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PROPOSED DISCIPLINE FOR A PROCEDURAL PROBLEM CHILD: REALLOCATION OF ADMIRALTY TORT AND COMPENSATION JURISDICTION BETWEEN FEDERAL AND STATE COURTS

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I. INTRODUCTION

In its current study of the division of jurisdiction between the federal and state court systems, conducted under mandate from Chief Justice Earl Warren, the American Law Institute tackles the task of disciplining one of the leading procedural problem children in American Law—admiralty tort and compensation jurisdiction. The present division of jurisdiction in admiralty tort and compensation law¹ is so uncertain and unmanageable that it has required the development of a specialized bar to administer it. The Institute's proposals for revision in this area do not call for any sweeping changes in the present division of jurisdiction, but they do recommend certain changes in the allocation of cases between the state courts and the federal courts. In this study we shall examine the present state of admiralty tort and compensation jurisdiction, the Institute's proposals and the cures they offer, and the alternative remedies that may be at hand.

II. PRESENT ALLOCATION OF JURISDICTION

Admiralty tort and compensation jurisdiction presently is divided between federal and state courts in an irrational pattern that has devel-

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1. Admiralty Tort and compensation law as used herein encompasses remedies of seamen, maritime workers and others for damages resulting from personal injury or death within maritime jurisdiction.

oped through inconsistent grants of jurisdiction by Congress and uncertain reallocations and definitions of these grants by the courts. Congress' jurisdiction over admiralty matters is derived from Article III, Section 2 of the Constitution, which provides in part: ". . . the judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction"

The first Congress, acting under this grant of power, gave the lower federal courts original jurisdiction over admiralty and maritime actions. The grant was not exclusive; Congress included a "saving to suitors" clause which reserved to admiralty claimants the right to pursue state remedies in the state courts. This basic grant of jurisdiction has changed little since 1789 and presently is embodied in Section 1333 of Title 28 of the United States Code. The section reads in part:

The district courts shall have original jurisdiction, exclusive of the courts of the states, of:

- (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.²

The first Congress also established the concept of diversity jurisdiction, which grants a party the right to seek enforcement in a federal court of a claim arising under state law if (1) one of the parties is a citizen of another state, and (2) the amount in controversy exceeds an amount fixed by statute, now set at \$10,000.³ Thus when the federal lower court system went into operation, this was the division of jurisdiction of admiralty tort and compensation claims:

- (1) Claims seeking enforcement of the traditional admiralty remedies⁴ could be brought in federal court, on the "admiralty" side, for trial without a jury.

- (2) Any remedy that the common law was competent to give, including state tort and wrongful death actions, could be brought in state court under the "saving to suitors" clause; actions on these remedies could also be commenced on the "law" side of federal court, if the requisites of diversity jurisdiction were present. A case reaching the "law" side of the federal court, unlike a case reaching the "admiralty" side of the same court, was triable to a jury.⁵

2. 28 U.S.C. § 1333(a) (1964).

3. 28 U.S.C. § 1332(a) (1964).

4. These remedies are unseaworthiness, under which a seaman can recover damages for injuries caused by the "unseaworthiness" of the vessel, and maintenance and cure, an early kind of workmen's compensation that covers seamen who are injured or become ill on a voyage.

5. The reason for the distinction is that by tradition trial by jury is foreign to admiralty. The origin of the tradition is unknown. See Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROB. 3, 7, n.29 (1948). The tradition is not surviving. In *Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963), the Supreme Court held that a maintenance and cure claim, which arises in admiralty, must be sub-

These traditional remedies and the allocation of jurisdiction over them have remained basically unchanged for almost 200 years. In 1920, Congress enacted the Jones Act,⁶ the first of several acts designed to broaden the tort and compensation remedies of maritime workers. The Act gives a seaman a cause of action against his employer for damages resulting from personal injuries sustained in the course of his employment; the remedy is based upon a showing of negligence rather than the unseaworthiness of the vessel. Jurisdiction over Jones Act cases is concurrent between state and federal courts, without the right of removal. Then in 1920 Congress passed the Death on the High Seas Act⁷ for the purpose of providing an admiralty remedy for wrongful death occurring on the high seas. Prior to the Act, survivors of a person whose death resulted from wrongful act on the high seas had no remedy at law or in admiralty unless the cause came within the coverage of a state wrongful death statute. In the Death on the High Seas Act, Congress failed to state whether the remedy was intended to be exclusive. Some federal courts have since held that the Act does not exclude the application by a state court of any applicable state wrongful death statute, with the result that jurisdiction over deaths occurring on the high seas is sometimes concurrent.⁸ In 1927, in an effort to grant compensation coverage to harbor workers injured on navigable waters, Congress passed the Longshoreman's and Harbor Worker's Act.⁹ Under the Act, jurisdiction sometimes depends upon the choice of the plaintiff, and sometimes upon a finding of fact made during trial on the merits.

The courts have held that admiralty jurisdiction extends only to navigable waters but have vacillated in their decisions as to what constitutes navigable waters. Navigable waters may include a drydock and a gangplank but exclude, sometimes, a pier and wharf; they may include a ship being repaired but exclude a ship being built, even though the ship is launched and afloat. Jurisdiction in this field, however, is not always limited to navigable waters; since the Jones Act was enacted under both the commerce power and the admiralty power it can be applied to cover injuries sustained by "seamen" on dry land.¹⁰ Here, again, the courts

mitted to a jury when it is joined with a Jones Act claim, which is a statutory remedy triable to a jury. The Fitzgerald doctrine has since been extended by lower federal courts. See p. 00 *infra*. An express repudiation of the tradition was made recently in *Close v. Calmar Steamship Corp.*, 44 F.R.D. 398, 407 (E.D. Pa. 1968), a case in which the court said the tradition was "no longer supported by viable policy considerations."

6. 46 U.S.C. § 688 (1964).

7. 46 U.S.C. § 761 *et seq.* (1964).

8. The results reached by some courts that embrace the theory that the act is not exclusive indicate the need for a revision of the substantive law. One federal court has ruled that although the act excludes recovery for damages for pain and suffering, the remedies provided by the act are not exclusive, and a claimant could recover damages for pain and suffering under a state statute after first recovering damages for pecuniary loss under the Death on the High Seas Act. *Petition of Gulf Oil Corp.*, 172 F. Supp. 911 (S.D.N.Y. 1959).

9. 33 U.S.C. § 901 *et seq.* (1964).

10. *Swanson v. Marra Bros.*, 328 U.S. 1 (1946).

have been unable to deliver a definition of "seaman" that sufficiently forewarns a potential victim or a litigant of his rights, if any, under the Act.

The law, thusly developed, appears to be that sometimes there is concurrent jurisdiction and sometimes the federal courts have exclusive jurisdiction over acts that sometimes must occur on navigable waters and sometimes may occur on dry land.

III. GOAL OF THE REVISION

An assessment of the Institute's proposals and any alternative choices cannot intelligently be made without an understanding of the purpose of the revision. In seeking the assistance of the Institute, Chief Justice Warren cited the "constant upward trend" in the volume of federal cases, and set as the goal of any revision "a proper jurisdictional balance between the Federal and State court systems, assigning to each system those cases most appropriate in the light of the basic principles of federalism."¹¹

Thus the goal of the Institute's revision must be to allocate to the courts of each sovereign those cases in which the sovereign has a vital interest; it is best summed up by Professor Charles A. Wright, one of the Institute's reporters, in these words:

The goal must be not to get cases out of federal courts, but to get out of federal courts the cases that do not belong there. . . .¹²

With this goal in mind, let us examine the Institute's proposals.

IV. PROPOSALS OF THE AMERICAN LAW INSTITUTE

In the area of admiralty tort and compensation jurisdiction, the Institute proposes to achieve the proper jurisdictional balance between the state and federal systems by adopting a plan of concurrent jurisdiction. Proposed Article 1316(b)¹³ grants exclusive jurisdiction to federal courts in maritime actions in rem and in actions involving the limitation of a shipowner's liability.¹⁴ Jurisdiction over all other maritime actions, including unseaworthiness, maintenance and cure, Jones Act cases, and actions under the Death on the High Seas and Longshoreman's and Harbor Worker's acts, is made concurrent between federal and state courts. Proposed Sections 1330(1) and 1301(f) prohibit federal courts

11. ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, Official Draft, Part I, Foreword (Official Draft 1965).

12. Wright, *The Federal Courts—A Century After Appomattox*, 52 A.B.A.J. 742, 746 (1966).

13. ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1316 (Tent. Draft. No. 6, 1968). All references in the text to the proposed section are to this draft.

14. 46 U.S.C. §§ 183-89 (1964).

from adjudicating state workmen's compensation claims.¹⁵ Removal to federal court is prohibited in Jones Act cases; all other actions are removable, under proposed Section 1317(a), if diversity jurisdiction is present.

The proposals, by the Institute's own admission, make no substantial reallocation of cases, but if adopted will remove many of the procedural problems in the field. The proposals also have shortcomings. The major one is the failure to adopt a plan of exclusive state jurisdiction over those admiralty matters which are peculiarly within the interest of the states.

V. THE CASE FOR EXCLUSIVE STATE JURISDICTION

The traditional pattern of concurrent jurisdiction in admiralty tort and compensation law, and the Institute's reaffirmation of the pattern, forces one to consider the case for exclusive jurisdiction, for if it is conceded that either of two court systems can handle a field of law, one must next ask if one of the two can handle it better than the other, or can handle it better than both of them together. Logic thus impels us to weigh the Institute's proposal for concurrent jurisdiction in the light of exclusive state or exclusive federal jurisdiction.

The main thrust of the arguments for exclusive federal jurisdiction is that admiralty law is federal law and best can be applied by federal courts. Proponents of exclusive federal jurisdiction also cite the fact that most admiralty tort and compensation cases are being litigated in federal courts under the existing division of jurisdiction. Justice Brennan, in his dissenting opinion in *Romero v. International Terminal Operating Co.*,¹⁶ points out that during a recent five-year period only about 150 admiralty cases were brought in the state courts. Some of the commentators also urge a unification of the federal and state court systems, which, presumably, would leave us with only one system—a federal one.

The contention that federal courts should exercise exclusive jurisdiction over admiralty tort and compensation matters because the law that is being applied is federal law has questionable merit. With the exception of maintenance and cure and unseaworthiness, the federal law that is being applied is neither unique nor a novel creature of the federal government. The Jones Act and the Death on the High Seas Act basically represent extensions to admiralty of common law negligence and wrongful death remedies that were developed under state law and that would otherwise be available to the claimant if the action had occurred on dry land. The Longshoreman's and Harbor Worker's Act was patterned after the New York workmen's compensation statute and was

15. The prohibition was removed from the revision by the American Law Institute at its 1968 Annual Meeting, however.

16. 358 U.S. 354 (1959).

adopted by Congress after two unsuccessful attempts by that body to bring longshoremen and harbor workers within the coverage of state compensation acts.¹⁷ Admiralty tort and compensation law is federal law, but most of it is, in reality, only the extension by the federal government of state-developed law to those areas outside the jurisdiction of the states. In view of these considerations, the argument that federal courts should be granted exclusive jurisdiction because admiralty tort and compensation law is federal law loses much of its force.

The small volume of admiralty cases filed in state courts in recent years does not indicate necessarily that claimants prefer to litigate these types of claims in federal court. Since federal courts have jurisdiction over all admiralty tort and compensation remedies, but state courts have jurisdiction only over some of these remedies, attorneys normally can be expected to choose the federal forum and avoid any problems of jurisdiction.

Although an argument for exclusive federal jurisdiction can be made, a study of the major considerations tips the scales against exclusive federal jurisdiction and toward exclusive state jurisdiction. Here, briefly, are the major arguments in the case for exclusive state jurisdiction:

A. *The State Courts are Competent to Handle these Cases*

There should be no question as to the competency of the state courts. Congress in its first allocation of admiralty jurisdiction reserved concurrent jurisdiction to the states, and subsequently, in the Jones Act, granted more admiralty jurisdiction to state courts. The broad grant of concurrent jurisdiction by the American Law Institute in its proposed revision is an acknowledgement by it that the state courts are capable of handling all of these kinds of admiralty matters. A similar view is held by many commentators. Professor Charles L. Black, Jr., sums up the case for state court competence thusly:

The common law courts are thoroughly used to such cases, and handling them may be looked on as part of the expertise of the common law bench and bar, as it could not be expected to be of admiralty. Under the saving clause and the Jones Act, the common law courts have experienced no difficulty in handling maritime injury cases, and there is no reason to anticipate that the trouble would increase if all of them went into state courts. . . .¹⁸

17. 40 Stat. 395 (1917); 42 Stat. 634 (1922). Both statutes were declared unconstitutional as improper delegations of legislative power. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924).

18. Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259, 278 (1950).

B. *The Federal Court System is Becoming Increasingly Unable to Handle these Cases*

As the areas of federal concern are expanded by Congress, the federal court system is becoming hopelessly overburdened.¹⁹ Admittedly no great volume of admiralty tort and compensation cases is escaping the federal system at this time, but no reallocation of jurisdiction should place any additional case load on the federal system when the federal system is crowded and where, as we shall see, the federal government has no crucial interest in the substance of the additional case load. Proponents of exclusive federal jurisdiction, or of concurrent jurisdiction, argue that the state court systems are also overburdened. That assumption, even if true, does not diminish the force of the argument for exclusive state jurisdiction. Even though some state court systems also may be overburdened, it is reasonable to assume that as the federal government continues to expand its regulatory powers into traditional state law areas, the burden on state courts will either decrease or at least will not increase at a rate as great as that of the federal system.²⁰ Even assuming that the federal dockets will not increase in the future at a rate faster than that of state dockets, it would appear more logical to impose the burden of increasing the judicial personnel and facilities needed to handle admiralty tort and compensation claims upon those states whose residents, either as shipowners or as maritime workers, derive direct benefit from prompt disposition of these types of cases.

C. *The States Have a Greater Interest in these Cases than does the Federal Government*

Federal courts were created and continue in existence to handle those cases in which there is a unique federal interest²¹—those cases that a state court can not be expected to handle properly in view of the uniqueness of the federal interest and the possible conflict between that interest and the interests of the state. Proper promotion of federal policy demands that federal courts handle cases involving civil rights, due process, anti-trust violations and like matters of unique and compelling federal interest. Because of the historical alliance between admiralty and the Federal Government, one may assume that there is a unique federal in-

19. The total caseload in the U.S. courts of appeal increased from 3,899 in 1960 to 6,548 in 1966, and is expected to increase to almost 11,000 by 1975. Cases under submission for more than three months in the courts of appeal increased almost 400% from 1960 to 1966. SENATE SUBCOMMITTEE ON IMPROVEMENT IN JUDICIAL MACHINERY, 90th Cong., 1st Sess., *CRISIS IN THE FEDERAL COURTS*, 74 (Comm. Print 1967).

20. From 1960 to 1965 the number of civil cases commenced in federal district courts increased 14 per cent, and the backlog increased 21 per cent. See Wright, *The Federal Courts—A Century After Appomattox*, *supra* note 12 at 742. For further discussion of the present state of federal court dockets, see Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 *TEX. L. REV.* 949 (1964).

21. See Wright, *The Federal Courts—A Century After Appomattox*, *supra* note 12 at 742.

terest in tort and compensation remedies for seamen and maritime workers. Such is not the case, however. The Federal Government may have had a special interest in maritime workers in the early days of the Republic; indeed, one may speculate how strong this interest was in 1783, when the nation consisted of thirteen separate states that together formed the only significant nation in the Western Hemisphere. There were no railroads, airplanes, telephones or telegraph, and no automobiles or developed road systems. Most of the communication, transportation, and trade between the states and with foreign nations was over navigable waters. The American navy was the bulwark in national defense. In 1789 there was a unique federal interest in seamen and maritime workers, but that interest has evaporated with the rise of the jet age and the decline of the importance of maritime shipping to American commerce and national defense.²²

If there is any federal interest in admiralty today, it is in the supervision of the commercial law of admiralty and the regulation of ships in their use of American ports. Since a court must assess blame in a collision of ocean-going vessels or the seizure of a ship which is in international commerce, it may be argued that these types of cases are of peculiar federal interest. There are also limited instances in which admiralty tort and compensation matters might merit the case-by-case supervision of a federal trial court. Where the Federal Government, a state other than the state of the forum, or a foreign defendant is a party, comity among sovereigns might impel jurisdiction in a federal tribunal. Comity among states also makes it desirable to grant exclusive jurisdiction to federal courts over limitation of liability actions, as such actions may make it necessary for the court in which they are filed to enjoin other courts from proceeding with other causes. It may also be argued that federal interest in the free flow of maritime commerce between states and with foreign nations is such that maritime liens and other maritime actions in rem should be enforced only under the eye of a federal court.²³ Except in these limited instances, in which jurisdiction perhaps should be made exclusive in the federal courts, there is little federal interest in admiralty tort and compensation cases; there is certainly no

22. During the period of the early development of admiralty law, maritime workers assumed in law the status of "wards" of admiralty. This judicial attitude apparently was based upon considerations of public defense and the character of seamen. "Special laws for seamen not only protected the childlike and improvident seaman (who is usually 'poor and friendless' and apt to acquire 'habits of gross indulgence, carelessness and improvidence'), but served 'the great public policy of preserving this important class of citizens for the commercial service and maritime defense of the nation.'" G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 253 (1957). See also Lovitt, *Things are Seldom What They Seem: The Jolly Little Wards of the Admiralty*, 46 A.B.A.J. 171 (1960).

23. Admiralty grants seamen liens against their vessels as security for their wages and for compensation. Such liens are no longer necessary where the shipowner is an American citizen, and should be abolished in those situations. The liens will be needed in those instances where the shipowner is a foreigner, but since the proposal for exclusive state jurisdiction would allocate those causes to the federal courts, no problem would arise.

federal interest in these cases sufficient to merit case-by-case regulation by overburdened federal trial courts. The federal interest, if any, in these cases is confined to maintaining uniformity and seeing that the federal policies and protections are carried out.

One cannot conclude that there is any unique federal interest in tort and compensation claims of maritime workers because maritime shipping is a major method of interstate and foreign travel and transportation. If such a connection made the interest vital, then it would be logical to assume that a similar interest would exist as to workers in the air transport or trucking industries, either of which involves international or interstate commerce equal to that of the maritime industry. Yet Congress has not chosen to add to or regulate the tort and compensation remedies of air transport or trucking employees.²⁴

If there is a unique interest of a sovereign in these kinds of cases, such an interest rests with the state in which the maritime accident occurs, or with the state in which the victim is domiciled; in most instances, the two will be the same. Deterrence is one of the major goals of accident law, and the state of the place of the accident has a strong interest in the day-to-day supervision of litigation involving industrial or other accidents, whether on dry land or on water. The state of the domicile of the victim has a unique interest in the speedy and proper disposition of the victim's cause, for it is the sovereign in which the claimant, his family, his creditors, and, many times, the defendant reside.

Concurrent jurisdiction is in itself an argument for exclusive state jurisdiction. If any judicial expertise is needed for day-to-day supervision of admiralty tort and compensation cases, then concurrent jurisdiction will divide the cases between the two systems and hinder the development of this expertise by either system. If the American Law Institute makes jurisdiction concurrent, then it must be assumed that such expertise is not required and, unless there is a unique federal interest in the tort and compensation claims of maritime workers, there is no justification for any federal jurisdiction.

24. A bill (S. 4089, 90th Cong., 2d Sess. (1968), to provide federal jurisdiction and a body of uniform federal substantive law for cases arising out of aviation accidents was introduced recently by Senator Tydings. It is probable, however, that the bill was motivated primarily by a desire to eliminate problems of jurisdiction and multiple litigation arising out of the multitude of claims generated by modern-day crashes. Two provisions of the bill indicate that protection of airline workers was not considered important by the drafters of the bill. One provision makes contributory negligence a bar to recovery. Another provision makes the right of action granted by the bill inapplicable where it would be inconsistent with the provisions or intent of any workmen's or employees' compensation statute. State compensation statutes usually can be applied to accidents occurring outside the state's borders, and it has been held that where a state compensation statute can be applied, the Death on the High Seas Act does not apply. *King v. Pan American World Airways*, 270 F.2d 355 (9th Cir. 1959), *cert. denied*, 362 U.S. 928 (1960). Since the Tydings bill contains language similar to that contained in the Death on the High Seas Act and applied in the *King* case to bring a claimant exclusively under the state compensation act, it is doubtful that the Tydings bill, if enacted, would afford much protection for airline workers.

Except in the few limited cases previously discussed, the federal interest in maritime tort and compensation cases is at most an interest in the uniform supervision of the remedies granted by federal law and supplemented by state law. This interest can be satisfied without clogging the federal court system with thousands of ordinary personal injury and workmen's compensation cases which occur on or near the water. It can be satisfied through Congressional policy-making legislation, and judicial supervision by the Supreme Court under its inherent right to review judgments of state courts. The interest of the states in the processing of routine admiralty tort and compensation cases is much greater than any such interest by the Federal Government. State courts are fully competent to handle these types of claims; the federal courts, because of the press of vital federal matters, are becoming less and less competent to do so. In such an atmosphere, any allocation of cases that lets jurisdiction over routine admiralty tort and compensation causes remain in the federal courts cannot be said to have taken out of the federal courts all of those cases that do not belong there.

Despite these convincing arguments, the Institute has chosen to adopt a standard of concurrent jurisdiction over admiralty tort and compensation cases. The Institute's reallocation, while it falls short of the goal of the revision, does make needed improvements in existing law. Let us examine the application of the Institute's proposals to the major problem areas in this field of law.

VI. THE LOCALITY OF THE TORT

A claimant injured on or near the water must determine at the outset whether his claim is in admiralty or whether it is under a state remedy. On such a determination hinges decisions as to which court has the power to adjudicate the claim, what damages may be recovered, what allegations and proof are necessary, and when the claim will be prescribed. Thus the uncertainty that currently exists as to the line between admiralty and non-admiralty remedies often results in hardship or injustice to an admiralty claimant.

Generally, the law is that the locality of the tort determines if a tort claim is in admiralty. The rule, as enunciated in *The Plymouth*,²⁵ is that:

Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance²⁶

Strict adherence to this doctrine has led to such illogical results as including within admiralty a wrongful death claim arising out of a plane

25. 70 U.S. (3 Wall) 20 (1865).

26. *Id.* at 36.

crash into Boston Harbor and excluding a claim by a seaman injured while standing on the dock casting off the mooring lines of a ship. In some instances, the decision for or against admiralty tort jurisdiction has hinged upon whether a ship's ladder broke at the top or at the bottom. The absurdity of strict adherence to the locality alone test was demonstrated by Justice Henry Billings Brown in an article written in 1909,²⁷ in which he alluded to the ladder cases and then posed this question: if the locality test is valid, then must an action for slander committed on a ship be an admiralty claim?

It can be argued that the "locality alone" test is not settled law, and that the Supreme Court expressly left the matter open for further development by its holding in *Atlantic Transport Co. of West Virginia v. Imbrovek*.²⁸ In that case Justice Hughes, speaking for a unanimous court, indicated that perhaps something more than the mere locality of the tort must be present to warrant admiralty jurisdiction. In the 55 years since *Imbrovek*, however, only one appellate case departs from the "locality alone" test. In *Chapman v. City of Grosse Pointe Farms*,²⁹ a claimant had sustained injuries as a result of a dive from the side of a pier on a lake into approximately 18 inches of water; the alleged negligence was the failure of the municipality, which owned and operated the pier, to warn against the dangers of diving from it. The Sixth Circuit, in denying claimant's libel in admiralty, rejected the "locality alone" test and enunciated another test, which may be labeled the "locality and relationship" test. The Court held:

While the locality alone test should properly be used to exclude from admiralty courts those cases in which the tort giving rise to the lawsuit occurred on land rather than on some navigable body of water, it is here determined that jurisdiction may not be based solely on the locality criterion. A relationship must exist between the wrong and some maritime services, navigation or commerce on navigable waters. . . .³⁰

In reaching the conclusion that the relationship of the tort to maritime service, navigation or commerce on navigable waters is a "condition sub silentio" to admiralty tort jurisdiction, the Sixth Circuit relied upon the language in *Imbrovek* and upon the holding by a district court in New York that a bather injured in navigable waters adjoining a beach could not seek damages in admiralty.³¹ No application for certiorari was made in the *Chapman* case, and it stands as the last appellate voice on the subject.

27. Brown, *Jurisdiction of the Admiralty in Cases of Tort*, 9 COLUM. L. REV. 1 (1909).

28. 234 U.S. 52 (1914).

29. 385 F.2d 962 (6th Cir. 1967).

30. *Id.* at 966.

31. *McGuire v. City of New York*, 192 F. Supp. 866 (S.D.N.Y. 1961).

It is perhaps too early to tell what effect *Chapman* will have on subsequent federal jurisprudence, but the decision has failed to move five of the six district courts who have decided "locality" cases since it was handed down. In *McCall v. Susquehanna Electric Co.*,³² the district judge cited *The Plymouth* and held that even though the negligent act was performed on land, the injury occurred on water and the claim was thus within admiralty under the "locality" test. The "locality alone" theory was followed, without discussion of *Chapman*, in four other cases.³³ In one of the cases, *Dagger v. U.S.N.S. Sands*,³⁴ a claimant was injured while inspecting a ship under construction. The district court acknowledged that any action arising out of the contract for the construction of the ship on which the accident occurred would not be cognizable in admiralty, but ruled that

jurisdiction over a cause of action based upon the commission of a tort . . . is not dependent upon the condition of the vessel on which the tort occurred but upon the occurrence of an event on navigable waters³⁵

The *Chapman* doctrine was followed in *Smith v. Guerrant*,³⁶ a case involving a claim for damages sustained when machinery being removed from a jetty to a wharf (neither of which are "navigable waters" under admiralty law) tumbled into navigable water. All parties to the suit apparently agreed that the claim was within admiralty, but the district court, on its own motion, dismissed the claim, holding that "locality alone" was not sufficient to give admiralty jurisdiction. The court noted:

Disputes like the present one, which is only incidentally related to navigable waters and wholly unconnected with maritime commerce, can be litigated in state courts under the diverse rules of state law without affecting maritime endeavors. The basis for the special grant of admiralty jurisdiction is absent here.³⁷

The Institute's revision rescinds the "locality alone" test but offers no substitute.³⁸ The reporters apparently favor a "locality and relationship" test similar to that used in the *Chapman* case,³⁹ but they leave the adoption and development of such a test to the courts. One danger in the

32. 278 F. Supp. 209 (D. Md. 1968).

33. *Rogers v. M/V Ralph Bollinger*, 279 F. Supp. 92 (E.D. La. 1969); *Dagger v. U.S.N.S. Sands*, 287 F. Supp. 949 (S.D. W. Va. 1966); *Hornsby v. Fishmeal Co.*, 285 F. Supp. 990 (W.D. La. 1968); *DiPaola v. Int'l Terminal Operating Co.*, 294 F. Supp. 736 (S.D.N.Y. 1968).

34. See note 33 *supra*.

35. *Id.* at 941.

36. 290 F. Supp. 111 (S.D. Tex. 1968); the Sixth Circuit recently followed its *Chapman* decision in *Gowdy v. United States*, 412 F.2d 525 (6th Cir. 1969).

37. *Id.* at 113.

38. ALI proposed § 1316(a). See appendix.

39. ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN FEDERAL AND STATE COURTS 144 (Tent. Draft No. 6, 1968).

Institute's approach is that the "locality alone" test is so ingrained in jurisprudence that it is unlikely that a statutory rescission of the test, without more, will alter the thinking of the judiciary. For example, in *Davis v. City of Jacksonville Beach*,⁴⁰ a case arising out of a collision between a swimmer and a surfboard, the court held that locality alone was enough to give jurisdiction in admiralty, but reasoned that even if some further maritime connection was required, it was present because a surfboard potentially can interfere with maritime trade and commerce.

As long as such a judicial attitude exists, it is doubtful that a pronouncement more specific than that contained in the Institute's proposal⁴¹ would deter those courts that desired to adhere to the "locality alone" doctrine.⁴² A specific delimitation of admiralty tort jurisdiction narrow enough to prevent rulings as in the *Davis* case might result in the exclusion from admiralty jurisdiction of some causes that actually belong there; one wonders, for example, how a statute could be worded which would exclude from admiralty pleasure boat accidents, except for those cases in which the general maritime interest requires that admiralty regulate the effects of such accidents. Considering the difficulties and dangers in elaboration, the Institute appears to have followed the wiser course.

The greatest harm done by the uncertainty surrounding the "locality alone" test is the possibility of litigation of a case in federal court that should have been litigated in state court, or vice versa, with resulting multiplicity of actions and possible substantial prejudice to claimants. The Institute's adoption of concurrent jurisdiction will allow a claimant to litigate the admiralty and common law remedies in the alternative in one action in either the federal or the state court, so that if the "locality alone" doctrine persists after the adoption of the revision, it will not provoke any procedural hardship.

VII. WORKMEN'S COMPENSATION: THE TWILIGHT ZONE AND *Calbeck*

Perhaps in no other area of procedural law has there been as much confusion and uncertainty as in the area of compensation for maritime workers other than seamen. The law in this area began on the wrong foot: since longshoremen and harbor workers were not seamen, they could not recover compensation from an employer for an on-the-job injury occurring on navigable waters under maintenance and cure or other admiralty remedies; since the federal jurisdiction over navigable waters was exclusive, these workers, injured while on navigable waters, could

40. 251 F. Supp. 327 (M.D. Fla. 1965).

41. *Supra* note 36.

42. Those courts inclined to reject the "locality alone" test will find sufficient statutory authority in proposed § 1316(a). In *Smith v. Guarrant*, 290 F. Supp. 111 (S.D. Tex. 1968), for example, the court reached its conclusion that "locality alone" was insufficient by "construing" present § 1333, the language of which is much more favorable to the "locality alone" test than that of the ALI's proposal.

not recover under any state compensation law. This conclusion, reached in *Southern Pacific Co. v. Jensen*,⁴³ has worked upon harbor workers a burden so harsh that the Supreme Court has spent 50 years trying to circumvent it. The Court first established the "maritime but local" doctrine, allowing the workers to recover under the state workmen's compensation statute even though the injury was on navigable waters, in those situations in which the matter was maritime but was of local concern and no violence would be done to the federal law by the application of the state law. In 1927 Congress passed the Longshoreman's and Harbor Worker's Act, which established a federal compensation remedy; the law, however, was designed to apply only to injuries occurring on navigable waters, and only if no state compensation statute was applicable.⁴⁴ The Act was designed to fill the gap between state law and the remedies of seamen. The inherent difficulty in defining "navigable waters" and the resulting harm to some admiralty claimants prompted the Supreme Court to establish the "twilight zone," first defined in the case of *Davis v. Department of Labor & Industries*.⁴⁵ The Court has fixed the "twilight zone" as that area involving mixed elements of land and maritime jurisdiction, and has decreed that in cases falling within the zone, courts should uphold the administrative findings of jurisdictional facts, or the valid choice of the claimant. Some states and some federal circuits, however, have not followed the doctrine, and this has led to continuing uncertainty.⁴⁶

The Supreme Court in *Calbeck v. Travelers Insurance Co.*⁴⁷ ignored the express language of the Longshoreman's and Harbor Worker's Act and ruled that when an accident occurs on navigable waters, the federal act can be applied, even if the state act also could be applied. As a result, much of the uncertainty in this area has been removed, and jurisdiction is presently allotted in this manner:

If the injury occurs on navigable waters, then the federal act can apply, or, if the matter is one of local concern, the state act also can apply; the choice will rest with the claimant. If the act occurs other than on navigable waters, the state act applies.

If the claimant is a seaman, the act does not apply and the claimant's remedy is under the Jones Act or other maritime remedies.

There are indications that the law will not stabilize at the *Calbeck*

43. 244 U.S. 205 (1917).

44. The Act, 33 U.S.C. § 903(a) (1964), provides that "compensation shall be payable . . . only if the disability or death results from an injury occurring upon the navigable waters of the United States . . . and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law . . ."

45. 317 U.S. 249 (1942).

46. See Note, 44 ORE. L. REV. 112 (1965).

47. 370 U.S. 114 (1962).

level, however. The Fourth Circuit recently held in *Marine Stevedoring Corp. v. Oosting*⁴⁸ that injury to a longshoreman sustained on a pier, which is in admiralty traditionally considered dry land, is compensable under the Longshoreman's and Harbor Worker's Act. In reaching its conclusion, the Court reasoned that since small vessels were able to navigate beneath the pier in question, the accident occurred "above" navigable waters, and, like injuries sustained by persons flying over water,⁴⁹ was within the jurisdictional scope of the phrase "upon navigable waters."⁵⁰ A writ of certiorari has been granted by the Supreme Court.⁵¹ Unless the court rejects the rationale of the case, the decision will create more uncertainty in this area of the law.

It must be assumed that in any borderline case, the claimant will bring his cause in a court that can apply either the federal or the state compensation statute. If this is so, one of the Institute's original proposals would have had the effect of moving most of these borderline cases out of the federal courts and into the state courts. The Institute initially proposed to grant concurrent jurisdiction over all Longshoreman's and Harbor Worker's Act cases, but to deny federal courts any jurisdiction over state workmen's compensation claims.⁵² If the plan had been adopted, and in view of the continued uncertainty in the application and limitation of the "twilight zone" and *Calbeck* doctrines, attorneys could have been expected to choose in any doubtful case the state forum with its freedom to apply both remedies. The Institute, however, rejected the proposal to limit the jurisdiction of federal courts over state compensation claims, and its final draft will allow both state and federal courts to apply both the federal and state compensation remedies of longshoremen and harbor workers.

VIII. JURY TRIALS

Although apparently no one contends that admiralty tort and compensation claimants should be denied the right of trial by jury, present law withholds the right from some of those claimants. Claimants pursuing their claims under "savings clause" remedies in either the state court or, under diversity jurisdiction, in the federal court, are entitled to trial by jury. Jones Act claimants are also entitled to trial by jury, whether the claim is pursued in state court or in federal court. Claimants pursuing other admiralty remedies in federal court, however, are denied trial by jury unless the diversity jurisdiction requirements are met. The rationale behind this illogical distinction is that in theory the federal

48. 398 F.2d 900 (4th Cir. 1968).

49. See *D'Aleman v. Pan American World Airways*, 259 F.2d 493 (2d Cir. 1958).

50. 398 F.2d at 908.

51. 393 U.S. 976 (1969). There are conflicting decisions from other circuits. See *Houser v. O'Leary*, 383 F.2d 730 (9th Cir. 1967).

52. Proposed §§ 1330(1) and 1301(f).

court, sitting in law, has no admiralty jurisdiction except in diversity and federal question cases; the court, sitting in admiralty, has original jurisdiction without more over admiralty causes, but trial by jury is foreign to admiralty.

While the pattern is, as the Institute describes it, "fortuitous and irrational," it has not worked much harm to claimants since the decision in *Fitzgerald v. United States Lines*.⁵³ In the *Fitzgerald* case, the Supreme Court established the rule that when an unseaworthiness or maintenance and cure action is brought in the alternative with a Jones Act case in federal court, the claimant is entitled to trial by jury, through the provisions of the Jones Act, on all counts. The right persists even though the claimant is unsuccessful in the Jones Act case. The *Fitzgerald* doctrine has been extended by lower courts in two recent cases. The Third Circuit, in *Haskins v. Point Towing Co.*,⁵⁴ applied the doctrine in a case in which the maintenance and cure action was brought in admiralty on the admiralty "side" of the court, and a Pennsylvania district court, in *Close v. Calmar Steamship Corp.*,⁵⁵ applied the doctrine to grant a jury trial on an admiralty indemnity action that had been consolidated with a longshoreman's negligence action based upon diversity jurisdiction. In the *Haskins* case,⁵⁶ the decision was based upon a "court-created right" to trial by jury in such cases. The manner in which the courts have readily extended this "court-created right" indicates that the jury trial bar under existing law is of little significance.

The Institute's proposal recognizes the irrationality of the present pattern and codifies and extends the *Fitzgerald* doctrine by granting a right to trial by jury in all admiralty and maritime issues if the relief sought is limited to money damages for personal injuries or death.⁵⁷ The conclusion is based upon the rationale that some admiralty causes, such as maritime collisions and commercial matters, require the expertise of the federal judge, theoretically skilled in admiralty, and other admiralty causes, like tort and compensation matters, do not require this expertise.

The Institute's proposal to bar jury trials in limitation of liability cases⁵⁸ is subject to criticism. The proposal denies jury trial in such actions except in the few limited instances in which jury trial now is granted by judicial precedent; such instances generally involve either a single claimant or a limitation fund in excess of the total claims. A review of the early decisions indicates that the courts in restricting jury trials in limitation actions were primarily worried about the resulting multiplicity of actions. Under present law a limitation proceeding is on the admiralty side of federal court; and since jury trial can not

53. 374 U.S. 16 (1963).

54. 395 F.2d 737 (3d Cir. 1968).

55. 44 F.R.D. 398 (E.D. Pa. 1968). See note 5 *supra*.

56. 395 F.2d 737 (3d Cir. 1968).

57. Proposed § 1319, reproduced in the appendix, *infra*.

58. *Id.*

be had there, any claimant entitled to a jury trial must proceed under the common law remedy, probably in state court. A duplicity of actions was the inevitable result, with the first trial in state court, or on the "law side" of federal court, to a jury, and the second trial, in the limitation proceeding, in admiralty, to a judge. If the Institute's proposal granting trial by jury in all admiralty tort and compensation causes in federal court is adopted, the reason for withholding jury trials in limitation actions may lose its force. There appear to be no insurmountable problems involved. If a limitation action is tried solely to a judge, the judge, consciously or not, must make two decisions: he must determine the judgment value of each claim, and then he must pro-rate the claims according to the amount of the fund. Since under the Institute's proposed revision no duplicity of actions will result, why not allow the first decision, the determination of the judgment value of the claims, to be made by a jury? After a jury determination of the value of the claims, the trial judge can pass upon the limitation action and pro-rate the limitation fund among the judgment creditors. This method of procedure, which recently was approved by the Seventh Circuit,⁵⁹ will be particularly helpful in those cases where there are other defendants not affected by the limitation action, and where the limiting owner's liability policy is in excess of the limitation fund. In such cases, the present Institute proposal may result in unnecessary duplication of trials, or denial of trial by jury to claims that will not be affected by the limitation action. The right of trial by jury is an extremely valuable one to a personal injury claimant and should not be withheld, especially in those cases where the granting of the right will not unduly impede the administration of justice.

IX. DIVERSITY JURISDICTION

Much of what may be accomplished by the Institute's proposal for concurrent jurisdiction in admiralty tort and compensation matters may be undercut by the Institute's retention of the concept of diversity jurisdiction, since continuation of the illogical concept inevitably will result in keeping in the federal courts many tort and compensation matters that, as we have seen, do not belong there.

Much has been written in support and in condemnation of diversity jurisdiction, and a full discussion of all of the arguments is beyond the scope of this analysis. An evaluation of the Institute's proposals for revision of the division of admiralty tort and compensation jurisdiction would be incomplete, however, without a criticism of the retention of the diversity concept and a rebuttal of the arguments the Institute apparently embraced in reaching its decision to retain the concept.

The Institute apparently bases its decision to retain diversity ju-

59. *Famiano v. Enyeart*, 398 F.2d 661 (7th Cir. 1968).

risdiction primarily on the strength of these premises: (1) state court judges and juries are incompetent or are unable fairly to deal with cases between citizens of the state of the forum and citizens of other states; (2) state court tribunals generally are inefficient, and (3) an unsuccessful litigant in the courts of a state other than his domicile will be likely to blame the loss of the lawsuit upon bias of the "foreign" court, with resulting "friction and divisiveness among the several states and their citizens."⁶⁰ The weakness of each of these premises quickly can be demonstrated.

Federal courts are in operation in every area of the nation, and the judge of each court usually is a lifelong resident of the area in which he serves; in many instances, he was the state court judge in the area prior to his selection as a federal judge. Federal juries are composed of the same people who are called to serve on state juries in the area, particularly since the federal system of preferential jury lists has been abolished. The Institute points out that federal jurors are drawn from a larger area and thus are more broadly based; from this it is inferred that they give sounder verdicts. Such an inference would have some validity if we assume that a broader-based jury would of necessity be a fairer or more intelligent one, but we cannot assume that a jury composed of urban and rural jurors usually will be more intelligent or impartial than a jury composed solely of urban jurors. The territorial jurisdictions of federal courts usually will yield more intelligent and more competent jury venires than usually are found in state courts in rural areas, but state courts in many urban areas are much more likely to produce "better" jurors than will the federal courts sitting in those areas. Thus it is difficult to follow the logic of the Institute that a federal forum will give an out-of-state defendant a judge and a jury free of prejudice against outsiders, but that a state court will not.

The Institute assumes that the federal judiciary is superior to the state judiciary primarily because life tenure gives a federal judge "a degree of independence . . . which a state judge, facing re-election, may find it hard to maintain."⁶¹ Unfortunately, life tenure also may allow a federal judge to continue to serve on the bench after attaining a degree of senility or other incompetence.⁶² It should be noted, also, that there is some merit in the argument that while judges should not be immersed in politics, they should not, in view of their policy-making roles and the plenary power they sometimes possess, be totally immune to the will of

60. ALI, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS*, Part 1, 53 (Official Draft, 1965).

61. *Id.* at 48.

62. The federal bench apparently occupies a position of pre-eminence in the American judicial system, but its right to the position may be questionable. For a realistic appraisal of the federal judiciary and an acknowledgement that it is not immune to dishonesty and incompetence, see Tydings, *The Congress and the Courts: Helping the Judiciary to Help Itself*, 52 A.B.A.J. 321 (1966).

the people. Both the federal plan of appointment for life and the traditional state plan of election of judges leave much to be desired. While there is little hope for improvement in the federal plan, because a constitutional amendment would be required to remove the present life tenure protection of federal judges, the traditional state method of selecting the judiciary is undergoing improvement. Evidence of this is the success of the "Missouri Plan," which provides for nonpartisan appointment of judges, with periodic confirmation by the electorate on a non-party basis. The plan has been adopted in over one-fifth of the states, and about ten additional states are in the process of adoption or have such a plan under consideration.⁶³ Thus if either judiciary can be said to be improving, it is the state judiciary. It is doubtful whether the federal judiciary now enjoys much superiority over the state judiciary; what advantage it may now enjoy may be a rapidly diminishing one.

It must be conceded that federal court procedure is more efficient and more modern than the judicial procedures of many of the states. One cannot assume, however, that the gap between the efficiency of the federal system and that of the state system as a whole is significantly large, or that it will widen in the future. Many states have overhauled their procedural machinery in recent years; some have patterned the new machinery after the federal process. In the past 29 years, 23 states have adopted new procedural rules or codes based closely upon the federal rules, and 10 other states have had complete revisions of their procedure.⁶⁴ In view of these developments, the Institute's contention that efficiency in procedural machinery is a significant consideration in the decision to retain diversity jurisdiction is of doubtful merit.

The premise that friction between the several states and their citizens is substantially promoted by unsuccessful litigation in the courts of one state by citizens of another state is equally debatable. Assuming that empirical knowledge would support such a contention, such knowledge also is likely to support the assumption that unsuccessful litigants in "spite" suits are the ones most likely to foster such friction, and that "spite" suits usually involve small amounts of money or things of little pecuniary value. Diversity jurisdiction, since it applies only to claims amounting to \$10,000 or more, does not rescue most of these "spite" actions from state courts, and hence diversity jurisdiction may not reach the root of whatever "friction" problem that might exist. Assuming, *arguendo*, that diversity jurisdiction does reduce the friction and divisiveness among the several states and their citizens, it is probable that the good which is done is outweighed or at least counterbalanced by the

63. See Hall, *The Missouri Nonpartisan Court Plan: A Quarter Century Review*, 33 U. Mo. K.C.L. REV. 163 (1965). While "many distinguished leaders of the bar" favor adoption of the Missouri Plan for the federal judiciary, some authorities oppose the adoption. See Wright, *The Federal Courts—A Century After Appomattox*, 52 A.B.A.J. 742, 743 (1966).

64. See Wright, *Procedural Reform: Its Limitations and Its Future*, 1 GA. L. REV. 563, 564 (1967).

harm done to federal unity by a procedural system under which federal courts daily are required to usurp traditional state court duties.

Finally, even if we assume that the Institute's arguments against state court efficiency and competency—the "machinations of the local court house gang"⁶⁵ and the like—are valid, such arguments would support the concept of a single court system under federal control, or another kind of diversity jurisdiction, but they do not support the present diversity concept which the Institute wants to continue. If diversity is essential to justice, why is there a minimum limit of \$10,000? Those who support diversity jurisdiction in its present form evidently feel that the federal government should insure against the inefficiency, incompetence and prejudice of state courts only where enough money is involved. Justice, to them, apparently is a sometimes thing.

X. REMOVAL

Under existing law, any admiralty tort or compensation cause, except a Jones Act case, may be removed from state court to federal court if the requirements of diversity of citizenship and jurisdictional amount are met. In its revision of this jurisdiction, the Institute plans to retain diversity jurisdiction and the removal of diversity causes.⁶⁶ The effect will be a continued diverting to federal courts of admiralty tort and compensation cases that properly belong in state courts and initially are brought there.

As we have seen, the concept of diversity jurisdiction is indefensible; the concept of removal from state to federal court because of diversity jurisdiction is equally indefensible. In the area of admiralty tort and compensation jurisdiction, the matter is made more indefensible because removal is permitted for all actions except those arising under the Jones Act. The Institute admits the irrationality of the present removal pattern,⁶⁷ but plans to retain it. It is disappointing that the Institute, given the opportunity to eliminate removal in admiralty tort and compensation cases, or, alternatively, to eliminate the illogical dichotomy of removability among those cases, has chosen to do neither.

Equally disappointing is the failure of the Institute to codify the holding in *Romero v. International Terminal Operating Co.*⁶⁸ that an admiralty case is not such a cause "arising under the Constitution, laws or treaties of the United States" as to be removable, without more, to

65. ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, Part 1, 52 (Official Draft 1965).

66. Proposed §§ 1317(a), 1304(a) and 1301.

67. The same policies that dictate not allowing Jones Act litigation to be removed would seem equally applicable to suits under the Death on the High Seas Act or to any other action for personal injuries or death within the scope of the admiralty and maritime jurisdiction.

ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN FEDERAL AND STATE COURTS 155 (Tent. Draft No. 6, 1968).

68. 358 U.S. 354 (1959).

to federal courts. A forceful argument had been made in *Romero* that since admiralty jurisdiction is expressly granted to Congress in the Constitution,⁶⁹ and since the present removal statute⁷⁰ grants removal, without more, to claims arising under the Constitution, all admiralty causes are removable of right to federal courts, regardless of the amount in controversy or the citizenship of the parties. A slim majority (four justices dissented) of the Supreme Court rejected the argument in the *Romero* case.

None of the Institute's proposed articles contains express language to the effect that an admiralty cause shall not be removable solely because it arises under the Constitution, laws or treaties of the United States. The Institute apparently is content to rely upon the holding in *Romero* and the Institute's belief, stated in the official commentary,⁷¹ that a case like *Romero* will not be removable under the proposed sections. A study of the Institute's removal provisions and a close look at the *Romero* case indicate that the Institute's choice may not be a wise one.

Under the Institute's plan, Proposed Section 1317(a) provides that an admiralty matter may be removed if removal is authorized by Section 1312. Section 1312(a) provides that a civil action may be removed if the action might have been brought in federal court under Section 1311. Section 1311(a) provides that all civil actions in which the initial pleading sets forth a substantial claim arising under the Constitution, laws or treaties of the United States may be brought in federal court.

Thus the same forceful argument that was made in *Romero* can be urged again upon the adoption of the revision. The Institute may feel that a possible construction of Section 1317 bars such an argument. Section 1317 provides that "a civil action . . . that might have been brought in a district court under Section 1316 . . . is not for that reason removable." There is no language in Section 1316, however, referring to cases arising under the Constitution of the United States; the most plausible construction of the two proposed sections is that these matters are not removable solely because they are admiralty matters and within original federal court jurisdiction. This is not the equivalent of saying that they are not removable solely because they are matters arising under the Constitution.

In a like manner, reliance upon *Romero* may be unwise. A study of the case reveals that (1) both the majority and the dissenters felt that the language of Sections 1331 and 1441 of Title 28 of the United States Code clearly supported the removability argument,⁷² (2) the lower courts

69. See p. 29 *supra*.

70. 28 U.S.C. § 1441 (1964).

71. ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN FEDERAL AND STATE COURTS 154 (Tent. Draft No. 6, 1968).

72. 358 U.S. at 378-79.

had been divided in their interpretation of this effect of the two sections prior to *Romero*, and (3) the *Romero* case was a five-to-four decision, with all four dissenters but only one of the majority still sitting.

For these reasons, it would appear prudent to include in proposed Section 1317(a) a provision that no cause shall be considered as arising under the Constitution, laws or treaties of the United States solely because it is an admiralty or maritime cause.⁷³

While the removal proposal is somewhat disappointing, it does eliminate two undesirable features of the present law. In recent years the diversity of citizenship requirement has lost some of its force because in a great majority of the cases the tortfeasor was insured by an insurer domiciled outside of the state; the insurer could and would use his diversity of citizenship to effect removal. The Institute proposal provides that an insurer cannot use its diverse citizenship for the purpose of removal when it has maintained an office in the state in which the action is brought for a period of two years or more preceding the commencement of the action.⁷⁴

The Institute proposal also remedies a wrong by permitting removal of cases of exclusive federal jurisdiction that are erroneously commenced in state court. Removal of such causes has been denied under the theory that jurisdiction on removal is a derivative jurisdiction. Therefore, if the state court lacks jurisdiction over the case, the federal court to which the case is removed is without jurisdiction even though the federal court could have jurisdiction if the matter had been originally brought there.⁷⁵ Under this theory any admiralty cause of exclusive federal jurisdiction could not be removed to federal court from state court. The Institute's proposal removes this doctrine from admiralty causes.⁷⁶

XI. SUMMARY AND CONCLUSIONS

The American Law Institute's proposals for revision of the allocation of admiralty tort and compensation jurisdiction between federal and state courts make several meaningful and well-reasoned changes.

73. The *Romero* holding hinges upon an interpretation of the present law (28 U.S.C. § 1331 (1964)); amendment of the section, by adoption of proposed Article 1311, could result in a reinterpretation of the question in the light of the new legislation. In such a case, the Supreme Court easily could find that the language of proposed §§ 1317(a), 1312(a)(1) and 1311(a) are clear and unambiguous and allow removal of all admiralty tort and compensation cases without more. If the language is clear, there would be no need to refer to the ALI commentary to discover intent. The American Law Institute's intent may be subtly to leave the matter open for a reversal of *Romero*. See ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN FEDERAL AND STATE COURTS 87 (Tent. Draft No. 6, 1968).

74. Proposed § 1302(b). Existing law [28 U.S.C. § 1332(c) (1964)] provides only that an insurer cannot use its diverse citizenship in the state of its incorporation or the state in which it has its principal place of business, except in suits under direct action statutes.

75. See *Minnesota v. United States*, 305 U.S. 382 (1939).

76. Proposed § 1317(b); see appendix *infra*.

If the proposals do not eliminate all of the major problems, it is partly because many of the major problems are caused by substantive deformities, and revision of these is beyond the scope of a procedural revision.

There are forceful arguments for exclusive state jurisdiction in this area, and it is hoped that serious study of such a reallocation will be made in the immediate future. Such a reallocation more nearly would accomplish the goal of getting out of the federal system many of the cases that do not belong there. A conversion to exclusive state jurisdiction would require many changes of mixed substantive and procedural character, and such a sweeping reallocation probably also was beyond the scope of the Institute's study.⁷⁷ The present advocacy of concurrent jurisdiction by the Institute, however, is a step in the direction of exclusive state jurisdiction, although the value of the step is limited by the continuation of diversity jurisdiction. It is unfortunate that the Institute sees fit to continue this concept.

If adopted, the revision will assist the courts in veering away from the unacceptable "locality alone" doctrine in the field of admiralty tort law, and will remove the residue of the injustices caused by irrational allocation of jury trials to admiralty claimants. The proposals also will be useful as a codification of existing procedural law. Within the limits inherent in a procedural revision and the self-imposed restraint of the diversity concept, the American Law Institute has formulated a plan of reallocation of jurisdiction that, if adopted, will benefit those who deal with or are affected by admiralty tort and compensation law.

APPENDIX

Sections Proposed by the American Law Institute For Reallocation of Admiralty Jurisdiction Between State and Federal Courts

Section 1316. Admiralty and maritime jurisdiction; original jurisdiction; exclusive jurisdiction.

(a) Except as provided in section 1330 of this title, the district courts shall have original jurisdiction without regard to amount in controversy of: (1) all civil actions of admiralty and maritime jurisdiction; and (2) any prize brought into the United States and all proceedings for the condemnation of property taken as prize. Unless otherwise provided by Act of Congress, the admiralty and maritime jurisdiction does not include a claim merely because it arose on navigable waters.

(b) The jurisdiction of the district courts under this section shall

77. The concept of due process probably would limit jurisdiction to the state in which the tort occurs, or a state which has "power" over a defendant. Extra-state service of process and enforcement of a judgment of one state against a defendant domiciled in another state also suggest problems and procedural delays. Such a plan might also require review by the Supreme Court of cases that now are being reviewed by the federal courts of appeal prior to any Supreme Court review. There are feasible solutions to most if not all of these problems; however, discussion of these solutions is beyond the scope of this study.

be exclusive of the courts of the States in actions for limitation of liability under sections 183 to 189 of Title 46 and in maritime actions in rem, whether arising under the general maritime law or to enforce liens given by Act of Congress or by a statute of a State. In all other actions within subsection (a) of this section, jurisdiction of the district courts shall be concurrent with the courts of the States.

Section 1317. Admiralty and maritime jurisdiction; removal of actions brought in State courts.

(a) A civil action brought in a State court that might have been brought in a district court under section 1316 of this title is not for that reason removable but may be removed to the district court of the United States for the district embracing the place where such action is pending if removal is authorized by subsection (b) of this section or sections 1304, 1312, or 1322 of this title.

(b) Any civil action brought in a court of a State of which the district courts of the United States have exclusive jurisdiction under section 1316(b) of this title may be removed by any party at any time to the district court of the United States for the district embracing the place where such action is pending and, except as provided in section 1315(b) of this title, shall proceed as if properly commenced therein.

Section 1319. Admiralty and maritime jurisdiction; trial by jury.

In any action commenced in or removed to a district court under sections 1316 or 1317 of this title, except for actions for limitation of liability under sections 183 to 189 of Title 46, the trial of all issues of fact of any claim arising out of personal injuries or death in which the relief sought is limited to money damages shall be by jury if any party demands it. In all other actions so commenced in or removed to a district court, there shall be no right to jury trial unless the requirements for jurisdiction under sections 1301, 1302 and 1304 or sections 1311 and 1312 of this title are satisfied and a right to trial by jury would exist without regard to this section.