CHAPTER IX
Maritime Torts

SECTION 55
INTRODUCTION: THE GENERAL MARITIME LAW CONCEPT

The next five sections of this study are devoted to a discussion of maritime torts in the conflict of laws. We are not concerned (except incidentally) with the internal law of any state or nation relating to maritime torts. Our interest lies only in the application of choice-of-law principles by the courts of the United States and the British Empire. Hitherto we have been accustomed to thinking of the various states of the United States as individual units in the conflict of laws, each having its own internal law. But in dealing with maritime torts we shall find it necessary, at times, to abandon this approach and to think of the entire United States as a single unit having a uniform internal law. Since maritime torts fall within the admirality jurisdiction, the national government has, under the Federal Constitution, almost complete power to prescribe their legal consequences.¹ In recent years Congress has, in the exercise of this power, introduced some important modifications in the American law of maritime torts.

It is still possible, however, for an individual state to make a very limited contribution to this body of law. In the view of the Supreme Court there is a class of matters which are "maritime but local" in nature. If Congress has not dealt with a maritime but local matter, a state legislature may legislate effectively with regard to that matter. A state statute can only

¹ For further discussion of the power granted to Congress by the Federal Constitution to deal with maritime torts, see Robinson, Admiralty (1939) 8, 27.
operate in cases appropriately connected with the state in question. State legislation is applied to such cases upon ordinary choice-of-law principles. Subsequent congressional legislation will, of course, supersede all state laws. Of matters maritime but local the outstanding example is wrongful death upon state territorial waters. Though such a tort is obviously maritime, the deceased man's dependents may base an action for his death upon the death statute of the state in which the fatal injury was inflicted. ²

Another factor which complicates the approach to a study of maritime torts is the concurrence of admiralty jurisdiction with that of the ordinary common-law courts. In a non-federal state, such as England, an action for a non-maritime tort could be brought only in the ordinary common-law courts. But a dispute arising out of a maritime tort might be litigated in either the common-law courts or the court of admiralty. Within a very broad field, and especially in matters of procedure, each court would apply different rules. The differences between these rules might, in some cases, be of considerable practical significance. In the United States, the jurisdictional situation is even more intricate. A maritime tort, like any other tort, may be litigating in (1) a state common-law court or (2) a federal common-law court, if there is diversity of citizenship. Because of its maritime character it could also be litigated in (3) a federal court of admiralty. Any one of these courts would, of course, be bound to follow the general maritime law of the United States or, in an appropriate case, the law of a state of the United States or of a foreign country, applied according to choice-of-law principles. But upon points of "procedure" each court would adopt its own rules and these might diverge considerably. Difficult questions are not infrequently raised as to whether a particular dispute is within the jurisdic-

² See below, p. 263.
tion of the admiralty tribunals. But the demarcation of admiralty jurisdiction is a topic outside the scope of the present work.

Maritime law has a tradition of international uniformity. Like the law merchant, it is supposed to have its roots in ancient rules and customs common to all nations. As the law merchant epitomized the custom of merchants of every nationality, so the general maritime law represented the usages of mariners in all parts of the world. The survival of admiralty courts has helped to preserve this tradition in the United States and the British Empire. At the present day the uniformity of maritime law as it is administered in the various countries of the world is not impressive. Even between England and the United States there have been serious divergencies on certain doctrinal issues. Much of the maritime law administered in these countries is laid down by local statutes. There is no uniform world-wide law of the sea. 8

It is still possible, however, to secure a reasonable degree of uniformity in the maritime field, as in other branches of law, by adherence to uniform choice-of-law principles. Differences between English and American marine law do not matter, if English and American courts can agree upon the demarcation of the spheres of authority within which these two bodies of law shall operate. There is a certain theoretical antipathy between the ancient conception of a uniform sea law for the whole world and the application of choice-of-law principles. The application of choice-of-law principles presupposes the existence of differences between the maritime laws of the

8 See The Milford, (1858) Swabey 362, 166 Eng. Rep. 1167, in which Dr. Lushington, a great admiralty lawyer of his time, seems to admit that the so-called general maritime law is really nothing more than internal law of the forum. See also Lloyd v. Guibert, (1865) 1 Q. B. 115, 123-125.

The classic criticism of the general maritime law theory as fictitious and misleading is that of Westlake. See his PRIVATE INTERNATIONAL LAW, Ed. 7 (1925) 290.
various nations. The ancient tradition of uniformity may move an admiralty judge to say, "I will not apply some particular foreign law to this case; I will apply the general maritime law, as I understand it." Admiralty courts have, generally speaking, accepted the idea that the law of the place of wrong should govern in matters occurring there. But a thoroughgoing application of this principle has sometimes been impeded by the ancient tradition.

Most of the problems with which we shall be concerned in the next four sections of this book are multiple contact problems. They arise because a ship is more than a mere chattel; it is, in some respects, like a floating island. As it moves about, from one country to another, it carries on board a community of persons. For their convenience, it is desirable that the ship be governed by some system of legal rules. Moreover, most ships are associated, by registration, with the nation of which their owners are citizens. They are part of its merchant marine; they fly its national flag. The government of that country has usually a certain interest in the ship, in the conduct of those on board her, and in the legal consequences of acts and events in which she may become involved. For these reasons, it is sometimes advisable, in cases whose facts are connected with a ship, to apply the law of the ship's flag. But one ship may collide with a ship which belongs to another country whose law is different and then we have to take two laws into consideration. Or one ship may sail into the territorial waters of another state. Here a collision or an injury on board will produce fresh multiple contact problems.

In the next four sections we shall have occasion to discuss the tort aspects of certain relations: passenger and carrier, employer and employees (seamen, stevedores, etc.). No attempt will here be made to deal with the contractual or quasi-contractual aspects of such relationships which might involve
additional choice-of-law principles. These have already been discussed in earlier sections; to introduce them here would only intensify the complexity of problems already complicated.

To say precisely to what country a ship belongs is not always easy. The flag, as we have suggested, is a prima facie symbol. But it does not always indicate who really controls the ship. In some instances the citizenship of the shipowner is more significant. The latter test has been adopted by the United States Seaman’s Act of 1920. An American court will apply that act to actions brought against their employers by seamen employed on vessels owned by American citizens, even though the vessel has been registered under a foreign flag. There may be other cases in which a vessel ought to be regarded as belonging to one nation although she flies another’s flag.

SECTION 56

MARITIME TORTS IN TERRITORIAL WATERS INVOLVING A SINGLE SHIP

In this section we are concerned with the multiple contact problems which arise from an injury occurring in territorial waters in which only a single ship is involved. For instance, one of the ship’s officers assaults a member of the crew, or the ship itself sinks, resulting in the death or injury of persons on board. Collision cases are reserved for another section. To make a multiple contact problem, we suppose that the law

4 Above, section 42, 44.
6 See the judgment of Lord Justice Brett in Chartered Mercantile Bank of India v. Netherlands, etc., Co., (1883) 10 Q. B. D. 521. See also Grand Trunk R. Co. v. Wright, (C. C. A. 6th 1927) 21 F. (2d) 814, in which a vessel of American registry, owned by an American corporation, was held to be governed by Canadian law with respect to an injury to an employee on board. The vessel was under charter to a Canadian corporation at the time of the injury.
of the ship and the law of the territorial waters are different. The possibility of applying either one or both is thus presented. The state of the territorial waters will no doubt be concerned with the legal consequences of any acts or events occurring within its boundaries. But the state of the ship's flag may also have a similar interest in whatever occurs on board the vessel and the application of its law may in some instances be more convenient for all persons concerned. It is not surprising therefore to find that American courts have sometimes adopted the law of the waters, and, at other times, the law of the ship. The general theory appears to be that the law of the waters should control unless the dispute concerns only the internal economy of the ship.

Let us consider first the situation of a foreign vessel within the territorial waters of the United States. *Uravic v. Jarka Co.*,¹ a Supreme Court decision, affords a good point of departure. Uravic, a stevedore, was killed while working on board a German vessel in New York harbour. Overruling a previous decision of the New York Court of Appeals,² the Supreme Court ruled that his dependents could maintain an action based upon the law of the United States. "There is strong reason," said Mr. Justice Holmes, "for giving the same protection to the person of those who work in our harbours when they are working upon a German ship that they would receive when working upon an American ship in the next dock, as is especially obvious in the case of stevedores who may be employed in unloading vessels of half a dozen different flags in turn." The litigation was disposed of in accordance with the terms of an appropriate federal statute.³

In *Western Fuel Co. v. Garcia*⁴ the factual pattern was

³ In this case, the court applied the Seaman's Act (1920) or Jones Act (1920) 41 Stat. 1007, c. 250, § 33, 46 U.S. Code (1934) § 688.
⁴ At the present day the appropriate American statute would be the Harbor Workers Act (1927) 44 Stat. 1424, c. 509, 33 U.S. Code (1934) §§ 901-950.
⁵ *Western Fuel Co. v. Garcia*, (1921) 257 U.S. 233, 42 Sup. Ct. 89.
identical with that of *Uravic v. Jarka*. Manuel Souza, a stevedore, was killed at work on board the “Tancred,” a Norwegian ship anchored in San Francisco Bay. It does not seem to have been doubted that the case should be governed by United States law. But at the time when it arose, the federal statute applied in *Uravic v. Jarka* had not been enacted. The Supreme Court held that, in default of federal legislation, the deceased man’s dependents might base their action upon the death statute of the state of California. The case illustrates the point, which we have already mentioned, that while the maritime law of the United States is controlled and prescribed by the federal government, it is possible for the several states to make a limited contribution to that body of law in the absence of federal action. The legal consequences of a wrongful death occurring in American territorial waters are frequently referred to the law of the state of wrong. The federal government has, however, enacted special statutes dealing with the death or injury of seamen and harbour workers. To this extent the state laws have been superseded.

So much for the situation in which the law of the territorial waters controls. Let us now turn to the cases in which the law of the ship’s flag has been adopted. These decisions do not announce any clear and definite theory. But they are all concerned with injuries received on board a foreign ship in American waters by a member of the crew. It will be remembered that in *Uravic v. Jarka*, the leading case in which the law of the waters was adopted, the injured man was not a seaman but a stevedore, temporarily present on the ship. When a member of the crew or some person more permanently at-

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tached to the ship is injured, American courts usually con­cede the application of the flag law. But the United States has an undeniable interest in the conduct of persons on board foreign ships in American waters. If the foreign law were shown to be peculiarly harsh or unjust, the case would be an apt one for the application of American law, even to the ex­tent of conferring a cause of action where the law of the flag gave none. No doubt it is desirable, so far as possible, to follow a uniform choice-of-law principle which will select a single law. But there are other conflict of laws situations in which the courts permit an alternative reference to the laws of either one of two states, because the factual pattern is con­nected with both of them.

We have still to consider the cases involving a conflict be­tween the law of a single ship and the territorial waters law of some state other than the United States. There is some au­thority for the view that the law of the territorial waters ought to prevail. But in a number of cases the law of the ship has been enforced on the ground that the dispute merely

7 The Hanna Nielsen, (D. C. Wash., 1928) 25 F. (2d) 984 (here, however, the law of the ship was presumed, in the absence of contrary proof, to be the same as that of the forum); Heredia v. Davies, (C. C. A. 4th, 1926) 12 F. (2d) 500 (here the law of the ship was presumed to be the same as that of the forum; the effect of the decision is obvious); Clark v. Montezuma Transp. Co., (1926) 217 App. Div. 172, 216 N. Y. Supp. 295; The Magdapur, (D. C. N. Y., 1933) 3 F. Supp. 971; The Seirstad, (D. C. N. Y., 1928) 27 F. (2d) 982; The Pinar Del Rio, (C. C. A. 2nd, 1927) 16 F. (2d) 984; Grand Trunk R. Co. v. Wright, (C. C. A. 6th, 1927) 21 F. (2d) 814 (injury resulting in death suffered by employee on board train ferry in American territorial waters; the ferry was of American registry but had been chartered to defendant railroad, a Canadian corporation; court held case governed by Canadian law).


affected the internal economy of the vessel. *Thompson Towing and Wrecking Ass’n v. McGregor*⁹ is the classic authority for this theory. In that case a member of the crew of an American ship was killed by a boiler explosion while the vessel was in Canadian waters. Applying American law, the court allowed a recovery by his dependents. With reference to the choice-of-law problem the court said:

“So far as this question is concerned, the ultimate basis of the decree was that the explosion of this boiler was a matter which did not directly involve the peace, dignity, or tranquility of the Canadian government but rather involved the internal discipline and management of the ship.”

This principle has been adopted in subsequent cases where a seaman on board an American ship has been injured or killed in foreign territorial waters.¹⁰ There seems to be no reason why it should not also be applied in cases where both the ship law and the water law are foreign.¹¹

In *Carrington v. Panama Mail Co.*¹² a stevedore was in-

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¹¹ The Supreme Court applied United States law to a seaman’s injury received on board an American ship in a Venezuelan harbour in *Alpha S. S. Corp. v. Cain*, (1930) 281 U. S. 642, 50 Sup. Ct. 443.


jured while working on board an American ship in a port of the Panama Canal Zone. The court applied United States law rather than the law of the Canal Zone. The decision has been criticized by Robinson\(^{18}\) because the court did not apply the law of the Canal Zone. He argues that since the injured man was not a member of the crew but a stevedore, temporarily engaged on the vessel, the dispute was something more than a mere matter of the ship’s internal economy and the water law ought to have governed the litigation. In support of the decision it may be said that the United States has a certain interest in the treatment of stevedores upon American ships, even in foreign harbours. But the application of American law under such circumstances would seem to be justified only if the law of the territorial waters appeared to be extremely harsh or inequitable.

### SECTION 57

**COLLISION IN TERRITORIAL WATERS**

In discussing the proper law to govern collisions in territorial waters it seems desirable to set apart rules of navigation from other types of legal rules. We shall first address ourselves to the rules affecting legal liability which are in no sense rules of navigation. Within this limited field, the general tendency of both English and American courts is to accept the guidance of the rules of the territorial law, irrespective of the law or laws of the ships involved. It might be thought that the laws of the ships concerned would be entitled to some consideration. But there is little evidence of such an idea in the reported decisions. In one case, the ship’s law was expressly rejected by an English court.\(^1\) However, there is no great plethora of precedents. It cannot be said that a ref-

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\(^{18}\) Robinson, Admiralty (1939) 148.

\(^1\) The M. Moxham, (1875) 1 P. D. 43; (1876) 1 P. D. 107.
ference to the law of one ship (or both, if they had a common law) is beyond the range of possibility.

*Smith v. Condry,*² decided by the Supreme Court in 1843, is the leading American case. It arose out of a collision between two American vessels in the port of Liverpool. Speaking for the court, Chief Justice Taney said:

"The collision having taken place in the port of Liverpool, the rights of the parties depend upon the provisions of the British statutes, then in force; and if doubts exist as to their true construction, we must of course adopt that which is sanctioned by their own courts."

The defendant argued that at the time when it struck the plaintiff's vessel, his vessel, the Tasso, was under the control of a compulsory pilot. British law compelled the defendant to allow this pilot to take charge of his vessel. But according to the decisions of the British courts, the owner of a ship was not liable for damages which were inflicted by it while it was under the control of a compulsory pilot. Applying this principle of British law to the case in hand, the Supreme Court exonerated the defendant.

In *Robinson v. Detroit & C. Steam Nav. Co.*,³ a federal circuit court of appeals adopted the law of foreign territorial waters upon several points. The case, which was litigated in admiralty, arose out of a collision in the Canadian waters of the Detroit river between the steamer City of Mackinaw and the tug Washburn. Two men on board the Washburn were

² Smith v. Condry, (1843) 1 How. (42 U. S.) 28, 33.

Wrongful death in a collision on American territorial waters is governed by the law of the littoral state. The federal death statute [41 Stat. 538, c. 111, § 7 (1920), 46 U. S. Code (1934) § 767] does not apply to deaths in American territorial waters. See ROBINSON, ADMIRALTY (1939) 144, 152.
drowned. Their dependents filed libels in rem against the City of Mackinaw. The court dismissed these libels because the Canadian law (in this instance, the law of Ontario) did not authorize proceedings against the ship. Then the owners of the steamship alleged that, under Ontario law, the negligence of those persons in charge of the tug would be imputed to all persons on board her, and so prevent them from recovering damages against the owners of the steamship. The court considered the Ontario law on this point carefully. It was finally decided that the Ontario authorities did not support any such rule of "imputed negligence." An in personam decree was accordingly rendered against the owners of the steamship.

As Robinson points out, there is one situation in which an American court would be very likely to apply a ship's law with respect to a collision in territorial waters. Suppose a seaman is injured as a result of a collision in foreign territorial waters. He brings suit in an American court against his employers. The court would probably hold that the relation of the seaman to his employers was a problem of the ship's internal economy and apply the ship's law to the seaman's action. But to determine whether the ship was properly navigated or not, the court might have to refer to the navigation rules of the territorial waters. A reference to the law of the ship with respect to the seaman's claim against his employers would be especially probable if the ship were owned by American citizens.

English decisions show the same tendency to apply the law of the territorial waters. In *The Arum* a collision oc-

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4 Robinson, Admiralty (1939) 147.

In Owners of S. S. Reresby v. Owners of S. S. Cobetas, (1923) Scots L. T. 719 a Scottish court refused to apply the law of foreign territorial waters to a collision which occurred there. The foreign law excused the defendant from liability, but the court rendered a judgment against him on the ground that the case ought to be decided by the general maritime law as administered at the
curred in the harbour of Gibraltar. Action was brought in an English court which found that the collision was due to the negligence of a pilot whom the port authorities had placed in charge of the offending vessel. Under the English Pilotage Act of 1913 the owners of the offending vessel would have been responsible, under such circumstances, for the resulting damage. But the court held that its decision must be governed by the common law of Gibraltar, which exonerated the owners from any liability for the acts of a compulsory pilot. The action was therefore dismissed.

Where, however, the foreign law creates a liability which English internal law would not recognize under the same circumstances, the first rule of Phillips v. Eyre will prevent an English court from enforcing the foreign law. The famous case of The Halley, upon which this rule was based, arose out of a collision in Belgian waters. The Privy Council refused to enforce the Belgian law because, contrary to English common law, it made the owners of the offending ship liable for the acts of a compulsory pilot.

In the case of The M. Moxham an unsuccessful attempt was made to induce an English court to apply the law of a ship in a collision case. The ship in question was of British registry; it had demolished a pier in Spanish waters. The shipowners alleged in their pleading that they were not liable for this injury, under Spanish law, because it was due to the negligence of the ship’s crew. The owners of the pier argued that, under these circumstances, British law should be allowed to impose liability upon the owners, no matter what the rule of Spanish law might be. They cited cases in which British forum. The decision is, from a conflict of laws point of view, highly objectionable, and has been criticized in Dicey, Conflict of Laws, Ed. 5 (1932) 987.


The M. Moxham, (1875) 1 P. D. 43, (1876) 1 P. D. 107.
criminal law had been applied to conduct on board British ships in foreign waters. Sir Robert Phillimore accepted this choice-of-law theory, but he was reversed by the Court of Appeal. That court held that the shipowners must be liable under Spanish law or not at all.

Several cases have come before the English courts in which the defendant had seized the plaintiff's goods in foreign territorial waters. If the seizures were justified under the law of the place of wrong, the actions were dismissed.\(^9\)

Let us consider now the position of legal rules governing navigation in territorial waters. These rules must be obeyed by all ships entering the territory, regardless of what law they carry with them. It would be most unfair not to decide all questions of responsibility for collisions in the territory by reference to those rules. Hence English courts in dealing with collisions in foreign waters usually apply the foreign rules of navigation.\(^{10}\) Doubtless American courts would follow the same practice.\(^{11}\)

Moreover, foreign navigation rules are exempt from the exclusionary effect of the first rule in *Phillips v. Eyre*. An English court will impose liability in respect of an act done in foreign waters which would have been perfectly innocent if it had been done in English waters. All that is necessary is to show that the act constituted a breach of a foreign rule of navigation. This exception to the first rule in *Phillips v. Eyre* stems from the Privy Council's opinion in *The Halley*\(^{12}\) upon which the first rule in *Phillips v. Eyre* was based. The passage is as follows:

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\(^{10}\) See the Russian S. S. Yourri, (1885) L. R. 10 App. Cas. 276; The Talabot, (1890) 15 P. D. 194; The Diana, [1894] A. C. 625.


\(^{12}\) The Halley, (1868) L. R. 2 P. C. 193, 203.
"It is true that in many cases the Courts of England inquire into and act upon the law of Foreign countries, as in the case of a contract entered into in a Foreign country, where, by express reference, or necessary implication, the Foreign law is incorporated with the contract, and proof and consideration of the Foreign law therefore become necessary to the construction of the contract itself. And as in the case of a collision on an ordinary road in a Foreign country, where the rule of the road in force at the place of collision may be a necessary ingredient in the determination of the question by whose fault or negligence the alleged tort was committed."

SECTION 58
MARITIME TORTS ON THE HIGH SEAS INVOLVING A SINGLE SHIP

Selecting a proper law for an alleged wrong on board a ship on the high seas is not a difficult matter. The law of the ship appears to be the obvious choice. The leading authority is the Supreme Court’s decision in The Titanic.\(^1\) The Titanic, a British ship on her maiden voyage, struck an iceberg on the high seas and sank with great loss of life. The Supreme Court held that her owners might limit the amount of their liability under American law. But in delivering the court’s opinion Mr. Justice Holmes clearly indicated that the liability of the owners for the many wrongful deaths in the catastrophe would be governed by British law.

In a few cases the somewhat whimsical theory has been advanced that if a man on board a vessel on the high seas is thrown into the water and drowned, the place of wrong is not the vessel but the sea.\(^2\) Therefore the law of the vessel cannot be applied. Excluding the law of the vessel, two alternative

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\(^1\) The Titanic, (1914) 233 U. S. 718, 34 Sup. Ct. 754. See also The Lamington, (D. C. N. Y., 1898) 87 Fed. 752.

theories remain. (1) There is no law in force on the high seas and so the man’s dependents recover nothing. (2) The high seas are governed by the general maritime law. The first of these alternatives is obviously objectionable. The second is plausible but it rests upon a doctrine which, however hoary and respectable, frustrates all choice-of-law policies. In Lindstrom v. International Nav. Co.\(^3\) the law-of-the-waters theory was expressly rejected. It cannot be reconciled with The Titanic nor with the Supreme Court’s decision in La Bourgogne,\(^4\) a collision case.

In 1920 Congress passed a statute to give a uniform remedy for wrongful death on American ships on the high seas.\(^5\) Prior to that date, the question of liability for wrongful death on an American ship had been referred to the law of the American state with which the ship was appropriately connected.\(^6\) The new statute, usually called the Federal Death Act of 1920, changes the internal American law in this respect and also epitomizes the choice-of-law principle. Section 4 provides “that whenever a right of action is granted by the law of any foreign state on account of death by wrongful act, neglect or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States.” In The Vestris\(^7\) this section was discussed and applied to a single ship disaster involving a British ship. Since the British law gave a right of action for wrongful death, the American court enforced it.

The law of the ship has also been applied to seamen’s deaths and injuries. As we have pointed out, the American Sea-

\(^4\) La Bourgogne, (1908) 210 U. S. 95, 140, 28 Sup. Ct. 644.
\(^5\) 41 Stat. 537, c. 111, § 1 (1920), 46 U. S. Code (1934) § 761. This statute was applied to wrongful death as an American ship on the high seas in Salla v. Hellman, (D. C. Calif., 1925) 7 F. (2d) 953.
\(^7\) The Vestris, (D. C. N. Y., 1932) 53 F. (2d) 847.
man's Act\(^8\) governs seamen's claims against their employers with respect to injuries on all American-owned vessels.\(^9\) But this statute has been held to have no application to American seamen who are injured on board a vessel of foreign ownership.\(^10\)

English authority upon the precise problem of this section is scanty, being confined to a few stray dicta in criminal cases.\(^11\) The case of *Madrazo v. Willes*\(^12\) (1820) would appear to be relevant although its incidents belong to a bygone era. The defendant, a captain in the royal navy, had seized a ship loaded with slaves, the property of the plaintiff, on the high seas. The plaintiff, a Spaniard, brought an action for damages in England. The English court appears to have referred the legality of the seizure to Spanish law, as the law of the ship. Since Spanish law permitted traffic in slaves, the seizure was held to be improper and judgment given in the plaintiff's favour.

### SECTION 59

**COLLISION ON THE HIGH SEAS**

In discussing collisions upon the high seas we must distinguish rules of navigation from other types of legal rules affecting liability. In navigation upon the high seas, the ships of all nations are governed by the International Rules. A British or American court would look to these rules for guidance in any collision case, irrespective of the nationality of the

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\(^8\) 41 Stat. 1007, c. 250, § 33 (1920), 46 U. S. Code (1934) § 688.

\(^9\) Above, pp. 261, 265.


\(^11\) See also *Canadian Nat. Steamships Co. v. Watson*, [1939] Can. L. R. 1, 1 Dom. L. R. 273, holding that an injury to a seaman on board a Canadian ship on the high seas should be governed by the law of the port of registry.

ships concerned. Since these rules are part of the law of every sea-going nation, no conflict-of-laws question can arise\(^1\) within the field which they cover.

But outside the field of navigation rules there is no such uniformity. These rules give us a criterion for deciding which ship is at fault. But they do not determine the legal consequences of fault. Upon questions of this kind the laws of other sea-going nations often differ from those of England or the United States. Different laws regarding the effect of wrongful death are common in the American cases. There may also be important differences regarding the measure of damages and vicarious liability.

When a ship becomes involved in a collision, the claims which may be brought against her or her owners fall into two distinct categories. The first of these categories consists of what may be called internal or carrying claims, claims with respect to cargo on board the ship which has been lost or injured and claims with respect to persons on board her who have been injured or killed. The second category includes what may be called external or non-carrying claims, which originate with the other ship involved in the collision. These may be claims for damage to the other ship, claims for loss or injury of cargo on board the other ship, or claims in respect of persons who were on the other ship and have suffered in the collision.

Let us deal first with the internal claims. The country to which the carrying ship belongs has a certain interest in these claims and its law is a convenient one for the parties. There is little connection, however, between these claims against the carrying ship and the non-carrying ship. The country to

\(^1\) American courts apparently apply the International Rules to the ships of foreign nations which have adopted them upon choice-of-law principles. See The Scotia, \((1871)\) 14 Wall. (81 U. S.) 170; The Belgenland, \((1885)\) 114 U. S. 355; 5 Sup. Ct. 860.

Courts of the British Empire apply the International Rules to foreign ships in obedience to statutes and orders-in-council. See Marsden, Collisions at Sea \((1934)\) 288.
which the non-carrying ship belongs can have little concern with the relations of the carrying ship to its passengers, crew, and cargo owners. So far as these relations are concerned the situation is not unlike a single ship disaster. In dealing with internal or carrying claims it should be possible to exclude altogether the law of the non-carrying ship. This appears to have been the course taken by the Supreme Court of the United States in the case of *La Bourgogne.*

So much for internal or carrying claims. Let us consider now the choice-of-law problem raised by the external claims brought in respect of the other vessel, its cargo, or the persons on board it. In this connection it is well to take a diversity between two possible situations: (1) where the ships involved belong to the same country and (2) where the ships involved belong to different countries.

Where both ships involved in the collision belong to the same nation, the choice-of-law problem need not, as Robinson points out, be any more difficult than that of a wrong involving a single vessel. The nation to which the two ships belong has the greatest interest in ruling upon the controversy, and the owners of the vessels should not complain of being judged by their own law. There can be little doubt that in case of a collision between two ships of the same nation, an American court would apply the law of that nation. But actual precedents for this practice are scanty.

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2 *La Bourgogne,* (1908) 210 U. S. 95, 28 Sup. Ct. 664. This decision apparently overrules Rundell v. La Compagnie Générale Transatlantique, (1900) 40 C. C. A. (7th) 625, 100 Fed. 655, holding that death claims against the carrying ship arising out of a collision ought to be governed by the general maritime law.

3 For dicta, see *The Scotland,* (1881) 105 U. S. 24, 31; *The Belgenland,* (1885) 114 U. S. 355, 369, 5 Sup. Ct. 860.

See also *The Hamilton,* (1907) 207 U. S. 398, 28 Sup. Ct. 133 where, however, the two ships were connected with the state of Delaware. The Hamilton struck and sank the Saginaw; both vessels were at fault. Claims were filed against the Hamilton in respect of several persons who, being on board the Saginaw, had been drowned. At this time there was no federal statute dealing with wrongful death on the high seas. The Supreme Court held that, in the absence of federal legislation, the claimants might rely upon the Delaware death act. Under the maritime common law, they would have had no cause of action. *The Harrisburg,* (1886) 119 U. S. 199, 7 Sup. Ct. 140.
In *The Eagle Point* British law was applied in a case of collision between two British vessels, the *Eagle Point* and the *Biela*. Both vessels were to blame for the accident. The owners of cargo aboard the *Biela* claimed damages against the *Eagle Point* for the full value of their cargo, to which they would have been entitled under American law. But the court decided that the case ought to be governed by British law instead. The British rule in such a case limited the *Eagle Point*’s liability to half the value of the cargo and it was so ordered.

English courts incline to a different view of the matter. They cling steadfastly to the principle that all collisions upon the high seas ought to be adjudicated according to the law maritime, as understood and applied by English courts. No exception to this general doctrine is recognized even though the ships involved share a common law and nationality. The problem was squarely raised and resolved in *Chartered Mercantile Bank of India v. Netherlands Steam Nav. Co.* where the facts were similar to those in *The Eagle Point*. The vessels involved, the *Crown Prince* and the *Atjeh*, were both Dutch. Each was partly at fault. The action was brought by the owners of cargo on the *Crown Prince* against the owners of the *Atjeh*. What their position under Dutch law would have been is not clear, but the court refused to consider Dutch law. It held that the cargo owner’s claim should be determined by the general maritime law. This meant, of course that the cargo owner’s claim was controlled by the ordinary English rule which the American court followed in *The Eagle Point*. Since the *Atjeh* was partly to blame, her owners were liable to the *Crown Prince* cargo owners for half damages.

A much more difficult problem is presented when non-carrying claims are brought against one of two ships which belong to different countries, governed by different laws. Among

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4 *The Eagle Point*, (1906) 73 C. C. A. 569, 142 Fed. 453.

the English and American materials of dogmatic authority support may be found for the application of no less than three different laws, viz: (1) the law of the ship against which the claim is made, the non-carrying ship; (2) the law of the carrying ship; (3) the general maritime law as interpreted by the forum. Let us consider the propriety of a reference to each of these laws, in order.

The law of the non-carrying ship against which claim is made is obviously connected to the factual pattern. It is in the interest of the government of the country to which that ship belongs to regulate the conduct of those who own and control her and to prescribe their liability for mismanaging her. If, for example, the laws of that country make shipowners liable for wrongful death caused by negligent navigation, those laws may properly be applied in a case where the death is suffered by persons on a foreign vessel. Effect was given to this view of the matter by Judge Learned Hand in *The James McGee*, where a vessel owned by a New Jersey corporation sank a vessel owned by the United States. Both ships were at fault. The facts occurred before Congress passed the Federal Death Act of 1920. Judge Learned Hand allowed the dependents of men drowned on the government ship to base their claims against the New Jersey ship upon New Jersey law. This decision has been followed in two cases of international conflict of laws.

The second law whose relation to an international collision on the high seas has been judicially discussed is the law of the carrying ship, the ship on which the injury has been sustained. The nation to which this ship belongs has also a certain interest in the controversy. It may quite properly desire to establish the rules of compensation for injury to its vessels or to

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those on board them. The interest of a state in determining the legal significance of acts which, though done in another state, take effect upon persons or things within its borders has always been recognized in conflict of laws. If a state may properly impose criminal or civil liability in respect of extra-territorial acts which take effect inside its boundaries, why should it not do so with respect to those which take effect on board its ships?

The relevancy of the carrying ship's law was recognized in *The Windrush*, although the decision proceeds upon the theory that the court applied the general maritime law. The carrying vessel was the American Windrush, the defending vessel, the Spanish Buenos Aires. Apparently the Buenos Aires was entirely to blame for the disaster. With regard to claims against the Buenos Aires for men drowned off the Windrush it was argued that the liability of the Buenos Aires and her owners must be defined by Spanish law. According to Spanish law the owners were personally liable for the deaths but no maritime liens were created against the Buenos Aires. The court rejected this argument, however, and applied American law, to wit, the Federal Death Act of 1920, which was interpreted as giving a lien. American law was not invoked as the law of the carrying ship, but as the general maritime law, seen through the eyes of the forum.

There remains the third of the three choice-of-law theories which we set out to investigate: the reference to the general maritime law. For all its unreality, this doctrine goes undisputed in British courts. As we have seen, its scope extends to collisions between two ships which belong to the same country. Its application to collisions between ships with different

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9 Above, p. 276.
laws is illustrated by *The Leon*.\(^{10}\) This action was brought by the owners of the British Harelda to recover damages from the owners of the Spanish Leon which had sunk the Harelda on the high seas. The owners of the Leon contended that their personal liability depended on Spanish law, and that according to Spanish law they were not vicariously liable for the negligent navigation of their servants, the master and crew. Sir Robert Phillimore declined to be controlled by Spanish law and held that "the law which is applicable here and governs the liability of the defendants in this case is the general maritime law as administered in this country."

In the United States the general maritime law of the forum theory is supported by various dicta of the Supreme Court.\(^{11}\) Moreover, as we have seen, it was expressly adopted in *The Windrush*.\(^{12}\) There the court applied American law to claims respecting persons drowned off an American ship sunk by a Spanish ship. In speaking of the Federal Death Act of 1920 as embodying the general maritime law the court was a little embarrassed by the implication that Congress had apparently altered the maritime law of the world.\(^{13}\) So the court emphasized the fact that numerous other maritime nations had recognized a cause of action for wrongful death too.

Notwithstanding the language used by the court in *The Windrush* and other opinions, there are substantial reasons for thinking that the general maritime law theory will not prove acceptable to American courts. This theory, as we have indicated, is based upon a fiction. There may be interesting similarities between the maritime laws of various nations. But there is no uniform maritime law. There is no reason why a

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\(^{10}\) *The Leon*, (1881) 6 P. D. 148.

\(^{11}\) See *The Scotland*, (1881) 105 U. S. 24, 31; *The Belgenland*, (1885) 114 U. S. 355, 369, 5 Sup. Ct. 860. See also *Conflict of Laws Restatement* (1934) § 410.


\(^{13}\) The same problem came before a British court in *Davidsson v. Hill* [1901] 2 K. B. 696.
collision between a French and a British ship ought to be ad­judicated according to American law upon the pretext that it is "general maritime law." In the maritime field, as elsewhere, uniformity in all courts and other choice-of-law ideals can best be achieved by the thorough-going application of choice-of-law principles. It is true that the general maritime law theory has been adopted in England. But English courts are notoriously indifferent to choice-of-law policies. American lawyers and judges understand these policies better because the diversity of internal jurisdictions in the United States has forced the courts to consider them. Some American writers disapprove of the general maritime law theory. A solution of the problem upon a choice-of-law basis would be much more in keeping with the American conflict of laws tradition.

The problem created by a collision of two ships governed by different laws is not unique in the conflict of laws. It is simply another example of a factual situation significantly connected with two states which have different internal laws. Similar problems have arisen in connection with railway carriage, telegrams, workmen's compensation, etc. Sometimes the courts have struggled to establish a uniform rule selecting one system of law to the exclusion of the other. But usually they have recognized the interests of both jurisdictions by permitting an alternative reference to the internal law of either one. The collision problem might well be treated in the same fashion. If we consider all the American cases together we may say that it has been so treated. Of course it is possible that a case may arise in which the policies of the two laws concerned conflict with one another. Then the court of the forum will have to choose between them.

14 For discussion of the dispute between conflict-of-laws writers and admiralty lawyers on this point, see ROBINSON, ADMIRALTY (1939) 836. See also BEALE, CONFLICT OF LAWS (1935) vol. 2, § 410.1; Magruder and Grout, "Wrongful Death Within the Admiralty Jurisdiction," (1926) 35 YALE L. J. 395, 413, note 79.

15 See above, section 38.