No. 93-1421

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Complaint of Great Lakes Dredge & Dock Company, for exoneration from or limitation of liability, GREAT LAKES DREDGE & DOCK COMPANY, Plaintiff-Appellant, v. CITY OF CHICAGO, an Illinois municipal corporation, Defendant-Appellee, and JEROME B. GRUBART, INC., an Illinois corporation, Claimant-Appellee.	Appeal from United States District Court for the Northern District of Illinois, Eastern Division --- No. 92 C 6754 --- Hon. Charles P. Kocoras, Judge

BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT

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CERTIFICATE OF INTEREST
OF THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES

The undersigned, counsel of record for the Maritime Law Association of the United States, furnishes the following information in compliance with Circuit Rule 12(d):

1. The full name of every Amicus Curiae the attorney represents in the case is the Maritime Law Association of the United States.

2. The Maritime Law Association of the United States is an unincorporated association.

3. The names of all law firms whose partners or associates have appeared for the Maritime Law Association of the United States or are expected to appear for the Amicus Curiae in this Court:

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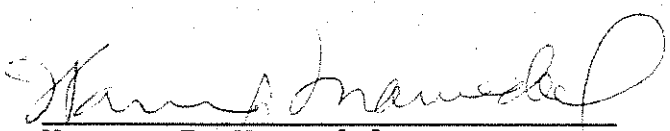

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SUMMARY OF ARGUMENT

The Maritime Law Association (MLA) contends that the district court erred in holding that there was no admiralty jurisdiction in this case. First, the district court failed to properly apply the judicially created parameters of maritime jurisdiction in tort established pursuant to the grant of power in Article III, § 2, clause 1 of the U.S. Constitution. The instant case meets the latest test established in Sisson v. Ruby, 497 U.S. 358 (1990) under this branch of admiralty jurisdiction. The instant case also falls within this branch of admiralty jurisdiction because it involves a commercial vessel on a navigable waterway, a situation the federal courts have never questioned as being within their admiralty jurisdiction. Second, the district court erred by failing to recognize that Congress exercised its power to revise and supplement the maritime law by creating a separate basis for admiralty jurisdiction in the Limitation of Liability Act, as well as in the Admiralty Extension Act.

The MLA also contends that this Court should reconsider its holding in Joyce v. Joyce, 975 F.2d 379 (7th Cir. 1992). That opinion effectively renders the Limitation of Liability Act a nullity. It does so by confusing a determination of jurisdiction/appropriateness of forum with the merits of a petition for exoneration from or limitation of liability. By determining by way of motion and in a summary fashion matters reserved by law for a full hearing, Joyce and the district court effectively deny the petitioner its due process rights under the Limitation of Liability Act.

ARGUMENT

I. There is Admiralty Jurisdiction over this Case.

A. Introduction.

The United States Constitution, Article III, § 2, clause 1, grants U.S. judicial power to all cases of admiralty and maritime jurisdiction. According to the Supreme Court, the Constitution establishes three different grants of power with respect to maritime law:

> (1) It empowered Congress to confer admiralty and maritime jurisdiction on the "Tribunals inferior to the Supreme Court" which were authorized by Art. I, §8, cl. 9. (2) It empowered the federal courts in their exercise of the admiralty and maritime jurisdiction which had been conferred on them, to draw on the substantive law "inherent in the admiralty and maritime jurisdiction," [citation omitted], and to continue the development of this law within Constitutional limits. (3) It empowered Congress to revise and supplement the maritime law within the Constitution.

Romero v. International Terminal Operating Co., 358 U.S. 354, 360-61, reh. den., 359 U.S. 962 (1959).

B. Admiralty Jurisdiction in Tort exists in this Case under the Sisson Test.

Historically, the federal courts applied a "locality" or "situs" test to determine whether a tort action fell within the admiralty jurisdiction of the court. The injury must have occurred on navigable waters. The Plymouth, 70 U.S. 20 (1866).

The Supreme Court modified the locality test in Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249 (1972), holding that federal admiralty jurisdiction did not lie in an action arising when an airplane, that flew predominantly over land, crashed into navigable waters, because the incident did not "bear a significant

relationship to traditional maritime activity." Following Executive Jet, federal courts developed various tests for determining the requisite nexus.[1]

In Foremost Ins. Co. v. Richardson, 457 U.S. 668 (1982), the Supreme Court held that a maritime activity need not bear a substantial relationship to a commercial activity if it has a potential impact on maritime commerce, and involves a traditional maritime activity. The Court noted that the collision of two pleasure boats on navigable waters satisfied the nexus requirement, and thus was cognizable in admiralty, because it implicated the traditional maritime concern of navigation and could possibly disrupt maritime commerce by blocking a navigable waterway. Lower courts then focused on navigation as the traditional maritime activity.

This narrow focus on navigation and vessel operation as to the existence of admiralty jurisdiction was addressed by the Supreme Court in Sisson v. Ruby, 497 U.S. 358 (1990), where the Court clarified the nexus test. Sisson involved a yacht docked at a marina on Lake Michigan. A fire erupted in the area of the washer/dryer unit on the vessel leading to the destruction of the yacht and damage to the marina and several neighboring vessels. The yacht owner filed a petition for exoneration from or limitation

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[1]Many followed some variation of the test developed in Kelly v. Smith, 485 F. 2d 520 (5th Cir. 1973), cert. denied, 416 U.S. 969 (1974). The Kelly court decided that a four-factor test should be applied: (1) the functions and roles of the parties; (2) the types of vehicles and instrumentalities involved; (3) the causation and type of injury; and (4) traditional concepts of the role of admiralty law.

of liability asserting jurisdiction under the general admiralty power of the court, as well as jurisdiction under the Limitation of Liability Act, 46 U.S.C. §§ 181-189. Because there was no navigational error, the district court dismissed the case for lack of maritime jurisdiction and denied that the Limitation Act provided an independent basis for admiralty jurisdiction. On appeal, this Court affirmed, holding that neither § 1333(1) nor the Limitation Act provided a basis for maritime jurisdiction.

In a unanimous decision, the Supreme Court reversed this Court and remanded the case for further proceedings on the merits of the limitation petition. The Sisson Court formulated a nexus test consisting of two parts: (1) whether the incident is likely to disrupt commercial maritime activity and (2) whether the activity giving rise to the incident bears a substantial relationship to traditional maritime activity. The Court clearly held that the impact required is potential rather than actual, and depends upon the general nature of the event rather than the specific facts of the case:

> We determine the potential impact of a given type of incident by examining its general character. The jurisdictional inquiry does not turn on the actual effects of maritime commerce . . . nor does it turn on the particular facts of the incident . . . Rather, a court must assess the general features of the type of incident involved to determine whether such an incident is likely to disrupt commercial activity.

Sisson, 497 U.S. 358, 363 (1990) (emphasis in original).

Sisson held that a pleasure boat docked for storage and maintenance is engaging in traditional maritime activity. It is difficult to conceive of anything a boat could do on the water that

would not qualify as a traditional maritime activity under Sisson.

Despite the Supreme Court's clear intent to broaden the jurisdictional inquiry and to end the hair-splitting jurisdictional tests which flourished after Executive Jet and Foremost, the district court returned to one of the many "tests" adopted prior to Sisson[2], and engaged in an overly detailed analysis of the specific facts in this case. To borrow a phrase, it "missed the boat".

That the district court's analysis was overly "fact specific" is evident at pp. 19-20 of its opinion, where it lists, in detail, the facts it finds determinative. The district court places great emphasis on the fact that pile driving is a common construction activity found in both maritime and non-maritime settings, and on the fact that the "principal" purpose of the placement of the dolphins was to protect the bridge. However, it is immaterial that pile driving is not uniquely maritime. Vessels engage in numerous activities not uniquely maritime.[3] The district court is also

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[2]On page 14 of its opinion, the District Court cites to the four-part test of Kelly v. Smith, 485 F.2d 520, 525 (5th Cir. 1974), as well as the modified test in Molett v. Penrod Drilling Co., 826 F.2d 1419 (5th Cir. 1987), cert. denied, 493 U.S. 1003 (1989). The Supreme Court declined to adopt this and other tests, stating that its own was sufficient. 497 U.S. at 365-66. Interestingly, while the district court found itself bound to follow this Court's reversed opinion in Complaint of Sisson, 867 F.2d 341, rev'd, 497 U.S. 358 (1990) regarding whether the Limitation of Liability Act constitutes an independent basis of admiralty jurisdiction, it fails to feel bound by this Court's rejection of this same "four factor" tests. 867 F.2d 341, 345 n.2.

[3]E.g., the carriage of goods (vessel or truck), carriage of passengers (vessel or train), dredging (earthmoving), laying of cable, fishing (one can fish, after all, off a bridge), docking (parking), etc.

improperly hair-splitting by making a distinction between an alleged "principal purpose" of dolphins, which it finds to be the protection of the bridge, and other purposes, which it admits "are vital to maritime commerce and their use as navigational aids." (Op. at p. 17).

The first inquiry the district court should have made under Sisson was to assess the general features of the "incident" to determine whether it is likely to disrupt commercial maritime activity. The "incident" here is a vessel's perforation of a submerged tunnel structure, which drained substantial water from a navigable river, flooded the tunnel, communicated damage to shore and required the closure of the waterway to maritime commerce. These general features plainly satisfy the requirement of a potential disruption to commercial maritime activity. In fact, as the district court itself points out, maritime commerce stopped completely on the river, the very concern raised in the Foremost decision.

Other courts have recognized that claims arising from vessels which cause damage to submerged structures are within the admiralty jurisdiction, and have even allowed limitation of liability in such cases.[4] Applying the principles of those cases, surely there would have been no dispute as to admiralty jurisdiction in this case if

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[4] See Marathon Pipe Line Co. v. Drilling Rig ROWAN/ODESSA, 761 F.2d 229 (5th Cir. 1985)(general maritime law applied to collision between the leg (spud) of towed drilling rig and a pipeline on the seabed); Signal Oil & Gas Co. v. Barge W-701, 654 F.2d 1164 (5th Cir. 1981), cert. denied, 455 U.S. 944 (1982)(barge engaged in pipeline construction on ocean floor permitted to limit liability for damages caused when anchor fouled on pipeline).

a vessel dragging its anchor in the river damaged an electrical cable, cutting off power to the City, or if the anchor perforated the tunnels as in this case.

The second inquiry under Sisson is whether there is a substantial relationship between the activity giving rise to the incident and traditional maritime activity. It is important to note the Supreme Court's direction that it is not necessary for lower courts to ascertain the precise cause of the incident to determine the activity engaged in. Sisson, 497 U.S. at 365 (i.e., the alleged cause of the fire in Sisson was the ignition of rags in a clothes dryer). It follows that the cause of the perforation of the tunnel, pile driving, is not critical to an analysis of the "general character of the activity" engaged in by the appellant's vessels. The general character of the activity is the anchoring or mooring of a commercial vessel in a navigational channel, or a commercial vessel performing work in a navigational channel. Again, it is immaterial that the cause was pile driving, just as it was immaterial in Sisson that the fire was caused by a dryer. The broad principles of Sisson are satisfied. Maritime jurisdiction exists.

C. Admiralty Jurisdiction in Tort exists in this Case Because the Barge was a Vessel engaged in Commercial Activities on a Navigable Waterway.

This case involves a barge engaged in commercial activity on the Chicago River. The Chicago River is indisputably a navigable waterway. The barge is a vessel (even the district court so held). In the first instance, this Court need not analyze Foremost or

Sisson for their application to this case. The fact that the barge was engaged in a commercial activity on a navigable waterway, a primary concern of admiralty law, is sufficient for maritime jurisdiction. East River S.S. Corp. v. Transamerican Delaval, 476 U.S. 858, 864 (1986).

The reasoning here is consistent with Executive Jet, Foremost and Sisson. Executive Jet was an airplane case; Foremost and Sisson were cases involving pleasure craft. Those cases arguably are not applicable to a situation involving a barge and commercial activity such as here. After all, as this Court has noted, what can have more admiralty flavor than a barge working on a navigable river in a commercial setting? Complaint of Sisson, 867 F.2d 341, 347 n.5 (7th Cir. 1989) (App. at Tab E).

D. The Limitation of Liability Act provides a Separate Basis For Admiralty Jurisdiction.

1. This Court's Opinion in Complaint of Sisson should not be considered Binding Precedent.

In rejecting the Limitation of Liability Act as a separate basis of admiralty jurisdiction, the district court relied on a portion of this Court's opinion in Complaint of Sisson. Contrary to the district court's description of that case, Complaint of Sisson was not "reversed in part" by the Supreme Court. It was reversed. While it is true the Supreme Court did not specifically address the issue of whether the Limitation Act provides an independent basis of jurisdiction, Sisson v. Ruby, 497 U.S. at 359 n.1, this does not lesson the fact that it reversed the entire case. (App. at Tab A). Logically, nothing remains of this Court's

opinion in that case: no part of the opinion should be considered binding. This Court is free to find that the Limitation Act is jurisdictional.

2. The Limitation Act establishes a Basis of Admiralty Jurisdiction Separate from Admiralty Jurisdiction in Tort.

Congress, by enacting 46 U.S.C. §183, et seq. to enable vessel owners to limit their liability, supplemented the federal court's admiralty jurisdiction in tort. After Congress first passed the Limitation Act in 1851, it was considered that the Act "embraced liabilities for maritime torts, but excluded both debts and liabilities for non-maritime torts." Richardson v. Harmon, 222 U.S. 96 (1911). In 1884, Congress amended the Act by adding §189, which in part provides that "[T]he individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities . . . ." June 26, 1884, c. 121, §18, 23 Stat. 57 (emphasis added).

Richardson was the first case in which the Supreme Court considered the meaning of §189. The vessel owner in Richardson sought to limit the liability arising out of an allision between his vessel and the abutment of a railway drawbridge. The district court accordingly dismissed the limitation petition for want of admiralty jurisdiction.

The Supreme Court reversed, holding that the 1884 amendment expanded the scope of the liabilities subject to limitation to include "all claims arising out of the conduct of the master and crew, whether the liability be strictly maritime or from a tort

non-maritime . . . ." 222 U.S. at 106 (emphasis added). The claimant (bridge owner) argued that Congress' specification that limitation was open to "any and all debts and liabilities that his individual share of the vessel bears" was only meant to encompass obligations ex contractu and not non-maritime liabilities in tort. The Court rejected this argument, stating that "the addition of the words 'and liabilities' would be tautology unless meant to embrace liabilities not arising from 'debts.'" Id. at 104. According to the Court, "[W]e therefore conclude that the section in question was intended to add to the enumerated claims of the old law 'any and all debts' not theretofore included." Id. at 106.

The conclusion is inescapable that because the right to limitation under §189 does not depend on the maritime nature of the liability, jurisdiction under the Limitation Act is not merely coextensive with the general admiralty jurisdiction in tort. According to Richardson's interpretation of §189, a federal court's admiralty jurisdiction in tort and its admiralty jurisdiction under the Act are necessarily two separate heads of admiralty jurisdiction, the latter extending jurisdiction to any and all liabilities arising out of the conduct of the vessel, even non-maritime.

3. Richardson v. Harmon remains Binding Precedent.

Richardson remains viable precedent because the Supreme Court has recognized throughout this century that the Act contains an independent, statutory grant of jurisdiction:

> In this case the statutes of the United States have enabled the owner to transfer its liability to a fund and

> to the exclusive jurisdiction of the admiralty, and it has done so. That fund is being distributed. In such circumstances all claims to which the admiralty does not deny existence must be recognized, whether admiralty liens or not.

THE HAMILTON, 207 U.S. 398, 406 (1907) (emphasis added).

> But this limitation of liability proceeding differs from the ordinary admiralty suit, in that by reason of the statute and rules, the court of admiralty has power (Providence & N.Y.S.S. Co. v. Hill Mfg. Co., 109 U.S. 578, 27 L.Ed. 1038, 3 S.Ct. Rep. 379, 617) to do what is exceptional in a court of admiralty -- to grant an injunction, and by such injunction bring litigants, who do not have claims which are strictly admiralty claims, into the admiralty court (Benedict, Admiralty, 5th ed. §70, note 97).

Hartford Accident & Indemnity Co. v. Southern Pacific, 273 U.S. 207, 218 (1926) (emphasis added). More recently, the Court reaffirmed that "the limitation extends to tort claims even where the tort is non-maritime." Just v. Chambers, 312 U.S. 383, 386 (1941).[5]

These Supreme Court precedents make clear that the Limitation Act is more than a mere procedural device and is broader than judicially developed parameters of maritime jurisdiction. Consequently, so long as the statutory prerequisites are met, there

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[5]Following the lead of the Supreme Court, other cases have confirmed the jurisdiction of admiralty courts in limitation cases where the claims asserted were non-maritime. THE ATLAS NO. 7, 42 F.2d 480 (S.D.N.Y. 1930); THE WICHITA FALLS, 15 F. Supp. 612 (S.D. Tex. 1936); Tracy Towing Line v. Jersey City, 105 F. Supp. 910 (D.N.J. 1952); The City of Bangor, 13 F. Supp. 648 (D. Mass. 1936); In Re Pennsylvania R. Co., 48 F.2d 559 (2d Cir.), cert. denied, 284 U.S. 640 (1931); In Re Highland Nav. Corp., 24 F.2d 582 (S.D.N.Y. 1927); THE NO. 6, 241 F. 69 (2d Cir. 1917). See also United States v. Matson Nav. Co., 201 F.2d 610 (9th Cir. 1953) ("The Supreme Court upheld the Act in Richardson v. Harmon, supra, even though it considered the Act as an extension of admiralty jurisdiction to theretofore non-maritime torts").

is admiralty jurisdiction under 46 U.S.C. §183, et seq. if: (1) the structure seeking the benefit of the Act is a vessel; (2) the liabilities must exceed the value of the owner's interest in the vessel; (3) the person or entity seeking limitation is the owner of the vessel; and (4) there is more than one claimant. All of these prerequisites have been met in this case.

4. The Executive Jet Decision did not change the Jurisdictional Effect of §189 of the Limitation Act as Interpreted by Richardson v. Harmon.

In Complaint of Sisson, this Court questioned the continued vitality of Richardson because it preceded the Supreme Court's decisions in Executive Jet and Foremost. However, the decision of the Supreme Court in Executive Jet establishing a "maritime nexus" test in addition to the traditional "situs" requirement for admiralty jurisdiction in tort did not change the meaning placed upon §189 of the Limitation Act by the Court in Richardson v. Harmon. The Court's sole concern in Executive Jet was the scope of a federal court's admiralty jurisdiction in tort under 28 U.S.C. §1333(1), as that was the ground of jurisdiction invoked in that case. 409 U.S. 249, 251 (1972).

The rule formulated by the Supreme Court in Executive Jet affects the rule of Richardson only if Richardson was a case which decided some aspect of admiralty jurisdiction over a maritime tort. On the contrary, Richardson expressly held that the Limitation Act was intended by Congress to apply to maritime and non-maritime torts. 222 U.S. at 106. Richardson did not hold that §189 of the Act effectively expanded admiralty jurisdiction in tort to cover

injuries which originated on navigable waters but were consummated on land. Rather, the Richardson Court construed the Act itself as providing a separate source of admiralty jurisdiction which defendant shipowners might invoke irrespective of the maritime nature of the liability sought to be limited.

Moreover, Executive Jet did not propound jurisdictional prerequisites for all species of admiralty jurisdiction, and expressly held that "in the absence of legislation to the contrary, there is no federal admiralty jurisdiction over aviation tort claims arising from flights by land-based aircraft between points within the continental United States." 409 U.S. at 274. (Emphasis added). Clearly, the Court recognized that its new test did not apply to Congressional legislation which conferred additional jurisdiction in admiralty.

The Court cited a specific example of such jurisdictional legislation: the Death on the High Seas Act (DOHSA), 46 U.S.C. §§761-768. In a footnote, the Court indicated that under DOSHA, jurisdiction would "clearly" lie in a federal admiralty court when an aircraft crashed on the high seas. 409 U.S. at 271 n.20. Because of the legislative grant of jurisdiction, it does not need to satisfy a maritime nexus test. The same is true of the Limitation of Liability Act and the Admiralty Extension Act.

5. The Admiralty Extension Act is not a Codification of Richardson v. Harmon and does not Change the Meaning of §189 of the Limitation Act. It is also a separate Basis of Admiralty Jurisdiction.

This Court also asserted in Complaint of Sisson that the Admiralty Extension Act, 46 U.S.C. §740, eliminated the need for the rules in Richardson.[6] 867 F.2d. at 341. If this statement is taken at face value, it means essentially that Richardson and the Extension Act are equal in meaning. In other words, the court implies that Richardson held torts caused by a vessel on navigable waters are within admiralty jurisdiction in tort notwithstanding that such injury is consummated on land. Richardson did in fact involve damage to a structure on land caused by a vessel. It did not, however, extend the general admiralty jurisdiction in tort over that damage: it found an independent basis for jurisdiction in the Limitation Act.

Subsequent to Richardson, the type of tort involved in that case remained outside of the general admiralty jurisdiction in tort. Two weeks after the Richardson decision, the Court handed down Martin v. West, 222 U.S. 191 (1911), which held precisely that there was no admiralty jurisdiction over an action filed by a bridge owner against a negligently operated ship on navigable waters which allided with its bridge. In fact, the legislative purpose of Congress' enactment of §740 was to overrule Martin, not

[6] 46 U.S.C. §740 provides in relevant part: The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury to person or property caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

codify Richardson, and extend admiralty jurisdiction to such cases. Sen. Rep. No. 1593, 1948 U.S. Cong. & Adm. News p. 1898. To say that §740 "codified" Richardson is to miss the point of both Richardson and 46 U.S.C. §740. If Richardson and §740 have equal meaning, then §740 was unnecessary and the Supreme Court handed down mutually inconsistent decisions in the same year.

Rather, the meaning of Richardson is not to be found in the particular fact pattern before the Court, but in the statutory language of §189. From that language, the Court fashioned a jurisdictional principle which transcended the particular facts before it to bring any tort not maritime within the admiralty jurisdiction through a properly filed limitation of liability proceeding. Through the Admiralty Extension Act, Congress simply "leveled the playing field" by extending admiralty jurisdiction, permitting the otherwise excluded shore based claimant to sue in admiralty, as the vessel owner already had the ability to seek admiralty jurisdiction regardless of the nature of the tort through the Limitation Act. DOSHA is of similar jurisdictional effect.

II. The Court's Reliance on Joyce v. Joyce is Clearly Erroneous.

A. Joyce was Improperly Applied.

Relying on Joyce v. Joyce, 975 F.2d 379 (7th Cir. 1992), a case involving a state court action against a yacht owner sued for negligent entrustment of his boat, the court below held that even if it were to find that it had subject matter jurisdiction over Great Lakes' limitation action, the action failed to state a claim upon which relief can be granted. The district court erroneously

concluded that "a finding of negligence liability (sic) against Great Lakes would be tantamount to a finding of Great Lakes' privity or knowledge, thereby precluding Great Lakes from seeking limitation pursuant to the Act under Joyce." (Op. at 29) (footnote omitted)).

Joyce is not analogous to this case. Joyce is fact-specific to a cause of action for the negligent entrustment of a pleasure craft and does not apply to a shipowner's right to limit in a commercial setting. Joyce involved one claimant not the multiple claimants here.[7] Finally, Joyce equates privity and knowledge with negligence which is incorrect. 3 Benedict on Admiralty, §51 (7th ed. 1993). (App. at Tab B).

B. This Court should reconsider its Opinion in Joyce v. Joyce because it deprives a Petitioner of its Statutory Right under the Limitation of Liability Act to present Evidence that it was not Negligent or that it lacked Privity or Knowledge of any Negligence.

The Limitation of Liability Act provides a shipowner with a procedural right to a hearing on the merits of exoneration or limitation. In a limitation action, the court has three options upon hearing the merits. It can exonerate the shipowner from all liability. It can determine that there is a right to limitation and permanently enjoin any state court proceedings and adjudicate all claims in the limitation. It can determine that there is no right to limitation but still decide all other matters or, in some

[7]If there is only claimant, the court may stay the limitation until the state court proceeding has been completed. See discussion, supra p. 11; Gilmore and Black, The Law of Admiralty, 2nd Edition, §§10-18 and 10-19 (2d ed. 1975)(App. at Tab C).

circumstances, send the remaining matters back to state court. 3 Benedict on Admiralty, §12 (7th ed. 1993). (App. at Tab B). The circular reasoning of Joyce would render the Limitation Act ineffective under any circumstance. The Supreme Court has specifically warned that a statute should not be construed so as to render it incapable of execution.

> Congress might have invested the Circuit Courts of the United States with the jurisdiction of such cases by bill in equity, but it did not. It is also evident that the State courts have not the requisite jurisdiction. Unless, therefore, the District Courts themselves can administer the law, we are reduced to the dilemma of inferring that the legislature has passed a law which is incapable of execution. This is never to be done if it can be avoided . . .

Norwich Co. v. Wright, 80 U.S. (13 Wall) 104, 123-124 (1871).[8]

Citing In re Oil Spill by the Amoco Cadiz, 954 F.2d 1279, 1305 (7th Cir. 1992), the district court recognized that in limitation proceedings, the ultimate burden of proving lack of privity or knowledge is on the vessel owner. (Op. at 27). In the non-admiralty doctrine of negligent entrustment, the burden of proof is on the plaintiff, not the vessel owner. Regardless, the court below, as well as this Court in Joyce, failed to recognize that the very essence of a limitation action includes a vessel owner's duty to present evidence of a lack of privity or knowledge. Determination of a limitation must be made by the

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[8]See also Woodfork v. Marine Cooks and Stewards Union, 642 F.2d 966, 970-71 (5th Cir. 1981) (a statute should not be construed in such a way as to render any of its provisions superfluous or insignificant); F.D.I.C. v. Nihiser, 799 F. Supp. 904, 908 (C.D. Ill. 1992), citing, Dole v. Steelworkers, 494 U.S. 26 (1990) (a court must construe a statute to effectuate its purpose).

district court according to principles of admiralty. Famiano v. Enyeart, 398 F.2d 661 (7th Cir. 1968), cert. denied, 393 U.S. 1020 (1969). The federal court's jurisdiction over the limitation action is exclusive. Langnes v. Green, 282 U.S. 531 (1931).

The limitation action filed in Amoco, presented the issue of whether the vessel was unseaworthy because the owner provided its vessel with an otherwise untrained or incompetent crew. A key difference between Joyce and Amoco is that in Amoco, the court properly afforded the owner a 9 1/2 month trial on the merits of its limitation petition to determine whether there was in fact a competent crew on board the vessel and whether the owner knew or should have known of any alleged negligence on the part of the crew. See also Zapata Haynie Corp. v Arthur, 980 F. 2d 287 (5th Cir. 1992)(three week trial held in district court to determine whether Zapata was entitled to exoneration or limitation of liability under its complaint).

The district court has deprived Great Lakes of its 5th Amendment procedural due process right to a hearing on the merits of its limitation complaint. A shipowner is entitled to a hearing on the merits and a limitation should not be dismissed on preliminary motions. J. Ray McDermott & Co. v. Hunt Oil Co., 262 F.2d 127, 128 (5th Cir. 1959)(App. at Tab D); 3 Benedict on Admiralty, §14, pp. 2-14, 2-15 (7th ed. 1993)(App. at Tab B). Great Lakes had a right to be heard. La Batt v. Twonney, 513 F.2d 641, 646 (7th Cir. 1975); Joe Louis Milk Co. v. Hershey, 243 F. Supp. 351, 355 (N.D. Ill. 1965). Its limitation complaint should

not have been dismissed for failing to state a cause of action. It is like depriving a defendant of his 5th Amendment rights because if he is innocent he does not need them and if he is guilty they will not help him.

Furthermore, the focus should be on the petition for limitation, the pleading that sets forth the basis for jurisdiction not the state court pleading. Joyce wrongly examines what will procedurally become the claim or response to the petition, the state court pleading. Artful pleading, rather than substantive law, controls over a Congressional Act, and deprives the vessel owner of his right under the law.

C. The Court should reconsider Joyce because it fails to Consider the Difference Between Exoneration and Limitation of Liability under the Act.

The Limitation Act creates a forum for a determination of whether a vessel owner is to be found negligent or not and whether the owner had knowledge of any alleged negligence that caused the damage complained of. Therefore, even if an owner is found to be negligent, while not entitled to exoneration, it still may be entitled to limit its liability under the Act, if it did not have privity or knowledge of the proximate cause of the accident.

The first inquiry in any Limitation Act proceeding is whether the shipowner is liable for negligence or unseaworthiness of its vessel. See Petition of Atlass, 350 F.2d 592 (7th Cir. 1965), cert. denied, 382 U.S. 988 (1966); Complaint of Sheen, 709 F. Supp. 1123, 1128 (S.D. Fla. 1989). If negligence or unseaworthiness is not found, then the shipowner is entitled to a decree of

exoneration. Id. However, if negligence or unseaworthiness is found, the court must then determine if the owner is nevertheless entitled to limit its liability. Id.; 709 F. Supp. 1123, citing, Providence & New York S.S. Co., 109 U.S. 578, 595 (1883). Only then does the inquiry center around whether the owner had privity or knowledge of the acts of negligence or conditions of unseaworthiness. 709 F. Supp. at 1128-29.

Clearly, this Court's holding in Joyce that a finding of negligence will be tantamount to a finding of privity or knowledge is erroneous and not supported by the law.

The instant action is factually distinguishable from Joyce because there is a distinction between the liability of an individual owner and a corporate owner under the act when deciding privity and knowledge. In Coryell v. Phipps, 317 U.S. 406 (1943) the Supreme Court held the owner of a stored vessel which caught fire from a fuel leak was entitled to limit because he had the vessel inspected by competent people who did not find a latent defect. Because the owner did not personally participate in the fault, he had no privity or knowledge of the defect.[9]

Negligent entrustment, the cause of action cited by the Joyce court, is a state common law doctrine that has been used in the recreational boating area. It is based on the owner's knowledge

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[9]This was followed by the Fifth Circuit in Gibboney v. Wright, 517 F.2d 1054 (5th Cir. 1975). In the Matter of Guglielmo, 897 F.2d 58 (2d Cir. 1990), the Second Circuit outlined when a pleasure boat owner will be charged with privity and knowledge of the incompetence or inexperience of a permissive user and contrasts the difference between professional or commercial operators and non-professional ones.

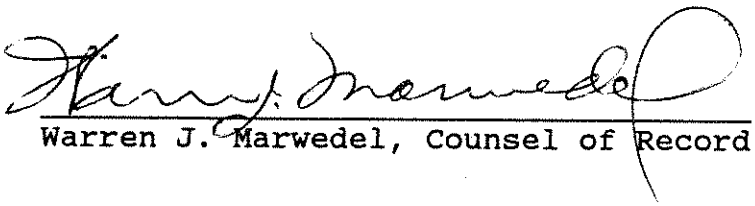
of the inexperience or incompetence of the permissive user. In Rautbord v. Ehmann, 190 F.2d 533 (7th Cir. 1951), the owner of a recreational boat allowed his thirteen year old son to operate the boat which hit and injured a swimmer. This Court found the father liable, but entitled to limit because the evidence established that the son was trained and experienced. Obviously, if the owner has information to question the competency, and does not, then limitation would not be granted, but the owner has a right to be heard and offer proof on the issue.

CONCLUSION

The judgment of the district court dismissing the limitation petition should be reversed and the cause remanded to the district court with instructions that petitioner-appellants be allowed to pursue their limitation action.

Dated: March 26, 1993

Respectfully submitted,



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No. 93-1421

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Complaint of Great Lakes Dredge & Dock Company, for exoneration from or limitation of liability, GREAT LAKES DREDGE & DOCK COMPANY, Plaintiff-Appellant, v. CITY OF CHICAGO, an Illinois municipal corporation, Defendant-Appellee, and JEROME B. GRUBART, INC., an Illinois corporation, Claimant-Appellee.	)	Appeal from United States District Court for the Northern District of Illinois, Eastern Division -------- No. 92 C 6754 -------- Hon. Charles P. Kocoras, Judge

CERTIFICATE OF SERVICE

The undersigned certifies that he served two copies of Brief of the Maritime Law Association of the United States as Amicus Curiae in Support of Plaintiff-Appellant, by messenger delivery to:

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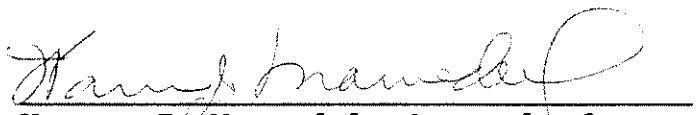

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APPENDIX

TO BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT

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TAB A

Supreme Court of the United States

No. 88-2041

Everett A. Sisson,

Petitioner,

v.

Burton B. Ruby, et al.

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

THIS CAUSE came on to be heard on the transcript of the record from the above court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is reversed with costs, and that this cause is remanded to the United States Court of Appeals for the Seventh Circuit for further proceedings in conformity with the opinion of this Court.

IT IS FURTHER ORDERED that the petitioner, Everett A. Sisson, recover from Burton B. Ruby, et al. Three Hundred Dollars ($300.00) for his costs herein expended.

June 25, 1990

Clerk's costs: $300.00

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 87-2713 and 87-2736

In the matter of:
The Complaint of Everett A. Sisson
as owner of the motor Yacht, The
Ultorian, for exoneration from
or limitation,

EVERETT A. SISSON, Plaintiff-Appellant, v. BURTON B. RUBY, FIREMAN'S FUND INSURANCE CO. and PORT AUTHORITY OF MICHIGAN CITY, Defendant-Appellee.	Appeal from the United States District of Illinois, Eastern Division, No. 86 C 1991; Nature: Complaint of Everett Sisson for Exoneration from or Limitation of Liability The Judge Nicholas J. Bua, Judge Presiding.

Statement Of Position of Appellant Everett Sisson Filed Pursuant to Circuit Rule 54

Now comes the appellant Everett Sisson by his attorneys Warren J. Marwedel, Dennis Minichello and Keck, Mahin and Cate and pursuant to this court's order of July 30,1990 hereby files its statement of position pursuant to Circuit Rule 54.

The United States Supreme Court has ruled that there is maritime jurisdiction in this case over Sisson's limitation claim pursuant to 28 U.S.C. §1333 (1) The Court has remanded this case to this court for further proceedings in accordance with its decision. This matter should be remanded to the district court for discovery and trial on the merits of the limitation of liability petition of Sisson.

Everett Sisson, Appellant

By: _____
One of his attorneys

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Dennis Minichello
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(01-0)

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

September 21, 1990.

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 53

Before

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge

IN THE MATTER OF:
THE COMPLAINT OF EVERETT A. SISSON.

EVERETT A. SISSON, Petitioner,

Nos. 87-2713 and 87-2736 v.

BURTON B. RUBY, et al. Respondents.

On Remand from the Supreme Court of the United States.

ORDER

On June 25, 1990, the Supreme Court of the United States reversed our decision herein (reported at 867 F.2d 341 (7th Cir. 1989)) and remanded the case for proceedings in conformity with its opinion (reported at 110 S. Ct. 2892 (1990)). In light of that opinion--finding subject-matter jurisdiction pursuant to 28 U.S.C. section 1333(1)--we remand this case to the district court for further proceedings pertaining to the petitioner's limitation of liability suit. All questions of costs should be directed, at least initially, to the district court. Circuit Rule 36 shall not apply.

JUDGMENT

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

September 21, 1990.

Before

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge

IN THE MATTER OF:
THE COMPLAINT OF EVERETTE A. SISSON.

EVERETTE A. SISSON,
Petitioner,

No. 87-2713 & 87-2736 vs.

BURTON B. RUBY, et al.,
Respondents.

On Remand from the Supreme Court of the United States

ON REMAND FROM THE UNITED STATES SUPREME COURT

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that this case is REMANDED to the district court for further proceedings pertaining to the petitioner's limitation of liability suit; all costs should be directed, at least initially, to the district court; Circuit Rule 36 shall not apply, in accordance with the order of this Court filed this date.

TAB B

BENEDICT ON ADMIRALTY

SEVENTH EDITION
(Revised)

LIMITATION OF LIABILITY

1992 Supplement

by

DALE S. COOPER, J.D.
of the New York Bar

VOLUME 3

SIXTH EDITION PUBLISHED AS THE LAW OF AMERICAN ADMIRALTY

1992

Matthew Bender

Times Mirror Books

Chapter II.

NATURE AND OPERATION OF THE LIMITATION PROCEEDING.

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§ 11. The Nature of the Limitation Proceeding.

A petition for limitation of liability was described by Mr. Chief Justice Taft as being

> "equitable in nature, partaking in a way of the features of a bill to enjoin a multiplicity of suits, a bill in the nature of an interpleader, and a creditor's bill. It looks to the complete and just disposition of a many-cornered controversy, and is applicable to proceedings *in rem* against the ship as well as to proceedings *in personam* against the owner, the limitation extending to the owner's property as well as to his person."[1]

(Continued on page 2–3)

[1] Hartford Accident & Ind. Co. v. Southern Pacific Co. (The Bolikow), 273 U.S. 207, 47 S. Ct 357, 71 L. Ed. 612, 1927 A.M.C. 402 (1927).

See also: Ema v. Compagnie Generale Transatlantique, 353 F. Supp. 1286, 1974 A M.C. 2498 (D.P.R. 1972).

Just v. Chambers (Friendship II), 312 U.S. 383, 61 S. Ct. 687, 85 L. Ed. 903, 1941 A.M.C. 430 (1941) "When the jurisdiction of the court in admiralty has attached through a petition for limitation, the jurisdiction to determine claims is not lost merely because the shipowner fails to establish his right to limitation. We have said that the court of admiralty in such a proceeding acquires the right to marshal all claims whether of strictly admiralty origin or not, and to give effect to them by the apportionment of the *res* and by judgment *in personam* against the owner, so far as the court may decree. And that, if Congress has this constitutional power, it necessarily follows, as incidental to that power, that it may furnish a complete remedy for the satisfaction of those claims by distribution of the *res* and by judgments *in personam* for deficiencies against the owner, if he is not released by virtue of the statute. While it is recognized that the equitable rule for retaining jurisdiction in order completely to dispose of a cause does not usually apply in admiralty, the proceeding for limitation of liability is different from the ordinary admiralty suit and, by reason of the statute and rules governing it, the court of admiralty has authority to grant an injunction and thus bring litigants into the admiralty court. There is thus jurisdiction to fulfill the obligation to do equity to claimants by furnishing them a complete remedy although limitation is refused. [citations omitted]").

Moran Transportation Co. v. Mellino, 185 F.2d 386, 1951 A.M.C. 66 (2d Cir. [N.Y.] 1950), *cert. denied*, 340 U.S. 953 (1951) ("The statutory purpose is to exempt the investor from loss in excess of the value of the investment in the vessel and freight . . . This goes to show that the purpose of limitation proceedings is not to prevent a multiplicity of suits but, in an equitable fashion, to provide a marshalling of assets—the distribution *pro rata* of an inadequate fund among claimants, none of whom can be paid in full.").

For a further discussion of the principles set out in Hartford Accident & Indemnity Co. v. Southern Pacific Co. *supra*, concerning the nature of the limitation proceeding see Petition of Trinidad Corp. (Fort Mercer), 229 F.2d 423, 1956 A.M.C. 872 (2d Cir. [N.Y.] 1955).

Moore-McCormack Lines v. McMahon (Mormackite), 235 F.2d 142, 1956 A.M.C. 1487 (2d Cir. [N.Y.] 1956) (A cross libel was held maintainable by the petitioner in a limitation of liability proceeding in order to avoid a multiplicity of suits.); British Transport Commission v. United States (Haiti Victory), 354 U.S. 129, 77 S. Ct. 1103, 1 L. Ed. 2d 1234, 1957 A.M.C. 1151 (1957) (Cross-claims between petitioner and claimants were allowed: "Logic and efficient judicial administration require that recovery against all parties at fault is as necessary to the claimants as is the fund which limited the liability of the initial petitioner. Otherwise this proceeding is but a 'water haul' for the claimants, a result completely out of character in admiralty practice.")

It is a special statutory proceeding.[2] It is *sui generis*.[3] It is simply a limit on the remedy.[4] It is nothing less than the administration of equity in admiralty.[5] The proceeding initiated by the petitioner is not a controversy between the shipowner and some other party—in this case a cargo owner—but is the assertion of a statutory right.[6] The Supreme Court early said[7] that the proceeding is not an action against the vessel and her freight, except when they are surrendered to a trustee, and in the light of the later pronouncements of that Court, Judge Learned Hand pointed out[8] that the proceeding is never *in rem*, not even when there is a transfer to a trustee. The courts have long been uncertain about the precise nature of the proceeding, and there are many discussions in the books as to whether the proceeding pertains to the right of the damage-claimants or to their remedy, and whether it is a

[2] The Eastland, 78 F.2d 984, 1935 A.M.C. 1347 (7th Cir. [Ill.] 1935), *cert. denied*, 297 U.S. 703 (1936).

[3] The Nevada, 81 F.2d 744, 1936 A.M.C. 371 (9th Cir. [Ore.] 1936).

[4] Royal Mail S.P. Co. v. Cia. de Nav. Lloyd Brasileiro (The Almirante Jacequay), 31 F.2d 757, 1929 A.M.C. 196 (E.D.N.Y. 1929), *cert. denied*, 287 U.S. 607 (1932); The Titanic (Petition of Oceanic S.N. Co.), 233 U.S. 718, 34 S. Ct. 754, 58 L. Ed. 1171 (1914); The Mandu, 1939 A.M.C. 287 (2d Cir. 1939).

Claimants may now preserve and exercise their rights under the "saving to suitors" clause (63 Stat. 101, 28 U.S.C. § 1333) by stipulating that their state action recoveries will not exceed the amount of the limitation fund. Upon such stipulation by the claimants, there is no longer a need for concursus and the admiralty court should dissolve the injunction: Lake Tankers Corp. v. Henn (Eastern Cities), 354 U.S. 147, 77 S. Ct. 1269, 1 L. Ed. 2d 1246, 1957 A.M.C. 1165 (1957).

[5] The Miramar (Petition of Statler), 31 F.2d 767, 1924 A.M.C. 234 (S.D.N.Y. 1929), *aff'd*, 36 F.2d 1021, 1930 A.M.C. 397 (2d Cir.), *cert. denied*, 281 U.S. 752 (1930); Petition of the Texas Co., 81 F. Supp. 758, 1948 A.M.C. 1933 (S.D.N.Y. 1948).

[6] The Glenbogie (Petition of Great Lakes Transit Corp.), 53 F.2d 1022, 1931 A.M.C. 1740 (N.D. Ohio 1931), *aff'd*, 63 F.2d 849, 33 A.M.C. 1019 (6th Cir. 1933).

[7] *In re* Morrison, 147 U.S. 14, 13 S. Ct. 246, 37 L. Ed. 60 (1893).

[8] The Alcyone, 55 F.2d 73, 1932 A.M.C. 174 (2d Cir. [N.Y.] 1932), *cert. denied*, 286 U.S. 558 (1932).

proceeding *in rem* or *in personam.*[9] While it has been said that there must always be a fund in court, or a ship in the hands of a trustee, there have been cases where a vessel on a ballast voyage, without any freight, has disappeared at sea, and the courts have taken jurisdiction of the shipowner's petition and rendered a decree thereon.[10] In such cases, there is no fund in court; yet there is the issue whether the damage-claimants can show that the shipowner is not entitled to any limitation at all.

In *The Aquitania,*[11] Judge A. N. Hand said that the limitation statutes "must be primarily founded, not upon the avoidance of a multiplicity of actions, but a possibility at least that the liability of the owner may exceed the value of the vessel and her pending freight." On the appeal, Judge Manton said that "the statute is intended to limit the liability of the shipowner, but not arbitrarily to give him a particular forum"; and that the earlier case of the *Garden City,*[12] where a petition was sustained as to a vessel valued at $30,000, against actual pending claims of only $4,000, was justified on the ground that the nature of the accident—a severe fire where a number of passengers were injured—created a possibility of future claims, and that the shipowner could not be compelled at his peril to assume the risk that eventual claims would exceed the value of the vessel.

A petition is always a defensive action. At no time can the owner recover a dollar by means of it from anybody, as was said by Judge Learned Hand in *The Franz and Loomis.*[13] In

[9] The James McGee (Petition of Standard Oil Co.), 300 F.2d 93, 1924 A.M.C. 1266 (S.D.N.Y. 1924); The Chickie, 141 F.2d 80, 1944 A.M.C. 635 (3d Cir. [Pa.] 1944): A.H. Bull Steamship Co. v. The Tassia, 41 F. Supp. 699 1942 A.M.C. 921 (S.D. N.Y. 1942) (After a vessel has been held immune from process because of the interest of a foreign sovereign, the owners of the vessel, sued *in personam,* may nonetheless petition to limit liability for collision and cargo damages.).

[10] The Hewitt, 15 F.2d 857, 1926 A.M.C. 1463 (S.D.N.Y. 1926); The Miramar, N. 5 *supra.*

[11] 14 F.2d 456, 1926 A.M.C. 1071 (S.D.N.Y. 1926), *aff'd,* 20 F.2d 457, 1927 A.M.C. 1320 (2d Cir. 1927).

[12] 26 F. 766 (S.D.N.Y. 1886).

[13] (Algoma Co. and Great Lakes

that case, it was assumed, *arguendo,* that a shipowner petitioner could interpose a counterclaim to a damage-claimant's claim. Supposing the counterclaim to be for a greater amount, and that the petitioner wished to use it, not as a set-off, but as the basis for an affirmative recovery against the damage-claimant, the court said, "[I]f this were permissible, it would *pro tanto* become an offensive suit." However, it was found that the petitioner had not clearly indicated that, if its aggregate losses in the collision were greater than those of the damage-claimant, it would seek to recover half the difference, and hence the point was not decided.[14]

But, in *British Transport Commission v. United States,*[15] the possibility of petitioner's receiving an affirmative recovery through counterclaims (or cross-claims) was discussed and not dismissed. Rather, the Court concluded ". . . that fairness in litigation requires that those who seek affirmative recovery in a court should be subject therein to like exposure for damages resulting from their acts connected with the identical incident." Three dissenters[16] argued that, technically, the Admiralty Rules (as then promulgated) did not provide for such a practice in a limitation proceeding. However, with the merger of the civil and admiralty rules in 1966, this dissent appears to have been answered.

> "While the initiative always rests with the shipowner-petitioner when he proceeds by petition, this cannot conceal the substance of the matter. The petitioner does not change his legal position as to the main issues; the damage-claimant must prove what he must prove if he is the actor—a definite tort or contract and the petitioner's connection with it. The petitioner accepts an affirmative

Transit Co.), 86 F.2d 708, 1937 A.M.C. 50 (2d Cir. [N.Y.] 1937).

[14] See § 79 *infra.*

[15] British Transport Commission v. United States, 354 U.S. 129, 77 S. Ct. 1103, 1 L. Ed. 2d 1234, 1957 A.M.C. 1151 (1957). See also Petition of Hocking, 146 F. Supp. 207, 1960 A.M.C. 2169 (D.N.J. 1956), allowing the petitioner to implead a damage-claimant.

[16] Justices Brennan, Frankfurter and Harlan.

> burden only for so long as the damage-claimants have not declared their position."[17]

A damage-claimant should be competent to sue; his character is usually that of a plaintiff; but any party having or able to assert a claim may present his claim.[18]

The shipowner-petitioner, by giving the stipulation, making the deposit, or transferring ship and freight to a trustee, gives the court jurisdiction of the property or fund. In *The Princess Sophia,*[19] it was said that the action of the petitioner does not give the court jurisdiction over he damage-claimants. On the other hand, it was said in *The Miramar*[20] that when the petitioner elects to resort to a limitation proceeding, the result of his action is to bring the claims that are asserted against him into the jurisdiction of the admiralty court and to subject them to the law administered in that court, which has jurisdiction to impose personal liability upon the petitioner. Failure to comply with the procedures prescribed by Supplemental Admiralty Rule F does not deprive the court of juridiction acquired when the petition and stipulation are filed. The effect of noncompliance with the requirements of Rule F is to render the monition ineffective and stay the limitation proceeding until a new monition is issued and the notice requirements are observed.[21] Whatever view is taken as to the jurisdiction obtained over claimants prior to their appearance, the monition and a default thereunder justify a permanent injunction, which is an effective bar to any proceedings of any nature in any court subject to the sovereignty of the United States, and is also believed to be a bar against any action in

[17] The El Sol-The Sac City, 72 F.2d 212, 1934 A.M.C. 1185 (2d Cir. [N.Y.] 1934).

[18] The Mandu (Petition of Cia de Nav. Lloyd Brasileiro), 21 F. Supp. 372, 1938 A.M.C. 45 (E.D.N.Y. 1938) and cases there cited, *rev'd on other grounds,* 102 F.2d 459, 1939 A.M.C. 287 (2d Cir. 1939); The Maine, 1939 A.M.C. 950 (D. Md. 1939).

[19] 36 F.2d 591, 1930 A.M.C. 91 (W.D. Wash. 1930), *aff'd without discussion of this point,* 61 F.2d 339, 1932 A.M.C. 1562 (9th Cir. 1932).

[20] N.5 *supra.*

[21] Petition of Canada Steamship Lines, Ltd. (The Noronic), 93 F. Supp. 549, 1950 A.M.C. 1499 (N.D. Ohio), *aff'd per curiam,* 185 F.2d 1019 (6th Cir. 1950).

any other country through the operation of the principle of comity.

§ 12. Operation of the Statute and Rules of Court.

The general scheme of the statutes and the rules is as follows: A shipowner who finds himself actually or prospectively faced with tort or contract liability claims arising out of a single voyage, or, if there is a situation in port between voyages, arising out of a single event or occasion, may, if he wishes, invoke the aid of the admiralty court to limit his liability and control a multiplicity of suits by placing the value of the ship, or the ship herself, and the earnings of the voyage, in the control of the court, accompanied by either an admission or a denial of general liability. The court, upon obtaining control of the value or the ship, enjoins all damage-claimants from maintaining separate suits and requires them to file their claims in the limitation proceeding. The damage-claimants may contest the asserted right of the shipowner to have the liability limited at all and may have a trial of that issue. If the shipowner admits his liability and if the damage-claimants admit his right to limit that liability, the only proceeding is the proof of the damage claims before a commissioner or a referee and a distribution of the fund. But if either point is contested, there is a trial of the issue, which may result in one of three ways: (1) The petitioning shipowner is wholly exonerated from all liability and his stipulation, payment, or transferred ship is released to him unconditionally; (2) he is found liable but, upon his proof that he was free of privity and knowledge, is declared entitled to limit his liability and awarded a permanent injunction against suits and claims; or (3) he is found not only liable, but affected with "privity or knowledge," and is declared liable for all damage claims in full without benefit of the limitation statutes, the value of the stipulation or other assets under control of the court being applied towards the satisfaction of such liability claims *pro rata*. When all the damage-claimants have been satisfied, either out of the funds in court or by means of additional settlement funds provided from any other source, the ship-

owner may—there being no further opposition—obtain a final decree and permanent injunction against all the world prohibiting any further proceedings on account of the voyage or occasion which has been the subject-matter of the limitation proceeding.

The damage-claimants have the right to examine into and oppose each other's claims so long as the available value for distribution is insufficient for the payment of all in full. See § 91 infra.

The bona fides of the shipowner's assertion that he is faced with actual claims, or fears claims, in excess of the value of ship and freight has ordinarily been tested as of the time of the filing of the petition; at that time, of course, apparent defences may exist which may or may not turn out to be good.[1] It has been said[2] that the matter may await the liquidation of the claims, if the face of the asserted claims is less than the stipulated limitation value of the vessel and freight. The time limit imposed by the Amendment of 1936, however, compels the shipowner to file his petition within six months nevertheless, but would not appear to affect the power of the

[1] The Victoria, 22 F.2d 532, 1928 A.M.C. 127 (9th Cir. [Wash.] 1928).

The owner of a ship appraised at $950,000.00 has been permitted to maintain proceedings for limitation of liability arising out of a collision that occurred while the ship was carrying over 490 passengers, notwithstanding that the claims actually filed at the time of the petition totalled only $159,000.00. It was held sufficient that there was "any probability" that the claims might exceed the appraised value: The Miss New York, 1941 A.M.C. 569 (S.D.N.Y. 1941).

A limitation proceeding is always available if the total amount of all potential claims exceeds the fund available for their satisfaction regardless of whether the available funds are measured by the law of the United States or that of a foreign country: Black Diamond S.S. Corp. v. Robert Stewart & Sons (The Norwalk Victory), 336 U.S. 386, 69 S. Ct. 622, 93 L. Ed. 754, 1949 A.M.C. 393 (1949).

The petition for limitation of liability becomes moot when the vessel owner's total potential liability exposure is less than the value of the vessel at the termination of the voyage during which the casualty occurred: Horton & Horton v. T/S J.E. Dyer, 1969 A.M.C. 2262 (S.D. Tex. 1969).

[2] The Hugh O'Donnell, 34 F.2d 925, 1929 A.M.C. 1744 (2d Cir. [N.Y.] 1929).

court to postpone the disposition of the question of limitation until after the claims have been liquidated and found actually to exceed the amount of the fund.

Limitation of liability may also be claimed as a defense. In such a case this defense may be raised even after the expiration of the six-month period for taking affirmative action by petition, provided all other time requirements for pleadings are met.[3]

Where a defense of limitation is raised, it must be tried in admiralty without a jury even when raised in a common-law suit. However, under the "saving to suitors" clause (28 U.S.C. §1333) the rest of the trial may proceed.[4] See §51 *infra.*

§ 13. What Are "Appropriate Proceedings."

The statute of 1851 (R.S. § 4284, 46 U.S.C. § 184) provides that "the freighters and owners of the property, and the owner of the vessel, or any of them, may take *the appropriate proceedings* in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable, among the parties entitled thereto."

The Supreme Court, in Supplemental Admiralty Rule F of the Federal Rules of Civil Procedure, § 2 *supra,* has outlined such proceedings, which are to be conducted exclusively in the admiralty court. More detailed rules, supplementing these Rules, have been made for the purpose in many of the districts. The District Court Admiralty Rules are collected in Vols. 5-5D; and the local rules of the Southern and Eastern Districts of New York, the Southern District of Texas (Houston), the Northern District of California (San Francisco), and the Northern District of Ohio (Cleveland) are especially referred to in the following discussion.

The Act of 1936, 46 U.S.C. § 185, now specifies two methods of procedure which the shipowner may select at his option:

[3] Murray v. New York Central R.R. Co., 287 F.2d 152, 1961 A.M.C. 1118 (2d Cir. [N.Y.]), *cert. denied,* 366 U.S. 945 (1961).

[4] Famiano v. Enyeart, 398 F.2d 661, 1968 A.M.C. 2147 (7th Cir. [Ind.] 1968), *cert. denied,* 393 U.S. 1020 (1969).

(a) To deposit with the United States district court, for the benefit of claimants, a sum equal to the amount or value of the owner's interest in the vessel and freight, or approved security therefor; (b) To transfer, for the benefit of claimants, to a trustee to be appointed by the United States district court, his interest in the vessel and freight.

These two procedures created by Congress in 1936 are not substantially different from those previously worked out interstitially by the Supreme Court and the lower admiralty courts.

Prior to the Congressional indication of the method of procedure in the Act of 1936, the best statement of the procedural possibilities was found in the case of *The H. F. Dimock,*[1] in which the court pointed out four ways in which the statute might be availed of, *viz.,* (1) by the simple answer of the shipowner when sued; (2) by his petition, offering a transfer of the ship to a trustee appointed by the court under R. S. § 4285 (46 U.S.C. § 185); (3) by a similar petition, offering a stipulation or deposit, instead of a transfer of the ship, under then General Admiralty Rule 51 promulgated by the Supreme Court, this method being also now provided by 46 U.S.C. § 185, such stipulation or deposit being in the amount of the vessel's value as appraised under the order of the court; or (4) by a creditor's suit for an apportionment and *pro rata* distribution.

The last was the method of procedure adopted in *The H. F. Dimock,* the libel being filed by the master of a vessel sunk in collision, against the colliding vessel and her owner, and against the owner of his own sunken vessel, and against all persons claiming damages against the colliding vessel or its owner by reason of the collision, alleging the inadequacy of the colliding vessel to respond in full for the damages and therefore asking a *pro rata* distribution of her value and the value of her pending freight amongst all the claimants in proportion to their losses. And the form of the proceeding was sustained, though the suit was for other reasons dismissed.

[1] 52 F. 598 (S.D.N.Y. 1892).

The methods described in *The H. F. Dimock* were not regarded as necessarily excluding the possibility of working out statutory limitation in other ways. The Supreme Court had said, as early as 1880, that its Rules on the subject "were intended to *facilitate* the proceedings of owners of vessels for claiming the limitation of liability secured by the statute;"[2] consequently the view was expressed that if at any time it should appear that some proceeding not provided for by the Rules was also appropriate for securing the result, it could hardly be doubted that such a proceeding would be sustained.[3] As to all details of procedure not specifically provided for by the Supreme Court Rules, the criterion is furnished by the appropriateness of the procedure to secure the result aimed at.

Neither the Limitation of Liability Act nor Supplemental Rule F provides for issuing process to the marshal to seize the vessel or freight on the filing of the petition or of the answer. In fact, it has been held that possession of the vessel by the marshal or by a trustee is not necessary for the validity of the limitation proceeding.[4] Whenever the owner voluntarily surrenders the *res*, process to the marshal is unnecessary. But in such case as *The H. F. Dimock*, process was necessary, and it was issued without question. And in the case of *Oregon R. R. & Nav. Co. v. Balfour*,[5] where the owner and lessee of a barge and towboat, which had caused damage, filed a petition in limitation of liability but surrendered only the barge, the court on application issued its process and seized the towboat also.

In *Mattson v. District Court*,[6] the plaintiff sued a shipowner in the Federal court at common law and was entitled to a jury

[2] The Benefactor, 103 U.S. 239, 26 L. Ed. 351 (1880); The Scotland, 105 U.S. 24, 26 L. Ed. 1001 (1881).

[3] Benedict, Third Edition, § 563 (1900); Benedict, Fourth Edition, § 530 (1910); Benedict, Fifth Edition, § 484 (1925); Benedict, Sixth Edition, § 481 (1940).

[4] The Mendota, 14 F. 358 (S.D.N.Y. 1882).

[5] 90 F. 295 (9th Cir. [Ore.] 1898), *appeal dismissed*, 179 U.S. 55, 21 S. Ct. 28, 45 L. Ed. 82 (1900).

[6] 56 F.2d 839, 1932 A.M.C. 555 (9th Cir. [Wash.] 1932).

trial. The shipowner pleaded the limitation statutes as a matter of defense, and the district judge treated this as a petition for limitation and heard the matter as in admiralty, without a jury. The plaintiff sought, by writ of prohibition, to prevent entry of a decree, but the Circuit Court of Appeals ruled that an appeal from the decree would be sufficient to afford any relief necessary to protect the plaintiff from the improper procedure.

Whether the two methods of procedure mentioned in the Act of 1936 exclude any further possibility of resorting to other methods of applying the limitation statutes, under the *Dimock* and other cases, is uncertain.[7] As the entire procedure is statutory, supplemented by rules, the safe course would seem to be to follow the Statute, which is to say that the correct procedure is that outlined in the Act of 1936.

§ 14. Preliminary Questions To Be Decided in a Limitation Situation.

The shipowner must determine whether to have the ship appraised, or to deliver title to her to a trustee. If the ship is still useful to him, and he desires to keep her in operation, he will have her appraised and furnish the court with an approved surety company stipulation or pay the cash value for which the ship is appraised, plus the freight. If the ship is in existence but useless to him—as when she is a constructive total loss—he will transfer her and the freight to the trustee named by the court. If the vessel is a total loss, except for some wreckage, lifeboats, or freight money, he will usually prefer to have the wreckage, etc., appraised and give a stipulation or pay the cash value. If the vessel is a total loss, with no wreckage and no freight, he will state those facts, and there will be no stipulation and no payment or transfer.

[7] See Grasselli Chemical Co. No. 4 (Petitions of Grasselli and DuPont), 20 F. Supp. 394, 1937 A.M.C. 1070 (S.D.N.Y. 1937).

See § 18 *infra*.

The Chickie, 141 F.2d 80, 1944 A.M.C. 635 (3d Cir. [Pa.] 1944) (A petition for limitation of liability is of no legally operative effect when there is no transfer of a *res* to a trustee, no monition is issued, and the required fee for filing is not paid.).

If the ship has been sued, or if property has been placed under writ of foreign attachment, the owner must decide whether to release the vessel or property upon an ordinary stipulation, or whether to leave them in the marshal's custody until he can complete and file his limitation petition. If the property is released upon an ordinary stipulation, the obligation of that stipulation cannot be avoided or merged if a limitation petition with a limitation stipulation is filed subsequently. A party who merely promised to give an ordinary stipulation to release a seized vessel (the vessel thereupon being released) has been held bound to give separate security to make good that promise, in addition to a stipulation furnished in connection with a limitation petition.[1] It is not sufficient to notify the opposing party that a limitation petition will be filed; the rights of damage-claimants to file suits and sue vessels and attach property continue unhampered until the moment when, limitation security having actually been furnished, the monition issues.[2]

The question whether to transfer the vessel and freight to a trustee, or to have the values appraised and give security for the amount appraised must be answered substantially *in limine*. For it has been held that making an *ex parte* appraisement and giving an *ad interim* stipulation for such appraised value is "due appraisement" and that "the petitioner's election to give security instead of surrendering the vessel is final

[1] The Agwisun, 20 F.2d 975, 1927 A.M.C. 1084 (S.D.N.Y. 1927).

[2] The Pelotas, 297 F. 318, 1924 A.M.C. 286 (E.D.N.Y. 1924); Petition of Goulandris, 140 F.2d 780, 1944 A.M.C. 357 (2d Cir. [N.Y.]), *cert. denied*, 322 U.S. 755 (1944) (A petition for limitation of liability, filed before the expiration of the six months' period, asking the court "upon further application" to cause due appraisement to be made, order the petitioners to file a stipulation with sureties, and issue a monition and an injunction, accompanied by a stipulation for costs, does not satisfy the requirements of the statute. It may not be necessary that the court's order and the actual furnishing of the limitation fund occur within the six months' period if the petition is accompanied with an *ad interim* stipulation and prayer for an order approving it or if the petitioners seek an order for due appraisement of their vessel and the pending freight within the six months' period.).

and irrevocable."[3] The court went on to say: "This is as it should be. Having obtained his injunction on this basis, there is no just reason why he should be permitted to surrender his vessel in order to gamble on the chance that he might be able to buy it back for less than the amount of his stipulation."

The shipowner may have some choice as to the district in which to file his petition.[4] He must also decide whether to admit liability and pray merely for limitation thereof, or to deny all liability and pray in the alternative for exoneration from all liability. He must be prepared to allege and prove that the loss occurred "without his privity or knowledge," and also, if his vessel is "seagong" and there are claims of loss of life or bodily injury, that such losses occurred without the "privity or knowledge" of the master at or prior to the commencement of the voyage. If the vessel was under charter, the shipowner and the charterer must determine whether it was such a charter as will permit the charterer to limit his liability as well, and if so, whether owner and charterer can act in concert. The ship owner must consider and list prior liens on the vessel, and also list and care for subsequent liens.

If the matters to be dealt with are maritime in nature and hence there is admiralty jurisdiction, the shipowner has the right to have the issue of limitation heard fully on the merits

[3] The Ontario No. 1, 80 F.2d 85, 1936 A.M.C. 18 (2d Cir. [N.Y.] 1935).

In the Mandu, 20 F. Supp. 820, 1937 A.M.C. 1062 (E.D.N.Y. 1937), the district court allowed a petitioner to withdraw his petition when it appeared that there was in fact no valid damage claim; on appeal, however, the asserted damage claim was held valid: 102 F.2d 459, 1939 A.M.C. 287 (2d Cir. 1939).

However, in The Rapel, 78 F. Supp. 78, 1948 A.M.C. 302 (S.D.N.Y. 1948), the court held that in a proceeding for limitation of liability, an *ex parte* appraisement based on affidavits submitted at the time of filing the *ad interim* stipulation is not "due appraisement" so as to relieve the petitioner of his burden to go forward with proof of the vessel's value. See, also, Gatewood v. Sanders (Fainwill), 56 F. Supp. 887, 1944 A.M.C. 1454 (E.D. Va. 1944).

[4] See § 72 *infra*.

and the court may not, in a preliminary way and upon motion, determine the question of limitation.[5]

The damage-claimants, confronted with a petition, must determine whether to contest or admit the asserted right of the shipowner to a limitation of his liability, whether to challenge the shipowner's choice of the district, whether to contest or admit the appraisal and the interim stipulation or payment into court or, if there is a transfer to a trustee, whether to admit or question the adequacy of the form and amount of the transfer.

If the shipowner has prayed for complete exoneration, the issue whether there is any liability at all is necessarily forced upon the damage-claimants; they cannot let it go by default.

The damage-claimants further face the question of promoting their group interest and minimizing their individual efforts and expenditures by organizing to some extent as a group; in large disasters, such group organization has been carried to the point of committee management, with rules and appellate committee provisions.[6]

§ 15. Time for Instituting Limitation Proceedings and Other Actions.

A petition for limitation must be filed within six months after receiving or filing the first notice of claim.[1] The purpose

[5] J. Ray McDermott Co. v. Hunt Oil Co., 262 F.2d 127, 1959 A.M.C. 384 (5th Cir. [La.] 1959).

As to Admiralty Jurisdiction generally see Vol. 1.

To avail oneself of the Limitation of Liability Act, it must be shown that the event giving rise to claims occurred on "navigable waters": Petition of Keller, 149 F. Supp. 513, 1963 A.M.C. 2067 (D. Minn. 1956); Petition of Reading, 169 F. Supp. 165, 1959 A.M.C. 1753 (N.D.N.Y. 1958), *aff'd*, 271 F.2d 959, 1960 A.M.C. 214 (2d Cir. 1959); Petition of Madsen, 187 F. Supp. 411, 1963 A.M.C. 488 (N.D.N.Y. 1960); Mercury Sabre, 227 F. Supp. 135, 1964 A.M.C. 1777 (D. Ore. 1964); *In Re* River Queen Serial No. H64106, 275 F. Supp. 403, 1968 A.M.C. 1374 (W.D. Ark. 1967), *aff'd*, 402 F.2d 977, 1968 A.M.C. 2759 (8th Cir. 1968).

[6] See § 82 *infra*.

[1] Act of June 5, 1936, § 3; 46 U.S.C. § 185.

BENEDICT ON ADMIRALTY

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Chapter II

NATURE AND OPERATION OF THE LIMITATION PROCEEDING

§ 11. The Nature of the Limitation Proceeding.

N.1 *See also In re* Ballard Shipping Co. 752 F. Supp. 546, 1991 A.M.C. 727 (D.R.I. 1990) ("As Augustus Hand wrote, 'The purpose of a limitation proceeding is not merely to limit liability but to bring *all* claims into concourse and settle *every* dispute in *one* action.' *The Quarrington Court*, 1939 A.M.C. 421, 423, 102 F.2d 916, 918 (2d Cir.) (emphasis added), *cert. denied*, 307 U.S. 645, 1939 A.M.C. 756 (1939).").

§ 12. Operation of the Statute and Rules of Court.

[Add new footnote at end of second sentence in section.]

0.1 *In re* Koala Shipping & Trading, Inc., 1984 A.M.C. 491 (S.D.N.Y. 1983) (Following the sinking of a cargo vessel the ship's owner moved the vessel, insured for over $4,000,000, out of the jurisdiction of the district court and then commenced a limitation proceeding. Numerous cargo claimants motioned that the district court remove the limitation injunction while the proceeding was pending so that they could proceed against the shipowner wherever the hull insurer was susceptible to jurisdiction. The district court held that it was within its equitable power to grant such a motion to preserve the status quo where the limitation proceeding was pending. However, the district court warned that it lacked the power to prevent the insurer from paying the claim to the mortgage holder and that it could not prevent the shipowner disposing of its assets prior to the completion of the limitation proceeding.); *In re* Spanier Marine Corp., 1983 A.M.C. 2441 (E.D. La. 1983) (The district court stayed all litigation stemming from a collision, including a state tort suit filed against the master of the ship, pending the outcome of the shipowner's limitation proceeding. The state court's findings against an individual defendant would interfere with the district court's determination of whether the shipowner was in privity with the master's actions would potentially deplete available insurance, and would create problems of *res judicata* and collateral estoppel.).

[*Add to footnote 1 following "Black Diamond S.S. Corp. v. Robert Stewart & Sons."*]

See also In re Korea Shipping Corp., 919 F.2d 601, 1991 A.M.C. 499 (9th Cir. 1990) (Where the parties agreed that United States substantive law (COGSA) applied, the district court properly rejected the foreign shipowner's assertion that Korean limitation law, which fixed liability below the amount of actual claims, should be applied because the limitation law of the foreign nation was such an integral part of the substantive law that it "attached" to it. It was irrelevant that the shipowner, seeking an advantage in United States courts, would be forced to pay a higher amount under the United States Limitation Act.).

[*Add new footnote at end of first sentence in fifth paragraph of section.*]

3.1 Wheeler v. Marine Navigation Sulphur Carriers, 764 F.2d 1008, 1987 A.M.C. 156 (4th Cir. 1985) (The court of appeals held that where a district court denies a defendant's limitation claim, the Jones Act plaintiffs are entitled to elect whether to remain in the limitation proceeding or to revive their original claims in the original forum with a jury trial.).

§ 13. What Are "Appropriate Proceedings."

[*Add new footnote after the words "exclusively in admiralty court" in the first sentence of the second paragraph of the section.*]

0.1 Bowoon Sangson Co. v. Micronesian Indus. Corp., 1984 A.M.C. 97 (9th Cir. 1983) (A Korean ship properly filed suit for limitation of liability in the Guam District Court where under Supplemental Rule F(9) no prior suit had been commenced nor attachment made in any other United States district court.).

§ 14. Preliminary Questions To Be Decided in a Limitation Situation.

[*Add new footnote to end of the second sentence following footnote 4.*]

4.1 Empressa Lineas Maritimas Argentinas S.A. v. United States, 1979 A.M.C. 2607 (D. Md. 1979), 1983 A.M.C. 2668 (D. Md. 1982), *aff'd*, 730 F.2d 153, 1984 A.M.C. 1698 (4th Cir. 1984) (A Coast Guard captain's superiors did not exercise reasonable diligence to investigate whether the captain's medical condition might affect his ability to perform as a commanding officer and, therefore, the United States could not limit its liability under 46 U.S.C.

§ 183(a) when the captain's judgment errors caused a collision with a freighter.).

[Add new footnote after the word "jurisdiction" in the last paragraph on page 2–14.]

4.2 It should be noted that the Limitation of Liability Act is not a source of admiralty jurisdiction. *In re* David Wright Charter Serv. of N.C., 925 F.2d 783, 1991 A.M.C. 2927 (4th Cir. 1991) (A complaint for limitation of liability for damages resulting from a fire and explosion on a ship occurring five months after the ship was placed on blocks for repairs in a shed 75 feet from water was dismissed for lack of admiralty jurisdiction.); *In re* Dickenson, 780 F. Supp. 974 (E.D.N.Y. 1992) (A petition for protection under the Limitation of Liability Act was dismissed for lack of admiralty jurisdiction where the vessel fire being litigated occurred approximately fifty feet from water while the vessel was in drydock.).

§ 15. Time for Instituting Limitation Proceedings and Other Actions.

N.1 *In re* Big Deal, Inc., 765 F. Supp. 277, 1992 A.M.C. 48 (D. Md. 1991) (Where the owner of a fishing vessel filed its petition for limitation of liability more than six months after it had received sufficient information concerning the alleged accident by the claimant, the proceeding was dismissed.); N.Y.T.R. Transp. Corp., Lim. Proes. Scow Marcy, 1985 A.M.C. 2827 (E.D.N.Y. 1985) (A nonresident vessel owner brought a timely limitation of liability proceeding where the complaint was filed in federal court within six months after its statutory agent received notice of New York state court action from the New York Secretary of State.); Jung Hyun Sook v. Great Pacific Shipping Co., 632 F.2d 100, 1981 A.M.C. 1232 (9th Cir. 1980) (A complaint filed against a shipowner in a Korean court was not a written notice of claim sufficient to commence the running of the six-month statute of limitations of 46 U.S.C. § 185. The court reasoned that the limitation of liability action provided for in § 185 was designed to permit the consolidation of all actions into one action that could dispose of all claims and that it would make little sense to require a shipowner to file under § 185 when the limitation action could neither limit the owner's liability nor halt the other proceeding. Since the Korean suit would continue regardless of an injunction issued by a U.S. district court, the purpose of § 185 would be frustrated if the filing in the Korean court were deemed sufficient written notice for § 185 purposes.).

N.3 *But see In re* Morania Barge No. 190, Inc., 690 F.2d 32, 1982 A.M.C. 2679 (2d Cir. 1982) (Where a claimant against a vessel in a state court proceeding who for over four-and-one-half years had been asserting damages that were more than $100,000 less than the value of the vessel suddenly moved to amend the claim to $2,500,000, the six-month limitation period of

Chapter VI.

PROCEDURAL CONSIDERATIONS

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§ 51. Limitation Against a Single Claim—No Concourse of Claimants.

A shipowner sued for damage in a state or federal law court does not have to plead or claim limitation of liability in such a non-admiralty court. While he has heretofore, in suitable

circumstances, been allowed to plead limitation in any non-admiralty court, and probably still has that right, he is not compelled to do so.[1]

When there is only one possible suit for damages and one shipowner, the advantage of 46 U.S.C. § 183 and the other limitation provisions could, prior to the 1936 amendments, be obtained in a state court by proper pleading.[2] Although it is not clear whether this procedure has been altered,[3] if the shipowner decides to invoke the jurisdiction of the federal district court by a limitation petition,[4] the question then arises whether, as a matter of discretion, the federal jurisdiction should be exercised to dispose of the entire cause.[5] Such discretion should be exercised to preserve, where possible, the

[1] The Norco (Larsen v. Northland Transp. Co.), 292 U.S. 20, 54 S. Ct. 584, 78 L. Ed. 1096, 1934 A.M.C. 501 (1934); The Admiral Fiske and Floridian, 41 F.2d 718, 1930 A.M.C. 1220 (9th Cir. [Wash.]), *cert. denied*, 282 U.S. 874 (1930); *Cf.* Colonial Sand & Stone Co. v. Moscelli, 151 F.2d 884, 1945 A.M.C. 1493 (2d Cir. [N.Y.] 1945).

[2] The Lotta, 150 F. 219 (E.D.S. C. 1907); Delaware River Ferry Co. v. Amos, 179 F. 756 (E.D. Pa. 1910); Carisle Packing Co. v. Sandanger, 259 U.S. 255, 42 S. Ct. 475, 66 L. Ed. 927 (1922).

See, also, American Steamboat Co. v. Chace, 83 U.S. (16 Wall.) 522, 21 L. Ed. 369 (1873); Loughlin v. McCaulley, 186 Pa. 517 (1898).

See § 73 *infra*.

[3] The argument that the procedure has been altered proceeds from the fact that the amendatory Act of June 5, 1936, c. 521, § 3; 46 U.S.C. § 185 specifies three methods of procedure, any one of which the shipowner may, at his option, select. See § 14 *supra*. Hence, it is said that no other methods of procedure may now be employed. The argument has not as yet been presented to a court in such circumstances as to require a decision. See The Grasselli Chemical Co. No. 4, 20 F. Supp. 394, 1937 A.M.C. 1070 (S.D.N.Y. 1937).

[4] White v. Island Transp. Co., 233 U.S. 346, 34 S. Ct. 589, 58 L. Ed. 993 (1913).

In re Wheeler's Will, 191 Misc. 33, 76 N.Y.S.2d 159, 1948 A.M.C. 495 (N.Y. Surr. Ct. 1948) (Limitation of liability can be asserted as a defense in a state court action.); King v. Liotti, 76 N.Y.S.2d 98, 1948 A.M.C. 476 (Sup. Ct. 1948) (Limitation of liability may not be asserted as a defense to a state court death action based on the personal negligence of the owner and operator of a motor boat.).

[5] Langnes v. Green (The Aloha), 282 U.S. 531, 51 S. Ct. 243, 75 L. Ed. 520, 1931 A.M.C. 511 (1931).

shipowner's rights under the Limitation of Liability Act and the suitor's rights to a common law remedy in the common law courts under the Judiciary Act of 1789.[6] The following considerations affect the court's decision:

If the effect of remitting the cause to the common law court will be to preserve the rights of both parties under both statutes, the federal admiralty court should exercise its discretion by remitting the cause to the common law court. Failure to act in this manner should provide a basis for appeal on the grounds of abuse of discretion.[7] Where the cause is remitted

[6] 28 U.S.C. § 1333(1):

"**Admiralty, maritime and prize cases**

"The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled. . ."

[7] Langnes v. Green (The Aloha), N.5 *supra.*

The rule in *The Aloha* was subsequently re-stated by Mr. Justice Sutherland in the following language:

"The situation then being that one statute [The Judiciary Act of 1789] afforded the right to a common-law remedy, and another the right to seek a limitation of liability, we said that a case was presented for the exercise of the sound discretion of the district court whether to dissolve the restraining order and permit the State Court to proceed, or to retain complete jurisdiction": *Ex parte* Green (The Aloha), 286 U.S. 437, 52 S. Ct. 602, 76 L. Ed. 1212, 1932 A.M.C. 802 (1932).

See The Rosa (*In re* New York Harbor Towboat Co.), 53 F. 132 (S. D.N.Y. 1892); The Trim, 1934 A. M.C. 1512 (D. Mass. 1934).

Similarly it has been held that the court, in limitation proceedings begun after verdict but before judgment in a state court, may allow the state court proceedings to go to judgment for the purpose of establishing the amount to which the limitation is to be applied: Davenport v. Winnisimmet Co., 162 F. 862 (1st Cir. [Mass.]), *cert. denied,* 212 U.S. 576 (1908), and this case, while not recently cited, appears to be in accord with the rule of Langnes v. Green.

In The Kearney, 3 F. Supp. 718, 1933 A.M.C. 705 (E.D.N.Y. 1933), the single claimant conceded the right to limit, but disputed the value of the vessel. The court said that the issue of liability could be decided by a common-law jury, but the issue of value must be tried in the admiralty court.

See *In re* Putnam (The Alcyone), 55 F.2d 73, 1932 A.M.C. 174 (2d Cir. [N.Y.]), *cert. denied,* 286 U.S. 558 (1932).

to the common law court, the admiralty court will not dismiss the petition, but retain jurisdiction in the event that a change in the situation, such as a challenge by the plaintiff to the shipowner's right to limitation, should make it necessary to assert the paramount federal right.[8] But if the effect of remitting the cause to the common law court would be to preserve only the right of the plaintiff while sacrificing the right of the shipowner to have his liability limited by the federal admiralty court, then such court should accept and retain jurisdiction and enjoin any action in the common law courts. By the same token, if the case for a limitation of liability assumes such a form that only a federal admiralty court is competent to afford relief, the jurisdiction of that court is exclusive and must be exerted to dispose of the entire cause; and an action in the state or other common law court may not be further prosecuted.[9]

Provided that the claimant does not challenge the privilege of limitation, the shipowner may not draw an action against him into the admiralty court when there is only a single claim, even where that claim is greater than the value of the vessel.[10] Where a single suit is commenced against the owner in admiralty instead of at law, the suit will not be enjoined in a limitation proceeding begun in another district if there is no reasonable prospect that the claims will exceed the value of the ship.[11]

[8] *Ex parte* Green, N.7 *supra;* Petition of Boston Tow Boat Co. (The Taurus), 1940 A.M.C. 72 (D. Mass. 1939); The S & H No. 7, 32 F. Supp. 282, 1940 A.M.C. 778 (E.D.N.Y. 1940); Curtis Bay Towing Co. v. Tug Kevin Moran, Inc. 159 F.2d 273, 1947 A.M.C. 51 (2d Cir. [N.Y.] 1947).

[9] Sutherland, J., in *Ex parte* Green, N.7 *supra.*

[10] Petition of Boston Tow Boat Co. (Taurus), N.8 *supra;* The S & H No. 7, N.8 *supra*; Red Bluff Bay Fisheries, Inc. v. Jurjev (The Helen L.), 109 F.2d 884, 1940 A.M.C. 1156 (9th Cir. [Wash.] 1940); Hedger Transport Co. v. Gallotta, 145 F.2d 870, 1944 A.M.C. 1462 (2d Cir. [N. Y.] 1944); Petition of Trinidad Corp. (The Fort Mercer), 229 F.2d 423, 1956 A.M.C. 872 (2d Cir. [N.Y.] 1955); Pennell v. Read, 309 F.2d 455, 1963 A.M.C. 2035 (5th Cir. [Fla.] 1962). *Contra* Petition of Dwyer Lighterage, Inc. (The Pelham), 69 F. Supp. 586, 1946 A.M.C. 1560 (S.D.N.Y. 1946).

[11] Curtis Bay Towing Co. v. Tug Kevin Moran, Inc., N.8 *supra.*

In a one-claim limitation proceeding the claimant may be permitted to maintain an action at law to determine the issue of liability upon filing a waiver of any claim of *res judicata* in reference to the issue of limitation of liability based on the judgment in the law action.[12] And where claimants stipulate

[12] Petition of Red Star Barge Line (Red Star 40), 160 F.2d 436, 1947 A.M.C. 524 (2d Cir. [N.Y.]), *cert. denied*, 331 U.S. 850 (1947); The Moran Scow No. 96, 75 F. Supp. 392, 1948 A.M.C. 321 (E.D.N.Y. 1948), *aff'd*, 185 F.2d 386, 1951 A.M.C. 66 (2d Cir. 1950); The Great Lakes Dredge & Dock Co. v. Lynch (James A. Dubbs), 173 F.2d 281, 1949 A.M.C. 986 (6th Cir. [Ohio] 1949); Waldie Towing Co. v. Ricca, 227 F.2d 900, 1956 A.M.C. 73 (2d Cir. [N.Y.] 1955); Star Brick Corp. v. Johnson, 262 F.2d 251, 1959 A.M.C. 1660 (2d Cir. [N.Y.] 1959); Weymouth, 223 F. Supp. 161, 1964 A.M.C. 448 (D. Mass. 1963).

Petition of Spearin, Preston & Burrows, Inc. (The Lavinia D.), 190 F.2d 684, 1951 A.M.C. 1523 (2d Cir. [N.Y.] 1951) (An erroneous requirement that the claimant concede the right to limit as a condition of permitting continuance of the state court action was waived by claimant's statement at the trial that he was willing to have the issue of limitation determined by the admiralty court.); The Ann Marie Tracy, 86 F. Supp. 306, 1949 A.M.C. 1815 (E.D.N.Y. 1949) (An injunction will not be modified to permit continuance by one party of a state court action when there are several damage claimants in respect of the same accident.): The Four Sisters, 75 F. Supp. 399, 1947 A.M.C. 1623 (D. Mass. 1947) (The modification of the injunction to permit the prosecution of a state court death action on behalf of the father of a seaman was held not to preclude determination of liability to other beneficiaries under the Death On the High Seas Act.); Moran Transportation Co. v. Mellino, 185 F.2d 386, 1951 A.M.C. 66 (2d Cir. [N.Y.] 1950), *cert. denied*, 340 U.S. 953 (1951) (The filing of a second claim does not preclude continuance of the state court action if the first claimant recognizes the priority of the second claim.); Hedger Transportation Corp. v. Gallotta (Rehearing), 1945 A.M.C. 150 (2d Cir. [N.Y.] 1945) (If the second claim is not of a type against which the owner may limit liability, the first claimant is entitled to proceed in state court provided that he consents to having the limitation issue heard in admiralty.).

If the state court should proceed *sua sponte* after an injunction is issued, the petitioner cannot claim *res judicata* of the state court judgment in the limitation proceeding: Beal V. Waltz, 309 F.2d 721, 1962 A.M.C. 2533 (5th Cir. [Fla.] 1962). And even where the state court finds the owner negligent, the district court can still make its own findings provided the issue of limitation was reserved at the time the state court action was allowed to proceed: Port of Pasco v. Pacific Inland Navigation Co. 324 F.2d 593, 1963 A.M.C. 2510 (9th Cir. [Wash.] 1963).

that their combined recoveries will not exceed the limitation fund, the injunction will be dissolved remitting such claimants to their common law remedies.[13]

§ 52. Limitation Against Two or More Claims—Concourse of Claimants.

Whenever there are two or more claimants presented or threatened,[1] in respect of his vessel and of a single event or

As to the rights of the parties to a jury trial when limitation of liability is raised as a defense in a law action, see Famiano v. Enyeart, 398 F.2d 661, 1968 A.M.C. 2147 (7th Cir. [Ind.] 1968), *cert. denied*, 393 U.S. 1020 (1969) and Terracciano v. McAlinden Construction Co., 485 F.2d 304, 1973 A.M.C. 2111 (2d Cir. [N.Y.] 1973).

While the courts will give effect to the Saving to Suitors clause where possible, forum shopping will not be condoned. If a claimant first sues in state court and the owner files a limitation petition in federal court, the claimant cannot (after sucessfully resisting the petition and getting the case transferred back to state court) non-suit his state court action and attempt to institute new proceedings on the civil side of the federal court: Eager v. Kain, 158 F. Supp. 222, 1957 A.M.C. 2447 (E.D. Tenn. 1957).

And where a husband and wife both file claims against an owner, it is not such a single-claim situation as to allow proceeding in state court upon the filing of a stipulation, even when the husband agreed to drop his claim if the petitioner was held entitled to limit: Gottlieb's Claim (My-Flo), 142 F. Supp. 364, 1956 A.M.C. 1342 (D. Mass 1956).

[13] Lake Tankers Corp. v. Henn (Eastern Cities), 354 U.S. 147, 77 S. Ct. 1269, 1 L. Ed. 2d 1246, 1957 A.M.C. 1165 (1957); Petition of the Texas Company (The Washington), 213 F.2d 479, 1954 A.M.C. 1251 (2d Cir. [N.Y.]), *cert. denied*, 348 U.S. 829 (1954), *clarified*, 220 F.2d 744, 1955 A.M.C. 716 (2d Cir. [N.Y.] 1955).

[1] The two claims must be of a type against which the shipowner may limit liability. In Hedger Transport Corp. v. Gallotta, 145 F.2d 870, 1944 A.M.C. 1462 (2d Cir. [N.Y.] 1944), *rehearing at* 1945 A.M.C. 150 (2d Cir. [N.Y.] 1945), a longshoreman filed an action for injuries against a barge owner in a state court. The owner commenced a limitation proceeding in the district court, and the longshoreman filed a consent to the limitation of liability and agreed that the value of the barge should be fixed in the admiralty court. The district court then vacated its stay of the state court action and thereafter the longshoreman joined the charterer of the barge. The charterer filed a cross action against the owner based on the owner's breach of the covenant of seaworthiness implied in the oral charter. In this situation the Circuit Court of Appeals held that the claim

TAB C

THE
LAW OF ADMIRALTY

SECOND EDITION

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§ 10–18. When either of the components in the standard situation is lacking—that is, when there is only one claim *or* when the aggregate of all claims will not exhaust the available limitation fund—the district court with which a petition for limitation of liability is filed will not enjoin the prosecution of claims in other courts, although in most situations it will retain jurisdiction of the case for the purpose of deciding the limitation issue, if, as and when such a decision becomes necessary. In this way the courts have sought, within the framework of the Limitation Act, to give effect to the policy of the saving to suitors clause. The working out of the theory has not been at all points entirely logical, but logic should not be required of courts which are obliged to implement, at one and the same time, two inconsistent and contradictory policies.

When the limitation fund exceeds the amount of all claims that could possibly be asserted against the owner, the district court must allow other actions against the owner, in state or federal court, to proceed.[71] At the outset, when its jurisdiction has been invoked by the filing of a petition, the district court must determine: 1) the amount of the limitation fund and 2) the aggregate amount of claims, including both those known to exist and those that might be asserted in the future. Only when it is satisfied that the claims exceed the fund may the court properly enjoin the prosecution of action in other courts. The mere existence of a multiplicity of claims, and the convenience (for the defendant) of bringing them into "concourse" does not justify the injunction.

The determination whether there is a "possibility" that claims, unknown as well as known, may exceed the fund is a human judgment and, as such, subject to error. On the whole the cases suggest that doubt should be resolved in favor of the shipowner, but the doubt must be a real one. In The Miss New York [72] an excursion steamer collided with a tanker in New York harbor. The steamer was appraised at $950,000; claims filed against the owner seven months later totaled only $159,000. Plaintiff, a personal injury claimant, moved to be allowed to proceed with a state court action against the owner. In denying the motion, Judge Clancy noted that there had

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70. See § 10–41 *infra*.

71. The Aquitania, 14 F.2d 456, 1926 A.M.C. 1071 (S.D.N.Y.1926), affirmed 20 F.2d 457, 1927 A.M.C. 1320 (2d Cir. 1927); Curtis Bay Towing Co. v. Tug Kevin Moran, Inc., 159 F.2d 273, 1947 A.M.C. 51 (2d Cir. 1947).

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Pre-1936 practice was apparently, where claims could not possibly exceed the fund, to dismiss the limitation petition out of hand.[74] The dismissal was not irrevocable, since if the assumed state of facts turned out to be wrong and it later appeared that claims did exceed the fund there was nothing to prevent the owner from filing a second petition. The 1936 amendments to the Limitation Act, which require the owner to file his petition within six months of notice of claim, have changed the situation. So that the owner may not be precluded by the six months requirement from filing a petition if the facts turn out to be other than as they are assumed, the district court should let the petition stand. In such a case, decided in 1947, Judge Learned Hand wrote:

> **"It cannot prejudice claimants that the proceeding remains open, if they are free to press their suits to judgment and to collect. If meanwhile by some chance, which at the moment is too remote for practical recognition, other claims should appear which will make a concourse proper, a concourse can take over the situation as it then is; everything theretofore decided will remain decided, but the shipowner will be entitled to such part of his relief as may remain possible. Both sides will be protected in their remedies so far as it is possible to protect them without unfair invasion of the interests of either by the other."** [75]

Claimants occasionally feel that the privilege of proceeding at common law is so important that they will enter into stipulations, reducing claims originally stated in larger amounts to amounts less than the limitation fund or agreeing never to enter judgments in any court for more than the amount of the limitation fund. Wheth-

73. Other cases reaching the same result as The Miss New York are The Victoria (Petition of Alaska S. S. Co.), 3 F.2d 330, 1926 A.M.C. 1096 (W.D. Wash.1924). The Tug No. 16, 237 F. 405 (S.D.N.Y.1916); The George W. Fields, 237 F. 403 (S.D.N.Y.1915); The Defender, 201 F. 189 (E.D.N.Y.1912).

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er the offer of such a stipulation, joined in by all claimants, is enough to force the district court to dissolve or modify its injunction was not, when the question first came up in litigation, entirely clear. The Second Circuit held in a series of cases decided during the 1950's that such a stipulation must be accepted and the injunction dissolved or modified.[76] Courts which thought more highly of the concourse of claims idea than did the Second Circuit, might not have been so ready to admit the ouster of jurisdiction by stipulation.[76a] However, in Lake Tankers Corporation v. Henn,[76b] the Supreme Court adopted what may be called the Second Circuit view of the matter, so that the possibility of judicial dissension was strangled at birth.

In Henn, as the result of a collision between a yacht and a tug which was push-towing a barge several passengers on the yacht were injured and one was killed. Lake Tankers (which owned both the tug and the barge) petitioned for limitation and was required to post separate bonds covering the value of the tug ($118,542.21) and the

76. Petition of Texas Co. (The Washington), 213 F.2d 479, 1954 A.M.C. 1251 (2d Cir. 1954), certiorari denied *sub nom.* Texas Co. v. United States, 348 U.S. 829, 75 S.Ct. 52 (1954). Aggregate claims of $2,225,000 having slightly exceeded the $2,109,000 limitation value of The Washington, the owner filed his petition and bond, whereupon various claimants reduced their claims until the aggregate was $350,000 less than the limitation value. The district court refused to vacate the injunction. On appeal, Judge Frank reversed, but, relying on the passage from the Curtis Bay Towing Co. case quoted in the text, at note 75 *supra*, held that "the district court will retain jurisdiction of the limitation proceeding". (This case involved appeals from two District Court orders, one by Judge Ryan which, as stated, was reversed; the other by Judge Weinfeld granting a motion to transfer the trial of a collision libel to another District which was affirmed.)

In Petition of Poling Holding Corp., 120 F.Supp. 890, 1954 A.M.C. 1733, (S.D.N.Y.1954), one argument made to sustain the right to limit was that a sufficient reduction had not been made to come under the Curtis Bay Towing Co. case. The claims amounted to within $16,000 of the $156,000 fund while in the Curtis Bay case they had been but one-seventh of the fund. The court held that the Curtis Bay case controlled since there was little likelihood of further claims.

In Petition of Trinidad Corp. (The Fort Mercer) 229 F.2d 423, 1956 A.M.C. 872 (2d Cir. 1955), the Court reaffirmed its holding in the Texas Co. case, which it had been asked to overrule. In Trinidad, however, Judge Hincks concluded that the stipulations filed with the District Court (to reduce aggregate claims below the limitation value) were for various reasons not satisfactory; the order allowing claimants to sue outside the limitation proceeding was reversed and the case remanded for further proceedings.

76a. See, for example, Judge Aldrich's opinion in Gottlieb's Claim (Petition of Boraks), 142 F.Supp. 364, 1956 A.M.C. 1342 (D.Mass.1956). Of course, in a no-fund case (where the ship has been lost with no freight pending), the right to limit must be decided in the limitation proceeding before state court actions are allowed, see The Susan (Petition of Wood), 230 F.2d 197, 1956 A.M.C. 547 (2d Cir. 1956) (where plaintiffs were, however, in order to avoid the bar of the Jones Act statute of limitations, allowed to institute their state court actions, whose prosecution would be enjoined until determination of the limitation issue).

76b. 354 U.S. 147, 77 S.Ct. 1269, 1957 A.M.C. 1165 (1957). The Henn case came up from the Second Circuit on certiorari, so that the Second Circuit's decision in Henn, 232 F.2d 573, 1956 A.M.C. 1018 (1956), affirmed on rehearing en banc, 235 F.2d 783 (1956), should be added to the list of cases digested in note 76 *supra*.

barge ($165,000.). The widow of the dead passenger, as his administratrix, had brought suit in state court in which she sought to recover $500,000. from Lake Tankers. Her state court action having been enjoined by the admiralty court, she filed a claim in the limitation proceeding for $250,000., allocating $100,000. of her alleged damage to the tug and the remaining $150,000. to the barge. (The aggregate of all the other claims filed in the limitation proceeding was less than $10,000., so that the bonds exceeded all claims.) On the widow's entering into the customary stipulation, the District Court ordered that she be allowed to proceed with her state court action. The Second Circuit affirmed, modifying the order to provide that any verdict in her favor in excess of $100,000. could be collected only if the jury allocated the amounts for which the tug and barge were found responsible. This disposition was approved by a bare majority of the Supreme Court.[76c] Justice Clark, for the majority, reviewed the history of the Limitation Act in a way that can hardly have given much comfort to shipowners. He concluded, citing Langnes v. Green: [76d]

> "The state proceeding could have no possible effect on the petitioner's claim for limited liability in the admiralty court and the provisions of the Act, therefore, do not control. . . . It follows that there can be no reason why a shipowner, under such conditions, should be treated any more favorably than an airline, bus or railway company. None of them can force a damage claimant to trial without a jury. They, too, must suffer a multiplicity of suits. Likewise, the shipowner, so long as his claim of limited liability is not jeopardized, is subject to all common-law remedies available against other parties in damage actions." [76e]

He then went on to comment on the concourse of claims idea. Referring to Justice Frankfurter's opinion in Maryland Casualty Company v. Cushing,[76f] he commented:

> **"The language in [that] opinion to the effect that *concursus* is 'the heart' of the limitation system . . . refers to those cases when the claims exceed the value of the vessel and the pending freight. In that event, as we have pointed out, the *concursus* is vital to the protection of the offending owner's statutory right of limitation. But this is not to say that where *concursus* is not necessary to the protection of this statutory right it is nonetheless required." [76g]**

76c. Justices Harlan, Frankfurter and Burton dissented. Justice Whittaker did not participate.

76d. 282 U.S. 531, 51 S.Ct. 243, 1931 A.M.C. 511 (1931). The case is discussed in the following section.

76e. 354 U.S. at p. 153, 77 S.Ct. at p. 1272.

76f. 347 U.S. 409, 74 S.Ct. 608, 1954 A.M.C. 837 (1954). The case is discussed in § 10-31 *infra*.

76g. 354 U.S. at p. 154, 77 S.Ct. at p. 1273.

Unmollified by Justice Clark's explication of his Cushing opinion, Justice Frankfurter, in Henn, joined in Justice Harlan's dissent.

In Henn only the death claimant sought (and was granted) leave to prosecute her state court action outside the limitation proceeding. However, it seems to follow from Justice Clark's opinion that the several personal injury claimants could also, on entering into the proper stipulations have pursued their common law remedies in separate civil actions. Absent the demonstrated need for a *concursus*, the shipowner, like the "airline, bus or railway company" must, as Justice Clark put it, "suffer a multiplicity of suits." In appropriate cases procedures are, of course, available for consolidating the civil actions [76h] so that the spectre of a "multiplicity of suits" is not as threatening as it sounds. It may be that if hundreds of claims were filed in the limitation proceeding, the *concursus* would be in any case maintained. However, if such a case arose in the real world, the aggregate of the claims would inevitably exceed the limitation found, so that the need for the *concursus* could be assumed.

The Henn case itself may be of no great interest, although it did serve the useful function of settling a question which otherwise might have accounted for a substantial amount of unnecessary litigation.[76i] We have quoted at some length from the majority opinions in the thought that the passages quoted, along with the oft-quoted passage from Justice Black's opinion in the Cushing case,[76j] help make the point that the majority which dominated the Court during the 1950's and 1960's was on the whole unsympathetic to the limitation idea. Henn was the last limitation case which the Court agreed to hear during that period. The Court's refusal for the better part of twenty years to pass on limitation cases of considerably more interest and importance than Henn must be counted, by the proponents of limitation, as a stroke of great good fortune. At the moment of writing the Court, as reconstituted in the 1970's, has not yet indicated whether its present membership continues to hold the attitudes

76h. See, by way of illustration, the Blunk case discussed in the text following note 59j *supra*.

76i. For an excellent analysis of the Henn case and its background in the Second Circuit cases (see note 76 *supra*), see Judge Brown's opinion in Pershing Auto Rentals, Inc. v. Gaffney, 279 F.2d 546, 1960 A.M.C. 1287 (5th Cir. 1960).

In Hanseatische Reederei Emil Offen & Co. v. Marine Terminals Corp., 1973 A.M.C. 1934 (N.D.Cal.1973), a multiple-claim inadequate-fund case, the District Court refused to allow the claimants to pursue their common law remedies outside the limitation proceeding. Judge Zirpoli observed: "Even if ordinarily . . . the claimants could be permitted to proceed in a state court, the admiralty court has the discretionary power to complete the case. [Citations omitted.] In view of the length of time that has already been spent trying the case and the small additional amount of time that would be required to complete it, the court concludes that it would be an abuse of discretion not to finally *adjudicate* this entire controversy in this court." (1973 A.M.C. at p. 1938. Emphasis in original.) The decision seems out of line with the general understanding of the meaning of the Henn case.

76j. See text at note 13 *supra*.

towards the purpose and policy of the Limitation Act which commended themselves to the majority of the Warren Court.

§ 10–19. In the case of multiple claims which do not exhaust the limitation fund, it would be convenient for the defendant-shipowner to bring the claims into concourse, but there is no need for limitation: on the ground that the Limitation Act does not exist merely to provide a *forum conveniens*, the courts have refused to gather all the claims into a limitation proceeding. The case of the single claim which exceeds the limitation fund presents the opposite situation. There is no need for a concourse, but there is need for limitation. In the single claim case, as in the converse, the case law allows plaintiff to have his common law action. However, since here there is a need for limitation and since under Supreme Court theory questions of limitations are properly cognizable only in the admiralty court, plaintiff is allowed to proceed outside the admiralty only on condition that he acknowledge defendant's right to litigate the question of limitation (as distinguished from his liability on the merits) in the admiralty court.

Until 1914 there was doubt whether a shipowner had any right to petition for limitation of liability against a single claim. The doubt was based on the observation that the relevant sections of the Limitation Act referred to claims and claimants in the plural as well as on the "concourse of claims" theory of the limitation proceeding. In White v. Island Transp. Co.,[77] the Supreme Court set these doubts at rest, holding that the limitation proceeding was available in the single claim as in the multiple claim situation, thus preferring the policy of the Limitation Act over the policy of the saving to suitors clause.

In 1931 in Langnes v. Green [78] the Supreme Court reconsidered the question and this time attempted to find a solution which would preserve the policies underlying both statutes. Such a feat called for no mean powers of judicial sleight of hand; it is not surprising that the courts below found the mandate in Langnes v. Green so obscure that the case was promptly returned to the Supreme Court docket, this time captioned Ex parte Green,[79] for the Court to explain in a second opinion what it had meant by the first. The two Green cases, which in effect overruled the White case, were the Supreme Court's last contributions to the subject; they remain the essential gospel on the handling of single claim cases where plaintiff elects to sue at common law and defendant seeks to move the case into admiralty by petitioning for limitation.

77. 233 U.S. 346, 34 S.Ct. 589 (1914). A passenger, injured on board a small vessel, brought suit in a state court against the owner. The one claim, according to the petition for limitation, exceeded the value of the vessel. The Court's opinion, however, did not make the excess the basis of decision.

78. 282 U.S. 531, 51 S.Ct. 243, 1931 A.M.C. 511 (1931).

79. 286 U.S. 437, 52 S.Ct. 602, 1932 A.M.C. 802 (1932).

The facts in the Green cases were as follows: Green, an employee on board the fishing vessel Aloha, sued Langnes, owner of the vessel, in state court to recover for personal injuries. Two days before the trial date of the state court proceeding Langnes petitioned the appropriate federal district court for limitation of liability. The district court enjoined further prosecution of the state court action and issued a monition requiring all claims to be filed against Langnes within a fixed time. Green filed a claim for $25,000 and no other claim was filed. The parties stipulated the value of the Aloha to be $5,000. On this state of the proceedings Green moved to dissolve the injunction and to be allowed to proceed with his state court action. The district court denied the motion, tried the case on the merits, held that Langnes was not liable to Green in any amount and entered judgment accordingly. The Supreme Court, commenting that the problem presented to the district court was "quite simple", held that, in the exercise of its discretion, the trial court should have allowed the state court action to proceed "retaining, as a matter of precaution, the petition for a limitation of liability to be dealt with in the possible but . . . unlikely event that the right of petitioner to a limited liability might be brought into question in the state court. . . ." [80] Only in this way, said the Court, can the rights of both parties [*i. e.* under the Limitation Act and under the saving to suitors clause] be preserved, citing as governing authority the opinion of Judge Brawley, "a capable admiralty judge," in The Lotta.[81] The district judge may be sympathized with for having overlooked this "quite simple" point, since he might reasonably have imagined that the authority of The Lotta, a 1907 case, had been destroyed by the Supreme Court's 1914 holding in the White case.

The Langnes v. Green mandate remanded the case to the district court "for further proceedings in conformity with this opinion." The district court dissolved the restraining order and allowed the state court action to proceed. In that action, according to the Supreme Court's narrative in Ex parte Green, Green then "put in issue the right of the owner to limited liability, by challenging the seaworthiness of the vessel and the lack of the owner's privity or knowledge." [82] The district court, feeling that this was the "possible but . . . unlikely event" contemplated in Langnes v. Green, enjoined the state court proceedings a second time unless Green should withdraw the limitation issue from the state court proceeding. Green then moved in the Supreme Court for leave to file a petition for a writ of mandamus against the district judge requiring him "to conform to the opinion of this court in Langnes v. Green . . ." In Ex parte Green the Supreme Court denied the motion, holding that the district judge had properly interpreted the mandate and that,

80. 282 U.S. 531, 541, 51 S.Ct. 243, 247, 1931 A.M.C. 511, 518.

81. 150 F. 219 (E.D.S.C.1907).

82. 286 U.S. 437, 440, 52 S.Ct. 602, 603, 1932 A.M.C. 802, 804.

unless Green agreed to withdraw the limitation issue from the state court proceeding, the "cause became cognizable only in admiralty."

The two Green opinions established the broad outlines of the practice which has ever since been followed, although it required a substantial volume of work in the circuit courts before the details were filled in. The most important of the subsidiary details was the exact content of the stipulation that plaintiff had to agree to in the limitation proceeding as a condition of getting back into the state court, and, in particular, whether he had to concede the defendant's right to limit (as some district courts held) or merely defendant's right to have the limitation issue litigated in the admiralty court. The Second Circuit in 1947 decided that only the right to litigate had to be conceded and has since been followed by other courts.[83]

The procedure which has been worked out under the Green cases is as follows: a single claim plaintiff who wishes to prosecute a common law action after the shipowner has filed a petition for limitation must

a) file his claim in the limitation proceeding;

b) where a stipulation for value has been filed in lieu of the transfer of the ship to a trustee, concede the sufficiency in amount of the stipulation;

(c) consent to waive any claim of *res judicata* relevant to the issue of limited liability based on any judgment obtained in the state court;

d) concede petitioner shipowner's right to litigate all issues relating to limitation in the limitation proceeding.[84]

83. Petition of Red Star Barge Line, Inc., 160 F.2d 436, 1947 A.M.C. 524 (2d Cir. 1947), certiorari denied 331 U.S. 850, 67 S.Ct. 1741 (1947). The Red Star Barge case was followed in Great Lakes Dredge Co. v. Lynch (The James A. Dubbs), 173 F.2d 281, 1949 A.M.C. 986 (6th Cir. 1949): and In re Trawler Gudrun, Inc., 101 F. Supp. 586, 1952 A.M.C. 75 (D.Mass. 1951). In The Lavinia D. (Petition of Spearin), 190 F.2d 684, 1951 A.M.C. 1523 (2d Cir. 1951), the district court had erroneously required the claimant to concede the petitioner's right to limit. On appeal the error was held waived by the repeated statements of the claimant's proctor at trial that he was willing to have the admiralty court decide the issues.

84. See the Red Barge Line case, note 83 *supra*; Petition of Moran Transp. Corp., 185 F.2d 386, 1951 A.M.C. 66 (2d Cir. 1950), certiorari denied 340 U.S. 953, 71 S.Ct. 573 (1951); Walde Towing Co., Inc. v. Ricca, 227 F.2d 900, 1956 A.M.C. 73 (2d Cir. 1955).

See the appendix to the opinion in the Eastern Cities—L. T. C. No. 38 (Petition of Lake Tankers Corp.), 232 F.2d 573, 1956 A.M.C. 1018 (2d Cir. 1956), for the forms of order and stipulation under which plaintiff was allowed to proceed in State court. This was the Second Circuit case affirmed *sub nom.* Lake Tankers Corp. v. Henn, 354 U.S. 147, 77 S.Ct. 1269, 1957 A.M.C. 1165 (1957). The reaffirmation of the doctrine of the Green cases in the Henn case (see text following note 76b *supra*) was so clear that the issue has almost entirely disappeared from litigation since the late 1950's. In Petition of Trawler Weymouth, Inc. (F/V. Weymouth), 223 F.Supp. 161, 1964 A.M.C. 448 (D.Mass.1963) Judge Wyzanski reviewed the history of the matter through Henn and held that an action seeking recovery both under the Jones Act and for maintenance and cure under the general maritime law should be allowed to proceed outside the limitation proceeding. Pennell v. Read, 309 F.2d 455, 1963 A.M.C. 2037 (5th

In what may be called the typical Langnes v. Green situation, the admiralty court dissolves or modifies its § 185 injunction to allow the civil action to proceed, meanwhile holding the limitation proceeding in abeyance until the result of the civil action is known. If, in that action, judgment is for the shipowner or is for the plaintiff in an amount less than the limitation fund, then the shipowner's right to limitation will never have to be decided. It is, however, possible for the admiralty court to reverse the customary sequence and decide the limitation issues first.

That procedure was followed in a case which came to the Fifth Circuit as Petition of Double D Dredging Company, Inc.[84a] Norton's administratrix brought a death action under the Jones Act. The shipowner petitioned for limitation, conceding in its petition that Norton had been a Jones Act seaman and that his death had occurred in navigable waters. The District Court decided to pass on the limitation issue first (without a jury), "consolidated" the Jones Act action and the limitation proceeding, and denied limitation. The Jones Act action then proceeded with a jury (apparently before the same District Judge) and there was a verdict for the defendant shipowner. In the jury action the shipowner was allowed to argue that Norton was not a Jones Act seaman and that his death had not occurred on navigable waters. On appeal the Fifth Circuit reversed, in an opinion by Judge Brown, on the ground that the shipowner was estopped from contesting in the jury action what he had already conceded in his limitation petition. Judge Brown suggested, somewhat obscurely, that a distinction could be drawn between the "navigable waters" concession, looked on as going to the jurisdiction of the admiralty court in the limitation proceeding, and the "Jones Act seaman" concession, not looked on as "jurisdictional" for that purpose. He added that the "navigability" issue appeared to have been "pivotal" in the jury's deliberations, so that the "concession" on that issue alone was

Cir. 1962) involved an odd switch on the usual situation: The single claimant had been injured in a Miami-Nassau yacht race. The two owners of the yacht, one a resident of Massachusetts, the other a resident of Florida, petitioned for limitation. The claimant moved to be allowed to bring separate action against each owner in Massachusetts and in Florida. The Fifth Circuit, affirming the District Court, analogized the case to the multiple claims—inadequate fund situation and held that the motion was properly denied. The claimant had offered to stipulate that, in the event of limitation being granted, each of the co-owners should be liable only in the amount of 50% of the limitation fund. The Pennell case seems inconsistent with the usual case-law interpretation of Largnes v. Green and Ex parte Green.

In Terracciano v. McAlinden Construction Co., 485 F.2d 304, 1973 A.M.C. 2111 (2d Cir. 1973) it appeared that the District Court, without objection from the defendant's counsel, had allowed the jury (in a Jones Act and unseaworthiness action) to decide whether the defendant was entitled to limitation of liability. The jury found that the defendant was liable, assessed the plaintiff's damages at $50,000 but entered a verdict for $5,000 on the theory that the defendant was entitled to limitation. The Second Circuit reversed for a variety of reasons. Judge Jameson's opinion did not say flatly that a jury can never decide the limitation issue but seemed to express surprise at the procedure.

84a. (Norton's case), 467 F.2d 468, 1972 A.M.C. 2377 (5th Cir. 1972).

enough to raise the estoppel. He also remarked that the District Judge, in the limitation hearing, had come "dangerously close to ruling that the shipowner was guilty of negligence and the vessel was unseaworthy, which, if intended as a finding, would have been *res judicata* or collateral estoppel in the jury case."

The Fifth Circuit's estoppel holding in Norton's case and, even more, Judge Brown's dictum about the possibility of the judge's finding in the limitation hearing being *res judicata* in the jury trial are of extraordinary interest. Both holding and dictum appear to be matters of first impression.[84b] In Norton's case the Jones Act action and the limitation proceeding had been "consolidated" and were apparently heard, successively, by the same judge. Would the same result follow if there had been no "consolidation" and if the jury trial had been held before a different judge or in a different court (state or federal)? If the District Judge, having "consolidated" the proceedings, had held the jury trial first, would the shipowner still have been "estopped" by the "concessions" in his limitation petition? Would he be estopped if the jury trial came first but in a different court? If the limitation hearing is held first, does the dictum mean that all "findings" are *res judicata* in the jury trial even if they are adverse to the plaintiff in the death action? Would not the plaintiff then be deprived of his constitutional right to a jury trial? Or does the dictum mean that findings in the limitation hearing are *res judicata* in the jury trial if they are in the plaintiff's favor but not if they are adverse to him?

The present discussion is being written so soon after the decision in Norton's case was reported that it is impossible to make even a guess as to whether the case will die unhonored and unsung or whether its apparently revolutionary implications will lead to an honorable and successful career in Shepard's Citation. Judge Brown's preeminence as an admiralty judge would seem to insure that the case will be at least pondered by the admiralty bar as well as by the membership of NACCA. It may be that shipowners' counsel, by giving thought to the matter, can prevent the Norton situation from arising again. There appears to be nothing in the relevant Rules [F (1) and F(2)] which made it necessary for the shipowner to "concede" in his limitation complaint (or petition) that Norton was a Jones Act seaman. If that is so, then that aspect of the case can be handled as a matter of proper drafting. The "navigability" point, as Judge Brown suggested, is somewhat trickier. Rule F(2) requires that the limitation complaint "state the voyage, if any, on which the demands sought to be limited arose . . ." If the vessel was indeed on a "voyage" at the time of the accident, it seems to follow that

84b. Judge Brown noted at the outset of his opinion that "The facts in this [Norton's] case in some respects parallel those of Davis v. Parkhill-Goodloe Co., 5th Cir., 1962, 302 F.2d 489, 1962 A.M.C. 1720." His reference was evidently to the facts and not to the legal issues involved in the 1962 case. Davis was a Jones Act case which did not in any way involve the Limitation Act.

it must also have been on "navigable waters," with the result that the "navigability concession" is inevitable.[84c] (The phrase "if any" in Rule F[2] presumably refers to cases when the vessel is in port, tied up at a wharf or, conceivably, in dry-dock.) If Judge Brown's dictum means that findings in a limitation hearing (at least if they are favorable to the plaintiff in the death or injury action) become *res judicata* in the jury trial, then counsel for petitioning shipowners may be well advised to give thought, in appropriate cases, to urging that the jury trial be held first. (Of course, if there was an unfavorable jury verdict on, say, unseaworthiness, the *res judicata* argument would run the other way, as no doubt it should.[84d])

Norton's case, to say the least, suggests possibilities of future development in an area where, it had seemed, the range of litigated issues had long since been settled.

§ 10–19a. In re Central Railroad of New Jersey[84e] raised, apparently for the first time, complicated questions about the interrelationship of the Limitation Act and the Bankruptcy Act in connection with the distribution of a limitation fund. In 1966 the Santa Isabel, owned by the Grace Line, had damaged a railroad drawbridge over the Raritan River in New Jersey. The New York and Long Branch Railroad (Long Branch), which owned the bridge, was itself owned in equal shares by the Central Railroad of New Jersey (Central) and the Pennsylvania Railroad Company, which later became the Penn-Central (PRR). Central and PRR operated the Long Branch under a long-term lease. Pending the determination of the Grace Line's liability, it was necessary for the railroads to advance funds for the repair of the drawbridge. Since Central's "cash position" made it impossible for it to put up its share, PRR advanced the entire amount (approximately $750,000.) under an agreement between the two railroads that PRR would be reimbursed both for its own advance and for its advance on behalf of Central out of whatever recovery might be obtained against the Grace Line. In 1966 Grace petitioned for limitation in the Southern District of New York. Central and PRR (with Long Branch joined as a nominal claimant) filed claims in the limitation proceeding. In 1967 Central petitioned for reorganization under § 77 of the Bankruptcy Act in the District of New Jersey. In 1968 the railroads and Grace, through their counsel, arrived at a settlement of the claims in the limitation proceeding which provided, inter alia, for the reimbursement to PRR of the advance for repairs which it had made both on its own behalf and on Central's. In January of 1969 Central's trustee applied to the New Jersey Reorganization Court for permission to join in the limitation

84c. On the extent to which plaintiffs in actions under the Jones Act and for unseaworthiness must (absent the "concession") prove that the accident occurred on navigable waters, see Chapter VI, §§ 6–21, 6–42.

84d. On the effect of a finding of "unseaworthiness" on the shipowner's right to limitation, see § 10–20 *et seq. infra*.

84e. 469 F.2d 857, 1973 A.M.C. 222 (3d Cir. 1972), certiorari denied 411 U.S. 938, 93 S.Ct. 1900 (1973).

TAB D

practice. Nothing in the governing provisions of the statute and rule requires this solecism.

We hold that, under these provisions, properly construed and applied to the present circumstances, all parties have the same time for appeal as has the United States, namely, sixty days. The motion to dismiss will be denied and the appeal will proceed in normal course to a hearing upon the merits.

Motion denied.

J. RAY McDERMOTT & COMPANY, Inc., Appellant,

v.

HUNT OIL COMPANY and Arkansas Fuel Oil Corporation, Appellees.

No. 17264.

United States Court of Appeals Fifth Circuit.

Jan. 9, 1959.

Admiralty petition by charterer of vessel for exoneration from or limitation of petitioner's liability. After monition and restraining order, the United States District Court for Eastern District of Louisiana, Herbert W. Christenberry, Chief Judge, granted motion of two claimants to dismiss order as to them on ground that claim advanced by such claimants resulted from breach of personal contract between the parties in failure to perform repair job to oil well in workmanlike manner and was not subject to limitation. Petitioner appealed. The Court of Appeals, Hutcheson, Chief Judge, held that the question of limitation could not be determined upon motion but that such question must await hearing of the case.

Reversed and remanded for further proceedings.

1. Shipping ⇐209(1)

In admiralty proceeding on petition by charterer of vessel for exoneration from or limitation of liability, question of limitation could not be decided upon motion. 46 U.S.C.A. § 183.

2. Shipping ⇐209(1⅛)

Where petitioner, as charterer of vessel, was owner pro hac vice, petitioner's employees were on vessel and petitioner's personal liability for acts of vessel was manifest, the United States District Court had admiralty jurisdiction of petition filed by petitioner for exoneration from or limitation of liability. 46 U.S.C.A. § 183.

Warren M. Faris, New Orleans, La., for appellant.

Leon Sarpy, New Orleans, La., for appellees.

Before HUTCHESON, Chief Judge, and CAMERON and WISDOM, Circuit Judges

HUTCHESON, Chief Judge.

This is not the first time that the questions presented for decision by this appeal have been before the court. When the matter was here before [1] it was on a petition for leave to file a petition for mandamus. This court in effect recognizing without deciding that the order under attack was an appealable order, denied the leave "without prejudice to the right of the applicant to renew it if and when it has without avail sought relief by appeal." The matter is now here, properly we think, on appeal.

What was begun, by an ordinary petition for exoneration from, or limitation of, liability, 46 U.S.C.A. § 183, and was continued as such, with the order of the court for monition and restraining order, the motion of Hunt Oil Co. and Arkansas Fuel Oil Corporation to recall, rescind,

1. In re J. Ray McDermott & Co., 5 Cir., 254 F.2d 390.

and dismiss the order as to them, on the ground that the claim they advance results from a breach of a personal contract between the parties in the failure to perform a repair job to an oil well in a workmanlike manner and hence is not subject to limitation, and the order of the district court granting the motion, has now been blown up by the brief of appellees into a cause celebre by the attempt to advance for the first time here the claim that the court was without jurisdiction because the subject matter of the suit was not of a maritime nature and, therefore, not within the admiralty jurisdiction.

[1] We think that the attempt must fail because it is not only quite plain that the district judge did not decide the case on the question of jurisdiction but on the question of whether the case was one for limitation of liability, but equally plain; that the case presented was within the admiralty jurisdiction; that the act of the court in attempting at this point to decide the question of limitation, was premature; and that it must await the hearing of the case when all questions, including the question of limitation must be decided. Our reasons for so thinking may be briefly stated.

The Supreme Court, in the landmark case of Hartford Accident & Indemnity Co. of Hartford v. Southern Pacific Co., 273 U.S. 207, 47 S.Ct. 357, 71 L.Ed. 612, a limitation case which had been tried in the Southern District of Texas and appealed to and affirmed by this court, 3 F.2d 923, considering the contention of the petitioner that jurisdiction was dependent upon the granting of limitation, authoritatively held to the contrary. Affirming that the statutes invoked in his proceeding have been uniformly given a construction to effect their great object, the court went on to say, 273 U.S. at pages 214, 215, 47 S.Ct. at page 358:

> "* * * that such a proceeding is entirely within the constitutional grant of power to Congress to establish courts of admiralty and maritime jurisdiction, (Norwich & New York Transp. Co. v. Wright, 13 Wall. 104, 20 L.Ed. 585); that to effect the purpose of the statute, Admiralty Rules * * * were adopted, by which the owner may institute a proceeding in a United States District Court in admiralty against one claiming damages for the loss, in which he may deny any liability for himself or his vessel, but may ask that if the vessel is found at fault his liability as owner shall be limited to the value of the vessel, as appraised after the occurrence of the loss, and the pending freight for the voyage; * * * that all others having similar claims against the vessel and the owner may be brought into concourse in the proceeding, by monition, and enjoined from suing the owner and vessel on such claims in any other court; that the proceeding is equitable in its nature, and is to be likened to a bill to enjoin multiplicity of suits, * * *."

Then, citing cases, it continued:

> **"It is quite evident from these cases that this Court has by its rules and decisions given the statute a very broad and equitable construction for the purpose of carrying out its purpose and for facilitating a settlement of the whole controversy over such losses as are comprehended within it, and that all the ease with which rights can be adjusted in equity is intended to be given to the proceeding. It is the administration of equity in an admiralty court. * * * It looks to a complete and just disposition of a many-cornered controversy, and is applicable to proceedings in rem against the ship, as well as to proceedings in personam against the owner; the limitation extending to the owner's property as well as to his person. The City of Norwich, 118 U.S. 468, 503, 6 S.Ct. 1150, 30 L.Ed. 134."**

In a later case, also from this circuit. Just v. Chambers, 312 U.S. 383, 668, 61 S.Ct. 687, 85 L.Ed. 903, the Supreme Court, quoting from and fully approving what was said in Hartford Accident &

Indemnity Co. of Hartford v. Southern Pacific Co. supra, again affirmed the sweeping character of the statutory remedy and concluded by saying:

> "There is thus jurisdiction to fulfill the obligation to do equity to claimants by furnishing them a complete remedy although limitation is refused."

In a still later case, these views were reaffirmed and applied in the Supreme Court, in British Transport Commission v. United States, 354 U.S. 129, 77 S.Ct. 1103, 1 L.Ed.2d 1234.

Such being the character and nature of the remedy sought in this proceeding, it has been and must be uniformly held that if there is jurisdiction in admiralty, that is, if the matters dealt with are of maritime nature and, therefore, of admiralty concern, the admiralty court may not, in a preliminary way and upon motion, determine the question of limitation.

[2] It is, of course, true, as appellees belatedly suggest for the first time in this court, that *if the petition does not present matters of maritime concern*, matters in short within the admiralty jurisdiction, and the case is not one for a court of admiralty, it will be dismissed. This, however, is not because there is no right of limitation, but because there is no jurisdiction in admiralty. The very paucity and inappositeness of citation in support of that view—one case being put forward, American Car & Foundry Co. v. Brassert, 289 U.S. 261, 53 S.Ct. 618, 77 L.Ed. 1162, where such jurisdiction was found wanting, makes it crystal clear that appellees' position here is without substance. As clearly enough appears in the Supreme Court decision and as is more clearly shown in the opinion of the Court of Appeals, 7 Cir., 61 F.2d 162, the admitted facts there were that the petition was filed, not by the owner of the vessel but by a ship manufacturer, who had made and sold it to Brassert, to obtain limitation of liability in respect of a claim that the vessel which had been manufactured by it for and sold to Brassert, the owner at the time of the explosion, had been defectively manufactured and, as a result thereof, had exploded while on a voyage on Lake Michigan. The Court finding: (1) that the facts pleaded were not sufficient for the purpose of the suit because at the time the boat was destroyed, the petitioner was not the owner of it; (2) that the statute limiting the liability of owners of vessels does not apply to manufacturers; and (3) that the vessel was not manned and operated by a master and crew of appellant; correctly held that, tested by the basic conceptions of jurisdiction in admiralty under the invoked statute, there was no such jurisdiction because there was no connection between the petitioner-manufacturer, and the vessel which was maritime in nature, and so holding, dismissed the suit as not within the invoked jurisdiction.

Here the facts, and, therefore, the law, are quite otherwise. The petitioner, as charterer of the vessel, was owner pro hac vice, its employees were on it, its personal liability for the acts of the vessel, limitation aside, was manifest, and the case was clearly one for admiralty jurisdiction. The granting of the petition to dismiss was error. This is not to say that respondents' claim on the merits that there was no limitation of liability has been in any way determined against it. It is to say, though, that the case is one for cognizance in admiralty and that all of respondents' rights are preserved to them in the court of admiralty to put forward and maintain there their claim as to the liability of the petitioners, and that it is not entitled to limitation.

The order appealed from is reversed and the cause is remanded for further and not inconsistent proceedings.

TAB E

fit from the deaths of insured wage earner victims.

AFFIRMED.

In the Matter of The Complaint of Everett A. SISSON, as owner of the motor yacht, THE ULTORIAN, for exoneration from or limitation of liability, Appellant.

Nos. 87-2713, 87-2736.

United States Court of Appeals, Seventh Circuit.

Argued May 23, 1988.

Decided Jan. 24, 1989.

Order Denying Rehearing and Rehearing En Banc March 16, 1989.

Owner of pleasure yacht brought suit to limit his liability for fire which both destroyed yacht and caused extensive damage to marina and several neighboring boats. After dismissal for lack of subject matter jurisdiction, 663 F.Supp. 858, owner moved for reconsideration. The United States District Court for the Northern District of Illinois, Nicholas J. Bua, J., 668 F.Supp. 1196, denied motion, and owner appealed. The Court of Appeals, Cudahy, Circuit Judge, held that: (1) District Court could not exercise admiralty jurisdiction over tort action arising out of fire on moored pleasure yacht in navigable waters of recreational marina, and (2) Limitation of Liability Act did not provide independent basis for court to exercise jurisdiction.

Affirmed.

Ripple, Circuit Judge, concurred in judgment and filed opinion and concurred in the denial of rehearing with an opinion.

1. Admiralty ⇐19

District court could not exercise admiralty jurisdiction over tort action arising out of fire on moored pleasure yacht in navigable waters of recreational marina, as fire out of which action arose did not have "significant relationship to traditional maritime activity." 28 U.S.C.A. § 1333.

See publication Words and Phrases for other judicial constructions and definitions.

2. Admiralty ⇐18

Mere fact that tort arises out of activities of noncommercial, pleasure vessels does not necessarily preclude federal court from exercising admiralty jurisdiction. 28 U.S.C.A. § 1333.

3. Admiralty ⇐18

Torts involving noncommercial, pleasure boats are not sufficiently related to traditional maritime activity to permit federal court to exercise admiralty jurisdiction, unless tort involves at least a potential threat to commercial shipping and implicates navigation. 28 U.S.C.A. § 1333.

4. Shipping ⇐209(1¼)

Limitation of Liability Act did not provide independent basis for federal court to exercise admiralty jurisdiction over tort action arising from fire on noncommercial, pleasure yacht moored in navigable waters of recreational marina. 46 U.S.C.A.App. § 181 et seq.

5. Shipping ⇐209(1¼)

Proceeding under the Limitation of Liability Act will be cognizable in admiralty only when underlying tort has relationship to traditional maritime activity. 46 U.S.C.A.App. § 181 et seq.

Dennis Minichello, Tribler & Marwedel, P.C., Chicago, Ill., for appellant.

Robert J. Kopka, Landau, Omahana & Kopka, Ltd., Chicago, Ill., for appellee.

Before CUDAHY, RIPPLE and KANNE, Circuit Judges.

CUDAHY, Circuit Judge.

This case presents an intriguing classificatory problem concerning the scope of the federal courts' admiralty jurisdiction. Specifically, we must decide whether a fire aboard a non-commercial vessel docked at a recreational marina on navigable waters

bears a significant relationship to traditional maritime activity.

Everett Sisson owned the Ultorian, a 56-foot pleasure yacht, docked at the Washington Park Marina on Lake Michigan in Michigan City, Indiana. A fire erupted on the vessel, destroying it completely and damaging extensively the marina and several other boats. The fire allegedly was caused by a defective washer and dryer. The net value of the Ultorian after the fire was $800. The owners of the other vessels and of the marina have made claims for damages in excess of $275,000.

Sisson sought injunctive and declaratory relief in the district court, asserting jurisdiction under 28 U.S.C. § 1333, which provides in part:

> The district court shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

Essentially Sisson wishes to limit his liability to the claimants for damages caused by the fire, pursuant to the Limitation of Liability Act, 46 U.S.C.A.App. § 181 *et seq.* The district court dismissed Sisson's complaint for lack of subject-matter jurisdiction. 663 F.Supp. 858 (N.D.Ill.1987).

Sisson moved for reconsideration, alleging that the Limitation of Liability Act provides a separate source of admiralty jurisdiction in this case. The district court denied the motion because, in its view, Sisson introduced a new legal theory which could have, but had not, been raised in the original opposition to dismissal. 668 F.Supp. 1196 (N.D.Ill.1987). The court then rejected Sisson's argument on the merits, concluding that the Limitation of Liability Act does not provide an independent basis of federal admiralty jurisdiction. The court held alternatively that, even if subject-matter jurisdiction did exist, Sisson was not entitled to limit his liability for damage caused by a pleasure boat.

For the reasons given below, we affirm the district court's dismissal of the case for lack of subject-matter jurisdiction.

I.

[1] Had this case arisen prior to 1972, it would have fallen within the admiralty jurisdiction. Throughout most of the history of admiralty law in this country, the key criterion distinguishing maritime torts has been whether the actionable wrong occurred "on navigable waters." The Supreme Court stated the rule in *The Plymouth*, 70 U.S. (3 Wall.) 20, 36, 18 L.Ed. 125 (1866): "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." The present case would clearly have satisfied this "locality test;" it involves a fire that began on board a vessel moored on navigable waters, with resulting damage to other vessels also moored on navigable waters.

This test, however, was changed in 1972 by the Supreme Court's decision in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972). In *Executive Jet* the owners of a jet aircraft invoked admiralty jurisdiction when their airplane crashed in Lake Erie. They alleged that the airport had negligently failed to keep its runway free of birds. The airplane's jet engines ingested the birds, causing the plane to lose power and crash. The tort arguably satisfied the locality test—the birds were ingested over, and the plane crashed in, the navigable waters of Lake Erie. *See The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 13 L.Ed. 1058 (1851). Reasoning that the locality test "was established and grew up in an era when it was difficult to conceive of a tortious occurrence on navigable waters other than in connection with a waterborne vessel," *id.*, 409 U.S. at 254, 93 S.Ct. at 497, the Court concluded that locality by itself was an inadequate basis for assuming admiralty jurisdiction over an airplane crash. Writing for a unanimous Court, Justice Stewart held that in the context of aviation, "a significant relationship to traditional maritime activity" must be shown as well, before admiralty jurisdiction could be invoked in tort cases. *Id.* at 268, 93 S.Ct. at 504. The Court's new "nexus"

test was not satisfied by the mere similarity of problems confronting ships that sink and aircraft that crash in navigable waters. The fact that a "land-based plane flying from one point in the continental United States to another" happened to wind up in the water rather than on land did not provide a significant relationship between the crash and "traditional maritime activity involving navigation and commerce on navigable waters." *Id.* at 272, 93 S.Ct. at 506.

Executive Jet left open the question whether the new "nexus" test would apply in non-aviation contexts. Any doubt about this issue was subsequently removed in *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed.2d 300 (1982), a case involving the collision of two pleasure boats on navigable waters. The Court first concluded that all tort actions invoking admiralty jurisdiction must meet the new nexus test requiring a significant relationship with "traditional maritime activity." *Id.* at 673–74, 102 S.Ct. at 2658. When subsequently defining traditional maritime activity, the Court recognized that "the primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce," but refused to require that alleged tortfeasors be "actually *engaged* in commercial maritime activity" before they could assert admiralty jurisdiction. *Id.* at 674–75, 102 S.Ct. at 2658 (emphasis in original). In the Court's view, the federal interest in protecting maritime commerce "can be fully vindicated only if *all* operators of vessels on navigable waters are subject to uniform rules of conduct." *Id.* at 675, 102 S.Ct. at 2658 (emphasis in original).

The Court held that although the boats involved were "pleasure" rather than "commercial" craft, the collision in *Foremost* fell within the federal courts' admiralty jurisdiction:

> The potential disruptive impact of a collision between boats on navigable waters, when coupled with the traditional concern that admiralty law holds for navigation, compels the conclusion that this collision between two pleasure boats on navigable waters has a significant relationship with maritime commerce.

Id. (footnote omitted). The Court cautioned, however, that "[n]ot every accident in navigable waters that might disrupt maritime commerce will support federal admiralty jurisdiction." *Id.* at 675 n. 5, 102 S.Ct. at 2658 n. 5. This seems to us a strong admonition to proceed with great caution in extending the *Foremost* principles.

We are now presented with a case that tests the limits of the developing admiralty nexus doctrine: Does a fire on board a moored pleasure yacht, docked in the navigable waters of a recreational marina on Lake Michigan, bear a significant relationship to traditional maritime activity? Guidance from the Court on this question is limited to two cases: a collision on navigable waters between pleasure craft, that passes the test, and the crash of a land-based airplane in navigable waters, that fails the test.[1] *Foremost* makes it clear that the distinction between aviation and non-aviation contexts is not the critical issue. However, the existing case law gives little basis for determining under what circumstances an accident involving a vessel, in navigable waters, would lack the requisite nexus with "traditional maritime activity."

[2] One principled approach to delimiting the scope of "traditional maritime activity" might be to look at the original rea-

1. We are obviously at an early stage in the development of doctrine here. The definitional boundaries are being refined through the process of inclusion and exclusion in particular cases. *See* E. Levi, *An Introduction to Legal Reasoning* 8–27 (1949) (the "inherently dangerous" concept); Llewellyn, *On Warranty of Quality and Society I & II*, 36 Colum.L.Rev. 699 (1936), 37 Colum.L.Rev. 341 (1937) (the "warranty of quality" doctrine). In both the Levi and Llewellyn analyses, the defining characteristics of doctrinal categories developed, through uncomfortable ambiguity of the sort we face here, rather rapidly. They dealt with areas of tort and commercial law that were integrally involved in the burgeoning industrial and commercial progress of the time. By contrast, the admiralty doctrine involved in this case has had few opportunities for clarification through extension. Thus a detailed discussion of the possibilities left open by existing Supreme Court opinions in the area is required.

sons for asserting admiralty jurisdiction over that activity. Most scholars of admiralty law agree that the original purpose of admiralty courts was to establish a uniform body of laws to govern (and to promote) maritime commerce. *See, e.g.*, G. Gilmore & C. Black, *The Law of Admiralty*, §§ 1–1, 1–5 (1975); 7A J. Moore & A. Pelaez, *Moore's Federal Practice* ¶ .190, at 2005–06, ¶ .325[5], at 3606–07 (2d ed. 1988); Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 Colum.L.Rev. 259, 280 (1950); Stolz, *Pleasure Boating and Admiralty:* Erie *at Sea*, 51 Calif.L.Rev. 661, 667 (1963). However, in *Foremost* Justice Marshall rejected efforts to limit the admiralty jurisdiction to cases involving commercial shipping:

> [P]etitioners' argument that a substantial relationship with commercial maritime activity is necessary because commercial shipping is at the heart of the traditional maritime activity [that admiralty jurisdiction seeks to protect] ... is premised on the faulty assumption that, absent this relationship with *commercial* activity, the need for uniform rules to govern conduct and liability disappears....

Foremost, 457 U.S. at 674, 102 S.Ct. at 2658. Thus admiralty jurisdiction is not precluded in the case before us simply because the tort involves pleasure, rather than commercial, vessels.

Another approach would be to analyze the types of instrumentalities and accidents involved in each case in order to determine their relationship to traditional maritime activities. This is, in part, the direction taken by the district court opinion in this case, which paid close attention to the fact that the fire in question allegedly started in a possibly defective washer-dryer unit. 663 F.Supp. 858, 862.

We believe that the precise source of a fire aboard a vessel should not carry great weight in determining whether the tort is "maritime." Accidents stemming from many diverse sources can have grave effects for "traditional maritime activity" when they occur at sea. If a fire threatened to disable a commercial vessel or to block the entrance to a major harbor, to exclude it from admiralty jurisdiction on the basis of its source would make little sense under the "nexus" test. Further, such an approach would seem productive of many instances in which it would be necessary to try the case (to determine the source of the fire) to resolve the jurisdictional issue. It would also set the scene for endless hairsplitting definitional debates that do little to further the policy goals of this doctrine. Almost any conceivable accident when it occurs on board a ship can be categorized alternately as the result of a "traditional" activity necessarily performed by sailors through history (washing, preparing food, navigating the ship) or as the result of "modern" circumstances (an electric tooth brush malfunctions, or a microwave oven starts a fire). Analysis centered on how closely the source of an accident is related to "traditional maritime activity" thus seems an unproductive approach to the problem—at least in the context of accidents involving only vessels in navigable waters (as opposed to incidents involving objects on shore). There is little support in the language of the Supreme Court cases in this area for limiting admiralty jurisdiction to accidents that originated in a certain part of a vessel (i.e., the engine or steering mechanism), or that were caused by instrumentalities invented after a certain point in history.

[3] However, the language used by the Court in *Foremost* does suggest some other limiting principles. Justice Marshall stressed repeatedly that a key function of admiralty jurisdiction is protecting "the smooth flow of maritime commerce" by ensuring uniform navigational rules, *id.* at 674–76, 102 S.Ct. at 2658–59, and by requiring that "all vessel operators are subject to the same duties and liabilities." *Id.* at 676, 102 S.Ct. at 2659. The references to "traditional maritime activity" in *Foremost* always rely upon discussions of "navigation"

or the "*operation* of a vessel" to explain the concept. *Id.* at 674-76, 102 S.Ct. at 2658–59 (emphasis supplied). In a key passage, *Foremost* holds that in that case the collision between two pleasure boats on navigable waters fell under admiralty jurisdiction because of "[t]he potential disruptive impact of a collision between boats on navigable waters, *when coupled with* the traditional concern that admiralty law holds for navigation." *Id.* at 675, 102 S.Ct. at 2658 (emphasis supplied). Thus there is a reasonable basis for concluding that the *Foremost* Court intended to limit admiralty jurisdiction in non-commercial maritime tort cases to torts involving navigation. In our view, a persuasive interpretation of *Foremost* would confine the admiralty jurisdiction in tort cases either to cases directly involving commercial maritime activity, or to cases involving exclusively non-commercial activities in which the wrong (1) has a potentially "disruptive impact" on maritime commerce and (2) involves the "traditional maritime activity" of navigation.[2]

Because the case before us involves only non-commercial activities, we must ask (1) whether the tort had a potentially "disruptive impact," and (2) whether it involved navigation.

In our view, a fire on board a moored vessel could disrupt commercial navigation. If, for example, the Ultorian had been moored at a large municipal dock rather than in a recreational marina (apparently exclusively for pleasure boats), the fire or smoke might easily have spread to commercial vessels. Further, the fire could have spread from the marina across oil-covered water to threaten or obstruct commercial traffic in the channel or elsewhere. However, as *Foremost* emphasized, "[n]ot every accident in navigable waters that might disrupt maritime commerce will support admiralty jurisdiction." *Id.* at 675 n. 5, 102 S.Ct. at 2658 n. 5. This caveat seems well-founded in light of the precedent established in *Executive Jet*. If potential disruptive impact upon commercial shipping were the primary criterion for determining whether a tort were related to traditional maritime activity, then the *Executive Jet* plane crash in navigable waters would have fallen within admiralty jurisdiction. Thus we must proceed to analyze the second *Foremost* criterion for non-commercial maritime torts—the "traditional maritime activity" requirement.

Following the guidance given by careful scrutiny of the language in *Foremost*, we here apply a narrow reading of "traditional maritime activity," limiting application to cases involving navigation. Strong arguments, however, exist for broader treatment of this issue. Logically, fires aboard vessels—even when moored—are as much a traditional maritime concern as errors of navigation. Fire at sea, or at a mooring, is an ancient and dreaded hazard facing mariners. In *Richardson v. Harmon*, 222 U.S. 96, 32 S.Ct. 27, 56 L.Ed. 110 (1911), the Supreme Court—in commenting upon the exclusion from admiralty jurisdiction of torts involving vessels in which the resulting damage occurred on land—appeared to link collision and fire as twin maritime hazards:

> **Prior to the [enactment of what is now section 189], it had been the settled law that the district court, sitting as a court of admiralty, had no jurisdiction to try an action for damages against a shipowner, arising from a fire on land, communicated by ship, or from a collision between the ship and a structure on land, such as a bridge or pier. The tort in both cases would have been a nonmaritime tort, and, as such, not within the cognizance of an admiralty court.**

Id. at 101, 32 S.Ct. at 28.

It is also somewhat puzzling to find the Court using a broad phrase such as "tradi-

2. We do not here adopt the "four-factor" test used in several other circuits, *see, e.g., Oman v. Johns-Manville Corp.*, 764 F.2d 224, 230 (4th Cir.1985); *Woessner v. Johns-Manville Sales Corp.*, 757 F.2d 634, 639–41 (5th Cir.1985); *Myhran v. Johns-Manville Corp.*, 741 F.2d 1119, 1121 (9th Cir.1984); *Harville v. Johns-Manville Corp.*, 731 F.2d 775, 783–87 (11th Cir.1984), because we do not find it helpful in developing the kind of analysis indicated by *Executive Jet* and *Foremost*.

tional maritime activity" in discussions that then proceed to deal only with navigation. The Court in *Foremost* may have been attempting to reconcile the relatively narrow policy basis for admiralty jurisdiction ("the primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce," *Foremost*, 457 U.S. at 674, 102 S.Ct. at 2658), with the broad application of the admiralty jurisdiction since its inception to all varieties of torts occurring on navigable waters—and particularly to collisions of vessels on navigable waters, the paradigmatic admiralty case. *See id.* at 672, 102 S.Ct. at 2657. Once the Court decided to include pleasure boats, thus determining that "maritime commerce" is not the only "traditional maritime activity," it appears to have looked to the traditional concern of admiralty law with navigational rules, and to the federal interest in ensuring uniformity in those rules, in defining the scope of the nexus requirement. *Id.* at 675, 102 S.Ct. at 2659. Although this approach has its difficulties, *see id.* at 682, 102 S.Ct. at 2662 (Powell, J., dissenting), it does attempt to determine which aspects of maritime activity are worthy of federal concern. Using this approach, the Court decided that a federal interest is served by having a uniform standard of conduct with respect to navigation on the navigable waterways. This uniform standard of conduct is ensured by federal laws governing the navigation of all vessels, including pleasure craft. *See* 33 U.S.C. §§ 2001–2073. Although federal laws also regulate fire safety aboard vessels,[3] the application of uniform fire safety laws to pleasure craft is not necessary to ensure the smooth flow of maritime commerce. By contrast, the comprehensive federal regulation of navigation through uniform "Rules of the Road" is essential to ongoing maritime commercial activity; if pleasure boats followed different rules than commercial vessels, they could disrupt the flow of commerce substantially. *But see* commentary cited *infra* note 4. Thus it seems that the federal interest invoked in *Foremost* is more at stake in the regulation of navigation than it is in the regulation of maritime fire safety.

Further, even if logic and the demands of a comprehensible framework of analysis might draw us to treat fire—even at a mooring—as the twin of collision when maritime hazards are involved, we would feel constrained by the Supreme Court's repeated use of specific language in assessing what constitutes "traditional maritime activity." We have already noted that the *Foremost* court, when identifying traditional maritime activity or concerns, consistently mentioned "maritime commerce," "navigation," or "operation of a vessel." *See* 457 U.S. at 674–77, 102 S.Ct. at 2658–59.[4] Similarly, in *Executive Jet*, the Court described the necessary maritime nexus as "some relationship between the tort and traditional maritime activities, involving *navigation* or *commerce* on navigable waters." 409 U.S. at 256, 93 S.Ct. at 498 (emphasis supplied). As the Fourth Circuit has noted:

> [I]n the context of the *Executive Jet* test, the *Foremost* decision reasserted the importance of navigation in establishing a sufficient nexus. The Supreme Court confirmed what was recognized by this court in *Richardson;* that is, controversies involving the navigation of vessels on navigable waters may come within the admiralty jurisdiction, although the vessels may be small pleasure boats.

Oliver by Oliver v. Hardesty, 745 F.2d 317, 319 (4th Cir.1984).

3. Federal regulations currently govern fire prevention and portable fire extinguishers on all vessels, including pleasure craft. 46 C.F.R. §§ 72.03, 76.05-25. The now-repealed Motor Boat Act of 1940 also contained a number of sections relating to fire safety. 46 U.S.C. §§ 526g–526j (repealed 1983).

4. The Supreme Court, in a much earlier case, noted that if it were to require a cause of action in tort to be of a maritime nature, it would look to "the relation of the wrong to maritime service, to navigation and to commerce on navigable waters." *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52, 62, 34 S.Ct. 733, 735, 58 L.Ed. 1208 (1914) (quoted in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 258, 93 S.Ct. 493, 499, 34 L.Ed.2d 454 (1972)).

In cases where there is an immediate threat to commercial shipping (as might be posed, for example, by a fire at a municipal dock serving all types of vessels), admiralty jurisdiction will clearly be invoked. However, in cases where the threat to commercial shipping is not direct or immediate, we are compelled to conclude that Supreme Court precedent to date recognizes torts involving pleasure boats as "maritime" only if there is at least a potential threat to commercial shipping, and only if "navigation" is implicated.[5] This may be too narrow and mechanical an interpretation of the Supreme Court. But the specific language of the Court seems to support it. And, as noted above, the Supreme Court's invocation of the need for uniform "Rules of the Road" as a touchstone where navigation or a collision is involved provides further support for this restrictive conclusion.[6] In the present case, if the Ultorian had been underway in the shipping channel when the fire broke out, we might reach a different result.

Even if we were not confined by the Supreme Court's repeated references to "navigation" as the traditional maritime activity in this context, there are reasons for declining to extend the nexus test to include fires on pleasure craft as a matter of course. First and most important, if this sort of fire were to join navigation as a "traditional concern" of maritime law, it would be nearly impossible to establish any limiting principle with respect to what satisfies the nexus requirement. *Cf.* Baer, *Admiralty Law and the Supreme Court* § 25–4 (3d ed. 1979 & Supp.1985) (summarizing *Foremost* and predicting that "a limitation [may be] placed on the scope of the Court's opinion"). For example, there would appear to be no way to distinguish the present case from the case of a pleasure boat that was moored too loosely during a storm and collided with a neighboring boat, or the case of a pleasure boat damaged by the swinging boom of a nearby sailboat. Indeed, without navigation[7] as the distinguishing feature, the new "nexus" test becomes identical with the old "navigable waters" test (at least for "vessels"), in defiance of the rule set out in *Executive Jet* and *Foremost*. Further, we do not think it appropriate to analogize broadly from navigation to fire in the context of a moored pleasure boat in the face of widespread scholarly criticism of the exercise of admiralty jurisdiction over pleasure boat torts. *See, e.g.*, Carnilla & Drzal, Foremost Insurance Co. v. Richardson: *If this is Water, It Must be Admiralty*, 59 Wash.L.Rev. 1 (1983) (criticizing *Foremost*'s assertion of admiralty jurisdiction over collision between small pleasure boats); Stolz, *Pleasure Boating and Admiralty: Erie at Sea*, 51 Calif.L.Rev. 861 (1963) (law of pleasure boating should be developed by state courts and legislatures); Note, *Pleasure Boat Torts in Admiralty Jurisdiction: Satisfying the Maritime Nexus Standard*, 34 Wash. & Lee L.Rev.

5. We stress that where commercial shipping is *actually* implicated, then admiralty jurisdiction is clearly invoked. However, where there is only a *potential* threat to commercial shipping (as was the case, for example, in *Executive Jet*), and where commercial vessels are not actually involved, we view the "navigation" requirement as a necessary limitation of an otherwise very broad category of accidents.

6. The asserted need for uniform Rules of the Road as a basis for admiralty jurisdiction is frequently invoked by courts. *See, e.g., In re Paradise Holdings, Inc.*, 795 F.2d 756, 760 (9th Cir.), *cert. denied*, 479 U.S. 1008, 107 S.Ct. 649, 93 L.Ed.2d 705 (1986); *Hagan v. Overman*, 767 F.2d 1093, 1094 n. 1 (4th Cir.1985); *Finneseth v. Carter*, 712 F.2d 1041, 1046–47 (6th Cir.1983). It is just as frequently criticized by commentators. *See, e.g.*, Carnilla & Drzal, Foremost Insurance Co. v. Richardson, *If this is Water, It Must be Admiralty*, 59 Wash.L.Rev. 1, 6–7 (1983); Stolz, *Pleasure Boating and Admiralty: Erie at Sea*, 51 Calif.L.Rev. 661, 713–14 (1963); Note, *Pleasure Boat Torts in Admiralty Jurisdiction: Satisfying the Maritime Nexus Standard*, 34 Wash. & Lee L.Rev. 121, 132 (1977); *see also Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 682, 102 S.Ct. 2654, 2662, 73 L.Ed.2d 300 (1982) (Powell, J., dissenting).

7. Because we are here dealing with a case that clearly does not involve navigation, we do not address the definitional difficulties involved in that concept. The difficult case might be a tort caused by a vessel in motion on the water that was not being deliberately "navigated" at the time (as when a boat slips its mooring). In that case, the Rules of the Road might be irrelevant to the hazard; however, an argument could be made that the vessel was "in navigation" because it was in motion on the navigable waters.

121, 139-40 (1977) (in cases of pleasure craft torts, courts must determine "whether the exercise of jurisdiction furthers the commercial interests which admiralty courts were created to serve"); *cf.* 7A J. Moore & A. Palaez, *Moore's Federal Practice* ¶ .325[5] (2d ed. 1988) (admiralty tort jurisdiction should be limited to matters concerning maritime industry); Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 Colum.L.Rev. 250 (1950) (same).

Thus, there is a basis for the somewhat narrow interpretation followed in many of the recent decisions of other circuits concerned with the scope of admiralty jurisdiction in tort actions involving pleasure craft.[8] And this interpretation is reassuring to those who perceive important principles of federalism in these distinctions. *See, e.g., Foremost*, 457 U.S. at 685, 102 S.Ct. at 2663 ("federalism concern is the dominating issue in the case") (Powell, J., dissenting).

Accordingly, we affirm the district court's conclusion that Sisson lacks subject-matter jurisdiction under 28 U.S.C. § 1333.

II.

[4] Sisson also argues that the Limitation of Liability Act provides a separate basis of admiralty jurisdiction.[9] Although the Act is not cast in jurisdictional terms, the Supreme Court in 1911 interpreted what is now section 189 of the Limitation of Liability Act [10] as expanding the scope of liability subject to limitation to include nonmaritime, as well as maritime, torts. *Richardson v. Harmon*, 222 U.S. 96, 106, 32 S.Ct. 27, 30, 56 L.Ed. 110 (1911). Sisson contends that because the right of limitation under section 189 "does not depend on the maritime nature of the liability, jurisdiction under the Limitation Act is not coextensive with admiralty jurisdiction in tort." Brief of Plaintiff-Appellant at 12 (emphasis omitted).

In *Richardson v. Harmon*, the owners of a steam barge that had collided with a bridge sought to limit their liability for damage to the bridge. The Supreme Court noted that, prior to the enactment of section 189, there was no admiralty jurisdiction over an action against a shipowner for damage occurring on land. "The tort would have been a nonmaritime tort, and, as such, not within the cognizance of an admiralty court." *Id.* at 101, 32 S.Ct. at 28. The Court, by finding that section 189 included nonmaritime torts within the Limitation of Liability Act, was able to allow the

8. *See, e.g., Hogan v. Overman*, 767 F.2d 1093, 1094 (4th Cir.1985) (admiralty jurisdiction exists where navigational error of pleasure boat caused water skier to be injured); *Medina v. Perez*, 733 F.2d 170, 171 (1st Cir.1984) (admiralty jurisdiction found where negligent navigation of pleasure boat injured swimmer), *cert. denied*, 469 U.S. 1106, 105 S.Ct. 778, 83 L.Ed.2d 774 (1985); *Smith v. Knowles*, 642 F.Supp. 1137, 1140 (D.Mo.1986) (no admiralty jurisdiction over pleasure boat passenger's drowning because boat owner's "estimate of water's depth did not affect the navigation of the boat"); *see also In re Paradise Holdings, Inc.*, 795 F.2d 756, 760 (9th Cir.1986) (admiralty jurisdiction found in case where "negligent operation of a vessel" resulted in death of body surfer); *Finneseth v. Carter*, 712 F.2d 1041, 1043 (6th Cir.1983) (parties agreed that collision of two pleasure craft constituted traditional maritime activity).

9. The district court was probably not incorrect in holding that Sisson could not raise this argument for the first time in a motion for reconsideration of the court's dismissal of his action for lack of subject-matter jurisdiction. *See Publishers Resource Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557, 561 (7th Cir.1985). We have recognized, however, that a "court's discretion to dismiss for lack of subject matter jurisdiction when the plaintiff could have pleaded the existence of jurisdiction and when in fact jurisdiction exists, should be exercised sparingly." *Hoefferle Truck Sales, Inc. v. Divco-Wayne Corp.*, 523 F.2d 543, 549 (7th Cir.1975). Thus, we will address the matter on the merits.

10. Section 189 provides in part:

> The individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending
>
> ....

46 U.S.C.A.App. § 189. When enacted (and at the time the Court decided *Richardson v. Harmon*, 222 U.S. 96, 32 S.Ct. 27, 56 L.Ed. 110 (1911)), section 189 was section 18 of the Shipping Act of 1884. For the sake of simplicity we will use the designation "section 189" throughout this opinion.

commercial vessel (that had been traveling on navigable waters) to limit its liability for the collision that caused damage to the bridge, a structure on land.

We question the applicability of *Richardson v. Harmon* to the present case in some part at least because the need that inspired that decision no longer exists. Section 189 was enacted to further the policy of the Limitation of Liability Act—to permit a shipowner to limit his risk to his interest in the ship—by allowing limitation of liability even when the damage resulted on land. That section 189 was intended to improve the competitive position of owners of commercial ships in this fashion is evidenced by its title when enacted: "An Act to Remove Certain Burdens on the American Merchant Marine, and Encourage the American Foreign Carrying Trade, and for Other Purposes." *See Richardson v. Harmon*, 222 U.S. at 101, 32 S.Ct. at 29.

In 1948, however, Congress enacted the Extension of Admiralty Jurisdiction Act, 46 U.S.C.A.App. § 740, which provides in part:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In passing this Act, Congress sought to "provide a remedy for damage done to land structures by ships on navigable waters." *Executive Jet*, 409 U.S. at 260, 93 S.Ct. at 500–01; *see* S.Rep. No. 1593, 80th Cong., 2d Sess., *reprinted in* 1948 U.S.Code Cong. & Admin. News 1898, 1899. Although the Extension of Admiralty Jurisdiction Act does not specifically supplant (or as the district court said here, "codify") *Richardson v. Harmon*, it does eliminate the need and reason for the rule established by the case; for now torts are "maritime" even when the damage occurs on land (and there is therefore no question that limitation of liability is available).

Perhaps more importantly, most of the cases involving issues related to the scope of admiralty jurisdiction under the Limitation of Liability Act were decided prior to the Supreme Court's decisions in *Executive Jet* and *Foremost*. During that time, the test for admiralty jurisdiction under 28 U.S.C. § 1333 was exclusively one of "locality." Thus, it is not surprising and seems rational policy that as long as "the event giving rise to the claims occurred on navigable waters" the owner of the vessel that caused the damage could limit his liability under the Act. G. Gilmore & C. Black, *The Law of Admiralty* 843–44 (1975). During this period, admiralty jurisdiction under the Limitation of Liability Act—although purportedly invoking a separate basis of jurisdiction—did not ignore completely the requirements of admiralty jurisdiction under section 1333. Even though it was not necessary that the *damage* occur on navigable water, there remained the requirement that the *vessel* involved in the tort bear a "relation" to navigable waters. *See, e.g., In re Builders Supply*, 278 F.Supp. 254, 258 (N.D.Iowa 1968). Petitioners here readily concede that this "relation" is still a necessary ingredient of jurisdiction under the Limitation of Liability Act. Thus, vessel owners seeking to limit their liability are not relieved altogether from satisfying the locality test. The requirements of that test are merely somewhat relaxed.

Now that the test for admiralty jurisdiction under section 1333 contains a nexus as well as a locality requirement, we must decide how the test for jurisdiction under the Limitation of Liability Act should reflect this additional dimension of admiralty jurisdiction. Specifically, we are presented with the question whether a court may assert admiralty jurisdiction over a limitation of liability action when the underlying tort fails to qualify as maritime because it is not "functionally" within the admiralty jurisdiction (since it is unconnected to traditional maritime activity). For the reasons which follow, we do not accept Sisson's contention that the nexus requirement for admiralty jurisdiction over the tort is irrelevant to the determination whether the Limitation of Liability Act independently confers admiralty jurisdiction.

[5] In our view, when a cause of action in tort does not bear any connection to

traditional maritime activity, there is no justification for allowing the Limitation of Liability Act—which provides for a practice apparently defensible only in a traditional maritime context—to provide an independent basis for admiralty jurisdiction. It is true that the Supreme Court allowed limitation of liability to be extended geographically beyond normal admiralty jurisdictional bounds. But *Richardson v. Harmon*, in extending limitation to liability for damage occurring on land, furthered the purposes of both admiralty jurisdiction in general and of the Limitation of Liability Act in particular. If the purpose of limitation was to improve the competitive position of the American shipping industry, it would make no sense to exclude damages which quite fortuitously impacted on land and not, for example, on another vessel. Thus, shipowners were allowed to limit their liability to the value of the vessel for all damage caused by the ship or its crew whether seaward or landward. No similar policy would be furthered, however, by allowing limitation for torts which bear no relation to traditional maritime activity; under those circumstances the competitive rationale would make no sense. If pleasure boating is to be excluded from admiralty jurisdiction for functional reasons, we should not extend limitation of liability in the face of those same reasons.

We believe that allowing admiralty jurisdiction here would be contrary to the policy of *Executive Jet* and *Foremost*. In creating the nexus requirement, the Supreme Court confined the reach of admiralty jurisdiction to include only those tort actions with which a uniform, sea-going jurisprudence should be concerned. To permit an alleged tortfeasor to circumvent the requirement that the tort bear a connection to traditional maritime activity simply by asserting a right to limit liability would eviscerate the nexus test. It would also lead to inequity between the parties if only the owner of the vessel causing the injury may claim jurisdiction under the Limitation of Liability Act. It appears that an injured party who wishes to avail itself of the benefits of admiralty law would still be required to satisfy both the nexus and the locality tests.

Asserting admiralty jurisdiction over this case would also be inconsistent with principles of federalism espoused by the Supreme Court in *Executive Jet*. There the Court found that the crash of an airplane, originating in one state and destined for another, was only "fortuitously and incidentally connected to navigable waters" and, as such, bore "no relationship to traditional maritime activity." 409 U.S. at 249, 93 S.Ct. at 495. Holding that this crash was outside the scope of admiralty jurisdiction, the Court explained that a state court "could plainly exercise jurisdiction over the suit, and could plainly apply familiar concepts of [state] tort law without any effect on maritime endeavors." *Id.* (footnotes omitted). Similarly, in the present case, the claims of other boat owners and of the owner of the marina could "plainly" be heard in state court without the intrusion of traditional maritime law concepts.

Apparently no other court has addressed the precise question we are attempting to resolve here: whether an action to limit liability is within the scope of admiralty jurisdiction when the underlying wrong bears no relation to traditional maritime concerns. As we noted above, this question would not have arisen prior to *Executive Jet*. We have reviewed the cases published after that decision in which vessel owners had sought exoneration under the Limitation of Liability Act. In all of those cases, disputes over subject-matter jurisdiction were resolved by analyzing whether the alleged torts satisfied the locality and nexus requirements. *See, e.g., In re Paradise Holdings, Inc.*, 795 F.2d 756, 758–60 (9th Cir.), *cert. denied*, 479 U.S. 1008, 107 S.Ct. 649, 93 L.Ed.2d 705 (1986); *Duluth Superior Excursions, Inc. v. Makela*, 623 F.2d 1251, 1252–54 (8th Cir.1980); *In re Brown*, 536 F.Supp. 750, 751–52 (N.D.Ohio 1982); *Clinton Bd. of Park Comm'rs v. Claussen*, 410 F.Supp. 820, 823–26 (S.D. Iowa 1976). If those courts had thought that the Limitation of Liability Act provided an independent basis of jurisdiction, irrespective of any relation to traditional maritime concerns, it would have been simpler for them to sustain jurisdiction on that ground. That none of the courts opted for this approach may call into question the continued validity of the Limitation of Liability Act as an independent basis of admiralty jurisdiction in these circumstances.

For all of the reasons stated, we hold that a proceeding under the Limitation of Liability Act will be cognizable in admiralty only when the underlying tort has a relationship to traditional maritime activity.[11] Accordingly, the district court's dismissal of this action for want of subject-matter jurisdiction is

11. Courts from a number of circuits have split on the issue whether the Limitation of Liability Act applies to pleasure craft. *Compare Feige v. Hurley*, 89 F.2d 575 (6th Cir.1937); *Warnken v.*

AFFIRMED.

RIPPLE, Circuit Judge, concurring in the judgment.

The majority opinion is a careful effort to apply faithfully the Supreme Court's holding in *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed.2d 300 (1982). In my view, the court reaches the correct result. The fire that caused the damage here occurred in a pleasure boat tied to a dock within the well-delineated confines of a marina dedicated exclusively to the wharfage of pleasure boats. It presented no harm to maritime commerce.

I write separately because the test adopted by the court, while producing the correct result in this case, will place inappropriate restrictions on admiralty jurisdiction in other instances. In my view, *Foremost* does not compel restricting admiralty jurisdiction in noncommercial activities to matters directly involving the navigation of a vessel. In *Foremost*, the Supreme Court had to deal with an incident arising out of an alleged noncompliance with the "Rules of the Road." However, I do not read the Supreme Court's opinion as necessarily precluding jurisdiction based on other hazards traditionally associated with maritime activities, including fire, when that hazard threatens maritime commerce.

Hopefully, before long, the Supreme Court will revisit this quagmire and resolve the current ambiguity generated by the courts of appeals in the wake of *Foremost*.

ORDER

On consideration of the Petition for Rehearing with Suggestion for Rehearing En Banc filed by counsel for the plaintiff-appellant in the above-named cause and the response thereto by appellee, no judge in active service has requested a vote thereon and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

RIPPLE, Circuit Judge, concurring. I join in the denial of the petition for rehearing. The matters raised in that petition were examined by the panel during its consideration of the merits, and I do not believe that further examination by the panel would be fruitful.

I have also decided not to call for a vote on the suggestion for rehearing en banc. This circuit sees little in the way of admiralty litigation and here the result, if not the articulated rule of decision, is correct. Before this court revisits the area again, there is every probability that the Supreme Court will have an opportunity to supply further guidance with respect to its decision in *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed.2d 300 (1982).

Robert KUBAT, Petitioner-Appellant, Cross-Appellee,

v.

James THIERET, Warden, and Neil F. Hartigan, Attorney General of Illinois, Respondents-Appellees, Cross-Appellants.

Nos. 88-1440, 88-1520.

United States Court of Appeals, Seventh Circuit.

Argued Sept. 28, 1988.

Decided Jan. 24, 1989.

As Amended Jan. 26, 1989.

Rehearing and Rehearing En Banc Denied March 15, 1989.

Defendant was convicted in the Circuit Court, Lake County, Robert K. McQueen,

Moody, 22 F.2d 960 (5th Cir.1927); *In the Matter of Michael Roberto*, 1987 A.M.C. 982 (D.N.J. 1986) [1986 WL 15685]; *Complaint of Brown*, 536 F.Supp. 750 (N.D.Ohio 1982); *Armour v. Gradler*, 448 F.Supp. 741 (W.D.Penn.1978); *Application of Theisen*, 349 F.Supp. 737 (E.D.N.Y. 1972); *In re Klarman*, 295 F.Supp. 1021 (D.Conn.1968); *Petition of Porter*, 272 F.Supp. 282 (S.D.Tex.1967); *Petition of Colonial Trust Co.*, 124 F.Supp. 73 (D.Conn.1954) (all holding Limitation of Liability Act applicable to pleasure craft) *with In re Lowing*, 635 F.Supp. 520 (W.D.Mich.1986); *In re Tracey*, 608 F.Supp. 263 (D.Mass.1985); *Baldassano v. Larsen*, 580 F.Supp. 415 (D.Minn.1984); *Kulack v. The Pearl Jack*, 79 F.Supp. 802 (W.D.Mich.1948) (all holding Limitation of Liability Act inapplicable to pleasure craft). Because we affirm the dismissal of Sisson's action for lack of subject-matter jurisdiction, we need not decide whether a pleasure boat owner may limit his liability for a tort that satisfies both the nexus and locality requirements of admiralty jurisdiction.