A Decade of Admiralty in the Supreme Court of the United States

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I

INTRODUCTION

Through a liberal and extremely fortunate interpretation of Article III, Section 2, of the Constitution of the United States,¹ it has become well established that our governing law in maritime matters in this country is a part of the national law safely insulated from the diverse or parochial tendencies of the local laws of the several states. As the commercial interests of the country have come to embrace a world-wide intercourse, indeed, our maritime law has come increasingly to be regarded as a segment of the general law of major national importance. The trend has been fortified of late by the success of our war-time effort on the sea and by a reinforced peace-time determination to assure the continued vitality and growth of our merchant marine. In all that this implies, the Supreme Court of the United States is of course the ultimate judicial arbiter.

In endeavoring to keep abreast of the output of the Supreme Court in these matters, the authors of this paper have been impressed by several circumstances which appear to warrant a review of the decisions of the past decade. For one such circumstance, the only modern textbook on Admiralty Law in the United States was published just a little less than ten years ago.² As the later reports of the Supreme Court disclose, this treatise now requires some supplementing and at least a little correction. For another, beginning a little more than ten years ago, the personnel of the Supreme Court has changed com-

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¹ "The judicial power shall extend . . . to all cases of admiralty and maritime juris-
diction." See Panama R. R. Co. v. Johnson (1924) 264 U.S. 375, 385; Detroit Trust Co. v. The Barlum (1934) 293 U.S. 21, 42.
² ROBINSON, ADMIRALTY (1939). The preface is dated Feb. 1, 1939.
pletely\(^3\) and with the change have come some shifts of emphasis, some fresh approaches and considerable transitional confusion. It should be of interest to discover how all this may have affected the progress of the Law of Admiralty. Finally, in the period under discussion, the Supreme Court has heard arguments and rendered decision in a very considerable number of maritime cases thought to have presented issues of sufficient importance or novelty to warrant consideration and disposition in the tribunal of last resort. It may be worth while to take note of the kind of cases which have been reaching the Court while giving attention at the same time to the procedural or substantive import of the decisions rendered.\(^4\) We attempt such a review herein under topical subdivisions of the subject matter which have become more or less conventional.

II

JURISDICTION AND THE SAVING CLAUSE

It is hornbook law that the admiralty jurisdiction within its proper limits is somewhat broader in scope than the commerce power, that it extends to all navigable waters providing a highway for interstate or foreign commerce, that waters navigable in fact are navigable in law and that navigable waters may be artificial as well as natural.\(^5\) The holding in *The Daniel Ball*\(^6\) that the Grand River in Michigan was navigable water within the meaning of early inspection and licensing statutes has been generally regarded as a leading precedent. The principle formulated in the opinion in that case, that "those rivers must be regarded as public navigable rivers in law which are navigable in fact,"\(^7\) has been applied and amplified in a series of later decisions.

Against this background of familiar precedent, the case of *United

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\(^3\) The change began with Justice Van Devanter's retirement June 2, 1937. Justice Black took his seat October 4, 1937. Thereafter, 1938-1945, Justices Reed, Frankfurter, Douglas, Murphy, Jackson, Rutledge and Burton were seated in that order. Chief Justice Stone died April 22, 1946 and Chief Justice Vinson took the oaths of office and entered immediately upon the performance of his duties on June 24, 1946. With the accession of Chief Justice Vinson the change in personnel was complete.

\(^4\) Thirty-seven opinions of the Supreme Court in admiralty or of concern to the admiralty law will provide the principal subject matter of this paper. A substantial proportion were opinions of major importance. Since the paper has been prepared chiefly for those interested in admiralty and presumably having a considerable familiarity with its leading cases and statutes, its traditions, and the current grist in the lower federal courts, we shall spare the reader a burdensome annotation beyond such references as the principal cases and materials immediately related thereto may appear to require.


\(^6\) (U.S. 1870) 10 Wall. 557.

\(^7\) Id. at 563.
States v. Appalachian Electric Power Co., though not a case in admiralty, is of more than ordinary interest. Proceeding in reliance upon the commerce power and the applicable statutes, the United States sought to enjoin further construction of a hydroelectric dam on the New River at Radford, Virginia. It appeared that the river flowed in substantial volume through rough and mountainous country and that its course was marked by many rapids and small falls. At intervals over the years shallow draft keel boats had plied some parts of its course carrying lumber, ore, tobacco or other local products. It appeared further that it might be improved without disproportionate cost. Administering the Federal Water Power Act of 1920, the Federal Power Commission had found that defendant's dam would affect interstate commerce and accordingly had denied defendant's right to proceed without the standard form license which it tendered. Defendant disregarded the order and the United States initiated the present suit. The district court and the circuit court of appeals concluded that the river was not navigable, that the construction would not affect interstate commerce and that the suit should be dismissed. Upon certiorari the Supreme Court held, *inter alia*, two justices dissenting, that the New River was navigable. It was said that the basic approach of *The Daniel Ball*, as supplemented in later decisions, continues applicable. Speaking for the majority, Mr. Justice Reed said: "A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken. . . . There must be a balance between cost and need at a time when improvement would be useful. When once found to be navigable a waterway remains so. . . . Nor is it necessary that the improvements should be actually completed or even authorized. . . . In determining the navigable character of the New River it is proper to consider the feasibility of interstate use after reasonable improvements which might be made."

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8 (1940) 311 U.S. 377.
10 The Commission made a finding in 1927 that the river was not "navigable waters" within the definition of the Federal Water Power Act. This conclusion appears to have been reversed by resolution adopted without notice in 1932. The United States initiated its suit in 1935, alleging that the river was navigable.
With attention properly centered upon the commerce clause and the permissible scope thereunder of federal regulation of waterways and of the federal power program, the Court has obviously moved far from the somewhat elemental principle of The Daniel Ball. The familiar proposition that navigable in law means navigable in fact is recast to say that navigable in law means potentially capable of being made navigable in fact with reasonable balance between the need and the cost whenever improvement may become useful. Possible implications for admiralty remain at the moment matter of speculation. We have come a long way in admiralty since the time when it was thought that the ebb and flow of the tides marked the landward limits of waters within the jurisdiction. May we go further, perhaps to waters wholly intrastate, in reliance upon potential interstate navigability?

From waters within the jurisdiction to the saving clause is a long stride made necessary by the absence of notable decisions affecting the intervening subject matter. The admiralty and maritime jurisdiction of civil causes has been from the beginning national and exclusive, “saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it.” It has been assumed generally to be hornbook law that the characteristic maritime proceeding in rem, whereby the libelant proceeds against the res as defendant in admiralty and obtains a judgment good against the world, is an exclusive maritime remedy denied the common law courts in such causes as might come within their purview by virtue of the saving clause. It now appears that there may be exceptions. We know of one.

In C. J. Hendry Co. v. Moore, the California Fish and Game Commission had seized a purse seine net while in use in navigable coastal waters in violation of local fishery regulations. A suit was

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13 Comment on the case has been concerned exclusively with regulation of waterways under the commerce clause and with the federal power program. See (1941) 21 B. U. L. Rev. 344; (1941) 16 Calif. S. B. J. 73; (1941) 9 Geo. Wash. L. Rev. 631; (1941) 54 Harv. L. Rev. 876; (1940) 35 Ill. L. Rev. 346; (1941) 26 Iowa L. Rev. 871; (1941) 39 Mich. L. Rev. 976; (1941) 25 Minn. L. Rev. 636; (1941) 19 N. C. L. Rev. 379; (1941) 15 St. John's L. Rev. 295; (1941) 15 Temple L. Q. 304; (1941) 19 Tex. L. Rev. 508; (1940) 14 Tulane L. Rev. 621; (1941) 89 U. of Pa. L. Rev. 672; (1941) 2 Wash. & Lee L. Rev. 272; (1940) 50 Yale L. J. 134.

14 28 U. S. C. § 371 (Third) (1940), derived from Section 9 of the Judiciary Act of 1789, confers exclusive jurisdiction on the federal courts “of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it . . . .”

15 ROBINSON, ADMIRALTY (1939) 23, 359.

16 (1943) 318 U. S. 133.
brought in the local court under the state’s Fish and Game Code, Section 845, to have the net declared a public nuisance and forfeited to the state. The Supreme Court of California sustained a judgment of forfeiture in an in rem proceeding17 and on certiorari the Supreme Court of the United States, one justice dissenting, affirmed. In a notable opinion based upon exhaustive historical research, the late Chief Justice Stone agreed that the proceeding in rem to enforce a maritime lien in suits between private parties is not a remedy which the common law is competent to give but marshalled convincing support for the conclusion that the forfeiture cases present an important historical exception. His researches disclosed that the in rem forfeiture to the Crown of an offending res used in violation of law was familiar practice in the English Court of Exchequer and that American colonial courts exercised a comparable jurisdiction before separate admiralty courts were established. He thought it unlikely that the Judiciary Act of 1789 was intended to exclude from the jurisdiction of state courts a proceeding so generally invoked and recognized as part of the common law in both England and America before the Revolution. He was impressed by the circumstance that legislation authorizing such proceedings had long been incorporated in statutes providing for the enforcement of local fishery regulations in nearly half the states and “without intimation from this or any other court that the Judiciary Act prohibited it.”18 “We conclude,” he said, “that the common law as received in this country at the time of the adoption of the Constitution gave a remedy in rem in cases of forfeiture, and that it is a ‘common law remedy’ and one which ‘the common law is competent to give’ within the meaning of §9 of the Judiciary Act of 1789.”19

The opinion is at once a monumental piece of erudition and a notable contribution to the meaning of the much mooted phrase “common law remedy.” Our own researches have disclosed no support for the fear expressed by Mr. Justice Black, dissenting, that the decision might open the way to dangerous inroads upon the policy of “ultimate exclusive national regulation of ships in commerce.” That policy remains amply fortified in a long line of leading cases. At the same time the exception here recognized would appear to make sense, both historically and practically. The proceeding in rem to enforce a maritime

18 C. J. Hendry Co. v. Moore, supra note 16 at 151.
19 Id. at 153.
lien in suits between private parties continues no less securely established as a remedy which only the courts of admiralty are competent to give.

III

MARITIME TORTS

Passing from jurisdiction as it concerns waters, or the concurrent competence of admiralty and local courts, to jurisdiction in terms of the law's traditional allocation of causes to the categories of tort or contract, we find that the Supreme Court in the decade under review has had slight occasion to consider or to reconsider the applications of familiar criteria. On the tort side, to be maritime, injuries to property or person must be consummated on or in navigable waters and not on land or its physical projections. Location is the test of jurisdiction and likewise the delimiting factor separating maritime wrongs from torts governed exclusively by local statutes or the common law. The test is not always easy of application, however, and the lower federal courts have had continuing difficulties.

In the matter of injuries to property, the problem of the submarine pipe or cable has been persistent. There have been further instances in which the ship's anchor or hawser has been permitted to foul the submarine pipe line or telephone cable with resulting damage. The lower courts have followed the somewhat mechanical reasoning of the Circuit Court of Appeals for the Ninth Circuit in the power cable cases, in denying jurisdiction, and to date the Supreme Court has been content to let the matter rest there. In the matter of injuries to the person, the lower courts have continued to stress the location of the initial impact. The ship's ladder cases have

20 Unless the physical projection may be considered an "aid to navigation": The Blackheath (1904) 195 U.S. 361; The Raithmoor (1916) 241 U.S. 166; Doullut & Co. v. United States (1925) 268 U.S. 33; ROBINSON, ADMIRALTY (1939) 50-55, 58-62.

21 The Russell No. 6 (E. D. N. Y. 1941) 42 F. Supp. 904 (injury to pipe line); United States v. The John R. Williams (C. C. A. 2d 1944) 144 F. (2d) 451 (injury to telephone cable).


23 United States v. The John R. Williams, supra note 21, cert. denied sub. nom Great Lakes Dock & Dredge Co. v. United States (1944) 323 U. S. 782.

given continuing difficulty and the Supreme Court's earlier pronouncements in *The Admiral Peoples*25 have been construed broadly by the lower courts to bring an increasing proportion of the ship's ladder or gangplank injuries within the admiralty.26 In the view of such courts as have spoken, it apparently makes no difference whether the ladder or gangplank belongs to the ship or to the dock or whether the injury is suffered during egress or ingress.

There is partial comfort at least for these broad conclusions in what the Supreme Court said in *Brady v. Roosevelt Steamship Co.*27 An administratrix had sued the private operator of a vessel owned by the United States Maritime Commission to recover for the death of a customs inspector who fell from the ship's ladder while going on board in the discharge of his official duties. The question was whether the Suits in Admiralty Act precluded a suit against the private operator, but in an opinion without dissent the Court said: "We agree with the court below that this was a maritime tort over which the admiralty court has jurisdiction."28 "Just as the twig is bent the tree’s inclined." It may perhaps be hopefully suggested that we are at an end of meticulous refinement and needless confusion with respect to the ship’s ladder cases and that all ship's ladder or gangplank injury falls at last to the admiralty where it so clearly belongs.

Though the tort be clearly maritime, there have been questions of substantive law which were not entirely free from doubt. As the states have been permitted to supplement and even modify the maritime law through application of their local death acts to deaths occurring on local navigable waters,29 so it now appears that their survivorship statutes may save the right to recover for local maritime injuries against the estate of the deceased tortfeasor. The issue was presented to the Supreme Court in a proceeding initiated by the executrix of a deceased yacht-owner for limitation of liability. The petition-


26 Ford v. Parker (D. Md. 1943) 52 F. Supp. 98 (watchman fell from ship's ladder supplied by dock lessee while going on board); United States Fidelity and Guaranty Co. v. United States (S.D.N.Y. 1944) 56 F. Supp. 452 (rigger fell from ship's ladder apparently supplied by ship while going on board); United States v. Marine (C.C.A. 4th 1946) 155 F. (2d) 456 (customs inspector fell from ship's ladder apparently supplied by ship while going on shore).

27 (1943) 317 U. S. 575.

28 Id. at 577, citing Vancouver S. S. Co. v. Rice (1933) 288 U. S. 445, and *The Admiral Peoples*, supra note 25.

29 And, prior to the Federal Death Act, to deaths occurring on the high seas on ships belonging to persons domiciled locally: The Hamilton (1907) 207 U. S. 398.
ers presented claims for injuries alleged to have been caused by carbon monoxide gas poisoning while they were guests of the deceased on a cruise in Florida territorial waters. The district court held that their causes of action survived under the Florida statute. The circuit court of appeals held, one judge dissenting, that under the governing maritime law the personal liability of the yacht-owner did not survive.29 Relying chiefly upon the earlier cases sustaining local liens for repairs or supplies furnished in the home port and upon the effect given in admiralty to local death statutes, the Supreme Court held, in Just v. Chambers,81 that the Florida rule of survival should be applied. The distinction argued between local supplementation and local modification of the maritime law of torts was dismissed as a subtlety which "does not merit judicial adoption." It was enough that the state legislature did not run counter to federal laws or to "the essential features of an exclusive federal jurisdiction."82 Further comment on the decision, which was without dissent, is reserved for the topics "Limitation of Liability" and "Uniformity".

IV

MARITIME COMPENSATION

A transition from torts to maritime compensation is suggested by the persistence of the tort analysis in determining the delimitation of maritime and local authority with respect to compensation matters. It will be recalled that the Jensen doctrine83 of thirty years past excluded the application of local compensation statutes to maritime injuries as working a material prejudice to the characteristic features of the general maritime law and interfering with the proper harmony and uniformity of that law in its international and interstate relations. It will be recalled further that an exception was thereafter recognized, in a sequence of important decisions following the Jensen case, where the matter was thought to be "maritime but local" and where there was in consequence no real prejudice to the uniformity of the maritime law as a national system.84 It will be recalled, finally, that the Congress, when ultimately persuaded to enact a compensation statute

29 The Friendship II: Just v. Chambers (C. C. A. 5th 1940) 113 F. (2d) 105.  
31 (1941) 312 U. S. 383.  
32 Id. at 391.  
83 Southern Pacific Co. v. Jensen (1917) 244 U. S. 205.  
84 ROBINSON, ADMIRALTY (1939) 101-109. The exception was not a post-Jensen creation, needless to say, but had its roots in an earlier recognition of matters of local concern. See The City of Norwalk (S. D. N. Y. 1893) 55 Fed. 98, 106.
for maritime workers, rejected the ideal of a comprehensive federal statute and provided coverage for disability or death occurring upon navigable waters only if compensation "may not validly be provided by State law." Commissioners under the Longshoremen's and Harbor Workers' Act of 1927 must still walk or wade warily, for the observance of a line of delimitation thus defined in decisions and incorporated by reference in the statute has given continuing difficulty.

In *Parker v. Motor Boat Sales*, the shore-side janitor, porter or handyman of a store selling small boats, outboard motors and maritime supplies used in the types of boats sold appears to have been assigned casually to help another employee carry a second-hand outboard motor to the James River to be tested on a customer's fifteen-foot rowboat. He rode in the boat, the boat capsized, and he was drowned. The Deputy Commissioner awarded compensation under the federal statute. The district court sustained the award. The circuit court of appeals reversed for two reasons: first, that decedent, having been previously cautioned not to go on the water, was not acting in the course of his employment; and second, that in any event his employment was "so local in character" that compensation might validly have been provided by state law. On certiorari, the Supreme Court reversed on both grounds. As to the first, there was thought to have been evidence sufficient to support the Deputy Commissioner's finding that decedent was acting in the course of his employment and the court should have accepted the finding as conclusive. As to the second, speaking for a unanimous court, Mr. Justice Black said: "habitual performance of other and different duties on land cannot alter the fact that at the time of the accident he was riding in a boat on a navigable river, and it is in connection with that clearly maritime activity that the award was here made .... Moreover, § 2(4) of the Act expressly provides for its application to 'employees [who] are employed ... in whole or in part upon the navigable waters of the United States'." It was not thought to have been the purpose of Congress to exclude such a case by the proviso in Section 3(a).

We note that the "maritime" aspect of decedent's employment was casual and incidental in the extreme and suggest that the result was debatable in principle to say the least. In ignoring many similar in-
stances in which an employment had been held local and resting its decision largely upon an assumption as to the Congressional purpose, it is arguable that the Court attributed to Congress precisely the purpose which it did not have. It may be doubted that a phrase lifted from Section 2 (4) defining terms fortified the conclusion reached. The Court appears, in brief, to have obliquely rejected the "maritime but local" exception. Had it finally lost patience with the difficulties encountered in the application of that exception? Was it influenced by the circumstance that the employer had too few employees to make the local compensation act applicable? So far as the opinion is concerned, these questions may be answered only by inference. In any event the decision was soon to return to plague the Court in another borderline situation.

In *Davis v. Department of Labor and Industries of the State of Washington,*39 a steelworker had been employed by a construction company in the work of dismantling an abandoned drawbridge over the Snohomish River. Three vessels were used in the work—a tug, a derrick barge, and a barge. As steel was cut from the bridge it was lowered to the barge by the derrick and when the barge was loaded it was towed to the point of storage. Decedent had helped to cut some steel from the bridge and at the time of the accident was working on the barge, where it was his job to examine the steel and as necessary to cut it in pieces of proper length. He fell or was knocked from the barge into the river and drowned. His widow claimed compensation under the state statute which provided coverage, *inter alia,* for workmen "engaged in maritime occupations for whom no right or obligation exists under the maritime laws."40 The state court held that an award in such circumstances would be in conflict with the Federal Constitution.41 On certiorari, the Supreme Court reversed, Chief Justice Stone dissenting. After commenting upon the difficulties encountered over the years in determining the scope of the "maritime but local" exception to the *Jensen* doctrine, the Court concluded that it could do no better, in the circumstances presented, than to rely upon a "presumption of constitutionality" in favor of the state enactment. "Giving the full weight to the presumption," said Mr. Justice Black for the majority, "and resolving all doubts in favor of the Act, we hold

40 8 REM. REV. STAT. (1932) §§ 7674, 7693a (Supp. 1940).
41 *Davis v. Department of Labor and Industries* (1942) 12 Wash. (2d) 349, 121 P. (2d) 365.
that the Constitution is no obstacle to the petitioner's recovery."

Consciously or unconsciously, the Court thus shifted the burden of prediction from the employee to the employer and established a "twilight zone" in which one prediction is presumably as good as another. Boundaries of the "shadowy area" were of course left undelineated and a fresh adventure in litigious progress by way of judicial inclusion and exclusion was implicitly invited.

All this and more was pointed out in a brief but incisive dissent on the part of the Chief Justice. Apparently the Chief Justice would have been willing to join in reconsideration of the Jensen doctrine. But in the presence of that doctrine, of the subsequent exclusion in a long line of decisions of injuries "maritime but local," and of the legislative purpose so clearly expressed in the Longshoremen's and Harbor Workers' Act, he was unwilling to join in judicial disregard of the jurisdictional command of the federal statute and the substitution of new uncertainties for old. He said: "Congress by the enactment of the Longshoremen's and Harbor Workers' Act has left no room for an overlapping dual system of the sort which the Court now espouses by placing its decision on a new doctrine that recovery under either the state or the federal act is to be sustained if the case is thought a close one." 43

Thus one at least of the questions suggested by the opinion in the Parker case would appear to be answered. The Court has now rejected the "maritime but local" exception as providing within itself a sufficient delimiting criterion. Our experience with the formula may henceforth contribute no more than warnings that we are about to enter, whether from land or sea, the "shadowy area" of overlapping presumptions. Will this increase predictability in an area which has been admittedly difficult? We doubt it. Indeed we think that recent difficulties have been exaggerated and that the Court's patience ran out too soon. Wise or unwise in its inception, we had had twenty-five years of experience with the "maritime but local" formula. Its "codeless myriad of precedent" had come to have meaning and to provide a substantial measure of predictability. It is not apparent that it was so much more difficult of application, among those sensitive to the requirements of maritime commerce, than other criteria traditionally invoked in delimiting land law from the law of the sea. Certainly it was no more difficult than many another generality of constitution or

42 Davis v. Department of Labor, supra note 39 at 258.
43 Davis v. Department of Labor, supra note 39 at 261.
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statute. Be that as it may, however, we are now off to new adventures. How close does a close case have to be? How presumptive the presumption? Given the facts of the Davis case, we know the answer. Beyond that we sail seas which are largely uncharted and on voyages which, for the time at least, may reward the pilots more handsomely than others.

The Longshoremen’s and Harbor Workers’ Act provides further with respect to coverage that no compensation shall be payable on account of the disability or death of a “master or member of a crew of any vessel.” As is well known, this is precisely as the seamen wanted it. But who are members of a crew? We have learned long since that the generality can be difficult of application. Twice in the last decade the difficulty has been taken to the highest court. In South Chicago Coal & Dock Co. v. Bassett, an employee on a lighter used in fueling vessels in local Indiana rivers and harbors fell from the lighter and was drowned. His inclusion in the lighter’s “crew” was necessary to complete the six-man complement required by certificates of inspection. However, he slept at home, boarded off ship and was paid an hourly wage. While he was called upon to handle the lighter’s lines in releasing or making the boat fast and occasionally did some cleaning of the boat, he appears to have had no duties while the boat was in motion. His chief task was to facilitate the flow of coal from the lighter to the vessel being fueled by removing obstructions to the flow with a stick. The Deputy Commissioner awarded compensation. The district court vacated the award. The circuit court of appeals reversed on the ground that there was evidence to support the Commissioner’s finding. On certiorari, the Supreme Court affirmed. Whether decedent was a member of the “crew” was said to be a question of fact, not of law; and the Commissioner’s finding, there being evidence to support it, was conclusive. Inclusion in the complement required by the certificate of inspection was not controlling. The question was one of decedent’s actual duties. “The word ‘crew,’” said the Court, “does not have an absolutely unvarying legal significance.” Workers situated as was decedent “may appropriately be regarded as ‘in the position of longshoremen or other casual workers on the water’.”

The single bargeman in charge of a barge without motive power,

44 Sec. 3(a) (1), (1927) 44 Stat. 1426, 33 U.S.C. § 903 (1940).
45 (1940) 309 U.S. 251.
46 South Chicago Coal & Dock Co. v. Bassett (C. C. A. 7th 1939) 104 F. (2d) 522.
47 South Chicago Co. v. Bassett, supra note 45 at 258.
48 Id. at 260.
however, may fall in a different category. In *Norton v. Warner Company*,\(^49\) such a bargeman on local Pennsylvania waters bought his own meals, lived, ate and slept on the barge, and was paid a monthly salary with quarters “based upon all services and time required to safeguard and operate the barge fleet.” In addition to taking general care of the barge, his duties included repairing leaks, pumping out, taking care of the lines at docks, taking lines from tugs, responding to whistles from tugs, putting out navigation lights and signals, taking orders from the tugboat when in tow and moving the barge at piers by the capstan. He was struck and injured by the capstan bar. The Deputy Commissioner awarded compensation. The district court sustained the award. The circuit court of appeals reversed.\(^50\) On certiorari, the Supreme Court affirmed. While the courts may not set aside the commissioner’s award because deemed to be against the weight of the evidence, they are not to remain passive when a term of the statute is misconstrued or other error of law committed. A barge is a vessel and as such may have a one-man crew. This barge had one. The crew functions were “different from the functions of any other ‘crew’ only as they were made so by the nature of the vessel and its navigational requirements.”\(^51\) *Caveat* commissioners! There is an elusive line between evidence to support, as matter of fact, and the import of the controlling word, as matter of law. When the commissioner slips, perhaps unconsciously, from the former category into the latter, revelation of his errors, if he has made them, must be the ultimate responsibility of the court of last resort. “If the award were to stand,” said the Court, “there would be brought within the Act a group of workers whom we do not believe Congress intended to include.”\(^52\)

There has been one further case under the Longshoremen’s and Harbor Workers’ Act, arising under the limitation provisions, which merits comment. Section 13 of the Act provides in part as follows: (a) “The right to compensation for disability under this Act shall be barred unless a claim therefore is filed within one year after the injury . . . except that if payment of compensation has been made without an award on account of such injury . . . a claim may be filed within one year after the date of the last payment”; and (b) that the bar shall not be effective unless objection to the failure to file is made “at

\(^{49}\) (1944) 321 U. S. 565.

\(^{50}\) Warner Co. v. Norton (C. C. A. 3d 1943) 137 F. (2d) 57.


\(^{52}\) Id. at 569.
the first hearing of such claim in which all parties in interest are given reasonable notice and opportunity to be heard.\textsuperscript{53} In \textit{Marshall v. Pletz},\textsuperscript{54} a longshore worker was injured and tender of compensation was made promptly, without an award, the insurance carrier notifying the Deputy Commissioner of its readiness to make and continue payments until a claim was filed. The worker declined the carrier's tender as insufficient. Negotiations continued for a year and five months during which the insurer made further tenders which were likewise refused. Medical care, including medical aid after the worker left the hospital, was furnished by the insurer. When the claim was eventually filed the insurer invoked the limitation provision. The Deputy Commissioner ruled that the claim was barred. The district court reversed. The circuit court of appeals affirmed, one judge dissenting.\textsuperscript{55} On certiorari, the Supreme Court reversed, three justices dissenting. "Tender is not payment," said Mr. Justice Roberts for the majority, and "the fact that the insurer was willing to pay compensation, which he [the worker] refused, does not bring him within the exception stated in \textsection{13}(a)."\textsuperscript{56} Moreover, "the furnishing of medical aid is not the 'payment of compensation' mentioned in \textsection{13}(a) . . . the terms 'payment' and 'compensation' used in \textsection{13}(a) refer to the periodic money payments to be made to the employee."\textsuperscript{57} Justices Black, Douglas and Murphy, dissenting, urged liberal interpretation in furtherance of the purposes of the Act and were of opinion that "the continuous process of negotiation and communication between the company, Pletz, and the Commissioner" was enough to support an estoppel.

The interpretation approved by the majority seems technical and the consequence needlessly harsh. We doubt that the Congress, in providing a limitation period, intended a result so rigorous or that the language used required it.\textsuperscript{58} Meanwhile the injured worker will be well advised to file his claim within the statutory period, notwithstanding tender in an unacceptable amount, and whatever the prospect that he might reach ultimate agreement with the insurer without formal contest before the commissioner.

\textsuperscript{53} (1927) 44 Stat. 1432, 33 U.S.C. \textsection{913} (1940).
\textsuperscript{54} (1943) 317 U.S. 383.
\textsuperscript{55} \textit{Marshall v. Pletz} (C.C.A.9th 1942) 127 F. (2d) 104.
\textsuperscript{56} \textit{Marshall v. Pletz}, supra note 54 at 389.
\textsuperscript{57} \textit{Id.} at 390, 391.
V

SEAMEN'S REMEDIES

The security of the sailor when he is injured in the course of his calling is not by way of the compensation statute, though here again the persistence of the tort analysis as a device for delimiting authority with respect to maritime or local injuries has given much difficulty. The sailor has, it will be recalled, his ancient right to wages, maintenance and cure, his right to damages if injured in consequence of the unseaworthiness of his ship or its equipment, and his alternative right to damages for negligent injury under the provisions of a modern employers' liability statute incorporated by reference in the Jones Act of 1920. With these he is content, at least to the point of wanting nothing to do with the more systematic and normally more modest indemnities of workmen's compensation legislation. In each of these three grand divisions of remedy there have been major problems for solution by the highest court during the decade past. We find, indeed, that seamen's remedies have been in all respects our most litigious subject matter.

Though recognized in some of the oldest codes of the sea, it was only in very recent years that the full scope of the right to wages, maintenance and cure was authoritatively indicated. The question presented in Aguilar v. Standard Oil Co. of New Jersey was whether the shipowner is liable to the seaman for wages and maintenance and cure when the seaman is injured while on authorized shore leave and while traversing the only available route between the moored ship and a public street. There were two cases. In one the seaman fell into an open and unlighted ditch while proceeding from ship to shore. The Circuit Court of Appeals for the Third Circuit held for the seaman. In the other the seaman was struck by a motor vehicle while crossing the dockowner's intervening premises on his return from shore to ship. The Circuit Court of Appeals for the Second Circuit held for the shipowner. On certiorari, the Supreme Court affirmed in the first and reversed in the second. After reviewing carefully the law's solicitude for seafaring workers, as expressed in classic codes, judicial decisions and modern legislation, the Court concluded that "the principles governing shipboard injuries apply to the facts presented by these

60 Jones v. Waterman S. S. Corporation (C. C. A. 3d 1942) 130 F. (2d) 797.
cases.\textsuperscript{62} "In short," said Mr. Justice Rutledge in a notable opinion, "shore leave is an elemental necessity in the sailing of ships, a part of the business as old as the art, not merely a personal diversion .... The shipowner owes the protection regardless of whether he is at fault; the seaman's fault, unless gross, cannot defeat it; unlike the statutory liability of employers on land, it is not limited to strictly occupational hazards or to injuries which have an immediate causal connection with an act of labor."\textsuperscript{63}

In another case decided the following year, the Supreme Court put at rest a troublesome issue, stemming from earlier precedent, with respect to indemnity for unseaworthiness and the doctrine of fellow servant. In \textit{Mahnich v. Southern Steamship Co.}\textsuperscript{64} the seaman had been injured at sea in a fall from staging which gave way when a defective rope supporting it parted. The rope was supplied by the boatswain at the direction of the mate and was cut from a coil which had been stored for two years but which appeared to be sound. After the accident the rope was found to be rotten at the breaking point. There was ample sound rope aboard for use in rigging the staging. In reliance upon a statement in the opinion in \textit{Plamals v. S. S. "Pinar Del Rio"},\textsuperscript{65} comparable on its facts, the district court held against the seaman on the issue of unseaworthiness. The Circuit Court of Appeals for the Third Circuit affirmed in similar reliance, one judge dissenting.\textsuperscript{66} On certiorari, the Supreme Court reversed, repudiating \textit{Plamals v. S. S. "Pinar Del Rio"} in so far as it might be thought controlling in the present circumstances, Justices Roberts and Frankfurter dissenting. The dissenting opinion presented an appealing argument, in terms of precedent and conventional logic, for the proposition that there is no recovery for unseaworthiness where the injury was caused by a fellow servant's negligence, and the opinion concluded with a vigorous protest against a tendency to disregard precedents which had "become so strong in this court of late as .... to shake confidence in the consis-

\textsuperscript{62}Aguilar v. Standard Oil Co., \textit{supra} note 59 at 733.

\textsuperscript{63}Id. at 734. \textit{Cf.} Nowery v. Smith (C. C. A. 3d 1947) 161 F. (2d) 732, \textit{affirming} 69 F. Supp. 755. Chief Justice Stone concurred in the result in the first case on the ground that recovery was authorized by the Shipowners' Liability Convention of 1936 (54 STAT. 1693), but in the second case would have affirmed the judgment for the reasons stated in the opinion of the circuit court of appeals. Justice Roberts took no part in the case.


\textsuperscript{65}(1928) 277 U. S. 151, 155.

\textsuperscript{66}Mahnich v. Southern S. S. Co. (C. C. A. 3d 1943) 135 F. (2d) 602.
tency of decision and leave the court below on an uncharted sea." The earlier precedent went overboard, nevertheless, and the majority ruled, in an opinion by Mr. Chief Justice Stone, that the shipowner's duty to furnish the seaman with a safe place to work and safe appliances is nondelegable and that he is not relieved from liability merely because the unseaworthiness was attributable to the negligence of a fellow servant in selecting an unsafe appliance. We think Justice Roberts correct in his contention that there was a substantial jettison of earlier precedent, but we are unable to share his concern for the sacrifice. Fellow servant, needless to say, has been an alien importation into the admiralty. It has never been relevant to wages, maintenance and cure. It is excluded under the Jones Act. Its further persistence in limitation of the alternative remedy for injuries due to unseaworthiness would have presented, we think, an unfortunate anomaly. We suggest that the end justified the means.

Passing to decisions under the Jones Act, we find that our period has produced a half dozen cases of considerable interest and importance. In Socony-Vacuum Oil Co. v. Smith the seaman was injured by a fall in the engine room caused by a defective step on which he stood while testing an engine bearing for overheating. He had previously observed and reported the defect in the step. There was testimony that he might have reached the bearing in another way. The trial court instructed that there was no assumption of risk by the seaman where the shipowner had failed in its duty to furnish a safe appliance. The Circuit Court of Appeals for the Second Circuit affirmed a judgment for the seaman and, on certiorari, the Supreme Court affirmed, Justice McReynolds dissenting. Delivering the opinion of the Court, Mr. Chief Justice Stone said: "We think that the consistent development of the maritime law in conformity with its traditional policy of affording adequate protection to seamen through an exaction of a high degree of responsibility of owners for the seaworthiness of vessels and the safety of their appliances will be best served by applying the rule of comparative negligence, rather than that of assumption of risk, to the seaman who makes use of a defec-

69 Smith v. Socony-Vacuum Oil Co. (C. C. A. 2d 1938) 96 F. (2d) 98.
tive appliance knowing that a safe one is available." Left to future cases as they might arise was the question of the rule to apply where the seaman's election to use an unsafe appliance is in disobedience of orders or made while not on duty. The principal issue was novel and its resolution would appear to be in accord with the best admiralty traditions. The rule of comparative negligence and corresponding mitigation of damages would appear to afford the shipowner in such circumstances as much protection as he is fairly entitled to enjoy.

Another Jones Act case, Jacob v. New York City, while of interest chiefly for its revelation of the jealousy with which at least some members of the present Court regard the seaman's right to have every factual doubt resolved by the jury, points up further the shipowner's duty to furnish reasonably safe and suitable simple tools and the application of the admiralty doctrine of comparative negligence, rather than assumption of risk or contributory negligence, when the unsafe tool is selected for use and there is resulting injury.

Like exaction of a high degree of responsibility of owners excludes the fellow servant defense under the Jones Act, even in cases involving the ship's doctor. De Zon v. American President Lines was a seaman's action at law under the Act to recover for the loss of an eye attributed to the negligence of the ship's doctor in treatment and in failing to have the seaman hospitalized ashore. The trial court directed a verdict for the defendant and the Circuit Court of Appeals for the Ninth Circuit affirmed, among other reasons, on the ground that the shipowner's duty to the seaman was discharged by using due care in the selection of a competent physician. On certiorari, the Supreme Court ruled otherwise. "We hold," said Mr. Justice Jackson for the Court, "that the shipowner was liable in damages for harm suffered as the result of any negligence on the part of the ship's doctor." A majority of the Court concluded further that the record disclosed insufficient evidence of the doctor's negligence to require that the case

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70 Socony-Vacuum Co. v. Smith, supra note 68 at 432.
71 (1942) 315 U.S. 752. The trial court had taken the case from the jury in reliance upon the simple tool doctrine and the circuit court of appeals had affirmed in similar reliance. Jacob v. City of New York (C.C.A. 2d 1941) 119 F. (2d) 800. The Supreme Court reversed, opinion by Justice Murphy, Justices Frankfurter and Jackson concurring in the result, Chief Justice Stone and Justices Reed and Roberts dissenting. On the jury aspect, cf. also the dissent in De Zon v. American President Lines, infra note 72.
72 (1943) 318 U.S. 660.
73 De Zon v. American President Lines (C.C.A. 9th 1942) 129 F. (2d) 404.
74 De Zon v. American President Lines, supra note 72 at 669. See Johnson v. United States (1948) 68 Sup. Ct. 391, applying res ipsa loquitur to acts of a fellow servant.
go to the jury and on that ground affirmed. Justices Black, Douglas and Murphy disagreed as to the sufficiency of the evidence and thought that the issue should have gone to the jury. It is not apparent that it would serve any useful purpose to explore this aspect of the case further. There are careful summaries of the evidence, in both majority and dissenting opinions, for those who may wish to read.

With contributory negligence, assumption of risk and fellow servant thus firmly excluded as shipowner’s defenses under the Jones Act, in the instances presented, we may pass to another Jones Act case which resolved a narrower issue but with implications of the broadest significance. *Garrett v. Moore-McCormack Co.* is an injured seaman’s suit in a Pennsylvania court for damages under the Act and for maintenance and cure. The seaman’s written release was set up in defense and there was dispute as to its validity. Under the Pennsylvania rule one who attacks the validity of his written release has the burden of sustaining his allegation by “clear, precise, and indubitable” evidence. Under the maritime practice, on the other hand, treating sailors as wards of admiralty, the burden of sustaining the validity of a release is upon the shipowner who sets it up. In reliance upon the local rule the Pennsylvania court gave judgment for the shipowner, notwithstanding the verdict, and the Supreme Court of Pennsylvania affirmed on the ground that the matter of burden of proof was procedural, not substantive, and was controlled therefore by the local law. On certiorari, the Supreme Court reversed. In a notable opinion for a unanimous Court, Mr. Justice Black pointed out that the admiralty practice is clearly contra to the local rule, that the seaman’s right to be free from the burden of proof imposed by the local rule inheres in his cause of action and is “a part of the very substance of his claim,” that the admiralty rule applies both to actions under the Jones Act and to actions for maintenance and cure, and that the admiralty rule must be applied uniformly throughout the country whether suit is brought in admiralty or in a local court. The “state court was bound to proceed in such manner,” said Mr. Justice Black, “that all the substantial rights of the parties under controlling federal law would be protected.” Further comment on the broader implications of the case is reserved for the topic “Uniformity.”

In another notable opinion of the following year the Court

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77 *Garrett v. Moore-McCormack Co.*, supra note 75 at 245.
achieved a result under the Jones Act comparable in some respects to that achieved in the Aguilar case, *supra*, with respect to maintenance and cure, and disposed of a question with respect to the Act’s application to shoreside injuries which had long bedeviled the lower courts. It may seem strange, in view of the Act’s explicit application to the seaman’s injuries suffered “in the course of his employment,” that there should ever have been a question; but so persistent has been the traditional test of tort jurisdiction, and so restraining its possible constitutional implications, that the issue remained in doubt until the Supreme Court finally found occasion to put it at rest. In *O’Donnell v. Great Lakes Dredge & Dock Co.* the deckhand of a sand ship was sent ashore to assist in repairing a gasket connecting the ship’s discharge conduit with the shoreside pipe and while so employed was injured ashore through the negligence of a fellow servant. Suit under the Jones Act was dismissed by the district court and the judgment in this aspect was affirmed by the Circuit Court of Appeals for the Seventh Circuit. On certiorari, the Supreme Court reversed. Pointing out that the Jones Act made the provisions of the Federal Employers Liability Act expressly applicable in behalf of “any seaman who shall suffer personal injury in the course of his employment,” the Court found nothing in the legislative history to suggest that the words did not mean what they said or that they were intended to be restricted to injuries occurring on navigable waters. The constitutional authority of Congress to provide seamen with a remedy of such scope derived from the commerce power and from the broader power to make laws necessary and proper for carrying into execution the judicial power extended by Article III, Section 2 “to all cases of admiralty and maritime jurisdiction.” Delivering the opinion of a unanimous Court, Mr. Chief Justice Stone said: “The right of recovery in the Jones Act is given to the seaman as such, and, as in the case of maintenance and cure, the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters . . . . Since the subject matter, the seaman’s right to compensation for injuries received in the course of his employment, is one traditionally cognizable in admiralty, the Jones Act, by enlarg-

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ing the remedy, did not go beyond modification of substantive rules of the maritime law well within the scope of the admiralty jurisdiction whether the vessel, plying navigable waters, be engaged in interstate commerce or not. 80 The opinion is a notable contribution to our admiralty jurisprudence in both its legislative and its constitutional aspects. The question as to whether like application might be made, under the anomalous doctrine of the Haverty case, and notwithstanding the Nogueira case, in behalf of the longshoreman temporarily employed in storing cargo on a vessel and similarly injured ashore was expressly reserved. 81

The question thus reserved in the O’Donnell case was presented to the Court in Swanson v. Marra Brothers. 82 While engaged in loading cargo on a vessel lying alongside, a longshoreman was injured on the pier by a life raft which fell from the vessel. After having sought and received compensation under the state employers liability act, he sued his employer, the stevedoring company, under the Jones Act. The district court dismissed and the Circuit Court of Appeals for the Third Circuit affirmed. 83 On certiorari, the Supreme Court affirmed. In the last of a long series of great admiralty opinions, prepared for delivery on what proved to be the day of his death, Mr. Chief Justice Stone pointed out that the Longshoremen’s and Harbor Workers’ Act was enacted within six months after the decision in the Haverty case and that within its coverage it provided a remedy in terms exclusive against the employer. He concluded: “We must take it that the effect of these provisions of the Longshoremen’s Act is to confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters and to substitute for the right of recovery recognized by the Haverty case only such rights to compensation as are given by the Longshoremen’s Act. But since this Act is restricted to compensation for injuries occurring on navigable waters, it excludes from its own terms and from the Jones Act any remedies against the employer for injuries inflicted on shore. The Act leaves the injured employees in such cases to pursue the remedies afforded by the local law, which this Court has often held permits recovery against the employer for

82 (1946) 328 U.S. 1, 34 CALIF. L. REV. 605.
injuries inflicted by land torts on his employees who are not members of the crew of a vessel." There was no dissent.

The problem of the longshoreman was again before the Court at this same sitting and with somewhat extraordinary consequences. The case presented an issue as to whether a longshoreman employed by a contracting stevedore and injured on shipboard could recover from the shipowner for injuries due to unseaworthiness. It is reviewed here for convenience and because of its interest in the light of some of the Jones Act opinions hitherto considered. The case is Seas Shipping Co. v. Sieracki. A longshoreman employed by the independent stevedoring company which was under contract to load the ship sued the shipowner, the contractor who built the ship, and a subcontractor to recover damages for injuries sustained aboard ship in consequence of hidden defects in a shackle supporting the ship's boom and tackle. The courts below agreed that the shipowner was not negligent in failing to test the shackle but were satisfied that the shackle's defects made the ship unseaworthy. The district court gave judgment against contractor and subcontractor but in favor of the shipowner. The Circuit Court of Appeals for the Third Circuit reversed as to the shipowner. On certiorari, the Supreme Court affirmed, Chief Justice Stone and Justices Burton and Frankfurter dissenting. "The nub of real controversy," said Mr. Justice Rutledge for the majority, "lies in the question whether the shipowner's obligation of seaworthiness extends to longshoremen injured while doing the ship's work aboard but employed by an independent stevedoring contractor whom the owner had hired to load or unload the ship." He then proceeded to develop what proved to be the decisive argument that loading and unloading is historically work in the ship's service, performed until recent times by members of the crew, that the shipowner's consent to performance of the service defines the boundaries of his responsibility, that his responsibility is unaffected by the circumstance that under modern conditions consent is given by contract with the longshoreman's employer rather than with the longshoreman himself, and that the responsibility for seaworthiness is noncontractual, nondelegable and "essentially a species of liability without fault." For precedent in

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84 Swanson v. Marra Bros., supra note 82 at 7.
87 Seas Shipping Co. v. Sieracki, supra note 85 at 89.
support, strangely enough, reliance was placed chiefly upon outmoded inferences from the Imbrovek, Haverty and Uravic cases. The contention that the Congress had excluded such inferences by providing exclusive rights of compensation in the Longshoremen's and Harbor Workers' Act was rejected in reliance upon Section 33(a) of the Act reserving to the longshoreman a right to proceed against third persons responsible for his injury. Thus the shipowner became a third person for some purposes but not for others and the majority resolved the nub of controversy in the longshoreman's favor.

In his last dissent, the late Chief Justice incisively and effectively exploded the entire theory of the majority opinion. He pointed out that longshoremen and harbor workers are in a class very different from those who actually sail our ships, that the Congress after extensive consideration and reconsideration had clearly recognized the difference in legislation enacted, that in the Longshoremen's Act it had expressly taken from such workers the right extended to them by judicial construction of the Jones Act in the Haverty and Uravic cases, that in the same statute it had given them rights to compensation against their employers for injuries inflicted without fault, and that under the instant decision they might now have even ampler rights of recovery than seamen as a class. "The Court has thus created," said Chief Justice Stone, "a new right in maritime workers, not members of the crew of a vessel, which has not hitherto been recognized by the maritime law or by any statute." There are no considerations of policy or practical need," he said, "which should lead us, by judicial fiat, to do that which Congress, after a full study of the subject, has failed to do . . . . There would seem to be no occasion for us to be more generous than Congress has been by presenting to them paid-up accident insurance policies at the expense of a vessel by which they have not been employed, and which has not failed in any duty of due care toward them." The ghost of Haverty is back, notwithstanding, and once again confusion in this troubled area is doubly confounded. Add some semantics and a bit of flippancy—and who shall say that either is unwarranted—and the matter of indemnity for personal injury in the maritime industry, long since become confused enough at best,

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90 Seas Shipping Co. v. Sieracki, supra note 85 at 103.
91 Id. at 106-107.
92 See (1947) 57 Yale L. J. 243, 253, 263.
becomes the industry's nightmare and the lawyer's paradise. We shall hear more of Sieracki, we suspect, in the years to come.

There remain cases to be considered under this topic in which the principal difficulties stem from the circumstance that the ship belongs to the United States but is being operated for the United States by a private company as operating agent. Suggestion of the pervasive importance of this relationship in recent years would be superfluous. It is well known that most of our vastly expanded merchant fleet has been so owned and operated. What of the seaman's remedies in such circumstances? On the one hand, there are problems involving the remedies provided by statute against the Government. Those we shall consider later, though proper classification is not always easily determined, under the topic "Government Immunity." On the other hand, there are problems involving the remedies of seamen and indeed of other maritime workers against the private company operating under an agency agreement. These we shall consider here.

We turn first to Hust v. Moore-McCormack Lines93 in which the seaman was injured aboard a Liberty ship owned by the United States and operated for it by the defending company as agent under an agreement with the War Shipping Administration. The accident occurred in March of 1943 one week before the effective date of the so-called Clarification Act94 and two months after the Supreme Court's decision in Brady v. Roosevelt Steamship Co.95 had overruled the Lustgarten case and held the operating agent of a government-owned merchantman liable for his torts notwithstanding his relation to the Government as principal and the exclusive remedy against the Government which was provided by the Suits in Admiralty Act.96 The seaman sued for damages under the Jones Act in an Oregon court where trial before a jury won him a verdict and judgment on the verdict. The Supreme Court of Oregon reversed on the ground that the seaman was an employee of the United States and as such not entitled to Jones Act recovery against the operating agent.97 On certiorari, the Supreme Court reversed, four to three, without Justice Jackson's participation, Justices Reed, Burton and Frankfurter dissenting. The dissent viewed the agreement as a conventional agency contract under which the

93 (1946) 328 U. S. 707.
94 (1943) 57 Stat. 45.
95 (1943) 317 U. S. 575.
Government became the employer and the seaman entitled only to his exclusive remedy against the Government under the Suits in Admiralty Act. It found nothing in the *Brady* case relevant to the seaman's right against his employer under the Jones Act, disagreed sharply as to the import of the Clarification Act, and declined to regard the operating agent as in any respect an owner *pro hac vice*. Rejecting these contentions, the majority concluded that the seaman's right to sue the operating agent under the Jones Act, with trial by jury, had been saved. It was conceded that he might be technically a government employee. It was insisted notwithstanding, and although the question had not been previously decided by the Supreme Court, that his rights under the Jones Act were within the principle announced in the *Brady* decision. To rule otherwise now, said Mr. Justice Rutledge for the majority, would be to sweep the various rights of seamen for the period of Government ownership and control into the "one hopper" provided by the Suits in Admiralty Act. The consequence would inevitably be complexity, uncertainty and confusion, with extensive loss of valuable seamen's remedies. It was not to be presumed that Congress or the Executive had intended such a result. The legislative history of the later Clarification Act, while admittedly amorphous, was thought to lend some support to the conclusion that Congress had no such intention. In its retroactive provisions, in any event, this Act was designed to conserve the seaman's remedies and among them his remedy under the Jones Act. Clearly, thought Mr. Justice Rutledge, the case was not to be controlled by common law rules of private agency. The further argument that the operating agent was to all intents and purposes an owner *pro hac vice* and responsible as such was contributed in a concurring opinion by Justice Douglas with whom Justice Black agreed.

It seems always to be in the sequence of the Court's sorrows that the momentary calm following the disposition of a sailor's case is succeeded by the tempest of a longshoreman's claim to more or less comparable relief. So it was, in any event, in the year after the *Hust* decision. The longshoreman's case is reviewed here, though it may belong logically under the topic "Maritime Torts" or elsewhere, because of its relation to the problem which the *Hust* case presented. In *Caldarola v. Eckert* a longshoreman employed by a stevedoring concern having a contract with the War Shipping Administration was

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injured on shipboard by a defective boom, as he alleged, while unloading a vessel owned by the United States and managed for it by private operators under the usual standard form agreement. In this instance the longshoreman elected to sue the operators for damages for tort in a New York court. The New York Court of Appeals, affirming the Appellate Division in setting aside a verdict for the longshoreman, held that under New York law the relation which the operating agents bore to the vessel did not make them responsible to a third person for its condition.\(^9\) On certiorari, Chief Justice Vinson having meanwhile succeeded the late Chief Justice Stone and Justice Jackson having returned to the bench, the Supreme Court affirmed, Justices Black, Douglas, Murphy and Rutledge dissenting. The Hust case was distinguished as arising under the Jones Act and the Brady case as going no further than to hold that the Suits in Admiralty Act had not freed the agent from liability for his own torts. It was not doubted that Caldarola could have proceeded against the United States under the Suits in Admiralty Act or that the tort was maritime. Since he had elected to proceed in New York under the saving clause, however, presumably to obtain the benefit of trial by jury, Mr. Justice Frankfurter for the majority thought that he had presented an issue as to whether a cause of action against the agents could be established under New York law. Conceding that construction of the contract between the United States and its agents was matter of federal law, it was insisted that the contract did not admit of a construction which could properly support liability under the New York law. Whether the question was one of right or remedy under the local law, it was said, after sampling an odd miscellany of leading cases, is “a question on which the authorities do not speak with clarity.” “In any event,” Mr. Justice Frankfurter continued, “whether New York is the source of the right or merely affords the means for enforcing it, her determination is decisive that there is no remedy in its courts for such a business invitee against one who has no control and possession of premises . . . . In so far as the issues in this case exclusively concern New York law, that court had the final say in holding that one in the relation of the respondents to the petitioner is not liable for the tort of which the latter complains.”\(^10\)

There were two dissenting opinions. One by Justice Douglas, with

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\(^10\) Caldarola v. Eckert, supra note 98 at 158.
whom Justices Black and Murphy concurred, relied chiefly upon the argument previously advanced in the *Hust* case that the private operator under agreement with the Government was to all intents and purposes an owner *pro hac vice* and liable as such. It was thought plain that the United States was merely the underwriter of financial risks and that the private operator performed managerial functions in the usual way. Since important private rights were involved, it was no answer that the Government might be inconvenienced as the majority opinion had suggested. "It is shocking," said Justice Douglas, "to find private operators getting immunity in this manner from their traditional liability for tort claims." 101 Another by Justice Rutledge was rested squarely upon the broader and firmer ground that "the liability here, since it arises from a maritime tort, is a creature of federal law in its entirety, not of state law." "If the liability here is founded in federal law, as creating the maritime tort," said Justice Rutledge, "then New York law has nothing to do with creating or nullifying the substantive right. Its sole function is to supply the remedy commanded by § 9 of the Judiciary Act." 102 It was clear in his view that federal law should not permit the result reached by the majority and that the terms of the operating agreement contemplated the liability of the agent in just such a case as this.

While we are somewhat less than impressed with the semantics of Justice Douglas' dissent, we sense in it an undercurrent of deeper and more persuasive argument not basically different from that of Justice Rutledge. In any case, finding no excuse for the confused evasions of the majority opinion, we venture to think Justice Rutledge clearly correct. With all deference, we suggest that there are modern authorities, at least, which speak with considerable clarity in his support. Reference may be made to cases in the *Jensen* line, in their substantive and less controverted aspect, and to the *Garrett* case, to mention only those which we have had occasion to note in this paper. Surely it is no part of the judicial function to perpetuate confusion where the way to clarity is indicated. If Caldarola's problems were not matters to be resolved under the national maritime law, whatever the forum, then that law is indeed a thing of shreds and patches. For obvious reasons, we shall recur again to *Caldarola* under the topic "Uniformity".

We shall conclude our review of decisions affecting "Seamen's

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101 *Id.* at 161.
102 *Id.* at 164.
Remedies," which we have not been able to confine always to seamen's cases, with note of a case standing somewhat apart but considered as appropriately here as anywhere. When are striking seamen guilty of mutiny? Southern Steamship Co. v. National Labor Relations Board\textsuperscript{103} was taken up on certiorari to the Circuit Court of Appeals for the Third Circuit to review a judgment enforcing the Board's reinstatement order.\textsuperscript{104} The employer had indulged in an unfair labor practice, there had been a strike, and several men had been discharged for participating therein. Our present interest arises from the circumstance that the strike was by seamen, on board their vessel, and while the vessel was away from her home port and docked in another port of this country. It was contended for the shipowner that the strike was mutiny, in violation of Sections 292 and 293 of the Criminal Code,\textsuperscript{105} and this contention the Supreme Court upheld. "There is no doubt," said Mr. Justice Byrnes, "that they undertook to impose their will upon the captain and officers." A distinction argued between strikes at sea and at dock found no support in the statute, which was comprehensive in its coverage. The Congressional mandate was plain. "If this mandate is to be changed," it was observed, "it must be changed by Congress, and not by the Courts."\textsuperscript{106} Note was taken of the circumstance that measures recently introduced to effect a change had not been enacted. "When the legislative purpose is so plain," Mr. Justice Byrnes concluded, "we cannot assume to do that which Congress has refused to do."\textsuperscript{107} Justice Reed dissented, Justices Black, Douglas and Murphy concurring, but on the narrower ground that since the strikers were actually discharged for their union activity the Board had a discretionary authority to order their reinstatement. The conclusion that the strike was mutiny was not challenged. Thus the arguments which persuaded the circuit court of appeals are arguments which should be addressed to the Congress and not to courts. Meanwhile, when seamen strike, at least in another than the ship's home port, their conduct is within the plain prohibitions of the mutiny statute.

\textsuperscript{104} Southern S. S. Co. v. National Labor Relations Board (C. C. A. 3d 1941) 120 F. (2d) 505, 19 N. Y. U. L. Q. Rev. 76.
\textsuperscript{105} (1909) 35 STAT. 1146, 18 U. S. C. §§ 483, 484 (1940).
\textsuperscript{106} Southern S. S. Co. v. Labor Board, supra note 103 at 43.
\textsuperscript{107} Id. at 44.
We may now find some respite in passing to the less litigious subject matter of maritime contracts. The Supreme Court has had slight occasion in the period under review either to return to the problems of contract which have required its consideration in earlier periods or to give attention to other questions in this category which may remain in doubt until it has spoken. It has disposed briefly of the contention that an indemnity provision in a stevedoring contract is non-maritime and without the jurisdiction of the admiralty. *American Stevedores, Inc. v. Porello* is of importance chiefly for its interpretation of the Public Vessels Act of 1925 and will be considered under the topic "Government Immunity." A longshoreman injured aboard a public vessel had libeled the United States under the Act and the United States had impleaded its contracting stevedore in reliance upon an indemnity provision in the agreement. The Circuit Court of Appeals for the Second Circuit had held the stevedore bound to make full indemnity to the United States. It was argued for the stevedore, *inter alia*, that the indemnity provision was non-maritime and without the jurisdiction. This argument the Supreme Court, on certiorari, rejected. Said Mr. Justice Reed for the Court: "To sever a contract provision for indemnity for damages arising out of the performance of wholly maritime activities would only needlessly multiply litigation. Such a provision is a normal clause in contracts to act for others and no more determines the nature of a contract than do conditions on the time and place of payment."

In addition to the above, the Court has had one case under the United States Arbitration Act of 1925 which may be appropriately considered under this heading. It will be recalled that the Act makes contracts for the arbitration of disputed maritime transactions specifically enforceable in admiralty, with certain exceptions, and that

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109 (1947) 330 U. S. 446.


process in rem is available in arbitration proceedings in conformity with the usual conditions prescribed by admiralty practice. In *The Anaconda v. American Sugar Refining Co.*, the owner had chartered the barge "Anaconda" to the American Sugar Refining Co. for a voyage from Cuba to a Florida port. The charter party provided for arbitration pursuant to the federal statute, "except that the provisions of Section 8 thereof shall not apply to any arbitration hereunder." Section 8 provides that the aggrieved party, if the cause be one in admiralty, may begin "by libel and seizure of the vessel ... according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award." The aggrieved party so began, notwithstanding the exception in the arbitration agreement, and the owner objected to the jurisdiction in reliance upon the agreed exception. The Supreme Court held, affirming the circuit court of appeals which had reversed the district court, that the parties to such an arbitration agreement may not stipulate away the jurisdiction which the legislation has declared open as heretofore. Mr. Justice Roberts for a unanimous Court said: "Congress may have thought it wise not to raise doubts under the admiralty clause of the Constitution. It may have thought that in many causes in admiralty if the aggrieved party could not seize the ship of his opponent, an arbitral award would be wholly unenforceable as the vessel might seldom or never again be within the jurisdiction of our courts. But, whatever its reasons, Congress plainly and emphatically declared that although the parties had agreed to arbitrate, the traditional admiralty procedure with its concomitant security should be available to the aggrieved party without in any way lessening his obligation to arbitrate his grievance rather than litigate the merits in court. It is enough that Congress has so declared." In the result and within the scope of the ruling, those who would arbitrate must take the Act as it is and not with jurisdictional exclusions of their own making. Though brief and to the point, the opinion may also imply warning against other tamperings with the statutory scheme which the desires of parties or the ingenuity of counsel may suggest.

113 (1944) 322 U. S. 42.


The Supreme Court has had one occasion in the same period to return to the lien problem and to clarify matters hitherto in doubt with respect to the application of the Lien Act of 1910 as amended in 1920.116 The case was *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co. of California.*117 The Oil Co. had a contract with a concern which we may call for convenience the Shipping Co. whereby Oil Co. agreed to sell fuel oil to any vessel “owned, chartered and/or operated” by the latter. Thereafter Shipping Co. chartered the two vessels involved on time charters, on the so-called “Government form,” owners to provide and provision captain and crew and maintain vessels in an efficient condition, charterers to provide and pay for fuel, charges, etc., and the captain to be “under the orders and direction of the charterers as regards employment or agency.” The charters contained no prohibition against the creation of liens for necessary supplies ordered by the charterers. Oil Co. libeled the vessels for fuel oil supplied on the charterers’ orders and the owners appeared and answered that the oil was furnished on the charterers’ credit. The district court sustained the liens. The circuit court of appeals, following earlier decisions in the Ninth Circuit,118 affirmed. On certiorari, the Supreme Court affirmed. Under the Lien Act, said the Court, if supplies are furnished to a vessel, “it is not necessary to allege or prove that credit was given to the vessel.”119 The mere fact that the charterers were required to provide and pay for the supplies “did not prevent the liens from attaching.”120 Nor were the liens defeated by the circumstance that the furnishing was pursuant to a general contract, the fuel having been supplied exclusively for the vessels, delivered directly to them, and so invoiced.122 Nor were they defeated

117 (1940) 310 U. S. 268.
120 Dampskibsselskabet v. Oil Co., supra note 117 at 273.
121 Id. at 276.
122 Ibid.; Piedmont Coal Co. v. Seaboard Fisheries Co. (1920) 254 U. S. 1, in which the contract was to supply such coal as a company owning both ships and factories might require, was distinguished.
by the nature of the charter parties and the fact that the owners furnished master and crew and were responsible for the maintenance of the vessels and their navigation. Speaking for a unanimous Court, Mr. Chief Justice Hughes said: "Where, as in this case, apart from mere navigation, the vessel is placed under the direction and control of the charterer as the hirer of the vessel, who as such may determine to what port she shall go and what she shall carry, subject only to specified exceptions, we think the charterer must be deemed to be intrusted with the vessel's management for the purpose of applying the statutory test of authority to obtain necessary supplies upon the credit of the vessel, in the absence of a provision to the contrary."\[123\]

The opinion in the case is a model of compact and illuminating analysis of the import and effect of applicable provisions of the Lien Act. It should serve to dispel many of the uncertainties which have hitherto prevailed with respect to the effect of the charterer's undertaking to provide and pay for supplies, the effect of supply pursuant to a general contract to supply a fleet, and the import of that intermediate class of charters, called time charters, which may combine features of both the demise and the affreightment agreement.

VIII

MARITIME CARRIERS

Under the Shipping Act of 1916 as amended,\[124\] water carriers are now subject to the regulatory authority of the United States Maritime Commission.\[125\] There have been some interesting borderline questions with respect to the scope of the Commission's authority. In California v. United States,\[126\] the Commission found that terminal operators along the commercial waterfront in the Port of San Francisco were engaged in preferential and unreasonable practices in the form of excessive free time and non-compensatory charges, ordered the cessation of such practices, and prescribed schedules of maximum free time and minimum charges. The State of California and the City of Oakland as terminal operators instituted proceedings to set aside the order. A district court of three judges denied relief.\[127\] On direct appeals, the Supreme Court affirmed, Justices Roberts, Black, Douglas

\[123\] Dampskibsselskabet v. Oil Co., supra note 117 at 279-280.


\[125\] ROBINSON, ADMIRALTY (1939) 468 et seq.

\[126\] (1944) 320 U.S. 577.

and Murphy dissenting. Conceding that the Commission had broad rate-making authority only with respect to common carriers by water, and that neither the State of California nor the City of Oakland were in that category, the Court's majority rested its decision upon the Commission's authority to order just and reasonable "regulations or practices." Dissenting justices, on the other hand, read the statute as giving no authority to regulate wharfingers' rates, nor did they think that such authority could be derived from statutory provisions aimed at unreasonable "regulations or practices." As the case stands decided, the Commission may now require wharfingers to make compensatory charges for the handling of ship cargoes, minimum conditions and charges may be prescribed, and public no less than private wharfingers may be brought within the regulatory regime.

In another case in which the scope of the regulatory scheme was again in issue, United States v. American Union Transport, Inc.,128 the Court has held, three justices dissenting, that independent freight forwarders engaged in forwarding for transshipment by common carriers by water are "carrying on the business of forwarding... in connection with a common carrier by water," within the coverage of Section 1 of the Shipping Act, and are therefore subject to the Act's regulatory provisions. Speaking for the majority in this instance, Mr. Justice Rutledge relied upon the broad and literal wording of the definition, the policy implicit in the scheme of regulation, the legislative history, and the decision in California v. United States, supra. Rejecting the dissenting argument that "in connection with" meant "so closely tied to the business of the water carrier, by corporate, financial, or physical union, as to make regulation of them appropriate in order to control effectively the carriers with which they are affiliated,"129 the Court again gave broad scope to the regulatory scheme. It may be suggested that the conclusion of the majority was not only supported by the considerations upon which the opinion relied but that the decision happily denies invitation to what might otherwise have been a litigious and costly determination of the meaning of "so

128 (1946) 327 U. S. 437. The case was taken to the Supreme Court on direct appeal from the decision of a district court of three judges (American Union Transport v. United States (S. D. N. Y. 1944) 55 F. Supp. 682) enjoining enforcement of an order of the Maritime Commission entered pursuant to § 21 of the Shipping Act and requiring answers to a questionnaire concerning forwarding operations. The decision of the district court was reversed.

129 The dissenting opinion was written by Justice Frankfurter, with whom Justices Black and Douglas concurred. Justice Jackson took no part in the case.
closely tied." Had the dissenters' formula prevailed, we may be sure that the ingenuity of counsel would have proceeded promptly to test its scope and import through devices in varying combinations. While conceding that recoil from such a consequence is no reason for mis-interpreting a statute, it may be suggested that it is at least a fortunate by-product of an interpretation otherwise well supported.

Other cases within the scope of this topic are a miscellany, though one or two may be of more than passing interest to the shipping trade. *Smith v. The Ferncliff*\(^{130}\) came to the Court on questions certified from the Fourth Circuit\(^{131}\) where the circuit court of appeals was in doubt as to the import of an earlier Supreme Court decision holding invalid as against policy a bill of lading clause which provided that "in the event of claims for loss, damage or short delivery the same shall be adjusted on the basis of the invoice value of the entire shipment adding expenses necessarily incurred."\(^{132}\) In the instant case the bill of lading contained a clause providing that shipper's claims should be adjusted "on the value declared by the shipper or on the net invoice cost plus disbursements, whichever shall be least." There was no choice of rates and no value was declared. The Supreme Court distinguished its earlier decision and sustained the clause as a valuation clause rather than a limitation agreement. It held further that damages should be computed by deducting the value of the goods in their damaged condition at delivery from the invoice cost valuation.

*Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo*\(^{133}\) brought to the Court, for the first time, curiously enough, the question whether the Fire Statute\(^{134}\) extinguishes claims against the ship as well as against the owner. It was contended that because the contracts were signed "for master" they became ship's contracts and that the ship was bound to the cargo though the owner might be freed. The Circuit Court of Appeals for the Second Circuit had rejected the contention\(^{135}\) and had taken a position in apparent conflict with views expressed in the Fifth Circuit.\(^{136}\) The Supreme Court affirmed. The

\(^{130}\) (1939) 306 U. S. 444.
\(^{131}\) The questions were certified in a case on appeal from the decision of the district court in *The Ferncliff* (D. Md. 1938) 22 F. Supp. 728.
\(^{133}\) (1943) 320 U. S. 249.
\(^{135}\) Consumers Import Co. v. Kawasaki Kisen Kabushiki Kaisha (C. C. A. 2d 1943) 133 F. (2d) 781.
argument that the ship might be liable though the owner were not, had been advanced in a proceeding for limitation of liability many years before and had been dismissed as "talking in riddles." Speaking for a unanimous Court in the instant case, Mr. Justice Jackson remarked that "the riddle after more than half a century repeated to us in different context does not appear to have improved with age." "There could be no practical exoneration of the owner," he observed, "that did not at the same time exempt his property." Accordingly he concluded that "any maritime liens for claimants' cargo damage are extinguished by the Fire Statute."

A final case under this topic may have broader implications, particularly for those who trust their goods to private carriers. The case was a proceeding by a barge owner for limitation of liability and the question was whether a sole shipper had established its claim. The barge sank in smooth water while molasses was being pumped aboard. The shipper relied upon a presumption of unseaworthiness. The owner attributed the sinking to an overloading of the after tanks resulting from the mate's delay in shifting the flow forward. The circuit court of appeals affirmed a judgment dismissing the shipper's claim on the ground that the presumption of unseaworthiness did not survive the owner's further proof which left the issue of cause in doubt. There was thus presented neatly an issue as to who had the burden of proof. In Commercial Molasses Corp. v. New York Tank Barge Corp., the Supreme Court held, Justices Black, Byrnes, Douglas and Murphy dissenting, that the burden was on the shipper. The dissenting justices would have no part in a distinction between public and private carriers, thought that both should be treated alike, and considered The Edwin I. Morrison controlling. The majority distinguished The Edwin I. Morrison as a case in which the obligations of a public carrier had been assumed, placed the burden of proof squarely upon those who ship by private carrier, and denied that the burden could be shifted to the carrier by a permissible inference from an unexplained sinking. The inference may require the owner to produce an explana-

137 The City of Norwich (1886) 118 U. S. 468, 502-503.
138 Consumers Co. v. Kabushiki Kaisha, supra note 133 at 253.
139 Id. at 254.
140 Id. at 256.
143 (1884) 153 U. S. 199.
tion, said Mr. Chief Justice Stone, but the shipper on whom the burden continues to rest “must do more than create a doubt which the trier of fact is unable to resolve.” The shipper, having thus failed to sustain his burden of proof, recovered nothing for his lost molasses.

IX

COLLISION

Two cases involving collision law have been taken to the court of last resort in the past decade. In one there was resolved an important issue of assumed conflict between the Inland Rules and local rules which had long plagued the courts of the Second Circuit. In the other a less than literal though clearly sensible interpretation was given the statute which makes it unlawful “to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft.” In each instance the decision was by a unanimous Court.

In the first, reported as Postal Steamship Corp. v. El Isleo, it appeared that the steamer “El Isleo” was Baltimore bound up the main Fort McHenry Channel on a clear night when the steamer “Eastern Glade” came out of a tributary channel on the port side intending to turn left into the same channel on a course likewise Baltimore bound. The “Eastern Glade” sounded two blasts to indicate that her course was to the left and up the Fort McHenry Channel. The “El Isleo” responded with an alarm and one blast to indicate that as the privileged vessel she was keeping her course and speed. As too often happens in such situations, the vessels collided. The district court viewed the case as one of crossing courses under Inland Rules, Articles 19-23, found the “Eastern Glade” solely at fault, and assessed damages accordingly. The circuit court of appeals affirmed. In so resolving the case the circuit court of appeals reasoned that the “El Isleo” was under a duty imposed by Article 21 of the Inland Rules to keep her course and speed and that she properly announced her determination to insist by crossing the first signal. This reasoning took no account of Article 27 of the Inland Rules which provides that “in obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances

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145 (1940) 308 U. S. 378.
which may render a departure from the above rules necessary in order to avoid immediate danger.” Moreover it disregarded as in conflict and invalid the local rules of the Board of Supervising Inspectors which forbade “cross signals” and required that in situations precluding an immediate compliance with each other’s signals “the misunderstanding or objection shall be at once made apparent by blowing the danger signal, and both steam vessels shall be stopped and backed if necessary, until signals for passing with safety are made and understood.” The same reasoning had been soundly criticized by the circuit court of appeals in one of its earlier cases, but was thought in the instant case to have become “too firmly established to be departed from until the Supreme Court speaks.” Speaking in the instant case, the Supreme Court reversed and remanded free of the assumed compulsion of former decisions. Articles 19-23 of the Inland Rules, said Mr. Chief Justice Hughes for the Court, are to be read in the light of Article 27. The local rules are to be construed in the light of the same Article and so construed are valid. The so-called privileged vessel has no absolute right to keep her course and speed regardless of the dangers involved. The following observations of the circuit court in another of its earlier cases were thought to be pertinent: “It is a hard rule which requires a master when he sees another vessel about to cross his bow with wanton disregard of his rights to stop and allow the arrogant usurper to pursue his wrongful course. But safety is better than pride; and however slight the hope that rules to promote safety will be observed under such circumstances, whatever courts may say, the vessels must be judged according to their legal duties.”

In the second case, Atlantic Refining Co. v. Moller, the tanker “Bohemian Club” proceeding northward up the Delaware River encountered dense fog and dropped anchor. When the fog lifted slightly, the master discovered that he was in danger of fouling a buoy. Accordingly he lifted anchor and proceeded to maneuver away from the buoy. Within a few minutes the fog closed in again and the vessel was again anchored, this time, apparently because she had been carried by the tide, a little inside the channel used by southbound vessels. There remained ample room for southbound vessels to pass, the fog bell was rung in compliance with statutory requirements, and lookouts were

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147 The Fulton (C. C. A. 2d 1931) 54 F. (2d) 467.
148 The Eastern Glade, supra note 146 at 6.
149 Postal S. S. Corp. v. El Isleo, supra note 145 at 388, quoting from Judge Swan’s opinion in The Quogue (C. C. A. 2d 1931) 47 F. (2d) 873.
stationed. Despite these precautions the "Bohemian Club" was struck at anchor by the "Laura Maersk" southbound and moving at an unreasonable speed. The circuit court of appeals found statutory negligence on the part of the "Bohemian Club" and ordered a division of damages. Curiously enough, the circuit court thought the initial anchoring in the northbound channel lawful in the circumstances but held the subsequent anchoring in the southbound channel in violation of Section 15 of the Act of March 3, 1899, quoted above. On certiorari, the Supreme Court reversed. The district court had found that in anchoring in the southbound channel the "Bohemian Club" had taken "the least dangerous course" and this finding was not disturbed by the circuit court. "Under a proper construction of § 15," said Mr. Justice Black for the Supreme Court, "the circumstances which necessitated both the first and second anchorings of the "Bohemian Club" were equally sufficient to warrant an exception to the duty which it requires." The command of Section 15 is not absolute. "An exception to the duty required by this section has been recognized where literal compliance with its terms would create a danger to navigation which could be avoided or reduced by violation of its terms." An opposite construction, as a practical matter, would defeat the plain purpose of the statute and would in addition be out of harmony with Article 27 of the Inland Rules.

X

LIMITATION OF LIABILITY

There has been little to say of liability limitation as such in the period of our present concern. In Just v. Chambers, holding that the local survivorship statute may be applied in admiralty to save a right to recover against the estate of the deceased tortfeasor for local maritime injuries, the Court took occasion to reiterate the familiar propositions that the statutory provision for limitation of liability looks to a complete disposition of what may be a "many cornered controversy," thus applying to proceedings in rem against the ship as well as to proceedings in personam against the owner, that it is applicable in cases of personal injury or death as well as in cases of injury to property, and that when the jurisdiction of the admiralty court has

151 The Bohemian Club (C. C. A. 3d 1943) 134 F. (2d) 1000.
153 Atlantic Refining Co. v. Moller, supra note 150 at 467.
154 Id. at 466.
155 (1941) 312 U. S. 383.
once attached through a petition for limitation it is not lost merely because the shipowner fails to establish his right to limitation but enables the court to marshal all claims, whether of strictly admiralty origin or not, and to give effect to them by apportionment of the res and by judgment in personam against the owner as the court may decree. There is thus jurisdiction to achieve the equitable result through use of the injunction or otherwise and to furnish a complete remedy though limitation is refused.\textsuperscript{156} \textit{Commercial Molasses Corp. v. New York Tank Barge Corp.}, discussed \textit{supra},\textsuperscript{157} was also a limitation proceeding, but the sole issue concerned the permissible inference from an unexplained sinking and the shipper’s burden of proof.

These cases aside, we are left with one instance and one only in which the issue presented was squarely within the scope of the limitation statute. The case is \textit{Coryell v. Phipps}\.\textsuperscript{158} While the owner’s yacht was in storage, and notwithstanding inspections by competent men who found nothing wrong with her, there was an explosion of gasoline fumes in the engine room followed by fire which spread to and destroyed libelants’ vessels afloat in the same storage basin. Libelants sued in admiralty for damages and the owner responded by setting up the defense of limitation of liability. The district court allowed limitation and the circuit court of appeals affirmed.\textsuperscript{159} Since both courts below had found lack of privity or knowledge, the libelants were left upon certiorari with little more than an argument resting upon the theory of imputed negligence. This argument the Supreme Court rejected. “In the case of individual owners,” said Mr. Justice Douglas for a unanimous Court, “it has been commonly held or declared that privity as used in the statute means some personal participation of the owner in the fault or negligence which caused or contributed to the loss or injury.”\textsuperscript{160} Even if it were to be assumed without deciding that there may be circumstances in which privity is constructive rather than actual,\textsuperscript{161} there was no case for recourse to such a premise in the present record. Mr. Justice Douglas concluded: “One who selects competent men to store and inspect a vessel and who is not on notice as to the existence of any defect in it cannot be denied

\textsuperscript{156} Id. at 385-387.
\textsuperscript{157} \textit{Supra} p. 203.
\textsuperscript{158} (1943) 317 U. S. 406.
\textsuperscript{159} \textit{Coryell v. Phipps} (C. C. A. 5th 1942) 128 F. (2d) 702.
\textsuperscript{160} \textit{Coryell v. Phipps, supra} note 158 at 411.
the benefit of the limitation as respects a loss incurred by an explosion during the period of storage, unless 'privity' or 'knowledge' are to become empty words. If § 4283 does not give protection to the individual owner in these circumstances, it is difficult to imagine when it would."\(^{162}\)

XI

GOVERNMENT IMMUNITY

The principles of sovereign immunity and their statutory modifications have become of increasing importance of late, as governments have extended their activities in the maritime carrying trade, and this importance continues to be reflected in the nature and number of the cases which reach the court of last resort. We find in the period under review two cases arising under the Suits in Admiralty Act of 1920, two arising under the Public Vessels Act of 1925, and two involving the immunities which are to be accorded the ships of a friendly foreign sovereign.

The first of our cases has clarified an odd bit of confusion stemming from a sequence of statutory enactments of common purpose but superficially inconsistent provisions. Section 9 of the Shipping Act of 1916\(^{163}\) permitted the enforcement of tort liens against government vessels and contained no provision as to the time within which suits must be brought. The Suits in Admiralty Act of 1920\(^{164}\) restored the immunity of such vessels from in rem arrest, authorized libels in personam against the government, authorized government intervention and assumption of liability where the vessel had been subsequently transferred to private ownership, and included a two-year limitation provision. The provision of Section 9 of the Act of 1916 was carried forward and became a part of Section 18 of the Merchant Marine Act of 1920\(^{165}\) passed three months after the enactment of the Suits in Admiralty Act of the same year. In *Clyde-Mallory Lines v. The Eglantine*\(^{166}\) a libel in rem for collision damages was filed four and a half years after the collision, after the vessel had been sold to a private operator, and the government intervened and pleaded the limitation provision of the Suits in Admiralty Act. The libellant relied upon Section 9 of the Act of 1916 as amended. The district court ruled

\(^{162}\) Coryell v. Phipps, *supra* note 158 at 412.
\(^{164}\) (1920) 41 STAT. 525, 46 U.S.C. §§ 741-752 (1940).
\(^{165}\) (1920) 41 STAT. 994, 46 U.S.C. § 808 (1940).
\(^{166}\) (1943) 317 U.S. 395.
against the government and the circuit court of appeals reversed. On certiorari, the Supreme Court affirmed. Speaking for a unanimous Court, Mr. Justice Black was clear that the Suits in Admiralty Act "prescribes a comprehensive procedural pattern." Nor was there practical difference "between suits against the government as owner of the vessel and against the government as the party in interest when it voluntarily appears to defend its lately sold property against tort liability." It was charitably suggested that the Congress, in passing the Merchant Marine Act, did not "have its attention focused on this particular problem." The opinion concludes: "We hold that when the government voluntarily appears in an action authorized by § 4 of the Suits in Admiralty Act, the proceedings are governed by § 5 with its limitation provisions."  

The second of our cases under this heading is of interest both as another instance in which the present Court has repudiated earlier precedents and as a case of somewhat broader interest to the shipping fraternity. The case is Brady v. Roosevelt Steamship Co. A customs inspector suffered fatal injuries in a fall from the ladder of a merchant ship which he was boarding in the performance of his official duties. The ship belonged to the United States Maritime Commission but was being operated by a private company as the Commission's managing agent under a contract authorized by Section 707 (c) of the Merchant Marine Act of 1936. The administratrix sued the managing agent in a state court and the suit was removed to the district court of the United States. In a comparable situation the Supreme Court had previously held that the United States was the real party affected, since money to pay the judgment would come from the United States in any event, and that the libel in personam against the United States authorized by the Suits in Admiralty Act was the exclusive remedy. In the instant case, on appeal from a judgment in favor of the administratrix, the circuit court of appeals followed the earlier Supreme Court decision and reversed, one judge dissenting. On certiorari, the Supreme Court repudiated its earlier decision and reversed the

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168 Clyde-Mallory Lines v. Eglantine, supra note 166 at 398, 399.
169 (1943) 317 U.S. 575.
171 Johnson v. Fleet Corporation (1930) 280 U. S. 320. The case of Lustgarten, one of four reported under this title, was the case in point.
circuit court of appeals. It was agreed that the tort was maritime and assumed that the plaintiff could have sued the United States under the Suits in Admiralty Act. But it was denied that this Act afforded the plaintiff in such situations her only remedy. The agent is liable for his own torts, said Mr. Justice Douglas speaking for a unanimous Court, and "such a basic change in one of the fundamentals of the law of agency should hardly be left to conjecture."\textsuperscript{173} On the other hand, the principal is not liable for every tort of the agent and there may be situations in which, if the agent is not liable, no one would be. "We can only conclude," said Mr. Justice Douglas, "that if Congress had intended to make such an inroad on the rights of claimants it would have said so in unambiguous terms.\textsuperscript{174} Nor could the result be affected by the circumstance that the managing agent might be entitled under its contract to reimbursement from the United States. "The rights of principal and agent \textit{inter se} are not the measure of the rights of third persons against either of them for their torts.\textsuperscript{175}"\textsuperscript{175} It was held that the Suits in Admiralty Act did not deprive the injured party of her right to sue the agent for the maritime tort and that the earlier case, in so far as it pointed to a contrary conclusion, must be considered as no longer controlling.

Our third case arose under the Public Vessels Act of 1925\textsuperscript{176} and resolved questions of interpretation of considerable importance. Section 1 of the Act provides in part that "a libel in personam in admiralty may be brought against the United States . . . for damages caused by a public vessel of the United States" and there is a clause in Section 2 to the effect that "suits shall be subject to and proceed in accordance with the provisions" of the Suits in Admiralty Act "in so far as the same are not inconsistent" with the provisions of the principal statute. In \textit{Canadian Aviator, Limited v. United States}\textsuperscript{177} the Canadian owner alleged that its steamship "Cavalier" en route from Canada to Jamaica in 1942 was directed by United States Naval authorities into Delaware Bay, that on entering the Bay it was ordered to follow directly astern the United States patrol boat "YP 249," and that while so following as ordered it struck and was damaged by a submerged wreck in consequence of the negligence of the patrol boat and those in charge. The owner elected to proceed on principles of both in rem

\textsuperscript{173} Brady v. Roosevelt S. S. Co., \textit{supra} note 169 at 580-581.
\textsuperscript{174} \textit{Id.} at 581.
\textsuperscript{175} \textit{Id.} at 583.
\textsuperscript{176} (1925) 43 STAT. 1112, 46 U. S. C. §§ 781-790 (1940).
\textsuperscript{177} (1945) 324 U.S. 215, 7 GA. B. J. 480.
and in personam liability and made the showing of reciprocity under
the Canadian law and practice which the Act required. The district
court dismissed. The circuit court of appeals affirmed the dismissal,
one judge dissenting, on the ground that "caused by a public vessel"
meant caused by a vessel as the "physical instrument" of harm—in
other words, that it meant caused by physical collision—and on the
further ground that the Act did not authorize in personam recovery
on principles of in rem liability. On certiorari, the Supreme Court
reversed on both grounds. Mr. Justice Reed delivered the opinion for
a unanimous Court. Liberal interpretation of Section 1 was found to
be amply supported by reference to legislative history and Congres-
sional purpose. The right to proceed according to in rem principles
was similarly supported, and more particularly by the incorporation
clause of Section 2, and the cause of action stated was clearly sufficient
on analogy with the cases of tug and tow. "For all practical purposes,"
observed Mr. Justice Reed, the "Cavalier" was "as firmly fastened to
the stern of the YP 249 as if she had been in tow." On certiorari, the Supreme Court
reversed on both grounds. Mr. Justice Reed delivered the opinion for
a unanimous Court. Liberal interpretation of Section 1 was found to
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sional purpose. The right to proceed according to in rem principles
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on analogy with the cases of tug and tow. "For all practical purposes,"
observed Mr. Justice Reed, the "Cavalier" was "as firmly fastened to
the stern of the YP 249 as if she had been in tow."

Our fourth case, actually two cases resolved in one opinion, has
broadened the interpretation of the Public Vessels Act to give it a
comprehensive coverage. Note that the Act's applicable provision,
quoted in our review of the Canadian Aviator case supra, authorizes
suit against the United States "for damages caused by a public ves-
sel." Canadian Aviator was a case of property damage. What of dam-
ages for personal injury or wrongful death? The first of the two cases
herein resolved, American Stevedores, Inc. v. Porello, was a long-
shoreman's libel against the United States, with the contracting steve-
dore impleaded, to recover damages for personal injuries sustained on
board a public ship while working at the vessel's loading. The second,
United States v. Lauro, was a suit to recover damages under the
New York death act brought against the United States by the admin-
istratrix of a longshoreman who had died as a result of injuries sus-
tained on board a public ship while similarly employed. In the first
the Circuit Court of Appeals for the Second Circuit resolved the issue
in the longshoreman's favor in reliance upon the Canadian Aviator
case. Since the issue had not been squarely posed in that case, cer-
tiorari was granted. In the second, the same circuit court of appeals

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178 Canadian Aviator v. United States (C. C. A. 3d 1944) 142 F. (2d) 709.
179 Canadian Aviator, Ltd. v. U. S., supra note 177 at 229.
180 (1947) 330 U. S. 446.
181 Ibid.
certified a question.\textsuperscript{183} Read in the light of its legislative history, the Public Vessels Act was interpreted by the Supreme Court to embrace both damages for personal injury and damages for wrongful death. The opinion was delivered by Mr. Justice Reed, Justice Frankfurter and Chief Justice Vinson dissenting. There were other issues which require no comment here.\textsuperscript{184} It is enough to note that the Act's coverage is now made all embracing. It may be observed, for the benefit of those interested in judicial recourse to legislative history, that the question was a difficult one and the result debatable. The result would appear to be in line, nevertheless, with a growing feeling in Congress and out "that the United States should put aside its sovereign armor in cases where federal employees have tortiously caused personal injury or property damage."\textsuperscript{185}

At this point our attention shifts to the immunities accorded ships of a friendly foreign sovereign and particularly the ships which the sovereign employs in the ordinary merchant trade. Expanding ventures of governments in the shipping business have increased correspondingly the importance of the legal questions involved. It will be recalled that in the leading case of \textit{The Pesaro}\textsuperscript{186} the Supreme Court sustained immunities claimed for a merchant ship owned and operated by a foreign government, upon principles previously applied in suits involving public vessels, and notwithstanding that the Department of State had declined to recognize the immunity. That decision was much criticized and our latest decisions of the Court indicate that it is now disposed to retreat, perhaps precipitately, from the advanced and debatable position which it took in that case.

In \textit{Ex Parte Republic of Peru}\textsuperscript{187} a Cuban corporation had libeled a Peruvian ship in the district court for an alleged breach of charter party. The Republic of Peru intervened as claimant, put up a bond for the ship's release, took the master's testimony on the merits, and obtained an extension of time within which to answer or otherwise plead to the libel, reserving expressly at each stage all available defenses and "particularly, but not exclusively, sovereign immunity." Meanwhile, following approved procedures, Peru obtained formal recognition of its claim to immunity by the Department of State and the usual statement and request were thereafter filed in court by the

\footnotesize{\textsuperscript{183} Lauro v. United States (C. C. A. 2d 1946) 157 F. (2d) 416.}
\footnotesize{\textsuperscript{184} Supra p. 197.}
\footnotesize{\textsuperscript{185} American Stevedores v. Porello, supra note 180 at 453.}
\footnotesize{\textsuperscript{186} (1921) 255 U. S. 216.}
\footnotesize{\textsuperscript{187} (1943) 318 U. S. 578.}
United States Attorney on instructions from the Attorney General. The district court denied a motion for release and dismissal on the ground that Peru had waived its immunity notwithstanding the attempted reservations. \(^{188}\) Peru then sought prohibition or mandamus in the Supreme Court, where it was held, Justices Frankfurter and Reed dissenting, that the Court had jurisdiction to issue the writ, that immunity had not been waived, and that the writ might issue, if necessary, upon further application. The decision is of importance chiefly for its ruling with respect to the Supreme Court’s jurisdiction to control proceedings in the district court through prohibition or mandamus. In a long and learned dissent, Mr. Justice Frankfurter argued that such jurisdiction had been effectively denied by the Judiciary Act of 1925 \(^{189}\) and that even if a discretionary authority had survived the Act it should not be exercised in the circumstances of this case. Mr. Justice Reed thought that the Court had jurisdiction but should not exercise it. On both contentions, as indicated, the majority of the Court went the other way. There was no division within the Court on the question of immunity. In consequence Mr. Chief Justice Stone’s formulation of the governing principle becomes all the more noteworthy. “That principle is,” he said, “that courts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the Government in conducting foreign relations.” \(^{190}\) With respect to the principle’s application in this case he concluded: “The Department [of State] has allowed the claim of immunity and caused its action to be certified to the district court through the appropriate channels. The certification and the request that the vessel be declared immune must be accepted by the courts as a conclusive determination by the political arm of the Government that the continued retention of the vessel interferes with the proper conduct of our foreign relations.” \(^{191}\) Patently this is a considerable retreat from the bold judicial assertion in *The Pesaro* that government ships in the carrying trade “are public ships in the same sense that war ships are.” The Court’s ruling on the issue of waiver appears to have been conceived also in a mood of comparable caution. For the practitioner it points up a procedure whereby in behalf of the friendly foreign sovereign he may proceed expedi-

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188 The Ucayali (E. D. La. 1942) 47 F. Supp. 203.
189 (1925) 43 STAT. 936.
190 *Ex Parte Peru*, *supra* note 187 at 588.
191 Id. at 589.
tiously to assert its interest, obtain the ship's release and conserve testimony, while saving the claim to immunity upon which he expects ultimately to rely.

The implications of *Ex Parte Republic of Peru* become even more obvious forecasts of things to come in the opinions delivered in *Republic of Mexico v. Hoffman* a little less than two years later. The suit was in rem for collision damages allegedly caused by the negligence of a Mexican merchant vessel. The Republic of Mexico claimed immunity. Communications filed in behalf of the Department of State called attention to the Mexican claim and accepted as true the contention that the vessel allegedly at fault was the property of the Mexican Government, but took no position with respect to the claim to immunity other than to cite two cases in which the decision had turned on an issue as to possession. The district court found that the vessel was in the possession of a private commercial corporation and denied immunity. The circuit court of appeals affirmed. On certiorari, the Supreme Court affirmed. Reviewing the authorities and leaning heavily upon his earlier opinion in *Ex Parte Republic of Peru*, Mr. Chief Justice Stone concluded "that it is the national policy not to extend the immunity in the manner now suggested, and that it is the duty of the courts, in a matter so intimately associated with our foreign policy and which may profoundly affect it, not to enlarge an immunity to an extent which the government, although often asked, has not seen fit to recognize." While stressing the proposition that it is "not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize," a "salutary principle" not followed in *The Pesaro*, the Chief Justice was content to rest his decision largely upon the circumstance that the vessel was not in the foreign government's "possession and service." Mr. Justice Frankfurter, with whom Mr. Justice Black concurred, agreed with the result but thought "possession" too tenuous a distinction and would have reconsidered *The Pesaro* "in the light of the important developments in the international scene that twenty years have brought." It was his

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195 Mexico v. Hoffman, supra note 192 at 38.
196 Id. at 35.
view, in brief, "that courts should not disclaim jurisdiction which otherwise belongs to them in relation to vessels owned by foreign governments however operated except when 'the department of the government charged with the conduct of our foreign relations,' or of course Congress, explicitly asserts that the proper conduct of these relations calls for judicial abstention."  

We venture to think that the tide is running strongly in the direction pointed by Mr. Justice Frankfurter. Nor do we share the view of critics who may choose to regard the result as judicial abdication. There has developed to date on this question no more than a discord of national views as to what the preferred international usage may require. Meanwhile our national policy with respect to the immunities of nationally owned ships has been clearly indicated in the Suits in Admiralty Act of 1920 and the Public Vessels Act of 1925, hitherto discussed. Surely it is ill-founded judicial presumption for the courts, in derogation of our national policy and disregard of the position taken by the executive in its conduct of international relations, to extend immunity and thereby remit to the executive department adjustments in behalf of claimants which that department has manifested neither readiness nor disposition to undertake. If there has been an improper judicial abdication, we suggest, it was rather in the ill-starred decision in The Pesaro.

XII

UNIFORMITY

There remains for consideration a general principle of the maritime system which, unlike most of the conventional subdivisions of subject matter hitherto considered, cuts horizontally across the body of admiralty jurisprudence as a part of the national law. It is a principle, indeed, which stems necessarily from the assumption that admiralty jurisprudence is a part of the national law. Historically it has had conscious expression increasingly as we have become increasingly conscious of the national scope and import of the system. Practically it has presented over the years a succession of problems, most of them peculiar to our federal system under which so much of human intercourse is left to the governance of laws local in origin and scope.

\footnote{197 Id. at 41-42.} \footnote{198 (1946) 40 AM. J. INT'L. L. 168.} \footnote{199 The Lottawanna (U.S. 1874) 21 Wall. 558, 575; The City of Norwalk (S.D. N.Y. 1903) 55 Fed. 98, 105-106; Southern Pacific Co. v. Jensen (1917) 244 U.S. 205, 216.} \footnote{200 E.g., see Judge Addison Brown's opinion in The City of Norwalk, supra note 199 at 106-108.}
We refer, of course, to that essential insulation of the admiralty from the diverse and parochial tendencies of the local laws of the several states which is commonly and somewhat elliptically described as the requirement of uniformity.

It will be apparent that under our dual system of courts and laws the requirement of uniformity may operate in two areas. On the one hand, it prescribes limits beyond which admiralty courts may not go in the permissible supplementing or modifying of the maritime law from local sources. On the other hand, it circumscribes the local courts in the disposition of such maritime cases as they may hear and decide by virtue of the saving clause and the federal courts when called upon, as courts of law, to hear and decide by virtue of constitutional and statutory authorizations other than those pertaining to the admiralty jurisdiction. In this latter aspect the problem resembles, though with much stronger sanction, that normally presented in conflict of laws situations in which the court called upon to hear and decide locally must have recourse in arriving at decision to a substantive law derived from extraneous sources. The Supreme Court has had opportunities to consider the requirement of uniformity in each of these areas, in the decade under review, and its contributions have been an odd mixture of clarification and confusion.

Turning first to the requirement as a restraint on the local borrowings of admiralty courts, we call attention again to Just v. Chambers, discussed supra under another heading.°° It was here held for the first time that the local rule of survival of a cause of action against a deceased tortfeasor may be applied by the admiralty court to a local maritime tort in a limitation of liability proceeding. As in borrowing from local laws creating liens for repairs or supplies furnished a vessel in her home port, or from local laws allowing recovery for wrongful death, the supplementation was permissible and there was no impairment of the uniformity required where “essential features” of an exclusive federal jurisdiction are involved. Here, as in the analogies invoked, the local rule did not “contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations.” Confusing as all this may well be to a foreign student of our peculiar system, it is doubted that anyone, having a proper regard for the historical development of our system and for the impact upon admiralty of this particular borrowing, will

°° Supra p. 176, 206.
A DECADE OF ADMIRALTY

doubt the validity of the conclusion reached. The borrowing is an aid to the just result, works no substantial prejudice to national uniformity, and is in line with other permissible variances under which our shipping has long since learned to operate with a minimum of practical difficulty.

Turning next to the requirement as it circumscribes local courts in the disposition of admiralty suits entertained by virtue of the saving clause or other federal statute, we again find helpful clarification in the opinion in *Garrett v. Moore-McCormack Co.*, also discussed *supra* under another heading.\(^{202}\) In this case the Court held, also for the first time, that in a seaman's suit in the state court for damages under the Jones Act and for maintenance and cure the burden of proof with respect to the validity of a release is to be determined in both causes of action in conformity with the admiralty law and not by any local rule. In an opinion reversing the contrary ruling of the Pennsylvania court, Mr. Justice Black said: "The source of the governing law applied is in the national, not the state, government. If by its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the State would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less but more secure."\(^{203}\) And again: "The right of the petitioner to be free from the burden of proof imposed by the Pennsylvania local rule inhered in his cause of action. Deeply rooted in admiralty as that right is, it was a part of the very substance of his claim and cannot be considered a mere incident of a form of procedure."\(^{204}\) It is noteworthy that in affirming a required uniformity of application with respect to both the Jones Act and the principle of maintenance and cure the Court relied *inter alia* upon *Southern Pacific Co. v. Jensen* and its aftermath, without prejudice to disagreement on constitutional issues raised by cases in the "Jensen line," and cited Mr. Justice Bradley's classic statement of the requirement of uniformity in the case of *The Lottawanna*.\(^{205}\)

In *Standard Dredging Corporation v. Murphy*,\(^{206}\) decided some

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\(^{202}\) *Supra* p. 187.


\(^{204}\) Id. at 249. See *Intagliata v. Shipowners & Merchants Towboat Co.* (1945) 26 Cal. (2d) 365, 159 P. (2d) 1, (1946) 34 Calif. L. Rev. 599.


\(^{206}\) (1943) 319 U.S. 306.
five months later at the same term, the Court had occasion to return to constitutional issues raised by cases in the "Jensen line." On appeals from judgments of the Court of Appeals of New York, it was contended that the New York Unemployment Insurance payroll tax, in so far as it was made collectible from employers of certain employees engaged in maritime employment, was invalid as in conflict with Article III, Section 2 of the Constitution vesting federal courts with an exclusive admiralty jurisdiction. In rejecting the contention for a unanimous Court, Mr. Justice Black said: "We are now asked to apply the Jensen doctrine to the field of unemployment insurance and to invalidate the statute before us on the ground that it is destructive of admiralty uniformity. The effect on admiralty of an unemployment insurance program is so markedly different from the effect which it was feared might follow from workmen's compensation legislation that we find no reason to expand the Jensen doctrine into this new area." With this we may unreservedly agree. As the opinion indicated, until the federal government has elected to occupy the field, it seems clear that state unemployment insurance does not affect "an exclusive federal jurisdiction" at all. "No principle of admiralty requires uniformity of state taxation."

Had Mr. Justice Black been content to stop here, we would have had no further comment. However, he was moved to add: "Indeed, the Jensen case has already been severely limited [citing Just v. Chambers, supra, and Davis v. Department of Labor, supra], and has no vitality beyond that which may continue as to state workmen's compensation laws." As hitherto indicated, against the background of our admiralty history, we detect nothing in Just v. Chambers that supports the gratuitous generalization. We have also commented hitherto and at some length upon Davis v. Department of Labor. It is enough to say at this juncture that we do not think the superimposing of new constitutional uncertainties upon old which that case accomplished constitutes a precedent relevant to the obiter dictum under consideration. We are inclined to suspect that our present liberal judges are in something of a state of mind about the Jensen case. The aberrations of Davis v. Department of Labor lend support to suspicion. Harsh as the Jensen case may have been on its facts, and ruthless as it may

207 Id. at 309. See Great Lakes Dredge & Dock Co. v. Charlet (C.C.A. 5th 1943) 134 F. (2d) 213.
208 Standard Dredging Co. v. Murphy, supra note 206 at 310.
209 Id. at 309, note 5.
210 Supra p. 178.
have been in some of its ultimate constitutional consequences, it is not to be overlooked that it rested upon a broad principle of fundamental importance in our admiralty law. Nor is it to be overlooked that it has stood unreversed for thirty years and that we have learned to live with it. Its harsher consequences have long since been corrected by federal laws. Indeed, important remedial legislation has been rested squarely upon its premises. Accordingly we doubt that sound liberal tradition requires the present Court to deploy again upon the battle-grounds of a generation past or to ignore the broader implications of the case in its present setting. We would hesitate, moreover, before the issue is presented, to deny all constitutional implications except as they may relate to state workmen's compensation laws. Uniformity is something residual and vital in much of our admiralty system. Who so bold as to predict that it may never have a constitutional sanction? We would think it the better part of valor to stay discreetly off such troubled waters until the voyage clearly requires their navigation.

With regret we are obliged to conclude our comment under this topic on a note of confusion and frustration. Passing from the clarifying light of Just v. Chambers and the Garrett case, and from the further illumination of Standard Dredging Corporation shadowed only by an unfortunate dictum inspired by Davis aberrations, we enter perforce the darkened miasma surrounding Caldarola v. Eckert.\textsuperscript{211} Returning to Caldarola, we remain as mystified as ever with respect to the promptings which left its issue in such uncertainty. We suspect, among other things, the state of mind which appears to prevail in certain quarters with respect to precedents in the Jensen line and a more immediate recoil, with changes in the Court's personnel, from implications of the Hust decision.\textsuperscript{212} Enough has been said of Caldarola hitherto. It is sufficient to repeat here that it returns the question of the law governing in maritime causes prosecuted in state courts under the saving clause to a needless uncertainty and that we persist in thinking the correct approach better indicated in Mr. Justice Rutledge's dissenting opinion. The cause was maritime. There was no hiatus in the maritime law. The maritime law should have been controlling.

\textsuperscript{211} Supra p. 193.

\textsuperscript{212} The Hust decision was by vote of four to three. The three dissenting justices in that case had been reinforced meanwhile by the return to the bench of Justice Jackson and the accession of Chief Justice Vinson.
CONCLUDING COMMENTS

While it is apparent that a review such as this may have no conclusion of the conventional kind, we venture nevertheless a few concluding comments which we hope may be of interest. Our concluding comments will be concerned chiefly with the more general import of the cases presented and with the Court's modus operandi.

It is apparent, in the first place, that admiralty matters continue to reach our highest court, in peace or war, in impressive volume and with reference to a wide range of subject matter. More than half of the cases of the decade have been of major importance to shipping activities and the others, with perhaps two or three exceptions, have been of considerable interstitial significance. There have been a few—e.g., C. J. Hendry Co., Aguilar, Mahnich, Garrett, O'Donnell, Commercial Molasses Corp., Brady, and Hoffman—which may well become landmarks of note to those who venture on the seas.

In the second place, it will be apparent that a number of the older and perhaps more settled topics, such as average, liens, pilotage, salvage, towage and the jurisdiction in tort or contract, have been of concern to the Court infrequently or not at all. Seamen's remedies, on the other hand, by reason of their nature and multiplicity and perhaps also by reason of a refreshed judicial concern, have become easily our most litigious subject matter in the court of last resort. Problems of compensation or indemnification for other maritime workers would appear to rank second in this respect and probably by reason of the chaotic state of our law in this area as well as a revitalized judicial concern. Problems of government immunity are a close third and for obvious reasons. For the uncertainties created in the decade past, with corresponding invitation to further litigation, the highest awards must clearly go to Davis, Sieracki and Caldarola.

In the third place, presented to the Court in a period patently one of transition, our cases appear to have precipitated a multiplicity of dissenting opinions. In approximately half of the cases the Court was unanimous and in a comparable number of instances there were dissents. In seven instances there were three justices in dissent and in four there were four, though the importance of the dissent does not appear to have been consistently measurable in terms of the number who concurred therein. To a considerable extent division was to be expected, in view of the issues presented, and beyond that we can only
suggest that a considerable discord has been an aspect of the Court’s more recent mood. Upon the whole, and in an area in which the justices have no more than the usual competence, we find nothing particularly disconcerting in a statistical excess of dissenting opinions.

In the fourth place, we note that earlier precedent has been thrown overboard in the Mahnich case, refusing to be guided by what was said in the Pinar Del Rio, and in the Brady case, repudiating Lustgarten, that the Davis case appears to reject criteria previously thought well established by precedents in the Jensen line, and that the Hoffman case seems to have at least pointed the way to an eventual repudiation of The Pesaro. There are those who choose to regard such disregard as in the current mood and who view it with dismay. Their view is well expressed in Justice Roberts’ jeremiad in his dissenting opinion in the Mahnich case. We do not share their alarms. The two precedents cleanly repudiated were outmoded, if they were ever right, and we think that there may be reliance upon the wisdom to be acquired from further experience so far as the other unsettling pronouncements are concerned. The overall picture in admiralty, at least, has disclosed nothing to date which may fairly be described as an injudicious disregard for judicial precedent.

In the fifth place, as of interest chiefly to those concerned with the relatively recent discovery of resources of interpretation in legislative history, we observe that recent experience in admiralty points to somewhat unsettling conclusions. We do not suggest that such conclusions are necessarily peculiar to admiralty. We only note that in the interpretation of important maritime legislation the legislative history has been a frequent recourse and that, when used by determined judges sympathetic with what is assumed to have been a broad legislative purpose, its confused resources may prove to be well-nigh as variant in ultimate effect as the length of a chancellor’s foot. Consult, for varying example, American Union Transport, Hust, Canadian Aviator, and Porello. We leave it to others better versed in problems of statutory interpretation to say what relevance or importance these observations may have in broader application.

Finally, we venture an inquiry, with deference, as to which of the members of the present Court are most likely to emerge as our principal reliance in the ultimate resolution of maritime controversies. The Court includes among its members no admiralty experts. Nor is this an unusual situation. Our justices are not appointed and perhaps could not be well appointed for their expertness in specialties within
the scope of the Court's authority. Their expertness is normally something acquired in consequence of their interest and their assignments. The late Chief Justice Stone would have been the last to claim a special competence in admiralty, prior to his judicial period, yet he left us in the period under review no less than eight notable opinions and two notable dissents. For the time, at least, his great learning and skillful craftsmanship will be sorely missed by the admiralty bar. Of the present Court, two have had no admiralty opinions, five have prepared opinions more or less fortuitously, it would appear, in one, two or three cases of maritime concern, while Mr. Justice Rutledge has had four, including a notable opinion in the Aguilar case, and Mr. Justice Black has had six, including a notable opinion in the Garrett case. Whatever the circumstances within the Court which led to these assignments, it would appear that we may look to Mr. Justice Black and Mr. Justice Rutledge, and that notwithstanding Davis and Sieracki respectively, for the interest in an intriguing subject and the devotion to an important segment of our national law which may develop, as it has in others in the past, the talents of a discreet and wise judge in matters pertaining to the sea.