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# COMPENSATION AND REWARD FOR SAVING LIFE AT SEA

Steven F. Friedell\*

## I. INTRODUCTION

A few hours after the Titanic sank on April 15, 1912, another British passenger vessel, the Carpathia, rescued the 712 survivors and the lifeboats in which they had taken refuge.<sup>1</sup> Under British law, the owners of the Carpathia could have recovered a salvage award, limited to the value of the lifeboats, from the owners of the Titanic,<sup>2</sup> and the British Board of Trade had the statutory discretion to make an additional award for the saving of human life.<sup>3</sup> By contrast, if the American law at the time had applied to the case, the salvors could have received no more than the value of the lifeboats, and if no property had been saved, they could not have recovered a penny.<sup>4</sup> A few months after the Titanic disaster, Congress enacted legislation<sup>5</sup> codifying a 1910 multilateral treaty that was intended to increase the rights of life salvors.

This Article explores the life salvage rules under the general

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1. "Report on the Loss of the Titanic," Cd. 6352, at 41 (1912), S. Doc. No. 933, 62d Cong., 2d Sess. 55 (report of formal British investigation). One of the survivors died shortly thereafter. *Id.* In their petition to limit liability, the owners of the Titanic alleged that 711 persons were saved. *The Titanic*, 209 F. 501 (S.D.N.Y. 1913). A congressional resolution honoring the Carpathia's captain recites that 704 persons were saved. S.J. Res. 111, 62d Cong., 2d Sess., 37 Stat. 639 (1912).

2. Merchant Shipping Act, 1894, 57 & 58 Vict., c. 60, § 544. The word "salvage" is used to describe either the act of saving or the award given. M. NORRIS, *THE LAW OF SALVAGE*, § 2, at 2 (1958).

3. See text at note 48 *infra*. Apparently the Carpathia's owners, the Cunard Line, made no request for a reward from the British government. Letter from Search Department, British Public Record Office, Nov. 1, 1978. Congress appropriated up to \$1000 to purchase or make a gold medal for the captain of the Carpathia. It also expressed its thanks to the captain and "through him to the officers and crew." S.J. Res. 111, 62d Cong., 2d Sess., 37 Stat. 639 (1912). One Senator said, "[T]he American Congress can honor itself no more by any single act than by writing into its laws the gratitude we feel toward this modest and kindly man [Captain Rostron of the Carpathia]." 48 CONG. REC. 7283 (1912).

4. See text at notes 19-20 *infra*.

5. Act of Aug. 1, 1912, 37 Stat. 242.

maritime law and under the 1912 life salvage statute.<sup>6</sup> Surprisingly, some life salvors had greater rights under the general maritime law than they have under cases construing the statute.<sup>7</sup> This

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6. 46 U.S.C. § 729 (1976). As will be discussed below, the provision was based on the Brussels Salvage Convention of 1910. Another provision enacted at the same time and also based on the treaty, 46 U.S.C. § 728 (1976), imposes criminal penalties on masters of vessels who fail to save persons "found at sea in danger of being lost" unless the rescue would present "serious danger to his own vessel, crew, or passengers."

An international conference called in response to the Titanic disaster imposed on masters a duty to respond to distress signals unless they are "unable" or consider it "unreasonable or unnecessary in the special circumstances of the case" to render assistance. International Convention for Safety of Life at Sea [hereinafter cited as SOLAS], art. 37 (translation submitted to the Senate), S. Doc. No. 463, 63d Cong., 2d Sess. 18 (1914). The French and Belgian governments differed over whether the Brussels salvage treaty imposed such an obligation. See also *The Roanoke*, 214 F. 63 (9th Cir. 1914) (suggesting that 46 U.S.C. § 728 would apply to such a case). In any event, the provision in SOLAS states that it does not "prejudice" the obligation laid down in the earlier treaty. SOLAS art. 37. See REPORT OF THE COMMISSIONERS OF THE UNITED STATES TO THE INTERNATIONAL CONFERENCE ON SAFETY OF LIFE AT SEA, S. DOC. NO. 463, 63d CONG., 2d SESS. 97 (1914). The 1914 treaty was not generally put into force, but subsequent treaties have contained similar provisions. E.g., International Convention for the Safety of Life at Sea, 1960, ch. V, reg. 10, 16 U.S.T. 185, 502-04, T.I.A.S. No. 5780, 536 U.N.T.S. 27, 332-34. The obligations to render aid at sea under the 1910 treaty and under SOLAS are codified in article 12 of the Convention on the High Sea, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (1958). Unlike England, the United States does not impose a criminal penalty on a master who violates his duty under SOLAS. (Violation is a misdemeanor under 12 & 13 Geo. 6, ch. 43, § 22 (1949).) The Coast Guard, however, can suspend or revoke a master's license, for "bad conduct" or "inattention to his duties." 46 U.S.C. § 226 (1976). A tort suit against the master might be possible. Cf. *Warshauer v. Lloyd Sabaudo S.A.*, 71 F.2d 146 (2d Cir.), cert. denied, 293 U.S. 610 (1934) (suggesting that a master who violates the duty imposed by the 1910 treaty may be civilly liable to the one who is not rescued).

7. Several other commentators have studied life salvage and the related topic of the possible liability of those who fail to save life. E.g., M. SHAPO, *THE DUTY TO ACT* (1977); Thomas, *Life Salvage in Anglo-American Law*, 10 J. MAR. L. & COM. 79 (1978); Landes & Posner, *Altruism in Law and Economics*, 68 AM. ECON. REV. 417 (1978); Landes & Posner, *Salvors, Finders, Good Samaritans and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83 (1978); Bockrath, *The American Law of Life Salvage*, 7 J. MAR. L. & COM. 207 (1975); Wade, *Restitution for Benefits Conferred Without Request*, 19 VAND. L. REV. 1183 (1966); Dawson, *Negotiorum Gestio, The Altruistic Intermeddler*, 74 HARV. L. REV. 817 (1961); Jarett, *The Life Salvor Problem in Admiralty*, 63 YALE L.J. 779 (1954); Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability* (pts. 1-2), 56 U. PA. L. REV. 217 & 316 (1908); Cunningham, *Life Salvage*, 17 GREEN BAG 708 (1905); Dunlop, *Life Salvage*, 15 SCOT. L. REV. 44 (1899); Note, *Restitution for Life Salvage in the Wake of Peninsular and Oriental Steam Navigation Co. v. Overseas Oil Carriers, Inc.*, 30 HASTINGS L.J. 227 (1978); 4 BROOKLYN J. INTL. L. 114 (1977); Comment, 2 CAL. W. INTL. L. J. 146 (1971); Comment, *Compensation for Life Salvage at Sea*, 2 HASTINGS L.J. 53 (1951). See also G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* § 8-12, at 570-74 (2d ed. 1975); *THE GOOD SAMARITAN AND THE LAW* (J. Ratcliffe ed. 1966).

Property salvage has parallels in the Roman law of *negotiorum gestio* (see Dawson, *supra*) and in several medieval sources. See M. NORRIS, *supra* note 2, §§ 8-11, at 7-12. The "Rhodian Law", thought by some to date from the tenth century B.C., also contains some passages on property salvage. See M. NORRIS, *supra* note 2, § 5, at 4. Others have argued

Article suggests that courts have given insufficient attention to the purposes of the Brussels Salvage Convention of 1910, which inspired the 1912 statute, and that American courts should remain free to recognize all rights that life salvors possessed before the Brussels Convention.

This Article then considers whether American courts should further expand the rights of life salvors by awarding life salvage even when no property is saved. A few courts have resorted to some ingenious devices to compensate rescuers or would-be rescuers of human life who would not have been entitled to any life salvage under the established rules of law. This Article suggests that if a case like the Titanic were to come before an American court today, the court should compensate the life salvors for their personal injuries and reasonable expenses and should have the discretion to reward them for extraordinary acts of heroism. The same relief should also be available to certain classes of unsuccessful rescuers. In all cases American courts should formally renounce the vestiges of a doctrine that denies those who save lives an award that is given to those who save property.

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that the "Rhodian Law" dates from the eighth century A.D. *E.g.*, Benedict, *The Historical Position of the Rhodian Law*, 18 *YALE L.J.* 223 (1909).

The Jewish and Christian religions have long been concerned with the duty to save life and property and, to some extent, with the right to compensation for saving life. *E.g.*, *Genesis* 4:9 ("[A]m I my brother's keeper?"); *Deuteronomy* 22:1-4 (duty to restore lost articles and to assist one whose ass or ox has fallen down on the road); *Luke* 10:30-37 (parable of the Good Samaritan); BABYLONIAN TALMUD, *Sanhedrin* 73a ("Whence do we know that if a man sees his fellow drowning in a river, mauled by beasts, or attacked by robbers, he is bound to save him? From the verse, 'Thou shalt not stand by the blood of thy neighbor.' (Lev. 19:16).") One was also obligated under Jewish law to pay others if necessary to save one in danger. BABYLONIAN TALMUD, *Sanhedrin* 73a; CODE OF MAIMONIDES, *Laws of the Murderer and of Protecting Life* 1:14 (1180). Commenting on the passage in the *Babylonian Talmud*, Rabbi Asher ben Yehiel (c. 1250-1327) wrote that one who saves another's life is entitled to recover his expenses from the person saved. SANHEDRIN, *Rabenu Asher*, c. 8. Although violation of the obligation to rescue another did not subject one to flogging, under the usual rule that flogging cannot be imposed when no overt act is involved, Maimonides considered the obligation to be an important one. CODE OF MAIMONIDES, *Laws of the Murderer and of Protecting Life* 1:16. Several American courts have used religious allusions in their description of the rights of life salvors. *E.g.*, *In re St. Joseph-Chicago S.S. Co. (The Eastland)*, 262 F. 535 (N.D. Ill. 1919), *affd. without opinion sub nom. Mattocks v. Great Lakes Towing Co.* (No. 2,804) (7th Cir. June 3, 1920), *cert. denied*, 258 U.S. 644 (1920) [hereinafter all references to the opinions at the various stages of this case will be cited as *The Eastland*]; *The Boston*, 3 F. Cas. 932 (C.C. Mass. 1833) (No. 1,673) (Story, J.); *Taylor v. Twenty-five Thousand Dollars*, 23 F. Cas. 806 (D.S.C. 1801) (No. 13,807). *See also* *Buch v. Amory Mfg. Co.*, 69 N.H. 257, 260, 44 A. 809, 810 (1898), where the court said, "[T]he priest and Levite who passed by on the other side were not, it is supposed, liable at law for the continued suffering of the man who fell among thieves, which they might and morally ought to have prevented or relieved."

## II. RIGHTS OF PROPERTY AND LIFE SALVORS UNDER THE GENERAL MARITIME LAW AND UNDER THE BRITISH MERCHANT SHIPPING ACT OF 1854

Generally, a volunteer receives property salvage under the general maritime law if he rescues or at least helps to rescue property that is in peril.<sup>8</sup> The court determines the amount of the award by examining a variety of factors affecting the volunteer's merit<sup>9</sup> and generally allows the salvor to recover his expenses, including lost profits.<sup>10</sup> Courts reward volunteer property salvors

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8. *The Sabine*, 101 U.S. 384 (1879). See generally G. GILMORE & C. BLACK, *supra* note 7, § 8-2, at 534-36. A volunteer is one who has no contractual or official duty to save. A large number of wrecked or endangered vessels are salvaged without charge by the Coast Guard in performance of its official duties under 14 U.S.C. §§ 2, 88 (1976) and by private parties under contract. For years it was thought that the Coast Guard could not legally receive salvage awards, but that may be changing. *United States v. American Oil Co.*, 417 F.2d 164 (5th Cir. 1969), *cert. denied*, 397 U.S. 1036 (1970). See G. GILMORE & C. BLACK, *supra* note 7, § 8-5 at 549-51. Judge Marvin wrote in 1858 that he could see no reason in law or policy for denying salvage to the crew or officers of a revenue cutter if they exceeded their duty. W. MARVIN, *A TREATISE ON THE LAW OF WRECK AND SALVAGE*, § 151 n., at 166 (1858). Contracts for salvage may be made either during the emergency or after it has passed. Most salvage contracts are on a "no cure—no pay" basis, meaning that payment is contingent on success in the salvage operation. See generally G. GILMORE & C. BLACK, *supra* note 7, § 8-15 at 578-85. Ordinarily, crew members who save their own ship are not entitled to salvage because of their contract to serve the ship and in order not to tempt a crew to put a ship into a dangerous position. *M. NORRIS*, *supra* note 2, § 52, at 81.

Generally, one who saves the property of another on land without the request of the owner to do so is denied any compensation, even if he expected to be compensated. See 2 G. PALMER, *THE LAW OF RESTITUTION*, § 10.3, at 369 (1978). Professor Palmer has criticized that rule, saying, "It is unfortunate that judges have been generally unwilling to turn . . . a strongly felt moral obligation into a legal obligation. The policies underlying such decisions are seen to be questionable when compared with the rules of maritime salvage. . . ." *Id.* at 370.

9. Among the factors considered are (1) the labor expended by the salvors in rendering the salvage service, (2) the promptitude, skill, and energy displayed in rendering the service, (3) the value of the property employed by the salvors in rendering the service and the danger to which such property was exposed, (4) the risk incurred by the salvors in securing the property from the impending peril, (5) the value of the property saved, and (6) the degree of danger from which the property was rescued. *The Blackwall*, 77 U.S. (10 Wall.) 1, 14 (1869). Another factor affecting the property salvor's award is whether he saved life in connection with the saving of property. *E.g.*, *The Emblem*, 8 F. Cas. 611 (D. Me. 1840) (No. 4,434); *Grand Union (Shipping) Ltd. v. London Steam-Ship Owners' Mutual Ins. Assn. (The Bosworth (No. 3))*, [1962] 1 Lloyd's List L.R. 483 (Q.B. Commercial Ct.). See text at notes 14-17 *infra*.

10. *E.g.*, *St. Paul Marine Transp. Corp. v. Cerro Sales Corp.*, 505 F.2d 1115 (9th Cir. 1974); *Atlantic Transp. Co. v. United States*, 42 F.2d 583 (Ct. Cl. 1930); *The Bosworth (No. 1)*, [1959] 2 Lloyd's List L.R. 511 (Adm.), *modified*, [1960] 1 Lloyd's List L.R. 163 (C.A.). See generally M. NORRIS, *supra* note 2, §§ 210-19, at 338-54; G. GILMORE & C. BLACK, *supra* note 7, § 8-9, at 562-63. Some expenses are disallowed if they are deemed too remote or too speculative. See M. NORRIS, *supra* note 2, §§ 214, 218 at 346-47, 351-53.

primarily to encourage efforts to save property from destruction at sea and to discourage embezzlement by salvors.<sup>11</sup>

The general maritime law has treated most life salvors less favorably than property salvors.<sup>12</sup> A life salvor has no claim against the person saved<sup>13</sup> and does only slightly better when he seeks compensation from the owner of the ship or its cargo. If the salvor saves both life and property ("the life-property salvor"),

11. *The Blackwall*, 77 U.S. (10 Wall.) 1, 14 (1869); *Mason v. The Blaireau*, 6 U.S. (2 Cranch) 240 (1804); *St. Paul Marine Transp. Corp. v. Cerro Sales Corp.*, 505 F.2d 1115, 1121 (9th Cir. 1974).

12. Courts in states where slavery was legal and courts in England before the abolition of the slave trade viewed slaves as property and gave a reward for saving the life of a slave. *E.g.*, *Flinn v. The Leander*, 9 F. Cas. 275 (D.S.C. 1808) (No. 4,870); *Cox v. Two Negroe Men*, (N.Y. Vice Adm. 1751), reported in *REPORTS OF CASES IN THE VICE ADMIRALTY OF THE PROVINCE OF NEW YORK AND IN THE COURT OF ADMIRALTY OF THE STATE OF NEW YORK*, 1715-88, at 173 (C.M. Hough ed. 1925); *The Trelawney*, 165 Eng. Rep. 592 (1802). Slavery was not abolished in New York until the nineteenth century. Laws of 1817, c. 137; Laws of 1841, c. 247; *Arents v. Long Island R.R.*, 156 N.Y. 1, 6 (1898); *Lemmon v. People*, 20 N.Y. 562 (1860). One federal court located in a free state refused to award salvage for saving slaves. *Gedney v. L'Amistad*, 10 F. Cas. 141, 145 (D. Conn. 1840) (No. 5,294a), modified on other grounds by the Circuit Court of Connecticut (unreported), modified on other grounds *sub nom.* *United States v. The Amistad*, 40 U.S. (15 Pet.) 518 (1841).

13. See S. REP. NO. 477, 62d Cong., 2d Sess. 2 (1912). It would have been unthinkable to sue a free person in rem for life salvage, for this would have meant detaining and selling the person saved. See Knauth, *Aviation and Salvage: The Application of Salvage Principles to Aircraft*, 36 COLUM. L. REV. 224, 228 (1936). The exemption of seamen in England and the United States from having to pay life salvage seems related to the British and American courts' traditionally benevolent attitude toward seamen. Cf. *Moragne v. States Marine Lines*, 398 U.S. 375, 387 (1970); F. WISWALL, JR., *THE DEVELOPMENT OF ADMIRALTY JURISDICTION SINCE 1800*, at 24-25 (1970) (seaman is a ward of the admiralty). The exemption of passengers from paying salvage probably rests on similar grounds. Salvage is not due even for saving the clothing or personal baggage of the crew because those who escape a shipwreck "usually find themselves in a strange land, without friends and without resources" and the "common feelings of humanity require that their clothing should be restored to them forthwith, unburdened with salvage." *The Rising Sun*, 20 F. Cas. 828, 830 (D. Me. 1837) (No. 11,858). The personal baggage and clothing of passengers is also exempt. *The Willem III*, 3 Adm. & Eccl. 487, 490 (1871). See also W. MARVIN, *supra* note 8, § 123, at 133. Money found on a dead body has been held to be a subject of salvage. *Broere v. Two Thousand One Hundred Thirty-three Dollars*, 72 F. Supp. 115 (E.D.N.Y. 1947) (motion), 78 F. Supp. 635 (E.D.N.Y. 1948) (decision); *Gardner v. Ninety-Nine Gold Coins*, 111 F. 522 (D. Mass. 1899). But see *The Amethyst*, 1 F. Cas. 762, 765 (D. Me. 1840) (No. 330) (thirty dollars found on a body ordered to be given to the heirs of the deceased). In contrast to British and American admiralty law, as of 1900, the Netherlands and possibly Belgium and Italy required the persons saved to contribute to the salvage award. See COMITÉ MARITIME INTERNATIONAL, BULL. No. 9, 152-53 (1901). The Brussels Salvage Convention provides that, in the absence of a contrary national law, the persons saved are not liable for salvage. See text at note 90 *infra*. Some state courts have permitted doctors and hospitals to recover from a patient's estate for unsolicited benefits rendered in an emergency even though the patient never regains consciousness. See, e.g., *In re Crisan's Estate*, 362 Mich. 569, 107 N.W.2d 907 (1961); *Cotnam v. Wisdom*, 83 Ark. 601, 104 S.W. 164 (1907). See generally 2 G. PALMER, *supra* note 8, § 10.4, at 374-77.

courts generally reward him only indirectly for saving life, treating it as just one element to be considered in determining the amount of property salvage. If the salvor saves life when no property is saved ("the pure life salvor"), courts will not reward him under the general maritime law. Finally, if the salvor saves life while others save property ("the independent life salvor"), courts have split over whether to reward him.

This Section takes a close look at the judicial treatment of the three classes of life salvors in England and the United States. As we will see, judges occasionally voiced their unhappiness about the restricted rights of life salvors, and sometimes found ways to expand those rights.

### A. Life-Property Salvors

Courts advanced two reasons to support the practice of giving property salvors a greater reward if they save life while they are saving property.<sup>14</sup> One is that property salvage is an "honorary" reward, and in determining the amount of that reward the court may consider the salvors' moral qualities demonstrated in saving human life.<sup>15</sup> Under this theory, the salvor is compensated only indirectly for life salvage; indeed, the court usually does not specify how much of the award reflects the enhanced merit shown by saving life.<sup>16</sup>

A second reason expressed by courts for increasing awards to life-property salvors is that saving life at sea furthers the general interest of shipowners and cargo owners.<sup>17</sup> This reason emphasizes

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14. *E.g.*, *The Emblem*, 8 F. Cas. 611 (D. Me. 1840) (No. 4,434); *Grand Union (Shipping) Ltd. v. London Steam-Ship Owners' Mutual Ins. Assn. (The Bosworth (No. 3))*, [1962] 1 Lloyd's List L.R. 483 (Q.B. Commercial Ct.). See G. GILMORE & C. BLACK, *supra* note 7, § 8-12, at 570.

15. *Lamar v. The Penelope*, 14 F. Cas. 977 (E.D.S.C. 1858) (No. 8,007). See also *The Plymouth Rock*, 9 F. 413, 418 (S.D.N.Y. 1881); *The Fusilier*, 167 Eng. Rep. 391, 396, 16 Eng. Rep. 19, 26-27 (P.C. 1865).

16. See *Grand Union (Shipping) Ltd. v. London Steam-Ship Owners' Mutual Ins. Assn. (The Bosworth (No. 3))*, [1962] 1 Lloyd's List L.R. 483 (Q.B. Commercial Ct.).

17. In addition to the shipowners' and cargo owners' humanitarian interest in the welfare of the passengers and crew, life salvors benefit shipowners and cargo owners by reducing the costs that arise from a disaster at sea. Even in the days when shipowners were not liable for the wrongful death of seamen, courts recognized that increasing the safety of seamen benefits the shipowners since it helps assure an adequate supply of men ready to risk the hazards of the sea. See, *e.g.*, *Harden v. Gordon*, 11 F. Cas. 480 (C.C.D. Me. 1823) (No. 6,047) (Story, J.). Also, the payment of life salvage is in the interest of shipowners and cargo owners because it further encourages people to engage in salvage activities. See generally *The Emblem*, 8 F. Cas. 611 (D. Me. 1840) (No. 4,434); *The Fusilier*, 167 Eng. Rep. 394, 16 Eng. Rep. 19 (P.C. 1865).

the general benefit to the owners of rescued property rather than the valor or moral qualities of the salvor. Under this theory, the salvor is compensated directly for saving life, and the court may specify the reward that is due.

Although these two theories stress different aspects of saving life at sea, they are not incompatible and may even complement each other. In one case a court considered the rescue of some lives a part of the "general service" rendered a vessel in distress, merely affecting the merit of the property salvage, but it characterized the rescue of some other lives as a "special service" and specified particular rewards for those efforts.<sup>18</sup>

The reason a court gives for compensating life salvage might affect the size of the award. For example, a court might be embarrassed to announce a nominal award for saving life at the same time it generously rewards saving property. It can avoid such embarrassment without increasing the life salvage by awarding a lump sum for saving both life and property. Of more general concern, the reason a court adopts for enhancing a life-property salvor's reward may influence its attitude toward rewarding independent life salvors and pure life salvors. If the court believes a life-property salvor deserves an enhanced reward only because saving life increases a property salvor's merit, then it may be reluctant to reward a life salvor who does not save property. If, however, the court believes a life-property salvor deserves an enhanced reward because saving life at sea furthers the interests of marine commerce, then it may be more willing to reward pure and independent life salvors. We turn now to the courts' treatment of those two types of salvors.

### B. *Pure Life Salvors*

Although few cases have actually ruled on the issue,<sup>19</sup> courts

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18. *The Bremen*, 111 F. 228 (S.D.N.Y. 1901). See also *The Mulhouse*, reported in *Rigby v. The Cargo and Materials from the Wrecked Ship Mulhouse* (pamphlet printed by Baker and Godwin, New York (1859)) (contained in 1 PAMPHLETS COLLECTED BY ELBRIDGE T. GERRY 681, part of the large Gerry Collection of the United States Supreme Court) [hereinafter cited as *The Mulhouse* (pamphlet)]. The court awarded life salvage to the master and crew of the *Tortugas* separately from a property salvage award to the vessel. Unfortunately, the property salvage aspect of the *Tortugas*'s service is not mentioned in the condensed report of the case generally available, 17 F. Cas. 962 (S.D. Fla. 1859) (No. 9,910).

19. The clearest ruling was in *The Zephyrus*, 166 Eng. Rep. 596 (Adm. 1842), discussed in text at notes 27-35 *infra*. The case was followed in *The Johannes*, 167 Eng. Rep. 87, 90 (Adm. 1860) (denying salvage to independent life salvors because the court had no jurisdiction "to deal with cases of pure life salvage"). In *The Renpor*, 8 P.D. 115 (C.A.



and writers have tended to agree that the general maritime law gives no reward for saving life when no property is saved.<sup>20</sup> The British High Court of Admiralty first enunciated the proposition in 1822 as dictum in *The Aid*.<sup>21</sup> In that case, twenty-two men were aroused from their sleep and set out in four boats for the express purposes of saving life in a raging winter storm. There was no prospect of saving property when they set out. At great risk to themselves, the salvors managed to save not only life but also property worth over £6,000.<sup>22</sup> Lord Stowell ruled that a "liberal salvage remuneration" was due, and he awarded them one tenth of the property's value, plus their expenses.<sup>23</sup> In reaching that result, the court said,

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1883), and *The Cargo ex Sarpendon*, 3 P.D. 28 (1877), two cases decided after passage of the Merchant Shipping Act, which gave the Board of Trade the discretion to reward pure life salvors, the courts ruled that an owner of a lost ship has no personal liability to pay life salvage. In *Peninsular & Oriental Steam Navigation Co. v. Overseas Oil Carriers*, 418 F. Supp. 656 (S.D.N.Y. 1976), *rev'd*, 553 F.2d 830 (2d Cir.), *cert. denied*, 434 U.S. 889 (1977), the district court denied recovery of expenses to a ship that diverted to pick up an ill seaman partly on the basis of the doctrine denying pure life salvage. The court of appeals reversed, using a restitution theory to afford relief. See text at notes 201-42 *infra*.

Although not actually ruling on the issue, the courts denying awards to independent life salvors under 46 U.S.C. § 729 (1976) would probably also have denied pure life salvage. For example, one of these cases, *The Eastland*, 262 F. 535 (N.D. Ill. 1919), assumed that independent life salvors had no right to salvage under the general maritime law. See also *The Admiral Evans*, 286 F. 442 (W.D. Wash. 1923) (denying life salvage under 46 U.S.C. § 729 and apparently under the general maritime law even though the ship was later raised). Cf. *The Shreveport*, 42 F.2d 524 (E.D.S.C. 1930) (court grants a reward under the 1912 salvage statute to independent life salvors but assumes that they have no reward under the general maritime law). If a court denies independent life salvage under the general maritime law, it will certainly deny life salvage when no property is saved.

20. *E.g.*, *The Plymouth Rock*, 9 F. 413 (S.D.N.Y. 1881); *The Emblem*, 8 F. Cas. 611 (D.C. Me. 1840) (No. 4,434); *Sturtevant v. The George Nicholas*, 23 F. Cas. 333 (E.D. La. 1853) (No. 13,578); *Grand Union (Shipping) Ltd. v. London Steam-Ship Owners' Mutual Ins. Assn. (The Bosworth (No. 3))* [1962] 1 Lloyd's List L.R. 483 (Q.B. Commercial Ct.); *The Cargo ex Schiller*, 2 P.D. 145 (C.A. 1877); *The Willem III*, 3 Adm. & Eccl. 487, 494 (1871); *The Fusilier*, 167 Eng. Rep. 391, 16 Eng. Rep. 19 (P.C. 1865); *The Aid*, 166 Eng. Rep. 30 (Adm. 1822). See generally G. GILMORE & C. BLACK, *supra* note 7, § 8-1, at 532; M. NORRIS, *supra* note 2, § 24, at 37; Jarett, *supra* note 7. In his treatise on wreck and salvage, Judge William Marvin cited *The Zephyrus* for the proposition that "the court has no authority to remunerate salvors for saving life merely." W. MARVIN, *supra* note 8, § 121, at 131. A year later, in *The Mulhouse*, 17 F. Cas. 962 (S.D. Fla. 1859) (No. 9,910), Judge Marvin was slightly less categorical. After stating the rule of *The Zephyrus* he wrote, "Indeed, if no property is saved, no means are supplied by which the court can reward the salvor. A suit in personam, for salvage for saving the life of a free person, would be a novelty and probably could not be maintained, unless under very special circumstances, of an express contract." 17 F. Cas. at 967.

21. 166 Eng. Rep. 30.

22. 166 Eng. Rep. at 30.

23. The expenses apparently included compensation for one of the salvors' boats, which was crushed during the rescue. 166 Eng. Rep. at 31.

The mere preservation of life, it is true, this Court has no power of remunerating; it must be left to the bounty of the individuals; but if it can be connected with the preservation of property, whether by accident or not, then the Court can take notice of it, and it is always willing to join that to the *animus* displayed in the first instance.<sup>24</sup>

It was unnecessary for Lord Stowell to assert in *The Aid* that the court lacked power to award pure life salvage since the salvors in that case also saved property.<sup>25</sup> Perhaps because his assertion was dictum, the judgment cited no authority and gave no reason why pure life salvors should have no enforceable right to salvage. Nonetheless, courts in England and the United States have generally accepted that dictum as a valid statement of law.<sup>26</sup>

*The Zephyrus*<sup>27</sup> was the first reported case to hold that no reward can be given for pure life salvage. Salvors saved the master and crew of a ship that was in great danger, but failed to save the vessel or cargo. They sued the owners of the vessel for as much salvage as the court might think fit. In a judgment by Dr. Lushington,<sup>28</sup> the court denied their claim, in light of "general

24. 166 Eng. Rep. at 31.

25. A federal district judge had reached a similar result about twenty years earlier in *Taylor v. Twenty-five Thousand Dollars*, 23 F. Cas. 806 (D.S.C. 1801) (No. 13,087). In that case the salvors rescued the passengers and crew of a schooner that was wrecked upon some shoals two miles from the South Carolina shore. While they were saving people, the salvors also saved \$25,000 of the captain's money. They may have intended to save some cargo when they initially approached the wreck; indeed, on a second trip that the salvors made to the wreck they saved some trunks and luggage. The opinion, however, seems to suggest that the salvors initially intended to save only life. Judge Bee said:

[The parties'] motives were generous and disinterested, and their assistance no less prompt than voluntary. Many others, in their situation, would have remained snugly on shore. It is true, that they consulted their feelings, and did not calculate their interests. This is their highest praise; and though it has been said, that their reward is laid up in heaven, I see no reason why they should not receive such as may be decreed to them on earth.

23 F. Cas. at 807.

The court awarded \$5,000 as compensation for the salvors' risk, services, and "humanity," and as "an inducement to others to 'go and do likewise.'" 23 F. Cas. at 807. See also *The Emblem*, 8 F. Cas. 611 (D. Me. 1940) (No. 4,434) (libellants rescued passengers of a wrecked ship and returned two hours later when they learned that there was valuable property aboard. Quoting *The Aid* and taking into account the saving of life, the court thought that the award should be liberal even though the salvage of property was of "no extraordinary merit").

26. See notes 19 & 20 *supra*.

27. 166 Eng. Rep. 596 (Adm. 1842).

28. Dr. Stephen Lushington was Judge of the High Court of Admiralty from 1838 to 1867. He was also a Member of Parliament from 1806 to 1808 and from 1820 to 1841. F. WISWALL, JR., *supra* note 13, at 40.

principles and . . . the established practice of the Court,"<sup>29</sup> and explained:

The jurisdiction of the Court, in salvage cases, is founded upon a proceeding against property which has been saved, and I am at a loss to conceive upon what principle the owners can be made answerable for the mere saving of life. The authority of decided cases is directly against any such proposition, and I have always understood it to have been settled by Lord Stowell as the law of the Court, that it is impracticable for parties to prefer a salvage claim in the Court of Admiralty, merely on account of having saved the lives of individuals from impending danger or destruction.<sup>30</sup>

That explanation for denying pure life salvages leaves much to be desired. It does not identify any cases demonstrating that the "established practice of the Court" opposed such a reward. Presumably the court had *The Aid* in mind as the case that settled the rule, but as we have seen, the comments in *The Aid* concerning pure life salvage were simply dicta. (Indeed, the *holding* in *The Aid* that a liberal reward is due even though the salvors' only intention when they set out was to save life could be read to demonstrate a highly favorable attitude towards life salvors.) Thus, it seems that the issue in *The Zephyrus* was one of first impression, and since it could find no "established practice" of awarding pure life salvage, the court was unwilling to create a new right.

More difficulties spring from the court's assertion that "general principles" required it to deny a pure life salvage award. It ruled that there must be a proceeding against property that has been saved — a proceeding in rem — for it to have jurisdiction. Since no property was saved in *The Zephyrus*, no proceeding in rem was possible, and not finding any other principle to support the salvors' claim, the court denied relief. Again it appears to have overstated the matter. Although salvage suits apparently were traditionally brought in rem, cases before *The Zephyrus* had permitted property salvage claims to be brought in personam.<sup>31</sup>

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29. 166 Eng. Rep. at 596.

30. 166 Eng. Rep. at 597.

31. *The Meg Merrilies*, 166 Eng. Rep. 434 (Adm. 1837) (the salvaged vessel was on a voyage when process was served); *The Trelawney*, 165 Eng. Rep. 441 n. (Adm. 1801) (salvors refrain from arresting vessel at the request of the vessel's owner); *The Hope*, 165 Eng. Rep. 440 (Adm. 1801) (court was not disposed to sustain objection to the proceeding. The shipowner argued that the only mode of proceeding for salvage was by warrant of arrest of the ship). The mode of proceeding in each of these cases was by monition, an instrument that required the person served to appear and show cause. *See also* *The Cargo ex Schiller*, 2 P.D. 145, 149 (C.A. 1877) (Brett, L.J.). Wiswall points out that the proceed-

Therefore, the fact that the suit in *The Zephyrus* was in personam should not have been a sufficient basis for denying jurisdiction. If property salvage cases suggest any general principle, it is that in order to encourage salvors to make their best effort, successful services are generously rewarded and no award is made for unsuccessful efforts. But that principle would require that courts reward successful life salvage efforts generously in order to encourage potential salvors to do their utmost to save life.<sup>32</sup>

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ing by monition differed from a form of in personam proceeding not used after the eighteenth century that involved the arrest of the body of the defendant. F. WISWALL, JR., *supra* note 13, at 62-64. In *The Rapid*, 166 Eng. Rep. 460 (Adm. 1838), the court dismissed a salvage suit that was brought by monition because the owners had been prejudiced by an eight-month delay in bringing suit. Although recognizing that "there may be some cases of special circumstances where salvors have been allowed to proceed by monition," the court was unhappy that suit had not been brought in rem, "the real foundation of this jurisdiction." 166 Eng. Rep. at 461.

Apparently the first English statute to provide for admiralty suits in personam was the Admiralty Court Act, 1854, 17 & 18 Vict. c. 78, § 13. The original rule allowing in personam admiralty suits in federal courts was rule 19, promulgated in 1844. 44 U.S. ix at xii. Before rule 19, federal courts generally entertained such cases more freely than their British counterparts. See Morrison, *The Remedial Powers of the Admiralty*, 43 YALE L.J. 1 (1933). The rules were restrictive at first. The 1854 English statute was applicable only to cases in which a party had a cause of action against a ship, freight, goods, or other effects. The federal rule was applicable only to salvage suits performed at the request of and for the benefit of the person sued. These restrictions were removed by legislation and judicial decision. Admiralty Court Act, 1861, 24 & 25 Vict. c. 10, § 35; *United States v. Cornell Steamboat Co.*, 202 U.S. 184 (1906). See also Admiralty Rule 18, promulgated in 1920, 254 U.S. App. at 8 (effective March 7, 1921). The current provision allowing suits in personam in England is the Administration of Justice Act, 1956, 4 & 5 Eliz. 2, c. 46 §§ 3, 4 (1956) as amended by the Courts Act, 1971, c. 23, § 56(4), sched. 11, pt II. The relevant American rule is Supplemental Rule C of the Federal Rules of Civil Procedure.

32. Cases before *The Zephyrus* had endorsed that principle. See *The Henry Ewbank*, 11 F. Cas. 1166, 1170 (C.C.D. Mass. 1833) (No. 6,376) (Story, J.); *Rowe v. The Brig*, 20 F. Cas. 1281 (C.C.D. Mass. 1818) (No. 12,093) (Story, J.); *The Emulous*, 8 F. Cas. 704, 707 (C.C.D. Mass. 1832) (No. 4,480) (Story, J.); *The William Beckford*, 165 Eng. Rep. 492, 492 (Adm. 1800) (Lord Stowell, then Sir William Scott); *The Sarah*, 165 Eng. Rep. 188 n. (Adm. 1800).

Several years after *The Zephyrus*, Dr. Lushington himself applied the principle to a difficult fact situation. In *The Fusilier*, 167 Eng. Rep. 391, 16 Eng. Rep. 19 (Adm. 1864), *affd.*, 167 Eng. Rep. 395, 16 Eng. Rep. 25 (P.C. 1865), the salvors saved a ship, its cargo, and 95 passengers; the issue was whether the cargo owners were liable under the Merchant Shipping Act of 1854, 17 & 18 Vict. c. 104, to contribute for the saving of life. Although he restated the proposition that pure life salvors could not maintain a suit in the Court of Admiralty under the general maritime law, 167 Eng. Rep. at 393, 16 Eng. Rep. at 21, Dr. Lushington held the cargo owners liable for life salvage on the facts before him. He explained that life salvage is awarded under the statute not only to encourage the saving of life, but also to encourage salvors generally, "for such reward operates as a further incentive to salvage exertions." 167 Eng. Rep. at 393, 16 Eng. Rep. at 21. He noted that the general maritime law required cargo owners to pay life-property salvors an enhanced reward for the same reasons. Even though the shipowner and cargo owner receive no direct benefit from the life salvage, they are greatly interested in having such services performed.

*The Zephyrus's* explanation seems even more curious when one notes that after Parliament enacted corrective legislation, Dr. Lushington denounced the rule denying life salvage as strange and grossly anomalous.<sup>33</sup> Why did he deny pure life salvage in *The Zephyrus*? It may be that he actually believed the Court of Admiralty lacked the power to grant pure life salvage in the absence of express authorization by Parliament. One cannot help but speculate, however, that he was using the jurisdictional argument to cloak a reason he felt uncomfortable articulating: he may have considered it less important to reward life salvors than to encourage maritime commerce by limiting cargo owners' and shipowners' losses.<sup>34</sup> A more remote possibility is that Dr. Lushington feared allowing life salvage suits to be brought in personam

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33. *The Coromandel*, 166 Eng. Rep. 1097, 1098 (Adm. 1857); *Silver Bullion*, 164 Eng. Rep. 312, 314 (Adm. 1854).

34. A similar policy apparently underlay the British limitation-of-liability statutes, which limited a shipowner's liability to the value of the ship and its freight for "losses or damages" that happen to cargo or other vessels without the shipowner's fault or privity. 53 Geo. 3, c. 159, § 1 (1813), amending 26 Geo. 3, c. 86 (1786) and 7 Geo. 2, c. 15 (1734). In *Cail v. Papayanni (The Amalia)*, 15 Eng. Rep. 778, 779 (Adm. 1863), *affd.*, 15 Eng. Rep. 778, 779 (P.C. 1863), in which the court allowed a shipowner to limit its liability under a limitation statute for collision damages, the court quoted Dr. Lushington: "The principle of limited liability is, that full indemnity, the natural right of justice, shall be abridged for political reasons." In *The Clara*, 166 Eng. Rep. 986, 987 (Adm. 1855), Dr. Lushington said that the limitation of liability statutes were enacted "upon the principle that unlimited liability was prejudicial to the maritime interests of this country." *But see* KENNEDY'S CIVIL SALVAGE 162 nn. 10-11 (4th ed. 1958), suggesting that the British limitation statutes did not apply to the liability to pay salvage.

The first American statute limiting liability was enacted in 1851, based in part on the British example. *See* G. GILMORE & C. BLACK, *supra* note 7, § 10-2, at 818-19. The statute limits liability not only for loss and damage but also for "any act, matter, or thing, . . . done, occasioned, or incurred, without the privity or knowledge" of the owner. 46 U.S.C. § 183 (1976). An amendment added in 1884 provides that owners may limit their liability for their "debts and liabilities." 46 U.S.C. § 189 (1976). As amended, the federal statute applies to property salvage claims incurred without the privity or fault of the owner. *The San Pedro*, 223 U.S. 365 (1912).

Even without the benefit of the limitation statutes, the salvage rules limit the salvage award to the value of the property saved. Indeed, the salvage rules are less favorable to life salvors than the limitation of liability statutes. For example, the denial of pure life salvage and the limitation of awards for life-property salvage to the value of the property saved limit the cargo owners' liability to the amount of the cargo saved. By contrast, the limitation statutes do not limit a cargo owner's liability. Also, when a ship is lost a life salvor has no claim against the freight and passage money that is earned. *M. NORRIS*, *supra* note 2, § 37, whereas such moneys are subject to claims in a limitation action. *The Main v. Williams*, 152 U.S. 122 (1894). Further, in contrast to the limitation statutes, the pure life salvage rule exonerates the shipowner even if the perilous situation is caused by the owner's fault or with its privity and knowledge. For some time now, American courts have been reluctant to limit a shipowner's liability under the statute and have expanded the use of the privity and knowledge exceptions. *See* note 167 *infra*.

against the shipowner lest other plaintiffs seek to recover in personam from the person saved, a situation that would contravene the court's concern for seamen and passengers.<sup>35</sup>

### C. *Independent Life Salvors*

An independent life salvor (one who saves life in a situation where another saves property) is similar to the life-property salvor in that he seeks a reward when property has been saved. On the other hand, he is similar to the pure life salvor in that he has not saved property. Courts have split over whether to reward him as they do life-property salvors or whether to deny him a reward as they do pure life salvors.

#### 1. *In England*

In *The Queen Mab*,<sup>36</sup> the court awarded £30 to salvors who saved the crew of a ship and £100 to other salvors who rescued the vessel. Unfortunately, the judgment did not explain the basis for its independent life salvage award. The only clue lies in the argument of the salvors, which referred to a statute giving the magistrates and justices of the peace of Cinque Ports, over which the Court of Admiralty had appellate jurisdiction, the authority to award salvage "for being instrumental in saving the life or lives of any person or any persons on board."<sup>37</sup>

In *The Zephyrus*,<sup>38</sup> which as we saw was a case of pure life salvage,<sup>39</sup> Dr. Lushington severely criticized *The Queen Mab*. In his view, neither the pure life salvor nor the independent life salvor should be given a right to any salvage recovery.<sup>40</sup> Although

35. This theory does not explain why Dr. Lushington felt that independent life salvors could not sue the cargo or ship in rem for a reward. See text at notes 39-44 *infra*. The inconsistency is not necessarily proof that the theory is incorrect. Commenting on Dr. Lushington's judicial career, one writer has said, "[J]udicial inconsistency was surely [Lushington's] greatest and most obvious shortcoming" but that "[f]rom the time of acting as advocate for the mistreated crewmen of the *Lowther Castle* [166 Eng. Rep. 137 (Adm. 1825)], he was benevolent to the plight of the mariner." F. WISWALL, JR., *supra* note 13, at 73.

36. 166 Eng. Rep. 395 (Adm. 1835). The life salvage award also covered the salvor's expenses. 166 Eng. Rep. at 396.

37. 166 Eng. Rep. at 396 (citing 1 & 2 Geo. 4, c. 75, § 8 (1821)).

38. 166 Eng. Rep. 596, 597 (Adm. 1842).

39. See text at note 28 *supra*.

40. Dr. Lushington observed that he could not see "any sound distinction between the case of a vessel saved by one set of salvors, and the crew by another, and a case in which the crew were rescued and no assistance whatever was rendered to the vessel." 166 Eng. Rep. at 597.

his comments about independent life salvage were dicta, any hopes that Dr. Lushington would change his mind were dashed eighteen years later in *The Johannes*,<sup>41</sup> where he held that general maritime law gives no reward to an independent life salvor. *The Johannes* gives no reason behind the holding other than a citation to *The Zephyrus* and the lack of a contrary precedent in "the general maritime law of Europe, either in ancient or modern times."<sup>42</sup> The opinion is particularly frustrating because it states,

Most true it is that the preservation of human life is a much higher service than the rescuing from destruction of any property however valuable. . . . Still, high as the merit confessedly is, the Court of Admiralty did not deem itself competent to deal with such cases. Strong reasons might be assigned for this abstinence, but it is not necessary to travel further; I adhere to my opinion that the Court had no original jurisdiction to deal with cases of pure life salvage.<sup>43</sup>

As in the case of pure life salvage, Dr. Lushington's "strong reason" for not rewarding independent life salvors may have been a desire to limit the liability of shipowners and cargo owners.<sup>44</sup>

Parliament enacted legislation in 1846 — presumably in reaction to *The Zephyrus* — that seemed to give life salvors a right to salvage. It is unclear, however, whether the statute applied both to pure life salvors and independent life salvors.<sup>45</sup> In any

41. 167 Eng. Rep. 87 (Adm. 1860). *The Johannes* also denied relief under the Merchant Shipping Act of 1854, 17 & 18 Vict., c. 104. See text at note 50 *infra*.

42. 167 Eng. Rep. at 90. *The Queen Mab*, 166 Eng. Rep. 395 (Adm. 1835), reached a contrary result, but Dr. Lushington apparently felt no need to discuss that case, having disapproved of it in *The Zephyrus*. See text at notes 38-40 *supra*. Dr. Lushington also either chose to ignore or was unaware of Judge Marvin's contrary decision in *The Mulhouse*, 17 F. Cas. 962 (S.D. Fla. 1859) (No. 9,910), which was based in part on an apparent misreading of an earlier case by Dr. Lushington. See note 71 *infra*. Most of the facts and all of the headnotes of *The Mulhouse* (not containing any reference to Dr. Lushington's earlier opinion) were reported in England in *The Shipping and Mercantile Gazette*, April 25, 1860 at 6, col. 5, about eight months before the decision in *The Johannes*. In his autobiography, Judge Marvin recounts that Dr. Lushington entertained him a couple of days during Marvin's trip to England in the summer of 1860, still several months before *The Johannes*, and that they discussed "law and lawyers." *Autobiography of William Marvin* (1892) (unpublished manuscript, ed. by K. Kearney and reprinted in 36 FLA. HIST. Q. 179, 211 (1958)) [hereinafter cited as *Autobiography*].

43. 167 Eng. Rep. at 90.

44. It is interesting to note Dr. Lushington's comments in *The Pensacola*, 167 Eng. Rep. 376, 379 (Adm. 1864), where he remarked,

[T]he very foundation of the law of salvage — that salvors should be stimulated by hope of liberal reward to brave difficulty and danger, and go forth to the succor of vessels in distress . . . applies with the highest force to those cases in which there is not only property but also life to be saved.

45. 9 & 10 Vict., c. 99, § 19 provides in pertinent part:

[E]very person . . . who shall act or be employed in any way whatsoever in the

event, in 1854 Parliament passed The Merchant Shipping Act,<sup>46</sup> a comprehensive piece of legislation designed to consolidate and amend the many statutes that applied to the British shipping industry. Sections 458 and 459 of that Act give salvors who save life within the United Kingdom a right to salvage against the owners of the ship and cargo that has been saved.<sup>47</sup> Furthermore, the life salvor's claim against the ship is preferred to the claims of other salvors. If no property is saved, or if the property saved is insufficient to pay life salvage, then the Board of Trade has the power to award such sums as it sees fit out of the Mercantile Marine Fund. An 1861 statute extended those provisions to lives saved from British ships anywhere in the world and to lives saved from foreign ships "wholly or in part in British waters."<sup>48</sup> Parliament further expanded the coverage of life salvage provisions in 1863 by giving the Vice Admiralty Courts in the various British possessions the power to hear "claims in respect of salvage of any ship, or of life or goods therefrom."<sup>49</sup>

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saving or preserving of any ship or vessel in distress, or of any part of the cargo thereof, or of the life of any person on board the same . . . shall . . . be paid a reasonable reward or compensation by the way of salvage for such service, by the commander, master or other superior officer, mariners, or owners of said ship or vessel, or their agent, or by the merchant whose ship, vessel, or cargo shall be so saved as aforesaid . . . .

(emphasis added).

Some have doubted the statute's effectiveness, saying that the statute does not provide clearly enough by whom the salvage is to be paid or how it is to be enforced. Jarett, *supra* note 7, at 782 n.23; MERCHANT SHIPPING ACT OF 1854, at 193 (Dowdeswell ed.), cited by counsel in *The Johannes*, 167 Eng. Rep. 87, 89 (Adm. 1860). In *The Fusilier*, 167 Eng. Rep. 391, 396-97, 16 Eng. Rep. 87, 89 (P.C. 1865), however, the Privy Council stated that the provisions of the 1846 Act were "substantially re-enacted" in the Merchant Shipping Act of 1854.

46. 17 & 18 Vict., c. 104.

47. The right to salvage from cargo owners was somewhat in doubt but was resolved favorably to the life salvor in *The Fusilier*, 167 Eng. Rep. 391, 16 Eng. Rep. 87 (P.C. 1865). See note 32 *supra*.

48. Admiralty Court Act, 1861, 24 Vict., c. 10, § 9. This statute was apparently intended to correct the result in *The Johannes*, 167 Eng. Rep. 87 (Adm. 1860), that denied a reward to those who rescued some people outside the three-mile limit and brought them to shore. *The Pacific* [1898] P. 170; *The Heindall* (Nova Scotia Vice Adm. 1872), reported in YOUNG'S ADMIRALTY DECISIONS 132 (Oxley ed. 1882). But see *Jørgensen v. Neptune Steam Fishing Co.*, 4 Fr. 992 (Scot. Ct. Sess. 1902).

49. Vice Admiralty Courts Act, 1863, 26 & 27 Vict., c. 24, § 10. See *The Heindall* (Nova Scotia Vice Adm. 1872), reported in YOUNG'S ADMIRALTY DECISIONS 132 (Oxley ed. 1882), where Judge Young fully discusses the effect of this statute. He rules out the possibility that Canadian courts have greater freedom than English courts to award life salvage even though the statutes express no such limitation. YOUNG'S ADMIRALTY DECISIONS at 133. In 1873, the Canadian Parliament enacted a life salvage statute effective the following year that was based on the British statute of 1854. The Wreck and Salvage Act,



The courts gave the life salvage statutes a mixed reaction. The High Court of Admiralty restricted the 1854 provision to life saved within three miles of the United Kingdom.<sup>50</sup> The Court of Appeal held that the statute does not give pure life salvors a claim against the owners of the ship and cargo; their only right is to ask the Board of Trade to make a discretionary reward.<sup>51</sup> Further, one judge ruled that life salvors cannot recover salvage from the owners of a sunken ship even when the owners have already recovered the value of the ship from a third party.<sup>52</sup>

But not all reaction to the life salvage statutes was negative. Dr. Lushington praised the reform of the life salvage rules,<sup>53</sup> and thought that when the statute was applicable, it often required large awards for saving life.<sup>54</sup> Lord Justice Baggallay also thought that denying life salvage was unjust.<sup>55</sup> He and Lord Justice James held for a divided Court of Appeal in *The Cargo ex Schiller*<sup>56</sup> that cargo owners must reward those who saved life even though the cargo was apparently raised "many weeks" after the saving of life by the owners' employees, who were not entitled to salvage.<sup>57</sup> The

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1873, 36 Vict., c. 55, § 23 (Can.). In *The Atlantic* (Nova Scotia Vice Adm. 1874), reported in YOUNG'S ADMIRALTY DECISIONS 170 (Oxley ed. 1882), the court awarded salvage for saving life in 1873 but did not state the statutory basis for its decree. If one reads *The Atlantic* by itself, one may understandably gain the impression, as one writer did, that Judge Young awarded life salvage in that case under the general maritime law. See 4 BROOKLYN J. INTL. L., *supra* note 7, at 123.

Under an 1862 act, the life salvage provision can be applied to life saved from foreign ships if the country to whom those ships belong is willing to have those provisions apply. The Merchant Shipping Act Amendment Act, 1862, 25 & 26 Vict., c. 63, § 59. Apparently only Prussia, in 1864, asked to have the life salvage statutes apply to its ships. See Jarett, *supra* note 7, at 782 n.23. The 1854 provision on life salvage as amended was substantially reenacted in the Merchant Shipping Act of 1894, 57 & 58 Vict., c. 60, §§ 544, 545. Some countries have legislation patterned on this provision. *E.g.*, CAN. REV. STAT., c. S-9, § 515 (1970); Shipping and Seamen Act, 1952, § 356 (New Zealand), 14 REPR. STAT. N.Z. 296. India and Israel have similar legislation, but lack provisions for discretionary governmental awards. Merchant Shipping Act, 1958, § 402, 14 INDIA A.I.R. MANUAL 452. Wreck and Salvage Ordinance, 2 Laws of Palestine, c. 155, § 19 (1933) (in force in Israel). This was also the case in Australia under § 315 of its Navigation Act of 1912, but a provision for discretionary governmental awards was added by § 157(1)(b) of the Navigation Act of 1958.

50. *The Johannes*, 167 Eng. Rep. 87 (Adm. 1860). That decision was effectively overruled by Parliament in its amendment to the statute the following year. See note 48 *supra*.

51. *The Renpor*, 8 P.D. 115 (C.A. 1883).

52. *The Annie*, 12 P.D. 50 (1886).

53. *The Coromandel*, 166 Eng. Rep. 1097 (Adm. 1857); *Silver Bullion*, 164 Eng. Rep. 312 (Adm. 1854).

54. *The Eastern Monarch*, 167 Eng. Rep. 43 (Adm. 1860).

55. *The Cargo ex Schiller*, 2 P.D. 145, 158 (C.A. 1877).

56. 2 P.D. 145 (C.A. 1877), *affg.* 1 P.D. 473 (1876).

57. Although the opinions do not specify the amount of time elapsed between the saving of life and the raising of the cargo, the defendants alleged that "many weeks" had

judgment of Lord Justice James exemplifies the liberal approach, relying

on the words of the statute as they would be understood by plain men who know nothing of the technical rule of the Court of Admiralty, or of flotsam, lagan, and jetsam. The legislature tells mariners that if they exert themselves to save life, they shall receive reward on the principle of salvage, and to put a technical meaning on the words, so as to limit the operation of the enactment, would be "to keep the word of promise to the ear and break it to the hope."<sup>58</sup>

## 2. *In the United States*

In 1860, the English case *The Johannes* held that independent life salvors have no right under the general maritime law to a reward.<sup>59</sup> As we saw, the case provided little analysis of the problem.<sup>60</sup> By contrast, an 1859 American case, *The Mulhouse*,<sup>61</sup>

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elapsed and the plaintiffs did not challenge this in their reply. 1 P.D. at 474-75. The cargo owners had argued in the trial court that the life salvors had no claim against property raised "long subsequent" to their services, 1 P.D. at 475, an argument that the trial judge thought was "untenable." 1 P.D. at 480. Lord Justice Brett's dissent in the Court of Appeal was not based on the interlude between the two salvage services. Instead, he felt that the life salvage statute only applied when wreck, flotsam, jetsam, or lagan were saved by men entitled to salvage. The cargo raised did not fit these categories, and the men who raised it received no salvage award, presumably because they were entitled to compensation under their contract whether or not they were successful.

58. 2 P.D. at 161. The last part of James's judgment is derived from Macbeth's lines:

And be these juggling fiends no more believed,  
That palter with us in a double sense,  
That keep the word of promise to our ear,  
And break it to our hope!

*Macbeth*, Act 5, scene 8, 19-22 (Harrison ed.).

59. An earlier case, *The Queen Mab*, rewarded independent life salvors but the decision may have been based on the court's reading of a statute. See text at notes 36-37 *supra*.

60. See text at notes 38-43 *supra*.

61. *The Mulhouse* (pamphlet), *supra* note 18. The report of the case went through a series of unfortunate condensations. A condensed report first appeared in 22 Monthly L. Rep. 276 (1858). The last sentence of the statement of facts in that report reads: "The more particular facts of the case are sufficiently stated in the opinion of the court *which we are obliged somewhat to condense*." 22 Monthly L. Rep. at 278 (emphasis added).

The *Monthly Law Reporter* version of the case served as the basis for the report in *Federal Cases*, 17 F. Cas. 962 (S.D. Fla. 1859) (No. 9,910), which is the only report generally available today and which contains the disclaimer quoted above. 17 F. Cas. at 963. The *Monthly Law Reporter* version was also the basis of the even more abbreviated report in 42 HUNT'S MERCHANT MAGAZINE 191, which gave only the prefatory statement of facts and the headnotes. The *Hunt's* report was reprinted in 31 NEW ORLEANS PRICE CURRENT, No. 56, at 3 (unpaginated) (March 28, 1860), which was in turn substantially reprinted in England in *The Shipping and Mercantile Gazette* on April 25, 1860, at 6. And the story gets worse! The editors of the *Gazette*, apparently believing that the headnotes constituted the full opinion, printed them as one long paragraph and modified the last

clearly decided the issue in favor of the independent life salvor, supporting its conclusion with solid policy analysis.<sup>62</sup> Unfortunately, modern American cases have neglected *The Mulhouse* and have assumed that independent life salvors have no right to a reward under judge-made law.

The *Mulhouse* ran aground off the coast of Florida in 1859. Numerous salvors worked "off and on as the weather would permit," for about one month, to save cargo and materials from the wrecked ship.<sup>63</sup> One ship, the *Globe*, saved the passengers of the *Mulhouse*, and another ship, the *Tortugas*, saved the crew and a small amount of property.<sup>64</sup> The *Globe* and the *Tortugas* were among the parties to claim a reward from the salvaged property.

Judge William Marvin, an authority on salvage,<sup>65</sup> began his opinion by accepting the rule of *The Zephyrus* that no reward is due for pure life salvage, but he suggested that such an award might be owed in case of an "express contract."<sup>66</sup> He then endorsed the proposition of *The Emblem*,<sup>67</sup> an American life-property salvage case, that

the general principles of humanity and of enlarged policy, applicable to these cases, where all are interested in adventures upon the

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sentence of the statement of facts to read, "The more particular facts of the case are stated in the following opinion of the Court:—." See also *Digest of Maritime Law Cases*, 8 L.T.R. (n.s.) 440, 441 (1863) (noting the holding in *The Mulhouse* on life salvage).

The records of the Southern District of Florida contain a brief opinion and a decree delivered by Judge Marvin in open court on May 6, 1859. Federal Archives, East Point, Ga., Record Group No. 21, Accession 53A418, Retrieval No. 60 [hereinafter cited as Court Records], at 323.

62. *The Johannes* did not consider *The Mulhouse*. See note 42 *supra*.

63. The *Mulhouse* (pamphlet), *supra* note 18, at 26. The prefatory statement of facts states that the *Mulhouse* was wrecked on March 26, and that the salvage services continued until April 25 when the ship broke up. The *Mulhouse* (pamphlet), *supra* note 18, at 5. Apparently the salvage services began on March 28. Amended libel of Rigby and others, Court Records, *supra* note 61, at 317. In the opinion delivered in open court, Judge Marvin said that the salvage services lasted "until about the 25th of April." *Id.* at 324.

64. The *Mulhouse* (pamphlet), *supra* note 18, at 33-34 (decree of the court).

65. William Marvin was a judge of the Superior Court of the Southern District of Florida from 1839 to 1847 and was a judge of the newly constituted District Court for the Southern District of Florida from 1847 to 1863. Judge Marvin published a treatise on wreck and salvage in 1858. He was a delegate to two conferences on general average, the Glasgow Conference in 1860 and the York Conference in 1864. A supporter of the Union while on the bench, Marvin decided many prize cases during the Civil War, and President Johnson appointed him Governor of Florida in 1865. He was elected to the United States Senate in the following year but was not allowed a seat because the newly freed slaves were not allowed to vote in Florida. See generally *Autobiography*, *supra* note 42; 11 THE NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 379 (1909).

66. 17 F. Cas. at 967.

67. 8 F. Cas. 611 (D. Me. 1840) (No. 4,434).

high seas, and liable to become in turn salvors and the saved, require that the circumstance of the preservation of life ought not to be kept wholly out of sight in measuring the reward.<sup>68</sup>

Judge Marvin interpreted this "enlarged policy" to mean that "if life is saved in connection with property, it is proper for the court to take notice of that fact, and increase the salvage accordingly."<sup>69</sup> He reasoned further that independent life salvors have a right to a reward because otherwise,

if any advantage in the salvage could be obtained by saving the property rather than the lives — a strong temptation would be held out to salvors, in many instances, to gratify their avarice at the expense of their feelings of humanity.<sup>70</sup>

These two factors — first, that independent life salvors' efforts further the general interests of maritime commerce in the safety of seamen, and second, that there is a need in many cases to encourage salvors to choose to save life rather than to save property — compelled<sup>71</sup> the court's holding: "[I]f one set of salvors

68. *The Mulhouse* (pamphlet), *supra* note 18, at 27, (quoting *The Emblem*, 8 F. Cas. 611, 612 (D. Me. 1840) (No. 4,434)). Judge Marvin also quotes this portion of *The Emblem* in his treatise on salvage published one year before *The Mulhouse*. W. MARVIN, *supra* note 8, § 121, at 131.

69. 17 F. Cas. at 967.

70. 17 F. Cas. at 967.

71. In reaching his conclusion in *The Mulhouse*, Judge Marvin also relied upon a British case, *The Genessee*, 12 Jurist 401, also reported *sub nom.* *The Genessee*, 6 N.Y. Legal Obs. 358 (Adm. 1848). (The report of *The Mulhouse* in *Federal Cases* cites "The Genessee Chief," 17 F. Cas. at 968. That was clearly not the case Judge Marvin had in mind. *The Genessee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851), was a landmark case in which the Supreme Court decided that federal admiralty jurisdiction extends to the Great Lakes. The case says not a word about life salvage. As the complete report of *The Mulhouse* (pamphlet), *supra* note 18, at 27, and the report in 22 Monthly L. Rep. at 288 make clear, Judge Marvin's authority was *The Genessee*.)

Unfortunately, *The Genessee* does not provide much support for the holding in *The Mulhouse*. Judge Marvin believed that in *The Genessee*, "Dr. Lushington upon general principles of law and before the passage of 'The Shipping Act,' rewarded some . . . salvors, who had saved the lives of the crew, though the property was saved by others." W. MARVIN, *supra* note 8, § 121 at 132 n. Yet that description of *The Genessee* is faulty in several respects. First, the case arose two years after Parliament passed the 1846 act that seemed to give life salvors a right to a reward. *See* note 45 *supra*. Second, for Dr. Lushington to hold that independent life salvors had a right to salvage would be inconsistent with his holding in *The Johannes*. *See* text at note 41 *supra*. Finally, the life salvors in *The Genessee* stood by the distressed ship at night during a gale at the request of her master or pilot. 12 Jurist at 402; 6 N.Y. Legal Obs. at 359-60. Such services are today well recognized as salvage services because of their benefit to the ultimate saving of property. M. NORRIS, *supra* note 2, § 26, at 39-40. It is clear that Judge Marvin was aware of at least one case giving property salvage for such stand-by services. *Allen v. The Canada*, 1 F. Cas. 464 (D.S.C. 1798) (No. 219), *cited in* W. MARVIN, *supra* note 8, § 109 n., at 120. Judge Marvin may also have known of a similar case, *The Courier*, 6 F. Cas. 647 (Super. Ct. S.D. Fla. 1836) (No. 3,283) (Webb, J.). Although the reports in *Federal Cases* show

saves life and another property, each is to be compensated out of the property saved, according to the merit of their respective services."<sup>72</sup> Yet in subsequent cases, the courts misconstrued or

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that he cited that *Courier* in *Pent v. The Ocean Belle*, 19 F. Cas. 200, 202 (S.D. Fla. 1861) (No. 10,961), *The Philah*, 19 F. Cas. 494-95 (S.D. Fla. 1857) (No. 11,091a), and *The Ellen Hood*, 8 F. Cas. 515, 515 (S.D. Fla. 1855) (No. 4,377), in fact he was referring in those three cases to an unreported decision that he had written in 1853, *Bethel v. The Courier*, 5 Admiralty Records 132-44 (S.D. Fla.) (Federal Records Center, East Point, Ga., Accession No. 53A418, Retrieval No. 53).

Although Judge Marvin's reliance on *The Genessee* was misplaced, it was certainly understandable. Dr. Lushington's opinion in that case was ambiguous about why the salvors who stood by the *Genessee*—members of the crew of the ship *Petrel*—were rewarded. It was equally vague about the reason for rewarding another vessel, the *Fame*, for coming out to the *Genessee* at the pilot's request. The court said,

The question I have to determine with respect to these two vessels is, whether what they did towards saving the lives of those on board the vessel, and rescuing the vessel from peril, will or will not enable the Court to give them a reward. As to their meritorious exertions, especially those of *The Petrel*, in laying by to save the lives of the crew, I think there cannot be two opinions entertained.

12 Jurist at 402; 6 N.Y. Legal Obs. at 360. Without further discussion of their services, the court awarded the two ships £300. Dr. Lushington rewarded salvors who rendered much the same service as the *Fame* in *The Undaunted*, 167 Eng. Rep. 47 (Adm. 1860).

Judge Marvin's misreading of legal history is, of course, far less significant than the quality of his policy analysis. In the words of Holmes, "Ignorance is the best of law reformers." O.W. HOLMES, *THE COMMON LAW* 64 (1881) (Howe ed. 1963). Holmes goes on to say:

People are glad to discuss a question on general principles, when they have forgotten the special knowledge necessary for technical reasoning. But the present willingness to generalize is founded on more than merely negative grounds. The philosophical habit of the day, the frequency of legislation, and the ease with which the law may be changed to meet the opinions and wishes of the public, all make it natural and unavoidable that judges as well as others should openly discuss the legislative principles upon which their decisions must always rest in the end, and should base their judgments upon broad considerations of policy to which the traditions of the bench would hardly have tolerated a reference fifty years ago.

Judge Marvin's liberal attitude toward life salvage may be related to the fact that as a young man he nearly drowned while sailing on the Potomac River with a friend in order to visit a "handsome young woman" in Alexandria, Virginia. It was Marvin's first attempt at sailing and he encountered "high head winds and considerable sea." Marvin and his companion managed to get ashore on their own, but their boat was lost. The incident apparently had a strong impact on Marvin, who recounted it over sixty years later in his autobiography. *Autobiography*, *supra* note 42, at 183. Marvin wrote, "I was not drowned! but ought to have been, and perhaps may live to be hung!" *Id.*

72. 17 F. Cas. at 967-68. The court also displayed a liberal attitude in its reward to the government-owned vessel, the *Tortugas*, which saved life and property. The court awarded each of the other property salvors a share of the particular property it saved, since the vessel had broken up and each cargo owner was treated as being on his own. 17 F. Cas. at 964. The percentage awarded depended upon the difficulty involved in raising the particular property. If this approach had been applied to the *Tortugas*, the court could have limited its life-property award to \$61, the value of the property it saved. Instead the court awarded \$100 to the master and crew plus about \$27 to the vessel for saving the property. *The Mulhouse* (pamphlet), *supra* note 18, at 33-34. The life salvage was paid

ignored<sup>73</sup> *The Mulhouse* (perhaps because of the abysmal reporting of the case),<sup>74</sup> and one writer criticized it fervently.<sup>75</sup> Until very recently, the case was the high water mark of life salvors' rights in the United States.

The retreat from independent life salvage since *The Mulhouse* has not been especially graceful. In *The George W. Clyde*,<sup>76</sup> Judge Charles Benedict — like Marvin, a respected admiralty judge — denied salvage to the tug Scandinavian, which rescued passengers and crew after the Clyde collided with another vessel and after other tugs had begun towing the Clyde to shore. In contrast, the court awarded \$1,000 to the property salvors who exerted themselves for only fifteen minutes, expending wholly nonextraordinary efforts in the face of wholly nonextraordinary risks. The court justified denying a reward to the Scandinavian as follows:

First, because her services were not needed nor furnished at the request of the captain of the Clyde; second, because . . . the only object of her exertions was to take off the crew and passengers. Services of that character do not give rise to a claim for salvage against the ship.<sup>77</sup>

Thus, without considering *The Mulhouse*, and without citing any authority, Judge Benedict held that an independent life salvor

out of the property saved by all of the salvors even though all of the property was not saved "in immediate connection with the saving of life." 17 F. Cas. at 968.

73. *The Mulhouse* was misconstrued in *The Admiral Evans*, 286 F. 442 (W.D. Wash. 1923). See text at notes 79-82 *infra*. See *The Shreveport*, 42 F.2d 524 (E.D.S.C. 1930), *The Eastland*, 262 F. 535 (N.D. Ill. 1919), and *The George W. Clyde*, 80 F. 157 (E.D.N.Y. 1897), where the courts expressed the view that independent life salvors had no right to salvage under the general maritime law.

74. See note 61 *supra*. The condensed report in *Federal Cases* omits the fact that the salvage of property lasted a month, and it omits the decree showing that the *Tortugas* saved both property and life. It also omits Judge Marvin's quotation from *The Emblem* and cites *The Genesee Chief* rather than *The Genessee* to support the court's holding on independent life salvage.

75. In his treatise on shipping, Professor Theophilus Parsons criticized the rule in *The Queen Mab* and *The Mulhouse*. He wrote, "[T]here seems to be no reason why salvage should be allowed in such a case and not where the crew are saved, but no assistance rendered to the vessel by any one, and the distinction is repudiated by Dr. Lushington," citing *The Zephyrus*. 2 T. PARSONS, A TREATISE ON THE LAW OF SHIPPING 297 (1869). Parsons's argument may prove too much. If there is no valid distinction between the situations of the pure life salvor and the independent life salvor, then perhaps the courts ought to award salvage in both cases, in light of the humanitarian interests at stake. The situations can be distinguished, of course, by the desire to limit the shipowner's liability to the value of the ship.

76. 80 F. 157 (E.D.N.Y. 1897), *affd. as to the property salvors*, 86 F. 665 (2d Cir. 1898). The life salvors did not appeal.

77. 80 F. at 158.

has no claim for salvage.<sup>78</sup>

Nor did the situation improve following *The George W. Clyde*. One ironic case was *The Admiral Evans*,<sup>79</sup> in which the life salvors alleged that they incurred \$2,000 of property damage while saving the passengers from a sinking ship that was raised later.<sup>80</sup> The court denied them a reward and any compensation for their loss, declaring, "Taking passengers from a sinking ship, rendering no service in rescuing the vessel, is not a salvage service."<sup>81</sup> The court cited *The Emblem* and *The Mulhouse* to support the proposition that saving life was a common duty of humanity and not for reward — a tortured misconstruction of cases that had rewarded life-property salvors and independent life salvors based on the humanitarian principles underlying the law of salvage.<sup>82</sup>

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78. At least one court and two writers have read the case that way. See *The Admiral Evans*, 286 F. 442, 443 (W.D. Wash. 1923); G. ROBINSON, *HANDBOOK OF ADMIRALTY LAW IN THE UNITED STATES* § 98, at 717 (1939); Cunningham, *supra* note 7.

Judge Benedict could have denied a reward to the Scandinavian simply because the passengers and crew were not in peril once the other tugs began to tow the Clyde. This is what the court apparently meant when it said that the Scandinavian's services were "not needed." Therefore the court's second reason for denying relief, that taking off crew and passengers is not a salvage act, seems to include taking off crew and passengers when that service is needed. The parties may not have focused on the life salvage issue. The libels of the owners and charterers of the Scandinavian did not claim a reward for saving life. Instead they claimed that they had saved the Clyde from sinking. Federal Records Center, Bayonne, N.J., Admiralty Cases, Files R. 401, 412. No briefs were filed, and there is no transcript of any argument before the court.

79. 286 F. 442 (W.D. Wash. 1923).

80. The life salvors also saved the baggage and mail on board the Admiral Evans. The court held that the ship could not be sued in rem for saving cargo and that United States mails cannot be sued in rem. 286 F. at 443.

81. 286 F. at 443.

82. Reminiscent of *The George W. Clyde*, see note 78 *supra*, the report of *The Admiral Evans* does not disclose that the life salvors based their claim on their assistance to the distressed vessel at the request of her master and on their standing by before and after she sank. Their main argument seems to have been that even though their standby services ultimately proved not to benefit the vessel, they should still have received a reward since their services were engaged by the master. Brief of Libellant at 3, *The Admiral Evans*, 286 F. 442 (W.D. Wash. 1923). Viewed in this light, the saving of life was merely incidental to the services rendered the ship.

The shipowner's brief, which the court heavily relied upon, sheds light on one problematic aspect of the decision. The last sentence in the opinion is "the Libellant may have a remedy *in personam*, but may not recover against the ship." Standing alone, this sentence seems to suggest that life salvors may be able to recover from the shipowner in personam, a proposition that one authority said was without support. 1 *BENEDICT ON ADMIRALTY* 328 n.23 (6th ed. 1940). *But see* *The Mulhouse*, 17 F. Cas. 962 (S.D. Fla. 1859) (No. 9,910) (suggesting that life salvors may be able to recover from the shipowner if there was an "express contract"). The shipowner's brief indicates, however, that the court probably intended to refer only to the salvor's possible right to sue the shipowners in personam for the services rendered at request. The brief stated,

Misfortune beget misfortune when *Barge 592-Delroy*<sup>83</sup> relied upon *The Admiral Evans* in 1937. The court denied an enhanced reward to a life-property salvor,<sup>84</sup> saying that his service of saving the crew "was not done in connection with the saving of the barge and its cargo and, therefore, cannot be allowed him."<sup>85</sup> One irony of *Barge 592-Delroy* is that it is irreconcilable with *The Emblem*,<sup>86</sup> which gave life-property salvors a liberal reward because they saved life.<sup>87</sup> A second irony is that *Barge 592-Delroy*, like *The Admiral Evans*, was decided after the United States and most other major maritime countries had ratified a treaty that was intended to increase the rights of life salvors. The next Section of this Article deals with the history of that treaty and the federal statute that it fostered.

### III. TREATY REFORM AND THE 1912 LIFE SALVAGE STATUTE

The Brussels Salvage Convention of 1910 was signed by 25 nations, including the United States and England, and was designed to unify the life salvage rules.<sup>88</sup> The Convention went through several drafts<sup>89</sup> before producing a treaty that made little

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As suggested upon page 3 of Libellant's Memorandum Brief, it may be true that the furnishing of services to a vessel at the request of her captain may result in a valid claim for salvage services, but unless such services result in aiding or saving the vessel herself, no lien can be claimed against her under the authorities above presented. Libellant, if he had any rights in rem, lost those rights when he surrendered possession of the articles saved, to wit, the baggage and mail. Upon these alone could he have claimed a lien. If he has any right to compensation for services rendered at request, such right cannot be enforced in a proceeding in rem brought against the vessel, but must be by action in personam against her owners.

Trial Brief of Respondent and Claimant at 9-10, *The Admiral Evans*, 286 F. 442 (W.D. Wash. 1923).

83. 1938 A.M.C. 57 (E.D. Pa. 1937).

84. The life-property salvor helped to rescue some crew members from a drifting barge, then returned with another set of salvors a few hours later to bring the barge to safety. 1938 A.M.C. at 57-58.

85. 1938 A.M.C. at 59.

86. 8 F. Cas. 611 (D. Me. 1840) (No. 4,434).

87. See note 25 *supra*.

88. International Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea. 37 Stat. 1658 (1911-1913), T.S. 576. The Belgian government took a leading role in drafting the convention. It organized the Comité Maritime International, an international organization of lawyers and judges that, among other things, prepared drafts of the salvage convention. Leading members of the Belgian government headed the Comité and the Brussels Convention. For an analysis of the salvage treaty and its unifying effect in Belgium, England, France, Germany, and the Netherlands, see I. WILDEBOER, *THE BRUSSELS SALVAGE CONVENTION* (1965). The Brussels Convention also concluded a collision treaty that many nations, but not the United States, have ratified. See *United States v. Reliable Transfer Co.*, 421 U.S. 397, 403 (1975).

89. Four conferences, beginning in 1905, were required to establish the convention.



change in the Anglo-American rules of property salvage, but

I. WILDEBOER, *supra* note 88, at 1. The first drafts of the treaty in 1905 left the subject of life salvage entirely to national legislation. Article 12 provided:

Les présentes dispositions ne portent point atteinte aux prescriptions des lois nationales concernant la compétence des autorités judiciaires ou administratives en matière de sauvetage ou d'assistance et la rémunération pour le sauvetage des vies humaines.

The translation by the Comité Maritime International was as follows:

The present provisions do not invalidate the prescriptions of the national laws relating to the jurisdiction of the authorities judicial or administrative as to salvage or assistance and the remuneration for salvage of human lives.

COMITÉ MARITIME INTERNATIONAL BULL. NO. 12, at 96 (June 1905).

The text of article 12 was clarified by a revised draft in October 1905, which provided in its second paragraph:

Les dispositions relatives à la rémunération ne concernent pas le sauvetage des personnes, sans que cependant il soit porté atteinte aux prescriptions des lois nationales à cet égard.

PROCÈS-VERBAUX DU CONFÉRENCE MARITIME 133 (1905).

An appropriate translation would be:

The provisions regarding remuneration do not concern the salvage of people, however this does not invalidate the prescriptions of the national laws in this matter.

The Committee that prepared the October 1905 draft reported that it intended to leave nations free to give life salvors whatever rights they thought fit, including a right to a reward from the person saved. *Id.* at 134.

In 1909 and 1910 the British proposed amendments dealing with independent life salvage and life property salvage that were similar to the British law on the subject. In 1909 Sir William Pickford proposed on behalf of the British government that the first article of the treaty provide that salvage of passengers, crew, and freight be included within the scope of the treaty. PROCÈS-VERBAUX DU CONFÉRENCE MARITIME 61 (1909). He also proposed amending the eighth article of the treaty to include the danger to the passengers and crew of the salvaged ship as an element to be considered by the judge in fixing the amount of the salvage award. Further, he proposed that the second paragraph of article 12, quoted above, be deleted. PROCÈS-VERBAUX DU CONFÉRENCE MARITIME 62 (1909). Although these proposals appear to call for the granting of pure life salvage, Sir William Pickford explained that this was not his government's intention. He said that the amendment "aims only at providing that the salvage of human beings performed at the same time ("en même temps") as the salvage of property be considered in the determination of the total amount of reward and in the apportionment of the compensation among the salvors." PROCÈS-VERBAUX DU CONFÉRENCE MARITIME 91 (1909) (Translation by this writer).

The British proposal as explained by Pickford was generally in line with British salvage law, which gave no claim against the property owners unless some property was saved. *The Renpor*, 8 P.D. 115 (1883). *See* text at note 51 *supra*. However, the proposal did not reflect the British government's statutory authority to make discretionary awards to life salvors. Also, the proposal's requirement that the life salvors perform their services at the same time as the salvage of property may have sounded more restrictive than British and American cases that allowed life salvage even though the property was rescued several weeks after the saving of life. *The Cargo ex Schiller*, 2 P.D. 145 (C.A. 1877), *The Mulhouse*, (pamphlet), *supra* note 18. The British and American cases had used the vague expression that the salvage of life and property must be "connected" in order for the life salvors to receive a reward but had never specified a time frame for measuring the connection. *See, e.g.*, *The Aid*, 166 Eng. Rep. 30 (Adm. 1822); *The Emblem*, 8 F. Cas. 611 (D. Me. 1840) (No. 4,434); *The Mulhouse*, 17 F. Cas. 962 (S.D. Fla. 1859) (No. 9,910). Pickford apparently intended something equally vague by his use of the expression "même temps,"

had a profound effect — largely not the one intended — on the

which implies a period of time of unspecified duration. See, e.g., LAROUSSE MODERN FRENCH-ENGLISH DICTIONARY, "Temps," at 698 (1960). Indeed, following the 1909 conference, the British delegates reported that the provision's exclusion of life salvage "unless there has at the same time been salvage of property" was "a reproduction of the present English law," citing *The Renpor*, 8 P.D. 115 (C.A. 1883) and *The Annie*, 12 P.D. 51 (1886). British Public Record Office, File FO369/271, case 602. These cases held that life salvage is not owed unless property is saved which can form a fund to pay salvage. (In *The Annie*, a public authority raised the sunken ship, but, as authorized by statute, the ship's proceeds were entirely used to pay the authority's expenses. The court said that no life salvage was due because "the *Annie* was not saved.") Although noting that the provision's restriction might be contrary to principle, the delegates reported that the restriction was necessary to obtain the assent of foreign countries, and that "it may well be urged that it would not be fair to make the owners of a ship or cargo which has been totally lost pay salvage in respect of the saving of human life." *Id.*

The British life salvage proposal did not quite make it through the convention unscathed. The delegate from France, M. Lyon-Caen, the only delegate to speak about the proposal, said that he supported it. He added, however, "[This reward] is taken out of the total reward paid by those whose property was salvaged." PROCÈS-VERBAUX DU CONFÉRENCE MARITIME 91 (1909). (Translation by this writer.) Not only did the French statement suggest that life salvage be paid by the property salvors, not the property owners, but it seems to imply that the saving of life by independent life salvors would not increase the amount paid by the property owners. That differs from the British proposal that the saving of life would affect the "total amount of the reward" as well as its apportionment. Apparently, the British did not immediately grasp the import of M. Lyon-Caen's gloss, for it was not until the next conference in 1910 that they made their objection. By that time they were faced with the following provision, adopted at the end of the 1909 conference:

Les sauveteurs des vies humaines qui sont intervenus à l'occasion des mêmes dangers ont droit à une équitable part de la rémunération accordée aux sauveteurs du navire, de la cargaison et de leurs accessoires.

*Id.* at 140.

As later translated by the American delegates, the provision read:

Salvors of human lives are entitled to an equitable share in the remuneration granted to salvors of ship, cargo, and accessories, if they have intervened on the occasion of common dangers.

*Report of the American Delegates to the Third International Conference on Maritime Law*, 1909 FOREIGN RELATIONS 664.

As explained in the report to the Brussels Conference by the committee responsible for the revised draft, article 9 does not provide a reward when life alone is saved, but if human lives have been saved at the same time [as property, then] it is fitting that the salvors of human life share the compensation with the salvors of the ship or the cargo. It should be thus each time that the salvors of human life intervene on an occasion of common danger, and it is not at all necessary that the intervention take place at the same moment as the salvage of goods or that they themselves participate in the latter.

PROCÈS-VERBAUX DU CONFÉRENCE MARITIME 140 (1909). (Translation by this writer.) The report in its original reads as follows:

Il résulte du texte qui précède qu'aucune rémunération n'est due à raison du sauvetage exclusif des vies humaines. Mais si des vies humaines ont été sauvées, en même temps que des résultats matériels étaient atteints, il convient que les sauveteurs des vies humaines participent au partage de l'indemnité avec les sauveteurs du navire ou de la cargaison.

Il doit en être ainsi chaque fois que les sauveteurs des vies humaines sont intervenus à l'occasion des mêmes dangers et il n'est nullement requis que leur

American law of life salvage. In the translation used by the Senate, the relevant treaty provision reads:

No remuneration is due from the persons whose lives are saved, but nothing in this article shall affect the provisions of the national laws on this subject.

Salvors of human life, who have taken part in the services rendered on the occasion of the accident, giving rise to salvage or assistance, are entitled to a fair share of the remuneration awarded to the salvors of the ship, her cargo, and accessories.<sup>90</sup>

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intervention se produise au même moment que le sauvetage des choses ou qu'eux-mêmes participent a celui-ci.

To have the treaty reflect the intention behind their original proposal, the British delegates sought to change article 9 at the 1910 conference to provide that there should be "a reward for the salvage of human lives in cases where there is also salvage of goods." PROCÈS-VERBAUX DU CONFÉRENCE MARITIME 54 (1910). (Translation by this writer.) The proposal in French reads ("[P]our le sauvetage des vies humaines, il pourra être attribué une rémunération dans les cas où il y aurait eu également sauvetage de biens." This proposal would have given the independent life salvor a right against the owner of the property rather than against the property salvor. Also, by giving independent life salvors a reward "in cases" where property is saved as opposed to the draft provision that awarded life salvors who acted in a common danger with property salvors, the British proposal more clearly reflected the English case law that rewarded life salvors whose services could be "connected" with the salvage of property. The committee that drafted the treaty reported that it rejected the British proposal of 1910 because the Convention's treatment of life salvage was an absolute innovation for a large number of countries and it therefore seemed advisable not to change the text for which the directions of adherence had been given. *Id.* at 102.

90. 37 Stat. 1671-72 (1911-1913). The official text of article 9 reads:

Il n'est dû aucune rémunération par les personnes sauvées, sans que cependant il soit porté atteinte aux prescriptions des lois nationales à cet égard.

Les sauveteurs de vies humaines qui sont intervenus à l'occasion de l'accident, ayant donné lieu au sauvetage ou à l'assistance, ont droit à une équitable part de la rémunération accordée aux sauveteurs du navire, de la cargaison, et de leurs accessoires.

The final text incorporated a change suggested by the French delegation. PROCÈS-VERBAUX DU CONFÉRENCE MARITIME 46 (1910). The purpose of the French amendment of 1910 was reported to be to "better render the thinking already set forth in the 1909 report, which said that it was not at all necessary that the intervention of the life salvors be at the same moment as the salvage of property or that they participate in the latter." *Id.* at 102. ("[Q]ui rendent mieux la pensée que le rapport de 1909 précisait déjà en disant qu'il n'était nullement requis que l'intervention des sauveteurs de vies humaines se fût produite au même moment que le sauvetage des choses ou qu'eux-mêmes eussent participé à celui-ci.")

No official translation of the treaty was made by the conference, and the British and American delegations each prepared their own translations. The American delegates' translation of the second paragraph of article 9 reads, "Salvors of human lives who have intervened on the occasion of the accident which gave rise to the salvage or assistance are entitled to an equitable share in the remuneration granted to salvors of the ship, cargo and their accessories." *Report of the American Delegates to the Third International Conference on Maritime Law*, Schedule A at 4. National Archives, Washington, D.C., Diplomatic Section, File No. 585.7A2. Although the British and American delegates' translations differed in great detail, the State Department submitted the British version to the

On its face, the provision does not require the owners of rescued ships and cargo to reward independent life salvors. The burden of paying life salvage falls only on the property salvor, not the property owner. If read restrictively, parties to the treaty would be bound to give life salvors no greater rights than those specified in the treaty. To avoid such an interpretation, the report of the subcommittee that drafted the treaty indicated that the text was flexible, that "each nation remains free to give life salvors greater or more specific rights," and that the British formula giving independent life salvors a right to a reward directly from the shipowner and cargo owner was free of criticism. Indeed, the subcommittee said that any nation would be able to give life salvors a right to salvage even when no property is saved.<sup>91</sup>

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Senate with only minor changes, apparently because it wanted the two countries to have the same translation, and because both countries appeared eager to submit the treaty for ratification. Letter of Charles C. Burlingham, an American delegate to the conference, to the Secretary of State, Dec. 3, 1910; letter of Charles C. Burlingham to Eugene T. Chamberlain, Commissioner of Navigation, Department of Commerce and Labor, Dec. 4, 1910. National Archives, Washington, D.C., Diplomatic Section, File No. 585.7A2/233. Burlingham wrote that the differences in the translations

do not affect the substance of the [salvage and collision] Treaties. Our translation is somewhat more literal; theirs is smoother and more elegant. In one or two articles they have clarified the text by adding certain explanatory words. Thus in the titles of the two Conventions they add the words "of law", which do not appear in the original, so that the title reads, [sic] "Convention for the Unification of Certain Rules of Law in regard to Collision", which is an improvement, as otherwise the title might indicate that the Convention related to rules of navigation."

Letter to the Secretary of State, *supra* (emphasis in original). Burlingham also wrote by hand that he was enclosing "comments on the British translations, which may possibly be of service to the translators of the Department." The files contain only a very short page of handwritten notes not pertaining to the issues before us. Burlingham was an outstanding member of the bar, specializing in the practice of admiralty law. He was counsel in some of the most important admiralty cases. See Frankfurter, *A Legal Triptych*, 74 HARV. L. REV. 433 (1961). His representation of the owners of the Titanic prevented him from representing the United States at the conference that drafted the initial Convention on Safety of Life at Sea in 1914.

91. PROCÈS-VERBAUX DU CONFÉRENCE MARITIME 102 (1910). The report stated, [C]e texte peut d'autant moins donner lieu à doute qu'il n'a aucun caractère restrictif; chaque nation reste libre de donner aux sauveteurs-vie des droits plus grands ou plus précis; rien ne pourrait être critiqué dans une loi nationale qui, par exemple, emploierait la formule "que pour le sauvetage des vies humaines il peut être attribué une rémunération dans les cas où il y a également sauvetage de biens" ou qui l'attribuerait même indépendamment de pareil sauvetage.

It may be translated as follows:

[T]his text is even less likely to cause doubt since it is not at all restrictive; each nation remains free to give life salvors greater or more specific rights. There would be no criticism of a national law which, for example, would use the formula, "that a reward can be given for the salvage of human lives in cases where there is also salvage of goods" or which would give one even independently of such salvage.

The 1910 treaty thus stated only the minimum rights that nations must give life salvors and left much of the treatment of life salvage to national law.<sup>92</sup> Presumably, either the United States Congress or the courts could have used the treaty as a basis for increasing the rights of pure life salvors and independent life salvors. As we will see, however, Congress and the courts have ignored the freedom that the 1910 treaty left them. Instead, they narrowly interpreted the treaty's life salvage provision.

American ratification of the treaty was swift and painless. The American delegates to the Brussels Convention reported favorably on the life salvage provision and the Senate committee followed suit.<sup>93</sup> Their reports were brief and general, not mention-

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The report accompanying the final draft of the treaty also noted that judges would have much discretion in applying the provision. *Id.*

92. The English translation of Wildeboer's work on the treaty states,

No unifying effect was intended by Art. 9. As to the first section this is apparent from its second sentence: the provision does not affect the regulations in the national laws. Concerning the second section it is apparent from the reports: [Procès-verbaux du Conférence Maritime 102 (1910)] the states remained free to grant a larger or smaller amount of rights to the life salvors in their national laws, for instance, to give them a right of remuneration independent of the salvage services rendered to vessel and cargo. However, an important difference between sect. 1 and sect. 2 is that *in cases of salvage to which, according to Art. 15, the Convention has to be applied the second section is always applicable*, while the first section only applies if the prevailing national law does not contain a provision divergent from Art. 9 sect. 1. If a divergence exists the provision of the national law will have to be applied.

I. WILDEBOER, *supra* note 88, at 244 (emphasis added) (footnotes omitted). One reading of that paragraph suggests, contrary to the conclusion reached in this Article, that when the treaty is applicable it does not allow nations to grant life salvors greater rights than those provided in the treaty. Another reading suggests, however, that nations remain free to give life salvors fewer rights only in those cases which are not covered by article 15, which provides that the national law, not the treaty, applies when "all the persons interested belong to the same State as the court trying the case." *Id.* at 279. When the treaty applies, however, states are free only to increase the rights of life salvors beyond the rights given in the treaty. The second interpretation is better. The report accompanying the final draft did not suggest that a country could not give a life salvor greater rights than those required under the treaty. At least two countries, England and the Netherlands, give life salvors additional rights. *See id.* at 249-50.

93. Following the 1909 conference, the American delegates reported:

The second paragraph of Article IX, while not very clearly expressed, must be regarded as giving to salvors of human lives intervening upon the occasion of a common danger the right to share in the salvage due from the property saved. They would not now have this right. We think the provision just and founded upon motives of humanity.

*Report of the American Delegates to the Third International Conference on Maritime Law*, 1909 FOREIGN RELATIONS 662. In their 1910 report the American delegates said, "Article 9 contains a reasonable provision for salvors of human life, limiting the recovery, however, to cases where property has been salvaged." *Report of the American Delegation on the Convention Relating to Salvage*, 1911 FOREIGN RELATIONS 14, 15. Similarly, the

ing that the treaty left each nation free to give life salvors additional rights.<sup>94</sup> The Senate approved the treaty unanimously, apparently without debate.<sup>95</sup>

After that, Congress probably did not need to do anything to give effect to the life salvage provision.<sup>96</sup> The courts could have satisfied the treaty's requirements by following *The Mulhouse* and rewarding independent life salvors out of the property saved. Although the treaty provides that life salvage should be paid out of the reward to property salvors, the *Mulhouse* rule is in accord with the intention of the treaty's drafting subcommittee.<sup>97</sup> Nevertheless, when Congress passed an act in 1912 to "harmonize"

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Committee on Foreign Relations reported "Article 9 contains a provision for compensation to salvors of human life, limiting the recovery, however, to cases where property has also been saved." Report, International Convention for the Unification of Certain Rules of Law with respect to Assistance and Salvage at Sea, Executive K, 62d Cong., 2d. Sess., National Archives, Washington, D.C., Congressional Section, File No. 4976, Folder 62B-B12. The report is typewritten with some additions written in by hand. It was not printed.

94. Their reports also did not discuss the dispute between the French and the British over whether the property salvor or the property owner should pay the life salvors. Indeed, the reports' description of article 9 as "limiting the recovery, however, to cases where property also had been salvaged" more appropriately describes the British proposal that the conference rejected in 1910. See note 89 *supra*.

95. 44 J. EXECUTIVE PROCEEDINGS OF THE SENATE 117-18, 62d Cong., 2d Sess. (Jan. 18, 1912).

96. The final draft of the treaty did not require that the nations signing it put it into effect by legislation, although such a provision was in an earlier draft of the treaty's protocol. I. WILDEBOER, *supra* note 88, at 1. Paragraph 1 of article 12 requires national legislation to give effect to the provision of article 11, which imposes a duty on masters to save life at sea. Unfortunately, due to a printer's error, the translation of paragraph 2 of article 12 that was used by the Senate provided that the "High Contracting Parties will communicate to one another . . . the laws or regulations which . . . may be hereafter promulgated . . . for the purpose of giving effect to the above *undertakings*." 37 Stat. 1672 (1911-1913) (emphasis added). This might imply a duty to give effect to all of the "undertakings" of the treaty. Actually, as is clear from the French original, 37 Stat. 1664 (1911-1913), and the translations of the British and American delegates, paragraph 2 of article 12 only required communication about the "above undertaking" namely the undertaking to enforce article 11 by national legislation. The error apparently arose when a printer used C.C. Burlingham's comparative draft of the British and American translations. Burlingham had changed the words "foregoing provision" in the American translation to match the British translation's, "above undertaking," but the final "g" in Burlingham's handwriting looks something like an "s." (The same is true of the final "g" in "giving" that appears in the same line.) It is evident from the many printers' marks on the comparative draft that this document was most likely used in printing the formal text of the translation of the treaty. The comparative draft is attached to Burlingham's letter of Dec. 3, 1910, to the Secretary of State. National Archives, Washington, D.C., Diplomatic Section, File No. 585.7A2/233.

97. See note 91 *supra* and accompanying text. The British Parliament did not modify its life salvage statute following its ratification of the 1910 treaty. That statute, like *The Mulhouse*, gives independent life salvors a claim for salvage against the owner, not the salvors, of the rescued property.

American law with the treaty,<sup>98</sup> the statute contained a life salvage section taken virtually word for word from the Senate's translation of the treaty.<sup>99</sup> There was no debate over the life salvage provision, and there was no explanation of it other than a brief, cryptic description in a Senate report.<sup>100</sup> No one in Congress

98. On January 30, 1912, only twelve days after the Senate gave its advice and consent to the treaty, Senator Burton introduced a bill, S.4930, that would give effect to the treaty. The bill was reported from the Foreign Relations Committee on March 12, 1912, without amendment. S.4930, 62d Cong., 2d Sess. (1912). On April 10, 1912, a bill was introduced in the House that was identical to S.4930, except that it provided a lower penalty for masters who violate their duty to save life at sea. H.R. 23111, 62d Cong., 2d Sess. § 2. On April 18, 1912, the Senate amended S.4930 to conform to the House bill, 48 CONG. REC. 4984-85 (1912), and it passed both houses without debate over the substance of the bill. 48 CONG. REC. 4984-85 (1912); 48 CONG. REC. 9554-55 (1912).

99. 46 U.S.C. § 729 (1976) provides:

Salvors of human life, who have taken part in the services rendered on the occasion of the accident giving rise to salvage, are entitled to a fair share of the remuneration awarded to the salvors of the vessel, her cargo, and accessories.

The only difference between the translation of the treaty and 46 U.S.C. § 729 (1976) is that the statute omits the words "or assistance" following the word "salvage." The omission was probably an oversight that does not change the meaning. The Senate Report states:

. In its title and throughout the bill the words "assistance" and "salvage" are used as in the convention itself. Neither in our law nor in the British law is there any distinction between salvage and assistance. But in the laws of continental Europe the distinction is maintained. By the term "salvage" — *sauvetage* (French) *Bergung* (German) — as used on the Continent is meant service rendered to vessels abandoned; while by "assistance" — *assistance* (French) *Hulfeseistung* (German) — is meant service rendered to vessels whose officers are still in charge.

S. REP. NO. 477, 62d Cong., 2d Sess. 2 (1912).

100. In relevant part the report accompanying the bill from the Senate Foreign Relations Committee read,

Section 3 of the bill provides that salvors of human life may share in the remuneration awarded to salvors of property.

The British merchant shipping act (1894) section 544, expressly provides that salvors of human life shall be paid a reasonable amount of salvage by the owner of the vessel, cargo, or apparel saved, and that this salvage shall be payable in priority to all other claims; and that if the vessel and cargo are destroyed or the value insufficient, the board of trade may award to the salvor out of the mercantile marine fund such sum as they think fit. Under our law, no remuneration is due from persons whose lives are saved, but the convention provides that salvors of human life are entitled to share in the award made to salvors of property on the same occasion.

S. REP. NO. 477, 62d Cong., 2d Sess. 2 (1912). Although the report confirms the practice of not requiring the persons saved to pay salvage, the report is otherwise unclear about the statute's effect on the judge-made law of life salvage. It even ignored the generally accepted practice of enhancing the reward of the life-property salvor for saving life, a practice confirmed by article 8 of the treaty. The report's purpose in summarizing the British statute is unclear. It is possible that the Committee on Foreign Relations wanted to reject the British scheme granting a right of salvage against the owner of the property saved. On the other hand, it is possible that the committee viewed the British law as an

explained how to determine what share the life salvors would receive, or what the statute meant by "the occasion of the accident," or whether courts are free to give life salvors greater rights than those granted by the statute. The courts have struggled ever since to provide answers to those questions.

#### IV. JUDICIAL INTERPRETATION OF THE 1912 STATUTE — CHANGES IN THE LAW OF INDEPENDENT LIFE SALVAGE

##### A. *The Cases*

The first case to apply the 1912 life salvage statute interpreted it broadly, but applied it strangely. *The Annie Lord*<sup>101</sup> was a case of life-property salvage, where the court faced the question of whether the Oliver, which had taken the crew off the damaged Annie Lord, could receive a *property* salvage award for its assistance in rescuing the damaged ship even though it did not complete the work of saving the property. After taking the crew aboard, the Oliver tried to tow the Annie Lord into port, but bad weather thwarted the attempt. It then brought the crew to shore, where, at the suggestion of the Oliver's captain, the captain of the Annie Lord arranged to have a United States revenue cutter bring in his ship. The United States filed no claim for salvage.<sup>102</sup> At trial, the court held that the Oliver could recover as long as its efforts were the proximate cause of the ship being saved.<sup>103</sup> Under the general maritime law of life-property salvage, the court then should have considered the saving of life as a factor affecting the size of the reward. Instead, it did an odd thing: it referred to the 1912 statute, noting that rescuing the crew of the Annie Lord from "great and imminent peril" constituted the saving of life under the statute.<sup>104</sup> This reference to the statute was unnecessary, because the Oliver was a property as well as a life salvor.<sup>105</sup> Nevertheless, the court read the statute as supporting a general policy favoring recovery for life salvors. The court believed the statute commanded it to find some way to compensate the life salvors.

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ideal solution, and it hoped that American courts would interpret the statute to conform closely to the British treatment of life salvors.

101. 251 F. 127 (D. Mass. 1917).

102. Indeed, the court assumed the United States was not entitled to salvage, since the Coast Guard performed the service. See note 8 *supra*.

103. 251 F. at 159.

104. 251 F. at 160.

105. See note 9 *supra*. The court itself seemed to sense this, since it noted, "it is *perhaps necessary*" to determine if the Oliver saved life. 251 F. at 160 (emphasis added).



That interpretation agrees with the report of the American delegates to the Brussels Convention, which pointed to the humanitarian purpose of the treaty's life salvage provision,<sup>106</sup> and agrees with the statute's emphasis on the importance of rewarding life salvors.

Although *The Annie Lord* read the life salvage statute generously and supported a favorable treatment of life salvors' claims, the case illustrates a potential problem with claims arising under the statute: the independent life salvor's chances of recovering expenses and a reward depend upon the fortunes of the property salvor. The statute requires that life salvors be given a "fair share of the remuneration awarded to the salvors of the vessel." Thus, if no property salvage is paid, no life salvage can be paid. If, for example, the government had been the only salvor of the *Annie Lord*, or if the sole property salvor had been another private salvor that had forfeited its reward through fraud,<sup>107</sup> there would have been no property salvage from which the *Annie Lord* could have recovered an award. The irony of this result, under a statute designed to increase the rights of salvors, is that fifty years earlier *The Mulhouse* gave independent life salvors a right to a reward against all of the property saved even though some property salvors were not entitled to salvage.<sup>108</sup> Thus, despite the broad interpretation of the statute in *The Annie Lord*, life salvors had potentially fewer rights under the 1912 statute than under the general maritime law.

That irony, somewhat obscured by the facts in *The Annie Lord*, became more apparent in a case involving one of the worst maritime disasters in American history. The *Eastland*, an excursion boat, capsized and sank at its dock on the Chicago River in downtown Chicago on July 24, 1915,<sup>109</sup> killing 835 passengers.<sup>110</sup> Many people along the shore and the river took part in the rescue efforts.<sup>111</sup> Most of the life salvage occurred immediately after the

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106. See note 93 *supra*.

107. See, e.g., *The Blaireau*, 6 U.S. (2 Cranch) 240 (1804).

108. *The Mulhouse*, 17 F. Cas. 962, 964-65 (S.D. Fla. 1859) (No. 9,910).

109. *The Eastland*, 262 F. 535, 536 (N.D. Ill. 1919), *affd. without opinion sub nom. Mattocks v. Great Lakes Towing Co.* (No. 2,804) (7th Cir. June 3), *cert. denied*, 258 U.S. 644 (1920).

110. *The Eastland*, 78 F.2d 984, 984 (7th Cir. 1935).

111. The affidavit of one of the life salvors, Sherwood Mattocks, recites that he saw "at least one hundred other persons engaged" in the saving of life and that he was informed that "several hundred other persons" also saved lives. Affidavit, April 3, 1919, Federal Records Center, Chicago, Illinois. There were at least ten additional affidavits by life salvors in the case. One of the salvors, John Hipple, was a passenger on the *Eastland*.

sinking, but some life salvors alleged that they worked for three days.<sup>112</sup> None of those who claimed life salvage claimed property salvage. The only significant property salvage was performed by contract: the day following the last life salvage efforts, the owner of the *Eastland* contracted with a towing company to raise the vessel for \$34,500. The towing company began to work about a week later, on August 4, 1915, and completed the job on August 16, 1915. The life salvors sought, under the 1912 statute, a fair share of the remuneration paid to the towing company.<sup>113</sup> In deny-

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The life salvors claimed \$20,000, more than half the amount awarded by contract to the towing company that raised the vessel. Claim of Sherwood S. Mattocks, et al., Dec. 5, 1919, Federal Records Center, Chicago, Illinois.

112. The claimants noted that all their work had been performed on or before July 27, three days after the accident. 262 F. at 538.

113. 262 F. at 537. The day after the *Eastland* was raised, its owners filed suit to limit their liability to the vessel's value, and a trustee appointed by the court subsequently sold the ship for \$46,000. Shortly thereafter, the towing company filed its claim for the \$34,500 promised under the contract. 262 F. at 537.

On July 30, 1915, three days after the owners of the *Eastland* and the towing company contracted to raise the vessel, a United States Marshal took "possession" of the steamer under a writ of attachment issued in connection with a grand jury investigation of the accident. *Evening Star* (Washington, D.C.) July 30, 1915, at 12, col. 3. The towing company performed its services while the Department of Justice was protecting the property. Record, 117-19, *Great Lakes Towing Co. v. St. Joseph-Chicago S.S. Co.*, 253 F. 635 (7th Cir.), cert. denied sub nom. *Bishop v. Great Lakes Towing Co.*, 248 U.S. 578 (1918), 249 U.S. 609 (1919). A commissioner's statement of the facts written many years later in related litigation might create the mistaken impression that the court authorized the formation of the salvage contract. *The Eastland*, 78 F.2d 984, 985 (7th Cir. 1935) ("Under the petition and libel a trustee was appointed by the Court, who immediately took possession of the boat as she lay in the Chicago River. Under authority of this Court a no-cure-no-pay contract was entered into for the raising of the steamer and removing the wreck from the path of navigation"). The description of the *Eastland* "as she lay in the Chicago River" actually describes her situation after she was raised, as is evident from both the petition to limit liability filed August 17, 1915 ("[T]he Great Lakes Towing Company has raised, righted and pumped out and freed the said Steamer of water and put her afloat and alongside of the dock in the Chicago river where she now lies") and the transfer to the trustee dated August 20, 1915. ("[T]he said St. Joseph-Chicago Steamship Company . . . does hereby convey, transfer and deliver to the said Denis Sullivan Trustee, . . . the interest of the St. Joseph-Chicago Steamship Company in the Steamer *Eastland*, her engines, hoilers [sic] boats, tackle, apparel and furniture as she now lies in the Chicago river.") The petition and transfer are in the Federal Records Center, Chicago, Illinois. The exchange of letters that formed the salvage contracts shows that the owners of the *Eastland* and the towing company were the only parties to the contract. Record, 134-36, 156, *Great Lakes Towing Co. v. St. Joseph-Chicago S.S. Co.*, 253 F. 635 (7th Cir.), cert. denied sub nom. *Bishop v. Great Lakes Towing Co.*, 248 U.S. 578 (1918), 249 U.S. 609 (1919).

If a court takes custody of a sunken vessel and contracts with a salvage company to raise it, the property salvor might argue that the amount earned under the contract is entitled to priority under the rule announced in *New York Dock Co. v. The Poznan*, 274 U.S. 117 (1927). That case held that even though wharfage services rendered a vessel *in custodia legis* do not create a maritime lien, such services rendered for "the common benefit" ought "in equity and good conscience" to be paid before maritime liens are

ing their claim,<sup>114</sup> the court read the 1912 statute narrowly. Ironically, the supposedly liberal life salvage statute presented more obstacles to recovery than did the general maritime law.<sup>115</sup>

In district court, Judge Carpenter gave several novel and restrictive interpretations to the life salvage statute.<sup>116</sup> First, he wrote that the statute creates a right to life salvage only for those

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satisfied. *The Poznan* is distinguishable, however, from a life salvor's claim to a share of the property salvage. Even though the property salvor's claim is preferred to ordinary maritime liens, the life salvage statute directs that his award be subject to the claims of life salvors.

114. In addition to holding that the life salvors had no valid claim under the life salvage statute, the court held that the life salvors' claim was barred by a two-year statute of limitations. They had waited more than three-and-one-half years after the accident to file their claims, and did so only after the Supreme Court refused to review an order that the towing company's claim would be preferred to the tort claims. 262 F. at 537. See *Great Lakes Towing Co. v. St. Joseph-Chicago S.S. Co.*, 253 F. 635 (7th Cir.), cert. denied *sub nom. Bishop v. Great Lakes Towing Co.*, 248 U.S. 578 (1918), 249 U.S. 609 (1919). The life salvors explained their delay by claiming that, since their right was against the funds awarded to the property salvors, they could not file their claim until a court determined that the property salvors had rights to a reward. 262 F. at 543-44. Although admitting that the life salvors' argument was "very seductive for the moment," the court held that the statute clearly established that suits for life salvage must be brought no later than "two years from the date when such assistance or salvage was rendered." 262 F. at 544.

115. The irony of *The Eastland* is diminished somewhat because the court labored under the belief that the general maritime law did not reward an independent life salvor. 262 F. at 239-40. The brief of the life salvors seemed to support that mistake. It said, "Section 3 is a remedial statute to add, if possible, to Nature's promptings an inducement to save human life. Until this statute the man who risked his life to save his brother went without compensation, but the man who deserted his brother and saved a barrel of pork would be awarded fair compensation . . ." Brief No. 1 of Life Salvors at 4-½. This was hyperbole, of course: property salvors who deserted people in distress would almost certainly forfeit their award due to their misconduct. See also note 157 *infra*.

116. In addition to the restrictive interpretations discussed in the text, Judge Carpenter's decision said, "The purpose of the statute being to engage the interest of life salvors at least equally between human lives and property, it can have no effect in a case where there was no association or co-operation between those saving lives and those saving ship or cargo." 262 F. at 540. Since the life salvors in *The Eastland* completed their work before the towing company contracted to save the ship, the life salvors did not satisfy that requirement. Although there is nothing in the statute or treaty that requires one to impose this condition, the court may have been influenced by the language in the statute that gives life salvors a fair share in the salvage reward if they "take part in the services rendered on the occasion of the accident giving rise to salvage." The words "take part in the services rendered" might connote a cooperative effort or an associated effort between the life and property salvors. Such an interpretation would be unwarranted. The corresponding treaty provision reads, "Les sauveteurs des vies humaines qui sont intervenus à l'occasion de l'accident ayant donné lieu au sauvetage" (emphasis added). The American delegates' literal translation read, "Salvors of human life who have intervened on the occasion of the accident which gave rise to salvage" (emphasis added). See note 90 *supra*. Unlike the statute, the treaty and the literal translation give no hint that the life salvors must "take part in the services rendered" or that they must be associated with the property salvors. It is enough that they rendered their services on the same general occasion. The statutory formula is based on the British delegates' translation, which was used

who render service "at the time that the property was saved"<sup>117</sup> and only for those who save life "substantially at the time and while both lives and property [are] in distress and danger of loss; not, of course, at the same instant of time, but during the period of peril."<sup>118</sup> This interpretation may have support in the reports of the Brussels conference that state that the saving of life should be awarded if it occurs at the "same time" even though not at the "same moment" that property is saved.<sup>119</sup> On the other hand, the drafters of the treaty may simply have meant by this that no award is required for pure life salvage, not that life and property must be saved at substantially the same time.<sup>120</sup> I think it most likely that the drafters, reluctant to commit themselves to a single rule in such a controversial area, were deliberately vague. If so, they were leaving a final resolution to the fair interpretations of national judges.<sup>121</sup> To read the language as strictly as possible, without weighing the important policies at stake, would probably be the surest way to misconstrue the drafters' intent. The court's application of its interpretation to the facts of *The Eastland* is particularly troubling. The court denied relief to the life salvors because it felt that the "period of peril" had passed before the property salvors began their services. This narrow reading of the vague "period of peril" concept ignores the humanitarian purposes of the statute. The "period of peril" could easily include the raising of a vessel a few days after the lives were saved.<sup>122</sup>

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in order that England and the United States might have a common translation. *See also* note 132 *infra*.

117. 262 F. at 540.

118. 262 F. at 541.

119. *See* notes 89 & 90 *supra*. Literally, the statute would seem to grant relief even when life and property are saved at different times. It is only required that the life salvors save life "on the occasion of the accident," not on the occasion of the property salvage. *See* Bockrath, *supra* note 7.

120. That is what the British delegates meant by the words "same time." *See* note 89 *supra*. Although the 1910 conference rejected a British proposal that would have allowed life salvage in "cases" where property was saved, the objection was apparently to requiring owners of saved property to pay life salvage directly. *See* notes 89 & 91 *supra*.

121. The report accompanying the final draft of the treaty said as much. *See* note 91 *supra*.

122. *See* text at note 148 *infra*. Compare *The Mulhouse* (pamphlet), *supra* note 18. In that case, salvage efforts lasted an entire month, yet Judge Marvin held that the life salvors had a claim under the general maritime law against all of the property saved even though some of that property was not saved in "immediate connection with the saving of life." *The Mulhouse*, 17 F. Cas. 962, 968 (S.D. Fla. 1859) (No. 9,910). *Cf.* *The Cargo ex Schiller*, 1 P.D. 473 (1876), *affd.*, 2 P.D. 145 (C.A. 1877) (life salvage awarded even though property was apparently raised many weeks after life was saved. *See* note 57 *supra*).

Why did Judge Carpenter interpret the "period of peril" test so narrowly? One reason appears to be the court's expressed desire to protect what it thought was the towing company's right to a paramount lien on the Eastland, having been the last to render service to the vessel.<sup>123</sup> Because it thought that property salvage liens are always favored over liens that arose earlier, the court felt that unless the life salvors and property salvors rendered their services at very nearly the same exact time, they can not have equal priority. Further, the court felt that unless the property salvor's lien was kept superior to the claims of life salvors who performed their services earlier, "no one could have been secured to raise the Eastland."<sup>124</sup> Judge Carpenter's concern was similar to that of another judge, who had disposed of a motion earlier in the same case by saying, "If dredging companies must divide with salvors whose names and claims are unknown and unascertainable, then lifting a sunken boat becomes an impossibility."<sup>125</sup>

The court's reasoning is faulty in several respects. It includes the questionable assumption that courts cannot moderate judicially created lien priorities to fulfill the humanitarian purposes

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123. 262 F. at 541-42. In making this assumption, the court relied on the court of appeals' determination earlier in the litigation that the towing company's liens must be given priority over claims for personal injury and death. *Great Lakes Towing Co. v. St. Joseph-Chicago S.S. Co.*, 253 F. 638 (7th Cir.), cert. denied sub nom. *Bishop v. Great Lakes Towing Co.*, 248 U.S. 578 (1918), 249 U.S. 609 (1919). Judge Carpenter's reasoning on the lien priority question closely followed an unreported decision by Circuit Judge Evans (sitting as a trial judge) in *The Eastland* that was written before the case was transferred to Judge Carpenter. Judge Evans wrote:

[I]f the Great Lakes Towing Company was required to share its claim (which represents only fair remuneration for services rendered) with the salvors of human life, it would never have engaged to lift the sunken boat from the bottom of the river. If dredging companies must divide with salvors whose names and claims are unknown and unascertainable, then lifting a sunken boat becomes an impossibility. The advantages that accrue to the salvage claimants by reason of the increased value of the boat due to its position will necessarily be lost.

I do not think Sec. 3 of the Salvage Act [46 U.S.C. § 729] contemplates any change in the maritime law so far as priority of claims is concerned. Life salvors are entitled "to a fair share of the remuneration awarded to salvors" of the same rank or whose claims are on an equal footing as to priority. They are not entitled to any part of the salvor's claim rendered later and independently of the services for which the life salvors make claim.

Decision by Judge Evans at 2-3 (July 2, 1919) (Federal Archives, Chicago, Ill., Accession No. 57A330, Location No. 369410, Location D592), reproduced at Record 73, 74, *Mattocks v. Great Lakes Towing Co.*, 254 U.S. 644 (1920). In the original petition, the life salvors alleged that their services were performed on only one day. Following Judge Evans's decision, they amended their petition to allege that their services lasted three days. Judge Carpenter ruled that the prior decision was not res judicata. 262 F. at 545.

124. 262 F. at 542.

125. Decision by Judge Evans, *supra* note 123, at 3.

of the 1912 statute. In the absence of any congressional intent to the contrary,<sup>126</sup> courts can fairly conclude that the life salvor, like the seaman seeking his wages,<sup>127</sup> deserves special consideration. Because the saving of life is at least as important as the saving of property, life salvors who perform their services a few days or weeks before property is saved should be on an equal footing with property salvors and should share in their award. This change in the priority rules is modest when compared to the British Parliament's determination that life salvors' liens are to be superior to property salvors' liens.<sup>128</sup> Finally, it is highly unlikely that a prospective salvor would have been deterred from raising the *Eastland* due to the potential claims of life salvors. Ordinarily, the property salvor could avoid losing part of its fair award to life salvors either by increasing its bid to take account of the potential life salvage claims or by securing a promise from the vessel owner to reimburse it for any life salvage awards. Although it might "cost" the property salvor something<sup>129</sup> to obtain either type of protection against life salvage claims, that cost is certainly no greater than that incurred by any property salvor who is required by the 1912 statute to share his award with life salvors. Furthermore, in determining what a "fair share" of the property salvor's award would be, the court can consider what life salvage claims the property salvor and property owner could have reasonably anticipated when they arranged to raise the property.

The situation is more complicated when, as ultimately happened in *The Eastland*,<sup>130</sup> the shipowner is able to limit its liability to the value of the ship and that value is insufficient to satisfy the claims of life salvors, property salvors, and tort victims. In that situation a court might refuse to make the property owner

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126. The Senate report's paraphrase of the statute merely said that life salvors "are entitled to share in the award made to salvors on the same occasion." See note 100 *supra*. The report mentioned the more liberal British priority scheme but expressed no opinion about it. The final report of the American delegates to the Brussels Convention and the Senate report accompanying the treaty said that the treaty limits the life salvor's right to "cases" where property has been saved. See note 93 *supra*. The description of the statute in the Senate report, though still extremely vague, is closer to the text of the treaty than the earlier reports. See note 94 *supra*.

127. Seamen's wage claims are generally superior to property-salvage claims even if the salvage claims arise later. G. GILMORE & C. BLACK, *supra* note 7, § 9-61, at 738. Wage claims might not be preferred if they are "old enough to be called stale." *Id.*

128. Merchant Shipping Act of 1894, 57 & 58 Vict., c. 60, § 544.

129. For example, in order to have its increased bid accepted by the property owner, the prospective property salvor may have to agree to raise the vessel sooner than it would otherwise have agreed to.

130. 78 F.2d 984 (7th Cir. 1935), *cert. denied*, 297 U.S. 703 (1936).

pay extra for life salvage if such payment would reduce the funds available to tort victims.<sup>131</sup> Nevertheless, a court could prevent any serious deterrence to property salvors by awarding a relatively small sum to the life salvors.<sup>132</sup> Because of these considerations, the final allocation of money in *The Eastland* may not have been grossly unfair. Unfortunately, Judge Carpenter's language understates the attention that the life salvage statute requires courts to pay to life salvors. *The Eastland* holding would also include cases where the available funds are sufficient to fully reward life salvors, property salvors, and tort victims.

Two leading scholars have attempted to square *The Eastland's* application of the "period of peril" test with the statutory provision by arguing that the statute does not reward pure life salvors and that the life salvors in that case thought they were performing only pure life salvage.<sup>133</sup> In other words, since no property was being saved when the life salvors rendered their services, the life salvors probably had no expectation at that time of ever

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131. Although much would depend on the facts of the case, a court might be willing to pay life salvors' claims for personal injury and expense prior to the claims of injured passengers and crew in order to encourage others to save life and thereby reduce the total injuries caused by an accident.

132. Judge Carpenter's concern that rewarding life salvage might deter prospective property salvors also seems to have manifested itself in a second argument. The opinion suggests that the statute could apply only when property is saved by noncontract salvors. 262 F. at 540. Since a court fixes the amount of property salvage somewhat arbitrarily in noncontract cases, G. GILMORE & C. BLACK, *supra* note 7, § 8-10, Judge Carpenter probably felt that noncontract salvors' expectations would not be seriously frustrated if part of their award were given to life salvors.

The court's concern for the expectations of contract salvors does not warrant its restrictive interpretation of the statute. It seems clear that the drafters of the 1912 statute did not actually consider the problem, but if they had done so, they would surely have noted that many salvage contracts provide that the amount of the salvage award will be settled by future negotiation, arbitration, or adjudication. In such cases, a court would hardly be defeating settled expectations by giving part of the award to a life salvor. Indeed, Judge Carpenter suggested elsewhere in his opinion that he would not permit property salvors to defeat the claims of life salvors by making a "private settlement" with the property owner. 262 F. at 544. Furthermore, as shown above, *see* text at notes 129-31 *supra*, when the salvage contract specifies the amount of the award, the property salvor can usually protect his expectation of a fair award by either increasing his bid or by requiring the property owner to reimburse him for the amount paid the life salvor. When a court refuses to make the property owner pay indirectly for life salvage, the property salvor's expectations will not be seriously frustrated if the court grants a relatively small award to the life salvor.

It is therefore inconsistent with the purpose of the statute—the just and uniform expansion of the rights of life salvors—to limit its scope by excluding cases where property is saved by contract salvors. *But see In re Yamashita—Shinnihon Kisen*, 305 F. Supp. 796 (D. Or. 1969) (following *The Eastland's* suggestion that the 1912 statute does not provide relief against contract salvors).

133. *See* G. GILMORE & C. BLACK, *supra* note 7, § 8-12, at 572.

receiving a reward. But that argument lacks support in the history of the treaty and statute and is not in harmony with American and British admiralty law. To encourage efforts to save life and property, courts often reward salvors who have no expectation of reward when they perform their services,<sup>134</sup> occasionally denying rewards to such salvors if the owner of the property saved reasonably expected the salvage services to be gratuitous.<sup>135</sup> Although it would seem unjust in a nonemergency situation to make a person pay for unsolicited benefits rendered without an intent

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134. See, e.g., *Costanzo Transp. Co. v. American Barge Line Co.*, 35 F. Supp. 929 (W.D. Pa. 1940); *The Star*, 53 F.2d 890 (W.D. Wash. 1931) (salvage award not barred by general custom in fishing trade to render salvage services gratuitously); *The Emblem*, 8 F. Cas. 611 (D. Me. 1840) (the court granted a liberal award to the life-property salvors primarily on account of the rescue of human life. The salvors did not return for valuable property aboard the wreck until after they first left the scene with the persons they rescued); *Taylor v. Twenty-five Thousand Dollars*, 23 F. Cas. 806, 807 (D.S.C. 1801) (No. 13,087) (life-property salvors "consulted their feelings and did not calculate their interests"). Cf. *Nicastro v. The Peggy B.*, 173 F. Supp. 61, 63 (D. Mass. 1959) (Ford, J.) (the life-property salvor's "first thought" and "primary motive" was to save a "fellow human being in peril at sea"); *The Aid*, 166 Eng. Rep. 30 (Adm. 1822) (life-property salvors entitled to liberal reward even though they set out with the expectation of only saving life). See also M. NORRIS, *supra* note 2, § 69, at 107. But see *The Vessel Judith Lee Rose, Inc. v. The Clipper*, 169 F. Supp. 885 (D. Mass. 1959) (Aldridge, J.) (the court found that custom of not charging for salvage services did not apply to the plaintiff, but disapproved of *Costanzo Transp. Co.* and *The Star* and suggested that salvage be denied if the salvor had no intent to charge when it rendered the service. This dictum in *Judith Lee Rose* was itself disapproved in *The Peggy B.*)

135. *The Harriot*, 166 Eng. Rep. 636 (Adm. 1842) (custom in South Seas whaling fishery not to charge for salvage service bars recovery); *The Zephyr*, 166 Eng. Rep. 160 (Adm. 1827) (ships in Honduras trade that sail in company have a "special agreement to give mutual protection"). See *Nicastro v. The Peggy B.*, 173 F. Supp. 61, 63 (D. Mass. 1959) (court awarded salvage but suggested that a reward might not be given if the salvor "expressly agrees to render assistance gratuitously." The person saved, who was the owner of the vessel, told his rescuers that he had insurance and that they would be compensated). But see *The Star*, 53 F.2d 890 (W.D. Wash. 1931) (allowing salvage even though there is a general trade custom to the contrary); *The Freiya v. The R.S.*, 65 D.L.R. 218, 224 (Ex. 1922), *revg.* 59 D.L.R. 330 (Ex. B.C. 1921) (the Exchequer Court found that the salvor did not "come within the ambit of [an] alleged custom" to render gratuitous service to others in the fishing industry. The court expressly left open the issue of the enforceability of the alleged custom, suggesting, however, that it might be invalid as "being in clear derogation" of a statute that provides that a "reasonable amount of salvage including expenses properly incurred" shall be allowed for assisting a vessel in distress. CAN. REV. STAT. c. 113, § 759 (1906), substantially reenacted in CAN. REV. STAT. S-9, § 517 (1970). The statute is substantially the same as the British Merchant Shipping Act, 1894, 57 & 58 Vict., c. 60, §§ 510(2), 516, which is in turn based on the Merchant Shipping Act of 1854, 17 & 18 Vict., c. 104, § 458. Since the British cases that denied salvage when the general custom was to provide gratuitous service were decided before the Merchant Shipping Act of 1854, it is possible that they may no longer be good law if the suggestion in *The Freiya* is followed. One could perhaps argue, however, that the general custom is not in conflict with the statutory policy, for when all parties expect the service to be gratuitous, the "reasonable amount of salvage" might be nothing.



to charge, it is sound policy to reward salvors who are too occupied with an emergency to "calculate their interests."<sup>136</sup> The law thereby lends its support to people's moral promptings to aid others in danger.<sup>137</sup> Applying those principles to *The Eastland*,

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136. *Taylor v. Twenty-five Thousand Dollars*, 23 F. Cas. 806, 807 (D.S.C. 1801) (No. 13,087). Judge Webb wrote in *The Howard*, 12 F. Cas. 630, 633 (Super. Ct. S.D. Fla. 1838) (No. 6,752a):

The wrecker who, regardless of personal considerations, gallantly rushes into dangers to preserve the lives and property of others, when exposed to the horrors of shipwreck . . . without stopping to enquire what amount in dollars and cents his exertions will bring to his own pocket, will always receive that liberal reward for his labors which it is the policy of the law to allow, and which courts feel pleasure in awarding to generous and manly conduct . . .

Judge Webb went on to say that the court liberally awards salvage to the professional wrecker partly because of "the benevolence with which he has pointed out the way of avoiding [the dangers that surround strangers] without the expectation or even hope of reward." 12 F. Cas. at 633. *See also* *The D.M. Hall v. The John Land*, 7 F. Cas. 770, 772 (N.D. Cal. 1855) (No. 3,939) (amount of salvage award depends "not merely [on] the value of the services, but [on] the spirit in which they are rendered"); *The Calypso*, 166 Eng. Rep. 221 (Adm. 1828) (salvage is based on the equity of rewarding spontaneous services, rendered in the protection of lives and property of others). Although it is presumed that the salvor is motivated by the hope of reward, *see* *The Pensacola*, 167 Eng. Rep. 376 (Adm. 1864), the reward will be reduced if the salvors are "calculating and mercenary." *Pacific Mail S.S. Co. v. Commercial Pacific Cable Co.*, 173 F. 28 (9th Cir. 1909). Since the salvors' expectations will be influenced by what the law allows, the issue of whether to reward salvors of life or property is essentially one of policy for the courts to decide. As stated by Judge Marvin,

The allowance of salvage, at all, in any case, is founded upon the idea that human nature is selfish, and that sound policy dictates that it should be stimulated by rewards to do acts at sea, which, if done on land, would be considered as gratuitous and as prompted by the generous impulses of humanity without the expectation of reward.

W. MARVIN, *supra* note 8, at 119n. *But cf.* RESTATEMENT OF RESTITUTION § 116 (1937) (an intent to charge is a prerequisite for restitution for services rendered in an emergency without request).

137. In *The Emblem*, 8 F. Cas. 611 (D. Me. 1840) (No. 4,434), Judge Ware commented on the supposed failure of several vessels to rescue people from a shipwreck as follows:

If this fact is to be taken as a just measure of the humanity of the persons who frequent those seas, I know not but it may be the part, not only of humanity but of worldly wisdom, to let them understand that sometimes even in godliness there is gain, and to tempt them by the allurements of pecuniary profit, if they can be led by no other to acts of humanity and mercy.

8 F. Cas. at 613. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 23 (Tent. Draft Nos. 1-7, 1973) ("Standing offers of rewards by governmental bodies . . . may be regarded as intended to create a climate in which people do certain acts in the hope of earning unknown rewards"). The *Restatement (Second)* takes the position that governmental offers of reward are enforceable even by persons who do not know of the reward when they perform the desired act, but that a private person's offer of reward is not enforceable if the plaintiff acts without knowledge of the reward. The *Restatement's* position on offers of reward by private parties is in accord with most, but not all cases. *See* CORBIN ON CONTRACTS § 59 at 244-47 (1963). In one of the minority cases the court said:

the life salvors ought to have shared in the award, for even if they expected no reward when they rescued lives, there is nothing to indicate that the shipowner and the towing company expected that no life salvage claims would arise when they made the contract soon thereafter. Compensating the life salvors for their injuries and expenses, if any, and rewarding them for their heroism would reinforce the value society places on saving life.

Judge Carpenter also held that life salvors would have a right to an award under the statute only if they had a choice between saving life and saving property.<sup>138</sup> Applying that standard, the court denied the *Eastland* life salvors a reward because they "had no chance to hesitate in determining whether it was more profitable to save the ship, or the men, women, and children on board."<sup>139</sup> Apparently the court was uninterested in the fact that those who saved life through "magnificent and heroic efforts"<sup>140</sup> probably chose to leave their positions of safety. As one writer, Lawrence Jarett, sarcastically commented, "Not tempted by evil, the life salvors could not, under the statute, be rewarded for doing good."<sup>141</sup> The rationale is even stranger because the court itself seemed unhappy with its interpretation. The judge wrote, "It is a sad reflection to contemplate this law. However, we may not inquire into the wisdom of Congress in its passage."<sup>142</sup>

Another important case to construe that statute, *The Shreveport*,<sup>143</sup> took a view of the statute that complements Judge Carpenter's opinion (which it did not cite), but applied that view much more liberally. The *Shreveport* was a tanksteamer that

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Is it not well that any one who has an opportunity to prevent the success of a crime, may know that by doing so he not only performs a virtuous service, but also entitles himself to whatever reward has been offered therefor to the public?

*Dawkins v. Sappington*, 26 Ind. 199, 201 (1866). See also *Auditor v. Ballard*, 72 Ky. (9 Bush) 572 (1873).

138. *The Eastland*, 262 F. 535, 540 (N.D. Ill. 1919).

139. 262 F. at 540. The court also said,

What they did was inspired by the spirit which since Christendom has been the foundation of the great brotherhood of mankind. Their work was done, and well done. Their reward they have; it never can be taken from them, and it is measured by a standard greater than money. They would not have done less [sic] for great promises.

262 F. at 540. An appropriate response might be, "[T]hough it has been said, that their reward is laid up in heaven, I see no reason why they should not receive such as may be decreed to them on earth." *Taylor v. Twenty-five Thousand Dollars*, 23 F. Cas. 806, 807 (D.S.C. 1801) (No. 13,807).

140. 262 F. at 536.

141. Jarett, *supra* note 7, at 786.

142. 262 F. at 540.

143. 42 F.2d 524 (E.D.S.C. 1930).

caught fire following several explosions in her cargo tanks. The accident killed or severely injured several members of the ship's crew and put both ship and crew in "imminent danger."<sup>144</sup> Another ship, the *Aldecoa*, picked up the surviving crew members from life boats, and some property salvors arrived on the scene a few hours after the *Aldecoa* had departed. The court granted the *Aldecoa* a share of the award made to the property salvors, stating that the 1912 statute "should be liberally construed with the humane object in view."<sup>145</sup> The court, like the *Eastland* court, emphasized the importance of the salvor's ethical dilemma of having to choose between saving life and saving property. On the *Shreveport* facts, however, it found that the *Aldecoa* "gave up an opportunity to save property" in order to save life.<sup>146</sup>

*The Shreveport* displayed a more liberal attitude than *The Eastland* toward the time that can elapse between the services of the life and property salvors. The court recognized that "there may be cases where the act of saving life and the act of saving property are so disconnected and wide apart in point of time and otherwise that the life salvors should not participate," but it gave the statute a liberal construction, saying that "[l]ife salvors, even though acting independently of the property salvors, are entitled to share in the award, provided their services are rendered on the occasion of the accident giving rise to salvage."<sup>147</sup>

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144. 42 F.2d at 526.

145. 42 F.2d at 538. The life salvors received \$5,000 out of a total award of about \$47,500. The court said that the life salvage award should be relatively small because the life salvors faced no risk and suffered almost no loss. 42 F.2d at 539-40.

146. 42 F.2d at 537. Two eminent scholars have said that the life salvors would not have received a reward if it had been clearly shown that they "would not under any circumstances have attempted the salvage of the *Shreveport*." G. GILMORE & C. BLACK, *supra* note 7, § 8-12, at 573. Another writer disagrees with this reading of the case, and writes, "the 'foregone opportunity rule' . . . is but an aspect of a wider judicial constructional approach, founded upon policy and supportive of the claims of life salvors." Thomas, *supra* note 7, at 102. Thomas's view is similar to *The Mulhouse's* view that there is a need to encourage seamen to save life rather than property, but there is no requirement that the life salvor actually be tempted to save property. Whatever was intended in *The Shreveport*, an interpretation of the statute that recognizes only the foregone opportunity of receiving property salvage is too narrow. Such an interpretation ignores the fact that most life salvors forego some valuable opportunity, be it the opportunity to continue their profitable enterprise or simply the opportunity to remain safely on their voyage or "snugly on shore." *Taylor v. Twenty-five Thousand Dollars*, 23 F. Cas. 806, 807 (D.S.C. 1801) (No. 13,087).

*The Shreveport* does not adopt another limitation of *The Eastland*: that there must be some association or cooperation between the property and life salvors in order for the latter to share in the award. See note 116 *supra*.

147. 42 F.2d at 537-38.

The court said the "occasion" was "the explosion . . . the consequent fire, and the continuance of the fire and peril of the vessel until she was rescued and placed in safety by the [property salvors]." <sup>148</sup>

One could reconcile the facts of *The Shreveport* and *The Eastland* with their disparate holdings, but reconciliation of their theories is not so easy. In *The Shreveport* only a few hours elapsed between the saving of lives and the saving of property; in *The Eastland* the lag was several days. But *The Shreveport's* emphasis on the "occasion" would still lead to a different result under *The Eastland's* facts. Surely the "occasion" of the *Eastland* accident included both the sinking and the "continuance of the . . . peril of the vessel until she was rescued and placed in safety" by the towing company. Perhaps Judge Carpenter would have reached that conclusion if he had construed the statute with "the humane object in view" instead of insisting that it was a "sad reflection to contemplate."

### B. A Suggested Interpretation of the Statute

How should a modern court apply the 1912 statute to a claim for independent life salvage? The statute clearly states that life salvors are to recover a "fair share" of the property salvage award. Yet this command is self-contradictory in many situations where any award is inherently unfair to the property salvor. If the life salvor can be adequately compensated by an award that is small relative to the property salvor's award, then any unfairness will be minimal. Also, if the property salvor and life salvor sue jointly, the judge can diminish the unfairness to the salvors by resorting to the fiction of awarding a disproportionately large recovery to the property salvor and then reducing it by a fair amount of life salvage.<sup>149</sup> But greater unfairness will result if the only award that can adequately compensate the life salvor is large relative to the property salvor's award and the court chooses to read the statute literally without artificially increasing the property salvor's award. Similarly, the property salvor will be treated unfairly if he received a fair award in a separate proceeding and has to share

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148. 42 F.2d at 538.

149. Professors Gilmore and Black argue that the life salvor's award under the statute ought always to be borne by the property owner, not the property salvor, by analogy to the life-property salvage reward. G. GILMORE & C. BLACK, *supra* note 7, § 8-12, at 573. A similar position is taken by Wildeboer, based on the obligation under article 8 of the treaty to consider the danger to passengers and crew of the salvaged vessel in determining the salvage award. I. WILDEBOER, *supra* note 88, at 247-48.

a part of it with a life salvor in a later proceeding. The most unfair of all is when the value of the property saved — the maximum amount that can be awarded the property salvor — is insufficient to adequately compensate the life salvor and property salvor for their services.

To resolve such dilemmas it is necessary to probe the purposes of the 1912 statute. Unfortunately, the authors of neither the statute nor the underlying treaty clearly spelled out the ideals that motivated their action. Nevertheless, several possible motivations have been suggested. *The Eastland* apparently viewed the purpose as one of deterring the evil temptation of those who can choose between saving life and property;<sup>150</sup> *The Shreveport* stated the same theory more positively.<sup>151</sup> That was certainly one of the purposes of the statute — courts have long recognized that one of the purposes of all salvage awards is to deter any form of misconduct by salvors.<sup>152</sup> But, notwithstanding Judge Carpenter's opinion in *The Eastland*, that could hardly have been the *only* purpose of the statute. Courts reward salvage in other cases where the potential for misconduct is minimal; why should independent life salvage awards alone be motivated by such narrow cynicism?

Although others have proposed interpretations of the life salvage statute,<sup>153</sup> a full statement of the statute's purpose must give credit to the views of the American delegates to the Brussels conference, who thought that the provision was based on humanitarian principles.<sup>154</sup> The treaty was intended to set a minimum level of protection for life salvors, undoubtedly for many of the reasons that courts generally award salvage — to encourage people to incur expenses and assume possibly grave personal risks in order to save the lives and property of others.<sup>155</sup>

The treaty was certainly not intended to reduce the rights of

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150. 262 F. at 539-40.

151. 42 F.2d at 537.

152. *The Blaireau*, 6 U.S. (2 Cranch) 240 (1804); *The Mulhouse*, 17 F. Cas. 962 (S.D. Fla. 1859) (No. 9,910). See generally M. NORRIS, *supra* note 2, §§ 98, 232.

153. One might imagine that the statute was designed to make property salvors pay a share of their reward to the life salvors who enabled them to devote more time to saving property. See *The Shreveport*, 42 F.2d at 540-41. One noted authority suggests that the statute's purpose "is to encourage a vessel which has picked up injured and dying persons to proceed at once to get them safe on shore, leaving others to save the property, with the assurance that the court will apportion the award fairly." A. KNAUTH, *THE AVIATION SALVAGE AT SEA CONVENTION OF 1938*, at 11 n.31 (N.Y.U. School of Law Contemporary Law Pamphlets, Series 1, No. 18 (1939)).

154. See note 93 *supra*.

155. *The Blaireau*, 6 U.S. (2 Cranch) 240 (1804); *The Mulhouse*, 17 F. Cas. 962 (S.D. Fla. 1859) (No. 9,910). See generally M. NORRIS, *supra* note 2, §§ 98, 238.

American life salvors below their level under American judge-made law. Yet that is exactly what *The Eastland's* interpretation does! Like *The Eastland*, *The Mulhouse* recognized that denying independent life salvors a reward might tempt salvors "in many instances, to gratify their avarice at the expense of their feelings of humanity."<sup>156</sup> Unlike *The Eastland*, however, *The Mulhouse* did not make the existence of such temptation a prerequisite for recovery. Rather, the court recognized that "the general principles of humanity and of enlarged policy" favor rewards.<sup>157</sup>

Faced with the inherent self-contradictions of the 1912 statute, *The Eastland* court interpreted it extremely narrowly. Such an interpretation is erroneous, misconstruing what few clues to legislative intent are available. Modern courts should abandon that view and adopt the only approach that would fairly satisfy

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156. 17 F. Cas. at 967.

157. *The Mulhouse* (pamphlet), *supra* note 18, at 27 (quoting *The Emblem*, 8 F. Cas. 611 (D. Me. 1840) (No. 4,434)). *The Eastland's* holding that no life salvage is due unless life and property are saved at substantially the same time is also more restrictive than *The Mulhouse*. See note 122 *supra* and accompanying text. Although *The Mulhouse* is generally more favorable to life salvors than *The Eastland*, it is unclear if the Chicago life salvors would ultimately have recovered under the general maritime law. Although *The Mulhouse* would have given them a lien against the relatively small proceeds of the *Eastland*, they would have had to compete for priority against the claimants for property salvage, personal injuries, and death. The life salvors could have argued that their claim ought to be preferred to the property salvor's lien because saving life is more important than saving property. Further, because *The Eastland* court was bound by a previous decision to give the towing company priority over the tort claimants, *Great Lakes Towing Co. v. St. Joseph-Chicago S.S. Co.* 253 F. 635 (7th Cir.), *cert. denied sub nom. Bishop v. Great Lakes Towing Co.*, 248 U.S. 578 (1908), 249 U.S. 609 (1919), it would logically follow that the life salvors' lien would be paramount. One objection to this argument is that but for the towing company's efforts, no property would have been available to satisfy any of the claims. *The Eastland*, 262 F. at 541-42. This objection, however, did not deter the British Parliament from requiring life salvage liens to be superior to property salvage liens. Merchant Shipping Act of 1894, 57 & 58 Vict., c. 60, § 544(2). The harm to the property salvors that results from giving the life salvors priority would be limited because it is unlikely that the life salvage award would itself exhaust the proceeds available. A more substantial objection would be that tort victims are more deserving of relief than life salvors. When the property salvors have exhausted most of the proceeds of the vessel, as was the case in *The Eastland*, it is unseemly for the noble life salvors to deprive disaster victims of whatever compensation might be had.

The 1912 statute would have been particularly useful in cutting the Gordian knot presented by the competing claims to priority. The statute would give the property salvors priority over the tort claims, but the life salvors would share in that reward. In that way the life salvors' award would not be at the expense of the tort victims, provided the court does not artificially increase the property salvor's award to take account of the amount that would adequately compensate the life salvor.

Of course, if the courts had not ultimately allowed the owners of the *Eastland* to limit their liability under 46 U.S.C. § 183, then the life salvors would have had full recovery if *The Mulhouse* had been followed. See note 167 *infra*.

all the statutory purposes: They should take advantage of the broad discretion they were given in applying the statute and should seek to determine in each individual case the amount that can be awarded the life salvors without seriously deterring people from saving property. If the amount awarded the life salvors under the statute is inadequate, the court should exercise its power preserved under the 1910 treaty<sup>158</sup> to award life salvage directly out of the property saved or directly from the shipowner.

#### V. BEYOND THE 1912 STATUTE — REFORM OF THE LIFE SALVAGE RULES

Even if courts reward independent life salvors more freely than they have so far under the 1912 statute, the problem of whether a court should reward pure life salvors will still remain. Traditionally, pure life salvors have received no reward, even though they may have forgone an opportunity to save property and even though they may have sustained substantial expense or personal injury in order to save life. That rule, however, is based on old English cases that were questionable even when decided and now are modified by statute.<sup>159</sup> Congress and the courts should reconsider the rule denying compensation for pure life salvors.

Perhaps the best approach would be to follow the English example and create a fund for rewarding pure life salvors. Lawrence Jarett has proposed setting up such a fund to reimburse persons for "any expenses or losses which are directly attributable to life salvage endeavors, whether successful or not."<sup>160</sup> His proposal is limited to lives saved in American navigable waters or from a vessel of American registry anywhere on the high seas. The fund would be collected from persons whose property is saved by the Coast Guard. That proposal is attractive because it would assure payment even if the shipowner becomes insolvent or is allowed to limit its liability to an amount that is insufficient to pay the life salvors. Jarett's proposal, if modified slightly, could be used to reimburse American shipowners who save refugees adrift on unseaworthy boats.<sup>161</sup> But since Congress has shown no

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158. See text at note 91 *supra*.

159. See text at notes 19-35 & 46-49 *supra*.

160. Jarett, *supra* note 7.

161. Cf. New York Times, July 15, 1979, at 1, col. 3 (ships bound for Japan avoid seas traversed by refugees fleeing Vietnam. The costs of rescue are considered to be prohibitive).

interest in establishing such a fund,<sup>162</sup> it would seem wise for the courts to do what they can to reform the life salvage rules.

One writer, David W. Brown, suggests that courts start awarding *property* salvage to those who save lives, because they save the owner of the vessel from potential liability to the passengers and crew.<sup>163</sup> This Article proposes a more direct solution: Courts should use their power to make substantive admiralty law<sup>164</sup> to overrule the pure life salvage doctrine and to give all life salvors direct recourse against the shipowner, the party best placed to compensate them.

The reasons originally advanced for not making the shipowner pay pure life salvage carry little weight today. If *The Zephyrus*, decided in 1842, is taken at face value, the British court denied pure life salvage because salvage suits could not be brought in personam and because property salvage could not be awarded unless property was saved. Although it may have made some sense in England in 1842 to prohibit in personam suits for life salvage, that rationale was out of place in the United States even then, since federal courts were more willing than their British counterparts to allow in personam suits under their admiralty jurisdiction.<sup>165</sup> Today, it makes even less sense, since salvors are free in almost all cases to sue in personam.<sup>166</sup>

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162. Over a century ago, an American newspaper urged Congress to reimburse shipowners for the expenses of life salvage. See *Commercial Bulletin* (Boston, Mass.), May 26, 1860, at 3, col. 3, reprinted in *The Times* (London), June 14, 1860, at 9, col. 6. The newspaper asserted that the expenses of rescue are often ruinous, and it expressed the belief that "if vessels saving life were indemnified for the expense . . . hundreds of lives might be saved every year, which otherwise would be liable to pass out of sight unheeded."

163. Comment, 2 *HASTINGS L.J.*, *supra* note 7. See also note 208 *infra*.

164. In *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), the Court created a new rule with respect to comparative negligence in collision cases and said, "[T]he Judiciary has traditionally taken the lead in the law maritime, and 'Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law.'" *Fitzgerald v. United States Line Co.*, 274 U.S. 16, 20." 421 U.S. at 409. In *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), where the Court created a wrongful death remedy under the general maritime law, the Court quoted a passage from *The Sea Gull*, 21 F. Cas. 909 (C.C. Md. 1865) (No. 12,578) that said, "[I]t better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." 398 U.S. at 387. *But see Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978). The courts have been particularly active in making salvage law. Judge Hough wrote, "No branch of marine law has grown more since printed reports began, and none is growing more now, than salvage." *Canadian Government Merchant Marine v. United States*, 7 F.2d 69 (2d Cir. 1925).

165. Morrison, *supra* note 31.

166. See note 31 *supra*. Apparently the only situation in which a property salvor can sue in rem but not in personam is where the owner does not request the salvage service and elects not to accept and possess the salvaged property. See *Lambros Seaplane Base, Inc. v. The Batory*, 215 F.2d 228 (2d Cir. 1954).



Similarly, it makes little, if any, sense to require someone to save property before awarding life salvage merely because would-be *property* salvors receive no reward for unsuccessful efforts. While the maritime interests in life and property salvage are similar, they are not identical. One reason for denying recovery for unsuccessful attempts to save property is to limit the shipowner's liability. Today's courts, however, are generally unwilling to limit shipowners' liability even under a statute designed for that purpose.<sup>167</sup> Therefore, unless a court applies the limitation statute to the life salvor's claim, no other form of limitation is consistent with the humanitarian interests of life salvage. Another reason for compensating only successful efforts to save property is to encourage would-be salvors to make extra efforts to succeed. In the context of life salvage, however, that policy would at most prohibit compensation for unsuccessful attempts at life salvage. And yet such a prohibition might actually discourage people from attempting to save life. If the expense and danger are great enough, potential rescuers might not make the effort if the chance for recovery depended on whether the injured victim survives. Thus, because society values life more than property, people who make reasonable, though unsuccessful, efforts to save life should be compensated, even though unsuccessful efforts to save property go unrewarded.<sup>168</sup>

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167. Under 46 U.S.C. § 183 (1976), a shipowner can limit its liability to the value of the ship and its freight for damage incurred without its privity and knowledge. In the past forty years, courts have significantly narrowed the owner's right to limit liability. The burden of showing lack of privity or knowledge rests on the shipowner claiming limitation. If a ship is unseaworthy when it begins its voyage or if the loss of a ship is caused by events within the owner's effective control, then the owner will most likely be denied the right to limit liability. G. GILMORE & C. BLACK, *supra* note 7, §§ 10-24, 10-25. Among the conditions that render a ship unseaworthy is an inadequate crew, either in number or competence. In *Cerro Sales v. Atlantic Marine Enterprises*, 403 F. Supp. 562 (S.D.N.Y. 1975), the shipowner was denied limitation because the crew was inadequate in number and inadequately trained to handle a fire emergency. In related litigation, a life salvage claim was denied on the basis of the 1912 statute. *St. Paul Marine Transp. Co. v. Cerro Sales Corp.*, 313 F. Supp. 377 (D. Hawaii 1970). *But see* *The Eastland*, 78 F.2d 984 (7th Cir. 1935), *cert. denied*, 297 U.S. 703 (1936). The excursion boat tipped over while at the dock, due to an engineer's negligence in handling the water ballast tanks. In granting the owners the right to limitation, the court affirmed the commissioner's findings that "at the time of the disaster the Steamer Eastland was seaworthy in every respect, properly equipped and manned and fit for the carriage of passengers if properly handled." 78 F.2d 984, 986.

168. The law of restitution allows those who save or attempt to save life a greater chance of receiving compensation than those who save property. *See* 2 G. PALMER, *supra* note 8, §§ 10.3-.4. Also, in a negligence action for personal injuries suffered by a rescuer, a person who attempts to save life is less likely to be found contributorily negligent than

Another frequently offered argument against pure life salvage is that we expect people to save life out of humanitarian motives and therefore we expect salvors to need less encouragement to save life than property.<sup>169</sup> Therefore, some might think it crass to ask for a reward for saving life. But even if less encouragement is needed to save life than property, it is still fairer and more efficient to offer monetary compensation for the expenses and personal injuries incurred. Rescues at sea can involve tremendous expenses for extra fuel, extra wages, and lost profits,<sup>170</sup> and because of the need for swift action, saving human life may entail special hazards not involved with saving property.<sup>171</sup> It would be unfair to life salvors to make them bear those costs, and it would be inhuman to deter potential life salvors by not assuring them of reasonable compensation.<sup>172</sup>

Finally, one might argue that shipowners should not have to pay for services that do not benefit them. That concern has not, however, prevented courts from requiring shipowners to pay enhanced rewards to life-property salvors and, in a few instances, to reward independent life salvors. Such rewards seem to be

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one who undertook the same risks to save property of little value. *Berg v. Great Northern Ry.*, 70 Minn. 272, 73 N.W. 648 (1897). See also note 200 *infra*.

169. "Their reward they have; it never can be taken from them, and it is measured by a standard greater than money. They would not have done less [*sic*] for great promises." *The Eastland*, 262 F. 535, 540 (N.D. Ill. 1919). See Landes & Posner, 68 AM. ECON. REV., *supra* note 7; Landes & Posner, 7 J. LEGAL STUD., *supra* note 7.

170. For example, the parties in *The Peninsular & Oriental Steam Navigation Co. v. Overseas Oil Carriers, Inc.*, 553 F.2d 830, 837 n.7 (2d Cir.), *cert. denied*, 434 U.S. 859 (1977), stipulated that fuel costs resulting from approximately 6½ hour diversion of a passenger ship cost \$8,500. A study prepared in 1976 shows that the daily cost of diversion for cargo vessels and tankers ranges from \$12,400 to nearly \$38,000. NATIONAL MARITIME RESEARCH CENTER, FEASIBILITY STUDY FOR THE DEVELOPMENT AND USE OF THE SATELLITE COMMUNICATIONS SYSTEM TO PROVIDE SHIPBOARD EMERGENCY MEDICAL SERVICE (NMRC-KP-155) 18-22 (1976).

171. G. ROBINSON, *supra* note 78, § 98, at 717-18.

172. See *The Emblem*, 8 F. Cas. 611 (D. Me. 1840) (No. 4,434); *New York Times*, July 15, 1979, at 1, col. 3 (ships bound for Japan are avoiding seas traversed by refugees fleeing Vietnam in unseaworthy boats, in part because of the costs of rescue); *Commercial Bulletin* (Boston, Mass.), May 26, 1860, at 3, col. 3, reprinted in *The Times* (London), June 14, 1860, at 9, col. 6 (editorial asserting that hundreds of lives were lost annually because shipowners could not afford the expense of saving life at sea). Commenting later on the failure of a passing ship to rescue the passengers and crew of a wrecked steamer, the *Commercial Bulletin* said:

We fear that her captain may have been one of those men who calculate the cost of humanity before they undertake it.

*Commercial Bulletin* (Boston, Mass.) October 13, 1860, at 3, col. 1 (unpaginated). Professors Landes and Posner recognize that the greater the cost of saving life, the less altruism is likely to generate rescue efforts. Landes & Posner, 7 J. LEGAL STUD., *supra* note 7, at 104.

based, at least in part, on the belief that they benefit the shipowner by encouraging people to "come to the rescue" when life and property are in peril and because all who are engaged in maritime commerce are interested in the safety of seamen.<sup>173</sup> More importantly, life salvors directly save many shipowners considerable expense. Because a shipowner owes a high standard of care to his passengers and crew, his potential liability for their deaths is great.<sup>174</sup> At the very least, most shipowners have a duty to incur reasonable costs to save the lives of their passengers and crew,<sup>175</sup> and life salvors spare the shipowners that expense. Even

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173. See *The Fusilier*, 167 Eng. Rep. 391, 16 Eng. Rep. 19 (P.C. 1864).

174. A shipowner is liable for the wrongful death of a passenger under either the Death on the High Seas Act, 46 U.S.C. §§ 761-767 (1976), or the general maritime law. See *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978) (The statute applies to death resulting from wrongful acts occurring more than three miles from shore. The general maritime law applies in all other cases). Although the cause of action for a passenger's injury or death is based on a "negligence" theory, the shipowner, like a carrier on land, owes a high standard of care to its passengers. *E.g.*, *Alpert v. Zim Lines*, 370 F.2d 115 (2d Cir. 1966); *Allen v. Matson Navigation Co.*, 255 F.2d 273 (9th Cir. 1958) (duty to exercise extraordinary vigilance and the highest skill). The shipowner is also strictly liable for the "misconduct" of its crew. *New Jersey Steamboat Co. v. Brockett*, 121 U.S. 637 (1887); *Tullis v. Fidelity & Cas. Co.*, 397 F.2d 22 (5th Cir. 1968).

A shipowner is liable under the Jones Act, 46 U.S.C. § 688 (1976), and, in case of death more than three miles from shore, under the Death on the High Seas Act for negligently causing the death of a seaman. In addition to the more usual cases where a shipowner's negligence causes a seaman's death, the Jones Act makes a shipowner liable if a seaman who becomes ill or injured while serving the ship dies as a result of the shipowner's failure to take reasonable steps to secure medical care for him. *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367 (1932). Also, the shipowner is liable under the Death on the High Seas Act or under the general maritime law if the seaman's death is caused by the unseaworthiness of the ship. See *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978).

Both the Jones Act and the seaworthiness obligation require a high standard of care on the part of the shipowner. The standard of care under the Jones Act, though called "negligence," is generally higher than the negligence standard under the land-based common law. Also, a shipowner is strictly liable under the Jones Act if the seaman's death results from the shipowner's violation of a statutory duty, even though the statute is not designed to prevent the type of injury that caused the death. *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958). See generally G. GILMORE & C. BLACK, *supra* note 7, §§ 6-35 to 6-36, at 376-82. The unseaworthiness remedy is a species of absolute liability, not founded on the fault of the shipowner. A vessel is unseaworthy if it is not "reasonably suitable for [its] intended service." *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960).

The shipowner also faces potential criminal penalties for the negligent loss of life. 18 U.S.C. § 1115 (1976).

175. A shipowner has a duty to use reasonable care to rescue a drowning seaman even though the seaman negligently caused his own distress. *E.g.*, *Reyes v. Vantage S.S. Co.*, 558 F.2d 238 (5th Cir. 1977); *Di Nicola v. Pennsylvania R.R.*, 158 F.2d 856 (2d Cir. 1946); *Kirincich v. Standard Dredging Co.*, 112 F.2d 163 (3d Cir. 1940); *Harris v. Pennsylvania R.R.*, 50 F.2d 866 (4th Cir. 1931). A shipowner has a similar duty to a drowning passenger. *Hutchinson v. Dickie*, 162 F.2d 103 (6th Cir.), *cert. denied*, 332 U.S. 830 (1947); *Melhado*

in the few instances where the life salvor does not save the shipowner any expense,<sup>176</sup> it seems best to place the expenses of the rescue on the shipowner in order not to deter would-be rescuers from engaging in expensive and potentially dangerous ventures to save life. Finally, the shipowner is in the best position to prevent injuries and thus to reduce the need for costly and dangerous rescues.

Rewarding pure life salvors calls into question the congressional intent behind the 1912 life salvage statute. Even though the statute does not explicitly deny pure life salvage, one might argue that Congress was aware that the courts had not awarded pure life salvage and did not want life salvors to gain any new rights beyond those granted explicitly by the statute. But such an interpretation would glean a lot of specific congressional intent from a very general congressional silence and "keep the word of promise to the ear and break it to the hope."<sup>177</sup> Congress passed the statute to comply with the 1910 treaty. The treaty was intended to increase the rights of life salvors and left each nation

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v. Poughkeepsie Transp. Co., 34 N.Y. Sup. Ct. 99 (1882); *Horsley v. MacLaren*, 22 D.L.R.3d 545 (Can. 1971), *overruling Vanvalkenberg v. Northern Navigation Co.*, 19 D.L.R. 649 (Ont. App. Div. 1913). *See also* *Reed v. Louisville & N. R.R.*, 104 Ky. 603, 47 S.W. 591 (1898) (railroad has duty to stop and rescue a passenger thrown from a train without its fault if it is reasonable to do so. If it is unreasonable to stop, it has a duty to "procure" others to go to the assistance of the victim). *Accord*, *Yazoo & Mississippi Valley R.R. v. Byrd*, 89 Miss. 308, 321, 42 So. 286, 288 (1906) ("for humanity's sake there should have been something done for him"); RESTATEMENT (SECOND) OF TORTS § 314A, Illustration 1 (1965). *But see* *Leslie v. Robinson*, 267 App. Div. 965, 46 N.Y.S.2d 538, *affd. per curiam*, 293 N.Y. 911, 60 N.E.2d 35 (1944) ("while it appears that there is no legal duty to attempt a rescue, it may be accepted, for the purposes of this decision, that such a duty is owed to an invitee who is in peril." *Held*, defendant was not negligent).

With respect to the obligation owed a seaman who becomes ill aboard ship, the Supreme Court wrote in *De Zon v. American President Lines, Ltd.*, 318 U.S. 660, 668 (1943):

Although there may be no duty to the seaman to carry a physician, the circumstances may be such as to require reasonable measures to get him to one, as by turning back, putting in to the nearest port although not one of call, hailing a passing ship, or taking other measures of considerable cost in time and money. Failure to furnish such care, even at the cost of a week's delay, has been held by this Court to be a basis for damages. *The Iroquois* [194 U.S. 240 (1904)].

The same duty may be owed passengers. *See* *Nietes v. American President Lines, Ltd.*, 188 F. Supp. 219 (N.D. Cal. 1959); RESTATEMENT (SECOND) OF TORTS § 314A (1965) (common carrier has duty to render first aid to injured passengers and "to care for them until they can be cared for by others").

176. For example, where a seaworthy ship founders without any negligence on the part of the master or crew and the master has insufficient time to make arrangements for the rescue of the passengers and crew. Or, where the owner-operator of the vessel is the sole survivor.

177. *The Cargo ex Schiller*, 2 P.D. 145, 161 (C.A. 1877) (James, L.J.).

free to give life salvors additional rights.<sup>178</sup> Since Congress seems to have had little desire other than to ensure internationally adequate rules of life salvage, it is more consistent with the purpose of the treaty to allow courts to compensate pure life salvors for their expenses and personal injuries.<sup>179</sup>

In fashioning a life salvage remedy against shipowners, courts should be guided by the need to encourage persons to undertake potentially dangerous and costly rescues at sea. Therefore, life salvors ought to receive compensation at least for personal injuries and reasonable expenses incurred in the rescue. Although guarantees of indemnity for expenses and personal injuries will remove most of the disincentive to saving life at sea, it might be appropriate in some cases to reward the life salvor even further. In cases of extraordinary risk and heroism, the promise of compensation for expenses and personal injuries may be inadequate to express society's gratitude and inadequate to encourage others to venture forth in similar circumstances.

All categories of life salvors should receive compensation or reward for saving life. Life-property salvors already receive reimbursement of their reasonable expenses and an additional reward

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178. See note 91 *supra* and accompanying text.

179. Another objection to rewarding life salvors might be that it is impossible to place a value on saving another's life. This does not seem to have been a serious problem, however, in the awarding of life salvage either under the general maritime law or under statute. See, e.g., *The Bremen*, 111 F. 228 (S.D.N.Y. 1901); *The Mulhouse*, 17 F. Cas. 962 (S.D. Fla. 1859) (No. 9,910); *The Suevic*, [1908] P. 154; *The Heindall* (Nova Scotia Vice Adm. 1872), reported in YOUNG'S ADMIRALTY DECISIONS 132 (Oxley ed. 1882).

The master of a vessel has a qualified duty under 46 U.S.C. § 728 (1976) and under the Safety of Life at Sea Convention to save the life of a person aboard another vessel. See note 6 *supra*. Although one acting under a legal duty to save property ordinarily has no right to property salvage, see note 8 *supra*, it seems clear that the duties to save life aboard another vessel do not prevent one from claiming compensation or a reward. The provision in 46 U.S.C. § 728 (1976) is based on the Brussels Salvage Convention that also provides that life-property salvors and independent life salvors are entitled to a reward for saving life. Those provisions would be virtually nullified, at least with respect to the master, if the duty to save life barred the salvor from obtaining a reward. Also, the Safety of Life at Sea Convention specifically provides that it does not prejudice the Brussels Salvage Convention. Ch. V, Reg. 10e, 16 U.S.T. 185, 504, T.I.A.S. No. 5780, 536 U.N.T.S. 27, 334 (1960). The British counterpart to 46 U.S.C. § 728 (1976) and the British statute that gives effect to the Safety of Life at Sea Convention expressly provide that compliance with those duties does not deprive the master "or any other person" of their right to salvage. 1 & 2 Geo. 5, c. 57, § 6 (1911); 12 & 13 Geo. 6, c. 43, § 22(8) (1949). See also G. GILMORE & C. BLACK, *supra* note 7, § 8-4. In cases of collision, expenses incurred by a ship in a search for its seaman who may have drowned are included in the damages recoverable from the ship responsible for the collision. *In re Sincere Navigation Corp.*, 327 F. Supp. 1024 (E.D. La. 1971).

for heroism, but probably not compensation for personal injuries.<sup>180</sup> Reform of the life salvage rules should give life-property salvors the right to full compensation for personal injuries connected with the attempt to save life. Similarly, independent life salvors, like those in *The Eastland*<sup>181</sup> and *The Admiral Evans*,<sup>182</sup> who receive no compensation under the life salvage statute, ought to receive compensation and reward.

A more difficult question is whether an independent life salvor who can recover under the life salvage statute should also be able to recover under a judicially created remedy. The shipowner could argue that Congress intended the statute to be the exclusive means of relief. It would seem fair, however, to allow life salvors who do not recover all of their expenses by sharing in the property salvage award to recover their remaining unreimbursed expenses directly from the owner. Yet allowing such a suit against the shipowner runs the risk of making the life salvage statute a dead letter, a result some courts might find unacceptable.<sup>183</sup> Courts

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180. Property salvors who suffer personal injuries have a well-recognized right to a special award. *E.g.*, *The Bremen*, 111 F. 228, 239-40 (S.D.N.Y. 1901). *See generally* M. NORRIS, *supra* note 2, § 220. In *The Cyclone*, 16 F. 486, 490 (S.D.N.Y. 1883), Judge Addison Brown awarded \$100 to a salvor "for his expenses and personal injuries arising from his fall" while extinguishing a fire. One court said that the amount awarded for personal injuries is viewed as a bonus and is not intended to be full compensation for the injuries suffered. *Nolan v. A.H. Basse Rederi Aktieselskab*, 164 F. Supp. 774, 778 (E.D. Pa. 1958), *modified on other grounds*, 267 F.2d 584 (3d Cir. 1959). *See also* *The Elkridge*, 30 F.2d 618 (2d Cir. 1929) (it is fair to give a seaman practically the same salvage award given to the representative of a seaman who lost his life. Each faced the same risk, and compensation for the loss suffered by the seaman's dependents can be had by statute). *But see* *Guindon v. Cargoes of Canal Boats Zenith, Adelphi, and Gold Dust*, 197 F. 227, 230 (W.D.N.Y. 1912) (awarding \$750 "in full compensation" for the \$500 in personal injuries and \$200 of property damage sustained "and as [a] salvage award").

181. 262 F. 535 (N.D. Ill. 1919).

182. 286 F. 442 (W.D. Wash. 1923).

183. In *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), the Supreme Court held in a 6-2 decision that the survivors in a wrongful death action cannot recover for loss of society under the general maritime law if the death occurs more than three miles from the United States. The Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 761-767 (1976), which applies to such cases, expressly limits recovery to pecuniary loss. 46 U.S.C. § 762 (1976). In a case involving death in coastal waters the Supreme Court had said earlier that the general maritime law allows recovery for loss of society in wrongful death cases. *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573 (1974). Some had thought that *Gaudet* and its predecessor, *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), had made DOHSA a dead letter. *Law v. Sea Drilling Corp.*, 534 F.2d 793 (5th Cir. 1975); G. GILMORE & C. BLACK, *supra* note 7, § 6-33. In *Higginbotham*, the Court said, however, "[C]ourts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." 436 U.S. at 625. The Court distinguished *Moragne*, which had created the general maritime law right to wrongful death, by saying that that case "fill[ed] a gap left by Congress' silence" and that "Congress withheld a statutory remedy

that insist on giving effect to the statute could do so by requiring independent life salvors to pursue their statutory claims prior to, or at least concurrently with, their action against the shipowner.

The proposal set forth above for the reform of the life salvage rules has support in some recent decisions by leading courts. These decisions have been made not in the name of salvage but under some creative legal doctrines that may impose certain unnecessary limitations on recovery.

#### A. *Grigsby: Vicarious Seamen*

Shipowners, even nonnegligent shipowners, are liable to seamen for personal injuries if they are caused by an unseaworthy condition of the ship. A ship is unseaworthy if it is not "reasonably fit for [its] intended use."<sup>184</sup> Although the unseaworthiness remedy is available only to seamen, the Supreme Court has said that a "seaman" includes someone like a repairman, carpenter, or stevedore who is "doing a seaman's work and incurring a seaman's hazards."<sup>185</sup> In *Grigsby v. Coastal Marine Service, Inc.*,<sup>186</sup> a shore-based worker named Grigsby attempted to save two repairmen who had gone into a barge's wing tank that was low in oxygen.<sup>187</sup> Grigsby died of suffocation when he descended into the tank. The court allowed Grigsby's survivors to recover against the barge owner for Grigsby's wrongful death, based on the unseaworthiness of the barge.<sup>188</sup>

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in coastal waters in order to encourage and preserve supplemental remedies." 436 U.S. at 625. Unlike DOHSA, the 1912 salvage statute need not be read restrictively. See text at note 158 *supra*. Arguably Congress left a gap in the treatment of life salvors "in order to encourage and preserve" such supplemental remedies as paying enhanced rewards to life-property salvors and providing full compensation to independent life salvors. Cf. Plaintiff's Brief Supporting Motion for Interlocutory Summary Judgment of Liability by Defendant at 2 n.2, *Peninsular & Oriental Steam Navigation Co. v. Overseas Oil Carriers, Inc.*, 418 F. Supp. 656 (S.D.N.Y. 1976) (in which the P&O argued, "[T]he Congressional intent [behind 46 U.S.C. § 729 (1976)] was to assure the life salvor's lien on salvaged property, without necessarily denying the salvor *in personam* rights").

184. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960).

185. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 99 (1946). See generally G. GILMORE & C. BLACK, *supra* note 7, § 6-54, at 440-41. Such plaintiffs are frequently called "vicarious seamen" or "Sieracki seamen." The longshoreman's right to sue the shipowner for unseaworthiness has been eliminated by the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 33 U.S.C. § 905(b) (1976).

186. 412 F.2d 1011 (5th Cir. 1969), *cert. denied*, 396 U.S. 1033 (1970).

187. One of the repairmen had gone into the tank to rescue the other. Grigsby was told that one had fallen and broken his back. 412 F.2d at 1018-19. The wing tank was intended to supply buoyancy. It was expected to be kept tightly closed for long periods of time and was not intended to carry people. 412 F.2d at 1030.

188. Recovery was based on the applicable state wrongful death statute as required

Grigsby's survivors would have had no claim for relief under the conventional rules of life salvage and under the 1912 statute because he failed to save life and because no property was saved from peril. The court, however, used Grigsby's status as a life salvor to dub him a "vicarious seaman" who could claim the unseaworthiness remedy.<sup>189</sup> Grigsby became a "vicarious seaman" because he did what "a seaman responding to the call of the sea would have done."<sup>190</sup> In reaching that result the court took a broad view of the humane policies underlying salvage law. The court said,

[O]f all branches of jurisprudence, admiralty must be the one most hospitable to the impulses of man and law to save life and limb and property. The law of salvage, a distinctively maritime branch of the law, is the historical forerunner of latter day doctrines which supposedly reflect the more enlightened and humane outlook of contemporary society. Maritime law in every way and in every context encourages the salvor to salve — to save.<sup>191</sup>

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at the time by *The Tungus v. Skovgaard*, 358 U.S. 588 (1959). Shortly after *Grigsby*, the Supreme Court overruled *The Tungus* and created a right to recover for wrongful death based on unseaworthiness under the general maritime law. *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375 (1970). *Moragne* would not change the result in *Grigsby*, but it would base the cause of action on federal, rather than state, law.

189. 412 F.2d at 1015, 1022, 1030. The court also suggested that "as a corollary" Grigsby succeeded vicariously to the repairmen's status as vicarious seamen. 412 F.2d at 1030. A similar result was reached two years earlier in *Nikiforow v. Rittenhouse*, 277 F. Supp. 608 (E.D. Pa. 1967) (not cited in *Grigsby*), in which a member of the Coast Guard was injured while attempting to pull a yacht off a sandbar. The yacht's stanchion post broke and struck the plaintiff. The court concluded that the Coast Guard member was a "vicarious seaman" entitled to recover from the owner of the yacht if the yacht was unseaworthy. In reaching its decision the court said that the Coast Guard's assistance to grounded vessels is an activity traditionally performed by those vessels' crews. 277 F. Supp. at 611. The extension of liability in *Grigsby* and *Nikiforow* was rejected in *Klarman v. Santini*, 363 F. Supp. 910 (D. Conn. 1973), *affd.*, 503 F.2d 29 (2d Cir. 1974) (one judge dissenting), *cert. denied*, 419 U.S. 1110 (1975). In addition, *Klarman* distinguished *Grigsby* on its facts. In *Klarman* an auxiliary police officer was killed while observing an attempted tow of a sloop that had run aground. The court held that the observer was not a "seaman" entitled to recover for unseaworthiness. The court of appeals pointed out that "while not determinative of this action" Congress had recently provided that an injured longshoreman may not recover against a ship based on unseaworthiness, Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 18(a), 86 Stat. 1263 (codified at 33 U.S.C. § 905(b) (1976)), and that this "affords an additional reason why the *Sieracki* rule [treating longshoremen as vicarious seamen] should not be extended further in line with *Grigsby* . . ." 503 F.2d at 35-36. The court pointed out that the 1972 amendments also increased the longshoreman's compensation benefits "thus affording an additional reason for eliminating the longshoreman's claim for unseaworthiness," but noted that the plaintiff received state workmen's compensation benefits. 503 F.2d at 36 n.10. *Cf. Horsley v. MacLaren*, 22 D.L.R.3d 545 (Can. 1971) (shipowner is not liable for death of rescuer when owner was not at fault in placing a guest in peril or in failing to rescue the victims).

190. 412 F.2d at 1022.

191. 412 F.2d at 1021.



Life salvors face terrible risks of death or personal injury, and the general maritime law denies many life salvors any compensation for injuries. *Grigsby* is therefore a great advance, because it opens one avenue toward compensation for a life salvor's death or injury.

It would be premature, however, to conclude that *Grigsby* gives all life salvors the right to recover against a shipowner for personal injuries incurred in an attempt to save life. The holding reaches only unseaworthy ships; although most shipwrecks or accidents that imperil life probably involve an "unseaworthy" ship, this is not always the case.<sup>192</sup> Further, it is not clear whether *Grigsby* would apply if the rescuer were not injured by the unseaworthy condition. In *Theodoris v. Hercules Navigation Co.*,<sup>193</sup> a man suffered a heart attack when he tried to rescue another who had fallen into a hold. The trial court, finding the ship to be unseaworthy because the hold was inadequately lit, granted relief based on *Grigsby*.<sup>194</sup> The court of appeals found that the ship was seaworthy and reversed. Although the court of appeals did not decide whether *Grigsby* would apply if the ship had been unseaworthy, Judge Brown, who wrote most of *Grigsby*,<sup>195</sup> suggested that making the ship liable for the rescuer's death would be a

sort of for-want-of-a-nail-the-shoe-was-lost 'proximate cause' [that] stretches both *Grigsby* logic and the limits of the English language very, very far, and an audible recitation proves it, for it sounds more than a little strange to say that [the rescuer's] death on the well-lighted main deck was 'caused' by inadequate lighting in hold No. 5.<sup>196</sup>

Viewed as an issue of either "proximate cause" or allocation of risk, the question whether the owner of an unseaworthy ship should be liable for a rescuer's death that is indirectly caused by the unseaworthy condition is fundamentally one of policy.<sup>197</sup> A

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192. A ship is "unseaworthy" only if it is "not reasonably fit" for the voyage. Ships are not required to be "accident-free." *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960). See, e.g., *Griffith v. Gardner*, 196 F.2d 698, 702 (9th Cir. 1952) (passenger washed overboard by "unusual waves which could not have been anticipated nor guarded against." *Held*, vessel was not unseaworthy).

193. 448 F.2d 701 (5th Cir. 1971).

194. 448 F.2d at 704. The lower court's opinion is not reported.

195. Judge Wisdom wrote that part of *Grigsby* that determined that Louisiana law gave a wrongful death remedy for unseaworthiness. 412 F.2d at 1023 n.\*\*. The other member of the panel was Judge (now Chief Justice) Burger.

196. 448 F.2d at 704 n.8.

197. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 42 (4th ed. 1971); Robertson,

policy favoring rescue has led courts to compensate injured rescuers in negligence cases even when the connection between the defendant's conduct and the rescuer's injury is somewhat attenuated.<sup>198</sup> It remains to be seen whether the courts will do the same when the defendant is without fault, as in unseaworthiness and products liability cases.<sup>199</sup> To hold the owner of an unseaworthy ship liable for life salvage fits well with *Grigsby's* broad humanitarian policy of encouraging rescue, at least as long as it creates no crushing liability for a shipowner. If, for example, a large ship diverts to rescue a few crew members of a small burning vessel at sea and sinks in an unexpected storm before reaching the burning vessel, the owners of the burning vessel should not pay for all of the deaths that would not have occurred but for the diversion.

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*Reason Versus Rule in Louisiana Tort Law: Dialogue on Hill v. Lundin & Associates, Inc.*, 34 LA. L. REV. 1 (1973).

198. "[A] rescuer is favored in the eyes of the law." *Lynch v. Fisher*, 41 So. 2d 692, 695 (La. App. 1949) (an employee of the defendants negligently parked their truck on a highway and another driver, Gunter, collided with it. A third party, Lynch, ran to help Gunter, found a pistol in Gunter's car and handed it to him. Gunter was temporarily deranged by the accident and shot Lynch. *Held*, the defendants are liable for Lynch's injuries). A less extreme case is *Zylka v. Leikvoll*, 274 Minn. 435, 144 N.W. 2d 358 (1966) (one who negligently creates a hazard on a highway is liable to a Samaritan injured by another oncoming car). Perhaps the best known case is *Wagner v. International Ry.*, 232 N.Y. 176, 133 N.E. 437 (1921) (railroad conductor did not close door on train and a man fell out as the train turned a curve on a trestle. Soon thereafter, the man's cousin walked along the trestle in search of him but fell off and was injured. The court held that the railroad was liable to the rescuer if it had negligently caused the first man's fall and if the rescuer acted reasonably in the emergency).

199. In one products liability case, rescuers or representatives of their estates recovered from a nonnegligent manufacturer even though the rescuers were not injured directly by the defective product. *Guarino v. Mine Safety Appliance Co.*, 25 N.Y.2d 460, 255 N.E.2d 173 (1969). In that case, a sewer worker's gas mask was defective, and he died in a sewer filled with poisonous gas. Several other sewer workers, not knowing that the sewer contained gas, rushed in to help without putting on gas masks. Some of the rescuers died; others were injured by the gas. The court held the manufacturer of the gas mask liable for the rescuers' deaths and personal injuries. The court said that the doctrine of "danger invites rescue" applies to breach of warranty cases even though no negligence is shown. Two judges concurred in the result but would limit the holding to situations where there is a "great moral obligation" to rescue as here where all involved were "part of a team of workers all similarly situated in a common effort." 25 N.Y.2d at 466, 255 N.E.2d at 176. Subsequently the New York Court of Appeals termed such products liability cases as cases of strict liability in tort and held that an innocent bystander may recover from the manufacturer of a defective product. *Codling v. Paglia*, 32 N.Y.2d 330, 298 N.E.2d 622 (1973), citing *Guarino* with approval.

In another products liability case, *Fedorchick v. Massey-Ferguson, Inc.*, 438 F. Supp. 60 (E.D. Pa. 1977), the plaintiff-rescuer was injured by a runaway loader while attempting to remove a fellow worker from its path. Applying what it conceived to be Pennsylvania law, the court held that the manufacturer would be strictly liable in tort under RESTATEMENT (SECOND) OF TORTS § 402A (1965) unless the jury found that the rescuer voluntarily assumed the risk.

But where the rescuer's injuries are not out of proportion to the risks created by the dangerous condition of the ship,<sup>200</sup> courts should award life salvage to encourage sailors to respond to the call of their fellow mariners.

#### B. *P&O: Reimbursement for Life Salvage Expenses*

*Grigsby* has opened the door to allowing life salvors to recover for personal injuries that they incur while attempting to save life. More significantly, it indicates a judicial attitude favoring reform of the harsh life salvage rules. A case that may have even greater importance for life salvors is *Peninsular & Oriental Steam Navigation Co. v. Overseas Oil Carriers, Inc.* (hereinafter referred to as "*P&O*"),<sup>201</sup> which allowed life salvors to recover under a restitution theory. William Turpin, a sixty-three-year-old seaman, suffered severe chest pains aboard an American flag tanker, the *Overseas Progress*, in the mid-Atlantic while en route to Baltimore. The tanker had no doctor, nurse, or operating room.<sup>202</sup> Believing that Turpin had suffered a heart attack, and guided by medical and radio advice from the Public Health Service, the tanker's officers gave Turpin several morphine injections and glycerin nitrate tablets. The following day, Turpin suffered another attack. This time the ship's master, W. J. Lidwin, sent a radio message asking all ships in the vicinity that had a doctor to answer. Of the three ships to respond, a British passenger vessel, the *Canberra*, was the closest. The *Canberra* had a hospital and a fully equipped operating room staffed by two surgeons, two nurses, and a hospital assistant. Captain Lidwin informed the *Canberra* of Turpin's condition and requested that the two ships rendezvous so that the *Canberra* could take Turpin aboard for

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200. Professors Landes and Posner give the following economic analysis of the problem of compensating rescuers for personal injuries:

[I]f the sum of the expected costs of the accident victim and of the rescuer is less than the expected costs of the accident had no rescue attempt been made, a rational tortfeasor would gladly have promised to reimburse the rescuer for his injury if, by [so] doing, the tortfeasor could have induced him to make the rescue attempt. . . . Consistently with this analysis, the rescuer is not permitted to recover damages from the tortfeasor if the danger of the rescue attempt was disproportionate to the expected loss from the accident.

Landes & Posner, 7 J. LEGAL STUD., *supra* note 7, at 111.

201. 553 F.2d 830 (2d Cir. 1977), *rev.* 418 F. Supp. 656 (S.D.N.Y. 1976), *cert. denied*, 434 U.S. 859 (1977). The plaintiff did not object to the defendant's petition for certiorari. Letter of counsel to the Clerk of the United States Supreme Court, Docket No. 77-124, Aug. 15, 1977.

202. 418 F. Supp. at 657.

treatment. Captain Snowden of the Canberra agreed; both vessels altered course, and the Canberra increased her speed. The ships met about six hours later, and Turpin was transferred to the Canberra, where he was treated. The Canberra maintained its increased speed and arrived in New York City three days later, only two-and-a-half hours behind schedule although she had traveled 232 extra miles to rescue Turpin. Turpin was transferred to a public health hospital in New York where he received further treatment. He was eventually discharged from that hospital.<sup>203</sup>

Before the vessels met, Captain Snowden told Captain Lidwin by radio telephone that the Canberra's owners, The Peninsular & Oriental Steam Navigation Company ("The P&O") might ask the tanker's owners for reimbursement. When the two ships met, Captain Snowden confirmed that conversation in a note that Captain Lidwin signed. The parties later stipulated that Captain Snowden did not demand reimbursement and that Captain Lidwin did not agree to make reimbursement. The matter was simply left to a future determination by the two shipowners.<sup>204</sup>

About a month after the incident, the owner of the Overseas Progress, Overseas Oil Carriers ("Overseas"), promptly paid a bill for \$248, covering the surgeon's services to Turpin.<sup>205</sup> After about another month, Overseas received a bill for over \$12,000, of which \$500 was for accommodation and nursing and the remainder for the additional fuel consumed by the Canberra when it increased its speed and diverted to pick up Turpin and bring him to New York. Overseas refused to pay the second bill, and the P&O filed suit in federal court.<sup>206</sup>

The plaintiff had two theories for recovery. First, it argued that the case could be viewed as a property salvage case.<sup>207</sup> Using the theory advanced by David Brown,<sup>208</sup> it said that saving expen-

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203. 553 F.2d at 832-33.

204. 553 F.2d at 833.

205. 418 F. Supp. at 657.

206. 553 F.2d at 833.

207. 418 F. Supp. at 658.

208. Comment, 2 HASTINGS L.J., *supra* note 7. Brown and the P&O relied on *United States v. Cornell Steamboat Co.*, 202 U.S. 184 (1906), *affg.* 137 F. 455 (2d Cir. 1905), which held that the federal government was liable to pay salvage to those who saved some imported sugar from destruction and thereby saved the government from the need to refund the duties that the sugar owners had paid. That case in turn relied on three foreign cases: *Duncan v. Dundee*, Perth & London Shipping Co., 5 R. 742 (Scot. 1st Div. 1878); *Five Steel Barges*, 15 P.D. 142 (1890); *Cargo ex Port Victor*, 1901 P. 243 (C.A. 1901). In *Duncan*, the court allowed a salvage recovery in an in personam action against a common

seas is a salvage act and that it had saved Overseas considerable expense because it would have taken the Overseas Progress fifty-seven hours to bring Turpin to the nearest shore hospital in Newfoundland, delaying its voyage to Baltimore and adding substantially to its fuel costs.<sup>209</sup> Moreover, the plaintiff argued that it should recover its expenses under a quantum meruit or unjust

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carrier on behalf of salvors who saved the ship and its cargo. The cargo was owned by "some hundreds of owners." 5 R. at 747. The owners of the ship would have been liable to the cargo owners had the cargo been lost, and were therefore benefited by the salvor's saving of the cargo. In *Five Steel Barges*, the builder of some barges was under contract to deliver them to the government. The plaintiff saved the barges from loss and two of them were delivered to the government. The builder of the barges was held liable in personam for the salvage of these two barges, because it would have been liable to pay damages or to make restitution to the government if the barges had been lost. In *Cargo ex Port Victor*, charterers were liable in personam for the salvage of cargo. The charterers would have been liable to the cargo owners had the property been lost.

In addition to *United States v. Cornell Steamboat*, courts in the Second Circuit have reached a similar conclusion on several occasions. In *Cowles Towing Co. v. Grain Transit Corp.* (The Barge GL 40), 66 F.2d 764 (2d Cir. 1933), the insurers of a sunken barge requested the salvage. The court held them liable and said, "a salvor's remedy in personam is not confined to the legal ownership of the property, but extends to one who has a direct pecuniary interest in its preservation." 66 F.2d at 766. In *Tice Towing Line v. James McWilliams Blue Line*, 51 F.2d 243 (S.D.N.Y. 1931), *revd. on other grounds*, 57 F.2d 183 (2d Cir. 1932), the court held that the owner of a tug that put a barge and its cargo in peril is liable to one who saves them. The court said, "[A] salvor is entitled to a salvage award as against any one whom he may have benefited by successful salvage services." 51 F.2d at 246. One of the cases relied on by this case was *Seaman v. Erie R.R.*, 21 F. Cas. 918 (E.D.N.Y. 1868) (No. 12,582), in which Judge Benedict awarded salvage against barge owners for rescuing the barge and its cargo. The barge owners would have been liable in case of loss or damage "and that liability they escaped through the services of this salvor." 21 F. Cas. at 918, 919. *See also* *The Public Bath No. 13*, 61 F. 692 (S.D.N.Y. 1894) (bailee liable for salvage). *But see* *The Cardy*, 64 F. Supp. 902 (E.D.N.Y. 1945) (charterer not liable for salvage unless he requests the service).

Professors Gilmore and Black termed the language quoted above from *Cowles Towing Co.* as "unsupported and perhaps unjustifiable dictum." G. GILMORE & C. BLACK, *supra* note 7, § 8-14. They also said that "it may be that the [*Cornell*] case stands merely for the proposition that courts occasionally award counsel who are able to fashion arguments so fresh and so novel as to tickle the judicial palate." *Id.* They argue that it would be unrealistic, for example, to make buyers of goods liable for salvage services which saved them profitable resales. *Id.* But when the expenses saved are clearly evident, when salvage is not payable by another party and when the interest at stake, such as the safety of passengers and crew, is highly valued, it seems fair to make the benefited party pay salvage.

209. Based on a study of diversion costs prepared for the National Maritime Research Center (part of the Maritime Administration), the plaintiff suggested that it saved Overseas \$6500 in fuel diversion costs to Newfoundland "plus the cost of getting back on course to Baltimore." Appellant's Brief at 10 n.5, *Peninsular & Oriental Steam Navigation Co. v. Overseas Oil Carriers, Inc.*, 553 F.2d 830 (2d Cir. 1977). In its complaint the plaintiff alleged that it saved Overseas from incurring costs, including possible tort suits by Turpin or his dependents, in excess of the amount claimed by the plaintiff. Complaint at 8, paragraphs 54 & 55.

enrichment theory, because the expenses were incurred because the Overseas Progress asked the Canberra to perform an obligation that Overseas owed to Turpin.<sup>210</sup>

The trial court denied relief on the salvage theory saying the "law of the sea has clearly not allowed an award solely for life salvage."<sup>211</sup> The trial court also denied the bulk of the plaintiff's claim on the contract and quasi-contract theories. It split the plaintiff's theory into two parts — first that a contract was implied in fact to reimburse the P&O for its expenses, and second, that the plaintiff should be reimbursed to prevent unjust enrichment. On the first point, the court held (correctly, it seems) that no contract was implied in fact to pay for the expenses because the captains expressly agreed to leave the matter open to a determination by their employers, and Overseas did not subsequently agree to pay.<sup>212</sup>

On the unjust enrichment claim, the court held that to have a valid claim, the plaintiff must show that the defendant has committed some act of misconduct or fault, such as a breach of a fiduciary duty.<sup>213</sup> Finding no act of fault or misconduct by Over-

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210. 418 F. Supp. at 657; Plaintiff's Brief Supporting Motion for Interlocutory Summary Judgment of Liability by Defendant.

211. 418 F. Supp. at 658 (citing *St. Paul Marine Transp. v. Cerro Sales Corp.*, 313 F. Supp. 377 (D. Hawaii 1970), and *The Eastland*, 262 F. 535 (N.D. Ill. 1919)). That response really did not answer the plaintiff's claim that it was much more than a life salvor—that by saving Overseas considerable expense it should be considered a property salvor. The court also rejected the plaintiff's contention that it was asking only for reimbursement of expenses and not a reward for saving life. 418 F. Supp. at 659.

212. 418 F. Supp. at 659. *But see* *United States v. Consolidated Edison*, 580 F.2d 1122, 1127 n.9 (2d Cir. 1978), where the court suggested that P&O could have been decided in favor of the plaintiff based on RESTATEMENT OF RESTITUTION § 107(2) (1937) and RESTATEMENT OF CONTRACTS §§ 226-236, 245-249 (1932). The section from the *Restatement of Restitution* provides "In the absence of circumstances indicating otherwise, it is inferred that a person who requests another to perform services for him . . . thereby bargains to pay therefor." The comment to that section states that it is based on the principle underlying the sections from the *Restatement of Contracts* cited above, namely that "the conduct and words of the parties are interpreted in the light of ordinary usages and it is the ordinary understanding that a person who asks another to do something for him . . . will pay for it unless the circumstances under which the request is made indicate otherwise." RESTATEMENT OF RESTITUTION § 107, Comment c (1937). The comment notes that the inference of a promise can be rebutted if such services are customarily rendered without compensation. In P&O the captain of the Overseas Progress left open the possibility that Overseas would decline payment, and Overseas alleged that the "long-standing translations of the sea" are not to charge for rendering this type of assistance. Defendant's Memorandum of Law in Support of Motion for Summary Judgment Dismissing the Complaint at 33, 418 F. Supp. 656 (S.D.N.Y. 1976). This would rebut any inference that Overseas bargained to pay for the service.

213. 418 F. Supp. at 659. The district court cited two cases for this proposition: *Shooters Island Shipyard Co. v. Standard Shipbuilding Corp.*, 293 F. 706 (3d Cir. 1923)

seas, the court said that the unjust enrichment theory failed for most of the plaintiff's claim.<sup>214</sup> The trial court did, however, find one element of unjust enrichment. It said that the \$500 cost for nursing and accommodation was an expense that Overseas would have had to incur in port if no public health hospital had been available.<sup>215</sup> Oddly enough, the court had little trouble allowing this aspect of the unjust enrichment claim, even though no fault or misconduct was involved. It said only that payment of those costs was not life salvage, since the services were rendered after the transfer of Turpin to the Canberra.<sup>216</sup>

Only the P&O appealed from the district court decision. It no longer argued that property salvage law gave it a right to reimbursement of its expenses, although it did remark that property salvage is quasi-contractual and "akin to the law of restitution."<sup>217</sup> Its major argument was that the district court had mistakenly held that misconduct or fault on the part of a defendant is a prerequisite to any unjust enrichment claim.<sup>218</sup> Further, it relied on sections 113 and 114 of the *Restatement of Restitution* for the proposition that it was entitled to restitution because it acted in an emergency and performed a duty that Overseas owed to Turpin.<sup>219</sup> Alternatively, the P&O argued for reimbursement

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and F.E. Grauwiller Transp. Co. v. King, 131 F. Supp. 630 (E.D.N.Y. 1955), *affd.*, 229 F.2d 153 (2d Cir. 1956). In *Shooters Island* the court held that a first mortgagee was not unjustly enriched by expenditures made on mortgaged land that were financed by a junior lienor where the junior lienor knew or should have known that the property was covered by a prior mortgage. The first mortgagee had not acted improperly and had not taken advantage of the junior lienor. 293 F. at 214. In *Grauwiller* a person had tortiously taken a scow from its rightful owner and had made repairs to it. The court held that the owner was not liable for the repairs, relying on *Shooters Island*.

214. 418 F. Supp. at 659.

215. 418 F. Supp. at 659. A shipowner has a "maintenance and cure" duty to provide medical care for seamen who become ill during a voyage. G. GILMORE & C. BLACK, *supra* note 7, § 6-8.

216. 418 F. Supp. at 659-60.

217. Appellant's Brief at 7, 553 F.2d 830.

218. The appellant distinguished the cases relied on by the district court and cited several authorities that state that recovery for unjust enrichment does not always depend on some fault or misconduct by the defendant. Appellant's Brief at 6-8, 553 F.2d 830, relying on *Berri v. City of New York*, 16 N.Y.S.2d 86 (City Ct. N.Y. Co.), *affd.*, 16 N.Y.S.2d 1015 (App. Term 1939), *affd.*, 259 App. Div. 453, 19 N.Y.S.2d 347 (1940) (citing the Introductory Note to Chapter 7, *RESTATEMENT OF RESTITUTION* at 525 (1937)); *Duffy v. Scott*, 235 Wis. 142, 292 N.W. 273 (1940); *Chase v. Corcoran*, 106 Mass. 286 (1871); and *RESTATEMENT OF RESTITUTION, passim* (1937)).

219. Appellant's Brief at 5. The sections provide:

§ 113.

A person who has performed the noncontractual duty of another by supplying a third person with necessaries which in violation of such duty the other had failed

because Overseas had a maintenance and cure obligation to take Turpin to the nearest port hospital.<sup>220</sup>

In an opinion by Chief Judge Irving Kaufman, the Court of Appeals for the Second Circuit reversed. It agreed with the appellants that section 114 of the *Restatement of Restitution*<sup>221</sup> applied. Overseas had a duty to provide Turpin with speedy medical attention, and the Canberra acted in an emergency to fulfill that duty. The Canberra was therefore entitled to restitution.<sup>222</sup>

*P&O* is sound. Only passenger ships are likely to have a hospital aboard,<sup>223</sup> and the few passenger ships crossing the Atlan-

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to supply, although acting without the other's knowledge or consent, is entitled to restitution therefor from the other if he acted unofficiously and with intent to charge therefor.

§ 114.

A person who has performed the duty of another by supplying a third person with necessities, although acting without the other's knowledge or consent, is entitled to restitution from the other therefor if

- (a) he acted unofficiously and with intent to charge therefor, and
- (b) the things or services supplied were immediately necessary to prevent serious bodily harm to or suffering by such person.

RESTATEMENT OF RESTITUTION §§ 113-114 (1937).

220. Appellant's Brief at 8-9. The duty had been recognized by the district court, 418 F. Supp. at 657 (citing *The Iroquois*, 194 U.S. 240, 243 (1904) and *G. GILMORE & C. BLACK*, *supra* note 7, § 6-13).

221. *See* note 219 *supra*.

222. 553 F.2d at 834-35. The measure of recovery allowed under § 114 of the *Restatement* is the market value of the services rendered, limited, however, to the amount by which the recipient has benefited. RESTATEMENT OF RESTITUTION §§ 114, comment d; 113, comment g; 155, comment d (1937). There being no market price for the services rendered by the Canberra, the court said that the only reasonable value of its services was the amount of its "reasonable expenses." 553 F.2d at 836. As to possible recovery for expenses in addition to the fuel expenses involved in *P&O*, see note 239 *infra* and accompanying text.

223. A study prepared for the National Maritime Research Center found that usually the chief mate and occasionally the purser or captain or other ship's officer provide the medical care aboard ship. The study of 89 merchant ships found that inadequate training is given to most of those providing medical care aboard ship. Indeed, on 20 of the ships studied, those providing care had received no formal training and relied only on experience. Of the ships studied, 70% had "sick-bays" with four beds or fewer, 13% had "infirmaries" with more than four beds, and 17% had no beds designated for patients. Sixty-five percent of the ships studied had medical reference books that were more than five years old, 52% had books that were at least 20 years old, and 12% of the ships carried no medical reference books. NATIONAL MARITIME RESEARCH CENTER, FEASIBILITY STUDY FOR THE DEVELOPMENT AND USE OF THE SATELLITE COMMUNICATIONS SYSTEM TO PROVIDE SHIPBOARD EMERGENCY MEDICAL SERVICE (NMRC-KP 155) 25-27 (1976). The study concluded

It was readily apparent from all avenues of inquiry that response capabilities in the delivery of medical care to U.S. merchant seamen suffering illness or injury while at sea is grossly inadequate and antiquated given the present level of emergency



tic are therefore likely to be asked to travel large distances to rescue ill or injured crew members of other ships.<sup>224</sup> It is unreasonable to force those ships to shoulder the expense when they save the other shipowners the cost of emergency rescue services, and when in most cases, the owners of the other ships can take alternative steps to reduce the need to call for such aid. For example, if the Overseas Progress had had a doctor, nurse, or medically trained officers aboard, it may not have needed to summon the Canberra. Stricter physical fitness tests for the crew and greater safety precautions aboard ship may reduce the risks of illness and injury.

Overseas argued that ships' captains would be reluctant to call for aid if they knew that their employers would have to pay the rescue ship's fuel costs.<sup>225</sup> The district court accepted that argument and thought the matter could be resolved best by legislation or "international compacts."<sup>226</sup> The court of appeals, however, stated that a captain who unreasonably refused to call for aid may be liable for any damages that his refusal causes.<sup>227</sup> The costs of the rescue are simply one factor that the master must consider in determining whether to request assistance. The court concluded that allowing recovery of expenses would encourage large vessels to render aid and would thus result in "an efficient and productive use" of the medical facilities of those large vessels.<sup>228</sup>

What effect will *P&O* have on the law of life salvage? One could argue that *P&O* does not apply to the typical life salvage situation. The court of appeals distinguished the rule denying

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medical care delivery available on shore and the present level of communications technology.

*Id.* at 2.

224. "Today the [Queen Elizabeth II] alone remains in scheduled service between the United States and Europe." *Last Watch on the North Atlantic*, COMPASS 18 (Spring/Summer 1978). (*Compass* is published by Marine Office of America Corporation.)

225. 553 F.2d at 836.

226. 418 F. Supp. at 660 (citing Knauth, *supra* note 13). The Aviation Salvage at Sea Convention of 1938 provided that the operator or owner of an aircraft would indemnify a rescuer for his expenses not exceeding 50,000 francs for each person saved, but in no event to exceed 500,000 francs. If no one is saved and if the rescuer had an obligation to rescue he may recover up to 50,000 francs from the owner or operator. Art. 3, 6B BENEDICT ON ADMIRALTY 1255 (7th ed. 1969). The equivalent value of 50,000 francs in 1938 was about \$3,500. A. KNAUTH, *supra* note 153, at 11 n.30. The 1938 treaty has not been put into force. 6B BENEDICT, *supra* at 1254. A bill, S.7, was introduced in 1941 to give effect to the 1938 treaty, but no further action was taken.

227. 553 F.2d at 836.

228. 553 F.2d at 836.

pure life salvage, pointing out that the P&O merely requested reimbursement of expenses rather than a reward, and also pointing out that the situation was not "a daring 'rescue at sea', but the transfer of an ailing seaman from one seaworthy vessel to another."<sup>229</sup> One might thus interpret *P&O* to apply only when someone performs a shipowner's duty and saves that owner some major expense when the ship is not in danger of sinking.

Yet so narrow a reading clashes with the liberal tone of the opinion. The court's attempt to distinguish its relief from pure life salvage is weak.<sup>230</sup> The largest share of a claim for life salvage is likely to be reimbursement for expenses, and the traditional rule denies pure life salvors any recovery at all.<sup>231</sup> Also, the fact that the rescue in *P&O* was not "daring" does not distinguish the case from one of pure life salvage. In the cognate area of property salvage, heroism increases the amount of a reward, but those who voluntarily help to save property in peril are entitled to a reward even if their services are not heroic.<sup>232</sup> By analogy, since the *P&O* voluntarily helped to "save the life of a sailor,"<sup>233</sup> its act was an act of life salvage. To carry the analogy further, if the *Overseas Progress* had been in danger of sinking and the *Canberra* had made a "daring rescue at sea," the rescue ship would have had an even more compelling claim for compensation since it would have risked loss of life and property as well as incurred substantial expense.

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229. 553 F.2d at 836.

230. Although there seems to be little merit in arguing that the 1912 life salvage statute preempts the field of life salvage, the court may have refused to characterize its relief as life salvage in order to avoid raising the issue. See text at notes 178-79 *supra*. Characterizing the relief as restitution, however, does not absolve one of deciding the preemption issue. One might argue that Congress intended the 1912 statute to be the sole reform of the rules applicable to people who save life at sea. The court, however, appeared ready to construe the statute liberally. It said, "[the statute] was intended to remove the disincentive to life salvage that resulted from the traditional rule, which encouraged sailors to rescue property rather than aid fellow seamen in jeopardy." 553 F.2d at 836. Viewing the statute that way, a court can easily decide that increasing the rights of life salvors is consistent with congressional intent. Increasing those rights is also consistent with the history of the underlying treaty. See note 91 *supra* and accompanying text.

231. See *The Admiral Evans*, 286 F. 442, 443 (W.D. Wash. 1923). By contrast, expenses were reimbursed when courts compensated life salvors. *E.g.*, *The Annie Lord*, 251 F. 157, 160-61 (D. Mass. 1917); *The Queen Mab*, 166 Eng. Rep. 395, 396 (Adm. 1835); *The Aid*, 166 Eng. Rep. 30, 31 (Adm. 1822).

232. *Mississippi Valley Barge Line Co. v. Indian Towing Co.*, 232 F.2d 750, 755 (5th Cir. 1956); *Sobonis v. Stream Tanker Natl. Defender*, 298 F. Supp. 631, 637 (S.D.N.Y. 1969) ("It is success and not heroics which is the *sine qua non* to an award of salvage"). Even giving advice can be a salvage act. *South America S.S. Co. v. Atlantic Towing Co.*, 22 F.2d 16 (5th Cir. 1927).

233. 553 F.2d at 835.

Other language in *P&O* suggests that the court intended its decision to stimulate broad changes in the life salvage rules.<sup>234</sup> The court attacked the rule denying pure life salvage as “questionable,” of “dubious vitality,” “almost universally condemned,”<sup>235</sup> and “irrational.”<sup>236</sup> Moreover, the court said in a footnote that to recover its expenses the plaintiff did not need to confer a monetary benefit on Overseas. Instead,

The value rendered in performing another's duty is sufficient to permit recovery. Thus, if the Overseas Progress had been totally unable to reach a shore hospital and the Canberra had been Turpin's only source of aid, it might be argued that her intervention, although vital to Turpin, did not save Overseas Progress from incurring any additional expense. Canberra could nonetheless have recovered for providing such assistance.<sup>237</sup>

Although it is not entirely clear, the court apparently meant by this statement that the *P&O* could recover its expenses even if

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234. A recent nonadmiralty case in the Second Circuit supports the proposition that *P&O* was intended to make sweeping changes in life salvage law. In *United States v. Consolidated Edison Co.*, 580 F.2d 1122 (2d Cir. 1978), the court said that the panel in *P&O* had taken a general principle of law and “us[ed] the opportunity to overrule specifically the outdated admiralty rule of ‘pure life’ salvage.” 580 F.2d at 1130. The Atomic Energy Commission (AEC) incurred substantial costs when it released large amounts of electricity to Consolidated Edison (Con Ed) during a power shortage. The AEC told Con Ed that it would look to it for reimbursement of its additional costs, and the court allowed the AEC its costs under the “emergency assistance doctrine” as embodied in § 115 of the *Restatement of Restitution*. The section is similar to § 114 of the *Restatement*, except that it involves performing another's duty by providing services “immediately necessary to satisfy the requirements of public decency, health, or safety.” Basing its interpretation of that section on *P&O*, the court said that the AEC could recover because it performed Con Ed's “duty to acquire and maintain adequate supplies of electrical power” during an emergency and with an intent to be reimbursed. 580 F.2d at 1127. Con Ed protested that it owes no absolute duty to the public, and that its duty under New York law is only to avoid intentional or grossly negligent cutoffs of power. The court discarded that objection by saying, “Duty is a flexible concept. Its existence depends on calibrating legal obligations to factual concepts. One may have only a duty to avoid gross negligence, but that is a duty nonetheless and one potentially cognizable by the emergency assistance doctrine.” 580 F.2d at 1127-28. Drawing attention to *P&O*'s statement that the Overseas Progress had a “manifest duty” to provide Turpin with medical attention, the court concluded that a “manifest duty” is a sufficient prerequisite for restitution, and found that Con Ed had a “manifest duty” to supply its customers with electricity and to acquire electrical power.

*Consolidated Edison* illustrates the looseness of the concept of performing another's duty. It was not necessary for the AEC to show that but for their release of electricity Con Ed would have incurred actual liability to its customers. It was enough to demonstrate a “manifest duty” of Con Ed to acquire the power.

235. 553 F.2d at 836.

236. “The irrationality of providing rewards for property salvage but not requiring payment for rescuing lives has been under attack for many years.” 553 F.2d at 836 n.6.

237. 553 F.2d at 835 n.4.

Overseas had no alternatives to calling the Canberra, in which case some might say that the Canberra did not really "save" Overseas any expense.<sup>238</sup>

*P&O* appears to give all life salvors a right to recover all their reasonable expenses.<sup>239</sup> The owners of the Titanic, for example, probably owed their passengers and crew a duty to exercise reasonable care to rescue them.<sup>240</sup> Under the circumstances, however, the only reasonable thing — indeed, the only possible thing — for the Titanic's owners to do was to offer other ships a reward if they would rescue these people. Whether or not the offer was made, the rule in *P&O* would have required the Titanic's owners

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238. The court went on to say that on the facts before it, "where performance of another's duty and traditional 'unjust enrichment' are present, both rules clearly require recovery." 553 F.2d at 835 n.4. It is difficult to understand the court's distinction between performing another's duty and "traditional 'unjust enrichment.'" Under the prevailing American theory of unjust enrichment, one is "enriched" when another fulfills one's duty to a third person. RESTATEMENT OF RESTITUTION § 1, comments a & b at 12 (1937); 2 G. PALMER, *supra* note 7, § 10.4, at 377. Such enrichment is considered unjust when, for example, the conditions of §§ 113 or 114 of the *Restatement* are met. Thus, in *Greenspan v. Slate*, 12 N.J. 426, 97 A.2d 390 (1953) a case relied on by *P&O*, a doctor treated a teenager whose parents refused to seek medical help. The doctor was entitled to recover from the parents for unjust enrichment because he fulfilled the parents' duty to provide medical care for their child.

239. It is unclear exactly what expenses would be deemed to be "reasonable" under *P&O*. The only item of expense at issue in the case was extra fuel costs, and one might argue that reimbursement should be limited to those expenses and should not reach extra wage, lost profits, and property damage. The court stated:

In determining the proper course of action, [masters] must consider the seriousness of the saman's illness, the availability and adequacy of medical facilities and the costs that will be incurred in securing aid. Once it is established that the fuel expenses of a ship rendering assistance is one of these costs, it will simply become another factor to be considered in the master's calculation. With radio-telegraphy, it is a simple matter for him to ascertain the size and location of ships in the vicinity just as the Overseas Progress did and to determine which vessel can be reached with minimum expense and delay.

553 F.2d at 836.

One reason for limiting a rescuer's recovery to extra fuel costs might be that such items are often relatively easy for a court to ascertain. See Note, *supra* note 7, at 246-47. But fuel costs are often not easy to ascertain with precision, as was the case in *P&O*, 553 F.2d at 837 n.7. A more persuasive argument for limiting recovery to fuel costs is that the master of a ship often must make a quick decision among different alternative means of rescue and that he should not be forced to enter lengthy calculations of possible costs.

Nonetheless, expenses in addition to fuel costs are generally allowed in property salvage cases, see note 10 *supra*, and society generally values life more than property. For that reason some expenses that are considered unreasonable or too "remote" in property salvage cases should arguably be allowed in life salvage cases. Surely all expenses beyond fuel costs that are reasonably foreseeable and easily ascertainable by the master of the rescued vessel should be allowed. The *P&O* recovered its medical costs before the case was appealed, and nothing in *P&O* suggests that that recovery was improper.

240. See note 175 *supra*.

to pay the reasonable expenses of the rescue.

Although *P&O*, along with *Grigsby*, broke the philosophical barrier of denying all compensation to pure life salvors, it actually gives them both more and less than they would have been given by simply overruling the pure life salvage rule. If *P&O* had given pure life salvors a right to salvage, the *P&O* would have been entitled to a reward, not merely reimbursement of expenses.<sup>241</sup> Although the restitution remedy is more restrictive in that respect, it is available in a broader class of cases than pure life salvage. Under the traditional rules of life salvage, an award is only available when life is saved; *P&O* does not require that the rescuer save life, only that it perform another's duty. If Turpin had died after the *Canberra* had diverted, the plaintiff would still have been able to recover its expenses under section 114 of the *Restatement of Restitution*.<sup>242</sup>

When all of the waves have calmed, the holding in *P&O* is close to the proposal suggested above<sup>243</sup> that life salvors and those who attempt to save life recover their expenses. *P&O* is also close to Brown's suggestion that saving a shipowner the expense of taking a seaman ashore or of paying another ship to divert to rescue him is a property salvage act.<sup>244</sup> What difference does it make whether the court achieves this result under a theory of restitution or under the approaches proposed by Brown and this Article? Restitution entitles the salvors only to compensation for their expenses, whereas my approach and Brown's approach would give the salvors the possibility of a reward in addition to their expenses. Because courts tend to give small rewards for saving life,<sup>245</sup> most life salvors are likely to be satisfied with re-

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241. The *P&O* disclaimed a right to a reward. 553 F.2d at 836.

242. The fact that [the services] result in no ultimate benefit to the recipient, as where a physician renders competent services to an unconscious patient who dies as a result of an apparently necessary and skillfully performed operation, does not prevent restitution, although it may affect the amount granted.

RESTATEMENT OF RESTITUTION § 113, comment g (1937), which also applies to cases under § 114. *Id.* § 114, comment d.

243. See text at notes 164-83 *supra*.

244. Comment, 2 HASTINGS L.J., *supra* note 7, at 55.

245. See G. GILMORE & C. BLACK, *supra* note 7, § 8-12, at 573-74. One reason for awarding life salvors less than property salvors may have been that due to the humanitarian impulses of seamen less incentive was needed to save life than was needed to save property. *But see* note 172 *supra*. Another reason for the disparity between the amount of property salvage and life salvage awards may have been that a diversion to save property automatically deprived the rescuing shipowner of its hull insurance and made it absolutely liable for cargo lost on account of the deviation. By contrast, a diversion to save life exposed the salvor to neither risk. See *The Boston*, 3 F. Cas. 932, 935 (C.C. Mass. 1833)

couping their expenses. Still, there may be cases of extraordinary risk and heroism where federal courts might feel that *P&O's* promise of reimbursed expenses may be inadequate to encourage others to render similar services and inadequate to express society's gratitude.

Whether a life salvor seeks only reimbursement of expenses or reimbursement and reward will have important procedural implications. A suit for reimbursement under the restitution theory, under the approach proposed in this Article, or even under Brown's salvage theory, can probably be brought in state or federal court.<sup>246</sup> Suit in a state court could be before a jury, and a jury would be available in federal court if the requirements for diversity jurisdiction are satisfied.<sup>247</sup> In addition, the state statute of limitations or the admiralty rule of laches would apply.<sup>248</sup> In contrast, if the life salvor sought to recover a reward in addition to his expenses, suit would be subject to a two-year statute of limitations<sup>249</sup> and might be restricted to federal court<sup>250</sup> with no

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(No. 1,673); *Scaramanga v. Stamp*, 5 C.P.D. 295 (1880); 2 T. PARSONS, *supra* note 75, at 298. Since the risk incurred by the salvor is one factor affecting the size of its award, it was logical to reward the property salvor more liberally than the life salvor. Today, however, the property salvor's risk is reduced because most hull policies allow the shipowner to pay a premium to be agreed on that will continue the insurance coverage in the event of a deviation. See G. GILMORE & C. BLACK, *supra* note 7, § 2-6, at 66; Vogel, *The Hull Policy: The Perils and Held Covered Clauses*, 41 TUL. L. REV. 259, 276 (1967). Also, under current statutes shipowners are not liable for cargo losses resulting from deviations to save property at sea. *E.g.*, 46 U.S.C. § 1304(4) (1976); Carriage of Goods by Sea Act 1971, c. 19, sched., Art. IV(4) (Eng.). The recently agreed-upon "Hamburg Rules" attempt to increase the liability for cargo losses in cases of unreasonable deviations to save property. United Nations Convention on the Carriage of Goods by Sea, 1978, Art. 5(6), 1978 A.M.C. 1036, 1039 (not in force).

246. 28 U.S.C. § 1333 (1976) gives the federal district courts exclusive original jurisdiction of admiralty cases "saving to suitors in all cases all other remedies to which they are otherwise entitled." That is, a plaintiff can bring an action in state court if the common law provides a remedy, such as compensation based on quantum meruit. See M. NORRIS, *supra* note 2, § 14 at 18. As a practical matter, state courts can hear any admiralty claim that is brought in personam with the possible exception of claims for a salvage reward. See Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259, 265 (1950). *But see* note 250 *infra*.

247. 28 U.S.C. § 1332 (1976). See generally Robertson, *Admiralty Procedure and Jurisdiction After the 1966 Unification*, 74 MICH. L. REV. 1628 (1976). Although the matter was not discussed by the courts in *P&O*, the parties apparently assumed that the suit was based on diversity of citizenship. Appellant's Brief at 7 n.2, 553 F.2d 830; Petition for Writ of Certiorari at 3, 434 U.S. 859 (1977). The complaint did not identify the claim as an admiralty or maritime claim, as permitted by rule 9(h) of the Federal Rules of Civil Procedure, and the plaintiff requested a jury trial.

248. See *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958).

249. 46 U.S.C. § 730 (1976); *The Eastland*, 262 F. 535 (N.D. Ill. 1919), *affd. without opinion sub nom. Mattocks v. Great Lakes Towing Co.* (No. 2,804) (7th Cir. June 3, 1920), *cert. denied*, 258 U.S. 644 (1920).

250. *The Jefferson*, 215 U.S. 130, 137 (1909) (a "court of admiralty of the United

right to a jury trial.<sup>251</sup> Restricting jurisdiction when rewards are sought is perhaps justifiable because the method of calculating a salvage award is historically unknown to common law and equity courts. In contrast, state courts are familiar with the general principles of restitution and reimbursement of expenses. Therefore, there ought to be no objection to allowing state and diversity courts sitting with a jury to hear cases when reimbursement of expenses is the only requested relief, even though federal law, not state law, applies to the rescuer's reimbursement claim.<sup>252</sup>

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States" has exclusive jurisdiction over salvage disputes); *The Freedom*, 1932 A.M.C. 933 (W.D.N.Y. 1932). See also M. NORRIS, *supra* note 2, §14 at 18; 1 BENEDICT, *supra* note 226, §123 at 8-10 to 8-11. But see *Light v. Schmidt*, 84 Mich. App. 51, 269 N.W.2d 304 (1978) (saving to suitors clause permits state courts to exercise in personam jurisdiction over salvage contracts in case involving a contract that does not appear to have been a "no cure—no pay" contract); *O.F. Shearer & Sons, Inc. v. Decker*, 349 F. Supp. 1214 (S.D. W. Va. 1972) (a state court may decide a salvage dispute, but must apply federal law); *Young v. Smith*, 1966 A.M.C. 2654 (Cir. Ct. Md. 1966) (a state court sitting in equity awarded salvage based on the usual principles applicable to such cases).

In a letter to President Polk, Judge William Marvin wrote, "[T]he rights and interests of owners [of wrecked property], underwriters, salvors and others can only be protected by a court possessing Admiralty jurisdiction. As yet this jurisdiction remains exclusively in the [federal] Superior Court [for the Southern District of Florida]." Letter of Sept. 15, 1845, National Archives, Washington, D.C., Diplomatic Branch, Appointment Papers of William Marvin (copy on file with the *Michigan Law Review*). Marvin wrote to notify the President that he was declining his recent election by the new State General Assembly to be a judge of the Circuit and Supreme Courts of Florida. He said he "did not feel at liberty" to leave the federal judgeship vacant, for to do so "would necessarily leave, for several months, large and important interests at the mercy of the bravest and strongest." *Id.* According to Marvin, wreckers saved and brought into Key West more than \$300,000 worth of property each year. *Id.*

251. See FED. R. Civ. P. 38(e).

252. See *Kane v. Motor Vessel Leda*, 355 F. Supp. 796, 804 (E.D. La. 1972), *affd.*, 491 F.2d 899 (5th Cir.), *cert. denied*, 419 U.S. 865 (1974) (applying federal principles to an unjust enrichment claim for repairs made to a vessel, but finding "analogies, drawn from civil and common law [to be] instructive"). Although *P&O* did not specify whether it was applying federal or state law, the general rule appears to be that the substantive law governing maritime affairs is federal unless there is a strong state interest. See G. GILMORE & C. BLACK, *supra* note 7, §§1-17 to -18. Doubt on this matter may be raised by *United States v. Consolidated Edison Co.*, 580 F.2d 1122 (2d Cir. 1978), where the court applied *P&O* to allow recovery for expenses incurred in supplying electric power to a utility. In rejecting Con Ed's "attempt to limit the [*P&O*] rationale to maritime situations and to its facts," the court said that *P&O* "was not applying some peculiarly maritime rule. On the contrary, the court took a more general equitable doctrine and applied it to a maritime context, using the opportunity to overrule specifically the outdated admiralty rule of 'pure life' salvage." 580 F.2d at 1130. Similarly, the district court in *Consolidated Edison* said that *P&O* was an application of a "land based principle of equity to a maritime situation." 452 F. Supp. 638, 655 (S.D.N.Y. 1977). Although *P&O* is based on general principles of land-based law, it is still federal law, not the law of a particular state, that is being enforced. A similar situation arises when a federal court applies "land-based principles of negligence" to a longshoreman's suit for injuries against

## VI. CONCLUSION

The history of life salvage in England has been marked by a steady increase in the rights of life salvors. At each stage, the law achieved a balance between salvors' claims to adequate compensation and general skepticism about the need for such compensation by providing the judge or the Board of Trade with great discretion to determine how much reward, if any, should be made. The drafters of the 1910 salvage treaty also recognized the value of giving judges broad discretion in awarding life salvage.

The development of twentieth-century life salvage law in the United States has been stunted by an unfortunate neglect of the 1910 Brussels Salvage Convention. Courts sought needlessly narrow constructions of the statute that codified the treaty's life salvage provision, ignoring the purposes of the treaty and failing to recognize the significance of a well-reasoned independent life salvage case, *The Mulhouse*. *Grigsby* and *P&O* have recently opened the door for salvors and would-be salvors to recover for personal injuries and expenses incurred in saving or attempting to save life. By following these decisions, American courts will rejoin the general trend of the rest of the English-speaking world toward granting recovery to all life salvors.

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a shipowner under 33 U.S.C. § 905 (1976). See *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505 (2d Cir. 1976).

In *Silva v. Bankers Commercial Corp.*, 163 F.2d 602 (2d Cir. 1947), the court ruled that state law applied to an unjust enrichment claim for freight paid in advance, but the court may have been influenced by its belief that a federal court's admiralty jurisdiction does not include the power to hear claims for unjust enrichment. Today it is clear that a claim for unjust enrichment arising out of a maritime contract like that in *Silva* is within a federal court's admiralty jurisdiction. *Archawski v. Hanioti*, 350 U.S. 532 (1956). In *Sword Line, Inc. v. United States*, 228 F.2d 344 (2d Cir. 1955), *affd. on rehearing*, 230 F.2d 75, *affd.*, 351 U.S. 976 (1956), the court of appeals said that its admiralty jurisdiction includes unjust enrichment claims arising out of any maritime transaction. Both the district court and the court of appeals in *P&O* went out of their way to indicate that they would have the power under their admiralty jurisdiction to grant quasi-contract relief. The plaintiff did not believe that the issue was before the court because the court had diversity jurisdiction. Appellant's Brief at 7, 553 F.2d 830 (2d Cir. 1977). The defendant did not question the court's jurisdiction, apparently because it also believed that the court had jurisdiction based on diversity. Petition for Writ of Certiorari at 3, 434 U.S. 859 (1977). The defendants did question the wisdom of substituting "land-based legal theories of restitution for the traditions of the sea." Answering Brief of Defendant-Appellee at 5, 553 F.2d 830 (2d Cir. 1977). See also 553 F.2d at 835.

The choice of law question is currently fairly academic, as there is little relevant state law on the issue of performing another's duty in an emergency. Until such law develops, courts are likely to treat the matter as one of general principle. Nevertheless, labeling the substantive law federal law, rather than state law, will increase the chance that such suits will be treated uniformly.



*Grigsby* and *P&O* do not duplicate the English scheme. The two American cases provide indemnity, not reward. Also, since pure life salvors will be compensated by private parties, not by a government agency, no relief will be available if the shipowner is insolvent or is permitted to limit its liability to the value of its sunken ship. On the other hand, *Grigsby* and *P&O* go beyond the English law and allow recovery even if the life salvors do not succeed in saving life. These differences seem minor, however, in comparison with the differences that existed a few years ago. The long-felt injustice of denying compensation to life salvors seems to be over. *Grigsby* and *P&O* demonstrate the tools that judges have long possessed to help bridge the gap between what precedent allows and what fairness and the interests of humanity require.

Problems remain to be worked out under *Grigsby* and *P&O*. What accommodations, if any, need to be made to the 1912 statute? What injuries and expenses are too remote to be entitled to compensation? Will the state courts be permitted to provide relief to life salvors under common-law doctrine? Will courts reward pure life salvors in addition to the indemnity allowed for expenses and personal injuries? This Article has proposed liberal solutions to these problems that are in keeping with the humanitarian interests at stake.

