1976

Admiralty Procedure and Jurisdiction After the 1966 Unification

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Recommended Citation

David W. Robertson, *Admiralty Procedure and Jurisdiction After the 1966 Unification*, 74 MICH. L. REV. 1627 (1976).

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ADMIRALTY PROCEDURE AND JURISDICTION AFTER THE 1966 UNIFICATION

David W. Robertson

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ADMIRALTY PROCEDURE AND JURISDICTION AFTER THE 1966 UNIFICATION

David W. Robertson*

I. INTRODUCTION

From the nation's beginning, the federal district courts have been vested with jurisdiction in cases "of admiralty or maritime jurisdiction."¹ Like its predecessor statute, section 1333 of the present Judicial Code asserts that the jurisdiction is "exclusive of the courts of the states," but the infamous "saving clause"² goes on to negate that exclusivity in the bulk of maritime cases by giving the plaintiff the option of maintaining his action in any other court having jurisdiction over it. In "saving clause" cases—that is, cases that could have been brought in federal court under the admiralty jurisdiction, but which were maintained, at plaintiff's option, in nonadmiralty tribunals—the substantive federal maritime law continues to obtain,³ although procedural consequences vary.

The operation of section 1333 would be typified in the case of a shipyard employee, injured while working aboard a vessel. Such a plaintiff could maintain a maritime tort action against the shipowner in federal court, basing jurisdiction on section 1333.⁴ If that choice were made, trial would be to the judge alone, in accordance with admiralty's well-entrenched nonjury tradition.⁵ If the plaintiff wanted

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† The systematic research for this article was completed in mid-1975.

1. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 76-77: "[T]he district courts shall have . . . exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . ; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it . . . ." The present version reads as follows: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled . . . ." 28 U.S.C. § 1333 (1970).

2. The wording of the saving clause was altered in 1948. Compare 28 U.S.C. § 1333 (1970), with Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 76-77. The meaning was not changed. See *Madruga v. Superior Ct.*, 346 U.S. 556, 560 n.12, 565-66 (1954).

3. See notes 316-35 *infra* and accompanying text.

4. The leading case on the extent of the admiralty jurisdiction over torts is *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972). Injury to a ship's repairman aboard ship would be within the section 1333 jurisdiction both before and after *Executive Jet*.

5. See FED. R. Civ. P. 38(e).

a jury trial, he would have to exercise his saving clause option to take the case either to state court or, if the diversity of citizenship and amount in controversy requirements could be met,⁶ to federal court on that basis.

Many maritime cases present plaintiff with this choice of avenues into federal court. The Federal Rules of Civil Procedure recite in clear terms how a plaintiff should manifest his choice. Rule 9(h) states:

A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim . . . . If the claim is cognizable only in admiralty, it is an admiralty or maritime claim . . . whether so identified or not . . . .⁷

Counsel for the plaintiff who can invoke federal court jurisdiction on both maritime and diversity grounds should make the designation permitted by rule 9(h) only if he is content with trial by a federal judge alone. If he wants a federal jury, he should refrain from making the rule 9(h) designation and should plead his case solely as a diversity action.

All of this is almost insultingly simple and familiar to counsel experienced in maritime litigation. Yet to some other lawyers it is arcane. Illustrative is *Romero v. Bethlehem Steel Corporation*,⁸ in which counsel for an injured shipyard employee filed a complaint that read: "Complainant alleges a cause of action based upon negligence in accord with general maritime law and a second cause of action on the grounds of unseaworthiness in accord with Rule 9(h) of the Federal Rules of Civil Procedure."⁹ The complaint went on to allege diversity and amount in controversy. Finally, the prayer read: "Wherefore, Complainant . . . demands judgment . . . general and equitable relief, and for [sic] a trial by jury."¹⁰ Knowledgeable counsel would have avoided the internal inconsistency of making a 9(h) designation when a jury trial was desired. In such a case, diversity should have been the only basis used to establish jurisdiction. Evidently unaware of the problem, plaintiff's counsel learned that the case was on the nonjury docket only when he appeared to select a jury. When the case was called, he requested a mistrial on the ground that his client was entitled to a jury. The trial judge

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6. See 28 U.S.C. § 1332 (1970).

7. FED. R. CIV. P. 9(h).

8. 515 F.2d 1249 (5th Cir. 1975).

9. 515 F.2d at 1251.

10. 515 F.2d at 1251.

denied the motion and, ultimately, rendered judgment for the defendant.

On appeal, the Fifth Circuit disposed of the plaintiff's argument that he was deprived of his seventh amendment rights:

Whatever the subjective intention of appellant's counsel, it is clear that neither the district judge nor the defendants were given cause to believe that Romero had ever withdrawn the reference to Rule 9 (h). . . . *Romero could have obtained a jury trial on all claims simply by omitting or withdrawing the 9(h) designation of his complaint* and bringing his entire suit as a civil action. Yet, he persistently refused to seek an amendment aimed at withdrawing the admiralty identification. We can find no logical purpose for this refusal in the face of his repeatedly professed desire for a jury.¹¹

Prior to 1966, the kind of difficulty encountered by plaintiff in *Romero* would have been less unexpected. In that year, however, the admiralty procedural rules were merged with the Federal Rules of Civil Procedure. The purpose of this highly controversial unification was to eliminate many of the mysteries of admiralty practice.¹² Yet the rule 9(h) designation is only one of several unique and often confusing admiralty procedures that has survived.

Before the 1966 unification, the district courts functioned under one set of procedural rules when exercising admiralty jurisdiction and under another when exercising federal question, diversity, or other jurisdiction. Thus, it was customary and correct to visualize a bifurcated federal district court, having both an "admiralty side" and a "civil" or "law side." The unification was designed to eradicate that conceptual separation¹³ and thereby yield significant simplification and increased accessibility. Prior to 1966, the admiralty courts had

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11. 515 F.2d at 1253-54 (emphasis added) (citations omitted).

12. See Wiswall, *Admiralty: Procedural Unification in Retrospect and Prospect*, 35 BROOKLYN L. REV. 36, 37 (1968).

13. The weight of opinion was that the 1966 unification of the admiralty rules of procedure and civil rules destroyed the wall of separation. See, e.g., Bradley, *Admiralty Aspects of the Civil Rules*, 41 F.R.D. 257 (1966); Colby, *Admiralty Unification*, 54 GEO. L.J. 1258 (1966); Crutcher, *Imaginary Chair Removed from the United States Courthouse; Or, What Have They Done to Admiralty?*, 5 WILLAMETTE L.J. 367, 374, 375 (1969); Currie, *Unification of the Civil and Admiralty Rules: Why and How*, 17 MAINE L. REV. 1 (1965); Fiddler, *The Admiralty Practice in Montana and All That: A Critique of the Proposal To Abolish the General Admiralty Rules by Amendments to the Federal Rules of Civil Procedure, and a Counterproposal*, 17 MAINE L. REV. 15 (1965); Hecht & Davis, *Unification of Admiralty and Civil Rules*, 1967 ABA SECT. INS. NEG. & COMP. L. 222; Maris, *Recent Changes in the Federal Rules of Procedure*, 42 F.R.D. 552 (1966); Wiswall, *supra* note 12.

Others were better prophets. See Cohn, *The Seamless Web: Civil—Admiralty Unification*, 1967 ABA SECT. INS., NEG. & COMP. L. 228, 231; Tweedt, *Will the Unification of the Civil and Admiralty Rules Be a Happy, Productive Marriage?*, *id.* at 233, 237.

been "veiled in mystical words, phrases, rules, and forms of practice which no outsider could confidently penetrate."¹⁴ After 1966, the "imaginary chair,"¹⁵ the "fiction of an independent admiralty jurisdiction,"¹⁶ would, presumably, vanish.

At the same time, it was thought necessary to preserve certain specialized admiralty procedures that were deemed intrinsic to the subject matter. Accordingly, Supplemental Rules A through F of the Federal Rules of Civil Procedure make provision for what may be called the essential peculiarities of admiralty practice: actions in rem; maritime attachment and garnishment; possessory, petitory, and partition actions; and actions for limitation of liability. Additionally, the numbered rules preserve a peculiar form of third-party practice,¹⁷ the nonjury tradition,¹⁸ and admiralty's liberal venue doctrines.¹⁹

Preservation of these special procedures reflects the current state of admiralty jurisdiction more accurately than does the superficial merger of admiralty and civil rules. The theory of the Rules draftsmen was that unification would eliminate any further talk of the "admiralty side" and the "civil side" of the court. Furthermore, there would be no occasion for using the terms "libellant," "libel," "respondent," and "proctor."²⁰ However, as this article will demonstrate, those terms and the separatist concept that underlies them persist. The outcome in the *Romero* case dramatically demonstrates the unwisdom of preserving as a specialist practice a field that is formally fully accessible to the generalist lawyer. The premise of this article is that many special characteristics of the admiralty jurisdiction subsist wholly without justification and fall into the category of the old-fashioned "trap for the unwary." If, as has been claimed, "[t]he entire thrust of modern law reform . . . has been away from the mumbo-jumbo theory of law practice,"²¹ admiralty practice in many respects stands well outside the mainstream. This article will document that claim and propose legislative correction. As a prologue to these efforts, the next section will examine several recent and unsuccessful attempts at reform.

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14. Crutcher, *supra* note 13, at 375.

15. *Id.* at 367.

16. *Id.* at 374.

17. FED. R. CIV. P. 14(c).

18. FED. R. CIV. P. 38(e).

19. FED. R. CIV. P. 82.

20. A "libellant" is a plaintiff, a "libel" is a complaint, a "respondent" is a defendant, and "proctors" are lawyers.

21. Zobel, *Admiralty Jurisdiction, Unification, and the American Law Institute*, 6 SAN DIEGO L. REV. 375, 398 (1969).

II. THE AMERICAN LAW INSTITUTE'S ADMIRALTY JURISDICTION PROPOSALS AND THE FEDERAL COURT JURISDICTION ACTS

On March 14, 1969, the American Law Institute (ALI) published its *Study of the Division of Jurisdiction Between State and Federal Courts*,²² which considered all aspects of federal jurisdiction. Included among the proposals offered by the Institute were certain modest suggestions for rationalizing admiralty and maritime jurisdiction. The conservative character of these recommendations was the product of conscious deference to the mysteries of maritime practice.²³ The prevailing attitude was epitomized by the Chief Reporter. "[W]e [the Reporters] were not admiralty experts . . . . [P]artly because of our inexperience . . . , and partly because we think it's sound anyway, we thought that fooling around with language which had been thoroughly construed by the courts, was thoroughly understood by experts . . .—with which we do not classify ourselves—was a very much safer and wiser course . . . ." ²⁴ This deference had a significant impact on the Institute's work. Critics brought a number of obvious and easily cured anomalies in the scope of admiralty jurisdiction to the Institute's attention. Some corrections were proposed,²⁵ but in an alarming number of instances the anomaly was re-

22. AMERICAN LAW INSTITUTE, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURT* (1969) [hereinafter ALI STUDY].

23. The following comments are representative: "[W]ith respect to admiralty, our major desire, really, was not to rock the boat . . . . [W]hat we really wanted to do was to leave pretty much as it was the outlines of this jurisdiction." AMERICAN LAW INSTITUTE, *PROCEEDINGS, 45TH ANNUAL MEETING* 45 (1968) [hereinafter *PROCEEDINGS*]. See *id.* at 45: "It was our objective . . . to make clearer as a matter of statute what is already clear to those experts in the mysteries of admiralty but not so clear to the run-of-the-mill, rank-and-file practitioner . . . ."

24. *Id.* at 60, 64. The Institute's philosophy was that admiralty is for the cognoscenti: "The gloss that time has created on the traditional words [of the grant of admiralty jurisdiction] may be puzzling to the neophyte but it is well understood by the specialized bar and experienced judges who try admiralty cases." ALI STUDY 230.

25. The Institute proposed six significant clarifications or alterations in admiralty jurisdiction:

(1) Adding language making clear that "the admiralty and maritime jurisdiction does not include a claim merely because it arose on navigable waters." See proposed section 1316(a), ALI STUDY 34, 231-34. Since this proposal was written, the Supreme Court has held that the mere fact of an injury or accident occurring on navigable waters is not sufficient, absent "a significant relationship to traditional maritime activity," to invoke the admiralty jurisdiction. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 268 (1972). The case deals with aircraft crashes, but the "maritime relationship" requirement was probably intended by the Court to apply more generally, and the lower courts are generally construing it that way. See, e.g., *Kelly v. Smith*, 485 F.2d 520, 524 (5th Cir. 1973) (deer hunters in small boat on Mississippi River); *Crosson v. Vance*, 484 F.2d 840, 842 (4th Cir. 1973) (water skier on tributary of Chesapeake Bay). An exception is *Richards v. Blake Builders Supply, Inc.*, 528 F.2d 745, 748-49 (4th Cir. 1975).

tained.²⁶

Almost as influential as this exaggerated respect for admiralty's complexity was the ALI's optimistic assumption that the 1966 unification of the admiralty rules with the Federal Rules of Civil Procedure²⁷ had cured a number of erstwhile problems. Acknowledging that an admiralty court's lack of jurisdiction to grant equitable relief had always been "quite senseless,"²⁸ the Institute hopefully supposed that "this unwise limitation was ended by the unification of civil and admiralty procedure in 1966."²⁹ Similarly, the traditional distinction

(2) Rewriting the saving clause to make explicit the categories of exclusive admiralty jurisdiction. See proposed section 1316(b), ALI STUDY 34, 234-39.

(3) Providing that actions under the Death on the High Seas Act, 46 U.S.C. §§ 761-768 (1970), may be maintained in nonadmiralty tribunals. See proposed section 1316(b), ALI STUDY 34, 236-37.

(4) Providing that an exclusively admiralty action originally brought in state court may be removed. See proposed section 1316(b), ALI STUDY 35, 244-45.

(5) Attempting to codify the rules of venue and process for admiralty actions. See proposed section 1318, *id.* at 36, 245-49.

(6) Granting a right to either party to a maritime personal injury or death case to demand a jury trial in admiralty. See proposed section 1319, *id.* at 37, 250-54.

26. For example, while acknowledging the lack of sense of holding that ship-repair contracts are maritime but ship-building contracts are not, the Institute declared it to be "an anomaly of little practical significance, save as a matter of symmetry, since so long as it is understood, as it is by those who build ships and those for whom they are built, they are able to safeguard their interests." *Id.* at 228. Actually, a wealth of anomalous doctrines respecting the admiralty's contract jurisdiction continue to generate litigation that is highly frustrating to the courts. See, e.g., *McCorkle v. First Pa. Banking & Trust Co.*, 459 F.2d 243, 244, 251 (4th Cir. 1972); *Kane v. Motor Vessel Leda*, 355 F. Supp. 796 (E.D. La. 1972); *Hinkins S.S. Agency v. Freighters, Inc.*, 351 F. Supp. 373 (N.D. Cal. 1972). Similarly, while there are strong arguments that pleasure boating should be excluded from admiralty jurisdiction, the Institute felt that

it would be difficult to draft the jurisdictional statute in such a way as to exclude pleasure boating, and [that] problems would arise in deciding what is a pleasure boat and what the jurisdictional consequences are of a collision between a pleasure boat and a commercial vessel. In addition it seems that the major problems here are not really jurisdictional but are matters of substantive law. Whether a pleasure boat should be regarded as a "vessel" for purposes of the Limitation of Liability Act, for example, is hardly the sort of question a jurisdictional study can appropriately resolve.

ALI STUDY 227-28. Further, while serious questions with respect to the boundaries of the category of actions in rem over which admiralty jurisdiction is exclusive remain, "the natural obscurity that has existed for many years without doing any great harm is being perpetuated. . . . [T]o clear everything up . . . is not what was attempted here." PROCEEDINGS 66.

27. See notes 13-19 *supra*.

28. ALI STUDY 226.

29. *Id.* The argument that the 1966 merger cured the equitable remedies problem uses the following reasoning:

A suit in admiralty is now, by force of Civil Rule 1, a "civil action." Rule 18 expressly allows joinder of as many claims as the party has, whether "legal, equitable, or maritime." For certain purposes a suitor may continue to invoke special admiralty procedures, but Rule 65, dealing with injunctions, is not one of these exceptional rules, and is fully applicable in terms to all civil actions. The concept of pendent jurisdiction, if necessary, is surely broad enough to permit a federal court . . . to give additional remedies for the same wrong, even

between building and repairing ships was seen to be completely anomalous, although it was not considered overly important. In any event, predicted the Institute, "since the unification of admiralty and civil procedure, the doctrines of ancillary and pendent jurisdiction will permit joinder or impleader in any case in which the transaction or occurrence involved gives rise to both maritime and non-maritime claims."³⁰

This article will demonstrate that the ALI erred in its appraisal of the admiralty jurisdiction.³¹ The maritime specialists' claims that admiralty procedure works well and that it is too delicate and mysterious to be tampered with probably should have been received with a bit more of the skepticism that is normally required when a generalist approaches a specialist preserve. The thought has been expressed, fairly unkindly, in a narrower context: "[I]t seems likely that [the Reporters] have simply been bamboozled by the antiquarian crustaceans of the admiralty bar, who maintain a monopoly of aqueous litigation by promulgating the myth that their subject is arcane."³²

The Institute's recommendations contemplated congressional implementation, which has not eventuated. On May 14, 1971, Senator Burdick introduced the "Federal Court Jurisdiction Act of 1971,"³³

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though there were no independent jurisdictional basis for the claim for the additional remedy . . . . Thus today there should be no difficulty in a federal court giving equitable relief in a case of admiralty or maritime jurisdiction.

Id. at 226-27. The assumption that the 1966 merger cured the equitable remedies problem was also made in much of the commentary dealing with the merger. See 1 W. BARRON & A. HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* § 32 (Wright ed. Cum. Supp. 1960); Colby, *supra* note 13, at 1268-70. The post-1966 cases do not bear out the prediction. See text at notes 49-108 *infra*. The argument that the merger could hardly have been expected to cure the problem is well put by Zobel, *supra* note 21, at 388-90.

30. ALI STUDY 228. Here again, the post-1966 cases do not bear out the prediction. Admiralty's ancillary and pendent jurisdiction may have been increased by the 1966 merger, but the extent and nature of the increase is far too uncertain and random to bear the weight the ALI study puts on it. See text at notes 108-230 *infra*.

31. One of the two published studies on the ALI's admiralty recommendations is highly critical. See Zobel, *supra* note 21, at 398, 410-11. The other study, Currie, *The Federal Courts and the American Law Institute—Part II*, 36 U. CHI. L. REV. 268, 286 (1969), is mildly approving. A third treatment of the ALI recommendations does not deal with admiralty. See Comment, *An Analysis of the ALI's Approach to the State-Federal Jurisdictional Dilemma*, 21 AM. U. L. REV. 287 (1972). Professor Maraist treats the ALI study tangentially, in the course of arguing for exclusive state-court jurisdiction over what he calls "admiralty tort and compensation cases," in *Proposed Discipline for a Procedural Problem Child: Reallocation of Admiralty Tort and Compensation Jurisdiction Between Federal and State Courts*, 24 U. MIAMI L. REV. 26 (1969).

32. Currie, *supra* note 31, at 303 (a remark directed specifically at the ALI's admiralty venue proposal).

33. S. 1876, 92d Cong., 1st Sess. (1971).

whose admiralty features were a verbatim reproduction of the ALI's recommendations.³⁴ During hearings on the bill,³⁵ the maritime bar became officially involved with the proposals for the first time.³⁶ The Maritime Law Association forcefully and unambiguously stated its opposition to any change³⁷ and thus rejected as unnecessary and probably dangerous even the minimal clarifications recommended by the ALI.³⁸ The major proposal—provision of a jury trial at the behest of either party in admiralty personal injury and death cases³⁹—was denounced as downright frightening.⁴⁰ The "Federal

34. Compare ALI STUDY 34-37, with §§ 1316-1319 of S. 1876, *supra* note 33.

35. See *Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 2d sess., pt. 2, at 635-703 (1972) [hereinafter 1972 *Hearings*].

36. "The Maritime Law Association of the United States is a 73 year old organization whose nearly 2,000 active members represent, for all intents and purposes, the entire admiralty bar in this country." Statement to the Senate Subcommittee by Herbert M. Lord, then Chairman of the Committee on Maritime Legislation of the Maritime Law Association (MLA) of the United States, 1972 *Hearings* 666. His statement may be a slight exaggeration—I am told that attorneys who frequently represent maritime plaintiffs do not inevitably join the Association. Evidently the Maritime Law Association had been invited to participate in the ALI Study but did not respond. See *id.* at 685, 686.

37. But see remarks of David Owen, for the MLA: "One thing I would like to make plain, and that is the admiralty bar generally and the Association in particular are not against change as such." *Id.* at 686.

38. See *id.* at 640, 662, 668-71, 672, 687-90.

39. See proposed section 1319, ALI STUDY 37, 250-54. The proposal appeared in S. 1876, 92d Cong., 1st Sess. § 1319 (1971).

40. Section 1319 not only grants a jury trial in a personal injury and death case in admiralty, but by excluding only actions for limitation of liability and actions against the United States and its agencies, it might be construed as providing for a jury trial in all cases of diversity jurisdiction. Some of our members are fearful that as previously worded, it might even permit the trial by jury of collision cases.

1972 *Hearings* 668.

[T]he fears that some of the members of our association have, namely, you are going to have jury trials in collision cases, in charter parties, cargo damage . . . [I]n some collisions you are going to have a jury trial and in some you are not. Right now you do not have jury trial in collision cases at all . . . [Y]ou cannot get it now. You cannot go into Federal court on diversity jurisdiction and get a jury trial in a collision case. Under the proposal you can.

Id. at 690. But see *Puget Sound Nav. Co. v. Nelson*, 41 F.2d 356 (9th Cir. 1930) (jury trial in diversity collision case); *Intagliata v. Shipowners & Merchants Towboat Co.*, 26 Cal. 2d 365, 159 P.2d 1 (1945) (collision case tried to jury in state court). Admittedly, jury trials in collision cases are rare. The probable reason is that in 1893 the Supreme Court in *Belden v. Chase*, 150 U.S. 674 (1893), affirmed a state court's application of the doctrine of contributory negligence in a collision case. Presumably plaintiffs do not bring collision cases in diversity actions since the application of the contributory negligence doctrine could act as a bar to recovery. While the application of the contributory negligence theory is completely out of line with the modern judicial posture on choice of law in maritime cases, see D. ROBERTSON, *ADMIRALTY AND FEDERALISM* 194-202 (1970), the decision has never been explicitly repudiated by the Court. Accordingly, experienced maritime counsel may avoid nonadmiralty tribunals out of respect for that threat.

For further objections offered by the MLA to the jury trial provision, see 1972 *Hearings* 687-90.

Court Jurisdiction Act of 1973"⁴¹ reflected certain changes generated by the hearings,⁴² but it remained closely modelled upon the ALI proposals. This bill died in the Senate Subcommittee on Improvements in Judicial Machinery. Some of the ALI's recommendations may be reintroduced in 1976 as part of a broad-ranging court reform proposal, but the immediate prospects for a legislative response to the problems of admiralty jurisdiction are bleak.⁴³

In any case, neither of the federal court jurisdiction acts spoke directly to the central issues of civil/admiralty separatism. The reform proposed here will be considered drastic: Admiralty ought to be abolished as a separate grant of federal jurisdiction that is formally coequal with the diversity and federal question grants. It should instead be made a subcategory of federal question jurisdiction. Very early in the ALI's deliberations there was "some demand"⁴⁴ for just such a change, but the idea was not acted upon. Nowhere in the published reports of the ALI's project is there any explanation of the source of the "demand" or of the reasons for not attempting to meet it.⁴⁵ The ALI Study simply raises the possibility, points out that "much can be said for it,"⁴⁶ demonstrates that it would be rather easy to accomplish, and then concludes that "it seems preferable" to leave matters as they are.⁴⁷

Despite the ALI position, the idea should be pursued as a potential remedy for the vestiges of civil/admiralty separatism that have

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41. S. 1876, 93d Cong., 1st Sess. (1973).

42. The basic grant of jurisdiction in section 1316(a) was substantially broadened by adding language extending admiralty jurisdiction to: claims for declaratory and equitable relief and interpleader; all claims arising out of the affairs of vessels of 300-plus gross tons; broad ancillary and pendent jurisdiction; aircraft crashes beyond a marine league. See S. 1876, 93d Cong., 1st Sess., § 1316(a) (1973). The attempted reformulation of the line between exclusive and concurrent jurisdiction, the new saving clause, was insignificantly reworded. *Id.* § 1316(b). The venue proposal was broadened to include a district where a state court would have jurisdiction over the defendant. *Id.* § 1318(a)(3). Language was added seeking to make clear that the broadening of process and venue is not meant to affect the remedy of maritime attachment. *Id.* § 1318(b)(1). A provision was added validating service or attachment in a district adjoining the one where the action is brought, where such arrest or attachment is made on a body of water that forms or includes the boundary between the two districts. *Id.* § 1318(b)(2).

43. For a recommendation that the Federal Court Jurisdiction Act of 1973 be resurrected and altered, see text at notes 379-405 *infra*.

44. See testimony of Leavenworth Colby, the ALI's admiralty adviser, who presented the legislation to the Senate Subcommittee, 1972 *Hearings* 637.

45. The matter is not mentioned in AMERICAN LAW INSTITUTE, PROCEEDINGS 45TH ANNUAL MEETING (1968). Nor is it explained in AMERICAN LAW INSTITUTE, TENTATIVE DRAFT NO. 6 (1968). I am informed by Professor Charles Alan Wright, who served as Reporter, that the suggestion originated with Leavenworth Colby. Mr. Colby's purpose seems to have been full civil-admiralty unification.

46. ALI STUDY 225.

47. *Id.* at 225-26.

survived the 1966 unification of the admiralty rules with the Federal Rules of Civil Procedure. The remainder of this article is devoted to examining the tenacity of civil/admiralty separatism in the federal courts (section III) and to detailing a proposal that attacks this separatism by integrating the admiralty jurisdiction into the federal question jurisdiction (section IV).

III. THE FAILURE OF THE 1966 UNIFICATION OF THE ADMIRALTY AND CIVIL RULES

This section will discuss many of the cases that have followed the 1966 unification of civil and admiralty rules; these cases demonstrate the tenacity of the civil/admiralty conception and the confusion it often causes. In this discussion, the terminology employed will reflect current thinking regarding the nature of maritime cases.⁴⁸ Thus, "suit in admiralty" is sometimes preferred to the more cumbersome "claim identified as an admiralty or maritime claim pursuant to Rule 9(h)," although the latter formulation has been the technically correct one since the merger. Similarly, "admiralty court," "admiralty side," or "court sitting in admiralty" have frequently been used, rather than the technically correct "United States District Court exercising its admiralty or maritime jurisdiction."

A. Admiralty's Equity Powers

In its 1969 recommendations the American Law Institute made no provision for equitable relief in courts of admiralty; the Institute took the position that the 1966 unification had cured the problem of admiralty's lack of equitable powers.⁴⁹ Like many other assessments of the effects of the 1966 merger, this position has proved to be overly optimistic. Some commentators have noted the continuing difficulty,⁵⁰ and a number of post-merger cases indicate that further action is needed to remove the lingering doubts about the availability of equitable relief in admiralty.

The pre-1966 notion that admiralty lacked plenary equitable

48. Since the 1966 unification it is technically incorrect to speak of "admiralty," the "admiralty side," or of "sitting in admiralty." See notes 13-20 *supra* and accompanying text. However, as pointed out in G. GILMORE & L. BLACK, *THE LAW OF ADMIRALTY* 19-20 (2d ed. 1975), it is efficient to employ the older terminology with the implicit understanding that "no case is any longer 'in admiralty' in the older sense."

49. See notes 27-29 *supra* and accompanying text.

50. See Currie, *supra* note 31, at 286-87 & n.337; Zobel, *supra* note 21, at 381-95; Comment, *Admiralty Practice After Unification: Barnacles on the Procedural Hull*, 81 YALE L.J. 1154, 1157-63 (1972).

power is totally lacking in sense.⁵¹ The difficulty in correcting this defect is that the matter was generally cast in jurisdictional terms; hence, efforts to find a remedy in the unification can be met with the familiar but potent argument that rules of procedure could not conceivably have been proposed or interpreted as a cure for jurisdictional limitations. The enabling statute⁵² and the rules themselves⁵³ make clear that no attempt was being made to alter jurisdictional boundaries. If admiralty lacked the equitable powers of its civil counterpart because of considerations rooted in the jurisdictional statute, or in the jurisdictional provisions of the Constitution,⁵⁴ then those limitations subsist.⁵⁵ The prevailing view prior to unification was plainly that the limitation was of jurisdictional stature.⁵⁶

The most thoughtful recent analysis of this question asserts that the pre-1966 cases denying equitable power depended on a want of jurisdiction over the underlying *claim*, and not on a want of jurisdiction to grant *relief*.⁵⁷ That progressive view seems to have been refuted by the two leading Supreme Court decisions on the subject of equitable relief in admiralty.⁵⁸ Thus, the conventional wisdom is

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51. For full discussion of the genesis of the American limitations on the equity powers of admiralty courts, see Morrison, *The Remedial Powers of the Admiralty*, 43 YALE L.J. 1 (1933). See also D. ROBERTSON, *supra* note 40, at 28-64, 104-22.

52. 28 U.S.C. § 2072 (1970).

53. See FED. R. CIV. P. 82.

54. It is not really necessary to reach constitutional considerations in analyzing this matter: "Since . . . Rule 82 forbids interpretation of the rules which would alter the court's subject matter jurisdiction, one need not reach the constitutional question in order to invalidate a rule interpretation on jurisdictional grounds. Conversely an interpretation that is unobjectionable under Rule 82 is also necessarily permissible under Article III." Comment, *supra* note 50, at 1159.

55. A very harsh critic of the American Law Institute's admiralty proposals has offered the fullest range of arguments that the 1966 unification could hardly have been expected to cure the equitable remedies problem. See Zobel, *supra* note 21, at 384-94. The countervailing arguments are well analyzed in Comment, *supra* note 50, at 1157-63.

56. See Zobel, *supra* note 21.

57. See Comment, *supra* note 50, at 1159-61.

58. In *Rea v. Steamer Eclipse*, 135 U.S. 599 (1890), a half owner and creditors libelled the vessel to secure possession from the other half owner. A third party intervened, seeking specific performance of an alleged contract of sale. Deeming the interests of both the co-libellants (creditors) and the intervenor "[merely] equitable," 135 U.S. at 607, the Court stated:

So far as the creditors and interveners were concerned, if the former desired to wind up the trust, or the latter to enforce an alleged contract of sale, which is indeed what is asked by this intervention, they should have resorted to a different tribunal. While the court of admiralty exercises its jurisdiction upon equitable principles, it has not the characteristic powers of a court of equity. It cannot entertain a bill or libel for specific performance, or to correct a mistake; or declare or enforce a trust or an equitable title; or exercise jurisdiction in matters of account merely; or decree the sale of a ship for an unpaid mortgage, or declare her to be the property of the mortgagees and direct possession of her to be given to them. The jurisdiction embraces all maritime contracts, torts, injuries or offenses, and it depends, in cases of contract, upon the nature of the

rather clearly supportive of those post-1966 decisions that refuse to find in unification a cure for the prior want of equity powers. The courts that have been willing to find such a cure have generally acted out of an abiding conviction that the limitation had always been senseless enough to be rejected out of hand.

The Fifth Circuit is alone⁵⁹ among the courts of appeals in having

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contract, and is limited to contracts, claims and services purely maritime, and touching rights and duties appertaining to commerce and navigation. There was nothing maritime about the claims of the interveners, and the intervention was properly dismissed for want of jurisdiction over the subject matter.

135 U.S. at 608 (citations omitted). Comment, *supra* note 50, views the pre-1966 jurisprudence as resting on the nonmaritime nature of the underlying subject matter, and focuses on the above disposition of the Supreme Court as though it dealt only with the intervenor's attempt to get specific enforcement of a contract of sale. The trouble with that analysis is that the Court in the *Eclipse* appears to have been partially referring to the co-libellants, whose interests allegedly stemmed from an agreement dealing in part with the operation of the vessel. The context of the quoted statement as well as its breadth and decisiveness seem to refute the suggested interpretation.

In *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684 (1950), the lower court vacated a foreign attachment of a vessel on the theory that the defendant in the in personam action was not the owner, and that the admiralty court lacked jurisdiction to inquire whether the transfer of the vessel was fraudulent. The disposition in the Supreme Court was favorable to the exercise of equitable power in that instance, but Justice Frankfurter's opinion devastates the theory that the general limitations on admiralty's equitable powers are nonjurisdictional:

Unquestionably a court of admiralty will not enforce an independent equitable claim merely because it pertains to maritime property. The reasoning of the District Court would be pertinent if the libellants, as creditors . . . , had gone into admiralty by way of a creditor's bill to set aside a pretended sale of the *Caribe* as a fraudulent transfer. But that is not the case before us. Libellants went into admiralty on a claim arising upon a contract of affreightment supplemented by charges of negligence in the nondelivery of a sea cargo—matters obviously within admiralty jurisdiction. As an incident to that claim, in order to secure respondents' appearance and to insure the fruits of a decree in libellants' favor, they made an attachment. . . . The issue of fraud arises in connection with the attachment as a means of effectuating a claim incontestably in admiralty. To deny an admiralty court jurisdiction over this subsidiary or derivative issue in a litigation clearly maritime would require an absolute rule that admiralty is rigorously excluded from all contact with nonmaritime transactions and from all equitable relief, even though such nonmaritime transactions come into play, and such equitable relief is sought, in the course of admiralty's exercise of its jurisdiction over a matter exclusively maritime. It would be strange indeed thus to hobble a legal system that has been so responsive to the practicalities of maritime commerce and so inventive in adapting its jurisdiction to the needs of that commerce. . . . We find no restriction upon admiralty by chancery so unrelenting as to bar the grant of any equitable relief even when that relief is subsidiary to issues wholly within admiralty jurisdiction.

339 U.S. at 690-92 (citations omitted). Justice Frankfurter went on to adduce a number of examples, putting the holding in perspective, and making clear the holding's dependency on the ancillary or derivative nature of the equitable issue in *Swift* itself. Making it clear that the Court considered the want of affirmative equitable powers to be a jurisdictional limitation, the opinion states: "[A]dmiralty is not seized of jurisdiction to correct a fraud simply because it is a fraud; that's the business of equity. The basis of admiralty's power is to protect its jurisdiction from being thwarted by a fraudulent transfer, and that applies equally whether it is concerned with executing its judgment or authorizing an attachment to secure an independent maritime claim." 339 U.S. at 694-95.

59. While the matter of declaratory and injunctive relief in admiralty under the

made clear its view that unification removed any doubt about the reach of admiralty's equity powers. In several cases, Judge Brown⁶⁰ has written: "The Chancellor is no longer fixed to the wool-sack. He may stride the quarterdeck of maritime jurisprudence and, in the role of admiralty judge, dispense, as would his landlocked brother, that which equity and good conscience impels."⁶¹ Yet it is in dicta rather than in the results achieved that the post-unification decisions in the Fifth Circuit support the argument that unification cured the equity problem. Three of the decisions sustain the power of a limitation court to enjoin proceedings collateral to the limitation proceeding.⁶² Under the prevailing view limitation courts have long had this power.⁶³ Nevertheless, the leading case in this series⁶⁴

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provisions of the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401-466(g)(1) (1970), was involved in *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967), the Court did not discuss the question of their general availability in admiralty.

60. Judge Brown was referred to as "our leading admiralty authority" by Justice Douglas in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 115 (1971) (dissenting opinion). Similar praise was bestowed on him in *Zobel*, *supra* note 21, at 399 ("the most authoritative maritime analyst in all the federal judiciary").

61. Evidently Judge Brown coined this phrase in *Compania Anonima Venezolana de Nav. v. Perez Export Co.*, 303 F.2d 692, 699 (5th Cir.), *cert. denied*, 371 U.S. 942 (1962). The phrase is quoted or paraphrased in a number of his subsequent opinions for the Fifth Circuit, including *Law v. Sea Drilling Corp.*, 510 F.2d 242, 250 (5th Cir. 1975); *Cates v. United States*, 451 F.2d 411, 414 (5th Cir. 1971); *Florida Bahamas Lines, Ltd. v. Steel Barge "Star 800" of Nassau*, 433 F.2d 1243, 1249 (5th Cir. 1970). It is also echoed in other Fifth Circuit opinions, *see, e.g.*, *Merrill-Stevens Dry Dock Co. v. M/V "Laissez Faire"*, 421 F.2d 430 (5th Cir. 1970); *Olympic Towing Corp. v. Nebel Towing Co.*, 419 F.2d 230, 235 (5th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970).

The recent decision in *Lewis v. S.S. Baune*, 534 F.2d 115, 121 (5th Cir. 1976) is either very heavy dictum or a holding that admiralty courts have the power to issue injunctions.

62. *See In re Unterweser Reederei, GMBH*, 428 F.2d 888, 892 (5th Cir. 1970), *vacated on other grounds sub nom. M.S. Bremen v. Zapata Offshore Co.*, 407 U.S. 1 (1972); *Olympic Towing Corp. v. Nebel Towing Co.*, 419 F.2d 230, 235 (5th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970) (dictum); *Guillot v. Cenac Towing Co.*, 366 F.2d 898, 904-05 (5th Cir. 1966).

63. FED. R. Civ. P. F(3), dealing with limitation procedure, states: "Upon compliance by the owner with the requirements of subdivision (1) of this rule all claims and proceedings against the owner or his property with respect to the matter in question shall cease. On application of the plaintiff the court shall enjoin the further prosecution of any action or proceeding against the plaintiff or his property with respect to any claim subject to limitation in the action." This provision reflects and continues powers of the pre-merger limitation court.

64. In *Guillot v. Cenac Towing Co.*, 366 F.2d 898, 904 (5th Cir. 1966), Judge Brown stated:

The Court to whom virtually exclusive responsibility is committed for the operation of this [limitation] machinery has ample resources to assure, as appropriate, that such Court retains exclusive control and power over competing claimants. And in this day, which, to the dismay of some, and the disappointment of many others who see the esoteric trappings of their specialized calling foundering from the forces of integrated rules, it would be odd indeed if the same person sitting as the same Judge were powerless to act because of the abbrevi-

is cited by the ALI Study in support of the statement that "today there should be no difficulty in a federal court giving equitable relief in a case of admiralty or maritime jurisdiction."⁶⁵

Other Fifth Circuit decisions that might be cited in support of the argument that unification cured the equity limitation are similarly narrow in their holdings. Under these cases, an admiralty court can distribute among nonlienholder claimants the post-lien-payoff proceeds of sale of a vessel,⁶⁶ exercise "equitable latitude" in declining to enforce a seaman's release against one not mentioned in it,⁶⁷ render appropriate orders respecting the provision or acceptance of security pending litigation,⁶⁸ treat a multi-claim mortgage foreclosure proceeding as a concursus and admit as a putative lienholder an advertising agency,⁶⁹ set aside or modify the judicial sale of a vessel on grounds of fraud,⁷⁰ and arrange lien priorities according to equitable principles.⁷¹ Each of these exercises of powers would probably have been sustained prior to unification as derivative or subsidiary to the main proceeding,⁷² but there is some powerful and expansive language in certain cases: "In many respects Israel's commencing a mortgage foreclosure invited a concursus in which at this day and time the disposition will be to let the Chancellor stride the quarter-

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ated, and now nearly obsolete, prefix to a cause number. In the Admiralty the Chancellor now goes to sea and has adequate equitable reserves. This language is relied upon by Wiswall, *supra* note 12, at 37, in support of the claim that the 1966 merger was motivated partially by a desire for "liturgical reform." A similar statement by Judge Brown appears in *Cates v. United States*, 451 F.2d 411, 412 (5th Cir. 1971): "In an appeal which for the most part ignores the distinctive role of this Court as though the balmy pre-McAllister days of reconsideration of admiralty cases de novo were still the birthright of proctors who have also lost their titles . . ." That even language reform is difficult to come by is indicated by continued references to "libellants," "respondents," and "proctors." See, e.g., *Jack Neilson, Inc. v. Tug Peggy*, 428 F.2d 54, 56 (5th Cir.), *cert. denied*, 401 U.S. 955 (1970); *Flaska v. Little River Marine Constr. Co.*, 389 F.2d 885 (5th Cir.), *cert. denied*, 392 U.S. 928 (1968).

65. ALI STUDY 227.

66. *Veverica v. Drill Barge Buccaneer No. 7*, 488 F.2d 880, 885 (5th Cir. 1974).

67. *Cates v. United States*, 451 F.2d 411, 415 (5th Cir. 1971).

68. *Keystone Shipping Co. v. S.S. Monfiore*, 409 F.2d 1345, 1346 (5th Cir. 1969).

69. *Stern, Hays & Lang, Inc. v. M/V Nili*, 407 F.2d 549, 551 (5th Cir. 1969). This case is cited in Landers, *By Sleight of Rule: Admiralty Unification and Ancillary and Pendent Jurisdiction*, 51 TEXAS L. REV. 50, 75 (1972), as supporting the general proposition that, much to the author's surprise and apparently to his mild regret, unification appeared to have disposed of at least some of the prior jurisdictional limits upon admiralty.

70. *Merrill-Stevens Dry Dock Co. v. M/V "Laissez Faire"*, 421 F.2d 430, 432 (5th Cir. 1970).

71. *Florida Bahamas Lines, Ltd. v. Steel Barge "Star 800" of Nassau*, 433 F.2d 1243, 1249-52 (5th Cir. 1970).

72. See *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684 (1950), discussed in note 58 *supra*.

deck to transport into the Admiralty *all* of the Court's equity powers."⁷³

At least one district judge in the Fifth Circuit evidently remains unimpressed. In *Nyon Technical Commercial, Inc. v. Equitable Equipment Co.*⁷⁴ defendant's counterclaim included a plea for injunctive relief⁷⁵ against a tort concededly maritime.⁷⁶ In denying the request, the court reasoned as follows: (1) "The traditional rule in admiralty has been that there is no power to grant equitable relief in a direct proceeding for that purpose."⁷⁷ (2) "The injunctive relief sought here by Equipment is not a subsidiary or derivative issue."⁷⁸ (3) The claim for injunctive relief may not be heard as pendent to the main claim.⁷⁹ (4) The 1966 merger of the civil and admiralty rules liberalized the use of counter-claims in admiralty, but it did not "create new substantive admiralty causes of action."⁸⁰ The court concluded that despite any suggestions generated by the merger, the Supreme Court must speak authoritatively before injunctive relief will become available in admiralty.⁸¹

Outside the Fifth Circuit there appear to be only two post-1966 admiralty decisions that are at all favorable to claims for equitable relief. In one of them, *Seaboard Shipping Corp. v. Jocharanne Tugboat Corp.*, the Second Circuit concluded that it might be within admiralty's equitable power to order a portion of the costs of salvag-

73. *Stern, Hays & Lang, Inc. v. M/V Nili*, 407 F.2d 549 (5th Cir. 1969) (footnote omitted) (emphasis added). See *Cates v. United States*, 451 F.2d 411, 414 (5th Cir. 1971), quoting *Compania Anonima Venezolana de Nav. v. Perez Export Co.*, 303 F.2d 692, 699 (5th Cir. 1962); *Keystone Shipping Co. v. S.S. Monfiore*, 409 F.2d 1345, 1346 (5th Cir. 1969).

74. 341 F. Supp. 777 (E.D. La. 1972).

75. Plaintiff's vessel burned at defendant's wharf. Plaintiff sought damages for the fire, and defendant counterclaimed, seeking damages for loss of wharf space and an injunction compelling plaintiff to remove the wreck.

76. "The cause of action which gives rise to the circumstances which are sought to be remedied by injunctive relief, that is, the claim that Nyon's vessel is trespassing on Equipment's wharf, is a maritime tort." 341 F. Supp. at 778.

77. 341 F. Supp. at 779.

78. 341 F. Supp. at 779. See *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684 (1950), discussed in note 58 *supra*.

79. 341 F. Supp. at 779-80. This aspect of *Nyon* is discussed in the text at notes 129-40 *infra*.

80. 341 F. Supp. at 781.

81. 341 F. Supp. at 781. The court also stated that injunctive relief should be denied on the merits. Compare *Amerind Shipping Corp. v. Jordan Intl. Co.*, 314 F. Supp. 1324 (E.D. La. 1970), where the district court, relying on Judge Brown's "Woolsack" quotation, found that irrespective of whether a claim by a port agent for reimbursement of wharfage charges paid lay in subrogation, which may be equity, or in quasi-contract, which had been rendered doubtful in admiralty by the same kinds of considerations that had generated the equity doubt, there was power to hear it. 314 F. Supp. at 1325-26. See text at note 61 *supra*. See also *Kane v. Motor Vessel Leda*, 355 F. Supp. 796, 801 (E.D. La. 1972).

ing a stranded vessel to be paid by an insurer who benefited from the services, although the court did not refer to unification.⁸² Much more positively, Judge Wyzanski in *McKie Lighter Company v. City of Boston*⁸³ expressed the view that withholding from admiralty the power to enjoin a maritime tort never had made sense; he relied most heavily on unification to support his strong assertion that, in any event, admiralty now possesses this power.⁸⁴ But the *McKie* statement was dictum in two senses: The injunctive relief sought⁸⁵ was denied on the merits, and Judge Wyzanski chose to rely on federal question jurisdiction⁸⁶ as well as on admiralty jurisdiction.⁸⁷

There are several decisions in the Second and Ninth Circuits that go against the argument that admiralty now has a full equity arsenal. In *New York State Waterways Association v. Diamond*,⁸⁸ the Second Circuit assumed that admiralty lacks the power to grant an injunction but speculated that the plaintiff in that case might obtain one from a three-judge court under federal question jurisdiction. Without any mention of the 1966 merger, the court stated that while the proscription against admiralty's granting equitable relief "has undergone increasing erosion in recent years . . . we still think it fair to say that the power of an admiralty court to grant injunctive relief remains severely circumscribed."⁸⁹ In *Beverly Hills National Bank and Trust Co. v. Compania de Navegacion Almirante S.A., Panama*,⁹⁰ the Ninth Circuit assumed that pre-unification⁹¹ Supreme Court decisions⁹² fully controlled the availability of equitable relief in admiralty. It thus held that the trial court⁹³ had erred in hearing a constructive

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82. 461 F.2d 500, 505 (2d Cir. 1972) (relief denied on other grounds).

83. 335 F. Supp. 663 (D. Mass. 1971).

84. 335 F. Supp. at 666-67.

85. A tug owner wanted the City of Boston to open a swing bridge regularly so he could reach his berth.

86. Federal question jurisdiction was present under statutes dealing explicitly with bridges over navigable water. See 335 F. Supp. at 666.

87. 335 F. Supp. at 666. In another district court decision, the court expressed grave doubt about the merger's effects on the availability of injunctive relief in admiralty, ultimately denying the relief sought on other grounds. See *Thyssen Steel Corp. v. Federal Commerce & Nav. Co.*, 274 F. Supp. 18, 20 n.3 (S.D.N.Y. 1967).

In *Carroll v. Protection Maritime Ins. Co.*, 512 F.2d 4, 9 (1st Cir. 1975), the First Circuit recently stated: "[B]ecause of the historic unavailability of equitable relief in admiralty, the plaintiffs' prayer for injunctive relief cannot be granted . . ."

88. 469 F.2d 419 (2d Cir. 1972).

89. 469 F.2d at 421 n.2.

90. 437 F.2d 301 (9th Cir.), cert. denied, 462 U.S. 996 (1971).

91. The 1966 unification was not mentioned with regard to the availability of equitable relief. On the subject of pendent jurisdiction, there were oblique references to unification. See 437 F.2d at 306 n.7.

92. See *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684 (1950), discussed in note 58 *supra*.

93. See *Compania de Nav. Almirante S.A., Panama v. Certain Proceeds of Cargo*, 288 F. Supp. 77 (C.D. Cal. 1967).

trust⁹⁴ claim in admiralty.⁹⁵ The appellate court concluded that there was authority to hear the claim, not as a matter of equity in admiralty, but rather in the exercise of the court's pendent jurisdiction.⁹⁶

Thus, the post-unification case law does not lend significant support to the ALI view that unification cured the equity problem.⁹⁷ The most significant decisions are those that deal with the power of

94. The equitable nature of a constructive trust claim, correctly assumed throughout the opinion in *Beverly Hills Bank*, was relied upon by the court in concluding that hearing the claim as a matter of pendent jurisdiction presented no jury trial problems. See text at notes 195-96 *infra*.

95. The Ninth Circuit held that the constructive trust claim was not incidental or derivative in the sense of the *Swift* case. See 437 F.2d at 305.

96. See notes 178-96 *infra* and accompanying text for discussion of this aspect of *Beverly Hills Bank*.

97. Courts in holdings and dicta have enumerated the powers of the admiralty court to be the following:

(1) to enjoin actions collateral to limitation proceedings that arise out of the same subject matter. *In re Unterweser Reederei, GmbH*, 428 F.2d 888, 892 (5th Cir. 1970), *vacated on other grounds sub nom. M.S. Bremen v. Zapata Offshore Co.*, 407 U.S. 1 (1972); *Olympic Towing Corp. v. Nobel Towing Co.*, 419 F.2d 230, 235 (5th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970); *Guillot v. Cenac Towing Co.*, 366 F.2d 898, 904-05 (5th Cir. 1966).

(2) to "reform" a seaman's release. *Cates v. United States*, 451 F.2d 411, 415 (5th Cir. 1971).

(3) to deem a mortgage foreclosure proceeding a concursus and admit a putative lienholder. *Stern, Hays & Lang, Inc. v. M/V Nili*, 407 F.2d 549, 551 (5th Cir. 1969).

(4) to render appropriate orders respecting security pending litigation. *Keystone Shipping Co. v. S.S. Monfiore*, 409 F.2d 1345, 1346 (5th Cir. 1969).

(5) to distribute the post-lienholder-payoff surplus of the sale of a vessel to nonlien claimants. *Veverica v. Drill Barge Buccaneer No. 7*, 488 F.2d 880, 885 (5th Cir. 1974).

(6) to apply quasi-contract or equitable subrogation principles to a port agent's claim for reimbursement of wharfage expenses. *Amerind Shipping Corp. v. Jordan Intl. Co.*, 314 F. Supp. 1324, 1326 (E.D. La. 1970).

(7) to arrange lien priorities according to equitable principles. *Florida Bahamas Lines, Ltd. v. Steel Barge "Star 800" of Nassau*, 433 F.2d 1243 (5th Cir. 1970).

(8) to set aside or modify the judicial sale of a vessel on grounds of fraud. *Merrill-Stevens Dry Dock Co. v. M/V "Laissez Faire"*, 421 F.2d 430, 432 (5th Cir. 1970).

(9) to decree equitable contribution or restitution of salvage expenses among insurers. *Seaboard Shipping Corp. v. Jocharanne Tugboat Corp.*, 461 F.2d 500, 505 (2d Cir. 1972).

(10) to enjoin a swing bridge from blocking plaintiff's tug from access to its berth. *McKie Lighter Co. v. City of Boston*, 335 F. Supp. 663, 666-67 (D. Mass. 1971).

All but the last two of the enumerated decisions were in the Fifth Circuit.

On the other hand, there were holdings or statements that admiralty lacks power:

(11) to enjoin the commission of a maritime tort. *New York State Waterways Assn. v. Diamond*, 469 F.2d 419, 421 (2d Cir. 1972); *Nyon Technical Commercial, Inc. v. Equitable Equip. Co.*, 341 F. Supp. 777 (E.D. La. 1972). *But see Thyssen Steel Corp. v. Federal Commerce & Nav. Co.*, 274 F. Supp. 18, 20 n.3 (S.D.N.Y. 1967).

(12) to hear a constructive trust claim. *Beverly Hills Natl. Bank & Trust Co. v. Compania de Nav. Almirante*, 437 F.2d 301 (9th Cir.), *cert. denied*, 462 U.S. 996 (1971).

(13) to specifically enforce a charter party. See *Commercial Metals Co. v. International Union Maritime Corp.*, 294 F. Supp. 570, 573 (S.D.N.Y. 1968).

admiralty to grant injunctive relief. With the exception of the Fifth Circuit limitation of liability cases⁹⁸ and Judge Wyzanski's strong dictum in *McKie Lighter Company v. City of Boston*,⁹⁹ the jurisprudence is unfavorable. One district judge expressed doubt about the effects of the merger on admiralty's injunctive powers;¹⁰⁰ another district judge¹⁰¹ and the Second Circuit¹⁰² were certain that admiralty still lacks general equitable power.¹⁰³

As indicated in some of the commentary,¹⁰⁴ it would be easy enough to cure this matter by statute,¹⁰⁵ and such legislation has indeed been proposed.¹⁰⁶ Thus, there is hope that the problem will eventually disappear, whether or not the rest of the suggestions outlined below are followed.¹⁰⁷ The major recommendation of this article, to remove admiralty's separate statutory basis and make it a subcategory of federal question jurisdiction, would cure the equitable powers problem, along with several others.

B. *Ancillary and Pendent Jurisdiction in Admiralty*¹⁰⁸

Nobody seems to be completely certain how to differentiate be-

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98. See note 97 *supra*. But see note 61 *supra*.

99. 335 F. Supp. 663, 666-67 (D. Mass. 1971).

100. See *Thyssen Steel Corp. v. Federal Commerce & Nav. Co.*, 274 F. Supp. 18, 20 n.3 (S.D.N.Y. 1967).

101. See *Nyon Technical Commercial, Inc. v. Equitable Equip. Co.*, 341 F. Supp. 777 (E.D. La. 1972).

102. See *New York State Waterways Assn. v. Diamond*, 469 F.2d 419, 421 (2d Cir. 1972).

103. In *Insurance Co. of North America v. Langan Constr. Co.*, 327 F. Supp. 567, 568 (S.D. Ala. 1971), the court, without comment on the law in the matter, said it "deems it unnecessary" to consider the injunction question raised in that maritime case.

104. See Comment, *supra* note 50, at 1163-64. After making the argument that the pre-1966 limitations were not jurisdictional, and were certainly not based on constitutional limitations, the author proposed that S. 1876, 92d Cong., 1st Sess., §§ 1316-1319 (1971)—the then-pending legislation echoing the ALI's jurisdictional recommendations—be amended by adding the following language: "The district courts of the United States, when hearing suits under the admiralty and maritime jurisdiction, shall be empowered to order all appropriate remedies, whether formerly characterized as legal, equitable or maritime." *Id.* at 1163-64 n.49.

105. See notes 41-43 *supra* and accompanying text.

106. The issue of equitable remedies in admiralty was only cursorily treated in the Hearings on S. 1876. Leavenworth Colby testified that the ALI did not consider the matter "properly jurisdictional." 1972 *Hearings* 655. He also reiterated the ALI view that the 1966 merger cured the problem. After the Hearings, I raised the matter of equitable remedies with subcommittee counsel, and language was added providing: "The district courts shall have original jurisdiction without regard to amount in controversy of all civil actions of admiralty and maritime jurisdiction, including those for interpleader, declaratory or equitable relief . . ." S. 1876, 93d Cong., 1st Sess., § 1316, May 23, 1973. There has been no further action. See notes 41-43 *supra* and accompanying text.

107. See notes 379-405 *infra* and accompanying text.

108. See Landers, *supra* note 69; Comment, *Third-Party Practice in Admiralty*,

tween the terms "ancillary" and "pendent" in the context of federal court jurisdiction.¹⁰⁹ The conventional distinction was evidently that ancillary jurisdiction is the broader category—a nebulous class of cases where the federal courts will exercise jurisdiction over matters, including those involving new parties, which themselves lack an independent federal jurisdictional basis. Pendent jurisdiction, in this view, is a definitely limited subcategory of ancillary jurisdiction, reaching only those cases where a plaintiff will be permitted to join to his main federal claim another *claim*, lacking an independent federal jurisdictional basis, against the defendant.¹¹⁰ Yet recent developments have suggested that something called pendent (or pendent party) jurisdiction might also validate the joinder of nonfederal parties who are involved in claims arising out of the same nucleus of operative facts as the federal claim.¹¹¹ This later development, though quite controversial, is apparently thriving in some quarters.¹¹² Thus, in the instant context there is probably no reason for attempting to distinguish between pendent and ancillary jurisdiction. The important issue is the degree to which either or both of these auxiliary jurisdictional bases are available to federal courts exercising admiralty jurisdiction.

One major premise of the ALI study was that unification would greatly increase the availability of "ancillary and pendent jurisdiction."¹¹³ Prior to unification, the accepted view¹¹⁴ was that courts of admiralty could not exercise pendent or ancillary jurisdiction.¹¹⁵ With

28 Sw. L.J. 1021 (1974); Comment, *Impleader of Nonmaritime Claims Under Rule 14(c)*, 47 TEXAS L. REV. 120 (1968); Note, *Pendent Jurisdiction in Admiralty*, 18 WAYNE L. REV. 1211 (1972); Comment, *Pendent Jurisdiction in Admiralty*, 1973 WIS. L. REV. 594; Comment, *supra* note 50, at 1164-80.

109. See, e.g., Landers, *supra* note 69, at 57 n.31; Comment, 28 Sw. L.J. 1021, *supra* note 108, at 1026 n.49; Comment, *Pendent and Ancillary Jurisdiction: Towards a Synthesis of Two Doctrines*, 22 UCLA L. REV. 1263 (1975); Note, *Rule 14 Claims and Ancillary Jurisdiction*, 57 VA. L. REV. 265 (1971); Note, 18 WAYNE L. REV. 1211, *supra* note 108; Comment, 1973 WIS. L. REV. 594, *supra* note 108, at 599 n.34.

110. See 1 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 23, at 97 (Wright ed. 1960); C. WRIGHT, LAW OF FEDERAL COURTS 65 (2d ed. 1970).

111. See *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800, 809-11 (2d Cir. 1971); *Astor-Honor, Inc. v. Grosset & Dunlap, Inc.*, 441 F.2d 627 (2d Cir. 1971). See generally *Moor v. County of Alameda*, 411 U.S. 693, 710-15 (1973).

112. The recent decision in *Aldinger v. Howard*, 44 U.S.L.W. 4988 (U.S. June 24, 1976), disapproves "pendant party" jurisdiction over a county with respect to a claim brought under civil rights statutes (42 U.S.C. § 1983 and 28 U.S.C. § 1343 (3)). The Court expressly reserved the "subtle and complex" general question of the availability of "pendant party" jurisdiction. See generally Comment, 22 UCLA L. REV. 1263, *supra* note 109, at 1277-87.

113. See notes 27-30 *supra* and accompanying text.

114. See *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800, 810 n.11 (2d Cir. 1971).

115. What this article will call "*Romero*-pendent" jurisdiction is to be distin-

the merger of the admiralty with the civil side of the federal court, there was reason to believe that the full array of incidental or derivative federal jurisdictional powers would extend to the court when it exercised its admiralty and maritime jurisdiction. Indeed, the framers of the amended rules evidently assumed this. There was also plausible reason to think otherwise, however, for many of the pre-1966 decisions denying to the admiralty various joinder, counterclaim, impleader, cross-claim, and other ancillary procedural devices seemed to be based on jurisdictional grounds that reached deep into statutory,¹¹⁶ and perhaps constitutional, doctrine.¹¹⁷

It would be interesting to analyze the relative merits of these two positions which, like so many other currently vexed issues of maritime law, wake "echoes in the deepest metaphysics of admiralty."¹¹⁸ But of more immediate relevance is exploration of what the case law since unification has made of the matter. If the results of this examination show that federal courts hearing admiralty cases have not exercised pendent and ancillary jurisdiction, we will have discovered yet another indication that unification did not accomplish its major purpose—the elimination of the idea of the admiralty as a separate court, behaving oddly because oddly labelled.

In the ensuing treatment of post-merger decisions relating to ancillary and pendent jurisdiction, the categories of cases¹¹⁹ are

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guished. Well before unification, there was a device, sometimes called pendent jurisdiction, whereby a personal injury suit on the civil side of federal court, with jurisdiction based on diversity or the Jones Act (Merchant Marine Act, 1920, ch. 250, § 1, 41 Stat. 988 (codified in 46 U.S.C. § 688)), could have appended to it claims based on the general decisional maritime law, with the entire case being tried to a jury. This, however, was not a device whereby other claims or parties were appended to the admiralty claim. It was the converse situation; a general maritime claim was appended to an arising under (or diversity) claim, on the civil side. The typical situation, exemplified by *Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963), and *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), involved a seaman's Jones Act claim against his employer, wherein jurisdiction on the civil side of court was based on the Jones Act itself (*i.e.*, "arising under" jurisdiction) to which the seaman's unseaworthiness and maintenance and cure claims were added. *Romero* hinted, and *Fitzgerald* made clear, that all three admiralty claims could be tried to the jury to which plaintiff is entitled under the terms of the Jones Act. See notes 231-86 *infra* and accompanying text.

116. Proponents of this view look all the way back to the First Judiciary Act, Act of 1789, ch. 20, 1 Stat. 76, which, according to one commentator, is "the sort of quasi-constitutional statutory law, change in which . . . one feels it almost impious to contemplate." Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259, 260 (1950).

117. See generally Landers, *supra* note 69.

118. G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 33 n.118 (1957), discussing whether admiralty cases are ipso facto also "arising under" cases. The Supreme Court later answered that question negatively. See *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), discussed in notes 231-39 *infra* and accompanying text.

119. For a "miscellaneous" pendent jurisdiction case, see *Czarnikow-Rionda Co.*

presented in what would be, according to traditional thinking, their approximate order of difficulty.¹²⁰ Thus, under this view, it ought to be easier for defendant to assert a nonfederal counterclaim than for defendant to add a nonfederal party; easier for defendant to add a nonfederal party than for plaintiff to add a nonfederal claim; and easier for plaintiff to add a nonfederal claim than for plaintiff to add a nonfederal party.

1. *Counterclaim*

The generally accepted view is that ancillary jurisdiction permits federal courts to hear, and to bring in additional parties to respond to, compulsory counterclaims. Permissive counterclaims, on the other hand, require independent jurisdictional grounds.¹²¹ Despite the fact that post-unification maritime cases have followed this traditional pattern,¹²² difficulties incident to civil/admiralty separatism have arisen. In each of the four relevant decisions, the nonmaritime counterclaim that the defendant asserted was permissive.¹²³ In the two cases where diversity of citizenship was present, the courts ordered the nonmaritime permissive counterclaims severed from the main claims and retained for later trial to a jury.¹²⁴ In the two cases where there

v. *Eddie S.S. Co. (Arb.)*, 1975 A.M.C. 1116, 1118 (S.D.N.Y. 1975) (pendent jurisdiction gives court power to order cargo purchaser's claims consolidated with shipowner-charterer arbitration) (dictum).

120. According to Professor Wright, the following categories all represent situations where "present consensus" concerning the interpretation of the Federal Rules of Civil Procedure would permit a federal court to adjudicate, despite the absence of independent federal jurisdiction over the matter reached: compulsory counterclaims under rule 13(a); adding parties to respond to a compulsory counterclaim under rule 13(h); impleader of a third-party defendant under rule 14; cross claims under rule 13(g); interpleader under rule 22; intervention as of right under rule 24(a). Conversely, under the conventional view the following matters are not within the reach of ancillary federal judicial power: permissive counterclaims under rule 13(b); joinder of parties under rule 20; permissive intervention under rule 24(b); and "joinder of claims under rule 18, except where the federal and nonfederal claims are so closely related as to amount to separate grounds in support of a single cause of action." C. WRIGHT, *supra* note 110, at 21.

121. *Id.*

122. For cases assuming that courts exercising admiralty jurisdiction can hear compulsory counterclaims that lack independent jurisdictional basis, see *Industrial Equip. & Marine Serv., Inc. v. M/V Mr. Gus*, 333 F. Supp. 578, 580 (S.D. Tex. 1971) (explicit assumption), and *Camper & Nicholsons, Ltd. v. Yacht "Fontainebleau II,"* 292 F. Supp. 734, 735 (S.D. Fla. 1968) (implicit assumption).

123. See *Industrial Equip. & Marine Serv., Inc. v. M/V Mr. Gus*, 333 F. Supp. 578 (S.D. Tex. 1971); *Camper & Nicholsons, Ltd. v. Yacht "Fontainebleau II,"* 292 F. Supp. 734 (S.D. Fla. 1968); *Alaska Barite Co. v. Freighters, Inc.*, 54 F.R.D. 192 (N.D. Cal. 1972); *Nyon Technical Commercial, Inc. v. Equitable Equip. Co.*, 341 F. Supp. 777 (E.D. La. 1972). In *Nyon* the court did not determine whether the counterclaim was permissive or compulsory, but it appeared to be permissive. See text at notes 129-40 *infra*.

124. In *Alaska Barite Co. v. Freighters, Inc.*, 54 F.R.D. 192 (N.D. Cal. 1972), a maritime shipper of goods sued on an affreightment contract, and the carrier filed

was no diversity jurisdiction the nonmaritime permissive counterclaims were dismissed.¹²⁵

Retention for later trial to a jury over a closely related but permissive counterclaim that lacks a basis for independent admiralty jurisdiction is preferable to dismissal, but the procedure is cumbersome. This awkwardness is the result of the continuation in the post-1966 rules of the maritime plaintiff's power to command a nonjury proceeding.¹²⁶ Whether that power ought to be preserved generally is a question that the ALI's 1969 recommendations answered in the

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a permissive counterclaim charging the shipper with antitrust violations. The carrier demanded a jury trial on the counterclaim. The court analyzed plaintiff's motion to dismiss the counterclaim as raising three major questions: (1) whether a permissive counterclaim can be sustained at all in an admiralty proceeding; (2) whether federal rule 9(h) preserved intact the former admiralty practice which gives plaintiff establishing admiralty jurisdiction an unrestricted choice of a nonjury forum; and (3) whether the antitrust counterclaim necessitates a jury trial. The court answered in the affirmative to each of the three enumerated questions. A fourth question also resolved affirmatively was the appropriateness of antitrust counterclaims. *See generally* 54 F.R.D. at 195-96.

With respect to the first, the court acknowledged that prior to unification, admiralty's use of the counterclaim device had been sparing, but pointed out that there is nothing in rules 13(a) or 13(b) that generates any doubt that the rule was intended to apply to admiralty cases. 54 F.R.D. at 195-96 n.1. The answer to the second question was easy; the rules make clear that a central purpose of rule 9(h) is to preserve plaintiff's right to elect a nonjury proceeding. 54 F.R.D. at 194. The counterclaim, on the other hand, was entitled to a jury trial. Thus, the only sensible resolution, somewhat cumbersome but necessary, was to try the main claim to the court and then to try the counterclaim to a jury.

In *Industrial Equip. & Marine Servs., Inc. v. M/V Mr. Gus*, 333 F. Supp. 578 (S.D. Tex. 1971), plaintiff brought an in rem action to enforce a preferred ship mortgage and defendant counterclaimed for breach of warranty in the sale of the vessel. Defendant demanded a jury trial. The court first determined, without any extended inquiry, that all of defendant's counterclaim, being based on a ship-sale transaction, was nonmaritime. *Cf. Ohio Barge Lines, Inc. v. Dravo Corp.*, 326 F. Supp. 863 (W.D. Pa. 1971) (analysis of the implied warranty problem). Then, finding diversity of citizenship to be present, the court retained the counterclaim and, together with plaintiff's cross-claim against the manufacturer of the engine of the vessel in question, *see* note 164 *infra*, severed it, presumably for later trial to a jury. The court ordered defendant's counterclaim and plaintiff's cross-claim redocketed, presumably on the "civil side," and ordered plaintiff to move for default in the instant proceeding. What this probably amounts to is a transfer of the counterclaim and cross-claim to the civil (*i.e.*, jury) docket.

125. Plaintiff in *Camper v. Nicholson, Ltd. v. Yacht "Fontainebleau II"*, 292 F. Supp. 734 (S.D. Fla. 1968), brought an in rem action to enforce a supply and repair lien on a vessel, and defendant counterclaimed alleging misrepresentations in the sale of the yacht. Under the anomalous but well-settled ship-sale doctrine, the counterclaim was deemed nonmaritime. 292 F. Supp. at 735. Being permissive, it necessitated an independent jurisdictional basis. Finding no diversity, the court dismissed the counterclaim. In *Nyon Technical Commercial, Inc. v. Equitable Equip. Co.*, 341 F. Supp. 777 (E.D. La. 1972), the permissive counterclaim was outside admiralty's jurisdiction because it demanded injunctive relief. *See* text at notes 74-81 *supra*. Finding no doctrine of ancillary or pendent jurisdiction strong enough to sustain the court's exercise of equity power, the counterclaim for an injunction was dismissed. *See* text at notes 129-40 *infra*.

126. FED. R. Civ. P. 9(h), 38(e). *See* text at notes 1-8 *supra*.

negative by providing for a jury trial at the option of any party in maritime personal injury and death cases.¹²⁷ The philosophy of that proposal, congenial to the generalist, is that the nonjury tradition is not rooted in any jurisdictional limitation upon admiralty courts.¹²⁸ Adoption of this philosophy should make acceptable a procedure whereby the existence of a right to jury trial for any appropriately joined party in a maritime case would result in all related factual questions being sent to a jury according to the normal judge/jury allocation.

The decisions dismissing permissive counterclaims that lack any independent basis for federal jurisdiction contain unexceptionable holdings, but they do present a conservative view of the effects of unification on admiralty jurisdiction that is dramatically uncongenial to the ALI's hopes. Exemplary is *Nyon Technical Commercial, Inc. v. Equitable Equipment Co.*,¹²⁹ in which plaintiff had left his vessel at defendant's wharf for repairs. While there, the vessel burned. Plaintiff sought damages for the destruction of the vessel, and defendant counterclaimed for damages and an injunction compelling plaintiff to remove the hulk. The jurisdictional difficulty presented by the counterclaim, otherwise founded on a maritime tort, was, of course, the equity limitation.¹³⁰ Defendant urged "two bases for the court's jurisdiction over its claim for injunctive relief: (i) pendent jurisdiction, and (ii) ancillary jurisdiction."¹³¹

The "ancillary jurisdiction" argument was based on the view that the 1966 extension of rule 13 counterclaim procedures to admiralty

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127. See proposed section 1319, ALI STUDY 37, 250-54. See also text at notes 390-401 *infra*.

128. During the Senate Subcommittee Hearings on the ALI's recommendations on admiralty jurisdiction, the Maritime Law Association objected both to the introduction of the jury generally and to extending the right to defendant as well as to plaintiff. See 1972 *Hearings* 688-99. In response to this criticism, one version of the modified bill circulated after the hearings restricted the right to demand a jury in a maritime injury or death case to the plaintiff. However, S. 1876, as reintroduced by Senator Burdick in May 1973, S. 1976, 93d Cong., 1st Sess. (1973), continued to mirror the ALI proposal.

129. 341 F. Supp. 777 (E.D. La. 1972). See notes 74-81, 125 *supra* and accompanying text.

130. See text at notes 74-81 *supra*.

131. 341 F. Supp. at 778. The idea (whether the court's or the defendant's is unclear) of the difference between pendent and ancillary jurisdiction portrayed here is intriguing:

[Defendant] first argues that the Court's pendent jurisdiction should be invoked over the equitable injunctive demand because it arises out of the same operative facts as the maritime claims. Secondly, it is urged that the court has ancillary jurisdiction over the claim for equitable relief; as a result of the merger of admiralty and civil rules of procedure in 1966, because Rule 13 extended the right to counterclaim to admiralty cases.

341 F. Supp. at 777-78.

removed the equitable jurisdiction difficulty. The court disagreed:

Prior to the merger of the rules, there was very limited use of counterclaims in admiralty. One of the purposes of the merger was to allow admiralty the same liberal practice of counterclaims as enjoyed by the civil practice. . . . The merger . . . did not, however, create new substantive admiralty causes of action, and this court does not have the power to entertain an equitable action to enjoin the commission of a maritime tort. . . . This is the law whether the equitable action is brought as a direct complaint or in a counterclaim.¹³²

Defendant's other argument—on a theory of “pendant jurisdiction”—was a clumsy effort to blend three decisions: *Swift & Co. Packers v. Compania Colombiana Del Caribe*,¹³³ the leading Supreme Court “equitable powers” decision in admiralty, which had held that the admiralty court could employ powers deemed equitable in order to secure the defendant's appearance; *Beverly Hills National Bank & Trust Co. v. Compania de Navigacion Almirante S.A., Panama*,¹³⁴ wherein the Ninth Circuit had held that a constructive trust claim was not incidental in the *Swift* sense,¹³⁵ but that it could be entertained by the court as pendent,¹³⁶ and *Romero v. International Terminal Operating Co.*,¹³⁷ where the Supreme Court had held that, in an action under the Jones Act on the civil side of federal court, claims based on the general maritime law doctrines of maintenance and cure and unseaworthiness could be tried as pendent to the Jones Act claim. It ought to be fairly obvious that the *Romero* decision had no relationship to the problem in *Nyon*. An admiralty court, seeking the power to entertain an equitable counterclaim, will not derive much support from a decision permitting general maritime claims to pend to statutory maritime claims in federal question proceedings.¹³⁸ It is likewise evident that the *Swift* case is not directly related to the argument that the *Nyon* defendant advanced. Defendant's major reliance should have been on *Beverly Hills Bank*, which had employed a pendent approach. The *Nyon* court, however, simply lumped *Beverly Hills Bank* and *Swift* together, saying: “In *Beverly Hills* . . . as was the case in [*Swift*], the court was faced with a situation where the plain-

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132. 341 F. Supp. at 781 (citations omitted).

133. 339 U.S. 684 (1950). See note 58 *supra*.

134. 437 F.2d 301 (9th Cir.), *cert. denied*, 462 U.S. 996 (1971), *discussed in* text at notes 178-96 *infra*.

135. *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684 (1950). See note 58 *supra*.

136. The court noted that diversity of citizenship provided a second, independent ground for the district court to exercise jurisdiction over the claim. 437 F.2d at 306.

137. 358 U.S. 354 (1959). See note 115 *supra*; notes 231-39 *infra* and accompanying text.

138. See note 115 *supra*.

tiff could not obtain a judgment if jurisdiction over the non-maritime claim was not retained."¹³⁹

There was no discussion in *Nyon* of the two major questions seemingly raised by the admiralty/counterclaim cases: (1) Was the counterclaim permissive or compulsory? Although the court would likely have found it permissive, there was no discussion of the issue. Indeed, because the claims of each party arose from allegations that the same fire was the fault of the other party, a decision that the counterclaim was compulsory would probably have been sustainable; (2) Was diversity or some other nonadmiralty ground of federal jurisdiction present? Presumably not, but the decision gives no indication.¹⁴⁰ Instead, the court manifested little willingness to search for a way in which to hear the counterclaim, perhaps out of a disinclination to broaden further the jurisdictional base of the "admiralty side" of federal courts.

2. *Third-Party Practice*

Traditionally, ancillary jurisdiction, which reaches third-party claims, among others, has been subjected to much less rigorous jurisdictional scrutiny than has pendent jurisdiction, which principally affects additional claims asserted by a plaintiff.¹⁴¹ But there is an admiralty peculiarity that must be noted here. Former Admiralty rule 56 permitted both "indemnity" impleader—whereby a defendant asserts that a third-party defendant may be liable to the defendant by way of "remedy over, contribution or otherwise"¹⁴²—and "substitute defendant" impleader—whereby a defendant asserts that third-party defendant may be directly liable to the plaintiff.¹⁴³ In the case of "substitute defendant" impleader, the third-party defendant

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139. 341 F. Supp. at 780. In Landers, *supra* note 69, at 74 n.96, this aspect of *Nyon* is criticized as being "of dubious authoritative value" because of its "failure to come to grips with the pertinent and relevant authorities." The author also took exception to the *Nyon* court's failure to mention the decision in *McCann v. Falgout Boat Co.*, 44 F.R.D. 34 (S.D. Tex. 1968), discussed in text at notes 147-56 *infra*, which would have supported the result reached in *Nyon*, and *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800 (2d Cir. 1972), discussed in text at notes 206-25, which would have indicated an outcome contrary to *Nyon*.

140. Additionally, the court erected an alternative holding: "Even assuming that the Court did have the power to issue an injunction in an admiralty suit of this type, [on the merits] this Court would not exercise that power in this case." 341 F. Supp. at 781.

141. See notes 109-13, 119-20 *supra* and accompanying text.

142. Admiralty Rule 56, 368 U.S. 1015 (1961).

143. The terms "indemnity impleader" and "substitute defendant" impleader were evidently coined in Comment, *supra* note 50, at 1172. These useful terms will be freely employed in this article. Despite the fact that under the federal rules "third-party practice" is the usual term, "impleader" seems a useful synonym.

is, in effect, tendered to the plaintiff, and the action proceeds as though the plaintiff had originally joined that defendant.¹⁴⁴ This feature of the pre-1966 admiralty practice is preserved in Federal Rules of Civil Procedure 14(c).¹⁴⁵ Because "substitute defendant"

144. The difference between the two forms of third-party practice is well illustrated by *Williams v. United States*, 42 F.R.D. 609 (S.D.N.Y. 1967), where plaintiff sued the United States for injuries allegedly sustained aboard a government vessel, and the Government sought to implead the state of New York. In the court's view, impleader was not offensive to sovereign immunity *provided*, as was true in the instant case, that the theory was restricted to indemnity impleader: "Under Fed. R. Civ. P. 14(a), unless the plaintiff amends his complaint, no demand is made by or on behalf of the plaintiff against the third-party defendant, and no judgment against the third-party defendant can run in favor of the original plaintiff." 42 F.R.D. at 615. To attempt "substitute defendant" third-party practice under rule 14(c) would, on the other hand, have offended New York's unwaived immunity, because under that form of third-party practice "the third-party plaintiff may also demand judgment against the third-party defendant in favor of the plaintiff." 42 F.R.D. at 615.

Also illustrative of the difference between "indemnity" third-party practice and "substitute defendant" third-party practice is *Donaldson v. United States Steel Corp.*, 53 F.R.D. 228 (W.D. Pa. 1971), although the opinion itself does not reveal an awareness of the difference. Plaintiff, a seaman, brought a Jones Act suit (the opinion does not reveal whether it was brought on the law side, with a jury demand, or in admiralty) for injuries sustained aboard the vessel. Defendant filed a third-party claim against several defendants, alleging that "if the defendant is liable for the injuries sustained by the plaintiff, then it is entitled to recover such sum from the third-party defendants whose alleged negligent and reckless operation of a motor vehicle caused the plaintiff's injuries." 53 F.R.D. at 229. The third-party claim was evidently asserted under rule 14(a) alone, and the court dismissed it on the ground that no indemnity relationship existed between defendant and third-party defendants:

[T]he requirement . . . that the relationship between the defendant, as a third-party plaintiff and the third-party defendants be in reality one of plaintiff-defendant must be met. Under the circumstances of this suit, there is no such relationship between the defendant as a third-party plaintiff and the purported third-party defendants, for no relationship exists between these two parties which would give rise independently to litigation between themselves.

53 F.R.D. at 230. No mention was made in the decision of rule 14(c), which says in pertinent part:

When a plaintiff asserts an admiralty or maritime claim . . . the defendant . . . , as a third party plaintiff, may bring in a third-party defendant who may be wholly or partly liable, either to the plaintiff or to the third-party plaintiff, by way of remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. In such a case the third-party plaintiff may also demand judgment against the third-party defendant in favor of the plaintiff . . . .

FED. R. CIV. P. 14(c). The quoted portion of rule 14(c) would seem to raise at least an argument that third-party jurisdiction should have been sustained in *Donaldson*. In essence, the defendant was arguing that the injuries for which plaintiff sued the employer arose in fact, wholly or partially, from an automobile accident. Perhaps even under rule 14(c), however, the suit against third-party defendants did not arise out of the "same . . . series of . . . occurrences." In the court's view, arguably, what was missing here was "some causal connection between the original action and the action brought in the third-party suit." 53 F.R.D. at 231.

Another possible interpretation of *Donaldson* is that plaintiff had brought his Jones Act suit on the law side of federal court in order to get a jury trial. In that posture, rule 14(c) would presumably not be available since by its terms it is keyed to situations where "plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h)." FED. R. CIV. P. 14(c). But see *Saus v. Delta Concrete Co.*, 368 F. Supp. 297, 298 (W.D. Pa. 1973), discussed in text at notes 281-86 *infra*.

145. The matter is well explained in Comment, *supra* note 50, at 1172-73.

third-party practice involves a functional tendering of the third-party defendant to the original plaintiff, jurisdictional limits ought to be congruent with those applicable to joinder of parties. As will be seen, the decision in *Leather's Best, Inc. v. S.S. Mormaclynx*¹⁴⁶ seems to have significantly expanded the availability of *pendent* jurisdiction in joining parties. Thus, "substitute defendant" practice may be broadened more successfully through pendent jurisdiction, although in this area the problem of the right to a jury trial has remained a troublesome factor. "Indemnity" third-party practice, on the other hand, is probably best treated with the traditionally more expansive ancillary jurisdiction approach.

a. "*Substitute defendant*" third-party practice under rule 14(c). The most celebrated case holding that the 1966 merger does not expand an admiralty court's powers over third-party defendants is *McCann v. Falgout Boat Co.*,¹⁴⁷ a decision that contains all the major arguments against interpreting the 1966 merger as giving ancillary and pendent jurisdiction to the admiralty courts.¹⁴⁸ Plaintiff, a seaman, sued his employer in admiralty, asserting causes of action based on the Jones Act and on unseaworthiness. The employer brought a third-party complaint under rule 14(c) against a San Antonio physician, alleging that because of his incompetence the plaintiff's injury had culminated in disability. In dismissing the third-party complaint, the court adopted the following line of reasoning:

(1) The claim against the doctor lacks independent admiralty jurisdictional basis; his negligence, if any, was committed on land, and it affected the plaintiff on land.¹⁴⁹ Nor was there jurisdiction based on diversity of citizenship.

(2) Rule 14(c), added in 1966, mirrors the former admiralty impleader practice of rule 56, under which the third-party defendant was not only subject to indemnity, but was also treated as though he had been joined by plaintiff.¹⁵⁰

(3) The law under former rule 56 was quite clear in prohibiting impleader of a third party over whom independent admiralty

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146. 451 F.2d 800 (2d Cir. 1971), *discussed in text* at notes 206-25 *infra*.

147. 44 F.R.D. 34 (S.D. Tex. 1968).

148. *See* Comment, 1973 Wis. L. Rev. 594, *supra* note 108, at 609-11. *See also* Landers, *supra* note 69, at 67-69; Comment, *supra* note 50, at 1176; Comment, 47 TEXAS L. REV. 120, *supra* note 108, at *passim*.

149. *See* *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 266-68 (1972) (discussion of the "locality" test for maritime tort jurisdiction, and of these two facets of the "occurrence" of a tort).

150. "An impleaded party stands as one charged with fault by the original petition, although in fact it did not so charge and is not amended. The cause is treated as if the petition had been filed against both the defendant and third-party defendant." 44 F.R.D. at 37 n.2 (1968).

jurisdiction was lacking.¹⁵¹ The major reason for this restriction was that bringing a nonmaritime party into an admiralty case would deprive him of his probable seventh amendment right to a jury trial.

(4) The 1966 merger could hardly be taken to work so fundamental a change in the former admiralty impleader restriction because the Advisory Committee, in drafting rule 14(c), must have known Admiralty rule 56 and its construction. If the Committee had wanted to change that construction, it would have done so explicitly. The Supreme Court has often said that a prior construction of a statute is deemed to receive legislative approval if the provision is reenacted without material change; surely a procedural rule should be accorded similar treatment. Furthermore, rule 82 provides that the rules should not be construed to extend jurisdiction, yet reading rule 14(c) as permitting impleader of a nonmaritime party would certainly have that effect.

The *McCann* decision has excited a good deal of commentary, most of it critical. One writer, though basically convinced that limitations on admiralty jurisdiction would reasonably have survived the merger, still found the decision unsatisfactory, partly because of the court's stress on the third-party's right to jury trial. He observed that the court evinced no awareness of a solution available since the merger of law and equity—bringing in the third party but trying the claim against him to a jury.¹⁵² The ALI jurisdictional study simply stated that *McCann* "takes too restrictive a view of the purpose of unification and of the rules adopted to implement unification."¹⁵³ A student commentator pointed out that by leaving open the possibility that nonadmiralty grounds of federal jurisdiction, such as diversity, would permit impleader under 14(c), the court left the jury trial problem unsolved. He also noted the inconsistency in saying that the exercise of ancillary jurisdiction in an admiralty action is more violative of rule 82 than is the use of this device in a diversity action.¹⁵⁴ Another student's principal objection rested upon strong indications that the 1966 Advisory Committee *did* wish to alter drastically some

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151. The court cited seven cases in addition to 3 J. MOORE, FEDERAL PRACTICE ¶ 14.20, at 669 (1966).

152. Landers, *supra* note 69, at 67-69. Landers also complained that the court had not made clear whether jurisdiction would have been denied if the San Antonio physician had been pursued for indemnity alone under rule 14(a). *Id.* at 68. It appears that the opinion was fairly clear on this point; indeed, the opinion took pains to limit itself to third-party practice under rule 14(c).

153. ALI STUDY 228.

154. Comment, *supra* note 50, at 1176-80.

theretofore fundamental aspects of admiralty practice.¹⁵⁵ Finally, an author dealing extensively with the case admitted the validity of the jury trial objection but thought that two solutions, short of dismissal, were available: By the first solution the court would give the doctor his jury trial, which, preferably, would include issues raised by plaintiff against the shipowner; the second possible solution was simply a split trial.¹⁵⁶

Despite these criticisms and the passage of five years, the same judge, in a similar situation,¹⁵⁷ declared that he "adheres to the *McCann* decision. Regardless of the desirability of appending non-federal, non-admiralty claims to admiralty causes . . . through the devices of pendent and ancillary jurisdiction, the use of these devices in admiralty cases were not intended by the 1966 unification and amendment of rules. Any change in this ancient restriction on the Court's jurisdiction should be by explicit alteration of the rules or statute."¹⁵⁸ Each time the Fifth Circuit has confronted the issue presented by the *McCann* case it has avoided a definitive ruling.¹⁵⁹

A much healthier attitude toward the civil/admiralty dichotomy was displayed by another district court in *Christman v. Maristella Compania Naviera*.¹⁶⁰ Plaintiff sued in admiralty for breach of a charter party, alleging that the defendant had never undertaken the

155. Comment, 1973 Wis. L. Rev. 594, *supra* note 108, at 610.

156. Comment, 47 TEXAS L. REV. 120, *supra* note 108, at 126.

157. *Stinson v. S.S. Kenneth McKay*, 360 F. Supp. 674 (S.D. Tex. 1973). Judge James L. Noel, appointed March 17, 1962, acknowledged both commentary adverse to *McCann* and contrary decisions, notably *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800 (2d Cir. 1972), discussed in text at notes 206-25 *infra*, but was unmoved. 360 F. Supp. at 675-76. Cf. *Sanchez v. Lloyd Richardson Constr. Corp.*, 56 F.R.D. 472 (S.D. Tex. 1972), sustaining admiralty jurisdiction and denying jury trial in an action by a maritime third-party defendant against an arguably nonmaritime fourth-party defendant. Plaintiff was hurt on a vessel, and fourth-party defendant was the alleged manufacturer of the device that hurt him. Close reading of a murky opinion suggests that the court found independent admiralty jurisdiction over the fourth-party defendant and thus did not have to reach the *McCann* point. See also *In re McAninch*, 392 F. Supp. 96, 97 (S.D. Tex. 1975) (plaintiff in limitation of liability proceedings under FED. R. CIV. P. F can employ rule 14(c) third-party practice); *Petition of Klarman*, 270 F. Supp. 1001 (D. Conn. 1967).

158. 360 F. Supp. at 676.

159. In *Watz v. Zapata Off-Shore Co.*, 431 F.2d 100 (5th Cir. 1970), an injured shipyard worker sued the vessel owner. The owner impleaded the hoist assembler, who impleaded the manufacturer of an allegedly defective chain. As to jurisdiction, the court said: "Without expressing any view on the correctness of a decision such as *McCann*, we note that the third-party complaint there was distinctly not maritime. . . . In our case, on the other hand, the consequence of Campbell's conduct was injury on board the [vessel]. The same reasoning that led us to conclude that admiralty jurisdiction existed over [plaintiff's] claim against [hoist assembler] sustains admiralty jurisdiction over [hoist assembler's] claim against [chain maker]." 431 F.2d at 118. See also *In re Motor Ship Pac. Carrier*, 489 F.2d 152, 154 (5th Cir.), *cert. denied*, 417 U.S. 931 (1974).

160. 293 F. Supp. 442 (S.D.N.Y. 1968).

agreed voyage. Defendant conceded as much and sought to implead its agent, who had allegedly signed the charter party without authority. The original third-party complaint was probably for indemnity alone, under rule 14(a),¹⁶¹ but it quickly became the functional equivalent of a rule 14(c) substitute defendant situation when plaintiff amended his complaint to assert a claim directly against the agent. The agent moved to dismiss both the third-party complaint and the plaintiff's complaint for want of jurisdiction. Acknowledging the want of admiralty jurisdiction over a third-party complaint based on a claim of breach of a nonmaritime agency agreement,¹⁶² the court nevertheless found diversity and held dismissal improper. Further, the court reasoned that plaintiff's claim against the third-party defendant—unlike defendant shipowner's claim—was not based on the agency agreement, but rather flowed out of the underlying charter party contract;¹⁶³ as such, it was a claim within the court's admiralty jurisdiction. Thus, the court viewed the proceeding as consisting of an admiralty complaint, an admiralty cross-complaint, and a diversity third-party complaint, all involving a common issue. Accordingly, it seemed reasonable to proceed with a single jury trial of the matter: "Third-party defendant's fear that a jury will be confused if the admiralty claim is tried with the alleged breach of agency agreement is unfounded. The jury, with the assistance of the court and counsel, will be able to focus on the single issue which it must determine, namely, whether third-party defendant breached its agency agreement with defendant."¹⁶⁴

On their facts, the rule 14(c) third-party practice decisions are consistent with each other and with the permissive counterclaim decisions: If there is no independent ground for federal jurisdiction, the third-party complaint will be dismissed;¹⁶⁵ if there is diversity but no independent admiralty jurisdiction over the third-party complaint,¹⁶⁶ it will be retained, with the parties' right to a jury trial

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161. The opinion does not discuss the distinction between the two forms of third-party practice.

162. The notion that contracts with shore-side agents are not maritime was avoided and probably weakened in *Hinkins S.S. Agency v. Freighters, Inc.*, 351 F. Supp. 373 (N.D. Cal. 1972).

163. 293 F. Supp. at 444.

164. 293 F. Supp. at 444. A similar but slightly more cumbersome approach was deemed necessary in *Industrial Equip. & Marine Servs., Inc. v. M/V Mr. Gus*, 333 F. Supp. 578 (S.D. Tex. 1971), where jurisdiction over a nonmaritime third-party complaint under rule 14(c) was retained because of the presence of diversity. However, the third-party complaint was severed from the maritime claim and retained for later trial, presumably to a jury. The counterclaim aspect of the case is discussed in note 124 *supra*.

165. *McCann v. Falgout Boat Co.*, 44 F.R.D. 34 (S.D. Tex. 1968).

166. In several cases independent admiralty jurisdiction was found to exist over third-party claims although the jurisdictional basis was not discussed in the opinions.

preserved as to that claim.¹⁶⁷ As argued above in connection with nonmaritime counterclaims,¹⁶⁸ the cumbersomeness of some of the techniques employed to preserve that jury right are probably necessary under the present state of doctrine. However, once it is realized that the plaintiff's "right" to a nonjury proceeding lacks constitutional, or even statutory, status, the difficulties become solvable.

The *Christman*¹⁶⁹ decision is appealing, largely because the approach adopted by that court could be extended to establish that the right to a jury trial of any party appropriately joined in a maritime case would take all related factual questions to the jury. Any factual matters solely involved with plaintiff's maritime claim could be tried to the judge alone, without unduly complicating or prolonging the trial. With this technique, the plaintiff's right to a nonjury trial can be treated as merely a matter of tradition that must yield in some cases to the combined pressure of the seventh amendment and the dictates of efficiency and economy.¹⁷⁰

Once the jury trial problem is solved, there is no legitimate reason for courts, in the exercise of their admiralty jurisdiction, to be any less free in recognizing pendent jurisdiction over substitute-defendant third-party claims than are federal courts generally in recognizing joinder of parties. In fact, under the approach approved in the *Leather's Best*¹⁷¹ decision, such recognition would be liberally given. Cases like *McCann*,¹⁷² however, suggest a prevailing judicial attitude that is unsympathetic to the larger aims of the 1966 merger and unresponsive to the logic compelling the breakdown of the civil/admiralty distinction. Hence, despite rays of hope like *Christman*, legislative action remains desirable.

b. "Indemnity" third-party practice under rule 14(a). In the third-party practice decisions involving rule 14(a) alone, the courts have uniformly sustained jurisdiction. In one case, occasionally cited in support of the application of pendent jurisdiction in admiralty, it appears that the third-party complaint was actually found to have an

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See *In re M/T Alva Cape*, 405 F.2d 962 (2d Cir. 1969); *Raymond Intl. Inc. v. M/T Dalzelleagle*, 336 F. Supp. 679 (S.D.N.Y. 1971); *Petition of Klarman*, 270 F. Supp. 1001 (D. Conn. 1967).

167. See *Industrial Equip. & Marine Servs., Inc. v. M/V Mr. Gus*, 333 F. Supp. 578, 581 (S.D. Tex. 1971); *Christman v. Maristella Compania Naviera*, 293 F. Supp. 442, 444 (S.D.N.Y. 1968).

168. See notes 125-28 *supra*.

169. 293 F. Supp. 442 (S.D.N.Y. 1968).

170. Cf. *Fitzgerald v. United States Line Co.*, 374 U.S. 16 (1963) (the Supreme Court's approach in a related situation), discussed in text at notes 236-39 *infra*.

171. 451 F.2d 800 (2d Cir. 1971).

172. 44 F.R.D. 34 (S.D. Tex. 1968).

independent admiralty basis.¹⁷³ In others, the 14(a) third-party action was retained as "diversity and/or pendent."¹⁷⁴ None of the opinions indicates that any jury trial problem was presented. Evidently, the prevailing view is that 14(a) third-party practice does not generate any problems with the seventh amendment. That viewpoint is certainly supportable on the basis of the simple but useful idea that a matter thus auxiliary to an admiralty proceeding is just not a "suit at common law."¹⁷⁵ This implicit philosophy of the 14(a) third-party practice decisions could, of course, be extended without too much strain to the 14(c) situation, and perhaps it should be. However, as indicated above,¹⁷⁶ there is an argument that 14(c) third-party practice is jurisdictionally indistinguishable from joinder of parties. And, as will be seen,¹⁷⁷ most of the joinder of parties decisions mirror the rule 14(c) third-party practice decisions in finding the preservation of the joined party's right to a jury trial to be a major problem. Thus, the simple solution of the 14(a) cases is not helpful in extending the jurisdiction of federal courts in other admiralty contexts.

3. Joinder of Claims

There are just two decisions that address the issue of joining claims in admiralty. Each concludes that pendent jurisdiction can sustain the power of a court exercising admiralty jurisdiction to hear nonmaritime claims. While both cases support the aims of unification, the difficulties presented in arriving at these results indicate that these aims have not yet been completely realized.

The first admiralty case to use pendent jurisdiction in its original sense of joining state claims with a federal claim¹⁷⁸ was *Beverly Hills Bank*¹⁷⁹ where the jurisdictional difficulty arose from the long-debated notion that courts exercising admiralty jurisdiction lack equitable powers.¹⁸⁰ Seeking to recover unpaid charter hire, a shipowner had asserted a maritime lien on funds in the hands of the defendant bank. Alternatively, the shipowner had sought recovery on a constructive trust theory. The maritime lien theory failed on the merits. Finding

173. See *Louis Furth, Inc. v. S.S. Srbija*, 330 F. Supp. 305, 307 (S.D.N.Y. 1970).

174. *Eutectic Corp. v. M/V Gudmundra*, 367 F. Supp. 681, 685 (S.D.N.Y. 1973); *Royal Typewriter Co. v. M/V Kulmerland*, 346 F. Supp. 1019, 1025 (S.D.N.Y. 1972), *affd.*, 483 F.2d 645 (2d Cir. 1973). See also *Gambino v. United Fruit Co.*, 48 F.R.D. 28, 29 (S.D.N.Y. 1969).

175. U.S. CONST. amend. VII.

176. See notes 141-46 *supra*.

177. See notes 205-30 *infra*.

178. See Note, 18 WAYNE L. REV. 1211, *supra* note 108, at 1214.

179. 437 F.2d 301 (9th Cir.), *cert. denied*, 462 U.S. 996 (1971).

180. See notes 90-96 *supra* and accompanying text.

no independent admiralty jurisdiction over the constructive trust claim due to its equitable nature,¹⁸¹ the trial court nevertheless heard the matter; it reasoned that ancillary jurisdiction over the constructive trust claim could be sustained on the basis of its derivative relationship to the main (maritime lien) claim.¹⁸²

The court of appeals disagreed with the recognition of ancillary jurisdiction: "Compania's constructive trust claim constituted a separate basis for recovery, legally unrelated to Compania's maritime lien claim; and we are inclined to the view that it was therefore an independent equitable claim beyond the admiralty jurisdiction."¹⁸³ On traditional learning, the analysis of the appellate court was correct.¹⁸⁴ Because the lien claim could be asserted without reference to the constructive trust matter, the issues were, in the relevant sense, separate. Still, to have held that such an important alternative argument must be dropped or pursued in a separate proceeding would have been separatism at its worst. The appellate court did mitigate this potentially harsh result by sustaining jurisdiction over the constructive trust claim on the basis of "pendent jurisdiction"¹⁸⁵ and diversity.¹⁸⁶

With regard to pendent jurisdiction, the court of appeals in *Beverly Hills Bank* reasoned that the gist of *United Mine Workers v. Gibbs*¹⁸⁷ was that a federal court has power¹⁸⁸ to entertain a state claim if it relates to the federal claim in a way that would generate the expectation that plaintiff would try both in a single proceeding. The court concluded that, because both claims arose from "a common nucleus of operative fact" and would ordinarily be tried in one judicial proceeding, the district court had the power, on the basis of *Gibbs*, to exercise pendent jurisdiction over the equitable claim.¹⁸⁹

Yet, the *Gibbs* case had dealt with the jurisdiction of federal courts in federal question cases, and it has always been recognized

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181. See *Compania de Nav. Almirante S.A., Panama v. Certain Proceeds of Cargo*, 288 F. Supp. 77, 81 (C.D. Cal. 1967).

182. The trial court read *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684 (1950), discussed in note 58 *supra*, as meaning that "an Admiralty Court can, as a means of effectuating a claim incontestably in Admiralty, determine subsidiary or derivative equitable issues." 288 F. Supp. at 81.

183. 437 F.2d at 305.

184. See note 58 *supra*.

185. 437 F.2d at 305.

186. 437 F.2d at 306.

187. 383 U.S. 715 (1966).

188. It is important to stress the word "power," because much of the traditional pendent-jurisdiction learning stresses that there are two inquiries: (1) whether the bare power to reach the asserted state claim exists; (2) the wisdom of reaching the claim. See 437 F.2d at 306.

189. 437 F.2d at 306 (footnote omitted).

that admiralty has peculiarities of its own, which generally tend toward the restriction of jurisdiction. The *Beverly Hills Bank* court addressed this complication in an unilluminating footnote: "*Gibbs* involved federal question jurisdiction but there is no reason why the doctrine of pendent jurisdiction should not be equally applicable when jurisdiction over the federal claim is in admiralty. 7(a) Moore's Federal Practice 3146-47."¹⁹⁰

A traditionalist could readily conclude that the court in *Beverly Hills Bank* made more of a leap than it acknowledged.¹⁹¹ Fairly and conservatively read, the case stands for the proposition that an admiralty court has jurisdiction over a plaintiff's closely related equitable claim against a defendant where jurisdiction over the defendant is also supported by diversity¹⁹² and where there has been waiver or other disposition of the potentially thorny seventh amendment issue.¹⁹³ Even thus limited, it is an important case, and the relative want of attention it has received is surprising.¹⁹⁴

As noted above in the discussion of counterclaims and third-party practice,¹⁹⁵ the maritime courts that have employed auxiliary jurisdictional techniques to establish jurisdiction over nonmaritime claims and parties have been sensitive to the jury trial rights involved. The Ninth Circuit in *Beverly Hills Bank* had a conspicuously easy time with that problem: "It is immaterial that the district court purported

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190. 437 F.2d at 306 n.7. Following that footnote, the Ninth Circuit also mentioned that the presence of diversity jurisdiction would sustain power to hear the constructive trust claim.

In making its pendent jurisdiction argument, the court did not rely on unification, nor did it mention that rule 18(a) states: "A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as he has against an opposing party." FED. R. CIV. P. 18(a).

191. The Moore treatise does support the use the court made of it. Professor Moore has frequently expressed impatience with jurisdictional niceties of any sort that he deems inimical to the just powers of a sensibly functioning federal court. The portion of the treatise referred to culminates with a nice statement of that philosophy: "If the matter is one which, in the opinion of the court, would ordinarily be expected to be tried in one judicial proceeding there is power in the court—whether sitting within its maritime or nonmaritime capacity—to hear and determine the entire cause by invoking its pendent jurisdiction." 7A J. MOORE, FEDERAL PRACTICE ¶ 270, at 3149 (2d ed. 1968).

192. See notes 94, 190 *supra* and accompanying text.

193. See notes 195-96 *infra* and accompanying text.

194. The case is briefly described, without comment, in the 1973 supplement to Moore's treatise. See 7A J. MOORE, *supra* note 191, ¶ 270, at 3149. It was cited in passing in two district court cases. See *Ohio Barge Lines, Inc. v. Dravo Corp.*, 326 F. Supp. 863, 867 (W.D. Pa. 1971); *Nyon Technical Commercial, Inc. v. Equitable Equip. Co.*, 341 F. Supp. 777, 779-80 (E.D. La. 1972). For two useful evaluations of the case, see Note, 18 WAYNE L. REV. 1211, *supra* note 108, at 1215 and Landers, *supra* note 69, at 70 n.88.

195. See notes 126-28, 167-69, 175-77 *supra*.

to exercise admiralty rather than pendent or diversity jurisdiction. . . . There was no right to a jury trial since the constructive trust claim was equitable . . . ; and even if such a right existed the bank could not complain for it did not demand a jury. . . ."¹⁹⁶

In the other major joinder of claims case, however, no such easy resolution of the jury problem was possible. In *Ohio Barge Lines, Inc. v. Dravo Corp.*,¹⁹⁷ the plaintiff alleged that defects in a towboat built by the defendant caused the vessel to go out of control while being operated by plaintiff and to hit several barges and a landing, all owned by Delta Concrete. Ohio Barge settled with Delta and took an assignment of Delta's legal claims. It then brought suit in admiralty against the shipbuilder for the amount paid Delta plus the cost of repairs; it urged eight separate theories in support of recovery.¹⁹⁸ There was no diversity of citizenship. Defendant's exception to the jurisdiction of the court was based on the foolish but well-settled doctrine that contracts for the sale or construction of ships are nonmaritime.¹⁹⁹ Examining each of plaintiff's eight theories separately, the court found independent admiralty jurisdiction over all except a count in express warranty and a count based on indemnification provisions in the construction contract. Those two counts were directly and closely tied to the ship-sale contract and were thus beyond the reach of admiralty jurisdiction. Nevertheless, on the authority of *United Mine Workers v. Gibbs*²⁰⁰ and the 1966 unification of the civil and admiralty rules,²⁰¹ the court found pendent jurisdiction.

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196. 437 F.2d at 306-07 (citations omitted).

197. 326 F. Supp. 863 (W.D. Pa. 1971).

198. Strict liability under RESTATEMENT (SECOND) OF TORTS § 402A (1965); assignment of Delta's claim for damage to its barge and landing; express warranty; implied warranty; indemnity provisions in the construction contract between plaintiff and defendant; indemnification under general tort principles; unjust enrichment; unseaworthiness. 326 F. Supp. at 865.

199. "Few admiralty doctrines have received more criticism and with so little effect as that which holds that agreements for the construction of vessels are not maritime contracts and, hence, not within the purview of admiralty jurisdiction. This holding has been repeated many times by decisions of the Supreme Court and is now accepted as firmly established, albeit arguably inconsistent and illogical." 326 F. Supp. at 864 (footnotes omitted).

200. "We cannot order that the non-admiralty counts be filed in a civil action because diversity is lacking. The situation therefore is not unlike that faced by the Supreme Court in *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), where it was held that pendent jurisdiction could be exercised in circumstances where diversity was lacking as to a state cause of action but where it and the federal claim were derived from a common nucleus of operative facts." 326 F. Supp. at 867.

201. "In the American Law Institute, Study of Division of Jurisdiction Between State and Federal Courts (1969) we read: 'Moreover, since the unification of admiralty and civil procedure, the doctrines of ancillary and pendent jurisdiction will permit joinder or impleader in any case in which the transaction or occurrence involved gives rise to both maritime and nonmaritime claims.'" 326 F. Supp. at 867-68.

In two respects *Ohio Barge Lines* extends the holding in *Beverly Hills Bank*. It is true that in both cases, pendent jurisdiction sustained an admiralty court's exercise of jurisdiction over a nonmaritime claim urged by plaintiff against the original defendant. Yet in *Beverly Hills Bank*, the holding was buttressed by the presence of diversity jurisdiction, while in *Ohio Barge Lines* diversity was lacking. Moreover, in *Beverly Hills Bank*, the court disposed of the issue of defendant's possible right to a jury trial of the appended claim by advertizing to its equitable nature and to a waiver argument.²⁰² The *Ohio Barge Lines* court did not mention the jury trial issue, probably because nothing helpful could be said. The claims over which independent admiralty jurisdiction was found wanting were claims at law, to which the seventh amendment right to jury trial would have extended, and there was less room to build a waiver argument than there had been in *Beverly Hills Bank*, for the *Ohio Barge Lines* defendant had vigorously contested the jurisdiction.

A student commentator saw the *Ohio Barge Lines* case as "an inevitable outgrowth of the merger of admiralty and civil procedure. . . . The instant [decision] was innovative and stands as a benchmark along the way toward a unified treatment of admiralty procedure and civil procedure in practice as well as in print."²⁰³ Another commentator, however, in arguing that unification could not have removed prior jurisdictional limitations on admiralty, asserted that "the *Ohio Barge* court indicated . . . that the maritime and nonmaritime issues were not separable. Therefore under traditional learning admiralty could decide the whole matter."²⁰⁴ The court actually said nothing of the kind and in fact relied explicitly on the 1966 merger rather than on "traditional [admiralty] learning." Together, *Beverly Hills Bank* and *Ohio Barge Lines* do advance the purposes of the 1966 unification, but the leaps that had to be made by both courts demonstrate that problems of the separatist tradition continue to plague the courts.

4. Joinder of Parties

According to the traditional view, the plaintiff in a maritime proceeding could not join a nonmaritime party.²⁰⁵ The strength of

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202. See notes 195-96 *supra* and accompanying text.

203. Note, 18 WAYNE L. REV. 1211, *supra* note 108, at 1219-20.

204. Landers, *supra* note 69, at 72 n.91.

205. The traditional learning on joinder of parties is fully explained in *Howmet Corp. v. Tokyo Shipping Co.*, 320 F. Supp. 975 (D. Del. 1971), where shipper brought an action in admiralty against the carrier and against the City of Wilmington, Delaware, for damage to the cargo occurring on the ship, on the pier, or both.

that prohibition highlights the dramatic nature of the Second Circuit's decision in *Leather's Best, Inc. v. S.S. Mormaclynx*.²⁰⁶ Plaintiff, the disappointed shipper of a cargo of valuable leather, sued Moore-McCormack Lines, which had conveyed the goods from Antwerp to New York, and Tidewater Terminal, with which the goods were stored in New York when they were stolen. The trial judge did not

The court granted the city's motion to dismiss for want of jurisdiction. No independent admiralty ground to support an action against the city could be found. 320 F. Supp. at 977-78. Plaintiff's pendent jurisdiction argument was brushed aside:

[A]lthough this Court had admiralty jurisdiction over [shipper's] first alternative claim for cargo damaged in ocean transit . . . this claim would not confer pendant or incidental admiralty jurisdiction over [shipper's] alternative and separate claim against the City for damage allegedly sustained after the cargo had been discharged . . . . To confer pendant or incidental jurisdiction, the complaint must state a "single cause of action" supported by federal and non-federal grounds, as distinguished from separate causes of action under federal and non-federal law. *Separate causes of action are presented . . . where the parties to the federal and non-federal claims are not identical.* Here the separate and alternative federal and non-federal causes of action are not asserted against identical defendants. Thus, no incidental or pendant jurisdiction exists with respect to the claim against the City.

320 F. Supp. at 979 (citations omitted) (emphasis added).

The strength of the traditional prohibition against using the pendent jurisdiction device to permit plaintiff to join an additional party is highlighted by *Consolidated Cork Corp. v. Jugoslavenska Linijska Plovidba*, 318 F. Supp. 1209 (S.D.N.Y. 1970). In that case cargo was damaged, probably on the pier, and the shipper brought an action in admiralty against the carrier and the carrier's stevedore. On the theory that the cargo damage occurred on the pier, independent admiralty jurisdiction was lacking. The court was quite troubled by the stevedore's being present in the case at the behest of plaintiff but elected to focus on the fact that the carrier had brought a third-party complaint against the stevedore under rule 14(c). A third-party complaint over the same defendant, in the court's view, would have sustained jurisdiction under ancillary notions: "Clearly, this procedure through which admiralty jurisdiction is retained over a matter involving the same transaction or occurrence could have and would have been invoked by [defendant] in this case but for plaintiff's libel. Therefore, the court will decide this case as if admiralty jurisdiction had been acquired . . . through the usual third-party procedure." 318 F. Supp. at 1211. The third-party complaint used by the *Consolidated Cork* court to sustain jurisdiction over the claims against the stevedore was obviously under rule 14(c). (In *Landers*, *supra* note 69, at 69 n.82, the *Consolidated Cork* case is briefed: "[N]o admiralty jurisdiction over plaintiff's direct claim against a third party, but admiralty proper if treated as third-party claim for indemnity." Actually, the third-party claim was both "indemnity" and "substitute defendant" third-party practice. For discussion of the jurisdictional affinity between "substitute defendant" third-party practice and joinder of parties see notes 141-46, 175-77 *supra* and accompanying text). Yet the court, evidently perceiving no difficulty with the jury trial issue, did not mention it. The *Consolidated Cork* case is doubly anomalous because of this failure. Both the rule 14(c) third-party practice decisions and the joinder of parties decisions generally have indicated at least a perception of the seventh amendment difficulty.

Comparison of the results in *Howmet* and *Consolidated Cork* is warranted. In *Howmet*, plaintiff was not permitted to join a defendant allegedly responsible for shore damage to cargo, whereas in *Consolidated* the court ignored that facet of the case in favor of focusing on the fact that the maritime defendant, in addition to the plaintiff, wanted the shorebased party in the case. It should be noted that the claim in *Howmet* seemed to be based on two separate incidents of damage, one at sea and one ashore, whereas in *Consolidated* all the damage presumably occurred ashore.

206. 451 F.2d 800 (2d Cir. 1971).

question the existence of independent admiralty jurisdiction against either defendant,²⁰⁷ but the Court of Appeals for the Second Circuit disagreed with the trial judge's theory that Tidewater was a party to the maritime contract of carriage.²⁰⁸ The only other traditional basis for admiralty jurisdiction over Tidewater would have been tort. However, even if the plaintiff's complaint had been read with the liberality necessary to discern a claim based on tort, there would have been no jurisdiction under traditional admiralty principles, because both the alleged negligence and the damage occurred on land.²⁰⁹

Upon concluding that there was no independent admiralty jurisdiction over Tidewater under either a contract or a tort approach, an admiralty judge of traditional views would have ordered dismissal as to that defendant. Under the traditional view, not even diversity (which was lacking in any event²¹⁰) would have cured the problem, for it was thought that independent admiralty jurisdiction was a requisite for the joinder of additional parties in a maritime case. Yet Judge Friendly, writing for the Second Circuit, ignored this constricting view and achieved a breakthrough of potentially major significance by using the device of pendent jurisdiction to sustain the trial court's power to hear the claim against the nonmaritime defendant.²¹¹

Judge Friendly's analysis in *Leather's Best* began with a consideration of the *Gibbs*²¹² liberalization of pendent jurisdiction over additional claims;²¹³ he concluded that the claim against Tidewater passed the "common nucleus of operative facts"²¹⁴ test. The first major step

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207. "The district court was not asked, and evidently saw no need, to examine the jurisdictional underpinnings of this action. Neither has any question in this regard been raised by the parties on this appeal." 451 F.2d at 807.

208. 451 F.2d at 807-08.

209. While the Supreme Court in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), held that not all torts that occur on water are within the admiralty jurisdiction, under one view of the case, it also strongly implied that some torts not occurring on water may be. See 409 U.S. at 256-61. See also Robertson, Book Review, 1976 WIS. L. REV. 352, 363-65. However, it is questionable whether anything in *Executive Jet* would have validated traditional tort jurisdiction over Tidewater. In any event, the *Leather's Best* decision antedates *Executive Jet*.

210. See 451 F.2d at 809 n.10.

211. *Leather's Best* is generally viewed as one of a trilogy of Second Circuit cases dramatically extending the pendent jurisdiction doctrine to include the joinder of additional parties by plaintiff. See Comment, *Federal Pendent Subject Matter Jurisdiction—The Doctrine of United Mine Workers v. Gibbs Extended to Persons Not Party to the Jurisdiction—Conferring Claim*, 73 COLUM. L. REV. 153 (1973). The other two cases of the series were *Astor-Honor, Inc. v. Grosset & Dunlap, Inc.*, 441 F.2d 627 (2d Cir. 1971), decided before *Leather's Best*, and *Almenares v. Wyman*, 453 F.2d 1075 (2d Cir. 1971), cert. denied, 405 U.S. 944 (1972), decided after *Leather's Best*.

212. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

213. 451 F.2d at 809.

214. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

beyond *Gibbs* necessitated by the instant case—use of pendent jurisdiction to bring in a nonfederal party—had already been taken by the Second Circuit in a nonadmiralty case, *Astor-Honor, Inc. v. Grosset & Dunlap, Inc.*,²¹⁵ which had involved federal claims under the copyright laws and state claims of unfair trade practice and unfair competition. There the court had held that a federal court had power to hear a state claim against a defendant not named in the federal claim, provided the *Gibbs* test was satisfied. The *Astor-Honor* court found support for this conclusion in prior decisions that had established ancillary jurisdiction to entertain compulsory counterclaims under rule 13(a) and third-party claims under rule 14(a).²¹⁶

The second necessary step—applying the liberal “pendent party”²¹⁷ device in an admiralty case—was a large one, but Judge Friendly took it with ease:

At an earlier date this [civil/admiralty] difference might have affected our decision here. But the rules of procedure in the admiralty and civil jurisdiction were merged in 1966, and we are of the opinion that at least since that merger, the constitutional rationale which underlies the doctrine of ancillary jurisdiction in the context of Rule 13(a) and Rule 14 may be applied to support the conclusion that a federal court has the power to hear a related state claim against a defendant not named in the federal claim regardless of whether the federal claim arises in the civil or admiralty jurisdiction.²¹⁸

As indicated above,²¹⁹ the traditional view of the availability of auxiliary jurisdictional devices in the federal courts generally would have listed the following categories, ranging from those where the extension of federal judicial power was deemed easiest to those where it was deemed most troublesome:

- (1) compulsory counterclaims and cross claims [added state claim by defendant];
- (2) third-party practice²²⁰ [state party added by defendant];
- (3) joinder of closely related state claim [state claim added by plaintiff];
- (4) joinder of closely related state party [state party added by plaintiff].

Prior to *Astor-Honor*,²²¹ the extension of federal judicial power to the

215. 441 F.2d 627 (2d Cir. 1971).

216. See Judge Friendly's discussion of *Astor-Honor* in *Leather's Best*, 451 F.2d at 809-10. See also note 211 *supra*; *Moor v. County of Alameda*, 411 U.S. 693 (1973); Comment, 22 UCLA L. REV. 1263, *supra* note 109.

217. Comment, 22 UCLA L. REV. 1263, *supra* note 109, at 1278.

218. 451 F.2d at 810-11 (footnotes omitted).

219. See notes 119-20 *supra* and accompanying text.

220. This would refer, of course, to “indemnity” third-party practice under rule 14(a), and not to the peculiarly admiralty “substitute defendant” third-party practice under rule 14(c). See notes 141-46, 175-77, 205 *supra* and accompanying text.

221. See notes 119-20 *supra* and accompanying text.

first three situations was well established on the civil side, and *Astor-Honor* set the fourth on its way. Before 1966, the prevailing view was that admiralty courts could not assume jurisdiction through the ancillary or pendent devices in *any* of these cases.²²² *Leather's Best* holds that the admiralty side of federal court may now extend its jurisdiction over cases in the fourth category, which traditionally has been seen as the least promising category for ancillary or pendent jurisdiction. The structure of Judge Friendly's argument and the prior practice on the civil side together suggest that all four of these categories of cases are as fully cognizable on the admiralty side as they are on the civil side.²²³

222. As to the various categories of ancillary jurisdiction—parties other than plaintiff adding nonfederal claims or parties—Judge Friendly pointed out in *Leather's Best* that, prior to 1966, there were no such doctrines in admiralty. 415 F.2d at 810 n.11. As to pendent jurisdiction, the prevailing view is correctly mirrored by the following footnote remark: "Prior to [*Beverly Hills Bank*], Professor Currie's appraisal of pendent jurisdiction in admiralty held true [from Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1, 59 (1959)]: 'No one has ever suggested . . . that the doctrine of "pendent" jurisdiction applies to maritime claims, except in the context of the problem of procedure in seamen's injury cases' [where the "pending" was not at all of a state claim to a maritime claim in admiralty court, but rather of a general maritime claim to a statutory maritime claim on the civil side of federal court]." Note, 18 WAYNE L. REV. 1211, *supra* note 108, at 1215 n.27. At the time of *Leather's Best*, there had been two other post-merger decisions arguably exploiting the third category of jurisdictional extension. See *Beverly Hills Natl. Bank & Trust Co. v. Compania de Nav. Almirante S.A.*, Panama, 437 F.2d 301 (9th Cir.), *cert. denied*, 462 U.S. 996 (1971), *discussed in notes 90-96, 178-94 supra*; *Ohio Barge Lines, Inc. v. Dravo Corp.*, 326 F. Supp. 863 (W.D. Pa. 1971), *discussed in notes 197-204 supra*. While neither case was mentioned in *Leather's Best* the prevailing view clearly was that a maritime plaintiff could not utilize the pendent jurisdiction device to add nonmaritime parties. See *Howmet Corp. v. Tokyo Shipping Co.*, 320 F. Supp. 975 (D. Del. 1971); *Consolidated Cork Corp. v. Jugoslavenska Linijska Plovidba*, 318 F. Supp. 1203 (S.D.N.Y. 1970), *discussed in note 205 supra*.

223. In two long footnotes in *Leather's Best*, Judge Friendly touched on these matters as follows:

Prior to the 1966 merger, there was no rule of compulsory counterclaim, much less a doctrine of ancillary jurisdiction, in the maritime jurisdiction, and permissive cross-litigation was limited to claims in admiralty arising out of the same contract or cause of action as the original claim. With merger, however, Rule 13 became applicable to proceedings brought in the admiralty jurisdiction. There is no evident reason why the doctrine of ancillary jurisdiction should not now be applicable as well to compulsory counterclaims which arise in the context of suits in admiralty.

With respect to third-party practice, too, admiralty practice differed from practice on the civil "side" prior to the 1966 merger. Under former Admiralty Rule 56, at least some independent basis of federal jurisdiction was always necessary to implead a third party. Indeed, there was substantial authority to the effect that the third-party claim had to come within the *admiralty* jurisdiction. With merger, a subsection (c) was added to Rule 14 with the intent of preserving certain features of admiralty impleader which were more liberal than civil impleader. The effect of merger upon the former admiralty requirement of independent jurisdiction for impleader has not as yet been conclusively resolved. But if we were presented with the question, it would be only with the greatest reluctance that we would conclude that under the merged rules the doctrine of ancillary jurisdiction did not extend to admiralty as well as to civil impleader. Certainly the practical considerations which support the doctrine of ancillary jurisdiction in the context of civil impleader are equally persuasive on the admiralty

But what of the seventh amendment right to jury trial, the issue that had created much of the difficulty in the admiralty counterclaim, third-party, and joinder of claims decisions?²²⁴ *Leather's Best* disposes of the problem with a footnote: "[I]n this case, we are not faced with any problem of denial of the right to jury trial since Tidewater made no such demand below."²²⁵ Judge Friendly's failure to treat the jury trial problem is puzzling. *Leather's Best* has the look of a case chosen by the court of appeals as a vehicle to write some law. The trial court's inclusion of the terminal operator on the theory that the claim against it was incident to a maritime contract was perhaps erroneous, but the Second Circuit was under no compulsion to notice that problem sua sponte. In the context of an exposition upon the post-1966 reach of admiralty's pendent and ancillary powers, the relegation of the jury trial problem to a footnote about "this case" is disappointing.

The *Leather's Best* decision has been used to support the exercise of pendent jurisdiction over rule 14(c) third-party defendants,²²⁶ and in one case to support pendent jurisdiction over an additional party joined by plaintiff,²²⁷ but it has not exercised an influence even remotely commensurate with its potential importance. One reason for the relative paucity of discussion of this aspect of the case²²⁸ might be its failure to confront the seventh amendment problem, but a more likely explanation is the tendency of courts and commentators dealing with matters of ancillary and pendent jurisdiction to perceive the subject as divided into fairly rigid compartments. Thus, for example, if a given decision dealt with third-party practice, it is not likely to be mentioned in the context of counterclaims. As the *Leather's Best* opinion indicated, the underlying problems are the same whether the additional claim or defendant is added to the maritime case at the behest of the plaintiff or the defendant, but, by and large, the cases

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side. In any event, we do not perceive the requirement of independent jurisdiction in pre-merger admiralty impleader to have had constitutional underpinnings. Rather it reflected a judicial conception of the limited nature of Admiralty Rule 56 and the appropriate reach of the then distinct admiralty jurisdiction. 451 F.2d 810-11 nn.11 & 12 (citations omitted) (emphasis original).

224. See notes 126-28, 167-69, 175-77 *supra* and accompanying text.

225. 451 F.2d at 811 n.12.

226. See *Royal Typewriter Co. v. M/V Kulmerland*, 346 F. Supp. 1019, 1025 (S.D.N.Y. 1972), *affd.*, 483 F.2d 645 (2d Cir. 1973).

227. See *Princess Cruises Corp. v. Bayly, Martin & Fay, Inc.*, 373 F. Supp. 762, 765 (N.D. Cal. 1974) (the jury trial problem was not mentioned).

228. The case is widely known for its substantive treatment of the \$500 per package limitation of the Carriage of Goods by Sea Act, 46 U.S.C. § 1304(5) (1970). See, e.g., Note, 4 J. MAR. L. & COMMERCE 159 (1972).

and the commentary do not treat these questions from this perspective.²²⁹

If *Leather's Best* had been decided by the Supreme Court, and if it were understood and followed by the lower courts in the sense indicated here, the 1966 merger would have gone far toward accomplishing what many of its proponents saw as its major purpose—the abolition of civil/admiralty separatism. Such a Supreme Court decision would validate the hope, expressed in the 1969 ALI study, that such jurisdictional anomalies as admiralty's want of equitable powers and the rule that ship-sale contracts are not maritime could be cured or mitigated by the doctrines of ancillary and pendent jurisdiction.²³⁰ As it stands, however, the case has not been that influential.

5. "Romero-Pendent"²³¹ Problems

This subsection discusses situations in which a party seeks to add maritime parties or claims to cases brought on the civil side²³² of federal court under federal question or diversity jurisdiction. In these decisions the problems of separatism are not the direct result of the conception of "admiralty" as a separate court. Rather, the difficulties confronted by the federal courts stem in part from the rigidity of the concomitant conception that maritime substantive law differs radically from other federal law, and in part from uncertainties as to the appropriate role of the seventh amendment in maritime cases.

The largest single category of such cases consists of actions brought by injured seamen, who typically will assert in a single proceeding three distinct claims against the employer: (1) Negligence, under the Jones Act;²³³ (2) unseaworthiness, under the general

229. Landers, *supra* note 69, at 73, appears to view the *Leather's Best* case in a light similar to that indicated in the text. Landers disapproved of the decision, using the familiar argument that the 1966 rules could hardly have worked the necessary change.

230. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 226-29 (1969).

231. For the explanation of this term, see note 115 *supra*.

232. See note 48 *supra* and accompanying text.

233. 46 U.S.C. § 688 (1970):

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

As interpreted in *Panama R.R. v. Johnson*, 264 U.S. 375 (1924), the Jones Act per-

maritime law; and (3) maintenance and cure, under the general maritime law. The Jones Act expressly gives an injured seaman the option of proceeding "at law, with the right of trial by jury." The problem that gave rise to the important case of *Romero v. International Terminal Operating Co.*²³⁴ was the natural desire of the seaman-plaintiff for a jury trial of the other two claims as well. The court of appeals had split on whether the unseaworthiness and maintenance and cure claims, premised as they are on federal case law, "arise under" federal laws in the sense necessary for federal question jurisdiction. In *Romero*, the Supreme Court decided that they did not, but went on to hold that when a seaman brings a Jones Act suit at law, the intimately related unseaworthiness and maintenance and cure claims can be heard simultaneously as a matter of pendent jurisdiction. One would have thought that this disposition necessarily afforded the seaman a jury trial on all three of his closely connected injury claims, but, because of the technical posture of the case, the *Romero* court expressly left this issue open.²³⁵

Several years later, in *Fitzgerald v. United States Lines Co.*,²³⁶ the Court resolved the matter in favor of the right to a jury trial. In *Fitzgerald* a seaman had brought a Jones Act suit on the civil side of federal court; he added counts based on the general maritime law of unseaworthiness and maintenance and cure, and demanded a jury trial of all the issues. The Supreme Court held in his favor:

Although remedies for negligence, unseaworthiness, and maintenance and cure have different origins and may on occasion call for application of slightly different principles and procedures, they nevertheless, when based on one unitary set of circumstances, serve the same purpose of indemnifying a seaman for damage caused by injury, depend in large part upon the same evidence, and involve some identical elements of recovery. Requiring a seaman to split up his lawsuit, submitting part of it to a jury and part to a judge, unduly complicates and confuses a trial, creates difficulties in applying doctrines of res judicata and collateral estoppel, and can easily result in too much or too little recovery.²³⁷

Thus, common sense dictated a single trial to a jury "[i]n the absence of some statutory or constitutional obstacle."²³⁸ While admiralty's

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mits an injured seaman, at his option, to proceed in admiralty, without a jury, or in state court or federal court, with a jury.

234. 358 U.S. 354 (1959).

235. 358 U.S. at 381. For a thorough analysis of the *Romero* case, see Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1 (1959), and Kurland, *The Romero Case and Some Problems of Federal Jurisdiction*, 73 HARV. L. REV. 817 (1960).

236. 374 U.S. 16 (1963).

237. 374 U.S. at 18-19 (footnote omitted).

238. 374 U.S. at 20.

nonjury tradition was firm and venerable, it did not, in the Court's view, amount to such an obstacle: "While this court has held that the Seventh Amendment does not require jury trial in admiralty cases, neither that amendment nor any other provision of the Constitution forbids them. Nor does any statute of Congress or Rule of Procedure, Civil or Admiralty, forbid jury trials in maritime cases."²³⁹

The traditional interpretation of *Romero* and *Fitzgerald* has been that pendent jurisdiction on the civil side of the federal court was the seaman's only route²⁴⁰ to jury trial of his unseaworthiness and maintenance and cure claims; on the admiralty side juries remained unknown.²⁴¹ But several recent decisions, noting that the language of *Fitzgerald*²⁴² is consistent with limited provision of jury trials in courts of admiralty, have concluded that in appropriate cases admiralty's nonjury tradition should yield to the dictates of the seventh amendment.²⁴³ The two leading cases are from the Third Circuit. In *Haskins v. Point Towing Co.*,²⁴⁴ a pleading that the court termed "confused"²⁴⁵ was interpreted as asserting a Jones Act claim at law, and unseaworthiness and maintenance and cure claims in admiralty. Plaintiff sought consolidation of the civil and admiralty actions and a jury trial of all three claims.²⁴⁶ The court granted his request because of the policy it found to be implicit in *Fitzgerald*:²⁴⁷

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239. 374 U.S. at 20.

240. A plaintiff with a maritime case as to which admiralty jurisdiction is not exclusive can proceed on the basis of diversity and get a federal jury, provided he can meet the requirements for diversity jurisdiction. See text at notes 4-7 *supra*.

241. See, e.g., *Humble Oil & Ref. Co. v. Philadelphia Ship Maintenance Co.*, 342 F. Supp. 786 (E.D. Pa. 1972); *Sanderlin v. Old Dominion Stevedoring Corp.*, 281 F. Supp. 1015 (E.D. Va. 1968).

242. See text at notes 237, 239 *supra*.

243. See *Blake v. Farrell Lines, Inc.*, 417 F.2d 264, 266 (3d Cir. 1969); *Haskins v. Point Towing Co.*, 395 F.2d 737 (3d Cir. 1968), *cert. denied*, 400 U.S. 834 (1970); *Saus v. Delta Concrete Co.*, 368 F. Supp. 297 (W.D. Pa. 1973). See generally *In re Dearborn Marine Service, Inc.*, 499 F.2d 263, 271 (5th Cir. 1974); *Terraciano v. McAlinden Constr. Co.*, 485 F.2d 304, 308-09 (2d Cir. 1973).

244. 395 F.2d 737 (3d Cir. 1968), *cert. denied*, 400 U.S. 834 (1970). The denial of certiorari occurred after the Third Circuit had affirmed a decision by the trial court on remand that plaintiff was not entitled to Jones Act benefits because he had failed to establish an employment relationship with the defendant. See *Haskins v. Point Towing Co.*, 421 F.2d 532 (3d Cir. 1970).

245. 395 F.2d at 738.

246. Broad discretion respecting consolidation and separate trial orders is provided in rule 42, which requires "preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States." See FED. R. CIV. P. 42.

247. In *Fitzgerald* the Supreme Court "made no attempt to define precisely how plaintiff had labeled his claims, whether in admiralty or at law, . . . [but rather] based its decision on the fundamental factors of simplicity, utility to litigants and the interest of justice in having one tribunal decide the three claims which in general arise from a unitary set of circumstances." 395 F.2d at 740.

We see no reason why a plaintiff who sues at law under the Jones Act for negligence must make his claims for unseaworthiness and maintenance and cure pendent to it on the *law side* in order to maintain his right to trial by jury on all three claims. To require this could compel him to lose the advantages which inhere in the characteristic admiralty claims, such as in rem process, interlocutory appeals, [and] admiralty attachment . . . . *There is no reason to make relinquishment of the procedural advantages of the inherent admiralty claims for unseaworthiness and maintenance and cure the price for a jury trial.*²⁴⁸

Thus, out of regard for "simplicity, utility to litigants, and the interest of justice,"²⁴⁹ *Haskins* took the *Fitzgerald* decision a major step forward. *Fitzgerald* had mandated jury trial of maritime claims brought on the civil side as pendent to "arising under" claims; *Haskins* extended the mandate to maritime claims brought on the admiralty side and consolidated with "arising under" claims. Still, the decision might have been interpreted as limited to the assertion of a seaman's rights under a statute affirmatively endowing seamen with the right to jury trial; the availability of jury trial for other kinds of maritime claims that lack an independent diversity or federal question basis was not implicated in the *Haskins* rationale.

It remained for the same court of appeals to complete the picture the following year. *Blake v. Farrell Lines, Inc.*²⁵⁰ consolidated several like cases in which a longshoreman's personal injury action against a shipowner was based on diversity and in which a separate admiralty suit for indemnity had been brought by the shipowner against the plaintiff's employer. Each shipowner moved for consolidation of the original diversity suit with the admiralty indemnity suit and requested a separate bench trial of the indemnity suit; each employer argued that consolidation should result in a jury trial of all issues in the case. The Third Circuit Court of Appeals held that the trial judges had properly ordered jury trial of the entire case. At the core of its decision was the court's perception that, while jury trial is clearly a matter of right under the Constitution, nonjury trial in admiralty is merely a matter of tradition.²⁵¹ The court noted that while the federal rules provide for "the assertion and preservation of the right to

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248. 395 F.2d at 741 (footnotes omitted) (emphasis added). *Accord*, *Saus v. Delta Concrete Co.*, 368 F. Supp. 297 (W.D. Pa. 1973).

249. 395 F.2d at 740.

250. 417 F.2d 264 (3d Cir. 1969).

251. "[J]ury trial is a matter of right in the action for damages while only historic practice and the failure of the Rules to make affirmative provision for this situation inhibit the ordering of a jury trial of the admiralty suit." 417 F.2d at 266-67.

jury trial,"²⁵² they "neither create nor preserve any right to a non-jury trial."²⁵³ It concluded that in special situations of trial consolidation of closely related actions or claims, one of which is attended by a right to jury trial and the other not, a court may, in the interest of efficient and expeditious administration of justice, submit both to a jury for a decision concerning disputed factual issues.²⁵⁴

The *Blake* court did caution against reading the decision to mean "that in the ordinary situation in which there is no right to a jury trial, the trial judge may, within his discretion, reject the traditional mode of fact finding and order a jury trial."²⁵⁵ Yet the reasoning in the case is potent,²⁵⁶ and might be used with equal efficacy to resolve the jury problems created by the use of ancillary and pendent techniques in cases originally based on admiralty jurisdiction. As previously mentioned, the jury trial problem in those cases has been handled in various ways. In some instances the problem was ignored,²⁵⁷ in others a jury trial of the nonmaritime claim was ordered.²⁵⁸ Occa-

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252. 417 F.2d at 266.

253. 417 F.2d at 266.

254. 417 F.2d at 266.

255. 417 F.2d at 266.

256. See, e.g., *Humble Oil & Ref. Co. v. Philadelphia Ship Maintenance Co.*, 312 F. Supp. 380, 381-82 (E.D. Pa. 1970), *revd. and remanded*, 444 F.2d 727 (3d Cir. 1971), *on remand*, 342 F. Supp. 786 (E.D. Pa. 1972). In *Bergeria v. Marine Carriers, Inc.*, 341 F. Supp. 1153 (E.D. Pa. 1972), a district court suggested the one obvious extension. In that case, a seaman brought a civil-side action premised on the Jones Act and the doctrine of unseaworthiness, demanding a jury trial. Shipowner counterclaimed for fraudulently procured maintenance and cure. Plaintiff urged that the counterclaim should be dismissed as not within federal jurisdiction. The court, however, found independent admiralty jurisdiction over the counterclaim. The major question remained the mode of trial of the issues presented by the counterclaim. Relying on *Fitzgerald, Blake*, and the fact that the issues on the main claim and the counterclaim were almost entirely overlapping, the court ordered the counterclaim tried to the jury. The court's discussion of the jury trial problem is aptly expressive of the *Blake* philosophy:

In the present case, the jury will have to determine whether the injuries giving rise to plaintiff's Jones Act claim were the result of an accident aboard ship . . . or whether they resulted from the preexisting condition alone. Much the same factual determination is involved in the claim for recovery by the shipowner of the maintenance and cure which it claims was fraudulently procured. . . . It would appear that this case presents the obverse of the *Fitzgerald* situation, since what is involved here is a claim to recover maintenance and cure allegedly wrongfully paid instead of a claim by the seaman to recover maintenance and cure in the first instance. However, *since the same policies of judicial efficiency and consistency apply*, we hold that *Fitzgerald*, as amplified by *Blake*, required submission of the counterclaim to the jury.

341 F. Supp. at 1157-58 (emphasis added).

257. See *Ohio Barge Lines, Inc. v. Dravo Corp.*, 326 F. Supp. 863 (W.D. Pa. 1971), *discussed in* notes 197-204 *supra* and accompanying text; *Eutectic Corp. v. M/V Gudmundra*, 367 F. Supp. 681 (S.D.N.Y. 1973); *Royal Typewriter Co. v. M/V Kulmerland*, 346 F. Supp. 1019 (S.D.N.Y. 1972), *affd.*, 483 F.2d 645 (2d Cir. 1973).

258. See *Alaska Barite Co. v. Freighters, Inc.*, 54 F.R.D. 192 (N.D. Cal. 1972), *discussed in* note 124 *supra*; *Industrial Equip. & Marine Serv., Inc. v. M/V Mr.*

sionally courts have found that a befuddled nonmaritime party made a highly fictional waiver of his seventh amendment rights.²⁵⁰ One possible nonseparatist resolution of the problem would be that the assertion of jurisdiction by an admiralty court over any closely related claim or party makes that claim or party maritime,²⁶⁰ thus removing it from the seventh amendment's "suits at common law" category. A more appealing solution, suggested by *Blake v. Farrell Lines, Inc.*, is to recognize that the want of juries in admiralty is merely a matter of tradition²⁶¹ that is clearly outweighed by the seventh amendment on the "admiralty side" just as *Fitzgerald* struck this balance on the "law side." Such recognition would lead to a requirement that, regardless of the original basis for jurisdiction, federal courts provide a jury trial for all issues upon the demand of any party who could have summoned a federal jury to decide any one of the claims. This practice would comport with the conclusion of one district court that, "[g]iven the policy of the seventh amendment . . . , federal courts are less apt to err by granting jury trials, where not prohibited, than by denying jury trials."²⁶²

As indicated above, very few cases where admiralty was the original basis for federal jurisdiction have adopted the philosophy of providing jury trials for all issues of fact.²⁶³ Indeed, this approach has gained only partial acceptance in the maritime cases brought on

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Gus, 333 F. Supp. 578, 582 (S.D. Tex. 1971), *discussed in* note 124 *supra*; *Christman v. Maristella Compania Naviera*, 293 F. Supp. 442, 444 (S.D.N.Y. 1968), *discussed in* notes 160-64 *supra* and accompanying text.

259. See *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800, 811 n.12 (2d Cir. 1971), *discussed in* notes 206-25 *supra* and accompanying text; *Beverly Hills Natl. Bank & Trust Co. v. Compania de Nav. Almirante S.A.*, Panama, 437 F.2d 301, 307 (9th Cir. 1971), *discussed in* notes 178-94 *supra* and accompanying text.

260. See text at note 175 *supra*.

261. Rule 38(e) does not detract from this argument. It states: "These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h)." FED. R. CIV. P. 38(e). This is no more than a statement that the rules draftsmen did not see fit to examine the tradition. See *Nice v. Chesapeake & Ohio Ry.*, 305 F. Supp. 1167 (W.D. Mich. 1969), in which the court stated:

The Explanatory Notes to then proposed Rule 38(e) indicate that the drafters were cognizant of a very limited right to a jury trial [in admiralty]. "There is no constitutional right to a jury trial in admiralty, and statutes conferring it are rare. The purpose of the new subdivision is to preserve the status quo as to a jury trial." Comm. on Rules of Practice and Procedure, Memo to the Advisory Comm. on Admiralty Rules, the Status of Unification of the Civil and Admiralty Rules 33 (Nov. 15, 1962).

305 F. Supp. at 1185 & n.4.

262. *Ballard v. Moore-McCormack Lines, Inc.*, 285 F. Supp. 290, 297 (S.D.N.Y. 1968). *Accord, In re Dearborn Marine Serv., Inc.*, 499 F.2d 263, 271 (5th Cir. 1974); *Terracciano v. McAlinden Constr. Co.*, 484 F.2d 304, 316 (2d Cir. 1973); *Gyorfi v. Partrederiet Atomena*, 58 F.R.D. 112, 114-16 (N.D. Ohio 1973); *Gvirtzman v. Western King Co.*, 263 F. Supp. 633 (C.D. Cal. 1967).

263. See text at notes 126-28, 154-56, 160-64, 176-77 *supra*.

the civil side, as reflected in three sets of cases. In one group of decisions, a shipowner's rights under the Limitation of Liability Act²⁶⁴ were asserted as a defense to a maritime action on the civil side of the federal court. In each case the court provided a bifurcated trial, and only the limitation issues were tried to the judge sitting alone.²⁶⁵ In these decisions, the plaintiff had asserted his saving clause option in order to get a jury trial, and it was the defendant who sought to convert all or part of the case into an exclusively admiralty proceeding. The bifurcated trial resolution was deemed essential to preserve both the plaintiff's seventh amendment rights and the defendant-shipowner's right to an exclusively admiralty defense.²⁶⁶

No consistent resolution has emerged for the second category of cases, in which the *plaintiff* seeks both unique admiralty procedures or remedies *and* a jury trial. Where plaintiffs sought to combine causes of action under the exclusively admiralty²⁶⁷ Death on the High Seas Act²⁶⁸ with a Jones Act civil action, jury trial of all the issues has been held proper.²⁶⁹ This outcome is in full accord with the spirit of *Haskins*²⁷⁰ and *Blake*²⁷¹ that "there is no reason to make relinquishment of the procedural advantages of the inherent admiralty claims . . . the price for a jury trial."²⁷² On the other hand, in two cases where plaintiffs sought to combine in personam jury trials with in rem procedures, district courts held that the in rem features would have to

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264. 46 U.S.C. §§ 181-189 (1970); *See also* FED. R. CIV. P. F.

265. *See Terracciano v. McAlinden Constr. Co.*, 485 F.2d 304, 308-09 (2d Cir. 1973) (appropriate procedure is to try liability issues to the jury and limitation issues to the judge alone; but where no objections made at the trial level, no error in trying the entire matter to the jury); *Famiano v. Enyeart*, 398 F.2d 661, 664 (7th Cir.), *cert. denied*, 393 U.S. 1020 (1968); *Doughty v. Nebel Towing Co.*, 270 F. Supp. 957, 959 (E.D. La. 1967).

266. Where limitation of liability is affirmatively invoked by a limitation complaint filed under the admiralty jurisdiction, *see* FED. R. CIV. P. F, there is no right to a jury trial on behalf of any of the claimants. *Complaint of Great Lakes Towing Co.*, 395 F. Supp. 810, 812-13 (N.D. Ohio 1974) (if there are multiple claimants in the limitation proceeding, admiralty's nonjury tradition takes precedence over Great Lakes jury trial statute, 28 U.S.C.A. § 1873 (1966)).

267. The weight of authority is that actions under the Death on the High Seas Act, 46 U.S.C. §§ 761-768 (1970), must be brought on the admiralty side, and may not be brought at law under the saving clause. *See* G. GILMORE & C. BLACK, *supra* note 48, at 40 n.133. But there has always been doubt about the validity of that view. *See* Comment, *Death on the High Seas Act*, 55 COLUM. L. REV. 907 (1955).

268. 46 U.S.C. § 761 (1970) (originally enacted as Act of March 30, 1920, ch. 111, § 1, 41 Stat. 537).

269. *Peace v. Fidalgo Island Packing Co.*, 419 F.2d 371 (9th Cir. 1969); *Gvirstman v. Western King Co.*, 263 F. Supp. 633 (C.D. Cal. 1967).

270. *Haskins v. Point Towing Co.*, 395 F.2d 737 (3d Cir. 1968), *cert. denied*, 400 U.S. 834 (1970), *discussed in* notes 244-49 *supra* and accompanying text.

271. *Blake v. Farrell Lines, Inc.*, 417 F.2d 264 (3d Cir. 1969), *discussed in* notes 250-54 *supra* and accompanying text.

272. *Haskins v. Point Towing Co.*, 395 F.2d 737, 741 (3d Cir. 1968), *cert. denied*, 400 U.S. 834 (1970).

be dropped from the case as the price for jury trial.²⁷³ From the traditional viewpoint, the reasoning of these cases was unexceptionable: (1) The law side of a federal court has no jurisdiction to entertain a libel in rem, which is the major category of exclusive admiralty jurisdiction; (2) There are no jury trials in admiralty; (3) Therefore, the plaintiff must choose between the admiralty side, where a libel in rem is available, or the civil side, where there is a right to a jury trial. Far preferable to this reasoning would have been an acknowledgment, on the authority of cases like *Haskins* and *Blake*, of the feasibility of jury trials in admiralty.

In a third category of *Romero*-pendent cases, the plaintiff pursues a maritime cause on the civil side of federal court and the original defendant seeks to implead a third-party defendant as a matter of admiralty or maritime jurisdiction under rule 9(h).²⁷⁴ If *Blake* is correct then it ought to follow that when a plaintiff asserts a maritime claim for jury trial on the law side, and the first defendant seeks to implicate the second according to third-party practice, the entire case may be tried to the jury.²⁷⁵ This was, in fact, the holding in *Gyorfi v. Partrederiet Atomena*,²⁷⁶ where the plaintiff had brought a diversity action²⁷⁷ against a shipowner, and the shipowner brought a third-party action, which he designated an admiralty claim under 9(h), against the stevedore. The question in the case was whether the stevedore was entitled to a jury trial of the third-party claim. The court held that the entire case should be tried to the same jury. Relying extensively on *Blake*,²⁷⁸ the court made an important distinction:

[T]he fact that there is no jury trial in admiralty does not mean that it is impermissible for a jury to hear and determine issues denominated as arising under the court's admiralty jurisdiction. . . .

273. *Johnson v. Venezuelan Line S.S. Co.*, 314 F. Supp. 1403, 1406-07 (E.D. La. 1970); *Fernandes v. United Fruit Co.*, 303 F. Supp. 681 (D. Md. 1969).

274. FED. R. Civ. P. 9(h).

275. Indeed, in *Close v. Calmar S.S. Corp.*, 44 F.R.D. 398 (E.D. Pa. 1968), the district court advanced from the assertion that if the more usual third-party practice had been employed there would clearly be a jury right, to the conclusion that there was similarly a jury trial in the consolidation situation.

276. 58 F.R.D. 112 (N.D. Ohio 1973).

277. "The complaint is lacking a formal jurisdictional allegation. However, the plaintiff does plead facts which would be sufficient to support both general civil jurisdiction under diversity of citizenship and admiralty jurisdiction. Trial by jury was requested." 58 F.R.D. at 113. The court elected to treat plaintiff's complaint, in accordance with its obvious intention, as though it were in diversity. This is to be contrasted with the highly technical, almost punitive, approach taken in *Americana of Puerto Rico, Inc. v. Transocean Tankers Corp.*, 317 F. Supp. 798 (D.P.R. 1969), holding that where plaintiff pleads both rule 9(h) and diversity, he is precluded from making a later jury demand. See note 314 *infra* and accompanying text.

278. The *Gyorfi* court was also much impressed by the reasoning of the court in *Close v. Calmar S.S. Corp.*, 44 F.R.D. 398 (E.D. Pa. 1968). See 58 F.R.D. at 115-16. *Close* was one of the cases consolidated on appeal in *Blake*.

[W]hile it is often said that there may not be a jury trial in admiralty, the accurate statement of law is that there is no *constitutional right* to a jury trial in admiralty and that customarily admiralty actions are tried to the court.²⁷⁹

Custom can yield, said the court, when factors such as those discussed in *Blake*²⁸⁰ are present.

A similar philosophy obtained in *Saus v. Delta Concrete Co.*,²⁸¹ where the plaintiff sued his employer at law under the Jones Act, and the employer brought in as a third-party defendant the owner of the barge on which the plaintiff had been hurt. The third-party defendant contended that because the plaintiff's Jones Act claim could not be considered a rule 9(h) claim, substitute-defendant third-party practice under rule 14(c)²⁸² was unavailable. The district court answered that despite the plaintiff's request for a jury trial of his Jones Act claim, the case was still, in a conceptual sense, an admiralty or maritime claim, for which the procedure of rule 14(c) was available. In response to the third-party defendant's contention that a Jones Act jury proceeding and a rule 9(h) maritime case are mutually exclusive concepts, the court noted that *Fitzgerald*²⁸³ and *Haskins*²⁸⁴ were "unequivocally against [third-party defendant's] argument."²⁸⁵ The *Saus* court also indicated that the entire matter should be tried to the jury.²⁸⁶

6. Summary

Much of the recent case law concerned with the conflict between one party's asserted right to jury trial and another's asserted right to an admiralty bench trial has revealed a judicial tendency to disregard the civil/admiralty barrier in order to accommodate the overriding seventh amendment right. Yet the cases continue to exhibit uncertainty over the proper force of admiralty's nonjury tradition, especially where admiralty was the basis for the original invocation of federal jurisdiction. Particularly in the *Romero*-pendent cases, there is evidence that the 1966 merger is gradually coming to have the intended effect of dissolving the artificial separateness of admiralty jurisdiction. However, there is more than enough evidence of a continuing poten-

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279. 58 F.R.D. at 114 (emphasis original).

280. See 58 F.R.D. at 115-16.

281. 368 F. Supp. 297 (W.D. Pa. 1973).

282. See text at notes 141-46 *supra*.

283. *Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963).

284. *Haskins v. Point Towing Co.*, 395 F.2d 737 (3d Cir. 1968), *cert. denied*, 400 U.S. 834 (1970).

285. 368 F. Supp. at 298.

286. 368 F. Supp. at 298.

tial for confusion and arguable injustice in the courts' view of the nature of unification to warrant legislative action to complete what the unification intended to achieve.

C. Other Separatism Problems

In a variety of otherwise unrelated ways, the separatist view of admiralty that has survived the 1966 unification continues to create problems for the courts. In this subsection, a number of such discrete problem areas will be briefly considered.

1. *Amendment of Pleadings To Add or Withdraw the Rule 9(h) Designation*

As indicated above,²⁸⁷ in cases where federal jurisdiction is present on diversity or federal question as well as admiralty grounds, the plaintiff must decide whether to include in his complaint "a statement identifying the claim as an admiralty or maritime claim"²⁸⁸ under rule 9(h). If the 9(h) designation is made, admiralty's nonjury tradition obtains;²⁸⁹ if it is not, trial will ordinarily be to a jury.

Rule 9(h) evidently contemplates a liberal policy of allowing amending pleadings to add or withdraw the identifying statement, for it specifies that such amendment "is governed by the principles of Rule 15."²⁹⁰ Rule 15 in turn states that "[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served . . . . Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and *leave shall be freely given when justice so requires.*"²⁹¹ On the basis of these provisions, the proper practice would appear to be clear. Indeed, a leading treatise on federal practice has so concluded:

The pleader's identification of his claim as an admiralty or maritime claim or his failure to do so is not an irrevocable election. The general liberal principles found in Rule 15 as to amendment of pleadings are expressly made applicable to the identifying statement by the penultimate sentence of Rule 9(h). Hence the identification

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287. See text at notes 1-12 *supra*.

288. FED. R. CIV. P. 9(h).

289. Rule 9(h) provides for an optional statement identifying the claim "as an admiralty or maritime claim for the purposes of Rule[s] . . . 38(e) . . . ." FED. R. CIV. P. 9(h). Rule 38(e) provides: "These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h)." FED. R. CIV. P. 38(e).

290. FED. R. CIV. P. 9(h).

291. FED. R. CIV. P. 15(a) (emphasis added).

can be deleted or belatedly inserted as permitted by the rules governing amendment of pleadings.²⁹²

Unfortunately, the case law on the matter is less clear. In several cases wherein plaintiffs sought to add the 9(h) designation, the indicated liberality has properly prevailed.²⁹³ But courts have been sharply divided in cases where the plaintiff's option to add the 9(h) designation clashes with another party's asserted right to jury trial. The conflict among the circuits has been produced in part by a lack of clarity in the rules themselves. While rules 9(h) and 15 express a liberal amendment policy, rules 38 and 39 provide that once any party has demanded a jury trial of an issue triable of right by a jury, a nonjury trial may be conducted only with the consent of the parties.²⁹⁴ Thus, the rules seem to speak with two voices to the situation where plaintiff has filed his maritime action on the basis of diversity or federal question jurisdiction, either party has demanded a jury trial, and plaintiff then seeks to amend in order to add the rule 9(h) designation.²⁹⁵

In the Fifth Circuit, *Johnson v. Penrod Drilling Co.*²⁹⁶ takes the position that in the situation suggested here the jury right prevails.²⁹⁷ In each of the two cases disposed of in *Johnson*, a seaman suing his employer under the Jones Act (and alleging diversity of citizenship as well) demanded a jury trial. Then, over two years later,²⁹⁸ each plaintiff sought to add a 9(h) designation; neither amended complaint referred to the matter of a jury trial. Despite defendants' motions for jury trials, each case was tried to the judge alone. That, said the Fifth Circuit, was reversible error, which deprived defendants of their seventh amendment right to trial by jury.²⁹⁹ The court's reasoning was as follows:

The procedure set forth in Rule 39(a) for transferring an action from a district court's jury docket to its non-jury docket gives explicit recognition to the quasi-constitutional privilege of the party who did not

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292. 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1314, at 455 (1969).

293. See *McCrary v. Seatrain Lines, Inc.*, 469 F.2d 666, 668 (9th Cir. 1972); *Doucet v. Wheless Drilling Co.*, 467 F.2d 336, 341 (5th Cir. 1972); *Elverfield v. Central Gulf S.S. Co.*, 1974 A.M.C. 409, 410 (N.D. Cal. 1973); *Di Paola v. International Terminal Operating Co.*, 294 F. Supp. 736, 737 (S.D.N.Y. 1968).

294. FED. R. CIV. P. 38(b), 38(d), 39(a).

295. See *Johnson v. Penrod Drilling Co.*, 469 F.2d 897, 901 (5th Cir. 1972), *affd. en banc*, 510 F.2d 234 (5th Cir. 1975): "Our resolution of the jury trial issue presented by these appeals requires that we attempt a reconciliation of apparently conflicting provisions of the Federal Rules of Civil Procedure."

296. 469 F.2d 897 (5th Cir. 1972), *affd. en banc*, 510 F.2d 234 (5th Cir. 1975).

297. *Accord*, *Banks v. Hanover S.S. Corp.*, 43 F.R.D. 374, 380 (D. Md. 1967).

298. 469 F.2d at 899, 900.

299. 469 F.2d at 899.

originally demand trial by jury to rely upon the jury trial demand made by the adverse party. We therefore hold that the district court erred when it transferred these two actions from its jury docket to its non-jury docket without first obtaining Rule 39(a) consent to the transfers. . . .³⁰⁰

To precisely the opposite effect is *McCrary v. Seatrail Lines, Inc.*,³⁰¹ decided by the Ninth Circuit Court of Appeals just twenty days before *Johnson*. In *McCrary*, a longshoreman had sued a shipowner in diversity, apparently without any explicit jury demand. The shipowner filed a third-party complaint against the stevedoring company, and in its answer the stevedoring company demanded a jury trial. The plaintiff settled with the shipowner during pretrial, and the trial judge decided to try the shipowner's action against the stevedore without a jury, despite the stevedore's objections. The Ninth Circuit affirmed, concluding that the trial judge had reached the right result for the wrong reasons. In the view of the trial judge, the indemnity claim of the shipowner against the stevedore lay only in admiralty; as such, it was triable to the court alone, without the necessity of a 9(h) designation.³⁰² That determination was erroneous, said the appellate court, because the shipowners' third-party claim "did not lie solely in admiralty. It was ancillary to the injured workman's diversity action."³⁰³ Therefore, it would have been incorrect to deny the stevedore's motion for jury trial on these facts alone. However, the shipowner should have been allowed, as it had demanded, to amend its third-party complaint to add the 9(h) designation under the terms of rule 15. Here, the shipowner had made a timely effort to amend its third-party complaint, and there was no showing that the stevedore would suffer any prejudice if the amendment were allowed.³⁰⁴

The Fifth Circuit offers the better argument. Under the present form of the Rules, admiralty's nonjury tradition is bound to conflict

300. 469 F.2d at 903. It should be noted that despite the fact that plaintiffs in *Johnson* were not explicit in withdrawing their jury demand when they sought to add the rule 9(h) designation, the Fifth Circuit properly read the amendments as designed for that purpose; indeed, that could have been the only purpose. This is to be contrasted with the kind of concern for technicalities manifested in some of the other decisions involving similar points. See text at notes 8-21 *supra*, 308-15 *infra*.

301. 469 F.2d 666 (9th Cir. 1972). Accord, *Elverfield v. Central Gulf S.S. Co.*, 1974 A.M.C. 409, 410 (N.D. Cal. 1973).

302. Rule 9(h) says in pertinent part: "If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes [Rules 14(c), 38(e), 82, and the Supplemental Rules] whether so identified or not." FED. R. CIV. P. 9(h).

303. 469 F.2d at 668.

304. *McCrary* thus is like *Johnson* in taking a nontechnical approach to construing pleadings, in sharp contrast to several other related decisions. See text at notes 8-21 *supra*, 308-15 *infra*.

on occasion with seventh amendment rights. As indicated above,³⁰⁵ a sensible interim policy would be a simple resolution in favor of the jury right in all such cases. A more stable long-term resolution would be achieved by legislation designed to bring the jury into admiralty proceedings.³⁰⁶ Better yet, legislative adoption of the proposal advocated in the concluding section of this paper³⁰⁷ would resolve this matter, and other problems as well.

In the converse situation, where a plaintiff seeks to withdraw his 9(h) designation in order to obtain a jury trial, there is no confusion in the rules, no conflict between the jury right and the liberal amendment policy of rules 9(h) and 15, and therefore no reason for judicial reluctance to permit amendment. It ought to be far easier for a plaintiff to withdraw a 9(h) designation and get a jury trial than it is to add the designation in the face of some other party's asserted right to jury trial. Yet the case law demonstrates precisely the reverse emphasis. In *Romero v. Bethlehem Steel Corporation*,³⁰⁸ the Fifth Circuit refused to permit plaintiff to amend his complaint in this fashion, on the theory that while such amendment might be permissible, plaintiff's counsel plainly did not know how to obtain it.³⁰⁹ In achieving that draconian result, the court strongly suggested that it ought to be much more difficult for plaintiff to "shift . . . from admiralty to law" than vice versa.³¹⁰ Other decisions agree with *Romero* that while the 9(h) designation may not be irrevocable, an amendment to withdraw it will not be allowed when it is attempted late³¹¹ or in improper form.³¹² Worse yet, other decisions flatly defy the plain wording of rule 9(h) that "the amendment of pleading to add or withdraw an identifying statement is governed by the principles of Rule 15,"³¹³ and hold that the 9(h) designation is irrevocable.³¹⁴

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305. See notes 126-28, 167-69, 175-77 *supra* and accompanying text.

306. See notes 33-43 *supra* and accompanying text.

307. See notes 379-405 *infra* and accompanying text.

308. 515 F.2d 1249 (5th Cir. 1975). See notes 1-12 *supra* and accompanying text.

309. 515 F.2d at 1249.

310. The Court quoted and relied on the earlier Fifth Circuit decision of *Doucet v. Wheless Drilling Co.*, 467 F.2d 336 (5th Cir. 1972), where the plaintiff had been accorded great latitude respecting a shift from "law to admiralty" in order to obtain pre-judgment interest under the Jones Act. 515 F.2d at 1252-53 n.1. See text at notes 345-52 *infra*.

311. *Anderson v. American Oil Co.*, 60 F.R.D. 676 (S.D. Ga. 1973).

312. *Williams v. Shipping Corp. of India, Ltd.*, 354 F. Supp. 626 (S.D. Ga. 1973).

313. FED. R. Civ. P. 9(h).

314. See *Transamerican Trailer Transp., Inc. v. Transocean Gateway Terminal, Inc.*, 1974 A.M.C. 1860 (S.D.N.Y. 1973); *Americana of Puerto Rico, Inc. v. Transocean Tankers Corp.*, 317 F. Supp. 798 (D.P.R. 1969); See also *Alaska Barite Co. v. Freighters, Inc.*, 54 F.R.D. 192, 194 (N.D. Cal. 1972) (dictum). Compare *Maz-*

This view of the rule 9(h) choice is clearly contrary to the spirit of unification, and seems yet another instance of the undesirable tenacity of old formalisms.³¹⁵

2. Choice of Law Mistakes

No convincing argument has ever been advanced for allowing the choice of forum in our federal system to affect applicable substantive law. It is now well-established that in a case based upon diversity of citizenship, a federal district court sitting in a particular state must apply the same substantive principles that the state's own courts would apply.³¹⁶ Similarly, if a plaintiff exercises his saving clause option to bring an admiralty and maritime case in a nonadmiralty forum, the applicable substantive principles will be those that an admiralty court would apply in that case.³¹⁷ Since 1917,³¹⁸ the Supreme Court has consistently held that the substantive aspects of cases of admiralty and maritime jurisdiction are presumptively controlled by the general maritime law of the United States, which consists of federal statutes and case law.³¹⁹ Choice of law in the maritime sphere is, in other words, governed by a reverse-*Erie* principle.³²⁰ In both diversity and admiralty cases consistency of the applied substantive law is the goal.

With some frequency, maritime matters arise for which there is no settled disposition in the federal maritime law, or which have some significant feature that is local in nature. In such instances, a "mari-

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zella v. Pan Oceanica A/S Panama, 232 F. Supp. 29, 32 (S.D.N.Y. 1964), a pre-unification decision wherein plaintiff originally pleaded admiralty and faulty diversity, and was allowed to amend his complaint to cure the diversity flaw on the sensible view that "plaintiff could now bring a new civil jury action based on diversity jurisdiction, and if plaintiff did so there would appear to be no reason to bar this new action for laches."

315. See *Mazzella v. Pan Oceanica A/S Panama*, 232 F. Supp. 29, 32 (referring to defendant's argument as "shades of a formalism which we had long thought dead and interred").

316. See *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

317. See *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917).

318. See *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918).

319. See generally, D. Robertson, *supra* note 40, at 136-47, 185-201. Very recently, in *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973), the Supreme Court made an important contribution on the question of when state law features can be applied in a case within the admiralty jurisdiction. In holding that Florida's statute dealing with oil pollution of territorial waters was constitutional, Justice Douglas said that the *Jensen* doctrine—federal supremacy in the maritime sphere—had given way under the weight of a number of considerations supporting state law competence. Further, he cast that portion of his opinion in terms of whether "admiralty jurisdiction" was "exclusive" in these matters. See 411 U.S. at 337-44. But he did not say or imply that the answer to this question, when can state law apply in a maritime matter, varies according to the court where the question is asked.

320. See D. ROBERTSON, *supra* note 40, at 136-283.

time but local"³²¹ rubric attaches, and these cases, while within the admiralty, can be determined according to state law principles.³²² However, in no case is choice of forum allowed to influence the matter.³²³ If the case is totally maritime, it is to be governed by the substantive federal maritime law, whether it has been brought in admiralty, in state court, or in federal court on diversity grounds. If the case is maritime but local in its nature, it may be governed by settled features of the maritime law and borrowed features of state law, but the federal-state blend is to remain the same regardless of whether the matter is litigated in admiralty, in state court, or in federal court on grounds of diversity.³²⁴

This reverse-*Erie* posture of maritime choice of law principles is as well settled as any legal doctrine can be. Yet the competing notion that in some instances the applicable substantive principles vary according to the forum selected continues to have a powerful and pernicious appeal. It is easy enough to understand why the error persists, for in a number of contexts courts have occasion to assert that, if a matter is maritime, one set of principles governs, whereas, if it is not, another set governs. Any such statement can conveniently and simplistically be cast in the form: "In admiralty, result A; at law, result B." A statement in this form is susceptible to the erroneous, mechanical interpretation that one result is called for in an admiralty court and another in a nonadmiralty court.

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321. The genesis of this phrase was apparently *Western Fuel Co. v. Garcia*, 257 U.S. 233, 242 (1921) (state's wrongful death statute applicable in an admiralty case).

322. See, e.g., *Wilburn Boat Co. v. Firemen's Fund Ins. Co.*, 348 U.S. 310 (1955) (state law principles govern breach of printed warranties in policy of insurance on houseboat operating on Lake Texoma, landlocked but touching two states).

323. With a single exception, the Supreme Court has been consistent in insisting on the correctness of the generalization in the text. In *Caldarola v. Eckert*, 332 U.S. 155 (1947), Justice Frankfurter rather plainly said that defendant's responsibility for personal injuries caused by a vessel it was operating under a wartime general agency agreement depended upon New York law's characterization of the contract *because* New York's own "determination is decisive that there is no remedy in its courts for such a business invitee. . . ." 332 U.S. at 158. There have been a number of attempts to rationalize *Caldarola* with the doctrine that choice of forum cannot affect choice of substantive law in maritime cases. See, e.g., D. ROBERTSON, *supra* note 40, at 242-46. But the case just does not fit. It stands alone.

324. The problem of maritime choice-of-law is clearly and correctly analyzed by Judge Wright in *Oppen v. Aetna Ins. Co.*, 485 F.2d 252 (9th Cir. 1973), where a group of pleasure boat owners sought recovery for physical damage and loss of use of their vessels resulting from the Santa Barbara oil spill. Plaintiffs argued that California law gave them the right to recover for loss of use of their vessels; thus the jurisdictional and choice-of-law inquiry was crucial. The court saw the inquiry as bifurcated: (1) Was the case one of admiralty and maritime jurisdiction? The conclusion was yes. See *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972). (2) Was California law a partial source of substantive principle in this admiralty case? This question was viewed as close and the answer was "perhaps."

The possibilities for confusion are illustrated in a recent decision, *Principe Compania Naviera, S.A. v. Board of Commissioners of the Port of New Orleans*.³²⁵ Arguably, the New Orleans dock board had committed a tort; when sued, it claimed sovereign immunity. The court disagreed, noting that while there was a wealth of state and federal cases establishing the board's immunity from tort liability, this case was in admiralty:

It is well settled that an *admiralty court* in proper exercise of its jurisdiction does not defer to state law in determining whether a cause of action cognizable in *admiralty* can be asserted. . . . To hold otherwise would destroy the uniformity *admiralty* seeks since *admiralty law* would vary according to the often-conflicting laws of the several states. . . .

It is likewise settled that where an *admiralty court* has jurisdiction over the parties and subject matter, sovereign immunity will not defeat an otherwise meritorious lawsuit brought against a state agency for its alleged torts. . . .

. . . .
In almost all the cases on this subject the Court has found, an *admiralty court* has never applied state immunity law to defeat an otherwise meritorious cause of action against an agency or political subdivision of the state. . . .

. . . .

Judge Wright thought that, until recently, there would have been no room for California law in a maritime tort case of this kind. However, he pointed out that the Supreme Court's decision in *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973), discussed in note 319 *supra*, had "broadened the power of the states to apply their own laws to certain maritime torts occurring within their territorial waters." 485 F.2d at 253. Ultimately it was not necessary to decide the close question of the appropriate scope for application of California law because of the decision that neither maritime nor California law would redress the plaintiffs' injuries. 485 F.2d at 259.

The important dimension of *Oppen* is the clarity with which the court's analysis supports the central point here. Whether a case is admiralty and maritime in nature is important for two distinct reasons: (1) If it is, it is litigable in the federal court without reference to federal question or diversity grounds. (2) And, if it is, it is presumptively governed by the substantive federal maritime law (to whatever extent modified by the admission of limited state-law competence), *whatever the court in which the matter is heard*.

See also *McCross v. Ratnakar Shipping Co.*, 265 F. Supp. 827, 830-31 (D. Md. 1967):

Three of the seven cases [before the court in this consolidated proceeding] were instituted as libels in admiralty. The other four cases are actions on the "law side" of this Court. This difference is without legal distinction, insofar as the "substantive" issues common to all seven cases are concerned. "For it is now clear that the maritime law controls all 'substantive' issues in the disposition of maritime claims regardless of the form or forum of suit. . . . This is so whether . . . [the] suit . . . be treated as a libel in admiralty . . . [or] as an action on the 'law side' of the federal court . . . or if the suit . . . had been brought in a state court under the saving clause. *Larios v. Victory Carriers, Inc.*, 316 F.2d 63, 65 (2d Cir. 1963)."

325. 333 F. Supp. 353 (E.D. La. 1971).

[T]his Court can find no valid reasons supporting the doctrine of immunity sufficient to offset the strong reasons . . . for not recognizing the state immunity doctrines *in a court of admiralty* . . . .³²⁶

There are two possible interpretations of the court's remarks: (1) In a proceeding based on the commission of a maritime tort, brought against the dock board in a United States district court on the ground of admiralty and maritime jurisdiction, there is no sovereign immunity; (2) In any proceeding in *any* court against the dock board based on the commission of a maritime tort, there is no sovereign immunity. The second statement is correct, but there is no way to discern whether the judge intended it. As the passage stands "admiralty court" might refer either to a United States district court exercising its admiralty and maritime jurisdiction, or to *any* court exercising jurisdiction over a maritime matter.

The importance of this recurrent and troublesome imprecision is considerable, for some courts apparently remain unaware of the reverse-*Erie* principle. A fairly typical misinterpretation is contained in a recent Eighth Circuit decision³²⁷ involving deaths on navigable waters within Arkansas. At the time of the decision the law pertaining to deaths in state waters was a blend of admiralty and state principles.³²⁸ On the issue of whether the trial court applied the correct principles as to beneficiary status, the court stated:

Had the federal district court been sitting as a diversity court faced with the problem of choosing which of several competing state laws should apply, the relevant contacts with . . . Arkansas may have been sufficient to support a choice of the law of that state. But, a federal court which sits in admiralty does not sit as a diversity court and thus in fashioning the full details of this . . . federal cause of action, it would seem that more consideration must be given to the problem of which law is to serve as the proper analogue than to a mere finding of a quota of contacts with a particular state.³²⁹

The assertion that a federal court, sitting in diversity, would be bound by some fairly demanding choice-of-law (state/state) principles, whereas the same court, sitting in admiralty, was free to concoct a sensible blend of the available bodies of substantive law, is inconsistent with both the reverse-*Erie* thesis and the spirit of the 1966 unification.³³⁰

326. 333 F. Supp. at 356-57 & n.10 (citations omitted) (emphasis added).

327. *Spiller v. Lowe & Associates, Inc.*, 466 F.2d 903 (8th Cir. 1972).

328. Very recent cases may have made the matter fully maritime. See *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573 (1974); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

329. 466 F.2d at 908 n.6 (citations omitted).

330. Other recent decisions have also displayed significant deviations. In *Capoz-*

None of the recent articulations of the idea that choice of forum determines choice of law were particularly costly. In two instances,³³¹ the mistakes were made by district courts and corrected on appeal. In other cases, courts arrived at the right answer for the wrong reasons.³³² However, it is purely fortuitous that no ultimate injustice was done to the parties by the adoption of this mistaken view. At worst it *can* cause injustice; at best it forces costly appeals, sows confusion, and frustrates legitimate expectations.³³³ The survival of a separatist notion concerning the nature of an admiralty court is at least partially at fault here. If "the admiralty" were

ziello v. Brasileiro, 443 F.2d 1155 (2d Cir. 1971), the trial court concluded that because the matter was in federal court on the basis of diversity, state law controlled the interpretation of an indemnity contract between shipowner and stevedore. The Second Circuit corrected the misconception, pointing out that it was of no importance in the instant case, where the applicable principles of state and maritime law were equivalent. 443 F.2d at 1157. In King v. Alaska S.S. Co., 431 F.2d 994 (9th Cir. 1970), the trial court held that because plaintiff predicated federal jurisdiction upon diversity of citizenship in a personal injury action by longshoreman against vessel owner, the state statute of limitations controlled. However, plaintiff could have leave to amend and invoke jurisdiction in admiralty, whereupon the doctrine of laches would apply. The Ninth Circuit, like the Second Circuit in *Capozziello*, made appropriate corrections. 431 F.2d at 996.

331. See note 330 *supra*.

332. See, e.g., *Spiller v. Lowe & Associates, Inc.*, 466 F.2d 903 (8th Cir. 1972), discussed in text at notes 327-30 *supra*, where the substantive conclusion reached was correct. The case involved the elements of the federal right for death on territorial waters created by the Supreme Court in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970). The court was free to choose among the features of competing state law as to elements of the new remedy not specified by the Supreme Court, *not* because it was sitting in "admiralty," but because it was hearing a suit on a maritime cause of action. A court whose jurisdiction was invoked on grounds of diversity would have been equally free.

333. All the above decisions, *supra* notes 330, 332, err in the direction of assuming that plaintiff must be in an admiralty court before he has access to maritime principles. The reverse was argued in an interesting way in *McNeil v. A/S Havbor*, 339 F. Supp. 1264 (E.D. Pa. 1972). Plaintiff in *McNeil* contended that a recent Supreme Court decision, *Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1971), making clear that his case was not within the admiralty and maritime jurisdiction, meant only that he was foreclosed from invoking that ground of federal jurisdiction, not that he was debarred from access to the beneficent principles of the federal maritime law. His argument was ingenious:

[P]laintiff . . . argues that *Law* dealt with maritime jurisdiction and did not limit the application of maritime law. Since this is a diversity case, plaintiff contends, this court has jurisdiction . . . and must, under *Erie* . . . apply Pennsylvania law. Plaintiff further argues that the Pennsylvania courts have applied maritime law in cases involving longshoremen and seamen. In this factual situation, the Pennsylvania courts, it is argued, would apply the general principles of maritime law . . . .

339 F. Supp. at 1266 (citations omitted). The court disagreed and found it obvious that the decision in *Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1971), completely removed cases like plaintiff's from the ambit of admiralty and maritime jurisdiction. 339 F. Supp. at 1266. The court might have added that *Victory Carriers* binds the Pennsylvania courts equally with the federal courts, so that, even giving plaintiff his *Erie* route to Pennsylvania law, the federal court would be bound to find against him when he got there. The Pennsylvania courts, like admiralty courts and diversity courts, are now foreclosed from treating these cases as maritime cases.

abolished as a separate heading of federal jurisdiction and merged into the federal question category,³³⁴ there would be much less occasion for the confusing language typified by *Principe*.³³⁵

3. Pre-Judgment Interest in Jones Act Cases

It is well settled that the award of pre-judgment interest under general maritime law lies within the discretion of the trial judge.³³⁶ Under the prevailing view that the availability of pre-judgment interest is a matter of substantive law,³³⁷ the saving clause plaintiff who would have obtained pre-judgment interest had he brought his case in admiralty is entitled to the same interest in the nonadmiralty tribunal.³³⁸

A special problem is presented in cases brought under the Jones Act,³³⁹ which incorporates for seamen the bundle of rights given railway workers under the Federal Employers' Liability Act,³⁴⁰ because of a line of cases holding that in FELA litigation there can be no award of pre-judgment interest.³⁴¹ Since the Jones Act incorporates FELA, one sensible resolution is to hold that the FELA cases disallowing pre-judgment interest override the normal maritime rule and make such interest unavailable in Jones Act cases as well. This viewpoint prevails in the Sixth Circuit.³⁴² Another equally tenable ap-

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334. See notes 379-405 *infra* and accompanying text.

335. 333 F. Supp. 353 (E.D. La. 1971), discussed in text at notes 325-26 *supra*. For related confusion in the choice-of-law area, see *Hobart v. Sohio Petroleum Co.*, 445 F.2d 435 (5th Cir.), cert. denied, 404 U.S. 942 (1971); *Leach v. Mon River Towing, Inc.*, 363 F. Supp. 637 (W.D. Pa. 1973); *Bensen v. Jackson*, 238 F. Supp. 309 (E.D. Pa. 1965).

336. See, e.g., *Iberia Tankers Co. v. Gates Constr. Corp.*, 1974 A.M.C. 2186 (2d Cir. 1974); *Dennis v. Central Gulf S.S. Corp.*, 453 F.2d 137, 141 (5th Cir.), cert. denied, 409 U.S. 948 (1972); *Complaint of Farrell Lines, Inc.*, 389 F. Supp. 194, 205 (S.D. Ga. 1975).

337. See, e.g., *Moore-McCormack Lines, Inc. v. Amirault*, 202 F.2d 893, 898 (1st Cir. 1953); *Barton v. Zapata Offshore Co.*, 397 F. Supp. 778, 780 (E.D. La. 1975).

338. See, e.g., *Doucet v. Wheless Drilling Co.*, 467 F.2d 336, 341 (5th Cir. 1972); *Canova v. Employers Mut. Liab. Ins. Co.*, 301 F. Supp. 738 (E.D. La. 1967), *affd. sub nom. Canova v. Travelers Ins. Co.*, 406 F.2d 410 (5th Cir.), cert. denied, 396 U.S. 832 (1969).

339. 46 U.S.C. § 688 (1970).

340. 45 U.S.C. §§ 51-60 (1970).

341. See, e.g., *Louisiana & Arkansas Ry. v. Pratt*, 142 F.2d 847, 848-49 (5th Cir. 1944); *Chicago, M., St. P. & P. R.R. v. Busby*, 41 F.2d 617, 619 (9th Cir. 1930). The reason for this limitation was not deeply rooted in policy but rather stemmed from a recognition that since at the time the Federal Employers Liability Act was enacted interest was not allowable on personal injury claims until damages had been judicially ascertained, the silence of the Act on the subject of interest was indicative of a purpose that no interest should be allowed. See *Louisiana & Arkansas Ry. v. Pratt*, 142 F.2d 847, 848-49 (5th Cir. 1944).

342. See *Petition of United States Steel Corp.*, 436 F.2d 1256, 1279 (6th Cir. 1970), cert. denied, 402 U.S. 987 (1971); *Cleveland Tankers, Inc. v. Tierney*, 169

proach to pre-judgment interest in Jones Act cases is to conclude that the FELA rule is not deeply rooted in policy,³⁴³ and that the normal maritime rule making pre-judgment interest available should prevail. This viewpoint obtains in the First Circuit.³⁴⁴

The Fifth Circuit, however, which hears by far the greatest number of such cases, has developed a hybrid resolution that is highly offensive to the general policy that choice of forum should not have substantive law consequences.³⁴⁵ In the Fifth Circuit, as elsewhere, the normal maritime rule providing for pre-judgment interest at the discretion of the trier of fact usually prevails in whatever court the case is heard.³⁴⁶ The rule applies to suits under direct action statutes against the liability insurer of a Jones Act employer.³⁴⁷ The same pre-judgment interest rule obtains in Jones Act cases brought in admiralty.³⁴⁸ But in Jones Act cases brought on the "law side," pre-judgment interest cannot be awarded.³⁴⁹ This peculiar and little-noted posture, which is one of the more indefensible, albeit accidental, effects of separatist thinking, excites controversy,³⁵⁰ makes courts

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F.2d 622, 626 (6th Cir. 1948); *Bednar v. United States Lines, Inc.*, 360 F. Supp. 1313, 1318 (N.D. Ohio 1973). Annot., 96 A.L.R.2d 1104, 1112-15 (1964), states as the general view that there is no pre-judgment interest in any Jones Act case. In fact, this appears to be the settled view of the Sixth Circuit only. *But see* *Mpiliris v. Hellenic Lines, Ltd.*, 323 F. Supp. 865, 895 (S.D. Tex. 1969): "While the court recognizes that there is some authority indicating that the court may, in the proper exercise of its discretion, award pre-judgment interest on wrongful death actions brought under the Jones Act . . . this authority represents only a minority position. The court has concluded that, at least in the present case, such pre-judgment interest should not be allowed."

343. *See* note 341 *supra*.

344. *See* *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048 (1st Cir. 1973).

345. *See* notes 316-35 *supra* and accompanying text.

346. *See, e.g.,* *Dennis v. Central Gulf S.S. Corp.*, 453 F.2d 137 (5th Cir.), *cert. denied*, 409 U.S. 948 (1972).

347. *See* note 336 *supra* and accompanying text.

348. *See, e.g.,* *Brown v. Aggie & Millie, Inc.*, 485 F.2d 1293 (5th Cir. 1973).

349. *See, e.g.,* *Doucet v. Wheless Drilling Co.*, 467 F.2d 336, 341 (5th Cir. 1972); *Sanford Bros. Boats, Inc. v. Vidrine*, 412 F.2d 958, 973 (5th Cir. 1969).

350. In *Barrios v. Louisiana Constr. Materials Co.*, 465 F.2d 1157, 1167 (5th Cir. 1972), the court referred to the plaintiffs' extensive brief on the issue of pre-judgment interest. That brief made a cogent argument for the availability of pre-judgment interest to any Jones Act plaintiff, and especially for the sort of workers who may have been doubtful as to the likelihood of their achieving seaman status via litigation. A frequent plaintiff, particularly in the Fifth Circuit, is an amphibious employee who may ultimately be deemed to be covered by the Jones Act and other seamen's remedies, or by the Longshoremen's and Harbor Workers' Compensation Act, or by the state workmen's compensation statute. According to the brief:

When the man is hurt, the employer makes an initial determination as to what benefits it will voluntarily pay. Here defendant decided to pay state compensation benefits (the lowest of the three possible rates) rather than either of the other two rates. When a Jones Act suit is filed sometime later, the employer generally stops paying all disability benefits under any of them. The employer's reasoning is to the effect that "until the man's status is determined we won't pay anything", or "since the man claims he is a seaman and we deny it, we can't

uncomfortable,³⁵¹ and yet is allowed to exist without plausible explanation.³⁵²

4. Appellate Jurisdiction of Interlocutory Decisions

Section 1292(a) of Title 28 of the United States Code lists four categories of interlocutory decisions that are appealable as of right.³⁵³ Two of those categories are of special relevance in maritime cases. Section 1292(a)(3) provides for the appealability of "[i]nterlocutory decrees . . . determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed."³⁵⁴ The purpose of that section is well understood.³⁵⁵ Admiralty courts traditionally determined liability first and afterwards referred the parties to a commissioner for the determination of damages. The major purpose of section 1292(a)(3) is to permit an appeal from the finding of liability.³⁵⁶ As was intended, this admiralty peculiarity survived the 1966 unification.³⁵⁷ It presents no special problems,

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pay maintenance or it would be an admission, and we won't pay state or federal compensation in the meantime because the man isn't asking for it." Brief for Plaintiff at 17, *Barrios v. Louisiana Constr. Materials Co.*, 465 F.2d 1157 (5th Cir. 1972). In such cases, it would seem that pre-judgment delay amounts to a real and compensable injury.

351. *See, e.g.*, *Thibodeaux v. Rowan Drilling Co.*, 314 F. Supp. 543, 546 (W.D. La. 1969), *affd. per curiam*, 429 F.2d 573 (5th Cir. 1970).

352. In *Barton v. Zapata Offshore Co.*, 397 F. Supp. 778, 780 (E.D. La. 1975), Judge Rubin wrote that the reason for denying pre-judgment interest in jury-tried Jones Act cases might be "that the jury considers the delay in making the award." That reason, of course, would be equally applicable to maritime cases tried to juries under the saving clause, in which pre-judgment interest is available. *See* text at note 338 *supra*. In *Sanford Bros. Boats, Inc. v. Vidrine*, 412 F.2d 958 (5th Cir. 1969), the court wrote that "[t]he reasons for this limitation have ranged from the view that 'unliquidated' claims cannot bear interest to the position that 28 U.S.C.A. § 1961 prohibits prejudgment interest in personal injury claims based upon federal law." 412 F.2d at 972-73 (citations omitted) (footnotes omitted). Of course, many other unliquidated maritime claims tried before juries merit pre-judgment interest. *See* text at note 338 *supra*. Further, a Jones Act personal injury claim tried to a judge alone is just as unliquidated as the same claim tried to a jury. When pre-judgment interest in Jones Act cases in admiralty is awarded, it is under the theory that the delay is a real loss and that the judgment should take it into account in order to afford full compensation for the entire loss. For a convincing argument that the statute cited in *Sanford Bros.* does not in fact speak to the question of pre-judgment interest, *see* *Moore-McCormack Lines, Inc. v. Amirault*, 202 F.2d 893, 895 (1st Cir. 1953).

353. 28 U.S.C. § 1292(a) (1970).

354. 28 U.S.C. § 1292(a)(3) (1970).

355. *See* 9 J. MOORE, *FEDERAL PRACTICE* ¶ 110.19(3), at 209 (2d ed. 1973).

356. Section 1292(a)(3) validates appeals in admiralty cases other than those where the district court determined liability separately from quantum, whenever the order goes to the merits. *See generally* 9 J. MOORE, *supra* note 355, ¶ 110.19(3), at 209.

357. The last sentence of rule 9(h) states: "The reference in Title 28, U.S.C. 1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h)." *FED. R. CIV. P.* 9(h). As originally promulgated, rule 9(h) referred specifically to rule 73(h) in order to preserve the right of interlocutory appeal in admiralty. When the Federal Rules of Appellate

except for occasionally requiring an appellate court to conduct an otherwise unnecessary inquiry into whether an action in federal court had an admiralty, as opposed to a "law side," basis for jurisdiction.³⁵⁸

Considerably more difficulty has been generated by section 1292(a)(1), which provides for the appealability of "interlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions . . . ."³⁵⁹ This provision presents one of those situations where, despite the 1938 merger of law and equity, the federal courts must sometimes make a law/equity distinction.³⁶⁰ The necessity arises when a party seeks appellate review of a district court's ruling on a motion to stay proceedings in that court. The statute has been interpreted to allow an appeal of such a ruling only if the action in which the stay was sought would, prior to 1938, have been an action at law, and if the stay was sought to permit the prior determination of some matter that would, prior to 1938, have been heard in equity.³⁶¹ The theory is that prior to 1938 an order staying a proceeding at law in favor of an equity proceeding would necessarily have been issued by a chancellor; therefore, the order is thought to be an "injunction," appealable under the terms of section 1292(a)(1). In contrast, an order staying other matters in favor of a prior determination at law would never have amounted to an "injunction."³⁶²

Courts that heard admiralty cases escaped much of the confusion generated by 1292(a)(1) by establishing that if the action stayed (or for which a stay is denied) is in admiralty, the order is not appealable, regardless of whether the action and the matter for which a stay is

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Procedure were adopted in 1968, rule 73(h) was abrogated, and the reference to it was deleted from rule 9(h). To replace that reference, the above-quoted sentence was added "to make it clear that the right of interlocutory appeal in admiralty continues to exist. Thus, the 1968 changes were entirely formal in nature." 5 C. WRIGHT & A. MILLER, *supra* note 292, § 1315, at 456 (1969).

358. See *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167 (2d Cir. 1968), where the trial court determined that the Federal Tort Claims Act, rather than the Public Vessels Act, was the proper basis of an action by a drydock owner against the United States based on the negligence of a Coast Guard seaman while the vessel was in drydock. That determination, while erroneous, would not ordinarily have required scrutiny by the appellate court, since, by whatever route, the trial judge had ultimately arrived at the correct substantive principles. See 398 F.2d at 168. However, because of the restriction of section 1292(a)(3) to admiralty cases, whether the trial judge's determination of liability was appealable necessitated inquiry into the correct basis for jurisdiction below. 398 F.2d at 169.

359. 28 U.S.C. § 1292(a)(1) (1970).

360. See C. WRIGHT & A. MILLER, *supra* note 292, at § 1045.

361. See *Jackson Brewing Co. v. Clarke*, 303 F.2d 844, 845 (5th Cir.), *cert. denied*, 371 U.S. 891 (1962); C. WRIGHT, *supra* note 110, at § 102.

362. The rule is confusing and troublesome and most of the literature has thus been critical. See, e.g., C. WRIGHT, *supra* note 110, § 102, at 461.

sought are "legal" or "equitable" in nature.³⁶³ Nevertheless, partly due to the above-described rule, with its underlying concept of a law/equity dichotomy, admiralty courts have encountered difficulties even after the 1966 unification. The most obvious anomaly is created by the very notion of separatism that characterizes admiralty: The appealability of interlocutory stays or refusals to stay in maritime cases depends upon whether the plaintiff designated this action as an admiralty and maritime claim under federal rule 9(h). If a rule 9(h) designation is made, the stay (usually sought so that arbitration may proceed) will not be appealable; if the designation is not made, appeal may be taken.

*Penoro v. Rederi A/B Disa*³⁶⁴ is the leading case pertaining to section 1292(a)(1) appeals in maritime matters. An injured long-shoreman had filed suit against a shipowner, and the shipowner had impleaded the stevedoring contractor. The stevedore, contending that it had the dual status of stevedore and charterer and that a charter party provided for arbitration of the dispute, moved for a stay of the third-party action pending arbitration. The trial court granted the stay, and the appellate court held the order nonappealable because "[o]rders by courts in admiralty granting or denying stays of proceedings before them have been spared the confusion . . . . Such orders have consistently been held not to be injunctions within the meaning of § 1292(a)(1) even if based on equitable defenses or counterclaims."³⁶⁵ The third-party plaintiff contended that the 1966 merger of the admiralty and civil rules forced admiralty courts to confront the "fictitious injunction" confusion of the civil jurisprudence, further theorizing that post-unification admiralty actions are to be treated as actions at law and that an order staying an action at law, pending arbitration, is appealable. The appellate court rejected this argument. Noting that the matter of interlocutory appeals under section 1292(a)(1) is not explicitly considered in rule 9(h), the court concluded that the 1966 draftsmen had demonstrated no intention to alter 1292(a)(1) in any way. Indeed, said the court, the continued existence of the "fictitious injunction" question in the post-1938 jurisprudence shows that "separate 'sides' " of the district court may survive unification for purposes of 1292(a)(1). "Since a court in admiralty had the power to stay its own proceedings without

363. See *Penoro v. Rederi A/B Disa*, 376 F.2d 125 (2d Cir.), *cert. denied*, 389 U.S. 852 (1967). See also C. WRIGHT, *supra* note 110, § 102, at 461 n.29.

364. 376 F.2d 125 (2d Cir.), *cert. denied*, 389 U.S. 852 (1967) (Black and Douglas, JJ., dissenting from the denial of certiorari).

365. 376 F.2d at 129.

the aid of equity prior to unification, there is no reason to believe that it somehow lost that power as a result of unification."³⁶⁶

Although the Second Circuit in *Penoro* evidently approved the difference between interlocutory appeal rules for admiralty and civil actions, the Fourth Circuit has deplored the distinction, while still feeling compelled to maintain it. In *J.M. Huber & Co. v. M/V Plym*,³⁶⁷ a shipper sued a carrier in admiralty for cargo damage, and the carrier moved to stay proceedings pending arbitration. The trial court's denial of the motion was held not appealable, in line with the court's interpretation that "if the underlying action is in equity or admiralty the fictional 'injunction' is lacking . . . ."³⁶⁸ However, the court of appeals expressed its impatience with the restriction, stating: "Were the decisional slate clean we would have no hesitancy in discarding this fictional distinction and upholding appealability . . . ."³⁶⁹

The consistent application of the rule that stay orders of admiralty proceedings are not appealable should not be taken to indicate that 1292(a)(1) problems cannot continue to arise in maritime litigation. In *La Capria v. Compagnie Maritime Belge*,³⁷⁰ the defendant argued that a district judge's order, permitting a longshoreman-plaintiff to add a rule 9(h) designation to his personal injury suit commenced on the basis of diversity, had, in effect, allowed a "transfer" to admiralty and therefore was appealable under 1292(a)(1) as an order enjoining further proceedings on the law side of court. Writing for the Second Circuit, Judge Friendly deemed this argument nonsense: "[I]t is the plaintiff who no longer wishes to proceed at law; to envision the chancellor contemplating an injunction to require a plaintiff to keep on proceeding at law despite the plaintiff's desire to shift to admiralty in order to avoid jurisdictional doubts would carry the 'element of

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366. 376 F.2d at 130-31. As well it might, the *Penoro* decision has served as ammunition in arguments that the merger could hardly be expected to work a full unification of the federal district courts. Writing in 1967, one commentator predicted: "I believe traditional admiralty procedure will continue to wait, in the wings, like an old actor awaiting his cue. Some indication of admiralty's persistence may be gathered from . . . *Penoro* . . . . Perhaps it is appropriate to postulate the potential survivability of the 'separate sides.'" Cohn, *supra* note 13, at 231.

When the Supreme Court denied certiorari in *Penoro*, Justices Black and Douglas expressed dismay: "An order should be appealable within the meaning of this statute [§ 1292(a)(1)] if in substantial effect it is equivalent to an injunction . . . . I think the time has come to abandon this outmoded fiction about 'sides' of the court . . . . Since the stay entered in this case was an injunction in every practical sense I would hold that it was an injunction in the statutory sense and allow the present appeal." 389 U.S. at 853-54.

367. 468 F.2d 166 (4th Cir. 1972).

368. 468 F.2d at 167.

369. 468 F.2d at 167.

370. 373 F.2d 579 (2d Cir. 1967).

fiction' . . . beyond permissible bounds."³⁷¹ Judge Friendly added a muted plea for reason in treatment of the admiralty/civil dichotomy: "Prior criticism of the conceptualism of insistence on the two-sidedness of a single court . . . gains added force from the recent amendments of the Federal Rules of Civil Procedure to include admiralty cases."³⁷²

IV. A COUNTER-SEPARATIST PROPOSAL

We no longer need separate admiralty courts. The sole responsible protest to the 1966 unification arose from the fear that the end of procedural separation would inevitably lead to the destruction of the conception of maritime law as a distinct body of substantive principles.³⁷³ But that argument rests on the dubious premise that a federal district judge becomes sensitive to the niceties of maritime law and the exigencies of marine commerce only through the magic of symbolism. Many members of the federal judiciary are expert in maritime matters, partly as a result of the concentration of maritime cases in nineteen United States district courts.³⁷⁴ However, as many of the cases discussed above show, the expertise is spotty. In most instances, procedural separateness seems to obfuscate rather than to promote understanding of uniquely admiralty considerations.³⁷⁵ The

371. 373 F.2d at 581.

372. 373 F.2d at 581.

373. Our mythical separate court of admiralty, which did not [prior to the 1966 merger] admit the joinder of non-maritime causes of action and did not purport to offer equitable remedies, was well situated to apply the law of the sea. It looked to its own clearly marked precedents to identify and to develop that law. It looked also to foreign law for information and authority on occasion. The successor to the court of admiralty, the United States District Court having jurisdiction impartially of actions in admiralty, in equity, and at law, and bound to accept complaints joining maritime and non-maritime claims, may find it increasingly difficult to administer one rule of contract law applying to a charter-party and another rule applying to a car rental agreement, or one rule of tort law applying to a ship collision and another rule applying to a collision between two automobiles, or one rule applying to a hull insurance policy and another rule applying to a standard fire policy.

Crutcher, *supra* note 13, at 376-77. See also Wiswall, *supra* note 12, at 46-47.

374. "Out of the 6020 admiralty cases commenced or pending as of June 30, 1960, 5655 were in these 19 districts." 1960 DIR. ADMIN. OFFICE, U.S. COURTS ANN. REP., Table C-3a, at 240-47. 1960 was the last year separate admiralty statistics were kept. See Comment, 1973 WIS. L. REV. 594, *supra* note 108, at 605 n.57. See also Fiddler, *supra* note 13, at 16-17.

375. In the words of the Advisory Committee, proposing the 1966 merger:

To the extent that admiralty procedure differs from civil procedure, it is a mystery to most trial and appellate judges, and to the nonspecialist lawyer who finds himself—sometimes to his surprise—involved in a case cognizable only on the admiralty "side" of the court. "Admiralty practice," said Mr. Justice Jackson, "is a unique system of substantive law and procedure with which members of this Court are singularly deficient in experience." *Black Diamond S.S. Corp. v. Stewart & Sons*, 336 U.S. 386, 403, 69 S. Ct. 622, 93 L. Ed. 754 (1949) (dissenting opinion). The comment applies generally to all levels of the judiciary. The distinctiveness of substantive maritime law is a matter beyond the com-

mystery engendered by separatism makes the nonspecialist judge and attorney even more likely to err.³⁷⁶ Since the unification, the silver oar has come to be not so much an awesome symbol of a genuinely specialist tribunal as an unfortunate and anachronistic signal of the "usual tendency of a particularistic, restrictive approach to procedure to drive out the more liberal view—the Gresham's law of procedure whereby the technical gloss supersedes the . . . liberalizing principle."³⁷⁷

The 1966 merger of the admiralty and civil rules was accomplished with the belief that "simplification through unification has been the path of procedural progress since the codes of the mid-nineteenth century."³⁷⁸ The task begun with that merger should be completed. A useful starting point would be legislation modelled after the proposed Federal Court Jurisdiction Act.³⁷⁹ The admiralty provisions in the proposal should be deleted as separate sections and rewritten into the federal question jurisdiction proposals as follows:³⁸⁰

§ 1311 *Federal question jurisdiction; original jurisdiction; exclusive jurisdiction*

(a) Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction, without regard to amount in controversy,³⁸¹ of all civil actions, including those for declaratory or equitable³⁸² relief, in which the initial pleading sets forth a substantial claim:

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petence of this Committee, even if we were disposed to concern ourselves with it; indeed, it is probably too much to hope that we can ever be spared the necessity of more or less recondite bodies of substantive law, whether they relate to maritime affairs, or patents, or copyrights, or combinations in restraint of trade. *It is multiplying the burden of the bench and bar, however, to require mastery of unnecessarily distinctive systems of practice and procedure.*

ADVISORY COMMITTEE ON ADMIRALTY RULES, AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS PROPOSED BY THE ADVISORY COMMITTEE ON ADMIRALTY RULES, 34 F.R.D. 331, 333-34 (1964) (emphasis added).

376. See *Romero v. Bethlehem Steel Corp.*, 515 F.2d 1249 (5th Cir. 1975), discussed in text at notes 8-11 *supra*.

377. Cohn, *supra* note 13, at 232, quoting Clark, *State Law in Federal Courts*, 55 YALE L.J. 267 (1946).

378. Currie, *supra* note 13, at 14.

379. See notes 33-43 *supra* and accompanying text. In the following discussion, the proposed Federal Court Jurisdiction Act of 1973 is taken as the beginning model. See S. 1876, 93d Cong., 1st Sess. (1973).

380. The following is evidently quite similar to a suggestion made by Leavenworth Colby, Admiralty Advisor to the American Law Institute, during the Institute's deliberations on the 1969 jurisdictional recommendations. See note 45 *supra*.

381. The Federal Court Jurisdiction Act followed the recommendation of the American Law Institute in removing the amount in controversy requirement for all federal questions cases. While the proposal should be adopted, it is obviously not essential to integrating admiralty cases into the general federal question jurisdiction, since no monetary jurisdictional requirement has ever existed in admiralty.

382. Adding the words "or equitable" to the proposal is probably unnecessary, but

- (1) arising under the Constitution, laws, or treaties of the United States;
  - (2) arising out of any admiralty or maritime matter, transaction, or occurrence.³⁸³
- (b) The jurisdiction of the district courts shall be exclusive of the courts of the States in actions and proceedings under Title 11 except

it seems desirable to provide explicitly against any continuation of the doubt about the equitable arsenal of a court exercising maritime jurisdiction. See notes 104-07 *supra* and accompanying text.

383. New subsection (2) simply lifts the proposal's section 1311 into the basic federal question grant. See S. 1876, 93d Cong., 1st Sess., §§ 1311, 1316 (1973). The proposal suggested here does not include the fairly extensive language that appeared in the Federal Court Jurisdiction Act attempting to clarify some of the contours of the body of cases that involve "admiralty or maritime matter[s], transaction[s], or occurrence[s]." S. 1876, 93d Cong., 1st Sess., § 1316 (1973). If that kind of clarification is still deemed desirable, all of the language of the proposed section 1316 in the Senate bill could be written into section 1311. While the decision whether to include all of that language is not central to the thesis here, it seems useful to point out reasons for believing it unnecessary. The Supreme Court has been quite active in the maritime sphere since the ALI's recommendations were formulated. Each of the decisions rendered during the intervening period has clarified an aspect of the maritime law, and most of them operate toward clarification of the boundaries of the admiralty jurisdiction. Significantly, with the exception of *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), each important step taken since 1969 has been restrictive. We have been taught since 1969 that (1) Fixed offshore drilling platforms are islands, not watercraft, and are to be treated almost as though they were real land, *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352 (1969). See also *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); (2) The pre-1972 Longshoremen's and Harbor Workers' Compensation Act meant what it said when it limited its coverage to "navigable waters," and injuries on a pier are outside that coverage, *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969). This outcome has been changed by the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, Act of October 27, 1972, P.L. 92-576, § 19, 86 Stat. 1263, amending 33 U.S.C. §§ 901-950 (1970), approved October 27, 1972, effective November 27, 1972; (3) Longshoremen (and probably seamen) do not recover on the basis of breach of the warranty of seaworthiness when their injury stems from an instantaneous act of negligence; unseaworthiness depends on the existence of a condition over some period of time, *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494 (1971); (4) A longshoreman hurt on a pier by pier-based equipment is a terrestrial tort victim, unable to enter the portals of the admiralty jurisdiction and the maritime law, *Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1971). This outcome has perhaps been changed by the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, *supra*; (5) The fact that an injury or accident occurred on navigable water by itself is not enough to invoke the admiralty jurisdiction, when aircraft are involved, and probably more generally. See *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972).

It seems fairly obvious that a jurisprudential trend toward clarification and restriction of the admiralty jurisdiction is under way; that is the sense in which the lower courts have been applying the Supreme Court decisions. In the *Executive Jet* case, the Court said admiralty cognizance of aircraft crashes depended upon some "significant relationship to traditional maritime activity." 409 U.S. at 271. The tenor of the opinion suggested that the "significant maritime relationship" requirement probably should obtain respecting all questions of admiralty tort jurisdiction, and that is the way the lower courts have been reading *Executive Jet*. See *St. Hilaire Moye v. Henderson*, 496 F.2d 973 (8th Cir.), *cert. denied*, 419 U.S. 884 (1974); *In re Motor Ship Pac. Carrier*, 489 F.2d 152 (5th Cir.), *cert. denied*, 417 U.S. 931 (1974); *Onley v. South Carolina Elec. & Gas Co.*, 488 F.2d 758 (4th Cir. 1973); *Oppen v. Aetna Ins. Co.*, 485 F.2d 252 (9th Cir. 1973); *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974); *Crosson v. Vance*, 484 F.2d 840 (4th Cir. 1973).

as otherwise there provided; in actions under the patent or copyright law of the United States; in actions under the antitrust laws authorized by section 15 or 26 of title 15; in actions on bonds of contractors for public buildings or works authorized by section 270b of title 40; and in actions brought under section 185 of title 46 for limitation of liability, admiralty and maritime actions brought against the United States and its agencies, and in all admiralty and maritime actions that proceed in rem or by maritime attachment.³⁸⁴ In all other actions within subsection (a) of this section, jurisdiction of the district courts shall be concurrent with the courts of the States.

This suggestion accomplishes my basic aim, integration of the admiralty into the federal question jurisdiction. Other admiralty proposals in the federal court jurisdiction acts dealt with removal,³⁸⁵ process and venue,³⁸⁶ and jury trial.³⁸⁷ The removal recommendation mirrored the prevailing view of existing law in one respect, by disallowing removal of in personam actions unless there is a federal jurisdictional basis other than admiralty,³⁸⁸ and deviated from it in another, by providing for removal of exclusively admiralty actions mistakenly brought in state court. Under my proposed integration of the admiralty jurisdictional grant into the federal question section, no separate provision for admiralty removal would be necessary. The proposed change, removal of exclusively admiralty cases, would follow from the general federal question removal section;³⁸⁹ moreover, once admiralty is made a subcategory of federal question jurisdiction, there will no longer be a plausible argument for prohibiting removal of concurrent jurisdiction admiralty cases. With respect to venue and process, the peculiarly admiralty proposals presented in section 1318 of the federal court jurisdiction acts could, in a purely mechanical fashion, be added as separate subsections to the provisions of the general federal question venue and process section.³⁹⁰

The effect of the proposed blending of the admiralty into the federal question jurisdiction upon the availability of jury trial in maritime cases should not be left to judicial inference. An appropriate resolution of the jury trial matter was contained in the proposed Federal Court Jurisdiction Act, which provided that in any case of

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384. What is proposed here is that the Senate bill's provisions on admiralty jurisdiction, S. 1876, 93d Cong., 1st Sess., § 1316(b) (1973), be added, verbatim, to the exclusive jurisdiction portion of the federal question proposal, *id.* § 1311.

385. S. 1876, 93d Cong., 1st Sess. § 1317 (1973).

386. *Id.* § 1318.

387. *Id.* § 1319.

388. See ALI STUDY, *supra* note 23, at 239-45. But see *Monarch Indus. Corp. v. American Motorists Ins. Co.*, 276 F. Supp. 972 (S.D.N.Y. 1967).

389. See S. 1876, 93d Cong., 1st Sess., § 1312 (1973).

390. See *id.* §§ 1314, 1318.

admiralty or maritime jurisdiction, "except for actions for limitation of liability under section 185 of title 46, United States Code, and actions against the United States and its agencies, any claim in personam limited to money damages for personal injuries or death shall be tried by a jury if any party demands it."³⁹¹ The question may arise of how best to integrate this proposal into the Judicial Code. A convenient place for such an insertion may be found in 28 U.S.C. § 1873,³⁹² which presently provides a limited right to jury trial for maritime claims relating to matters occurring on the Great Lakes. Although usually viewed as an anachronism reminiscent of a peculiar period in the nineteenth-century development of American admiralty jurisdiction,³⁹³ the statute could easily accommodate a new subsection that would incorporate the present jury trial recommendation.³⁹⁴

This proposal to integrate the admiralty with the federal question jurisdiction would necessitate modest amendment of the Federal Rules of Civil Procedure. Admiralty cases under the proposed section 1311(a)(2)³⁹⁵ would continue to be "admiralty and maritime claims"³⁹⁶ within the meaning of rule 9(h). A plaintiff with admiralty as his only federal jurisdictional basis would continue to be a maritime plaintiff under that rule; a plaintiff with an additional basis for federal jurisdiction would still be permitted the choice of proceeding on the basis of maritime jurisdiction. In either case, the proce-

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391. *Id.* § 1319.

392. The statute presently reads:

In any case of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons or upward, enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between places in different states upon the lakes and navigable waters connecting said lakes, the trial of all issues of fact shall be by jury if either party demands it.

28 U.S.C. § 1873 (1970). I am indebted to Leavenworth Colby, Admiralty Adviser to the American Law Institute, for the idea of using this statute as a vehicle for the new jury trial provision. See note 45 *supra*.

393. See N. HEALY & B. CURRIE, *CASES AND MATERIALS ON ADMIRALTY* 27-30 (1965).

394. The statute would then read:

(a) In any case of admiralty or maritime jurisdiction, except for actions for limitation of liability under section 185 of title 46, United States Code, and actions against the United States and its agencies, any claim in personam limited to money damages for personal injuries or death shall be tried by a jury if any party demands it. (b) In any case of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons or upward, enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between places in different states upon the lakes and navigable waters connecting said lakes, the trial of all issues of fact shall be by jury if either party demands it.

It may be that the Great Lakes jury provision ought to be changed or abolished, but this is not the place to argue that matter.

395. See text at note 383 *supra*.

396. FED. R. CIV. P. 9(h).

dural consequences specified in rule 9(h) would survive. However, if all the present recommendations were adopted, the second sentence of rule 82 and the reference thereto in rule 9(h) would be deleted.³⁹⁷ Further, while not essential, the following revision of rule 38(e)³⁹⁸ would clarify matters:

(e) *Admiralty and Maritime Claims*

An admiralty or maritime claim within the meaning of Rule 9(h) shall be governed by the provisions of 28 U.S.C. section 1873. In respects not covered by that statute, these rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).

After these changes in the rules, several special procedures for admiralty and maritime claims under rule 9(h) will still exist: third-party practice under rule 14(c);³⁹⁹ interlocutory appeals under 28 U.S.C. § 1292(a)(3);⁴⁰⁰ trial by judge alone, except as provided in the amended 28 U.S.C. § 1873.⁴⁰¹

The proposed integration of the admiralty and the federal question jurisdictions would not affect the source of substantive law in maritime cases. As stressed above,⁴⁰² that law is presumptively federal. The task of determining when and to what extent state principles should apply is a preeminently judicial one, and is "among the most difficult and subtle that . . . courts are called upon to make."⁴⁰³ These necessary choice-of-law determinations under my proposal would be neither easier nor more difficult than at present, although I believe some of the mistakes discussed earlier in this article⁴⁰⁴ would be somewhat more difficult to commit. The inclusion of the words "or maritime" in the suggested incorporation of

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397. That sentence reads: "An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C. §§ 1391-93." FED. R. CIV. P. 82. Under the recommendation to write the proposals of the federal court jurisdiction acts on admiralty venue and process into the general federal question venue and process sections, the caveat would no longer be necessary. See text at note 390 *supra*.

398. Rule 38(e) now states: "These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h)." FED. R. CIV. P. 38(e). Since the present recommendation would entail amending 28 U.S.C. § 1873 to make specific provision for jury trial on some admiralty and maritime cases, see notes 391-94 *supra* and accompanying text, rule 38(e)'s disclaimer of any effect of the rules themselves on jury trial could stand. See note 261 *supra*.

399. See notes 141-46 *supra* and accompanying text.

400. See notes 353-58 *supra* and accompanying text.

401. See notes 390-94, 398 *supra* and accompanying text.

402. See notes 316-35 *supra* and accompanying text.

403. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 375 (1959).

404. See notes 316-35 *supra* and accompanying text.

admiralty into the federal question jurisdiction⁴⁰⁵ is intended to make clear that this delicate choice-of-law balance would be unaffected.

The proposal to make admiralty and maritime cases a subcategory of federal question cases closely approaches the result rejected by the Supreme Court in *Romero v. International Terminal Operating Co.*⁴⁰⁶ In that case, the Supreme Court was asked to conclude that the terms of the present federal question statute⁴⁰⁷ were broad enough to accommodate cases arising under the general maritime law.⁴⁰⁸ A five-member majority refused to do so, reasoning that the words of the present federal question grant trace to the Judiciary Act of 1875, which directly tracks the language of Article III, section 2, clause 1, of the Constitution; similarly, the co-equal admiralty grant traces back to the language of Article III. There was thus every indication that Congress, like the Framers, meant to distinguish cases of admiralty and maritime jurisdiction from those arising under federal laws.

Nothing in the *Romero* opinion even remotely suggests that it is beyond the power of Congress to integrate the federal question and admiralty jurisdictions. Justice Frankfurter's majority opinion does stress that Article III of the Constitution plainly erects federal question cases as one category of judicial power, and admiralty and maritime cases as another. He was impressed with the fact that "in dealing with a subject as technical as the jurisdiction of the courts, the Framers, predominately lawyers, used precise, differentiating, and not redundant language."⁴⁰⁹ But this distinction in the Constitution militates only against interpreting a statutory scheme based on the words of the Constitution as somehow blurring the distinction; it does not erect a constitutional bar to an alternative statutory rendering. Justice Frankfurter explicitly addressed this issue: "It is a statute,

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405. See note 383 *supra* and accompanying text.

406. 358 U.S. 354 (1959).

407. 28 U.S.C. § 1331(a) (1970): "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

408. The Supreme Court was being urged to hold that cases arising under the general maritime law also arise under federal law in the sense necessary to sustain federal question jurisdiction. This proposition was put forth as an answer to the problem of trying the typical three-pronged seaman's personal injury action. The Jones Act gives such a plaintiff access to the "law side" of the federal court and to a jury; naturally, there was pressure also to take the maintenance and cure and unseaworthiness claims that typically accompany a Jones Act claim to the jury. Plaintiffs in *Romero* urged that the maintenance and cure and unseaworthiness claims arose under federal law, so that all three claims could be tried to the jury. The Court rejected that argument, but did hold that the two general maritime law claims could be heard in the federal district court, law side, as pendent to the Jones Act claim. See notes 115, 231-39 *supra* and accompanying text.

409. 358 U.S. at 364.

not a Constitution, we are expounding. Of course the many limitations which have been placed on jurisdiction under section 1331 are not limitations on the constitutional power of Congress to confer jurisdiction in the federal courts."⁴¹⁰

Nor does *Romero* offer any argument against the wisdom of integrating the jurisdictional grants in the wake of the 1966 merger. Indeed, Justice Frankfurter indicated that the Court could have read the *present* federal question grant to include maritime cases if sound reasons for policy had dictated such a reading: "Of course if compelling reasons can be found for redefining the statute, if an ancient error cries out for rectification, we should not be deterred from applying new illuminations to the interpretation of past enactments."⁴¹¹ The failure of the *Romero* majority in 1959 to find reasons sufficient to support what it considered a strained interpretation of section 1331 hardly constitutes an argument against present legislative action to complete the unification project begun ten years ago.⁴¹²

The motivation for this article is a self-described generalist bias against unnecessary separatism, esoterism, and specialization. It seems obvious that few of the effects of civil/admiralty conceptualism detailed in section III of this paper should have survived the 1966 merger of the admiralty with the civil rules. Yet as Professor Brainerd Currie pointed out in his analysis of the *Romero* case, there is something "seductive [about the] influence of thinking in dichotomous terms of the admiralty and civil jurisdictions."⁴¹³ Six years later, writing about the imminent merger of the civil and admiralty rules, Currie was forgivably exultant: "One may understand and respect the preference of the admiralty bar for a separate set of rules; yet I must say that, given the demonstration of the extent to which uniformity is feasible, unification seems compelled by the logic of history."⁴¹⁴ The exultation was premature. As I sought to demon-

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410. 358 U.S. at 379 & n.51.

411. 358 U.S. at 380.

412. The commentary inspired by *Romero* was generally favorable to the resolution reached by the majority. See Currie, *supra* note 235; Kurland, *supra* note 235. But nothing therein is pertinent as an argument against the proposal to combine the admiralty and the federal question jurisdictions by amendment to the Judicial Code. Indeed, the best-known commentary, Currie, *supra* note 235, is at bottom a diatribe against precisely the kind of separatism being decried here. In Professor Currie's view, the problem that gave rise to the issue in *Romero* was itself a product of artificial separatist thinking about the nature of the admiralty jurisdiction.

413. Currie, *supra* note 235, at 14.

414. Currie, *supra* note 13, at 13. Professor Currie's firm convictions against separatism have been well known and sometimes deplored. One commentator stated: [T]he protective feature of the General Rules—the forced awareness that Admiralty was "different"—was ignored by many who propounded unification, and

strate in this article, 'civil/admiralty separatism is still very much with us. It is time to take aim once again at the goal of unification, so that it may yet be possible accurately to state: "We now have one form of civil action. Libels, libelants, respondents, exceptions, petitions and monitions have met the fate of the Dodo bird, and maybe even proctors are going the way of the duck billed platypus."⁴¹⁵

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the cloaking of the substance of Admiralty law in quaint antique terminologies was scoffed at by many others as a pseudo-mystery by which the proctors, as the only initiates, snobbishly contrived to set themselves above and apart from the Bench and their brothers at the Bar. It cannot tarnish the valuable contributions to the literature of Admiralty by the late Professor Brainerd Currie . . . to cite his single-minded zeal for reform and his widely-held view that while Admiralty had become a relatively unimportant area of the law, and the unification about to take place was not an event comparable with the 1938 merger of Law and Equity, it was still a necessary duty to ring out the old, ring in the new, and welcome Admiralty to the dynamic twentieth century Law and Equity Club on an equal footing.

Wiswall, *supra* note 12, at 47.

415. Bradley, *supra* note 13, at 260. Genuine specialists in maritime law will not fear the unfrocking. As pointed out shortly after unification: "We do not think that specialization in admiralty practice will be affected by the unification of the rules. . . . [S]pecialization is not primarily a matter of procedure, but a matter of substantive law and know-how in the field of specialization." Tweedt, *supra* note 13, at 237.

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