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LIMITATION OF SHIPOWNER LIABILITY: ITS AMERICAN ROOTS AND SOME PROBLEMS PARTICULAR TO COLLISION

Joseph C. Sweeney*

I INTRODUCTION

"As Maine goes, so goes the nation" once described American political life.¹ It might also have described the origins of statutory limitation of shipowners' liability in America, for the fingerprints of the State of Maine can be seen in the legislation authored by Senator Hannibal Hamlin² and

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¹The expression originated in the nineteenth century, when Maine held its federal and state elections in September, instead of in November, the month specified by Congress in 1845 for the rest of the nation.

²Hannibal Hamlin (1809-1891) was born in Paris, Maine, where his father was a physician and Sheriff of Oxford County. He attended nearby Hebron Academy. After his father's death, he read law and clerked in the Portland law office of Samuel Fessenden. He was admitted to the Maine bar in 1833, elected as a Democrat to the state legislature in 1835, and reelected six times. In 1842, he was elected to Congress, and reelected in 1844. When, in 1846, he first sought a seat in the U.S. Senate, he was defeated. On a second try in 1848, he was elected to the Senate, and then very narrowly reelected in 1854. He served as the Chair of the Senate Commerce Committee until 1856, when he abandoned the Democratic Party (because of the power of its pro-slavery elements) and joined the new Republican Party. In 1857, he was elected Governor of Maine but served only a short time before being reelected to the Senate, where he served again until 1861. At the convention of the Republican Party in Chicago in 1860, the New Yorker William H. Seward led on the first two ballots for the presidential nomination, but on the third ballot, Abraham Lincoln of Illinois captured the nomination. Hamlin was Seward's choice to balance the ticket. Hamlin's four years as Vice President were very frustrating; he was not part of Lincoln's inner circle and was never consulted. He spent his days presiding over the Senate where he had once been a great power. His views on the abolition of slavery were more radical than those of Lincoln. When, in 1864, Lincoln renamed his party the National Union Party, he dropped the Republican Hamlin as his running mate in favor of the War Democrat Andrew Johnson, the military governor of Tennessee. Hamlin returned again to the Senate, where in 1869 and 1877, Republican majorities made him Chair of the Foreign Relations Committee. He resigned from the Senate in 1881, and was appointed U.S. Minister to the court of the restored monarch Alfonso XII of Spain, but he resigned that post the next year. He then returned finally to Maine, where he died in 1891. See generally C. Hamlin, *Life and Times of Hannibal Hamlin* (1899) and H. Hunt, *Hannibal Hamlin, Lincoln's First Vice President* (1969).

derived from a statute³ enacted in 1821 by the brand new state of Maine.⁴ Maine was a powerful ship-building center in the age of sail, and Maine's shipowners were carriers of capacity far beyond the needs of local industry.

The new legislation was not revolutionary, however; the concept went back for centuries.⁵ The needs of a growing industry⁶ and a spectacular decision of the Supreme Court of the United States, seen as a threat by shipowners,⁷ provided the impetus for a national American effort to protect maritime investors. The policy behind limitation of shipowners' liabilities affecting innocent claimants was considered briefly then, when the federal law was enacted in 1851, but never seriously since. Limitation of shipowners' liability operated like a stealth bomber, off legal radar screens until after the Second World War, when its repeal was demanded by the personal injury bar. Justice Black framed the policy debate in 1954:

Many of the conditions in the shipping industry which induced the 1851 Congress to pass the [Limitation of Shipowner Liability] Act no longer prevail. And later Congresses, when they wished to aid shipping, provided subsidies paid out of the public treasury rather than subsidies paid by injured persons.⁸

Gilmore and Black gave us a memorable phrase in 1975:

In the first edition of the treatise the foregoing discussion was concluded with the observation: The Limitation Act has been due for a general overhaul for the past seventy-five years; seventy-five years from now that statement will still be true, except that the overhaul will then be one hundred and fifty years overdue.⁹

³An Act respecting the wilful destruction and casting away of ships and cargoes; the custody of shipwrecked goods, and trade and navigation, 1821 Me. Laws 78, §§ 8-10, revised in 1840, 1857 and 1930. See Sprague, *Limitation of Ship Owners' Liability*, 12 N.Y.U.L.Q. Rev. 568, 574-77 (1935).

⁴Fishermen were the first settlers of Maine, in 1622. The Massachusetts colony claimed the area in 1652, annexing it in 1668. In 1691, a royal charter granted the District of Maine to Massachusetts, even though the two were physically separated by the New Hampshire colony. Shipbuilding and furnishing masts and other naval stores for the Royal Navy were the principal industries. The economic and political interests of Maine and Massachusetts diverged during and after the War of 1812, leading to a peaceful separation in 1820. As part of the Missouri Compromise of 1820, Maine was admitted to the Union. See generally W. Rowe, *The Maritime History of Maine* (1948) and S. Morison, *The Maritime History of Massachusetts, 1783-1860* (1941).

⁵See Sprague, *supra* note 3, 568-574.

⁶Registered tonnage in foreign trade increased from 537,563 gross tons in 1830 to 2,348,358 gross tons in 1857. See J. Hutchins, *The American Maritime Industries and Public Policy, 1789-1914* (1941), 304-07.

⁷*New Jersey Steam Nav. Co. v. The Merchants' Bank of Boston* (The Lexington), 47 U.S. (6 How.) 344 (1848). See text *infra* accompanying notes 40-67.

⁸*Maryland Cas. Co. v. Cushing*, 347 U.S. 409, 437, 1954 AMC 837, 859 (1954) (Black, J., dissenting).

⁹G. Gilmore & C. Black, Jr., *The Law of Admiralty* 846 (2d ed. 1975).

Nevertheless, until the Act is repealed, lawyers, insurers and their clients must be aware of its broad scope and harmful potential, even though it can no longer be a factor in setting insurance rates because of the likelihood of successful challenges, chiefly because of the denial of limitation for liabilities in the "privity or knowledge" of shipowner petitioners.¹⁰

II HISTORICAL ANTECEDENTS

Because, in this country, limitation is entirely statutory, this review will concentrate on the British and American legislation preceding the 1851 federal enactment. The late James J. Donovan surveyed the classical antecedents in his 1979 article for the Tulane Admiralty Law Institute¹¹ and readers are invited to look there for the Rhodian Law, the Code of Amalfi, the Barcelona Consulado del Mare, the Codes of the Hanseatic League and the 1681 Ordonnance de la Marine. A concept common to these historical antecedents was the abandonment of the damaged ship to her creditors.¹²

It was the possibility of single-ship disasters destroying the personal fortunes of shipowners that produced statutory relief in Great Britain in 1734. At that time, British merchant adventurers were trading to India, the Arctic (Russia), the Baltic, the Mediterranean and North America.¹³ Marsden found that the case of *Boucher v. Lawson*,¹⁴ in which shipowners were held personally liable for a cargo of gold and silver stolen by the master, was the spur for parliamentary action to limit liability.¹⁵ Industry spokesmen petitioned

¹⁰See, e.g., *Spencer Kellog & Sons v. Hicks (The Linseed King)*, 285 U.S. 502, 1932 AMC 503 (1932); *In re Marine Sulphur Queen*, 460 F. 2d 89, 1972 AMC 1122 (2d Cir. 1972), cert. denied sub nom. *United States Fire Ins. Co. v. Marine Sulphur Transp. Corp.*, 409 U.S. 982 (1972); *Empresa Lineas Maritimas Argentinas, S.A. v. United States*, 730 F. 2d 153, 1984 AMC 1698 (4th Cir. 1988).

¹¹Donovan, *The Origins and Development of Limitation of Shipowners' Liability*, 53 Tul. L. Rev. 999, 1000-05 (1979); see also Sprague, note 3 *supra*, and Putnam, *The Limited Liability of Ship-Owners for Master's Faults*, 17 Am. L. Rev. 1 (1883).

¹²Abandonment of the vessel to creditors was a feature of the early codes, see Donovan, *supra* note 11, 1003-05, and was incorporated in the Ordonnance de la Marine (1681) and the French Code de Commerce (1807) (Art. 216). See also Sprague, *supra* note 3, 569-71 and Putnam, *supra* note 11, 2-13. It is a rarely used part of the the 1851 American statute:

And it shall be deemed a sufficient compliance with the requirements of this act, on the part of such owner or owners, if he or they shall transfer his or their interest in such vessel and freight, for the benefit of such claimants, to a trustee to be appointed. . . . And after which transfer, all claims and proceedings against the owner or owners shall cease.

46 U.S.C. § 184.

¹³D. Howarth, *Sovereign of the Seas: The Story of Britain and the Sea* 169-235 (1974).

¹⁴Cas. Temp. Hardw. 85 (1734).

¹⁵4 R. Marsden, *The Law of Collisions at Sea* 130 (British Shipping Laws, K. McGuffie rev. 11th ed. 1961). "*Boucher v. Lawson* is clearly the case referred to in the petition of the shipowners set out in the Journals of the House of Commons, Sess. 1733, p. 277." Id. at n. 15.

Parliament for relief that was granted after a consideration of many of the same arguments that would be made to the U.S. Senate in 1851—that shipowners' investments would be discouraged by a risk of ruinous liability, which Holland and other competing continental states had eliminated.¹⁶ Parliament clearly expressed its sympathies and spelled out its purpose in "An act to settle how far owners of ships shall be answerable for the acts of the masters or mariners; and for giving further relief to the owners of ships."¹⁷

Fifty years later, the English maritime industry returned to Parliament, for expansion of the statutory coverage.¹⁸ The new version, "An act . . . for giving a further relief to the owners of ships," was approved by an accommodating Parliament for an industry then even more powerful than it had been fifty years before.¹⁹

It appears that the English statutes and cases were still concerned with single ship disasters in 1783, but a further expansion of the Limitation Act in 1813 specifically provided for collision resulting from negligence.²⁰ The intent of Parliament to protect ocean transport is clear from the exclusion of canal barges and vessels of inland navigation.²¹ Again, the parliamentary

¹⁶Marsden, *supra* note 15, at 134. See also Putnam, *supra* note 11, at 7-12.

¹⁷Geo. 2 c. 15 (1734). This statute concerned losses to shippers from theft by master or crew. It was enacted in the Seventh Parliament of the United Kingdom, during the administration of Sir Robert Walpole, first prime minister.

¹⁸26 Geo. 3 c. 86 (1786). This statute concerned loss by fire as well as theft by other than master or crew. See Marsden, *supra* note 15, at 132.

¹⁹D. Howarth, *supra* note 13, at 139-57.

²⁰An Act to Limit Responsibility of Ship Owners in Certain Cases. 53 Geo. 3 c. 159 (1813). The key provision reads:

That no Person or Persons who is, are or shall be Owner or Owners, or Part Owner or Owners of any Ship or Vessel, shall be subject or liable to answer for or make good any Loss or Damage arising or taking Place by reason of any Act, Neglect, Matter or Thing done, omitted or occasioned, without the Fault or Privity of such Owner or Owners, which may happen to any Goods, Wares, Merchandize or other Things laden or put on board the same Ship or Vessel, after the First Day of *September* One thousand eight hundred and thirteen, or which after the said First Day of *September* One thousand eight hundred and thirteen may happen to any other Ship or Vessel, or to any Goods, Wares, Merchandize or other Things, being in or on board of any other Ship or Vessel, further than the Value of his or their Ship or Vessel, and the Freight due or to grow due for and during the Voyage which may be in Prosecution or contracted for at the time of the happening of such Loss or Damage.

Marsden noted, "There does not appear to have been any considerable discussion in Parliament upon the principle of either this or the subsequent acts limiting shipowners' liability," Marsden, *supra* note 15, at 132 n. 17.

²¹53 Geo. 3 c. 159, § 5. See Marsden, *supra* note 15, at 132; Putnam, *supra* note 11, at 12 and Sprague, *supra* note 3, at 571-74. The same limitation was built into the American statute when the bill was amended at the crucial debate (second reading), See text *infra* at notes 92-94. The inland navigation exclusion was removed from the American statute in 1886. See *infra* note 94.

purpose was to encourage investment in the industry.²² The English law was amended again in 1854 and 1862, and then reenacted in 1894, as part of the Merchant Shipping Act. It retained the features of the 1813 statute until revision for conformity of British law with international conventions of 1924, 1957 and 1976.²³

The ship-building, ship-owning and ship-operating Commonwealth of Massachusetts adopted its version of the English statutes in 1819, for the same reason that had persuaded three British parliaments—encouraging investment in the ocean-going maritime industry in which Massachusetts then specialized.²⁴ The Massachusetts statute would have benefited Maine shipowners until 1820, when Maine separated from Massachusetts. After statehood, Maine shipowners quickly persuaded the new Maine legislature to follow the path of Massachusetts.²⁵

²²See the preamble, "to increase the number of ships and vessels belonging to the United Kingdom. . . and to prevent any discouragement to merchants." 53 Geo. 3 c. 159 (1813). Hull insurance was then available to shipowners, but protection and indemnity insurance of liabilities for cargo damage or personal injuries would not be available from mutual associations (P & I Clubs) until 1855, when the Shipowners Mutual Protection Society and the Mutual Association of Sailing Ship Owners (forerunner of the West of England Steam Ship Owners' Protection and Indemnity Association) were founded. See N. Singh & R. Colinaux, *Shipowners* 485-86 (13 British Shipping Laws, 1967).

²³The Merchant Shipping Act, 56 & 58 Vict. c. 30. The most recent international convention, the 1976 Convention on Limitation of Liability for Maritime Claims was incorporated into British law in the Merchant Shipping Act of 1979, Schedule 4. The Comité Maritime International has produced, in 1924, 1957, and 1976, three conventions on this subject, reprinted in 6 Benedict on Admiralty, Docs. No. 5-1, 5-2 and 5-4 (F. Wiswall ed., 7th ed. rev. 2000).

²⁴An Act to encourage Trade and Navigation within this Commonwealth, 1819 Mass. Acts 193. See Putnam, *supra* note 11, at 13 and Sprague, *supra* note 3, at 574-77. The key provision reads:

Section 1. . . . no person or persons who is, are or shall be owner or owners in part or in whole, of any ship or vessel shall be subject or liable to answer for or make good to any one or more person or persons any loss or damage, by reason of any embezzlement, secreting or making away with, by the master or mariners, or any of them of any goods, wares or merchandize or any property whatsoever which shall be shipped, taken in or put on board any ship or vessel or for any act, matter or thing, damage or forfeiture done, occasioned or incurred by the said master or mariners or any of them without the privity or knowledge of such owner or owners further than the value of the interest which such owner or owners have or had, at the time of such shipment in the ship or vessel, with all her appurtenances and the full amount of his interest in the freight due or to grow due for and during the voyage wherein such embezzlement secreting or making way with, as aforesaid or other malversation of the master or mariners shall be made, committed or done any law, usage or custom to the contrary notwithstanding.

The mystery of the Massachusetts statute is that it tracks more closely the 1786 version of the English statute than the newer 1813 version; perhaps the newer version, enacted during the War of 1812, was unknown to the draftsmen in Massachusetts. The 1819 statute of Massachusetts was revised in 1835, 1860, and 1882 before being repealed in 1902, in favor of the federal act.

²⁵See *supra* note 3.

III BACKGROUND OF THE FEDERAL LIMITATION OF LIABILITY ACT

A. The 1851 Maritime Industry

1. The Ocean-going industry

American packet service,²⁶ often using the very fast clipper ships,²⁷ dominated the carrying trades in many parts of the world at this time, while the Port of New York dominated American foreign trade. In the North Atlantic, cotton was the principal American export, while machinery, iron, copper, coal and luxury goods were the imports; many of the sailing ships also carried emigrants from Ireland, Scotland and Germany.²⁸ The discovery of gold in California led quickly to greatly increased American inter-ocean service, by way of Panama or Cape Horn,²⁹ a trade protected from foreign competition by the cabotage law.³⁰ This was also the time when the China and India tea trade increased significantly.³¹ The infamous triangle trade—Caribbean sugar to New England, distilled rum to Africa and slaves to the Caribbean—by which great fortunes had been made in the eighteenth and early nineteenth centuries, had been suppressed legally, although an illegal slave trade continued.³² When the Erie Canal opened in 1825, it presented a tremendous volume of agricultural products in bulk for export, at the same time enhancing the movement of imports to the hinterland. In sum, trade was booming when the federal limitation of liability statute was enacted, and would continue to do so until the financial panic of 1857.³³ In the next ten years, during and after the American Civil War, the American ocean-going industry

²⁶See generally R. Albion, *Square Riggers on Schedule: The New York Sailing Packets to England, France and the Cotton Ports* (1938) and R. Albion, *The Rise of New York Port, 1815-1860* (1939).

²⁷C. Cutler, *Greyhounds of the Sea: The Story of the American Clipper Ship* (1930).

²⁸See generally Albion, *supra* note 26, and Cutler, *id.* The North Atlantic situation is described in B. Tyler, *Steam Conquers the Atlantic* (1939); C. Ridgeley-Nevitt, *American Steamships on the Atlantic* (1981); and J. Brinnin, *The Sway of the Grand Saloon: A Social History* (1931). The emigrant experience is described in E. Laxton, *The Famine Ships* (1996) and Herman Melville's novel, *Redburn, His First Voyage* (1849). See also A. Nevins, *Sail On, The Story of the American Merchant Marine* (1946).

²⁹See J. Delgado, *To California by Sea: A Maritime History of the California Gold Rush* (1990).

³⁰Cabotage laws restrict the carriage of passengers and cargo between domestic ports to American built vessels enrolled for such trade. See, e.g., the Navigation Act of 1817, 3 Stat 351.

³¹See generally F. Dulles, *The Old China Trade* (1930); E. May & J. Fairbank, *America's China Trade in Historical Perspective* (1986), and J. Perry, *Facing West: Americans and the Opening of the Pacific* (1994).

³²See generally D. Mannix & M. Cowley, *Black Cargoes: A History of the Atlantic Slave Trade 1518-1865* (1962) and H. Thomas, *The Slave Trade: The Story of the Atlantic Slave Trade 1440-1870* (1997).

³³See *supra* note 6.

would begin a rapid decline that has not ceased.³⁴ As America's sailing ships of wood decayed, their places would be taken by British steam ships of steel, and control of ocean trade would pass from the shipowners of America to those of her British rival.

2. Coastal Shipping

Until the middle of the nineteenth century, all American cities were to be found on waterways. Sailing packet service connected Atlantic and Gulf ports before the advent of wagon roads or railroads. It would be years before the railroads could compete.³⁵ Sailing vessels continued in service for many years, although some side-wheel steamboats were introduced to Long Island Sound and Chesapeake Bay. The cabotage law protected American shipowners from foreign competition in these waters.³⁶

3. Internal Shipping: Canals, Rivers and Lakes

In the era in which the federal limitation act emerged, river and lake traffic had increased dramatically, because of the advent of the steamboat—initially side-wheel vessels, subsequently stern paddle-operated.³⁷ Cincinnati, St. Louis, Memphis, Cleveland and Chicago became major ports. The opening of the Erie Canal in 1825³⁸ greatly shortened the route for movement of mid-western produce to eastern markets, offering an alternative to river transport on the Ohio and Mississippi for transfer at New Orleans to ocean-going vessels bound for coastal or overseas markets.³⁹ The age of the steamboat was also the age of spectacular explosions of steam boilers causing many deaths, injuries and substantial cargo damage.

³⁴See generally Nevins, *supra* note 28; A. Gibson & A. Donovan, *The Abandoned Ocean* (2000); S. Lawrence, *United States Merchant Shipping Policies and Politics* (1966); G. Mangone, *Marine Policy for America* (1972). See also R. Carlisle, *Sovereignty For Sale: The Origins and Evolution of the Panamanian and Liberian Flags of Convenience* (1981) and G. Jantscher, *Bread Upon the Waters: Federal Aids to the Maritime Industries* (1975).

³⁵See A. Chandler, ed., *The Railroads, the Nation's First Big Business* (1965); W. Daniels, *American Railroads: Four Phases of Their History* (1932) and O. Jensen, *The American Heritage History of Railroads in America* (1975). See also D. Holly, *Tidewater by Steamboat: A Saga of the Chesapeake* (1991).

³⁶See *supra* note 30.

³⁷See generally L. Hunter, *Steamboats on the Western Rivers: An Economic and Technological History* (1949) and E. Haites, J. Mak & G. Walton, *Western River Transportation: The Era of Early Internal Development 1810-1860* (1975).

³⁸See generally R. Shaw, *Canals for a Nation: The Canal Era in the United States 1790-1860* (1991).

³⁹See generally J. Morrison, *History of American Steam Navigation* (1903) and Burke, *Bursting Boilers and the Federal Power, 1816-1852*, 7 *Tech. & Culture* 1 (1966).

B. The Lexington Controversy of 1848

In *New Jersey Steam Navigation Co. v. The Merchants' Bank of Boston (The Lexington)*,⁴⁰ the Supreme Court of the United States held the owner of a steamboat liable for the value of a chest, said to contain gold and silver coins, lost when an unseaworthy vessel sank following a fire. The shipper, claiming \$25,000 in damages, had alleged, in contract and tort, that the coins had been delivered on board the steamboat *Lexington* at New York, for shipment to Boston. The shipper further alleged that the *Lexington* was a common carrier, that the chest had been carelessly stowed, that the machinery of the steamboat was imperfect and insufficient, and that the careless, improper, and negligent management and conduct of employees, servants and agents of the respondent had contributed to the loss of the cargo.⁴¹ The shipper attached *The Massachusetts*, a sister ship, to begin the litigation in federal court in Rhode Island.⁴²

The shipowner denied these allegations and maintained that an implied condition of the underlying contract made it responsible only for ordinary care and diligence and that notice of its non-liability was posted on the wharf, onboard the steamboat, and in its sales office.⁴³ Although the district court dismissed the libel, the circuit court (Story and Pitman) took testimony and gave judgment for the shipper for full damages (\$22,000).⁴⁴

The Lexington was a paddle-wheel steamboat engaged in regular multi-modal liner service between New York and Boston.⁴⁵ The shipper, the Merchants' Bank of Boston, shipped a wooden chest of gold and silver coins, without informing the carrier of the contents, although the weight of the coins may have made its valuable contents obvious.⁴⁶ The bill of lading excepted "danger of fire, water, breakage, leakage, and all other accidents"

⁴⁰47 U.S. (6 How.) 344 (1848).

⁴¹Id. at 350-51.

⁴²Id. at 352.

⁴³Id. at 346-47.

⁴⁴Id. at 353.

⁴⁵Id. at 346-52. The *Lexington* normally proceeded from New York to Stonington, Connecticut, where passengers and cargo transferred to the new Shore Line Railroad for Providence and Boston. On January 13, 1840, the *Lexington* sailed from New York with 150 passengers and 150 bales of cotton. Her steam powerplant had just been converted from wood to the hotter fuel of coal, without enhancement of her fan blowers for cooling. Underway, her smoke stacks soon grew red-hot and ignited her woodwork, the fire quickly spreading to cotton bales stowed nearby. Although the fire broke out when the *Lexington* was only four miles from land, her pilot failed in his attempt to run her ashore, and she sank, a total loss. The lost cargo on which suit was based consisted of approximately \$18,000 in silver and gold coins in a wooden chest owned by a freight forwarder. The coins may have been thrown overboard when the chest was commandeered for use as a water tank in fighting the fire.

⁴⁶47 U.S. at 346-47.

and limited carrier liability to \$200 per package.⁴⁷ After the vessel departed from New York, a fire broke out that could not be controlled. The ship sank in Long Island Sound, taking the lives of all but four of the 150 passengers and causing the loss of plaintiff's chest of coins.⁴⁸

The shipowner denied negligence, asserting that its servants exercised ordinary care, and that, in any event, it was not liable because of its notices of non-liability in the bill of lading exculpatory clause and the posted signs.⁴⁹

The case was argued twice in the Supreme Court: in January and December of 1847. Rhode Island lawyers Ames and Whipple argued for the shipowner.⁵⁰ R.W. Greene from Rhode Island argued for the shipper, but the principal advocate for the shipper was Daniel Webster, Whig Senator from Massachusetts and former (and future) Secretary of State.⁵¹

⁴⁷The bill of lading provided, after spaces for the names of the shipper, consignee, and vessel, ". . . danger of fire, water, breakage, leakage, and all other accidents excepted; and no package whatever, if lost, injured or stolen, to be deemed of greater value than two hundred dollars. . . ." At the wharf, a sign with the following warning was posted: "Notice to shippers and Consignees[:] All goods, freight, baggage, bank-bills, specie, or any other kind of property, taken, shipped, or put on board the steamers. . . must be at the risk of the owners of such goods. . . ." 47 U.S. at 346-47.

⁴⁸Id. at 356-58.

⁴⁹Id. at 350 and at 346.

⁵⁰In the Supreme Court, the shipowner contended that there was no admiralty jurisdiction since the contract was made in New York City and the voyage through Long Island Sound was land-locked, citing *The Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825), and its underlying proposition that the statute of Richard II excluded admiralty jurisdiction from ports, creeks, and havens, and implying the same restraint on the land-locked waters in question. Id. at 352. In the respondent's view, admiralty jurisdiction was only available for possessory or petitory suits and for mariners' wages, not for contracts made on land. Id. at 359-62. The respondent also argued that even if there was a contract, there was no contract between the carrier and the shipper (although separate contracts did exist between the carrier and the freight forwarder and the freight forwarder and the shipper). Id. at 363-68.

⁵¹Daniel Webster (1782-1852), born in Salisbury, N.H., attended Phillips Exeter Academy before he attended Dartmouth College, from which he graduated in 1801. He read law in Boston, but moved to Portsmouth, N.H. to begin the practice of law (from 1807). He entered politics there as a Federalist and was elected to Congress for two terms (1813-1817). In 1816, he removed to Boston to practice law and politics. He was elected to Congress from Massachusetts for two terms (1823-27), and then, in 1827, to the U.S. Senate, where he became a leader of the new Whig Party. In 1841, President Tyler appointed Webster Secretary of State, and he served for two years. He was reelected to the Senate in 1845, holding that office until 1850, when he was again appointed Secretary of State, serving President Fillmore for two years until Webster's death (1852). In the year of his death, he sought the Whig nomination for president but lost to General Winfield Scott. He died at his farm in Marshfield, Massachusetts, on Oct. 24, 1852. Webster's frequent service in Washington enabled him to have a very active and lucrative practice before the U.S. Supreme Court, beginning in 1814. He argued 249 cases in the court—which was then located on the floor beneath the Senate chamber in the U.S. Capitol. Among his famous cases were: *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824); and *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837). See C. Fuess, *Daniel Webster* (1930).

During the second argument, Webster argued that the case was within admiralty jurisdiction and that the shipowners, as common carriers, were liable for the loss without proof of actual negligence.⁵² The second argument lasted eight days, dealing extensively with English and continental history and precedents.

The opinion of the Court, affirming the decree of the circuit court, was written by Justice Samuel Nelson, an experienced commercial and admiralty lawyer and former Chief Justice of the New York Supreme Court.⁵³ He was joined in the opinion by Chief Justice Taney, and Justices McLean and Wayne. For the Court, Justice Nelson first held that there was a single contract of transportation between the shipper and the carrier (citing New York and Pennsylvania cases).⁵⁴ Were it not for this "special agreement," respondent, as a common carrier, would be regarded as an insurer of the goods and accountable for any damage or loss in the course of the conveyance, unless the same arose from an inevitable accident, such as an act of God or the public enemy.⁵⁵ Justice Nelson framed the issue as follows:

The general liability of the carrier, independently of any special agreement, is familiar. He is chargeable as an insurer of the goods, and accountable for any damage or loss that may happen to them in the course of the conveyance, unless arising from inevitable accident—in other words, the act of God or the public enemy. The liability of the respondents, therefore, would be undoubted, were it not for the special agreement under which the goods were shipped.

The question is, to what extent has this agreement qualified the common law liability? . . . But admitting the right thus to restrict his obligation, it by no

⁵²Id. at 377. He argued that Congress, by enacting the Judiciary Act of 1789 and the Great Lakes Act of 1845, had made American admiralty jurisdiction coextensive with the constitutional grant.

⁵³Samuel Nelson (1792-1873) was the Supreme Court's admiralty expert in the middle years of the 19th century, having served 27 years (1845-72). His appointment by President John Tyler followed Senate rejection or withdrawal of three previous nominees. Nelson came from Hebron, in upstate New York, attended Middlebury College, and was admitted to the New York bar in 1817. He had a successful commercial and admiralty practice in New York City. He entered politics in the early days of his career and served as a delegate to the New York constitutional convention in 1821. In 1831, he was appointed an Associate Justice of the New York Supreme Court (a trial court), and became its Chief Justice in 1836. A Jacksonian Democrat, he was easily confirmed by the Democratic-majority Senate in 1845, five days before Tyler left office. Justice Nelson wrote the Court's opinion in *The Schooner Catharine v. Dickinson*, 58 U.S. (17 How.) 170 (1855), which imposed the equal division of damages rule in both-to-blame collisions until displaced by *United States v. Reliable Transfer Co.*, 421 U.S. 397, 1975 AMC 541 (1975). He dissented in *The Prize Cases*, 67 U.S. (2 Black) 635 (1863), because he required a congressional declaration of war to justify the blockade of Confederate ports. He wrote the majority opinion in *The Plymouth*, 70 U.S. (3 Wall.) 20, 1999 AMC 2403 (1866), restating the principle that both the commission and the consummation of a maritime tort must occur on navigable waters, a doctrine set aside in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 1973 AMC 1 (1972). See Sprow, Samuel Nelson, in K. Hall, ed., *Oxford Companion to the Supreme Court of the United States*, 583-84 (1992).

⁵⁴47 U.S. at 380.

⁵⁵Id. at 381-82.

means follows that he can do so by any act of his own . . . he should not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public, limiting his obligation, which may or may not be assented to.⁵⁶

After considering the evidence as to improper stowage and negligent fire-fighting, Justice Nelson found the carrier liable, notwithstanding the special agreement.⁵⁷ He held that the exculpatory language relied upon by the shipowners could not overcome their obligations as common carriers, and therefore as insurers, so that the shipper could recover its damages in full.⁵⁸

Concurring in the judgment of the Court, Justice Catron relied on maritime tort theory for carrier liability, for which Arthur Browne was presented as authority.⁵⁹ Dissenting, Justice Daniel, wrote a twenty-four page opinion, in which Justice Grier seems to have joined.⁶⁰ Ever opposed to expanding federal power, Daniel turned first in his opinion to the statutes of Richard II, noting in his historical review that "the common law of England is the one uniform rule to determine the jurisdiction of our courts."⁶¹ As had Justice Catron, Justice Daniel turned also to Arthur Browne as authority, because "scarcely any assertion of power ever made by the Admiralty courts, however reprobated and denied by the common law tribunals, is not commended, if not justified" by Browne.⁶² With palpable irony, Justice Daniel then endorsed Browne's conclusion that contracts made on land for execution on the sea are not within admiralty jurisdiction, excepting those for seamen's wages and hypothecations.⁶³ Respecting Justice Catron's alternative rationale based on tort theory, Justice Daniel again quoted Browne: "[W]e have the explicit declaration of Professor Browne himself, amidst all his partiality, that in matters of tort the jurisdiction of the admiralty is limited to actions for assault, collision and spoil."⁶⁴

Justice Woodbury also concurred in the result reached by the Court, preferring Catron's tort theory for its rationale. He seems to have written separately in order to respond to Justice Daniel, pointing out that, by 1789, the place of performance of the contract, rather than the place of contracting,

⁵⁶Id. at 390.

⁵⁷Id. at 385.

⁵⁸Id. at 383-85.

⁵⁹Id. at 394. Arthur Browne's treatise, *A Compendious View of the Civil Law and of the Law of the Admiralty* (1802-03) was the principal treatise in use in the federal courts, having been republished in New York in 1840. See Sweeney, *The Admiralty Law of Arthur Browne*, 26 J. Mar. L. & Com. 59 (1995).

⁶⁰47 U.S. at 418.

⁶¹Id. at 400.

⁶²Id. at 400-03.

⁶³Id. at 404.

⁶⁴Id. at 401.

was being used, even in England, to determine admiralty jurisdiction, so long as the subject matter was maritime.⁶⁵

Notwithstanding the ensuing outcries from shipowners, the lasting importance of *The Lexington* is its holding that carriers can be held liable for negligent damage to cargo, despite exculpatory language in their contracts of carriage. That holding served well the producers of the American heartland when shipping on rivers, lakes, and oceans was still vital to the nation's economy, protecting them from over-reaching by both transporters and their insurers.

Not long after the Supreme Court's decision in *The Lexington*, the case of the packet ship *Henry Clay* added to the anxiety of the shipping industry. The *Henry Clay* burned at the wharf in New York on Sept. 4, 1849, after loading, but before getting underway. Cargo owners sued the shipowner for their losses. Even though there was no proof of actual fault or negligence, the shipowner was held liable.⁶⁶

C. The Legislative History of the 1851 Act

1. Organization of the Thirty-First Congress

The Thirty-First Congress, elected in November of 1848, was organized by the Democrats, despite the simultaneous election of the Whig President Zachary Taylor.⁶⁷ There were 112 Democrats to 109 Whigs and 13 Free-Soilers in the House, where three weeks of raucous debate were required before Howell Cobb of Georgia was chosen Speaker. The House was constantly in turmoil thereafter, because of bitter fights between factions of the North and South in both major parties.⁶⁸ In the sixty-two-member Senate, the

⁶⁵Id. at 420.

⁶⁶The decision in *The Henry Clay* is not officially reported; however, the facts of that case are recounted in *Wright v. Norwich & N.Y. Transp. Co. (The City of Norwich)*, 30 F. Cas. 685, 687 (C.C.D. Conn. 1870) (No. 18,087), *aff'd*, 80 U.S. (13 Wall.) 104 (1872). Three years after the fire aboard the *Henry Clay*, the restored side-wheeler, largest of her day, again caught fire, this time during a race on the Hudson River. Sixty passengers died, and the officers were indicted for manslaughter. See *The Henry Clay*, 11 F. Cas. 1164 (S.D.N.Y. 1852) (No. 6,375). The case of *The Henry Clay* was mentioned several times in the 1851 debate on the limitation of liability, and that vessel's two disasters also prompted legislation for stricter inspections of steam vessels.

⁶⁷H. Holman, *Election of 1848*, in 2 A. Schlesinger, Jr. & F. Israel eds., *History of American Presidential Elections 1789-1968* (1971). The intellectual and political history of the period may be reviewed in: L. Hartz, *Economic Policy and Democratic Thought 1776-1860* (1948); I. A. Nevins, *Ordeal of the Union: Fruits of Manifest Destiny 1847-1852* (1947); M. Holt, *The American Whig Party: Jacksonian Politics and the Onset of the Civil War* (1999).

⁶⁸The Southern Whigs would not support the Northern Whig candidate for Speaker; Free-soilers objected to the Southern Democrat, Cobb, who was elected on the sixty-third ballot. Cobb (1815-1868) became a Major General in the Confederate army.

Democrats enjoyed a majority of ten. William R. King⁶⁹ of Alabama was President Pro-Tempore; he would later serve as Vice President to President Franklin Pierce. In accordance with the practice prior to the Twentieth Amendment, the Congress elected in November 1848 did not assemble for its first session until December 1849; the second session would not assemble until December 1850 (*after* another congressional election). That session adjourned on March 3, 1851, the day on which the federal limitation of liability statute was enacted.⁷⁰

Senator Hannibal Hamlin, Democrat of Maine was the Chair of the Senate Commerce Committee. He introduced the limitation of liability bill on Tuesday, January 28, 1851, quoting only the language of the bill.⁷¹ Senator Badger⁷² became the principal opponent of the bill; he suggested delay because of the major change it introduced in the liability of shipowners.⁷³ In response, Senator Hamlin stressed its similarity to the existing English statutes:

This bill is predicated on what is now the English law, and it is deemed advisable by the Committee on Commerce that the American marine should stand at home and abroad as well as the English marine. Senators who may be disposed to look into the provisions of the English law, will find in the ninth, sixteenth, and thirtieth volumes of the English statutes the very principle contained in this bill. When the bill shall come up for discussion, I shall be ready to offer such suggestions as force themselves upon my mind, to show the necessity and propriety of this measure.⁷⁴

⁶⁹Sixty-two senators, from thirty-one states, were presided over by the Whig Vice President, Fillmore, until the death of President Taylor. William R. King (1786-1853) had spent 30 years in the Senate.

⁷⁰The principal product of this fractious Congress was Henry Clay's Compromise of 1850, a minefield of sectional discord, which prompted eight months of fierce rhetorical confrontation. The compromise consisted of five statutes: admission of California as a free state; organization of New Mexico Territory and adjustment of the boundaries of Texas; organization of Utah Territory; a new Fugitive Slave Act under federal jurisdiction; and abolition of the slave trade in the District of Columbia. See generally, H. Holman, *Prologue to Conflict: The Compromise of 1850* (1964). Many details can be discovered in biographies of participants in the debates: R. Remini, *Henry Clay, Statesman for the Union* (1991); C. Schurz, *Henry Clay* (1915); G. Capers, *Stephen A. Douglas, Defender of the Union* (1959) and R. Johannsen, *Stephen A. Douglas* (1973).

⁷¹Cong. Globe, 31st Cong. 2d Sess. 334-35 (1851).

⁷²George Edmund Badger (1795-1866) was born in New Bern, North Carolina (former colonial capital), attended Yale College (1810-11), read law and was admitted to the bar in 1814, afterwards practicing in New Bern. He was elected to the lower house of the North Carolina Assembly in 1816, and then to the Superior Court, where he served from 1820 to 1825. He moved to the new capital, Raleigh, where he practiced law until appointed Secretary of the Navy by President Harrison in 1841. He served only six months before resigning and returning to Raleigh. He was elected to the U.S. Senate as a Whig in 1846, reelected in 1849 and served until 1855. Badger was one of President Fillmore's nominees to the U.S. Supreme Court, but action on the nominations was postponed by the Democratic Senate until the new Democrat president, Pierce, took office. See *Biographical Directory of the American Congress, 1774-1996* at 602 (J. Treese, ed. 1997).

⁷³Cong. Globe, 31st Cong. 2d Sess. 332 (1851).

⁷⁴*Id.*

Senator Hale (Dem., N.H.) then moved to send the bill to the Judiciary Committee, because of the change it would make in the common law liability of carriers:

I have looked at this bill and examined it, and it will be found that it cuts up the whole common law in regard to common carriers in this country. I will not say that it is not right; but I think a bill making such fundamental changes in the common law ought to have the sanction of the Judicial Committee. I wish to make a single remark, though I do not wish to be understood as against the bill. I have examined it and the English statutes and, as has been suggested, the bill is an abstract of the English law in regard to this subject.⁷⁵

Senator Hamlin replied that the Committee on Commerce had consulted intelligent merchants and commercial men who knew more about the needs of commerce than the judiciary, and repeated that the bill conformed to the law of England. Senator Butler (Dem., S.C.) then noted that the bill had come from a respectable committee [Commerce], fully competent to decide upon it, thus no reference to the Judiciary Committee was necessary. Sen. Hale then withdrew his motion.

2. The Debate in the United States Senate

The only public consideration of this change in policy so beneficial to shipowners occurred on Wednesday, February 26, 1851, in the Committee of the Whole.⁷⁶ Initially, there was opposition to considering Hamlin's bill because of other pressing business, but Hamlin prevailed and presented the bill as Chair of the Committee on Commerce.⁷⁷ As is usually the case, proposed maritime legislation was not a partisan matter; Whigs and Democrats were to be found on both sides of the debate. Senator Badger (Whig, N.C.) stated his intention to oppose the bill because of the total change it would effect in the common law of carrier liability and wished to delay consideration:

But I must say, nevertheless, that I think it is a little unreasonable to expect that that bill shall be taken up, considered, and passed at this period of the session. It is a bill as the honorable Senator well knows, proposing to make a total change in the rule of the liability of carriers on the water, and to substitute for these rules, which have prevailed ever since this Government had an existence, an entirely new system.

Now, I am not prepared to say that, upon a full and thorough examination of the bill of the Committee on commerce, it may not be right and proper. That

⁷⁵Id.

⁷⁶Id. at 713-720.

⁷⁷Id. at 713-15.

it needs very considerable modification in some particulars, I am satisfied. In the main it may be right and proper, but there are great doubts about it. It is an important alteration in an important branch of the marine law. It is an alteration that ought not to be made without full and grave consideration and the most ample opportunity for discussion, and without attributing any fault to anybody—for fault is not to be attributed in any quarter that I know of—it is nevertheless certain that we have now arrived at a period of the session when it would be extremely unwise for Congress to undertake to make alteration in the little time we have left for its consideration. If this subject is to be considered, however, I hope that it will be considered tomorrow. I have a book or two, to which I wish to refer for the purpose of showing that in one aspect of the case there is no necessity for this bill, and in another that some of the provisions of it will operate mischievously. I hope, therefore, at least, that we will not take it up today.⁷⁸

Sen. Davis (Whig, Mass.) was moved to intervene in favor of the bill, because it substantially affected a vital national interest:

[The bill] proposes to change a system which has existed for a great period of time. I wish only to say in reply to that, that it is by a recent decision [*The Lexington*] some two or three years since, that the owners of ships have comprehended their liabilities. It is by an interpretation and construction given to them by courts below that they now understand that if a ship lying at the wharf in New York takes fire and burns up without fault on the part of the owners, they are liable as common carriers [*The Henry Clay*]. This becomes a very serious question—one that affects that interest very deeply; and therefore it is that it is necessary that the law should be changed. Now, I would be very much gratified if the question could be decided this session; and if the Senator from Maine presses the consideration of the measure I, for one, will sustain him. I am not allowed, upon the question of taking up the bill, to go into the merits of the law that is proposed in the bill. I will only say, that it is the adoption of a system which has been several years in operation in England, with certain alterations merely, as I understand it, to adapt it to the affairs of this country, and nothing more. It is simply placing our mercantile marine upon the same footing as that of Great Britain. We are carriers side by side with that nation, in competition with them, and we cannot afford very well to give them any great advantage over us without affecting our interest very seriously.⁷⁹

Sen. Pearce (Whig, Md.) supported the principle embodied in the bill, but urged postponement of consideration until work on the appropriations bills was complete. Sen. Cass (Dem., Mich.) interjected that it was a change essential to preserving an American industry:

[A]s I understand this matter, the liabilities of shipowners in foreign countries have been reduced, while those of our own shipowners, if not actually

⁷⁸Id. at 714.

⁷⁹Id.

increased, have been effectively so by the decision of the Supreme Court. Now, how are we to continue our commercial interest on a firm foundation unless we put our shipowners on the same footing with those of other countries? Is there a more important matter than one like this, in which the interest of our whole commercial marine is at stake?⁸⁰

Sen. Hamlin then noted the conflicting interests of shipowners and shippers, but that *The Lexington* decision required immediate action,

Perhaps I have been more familiar than any other with the views of shipowners and importing merchants upon this question. They have interests perhaps directly opposite each other, so far as the risks may be concerned. But the Senator from Massachusetts has well said that until recently our shipowners have not understood the extent of their liabilities. Indeed, there are many of them who do not understand them now. And at this time there is a great deal of feeling among that class of our community who have discovered that they are underwriters for everybody for whom they may transport goods. It is a question which the Senator from Michigan has well said affects the commerce of the whole country.⁸¹

Sen. Badger, however, resumed his attack on taking up a measure that would change the existing liability of carriers, something well understood by all common carriers.⁸²

The motion to postpone consideration was lost on a vote to immediately take up consideration of the bill, 23 votes to consider, 13 votes to postpone, surely a crucial indication of majority support.⁸³

Sen. Hamlin then made amendments to the text and reviewed all its provisions, using the statutory language. He clearly did not believe that greater liabilities would increase the carefulness of mariners, whose very lives were at risk.

Hamlin's speech is the functional equivalent of the modern committee report. Only the portions dealing with general limitation of liability (Sections Three and Four) are reproduced:

The third section of the bill provides that the owner of any vessel shall be liable only to the full extent of ownership in the vessel.

The fourth section provides a remedy for the parties who may sustain a loss where the value of the vessel and her freight for the voyage shall not be sufficient to pay the whole amount of the loss.

⁸⁰*Id.*

⁸¹*Id.*

⁸²*Id.* at 715.

⁸³*Id.*

These two sections are substantially the English law. What is now the risk and liability of a shipowner? You send him abroad upon the ocean with all that he is worth. He may be connected with individuals with whom he has no knowledge, and he is made liable by the acts of others for an amount which not only puts him to the risk of the value of his vessel which is afloat, but of all his own fortune. We have here, in this very Senate, time after time, changed the principle of the common law, and made it applicable to men who are at home in their own vicinage, who can inspect their own business, precisely to the extent that it is proposed to make it applicable in this bill. It is an encouragement to our navigating interest all over the land. It is removing some of those liabilities by which every man who is connected with that interest and is able to respond to the damages that properly belong to him, will do so, and continue in the business. But if they are to be held liable to the extent of the law as it now is, men of pecuniary ability who are able to respond to damages will be driven out of it, and another class of irresponsible men will take their places, and thus make the commercial interests less protected than they would be without the adoption of this section. . . .

These are the provisions of the bill. It is true that the changes are most radical from the common law upon the subject; but they are rendered necessary, first, from the fact that the English common law system really never had an application to this country, and second, that the English Government has changed the law, which is a very strong and established reason why we should place our commercial marine upon an equal footing with hers. Why not give to those who navigate the ocean as many inducements to do so as England has done? Why not place them upon that great theatre where we are to have the great contest for the supremacy of the commerce of the world? That is what this bill seeks to do, and it asks no more.⁸⁴

At this point, Sen. Butler (Dem., S.C.) threatened to “filibuster” because this aid to shipowners must entail losses for shippers, as the insurer-liability of common carriers is changed:

[W]e are called upon now . . . to pass an act similar to that in force in an island of ship-owners: for, of all the countries on earth, I suppose Great Britain has more interest in relieving itself from liabilities upon the ocean than any other; and I suppose that portion of the United States represented by the honorable chairman of the committee may be in the same situation. But allow me to remark that with regard to this liability, or the interest that is affected by this liability, there are other parties whose interests are concerned besides mere ship-owners. Now, the common law in regard to common carriers was a wise one; and I venture to say that in Great Britain at this day you will not find Parliament ready to abolish the liabilities of common carriers on land. They have been willing, no doubt, to relax the law, so far as the liabilities of ship-owners were concerned, because they are an island of ship-owners. On the contrary, those of us who have to trust to the carriage of goods by ships may

⁸⁴Id.

have an adverse interest. I do not commit myself upon this subject; but I will answer for one thing—that the wisest principle of the common law was that when a loss occurred by the act of the common carrier, the onus should be thrown upon the common carrier to exempt himself from liability by showing that it was not an act of God or of a common enemy. Now, the whole of the evidence must necessarily be with the captain and the crew; and if he can exempt himself from liabilities by showing that it was the act of God or of a common enemy, he has it in his power at all times to show that it was not by his negligence that the fire originated. You are going upon the broad proposition that when there is a loss by fire there shall be no liability. It is a principle which, if adopted, strikes deeply into an interest that concerns more persons than ship-owners. . . .

Those who trust their goods to ship-owners have great interests at stake, and it is venturing a great to change the liability from that which the common law prescribes.⁸⁵

Sen. Underwood (Whig, Ky.) then raised the issue of sectionalism, averring that the bill had nothing in it for the South and Central states—specifically, no reduction in freight rates:

Now, I should like before a bill is to be passed by which a practice of sixty years' standing (a practice which has obtained ever since the Government went into operation) is to be changed—I should like to be well informed as to how it is to affect the great agricultural interests of the country, while we are thus benefitting the mercantile interests. Can it be shown that freights will come down? It seems to me that under the existing laws these merchants have the power of indemnifying themselves against all risks by the insurance, offices which have been alluded to. If it requires insurances to cover these losses, I venture to say that they will be made up out of the freights charged upon my constituents and the other producers of the country. If ship-owners have to pay, they will indemnify themselves out of those who employ the vessels. If they do not, they are the most benevolent and accommodating set of gentlemen that can be found in the whole country—and I believe that is not the peculiar characteristic of the mercantile interests. They are generally thrifty men, guarding against all liabilities, and the insurance offices are provided for that very purpose.

Then the argument is that we cannot compete with our great rival upon the ocean—with Great Britain—and that we must pass the first section of this bill in order to enable us to enter into competition with her. . . .

It ought to be shown that if this bill goes into operation it will so operate as to reduce the freights and enable us to compete for the carrying trade with England; because, under the regulation which controls the navigation of that

⁸⁵Id. at 715-16. There followed a brief intervention about Butler's charge of reckless and inconsiderate action; Sen. Foote (Whig, Vt.) spoke of the lengthy [unreported] hearings before the Commerce Committee during which the bill was well considered and thoroughly matured. Id. at 716.

country, they are now enabled to underwork us. I venture to say that in the commercial transactions of the world it is the *underworkings* that most effectually operate upon this part of the business. We know that in land carriage, in the freights from the East to the West, that in railroads and steamboats, and in wagons from Cumberland to Wheeling, or to Brownsville, it is the price which the employer has to pay that regulates the matter in making the arrangements for employing. Now, I want to be informed that, in consequence of those favoring laws passed by the Parliament of Great Britain in reference to British navigation, that ration is so beneficial as to enable the British commercial marine to underwork in a great measure the American marine, and that by the passage of this law it will enable the freights to come down so that we can compete upon that basis. . . .

You must show, in order to prove that we can then enter favorably into that competition, that this legislation is necessary to bring down freights. For if you cannot compete upon the score of economy in the transportation of tobacco, cotton, flour, pork, and other articles of that sort, my word for it, the man who will do the work the cheapest and upon the best terms is employed, whether it is his own national vessel or a foreign one.

We are acting entirely in the dark in reference to this matter. It seems to me that we have a bill here of the most important character, affecting the great agricultural interests of the country, and affecting these interests adversely and disadvantageously, for the purpose of benefitting the commercial interests and the ship-owners of this country.⁸⁶

Senator Dickinson (Dem., N.Y.) took up Underwood's challenge, asserting that any benefit to commerce must necessarily benefit agriculture; especially since the common law rule violates "the spirit of the age:"

[T]he advance and progress of commerce demand that there should be some amelioration of this [common law] iron rule. You cannot benefit commerce without benefitting agriculture. The common carriers, if they are relieved by the operation of this bill, will receive benefits that will be felt in all the ramifications of society, and none will profit more than the agricultural interest.⁸⁷

Senator Rantoul (Dem., Mass.) supported Dickinson's reasoning in a lengthy speech filled with statistics about shipowners and U.S. foreign trade, to justify following British precedent:

We are bound to enact this provision into a law, because every act that is done to benefit the navigation of this country benefits all the interests of the country in its ultimate effects, by its effects upon freights that are transported between this and other countries. How is the rate of freights determined? The Senator from Kentucky [Mr. Underwood] has asked, and fairly asked, what is

⁸⁶Id.

⁸⁷Id.

the effect upon his constituency? What is the interest of the grower of tobacco, corn, pork, and other agricultural products, in this action in regard to the shipping interests of this country

[A]lthough I consider the shipping interest a vast interest, still I consider that the agricultural interest is much vaster and its welfare must be consulted by us in endeavoring to make the change that we are now proposing to make. The first mode in which we are to determine how this bill is to affect the rate of freight is first to find out what supports, what determines the rates of freight. It is the proportion between the quantity of shipping to carry the freight and the quantity of freight to be carried. And how is that affected? Everything that benefits your navigating interests, everything that makes the freight of your merchants easier, cheaper, and safer in its carriage, will produce its beneficial effect. You cannot add a thousand tons to your shipping without bringing down the rates of your freight. You cannot impose upon your shipowner, or allow to remain upon him, any liability without raising your rates of freight, or at all events, preventing their reduction. The proportion may be very small; but so far as the effect goes it is an effect upon him whose freight is carried, but not ultimately upon the shipowner. He first feels the benefit of this change; but how long does he feel it? Just so long as it takes to build more ships and restore the proportion between the profit made out of that trade and the profit of other branches of industry and business. Capital seeks investment in the shape or shapes that are supposed to be the most profitable; and when you build more ships then down go the rates of freight, and tobacco, and pork, and corn are carried cheaper than before. Is there any escape from that reasoning? I am really unable to discover any.⁸⁸

Senator Rantoul concluded with the difference between the liability rule for land carriage and for ocean carriage:

How is a ship-owner to endanger and risk the property of others that he may have to carry without endangering his own property by the same negligence or want of integrity? How is he to do it without a risk of the destruction of his own property? How are his agents that are upon the ships, the master and crew, to risk the property of others that the ship-owner may have placed under their care, without great danger to their own lives? That is not the case with the common carrier upon the land. He can risk the property of others without there being any risk to his own person. Not so with the ship-owner; for then his ships would be in danger.⁸⁹

At this point, Senator Phelps (Whig, Vt.) proposed to do away with further debate by a test vote; accordingly, he moved to lay the bill upon the table (i.e., postpone further consideration). His motion was defeated, on a vote of twenty in favor, twenty-eight against.⁹⁰ In other words, there were

⁸⁸*Id.* at 716-17.

⁸⁹*Id.* at 717.

⁹⁰*Id.*

now five additional votes in support of the bill, as well as seven more in opposition.

The basic decision having been made, there was an agreed amendment concerning the liability of owners of chartered vessels.⁹¹ An amendment broadening the exclusion from the bill of vessels on inland waters, however, provoked further debate.⁹²

Senator Seward (Whig, NY) joined the opposition to the amendment because of the inconsistency in reducing uncertainty with limitation of shipowner liability for foreign voyages but *not* for those on lakes and rivers.⁹³ Nevertheless, the inland exclusion was approved.⁹⁴

The debate concluded with a discussion of exculpatory clauses in bills of lading, which might make limitation legislation unnecessary, at least for the protection of shipowners from cargo claims; The *Lexington* decision was cited for the proposition that the shipper must have consented to the exculpatory clause, and that adding such clauses after shipment was not effective.⁹⁵ Senator Phelps pointed out that the limitation act would not affect bill of lading clauses, bringing to a close that aspect of the discussion.⁹⁶

3. Enactment and Approval

Senator Hamlin's bill was enacted on March 3, 1851, the last day of the second session of the Thirty-First Congress.⁹⁷ It was bundled with appropri-

⁹¹Id.

⁹²Id.

⁹³Id.

⁹⁴Id at 717-18. This exclusion was later removed. Act of June 19, 1886, ch. 421 § 4, 24 Stat. 80.

⁹⁵Cong. Globe, 31st Cong., 2d Sess. 718 (1851).

⁹⁶Id.

⁹⁷Act of Mar. 3, 1851, ch. 43, 9 Stat. 635. Section One deals with non-liability for fire not caused by vessel owners' design or neglect. Section Two deals with non-liability for valuable articles carried without notice to the master. Sections Three and Four deal with general liability:

Sec. 3. And be it further enacted, That the liability of the owner or owners of any ship or vessel, for any embezzlement, loss, or destruction, by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandize, shipped or put on board of such ship or vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners respectively, in such ship or vessel, and her freight then pending.

Sec. 4. And be it further enacted, That if any such embezzlement, loss, or destruction, shall be suffered by several freighters or owners of goods, wares, or merchandize, or any property whatever, on the same voyage, and the whole value of the ship or vessel, and her freight for the voyage, shall not be sufficient to make compensation to each of them, they shall receive compensation from the owner or owners of the ship or vessel, in proportion to their respective losses; and for that purpose the said freighters and owners of the property, and the owner or owners of the ship or vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner or owners of the ship or vessel may be liable amongst the parties

ation bills for the Departments of State, Treasury, Interior, War, Navy and the Post Office, along with legislation on postal rates, customs duties, light-houses, territories and land claims. The House of Representatives promptly concurred in the Senate bill, and, later that day, President Millard Fillmore manifested approval with his signature.⁹⁸ The legislation would remain undisturbed through the Civil War.

IV APPLICATION OF THE FEDERAL LIMITATION OF LIABILITY ACT

A. The City of Norwich Case

Section Three of the 1851 Limitation Act simply states that the liability of shipowners "shall in no case exceed the amount or value of the interest of such owner."⁹⁹ Section Four provides that claimants "shall receive compen-

entitled thereto. And it shall be deemed a sufficient compliance with the requirements of this act, on the part of such owner or owners, if he or they shall transfer his or their interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person or persons who may prove to be legally entitled thereto, from and after which transfer, all claims and proceedings against the owner or owners shall cease.

⁹⁸Millard Fillmore (1800-1874) was born in extreme poverty in the Finger Lakes region of New York. Without any formal schooling, he was apprenticed at age fifteen to wool carders at a textile mill. During apprenticeship, he was occasionally permitted to attend a one-room school. Voluminous reading led to a teaching position at age twenty-two in Buffalo, where he began to read law. He was admitted to the New York Bar in 1823, and became a political protege of Thurlow Tweed, initially in the Anti-Masonic Party and later as a Whig. Fillmore was elected to the New York Assembly in 1829 as an Anti-Mason and served three terms. In 1832, he was elected to Congress as an Anti-Mason. He did not seek reelection in 1834, but was elected again to the Congress, as a Whig, in 1836, and reelected in 1838 and 1840. He became leader of the Whigs in the House and Chairman of the Ways and Means Committee. He was defeated in 1844 in a campaign for Governor of New York, but elected Comptroller in 1847. In 1848, the Whigs proposed to nominate for President of the United States Zachary Taylor, a popular general with no known political views. A slaveowner from Louisiana, Taylor was seen as needing a running mate from the north-east who did not own slaves, and Fillmore was chosen as the Whig candidate for Vice President. President Taylor served only sixteen months before falling ill and dying. On July 9, 1850, Fillmore became President, in the midst of the divisive Senate debates over the Kansas - Nebraska bill. President Fillmore's approval of a new fugitive slave law, (part of the Compromise of 1850), cost him renomination in 1852. After a year touring Europe, Fillmore returned to contest the Whig nomination in 1856, losing it to another general, Winfield Scott. Fillmore then joined the bigots of the Know-Nothing Party - formally, the American Party - as their candidate for the presidency. He carried only Maryland. Fillmore supported Lincoln and the Republican Party in 1860, McClellan and the Democrats in 1864. See R. Rayback, Millard Fillmore (1959) and E. Smith, The Presidencies of Zachary Taylor and Millard Fillmore (1988).

⁹⁹46 U.S.C. app. § 183.

sation from the owner or owners of the ship or vessel, in proportion to their respective losses.”¹⁰⁰ That section then, mysteriously, provides that both shipowners and loss or damage claimants, “may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner or owners of the ship or vessel may be liable amongst the parties entitled thereto.”¹⁰¹ There is no further indication of the precise court, federal or state, in which this is to occur. Nor is there any indication of the type of jurisdiction, law, equity or admiralty, from which procedures are to be drawn.

Two decades passed before the Supreme Court heard its first case under the 1851 Limitation Act. Today, we cannot be sure why it took so long for the normally litigious shipping industry to bring such a dispute to the High Court. The interval included civil war and reconstruction. Another deterrent might have been the absence of readily ascertainable procedures for taking advantage of the substantial privilege conferred by Congress on shipowners. In any event, the case of *Norwich & New York Transportation Co. v. Wright (The City of Norwich)*¹⁰² brought to the Court the issue of whether the Act applied to collision cases, and the Court, on March 4, 1872, held that it did. Shortly afterward, on May 6, 1872, the Court added to the Admiralty Rules promulgated in 1845, Rules 54, 55, 56 and 57, specifying the procedure for use in cases invoking the Limitation Act.¹⁰³

¹⁰⁰Id. § 184.

¹⁰¹Id.

¹⁰²80 U.S. (13 Wall.) 104, 1998 AMC 2061 (1872).

¹⁰³These were presumably the work of Justice Bradley. Joseph P. Bradley (1813-1892) was born on a farm near Albany, N.Y. He was educated at home until the age of 20 when he entered Rutgers College, from which he graduated in 1837. He then read law for two years and, having married the daughter of the Chief Justice, he was admitted to the New Jersey Bar in 1839. He practiced railroad law for the next 30 years. Originally a Whig, Bradley became a stalwart Grant Republican. His selection in 1870 for the U.S. Supreme Court was over-shadowed by the desire of President Grant to appoint a justice who would overturn *The Legal Tender Cases*, 75 U.S. (11 Wall.) 603 (1870). Bradley voted to overturn in *Knox v. Lee*, 79 U.S. 457 (1871). In 1877, he served on the electoral commission to decide the contested presidential election of 1876. When the only independent member of the Supreme Court (Davis) resigned, Bradley was appointed to the Commission as the fifth Justice. Electoral votes of Florida, Louisiana, Oregon and South Carolina had been challenged, Bradley voted with the seven other Republicans on the 15 member Commission to award the presidency to Republican Rutherford B. Hayes by an electoral college vote of 185 to 184 for the Democrat Tilden who had a 250,000 vote popular majority out of 8,300,000 votes cast. Some of Bradley's decisions are today considered controversial: He wrote the majority opinion in *The Civil Rights Cases*, 107 U.S. 3 (1883), holding unconstitutional the 1875 Civil Rights Act. He also expanded the Eleventh Amendment to immunize states from law suits in federal courts, *Hans v. Louisiana*, 134 U.S. 1 (1890), and his concurrence in *Bradwell v. Illinois*, 83 U.S. 130 (1873) still enrages feminists because of its relegation of women to, “the noble and benign offices of wife and mother.” Nevertheless, he wrote other important admiralty decisions: *Providence & N.Y. S.S. Co. v. Hill Mfg. Co.*, 109 U.S. 578 (1883); *The Scotland*, 105 U.S. 24, 1999 AMC 895 (1882); *The North Star*, 106 U.S. 17, 1999 AMC 1503 (1882); *Butler v. Boston S.S. Co.*, 130 U.S. 527 (1888); *Cope v. Vallette Dry Dock Co.*, 119 U.S. 525 (1886); *The Belgenland*, 114 U.S. 355 (1885); *The Benefactor*, 103 U.S. 239 (1880); *The Alabama and the Game-Cock*, 92 U.S. 695 (1875); and *The Lottawanna*, 88 U.S. 558, 1996 AMC 2372 (1874). See C. Fairman, Mr. Justice Bradley in Mr. Justice (A. Dunham & P. Kurland eds. 1964).

The collision of the steamer *City of Norwich* with the schooner *General S. Van Vliet* would be in front of many courts for twenty years.¹⁰⁴ It took place in Long Island Sound near New York Harbor on the night of April 16, 1866. The *City of Norwich* was proceeding east toward New Haven at twelve knots, while the schooner was proceeding south at three to four knots, beating against a head wind.¹⁰⁵ Under the starboard hand rule—an established custom of the sea as well as a newly promulgated regulation¹⁰⁶—the *City of Norwich* was the burdened vessel, obliged to keep out of the way of the *Van Vliet*. The *Van Vliet* sank immediately after collision, a total loss of ship and cargo. The *City of Norwich* caught fire when sea water surged into the engine room and, in half an hour, she also sank in 20 fathoms, a total loss of the cargo. The steamer was salvaged and repaired three weeks later, albeit at great expense.¹⁰⁷

In the United States District Court for the District of Connecticut, the owners of the *Van Vliet* brought an action against those of the *City of Norwich*, seeking damages for loss of their schooner and her cargo.¹⁰⁸ Owners of cargo aboard the steamer sued the *City of Norwich* in an action

¹⁰⁴The litigation began in the U.S. District Court for the District of Connecticut, where the owners of the *Van Vliet* obtained a judgement against the owners of the *City of Norwich* for the loss of the *Van Vliet* and her cargo. *Wright v. Norwich & N.Y. Transp. Co.*, 30 F. Cas. 685 (D. Conn. 1867) (No. 18,087). Before judgment could be passed in that action, owners of cargo aboard the *City of Norwich* arrested the steamship (which had been raised and repaired) in the Eastern District of New York. *Place v. City of Norwich*, 19 F. Cas. 792 (E.D.N.Y. 1866) (No. 11,202). Owners of the *City of Norwich* then sued their insurer on a fire insurance policy, and prevailed over the insurer's claim that the loss was marine and not fire, *Norwich & N.Y. Transp. Co. v. Western Mass. Ins. Co.*, 18 F. Cas. 447 (C.C.D. Conn. 1868) (No. 10,363). In New York, the owners of cargo aboard the *City of Norwich* prevailed against the bill of lading's exculpatory clause (perils of the sea), 5 F. Cas. 780 (E.D.N.Y. 1869) (No. 2,760) and against its unit limitation of liability (\$100 per package), *The City of Norwich*, 5 F. Cas. 781 (S.D.N.Y. 1870) (No. 2,761). The Connecticut decision was affirmed in the same year as to the liability of the *City of Norwich*, 30 F. Cas. 685 (C.C.D. Conn. 1870) (No. 18,087).

A new round of litigation then began on the question of the value of the *City of Norwich* in limitation proceedings in New York, 5 F. Cas. 782 (E.D.N.Y. 1873) (No. 2,762). The \$70,000 valuation of the repaired vessel was cut down to the value of the sunken wreck (\$2,500), 18 F. Cas. 436 (E.D.N.Y. 1875) (No. 10,360). There followed a battle over costs, 18 F. Cas. 439 (E.D.N.Y. 1878) (No. 10,361). In an unreported decision, the Eastern District next proposed to distribute the proceeds, and affirmance of the earlier decrees followed, 18 F. Cas. 440 (C.C.E.D.N.Y. 1879) (No. 10,362), the circuit court holding also that the fire insurance proceeds (\$49,000) need not be added to the limitation fund. In this, the second appeal, the Supreme Court affirmed the circuit court by a 5 to 4 vote, *The City of Norwich*, 118 U.S. 468, 1998 AMC 2077 (1886).

The *City of Norwich* was held in sole fault for a collision with a tug and tow in the East River in 1874. *The City of Norwich*, 5 F. Cas. 786 (E.D.N.Y. 1875) (No. 2,763).

¹⁰⁵80 U.S. at 114-16. See also the circuit court's opinion, 18 F. Cas. 447 (C.C.D. Conn. 1868) (No. 10,363).

¹⁰⁶Act of Apr. 29, 1864, Ch. 69, 13 Stat. 58, arts. 12 and 14.

¹⁰⁷80 U.S. at 107.

¹⁰⁸Supra note 104.

in rem in United States District Court for the Eastern District of New York.¹⁰⁹ In the Connecticut action, the steamer's owners argued unsuccessfully that the schooner was solely at fault because she had no side lights or running lights. However, witnesses aboard a vessel astern of the *City of Norwich* had seen the lights of the *Van Vliet* at about the time of the collision,¹¹⁰ and the court gave judgment for the *Van Vliet* to the full value of the vessel and her cargo.¹¹¹ After the decree had been entered, the owners of the *City of Norwich* sought limitation of their liability, calling the attention of the court in Connecticut to the litigation in New York, and petitioning the court in Connecticut to limit their liability to the owners of the *Van Vliet* to a proportionate share of the value of the *City of Norwich* (assessed after her sinking, but before her salvage).¹¹² The *Van Vliet's* owners argued that the Limitation Act did not apply to the claims of those who owned the other vessel in a collision (in this case, the *Van Vliet*) and her cargo, but only, in such cases, to claims of those who owned cargo aboard the vessel seeking limitation (in this case, the *City of Norwich*). Alternatively, the schooner's owners argued that, even if the Limitation Act did apply to collision claims like theirs, a district court lacked jurisdiction to afford a shipowner relief under the Act.¹¹³

The Connecticut court rejected the shipowner's first argument but accepted the second.¹¹⁴ On appeal, the United States Circuit Court for the District of Connecticut reversed, holding that cases of collision were not covered by the Act.¹¹⁵ A writ of error brought the case to the Supreme Court, which affirmed, without dissent.¹¹⁶

Justice Bradley wrote for the Court, reviewing the history of the Act and similar legislation abroad.¹¹⁷ His opinion then stated what the Court deemed to be the purpose of the statute: "The great object of the law was to encourage ship-building and to induce capitalists to invest money in this branch of industry."¹¹⁸ The court could therefore find no justification for treating collision claims as excluded from the Act. In the Court's view, innocent collision claimants as well as innocent cargo owners "stand on an equality with regard

¹⁰⁹See *supra* note 104.

¹¹⁰80 U.S. at 115.

¹¹¹*Id.* at 107, \$19,975 for the schooner and \$1,921 for her cargo.

¹¹²*Id.* at 108.

¹¹³*Id.*

¹¹⁴*Id.*

¹¹⁵*Id.*

¹¹⁶*J. Strong* did not take part in the case. *Id.* at 128.

¹¹⁷80 U.S. at 116-19, going back to Grotius and the 1681 *Ordonnance de la Marine*, and including the English statutes of 1734, 1786 and 1813, as well as the statutes of Massachusetts (1819) and Maine (1821).

¹¹⁸80 U.S. at 120.

to each other if they arise from the same cause.”¹¹⁹ Because the claims against the *City of Norwich* and her owners exceeded greatly the value of the steamer and her freight, the Limitation Act applied.¹²⁰

The Supreme Court ordered the case remanded for proceedings in the Eastern District of New York, where the fund for limitation (i.e., the vessel) was located.¹²¹ (The amount of that fund would be the subject of fifteen more years of litigation).¹²² In its order, the Court prescribed procedures for the court below.¹²³ For use in future cases, virtually identical directions appeared in the new Admiralty Rules, which were promulgated a few months later.¹²⁴ As for the meaning of “appropriate proceedings in any court,” the Supreme Court made clear its preference for the federal admiralty court, “Now, no court is better adapted than a court of admiralty to administer precisely such relief [apportionment].”¹²⁵ The rules for administering the Limitation Act, promulgated in the wake of *The City of Norwich*, survived intact the 1920 and 1948 revisions of the Supreme Court Admiralty Rules and emerged in 1966 as the substance of Rule F to the Supplementary Rules of the Federal Rules of Civil Procedure, which tracks the language of the current version of the Limitation Act.¹²⁶

¹¹⁹Id. at 122.

¹²⁰Id. at 126 and 128.

¹²¹Id. at 124 and 128.

¹²²See *supra* note 104.

¹²³According to the Court:

The proper course of proceeding for obtaining the benefit of the act would seem to be this: When a libel for damage is filed, either against the ship *in rem* or the owners *in personam*, the latter (whether with or without an answer to the merits) should file a proper petition for an apportionment of the damages according to the statute, and should pay into court (if the vessel or its proceeds is not already there), or give due stipulation for, such sum as the court may, by proper inquiry, find to be the amount of the limited liability; or else surrender the ship and freight by assigning them to a trustee in the manner pointed out in the fourth section. Having done this, the ship-owner will be entitled to a monition against all persons to appear and intervene *pro interesse suo*, and to an order restraining the prosecution of other suits. If an action should be brought in a State court the ship-owner should file a libel in admiralty, with a like surrender or deposit of the fund, and either plead the fact in bar in the State court or procure an order from the District Court to restrain the further prosecution of the suit. The court having jurisdiction of the case, under and by virtue of the act of Congress, would have the right to enforce its jurisdiction and to ascertain and determine the rights of the parties.

Id. at 125.

¹²⁴80 U.S. at xii-xiv. Rule 54 describes the shipowner's petition or libel and the establishment of the fund, and requiring claimants to prove their claims; and the issuance of an order to restrain the further prosecution of suits against the owners. Rule 55 describes the claims process and the pro-rata distribution of the fund. Rule 56 describes the method for contesting the right to limitation or claim. Rule 57 describes venue in the federal court.

¹²⁵80 U.S. at 123.

¹²⁶46 U.S.C. app. § 185.

Not long after *The City of Norwich* settled vital details about the scope and implementation of the Limitation Act, two cases presented the Court with the opportunity to confirm its constitutionality, as an exercise of Congressional power to regulate interstate commerce. In *Lord v. Goodall, Nelson & Perkins Steamship Co.*,¹²⁷ the act was held constitutional as applied to a vessel lost while voyaging between ports of a single state, and in *Providence & New York Steamship Co. v. Hill Manufacturing Co.*¹²⁸ the act was held constitutional as applied to claims after a ship, having completed her voyage from Providence to New York, burned at her unloading pier. In *The Scotland*,¹²⁹ the Court held that the Act entitled the foreign owners of a liner serving New York and Liverpool to limitation for liability from her collision with an American ship on the high seas.

B. The Case of the North Star: When Both Vessels Are To Blame

In another collision case, the Supreme Court devised the Single Liability Rule, for collision cases where two or more limitation proceedings might be simultaneous. The case of *The North Star*¹³⁰ involved a collision between two steamships in a meeting situation, one leaving, the other entering New York Harbor south of Sandy Hook. The outbound *Ella Warley* sank and was a total loss; the inbound *North Star* was badly damaged, but survived to be arrested in an action brought by the *Ella Warley*'s owners. The *North Star*'s owners retaliated with a cross-libel against the *Ella Warley*'s owners, and the libel and cross-libel were consolidated for trial. In an unreported decision, the district court found the *North Star* solely to blame. On appeal, however, the circuit court found both vessels blameworthy and divided the damages equally, under the American rule then in force,¹³¹ rendering a decree in favor of the *Ella Warley*'s owners for the amount by which their damages exceeded one-half the total damages of both parties.

Neither owner petitioned for limitation, but both appealed, and the Supreme Court found the *Ella Warley*'s total loss put her owners in the same position as would their filing of a limitation petition.¹³² (At the time *The North Star* was decided, an owner was permitted to delay seeking limitation until after being held liable.) The Court speculated that the *North Star* would prob-

¹²⁷102 U.S. 541 (1880).

¹²⁸109 U.S. 578 (1883).

¹²⁹105 U.S. 24 (1886).

¹³⁰106 U.S. 17 (1882) (per J. Bradley, for a unanimous Court).

¹³¹18 F. Cas. 381 (C.C. S.D.N.Y. 1871) (No. 10, 331), aff'd, 106 U.S. at 20, referring to *The Schooner Catharine v. Dickinson*, 58 U.S. (17 How.) 170 (1855), overruled, *United States v. Reliable Transfer Co.*, 421 U.S. 397, 1975 AMC 541 (1975).

¹³²106 U.S. at 29.

ably not be entitled to limit because the faulty positioning of her sidelights was attributable to her owners and was a contributing cause of the collision.¹³³ The *Ella Warley's* owners contended that, as their vessel was a total loss, the Limitation Act protected them against any liability to the *North Star's* owners and that they, on the other hand, were entitled to recover half their damages from the *North Star's* owners. The *Ella Worley's* owners also argued that the *North Star's* owners were not entitled to any deduction in respect of the *North Star's* damages, i.e., that limitation should be applied *before* a balance was struck between the damages assessment of the two vessels.¹³⁴ That contention was flatly rejected by the Supreme Court, which affirmed the decree of the circuit court as written.¹³⁵ The Court thus established the rule that, in both-to-blame collision cases, limitation can occur only *after* a balance has been struck, and then, in the absence of privity or knowledge, the limiting calculation is to be applied to the balance which would otherwise be owing by one owner to the other. The rule was stated by the Court as follows:

When this resulting liability of one party to the other has been ascertained, then, and not before, would seem to be the proper time to apply the rule of limited responsibility, if the party decreed to pay is entitled to it. It will enable him to avoid payment pro tanto of the balance found against him.¹³⁶

While the rule of *The North Star* was adopted at a time when damages were divided equally in both-to-blame collisions, regardless of the respective degrees of blame, it remains valid under the current rule of proportional fault established in *Reliable Transfer v. United States*.¹³⁷

It is apparent that the judicial goal is a single judgment, essentially a shortcut, where one judgment resolves all issues—not only those relating to liability, but also those relating to the right of each owner to limit, and to the constitution and distribution of the fund. Because of the difficulty sometimes encountered today in achieving this goal in a single court, solutions must be devised for situations in which only a part of the total collision-limitation problem has been referred to a court.

¹³³*Id.*

¹³⁴*Id.* at 28.

¹³⁵*Id.* at 29. See also *The Manitoba*, 122 U.S. 97 (1897) where the rule of *The North Star* was applied to a both-to-blame collision with very unequal damages (\$85,818 and \$7,470 respectively).

¹³⁶106 U.S. at 20.

¹³⁷421 U.S. 397 (1975), overruling *The Schooner Catharine v. Dickinson*, 58 U.S. (17 How.) 170 (1855).

C. Limiting Collision Liability in U.S. Courts

Like the case from which it emerged, the *North Star* model was designed for collisions in which, because both vessels were to blame, their damages were divided evenly. The *North Star* model also presupposed that the claims of third parties had already been paid by each vessel respectively, that these claims were included in each vessel's collision damage claim,¹³⁸ and that any amounts received by the owners, in litigation or settlement, would be added to each vessel's limitation fund.¹³⁹

1. Single Limitation Fund

In *In re Petition of Diesel Tanker A.C. Dodge*,¹⁴⁰ two laden tankers had collided in the Delaware River near Philadelphia. The *Dodge* exploded and sank, killing eight of her crew; the *Michael* was badly damaged, with three deaths among her crew. There were substantial faults attributable to both vessels, so the district court's decision that both were to blame meant, at that time, an equal division of damages, plus joint and several liability of both vessels to third parties with both personal injury and cargo claims. The owner of the *Michael* settled the claims of those with cargo aboard the *Dodge*, as well as most of the personal injury and death claims against the *Michael*. The *Michael* paid \$57,000 to the widow of the master of the *Dodge*, on her claim of \$118,500. The total of *Michael's* collision damages for hull, detention and third party settlements amounted to \$300,000 more than the total loss claims of the *Dodge*.¹⁴¹ The owner and operator of the *Dodge* petitioned to limit liability; the owner of the *Michael* did not.

On appeal, the issue before the court concerned \$61,500 awarded by the commissioner to the widow of the master of the *Dodge* from the *Dodge's* limitation fund. The owners and operators of the *Dodge* objected to the district court's judgment, confirming the commissioner's decision, that the owner of the *Michael* was not responsible for some portion of the widow's recovery. The court of appeals was not persuaded, viewing the *Dodge's*

¹³⁸The *Albert Dumois*, 177 U.S. 240 (1900), discussed *infra* in text at notes 165-67.

¹³⁹*O'Brien v. Miller*, 168 U.S. 287 (1897).

¹⁴⁰282 F.2d 86, 1961 AMC 233 (2d Cir. 1980).

¹⁴¹*Id.* at 88. See also *Great Lakes Towing & Dock Co. v. M/T Robert Watt Miller*, 957 F.2d 1575, 1992 AMC 2310 (11th Cir.), cert. denied sub nom. *Chevron Transport Co. V. Great Lakes Dredge & Dock Co.*, 506 U.S. 981 (1992). For a collision on the St. John's River at Jacksonville in 1975, a tanker and a dredge were both found to blame. The tanker's petition for limitation was denied, and fault was apportioned 70% to the tanker and 30% to the dredge. In this, the third appeal, the court allowed contribution from the tanker owner for the amount, in excess of the dredge's proportion of liability, of a judgment for the estate of a deceased member of the dredge's crew, even though the tanker owner had previously settled with the estate.

objections as an attempt to get around *The North Star*. In his opinion for the court, Judge Waterman described the position taken by the owners and operators of the *Dodge* as follows: "that the *Dodge*, by virtue of its election to limit liability, insulated from having to pay the *Michael* one half of the difference between its loss and the *Michael's* loss, should be permitted to require the *Michael* to pay some portion of the *Dodge's* obligation to Mrs. Elliott."¹⁴² The court refused to hold the *Michael* liable, adhering to *The North Star* requirement that limitation of liability should not occur until after the balance of the two ships' collision damages has been struck. The court was not dissuaded by a prediction from the owner and operator of the *Dodge* that application of the rule of *The North Star* would lead to great uncertainty for innocent claimants in cases where the American rule of joint and several liability was not applied. The court reasoned that requiring further payments from the non-limiting vessel, "would constitute an improper nullification of valid settlements."¹⁴³ In the end, the court stuck with *The North Star* principle, and the *Dodge* had to pay the remaining portion of the widow's claim from the *Dodge* limitation fund.

In *Petition of Oskar Tiedemann and Co.*,¹⁴⁴ a tanker, the *Mission San Francisco*, collided with a cargo ship, the *Elna II*, on the Delaware River. The tanker exploded and sank; the cargo ship was badly damaged. Both vessels petitioned to limit, and all claims were made in both petitions. Finding both vessels to blame, the district court denied a petition of the United States as owner of the tanker, but granted that of the owners of the cargo ship.¹⁴⁵ The claims against *Elna II* exceeded \$800,000, but the court eventually approved a limitation fund of \$195,000.¹⁴⁶ The United States Court of Appeals for the Third Circuit affirmed.¹⁴⁷

¹⁴²Id. at 89.

¹⁴³Id., citing *The Chattahoochee*, 173 U.S. 540 (1879). This case established the rule recognizing, in a collision case, the indirect liability of the carrier to its own cargo because of joint and several liability. Contrast the Brussels Collision Convention of 1910, which provides for several liability only, so that a carrier (having no liability to cargo by reason of the negligent navigation defense) will recover from the non-carrier only the proportionate contribution to the collision. See art. IV. International Convention for the Unification of Certain Rules of Law with Respect to Collision Between Vessels, adopted at Brussels, Sept. 23, 1910, and in force Mar. 1, 1913. 212 Consol. Treaty Ser. 178, reprinted at 6 Benedict on Admiralty Doc. 3-2 (F. Wiswall ed., 7th rev. ed. 2000).

¹⁴⁴*Petition of Oskar Tiedemann & Co.*, 179 F. Supp. 227 (D. Del. 1959), aff'd, 289 F.2d 237 (3d Cir. 1961).

¹⁴⁵The owner and operator of the tanker were denied limitation because the court found that she had violated two statutory rules of the road for navigating inland waters, that obliging vessels to keep to starboard in narrow channels, 33 U.S.C. § 2009 (Rule 9), and that obliging a vessel to respond to another's signal in anticipation of passing head-on and port to port, 33 U.S.C. § 2034(a) (Rule 34(a)). 179 F. Supp. at 231-32.

¹⁴⁶See *Petition of Oskar Tiedemann & Co.*, 367 F.2d 498, 502, 1966 AMC 1934 (3rd Cir. 1966), cert. denied, 386 U.S. 932 (1967).

¹⁴⁷*Petition of Oskar Tiedemann & Co.*, 289 F.2d 237, 1961 AMC 1878 (3rd Cir. 1961).

In a subsequent appeal,¹⁴⁸ the owners of the cargo ship objected to the district court's decision to revisit its decree fixing the limitation fund, to impose liability in full for seamen's claims of maintenance and cure for injuries sustained in the collision. The court of appeals found that the court below had erred in reopening the matter of the freighter owner's liability, even though the seamen's claims represented a liability that was not subject to limitation. For the court of appeals, the limitation decree was final.¹⁴⁹

In *Complaint of Seiriki Kisen Kaisha*,¹⁵⁰ the *Stena* (5,940 gross tons) collided with the *Seiryu* (17,151 gross tons) in waters eight and a half miles off the coast of Cuba. The *Seiryu* went down, with loss of cargo but no loss of life; the *Stena* was badly damaged. The Brussels Collision Convention of 1910¹⁵¹ governed, obliging the court to assign fault proportionately, and dictating several liability, rather than joint and several liability.¹⁵²

Each vessel was clearly aware of the other's presence, yet they managed to collide at right angles while both were at full speed; the *Seiryu* being on a crossing course (and therefore the give-way ship), while the *Stena* was the stand-on vessel.¹⁵³ The *Seiryu's* watch officer did not attempt to determine the risk of collision, either visually or by radar, and somehow reached the erroneous conclusion that the *Stena* was on a parallel course.¹⁵⁴ Nevertheless, about two to three minutes before the collision, the *Seiryu* turned to port, without signal to the *Stena*. This turn brought the *Seiryu* directly across the extended course line of the *Stena*, and was found to have been the immediate cause of the collision.¹⁵⁵

Just prior to the accident, the *Stena's* watch-officer had allowed the lookout to go below, while the watch officer meanwhile occupied himself with non-urgent navigational tasks. The vessel's automatic pilot was engaged. Aboard the *Stena*, therefore, nobody was watching the approaching *Seiryu*, and, when she turned toward the *Stena*, no warning signal was sounded by the *Stena*, an omission found to be a contributory cause of the collision.¹⁵⁶ Nevertheless, the court found the *Seiryu* to be more at fault, in terms of both culpability and causation, because of its status as the give-way vessel and

¹⁴⁸Petition of Oskar Tiedemann & Co., 367 F. 2d 498, 1966 AMC 1934 (3rd Cir. 1966), cert. denied, 386 U.S. 932 (1967), rev'g 236 F. Supp. 895 (D. Del. 1964).

¹⁴⁹367 F.2d at 502-03.

¹⁵⁰629 F. Supp. 1374, 1986 AMC 913 (S.D.N.Y. 1986).

¹⁵¹Id. See supra note 143. Both Japan (*Seiryu*) and Cayman Islands (*Stena*) were signatories of the 1910 Brussels Collision Convention. (Cuba, rejected as the territorial waters state, is not a signatory.)

¹⁵²629 F. Supp. at 1392-95.

¹⁵³629 F. Supp. at 1378.

¹⁵⁴Id.

¹⁵⁵Id. at 1381.

¹⁵⁶Id. at 1380.

because of its unexplained last-minute course change. The court therefore assigned 60% of the fault to the *Seiryu* and 40% to the *Stena*.¹⁵⁷

The owners and bareboat charterers of both vessels petitioned for limitation under the 1851 Act. The court denied limitation to the owner and operator of the *Seiryu*, but granted it to the owners of the *Stena*. The *Seiryu* interests were denied limitation because they had failed to prove that the accident was not caused by their privity or knowledge; that is, they had failed to prove her crew, particularly the watch officer, competent. The watch officer held only a class B Korean license, although the applicable regulations required all deck officers to hold class A licenses. The differences between these two licenses related to training in electronic navigation equipment. They also related to proficiency in the English language, and the only radar manuals on board the vessel were written in Japanese and English.¹⁵⁸

Cargo on the *Stena* was not damaged, but a general average had been declared.¹⁵⁹ Cargo on the *Seiryu* was lost when she sank, but its owners could recover damages from the *Stena*. Recovery by the owners of *Seiryu*'s cargo from the owner of the *Stena* was limited by the Convention of 1910, in proportion to the *Stena*'s 40% contributory fault, and subject to *Stena*'s limitation of liability under the 1910 Act.¹⁶⁰ The total loss of *Seiryu* (\$8.5 million), and that of her cargo (\$16.5 million), was balanced against the hull damage to *Stena* (\$1.7 million) and minimal damage to her cargo, in light of the 60-40 division of damages.

The court granted *Stena*'s limitation petition, but denied *Seiryu*'s, so *Seiryu*'s cargo owners could recover from *Stena* 40% of their damages to the limit of the fund, while *Stena*'s cargo interests could recover 60% of their general average contributions from *Seiryu*, without limitation.¹⁶¹ Ultimately, the case amounted to a financial victory for *Seiryu*, despite the denial of limitation. *Seiryu*'s cargo owners took 40% of the \$11,295,000 in *Stena*'s limitation fund, leaving \$6,577,000 for the claims of *Seiryu*'s owners. By the rule of *The North Star*, the *Stena*'s right to limitation is recognized only after the balance of losses between the two vessels has been struck. The result was therefore a decree in favor of *Seiryu* owners in the amount of \$1,750,000.¹⁶²

¹⁵⁷Id. at 1382.

¹⁵⁸Id. at 1388-90.

¹⁵⁹Id. at 1391.

¹⁶⁰Id. at 1392.

¹⁶¹Of course, *Seiryu*'s cargo would also be subject under its bills of lading to the COGSA defenses (e.g., negligent navigation) and unit limitation, (\$500 per package); accordingly, cargo interests settled their claim against *Seiryu* for \$1 million. Id. at 1391-92.

¹⁶²Id. at 1392. "Innocent" cargo takes before "guilty" claimants. See *The Mauch Chunk*, 154 F. 182 (2d Cir. 1907), for the equitable rule of subordination whereby satisfaction of claimants without clean hands, such as a both-to-blame vessel owner, is postponed until all innocent claimants are paid in full.

Had limitation been granted to *Seiryu*, the \$1,750,000 from *Stena* would then have bolstered *Seiryu's* limitation fund,¹⁶³ but *Seiryu's* petition was denied. This case is especially instructive because others involving a single limitation fund do not provide the financial details to determine completely the consequences for the interests of each colliding ship.¹⁶⁴

2. Two (or more) Limitation Funds

In *The Albert Dumois*,¹⁶⁵ the *Argo*, descending the Mississippi River at 20 m.p.h., collided with the *Albert Dumois*, which had been ascending the river at 9 m.p.h. The *Argo* sank; the *Albert Dumois* survived. Both vessels were found to blame. Owners of both vessels petitioned to limit liability, and both petitions were granted. Before the Supreme Court were the death claims for passengers on the *Argo*, which had been made only against the non-carrier, the *Albert Dumois*.¹⁶⁶ Reaffirming the rule pronounced in the *The North Star*, the Court held that the court of appeals had not erred in ordering that the payments to those claiming on behalf of the dead passengers should be deducted from both limitation funds. Writing for the Court, Justice Brown noted that:

We held [in *The North Star*] that the Admiralty rule that, where both vessels are in fault, they must bear the damages equally, applied, and that the one suffering least should be decreed to pay to the other the amount necessary to make them equal, namely, one half the difference between the respective losses sustained, and that when this resulting liability of one party to the other has been ascertained, then, and not before, was the proper time to apply the rule of limited responsibility, if the party decreed to pay is entitled to it.¹⁶⁷

In *Petition of Bloomfield Steamship Co.*,¹⁶⁸ successful petitions to limit liability by the owners of both vessels involved in a collision, and claims by the

¹⁶³See supra note 143.

¹⁶⁴See, e.g., *Weyerhaeuser S.S. Co. v. United States*, 372 U.S. 597, 1963 AMC 846 (1963) (actual payments rather than statutory compensation amounts used to determine third party injury claims). In *Guillot v. Cenac Towing Co.*, 366 F. 2d 898, 1966 AMC 2685 (5th Cir. 1966), the Fifth Circuit stated the principle that the actual payouts to third parties rather than the potential indemnification claims should be included in the claims on the limitation fund. The case involved an explosion rather than a collision. See also *Empire Seafoods v. Anderson*, 398 F. 2d 204, 1968 AMC 2664 (5th Cir. 1968) (limitation eventually denied for shrimp boat's allision with bridge). *Cargill Grain Co. v. Buffalo Barge Towing Corp.*, 1941 AMC 122 (S.D.N.Y. 1940), involved the collision of two barges, with resulting hull and cargo claims. Both owners petitioned for limitation. The court marshalled the funds so that innocent cargo with a claim against only one fund was paid out of that fund, while claimants who could be paid out of either fund were paid out of the other, which paid more.

¹⁶⁵177 U.S. 240 (1900).

¹⁶⁶*Id.* at 255.

¹⁶⁷*Id.* at 256. Chief Justice Fuller and Justice Peckham dissented, without opinions.

¹⁶⁸422 F.2d 728, 1970 AMC 521 (2d Cir. 1970).

owners of cargo lost aboard one of them, left the courts to dispose of a non-carrier's claim for indemnification from the carrier. The dispute arose from a collision between the American flagged *Lucile Bloomfield* and the Norwegian flagged *Ronda* in international waters off Le Havre, France. Only slightly damaged in the collision, the *Lucile Bloomfield* continued on her way; the severely damaged *Ronda* managed to enter Le Havre, but she capsized and sank at a pier the following day, a total loss of both vessel and cargo.¹⁶⁹ The owners of cargo that went down with the *Ronda* promptly sued the owners of both vessels in New York.¹⁷⁰ Two weeks later, the American owners of the *Lucile* petitioned to limit their liability with respect to the collision.¹⁷¹ The owners of the *Ronda's* cargo then presented their claims in the *Lucile Bloomfield* limitation action, but the owners of the *Ronda* did not, opting instead to sue the owners of the *Lucile* in the English High Court of Justice. Later, when the owners of the *Lucile* sued the owners of the *Ronda* in a federal court in Louisiana, that action was transferred to the Southern District of New York, and, on the next day, the owners of the *Ronda* filed their own petition for limitation in the Southern District.¹⁷²

The owners of cargo lost aboard *Ronda* settled with the owners of the *Ronda*, but not with the owners of the *Lucile*. Trial in the English court of the collision action (*Ronda v. Lucile*) took place before trial in the federal court in New York (*Lucile v. Ronda*), but the judgments handed down by both courts were that both vessels were to blame. The English court apportioned the damages fifty-fifty. In New York, the owners of both the *Ronda* and the *Lucile* were allowed to limit their liabilities pursuant to the 1851 Act. The owners of cargo lost aboard *Ronda* were allowed to collect from *Lucile*, as joint tortfeasor, the remainder of their damages (\$1,663,000), that is, after subtraction of

¹⁶⁹Id. at 729-30. The *Ronda*, outbound from New York with military cargo for Le Havre (cargo value \$1,863,000) collided at the pilot station with *Lucile Bloomfield* (hereinafter *Lucile*). outbound from Le Havre. *Lucile* suffered minimum physical damage (\$7,979) and no cargo damage. *Ronda* was a total loss, her freight was only \$98,500.

¹⁷⁰Id. at 730.

¹⁷¹Id. at 730. In *The Lucile Bloomfield*, [1964] 1 Lloyds L. Rep. 324, the English admiralty court refused to dismiss the arrest of the *Lucile* in England despite the limitation proceedings in the United States. The Eastern District of Louisiana held that its limitation injunction had no extraterritorial effect. In re Bloomfield S.S. Co., 227 F. Supp. 615 (E.D. La. 1964), aff'd, 363 F. 2d 872 (5th Cir. 1966).

¹⁷²When suit by the owners of cargo lost aboard *Ronda* prompted her owners to petition for limitation, the *Ronda's* owners tried to exclude the owners of the *Lucile* from the effect of the standard restraining order, in pursuit of a strategy for presenting as controlling the judgment of the English court as to liability between the vessels. The owners of cargo lost aboard the *Ronda* objected to the exclusion, in an unsuccessful effort to thwart limitation. The district court agreed that excluding the owners of the *Lucile* from the restraining order was improper, but, instead of dismissing the petition of the owners of the *Ronda*, simply extended the order to embrace the *Lucile's* owners. Petition of A/S J. Ludwig Mowinckels Rederi, 268 F. Supp. 682, 1968 AMC 727 (S.D.N.Y. 1967). The author acted of counsel for the owners of the *Ronda* in these cases.

the amount collected from *Ronda* in settlement (\$200,000).¹⁷³ The owners of the *Ronda* were required to pay an equal share of *Lucile's* collision damage (\$3,989), but they were not required to indemnify the owners of the *Lucile* for even part of their payments to the owners of the cargo lost aboard *Ronda*. The court ruled that *Lucile* could assert such claim only to the extent that payment by the non-carrier to cargo exceeded one-half of cargo's total damage claim.¹⁷⁴ One half of *Lucile's* cargo liability was \$831,500 but her limitation fund was only \$680,817.¹⁷⁵

On appeal to the United States Court of Appeals for the Second Circuit, the owners of the *Lucile* asserted a right to \$460,000 from *Ronda*, half of the sum of *Lucile's* limitation fund (plus interest) and half of *Lucile's* own damage.¹⁷⁶ This claim was clearly rejected by the Second Circuit, which held that a right of contribution was not an integral part of the vessel's collision damages; accordingly, the district court had correctly denied the owners of the *Lucile* any indemnification recovery from the owners of the *Ronda*.¹⁷⁷

Dueling limitation petitions were also involved in *Allseas Maritime, S.A. v. M/V Mimosa*¹⁷⁸ although the financial consequences were not worked out by the court in that case, because the shipowners eventually settled with all claimants except salvors. The collision of the Liberian tankers, *Burmah-Agate* and *Mimosa* in an anchorage area of Galveston Bay led to the deaths of thirty five members of the crew on *Burmah-Agate* and of one crew member on *Mimosa*, the loss of *Burmah-Agate's* crude oil cargo (with consequent pollution), and the constructive total loss of both vessels. With her rudder jammed and engines still running, the fiery *Mimosa* was abandoned by her crew to run in ever-widening circles, threatening oil drilling rigs and platforms. Eventually, some seven and a half hours after the collision, when her engines had run dry of fuel and stopped, the drifting wreck was pushed by a tug out of harm's way.¹⁷⁹ The owners of both vessels petitioned in the United States District Court for the Southern District of Texas to limit their liability, claims being made by *Burmah-Agate's* cargo, by surviving crewmen, and on behalf of the estates of the deceased crewmen from both ships. The tug also

¹⁷³422 F. 2d at 734. *Ronda's* cargo was subject to the unit limitation (\$500) of liability to cargo in the Carriage of Goods by Sea Act, 46 U.S.C. § 1304; accordingly, they settled the cargo damage claim for \$200,000. There were no significant personal injuries, but there was an enormous claim against the owners of the *Ronda*, pursued only in the French courts, for wreck removal at Le Havre.

¹⁷⁴*Id.* at 734-35.

¹⁷⁵*Id.* at 734.

¹⁷⁶*Id.* at 734-35.

¹⁷⁷*Id.*, citing *Erie R.R. Co. v. Erie Transp. Co.*, 204 U.S. 220 (1907), and *Halcyon Lines v. Haenn Ship Corp.*, 342 U.S. 282, 1952 AMC 1 (1952), for principles of indemnification.

¹⁷⁸574 F. Supp. 844 (S.D. Tex. 1983), *aff'd*, 812 F. 2d 243, 1987 AMC 2515.

¹⁷⁹574 F. Supp. at 845-46.

sought an award for salvage of the *Mimosa*.¹⁸⁰ In this case, application of the rule of joint and several liability as to the claims by the owner of *Burmah-Agate's* cargo was complicated by a clause in the charter party, pertaining to collisions for which both vessels were to blame, which required the cargo owner to reimburse the carrier for any indirect liability to cargo as a result of joint and several liability.¹⁸¹ Once it became apparent that the clause would be enforced, the parties were able to settle the cargo claims on the basis of the rule of *The North Star*.¹⁸² The wrongful death and personal injury claims were likewise settled, and on appeal, the United States Court of Appeals for the Fifth Circuit reduced the salvor's award from \$150,000 to \$67,500.¹⁸³

V CONCLUSION

Despite its derivation from the rule of equal division of damages in collisions where both vessels are to blame, the rule of the *North Star* still governs computation today of damages in cases of collision where the Limitation Act is invoked. Results under that rule, however, now vary greatly depending upon the percentages of fault, rules of joint and several liability and contribution, Both-to-Blame Collision clauses in charter parties, statutory limits of liability for damage to cargo, indemnification rules and provisions, the "innocence" of claimants, and the priority traditionally assigned their claims. The situation is even more complicated when one vessel has settled joint liability claims and the other has not, because indemnification is not a *right* of the petitioning party.¹⁸⁴ Accordingly, the timing of settle-

¹⁸⁰812 F.2d at 246.

¹⁸¹*Id.* at 852-54.

¹⁸²A Both-to-Blame Collision Clause in a bill of lading governed by the Carriage of Goods by Sea Act, 46 U.S.C. § 1301 et seq., cannot be enforced against cargo owners. *United States v. Atlantic Mut. Ins. Co.*, 343 U.S. 236, 1952 AMC 659 (1952). The same clause in a charter party, however, can be. See, e.g., *Union Transp. Co. v. United States*, 1976 AMC 1480 (N.D. Cal. 1976); and this case, 574 F. Supp. at 852-54.

¹⁸³812 F.2d at 244-45.

¹⁸⁴See *Petition of Bloomfield S.S. Co.*, 422 F.2d 728, 1970 AMC 521 (5th Cir. 1970); *Guillot v. Cenac Towing Co.*, 366 F.2d 898, 1966 AMC 2685 (5th Cir. 1966). See generally Staring, Contribution and Division of Damages in Admiralty and Maritime Cases, 45 Cal. L. Rev. 304, 337 (1957).

In *The Voco*, 93 F. Supp. 718, 1950 AMC 1552 (S.D.N.Y. 1952), an innocent vessel claimed in the limitation proceedings of two guilty vessels but was allowed to recover only two thirds of her damages; it is possible that the court so ruled in order to minimize the effect of this innocent claim on other claimants because this claimant could recover outside this limitation action—from the other guilty vessel. See also *The Doris Eckoff*, 41 F. 156 (SDNY 1890), which involved a collision of two vessels, both then being controlled by tugs. The court found the four vessels at fault and assessed the percentage allocations, referring to the possibility of non-collection and noting that, "Whatever portion of the one-fourth payable by each is not available by reason of inability to collect it, or by reason of limitation of liability,

ments of cargo or personal injury claims will be most important. The expectation, hopefully justified, is that the limitation courts will attempt to act in an equitable manner toward both innocent claimants and the shipowner beneficiaries of the 1851 Congress. While the dismal science of economics may have provided the justification for the original enactment of the Limitation of Liability Act, at a time when insurances were primitive and vessel owners knew nothing about their investments for months at a time, protections available to the shipping industry are far greater today, so natural law and justice cry out against preserving investors at the expense of innocent victims.

must be borne *pro rata* by the remaining vessels or their owners, and so on." 41 F. at 157. Cf. *In re Eastern Dredging Co.*, 182 F. 179 (D. Mass. 1909).

The case of *The George W. Roby*, 111 F. 601 (6th Cir. 1901), arose after a both-to-blame collision on Lake Huron. The steamship *Florida* sank but the steamer *George W. Roby* survived, and the latter vessel's owners petitioned for limitation. The *Roby's* limitation fund was \$59,300, and the claims against it were \$118,377. The court gave priority to the claims of those owning cargo aboard the *Florida* over the claims of those owning the lost vessel. Because the fund was insufficient to pay in full the *Florida* cargo claims, the *Florida's* owners got nothing. *Florida* owners claimed the right to a set-off, whereby they would recover \$11,398 by setting one half of the decree against the *Roby* against one half of the value of the *Florida*. The court negotiated the set-off on the authority of *The North Star*, 106 U.S. 17 (1882), and *The Chattahoochee*, 173 U.S. 540 (1899).

Illustrative examples of adjustments to final judgments under The North Star rule can be found in N. Healy & J. Sweeney, *The Law of Marine Collision* 591-94 (1998).

