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Admiralty—Contribution Denied in Non-Collision Case

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United States v. Pacific Railroad, supra, said: "The Government cannot be charged for injuries to, or destruction of, private property caused by *military operations of armies in the field, or measures taken for their safety and efficiency*——." (Italics supplied) (p. 239).

The language of the Congressional cases and that of the Supreme Court in the *Pacific Railroad* case shows the test there employed to be substantially at odds with the test set out in the *Grant* case and adhered to by the Majority in the instant case. The precedent—value of either line of reasoning is relatively weak, since military destruction of American citizens' property is a novel fact situation in our law, and cases concerned with this issue have been rarely litigated.

The facts of the principle case show that the approach of Japanese forces necessitated a military decision. The choice was to stay and fight or retreat. Had the decision been to fight, and during the battle had the property in question been destroyed, no compensation would be required. Retreat was the wiser alternative, and as a part of this maneuver the oil was destroyed. The Fifth Amendmen should not be applied without regard for the realities of the situation under which the alleged taking occurred. The circumstances here involved reveal that Plaintiff's property was not taken for any public benefit but was destroyed as a result of a hostile engagement between our forces and those of the enemy.

Neil R. Farmelo

ADMIRALTY—CONTRIBUTION DENIED IN NON-COLLISION CASE

Libellant, a shipfitter's employee was injured through the joint negligence of his employer and the owner of the ship on which he was working. Libellant sued the shipowners who sought contribution from the shipfitting company. The trial judge refused to follow a jury finding of comparative negligence but held the shipfitting company liable for contribution to the extent of one half of libellant's total injuries. *Halcyon Lines v. Haenn,* 89 F. Supp. 765 (E. D. Penn. 1950). The Court of Appeals upheld the right to contribution but modified the amount libellant could recover to a sum that he would have received if he had elected to sue under the Longshoreman's and Harbor Worker's Act, 44 Stat. 1424 U. S. C. A. Sec. 901, *Baccile v. Halcyon Lines,* 187 F. 2d 403 3rd Cir. 1951).

The Supreme Court through Justice Black (7-2) denied the right to contribution, finding that congressional action would be the appropriate way to create that remedy, in view of the great amount of admiralty legislation. *Halcyon Lines v. Haenn,* 72 S. Ct. 277 (1951).

The common law rule is that joint tortfeasors are not entitled to contribu-

tion. *Union Stockyards Co. of Omaha v. Chicago B & Q R Co.,* 196 U. S. 217 (1904). Choice of defendant rests with the plaintiff. *Village of Portland v. Citizens Tel. Co.,* 206 Mich. 632, 173 N. W. 382 (1919). See Prosser, Torts p. 1114 (1915). F. James, *Contribution, a Pragmatic Criticism,* 54 Harvard L. Rev. 1156 (1941). The gross inequity resulting in placing the just burden of many on one defendant has prompted several states to adopt a uniform contribution among tortfeasors law. See Uniform Laws Annotated VOL. IX, p. 160, Gregory, *Contribution Among Joint Tortfeasors, A Defense,* 54 Harvard L. R. 1170 (1941).

The Admiralty rule, as old as the pre-Hanseatic laws of Wisby in the 13th century, is that in *collisions* at sea if both ships are at fault the total damages are divided equally. *The Calypso,* 166 Eng. Rep. 1000, Swab. 29 (1856). This is also the American rule. *The Sapphire,* 87 U. S. 164 (1871), *The North Star,* 106 U. S. 17 (1882). See also Robinson, Admiralty, 2d edition, p. 319 (1901), Knight, Modern Seamanship, 11th edition, p. 474 (1945). This rule was modified by certain continental nations and England at the 3rd International Diplomatic Conference on Maritime law in Brussels in 1910. At that time a proportional method of division of damages was adopted relative to the degrees of negligence of the parties. See for text: Supplement 4, American Journal of International Law 1910, p. 121.

The American rule provides that in a *collision* caused through fault of both, the joint wrongdoers each pay half of the damages caused to innocent third parties. *The North Star, supra, The Chattahoochee,* 173 U. S. 540 (1899). Various federal decisions have carried this "constructive contribution" into the field of *non-collision* cases. Thus in *The Tampico,* 45 F. Supp. 174 (S. D. N. Y. 1942) the court allowed contribution from libellant's employer to a barge owner to the extent of one half, in a *non-collision* case. *Semble; U. S. v. Rothchild International Stevedore Co.,* 182 F. 2d 181 (9 Cir. 1950). *Spaulding v. Parry Navigation Co.,* 90 F. Supp. 569 (S. D. N. Y. 1950) *rev'd on other grounds,* 187 F. 2d 257 (2d Cir. 1951), *Barbarino v. Stanhope S. S. Co.,* 181 F. 2d 553, 555 (2d Cir. 1945) where Judge Learned Hand pointedly refused to recognize the distinction between *collision* and *non-collision* cases. See also *American Stevedores Inc. v. Porello,* 330 U. S. 447, 458 (1947).

Justice Black in the principle case admits that Admiralty courts have been "freer than common law courts in fashioning rules," and he states that the equal division rule would be used in the instant case if the "ends of justice" demanded. See 6 NACCA L. J. 31, (1941), Morrison, *The Remedial Powers of the Admiralty,* 43 Yale L. J. 1 (1933). It is clear as Justices Reed and Burton indicate by their dissent that where both parties are negligent each owner or underwriter should bear his fair share of the burden of damages. To allow equal division in *non-collision* cases would be no startling judicial legislation. The

Supreme Court in the past has allowed the equal division rule in *collision* cases despite a statute limiting the liability of one of the negligent parties. See *The Chattahoochee, supra; The Harter Act,* 27 Stat. 445, 446 U. S. C. Sec. 190-195. As the Court said in *The Tampico, supra* "in reason and principle collision cases point the way." Justice Holmes, confronted with a similar argument that an expansion in admiralty law should be left to the Congress replied: "It would be a mere historical anomaly if admiralty courts were not free to work out their own systems and to finish the adjustment of maritime rights and liabilities." *Erie Ry. Co. v. Erie Transportation Co.,* 204 U. S. 220, 225 (1907).

Daniel T. Roach

EVIDENCE—WIRE RECORDINGS OF CONFIDENTIAL COMMUNICATIONS BETWEEN HUSBAND AND WIFE HELD INADMISSABLE

The plaintiff had induced his son to make a wire recording of an argument between plaintiff and his wife while they were alone in their common bedroom. Held: Admission of the recording in divorce proceedings brought by plaintiff against his wife was error because the status of the parties and the confidential nature of the communication made it privileged, *Hunter v. Hunter* 169 Pa. Super. 498, 83 A (2d) 401 (1951).

Although the absolute common law prohibition, *Davis v Dinwoody* 4T. R. 678, 100 Eng. Rep. 1241 (1792), against the use of testimony of one spouse in the cause of the other, whether it be hostile or helpful, has been to a large extent abrogated in this country by statute, *New York Civil Practice Act* §346, 28 *Purdon's Pa. Stats.* §317, and by decisional law, *Funk v. U. S.* 290 U. S. 371 (1933), the privilege attached to confidential communications between husband and wife still persists, *Wolfle v. U. S.* 291 U. S. 7 (1934), *New York Civil Practice Act* §349, *New York Penal Law* §2449, 28 *Purdon's Pa. Stats.* §316.

The privilege relates to either the written or spoken word but is applicable only where the communication is confidential due to its nature, *Seitz v. Seitz* 170 Pa. 71, 32 Atl. 578 (1887), *Parkhurst v. Berdell* 110 N. Y. 386, 18 N. E. 123 (1888) and is made in the absence of third persons, *People v. Lewis* 62 Hun 622, 16 N. Y. Supp (Sup. Ct. 1st Dept. 1891).

The reason for the privilege is the preservation of conjugal unity. Therefore, the privilege acts as a bar available only to one spouse against testimony by the other, and does not prevent the admission into evidence of conversations overheard, *Commonwealth v. Wakelin* 230 Mass. 567, 120 N. E. 209 (1918), but cf. *Nash v. Fidelity Phoenix Fire Ins. Co.* 106 W. Va. 672, 146 S. E. 726 (1929), or letters intercepted by third parties, Cf. *People v. Hayes,* 140 N. Y. 484, 35 N.