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LIMITATION OF LIABILITY IN ADMIRALTY: AN ANACHRONISM FROM THE DAYS OF PRIVILEGE

I

SCOPE AND DIRECTION

Admiralty lawyers are currently expressing grave concern over some "extraordinary" cases recently decided in the federal courts. Among these, *Murray v. New York Central R.R.*¹ is probably having the greatest impact. Therein it was held that maintenance and cure "is sufficiently contractual to put it in the contract category and thus place it outside the compass of limitation."² In view of the prior personal contract history,³ this ruling is a radical change — one more indicative of legislative fiat than judicial decree. Other judges, instead of dismissing or sidestepping the holding as the act of an over-zealous advocate of limitation abolition, have affirmed the holding⁴ and now threaten to spread it into other circuits.⁵ The effect of such action would result in a devastating escalation of recoverable damages following a collision or accident, sometimes doubling the shipowner's total liability.

The *Murray* case, the recent trend of judicial decisions, and the comments expressed therein are indicative of the fact that the courts are completely dissatisfied with the limitation feature of admiralty law. The courts' present attitude is one of growing impatience with the legislature's failure to overrule the Limitations Act of 1854, especially in its application to personal injuries.⁶ The inability of a passenger or seaman adequately to protect himself against a collision and the subsequent

1. 171 F. Supp. 80 (S.D.N.Y. 1959), *aff'd*, 287 F.2d 152 (2d Cir. 1961).

2. *Murray v. New York Central R.R.*, 171 F. Supp. 80, 83 (S.D.N.Y. 1959).

3. 3 BENEDECT, ADMIRALTY 371 (6th ed. 1940); GILMORE & BLACK, *THE LAW OF ADMIRALTY* 706 (1957); Castles, *The Personal Contract Doctrine: An Anomaly in American Maritime Law*, 62 *YALE L.J.* 1031 (1953).

4. 287 F.2d 152 (2d Cir. 1961).

5. Subsequent to the preparation of this comment, the threat became a reality. The District Court of Delaware has gone beyond *Murray* and declared that maintenance and cure does not even come within the ambit of the Limitation of Liability Act.

Needless to say, the duty [maintenance and cure] is a unique one and quite different from the duty to make reparation for personal injuries. Congress cannot be presumed to have created the possibility that this duty can be wiped out. If maintenance and cure is subject to limitation, a seaman's protection under the ancient right might be seriously diminished in some circumstances. Therefore, despite the broad language of the Limitation of Liability Statute, 46 U.S.C. § 183, I hold upon principle, that such liability is not one which is extinguished by the granting of a petition to limit liability. . . . This was also the result reached by Judge Murphy in *Murray v. New York Central R.R. Co.*, a decision squarely on point which, in the absence of authority to the contrary, I shall follow. *Petition of Oscar Tiedemann & Co.*, 236 F. Supp. 895, 912 (D. Del. 1964).

6. In re United States Dredging Corp., 264 F.2d 339, 341 (2d Cir. 1959), the court stated:

However, it is at least doubtful whether the motives that originally lay behind the limitation are not now obsolete; and certainly we should now have no warrant for extending its scope, when the liability is for personal injury arising from the shipowner's fault.

possibility of limitation of his recoverable damages has impressed the courts as patently unjust. A large cargo owner can protect himself through insurance and pass the premium cost along to the consumer. Ship-owners can likewise insure and limit. However, the seaman or passenger must content himself with his proportionate share of the limitation fund though it may not ever approximate his injuries. The judiciary has demonstrated its unwillingness to continue this injustice and the present bent of the courts to judicially engraft severe limitations on the application of the Act may make Congressional repeal of the act unnecessary.

History indicates that the same economic policy which gave rise to the privity doctrine in the products liability area⁷ also gave birth to the Limitations Act. Also, the same paternal desire to protect the previously unprotected individual, which assailed and overcame the doctrine of privity, now threatens to undermine the Limitations Act. Both doctrines were born during the infancy of the Industrial Revolution of a desire to shield the small manufacturer and shipowner. Their most extensive interpretations appeared at a time when mining, manufacturing, and shipping began to compete favorably with that of England, France and Germany; severe restrictions of each arose concurrently with the growth of the modern corporation, present insurance practices and the resulting socio-political changes.⁸ Perhaps it would be enlightening to compare them and speculate as to the future of the limitation doctrine now that privity has been dealt several resounding death blows.

II.

A CENTURY OF PRODUCTS LIABILITY: FROM NO LIABILITY TO STRICT LIABILITY

A defectively drafted declaration, with its main reliance on breach of a special contract, led to Lord Abinger's famous dicta in *Winterbottom v. Wright*⁹ that no recovery in tort could be had unless privity of contract existed.¹⁰

7. For a survey of the Products liability area, see generally: FRUMER & FRIEDMAN, *PRODUCTS LIABILITY* (1964); Freezer, *Manufacturer's Liability for Injuries Caused by His Products: Defective Automobiles*, 37 MICH. L. REV. 1 (1938); Jaeger, *Privity of Warranty: Has the Tocsin Sounded?*, 1 DUQUESNE L. REV. 1 (1963); James, *Products Liability*, 34 TEX. L. REV. 192 (1955); Jeanblanc, *Manufacturer's Liability to Persons Other Than Their Immediate Vendees*, 24 VA. L. REV. 134 (1937); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

8. Historical matter taken from BRUCE, *THE SHAPING OF THE MODERN WORLD* 699 (1958) and *Annot.*, 164 A.L.R. 569, 584 (1946).

9. 10 M. & W. 109, 152 Eng. Rep. 402 [Ex. 1841].

10. *Id.* at 114 "[I]f the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue."

The 1841 dicta of *Winterbottom* crossed the ocean to become the basis of the 19th century general American rule¹¹ that contractors, manufacturers, or vendors were not liable to third parties for negligence in the construction, manufacture, or sale of their articles. ". . . [A] wise and conservative public policy has impressed the courts with the view that there must be a fixed and definite limitation to the liability of manufacturers and vendors for negligence. . . ."¹² Exceptions were condoned only in certain invitee situations¹³ or if inherently dangerous instrumentalities were involved.¹⁴

As the 20th century dawned, the courts began to view the status of manufacturing in a new light. The sheltered babe had grown into a monopolistic giant and the courts attempted to aid the abused consumers by expanding the definition of inherently dangerous instrumentalities. The explosion of a carbonic acid gas cylinder in 1907¹⁵ fell within the inherently dangerous label, and later the explosion of a coffee urn cast liability upon its manufacturer.¹⁶ Finally, Justice Cardozo, in 1916, came forth with his monumental decision¹⁷ announcing the "modern rule" that inherently dangerous articles need not be limited to poisons, explosives, and the like:

If the nature of the thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. . . . If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of the thing of danger is under a duty to make it carefully. . . . Precedents drawn from the days of travel by stagecoach do not fit the conditions of travel today.¹⁸

The last thirty years have witnessed the birth of social legislation in America, the phenomenal rise of insurance to become an integral part of doing business and the complete maturation of marketing

11. *National Savings Bank v. Ward*, 100 U.S. 195, 204 (1879); *Bragdon v. Perkins — Campbell Co.*, 87 Fed. 109 (3d Cir. 1898); *Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. 400, 406 (7th Cir. 1894).

12. *Huset v. J. I. Case Threshing Mach. Co.*, 120 Fed. 865, 867 (8th Cir. 1903).

13. *Roddy v. Missouri Pac. Ry. Co.*, 104 Mo. 234, 15 S.W. 1112 (1891); *Coughtry v. Globe Woolen Co.*, 56 N.Y. 124 (1874); *Bright v. Barnett & Record Co.*, 60 N.W. 418, 420 (Wis. 1894).

14. The first items to be classified as dangerous instrumentalities were: poisonous drugs, *Thomas v. Winchester*, 6 N.Y. 397 (1852); tainted food and drink, *Bishop v. Weber*, 139 Mass. 411, 1 N.E. 154 (1885); guns and other explosives, *Landridge v. Levy*, 2 M. & W. 519 (1887) and *Wellington v. Oil Co.*, 194 Mass. 64, 67 (1907). "Health is too dear, and life too sweet, and consequences too great, to admit of either carelessness or mistake in manufacture or fraud in inducing the sale of the same." *Hruska v. Parke, Davis & Co.*, 6 F.2d 536, 538 (8th Cir. 1925). However, lamps which exploded, [*Longmeid v. Holliday*, 6 Exch. 761 (1852)], or cylinders of lubricating oil which burst into flame, [*Standard Oil Co. v. Murray*, 119 Fed. 572 (7th Cir. 1902)], were not included since they were *not* considered *inherently* dangerous.

15. *Keep v. Nat'l Tube Co.*, 154 Fed. 121 (3d Cir. 1907).

16. *Statler v. George A. Ray Mfg. Co.*, 195 N.Y. 478, 88 N.E. 1063 (1909).

17. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

18. *Id.* at 389, 111 N.E. at 1053.

analysis, adhesion contracts, and nationwide advertising. With the growth of social consciousness and insurance protection, dismissals for lack of privity decreased rapidly. Necessary component automobile parts such as defective wheels,¹⁹ brakes,²⁰ steering²¹ and other equipment,²² both electrical and mechanical, that could quickly maim if defective easily came within the *MacPherson* rule. However, seemingly innocuous items, including truck door handles,²³ ordinary beds,²⁴ lounge chairs,²⁵ mattresses,²⁶ and refrigerators,²⁷ at first rejected according to the *MacPherson* test, eventually came before other courts who refused to follow precedent.²⁸ Finally, most commentators and courts came to realize that the exceptions had engulfed the general rule.

In other words, under the modern law, where the manufacturer is held not liable for negligence, he is excused from liability on doctrines of the law of torts; lack of foreseeability, want of actual negligence, or the fact that the injury was not proximately caused by his conduct, is the true basis of nonliability. The manufacturer is not excused under the modern law merely because there happened to be a lack of any privity of contract between him and the injured person; such an artificial and anachronistic basis for relief from tort liability can no longer, in the final analysis, be asserted.²⁹

The necessity of privity, even in warranty actions, received its ultimate death blow from the *Henningsen* case.³⁰ The New Jersey Supreme Court held that in this age of nationwide advertising and universal form contracts privity must be abolished. Since the real contract is between manufacturer and consumer, requiring circuitous litigation is unfair to courts and plaintiffs alike. Thus, privity is considered dead by most writers, and if courts ever impose strict liability upon manufacturers in all situations, products liability will be a matter of historical interest only.

19. *Supra* note 17.

20. *Quackenbush v. Ford Motor Co.*, 167 App. Div. 433, 153 N.Y. Supp. 131 (1915).

21. *Goullon v. Ford Motor Co.*, 44 F.2d 310 (6th Cir. 1930).

22. *Stevens v. Allis-Chalmers Mfg. Co.*, 151 Kan. 638, 100 P.2d 723 (1940); *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950); *Yaun v. Allis-Chalmers Mfg. Co.*, 253 Wis. 558, 34 N.W.2d 853 (1948).

23. *Cohen v. Brockway Motor Truck Corp.*, 240 App. Div. 18, 268 N.Y. Supp. 545 (1934).

24. *Isbell v. Biederman Furniture Co.*, 115 S.W.2d 46 (Mo. App. 1938); *Field v. Empire Case Goods Co.*, 179 App. Div. 253, 166 N.Y. Supp. 509 (1917).

25. *Liedeker v. Sears Roebuck & Co.*, 249 App. Div. 835, 292 N.Y. Supp. 541, *aff'd* 274 N.Y. 631, 10 N.E.2d 586 (1937).

26. *Jaroniec v. C. O. Hasselbarth, Inc.*, 223 App. Div. 182, 228 N.Y. Supp. 302 (1928).

27. *Tayer v. York Ice Mach. Corp.*, 119 S.W.2d 240 (Mo. App. 1937).

28. *Miles v. Chrysler Corp.*, 238 Ala. 359, 191 So. 245 (1939) (door handle); *Maecherlein v. Sealy Mattress Co.*, 145 Cal. App. 2d 275, 302 P.2d 331 (1956) (mattress); *Phillips v. Ogle Alum Furniture*, 106 Cal. App. 2d 650, 235 P.2d 857 (1951) (kitchen chair); *Beadles v. Servel, Inc.*, 344 Ill. App. 133, 100 N.E.2d 405 (1951).

29. *Annot.*, 164 A.L.R. 569, 592 (1946).

30. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

III.

LIMITATION — A HALF CENTURY OF GROWTH; A QUARTER CENTURY OF FLUCTUATION; A QUARTER CENTURY OF DECLINE

While the privity principle espoused by *Winterbottom v. Wright*³¹ was crossing the ocean to the American shore, and the first great American merchant marine was on the rise, Congress, with very little debate, passed the Limitation of Liability Act of 1851.³² Its express purpose was to bring the domestic law into harmony with that of England and thus encourage investment in the American shipping industry.³³ Typical statements made while the bill was under discussion include:

I desire to call the attention of the Senate to a single point — this bill is predicated on what is now the English law, and it is deemed advisable by the Committee on Commerce that the American marine should stand at home and abroad as well as the English marine.³⁴

Why not give to those who navigate the ocean as many inducements to do so as England has done.³⁵

The Act was aimed primarily at protecting the property of the large cargo shippers and only incidentally at protecting passengers and seamen. However, in time, the latter claims began to approximate and, in some cases, even surpass the former. The Act (1) declared the general principle of limited liability, (2) mentioned specifically the method of surrender to the trustee, (3) referred vaguely to "appropriate proceedings" and (4) afforded relief to owners of all vessels except those used in rivers or inland navigation.³⁶ It was sufficiently broad to provide the courts with a basis for a half century of tremendous growth.

A. *A Half Century of Growth*

While *Winterbottom v. Wright*³⁷ was being cited in dismissing American product liability cases, another *Wright* decision, *Norwich Co. v. Wright*,³⁸ coincidentally happened to be the first limitation problem to reach the Supreme Court. That case involved a collision on Long

31. *Supra* note 9.

32. GILMORE & BLACK, *THE LAW OF ADMIRALTY* 664 (1957).

33. Castles, *The Personal Contract Doctrine: An Anomaly in American Maritime Law*, 62 *YALE L.J.* 1031 (1953).

34. Statement by Senator Hamlin, of Maine, Chairman of the Committee on Commerce of the Senate, January 25, 1851 23 *CONG. GLOBE* 331-32, 31st Cong., 2d Sess. (Jan. 25, 1851).

35. *Ibid.*

36. 3 *BENEDICT, ADMIRALTY* 337 (6th ed. 1940).

37. *Supra* note 9.

38. 80 U.S. 104 (1871).

Island Sound in which the owners of the non-negligent vessel invoked the Limitation Act and relief was summarily granted.

During this period, the courts, in light of the origin and purpose of the Act generally construed it liberally so as to favor the shipowner. Benedict states³⁹ that the judges, in their zealous opinions, emphasized the purposes of this legislation "to promote the building of ships, and to encourage persons engaged in the business of navigation"⁴⁰ to put "American shipping upon an equality with that of other maritime nations"⁴¹ and "to encourage investment by exempting the investor from loss in excess of the fund he is willing to risk in the enterprise."⁴² These same courts, however, before the century had come to a close, had made the American Limitation Act far more protective than its emulated English parent.

In 1872 the Supreme Court assigned exclusive jurisdiction to the Federal Admiralty courts in limitation actions,⁴³ thereby confining seamen and cargo owners to non-jury tribunals. Eight years later, in 1880, the Supreme Court held, in *The Benefactor*,⁴⁴ that a shipowner could postpone filing his petition for limitation until after the final judgment or decree had been taken against him or his ship.⁴⁵ The Court went on to say that perhaps limitation is never precluded "so long as any damage or loss remains unpaid."⁴⁶ Following such a line of analysis, one could project that not only were seamen and cargo-owners limited in their recovery, but they could possibly be forced to wait and bargain until laches set in or the shipowner filed his petition. Even if the shipowner filed immediately following the entry of judgment, he would still have retained full beneficial use of the money owed for the four or five year period of trial and appeal.

The following year saw *The Scotland*⁴⁷ finally settle the issue of interest determination in favor of the shipowner. Contrary to the supposedly imitated laws of England, (which determined the value of the vessel for limitation purposes as of the moment immediately preceding the collision) the American courts restricted liability to whatever value a ship might have at the termination of the voyage "after the effects of the collision were fully developed."⁴⁸ Under such analysis, a sunken ship might have a value of zero.

In *Place v. Norwich & New York Transp. Co.*,⁴⁹ decided in 1886, it was held that insurance was not "an interest in the vessel" and thus need not be turned over in the limitation action. It was likened to a personal

39. Benedict, *supra* note 36 at 334.

40. *Moore v. American Transp. Co.*, 65 U.S. 1, 39 (1860).

41. *The Main v. Williams*, 152 U.S. 122, 128 (1894).

42. *Flink v. Paladini*, 279 U.S. 59 (1929).

43. General Admiralty Rules Nos. 54, 55, 56 and 57 of May 6, 1872.

44. 103 U.S. 239 (1880).

45. *Id.* at 244.

46. *Id.* at 250.

47. 105 U.S. 24 (1881).

48. *The City of Norwich*, 118 U.S. 468, 490 (1885).

49. *Ibid.*

collateral contract — a guarantee against loss, but conferring no interest in property. When confronted with the hardship involved in the case, the shipowner being fully indemnified and those suffering loss due to his employees' fault obtaining nothing, the court remarked:

If the shipowner is indemnified against loss, it is because he has seen fit to provide himself with insurance. The parties suffering loss from the collision could, if they chose, protect themselves in the same way. . . . The truth is, that the whole question, after all, comes back to this: Whether a limited liability of shipowners is consonant to public policy or not. Congress has declared that it is, and they, and not we, are the judges of that question.⁵⁰

In so holding, the Court again went beyond the limitation law of England in an effort to protect the shipping interests. The Court did not seem to consider, however, that even though the cargo owner might be able to afford sufficient insurance to cover his loss, the injured seaman might not be in the same position.

Finally, Congress, in legislation of 1884 and 1886, rounded out the shipowner's protection by (1) extending the right to limit to "all claims" except seaman's wages and (2) abolishing the restrictions as to inland vessels.⁵¹ This was the heyday of the shipping industry. Every shipowner could now limit nearly all liability arising out of tort or contract. Sailing was to remain smooth for the next quarter of a century, but a distant change was in the wind.

B. *A Quarter Century of Fluctuation*

Exceptions oftentimes foreshadow the death of a judicial decision or legislative decree. As the public policy that motivated a particular act or decision changes, policy exceptions are inevitably made. At first these exceptions appear slight and barely noticeable, but eventually they snowball to such size and proportions as to completely engulf the general rule. This evolution is clearly evident in the development of the "inherently dangerous" exception. Exceptions to the Limitation Act followed a similar progression. In addition to the requirement of the absence of "privity or knowledge" incorporated in the Act, another exception commanded "that even though the loss is incurred without the shipowner's 'privity or knowledge,' limitation of liability will not be allowed if (1) the shipowner's liability is based on a contract and (2) that contract is *personal*."⁵² The Supreme Court, while expanding limitation into the non-maritime tort area in 1911,⁵³ indicated that it had already accepted and approved the existence of the contract exception.

Thus construed, the section [i.e. § 189] harmonizes with the policy of limiting the owner's risk to his interest in the ship in respect

50. *Id.* at 495.

51. *Supra* note 36 at 338.

52. CASTLES, *supra* note 33 at 1032.

53. *Richardson v. Harmon*, 222 U.S. 96 (1911).

of all claims arising out of the conduct of the master and crew, whether the liability be strictly maritime or from a tort non-maritime, but leaves him liable for his own fault, neglect, *and contracts*.⁵⁴ [Emphasis added.]

Though citing no specific cases, the Court apparently had in mind the several district and circuit court decisions⁵⁵ that held contracts for supplies and repairs in the home port to be "personal" and thus outside limitation. The courts enunciated the "making" criteria to determine what contracts should be considered "personal." If the contract had been executed by the owner personally, as distinguished from one imputed to him by law, it was deemed personal and thus not subject to limitation.

The present supply claims were furnished . . . upon the personal contract of the owners. The act of 1884 limiting the liability of the owners of a vessel on account of the same, does not, I think, restrict the liability of owners upon their own personal contracts, but only their liability 'on account of the vessel,' that is, the liability that is imposed on them by law in consequence of their ownership of the vessel, viz., for the contracts or acts of the ship, or her master, without the owner's express intervention.⁵⁶

Following the "personal contract" theory laid down in the original repair and supply cases, the Supreme Court, in 1918, had no difficulty including the charter party as a "personal contract."⁵⁷ The Court stated that "[t]he contract was between human beings and the petitioner by his own act knowingly made himself a party to an express undertaking for the seaworthiness of the ship."⁵⁸ Whether the owners best efforts were expended to make the vessel seaworthy was not considered a material question since the action was in warranty.

A year later, Judge Learned Hand, sitting on the New York District Court, attempted to restrict the growth of the "personal contract" exception.⁵⁹ He stated that the person making the contract was of little significance, but rather, one should look to the owner's relationship to the breach. If he were in privity or had warranted against the breach, then only should he be found liable. The Supreme Court, in 1932, likewise refused to expand the charter party decisions of 1918 and 1919. Taking the same "making" approach that had been promulgated in the initial supply and charter party holdings, the Court declared that bills of lading were not personal contracts⁶⁰ because not executed by the

54. *Id.* at 106.

55. *Great Lakes Towing Co. v. Mill Transp. Co.*, 155 Fed. 11 (6th Cir. 1907); *The Amos D. Carver*, 35 Fed. 665 (S.D.N.Y. 1888); *The Mary Morgan*, 28 Fed. 196 (E.D. Pa. 1886).

56. *The Amos D. Carver*, 35 Fed. 665, 669 (S.D.N.Y. 1888).

57. *Luckenbach v. W. J. McCahan Sugar Refining Co.*, 248 U.S. 139 (1918); *Pendleton v. Benner Line*, 246 U.S. 353 (1918).

58. *Pendleton*, *supra*, note 57.

59. *The Soerstad*, 257 Fed. 130 (S.D.N.Y. 1919).

60. *Earle & Stoddart, Inc. v. Ellerman's Wilson Line, Ltd.*, 287 U.S. 420 (1932).

shipowner or any of his officers or managers. Rather, they are given by agents of various railroads or other steamship companies and thus should be regarded as merely "ship's documents."⁶¹ This decision was certainly in line with previous personal contract history. The "making" rule was not satisfied for the reasons stated above, and the "breach" rule was not applicable because there was nothing resembling warranty. In fact, all the bills of lading contained an express disclaimer of liability. This universally utilized disclaimer was later adopted by the Carriage of Goods by Sea Act of 1936.⁶² It seems that cargo owners could not arouse sufficient sympathy in the courts or the public to induce expansion of the personal contract exception. Perhaps this was because their position had so little appeal. They were universally covered by insurance; thus, litigation simply pitted one insurance company against another. In addition, they had expressly consented to the liability disclaimer present in every bill of lading.

C. The Quarter Century of Decline

The Roosevelt years, seated in the depths of depression, witnessed an abrupt change in the political climate. While Congress was passing social legislation and the National Labor Relations Act and the courts were expanding the "inherently dangerous" exception to its outer limits, these same organs of power were making inroads into the Limitation Act and the previous protection afforded the shipowner. Subsidies had become a more common method of aiding favored industries, and seamen, not shipowners, were the favored darlings of the day.

The first case⁶³ of this era saw the Supreme Court limit the effect of General Admiralty Rules Nos. 54, 55, 56, and 57 of May 6, 1872, which had assigned exclusive jurisdiction to the Federal Admiralty Courts, by deciding that a single claimant should be allowed to proceed with a trial on the merits of his own case in the forum of his choice. Only the right to limit and the question of value should be heard in the admiralty court. Thus, the injured seaman might now have an opportunity to present his case before a jury.

The Legislature, not to be outdone in aiding the "small man," passed several amendments to section 183 of the Act. The first of these required the shipowner, who was found liable but entitled to limitation, to supplement the fund available for loss of life and bodily injury to \$60 per ton of the vessel's tonnage.⁶⁴ Thus, a sunk vessel no longer totally eliminated the shipowner's liability. The seaman's plight had finally come to the attention of Congress.

61. *Id.* at 429.

62. 49 Stat. 1211 (1936), 46 U.S.C.A. § 1305 (1958).

63. *Langnes v. Green*, 282 U.S. 531 (1931).

64. 49 Stat. 1479 (1958), 46 U.S.C.A. § 183(b) (1958).

In 1936, *The Benefactor*⁶⁵ was legislatively overruled by subsection (b) of section 183.⁶⁶ Filing the limitation petition now was required within six months after the claim and could no longer be delayed until after entry of judgment or "so long as any damage or loss remains unpaid."⁶⁷

Place v. Norwich,⁶⁸ which had declared that insurance was not a part of the owner's interest and thus need not be surrendered, was impaired by the 4-4-1 decision in *Maryland Casualty Co. v. Cushing*.⁶⁹ The dissent in that case stated that collision insurance, unlike hull insurance, is expressly acquired for the benefit of injured claimants. To deny them recovery would only aid insurance companies; certainly not one of the express purposes for passing the Limitation Act.⁷⁰

Judicial expansion of the Limited Liability Act at this date seems especially inappropriate. Many of the conditions in the shipping industry which induced the 1851 Congress to pass the Act no longer prevail. And later Congresses, when they wished to aid shipping, provided subsidies paid out of the public treasury rather than subsidies paid by injured persons.⁷¹

In 1955, the next of kin of deceased seamen, whose fishing ship had capsized at sea, sought to expand the doctrine of personal contract to a previously unthinkable degree. They alleged that seamen's claims, based on unseaworthiness, are not subject to limitation because contractual in nature and personal to the owner. They cited the line of charter cases that held the express or implied warranty of seaworthiness to be personal to the owner and not subject to limitation. The court held:

These cases are based on a theory of warranty implied in fact and recognize the right of the charterer to expressly disclaim such a warranty. But, the owner's *liability to seamen* for failure to supply a seaworthy vessel flows from an obligation imposed by law which is absolute, non-delegable, and not subject to disclaimer.⁷²

Thus, the test expressed by the Second Circuit was whether the contracting party voluntarily assumed the obligations or whether the liability was imposed by law as an essential element of the owner and seaman relationship.

Four years later, the Second Circuit also decided that if the fulfillment of a contract required the use of several vessels and fire arose upon one of these vessels, all of the vessels had to be surrendered before liability could be limited.⁷³ The particular fact situation involved a dredging operation in which several tugboats and a number of barges

65. *Supra* note 44.

66. 49 Stat. 1479 (1958), 46 U.S.C.A. § 183(b) (1958).

67. 103 U.S. 239 at 250.

68. *Supra* note 48.

69. 347 U.S. 409 (1954).

70. *Id.* at 436.

71. 347 U.S. 409, at 437.

72. *Petition of Wood*, 230 F.2d 197, 199 (2d Cir. 1956).

73. *In re United States Dredging Corp.*, 264 F.2d 339 (2d Cir. 1959).

were being utilized. Specific contractual situations that would demand the use of an entire fleet could be imagined. Would they all have to be surrendered to pay for the injuries of an injured seaman? This case could serve as precedent for such a holding.

The most clearly "extraordinary" case to arise recently in this area is *Murray v. New York Central R.R.*,⁷⁴ which held maintenance and cure, arising out of employment, sufficiently contractual to be excluded from limitation. This case runs directly contrary to all "personal contract" precedent.

The first question is whether maintenance and cure is contractual. *Miller v. Standard Oil*⁷⁵ held that the employer-employee relationship may be contractual, but the right founded upon maintenance and cure is not founded upon a "meeting of the minds." It is inexorably attached by ancient and established maritime law to every seaman's contract of employment. *De Zon v. American Presidential Lines*⁷⁶ stated that when a seaman joins ship, the maritime law annexes a duty that no private agreement is competent to abrogate. *Hazelton v. Luckenbach*⁷⁷ added that the obligation to provide maintenance and cure is independent of fault: an absolute liability. *Hunt v. Trawler Brighton, Inc.*⁷⁸ and *The Cliftwood*⁷⁹ held that the right of the seaman to recover maintenance and cure is not dependent upon his signing articles [his employment contract]. In *The Cliftwood*, though the seaman could not recover his wages absent a contract of employment, he did recover maintenance and cure.

Assuming, *arguendo*, that maintenance and cure is contractual, is it personal? The "making" rule certainly indicates otherwise. The ship's agent or the master usually enters into the employment contracts, and no one could rationally consider an owner's personal intervention. His sole basis for liability is thus as the owner of the ship. There is no personal reliance upon his credit such as existed in the early supply cases and no personal contract such as appeared in the charter party cases.

Following the "breach" approach of Learned Hand, it is clear that the owner personally makes no express warranty of his fulfillment of maintenance and cure. As mentioned before, maintenance and cure attaches as soon as a seaman joins ship, and sometimes may attach before or continue after his departure. The shipowner cannot disclaim it, and he certainly does not voluntarily warrant it.

Petition of Hutchinson,⁸⁰ the case nearest the issue, involved an explosion on board a yacht resulting in injury to the plaintiff, a seaman. Sometime later, the shipowner promised the hospital that he would

74. 171 F. Supp. 80 (S.D.N.Y. 1959), *aff'd*, 287 F.2d 152 (2d Cir. 1961).

75. 199 F.2d 457 (7th Cir. 1952).

76. 318 U.S. 660 (1943).

77. 134 F. Supp. 525 (D. Mass. 1955).

78. 102 F. Supp. 300 (D. Mass. 1952).

79. 280 Fed. 726 (D. Ala. 1922).

80. 28 F. Supp. 519 (E.D.N.Y. 1938).

personally assume the debts of the injured persons. This was construed as a personal contract since made by the shipowner directly, as distinguished from one imputed to him by law from his relationship to the vessel. Comparing this case with *Murray*, the extent of the Second Circuit decision becomes apparent.

A final reason rendering the *Murray* decision "extraordinary" is that only six years previously the same court had dismissed the idea that seaworthiness may be personal to the owner and exempt from limitation. All the arguments that seaworthiness is an obligation imposed by law — absolute, non-delegable, and not subject to disclaimer — could be equally applied to maintenance and cure. If the implied warranty of seaworthiness is not personal, neither is maintenance and cure.

Considering the decisions in retrospect, a semblance, at least, of a current position presents itself. A limitation action today is not entirely within the exclusive jurisdiction of the admiralty courts.⁸¹ The shipowner has only six months (subject to some discretion, as evidenced by several cases) to file his petition for limitation if he intends it to be effective.⁸² The *Scotland*⁸³ case, which settled the time for interest determination as the period following the accident "after the effects of the collision were fully developed" still seems to be good law but the question of insurance interest is beginning to receive opposition.⁸⁴ Limitation still extends to most vessels and as of 1911 to non-maritime torts.⁸⁵ A fund for bodily injury and death must amount to at least \$60 per ton.⁸⁶ The home port doctrine has died,⁸⁷ but the recognition of supply cases as personal contracts still seems to live on. Charter party situations are definitely included⁸⁸ and bills of lading strictly excluded⁸⁹ from the "personal contract" doctrine. Also, limitation today may demand the forfeiture of several ships⁹⁰ if necessarily utilized and required by a particular contract. Finally, though the implied warranty of seaworthiness has been excluded from the "personal contract"⁹¹ area, maintenance and cure has somehow forced its way in.⁹²

Projecting into the future in light of *Murray* and the recently decided *Petition of Oscar Tiedemann*,⁹³ maintenance and cure can be

81. *Supra* note 62.

82. *Supra* note 65.

83. *Supra* note 47.

84. *Supra* note 78.

85. *Supra* note 53.

86. *Supra* note 63.

87. GILMORE & BLACK, *THE LAW OF ADMIRALTY* 708 (1957).

88. *Supra* note 57.

89. *Supra* note 60.

90. *Supra* note 72.

91. *Supra* note 71.

92. *Murray v. New York Central R.R.*, 171 F. Supp. 80, 83 (S.D.N.Y. 1959).

93. *Petition of Oscar Tiedemann & Co.*, 236 F. Supp. 895 (D. Del. 1964). Judge Layton differed from Judge Murphy's personal contract approach by asserting that the inclusion of maintenance and cure within the Limitation Act was not a part of the Legislative intent. No Congressional report was cited and concededly none exists.

seen as acquiring a new importance in limitation actions. Until recently the main thrust of the injured seaman's claim has been in the nature of Jones Act negligence⁹⁴ and unseaworthiness.⁹⁵ Much larger recoveries can usually be obtained in such proceedings,⁹⁶ and the element of maintenance and cure is included in the verdict. However, both negligence and unseaworthiness are subject to limitation and if the fund created is insufficient to meet the claims of the dead and injured (as it usually is) the seaman is restricted to his proportionate share. But if *Murray* and *Oscar Tiedemann* continue to prevail the seaman can go beyond the limitation fund to acquire an amount necessary for his maintenance and cure. If the commissioner then grants fairly large sums, as was done in *Oscar Tiedemann* (some verdicts were as high as \$40,000), the Limitation Act is smartly circumvented and the shipowner is saddled with a new liability for which he was unprepared. The total maintenance and cure liability in *Oscar Tiedemann* was in excess of \$160,000; a sum nearly equal to the limitation fund itself and not at all covered by insurance. Thus, a new liability maneuver was born and the shipowner was the unwary victim. The 19th century shipowner's stronghold, besieged by the Jones Act in 1915 and 1920⁹⁷ and by the doctrine of unseaworthiness in the 40's and 50's,⁹⁸ is now being assailed by maintenance and cure.⁹⁹ In the course of a century, the wheel of history has made a full turn; the victimized becoming the ward and the darling the prey.

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The public policy at the time was entirely directed to the benefit of the shipowner, as shown in the earlier part of the paper, and the seaman's claims were intended to be limited as well as the cargo owner's. See text quote to note 50.

94. In Section 33 of the Marine Act of 1920, Congress amended Section 20 of the Act of 1915 to read as follows:

Any seaman, who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; . . . 41 Stat. 1007 (1920), 46 U.S.C.A. § 688 (1958).

95. The vessel and owner are, both by English and American law, liable to an indemnity for injuries received by a seaman in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. *Scarff v. Metcalf*, 107 N.Y. 211 (1887).

96. The amount recoverable under maintenance and cure is limited to the sum necessary to maintain the person while he is sick or injured and the required costs of his intended cure. Damages for loss of future earning power and permanent injury are not recoverable.

97. *Supra* note 93.

98. "Until the mid 1940's the seaman's right to recover damages for injuries caused by the unseaworthiness of the ship was an obscure and relatively little used remedy. . . . Today the unseaworthiness doctrine has become the principal vehicle for personal injury recovery." GILMORE & BLACK, *THE LAW OF ADMIRALTY* 315 (1957).

99. Of course, the shipowner can insure against this liability, as he has insured against negligence and unseaworthiness. However, the statutes and the courts are now heavily weighted in favor of the seaman and against the shipowner and this hand-on-the-scale practice seems to be destined to put an end to American shipping. Competition from domestic air carriers and foreign shipping (which benefits from lower wage scales and favorable tax treatment) have stunted development and precipitated a severe decline. The disfavor exhibited by the courts and government seems destined to kill American shipping just as quickly as previous favor gave it life.