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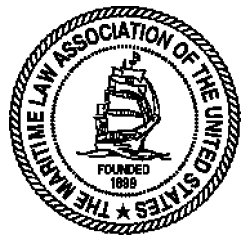

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THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES

THE MLA REPORT

Editors:

CHESTER D. HOOPER
DAVID A. NOURSE

TABLE OF COI TEI TS

EDITORIAL COMMEI T

This edition of the MLA Report features an article by Professor Michael F. Sturley entitled "What Has Become of the Rotterdam Rules?" It discusses the current status of the ratification debate concerning this new carriage convention. This edition also contains newsletters of the Association's Committees that were issued in connection with the Fall Meeting in New Orleans in late October 2016, a meeting that celebrated the 50th anniversary of the Association's first meeting outside of New York and the 50th Tulane Admiralty Law Institute program.

In accordance with our practice of honoring members who have materially advanced the work of the Association, we have included remembrances of Richard W. Palmer of Philadelphia, the 36th president of the Association, and Benjamin Allston Moore, Jr., of Charleston.

With the goal of acquainting members with a treasure trove of documents concerning the Association's history that are now accessible through its website, we have also included Memorials to J. Parker Kirlin, founder of the firm that became Kirlin, Campbell & Keating, Judge Henry Galbraith Ward of the Second Circuit Court of Appeals, and Charles S. Haight, of the firm that became Haight, Gardner, Poor & Havens, which were published as MLA Documents in 1928, 1934 and 1938 respectively, and a history of the Southern District of New York written by Judge Charles M. Hough which was published as MLA Document No. 194 in 1934. For the possible benefit of those members who, like us, may be deemed computer handicapped, we have provided step-by-step instructions for finding other such documents on the website.

We thank the following members of the Committee on Young Lawyers for their proof-reading and cite checking assistance in the preparation of this edition: J. Ben Segarra of Maynard, Cooper & Gale, PC in Mobile, Stephanie Propson of Fincantieri Bay Shipbuilding in Sturgeon Bay; and Christine M. Walker of Fowler White Burnett PA in Miami. We appreciate their help. However,

we remain responsible for any errors or ambiguities that may have escaped their and our view.

As in the past, we remind readers that articles, case notes and comments published in the MLA Report are for informational purposes only, are not intended to be legal advice and are not necessarily the views of The Maritime Law Association of the United States.

Chester D. Hooper
David A. Nourse
Editors

IN MEMORIAM

Richard W. Palmer

Dick Palmer, former president of the Association from 1988 to 1990, died on March 1, 2017, in Philadelphia at the age of 97. He is remembered by his former colleagues not only as an accomplished attorney and leader of the maritime bar, but also as a gentleman, a mentor, a friend and a storyteller extraordinaire.

Dick was born and raised in Boston. After obtaining his undergraduate degree from Harvard College in 1942 he joined the U.S. Navy. He served as an officer on cargo and supply ships in the Pacific during the balance of World War II and acquired an interest in the practical aspects of shipping. After the war, he enrolled in Harvard Law School and obtained his law degree in 1948.

Dick began his legal career in New York in 1948 as an associate with Burlingham, Veeder, Clark and Hupper, the predecessor of Burlingham, Underwood & Lord, a firm that counts at least six past presidents of the Association among its distinguished alumni.

During his tenure at the Burlingham firm Dick represented The Pennsylvania Railroad Company in a number of reported cases including complex litigation arising from the infamous South Amboy Ammunitions Pier explosion in May, 1950. The explosion resulted in 25 deaths, destroyed a freight train and five barges and leveled most of the town of South Amboy. Together with Eugene Underwood Dick represented the ship owner in the Second Circuit's landmark safe berth decision in favor of the owner in *Park Steamship Company v. Cities Service Oil Co.* At Burlingham's he was also intimately involved in litigation arising from the 1946 collision of the S.S. WILLIAM S. HALSTED and the tanker ESSO CAMDEN in Chesapeake Bay. Two decisions of the Second Circuit arising from that casualty continue to be cited as precedent on recoverable damages in maritime collision cases.

While in New York Dick met and married his beloved wife Nancy. In 1959 they moved to Philadelphia and Dick took a position with the firm of Rawle & Henderson. Shortly after his move to Philadelphia Dick was retained to represent the owner of the S.S. MARIE LEONHARDT which collided with the Delaire Railroad Bridge, a drawbridge over the Delaware River north of Philadelphia. The bridge owner sued the vessel owner for damages to the bridge and the owner counterclaimed for damages to the vessel. Following a trial the district court assigned one-hundred percent of the fault to the bridge, notwithstanding allegations that the vessel violated numerous rules of the road and other statutory requirements, a decision that was affirmed by the Third Circuit.

In 1979, Dick, together with several other colleagues including John Biezup and Welles Henderson, formed the firm of Palmer Biezup & Henderson in Philadelphia. The new venture was well received by ship owners and P&I Clubs alike, and the firm continues to serve those same clients today.

Dick played a pivotal role in litigation arising from perhaps the worst maritime disaster in Philadelphia history, the collision of the tankers EDGAR M. QUEENY and CORINTHOS in January, 1975. The QUEENY collided with and holed the CORINTHOS, which was moored alongside the British Petroleum Terminal in Marcus Hook, Pennsylvania. The QUEENY sustained bow damage but the CORINTHOS immediately suffered a series of massive explosions. The casualty resulted in 25 deaths and many more injuries. The fire aboard the CORINTHOS burned for days. The explosion caused heavy damage to the town of Marcus Hook and resulted in a massive oil spill impacting 50 miles of the Delaware River. Burning oil drifted two miles upriver and ignited a Navy Destroyer. The collision occurred while the QUEENY was attempting to make a turn after departing from a Monsanto terminal on the opposite side of the River.

The owners of both vessels filed Limitation of Liability actions in the Eastern District of Pennsylvania. Dick represented the CORINTHOS. He was able to develop evidence to prove that the collision was caused by defects in the astern guardian valve and

astern turbine of the QUEENY that reduced the tanker's backing power by forty percent and prevented it from completing the attempted turn. And he proved that the defects were known to the management of the QUEENY in advance, thus precluding the owner's right to limit its liability to the value of the destroyed tanker.

Following the 1989 EXXON VALDEZ grounding and oil spill in Prince William Sound, Alaska, Dick was retained to represent Lloyd's, numerous London Market companies and a host of other insurance companies around the world who had subscribed to a $1 Billion Global Corporate Excess Policy in response to Exxon's demands for insurance coverage under the Policy. The ensuing coverage litigation with Exxon played out in federal and state courts in New York and Texas over the next eight years and involved two trips to the U.S. Supreme Court.

Dick is fondly remembered by his younger colleagues as a warm-hearted mentor and a willing teacher of both litigation practice and client relations and development. He invested an extraordinary amount of his time with associate attorneys to develop their skills and was always keenly interested in their families and well-being. Dick retired from full-time practice in the late 1990s after a successful and colorful career.

Frank P. DeGiulio

Remembrance

Our periods as officers and directors were close and our work together in the terms of our respective presidencies was especially pleasant, as were numerous social occasions that Joyce and I enjoyed with Nancy and Dick. He was a distinguished lawyer and leader of his firm, a thoughtful counselor, sound in judgment, and a highly considerate gentleman.

Graydon S. Staring

Remembrance

I remember Dick as a fine lawyer and leader of our Association. It was an honor and privilege to serve with Dick and to have Dick represent our association in both domestic and international maritime matters. His calm, polite, and judicious manner set a good example for the rest of us. I shall always remember his guidance and assistance and the good times that Stephie and I had with Nancy and Dick.

Chester D. Hooper

Remembrance

It was a great privilege to have known Dick Palmer since the 1960s. It was a great delight beyond compare to be his friend. He had all of the attributes that one could hope for in an admiralty attorney, President of MLA, colleague and friend.

He served for five years in the Navy during World War II as a naval officer in the South Pacific. His academic credentials were excellent. He was upgraded in life by having the good fortune to marry Nancy. He served as an active admiralty lawyer in New York City and, after his move to Philadelphia for many years as a partner with Wells Henderson and others.

In the late 1960s, arose the FREE STATE in Jacksonville. My participation was in the Jacksonville pollution but the case later developed into a battle of the admiralty giants: Gordon Paulsen and Terry Haight on one side and Dick Palmer on the other. This case was ultimately tried by District Judge Charles Brieant, an active MLA member. I learned much from following the case after the Jacksonville phase.

He was the vice president of MLA from 1984 to 1988 and presided as president from 1988 to 1990. In all aspects, Dick took the various volunteer professional endeavors as serious matters, but he was the kind of person that never took himself too seriously. He

was innovative, friendly and had the degree of success that any of us would wish to have if we were the president of MLA.

Dick's attributes were the characteristic that endeared him to all of the MLA members. He was friendly, unassuming and always a classic gentleman. When I was in my early stages of practicing, he treated me with such great respect and friendship that (I knew was undeserved) and I was flabbergasted! Such kindness was very meaningful. In addition, this kindness continued throughout his whole life.

For many, many years after the MLA Fall and Spring meetings he would gather a group of eight or ten, mostly long-time MLA members, and would proceed to the Harvard Club for lunch. He would invite me. What he was trying to do for me although it was a subtle approach, was to demonstrate how to treat one new young lawyer coming into the fold. In the recent past when MLA met in Philadelphia, I was able to inform him of my feelings. In addition, our feelings for Nancy were also grand and we remain thankful for her graciousness to Anne and me.

He set a standard which not many have the talent to maintain, but all of us including those who will come into the officership of MLA, will all be able to say we tried to follow his lead.

He leaves with a great loss but he also leaves us with a greater memory.

James F. Moseley

Remembrance

I had known Richard (Dick) Palmer since 1984 when we were both officers of the Maritime Law Association of the United States. Dick was Vice President from 1984-1988 and President from 1988- 1990. I was the membership Secretary during those years and had plenty of opportunity to observe Dick as he did an outstanding job as President.

I always enjoyed working with Dick; he was always cheerful and helpful to me. He had an aura around him of excellent management skills as well as being a very kind and gentle person.

We always got along well as fellow officers of the Association as well as in our respective officer positions. He was very helpful to me when I was President and made excellent suggestions as to what we should be doing.

He always had a smile on his face of what it meant to be an officer and was an excellent source of the history of the Association. I learned a lot from the style of Dick's term as President of how to act as the President of the Association.

I saw Dick for the last time at the Philadelphia meeting in 2014, I believe it was. I and some of the other officers had the pleasure of having dinner with him and his wife in a private club, I believe. He was his usual jovial self. Jane Young and some of the other officers and their wives joined us This was my final meeting with our distinguished Former President

I was very lucky to have a friend like Dick as well as a splendid mentor.

In the words of my Jesuit instructors at Regis and the College of the Holy Cross I can only say the immortal words *Ave Atque Vale* Hail and farewell to my friend Dick Palmer.

Howard M. McCormack

Remembrance

I really got to know Dick when I was on the arrangements committee for the first Orlando meeting and the Marco Island meeting in Florida. He was wonderful to work with. His attitude was always upbeat and encouraging, and he rarely second guessed a recommendation or decision except one. He liked formal dress

for the final dinner. It was the mark of a true gentlemen of the old school, something I now miss greatly.

One thing I found interesting was his system of keeping track of people. In the days before smart phones and email lists, he carried small bundles of index cards so that he could remember people and things that were important to those people. I spent a day with him, travelling from Orlando to Marco Island, while he was working on his cards. He explained how he maintained and used the cards, and all in the greatest humor. He had only nice things to say about people, and his sense of humor kept me in stiches for the whole day.

Dick, in my mind, was representative of the way things were, and should be today, in the practice of law. He taught me that you can disagree without being disagreeable. I will miss him.

Warren J. Marwedel

Remembrance

One of the great joys of a Past President is to recall fondly the immense gratitude they feel for the ones that preceded, and inspired them. Dick is one of those to me. I early on was graced with his and Nancy's company on several occasions. What amazed me was their obvious brilliance, clarity of thought and expression, and most of all, charm. I am smiling as I remember these most marvelous people. The MLA was truly blessed to share them.

Robert B. Parrish

Remembrance

My first encounter with Dick Palmer was in 1986 when I was working as a law clerk in the Legal Department of ABS. We were both involved in the NTSB investigation of the flooding of the engine room of the MIT PRINCE WILLIAM SOUND. Dick represented the owner and the P&I Club. He was the consummate professional and made a deep and lasting impression on me. He was

the first among several that taught me by example how to conduct myself in the practice of maritime law.

I'm grateful that we had the opportunity to honor Dick with a dinner of Past Presidents at the 2014 Fall Meeting of the Association in Philadelphia. It was a great honor for me, as President, to host that dinner and to be able to pay tribute to Dick and his wife, Nancy.

Dick Palmer was one of the true deans of the admiralty bar and he will be missed by all of us.

Bob Clyne

IN MEMORIAM

Benjamin Allston Moore, Jr.

Benjamin Allston "Ben" Moore, Jr. passed away peacefully at his home in Charleston, South Carolina on February 18, 2017. He was born in Charleston on December 2, 1930, received his early education there, and graduated from Episcopal High School in Alexandria, VA in 1948, receiving the Randolph Fairfax Memorial Medal for Character, Conduct, and Scholarship. He continued his education at Princeton University, where he was a member of the Cottage Club and track team, winning the Ivy League championship in the broad jump. After graduating from Princeton in 1952, and completing the Naval ROTC program there, Ben entered the Navy and served proudly aboard the USS THOMAS E. FRASER, being honorably discharged in 1954 as a Lt. JG. He thereupon entered the University of Virginia School of Law, where he was editor of the Virginia Law Weekly.

Upon graduation from UVA in 1957, Ben moved back to his beloved Charleston and joined his father's law firm, then known as Moore and Mouzon (later to be known as Moore, Mouzon & McGee, and still later, Buist Moore Smythe & McGee). Ben's father, B.A. Moore, Sr., was at the time practicing with Harold A. Mouzon, then considered the "Dean" of the Charleston admiralty bar, and an AMC Associate Editor from 1929 to 1966. The firm had developed a specialty in admiralty law, representing shipowners and their P&I Clubs at the Port of Charleston. Drawing upon his love of sailing, and his shipboard service in the Navy, Ben was quick to embrace admiralty law as the principal focus of his practice. His obvious affinity for all things "maritime" was not lost on his senior partner, Mr. Mouzon, who promptly took Ben under his wing, and thus began Ben's long and illustrious career as an admiralty lawyer. Some ten years later, in 1967, following Mr. Mouzon's passing, Ben assumed the mantle of AMC Associate Editor for Charleston, a job he took seriously, enjoyed immensely, and fulfilled admirably until 2001, when he was kind enough to pass on that honor to the writer.

Ben's contributions to the furtherance of professionalism and collegiality within the admiralty bar, particularly in the Southeastern states, cannot be overemphasized. In 1968, he, along with several other close friends and fellow admiralty lawyers in other Southern "out-ports" (as they were somewhat derisively referred to back then by our Northern "big-city" brethren!), organized and founded the Southeastern Admiralty Law Institute ("SEALI"), the first such regional association of admiralty practitioners in the country. Not limiting his time to admiralty organizations, he also founded, in 1968, and was the first president of, the South Carolina Defense Trial Attorneys' Association, and he later served a term as president of the Charleston County Bar Association.

In 1957, at the urging of Mr. Mouzon, Ben joined the Maritime Law Association, and remained an active member until his retirement, forming many close and enduring friendships. He regularly attended MLA annual meetings and participated in the Association's committee work. That service, and Ben's affable "Southern charm", did not go unnoticed by his fellow MLA members, who elected him to the Association's then Executive Committee, for the term of 1974 to 1977. One of Ben's proudest accomplishments for the MLA was his introduction of an official MLA yacht burgee, one of which he proudly flew on his 50' Sailing Ketch BON AMI during the Expo '98 Round the World Rally.

Ben was this writer's mentor, partner and friend for almost 50 years, and was largely responsible for his choosing a career in admiralty law. It was Ben's abiding belief that "admiralty lawyers" were among the "the best" of our profession, with a commitment to collegiality, civility and professionalism that lifted them above the more worldly goals of success and financial gain. His sage wisdom, humor, dedication to admiralty law, and to the legal profession in general, will be sorely missed by all who had the good fortune to know him.

Ben was a member of the Society of the Cincinnati, the St. Cecelia Society, the Society of the Colonial Wars, the South Carolina Society, the Charleston Ancient Artillery Society, the St.

George's Society, the Carolina Plantation Society and the Carolina Yacht Club. He was a life-long member of St. Michael's Church, where he served as both Trustee and Senior Warden. Ben is survived by his wife, Judy, 3 children, 11 grandchildren, and a stepson.

Gordon D. Schreck

WHAT HAS BECOME OF THE ROTTERDAM RULES?*

Michael F. Sturley**

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** Fannie Coplin Regents Chair in Law, University of Texas at Austin; B.A., J.D., Yale; M.A. (Jurisprudence) Oxford. In the course of this paper, I discuss the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (popularly known as the "Rotterdam Rules"). *See infra* note 2 and accompanying text. In the interest of appropriate disclosure, I note that I served as the Senior Adviser on the United States Delegation to Working Group III (Transport Law) of the United Nations Commission on International Trade Law (UNCITRAL), which negotiated the Rotterdam Rules; as a member of the UNCITRAL Secretariat's Expert Group on Transport Law; and as the Rapporteur for the International Sub-Committee on Issues of Transport Law of the Comite Maritime International (CMI) and for the CMI's associated Working Group, which prepared the initial draft for UNCITRAL's consideration. But I write here solely in my academic capacity and the views I express are my own. They do not necessarily represent the views of, and they have not been endorsed or approved by, any of the groups or organizations (or any of the individual members) with which (and with whom) I have served. I delivered an earlier version of this paper at the 23rd Annual Admiralty Symposium of the Louisiana State Bar Association in New Orleans on September 16, 2016.

I. Introduction

During the summer of 2008, the U.N. Commission on International Trade Law (UNCITRAL) completed the negotiation of a new multilateral convention to govern international ocean transport! After review by the Legal Committee, the General Assembly on December 11, 2008, formally adopted the U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (popularly known as the "Rotterdam Rules").[2] The Convention has been open for signature since September 23, 2009, and the United States was one of the sixteen countries to sign the Convention on the first day in Rotterdam. Twenty-five countries have now signed the Convention. Three of those (including Spain) have already ratified it.

Unfortunately, the United States has not yet made any publicly visible progress toward ratifying the Rotterdam Rules. The U.S. commercial interests that worked for years to negotiate the Convention have long been pushing for ratification, primarily to bring the U.S. legal regime into the twenty-first century,[3] and all of the U.S. commercial interests that would be most directly affected by the Rotterdam Rules are in favor of U.S. ratification. It is thus

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' *See* Report of the United Nations Commission on International Trade Law, 41st Session, U.N. GAOR, 63d Sess., Supp. No. 17, Annex I, U.N. Doc. A/63/17 (2008).

[2] The original final text of the Convention is annexed to General Assembly Resolution 63/122, U.N. Doc. A/RES/63/122 (11 December 2008). Minor amendments were adopted in January 2013 to correct two editorial mistakes. *See* Correction to the Original Text of the Convention, U.N. Doc. C.N.105.2013.TREATIES-XI-D-8 (Depositary Notification) (Jan. 25, 2013). For a more detailed discussion of the issue, *see* Michael F. Sturley, *Amending the Rotterdam Rules; Technical Corrections to the UJ . Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, 18 J. INT'L MAR. L. 423 (2012).

[3] *See generally, e.g.*, Michael F. Sturley, *Beyond Liability Disputes: The Larger Impact of the Rotterdam Rules on the Efficiency of the Shipping Industry*, in H AEITOYPFIA THE NAYTIAIAKHE EDDCEIPHEHE EE DEPIOAOYI OIKONOMIKHE AiTAIDETAE: 8° AIEONEE EYNEAPIO NAYTIKOY AIKAIOY [SHIPPING IN PERIODS OF ECONOMIC DISTRESS: EIGHTH INTERNATIONAL CONFERENCE OF MARITIME LAW] 123 (Piraeus: Piraeus Bar Association, 2015).

surprising that we have not seen more visible progress toward that goal.

Some of the explanation can no doubt be attributed to the usual factors that make ratification of any treaty difficult in the best of times. The Senate is notorious for its inertia, for example, particularly on issues that do not generate much public attention. But the single biggest explanation for the current lack of progress is the opposition of the American Association of Port Authorities (AAPA) and some public port authorities — opposition that surfaced while the State Department was preparing the ratification package. This article reviews and evaluates that opposition.

II. The Rotterdam Rules

To understand and evaluate the current status of the ratification debate, it is helpful to have some background information on the Rotterdam Rules to provide context. I will accordingly discuss the process by which the Convention was negotiated and explain a few of the relevant substantive provisions.

A. The I egotiation of the Rotterdam Rules

One of the most important goals of the Rotterdam Rules was to meet the needs of industry, particularly by updating and modernizing the governing legal regime. In the United States, liability for the loss or damage of goods carried by sea is governed primarily by the Carriage of Goods by Sea Act (COGSA),[4] which is the U.S. enactment of a 1924 international convention popularly

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° Ch. 229, 49 Stat. 1207 (1936), *reprinted in note following* 46 U.S.C. § 30701. A quarter-century ago, COGSA was codified at 46 U.S.C. app. §§ 1300-15. A decade ago, when Congress recodified most of title 46 of the United States Code and enacted the new version as positive law, *see generally* Michael F. Sturley, *Reflections on the Recodification of Title 46*, 2 BENEDICT'S MARITIME BULLETIN 209 (2004), it did not include COGSA in the recodification. *See* Pub. L. No. 109-304, 120 Stat. 1485 (Oct. 6, 2006). COGSA accordingly remains in force as an uncodified statute.

known as the Hague Rules.[5] Most of the world's major maritime nations have adopted the amendments to the Hague Rules in the Visby Protocol,[6] which produced the Hague-Visby Rules, and a small portion of international maritime trade is subject to a U.N. convention popularly known as the Hamburg Rules,[7] but even those regimes are now out-of-date. And none of the current regimes fully addresses the needs of modern commerce.

From the beginning, UNC11 RAL made a point of reaching out to commercial interests to develop a new regime that would meet commercial needs. When the Commission first considered the Transport Law project it directed the Secretariat to consult with non-governmental organizations (NGOs) that act on behalf of various segments of the industry, including the Comite Maritime International (CMI), the International Chamber of Commerce (ICC), the International Union of Marine Insurance (IUMI), the International Federation of Freight Forwarders Associations (FIATA), the International Chamber of Shipping (ICS), and the International Association of Ports and Harbours (IAPH).[8] Thereafter, representatives from interested NGOs attended every meeting of the CMI's International Sub-Committee, and commercial observers

[5] International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 120 L.N.T.S. 155 (Hague Rules), *reprinted in* 6 BENEDICT ON ADMIRALTY doc. 1-1 (7th rev. ed. 2016).

[6] Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Hague Rules), Feb. 23, 1968, 1412 U.N.T.S. 128 (the Visby Protocol), *reprinted in* 6 BENEDICT ON ADMIRALTY doc. 1-2 (7th rev. ed. 2016). In many countries, the Hague Rules have been further amended by the Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Dec. 21, 1979, 1984 Gr. Brit. T.S. No. 28 (Cmnd. 9197), *reprinted in* 6 BENEDICT ON ADMIRALTY doc. 1-2A (7th rev. ed. 2016).

United Nations Convention on the Carriage of Goods by Sea, Mar. 31, 1978, 1695 U.N.T.S. 3, *reprinted in* 6 BENEDICT ON ADMIRALTY doc. 1-3 (7th rev. ed. 2016).

[8] *See Report of the United I ations Commission on International Trade Law on the Work of Its Twenty-I inth Session,* U.N. GAOR, 51st Sess., Supp. No. 17, ¶ 215, U.N. Doc. A/51/17 (1996), *reprinted in* 1996 CMI YEARBOOK 355.

were active participants at every session of the UNCITRAL Working Group.

Although the CMI was the most active NGO, all of the listed organizations participated in the process. The International Association of Ports and Harbours (IAPH) was involved from the very beginning, having been represented at the UNCITRAL Commission meeting at which the project was launched.[9] Indeed, the IAPH participant was the late Patrick J. Falvey, who was then the Chairman of the IAPH Legal Counselors, having recently completed his forty-year career at the Port Authority of New York and New Jersey (including almost twenty years as its general counsel).[10] The IAPH continued to participate throughout the process, including at the Commission session at which the Rotterdam Rules were finalized."

When the UNCITRAL negotiations began, the State Department put together a broad delegation to represent U.S. interests. A lawyer from the Office of the Legal Advisor headed the delegation, which also included two additional government representatives — one from the Department of Transportation's Maritime Administration (MARAD) and one from the Office of Transportation Policy in the State Department's Bureau of Energy, Economic and Business Affairs' Transportation Affairs division. I was included as the delegation's "senior advisor," having expertise on the issues but no regular clients whose interests might color my

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9 See List of Participants, United Nations Commission on International Trade Law, Twenty-ninth Session 18, U.N. Doc. A/CN.9/XXIX/INF.1 (1996) (identifying Patrick J. Falvey as the IAPH participant).

" See, e.g., List of Participants, United Nations Commission on International Trade Law, Thirty-third Session 22, U.N. Doc. A/CN.9/XXXIII/INF.1/Rev.1 (2000) (identifying "Patrick J. Falvey, Former Chairman, IAPH Legal Counselors," and "Hugh H. Welsh, Chairman, IAPH Legal Counselors," as the IAPH participants). Mr. Welsh also represented the Port Authority of New York and New Jersey. *See, e.g., Hess v. Port Authority Trans-Hudson Corp.,* 513 U.S. 30, 32 (1994).

" See List of Participants, United Nations Commission on International Trade Law, Forty-first Session 29, U.N. Doc. A/CN.9/XLI/INF.1 (2008) (identifying Frans van Zoelen, "Chairman, Legal Committee," as the IAPH participant).

recommendations. A number of industry representatives wished to be included as "advisors" to represent the interests of their industries, and they were all welcomed into the delegation. Carrier, cargo, and transportation intermediary advisors were particularly active in the process, but no one was denied access. Representatives of the Association of American Railroads (AAR) would have been included in the U.S. delegation, but the AAR obtained observer status from UNCITRAL so that its representatives had an independent seat at the negotiations and could speak on its own behalf (without going through the U.S. delegation).[12] Finally, the Maritime Law Association (MLA) had one or more advisors at every meeting, representing the interests of the maritime industry as a whole. Although the federal government did not fund these industry advisors, they had tremendous influence in the positions that the delegation took during the negotiations. Indeed, with the exception of a very few issues on which the government had independent concerns — *i.e.,* safety and security issues — the U.S. position on any subject was a compromise agreed upon by the affected industries during U.S. delegation meetings.

Before each UNCITRAL Working Group session, the U.S. delegation met in Washington with an even broader group of industry representatives so that every affected group would have the opportunity to express its views. For example, representatives of the stevedores and terminal operators, the trucking industry, and cargo underwriters did not attend UNCITRAL Working Group sessions but they generally attended the U.S. delegation meetings in Washington to ensure that their interests were considered. To enable all interested parties to have the opportunity to participate in those meetings, an official notice was published in the *Federal Register* before each meeting and the head of the U.S. delegation sent an e-mail message (with the *Federal Register* notice attached) to anyone who was thought to have even an indirect interest in the subject.

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[12] AAR representatives nevertheless attended virtually every U.S. delegation meeting.

A few weeks before the meeting held on April 20, 2004, for example, the head of the U.S. delegation sent the following e-mail message to forty-seven separate recipients, including the Executive Vice President and General Counsel of the American Association of Port Authorities (AAPA):

> Subject: State Department Meeting on New UNCITRAL Transport Convention: Tuesday, April 20, 2004
>
> Attached to this email is a notice that has been submitted to the Federal Register for publication. It announces a public meeting on the new UNCITRAL Transport Convention. All of you have indicated an interest in receiving information about this project. You are all cordially invited to attend. It would be appreciated if you could let me know by email if you intend to attend, so that we can make sure that there are enough seats.
>
> While anyone is welcome to raise any relevant topic, it would help us to make the best use of our time if you would let me know in advance if there is a particular topic that you would like to have included in the agenda.[13]

The attached notice, which was subsequently published in the *Federal Register* on April 9, gave more specific details about the upcoming meeting:

> There will be a public meeting of a Study Group of the Secretary of State's Advisory Committee on Private International Law on

13 For an additional perspective on this e-mail message, *see* Chester D. Hooper, *Activities in the United States to Ratify the Rotterdam Rules*, 2015 DIR. MAR. 750.

Tuesday, April 20, 2004, to consider the draft instrument on the International Transport Law, under negotiation at the United Nations Commission on International Trade Law (UNCITRAL). The meeting will be held from 1:30 p.m. to 5 p.m. in the offices of Holland & Knight, Suite 100, 2099 Pennsylvania Avenue, N.W., Washington, D.C.

The purpose of the Study Group meeting is to assist the Departments of State and Transportation in determining the U.S. views for the next meeting of the UNCITRAL Working Group on this draft instrument, to be held in New York from May 3 to 14, 2004.

The current draft text of the instrument and related documents of Working Group III (Transport Law) are available on the UNCITRAL website, *http://www.uncitraLorg.* The Study Group meeting is open to the public up to the capacity of the meeting room. Persons who wish to have their views considered are encouraged to submit written comments in advance of the meeting. Comments should refer to Docket number MARAD-2001-11135. Written comments may be submitted to the Docket Clerk, U.S. DOT Dockets, Room PL-401, Department of Transportation, 400 7th Street, S.W., Washington, DC 20490-0001. You may also send comments electronically via the Internet at *http://dmses.dotgov/submitt* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., Monday through Friday, except

> federal holidays. An electronic version of this document, along with all documents entered into this docket, is available on the World Wide Web at *htWdms.dotgov.* For further information, you may contact Mary Helen Carlson at 202-776-8420, or by e-mail at *carlsonmh@state.gov.*[14]

Of course not everyone attended these meetings. Representatives of shippers, carriers, stevedores and terminal operators, transportation intermediaries, and cargo underwriters, for example, recognized that the proposed convention could affect their interests, and therefore attended the meetings. But others concluded that the proposed convention either would not have a significant impact on them or that their interests were already adequately represented by other organizations. The AAPA, for example, stopped coming to the meetings.[15] Its executives apparently believed (correctly, in my opinion) that (1) the proposed convention would not have a significant impact on its members' operations, and (2) to the extent that the convention would affect its members' operations, the stevedores and terminal operators (who were already well represented at the meetings) had the same interests as the ports, and could effectively advocate those views.

B. Particular Aspects of the Rotterdam Rules

The primary purpose of the Rotterdam Rules is to bring the law governing the carriage of goods by sea into the twenty-first

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[14] 69 Fed. Reg. 18998 (Apr. 9, 2004).

[15] In contrast, the railroads sent representatives to all of the Washington meetings, to every UNCITRAL Working Group session, and to U.S. delegation meetings during the negotiating sessions, even though any effect on the railroads of the proposed convention was not readily apparent. The trucking industry attended some meetings but it was less active, recognizing that its interests — to the extent that the new convention would affect them — were the same as the railroads' interests, and the railroads were already effectively advocating their views.

All of this activity vividly demonstrates that the negotiating process was completely transparent, and even those who would not be directly affected by the final product were welcome to participate fully if they wished to be involved.

century.[16] When the new Convention enters into force, it will provide benefits for the entire industry, including (for example) the facilitation of electronic commerce. It is unnecessary to explain in detail here what the Convention will do, for other sources are readily available.[17] But it would be helpful when considering the opposition to the Rotterdam Rules to have a few specific aspects in mind.

1. Door-to-Door Coverage

Perhaps the most significant innovation of the Rotterdam Rules is the extension of geographic coverage. Like COGSA,[18] the Hague and Hague-Visby Rules are both limited to tackle-to-tackle coverage.[19] The Hamburg Rules extend coverage somewhat, but still apply only on a port-to-port basis." Modern contracts of carriage, however, frequently cover carriage from an inland place of origin to an inland destination. In order to provide a single legal regime to govern that contract, the Rotterdam Rules extend coverage to the entire contractual period on which the parties have agreed, whether it be port-to-port, door-to-door, or some variation thereof.[21] As the Supreme Court has observed in this context, "[c]onfusion and inefficiency will inevitably result if more than one body of law governs a given contract's meaning."[22]

" *See, e.g.,* Michael F. Sturley, *Reflections on Fifty Years of Revolutionary and Glacial Change in the Shipping Industry,* 50 EUROPEAN TRANSPORT LAW 357 (2015).

" *See generally, e.g.,* MICHAEL F. STURLEY, TOMOTAKA FUJITA & GERTJAN VAN DER ZIEL, THE ROTTERDAM RULES: THE U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA (London: Sweet & Maxwell 2010).

18 See COGSA § 1(e)

19 See Hague-Visby Rules art. 1(e).

" *See* Hamburg Rules art. 4(1); *see also art.* 1(6).

21 See generally, e.g., STURLEY, FUJITA & VAN DER ZIEL, *supra* note 17, Tii 4.001-.008.

22 Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd., 543 U.S. 14, 29, 2004 AMC 2705, 2715 (2004).

2. Performing Parties

Closely related to the Rotterdam Rules' expansion to door-to-door coverage is the explicit recognition of the role played by performing parties.[23] In modern multimodal carriage, carriers routinely sub-contract at least a portion of their obligations. If the carrier that contracts with the shipper is an ocean carrier, for example, it will routinely sub-contract with an inland carrier to move the goods from the place of receipt to the port of loading, or from the port of discharge to the ultimate place of delivery. If the carrier that contracts with the shipper is a "non-vessel operating common carrier" (NVOCC), it will routinely sub-contract with other companies (including inland and ocean carriers) to perform every aspect of the carriage. In the Rotterdam Rules, those sub-contractors are labelled "performing parties,"[24] and if they do their work at sea or in the port area they are "maritime performing parties."[25]

The Rotterdam Rules impose primary responsibility for cargo loss or damage on the carrier that contracts with the shipper, but when a cargo claimant is able to show that a particular maritime performing party was in fact responsible for the loss of or damage to the cargo, article 19(1) gives the claimant a direct claim against that maritime performing party under the terms of the convention.[26]

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[23] *See generally, e.g.*, STURLEY, FUJITA & VAN DER ZIEL, *supra* note 17, Ili 4.025-.030.

[24] Article 1(6)(a) defines a "performing party" as "a person other than the carrier that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, keeping, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.." *See generally, e.g.,* STURLEY, FUJITA & VAN DER ZIEL, *supra* note 17, Ili 5.144-.155. The word "keeping" was added by the 2013 amendment to the convention. *See supra* note 2.

[25] Article 1(7) defines a "maritime performing party" as "a performing party to the extent that it performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship." *See generally, e.g.,* STURLEY, FUJITA & VAN DER ZIEL, *supra* note 17, Ili 5.156-.159.

[26] Article 19(1) provides:

That provision was not revolutionary. Cargo claimants have long sued negligent sub-contractors that damaged their cargo.[27] Article 19(1)'s innovation is to bring the action within the scope of the Convention, rather than leaving claimants with different remedies against different parties for the same loss or damage depending on whether the carrier or the responsible sub-contractor is being held liable.

3. Automatic "Himalaya" Protection

When an entity qualifies as a "maritime performing party" under article 1(7), with the result that it might become liable under article 19(1) for damage that it causes to cargo that it is handling on behalf of a carrier, article 4(1) guarantees that it will be entitled as a matter of law to the benefit of all of the carrier's defenses and limitations of liability, regardless of whether it is sued under the Convention or under some other legal theory (such as tort or

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> A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier's defences and limits of liability as provided for in this Convention if
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> (a) The maritime performing party received the goods for carriage in a Contracting State, or delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State; and
>
> (b) The occurrence that caused the loss, damage or delay took place: (i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship and either (ii) while it had custody of the goods or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.

See generally, e.g., STURLEY, FUJITA & VAN DER ZIEL, *supra* note 17, Ili 5.163-.195. The 2013 amendment to the convention, *see supra* note 2, corrected a drafting error in paragraph 19(1)(b).

[27] *See, e.g., I orfolk Southern Railway Co. v. James I . Kirby, Ply Ltd.,* 543 U.S. 14, 2004 AMC 2705 (2004); *Robert C. Herd & Co. v. Krawill Machinery Corp.,* 359 U.S. 297, 1959 AMC 879 (1959).

bailment).[28] Current U.S. law generally gives a carrier's servants, agents, and sub-contractors the benefit of the carrier's defenses and limitations of liability only by contract — and only if the carrier included an adequate "Himalaya clause" in its bill of lading. Although Himalaya clauses are often effective to protect entities that qualify as maritime performing parties under the Rotterdam Rules,[29] some bills of lading omit the Himalaya clause entirely[3°] and some Himalaya clauses are held to be inadequate.

In *Jagenberg, Inc. v. Georgia Ports Authority*,[31] for example, a port authority, acting as the agent for an ocean carrier, damaged a single "package" of the plaintiff's cargo while moving it in the port area.[32] The plaintiff, alleging that the port authority and the ocean carrier had breached their obligations as bailees of the cargo, claimed $750,000 in damages for the package and both defendants moved for partial summary judgment to limit their liability to COGSA § 4(5)'s $500.[33] The port authority's rights

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[28] Article 4(1) provides:

> Any provision of this Convention that may provide a defence for, or limit the liability of, the carrier applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted in respect of loss of, damage to, or delay in delivery of goods covered by a contract of carriage or for the breach of any other obligation under this Convention against:
>
> (a) The carrier or a maritime performing party;
>
> (b) The master, crew or any other person that performs services on board the ship; or
>
> (c) Employees of the carrier or a maritime performing party.

[29] *See, e.g.*, Michael F. Sturley, *Third Party Rights and the Himalaya Clause*, 2A BENEDICT ON ADMIRALTY § 169 (7th rev. ed. 2016).

" See, e.g., Fortis Corp. Ins., SA v. Viken Ship Management AS, 597 F.3d 784, 792, 2010 AMC 609 (6th Cir. 2010) (O'Connor, J., sitting by designation).

" 882 F. Supp. 1065, 1995 AMC 2333 (S.D. Ga. 1995).

[32] 882 F. Supp. at 1068-69.

33 882 F. Supp. at 1069.

depended on the carrier's Himalaya clause, which the court held to be inadequate to protect the port authority.[34] The court therefore granted only the carrier's motion for partial summary judgment[35] and the case proceeded on the basis that the port authority faced full liability for the damage. Under the Rotterdam Rules, the port would automatically have benefitted from the same rights as the carrier.

III. The Sole Opposition to U.S. Ratification

It is surprising that port interests would oppose U.S. ratification of the Rotterdam Rules since — as was apparent over a dozen years ago when the proposed convention was being negotiated the proposed convention would have very little impact on the ports.[36] The final text confirms this. Many ports — including two of the most vocal opponents of the Convention — would not be liable under the Rotterdam Rules without their consent because they are entitled to sovereign immunity.[37] Many other ports — including the largest ports in the container trade (the trade that will be most significantly affected by the Rotterdam Rules) — would not be liable under article 19 because they are simply landlords that lease space to the stevedores, terminal operators, and other private parties that conduct the actual operations in the port.[38] Those port authorities would not qualify as "maritime performing parties" under article 1(7) because none of them "performs or undertakes to perform any of the carrier's obligations" under the contract of carriage. That work is left to a landlord port's tenants.

" 882 F. Supp. at 1074-76.

'5 882 F. Supp. at 1076-79.

36 See supra text at note 15.

[3]*7 See, e.g., Federal Maritime Commission v. South Carolina State Ports Authority,* 535 U.S. 743, 751 (2002) (finding South Carolina State Ports Authority entitled to sovereign immunity); *Kamani v. Port of Houston Authority,* 702 F.2d 612 (5th Cir. 1983) (fmding Port of Houston Authority entitled to sovereign immunity).

" MARAD reports, for example, that the Port Authority of New York & New Jersey, the Port of Long Beach, and the Port of Los Angeles are all landlord ports.

It is even more surprising that port interests would oppose U.S. ratification of the Rotterdam Rules when so many provisions of the Convention would provide greater protection to ports than does current U.S. law. Perhaps the most obvious example is article 4(1), which would guarantee a port (when it qualifies as a "maritime performing party" under article 1(7)) the benefit of all of the carrier's defenses and limitations of liability, regardless of whether it is sued under the Convention or under some other legal theory (such as tort or bailment). Because ports now have only the uncertain contractual protection of Himalaya clauses,[39] the automatic protection of article 4(1) is indeed a valuable benefit.

The ports' objections to U.S. ratification of the Rotterdam Rules remain surprising even when the stated reasons for those objections are considered. Although the ports have generally been vague in explaining why they oppose U.S. ratification of the Rotterdam Rules, one port authority gave the Maritime Administration a detailed memorandum (which I will call here the "Ports' Memorandum") with a list of various objections. In the rest of this section, I will examine those objections in detail. None provides a plausible reason to oppose U.S. ratification. They instead reveal a lack of understanding of the Convention, the process by which it was negotiated, and current U.S. law.

A. The Ports' Opportunity to Participate in the Negotiations

The first objection mentioned in the Ports' Memorandum is the supposed "fail[ure] to include the United States port community in the seven year drafting process." As explained above, the American Association of Port Authorities was notified of the negotiations, was given an opportunity to participate in the process, attended at least one meeting, and chose not to participate further.[40] Every meeting of the U.S. delegation was publicized in advance in the *Federal Register* and any interested party — including any port

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[39] *See supra* notes 29-35 and accompanying text.

[40] *See supra* notes 8-15 and accompanying text.

authority — was invited to attend the meetings or to submit comments.[41] Moreover, experienced representatives of the United States port community participated in the negotiations as representatives of the International Association of Ports and Harbours (IAPH).[42]

To the extent that the ports failed to participate in the drafting process, they themselves made the decision to abstain from the negotiations. Of course they were not obligated to participate, and they certainly retain their right to criticize the result of the negotiations in which they chose not to participate. If they had legitimate concerns, it would still be appropriate to address them. But it is simply inaccurate for them to assert that they were in any way excluded from the process.

B. Prior International Treaties

In a somewhat cryptic objection, the ports complain that they *"have never been the subject of international treaties."* It seems odd that ports, whose business (at least to the extent relevant here) is based on international trade, would be espousing isolationist views. The Ports' Memorandum offers no reason for objecting to the source of the legal regime (as opposed to its substantive content). It certainly makes no effort to challenge the advantages of international uniformity,[43] which is a well-recognized benefit of having an international treaty that establishes the same legal standards in different countries for multinational transactions.

In any event, the ports' assertion is substantially incorrect. Although it is true that ports *as ports* have never been the subject of an international treaty governing the carriage of goods by sea, that truth will not change under the new Convention. Ports *as ports* are not subject to the Rotterdam Rules; nothing in the Rotterdam Rules

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[41] *See, e.g.*, 69 Fed. Reg. 18998 (Apr. 9, 2004).

[42] *See supra* notes 9-10 and accompanying text

[43] *See generally, e.g.*, Michael F. Sturley, *Uniformity in the Law Governing the Carriage of Goods by Sea*, 26 J. MAR. L. & Com. 553 (1995).

regulates ports as such. The Rotterdam Rules would apply to a port only to the extent that it is a "maritime performing party," and a port would not qualify as a performing party unless it "performs or undertakes to perform" some "of the carrier's obligations under the contract of caniage."[44] To the extent that a port is currently performing any of the carrier's obligations, it is already liable to be sued for any loss or damage that it causes to the cargo in its care. And if a port is sued, it will quickly assert the benefits of the carrier's COGSA defenses under a Himalaya clause.[45] Although COGSA appears in the *Statutes at Large* as an Act of Congress, it is well recognized that this particular statute is simply the U.S. enactment of an international treaty known as the Hague Rules.[46] To be sure, Congress modified the treaty language in a handful of places,[47] but each of those modifications was intended to give effect to the international understanding, not to change it.[48] Moreover, a carrier's rights are sometimes defined by another international convention, such as the Hague-Visby Rules,[49] and when that happens a port's derivative rights under a Himalaya clause would also be defined by the international treaty. International treaties have long been a part of the landscape for the international carriage of goods by sea, and to the extent that ports are part of that process

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" Article 1(6)(a). *See supra* note 24 (quoting article 1(6)(a)).

[4]5 *See supra* notes 31-35 and accompanying text.

" See, e.g., Robert C. Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297, 301-02, 1959 AMC 879 (1959).

[47] *See generally, e.g.,* Michael F. Sturley, *The History of COGSA and the Hague Rules,* 22 J. MAR. L. & Com. 1, 53-54 (1991).

" The most obvious change was in COGSA § 4(5), which enacts article 4(5) of the Hague Rules. Whereas the Hague Rules provide for a package limitation of £100 sterling, COGSA § 4(5) sets the limitation amount at $500. But the Hague Rules explicitly authorized that "amendment." *See* Hague Rules art. 9(2) ("Those contracting states in which the pound sterling is not a monetary unit reserve to themselves the right of translating sums indicated in this convention in terms of pound sterling into terms of their own monetary system in round figures.").

[49] *See, e.g.,* Michael F. Sturley, *Bill of Lading Provisions Calling for the Application of Legal Regimes Other Than the Carriage of Goods by Sea Act,* 2A BENEDICT ON ADMIRALTY § 46 (7th rev. ed. 2016).

as opposed to being mere landlords[50] — they are (by their own choice) very much subject to those treaties.

C. The Ports' Control Over the Conditions and Limits of Their Liability

Turning to specific objections to the substance of the Rotterdam Rules, the Ports' Memorandum argues "that under the Rotterdam Rules, U.S. ports have absolutely no control over the conditions and limits of their own liability." The asserted basis for that argument is that article 80 permits carriers to enter into "volume contracts" with customers[51] "and thereby establish the applicable liability conditions and amounts per customer." The Ports' Memorandum recognizes "that the ports ... will get the benefit of any lower liability negotiated by a carrier, and not suffer if there is a higher liability assumed by the carrier in the volume contract."[52] In other words, the carriers' limited freedom of contract under article 80 can only help the ports. Whatever the carrier does, a port's maximum liability will be established by the Convention's terms. The only uncertainty will be whether it might benefit from the carrier's having made a better bargain (without informing it).[53] The objection, in other words, is that a port might get a windfall without having known in advance that this good fortune was possible.

Even if it were a bad thing to obtain a windfall, the ports' objection reveals a major misunderstanding of current U.S. law.[54]

" *See supra* note 38 and accompanying text.

" *See generally, e.g.,* STURLEY, FUJITA & VAN DER ZIEL, *supra* note 17, Ili 13.049-.059.

[52] *Cf infra* text at note 71.

[n] *See, e.g.,* Michael F. Sturley, *The Rotterdam Rules and Maritime Performing Parties in the United States,* 79 J. TRANSP. L., LOGISTICS & POLICY 13, 25-28 (2012) [hereinafter *Maritime Performing Parties].*

m This objection also reveals a minor misunderstanding of the Rotterdam Rules. Under article 80, carriers can conclude "volume contracts" with shippers but only if they comply with strict requirements that protect shippers from carriers' overreaching. *See generally, e.g.,* STURLEY, FUJITA & VAN DER ZIEL, *supra* note

To the extent any basis exists for the objection, the problem is much more serious today. Performing parties such as ports are currently subject to suit in tort (or bailment) for any damage they cause to the cargo but they generally receive the benefit of the carrier's defenses and limitations under a Himalaya clause in the bill of lading. If the Himalaya clause is missing (which sometimes happens[55]) or inadequate (which also happens[56]), the performing party's potential liability is unlimited. In other words, a performing party's protection is entirely in the hands of the carrier that drafts the bill of lading. Although the Ports' Memorandum may be correct in claiming that "it is impossible for ports to know what the terms are for the thousands of confidential volume contracts in effect between each carrier and each of its customers," the Memorandum ignores the fact that it is even more impractical for ports to know the terms of the Himalaya clauses in every bill of lading that each carrier issues to each of its customers. The significant difference is in the consequences. Not knowing the terms of the Himalaya clauses means that a port will not know whether it is subject to no liability,[57] unlimited liability,[58] or some limited liability between those two extremes.[59] Not knowing the terms of a volume contract, on the other hand, means that the port will not know whether its liability is capped at the level of the Rotterdam Rules or whether it may have even less potential liability.

Moreover, the ports' objection reveals an even more fundamental misunderstanding of current U.S. law and practice. In the real world, a carrier's or a performing party's liability is rarely

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17, T13.039-.068. Informed observers do not expect many volume contracts to address liability terms.

55 *See supra* note 30 and accompanying text

56 *See supra* notes 31-35 and accompanying text

57 *Cf., e.g., Federal Insurance Co. v. Union Pacific Railroad Co.,* 651 F.3d 1175, 2012 AMC 1303 (9th Cir. 2011).

58 *See, e.g., Jagenberg, Inc. v. Georgia Ports Authority,* 882 F. Supp. 1065, 1995 AMC 2333 (S.D. Ga. 1995)..

59 *See, e.g., Colgate Palmolive Co. v. M/V Atl. Conveyor,* 1997 AMC 1478 (S.D.N.Y. 1996).

affected by the statutory liability limits Even under COGSA's 80-year-old $500/package limit, a large majority of maritime shipments today are worth less than the specified limitation amount.[60] The more important limitation is the actual value of the goods.[61] The Rotterdam Rules continue that principle.[62] Neither the carrier nor its maritime performing parties have any effective control over the value of the goods that are shipped, and shippers very rarely declare the actual value of the goods.[63] In most cases, therefore, the effective limit on a maritime performing party's potential liability is entirely in the shipper's hands, and neither ports nor carriers have either knowledge or control over the limits of their own liability.

D. Ports as Attractive Targets for Suits

The Ports' Memorandum's next objection reveals another fundamental misunderstanding of the Rotterdam Rules and current U.S. law. The Memorandum predicts that "[p]orts will become the most attractive target for suits involving cargo damage when the cause or place of damage is in doubt."[64] The gravamen of the

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[60] *See, e.g.,* Michael F. Sturley, *Unit Limitation under the Rotterdam Rules and Prior Transport Law Conventions: The Tail That Wags the Dog,* in CURRENT ISSUES IN HONG KONG AND INTERNATIONAL MARITIME LAW 93, 103 & n.78 (Hong Kong Centre for Maritime and Transportation Law, City University of Hong Kong 2015).

[61] *See* COGSA § 4(5) (2d paragraph) ("In no event shall the carrier be liable for more than the amount of damage actually sustained.").

[62] *See* Article 22(1).

[63] *See, e.g., I orfolk Southern Railway Co. v. James I . Kirby, Ply Ltd.,* 543 U.S. 14, 19, 2004 AMC 2705 (2004) (noting that it "is common in the industry" for shippers not to declare the true value of their shipments) (citing Michael F. Sturley, *Carriage of Goods by Sea,* 31 J. MAR. L. & Com. 241, 244 (2000) (explaining why shippers do not declare the true value of their shipments)).

[64] This objection also reveals a basic misunderstanding of the Rotterdam Rules. A cargo claimant cannot recover from anyone other than the carrier "when the cause or place of damage is in doubt." The Convention imposes liability on a maritime performing party only if the damage occurred when it was responsible for the goods. Article 19(1)(b)(ii)-(iii); *see supra* note 26 (quoting article 19(1)). And article 4 protects maritime performing parties from liability otherwise than as imposed by article 19.

objection is that volume contracts "usually" include forum selection clauses that may prevent a cargo claimant from suing the carrier where the damage occurred, whereas ports may be sued where they operate. "Thus the port becomes the first target for lawsuits where there may be joint liability."

It is true that volume contracts could include forum selection or arbitration clauses that require suits against a carrier to be brought overseas,[65] and those clauses would be enforceable under specified conditions,[66] but requiring suit overseas is very much the exception to the general rule. For the most part, article 66 makes it easier for a cargo claimant to seek redress against the carrier in the most convenient forum — thus making it more likely that the carrier, instead of a port, will be sued (or at least that the port will not be sued alone).[67]

Current law is much more likely to trigger the problem of which the port complains. Under *Sky Reefer*,[68] foreign carriers today can almost always avoid litigation in the United States if they simply include the appropriate clause in their bills of lading (without any of the protections that article 80 of the Rotterdam Rules creates for volume contracts). Thus the Rotterdam Rules would represent a significant improvement for ports that worry about the risk of "becom[ing] the most attractive target" for cargo-damage suits. The Ports' Memorandum has the analysis exactly backwards.

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[65] Because volume contracts are a creation of the Rotterdam Rules, no one yet knows whether they will "usually" include forum selection clauses. To the extent that volume contracts resemble the "service contracts" now common in U.S. trades, it is perhaps more likely that forum selection clauses in volume contracts will specify U.S. forums.

[66] *See generally, e.g.*, STURLEY, FUJITA & VAN DER ZIEL, *supra* note 17, ¶¶ 12.044-.057, 12.081-.088.

[67] *See generally, e.g.*, STURLEY, FUJITA & VAN DER ZIEL, *supra* note 17, ¶¶ 12.022-.041, 12.077-.079.

[68] *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 1995 AMC 1817 (1995). *See generally, e.g.*, Michael F. Sturley, *Forum Selection Clauses*, 8 BENEDICT ON ADMIRALTY § 16.09[A] (7th rev. ed. 2015).

E. The Convention's Alleged Failure to Provide Adequate Guidance

1. Apportionment of Lability

A recurring theme in the Ports' Memorandum is that "[c]ontradictions and confusions abound" in the Rotterdam Rules. The first concrete example of that complaint is that "the Rotterdam Rules provide no guidance as to how liability is to be apportioned" when the carrier and a port are sued in a single suit. It is true that the Rotterdam Rules do not specify how to apportion liability. Because the Rotterdam Rules do not attempt to regulate every aspect of the carrier-shipper relationship, they fail to resolve many issues. Of course it would have been absurd if the Rotterdam Rules had attempted such an ambitious task. Moreover, for eighty years COGSA has similarly failed to address how liability is to be apportioned when a carrier and a performing party are co-defendants. Fortunately, well-established principles of maritime law resolve that issue today and will continue to apply under the Rotterdam Rules.[69]

Unfortunately, the Ports' Memorandum ignores those well-established principles of maritime law. In a subsequent section, it asserts that "[m]any jurisdictions permit a tortfeasor a credit when a co-tortfeasor settles with the plaintiff." It then complains, "if a shipper settles with an at-fault operating port for a modest sum due to limitations under either the Rotterdam formula or a volume contract, an at-fault landlord port would be required to pay a disproportionate part of the loss." This analysis errs on many levels. To begin with, the initial assumption is wrong. Under state law in some states, a non-settling tortfeasor receives a dollar-for-dollar credit, but in *McDermott, Inc. v. AmClyde*,[70] the Supreme Court adopted the proportionate share approach in maritime law for apportionment of liability. The feared problem does not arise in maritime law. Second, the Rotterdam Rules protect maritime

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[69] *See, e.g., McDermott, Inc. v. AmClyde*, 511 U.S. 202 (1994).

[70] 511 U.S. 202 (1994).

performing parties from being sued for more than the amount of the carrier's liability "under either the Rotterdam formula or a volume contract."[71] And fmally, to the extent any basis exists for the problem described in the Ports' Memorandum, the problem is far worse under existing law (under which maritime performing parties do not have the benefit of automatic Himalaya protection, for example) than it would be under the Rotterdam Rules.

2. Sovereign Immunity

The Ports' Memorandum's second concrete example of "unclear draftsmanship" is the Convention's failure to specify whether it would abrogate the sovereign immunity that "[s]ome US ports presently enjoy . . . under the Eleventh Amendment of the U.S. Constitution." The Memorandum complains that the "question has not been judicially resolved at this time." Of course no court could have ruled on a port's entitlement to sovereign immunity under the Rotterdam Rules because the Convention is not yet in force. But courts have ruled on various ports' claims to sovereign immunity in cargo-damage cases under current law, and nothing in the Rotterdam Rules would change those results. I have addressed this issue in detail in an earlier article,[72] and there is no need to repeat my analysis here. The bottom line is that some ports are entitled to sovereign immunity and some ports are not. The result is controlled by legal principles independent of COGSA that will not change under the Rotterdam Rules. Indeed, it is difficult to imagine a plausible legal theory under which a treaty could deny constitutionally protected rights.

3. Breaking the Liability Limits

Perhaps the most significant criticism along these lines is that the Rotterdam Rules do not provide adequate guidance on when it is possible to break the liability limits under article 61. The Ports' Memorandum worries that "there may in fact be no limit to the amount of loss for which a (carrier or) port may be liable." Once

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[71] *See supra* notes 28-35 and accompanying text; text at note 52.

[72] *See generally* Staley, *Maritime Performing Parties*, *supra* note 53, at 28-35.

again, the ports' objection betrays a misunderstanding of the Rotterdam Rules' relationship to current law. The Hague Rules created the package limitation codified at COGSA § 4(5) to protect carriers from unlimited liability but did not provide any explicit mechanism for breaking that limitation, even in cases of deliberate misconduct. Courts therefore developed judicial doctrines for breaking limitation. The U.S. courts have been particularly inventive in this regard, and thus it is easier to break limitation under COGSA than under any international regime. Judicial inventions such as the "fair opportunity"[73] and "deviation"[74] doctrines often permit limitation to be broken in circumstances that have little if anything to do with carrier misconduct. The Hague-Visby Rules addressed the problem by adding a provision (article 4(5)(e)) to permit limitation to be broken only in cases of intentional or reckless carrier misconduct, thus protecting carriers (and other parties, such as ports, who receive the same benefits under a Himalaya clause) more effectively than COGSA or the Hague Rules. The Hamburg Rules strengthened that provision very slightly in article 8. In the Rotterdam Rules, article 61 starts with the language of article 8 of the Hamburg Rules and makes it somewhat more difficult for limitation to be broken. Once again, the risk that the ports fear is much greater under current law; the Rotterdam Rules would give ports much better protection than they currently have today.

IV. Conclusion

It is disappointing that the United States has not yet ratified the Rotterdam Rules. It is more disappointing that the principal reason for our failure to ratify is apparently due to misunderstandings on the part of an industry that will be affected only tangentially by the Convention when it eventually enters into force. Even if the ports' negative analysis of the Rotterdam Rules had been accurate (rather than based on misunderstandings throughout), it would still be so incomplete that it would be of little value. The

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[73] *See, e.g.,* Michael F. Sturley, *The Fair Opportunity Requirement,* 2A BENEDICT ON ADMIRALTY § 166[c] (7th rev. ed. 2016).

[74] *See, e.g.,* Michael F. Sturley, *Deviation,* 2A BENEDICT ON ADMIRALTY ch. 12 (7th rev. ed. 2016).

ports have focused entirely on liability aspects of the regime, which are relevant in those rare cases — fewer than one percent of all shipments — in which something goes terribly wrong and cargo is lost or damaged. Most of the time, everything turns out well and cargo reaches its intended destination in good condition. Although the Rotterdam Rules address liability issues, the Convention covers much more, and the Ports' Memorandum ignores all of the non-liability provisions.

Perhaps most significantly, the new Convention facilitates electronic commerce (as part of the general updating effort to provide a 21st century regime for ocean carriage), which will produce significant cost savings for everyone in the industry. That is a major reason why carriers (represented in the United States by the World Shipping Council) overwhelmingly support the Rotterdam Rules despite the imposition of somewhat higher liability on carriers. Those savings on every shipment would far outweigh any increase in liability when things go wrong (less than one percent of the time). Similarly, shippers (represented in the United States by the National Industrial Transportation League) overwhelmingly support the Rotterdam Rules, primarily for the non-liability benefits.

It is ironic that the Ports' Memorandum in its concluding paragraphs recognizes that the ports' "economic well-being" depends "on the success of their operators," but does so in a manner suggesting that potential increased burdens on operators provide a basis for opposing the Rotterdam Rules. Although the economic well-being of ports is indeed ultimately tied to the economic wellbeing of the other participants in the enterprise, the Ports' Memorandum has once again drawn precisely the wrong conclusion from that insight. All of the interests that would be most directly affected by the Rotterdam Rules — including the operators who use the ports' facilities on a daily basis — recognize that the new Convention would be good for the industry as a whole. And the benefits of the Rotterdam Rules for those who use the ports would be good for the ports, too.

COMMITTEE OI CARRIAGE OF GOODS

Editor: Michael J. Ryan
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CARGO I EWSLETTER I 0.68

Fall 2016

COGSA MAY BE EXTEI DED, IF YOU SAY IT RIGHT...

Atwood Oceanics, Inc. v. M/V Pac Altair, et al., 191 F. Supp. 3d 1328, 2016 AMC 1993 (S.D. Ala. 2016)

A shipment consisting of 85 marine drilling riser joints and one (1) "crate seals accessories" were shipped onboard for transportation from Port Klang, Malaysia, to Mobile, Alabama, as "on-deck" cargo. When struck by a rogue wave, one riser was lost overboard and at least three other risers suffered physical damage.

The court considered only a motion for partial summary judgment brought by the plaintiff against the carrier defendants. Plaintiff argued no package limitation should apply as the cargo was "on-deck," to which COGSA does not apply, asserting that the bill of lading "would have to have contained language "expressly" extending the benefit of that limitation to on-deck cargo..." The carrier defendants asserted that the package limitation should apply to the cargo, as no higher declarations or valuations were declared by the shipper. They also asserted that on-deck storage was done with the knowledge and approval of the shipper with full acceptance of any risk of damage or loss.

Initially, the court noted that COGSA itself did not cover "cargo which by the contract of carriage is stated as being carried on deck and is so carried." Thus, the on-deck cargo was not automatically subject to COGSA. At the same time, the court noted parties may contractually extend COGSA to on-deck cargo where

the bill of lading "makes COGSA applicable at times when it would not apply by its own force."

> Put simply, the parties can decide to expressly extend COGSA to on-deck cargo as a contractual term in a bill of lading, and this choice will be enforced. [citation omitted]
>
> * * *
>
> However, the extension of COGSA to on-deck cargo must be ***expressly*** stated in a bill of lading because COGSA does not apply *ex prorio (sic) vigore.*

Reviewing cases, the court found: "Neither the BOL nor the Clause Paramount within the BOL expressly state that COGSA applies to on-deck cargo or that COGSA is being extended by agreement of the parties specifically to on-deck cargo."

The court noted that: "Rather than evincing an expressly agreed upon application of COGSA to on-deck cargo, the Clause Paramount is *wholly silent* as to COGSA's applicability *to on-deck cargo* (and thus as to COGSA's $500/package limitation)."

To the extent this silence could be construed as ambiguity in the bill of lading, any such ambiguity is construed against the carrier defendants (as drafter).

The court found other arguments raised by the plaintiff as to overall liability, issues, and the applicability of the Harter Act to be premature and denied such portion of the plaintiff's motion at this time, as the singular issue involved was the application of COGSA and its package limitation to on-deck cargo.

JUST BECAUSE IT SA! K All 'T EI OUGH...

In the Matter of the Complaint of Sea Star Line, LLC, d/b/a TOTE Maritime Puerto Rico, et ano., 2016 AMC 2409, 2016 U.S. Dist. LEXIS 178293 (M.D. Fla. Sept. 23, 2016)

The vessel S.S. EL FARO was lost at sea near the Bahamas on October 1, 2015. All persons aboard during that voyage were lost at sea.

Petitioners, the shipowners, initiated a limitation of liability proceeding, and dozens of wrongful death and cargo claims were filed against petitioners in that action.

Four wrongful death claimants filed a motion requesting the court to grant partial summary judgment on the issue of the vessel's alleged unseaworthiness. These claimants' primary argument was that the vessel's loss of propulsion during the voyage was sufficient to render the vessel unseaworthy as a matter of law.

After setting forth the standard of review, the court addressed the merits of the motion. The court stated claimants' argument on the seaworthiness issue was remarkably straightforward: the EL FARO lost propulsion due to an engineering problem; why it lost propulsion did not matter; the fact that the vessel lost propulsion was sufficient on its own to render the vessel unseaworthy as a matter of law. Moreover, the vessel sank. Claimants asserted, "If a vessel that does not float is not considered unseaworthy, then the term `unseaworthiness' has no meaning."

The court found that the claimants did not carry their burden. While general maritime law imposes an absolute duty on the shipowner to furnish a seaworthy vessel, this does not mean that the shipowner is required to furnish an accident-free vessel. The question of a vessel's seaworthiness is ordinarily one to be answered by the trier of fact. "Only in rare cases will the issue be resolved for or against the shipowner as a matter of law (citing cases)."

The court noted a rebuttable presumption of unseaworthiness can arise when a showing is made that the vessel "sank in calm weather and seas" or where the vessel's equipment breaks under normal use (citing cases). However, "there is no presumption that a ship is unseaworthy merely because an accident has occurred on it."

The court found claimants were not entitled to any presumption of unseaworthiness. No evidence was presented by claimants, or event suggested, that the vessel sank in calm waters.

As to the vessel's loss of propulsion, the court noted the claimants assume, "again without advancing any argument or evidence," that the vessel's loss of motor power was not related to or the result of the extraordinary conditions the vessel faced on the day of the sinking: "That is, Claimants have made no showing that the loss of propulsion occurred while in *normal use"* (citation omitted). The court found no presumption applied.

The court went on to note that opposing affidavits were submitted by petitioners which sufficed to show a genuine dispute of material fact existed regarding the seaworthiness of the vessel. Finally, the court noted that entry of summary judgment was not appropriate unless "the party opposing the motion had had an adequate opportunity for discovery" (citation omitted).

The National Transportation Safety Board's litigation hold on certain classes of discoverable information was currently still in force. Thus, the court held the claimants' motion was premature on the grounds that petitioners had not yet been afforded a meaningful opportunity for discovery.

[Editor's note: Copies of the order were sent to 94 individual counsel which presumably included all attorneys appearing for petitioners as well as claimants.]

AIRBILL SAYS IT LOUD AI D CLEAR; EVEI FOR GEMS...

Golden Hawk Metallurgical, Inc. v. Fed. Express Corp., No. 15-14005, 2016 U.S. Dist. LEXIS 137476 (E.D. Mich. Oct. 4, 2016)

Plaintiff sought recovery from defendant for the loss of two shipments containing precious metals and gems sent separately by air. The precious metals and gems were not delivered to either destination, plaintiff alleging that one of the defendant's employees likely stole the goods, replacing them with rocks. Airbills were issued which expressly limited defendant's liability to $100, unless a higher value was declared and paid for. Plaintiff did not declare a value on either shipment, nor did plaintiff pay for a value higher than $100 in relation to either shipping contract.

Suit was brought originally in state court, and defendant removed the case to the federal court and moved for partial summary judgment. Defendant asked the court to dismiss plaintiff's counts for breach of duty as a bailee and conversion as being precluded by the Airline Deregulation Act of 1978 (ADA).

[The court noted plaintiff's contention that the issue involved was whether the plaintiff's stated claims were preempted by the Carmack Amendment. The court noted the Carmack Amendment does not apply to an air carrier such as FedEx.]

Citing cases, the court found the ADA preempted counts I and II, regardless of whether they arose from Michigan statutory or common law, and granted the motion to dismiss such counts.

Plaintiff also alleged defendant was liable for breach of contract, and defendant argued that the shipping contracts limited liability to $100, in any event.

The court addressed whether the "conversion exception," which exposes a carrier to full liability when it has appropriated a shipper's property for its own use or gain, was at issue; however, the court found the exception did not apply. While plaintiff carried its

burden of showing an employee converted the metals and gems, plaintiff did not allege the carrier appropriated the property itself or profited from its conversion. "[w]illful blindness to the activity of third parties (even employees) does not qualify [for the exception]."

The court considered whether an air carrier's terms were enforceable via the "reasonable notice" test (citing cases). The tops of the airbills contained the shipping forms which the plaintiff completed. On the bottoms of the airbills, a capitalized, bolded warning appeared, followed by a paragraph detailing the terms and conditions. The paragraph also directed the shipper to the Service Guide, which was available online, and contained identical terms: "The airbills' bottom sections are not cluttered, nor are their essential conditions buried among a litany of immaterial terms."

The court found the airbills provided "conspicuous warnings" of defendant's limited liability, and plaintiff did not offer evidence showing defendant behaved in any way to render the contract's terms less clear. The court found plaintiff could recover no more than $100 for its claim for breach of contract.

FIRST AT THE TROUGH WII S...

Stemcor USA, Inc. v. Am. Metals Trading, et al., 199 F. Supp. 3d 1102, 2016 AMC 2325 (E.D. La., 2016)

The court considered the attachment of 9,000 tons of pig iron by five competing interests. Two claimants filed separate legal actions in the federal court. Orders for writs of maritime attachment were executed.

Subsequently, vessel interests intervened in one of those actions, claiming unpaid freight, dead freight, and demurrage, and obtained a writ of attachment.

Before service of any writs of attachment, one of the "claimants" amended its complaint to add a claim for enforcement of a foreign arbitration award and had an additional writ of

attachment issued under Louisiana's non-resident attachment statute.

The first two attachments were served on the pig iron cargo aboard the vessel, and the two actions instituted in the federal court were consolidated. Another claimant then intervened in these actions on the basis of a loan agreement which was secured by a pledge of pig iron inventory. A writ of attachment was obtained under Louisiana law.

After a dispute over the ownership of the pig iron cargo, vessel interests' papers were modified and served at 8 AM on December 29, 2012. About the same time, another suit was filed by the last "claimant" in Louisiana state court seeking to attach the pig iron and seizure papers were served eight minutes before the vessel interests' papers.

Subsequently, the pig iron was sold and proceeds paid into the registry of the district court, pending resolution of the claims.

Initially, the court noted that Rule B attachments must be based on "maritime" claims. It found the actions initially instituted by the two claimants in federal court were not maritime, but rather sale of goods. Thus, there was no basis for the issuance of Rule B attachments.

As to the attachment by one of the initial "claimants" under the Convention on Recognition and Enforcement of Foreign Arbitral Awards, the court noted Louisiana law was alleged as a basis for attachment.

The court found that attachment of property under the applicable state law could not be used to compel arbitration or obtain security for such and held the attachment should be vacated.

Having dealt with the federal attachments and the state law attachment based on the Convention on Enforcement, the court then addressed the attachments made under state law by the vessel interests and the last "claimant." The last claimant's attachment was

served eight minutes before the attachment of the vessel interests. Based upon precedent, "when one court exercises *in rem* jurisdiction over a *res,* a second court will not assume *in rem* jurisdiction over the same *res."* (citation omitted). It ordered the vacation of the other attachments for lack of jurisdiction and transfer of the proceeds of the sale to the local state court.

HAGUE RULES "UI IT" DOES I OT APPLY TO BULK CARGO?

Vinnlustodin HF, et ano. v. Sea Tank Shipping - AS, [2016] EWHC 2514 (Comm) (14 Oct. 2016)

A shipment of fish oil was damaged on a voyage from Iceland to Norway. The shipment was carried pursuant to a charter party providing for the carriage of "2,000 tons of fish oil in bulk, 5% more or less in charterers' option." The charter party form incorporated Article W of the Carriage of Goods by Sea Act of 1924 which referred to a limitation of liability not to exceed £100 per package or unit as contained in the Hague Rules. The shipment was rated on the basis of a lump sum.

The charter party also provided for arbitration; however, the parties agreed that the Commercial Court should have jurisdiction to determine an agreed preliminary "Limitation Issue," namely, whether the defendant was entitled to limit liability to £54,730.90 (based upon £100/metric ton of cargo damaged).

The court noted there was no English authority which has determined whether Article W, Rule 5 applied to bulk cargo. However, it was referred to a number of decisions where the point had been considered, to Commonwealth authorities, and to many textbooks and commentaries discussing the issue, as well as to the relevant *travaux preparatoires.*

In a decision comprising 66 paragraphs, the court concluded that the word "unit" in the Hague Rules (Article W, Rule 5) was not apt to apply to bulk cargoes, and that even if it could apply, the only legitimate application would be by way of interpreting the word

"unit" as "freight unit." "This cannot be done in the present case in a way which gives rise to a lower limitation figure than the claim because of the lump sum nature of the freight."

"MAY" DOESI 'T MEM YOU MUST...

Landstar Ranger, Inc., et ano. v. Global Experience Specialists, Inc., Civ. Action No. 5:14-CV-193-RLV-DCK, 2016 WL 3636941 (W.D. N.C. July 6, 2016)

A U.S. magistrate judge denied defendant's motion to change venue involving a shipment to which the Carmack Amendment applied.

Defendant objected to the order, arguing that the magistrate judge did not address its argument that, if defendant is a statutorily-defined carrier, then venue should be transferred to the judicial district where the loss that is the subject of the lawsuit purportedly occurred, pursuant to Carmack.

The court did not accept this objection: "Defendant's objection is rejected. The plain language of the Carmack Amendment does not support Defendant's argument that venue is proper only in the Northern District of Illinois."

The court pointed out that the Carmack Amendment explicitly states a civil action under the applicable section "may" be brought against the carrier in the judicial district in which such loss or damage is alleged to have occurred.

> The Court reads this statute as permissive in nature given that, as Defendant concedes, the statute uses the singular and discretionary term "may," rather than "shall" or "must,' or even "may" modified by the limiting term "only."

The court considered the use of "may" indicates that a district court maintains its discretion to grant or deny a defendant's

motion to change venue under 28 U.S.C. §1404, irrespective of whether defendant is or is not in fact a relevant "carrier."

The court overruled the objections made and affirmed the decision denying the motion to change venue.

COMMITTEE OI CRUISE LII ES AI D PASSE! GER SHIPS

Chair: Carol L Finklehoffe

I EWSLETTER

Volume 10, I umber 2, Fall, 2016

The Cruise Passenger Protection Act of 2015

A new senate bill, The Cruise Passenger Protection Act of 2015 ("CPPA"), H.R. 3142, 114th Cong. (2015), has recently been introduced. Sponsored by U.S. Congresswoman Doris Matsui (D-CA) and Senator Richard Blumenthal (D-CT), it is designed to improve upon the 2010 Cruise Vessel Security and Safety Act ("CVSSA"), H.R. Res. 3360, 111th Cong. (2010).

The CPPA would require:

- The installation of Man Overboard Systems on all cruise ships since the technology is now available. This system should have both an alarm and video capture feature.
- A certified Victim's Advocate who would be the victim's primary point of contact in order to make certain that a passenger is informed of his or her rights and the cruise line was in compliance with the law. In addition have a twenty-four (24) hour toll free number for crime victims so they can obtain support services.
- Medical staff credentialing and certifying process outlined in the CVSSA to apply to all medical cases, and not just in sexual assaults. The training should be mandatory and certified by an independent third party.

- Acoustic sounding devices to be added to all cruise ships to enforce the Homeland Security requirement that no ship (i.e. ships manned with pirates or terrorists) come within five hundred (500) feet of a cruise ship.

- The CVSSA to apply to all cruise ships, whether or not the voyage embarks or disembarks in the United States.

- A toll free hot-line and websites for passenger complaints and would give the DOT authority to investigate.

- Staffing of an appropriate number of sea marshals on a vessel, who are trained and certified by the United States Coast Guard.

- Strengthening of video surveillance requirements including placement, access to requests, and notice of video surveillance equipment to monitor crime.

- The Department of Transportation to maintain, on a website, the statistical compilation of reported incidents of missing persons, crimes, and other information for vessel passengers.

- The Department of Transportation to be the lead federal agency on consumer protection issues for cruise ship passengers, and to determine if any of the enumerated rights in the international cruise line passenger bill of rights is enforceable under federal law.

- Civil and criminal penalties for the violations of this Act, including withholding or revoking clearance or denial of entry into the United States.

- Cruise lines to provide consumers with a clear upfront summary of the restrictive terms and

conditions in cruise line contracts and a short summary of the key rights and limitations.

UPDATE OI THE LAW

By: Carol L Finklehoffe, Esq.
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PASSE! GER CLAIMS

Collateral Source Rule

Beam v. Carnival Corp., 15-22103-CIV-GAYLES (S.D. Fla. Oct. 12, 2016)

Plaintiff may introduce her total medical bills to the jury. The court reserved the right to reduce any award post trial based on any negotiated reductions and/or write offs.

Hillenburg v. Carnival Corp., 1:16-cv-22091 (ALT), 2016 WL 5922756, 2016 U.S. Dist. LEXIS 146252 (S.D. Fla. Sept. 21, 2016)

Court struck the cruise line's affirmative defense, prohibiting the defendant from reducing its liability by amounts paid to the plaintiff by collateral sources. In attempting to reduce the amount of damages by the amount of benefits paid or payable runs squarely against the collateral source rule. The plaintiff still has the burden to demonstrate the reasonableness and necessity of her medical expenses which the cruise line may still challenge.

Richter v. Carnival Corp., 15-22189-CIV-LENARD/GOODMAN (S.D. Fla. Sept. 21, 2016)

Court granted plaintiff's motion *in limine* to exclude evidence regarding medical bills that were reduced or forgiven as part of her insurer's separate payment contracts with her medical providers based upon the collateral source rule.

Galarza v. Carnival Corp., 15-24380-CIV-ALTONAGA/O' SULLIVAN (S.D. Fla. Sept. 2, 2016)

Denial of the plaintiff's motion *in limine* to exclude evidence regarding medical bills that were reduced or forgiven as part of her insurer's separate payment contracts with her medical providers.

Daubert Challenges

Beam v. Carnival Corp., 15-22103-CIV-GAYLES (S.D. Fla. Oct. 12, 2016)

The court rejected the defendant's argument that the plaintiff's liability expert should be stricken because his opinions were merely based on common sense. The court found that there were sufficient materials which the expert relied upon to support his opinions. In addition, the expert's testimony would be helpful in the jury's understanding of maritime safety regulations. The court also denied defendant's challenge to the plaintiff's damages expert ruling that the expert's opinions were not based solely on temporal proximity. The doctor's opinions were based on a medical history from the plaintiff as well as review of films and an evaluation of the plaintiff. Most significantly the doctor was able to see the plaintiff's cervical spine during surgery to rule out other possible causes.

Brown v. I CL (Bahamas) Ltd., 1:15-civ-21732 (LEN), 2016 U.S. Dist. LEXIS 82084 (S.D. Fla. June 10, 2016)

In denying the defendant's motion to strike the plaintiffs neuropsychology expert the court found that the doctor's telephonic interview coupled with his review of medical records was sufficiently reliable methodology. Further that the doctor could rely on the opinions of other doctors who administered the battery of tests, so long as their methods were reliable. Failure to examine pre-incident medical records goes to the weight of the expert's testimony, not to its admissibility.

The court granted the defendant's motion to strike certain opinions of the plaintiffs neurology expert as untimely. The doctor's initial report with his clinical impressions was timely

disclosed. However the doctor obtained additional information and formulated his final diagnosis later. No supplemental disclosure was issued and the defendant did not learn of the additional diagnosis until the doctor's deposition. Due to the late disclosure and/or failure to supplement, the defendant was denied an opportunity fully to prepare his cross examination.

The court granted the plaintiffs motion to strike certain statements contained within the report of the defense expert. The court struck statements pertaining to the plaintiff's poor safety judgment on the night in question, psychological dysfunction, consistency in receiving psychological counseling and loss of her job, home, and other social stressors. The doctor would be permitted to testify as to interpreting medical records and films.

Galarza v. Carnival Corp.,1:15-cv-24380,
ALTONAGA/O' SULLIVAN (S.D. Fla. Aug. 9, 2016)

The court rejected the defendant's motion to strike plaintiff's liability expert finding that the expert's inability to properly test the subject stairs due to a change in their condition does not automatically render his methodology unreliable. The expert could rely on publicly available data and studies to support his opinions. Based on the expert's experience the court ruled he could also testify regarding the material of the plaintiffs shoes and its slip resistance. Although not an expert on the specific subject, the witness was also able to testify as a lay witness as to his experience of pressure cleaning teak decks and the effect of the same. The expert was also allowed to testify as to the concavity of the stairs after he poured water on the steps and measured and photographed them to determine they held water.

Plaintiff's medical experts were allowed to testify because it was shown that they considered the plaintiffs medical history and other probable factors causing her symptoms. Their opinions were not based on temporal proximity alone.

In light of his experience, the plaintiffs physiatrist was allowed to testify regarding the probable cause of the knee pain and

its relationship to depression. Although not an expert in psychology or orthopedics, the court examined his qualifications in light of the subject matter and ruled that a witness who possess general knowledge of a subject may qualify as an expert despite the lack of specialized training or experience so long as his testimony would likely assist a trier of fact.

Geyer v. I CL (Bahamas) Ltd., 1:15-cv-24410 (OSU), 2016 WL 4576041, 2016 U.S. Dist. LEXIS 121453 (S.D. Fla. Aug. 26, 2016)

Relying on the doctor's experience, the court found that his opinion based solely on the review of medical records was sufficiently reliable and denied the defendant's motion to strike. The court also refused to strike the doctor's opinion about the plaintiff needing additional surgeries, which was first revealed after the disclosure deadline at his deposition. The doctor changed his opinion based on new medical records not available when he wrote his report. Although untimely it was not prejudicial as the defendant still had several months to consult with its own expert before trial and could still effectively cross examine the expert.

Experts

Leibel v 1 CL (Bahamas) Ltd., 185 F. Supp. 3d 1354, (S.D. Fla. 2016)

The court denied the plaintiffs motion to substitute their expert, where the expert quit after the scheduling order deadline, as the plaintiff failed to show both good cause and excusable neglect. The court found the expert's refusal to testify was entirely preventable due to counsel's failure to properly prepare her expert by giving him the necessary records and/or allowing him to examine the plaintiff.

Personal Jurisdiction

Brown v. Carnival Corp., et al., 1:16-cv-21448, 2016 WL 4613385, 2016 U.S. Dist. LEXIS 130878 (S.D. Fla. Aug. 12, 2016)

The court lacked both specific and general jurisdiction over the tour operator under Florida' Long Arm Statute. The court found that the plaintiff failed to set forth factual evidence to rebut the tour operator's affidavits filed in support of its motion to dismiss. The court further denied the plaintiffs request to engage in jurisdictional discovery it should have done prior to filing suit. This case is on appeal.

Pleading Requirements

Cubero v. Royal Caribbean Cruises, Ltd., 1:16-cv-20929, 2016 WL 4270216 (S.D. Fla. Aug. 15, 2016)

The plaintiff's complaint alleges negligence premised, in part, on cruise line's failure to maintain and monitor security cameras. Defendant moved to dismiss claiming that no such duty exists under maritime law. Dismissal was denied as the issue of whether the defendant owes a specific legal duty is more properly addressed at later stages of the litigation and the court would not engage in the striking of alleged duties in a line-item fashion.

Under the Death on the High Seas Act to state a claim for loss of nurture and guidance, the plaintiff must allege very specific facts as to how the decedent's guidance had a pecuniary value beyond the irreplaceable values of companionship and affection. Merely alleging the decedent was living with and providing care to his mentally challenged daughter and son battling leukemia was not enough.

H.S. v. Carnival Corp., 1:16-cv-20331, 2016 WL 6583693, 2016 U.S. Dist. LEXIS 73373 (S.D. Fla. 2016)

Dismissal granted in case where minor passenger voluntarily left the teen night club and was subsequently sexually assault by two

other minors in their cabin after becoming intoxicated. The court ruled the complaint failed to allege sufficient facts to establish the cruise line breached its duty of care, i.e. the cruise line was aware of some unruly behavior. Fraudulent inducement must be pled with specificity, and plaintiff may not rely solely on promotional literature saying the teen programming was otherwise "age appropriate, professionally supervised, and safe." Similarly, plaintiff cannot state a cause of action for fraudulent concealment for alleged deliberate concealment regarding sexual assaults when promotion literature said that cruising was "safe" and sexual assaults are "uncommon." Since there were no allegations of the time or place of these statements, the particularity requirements for pleading fraud claims were not met.

Punitive Damages

Warren v. Shelter Mut Ins., 196 So.3d 776, (3d Cir. 2016)

The appellate court upheld a jury award of one hundred and twenty-five thousand ($125,000.00) in compensatory damages and twenty-three million ($23,000,000.00) in punitive damages, confirming that punitive damages are available to non-seafarers under general maritime law.

Vairma v. Carnival Corp., 1:15-civ-20724SEITZ/TURNOFF (S.D. Fla. March 9, 2016) *motion reh. denied* 2016 U.S. Dist. LEXIS 61702, 2016 WL 2742400 (S.D. Fla. May 10, 2016)

Summary judgment entered striking the plaintiff's claim for punitive damages. While punitive damages are recoverable in a maritime negligence claim, the defendant's actions did not amount to willful, wanton, and outrageous conduct. In concluding that the award of punitive damages was not found to be excessive, the court looked at (1) the reprehensibility of the conduct, (2) the proportionality of punitive damages to compensatory damages, finding that there is no mathematical bright line, and (3) comparison to similar civil or criminal penalties that could be imposed.

*Brown v. Carnival Corporation, et al., 1:*16-cv-21448 (UNG), 2016 WL 4613385, 2016 U.S. Dist. LEXIS 130878 (S.D. Fla. Aug. 12, 2016)

Passenger was injured while participating in a shore excursion offered by the cruise line. The court ruled that the plaintiff failed properly to state a cause of action for negligence where she failed to plead sufficient facts as to how the cruise line knew or should have known of a dangerous condition. Plaintiff was required to identify the dangerous condition and how the cruise line had knowledge of it. Conclusory statements that there had been prior incidents without more is insufficient. The plaintiff also failed to plead sufficient facts to state a cause of action for apparent agency, joint venture and third party beneficiary. The court refused to consider the passenger ticket contract as it would not consider the tour operator an independent contractor merely because the cruise line calls them that. The plaintiff was granted leave to amend her complaint.

Statute of Limitations

Chang v. Carnival Corp., 839 F.3d 993 (11th Cir. 2016)

Equitable tolling did not apply where the cruise line warned the plaintiff that it intended to enforce the forum selection clause. For equitable tolling to apply, plaintiff must show the state court possessed subject matter jurisdiction concurrently with federal jurisdiction; state suit was dismissed solely on the ground of improper venue; the defendant was aware prior to the expiration that the plaintiff intended to file suit; and plaintiff was entitled to believe that his state filing might be sufficient given the fact that defendants can, and often do, waive their defense of improper venue.

I ewell v. Carnival Corp., 1:15-cv-24499 (JLK), 2016 WL 1718249, 2016 U.S. Dist. LEXIS 568895 (S.D. Fla. 2016)

The plaintiff erroneously filed her claim in state court. Forty (40) days after the complaint was filed and two days after the one year statute of limitation, the defendant moved to dismiss for improper venue. The motion was granted and affirmed by the

Florida's Third District Court of Appeal. The plaintiff then filed in federal court and the defendant again moved to dismiss the action as time barred. The court ruled that equitable tolling applied because the state court had subject matter jurisdiction and the dismissal was based on a technical defense, venue. Further, the plaintiff diligently pursed her claim and acted in good faith.

Veverka v. Royal Caribbean Cruise Ltd., 649 F. App'x 162 (3rd Cir. 2016)

Appellate court upheld the granting of a summary judgment where the plaintiff failed to file suit within the one year statute of limitation set forth in her ticket contract.

Summary Judgments

Aponte v. Royal Caribbean Cruises, Ltd., 1:15-cv-21854 (SCO), 2016 WL 49169672016 U.S. Dist. LEXIS 125214 (S.D. Fla., Sept. 14, 2016)

Plaintiff slipped and fell on a puddle of liquid soap in a public restroom. Court granted defendant's motion for summary judgment as the plaintiff could not establish notice. The plaintiff presented no evidence as to how long the soap was on the floor as the record was devoid of any evidence of dirt, tracks, or footprints in the puddle prior to plaintiff's fall nor could the plaintiff show that the puddle was on the ground while a crewmember was in the restroom. Merely alleging how long the puddle may have existed was speculation. The court also found that the puddle was an open and obvious condition so the cruise line had no duty to warn.

Bujarski v. I CL (Bahamas) Ltd., 1:15-cv-21066 (OTA), 2016 WL 3947609, 2016 U.S. Dist. LEXIS 97525 (S.D. Fla. 2016)

While a plaintiff need not show notice where the cruise line created the dangerous condition, this only applies where there is an overt act of the shipowner. The mere emergence of a foreign substance, such as a puddle of water, is not sufficient and the plaintiff must show actual or constructive notice.

Frasca v. I CL (Bahamas) Ltd., 654 F. App'x 949 (11th Cir. 2016)

The court found that while a reasonable person may perceive that a deck's surface would likely be more slippery than usual as a result of the weather conditions, it does not mean that he could determine how slippery it actually was. A jury could credit the expert's testimony and conclude the deck's visible wetness and weather conditions would not alert a reasonable observer to the extent of the slipperiness. The lower court erred in granting summary judgment.

Galarza v. Carnival Corp., 15-24380-CIV-ALTONAGA/O' SULLIVAN (S.D. Fla. Aug. 9, 2016)

Motion for summary judgment denied where a plaintiff slipped and fell on exterior steps that she knew were wet. Court found that she raised a genuine issue of material fact as a jury may determine the steps were unreasonably slippery, dangerous, and this danger would not have been obvious to an individual utilizing her normal faculties. Plaintiff established notice by showing the cruise line created, knew, or should have known about the danger because of similar prior accidents occurring in a substantially similar area. The court noted that substantially similar does not require identical circumstances but allows for some play in the joints depending on the scenario presented and the desired use of the evidence.

Jaber v. I CL (Bahamas) Ltd., 1:14-cv-20158 (KIN), 2016 WL 853018, 2016 WL 853018 (S.D. Fla. March 2, 2016)

Partial summary judgment on liability granted in the plaintiff's favor where a bunk bed missing a securing pin fell and struck the plaintiff. Court ruled there can be liability for negligence when the absence of a precautionary measure creates an unreasonable risk. Notice was established because there were six (6) other bunks that fell on the same ship. The plaintiff need not show that the specific bunk was faulty.

*Kressly v. Oceania Cruises, Inc., 1:*15-civ-23603 (MOO), 2016 U.S. Dist. LEXIS 137871 (S.D. Fla. Oct. 3, 2016)

Slip and fall in adverse weather. The cruise line owed a duty of reasonable care and not a heightened duty of care as urged by the plaintiff due to the circumstances peculiar to the maritime context. Court clarified that where the risk is greater because of high seas, an increased amount of care and precaution is reasonably owed. Summary judgment granted where the plaintiff failed to provide evidence that the route selected was unreasonable or the cruise line was on notice of the severity of the bad weather it encountered.

Salazar v. I orwegian Cruise Line Holding, Ltd., 188 F. Supp. 3d 1312 (S.D. Fla. 2016)

Summary judgment granted where the court found that wet substance on the dance floor was an open and obvious condition, and there was no duty to warn. The plaintiff admitted seeing passengers drinking and dancing. The court ruled it would be obvious to a reasonable person that the dance floor had the potential to be slick due to the possibility of someone spilling a drink. In addition, there were strobe lights which would allow a reasonable person, through the use of his senses, to observe the wet nature of the floor. Alternatively, the plaintiff could not establish notice because he could not show what the liquid was, how it got there, how long it was there, and did not know of the presence of a crewmember assigned to the area.

Virgillo v. I CL (Bahamas) Ltd., 1:15-cv-21962 (SCO), 2017 U.S. Dist. LEXIS 38007 (S.D. Fla. Aug. 17, 2016)

Denial of the defendant's summary judgment motion where the plaintiff was able to produce evidence that the cruise line was involved in the design of the flooring. Therefore defendant would have had knowledge of the dangerous condition, i.e. too low coefficient of friction when the floor was wet. The plaintiff was also able to show substantially similar incidents of water backing up in restrooms. The court found there was sufficient evidence for a reasonable juror to conclude that defendant was on notice of a

dangerous condition, that the floor could be wet despite normal operation of the bathrooms, and that a passenger could slip and fall if no action was taken by the cruise line.

CREWMEMBER CLAIMS

Arbitration

Alberts v. Royal Caribbean Cruises, 834 F.3d 1202 (11th Cir. 2016)

A United States citizen working as a crewmember brought an action challenging the cruise line's arbitration provision requiring him to arbitrate his claims abroad. The crewmember argued that because he only worked in international waters, and not in one or more foreign states, his contract did not envisage performance abroad. In rejecting this argument, the court ruled that performance abroad includes the seaman's work traveling to and from a foreign country.

Suazo v. I CL (Bahamas) Ltd., 822 F.3d 543 2016 AMC 1447 (11th Cir. 2016)

Issue of first impression as to whether an injured cruise ship employee can bar arbitration by showing that the high costs may prevent him from effectively vindicating his federal statutory rights in the arbitral forum. While normally such a public policy issue should be raised after the arbitration, the court found that in this case the plaintiff failed to establish the costs of the arbitration would preclude him from arbitrating his federal statutory claims. In this instance, the Collective Bargaining Agreement ("CBA") agreement provided that if he was represented by the Norwegian Seafarer's Union, the cruise line would bear the entire cost. The CBA was silent as to who would have to bear the costs if the crewmember chose to obtain independent counsel. Having chosen to use independent counsel, he must deal with the consequences. The court further noted that even where the contract requires the splitting of the fees, it is still insufficient as the employer could pay the initial costs and then seek reimbursement from the crewmember later.

Choice of Law

Fox v. Holland Am. Line. Inc., 1:14-cv-1081 (JCC), 2016 WL 1258389, 2016 U.S. LEXIS 44145 (E.D. Wa. March 31, 2016)

The court rejected the choice of law in the party's contract as void under Section Five of the Federal Employers' Liability Act. The application of British Virgin Island law would force plaintiff to forgo her Jones Act claims and allow the defendants to evade liability. Applying the *Lauritzen* test the court ruled U.S. law applies where there is an American plaintiff who was hired in California by a company registered in Washington and conducting business in the U.S.

Intentional Infliction of Emotional Distress

Bobola v. F/V Expectations, et al., 1:16-cv-10664 (SAY), 2016 WL 4599901 (D. Mass. Sept. 2, 2016)

Nothing under the Jones Act prevents a crewmember from bringing an individual claim against the vessel's captain for negligence or willful misconduct. Allegations involving extreme or outrageous threats, such as death threats, can be sufficient to state a claim for intentional infliction of emotional distress. Liability cannot be predicated upon mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The crewmember must still show he suffered physical symptoms arising from the alleged emotional distress.

TRIAL RESULTS

Loftus v. Horizon, Inc., and Matson, ALJ No.: 2014-SPA-004 (Boston, MA July 16, 2016)

Finding a clear violation of the Seaman Protection Act 46 U. S.C. § 2114(a), a U.S. Department of Labor Administrative Law Judge awarded a former Horizon Line master over one million dollars ($1,000,000.00) after he was discharged for reporting safety violations. The claimant proved, by a preponderance of the evidence, that he engaged in a protected activity by threatening to

report and then actually reporting to the United States Coast Guard what he believed were safety violations. The judge further found that the shipowner knew of the claimant's protected activity and that his protected activity was a contributing factor in the shipowner's decision to take adverse action against him.

Golden v. Carnival Corp., 14-24899-CIV-LENARD/GOODMAN(S.D. Fla. June 10, 2016)

The jury returned a verdict for the defendant where the plaintiff alleged he burnt his feet on a deck that became excessively hot in the sun.

Higgs v. Costa Crociere S.p.A. Company, 15-60280-CIV-COHN/SELTEZ (S.D. Fla. March 4, 2016)

The plaintiff tripped and fell over a cleaning bucket and injured her shoulder. The jury returned a verdict of one million three hundred sixteen dollars and one cent ($1,316,326.01) finding the defendant eighty-five percent (85%) negligent. The court denied the defendant's motion for a new trial or in the alternative remittitur of the non-economic damages as they were allegedly excessive in light of the evidence.

Jaber v. I CL (Bahamas) Ltd., 1:14-civ-20158 (KIN), 2016 WL 3456851, 2016 U.S. Dist. LEXIS 86395 (S.D. Fla. June 20, 2016)

The plaintiff sought two million eight hundred thousand dollars ($2,800,000.00) in damages alleging she suffered a mild traumatic brain injury when she was struck in the head by a bunk bed that fell spontaneously. Defense counsel challenged the findings of the plaintiffs medical expert and the court ultimately determined that his opinion was not credible and was made without reference to the plaintiff's medical history. Following a bench trial the court awarded her nine thousand fifty-four dollars and fifty cents ($9,054.50) in damages.

Kellner v. I CL (Bahamas) Ltd., 1:15-cv-23002 (ALT), 2016 WL4440501, 2016 U.S. Dist. LEXIS 111777 (S.D. Fla. Aug. 22, 2016)

Directed verdict granted. The plaintiff failed to introduce any admissible evidence of medical causation at trial nor did she establish that she suffered any damages as a result of the defendant's negligence. Expert testimony is required to establish medical causation for conditions not readily observable or susceptible to evaluation by lay persons.

Tindle v. Hunter Marine Transport, Inc., 5:14-cv-00110 (RUS), 2016 WL 270481, 2016 U.S. Dist. LEXIS 66419 (W.D. KY 2016)

Crewmember died of an acute asthma attack. Vessel owner was liable even though there were no outward appearances to suggest crewmember was ill and the crewmember refused offers to disembark. The court ruled that under its maintenance and cure obligation the captain of a vessel has a duty to ensure proper medical care and to evacuate a crewmember whether or not he wants to get off the vessel. Jury entered an award of one million seven hundred seventy-seven thousand two hundred and fourteen dollars ($1,777,214.00).

Trapani v. Royal Caribbean Cruises Ltd., JVR No. 1602250027, 2015 WL 10373342, 2015 Jury Verdicts LEXIS 9398 (Nov. 6, 2015)

Crewmember alleged that due to the cruise line's failure to provide prompt, adequate, and appropriate medical care she suffered an angiomyolipoma tumor, which went undiagnosed and eventually ruptured. She further alleged that at no time did she know or have reason to know that she suffered from this condition until her injury. The cruise line argued that the crewmember's injuries were a result of intervening and unforeseeable causes for which it had no duty to warn. In addition, the plaintiff failed to exercise ordinary care and caution for her welfare which directly contributed to her injuries. After a five (5) day trial the jury found the cruise line one hundred percent (100%) liable and awarded the plaintiff one million nine

hundred ninety-one thousand one hundred forty-nine dollars ($1,991,149.00).

Weeks Marine Inc. v. Watson, 190 F.Supp.3d 588 (E.D. La. 2016)

Bench trial involving a crewmember who was injured when a steel table toppled over in rough seas and claiming punitive damages for failure to pay maintenance and cure. Shipowner filed declaratory judgment seeking declaration it did not owe maintenance and cure. The plaintiff was able to show a causal connection between his injury and the unseaworthiness of the vessel. Further, the shipowner arbitrarily refused to pay maintenance and cure by intentionally ignoring and rejecting the opinions of subsequent treating physicians who disagreed with the findings of its own expert. Crewmember awarded one million one hundred thirty-nine thousand eight hundred and twenty-eight dollars ($1,139,828) plus the payment of maintenance and cure until maximum medical improvement.

COMMITTEE OI MARI! E II SURAI CE AI D GEI ERAL AVERAGE

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I EWSLETTER

Fall 2016

Cover artwork provided by Anna Wilson, an Art Director for an ad agency in St. Petersburg, Florida, who also does freelance illustration, graphic design and web design. Anna received a BFA in Illustration from the Savannah College of Art and Design (SCAD) in 2012. Her website is: http://www.annawilsonillustration.com,

Editorial I ote:

Many thanks to the members of the MLA Young Lawyers Committee who contributed the case summaries, specifically Theresa M. Carroll, Esq. of Carroll, McNulty, Kull, LLP (Chicago), Olaf Aprans of Clinton & Muzyka (Boston) and Hugh Baker, a

Tulane law student and managing editor of the Tulane Maritime Law Journal.

THE HAI JII BAI KRUPTCY AI D FIRST-PARTY CARGO COVERAGE FOR FORWARDII G CHARGES

Andrew D. Kehagiaras
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I. Introduction

On 31 August 2016, Hanjin Shipping Co. Ltd. ("Hanjin") filed a petition for rehabilitation in the Bankruptcy Division of the Seoul Central District Court. By that time, Hanjin's debt was roughly $5 billion. And there was $14 billion in cargo in transit, in 500,000 containers, worldwide. Typically, the court would have acted on the rehabilitation petition within two to four weeks. But in this case, the court granted the petition on 1 September 2016.

While Hanjin was filing its rehabilitation petition, creditors were filing lawsuits against Hanjin, including actions in the United States under Rules B and C of the *Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions.* But all actions against Hanjin in the United States quickly became subject to an automatic stay. Hanjin accomplished that by filing a petition in the United States Bankruptcy Court for the District of New Jersey for "recognition" of the Korean rehabilitation action under Chapter 15 of the Bankruptcy Code. Days later, Hanjin moved for and obtained provisional relief to get that recognition. Ordinarily, there is a recognition hearing roughly 30 days after the filing of the petition. During that "gap period," there is no automatic stay in the United States as to any collections actions. But the granting of the provisional relief put the automatic stay in place.

II. Coverage for "Forwarding Charges" under Standard Policy Terms

The inability, at least initially, of ships to discharge cargoes, the difficulties that consignees had with taking delivery of their

cargoes, the suspension of "door" deliveries by Hanjin, and the disputes arising over the extended holding of empty Hanjin containers and attached chassis are only a few of the issues that have arisen since Hanjin's bankruptcy filing. Those operational issues will almost certainly give rise to numerous insurance-related issues. This short article will address the issue of forwarding charges for cargoes "stranded" as a result of the bankruptcy.

After the filing, Hanjin terminated all multimodal "door" deliveries at the cargoes' ports of discharge or at the designated rail ramps. That termination meant that cargo interests have become responsible for recovering their cargoes at the points of termination and then arranging for their on-carriage to their inland points of destination.

In the first instance, clause 12 of the 2009 Institute Cargo Clauses (A) ("ICCA") grants coverage for the cost of the on-carriage to inland delivery points. But given Hanjin's circumstances, the exclusions in the clause would likely take away that coverage. Clause 12, for example, states:

> Forwarding Charges
>
> 12. Where, as a result of the operation of a risk covered by this insurance, the insured transit is terminated at a port or place other than that to which the subject-matter insured is covered under this insurance, the Insurers will reimburse the Assured for any extra charges properly and reasonably incurred in unloading storing and forwarding the subject-matter insured to the destination to which it is insured.

Id.

Clause 4.6 of the ICCA excludes:

> [L]oss damage or expense caused by insolvency or financial default of the owners managers charterers or operators of the vessel where, at the time of loading of the subject-matter insured on board the vessel, the Assured are aware, or in the ordinary course of business should be aware, that such insolvency or financial default could prevent the normal prosecution of the voyage.
>
> This exclusion shall not apply where the contract of insurance has been assigned to the party claiming hereunder who has bought or agreed to buy the subject-matter insured in good faith under a binding contract.

The above condition as to an assured's "awareness" of a vessel owner's or operator's insolvency or financial default or, alternatively, that an assured *should* have been aware of the same, could give rise to some interesting issues. Hanjin's perilous financial condition and its efforts to restructure its debt had been in the news for months leading up to the filing of the rehabilitation petition.

The Lloyd's Market Association's Joint Cargo Committee's Insolvency Exclusion Clause (JC93), which is in some older policies, is even more demanding on assureds:

> It is hereby agreed that the exclusion "loss damage or expense arising from insolvency or financial default of the owners managers charterers or operators of the vessel" is amended to read as follows:
>
> > In no case shall this insurance cover loss damage or expense arising from insolvency or financial default of the owners managers charterers or operators of the vessel where the

> Assured are unable to show that, prior to the loading of the subject-matter insured onboard the vessel, *all reasonable practicable and prudent measures were taken by the Assured, their servants and agents, to establish the financial reliability of the party in default.* [Emphasis added.]

Id.

A policy that incorporates the AIMU's 2004 All Risks Cargo Clauses ("AIMU") would likely lead to the same result as under the ICCA. AIMU clause 2(D) covers "Manding, warehousing, forwarding and special charges incurred by reason of perils insured against." *Id.* But that coverage is subject to the insolvency exclusion in clause 3(A)(2)(c), which excludes loss, damage, or expense "arising from insolvency or financial default of the owners, managers, charterers, or operators of the vessel." *Id.*

Title 46 ocean transportation intermediaries ("OTIs") often sell cargo insurance to their customers under the OTIs' open marine cargo policies. Given the language of the above insolvency exclusions, OTIs could face claims implicating their errors-and-omissions coverages ("E&O")— yet another insurance implication of Hanjin's bankruptcy. For example, an affected ICCA cargo owner could argue that under the circumstances, its non-vessel-operating common carrier or ocean freight forwarder "negligently selected" Hanjin in the early part of 2016, because of its lack of "financial reliability" or, at the very least, because Hanjin's pre-petition insolvency or financial defaults could have prevented the normal prosecution of the voyage in question.

Concern over Hanjin-related cargo-cover, extra-expense, and E&O issues, among others, is just starting. Stay tuned!

RECEI T CASES OF II TEREST

Jurisdiction & Venue

Zambranov. Vivir Seguros, C.A., No. 16-cv-22707, 2016 WL 5076185 (S.D. Fla. Sept. 20, 2016)

The motor yacht FREE WATER sank to the bottom of Venezuelan waters on May 22, 2015. The vessel's insurer, Vivir Seguros, C.A. ("Seguros"), denied coverage for the loss on the grounds that the owners breached a warranty under the insurance policy by towing an auxiliary boat in violation of the policy and in violation of Venezuelan law. The coverage limit on the policy was $430,000.00.

The owners filed an action against Seguros in the Southern District of Florida and sought a Rule B maritime attachment in the amount of $562,900.00. The court granted the Rule B attachment *ex parte,* and the garnishee, Intercontinental Bank, held $200,994.69 under that process. Seguros filed a motion to vacate this maritime attachment under Rule E(4)(f).

The court held that owners had a bona fide admiralty claim against Seguros for breach of a marine insurance contract and rejected Seguros's procedural arguments based on Venezuelan law, whereby Seguros claimed that the action should have been filed in Venezuelan maritime courts and with the approval of Venezuelan insurance regulators. The court further found that Seguros was not found within the district and that Intercontinental Bank was within the district and in possession of Seguros's funds. Accordingly, owners had a valid Rule B attachment.

The court nonetheless decided to vacate the Rule B attachment under its equitable vacatur power when considering that both of the parties were subject to the jurisdiction of Venezuelan courts, the incident occurred in Venezuelan waters, and the fact that the attachment was not over a vessel, but bank accounts held by Seguros. The court, therefore, vacated the Rule B attachment and dismissed the complaint.

I eal v. Christini, No. 16-00242, 2016 WL 5928797
(D. Hawaii Oct. 11, 2016)

In this case, a defendant insurance broker won dismissal of a lawsuit for lack of admiralty subject matter jurisdiction, as the plaintiff insureds' allegations involved professional negligence from torts occurring entirely on land. The plaintiffs were a scuba diving and snorkeling tour company that had bought maritime insurance through the defendant broker "for the purpose of being protected against claims arising from scuba diving and snorkeling tours." Plaintiffs were sued following an accident in which one person was killed and two were injured; one of the injured parties made claims for maintenance and cure under the Jones Act.

Upon tendering their claims, the plaintiffs allegedly discovered for the first time that their insurance coverage did not include Maritime Employment Liability ("MEL") coverage. Plaintiffs then sued several entities involved with the placement of their insurance policies, alleging that the brokers breached their duty to offer or provide MEL coverage. The jurisdictional basis for the plaintiffs' lawsuit was based solely on admiralty jurisdiction.

The court, upon reciting the test for general maritime jurisdiction over torts as requiring a "location" prong and a "connection" prong, found that the plaintiffs' lawsuit failed to satisfy the first prong. The location requirement requires that the alleged incident occur on navigable water or be caused by a vessel on navigable water; however, in the case before the court, the "sale of and negotiation over [the] insurance policies did not occur on navigable water, nor did the subsequent denial of coverage." The court further held that even if the plaintiffs amended their complaint to assert a breach of contract claim, they could not demonstrate contractually-based admiralty jurisdiction. Such jurisdiction requires that the subject matter of the contract involved services that are "maritime in nature." The court found that the plaintiffs' proposed claim — a contract to provide proper maritime insurance — could not, without more, satisfy the contract test for admiralty jurisdiction. Accordingly, the court granted the defendant insurance broker's motion to dismiss for lack of admiralty jurisdiction.

Definition of "Occurrence"

United Specialty Insurance Co. v. Porto Castelo, Inc., No. 15-1036, 2016 WL 2595072 (S.D. Tex. May 5, 2016)

The insurer, United Specialty Insurance Company ("United"), issued a protection and indemnity policy to Porto Castelo, Inc. ("Porto") and Trident Circle, Inc. ("Trident"), who owned the shrimp trawler MISS EVA. The P&I policy had a limit of $500,000.00, with a crew sublimit of $100,000.00 applicable to each "occurrence."

On December 1, 2014, an explosion and fire occurred onboard the MISS EVA, resulting in significant injuries to the four crewmen onboard. Porto and Trident demanded that United pay the policy limit of $100,000.00 applicable to each injured crew member, or $400,000.00. United refused, arguing that there was a *single* occurrence and that the $100,000.00 limit applied to the aggregate of the four crewmen injuries.

The court agreed that the plain and unambiguous language of the policy demanded a construction of "occurrence" as meaning "on events that cause the injuries and give rise to the insured's liability rather than the number of injurious effects." This clear language capped United's liability at $100,000.00 for the aggregate injuries of the crewmembers. The court, therefore, ruled for the insurer.

Removal

Katchmore Luhrs, LLC v. Allianz Global & Corporate Specialty, No. 15-23420, 2016 WL 1756911 (S.D. Fla. May 3, 2016)

In this case, the defendant insurer removed the action from state court on the basis of diversity jurisdiction under 28 U.S.C. 1332, and on the purported grounds that the federal court had original jurisdiction as an admiralty and maritime claim under 18 U.S.C. 1333, as the action involved a marine insurance policy. Because the court found diversity jurisdiction to exist, it declined to

rule on the issue of whether removal was appropriate under 28 U.S.C. 1333.

The parties agreed that they were citizens of different states, but disagreed as to the amount in controversy. The face value of the policy was $71,500.00, but because the plaintiff was asserting claims for attorneys' fees based on Florida's bad faith statute, the court found diversity jurisdiction to exist based on the overwhelming evidence that plaintiffs' claim for unpaid attorneys' fees will exceed $3,500.00.

All Risks Policy Interpretation

AGCS Marine Insurance Co. v. World Fuel Services, Inc., 187 F. Supp. 3d 428, 2016 AMC 2487 (S.D.N.Y. 2016)

In *World Fuel,* the Southern District of New York considered the issue of whether there was coverage under an "all risk" cargo policy for the loss of approximately $17 million worth of marine gasoil ("MGO") on account of the insureds, World Fuel Services, Inc. and World Fuel Services, Europe, Ltd. (collectively "World Fuel"), being duped into transferring the MGO at sea to an imposter purporting to work for the U.S. Government. The imposter thereafter absconded with the MGO, and World Fuel looked to their "all risk" policy issued by AGCS Marine Insurance Company ("AGCS") to pay for this loss. The court granted summary judgment in favor of World Fuel, holding that the loss occurred during transit and falls within the broad all risk cover.

An individual by the name of James Battell emailed World Fuel on October 28, 2013, seeking to purchase significant quantities of MGO. He advised that he worked for the Defense Logistics Agency, which supplies fuel to the U.S. Government. Battell ultimately was an imposter and thief. The parties eventually reached a contract to sell 17,000 metric tons of MGO worth an estimated $17,284,750.00. The delivery terms were "F.O.B. destination," *i.e.*, the buyer would take title only upon delivery. The MGO was delivered by one of World Fuel's suppliers, Monjasa A/S

("Monjasa") off the coast of Lome, Togo, in two ship-to-ship transfers. Thereafter, World Fuel sent Battell an invoice for the fuel, which was never paid. It was later discovered that Battell was an imposter. Upon this discovery World Fuel submitted a claim to its insurer, which denied coverage.

The court considered three policy provisions at issue, (1) the "All Risk" clause, (2) the "Fraudulent Bills of Lading" clause, and (3) the "F.O.B." clause.

1. *All Risk Clause.* The "All Risk" clause in the policy protected World Fuel "[a]gainst all risks of physical loss or damage from any external cause . . . *from time of leaving tanks at port of shipment and while in transit and/or awaiting transit and until safely delivered in tanks at destination."*

AGCS denied coverage on the grounds that the loss did not occur within the temporal scope of the "All Risk" cover. AGCS primarily argued that the "loss" postdated the safe delivery of the MGO, because Battell absconded with the fuel after delivery. World Fuel took the position that "safe delivery at destination" never actually occurred because the fuel was delivered to a thief.

After engaging in an in depth historical analysis of analogous case law, the court found that under New York law World Fuel met its burden of showing that the loss occurred within the temporal scope of the "All Risk" coverage, stating that "delivery" to a thief is no delivery at all. The court found that there is a distinction on this issue between cases involving fraud at the outset and those involving long running customers who were, at the time of delivery, bona fide, but who later failed to pay. This case fell into the former category, was caused by malicious fraud, and was therefore unforeseeable and unavoidable, thereby invoking coverage under the "All Risk" clause. The court, therefore, found that the "loss" occurred while the MGO was "in transit" and covered under the "All Risk" clause in the policy.

AGCS argued in the alternative that World Fuel lacked an insurable interest in the MGO, because Monjasa had title to the fuel

during the transit. World Fuel, according to AGCS, only acquired title after the MGO's delivery. The court likewise rejected this argument, as World Fuel was still physically dispossessed of the fuel.

In an alternative argument, AGCS sought to apply the "inherent vice" exclusion in the policy, which stated that "[t]his insurance shall in no case be deemed to extend to cover loss, damage or expense proximately caused by [i]nherent vice or nature of the subject matter insured." AGCS argued that an inherent defect in the cargo existed predating the shipment on account of Battell's misconduct predating the shipment. The court declined to extend the doctrine of inherent vice to this fact pattern, holding that it is limited to occasions of physical defects inherent to the cargo itself, and not externally caused fraudulent activities such as Battell's activity at issue.

Although coverage under the "All Risk" Clause was sufficient to grant summary judgment in favor of World Fuel, the court went on to comment on the remaining clauses at issue for purposes of completeness.

2. *The Fraudulent Bills of Lading Clause.* The fraudulent bills of lading clause provided an independent grant of coverage for physical loss incurred "through the acceptance by [World Fuel], its Agents or the shipper of fraudulent bills of lading, shipping receipts, messenger receipts, warehouse receipts or other shipping documents." World Fuel argued that its contract with Battell constituted an "other shipping document," but the court rejected this argument, holding that "a contract is not used in the ordinary course of shipping, even though it may initiate and even describe the shipping process." World Fuel also argued that the bunker delivery receipts qualified coverage under this clause as "shipping documents," but the court likewise rejected this argument because the bunkering receipts were not issued until *after* the transfer or loss, and could not have been the actual cause of the loss whereby coverage would apply.

3. *The F.O.B. Clause.* The F.O.B. clause provided coverage for goods "sold by [World Fuel] on F.O.B., F.A.S., Cost and Freight or similar terms whereby [World Fuel] is not obligated to furnish marine insurance." The F.O.B. clause "attaches subject to its terms and conditions and continues until the goods . . . are loaded onto the primary conveyance or until [World Fuel's] interest ceases." The court declined to find coverage under this clause as to do so "would transform the policy from a guard against physical loss or damage during transit into a guard against non-payment for any reason whatsoever . . ." The court found "AGCS's interpretation of the F.O.B. Clause, so as not to cover non-payment risk in perpetuity, is the only reasonable one."

Drilling Rig Exclusion

Richard v. Dolphin Drilling, Ltd., 832 F. 3d 246 (5th Cir. 2016)

In *Richard,* the Fifth Circuit considered whether, under Louisiana law, a plaintiff's personal injury onboard a drill ship was excluded by an excess policy's "drilling rig" exclusion for "any liability for, or any loss, damage, injury or expense caused by, resulting from or incurred by reason of any liability or expense arising out of the ownership, use, or operation of drilling rigs . . . ." The Fifth Circuit affirmed the decision of the Western District of Louisiana and answered that question in the affirmative. The Fifth Circuit rejected the third party defendant-appellant Offshore Energy Services, Inc.'s ("Offshore") argument that a "drill ship" is not a "drilling rig," holding that the purpose of the exclusion was to limit coverage to vessels while excluding drilling platforms.

The Fifth Circuit likewise rejected Offshore's waiver argument, whereby Offshore claimed that its excess underwriter, Valiant Insurance Company ("Valiant"), waived its drilling rig exclusion defense by waiting until 2014 to assert it (suit beginning in August 2011) and by failing to issue a reservations of rights letter. The court found that there was no waiver because Valient never participated in Offshore's defense and because Valiant was not made a party to the suit until three (3) years after it was commenced.

Being there was no evidence that Valiant relinquished its drilling rig exclusion, the court found that no waiver occurred.

Other Insurance Clause

Mitsui Sumitomo Insurance USA, Inc. v. Tokio Marine & I ichido Fire Insurance Co., 659 F. App'x 918 (9th Cir. 2016)

In *Mitsui,* the Ninth Circuit considered the issue of whether the defendant-appellee, Tokio Marine & Nichido Fire Insurance Company, Ltd. ("Tokio"), was obligated to contribute to the defense costs paid by the plaintiffs-appellants, Mitsui Sumitomo Insurance USA, Inc. and Mitsui Sumitomo Insurance Company of America (collectively "Mitsui"). Mitsui brought a claim against Tokio for equitable contribution arguing that both Mitsui and Tokio were primary insurers on the same risk. The Central District of California, however, found that Tokio did not share the same level of risk as Mitsui because the Tokio Policy's Endorsement 8 stated that it was "in excess of the greater of amounts collectible by "other insurance." Further, this "Endorsement replaced operative language on the first page of the policy indicated that the endorsement is addressing the level of risk, primary vs. excess, and is not a mere 'other insurance' clause." The Ninth Circuit agreed based on the plain language of the policy endorsement, and accordingly affirmed the district court's dismissal of Mitsui's claim on summary judgment.

The Ninth Circuit likewise affirmed the Central District of California's decision to dismiss Mitsui's subrogated bad faith claim for improper venue based on a forum selection clause in the Tokio policy. Lastly, the Ninth Circuit denied Tokio's request for attorneys' fees, advising that there was no basis for such an award.

Uberrimae Fidei

***QBE** Seguros v. Carlos Morales-Vazquez,* 2016 AMC 2820, 2016 WL 5462806 (D.P.R. 2016)

The insurer, QBE Seguros ("QBE"), brought a declaratory judgment action seeking to find that its yacht policy issued to its insured, Carols Morales Vazquez ("Vazquez"), was void *ab initio* because Morales breached what the court called the "warranty of truthfulness," also known as the doctrine of *uberrimae fidei.*

The policy insured a 48' yacht that sustained damages as a result of a fire. In its investigation, QBE learned that around 2010 Morales owned a 40' yacht and grounded the vessel while no one else was onboard, resulting in a total loss of the vessel. Morales failed to disclose this prior loss to QBE when he completed his insurance application, which specifically inquired as to any past accidents or losses involving vessels he owned, operated or controlled. Morales also failed to list five vessels that he likewise owned in his application.

Morales argued that the passage of the United Kingdom's Insurance Act of 2015 ("U.K. Insurance Act"), which abolished the doctrine of *uberrimae fidei,* served as a model for likewise abandoning that doctrine in the United States. The District of Puerto Rico rejected this argument, noting that the First Circuit had recently joined the view of most circuit courts in adopting the doctrine of *uberrimae fidei* as an established rule of federal maritime law. Although English law is on occasion referenced in support of federal maritime decisions, this does not mean that federal courts should act in lock step with English marine insurance law. Accordingly, the District of Puerto Rico denied Morales's motion for judgment on the pleadings and allowed QBE to proceed with its declaratory judgment action predicated on Morales's breach of the *uberrimae fidei* doctrine.

UK Fraudulent Claims Rule

Versloot Dredging BV et al. v. HDI Gerling Industrie Versicherung AG, et al., [2016] UKSC 45

In this case, the United Kingdom Supreme Court addressed the question of whether an insurer is entitled to deny coverage to a claim that an insured embellished or supported with false statements, where the claim would have been equally recoverable whether the falsities had been made or not. The analysis of the so-called "fraudulent claims rule" arose in the context of a claim involving the *DC MERWESTOI E,* which was incapacitated when water flooded and destroyed her engine room. One of the vessel's managers represented to the insurer's investigators that the bilge alarm had sounded when water entered the engine room, but the crew had been unable to investigate or deal with the leak because of bad weather conditions. The manager pretended that members of the crew had told him about the alarm but, in fact, he had invented the story. Although the vessel's master later supported the manager's story, the manager had no basis for his theory at the time he gave it to the insurance company. The manager's proffered explanation for lying was that he was "frustrated by the insurers' delay in recognizing the claim and making a payment on the account." The lower court, noting that the manager's lie was irrelevant to the claim for coverage purposes, nevertheless held that the insurer could properly deny coverage in light of the manager's collateral lie. The UK Supreme Court reversed, finding that the "fraudulent claims rule" did not preclude coverage for an otherwise covered claim that the insured had bolstered or embellished with falsehoods. Lord Sumption, writing for the majority, found that a fraudulently exaggerated claim differed from a justified claim supported by collateral lies: fraudulence implies dishonesty calculated to get something to which the insured is not entitled, whereas an insured seeks no more than what he is owed by telling collateral lies that do not go to the heart of an otherwise covered claim. In considering how "material" the lie must be to the claim before coverage will be impacted, Lord Sumption found that the fraudulent claims rule "does not apply to a lie which the true facts, once admitted or

ascertained, show to have been immaterial to the insured's right to recover." In other words, if the lie is wholly unrelated to the insured's ability to recover under the policy, the insurer is not entitled to deny coverage based upon any collateral misrepresentations. Lord Mance filed a dissenting opinion, noting that he would have affirmed the lower court's finding that the manager's collateral lie resulted in forfeiture of coverage.

Material Misrepresentation

Firemen's Fund Insurance Co. v. Great American Insurance Co. of I ew York, 822 F.3d 620, 2016 AMC 1217 (2d Cir. 2016)

Policies issued by Great American Insurance Company of New York ("Great American") and Max Specialty Insurance Company ("MSI") were void *ab initio* under admiralty law and applicable state law, respectively, in light of the insured's failure to disclose information about a dry dock's deteriorating condition. The insured, Signal International, LLC ("Signal"), owned and later leased a dry dock in Texas. Multiple engineering and risk management firms evaluated the dry dock over a period of several years, and reported that the dry dock had significant problems (including a corroded pontoon deck) that required extensive repairs. Several of the reports indicated that the repairs were not economically justifiable, given the high cost of repairs as compared with the dry dock's advanced age and limited projected life span. Signal did not, in fact, replace the damaged pontoon deck, instead engaging in temporary solutions to patch holes in the deck, and did not disclose the dry dock evaluations to its insurers for the 2009 policy year. On August 20, 2009, Signal attempted to remove one of the pontoons, which ultimately caused the dry dock to sink.

With regard to the loss of Signal's dry dock, Firemen's Fund Insurance Co. ("Firemen's Fund"), which issued a primary and excess policy to Signal, sought contribution from Great American, which had issued a pollution policy, and MSI, which issued an excess property policy. The Second Circuit, after determining that the Great American policy was a "marine insurance contract" subject to admiralty jurisdiction and the doctrine of *uberrimae fidei,*

found that Signal had violated its duty of utmost good faith to Great American by failing to disclose the dry dock's condition in its renewal application. It was undisputed that Signal had multiple surveys of the dry dock in its possession at the time of renewal that, if disclosed, would "have raised significant concerns about the likelihood of pollutant emissions from the dry dock." The fact that Great American did not request such information was irrelevant; Signal's duty of utmost good faith required it to disclose informational material to the risk, and there was "no genuine dispute that a reasonable person in Signal's position would have known that these particular facts were material."

Turning to the MSI policy, the Second Circuit found that Signal's failure to disclose the dry dock's condition also constituted a "misstatement of material fact in the [insurance] application" under Mississippi law, which governed that policy. The fact that MSI accepted a "property insurance submission" of Signal's own creation, rather than a formal insurance application, did not change this conclusion. The court cited the Mississippi Supreme Court's recognition of "the universal rule that any contract induced by misrepresentation or concealment of material facts may be avoided by the party injuriously affected thereby," and found that Signal's selective disclosure of information about the dry dock violated this rule, as it was material and intended to induce MSI to insure it. *Id.* at 647 (quoting *Fid. Mut. Life Ins. Co. v. Miazza,* 46 So. 817, 819 (Miss. 1908)).

Broker Duties

Gemini Insurance Co. v. Western Marine Insurance Services Corp., No. 2:10-cv-03172, 2016 WL 3418413 (E.D. Cal. June 21, 2016)

Western was a surplus lines broker for Gemini, with authority to underwrite binding coverage for Gemini pursuant to a Program Administrator Agreement; the agreement also required Western to indemnify Gemini against third party claims. The lawsuit arose out of Western's issuance of policies to an insured, Wesco, over a three-year period. Wesco failed to provide answers to certain

required questions in the insurance application and renewal applications, but Western issued the policies without following up. Western also failed to notify Wesco in the second and third policy years that it was not offering, and did not issue, requested blanket coverage for several marinas owned by Wesco.

Wesco sought coverage for "wind/storm damage caused to docks." Investigation of the claim revealed a variety of discrepancies in the insurance application, as well as post-dating of the date of loss by several years. Gemini ultimately decided to pay Wesco's claim, but only up to individual limits of liability rather than pursuant to Wesco's requested blanket coverage. In Wesco's ensuing coverage action, Western's insurer (Scottsdale) defended Gemini pursuant to the Agreement, but later withdrew; Western did not assume Gemini's defense. Following a settlement, Gemini filed a lawsuit against Western, alleging breach of contract and negligence.

The court first addressed several issues in connection to whether Gemini was entitled to summary judgment for its breach of contract claim against Western. The court concluded the Gemini was a party entitled to indemnification under the agreement with Western and that Western was required to provide notice to Wesco that the renewed policies did not contain the requested blanket coverage. However, with regard to whether Gemini was negligent in the events leading to Wesco's underlying lawsuit (which would have triggered Western's indemnity obligation), genuine issues of material fact existed. Specifically, the court found that Western was entitled to rely on Wesco's insurance application and was under no duty to inquire about Wesco's omissions. Further, the court found that there was disputed evidence with regard to whether Gemini negligently waived coverage defenses to Wesco's claim. Accordingly, the court denied Gemini's summary judgment motion as to its breach of contract claim.

The court then granted Western's summary judgment motion on Gemini's negligence claim, finding that Gemini was seeking to recover a purely economic loss in violation of the economic loss rule.

Certain Interested Underwriters at Lloyds, London v. Bear LLC,
No. 15-cv-630 2016 WL 4496831
(S.D. Cal. April 29, 2016)

This decision concerns a motion to dismiss by third-party defendant, Marsh USA, Inc. ("Marsh"). The case arose out of action where the plaintiff, Certain Interested Underwriters at Lloyd's, London ("Underwriters"), filed a complaint against defendant Bear LLC ("Bear"). Bear then filed an Amended Third Party Complaint ("ATC") against Marsh. Marsh then sought to have the claim dismissed.

Here, the dispute arose between defendant Bear and third party defendant Marsh over the coverage acquired by Marsh, acting as broker, for Bear's 102-foot-long yacht the M/V POLAR BEAR ("POLAR BEAR"). Bear stated that its principal, Larry Jodsaas, had authorized Marsh to secure a single layer insurance policy that included hull coverage in the amount of $17,000,000. However, instead of purchasing a single layer insurance policy as requested, Bear alleges that Marsh acquired a policy that contained two covers for physical loss and damage. Although this policy insured a total amount of $17,250,000, the policy was broken into two parts: (1) $12,150,000 for "Hull Insurance"; and (2) $5,100,000 for "Increase Value and Excess Liabilities Clauses."

The POLAR BEAR ran aground in May of 2014, damaging the bottom of its hull. While undergoing repairs at a San Diego ship yard, the yacht caught fire and the vessel was completely destroyed. Bear's third party complaint alleges that Marsh: (1) breached its oral contract; (2) breached its fiduciary duty; and (3) committed negligence. Marsh sought to have the claim dismissed arguing that because the insurance coverage totaled over $17,000,000, Bear was not damaged by any alleged breach.

Before the district court could determine whether or not the claims could be dismissed, it first had to determine the applicable law. After finding admiralty jurisdiction and determining that there was no federally entrenched federal maritime rule concerning contracts for the procurement of insurance and disputes arising

between an insurance broker and its principal, the court determined that state law applied to Bear's third party complaint. Next, the district court found that Florida had the most significant relationship to the issues in question, and therefore Florida state law was the appropriate applicable law. In making its determination the court reasoned that because Marsh's representative from its Florida office reached out to Bear and processed the agreement authorizing Marsh to procure insurance on behalf of Bear, Florida state law applied to the substantive issues.

In order to overcome Marsh's motion to dismiss, the district court stated that Bear's allegations "must be enough to raise a right to relief above the speculative level," and "[o]nly a complaint that states a plausible claim for relief will survive a motion to dismiss." When analyzing Bear's claim for a breach of contract the court stated that under Florida law, a contract claim requires three elements: (1) a valid contract; (2) a material breach; and (3) damages. Here, the court held that Bear alleged facts sufficient to state a plausible claim. The court reasoned Bear had sufficiently stated that it had entered into an oral agreement with Marsh to obtain a single layer insurance policy and Marsh had failed in procuring such a policy. Furthermore, the court stated Bear's allegations that it "may have to incur fees and costs to prove the amount of its losses on the 'sum insured' excess value cover, even though it would not otherwise be required to do so," was sufficient in showing its potential for suffering damages. Therefore, the court held that the claim survived summary judgment.

Next, the court addressed whether Bear stated a plausible claim in its allegations that Marsh, as Bear's insurance broker, breached its fiduciary duty. The court stated that under Florida law, an insurance broker owes a fiduciary duty to its insured and must not mislead the insured as to the scope of its coverage. The court held that Bear's allegations that Marsh had procured a double layer insurance policy, instead of a single layer policy, and that Marsh had failed to inform Bear of the different policy obtained were sufficient to have stated a plausible claim.

Lastly, the court addressed Bear's negligence claim. Under Florida law, an insurance broker may be held liable when "there is an agreement to procure insurance and a negligent failure to do so." This liability can result from a "negligent failure to obtain coverage which is specially requested or clearly warranted by the insured's express needs." Because Bear alleged that it specifically requested a single layer insurance policy, it had alleged a plausible claim. Therefore, Marsh's motion to dismiss was denied.

Held Covered Clause

Atlantic Specialty Insurance Co. v. Thomassen, No. 1:15-cv-00009, 2016 WL 4649804 (D. Alaska Sept. 9, 2016)

This decision concerns an interpretation of a policy of insurance covering a 73-foot tender vessel, the KUPREANOF, owned by Angelette, LLC, which is solely owned by the defendant, Jay Thomassen. Mr. Thomassen obtained insurance for the vessel through an insurance agent, Sea-Mountain Insurance. The plaintiffs, Atlantic Specialty Insurance Company, Travelers Property Casualty Company of America, Navigators Insurance Services of Washington, Inc., and Great American Insurance Company ("Underwriters"), agreed to underwrite a marine insurance policy for the vessel. The policy contained both a "Layup Warranty" provision and a "Held Covered Clause." The two provisions stated:

> **Layup Warranty:** Vessel warranted laid up and out of commission from August 20 to June 20, annually. Permission granted to make alterations and repairs, to dock and undock, go on or off ways, gridirons and drydocks and to move about port for said purposes.
>
> **Held Covered Clause:** Held Covered in respect to breach of trading warranty, and/or lay-up warranty provided Underwriters are advised within 72 hours from inception of the

> breach, at additional premiums if any, to be determined by Underwriters.

On June 6, 2015, the vessel was in Petersburg, Alaska, undergoing repairs. Sometime during the morning of June 7, the vessel departed the docks at Petersburg heading towards Juneau. On June 10, the vessel sank; Mr. Thomassen notified the Underwriters of the sinking at 8:04 am Alaskan time. Plaintiff Underwriters then filed a suit seeking declaratory judgment stating that there was no coverage under the policy for hull or protection and indemnity because the vessel and crew claims arose from a sinking that occurred while the vessel was in breach of the layup warranty. Mr. Thomassen then sought to take advantage of the held covered clause in the policy, but was informed by the Underwriters that they did not receive the proper 72-hour notice required by the provision. Mr. Thomassen filed a motion for summary judgment and the Underwriters filed a cross-motion for summary judgment. Additionally, there was a motion to intervene filed by a crew member, Yolanda Perez Orozco.

Before the district court could make a ruling on the motions presented, the court first had to determine whether state law or maritime law would apply. Since the issues surrounded two warranty provisions within a marine insurance policy, the district court followed the Supreme Court's decision in *Wilburn Boat v. Fireman's Fund Insurance Co.,* 348 U.S. 310 (1955) and held that marine insurance warranty clauses should be interpreted using state law. Therefore, the court determined that Alaska state law would apply.

After determining that Alaska state law would apply, the court addressed the issue of whether or not there was a breach of the layup warranty provision. The parties disputed the meaning of the phrase "[p]ermission granted to make alterations and repairs, to dock and undock, go on or off ways, gridirons and drydocks and to move about port for said purposes." The defendant argued that it could reasonably be interpreted to allow the vessel to transit from Petersburg to Juneau and head to its fishing grounds, without breaching the layup warranty provision. The Underwriters

countered by arguing that under the "permission granted" clause, the vessel was in breach of the warranty on June 6, meaning that the vessel was no longer laid up once its repairs were completed and it had started preparing to leave Petersburg. The district court found both of these arguments unpersuasive. Instead, the district court determined that the provisions: (1) provided permission to make alterations and repairs; (2) provided permission to dock and undock, go on or off ways, gridirons and drydocks; and (3) provided permission to move about port for said purposes in order to make alterations or repairs *or* "dock[ing] and undock[ing], go[ing] on or off ways, gridirons and drydocks." Furthermore, the district court determined that the layup warranty would have been breached when "the vessel left a particular location for any purpose other than (1) to make alterations and repairs, or (2) to dock and undock, or to go on or off ways, gridirons, and drydocks within the port." Therefore, the court held that the layup warranty was breached when the vessel moved about the port for purposes other than for making alterations or repairs, docking or undocking, or going on or off ways, gridirons, or drydocks within the same port.

Next, the district court addressed whether or not, pursuant to the held covered clause, Underwriters received the proper 72-hour notice. Here, it was determined by the district court that the vessel was covered under the policy only if Underwriters were notified within 72 hours of the precise time a breach of the layup warranty began. Mr. Thomassen's knowledge of the breach was irrelevant. Mr. Thomassen asserted, along with crew member Yolanda Perez, that the vessel left the dock at 8:04 a.m. Underwriters relied on a Coast Guard report filed by the vessel's captain, stating that the vessel left Petersburg at 4:00 am on June 7. Because there was a genuine dispute of a material fact, the district court denied both parties motions for summary judgment.

Lastly, the district court addressed whether or not Ms. Perez had a right to intervene pursuant to the Federal Rules of Civil Procedure. In order to intervene pursuant to Federal Rule of Civil Procedure 24(a)(2), the Ninth Circuit requires an applicant to demonstrate that "(1) it has a significant protectable interest relating to the property or transaction that is the subject of the action; (2) the

disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately represent the applicant's interest." *Id.* at *7 (quoting *Chamness v. Bowen*, 722 F.3d 1110, 1121 (9th Cir. 2013)). Here, Ms. Perez argued that she had a protectable interest in that she would suffer a practical impairment of her interest if the Underwriters were to prevail. However, the court determined that her protectable interest was in her right to seek cure, and therefore, the district court held that because the outcome of this litigation would not affect the validity of Ms. Perez's legal claims for cure, the court would not allow intervention.

Therefore, the court denied both the plaintiffs and the defendant's motion for summary judgment, and denied Ms. Yolanda Perez motion to intervene.

Other Work Endorsement

St. Paul Fire & Marine Insurance Co. v. Renegade Super Grafix, Inc., No. 1:15-cv-104, 2016 WL 4926190 (S.D. Miss. Sept. 15, 2016)

In 2009, Gulf Coast Shipyard Group, Inc. ("Gulf Coast") began construction of a vessel named "T-051" under a vessel construction contract dated December 18, 2006. Gulf Coast hired Renegade Super Grafix, Inc. ("Renegade") to paint the vessel using Awlgrip paint. Renegade began painting in 2010, but cracks began appearing in the work as early as December 2011. These cracks eventually worsened to catastrophic failure of the Awlgrip system. Renegade attempted to repair this failure in 2012 and 2013, but failed. Gulf Coast removed the defective Awlgrip system thereafter.

On October 8, 2013, Gulf Coast filed suit in state court against Renegade, Akzo Nobel Coatings, Inc. ("Akzo") and International Paint, LLC ("International"), alleging a myriad of claims, including breach of contract, warranty, fraud, misrepresentation, and tort based claims. Renegade sought defense

and indemnification from its marine general liability carriers, St. Paul Fire & Marine Insurance Company ("St. Paul"), who insured Renegade for the policy period from July 12, 2011 through July 12, 2012, and Travelers Property Casualty Company of America ("Travelers"), who insured Renegade for the policy period from July 12, 2012, through July 12, 2013.

Travelers and St. Paul filed this declaratory judgment action in the Southern District of Mississippi, seeking a declaration that neither were liable to defend or indemnify Renegade. The insurers argued on summary judgment that there was no "occurrence" under either policy. Further, the insurers argued that the loss fell within several exclusions even if covered. Renegade countered, arguing that the policy was ambiguous and should be read to consider the foregoing event an "occurrence." Moreover, Renegade argued that the "other work" endorsement of the policy covered Renegade for "boat service and repair- painting of hulls."

The court, applying Mississippi law, found that the policies appeared "to at least arguably afford coverage for the claims asserted by Gulf Coast in the underlying state court litigation." The policy defined "occurrence" as "an accident, including the continuous or repeated exposure to substantially the same general harmful conditions." The "Other Work Endorsement" provided coverage as follows:

> OTHER WORK ENDORSEMENT
>
> This endorsement alters the coverage provided under Section III: Ship Repairer's Legal Liability
>
> In consideration of the premium charged, it is hereby mutually agreed that the following coverage is added:
>
> Subject to prior notification and agreement of the Company, this insurance shall be extended to cover other repair operations

which do not come within the scope of ship repairing operations of the insured. The gross charges incurred from such operations shall be declared to the Company and adjusted at the rate set forth elsewhere in the policy.

With respect to such operations:

(a) the terms "ship repairers" and "ship repairing" wherever used in this policy shall be deemed to include other repair operations of the insured;

(b) it is mutually agreed that this shall include coverage for loss of or damage to property other than watercraft which is in the care, custody and control of the Insured for purpose of being worked upon including whilst in transit to or from sub-contracted repairer's or manufacturer's premises.

OTHER REPAIR OPERATIONS NOTED ABOVE CONSIST OF: BOAT SERVICE AND REPAIR- painting of hulls.

Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, provisions, agreements or limitations of the above mentioned policy, other than as above stated.

The court construed the "other work" endorsement as, at a minimum, creating ambiguities in the policies as a whole. The court noted that the policy exclusions did not specifically appear in the "other work endorsement," which creates an ambiguity as to whether they apply to "boat, service and repair- painting of hulls," a cover which is generally afforded in this endorsement, without

stating clearly whether further exclusions and conditions found elsewhere in the policy apply. Accordingly, the court denied Travelers' and St. Paul's motions for summary judgment and ordered them to show cause why the court should not enter summary judgment in favor of Renegade.

Bad Faith

Sea Tow Services International Inc. v. Si Paul Fire &Marine Insurance Co., No. 09-cv-5016, 2016 WL 6092486 (E.D.N.Y. Sept 29, 2016)

Sea Tow Services International ("Sea Tow") was sued along with its Miami franchisee, Triplecheck, Inc. ("Triplecheck"), by a Triplecheck employee who sustained severe personal injuries. Sea Tow was insured under its own policy with St. Paul Fire & Marine Insurance Company ("St. Paul") and as an additional insured under Triplecheck's policy with RLI Insurance Company ("RLI"). During the personal injury action, St. Paul took the position that RLI was obligated to defend the action as Sea Tow's primary insurer. RLI, disagreed, but St. Paul agreed to defend the action with an eye of recouping defense and indemnification costs later from RLI. St. Paul pursued a defense and settlement strategy over Sea Tow's objection that only protected Sea Tow, and not its franchisee. In response, Sea Tow went behind St. Paul's back and obtained a global settlement within the combined policy limits available to both Sea Tow and Triplecheck. The settlement was paid by both St. Paul and RLI, and the dispute between these insurers was resolved.

Thereafter, Sea Tow initiated the instant action against St. Paul alleging breach of the insurance policy, bad faith, unfair and deceptive trade practices in violation of the New York general Business Law, § 349, tortious interference with the Sea Tow-Triplecheck contract, professional malpractice, defamation, and civil conspiracy. The Eastern District of New York granted St. Paul's motion for summary judgment and dismissed all counts.

The court interpreted the St. Paul policy to allow St. Paul to pursue a unilateral settlement for its insured "at its discretion," which is recognized to give the insurer an "unconditioned right to settle [a] claim or suit without the [insured's] consent." St. Paul, therefore, did not breach its contract by pursuing unilateral settlement. Likewise, the court declined to find a violation of the duty of good faith and fair dealing based on the insurer's unequivocal discretion to settle matters without the insured's consent, provided that the insured was not personally exposed beyond the policy limits (which did not apply in this case). Further, to establish bad faith, the plaintiff must show "gross disregard" of the insured's interests, which was not the case under these facts.

The court further noted that at no point did St. Paul waver from its coverage obligation to Sea Tow, and that there is no legal authority that supports the proposition that seeking alternative coverage from other policies such as RLI's creates an instance of bad faith.

As for the claim for interference with the Sea Tow-Triplecheck contracts, the court found no evidence that there was any breach of these contracts, which was an element of Sea Tow's intentional interference claims.

The court dismissed the remaining claims of unfair and deceptive acts, civil conspiracy, defamation, and professional malpractice on similar principles and on account of an utter lack of evidence. Additionally, the defamation claim was barred by the statute of limitations.

Gemini Insurance Co. v. Western Marine Insurance Services Corp., No. 2:10-cv-03172, 2016 WL 3418413 (E.D. Cal. July 21, 2016)

Western was a surplus lines broker for Gemini, with authority to underwrite binding coverage for Gemini pursuant to a Program Administrator Agreement; the agreement also required Western to indemnify Gemini against third party claims. The lawsuit arose out of Western's issuance of policies to an insured, Wesco,

over a three-year period. Wesco failed to provide answers to certain required questions in the insurance application and renewal applications, but Western issued the policies without following up. Western also failed to notify Wesco in the second and third policy years that it was not offering, and did not issue, requested blanket coverage for several marinas owned by Wesco.

Wesco sought coverage for "wind/storm damage caused to docks." Investigation of the claim revealed a variety of discrepancies in the insurance application, as well as post-dating of the date of loss by several years. Gemini ultimately decided to pay Wesco's claim, but only up to individual limits of liability rather than pursuant to Wesco's requested blanket coverage. In Wesco's ensuing coverage action, Western's insurer (Scottsdale) defended Gemini pursuant to the Agreement, but later withdrew; Western did not assume Gemini's defense. Following a settlement, Gemini filed a lawsuit against Western, alleging breach of contract and negligence.

The court first addressed several issues in connection to whether Gemini was entitled to summary judgment for its breach of contract claim against Western. The court concluded that Gemini was a party entitled to indemnification under the agreement with Western and that Western was required to provide notice to Wesco that the renewed policies did not contain the requested blanket coverage. However, with regard to whether Gemini was negligent in the events leading to Wesco's underlying lawsuit (which would have triggered Western's indemnity obligation), genuine issues of material fact existed. Specifically, the court found that Western was entitled to rely on Wesco's insurance application and was under no duty to inquire about Wesco's omissions. Further, the court found that there was disputed evidence with regard to whether Gemini negligently waived coverage defenses to Wesco's claim. Accordingly, the court denied Gemini's summary judgment motion as to its breach of contract claim.

The court then granted Western's summary judgment motion on Gemini's negligence claim, finding that Gemini was

seeking to recover a purely economic loss in violation of the economic loss rule.

COMMITTEE OI YOU! G LAWYERS

Chair: Blythe Daly
Vice Chair: Jennifer Porter
Secretary: Imran **0.** Shaukat

I EWSLETTER

Vol. 2016-2 (October 2016)

"THEORETICALLY QUARTERLY"

Message from the Chair

Despite the fact that it's still 80 degrees in New York, it is time for the fall meeting of the Maritime Law Association. Fifty years ago the MLA held its first meeting outside of New York City in New Orleans. That first "port" meeting was held in conjunction with the inaugural Tulane Admiralty Law Institute. Next week from October 26 — 28, 2016, the MLA and the ALI will be celebrating their 50th reunion and we hope many Young Lawyer Committee members are planning to celebrate with us.

The meeting in New Orleans not only provides expanded networking opportunities, but also provides an opportunity to earn up to 15 CLE credit hours. The mornings will be devoted to the traditional ALI CLE programming at the New Orleans Board of Trade on Wednesday and Thursday and at Tulane on Friday. The MLA committee meetings will be hosted by several law firms in the afternoons.

As always, I would like to extend a special thanks to all YLC members who have volunteered for committee work since our last meeting and who have volunteered to assist with the committee meetings in New Orleans. The contributions of our members are

vital to the work of the Association and are recognized by the MLA President, Board, and Committee Chairs. Thank you.

Le Bon Temps Roule!
- Blythe Daly

YLC in I ew Orleans

This year's reunion in New Orleans offers great chances for networking and learning, but the strength of the MLA relies upon the collaboration of its members — including the YLC. We will be holding a short but separate MLA YLC committee meeting in New Orleans to address any issues specific to our members. The meeting will precede the Opening Reception. In addition to reports from the YLC liaisons, we will receive an update on the website, and have a short discussion on the future of the MLA. We appreciate the generosity of our hosts at Jones Walker.

Wednesday, October 26, 2016
5:00 — 6:00 p.m.
Jones Walker LLP
201 St. Charles Ave., Suite 5100

* * *

In addition, our ALI hosts in New Orleans has organized a fantastic Social Event on Thursday evening.

Thursday, October 27, 2016
6:00 — 9:00 p.m.
Pat O'Brien's Briar's Suite

The event features a premium open bar and catered food service. The event has been generously subsidized and sponsored by S-E-A, Ltd. $50 per person advance purchase. Register here: http://www.law.tulane.edu/tlsLifeAfterLS/ALI docs.aspx.

A special thanks to **Walter Maestri** for his organization of this event.

Highlighted YLC Members

Certain of our YLC colleagues have contributed time and effort into various ALI programs and the MLA committee meetings. Please plan to support your fellow YLC members at the following programs:

Wednesday October 26, 2016
9:00 — 10:00 a.m.
50-Year Retrospective on Marine Insurance
Laura Beck Knoll, paper co-author

Wednesday, October 26, 2016
11:30 a.m. — 12:30 p.m.
Bodily Injury and Death II
Rebecca Hamra, paper co-author

Wednesday, October 26, 2016
2:00 — 3:30 p.m.
Fisheries Committee Meeting
Scott Gunst, Jr., Recent Case Law Summary

Wednesday, October 26, 2016
3:30 — 5:00 p.m.
MLA Joint Marine Torts
& Casualties/Cruise Lines
& Passenger Ships Committees
Rebecca Hamra, Presenter: The Zika Virus: From Stagnate Waters to Growing Fears

Thursday, October 27, 2016
11:30 a.m. — 12:30 p.m.
Collision, Limitation of Liability and Salvage
Laura Beck Knoll, paper co-author

Thursday, October 27, 2016
2:00 — 3:30 p.m.
Stevedores, Marine Terminals & Vessel Services Committee

Imran Shaukat, Report on *In re Petition of Frescati Shipping Company, Ltd., as the Owner of the M/T Athos I,* 2016 WL 4035994 (E.D. Pa July 25, 2016)

CALL!! G ALL PHOTOGRAPHERS

The MLA is seeking volunteers to take photographs at the various ALI or MLA meetings or other events they attend in New Orleans. Volunteers are not expected to spend their entire time taking photos, but rather, the MLA would like a number of volunteers to agree to take photos and later download them into a designated link and/or website. Those interested should contact Pamela Schultz: pschultz@hinshawlaw.com.

RECEI T PROJECTS

At the request of Chet Hooper and David Nourse, the following YLC members assisted in proof-reading and cite checking the upcoming edition of the MLA Report: **Corey R. Greenwald, J. Ben Segarra, Stephanie Propsom,** and **Christine M. Walker.**

OI GOII G PROJECTS

Sean Pribyl, liaison to the Government Counsel committee, has advised that the inaugural MLA Government Counsel co-sponsored panel on "Best Practices in Maritime Investigations" will take place on Dec. 1, 2016 from 11:30 a.m. to 1:00 p.m. in New Orleans. The program is co-sponsored by the Admiralty Section of the Federal Bar Association and the ABA TIPS Admiralty & Maritime Law Committee. Additional YLC members **Raymond Waid** and **Jessica Link Martyn** have assisted in organizing the program.

The Recreational Boating Committee publishes a newsletter entitled "Boating Briefs," which reports on cases involving recreational boats as well as legislative and regulatory developments specific to recreational boating. The Committee requests YLC members keep a lookout for these types of developments and cases

and report them to the Committee. In addition, if a YLC member has been involved in an interesting case involving recreational boating, there may be an opportunity for that member to make a presentation about the case at a Committee meeting. If you have anything to report, please contact the chair of the Recreational Boating Committee, Mark Buhler, at mark.buhler@earthlink net, or the YLC liaison, Bo Williams, at bo.williams@phelps.com.

Peter Black, the YLC liaison to the Website and Technology Committee, advises us that the committee is in the process of establishing a LinkedIn page for the MLA. Watch for the page to go live and for opportunities to contribute to the same.

ASSISTAI CE I EEDED

The MLA Archives Committee is looking for 1-2 volunteers in New York to assist in reviewing, sorting, and organizing certain of the MLA numbered documents. The Committee would like to complete the project in the next few weeks. If you are interested in assisting, please contact William Bell at WEBELL@MDWCG.com or (212) 376-6447. We thank you in advance for your assistance.

CALL FOR PROJECTS

To the Standing Committees: Please let the YLC know how we can help with your projects. If you have projects in need of research or have writing opportunities that are well-suited for younger lawyers, please keep our committee in mind Additionally, we can usually find a YLC member to assist with staffing your meeting (handling CLE paperwork, sign-in sheets, handouts, and assisting with presentation set up, etc.), if and when the need arises.

PUBLICATIOI OPPORTUI ITIES

Do you have any war stories from your practice that you wish to share with others? Do you think you have a sense of humor? Consider submitting your written piece for consideration to *Benedict's Quarterly Maritime Bulletin.* You may write to Managing Editor Joshua S. Force at jforce@shergarner.com.

PROCTOR STATUS

Any Associate member of the MLA who has been a member of the MLA for four years or more is eligible to apply for Proctor status with the MLA. The advantages of Proctor status are numerous, not the least of which is that a member cannot serve as a committee chair, vice-chair, or director unless s/he is a Proctor or Non-Lawyer member. Proctor applications may be obtained and submitted on the MLA website.

YLC MEMBERSHIP LIST OI WEBSITE

If you are not already signed up as a member of the YLC, please make sure you do so. In addition, please review your email and notification settings on the website. We use the membership list on the website as a vehicle for communicating with our members. We have reason to believe that some of our young lawyers are not registered as YLC members or may have restrictive notification settings and thus do not receive our communications. If you know anyone that might fall into either category, please pass this message along and encourage them to formally join the committee and to check their settings. Conversely, if you are no longer a YLC member and are tired of our shenanigans, feel free to unsubscribe.

EDITORS' I OTE

MLA ARCHIVES

Thanks to steps taken during the administration of MLA President Robert G. Clyne, a review is being made of documents in the MLA archives. Documents which have been identified as MLA Documents 1 through 824 have been scanned on to the MLA website and can now be reviewed on line. Other documents relating to the MLA, such as the minutes of Board meetings, Secretary's reports concerning the status of the Association, MLA *amicus* briefs and historically significant or interesting documents are being collected for scanning. These documents soon will be available to members on line.

We are indebted to William E. Bell of Marshall, Dennehey, Warner, Coleman & Goggin, a member of the Website and Technology Committee, for introducing us to a series of Memorials to leaders of the maritime bar published as MLA Documents during the period 1928 through 1953. It appears to have been the practice of the Association in these years to recognize the accomplishments of departed members and their contributions to the maritime law in this manner. We frankly were surprised to learn of these Memorials and puzzled that the practice of publishing them apparently had stopped. As this was "before our time", we consulted Marshall Keating. He knew that there had been a Memorial written respecting his grandfather, J. Parker Kirlin, but was unaware of any practice of the MLA to publish Memorials during his years as a member or before, stating: "I fear that, like many of the other courtesies of that era, the memorials practice died with WW2".

With the goal of interesting our readers in these records of the Association's history, we include in this issue of MLA Report three of the Memorials: the first, a Memorial of J. Parker Kirlin, was first published as MLA Document No. 144 in 1928; the second, a Memorial of Judge Henry Galbraith Ward of the Second Circuit Court of Appeals was first published as MLA Document No. 192 in 1934; the third, a Memorial of Charles S. Haight, was first published as MLA Document No. 240 in 1938. We also include a history of

the U.S. District Court for the Southern District of New York written by Judge Charles M. Hough, first published as MLA Document No. 194 in 1934. We think that you will enjoy these glimpses into the past.

In order to view these documents on the MLA website, follow these steps:

- Log in: You will need a Username or email address and password
- Find and click on "Document Library" in "Site Quick Links", located about half way down the page on the right hand side
- Find and click on "MLA Historical Documents" in the alphabetical list of the contents of the "Document Library"
- Find and click on the particular document you wish to see
- Click on "Download" and the document will appear on your screen.

Chester D. Hooper
David A. Nourse
Editors

MARITIME LAW ASSOCIATIOI OF THE UI ITED STATES.

DOCUMENT No. 144

MEMORIAL OF JOSEPH PARKER KIRLII

PREPARED BY JOHI MUI RO WOOLSEY, T. CATESBY JOI ES Al, D CHAUI CEY I. CLARK FOR THE MARITIME LAW ASSOCIATIOI .

Joseph Parker Kirlin, a member of this Association since its foundation in 1899, died in the City of New York on December 22, 1927.

Mr. Kirlin was born in Scranton, Pennsylvania, on December 5, 1861, and was the son of Elias Hiram Kirlin and Elizabeth Roberts Kirlin.

His early education was secured at a high school at Scranton, and at Keystone Academy at Factoryville, Pennsylvania.

Before commencing his college course he had acted as business manager for the late Frank Hefright at Huntington in the construction of Government improvements on the Great Kanawha River in West Virginia in 1877 and 1878.

Mr. Kirlin's father was a civil engineer and in 1880 when Mr. Kirlin arrived at college age he was living at Parkersburg, West Virginia, and was engaged on the construction of a railroad in West Virginia. Consequently it was quite natural that Mr. Kirlin should enter the University of Virginia and commence his college course there. He did this in the autumn of 1880, and he always looked back with the greatest delight on the two years he spent there.

Mr. Kirlin was at the University of Virginia from 1880 to 1882. He did not take a degree there, but came north in 1882 and entered Columbia. There he took the degree of Ph.B. in 1883, and the decree of LL.B. with honors from the Columbia Law School in 1884.

After his graduation from Columbia, Mr. Kirlin continued the study of law, first in the office of Charles Swan at Charleston, West Virginia, and later in the office of Charles E. Crowell and Edward S. Hatch in New York City.

In the Fall of 1884, Mr. Kirlin entered the office of Ebenezer Buckingham Conyers, who was just commencing to represent British shipping interests here, and there Mr. Kirlin began the lifelong association with admiralty and maritime law with which he was continuously and actively identified until he suffered a stroke in March of 1922.

In 1889 Mr. Kirlin became a partner of Mr. Conyers under the firm name of Conyers & Kirlin.

On January 7, 1891, he was married to Elizabeth Burt, by whom he had two children, Ralph Kirlin, now resident in Santa Fe, New Mexico, and Elizabeth Louise Kirlin, now the wife of Cletus Keating.

The firm of Conyers & Kirlin continued until Mr. Conyers' death in 1905. Thereafter the style of the firm remained unchanged, although in 1908 John Munro Woolsey and Charles Ralph Hickox were taken in as members. In 1915 the firm name was changed to Kirlin, Woolsey & Hickox, and in 1917 Cletus Keating became a member of the firm.

In 1920 Ira Alexander Campbell, who had practiced law in San Francisco, joined the firm and the name was changed to Kirlin, Woolsey, Campbell, Hickox & Keating. William H. McGrann, Charles T. Cowenhoven, Jr., Robert S. Erskine and Leslie deG. Potter, who had long been associated with the firm, were then taken into partnership.

From the beginning of his association with Mr. Conyers it became clear that Mr. Kirlin had found the specialty for which he had a peculiar aptitude.

During his long career at the admiralty bar, Mr. Kirlin came into contact with practically every kind of case that could arise under our maritime practice.

There were many opportunities open for a man who commenced the practice of maritime law at the time when Mr. Kirlin joined Mr. Conyers. Maritime law was fast developing both its substantive and procedural aspects during the years immediately following.

Various changes in the maritime law were being made, and changes in the law always mean litigation.

After a series of international conferences new international rules for avoiding collisions at sea were embodied in a statute approved on August 19, 1890, and on February 13, 1893, the so-called Harter Act was enacted.

By the establishment of the Circuit Court of Appeals in 1891 as the final court to which appeals in admiralty cases could be taken as of right, a new forum was created, and consequently new questions of procedure arose.

The Harter Act, especially, because it involved the relation between ship and cargo, necessitated much litigation in order to construe its scope and meaning.

Mr. Kirlin had many cases in the United States Supreme Court which involved the construction of this act, but it was on a matter of practice that he made his first 'appearance there. His first case in the Supreme Court was *In re I ear York & Porto Rico Steamship Company, 155* U. S. 523 (1895), and involved an application for a writ of prohibition against the Honorable Addison Brown, United States District Judge for the Southern District of New York, who was developing a practice in admiralty for which there was not any specific authority in any rule or decision of the Supreme Court by which he brought in third parties who might be considered to be liable for the damage complained of by the libellant, or from whom the respondent claimed to be entitled to- indemnity.

Mr. Kirlin was successful in this case and from it grew the third party practice in admiralty which is one of the important characteristics of our admiralty procedure. The decision which Mr. Kirlin secured in the New York & Porto Rico case has been crystallized by the present rules of the Supreme Court.

When the Spanish War broke out, Mr. Kirlin found himself suddenly and unexpectedly called on to defend many Spanish vessels in the Prize Courts of the United States. His successful defense of the coastwise fishing vessels in the case of *The Paquete Habana, 175* U. S. 677 (1900), in which he secured damages against the United States for wrongful capture, 189 U. S. 453 (1903), constituted, perhaps, his greatest contribution to international maritime law. The opinion by Mr. justice Gray, which sustained Mr. Kirlin's contention and freed the fishing vessels, was largely based on authorities submitted in Mr. Kirlin's brief, and has since been often cited as one of the great international law cases.

In another celebrated Spanish War case, *The Styria*, 186 U. S. 1 (1902), Mr. Kirlin sustained the position that a shipmaster who had reasonable ground to fear capture if he sailed with contraband on board was justified for the safety of his ship and other cargo in discharging the contraband before starting on his voyage.

Mr. Kirlin was always a master of the facts in his cases. In the art of direct examination which is usually somewhat disparaged in favor of its somewhat more showy sister art—cross-examination—Mr. Kirlin shone. When he had finished the examination of one of his own witnesses the facts were concrete things visible "in the round"—and not mere shadows, or even mere bas-reliefs.

Mr. Kirlin was exceedingly thorough in his preparation for trial and in getting a comprehensive grasp of the material facts of his cases.

An illustration of his thoroughness in everything which he undertook is that he read and made digests of every collision case in

the Supreme Court reports before he had ever had a collision case in his practice.

As time went on Mr. Kirlin became better and better known as a collision lawyer, for collision cases involve many detailed and complicated questions of fact.

His first collision case in the Supreme Court was *The Victory and The Plymothian,* 168 U. S. 410 (1897), in which he succeeded in reversing a decision of the Circuit Court of Appeals in which Mr. Chief justice Fuller had sat and for which he had written the opinion. It is perhaps unnecessary to state that the opinion of the Supreme Court reversing the Circuit Court of Appeals was also written by Mr. Chief Justice Fuller.

Mr. Kirlin's reputation in collision cases resulted in his often being engaged as counsel in other important maritime litigations.

He had the unique distinction of having been counsel in the cases arising out of the three greatest maritime disasters of the past generation. He was counsel for the passengers and others; who were claiming damages in the case of *La Bourgogne,* 210 U. S. 95 (1908); for the White Star Line in the case of *The Titanic, Oceanic Steam I avigation Company, Ltd. v. Mellor,* 233 U. S. 718 (1914); and in the case of *The Lusitania,* 251 Fed. 715 (1918).

He was unsuccessful in the case of *La Bourgogne,* but in the other two cases maintained his contentions.

His last collision case in the United States Supreme Court was *Lie v. San Francisco & Portland S.S. Co.,* 243 U. S. 291 (1917), in which he was counsel for San Francisco lawyers.

Mr. Kirlin's experience in and knowledge of marine insurance and general average law was great. He was chairman of the Association of Average Adjusters of the United States in 1918-1919.

One of his most celebrated cases was *The Jason,* 225 U. S. 32 (1911), in which he succeeded in maintaining the validity of a

general average clause in which cargo agreed to pay general average in case of a general average arising as the result of negligent navigation with respect to which the shipowner was relieved from liability by statute.

In the early part of 1914, Mr. Kirlin was thrown from a train on the Long Island Railroad as it went around a curve near Glen Cove, Long Island. He fell on his neck and shoulder on a grassy slope. It was remarkable that this fall was not fatal to him. Fortunately, however, he escaped with only a very severe shock which kept him confined to his house for some weeks. It is believed, however, by many of his friends that the jar of this accident was what led to the stroke he suffered in March, 1922.

Mr. Kirlin was just recovering from this accident when the Great War began in August, 1914. Its coming apparently stimulated him into renewed activity and from the very commencement of hostilities he was continuously in demand to advise on subjects of international law and international trade.

He represented the shipowner in the first case in which the British captured a prize. That was the case of *The Leda*, condemned in Bermuda, and subsequently released by the British as an act of grace, owing to the fact that although *The Leda* was registered as owned by a German company, her real owner was an American company which was the only stockholder in the German company. This was the first recorded instance of a belligerent's releasing a prize under such circumstances.

In the early days of 1918, following the breakdown of the Government shipping program, the Secretary of War and the United States Shipping Board created the Shipping Control Committee, of which Mr. P. A. S. Franklin was made Chairman. To the end of the war this committee operated the Government fleets with the success that is now history. From the time of its creation until the end, Mr. Kirlin was general counsel to this committee. The success of this committee was largely due to its charter of powers. Mr. Kirlin drew up this charter, and persuaded Mr. Franklin to insist upon it before accepting the post of chairman. This charter successfully withstood

attacks arising out of all kinds of departmental jealousies and encroachments. It gave the Shipping Control Committee the free hand which enabled it to mobilize without interference from our authorities a bridge of ships between the 'United States and France.

After the war he was frequently called on for advice on shipping questions of international importance as between this country and England.

During his connection with the large and important matters which only can be mentioned in a memorial of this kind, Mr. Kirlin was constantly engaged in the trial of every kind of litigation that could arise, out of, or in connection with, shipping matters and in writing opinions for clients on every aspect of maritime law.

Your committee believes that, having regard to his multifarious experience in shipping cases and the important part which he took from a legal standpoint in both the Spanish War and the Great War, Mr. Kirlin probably had more experience as a maritime lawyer than any American has ever had. Indeed, in view of the division of interests between solicitors and banisters in England, it seems to your committee that the statement could be made even broader, that he had the greatest experience of any maritime lawyer of modern times.

For it will be found on reflection that most of our great maritime lawyers have either achieved their distinction in this branch of law after being put on the bench, or else after an active career in maritime law at the bar they have gone on the bench of a court which does not deal with maritime matters. Thus, Mr. Kirlin practically stood alone as the great American maritime lawyer and he was almost as well known in England as he was here owing to the great number of his English clients and his success with their litigations here.

Mention of the cases which a man has argued in the Supreme Court of the United States, of which Mr. Kirlin had upwards of thirty, or of the great trials in which he has taken part, or of the positions which he has held, does not in any way convey the

impression of the personality of the man himself, and only those who were privileged to be associated with Mr. Kirlin, day in and day out, can realize what unusual personal qualities he possessed.

He had a temperament which was peculiarly suited to the life of litigation which he had to lead. He was the most even-tempered man imaginable. Work, however arduous, did not seem to disturb him, and he maintained up to his last illness a boyish freshness of outlook which was as unusual as it was delightful. He felt the savor of life to a peculiar extent and enjoyed every incident in his work and in his pleasure with a poignancy that was pleasant to watch.

One day Mr. Kirlin made a remark to Mr. Woolsey which he will always remember because it contained such a happy summary of Mr. Kirlin's attitude towards life. He said: "The secret of a happy life is to work hard and to cultivate the art of small delights"!

He had found the secret, and had embodied it in a memorable phrase.

To a very busy man, such as he, it must have meant a great deal to have been able in the ordinary routine of his days to have taken such keen pleasure in the little things of which, after all, life is largely made up. This boyish quality of almost poignant contemporaneous enjoyment of everything enabled him to accomplish an immense amount of work with the least possible friction, and made him a most delightful companion in his hours of ease.

It was noteworthy that he never made enemies of lawyers who were opposed to him. In fact it was not uncommon for a lawyer who had been against him in one case to come around with his next maritime case and engage Mr. Kirlin as his counsel.

He was not only, therefore, a very happily constituted man, but was a very happy man, and it seemed almost incredible to those who knew him best that he should have been stricken so early, and that an active and happy spirit such as his should have had to

undergo the suffering and helplessness of an illness of almost six years before he died.

JOHN M. WOOLSEY,
T. CATESBY JONES,
CHAUNCEY I. CLARK,
Committee on this Memorial.

IN MEMORIAM

The Honorable Henry Galbraith Ward

DOCUMENT No. 192

HENRY GALBRAITH WARD, the son of the Reverend Henry Dana and Charlotte Galbraith Ward, was born in the City of New York on April 19, 1851. He was graduated from the University of Pennsylvania with high honors, at the age of nineteen, receiving at the same time both the degree of Bachelor of Arts and that of Master of Arts. He studied law in the office of Richard C. McMurtrie, Esq., in Philadelphia, and was admitted to the Pennsylvania Bar in 1873. About 1880, he became a member of the Philadelphia firm of Biddle & Ward and, in 1883, he moved to New York. On August 13, 1891, he married Mabel Marquand. He was engaged in active practice, chiefly at the Admiralty Bar, until 1907, when President Roosevelt appointed him a Judge of the United States Circuit Court of Appeals for the Second Circuit. He served on that Bench until 1925, when he resigned. He died on the night of August 23-24, 1933.

These are the facts, but they are only the very bare facts with reference to Judge Ward's full life among us.

When Judge Veeder asked me to prepare a memorial for Judge Ward, to be submitted at this meeting of the Maritime Law Association, I gladly agreed to do so, but I asked to be allowed to write of his human qualities, rather than of his legal attainments as lawyer and judge. Others may record his history in the profession—tell of the important cases which he tried, of the large clients whom he represented, and analyze and discuss his opinions in the cases which he decided, and all of that will be appropriate, but it will not give the real picture of the man. I do not claim that he was the greatest Federal Judge to sit in the Southern District of New York, but he was the most beloved member of the Admiralty Bar and of the Admiralty Bench, in our generation, and I prefer to write of him from the personal standpoint, as I knew him I did not know him any better than other lawyers of his day, and the anecdotes which I shall

tell could be duplicated by many, but they are of value just because his personal attitude toward me and toward everyone with whom he came in contact was precisely the same.

It was my good fortune to start practice at the Admiralty Bar in 1895, when Judge Ward was forty-four years old and in his absolute prime, professionally. At a dinner given in honor of Judge Brown, after he retired from the Bench, he referred to Judge Ward as "the Bayard of the Admiralty Bar," and that is what he was—handsome in appearance, graceful in bearing, gracious in manner, magnanimous always and a man who held the highest ideals and lived up to them.

Our first meeting was in his office, which was then at 160 Broadway. I had gone there, as I remember it, to serve a copy of a pleading or of a brief in a case in which he and Mr. Wheeler were opposed. I think that the date was 1896—about one year after I had been admitted to the Bar. When my document was sent in, I waited for an admission of service, and was surprised to be told: "Mr. Ward would like to see you." When I entered his office, youngster that I was, I was greeted with that friendliness which seemed always to radiate from his presence. He was not only interested in the case but appeared to be interested in me; discussed with me some of the legal questions involved and sent me away, after perhaps ten minutes of conversation, with a proud and swelling heart, of all of which he was wholly unaware.

It was my good fortune to start trial work fairly early, and it so happened that Judge Ward was not infrequently my opponent. I can remember that one of my earliest trials involved a collision between a Pennsylvania Railroad tug or carfloat and a steamer of the Starin Line. I needed the testimony of the entire crew of the Starin boat, but she was running on a regular schedule and to take the men off for examination meant to lay up the boat. I therefore asked Judge Ward if he would be willing to make a trip on the boat up to Glen Island and back and to examine the witnesses aboard. Without a moment's hesitation, he agreed, and so we started off bright and early one morning—Judge Ward, Miss Powers and myself. During the direct examination of one of my first witnesses, I asked a

question which produced a quick and emphatic protest. Judge Ward's indignant words were: "Haight, you know perfectly well that you have no right to ask a question like that." I stopped dead in my tracks. I hadn't known that I had no right to ask that question, but I was glad to take his word for it, and the question was withdrawn. From that time on, our relations became more and more friendly and, although we were practically never on the same side of a case, they became continually closer.

At the Bar, Judge Ward was a sharp contestant and a hard fighter, but he was always generous, whether he emerged from a case as winner or loser, and it is not always easy to be a graceful loser. I well remember the collision between the City of Atlanta and the Pennsylvania R.R. Transfer No. 15, which occurred in 1904. The case was tried before Judge Holt and he held Transfer No. 15 solely at fault. After the trial, Judge Ward said to me: "Haight, if I had been held for half damages, I would have stood for it, but I will never pay you your full claim. I am going to appeal that case and reverse you.". By that time I knew Judge Ward well enough to suggest that I would make him a wager that I could hold my decree and, immediately, he offered to bet me a box of cigars that I was wrong. The case was appealed and affirmed and, a day or two later, I received as good a box of cigars as the University Club could provide, with Judge Ward's card, upon which he had written this message: "I hope that my cigars are better than my law."

One of Judge Ward's most striking characteristics was his absolute simplicity of manner. He never stood upon his dignity. I was in his office once, discussing a case with Judge Hough, long 'before either of them went on the Bench. A question arose upon which Judge Hough wanted some information and he rang for an office boy and said: "Ask Mr. Ward to step here." His message was intended for young Artemas Ward, who was then in the office, but in a moment or two Judge Ward himself appeared. That was the only occasion upon which I can remember seeing Judge Hough blush with embarrassment, but he did blush then. He assured Judge Ward that he never would have sent such a peremptory message to him, and continued that assurance to me, long after Judge Ward had left. But Judge Ward himself did not show the slightest surprise, in the

first instance, and I am satisfied that he would have been perfectly willing to be summoned, if his presence had been desired.

Everyone who knew both Judge Ward and Judge Hough realized how close their relations were. They often differed on questions of law, but in everything else they were at one. At one of the dinners given in Judge Ward's honor, at the time of his retirement, Judge Hough told of his early association with Judge Ward, in Philadelphia, and said that there had been one attraction only which had brought him to New York and that that attraction was Henry Galbraith Ward.

I think that Judge Ward's character can best be summed up in a story which he himself told at the time of his retirement from the Bench. I do not remember the name of the precise town in Pennsylvania to which the story referred, but any name will serve, and the rest of the story I remember vividly.

An old Quaker was traveling on foot along a country road on a hot summer day, bound, we will say, for the town of Judson. Reaching a fork in the road and being uncertain which way to turn, he paused and waited for a wagon which he saw approaching in the distance. The wagon was piled high with household goods and when it was abreast of the old Quaker he stopped the driver and said: "I beg your pardon, sir, but will you tell me which is the road to Judson?" The driver, pulling up his horse, replied: "Well, if you want to go to the town of Judson, just follow the road that I have come, but why anybody wants to go there is beyond me. I have lived there for the last five years and the people are the meanest and the most contemptible that I have ever known. Thank God, I am moving away and am going to live with white people." The old Quaker paused for a moment and then said slowly: "Friend, thee will find it just the same where thee is going."

He resumed his journey, and after some time he came to another fork in the road and, once more, he was in doubt which way to go. Again, he saw a wagon approaching, loaded with household goods, and again he waited for information. He stopped the driver with the same inquiry as before and this time the driver replied: "If

you want to go to Judson, follow the road which I have come and it will lead you directly there." And then, in a spirit of friendliness, he asked the old man if he expected to live in Judson, and when he was answered in the affirmative the driver said: "Well, I envy you. I have lived in Judson for the last five years and you Will find there the kindest, the most hospitable and the friendliest people in the world. I am brokenhearted that, for business reasons, I must move away." And, again, the old Quaker paused and then said: "Friend, thee will find it just the same where thee is going."

I have always loved that story and it illustrates, more vividly than anything that I can say, the reason why we loved Judge Ward. Because he was so generous, so friendly and so kindly, he brought out in us our best qualities and made us even a little like himself.

Judge Ward has long been missed by those who knew him at the Bar and on the Bench and now he has gone beyond our view forever, but we must all of us be glad that he has crossed the threshold and that his kindly soul has been released from the physical handicaps which had become a burden to him.

Charles S. Haight

IN MEMORIAM

Charles S. Haight

DOCUMENT No. 240

CHARLES S. HAIGHT, a member of this Association since 1901, died on February 20, 1938. He was born in 1870 at New Lebanon Center, New York, a beautiful mountain country which he loved, to which he constantly returned, and where he lies buried. He graduated from Yale in 1892 and from the Harvard Law School three years later. He at once entered the office of Wheeler & Cortis, and remained throughout his life in that firm and its successors. In 1911, the firm was reorganized as Haight, Sandford & Smith, and he became the senior partner.

From the beginning, he was attracted by the admiralty, and for many years he drilled himself thoroughly in the routine of its practice, conducting many trials, especially of charterparty and collision cases. His success as an advocate was due partly to the intense conviction with which he presented every case which he took into court, partly to his unusual faculty of vivid, emphatic statement, and partly to the great thoroughness of his preparation. As a conciliator and negotiator, he was conspicuously successful, having to an unusual extent the ability to remove suspicion of each other from the minds of the parties to a controversy, and to lead each to understand the other's point of view.

In these earlier days, not content with the demands of an exacting practice, he did the greater part of the preparation of "Haight's Questions and Answers," which has smoothed the pathway to the Bar of many younger men.

As Mr. Haight's practice widened and as he grew to have an extraordinarily wide circle of friends in the shipping world, both here and in Europe, he became more and more interested in the broader problems of the shipping industry, especially in its international aspects. He believed that trade between nations was a great force for peace and good will in the world, and that the man

who worked to secure the harmonious operation Of such trade, by promoting uniformity in law and by preventing any national action likely to lead to retaliation and international friction, was serving, not merely his clients, but the world. This conviction was the motive which inspired much of his life's work.

With the outbreak of the war, the international questions became acute and Mr. Haight was confronted by a multitude of problems of the utmost urgency and difficulty. Only a few illustrations of his work can be given.

As the war progressed, the British search for contraband became more and more strict, until finally every ship which sailed from this country for a neutral port in Europe was obliged to submit to search in a British port; frequently her cargo was discharged; she was apt to be detained indefinitely on suspicion, and, by the time she had been released, great losses had been incurred and frequently weeks of her time had been lost—this at a period when the world needed the full use of every possible ton of shipping. Mr. Haight succeeded, in cooperation with the British Ambassador, in working out a plan by which vessels loaded in this country under the supervision of British inspectors, by whom their hatches were sealed, and such ships passed the blockade without detention. In the case of baled goods, like cotton, a certain proportion of each shipment was examined by X-ray, in order to determine whether or not the bales contained concealed contraband.

Another important contribution which Mr. Haight made was the handling of negotiations for the purchase by the United States Government and by private American interests of about forty Austrian steamships interned in various American and foreign ports. The acquisition of these vessels increased American shipping by more than 400,000 deadweight tons. Subsequently, at the height of the submarine campaign, January-March, 1918, Mr. Haight visited Switzerland, representing the United States, on a special mission in an effort to purchase from German owners their vessels interned in. South American ports.

The close of the war gave opportunities for the type of constructive work in which Mr. Haight particularly believed. He advocated, and finally secured the passage, of the reciprocal tax legislation, tinder which foreign steamship owners are exempt from income tax in this country, provided that their own Government grants reciprocal immunity to Americans. This averted the danger of an international tax war on shipping.

Similar reasons led him to oppose, at a later time, the attempted regulation of foreign freight rates by national action, on the ground that such regulation was unwise, in that it would surely lead to retaliation, and illegal, in that it violated existing treaties.

He was a permanent American member of the Comite Maritime Internationale and frequently attended its meetings in Europe.

For some sixteen years, as Chairman of the Bill of Lading Committee of the International Chamber of Commerce, and purely as a work of public service, Mr. Haight advocated in this country and abroad uniformity of legislation with respect to the carriage of goods by sea under bills of lading, and it may fairly be said that it was due to him more than to any other man in the world, that the Hague Rules were enacted into law by practically all of the maritime nations. He put into this work, here and in Europe, an incredible amount of time and strength.

In many other ways Mr. Haight worked to preserve and to develop harmonious relations and uniform law among the maritime nations. In recognition of these services, he received the decorations of France, Norway, Sweden and Denmark.

His work along these and other lines made him an international figure in the shipping world, and brought him into close and cordial relations with many friends in most of the nations of Europe.

He was active in this Association as Chairman of the Committee whose work resulted in the Public Vessels Act, as

Chairman of the Bill of Lading Committee, as delegate to the Congress of the International Chamber of Commerce, and in many other ways.

Mr. Haight's practice was only one portion of his activity. A large amount of time and strength were devoted to public service and to philanthropic work. He was a director of the Maritime Association of the Port of New York, and a very active member of the Board of Managers of the Seamen's Church Institute. As Chairman of the Joint Emergency Committee of Seamen's Welfare Agencies in the Port of New York, he organized a system of contributions by the visitors to ships, which has provided a steady and dependable fund for the relief of destitute seamen. He was a founder and an active director of the Scandinavian American Foundation, and was also the founder, with others, of the Lebanon School for Boys, which occupies some of the buildings of the old Shaker settlement in New Lebanon. He was always an enthusiastic Yale man and in particular supported her scholarship funds. For nearly forty years he devoted time and strength to the work of St. James' Protestant Episcopal Church, of which he was the junior warden.

It is hardly necessary to speak to you, most of whom knew him well, of the charm of Mr. Haight's personality and of his extraordinary energy. A day of intense activity at the office was almost habitually followed by work at home, often extending far beyond the small hours. He never relaxed and his play was as strenuous as his work. He was fond of outdoor life and two or three times in each year he used to get away for a week of shooting at New Lebanon or in South Carolina, or of fishing in Canada. His sense of humor and his unfailing cheerfulness and optimism gave him extraordinary buoyancy. He took his own troubles with a smile and gave help, in advice; in money, and, above all, in spiritual stimulus, to an amazing number of people who brought their difficulties and their discouragements to him.

In 1897 Mr. Haight was married to Miss Alice M. Hoyt, and for almost forty years they had a singularly happy and harmonious life. Of their four children, one became his father's partner.

In September, 1937, while in Rio de Janeiro on an important business mission, Mr. Haight received word of the dangerous illness of Mrs. Haight. He left immediately by air, and a special plane from Miami brought him to her bedside in New Lebanon only a few hours before her death. This strain was followed by a prolonged, period of excessively hard and trying work. He became. ill early in February, but was apparently on the road to recovery, and was dictating letters, talking on the telephone and holding conferences, when the end came suddenly, thus fulfilling his oft-expressed wish that he might die in harness.

It seemed fitting that, at the moment of his burial on a rainy day in the hills of Lebanon, the sun broke through the clouds.

John W. Griffin

1789-1919

THE U! ITED STATES DISTRICT COURT

for the

SOUTHER! DISTRICT OF I EW YORK

Its Growth, and the Men Who Have Done Its Work

By

CHARLES MERRILL HOUGH, LL.D., J.U.D.

District Judge 1906-1916
Circuit Judge 1916-1927

Document No. 194
June, 1934

MARITIME LAW ASSOCIATION

of

THE UNITED STATES

This account of the history of the United States District Court for the Southern District of New York, was found among Judge Hough's papers after his death on April 22, 1927. It was evidently written in 1923, and is published by the Maritime Law Association (of which he became a member in 1911, and was President from 1919 until his death), in accordance with a resolution adopted at the Annual Meeting of 1934.

The text has been carefully examined by Mrs. Hough and by Charles Weiser, Esq., the present Clerk of the Southern District Court; and the additional information contained in the Appendix has been prepared by Mr. George J. H. Follmer, Chief Deputy Clerk. The data concerning the Eastern District were prepared by Percy G. B. Gilkes, Esq. Grateful acknowledgement is made for this assistance.

Arnold W. Knauth, *Secretary.*

THE UNITED STATES DISTRICT COURT
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It is an historical commonplace that but for the system of United States Courts extended throughout the states "the Federal Constitution could never have been put into practical working order."[1]

But no system is mature at birth, and no apparatus, however cunningly devised, works without human guidance; nor can it work to advantage without material whereon to exhibit merit.

The national courts in the City of New York are an excellent example of a human device, reasonably well planned but of small importance until the community furnished material suitable for its activity—and happy selection provided, upon the whole, men capable of accepting and improving the opportunity afforded by that material.

The very fact that the constitutional clauses relating to the judiciary were the subject of little discussion prior to adoption of the Constitution, is strong evidence that few observers or critics perceived that an independent national judicial system would not

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[1] Fiske's *Critical Period of American History,* p. 300.

only grow with the nation, but in ways that could not be foreseen would contribute to the nation's growth.

What opposition there was came from men, like Maclay of Pennsylvania, who merely included the judiciary in an all pervading hatred of any form of central or national government. Thus Maclay wrote of the Judiciary Act of 1789[2] that it was "calculated for expense, and with a design to draw by degrees all law business into the federal courts. The constitution is meant to swallow up state constitutions by degrees, and thus to swallow all state judiciaries."

Opposition of this kind might inflame anti-national prejudice, but there is no evidence of professional opposition to some federal system of courts. It was perhaps well for the harmony of the Constitutional Convention on this point that Thomas Jefferson was abroad, for ten years later, it having come to his ears that the Courts of the United States were following common law precedents, he wrote to Edmund Randolph: "Of all the doctrines preached by a federal government, the novel one of the common law being a force and cognizable as an existing law in their courts is to me the most formidable"—for he held the strange opinion that the national courts would engross all business because so much of common life was founded on common law.

But even if Jefferson's masterful management had been felt in Convention, the result would scarcely have been different. Most of the work on the judiciary clauses was "done in Committee by Ellsworth, Wilson, Randolph and Rutledge,"[3] and most of the Convention delegates, with substantially all of the leaders of the bar throughout the country, thought with a later historian that "from the Declaration of Independence to the date of the ratification of the Constitution the judicial tribunals of the States had been unable to administer justice to foreigners, to citizens of other states, to foreign governments and their representatives and to the governments of

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21 Stat., 73.

'Fiske' s *Critical Period of American History,* p. 300.

their sister states, so as to command the confidence and satisfy the reasonable expectations of an enlightened judgment."[4]

To a considerable extent the same men, and certainly men in a like mood, took up the establishment of the courts at the first session of Congress. They knew that some effort in the Convention to secure to state tribunals first instance work in matters affecting the national government had been voted down, and the method of appointment and tenure of office of the proposed federal judiciary settled without opposition,[5] and on this foundation they built.

The Judiciary Act of 1789 was a Senate measure, and there were but six votes against it and no reported discussion.[6]

In the House, criticism of a curious nature developed, wholly directed against the proposed District Courts. The spokesman was Samuel Livermore of New Hampshire, himself a well known judge, who advanced the singular objection that it was wrong to multiply courts—there should be as few of them as possible, because "mankind in general are unfriendly to courts of justice." Egbert Benson of New York rejoined that the Senate had spent much time over this bill and had done it "tolerably well"; whereupon the House passed it.[7]

The ever interesting salary question evoked more talk than any other recorded episode. As summarized by Hildreth,[8] the South was for a generous scale of remuneration, while New England held for low salaries. Again Mr. Livermore took the lead, and the discussion[9] reveals at least what was the legislative estimate of the probable earnings of a leading lawyer of the time—it was "two thousand guineas" per year. In result, the salaries of the thirteen

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°Curtis's *History of the Constitution,* Vol. 2, p. 442; Harper Bros., 1859.
Bancroft, *History of the United States,* Vol. 6, pp. 223 and 352 (Appleton & Co., 1885).
'I Ann., 51.
I Ann., 813.
'Harper Bros., 1851, Vol. 4, p. 126.
'I Ann., 396 *et seq.*

original District Judges ranged from $800 in Delaware to $1,800 in Virginia and South Carolina.

The relative importance of New York is well enough illustrated by the fact that to Pennsylvania was awarded $1,600, while Maryland and New York were bracketed at $1,500.[10]

No reported discussion is known concerning the names to be given to the inferior courts. The Circuit Court, as the Act clearly shows, was the tribunal in which the Supreme Court Justices were expected to do most of their work. At a time when in no city on the continent were courts continuously open, it was assumed that the officers of the Supreme Court could not fmd work at the Capital for more than a few weeks a year; the rest of the time they were and were intended to be truly *"Justices in eyre."* Therefore most naturally to their court was given the name Circuit; for, as had been said nearly two hundred years before, "the Judges of Circuits as they be now, are come into the place of the ancient justices in eyre called *justiciarii itinerantes,* ... (and) all the counties of the realm were divided into six circuits and two learned men well read in the laws and customs of the realm were assigned by the King's Commission to every circuit, to ride twice a year through those shires allotted to the circuit, making proclamation beforehand a convenient time in every county of the time of their coming and place of their sitting, to the end that the people might attend therein in every county of the circuit."[11]

Quite in ancient style, the act directed the circuit court to be held by two Justices of the Supreme Court and the District Judge sitting together. Yet even in the beginning favor was shown, if not to the dignity, at least to the probable age of the incumbents of Supreme Court office, for they were not required to proceed into the districts of Maine and Kentucky, then respectively parts of the States of Massachusetts and Virginia; and to the District Courts in those

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[10] Act September 23, 1789.

[11] *The Use of the Law,* attributed to Sir Francis Bacon, *circa* 1630.

outlying regions was given the jurisdiction of the circuit court as well.

How completely this trial work was looked on as the principal duty of the Supreme Court Justices is shown by the constant use of the phrase "Circuit Judge" in describing them; this title was used in the messages of the various Presidents until certainly Jackson's time. The man who was laboriously described as "Mr. Justice" when sitting *in bane* at the Capital, became a "Circuit Judge" during most of the year.

The title "District Court" arrived without reported discussion. The word was well enough known in legal and ecclesiastic phraseology, and meant generally the region within which one may be compelled to appear, so that *"hors de son fee"* and *"extra districtum suum"*[12] meant the same thing in the manorial courts.

There is, however, no evidence that the framers of the Judiciary Act examined the ancient authorities. The word "District" lay at their hand because Kentucky had for some time been known as the district of that name—the phrase was common in Virginia statutes. Indeed some word that could be widely used to describe new political units was required, and the word "District" was of a convenient vagueness to apply not only to a judicial area, but to the regions returning members of Congress, and particularly to the already projected District of Columbia.

While some objection had arisen to a District as distinct from the Circuit Court, it is plain that no one objected to conferring on some court jurisdiction in admiralty and over cases involving seizure of goods and merchandise imported in violation of revenue and navigation laws. There is ample evidence in the Vice- and State Admiralty records still remaining in the custody of the Southern District, that for nearly a hundred years the Crown and the State in succession thereto, had been accustomed to seize illegally imported

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12 Cf. Sub *nom.* District, Jacobs's Law Dictionary (1809), and citations; also Blount (1670).

merchandise in substantially the same manner as ships were attached, and all the proceedings for the condemnation of the offending goods had been carried through in the Admiralty Court, and under a procedure analogous to maritime proceedings *in rem,* as is done to this day.

When the House of Representatives, finding that the Senate had done its work "tolerably well," accepted the Judiciary Act, everyone regarded as the District Court's principal work, and the reason for its existence, the labor of attending (in the statutory phrase) to "All civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost and navigation or trade of these United States."

To be sure the District Court was given jurisdiction to administer for minor offenses "not over thirty stripes," and it might try certain suits by aliens for *torts* in violation of "treaties and the law of nations," also small actions by the United States; but everything except the still existing consular jurisdiction, and admiralty and governmental seizures, was concurrent either with the State Courts or the Circuit Court, and so it practically remained, plus bankruptcy at times, for a century and a quarter. So long a stretch of substantially unchanging work is unique in American judicial history.

The appellate jurisdiction of the Circuit over the District created by the original statute, is a curious instance of how a habit once formed survives the reason for forming it. The Act of 1789 required the attendance of at least two Judges to make a Circuit Court, and both were required to proceed from district to district, though certainly with no great frequency, for it was specifically provided that in the District of New York the Circuit Court should first sit on the 4th of April, 1790, and thereafter on the like day "of every sixth calendar month thereafter." It was never intended that a single Judge sitting at Circuit, should entertain appeals from the District Court, but in 1802[13] the requirement of two "Justices in

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" Act of April 29, 1803, 2 Stat., 156, allowed the Supreme Court to allot the circuits among the judges, and established six circuits instead of three. There were

eyre" was relaxed, and yet the appellate jurisdiction lasted until 1891.

As a semi-annual visit from the Circuit Judges was thought to be sufficient for the business of the whole State of New York, so it was evidently unthought of that the District Court could ever be in practically continuous session. The act only decreed that it should hold four sessions annually, of which the first should open in New York on the first Tuesday of November, 1789, and accordingly it did so open on November 3, before James Duane, who had been commissioned September 26. Duane had been a distinguished lawyer, well known in the Vice Admiralty Court a quarter century before; and many relics of his work exist on the files of the colonial court. He was not a man of great book learning, nor bred to the bar, but turned to it after an early mercantile career; yet he was extremely successful in business and laid out his winnings in land, evidently hoping to found something like a Manor at Duanesburg in Schenectady County. Under the Crown he had been Advocate General and Attorney General, was the first Mayor of New York after the British evacuation, and as such personally administered the "Mayor's Court," of which the present City Court and the Special Sessions may be considered the remote descendants. In his 57th year when appointed, his judgeship he doubtless regarded as a convenient and honorable ending to his active life, for he must have known that his judicial duties would be extremely light.

The District Court minutes are very full and still perfect; they show that the tribunal was opened with considerable state in the "Exchange," a building then much used for many kinds of public functions, and situated near the foot of Broad Street. Nothing was done, and there was nothing to do but read the Judge's commission and admit to the bar of the new Court such gentlemen as chose to attend.

The "Roll of Attorneys" was at once instituted, and is an actual roll of skins of parchment. As one skin was filled with names

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not enough judges to furnish two men for so many circuits, and so the two judge requirement was altered.

another was affixed thereto, and this method continued for about forty years, until books were substituted and the "roll" became a symbol.

About this first District Court there was a strong flavor of the state and provincial tribunals that had dealt with ships, customs duties and governmental seizures. Judge Duane had had much experience in that kind of business. The Clerk was Robert Troup, who had assiduously practiced in the State's Admiralty Court. The Collector who furnished the grist was John Lamb, who had held the office under the State, and contributed to the State admiralty court nearly all the business it ever possessed. The first United States Attorney was Richard Harison, a lineal descendant of the first Judge of the Vice Admiralty Court, who held his commission directly from the High Court of Admiralty.[14]

There continued to be nothing for the District Court to do, except admit more attorneys, until April 16, 1790, when the first process issued under a libel entitled *United States of America vs. Three boxes of Ironmongery, etc.*

There were no dockets, as that word is now understood, but from the minutes (so full are they) the history of this first litigation can be fully seen, and it is illustrative of what occupied the Court's time. A man with friends in New York had emigrated from England to Canada, and after no great stay there had come on to New York via the Hudson Valley. He brought his household goods with him, and his New York friends waited upon John Lamb, Collector, to ascertain whether duty should be paid upon said goods. They were told that what was old would pay no duty, but new articles were dutiable. The emigrant passed through New York and thence on to Elizabeth, N. J., or Elizabethtown as it was then called. What aroused Lamb's suspicions does not appear, but he sent several persons described as "tide-waiters" down to Elizabeth, who rummaged through the house containing the immigrant's goods,

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" It is commonly said that the Vice Admiralty Judges were commissioned by the Crown, but in point of fact they were appointed by the High Court in England. Judge Harison's Latin commission existed until 1911, when it was consumed in the fire that destroyed most of the State Library in Albany.

seized and brought back to New York what they considered dutiable, and against such articles the first action in the District Court of the United States for the District of New York was promoted. Thereupon application was made to Judge Duane to find these and other facts, which he apparently did after a public hearing, and his findings are entered at large in the minutes. In result he ruled that the maximum amount of duties that might be claimed by the United States upon the goods in question was $95. These facts were certified to the Secretary of the Treasury for mitigation or remission of duties or penalty. It is certain that more than three-fourths of the minutes of the District Court during the whole period of Judge Duane's incumbency are taken up with applications of this nature. There were a few admiralty suits, never seriously contested; they were really to all appearance methods of selling vessels and giving good title thereto. This business after the fall of 1790 was carried on at the City Hall, which then stood where now is the Sub Treasury.

Duane was not in good health, and in the spring of 1794 he resigned, retired to Duanesburg and there died on February 1, 1797.

When in 1914 a Committee of the bar was moved to complete as far as possible the collection of portraits in the District Court Room, search was made among Judge Duane's numerous descendants for some portrait differing from the official representation of him as Mayor hanging in the City Hall. What was called the "family portrait" was and is in the possession of Mrs. Austin of Summit, N. J. It was contained in an oval frame; to be copied this frame was removed, and it was found (what had long been forgotten by the family) that the portrait as painted had been square, and to fit it to the oval frame the canvas corners had been turned in. The turned in portion contained the signature of Copley. From the apparent age of the sitter, the painting must have been made during the last visit to America of Lord Lyndhurst's father.

The first five years of the court's existence covered not only Duane's term of office but the business originating under him The history of those years occupies 213 pages of the minute book, and shows the entry of 378 final orders. The business was vital to the maintenance of the general government, but directly affected only

the maritime and importing portions of the community, and could have attracted no public attention; its remoteness from the ordinary life of the average citizen is very marked.

John Lawrence, the second Judge, was so promptly appointed (May 6, 1794) as to make it a fair inference that Duane had duly arranged the succession. Lawrence was a Cornishman who came to New York in 1767, as a lad of seventeen. He studied law under Governor Colden, and though it is traditional that he had considerable knowledge of the admiralty, there is no evidence in the surviving records of either the Colonial or State Courts that he ever appeared as a proctor. He reached the rank of Colonel in the Revolutionary Army, and is best remembered as the Judge Advocate of the Court that tried Major Andre. He had served in the Continental Congress and for two terms in the House of Representatives. His Judgeship was but a means of filling up the time between retirement from the lower house of Congress and election as a Senator from New York. Thus his judicial labors extended only to December, 1796, and for several months before his resignation he was Senator-elect, there being then no prohibition either by statute or public opinion against a Judge running for political office while holding judicial preferment. He did not care to remain in public life after the fall of the Federalist party, resigned his Senatorship in 1800, retired to a private and prosperous career and died in 1810 at his "uptown" residence-356 Broadway.

Lawrence's administration of the District Court is marked only by the fact that he was the first Judge whose conduct was reviewed by the Supreme Court.[15] This matter was a motion for mandamus to compel him to do something that the French Consul desired, and is the first legal report of those demands of Revolutionary France which subsequently led to our state of *quasi* hostility with that nation.

The first admiralty cause in the Supreme Court originated in the New York District, and reached the highest Court in Lawrence's

[15] *United States vs. Judge Lawrence,* 3 Dall. (3 U. S.), 42.

time.[16] Though this case contributed nothing valuable to general law, the record, still extant with its curious exhibits, is an interesting piece of evidence as to the rude habits of maritime life in the closing years of the eighteenth century.

Lawrence was one of the original members of the Society of the Cincinnati, and on April 12, 1913, that Society presented to the Court the Judge's portrait, now hanging in its Motion Room.[17]

The resignation of Judge Lawrence seems to have left a gap difficult to fill. It is clear that no man of good business felt attracted to the office of District Judge by its salary, and the official occupations, though agreeable, were singularly monotonous; for the District Court of the time might almost be described as an arm of the Treasury, occupied during most of its scanty sessions with efforts to collect revenue, and no active lawyer felt like devoting himself wholly to such a pursuit. To be sure, the District Judge sat also at Circuit, but that Court had even less to do than the District. It must have required some affection for the slowly developing marine business of the City to get a Judge at all, but one was found in Robert Troup, who had for a while been the Clerk under Duane, and was long politically active with Lawrence.

Born in New York in 1757, Troup had taken his degree at Columbia when seventeen, studied law under John Jay, entered the Revolutionary Army, been captured and confined for some considerable time on the prison ship, *Jersey.* He became District Judge immediately on Lawrence's resignation (December 10, 1796) and served for about a year and a quarter (April, 1798). After his resignation he frequently appeared as attorney of record in the United States Courts, and there and elsewhere was known as an active and fairly successful lawyer. But the great event of his life

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[16] La Vengeance, 3 Dall., 297 (August, 1796). The records of this and the other early cases referred to are, with the papers of the State and Colonial Admiralty Courts, now kept in a separate box in the office of the Clerk of the Southern District.

"The ceremonies in connection with this presentation were printed and remain on the files of the District Court as well as in the archives of the Society of the Cincinnati.

was his military service, and for many years before his death (January 14, 1832) he was best known as Col. Troup, and by his published account of life on *The Jersey.* Of him no portrait has been discovered, nor do his descendants still living in New York know that one exists. The business of the Court during his brief administration did not vary from that of his predecessors, except that the admiralty steadily though slowly increased in volume and apparent importance, while governmental matters diminished in relative quantity. Eight or nine years of Custom House management had shaken the system into a condition of stability. The earliest District Court minutes render the inference irresistible that much of the litigation arose from official inefficiency, and an ignorance common to both officials and the public.

The first Judge who regarded his judicial position as the fitting end of a life consistently devoted to legal work was John Sloss Hobart, who took office on April 12, 1798. Born in Connecticut in 1733 and a graduate of Yale in 1757, Hobart became District Judge at the age of sixty-five, obviously to close a professional life of the greatest activity, for whether at the bar or on the State bench of New York, in Congress or at the State Constitutional Convention, he was always a lawyer. No one had taken a more important part in shaping the state government of the revolted province of New York. He was locally so well known for public services of this nature that, although he had never worn a uniform, membership was granted him in the Society of the Cincinnati. For him the court was a permanency, and with him began the line of Judges who, once appointed, found in their judicial work professional occupation and inspiration. He was the first judge to die in office, on February 4, 1805.

He thus occupied the bench during the time of belligerency with France in 1799, and had before him numerous causes raising questions of law as to the rights of captors and salvors on the troubled waters around the West Indian Islands. Under Hobart the business increased, not so much in mere number of adjudications as in the importance of business, though to modern ears the whole amount of work done by all the courts, state and federal, in the City of New York about the beginning of the nineteenth century seems

ridiculously small. Only one of Judge Hobart's decisions was taken to the Supreme Court, and the case of *The Amalia* has perhaps the strongest flavor of what life on the sea might be like about 1799,[18] of all the early marine causes in the U. S. Reports.

The *Amalia* hailed from Hamburg, and was documented by that free city; she was seized by a French privateer, for what reason is undiscoverable, as Hamburg and France were at peace, was never condemned in any court of admiralty, but turned by the French into a privateer, and on going forth as L'Amelie, flying the French flag, was seized by U. S. S. *Constitution,* Captain Talbot, brought into New York for condemnation, and there was claimed by her original German owners. Ultimately Captain Talbot was awarded salvage; but the report does small justice to the history of violence revealed by the original papers still on file in the Southern District.

Judge Hobart left no descendants. His original commission still remains on the files of the Southern District; and it was only by accident, and after prolonged search that an admirable pastel by Sharpless was discovered in the Independence Hall in Philadelphia, representing him as a United States Senator—an office he occupied for a few months and resigned to become District Judge. A copy of this portrait, given by the bar in 1914, now hangs in the District Court Motion Room.

The most striking politico-legal episode of Hobart's incumbency was the incoming and outgoing of the "Midnight judges." While with practical unanimity historians have written of the political side of that matter, and ascribed the re-organization of Circuit Courts and the creation of Circuit Judges to Federalist desire to perpetuate their power in the judicial department, reading our

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" Talbot vs. Seeman, I Cr., I. It is characteristic of the time, that the vessel's name is indifferently German, French or English throughout the record. This was the first effort of Marshall, C.J., in admiralty. The only other matter from the New York District considered in the Supreme Court prior to 1812 is *Dewhurst vs. Coulthard,* 3 Dall., 409. The first case from any state tribunal in New York did not reach the Supreme Court until February, 1805, *Hallet vs. Jenks,* 2 Cr., 210.

records and other public documents reveals legal and personal reasons for the creation as well as destruction of the new system.

Circuit Courts under the Judiciary Act of '89 existed only when at the appointed times two Justices of the Supreme Court came into the District and heard such appeals and cases in law and equity as might be ready for them. The three circuits then created meant nothing except as they set limits to the journeyings of the Judges for a given circuit. Against this system the elderly gentlemen of the Supreme Court protested from the beginning. It was impossible to assign them all to duties that did not take most of them far from home, and where they incurred unaccustomed hardships. The system is commonly believed to have been fatal to Justices Wilson and Iredell. As early as 1792 Washington sympathetically laid before Congress a memorial of the Judges on the subject.[19]

So far as the State and District of New York was concerned the procession must also have been wearisome because there was so little business. The Circuit Court records for the years to 1795 cover 57 pages, and show the trial or other disposition of 46 causes, for the most part criminal trials. In practice the District Court in New York has almost never exercised its criminal jurisdiction, even trivial cases were from the beginning brought in the Circuit Court.

On the day appointed by Congress the Circuit Court opened before Chief Justice Jay, Justice Cushing and Judge Duane. There is no surviving record of any ceremony at its opening in the City Hall on April 4, 1790; but the new tribunal immediately busied itself with an affair interestingly illustrative of how tentative and uncharted in detail was the new scheme of national government.

Their first case was an indictment against Hopkins and Brown for conspiring on the high seas to destroy the brigantine

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" They never ceased to complain, and Madison in 1816, Monroe in 1824, and Adams in 1829, embodied their objections in presidential messages. Thus Madison said, "The time seems to have arrived which claims for members of the Supreme Court a relief from *itinerary* fatigues incompatible as well with the age which a portion of them will always have obtained," as with their dignity and other labors.

Morning Star and to murder the captain and a passenger. The minutes contain a syllabus of the indictment, and show in detail the course of trial. The prisoners were found guilty and sentenced to six months imprisonment "without bail or mainprize," which imprisonment was to begin by standing in the pillory for one hour, and to conclude with the receipt by each prisoner of "39 stripes upon the naked back" to be administered at the "public whipping post" in the City and County of New York.

The counsel on both sides are identifiable as men of rank at the bar, and the Judges need no identification, yet the point was not raised that at the time of indictment and trial, there existed no statute of the United States defining or punishing the offense for which Hopkins and Brown were imprisoned and scourged."

A Court with so little to do, which yet required the presence of at least two Judges to transact any business, was embarrassed by its own greatness, and the minutes indicate some effort to conceal the nakedness of the land. Even after 1795 the records show that Court met and adjourned without transacting any business and without stating who was present. The inference is irresistible that no one was there but the District Judge, and he put a discreet minute in the book to keep up appearances. It was not, however, until April, 1799, that it distinctly appears that the District Judge sat alone, and permitted process to be returned.

During the life of the Court as organized by the Act of 1789 the longest entry in the minutes, and one of the most important works it did, is an opinion as to the duties laid on the Judges by an Act to "provide for the settlement of the claims of widows and orphans barred by the limitations heretofore established" in respect to invalid pensions.[21] Messrs. Jay, Gushing and Duane in April, 1792, considered at length the fact that they and their associates in the divers circuits were directed by Congress to consider the

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" The first National Crimes Act was enacted April 30, 1790, I Stat., 112, and contains no allusion to such an offense as that for which Hopkins and Brown were punished.

[21] Act of March 23, 1792, I Stat., 243.

demands of such widows and orphans, adjudicate upon them and cause the worthy applicants to be added to the pension roll.

They were "unanimously of opinion" that these duties were not judicial; that the Legislature could not "constitutionally assign to the judiciary" non judicial labors; but that since the "objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of Congress," they, the Judges, would as "Commissioners" execute this act in their private but not in their official capacity. Having entered these views upon the minutes, a copy thereof was transmitted to the President, in a letter which is a model of eighteenth century humility The letter is as follows: "Sir: As we could not in our opinion convey the enclosed extracts from the minutes of the Circuit Court now sitting here to the Congress of the United States in so respectful and proper a manner as through the President, we take the liberty to transmit them to you and to request the favor of you to communicate them to that Honorable Body. We have the honor to be with perfect respect, Sir, Your most obedient and most humble servants."

But even with a few admiralty appeals, in which no opinions are preserved, and some naturalization, there was little for the Circuit Court to do in New York; and when Jay retired from the Chief Justiceship, Paterson of New Jersey was the nearest available Justice. This difficulty (by no means confined to the New York District) first led Congress to a series of acts providing that a Circuit Court might consist of one Justice and the District Judge if they agreed, and might be adjourned by the District Judge if no Justice appeared,[22] and they undoubtedly suggested the statute so much execrated as productive of the "Midnight Judges."[23]

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[22] Act of March 2, 1793, I Stat., 333; Act of March 19, 1794, I Stat., 369. By the first of these statutes a difference of opinion between one Justice and the District Judge continued the cause; but if a like division occurred at the next term when a different Justice attended, judgment should be rendered in conformity with the opinion of the Supreme Court Justice.

[23] Act of Feb. 13, 1801, 2 Stat., 89.

This statute set up six circuits instead of three, and those on the Atlantic seaboard still have the same numbers and area as were then assigned them.

The intent of the act was to give every circuit three circuit judges who should constitute both a court of first instance and of appeal from the Districts, and who should be on hand to push business, and relieve the Justices from "itinerary fatigues."

To the men appointed for the second circuit—Egbert Benson of New York, Oliver Wolcott of Connecticut and Samuel Hitchcock of Vermont—no exception could be taken so far as their personal and professional standing was concerned, however obnoxious their politics were to the triumphant Jeffersonian party. They met and produced their commissions in the City Hall of New York on June 5, 1801, and thereafter from time to time held court for a year. The business done required no more than thirty pages of the minute book, although bankruptcy under the Act of 1801 had been added to circuit jurisdiction. These distinguished lawyers are always spoken of as the "Midnight Judges" because of the tradition that they were created on the last night of Adams' administration; but the records show their commissions as all dated February 26, 1801.[24]

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[24] Judge Benson was born in New York City in 1746, graduated at Columbia 1765; was Attorney General of New York for twelve years, beginning in 1777; at divers times between 1784 and 1815 was a member both of the Continental and Federal Congress; was for a brief period in 1794 Justice of the Supreme Court of the State and was one of the early Presidents of the New York Historical Society, in whose library his portrait now hangs.

Oliver Wolcott was born in Connecticut, January 11, 1760, and graduated at Yale in 1778. He was the second Secretary of the Treasury of the United States, and for ten years, beginning in 1817, was the Governor of Connecticut. On retirement from public office he became a resident of New York City, and there died June 1, 1833.

Samuel Hitchcock was born in Massachusetts, March 23, 1755, and graduated at Harvard in 1777. He moved to Burlington, Vermont, about 1786, and was one of the earliest and best known lawyers in that state; was District Judge for Vermont from 1793 until commissioned as Circuit Judge. He remained prominent in the affairs of Vermont until his death at Burlington, November 30, 1813.

The non-political difficulty with the Circuit Court as newly made by the Act of 1801 was that the whole system was top-heavy, there was really nothing for three resident Circuit Judges to do, and the inference is strong that such men as the three who served in the Second Circuit soon found out that no court could make business, but must wait for business to grow out of the community, and they were not indisposed to be legislated out of offices whose emoluments were but $2,000 a year, especially as the offices were also abolished, and they were not troubled by the sight of political opponents as successors.

By the new act,[25] which increased the District jurisdiction by detaching bankruptcy from the Circuit, was created the system of circuits and circuit courts which lasted till 1912. The Supreme Court was permitted to apportion circuit work as it deemed best, and one Justice became the allotment of each circuit. But the difficulty of earlier years as to adjournments continued. It was evidently impossible to rely upon a Justice being on hand and on time, and the power of the District Judge to hold a Circuit Court alone was not yet recognized. It was thought to require an Act of Congress[26] to enable the Marshal to adjourn a stated term "by virtue of a written order from the Judge," if not even the District Judge appeared on the statutory day.[27]

When Judge Hobart's successor was appointed, the District Court was plodding on much as it had done for fifteen years, and the Circuit Court still required the presence of a Justice from another state to enable it to function in the trial of causes, and it was still, when functioning, almost wholly busied with the punishment of crime.

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[25] Act of April 29, 1802, 2 Stat., 156.

[26] Act of March 26, 1804, 2 Stat., 291.

[27] There were many changes in the law with regard to the power of single Judges to hold a Circuit Court. The matter was reviewed by Judge Betts in 1852, *In re Kaine,* 14 Fed. Cas., p. 86, and is a curious example of how difficult it was to overcome the ideas prevalent in 1789, as to the number of judges deemed proper for an important court of record.

President Jefferson appointed to succeed Hobart, Matthias Burnet Tallmadge of Herkimer, N. Y. This gentleman, who was born March 1, 1774, and graduated at Yale in 1795, had established his professional and political fortune by marrying the daughter of Governor Clinton,[28] and his record as a Judge was marked by curious and long remembered difficulties with the colleague soon to be appointed. Tallmadge's health seems to have been always feeble. The minute book shows frequent absence through illness, which seems to have affected the Judge's literary style, for on April 4, 1807, it is recorded that the written order to the Marshal to adjourn Court begins as follows: "Sir, I yet feel myself too very unwell to attend court today even for the purpose of adjourning it." Somewhat similar entries continue for some time, and finally the Court was adjourned *sine die* and did not in fact meet again until September 1. This was the Circuit Court, but it cannot be said that the business of that tribunal suffered greatly by a five-month interregnum.

By this time, however, a Circuit Justice had been appointed, whose home was in New York, and who was minded to make the business of the trial court in New York City an important part of his life; and with Brockholst Livingston[29] really begins the history of the Circuit Court as a growingly important metropolitan tribunal.[3°]

By 1812 Federal business had begun to appear in the interior of New York State, and by the Act of April 29, in that year[31] two District Judges were provided for the New York District. Either

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[28] He had been a member of the New York State Senate for two years when in June, 1805, he was appointed as District Judge, "although quite without reputation as a lawyer." (Genealogical Sketches of the Graduates of Yale College, Vol. 5; History of Herkimer County, Benton, p. 179; N. Y. Geographical Record XIII, Vol. 2, p. 461.)

[29] Appointed associate Justice, Nov. 10, 1806.

[3°] Justice Livingston died in 1823; his successor was Smith Thompson, also a New Yorker, who died in 1843, and was shortly succeeded by Samuel Nelson, who served until he attained the age of 80 in 1872. It was this succession of Circuit Justices who regarded New York as home, that made the Circuit Court a tribunal attractive to a growing bar in a growing city, and by the time Justice Nelson's career ended the Supreme Court was far too busy in Washington, to permit its members to do much trial work on the circuit.

[31] 2 Stat., 719.

Judge might conduct court by himself, but if they transacted business together and differed in opinion, that of the senior Judge prevailed. The reason for appointing a second Judge is revealed by the requirement that terms of court be held at Utica, Geneva and Salem, and that a clerk should be appointed who should reside and keep his office at Utica.

To fill the new office thus created William Peter Van Ness was appointed May 27, 1812, who was born in Ghent, N. Y., in 1778, and received his degree at Columbia in 1797. He was locally best known as Aaron Burr's second in the famous duel with Hamilton, and much of his subsequent life was devoted to explaining and justifying in print his relation to the affair. Between him and Tallmadge there quickly developed (if there did not exist before) a marked animosity. Tallmadge was an up-state man and sought to obtain the separation of the State into two districts in order that he might reign alone in one. He succeeded in doing this, or thought he had, by the Act of April 9, 1814,[32] which laid off the Southern District of New York, but included within its limits to the northward the counties of Rensselaer, Albany, Schenectady, Schoharie and Delaware. The rest of the State was to be the Northern District, and to it Judge Tallmadge was assigned by name; the Southern District was left to Van Ness. The act even descends into such particulars as to permit Van Ness to sit in the Northern District in case of the "inability on account of sickness or absence" of Tallmadge. Despite its particularity, however, the statute was imperfect and did not provide for the organization of the Northern District in respect of clerk, marshal and the like. This omission was not provided for until the Act of March 3, 1815.[33]

There remains among the manuscripts of the New York Public Library the letter of one John T. Irving to Judge Van Ness, written from Washington, and describing what he saw in the House of Representatives in respect of completing the organization of the Northern District. Irving says that when "Mr. Taylor of our state" moved to complete such organization "I immediately saw the drift

[32] 3 Stat, 120.
[33] 3 Stat, 235.

of this business," for if the proposal should succeed "the Northern District will be completely organized and when Tallmadge relinquishes his berth, or is compelled to leave it, a successor will be appointed in his place, when in fact there is no manner of necessity for a distinct district, but upon the event of a vacancy both might be consolidated into one, and the office of District Judge of the State be made both respectable for the extent of its jurisdiction and for the salary attached to the office. In fact I saw no necessity for this step of Mr. Taylor, and particularly as all the business of the Northern District has been faithfully discharged so far as I know, although Tallmadge has had no share in its transaction."

But Judge Van Ness was quite capable of promoting his own interests by congressional action; it is certainly true that he and not Tallmadge did most of the work in the interior of the state, and the old directories of New York show that Tallmadge never resided in the Northern District but continued to live in the city. The Act of February 15, 1816,[34] shows that one term in the Northern District had been wholly omitted, and this curative statute was passed declaring that no proceedings should be affected by such omission. The almost contemporary statute of April 27, 1816,[35] grants Judge Van Ness $1,500 in a lump sum as compensation for his services in holding the Northern District Court, and the statute of March 3, 1817,[36] gave him an additional thousand.

Thus the Southern and Northern Districts became separate entities in 1815, and three years later the four northern counties of the Southern went to the Northern District,[37] thus leaving the Southern what might even then have been properly called the "City District."

While the right of the District Judges in New York to sit as well in one District as the other, was a concession to Tallmadge's physical weakness, it marks the beginning of the system of using Judges out of their own Districts in order to relieve press of business.

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m 3 Stat., p. 254.
35 3 Stat., p. 318.
Is 3 Stat., p. 392.
r Act of Apri13, 1818, 3 Stat., 413.

Judge Tallmadge rarely sat in the Southern District (after 1815),[38] although he lived there (so far as can now be seen in violation of law); while Van Ness, as the early records show, did most of the work in the Northern District also.

That judge was not only active politically and judicially, but possessed the pen of an orator, as may be seen by his published decisions,[39] while his difficulties with his colleague produced not only legislation but tradition. When, in 1900, Judge Addison Brown was visibly overworked and suggestion was made that an additional District Judge be appointed, he pointed out to many members of the bar, that the experiment had been tried ninety years earlier, with frictional results, and mildly hoped that the twentieth century would show an advance in professional manners. When in 1903 an additional judgeship in the Southern District was plainly necessary, the then incumbent (Judge Adams) remembered and suggested a renewal of the legislation by which when there were two District Judges in the same District, of differing opinions, the view of the senior Judge should be controlling.

Under Justice Livingston and Judge Van Ness the business of the United States Courts increased steadily, not only nor so much in number of litigations, as in the quality of business transacted. Petitions for remission of penalties ceased to be entered in the minute book, and that volume assumed the brevity, if not paucity of statement that marks it today. During the last part of Van Ness's incumbency (1820-5) the number of final judgments or decisions in the District Court was 542, and in the Circuit, 187; but it was not until 1827 that the first volume of *Paine's Reports* was published,

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" In the summer of 1819 New York was visited with an epidemic of yellow fever. Judge Tallmadge fled from it, to his father's house in Poughkeepsie, and there died (not of the fever) on October 7. His descendants are numerous, but search has revealed no portrait of him.

" Van Ness's Prize Cases (Gould, Banks & Gould, N. Y., 1814); the first report of any kind from the Second Circuit. The two causes reported are also in I Paine, and Fed. Cas. Nos. 7415 and 7417.

and the work of the Second Circuit justified the labors of a reporter, who published for profit.[40]

Van Ness died in office November 7, 1826. His immediate descendants removed from New York, and when in 1914 the legal fraternity of Phi Delta Phi offered to assist in completing the line of judicial portraits, they presented to the Court a copy of the portrait of Judge Van Ness by Jarvis, then in the possession of his grandson's widow in Baltimore, Md.

Down to 1825 Congress paid no attention to the place of sitting of the Court, and the habits of the Circuit and District naturally conformed to those of the community The City Hall in Wall Street contained no offices of any kind.[41] The sessions of courts were held there, but the records and clerk's office were elsewhere. When the present City Hall was opened in 1812 it was at first used for trials in the same way, and the United States tribunals sat there, at least when a jury was required or an audience expected. The minutes, however, refer to the "District Court Room on Dey Street" *(circa,* 1807), and it is clear that hearings without jury were there held.[42]

In 1825 Congress decreed[43] that the Circuit and District Courts should be "holden in the City Hall of the City of New York as heretofore until otherwise ordered by law or until the Secretary of the Treasury on the representation of the Judges of said courts

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[40] Paine's Reports, 2 vols.; Vol. I, 1827, Vol. 2, 1856, after the death of the reporter. The cases contained are for the most part in the circuit, begin with 1810 and cover both Districts of New York. It is sufficient evidence of the comparative unimportance of New York that before Paine's first volume, Bee, Brockenbrough, Cranch, Fisher, Gallison, Mason, Peters, Wallace, Sr., Ware and Washington were reporting in other circuits, although some did not publish until after 1827.

[41] See Stokes's "Iconography of New York," for plan of this building. It was demolished when the building in City Hall Park was ready for use.

[42] Judge Hobart during the latter years of his life lived at 16 Dey Street, and Edward Dunscomb, the clerk, at 49 Dey Street. It is believed that this last was the "District Court Room" referred to.

[43] Act of March 4, 1825, 4 Stat., 101.

respectively, shall direct further or other accommodation be provided."

The act, however, permitted the District Court to continue to hold sessions "where the same are now held" until May, 1826. That place was certainly whatever house near the City Hall Park the clerk for the time being occupied as an office, but just what building the Act of Congress refers to is not known."

" The habitations of both the Federal and State Courts in New York City, is a matter as to which exactness is sometimes difficult, and of no great importance. Until about 1830, the present City Hall was used for formal sessions of all the higher courts, and the U. S. Circuit Court judging from the captions of the minute book did nearly all its work there—it seldom functioned without a jury.

But the District minutes rarely state where the court sat, and non-jury work was doubtless largely done at the Judge's office, which can be traced through contemporary directories as always near "The Park." Thus from 1808-11 Judge Tallmadge was at 17 John Street, and Judge Van Ness can be discovered at 45 Chambers Street and later at 94 Nassau Street.

Shortly before 1830 the City Hall became too small for the demands upon it, and the municipality took over the "Old Alms-House," wherein to house courts and city bureaus of many kinds.

This was a building erected about 1790, approximately on the site of the "Tweed" County Court House, on Chambers Street, between Broadway and Center Street, the other or north side of Chambers Street being occupied by the Bridewell, the Work House and the "Gaol." In 1812 the erection of a "New Alms House" on the present site of Bellevue Hospital, enabled the city to devote this building to a variety of uses; it housed the New York Historical Society, "Scodder's Museum" and other presumably educational enterprises, and was known as The New York Institution. There is a view of it in Stokes's "Iconography," Vol. III, p. 584, where it appears as a plain stone barracks.

As soon as it was remade into public offices the U. S. Court occupied its "East End," and after a few years the Clerk and Marshal and U. S. Attorney also moved there, although as late as 1832, the Attorney was at 64 Varick Street, the Clerk at 141/2 Pine Street and the Marshal at 41 Cedar Street. The name "Old Alms House" was finally forgotten and the building known as the "New City Hall," though well into the '40's Valentine's Manual gives both names and puts the latter one in parenthesis. The Court minutes, however, invariably speak only of The City Hall, but in point of fact from 1830 to 1854 the only court that regularly sat in what is now called the City Hall was the Common Pleas—the Supreme and Superior Courts were most of the time under the same roof as the U. S. Courts.

On January 19, 1854, the New City Hall burned, but the court records and the library of the Law Institute were not seriously injured. The building was

A survey of court work to the end of Van Ness's time can easily be expressed in words of undue disparagement, by measuring it all (after the modern fashion) in terms of reported cases, and pointing to Paine's scanty volume as the fruit of thirty-five years.

This is not just, for while it is true that until the City of New York began to take the first place in commerce, the Second was not a comparatively important circuit, it is as true that if the judges to and including Van Ness had been themselves as inclined to reporting as were Deady, Baldwin and Bee, volumes as important in subject matter could have been produced; the minutes and file papers show that. But until far into the 19th century opinions were not filed, they were read from the bench, and the manuscripts remained private property of the Judge. If he liked semi-literary work, or wished the sort of mouthpiece Davies was for Ware, and Peters for Washington—reports appeared; otherwise the only possible reporting consisted in such notes as make up most of *(e.g.)* the New York *Johnson* before Kent took office. Paine was the son of the District Judge in Vermont, and a great admirer of Brockholst Livingston, and put out his first volume as a tribute to Livingston's

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never repaired, and the courts both state and federal were scattered and uncomfortable for some time The U. S. Court offices found an abode at College Place, corner of Murray Street, while court was held (with the Supreme and Marine, and later the Superior Court also) in a building indifferently called "The New Court House" and the "Fireproof building" then just completed at the southwest corner of Chambers and Centre Streets. But the Circuit and District minutes still speak of court as held at "The City Hall in the City of New York"; apparently any building within City Hall Park was thought entitled to that official designation. Perhaps it was thought to be compliance with the Act of 1825.

By this time the north side of Chambers Street adjacent the Park had long passed into private hands, and on part of the Workhouse grounds was erected 39-41 Chambers Street. In this building the United States rented space, ample for the demands of the time, and the minutes of November 23, 1858, contain the following: "The new United States Court Building in Chambers Street opposite the Park having been completed, the Court opens in its new room."

In this house both the Circuit and District Courts and all their adjuncts, remained until May, 1875, when they occupied their allotted portion of the 2nd, 3rd and 4th floors of the "U. S. Court and P. 0. Building" at the southern tip of City Hall Park. A letter from the Librarian of the Municipal Reference Library, giving further information about the location of the Court, is printed in the Appendix.

memory, and probably with some family feeling for the circuit hierarchy; but he never made any effort to go back of his own acquaintance with the court, and trusted too much to memory; thus he forgot all about Tallmadge, and records Van Ness as a District Judge in 1810—two years before he was appointed.

The fair measure of any court is to consider not only its literary law, but the kind and quantity of work done, and the repute of the men who did it among their neighbors. By that standard the judges before Betts are all (except Tallmadge) to be approved, and their courts created a prestige which measurably advanced the idea of nationality, but they undoubtedly contributed less to book law than any other judicial aggregation of the same numbers and opportunity and contemporaneous with them; they were more occupied with business and politics.

The politics is amusingly evidenced by the beginnings of rules of court. In the modern sense of practice regulations applicable to the bar there were none for many years. Until Tallmadge appeared the incumbents had been familiar in youth with the ways of the Vice- and State-Admiralty, and they went on by tradition.

But rules were from time to time entered in the minutes for the guidance of Clerk and Marshal. Thus in 1796 the Clerk was first ordered to put Registry funds in a bank, and The Bank of the United States was named; Tallmadge promptly changed both clerk and bank; a Clinton became the clerk, and the Manhattan Company the bank. Van Ness as promptly made one Rudd the clerk, and handed the money over to the City Bank—but when Rudd proved a defaulter he went back to the Bank of the United States.

In Judge Hobart's time legal notices were directed to be published in the *Daily Advertiser*, but his successor's first "rule" substituted that staunch Jeffersonian sheet, *The American Citizen.*

By 1812, however, the probability of prize causes in the near future, moved the court to appoint a committee of the bar to formulate rules. After only a few weeks of labor they produced

(Sept. 2, 1812) a set of rules in Prize and forms for standing interrogatories; nothing more.

The committee consisted of Nathan Sandford, Thomas A. Emmet and Charles Baldwin, to whom were later added William Slosson and John T. Irving. After their prize effort, they assuredly took their labors easily, for it was not until November 6, 1821, that any general rules for the instance or law sides of the court were promulgated. They are 56 in number and for the most part relate to administrative details—but most of them are in substance law today.

Livingston and Van Ness passed on too soon to reap any harvest of work from equity and patent suits. How modern is this litigation, which has at times almost swamped the courts of the District, is often forgotten. In 1811 Justice Livingston *(Livingston vs. Van Ingen,* I Pai. 45) held that no such jurisdiction existed; Congress did not supply the lack until 1819 (3 Stat., 481), and that the want supplied was not pressing is fully shown by the paucity of such litigation until Justice Nelson's time.[45]

Judge Van Ness was a worker, diligent in the day of small things; his death, however, was coincident with an era of greater opportunity, and in Samuel Rossiter Betts (appointed December 21, 1826) there appeared a man whose native force of character, acquired learning and extraordinary industry fully qualified him to reap the legal harvest produced by such a harbor as New York's, meeting the commerce of the new Erie Canal and the railways so soon to cover the land. The city population almost doubled in the decade between 1820 and 1830, and soon after Betts[46] took office the town of 30,000 souls of Duane's time contained 200,000.

"Robb's Patent Cases (Boston, 1854) purport to contain all Circuit and Supreme Court decisions in patent matters with some cases in state courts from 1789 to 1850. There are 124 of them. A larger number has recently been heard in a single year, in the Southern District.

" Judge Betts was born in Berkshire County, Mass., in 1787, graduated at Williams in 1806, saw some slight service in the War of 1812, was a Member of Congress in 1815 and after serving 41 years as District Judge retired in 1867. He died at New Haven, Conn., November 3, 1868.

While he was still a new Judge, sessions of the Circuit Court were required on the last Mondays of February and July, in addition to the original two terms a year; while the District Court, instead of holding the four sessions annually first provided for, was instructed (as at present) to hold a term on the first Tuesday of each month. By the same statute[47] the rise of New York is pecuniarily emphasized by raising the Judge's salary to $3,500 a year, while Pennsylvania and South Carolina, which thirty odd years before had been ranked as more fmancially important, were granted no more than $2,500.[48]

Judge Betts diligently sought to state and modernize admiralty practice, and his work promptly bore fruit on November 4, 1828, when he promulgated 180 rules and 30 standing interrogatories covering the whole ground of Prize and Instance, plus such few common law rules as seemed necessary for a court sitting in a state still pursuing common law practice with as great rigidity as any of the thirteen colonies.

After working ten years under these rules, Betts published the first work on American Admiralty Practice[49] worthy the name.

He evidently preferred reaching the professional public by a treatise rather than by reports. Grudgingly he did permit some selected judgments to be printed, but only years after the publication of his book. ° None of his manuscripts went on the files of the court, but remained in neat bundles in District Court Chambers until 1912, when they were delivered to some of his descendants.

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[47] Act of May 29, 1830, 4 Stat., 422.

"This habit of paying salaries roughly graded according to amount of business or supposed cost of living, lasted until Act of February 12, 1903, 32 Stat., Part I, page 825—when uniformity became the rule.

[49] A Summary of Practice in Instance, Revenue and Prize Causes in the Admiralty Courts of the United States for the Southern District of New York, and also on appeal to the Supreme Court, together with the Rules of the District Court. (New York, Halsted & Voorhies, 1838).

5° Blatchford & Howland (1855) contains cases between 1827-1837; Olcott (1857) covers 1843-47; and Abbott's Admiralty (1857) 1847-50. Blatchford's Prize Causes (New York, Baker, Voorhies & Co., 1866) was published without known permission from the Judges whose opinions are therein contained.

When the Judge retired in 1867, Daniel Lord moved an entry in the court minutes which in part states that:

> "Had all the decisions made by him been published when they were made it would now be seen that to him more than to any other Judge is due that constitutional administration of the admiralty law which now prevails undisputed throughout the nation and which when he came to this bench was almost everywhere debatable ground. And it is but just to him to say that the views of that law which he now holds, in common with all the great admiralty judges, were the convictions of his earliest judicial investigations in this court and have always been continuously held and administered by him."

If anything be needed (beyond reading his decisions) to prove the truth of this encomium, it will be found in the concluding sentence of the preface to Betts's Practice:

> "And when the celerity of the proceedings and efficiency of the remedies of maritime courts become generally known and appreciated in this country, it is believed their jurisdiction will no longer be restricted to the accident of flux and reflux of tides, but will also be extended to and embrace the commercial navigation of the United States over all their great inland waters."

This was written and published thirteen years before *The Genesee Chief* (12 How., 443).

Judge Betts gradually collected the first Admiralty Library in the United States[51]; and his book proves that he had studied the English and Continental authorities as well as the practice "made in New York" evidenced by the Vice Admiralty records and handed down by tradition. It is a tribute to his judgment and boldness that

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[51] The size and value of this library are much commented on in contemporary newspaper reports of the fire in the "New City Hall" in 1854. The books escaped injury other than that received by being thrown out of second story windows into snow.

study did not lead him to adopt any of the refinements of even the English civilians, and it is no small praise for him and for the practitioners of New York far back in the eighteenth century that Betts's Rules of 1838 (if arrest and imprisonment for debt be modernized) are substantially law today and would not have shocked the practicers (as the phrase then went) of 1750.

The substantial changes he deemed necessary were to hasten default by substituting one proclamation for three on different days, and facilitate filing libels and obtaining monition or citation without (in most cases) special allocatur. Taking testimony in open court was known in provincial times though rarely practiced, but District Court practice had always been that (in Judge Betts's language) "Oral testimony is taken on hearing in the same manner as trials at common law," except that where appeal was contemplated, and the party producing evidence stated that it would "not be in his power to produce the witnesses before the Circuit Court" their evidence was taken down in writing by the clerk for incorporation in the apostles pursuit to Sec. 30 of the Judiciary Act.

In 1838 there could be said to be a few lawyers in New York, and in New York alone who were primarily known as belonging to the Admiralty bar. Erastus C. Benedict, author of *Benedict on Admiralty, 1st* Ed., 1850, who in 1823 had been Judge Betts's pupil, devoted himself almost wholly to that branch of the profession; Francis B. Cutting had a more general practice, but these two gentlemen may be called the founders of the distinctively admiralty bar of the United States.

The District Court entered 424 final orders, in the year the Judge published his practice book, and in the five years between 1840-45 it attended to 1645 motions or cases, while the Circuit Court considered 676. Considering that this work was done by two men, one of whom owed his first duty to the Supreme Court in Washington, the Circuit and District were busy tribunals; they had arrived with the metropolitan business of New York.

As the years passed the work grew heavier in responsibility for the District Judge, for in 1844[52] the disgust of the Supreme Court with their "itinerary fatigues" obtained further result and Congress permitted the Justices to attend no more than one term of the Circuit Court per annum, which term the justice might designate, and at which such matters as he chose to hear should "have precedence in the arrangement of the business of the Court." It was still impossible to get assistance in the busier districts from Judges not so much engaged; the system now of long standing of making District Judges interchangeable within their circuits was not completed until 1852.[53] Until that date the courts in New York City were well served only because the men in office loved their work, and Justice Nelson to the end of his long life regarded the city as his home. His record on the state bench had made him well known to the bar, and while business flowed into the courts of which he was the local head, mainly because maritime, revenue and interstate business continually increased, the increase was in no small degree due to the liking widely felt for himself and his associates.

After 1852 Judges Ingerso11[54] of Connecticut and Prentiss[55] and Smalley[56] of Vermont became frequent visitors to the city; and there is a tradition at the Vermont bar that it was the hospitality of the last named gentleman which ultimately induced Congress to amend the Act of 1852 by limiting the daily judicial expense account to $10. It is related that he frequently entertained counsel at the Astor House, and charged the cost thereof to the Government, until passage of the limiting act of March 3, 1871, 16 Stat., 494.

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[52] Act of June 17, 1844, 5 Stat., 676.

[n] Act of July 29, 1850, 9 Stat., 442, enabled District Judges to go into other districts of the circuit in the case of sickness or other disability of any District Judge.

Act of April 2, 1852, 10 Stat., 5, made it possible for District Judges similarly to hold court when the "public interests required it from the accumulation or urgency of judicial business in any district." These two acts are probably the last instance of the use of the phrase "Circuit Judge," meaning thereby "Circuit Justice."

m District Judge, 1853-1860.

[55] District Judge, 1842-1857.

[56] District Judge, 1857-1877.

Justice Nelson had no objection to reporting, and in Samuel Blatchford found a reporter who distinctly advanced the reputation of the Circuit by judicious selection of cases and syllabi evidencing a legal breadth which he also proved at the bar and on the bench.

Judge Betts's conduct as to reporting, so detrimental to his fame, can be partly explained by the District Court scrap books, still extant; beginning in 1839 and extending beyond Betts's time. These volumes show that especially before and during the Civil War the daily newspapers printed opinions and court transactions with fullness and in a lawyer-like manner now unknown. In these scrap books will be found in print taken from newspapers not only hundreds of Betts's opinions, but similarly printed judicial decisions from all over the country as well as accounts of *causes celebres,* especially relating to extradition, piracy and slavery now utterly forgotten.[57]

In Judge Blatchford a successor to Judge Betts was found who, if not the latter's equal in natural ability and urbanity of manner, had largely spent his life in the national courts and was possessed of an energy and industry beyond praise.[58] Under him and the Circuit Judges appointed when the Justices of the Supreme Court

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[57] The oldest scrap book is mentioned as one of the source books of the Federal Cases in the Preface to that work. Blatchford's Circuit Court Reports began in 1850; Benedict's District Court Reports in 1865, by which time Judge Betts's health was so infirm that he had ceased to exert influence. The business of the Southern District between 1865 and 1867 was for the most part transacted by other District Judges in the circuit, especially Judge Benedict of Brooklyn. The issuance of the Federal Reporter in 1880 marks the end of Benedict's Reports, the editors of which immediately became the local representatives of the new publication. The Blatchfords endeavored to continue their series in rivalry with Fed. Rep. The effort failed, and the feeling thereby engendered between the Benedicts and Blatchfords served to amuse the junior bar of the time. Justice Blatchford and his son regarded Fed. Rep. as undignified, and the Benedicts as recreant to the cause of dignity.

[55] For Blatchford's life see 150 U. S., 707. He was the first, and as yet the only man, to pass through all the grades of the federal judiciary. His portrait by Huntington, now in the District Court Motion Room, was given by the bar on his appointment to the Supreme Court in 1882.

practically retired from circuit work in 1869,[59] the business of the Court increased both in quantity and in importance, especially on the Equity side. The necessity of appointing additional Judges was, however, avoided for more than a generation by the device of splitting from the Southern, the Eastern District of New York.[60] This new Court was in several ways a relief valve for the older district. Not only was local business, then very small, cared for, but admiralty jurisdiction was almost concurrent, and the Judge of the Eastern District was[61] shortly afterward by statute authorized to hold terms for the trial of Criminal causes in the Southern District and to receive additional pay for so doing. The result of this statute was to make Judge Benedict for nearly thirty years almost the only Criminal trial Judge in the Federal Courts of both Districts.

For more than 25 years after the first Circuit Judge was appointed under the Act of 1869, the two Courts of the District remained, if not fully manned, not absurdly undermanned. The resident District Judge was in the main left to transact the admiralty and bankruptcy business of his own court, while the circuit work was largely done by the Judges from Northern New York, Vermont and Connecticut, and Judge Benedict tried practically all the criminal causes. The Circuit Judge could within limits select his own work, and when Judge Blatchford went to the Circuit he made more sure the foundations of the reputation which finally brought him to the Supreme Court, by confining his work to admiralty appeals and equity, with special reference to patents.

In Judge Choate,[62] who succeeded Blatchford as District Judge, a man appeared who, like his classmate and successor

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" Act April 10, 1869, 16 Stat., 44, creating Circuit Judges. Under that statute Lewis B. Woodruff (1869-1875) and Alexander S. Johnson (1875-1878) served before Blatchford was himself appointed C. J. March 4, 1878.

" Act Feb. 25, 1865, 13 Stat., 438.

[61] Act of Feb. 7, 1873, 17 Stat., 422; R.S. 613; repealed by Act March 2, 1909, 35 Stat., 685, on the granting of a fourth Judge to the Southern District.

[62] William Gardner Choate, b. Aug. 30, 1830, A.B. Harvard 1852, was appointed District Judge, March 25, 1878, and resigned in June, 1881, on the qualification of his successor. He died November 14, 1920. A full statement of his life and services prepared by Hon. Harrington Putnam is in the Memorial Book of the Association of the Bar of the City of New York.

Brown, was peculiarly qualified by native habit of mind, to apply to the admiralty the principles of equity. The satisfaction of the bar and the public with his grasp not only of law but facts is markedly shown by the few appeals taken from Choate to Blatchford in the admiralty between 1878 and 1881.

On Judge Choate's resignation Judge Brown[63] took up his work in the same spirit and with equal if not greater grasp of the law, although Choate's inferior as a judge of facts.

Under the system of court administration then prevailing, Judge Brown was relieved by the repeal of the Bankruptcy Act of 1867 from most judicial duties other than the pursuit of admiralty. It is not too much to say that the growth of the American admiralty during the next twenty years was more largely due to Judge Addison Brown than to any other one man or one court, not excluding the Supreme Court itself. On his retirement he prepared and presented to the then members of the bar a Digest of his labors as represented by something over two thousand written opinions filed by him; a little book carefully treasured by those who received it. Had Judge Betts prepared a similar volume, each book in its own generation might have been called a "Digest of the Achievements of American Admiralty."[64]

Although over seventy years of age, Judge Brown in 1901 was in vigorous health, but he saw that the Bankruptcy Act of 1898

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[63] Addison Brown, b. Feb. 21, 1830, A.B., Harvard, 1852, District Judge, June 2, 1881, retired on the appointment of his successor, Aug., 1901, died April 9, 1913. A memorial written by Judge Choate was presented to a meeting of the Bar in memory of Judge Brown and is now on the files of the Court.

[64] The "Indexed Digest of Decisions of Hon. Addison Brown, LL.D., U.S.D.J. for the S.D. of N. Y., 1881-1901; reported mostly in the *Federal Reporter,* Vols. 8-114," was printed by The New Era Printing Co. of Lancaster, Pa., and is now out of print. Judge Brown states in his preface that he had not indexed about one-quarter of his opinions as they were "mostly of minor importance." He concludes his preface by saying, "Nor can I fail to acknowledge my very deep appreciation of the unfailing courtesy, kindness and consideration that from the moment of my entrance into office on June 18, 1881, have made our intercourse *(i.e.,* that between bench and bar) one of unbroken harmony, cordiality and pleasure."

had produced an apparently permanent volume of business that no one man can could carry in addition to the previous labors imposed on the District Judge.[65]

He therefore advised the admiralty bar early in the summer of 1901 of his intention to retire. His successor, Judge Adams,[66] was chosen by that bar, but no effort was made to obtain an additional resident Judge to share or assume the burdens of bankruptcy. This was unfortunate both for the business of the Court and the happiness of the new Judge. A most conscientious man, thoroughly acquainted with admiralty, but of small experience in other branches of the law, he became ill from overwork in less than a year and a half, and never fully recovered from that illness.

Relief finally came to the Court by the appointment of Judge Holt, and thereafter Judge Adams confined himself wholly to the Admiralty.[67]

It seems never possible to obtain anticipatory relief from Congress in respect of accumulated work; and while the ordinary business of the Circuit Court appeared to be sufficiently cared for

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[65] See the tabular statement (p. 34) of the difference between the business generated after three years of the Bankruptcy Act of 1867 and that produced after two years of the statute of 1898.

[66] George Bethune Adams, b. April 3, 1845, appointed Aug. 30, 1901, died in office Oct. 9, 1911, after an illness extending over more than a year, which wholly disabled him from discharging his judicial duties. A memorial is printed in the Bar Association Report for 1912, at page 205.

[67] *District judges since Judge Brown's retirement:*

George B. Adams, August 30, 1901.
George C. Holt, March 3, 1903, Act, February 9, '03, 32 Stat., 805.
Chas. M. Hough, June 27, 1906, Act, May 26, '06, 34 Stat., 202.
Learned Hand, April 26, 1909, Act, March 2, '09, 35 Stat., 685.
Julius M. Mayer, February 26, 1912 *(vice* Adams, deceased).
Augustus N. Hand, September 30, 1914 *(vice* Holt, retired). Martin T. Manton, August 23, 1916 *(vice* Hough made Cir. Judge). John C. Knox, April 12, 1918 *(vice* Manton made Cir. Judge). Francis A. Winslow, Henry W. Goddard, January 4, '23, Act, Sept. 14, '22, 42 Stat., 837.
William Bondy, 1923.
A complete list will be found in the Appendix.

by a resident Circuit Judge with the aid of District Judges from other parts of the Circuit, there accumulated during the '70s and early '80s of the nineteenth century a "Customs Calendar" made up of actions at law to recover from the Collector of Customs illegally exacted import duties. Comparatively few of these cases were actually tried because separate suits had to be brought by each importer and usually for each importation; yet the decision of one test case might dispose of hundreds if not thousands of litigations scattered over the entire country. Yet they had to be cared for somehow, and by about 1885 there had accumulated about 20,000 such cases pending in the Southern District alone. Even if only test cases were tried, it was a serious matter to dispose of them, and it was finally admitted that Judge Wallace, who succeeded Judge Blatchford in 1882, was unable to do the work in addition to his other duties. This resulted in 1887 in the appointment of a second Circuit Judge, and it was understood at the time that Judge E. Henry Lacombe filled an office primarily created to demolish the "Customs Calendar."

For four years he continued this labor until the system of seeking recovery of Customs duties was changed by the "Customs Administrative Act of 1891." The Circuit Court of Appeals Act of the same year (contemporaneously known as the Evarts Bill, because it was fathered by Senator Evarts of New York) introduced a radical change in the construction of the national courts and produced results not foreseen when it became law—for it ultimately produced the death of the Circuit Court by a process of absorption into the District Court.

The new intermediate appellate Court opened its sessions on October 27, 1891, and the last appearance of Justice Blatchford in the Courts where he had spent so much of his life was to attend, in August of that year, and enter formal decrees of affirmance of pending appeals in the Circuit Court, in order that Wallace and Lacombe, J.J., might hear those appeals in the newly created court without disqualification. Thus in an ante-room of the Court and Post Office Building passed away an appellate jurisdiction in the circuit which had lasted without interruption or diminution for a hundred and one years.

The early years of the Circuit Court of Appeals made small difference with circuit work. Appellate cases were no more numerous than they had been until the bar at large found out by practical experience how much easier it was to take appeals other than in Admiralty, to another story in the same Court House instead of to Washington.

But as the years passed, more and more the Circuit Judges retired from first instance work, until with the close of the century it was, except for the continued and intensive industry of Judge Lacombe, almost entirely true that the Circuit Court was an organization whose work was wholly done by District Judges, while the management of the Clerk's Office and arrangement of labor were in the hands of the Circuit Judges, who did none of the work in which they had largely lost interest.

The most obvious way of meeting an advancing tide of litigation was to multiply District Judges, but the inconvenience and inherent error of a system of control in the hands of one set of men and entrusting the work to entirely different men grew with the years. Result was Sec. 289 of the Judicial Code, taking effect January 1, 1912, which abolished the Circuit Courts and transferred their records, jurisdiction, and indeed their whole history, to the Districts.

Shortly thereafter came the Act of October 22, 1913 (38 Stat., 219) abolishing the short-lived Commerce Court and transferring all its jurisdiction to the Districts. Thus was substantially completed for a term of years at all events a continual accretion of jurisdiction in the District Courts from which the political history of the country shows no considerable subtraction except that caused by the creation in 1910 of the Court of Customs Appeals, which took away from both the District and the Circuit Courts of Appeal the duty of examining in any form claims of importers for rebates of Customs duties.

The personnel of the District Court has during the last decade been at times greatly affected by the Act of October 3, 1913 (38 Stat., 203), which authorized the Second Circuit alone and

practically the City of New York alone to draw upon all the rest of the country for specially designated District Judges.

This Act at the time of its passage was often called the Lacombe Bill, because the substance of it had been advocated for many years by that Judge. The system was tentative, but has been enlarged to the whole country by the Act of September 14, 1922 (42 Stat., 837), which seeks measurably to use the United States Judges not only in the regions for which they are appointed, but wherever men are wanted to overcome arrears of work.

The experience of the Southern District with trial Judges reared under very different local conditions is instructive and not altogether happy. It is instructive because it teaches the observer how singularly varied are the habits of bench and bar in the different states and how local customs affect the practical management of cases even in the national courts. These varying habits disconcert the bar and retard the trial of causes, at least until the visiting Judge has (and the process takes no short time) become accustomed to the habits of the bar he must necessarily encounter.

Our local experience has been somewhat unhappy also because experience has shown that it is almost impossible to bring men from a distance for a month or at most two and then invite them to attempt the trial of causes such as Equity or Admiralty which are very likely to produce voluminous records requiring careful perusal after argument concluded. The effect of this has been to throw the jury work unduly on the visiting Judges, and oftentimes to increase the labor of the residents because the Equity and Admiralty side of the Court was then left to be taken care of wholly by them.

The effect of the social and commercial upheaval caused by the World War even upon the work of a single court is best shown by the table which appears as an appendix at page 34.

The manuscript ends with these quotations:

Sine summa justitia, rem publicam geri non potest.

(Cicero De Repub.)

. . . The plough, the axe, the mill
All kin's o' labor, an' all kin's o' skill
Would be a rabbit in a wild cat's claw
Ef `twamt fer thet slow critter—'stablished Law.

(Biglow Papers, Ser. II, Letter 2.)

And the men did the work faithfully.

(II Chron. XXXIV, 12.)

Their works do follow them.

(Rev. XIV, 14.)

APPENDIX

CAUSES BEGUN IN DISTRICT AND CIRCUIT COURTS, SOUTHERN DISTRICT OF NEW YORK, IN THE YEARS GIVEN:

	1860	*1870*	*1880*	*1890*	*1900*	*1910*
Admiralty	245	255	525	408	423	384
Law	120	151	185	162	405	346
Equity	93	369	509	196	319	607
Criminal	75	153	95	82	92	405
Appeals and Miscellaneous Matters	10	126	61	70	8	38
	543	1,054	1,375	918	1,247	1,780
Bankruptcy		292	...	...	1,378	1,346

In 1920, new causes in District Court:

Admiralty	1,904
Law	1,215
Equity	1,405
Criminal	2,740
Miscellaneous	346
Total	7,620
Bankruptcy	1,503

Appendix

UNITED STATES JUDGES

DISTRICT OF NEW YORK

District Judges		
James Duane	1789-1794	Resigned
John Lawrence	1794-1796	Elected U. S. Senator
Robert Troup	1796-1798	Resigned and resumed practice
John Sloss Hobart	1798-1805	Died in office
Mathias Burnet Tallmadge	1805-1814	Continued as Judge for the newly-formed Northern District until 1819

SOUTHERN DISTRICT OF NEW YORK

District Judges		
William Peter Van Ness	1812-1826	Died in office
Samuel Rossiter Betts	1826-1867	Died in office
Samuel Blatchford	1867-1878	Became Circuit Justice
William Gardner Choate	1878-1881	Resigned
Addison Brown	1881-1901	Retired
George Bethune Adams	1901-1912	Died in office
George C. Holt	1903-1914	Retired
Charles M. Hough	1906-1916	Made Circuit Judge
Learned Hand	1909-1924	Made Circuit Judge
Julius M. Mayer	1912-1921	Made Circuit Judge
Augustus N. Hand	1914-1927	Made Circuit Judge
Martin T. Manton	1916-1918	Made Circuit Judge
John Clark Knox	1918	
Francis A. Winslow	1923-1929	Resigned

Henry W. Goddard	1923	
William Bondy	1923	
Thomas D. Thacher	1925-1930	Appointed Solicitor-General
Frank J. Coleman	1927-1934	Died in office
John M. Woolsey	1929	
Robert P. Patterson	1930	
Alfred C. Coxe, Jr.	1929	
Francis G. Caffey	1929	

Circuit Court

Circuit Judges

Egbert Benson, of New York	1801-1802
Oliver Wolcott, of Connecticut	1801-1802
Samuel Hitchcock, of Vermont	1801-1802

(known as the "Midnight Judges")

Circuit Justices

Brockholst Livingston	1806-1823	
Smith Thompson	1823-1843	
Samuel Nelson	1843-1872	
Lewis B. Woodruff	1869-1875	
Alexander S. Johnson	1875-1878	
Samuel Blatchford	1878-1882	Became Supreme Court Justice
William J. Wallace	1882-1891	Became Circuit Judge
E. Henry Lacombe	1887-1891	Became Circuit Judge

Circuit Court of Appeals

Circuit Judges

William J. Wallace	1891-1907	Resigned
E. Henry Lacombe	1891-1916	Resigned
Nathaniel Shipman	1892-1902	Resigned
William K. Townsend	1903-1907	Died in office

Alfred C. Coxe	1902-1917	Resigned
Henry G. Ward	1907-1921	Retired*
Walter C. Noyes	1907-1913	Resigned
Martin A. Knapp (assigned to Commerce Court)	1910-1913	Court was abolished
Henry Wade Rogers	1913-1926	Died in office
Charles Merrill Hough	1916-1927	Died in office
Martin T. Manton	1918	
Julius M. Mayer	1921-1924	Resigned
Learned Hand	1924	
Thomas W. Swan	1926	
Augustus Noble Hand	1927	
Harrie Brigham Chase	1929	
Julian W. Mack	1914	(Seventh Circuit)
	1929	(Second Circuit)

* Judge Ward sat in many District Court Admiralty trials in 1922 and 1923.

Appendix

CLERKS OF THE SOUTHERN DISTRICT COURT

Robert Troup	1789-1796
Edward Dunscombe	1796-1808
Charles Clinton	1809-1814
Theron Rudd	1814-1817
James Dill	1817-May 19, 1819
Gilbert Livingston Thompson	1819-Aug. 17, 1821
James Dill	Aug. 17, 1821-1827
Frederick I. Betts	Feb. 10, 1827-Mar. 10, 1841
Charles D. Betts	Mar. 10, 1841-Jan. 1845
James W. Metcalf	Jan. 10, 1845-Jan. 8, 1851
Geo. W. Morton	Jan. 8, 1851-Mar. 26, 1855
Geo. F. Betts	Mar. 26, 1855-Sep. 17, 1878
Samuel H. Lyman	Sept. 18, 1878-July 1, 1901
Thomas Alexander	July 20, 1901-July , 1912
Alex. Gilchrist, Jr.	Oct. 14, 1912-July 31, 1930
Charles Weiser	Aug. 1, 1930-

CLERKS OF THE CIRCUIT COURT OF APPEALS

John A. Shields	1891-1894
James C. Reid	1894-1897
William Parkin	1897

Appendix

UNITED STATES ATTORNEYS

Southern District of New York

	Appointed
Richard Hanson	1789
Robert Tellotson	1819
John Duer	1828
James A. Hamilton	1829
William M. Price	1834
Jonathan Prescott Hall	1849
Charles O'Conor	1853
John McKeon	1854
Theodore Sedgwick	1858
James I. Roosevelt	1860
E. Delafield Smith	1861
Daniel S. Dickinson	1866
Samuel G. Courtney	1866
Edwards Pierrepont	1869
Noah Davis	1870
George Bliss	1872
Stewart L. Woodford	1877
Elihu Root	1883
Stephen A. Walker	1886
* Edward Mitchell	1890
* Henry C. Platt	1893
Wallace Macfarlane	1894
Henry L. Burnett	1898
Henry L. Stimson	1906
Henry A. Wise	1909
H. Snowden Marshall	1913
Francis G. Caffey	1917
William Hayward	1921
Emory R. Buckner	1925
Charles H. Tuttle	1930
Robert Manley (Acting)	1930

George Z. Medalie	1931
Thomas E. Dewey	1933
Martin Conboy	1933

* Temporary.

Appendix

LOCATIONS OF THE SOUTHERN DISTRICT COURT

In the records of the Clerk of the Southern District there is found the following answer, dated August 21, 1912, to a questionnaire of the Attorney General:

> "From 1859 to 1875 inclusive, the Courts, Marshal's and Clerk's offices, etc., were located in Burton's Theatre, a building on Chambers Street, near Broadway, opposite City Hall Park, and which had been leased for the use of the Government through the efforts of Mr. Justice Nelson, associate justice of the Supreme Court, assigned to the Second Circuit."

According to the researches of Rebecca B. Rankin, Librarian, of the Municipal Reference Library, the location of the U. S. District Court in the years 1838-1875 was at the following addresses:

1838-1853—New City Hall, East wing
1854-1858—New Court House, first floor
1859-1869-39 Chambers Street
1870- —49 Chambers Street
1872- —41 Chambers Street

Appendix

THE EASTERN DISTRICT OF NEW YORK

The District Court and Circuit Court were organized in the County Courthouse in Brooklyn, March 22, 1865.

District Judges

Charles L. Benedict	Commission dated March 9, 1865, sworn in March 20, 1865, by Hon. Samuel R. Betts, United States District Judge, Southern District of New York Resigned in 1897
Asa W. Tenney	Sworn July 20, 1897 Died December 20, 1897
Edward B. Thomas	Sworn February 21, 1898, by Hon. Addison Brown, United States District Judge, Southern District of New York Resigned December 31, 1906
Thomas Ives Chatfield	Sworn January 15, 1907, by Judge Thomas Died December 24, 1922
VanVechten Veeder	Sworn February 16, 1911, by Judge Chatfield Resigned December 31, 1917
Edwin Louis Garvin	Sworn April 2, 1918, by Judge Chatfield Resigned October 31, 1925

Marcus B. Campbell	Sworn January 8, 1923, by Judge Garvin
Robert A. Inch	Sworn June 4, 1923, by Judge Garvin
Grover M. Moscowitz	Sworn December 26, 1925, by Judge Campbell
Clarence G. Galston	Sworn May 4, 1929, by Judge Campbell
Mortimer W. Byers	Sworn December 2, 1929, by Judge Campbell

TABLE OF CASES