the floor that explicit language be inserted to avoid confusion. The Reporters replied that such a change would in practice require a court to conduct an impossibly difficult investigation of *scienter*. Inasmuch as section 1386(a) (3), dealing with the raising of jurisdictional issues, refers to "conscious concealment of a known jurisdictional defect,"<sup>158</sup> the apprehension of difficulty appears either unsubstantial or inconsistent.

#### E. *Juries: Who Has the Right?*

Existing rules on availability of a federal jury right in maritime cases are indeed "fortuitous and irrational."<sup>159</sup>

That Congress could rationalize the problem, none can doubt. There does not seem to be any constitutional right to trial by jury in maritime matters. The available evidence indicates that at the time the Constitution was framed, admiralty matters were judge-tryed by choice and convenience, rather than on

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156. ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, TENTATIVE DRAFT NO. 6, 20 (1968).

157. 28 U.S.C. §§ 1441-50 (1964).

158. ALI STUDY at 64-65.

159. *Id.* at 250.

principle. State experience with juries in admiralty had uniformly resulted in a return to the pre-Revolutionary practice.<sup>160</sup> While venerating the jury as an institution, the current legal temper seemed willing to exempt maritime matters from the jury requirement. Thus the Massachusetts Constitution (1780), in preserving the jury right generally, added: "and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and such as relate to mariners' wages, the legislature shall hereafter find it necessary to alter it."<sup>161</sup>

The Institute's decision to enlarge the jury right seems wise in principle, but in application as fortuitous and irrational as the system it seeks to replace. It denies the jury right in any but *in personam* actions for personal injury or death. Why stop there? The argument that "one cannot contemplate with equanimity the trial of [collision] cases before a common-law jury"<sup>162</sup> does not persuade. Civil antitrust and assorted disaster cases (air or land) produce evidentiary quagmires considerably more complex than the ordinary collision case; yet they are regularly jury-tried.<sup>163</sup> Moreover, section 1319 will still allow a jury in any collision-injury case not involving limitation. The other argument against affording a jury right is simply that it is not needed, because maritime litigants in non-injury situations are happy without a jury.<sup>164</sup> The general contentment with a judge trial, however, is not a reason for denying the jury right entirely. Those litigants who do not desire juries will continue to waive them; those who request them should be entitled to have them.

So long as the Institute is restating the jury-admiralty relation, and permitting juries in injury and death cases, it is not clear why limitation cases, and maintenance cases not involving personal injury (as for sickness) should not be jury-tried. Although the order of proof is somewhat altered, the issues in a

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160. C. UBBELOHDE, *THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION* 200-01 (1960).

161. MASS. CONST. art. XV (1780).

162. Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1, 60 n.329 (1959). The reporters originally proposed that the jury right extend even to actions *in rem*, ALI STUDY, TENTATIVE DRAFT NO. 6, 22, a disposition which one court has suggested is permissible even under existing law. *Haskins v. Point Towing Co.*, 395 F.2d 737, 741 (3d Cir. 1968).

163. See 1967 DIR. ADM. OFF. U.S. COURTS, ANN. REP. at 237-38 and 1968 DIR. ADM. OFF. U.S. COURTS, ANN. REP. at 234 for numerous examples of lengthy jury trials.

164. Currie, *supra* note 162, at 60.

limitation proceeding are well-adapted to jury trial. Such familiar questions as negligence, agency (called "privity" in the limitation context), causation, and damages are jury-tried in other contexts all the time. What policy justifies trying a 50-death air crash to a jury, but a two-death motorboat explosion to a judge? Similarly, the typical maintenance-for-sickness case projects issues well within a jury's competence: Did the seaman become ill in the service of the vessel? When did he reach maximum medical benefits? The latter inquiry, indeed, plays a part in *every* maintenance case, including those which the Institute proposal would allow the jury to determine. I tend to favor jury trial of all injury, death, or maintenance cases; I only argue now that however such cases are to be tried, the same trier ought to determine all of them.

The Institute's proposal seems vulnerable on another point of logic. It permits the defendant, as well as the plaintiff, to demand a jury. Now the unspoken assumption in any effort to enlarge the jury right in personal injury cases is that the effort favors plaintiffs, rather than defendants. Generally the assumption is valid, and plaintiffs will be the chief beneficiaries of an expanded jury right. But what of the situation which may develop in a clogged-docket district, where a jury-waived case will reach trial months, perhaps even years, earlier than it would if it were on the jury list?<sup>165</sup> Plaintiffs in those circumstances frequently opt for juryless trials. The Jones Act specifically preserves to the plaintiff the election to proceed in admiralty.<sup>166</sup> Suppose a seaman, relying on the Act, commences an admiralty action, only to find the defendant claiming a jury under section 1319. How is the district court to effectuate the policy of encouraging the plaintiff's choice? How, for that matter, is the court to reconcile the policy of the Jones Act with the policy of section 1319?

A final weakness in the jury provision lies in the effect it will have on the business of the district courts. The commentary

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165. 1968 DIR. ADM. OFF. U.S. COURTS, ANN. REP. at 236 shows that the median interval from issue to trial in non-jury cases was ten months; in jury trials, fifteen months. In the Eastern District of Pennsylvania the respective figures were one month and 40 months. Oddly enough, in the Southern District of New York, the figures were 37 months and 36 months.

166. 46 U.S.C. § 688 (1964). FED. R. CIV. P. 9(h) and 38(e) preserve the right of any maritime plaintiff to a non-jury trial. *Sanderlin v. Old Dominion Stevedoring Corp.*, 281 F. Supp. 1015, 1017 (E.D. Va. 1968).

cites the estimate of an anonymous federal judge "with much experience in these matters . . . that 95% of the cases in which a right to trial by jury is given by this section are presently triable to a jury."<sup>167</sup> If his Honor meant "presently triable to a jury in a federal court," I believe he may have overlooked the following classes of cases, all of which are now not so triable, but which would be heard by a jury under the Institute disposition: all actions under the Death on the High Seas Act; all actions under state death statutes where the parties are co-citizens; all actions for maritime personal injury (except seamen's actions), regardless of the amount in controversy—the passenger slip-and-fall cases, for example; all actions for maritime personal injury between co-citizens—as motorboat accidents not involving limitations. That seems a large block of jury trials to be throwing into the federal courts. Moreover, the Institute, in another part of its Revision,<sup>168</sup> abolished federal diversity jurisdiction over suits commenced by in-state plaintiffs. Thus local longshoremens, if they want juries, would have to go to the state courts, were it not for section 1319, which completely restores diversity jurisdiction as to them. This section not only restores jurisdiction, but substantially enlarges it, since absent the Study, longshoremens with claims for less than the jurisdictional amount (the large majority of such actions, if Bostonian experience is at all typical) could never obtain federal juries at all. Because most of them want juries, they generally bring their actions in the state courts at present, rather than in juryless admiralty. Section 1319 can be expected to change that process, and hence put even more jury cases onto federal dockets.<sup>169</sup>

### III. CONCLUSION

The maritime laws and statutes of the United States are in such a confused state that rationalization and restatement are desperately needed. Analytically and historically, a revision of the federal jurisdictional statutes offers an ideal arena for completion of this essential task. Under all the circumstances of

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167. ALI STUDY at 254.

168. *Id.* at 12.

169. In criticizing this aspect of Section 1319, I am, once again, not urging either the broadening or the retracting of the jury right. One ought here to note, however, that the Institute's proposal if enacted would permit the plaintiff in any personal injury action both to sue the defendant wherever he can find him (Section 1318), in contrast with the strict venue requirements for non-admiralty cases, 28 U.S.C. § 1391 (1964), and to have a jury.

its production, the American Law Institute's Study has let admiralty down badly. Incomplete in its jurisdictional definitions; unjustifiably casual in assessing the effect of the 1966 rules unification; inadequate in its treatment of the federal-state relation; and unnecessarily inconsistent in its resolution of the jury question, the Study leaves all the pre-existing admiralty questions at best only partly answered, at worst made more difficult.