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WATER LOG

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ADMIRALTY LAW: AN OVERVIEW

—by James Robertson*

I.

There has always been an air of mystery and romance—and even danger—about the seas. No less so of the maritime disputes litigated in courts of admiralty. Laymen and lawyers alike have perceived the maritime law as foreign, strange; the courts in which it is enforced as alien, full of pitfalls for the landlubber.

There is a kernel of truth in this perception—but only a kernel. The maritime law in most respects is just like any other body of law. It emanates from a sovereign—the United States—and is enforced in courts practically all lawyers have some familiarity with. Some of its rules have been enacted by a legislature—the Congress. Most have evolved through a common law type process.

Upon becoming familiar with the general parameters of the admiralty and maritime law, one frequently concludes that, when compared to "land" law, maritime law is of a somewhat higher quality—measured by notions of reason and justice. Its courts and procedures have traditionally been believed by objective observers of both to be superior to their common law counterparts. Maritime law and admiralty jurisdiction are not to be feared. They are to be learned, and experienced, and ultimately respected as complementary vessels of justice.

There are many areas of substantive maritime law—most having common law counterparts. There is the law of maritime torts—seamen's personal injuries and death claims, collision cases, and other actions for negligence. There are maritime contract claims—claims arising out of maritime insurance contracts, contracts for repairs of vessels, charter parties, contracts for the carriage of cargo, bills of lading, and many others. Then there are the unique areas of the admiralty law—salvage, general average, and, strangest of all, maritime liens. All of this can most assuredly be mastered by the diligent and competent lawyer. It can be understood by the layman. Any specific problem arising under the maritime law may be accurately analyzed, and the appropriate remedy invoked, if one will take the time to understand certain fundamental premises about the maritime law.

Our purpose here is to provide this general background and context. An in-depth understanding of what we discuss here, necessarily sketchily, will, we believe, give the reader a base from which to attack most any admiralty problem. On the other hand, the uninitiated who dives into a maritime matter without an understanding of the history and development of the general maritime law does indeed risk running aground on well marked, but simply misunderstood, shoals.

II.

Rights and remedies arising under the general maritime law in this country have traditionally been enforced in the federal courts. Article III of the Constitution provides that the federal judicial power extends to all cases of admiralty and maritime jurisdiction. The Congress has vested in the United States district courts exclusive original subject matter jurisdiction over all admiralty and maritime cases. This jurisdiction, however, is a rather odd kind of exclusive jurisdiction, for the savings to suitors clause then goes on to provide that any litigant seeking "a common law remedy" in an otherwise maritime case may bring his action in state court.

Generally speaking, what all of this means is, in the case of an admiralty action in which the plaintiff seeks an *in rem* remedy, *i.e.*, seizure of the defendant's vessel, the federal courts have exclusive subject matter jurisdiction. On the other hand, if the plaintiff sues an individual or corporate defendant *in personam* only, the suit may be brought in federal court or state court, at the election of the plaintiff. Over 98 per cent of all admiralty cases could be brought *in personam* only, if the plaintiff so desired.

What then is a maritime case? How do we determine whether or not a particular action lies within the admiralty and maritime jurisdiction of the courts of the United States? Though the dividing lines have never been crystal clear, they have, with certain minor exceptions, evolved in favor of a steadily expanding jurisdiction.

Generally speaking, any civil action sounding in tort which in whole or in part arises on navigable waters, wherein the parties to the case or their activities have a significant relationship to traditional maritime activities, lies within admiralty jurisdiction. As a result of a Supreme Court decision last June, practically any activity involving use of a vessel on navigable waters is likely to be held to have a significant relationship to traditional maritime activities. Though most admiralty cases will involve commercial activities, the parties do not have to be actively engaged in commerce before they may be brought within the admiralty and maritime jurisdiction.

In contract disputes, so long as the subject matter of the contract has a substantial maritime connection, the case may be brought in federal court in admiralty jurisdiction. Here we find several distinctions which might appear to the layman to be a bit arbitrary. A lawsuit arising out of a contract to build a ship is not within admiralty jurisdiction. On the other hand, a suit arising out of a contract to repair the same ship would be within admiralty subject matter jurisdiction. By the same token a contract for the sale of a ship is not within admiralty jurisdiction. However, a lawsuit arising out of a charter party, *i.e.*, a contract to lease a vessel is in admiralty jurisdiction, as is a dispute arising out of a ship mortgage or other secured transaction in which the vessel is pledged as security for a debt.

Admiralty courts and the maritime law are concerned with vessels, the cargo they move, and the people who work aboard or sail upon those vessels. But what is a vessel? As a rule, any artificial structure capable of transporting persons or cargoes upon navigable waters is considered a vessel.

What, then, are navigable waters? Traditionally, those waters have been deemed navigable which are navigable in fact, *i.e.*, any body of water which in its natural or usual condition is capable of supporting navigation and commerce. Though it was once thought that admiralty jurisdiction required interstate commercial or navigational activities, that is no longer the case. So long as the waters are capable of supporting navigation or commerce, admiralty jurisdiction may lie. (In candor, some courts occasionally forget this fact.)

III.

Historically, there have been a number of differences between proceedings in admiralty courts and proceedings in the common law courts of the state. First and foremost among these differences concerns the right to trial by jury. The Seventh Amendment to the Constitution of the United States secures to litigants the right to trial by jury in all cases at common law. Most states have similar provisions in their constitutions. Traditionally, however, admiralty courts sat without a jury. This distinction holds today. If a plaintiff brings a pure admiralty action in federal court and invokes admiralty subject matter jurisdiction, no party to the case has a right of trial by jury. On the other hand, the plaintiff is free to sue *in personam* in the state courts or, if he has diversity of citizenship, to invoke that independent ground for subject matter jurisdiction in the federal courts, and in those instances he may demand trial by jury.

A second major difference between practice in the two courts concerns the *in rem* process. At common law and in most state courts today, a plaintiff may only sue a defendant *in personam*. In such cases the plaintiff generally is unable to obtain any security to guarantee that the defendant will be able to pay the judgment until

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FEDERAL POLICY TOWARD BARRIER ISLANDS—UPDATE

As reported in an earlier issue of the *Water Log* (Vol. 1, #2, April-June 1981), the federal government's policy toward barrier islands in the past has been uncoordinated and absent any discernable direction. On one hand, development on barrier islands has been subsidized through the availability of low-cost federal flood insurance and through construction grant and loan programs. Yet, at the same time, certain islands have been protected from development through the actions of agencies such as the National Park Service and the Office of Coastal Zone Management.

However, recent actions in Washington indicate that the federal government may no longer be willing to subsidize the high risk of development in these hazardous and ecologically fragile areas. One of the first steps in this new policy was the passage of the Omnibus Budget Reconciliation Act of 1981 (OBRA). Section 341(d)(1) of OBRA amended the National Flood Insurance Act of 1968 (NFIA) to provide that no new federal flood insurance will be provided on or after October 1, 1983, for any "new construction or substantial improvements of structures located on undeveloped coastal barriers." It authorizes the Secretary of the Interior to designate areas as undeveloped coastal barriers for purposes of the Act, based on the following statutory definition propounded in the amendment.

(1) [T]he term "coastal barrier" means—

(A) a depositional geologic feature (such as bay barrier, tombolo, barrier spit, or barrier island) which—

(i) consists of unconsolidated sedimentary materials.

(ii) is subject to wave, tidal, and wind energies, and

(iii) protects landward aquatic habitats from direct wave attack; and

(B) all associated aquatic habitats including the adjacent wetlands, marshes, estuaries, inlets, and nearshore water.

This section goes on to provide that a coastal barrier will be considered undeveloped if "there are few manmade structures on the barrier or portion thereof and these structures and man's activities on the barrier do not significantly impede geomorphic and geologic processes." However, coastal barriers which are within the boundaries of federal, state, local and private protected areas held primarily for wildlife refuge, sanctuary, recreational or natural resources conservation are not considered undeveloped under the NFIA amendments. Finally, OBRA requires the Secretary of the Interior to report to Congress with recommendations (if any) relating to the term "coastal barrier."

Following this mandate of OBRA, the Department of the Interior has recently proposed to Congress that 188 areas in 16 states along the Atlantic and Gulf Coasts be designated as undeveloped coastal barriers. Of these areas, four are in Mississippi (Deer Island, Cat Island, Round Island, and Belle Fountaine Point) and four are in Alabama (Mobile Point, Dauphin Islands, Perdido Key, and Pelican Island). Unless an overriding need for change arises within the 90- day public comment period, the designations for all 188 areas will be made final in late November.

In Interior's draft environmental impact statement written to comply with the National Environmental Policy Act of 1968 (NEPA), some of the consequences of limiting federal flood insurance in this manner are discussed. First and foremost, the government wants to transfer some of the high risk of development in these hazardous areas from the taxpayer back to the private sector, as it was prior to NFIA, thereby saving several million dollars per year of federal funds that would otherwise be paid out in claims for storm damaged property. Second, with the withdrawals of federally supported low-cost flood insurance in these areas, it is likely that development activities on coastal barriers will diminish considerably. This reduction in development will lessen the pollution of the coastal waters which invariably accompanies such development, and help maintain the integrity of coastal barriers as protective storm buffers for the mainland, as havens for a variety of wildlife, and as a valuable fishery resource.

In addition to proposing the list of coastal barriers, Interior has promulgated substantive and procedural standards used in the designation of undeveloped coastal barriers, maps depicting the area, and a report of the findings and conclusions of the study upon which the proposed designations are based. In this report, Interior agreed with and utilized the statuotry definition of "coastal barrier" as provided in the amendment. However, it did recommend one change in the Act. As currently written, the law excludes certain areas that are now being held primarily for natural resources conservation. Interior feels that since these areas "logically should not need this program" (federal flood insurance), the exception should be deleted. Once final designation of the undeveloped barrier areas is complete, Interior's responsibilities under OBRA will be met. It then becomes the responsibility of the Federal Emergency Management Agency (FEMA) to promulgate regulations governing the federal flood insurance program as it relates to these undeveloped barriers.

While no specific date has been set for the promulgation of these regulations, FEMA anticipates having them ready after the first of the year. A critical part of these regulations will be the interpretation of the language "new construction or substantial improvements of structures" in the amendment. If the existing NFIA regulations are incorporated into the new one, then a "new structure" will be defined as any permanent construction beyond site preparation or excavation. Since there is no practical way that FEMA can track the date that construction starts, this definition has been applied to the date of the issuance of the building permit, so long as the structure is built within 180 days of issuance of the permit. "Substantial improvements" would be defined as repairs or improvements, the cost of which equals or exceeds 50% of the market value of the structure before the improvement or repair is started. This would probably mean that a federal flood insurance policy that is in effect prior to the October 1983 deadline will not be renewed if over 50% of the structure is destroyed by a storm occurring after October 1983.

In addition to OBRA, there are two major bills currently pending in Congress that would further limit federal subsidies for barrier island development. S. 1018 (the Coastal Barrier Resources Act), which was approved by the Senate Environment and Public Works Committee on May 13, would prohibit the federal government from funding roads, bridges, sewers, economic development, home construction, loans, and shoreline erosion and stabilization projects on undeveloped barrier islands. Expenditures for coastal water-dependent energy activities, air and water navigation aids, fish and wildlife protection and enhancement, national security activities, disaster relief, and non-structural stabilization measures are excepted from the bill. It is likely that the bill will incorporate most of the areas that Interior designates as undeveloped barriers under OBRA. A floor vote on S. 1018 is expected in September. It is expected that the House version of the Coastal Barrier Resources Act (H.R. 3252) will be reported out of the House Merchant Marine & Fisheries Committee in late September.

It is not clear at this point whether passage of a Coastal Barrier Resources Act will encompass the federal flood insurance prohibition under OBRA. However, in approving S. 1018, the Senate Committee accepted an amendment by Sen. Chafee, sponsor of the measure, restating that it would not affect the federal flood insurance prohibition on barrier islands scheduled to go into effect in October 1983.

Casey Jarman & Rich Littleton

Note: Since going to press, S1018 and HR 3252 have been passed by U.S. Senate and House, respectively.

RECENT LEGISLATION

The 1982 session of the Mississippi Legislature passed several bills which are important to coastal residents:

*MISS. CODE ANN. §42-27-51 was amended to permit the Mississippi Commission on Wildlife Conservation to issue an after-the-fact permit for regulated work conducted in coastal wetlands without first obtaining a current and valid permit. (For a more detailed discussion of this amendment, see *Water Log*, Vol. 2, No. 2, pg. 1 [Apr.-June, 1982].)

*A position of environmental permit coordinator within the Mississippi Department of Economic Development was created to coordinate and implement the "one-stop permitting" requirements of §§25-45-1 through 25-45-11.

*MISS. CODE ANN. §§49-15-3, 49-15-15, 49-15-29, and 49-15-42 were amended as follows: (1) Subsection (h), added to §49-15-3, defines "illegal oysters" as all untagged shell stock, shell oysters obtained from uncertified shops or dealers or unlicensed catchers, oysters obtained from waters not declared safe and sanitary by the Board of Health, except for those caught by the Commission for re-laying pursuant to §49-15-27 and shucked oysters obtained from uncertified shops or repackers; (2) prohibits the sale or possession of illegal oysters in Mississippi; (3) authorizes the Commission on Wildlife Conservation to establish check points for the inspection of oysters; (4) establishes license fees for out-of-state vessels; (5) requires tagging of all oysters harvested in Mississippi; (6) requires a recreational permit to catch oysters for personal use; and (7) requires drivers of vehicles transporting oysters from outside the territorial limits of Mississippi to possess a bill of lading.

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IN REM ARREST OF A VESSEL: IS IT CONSTITUTIONAL?

Until recently, the *in rem* arrest in admiralty had served the shipping industry's needs for more than a century without challenge. It was and is one of the few legal remedies that enjoys international recognition. However, in this country, the *in rem* arrest of a vessel has come under increased constitutional scrutiny by the federal courts.

This action is used primarily to secure a maritime lien, much like a replevin action is used to "secure" a purchase money mortgage in shore law. The similarity, however, stops there. The process of seizing a vessel has been tailored especially to meet the needs of ocean commerce, rather than the transfer of property on land. One important distinction is that the *in rem* arrest is used only when authorized by statute or to secure liens that arise by operation of law in certain recognized situations. For example, if a ship delivers damaged cargo, has a collision at sea, or fails to pay its crew, a "maritime lien" arises automatically in favor of the aggrieved party, who may then have the vessel arrested. Since vessels are capable of leaving a country very quickly, this process developed to insure that certain maritime grievances would be adjudicated in a convenient forum.

Also, the arrest of a vessel is often the only way that a court can obtain jurisdiction over a controversy, because the parties' nationalities are often different. When a vessel is arrested, the court is said to have acquired jurisdiction over the ship itself. Normally, courts have jurisdiction over people (in personam) rather than things (in rem) but in admiralty, *in personam* jurisdiction is not always available.

It is not the right to arrest a vessel that has come under constitutional fire in recent years but the procedure that is followed. For example, if a ship delivered damaged grain to a company in New Orleans, the company could have the vessel arrested with relative ease. Under Rules C and E of the Federal Rules of Civil Procedure, the company would file a verified complaint with the clerk of the federal district court, claiming a maritime lien on the vessel, describing the ship with particularity, and asking that the ship be arrested. Then the clerk would issue a warrant authorizing a U.S. marshal to seize the vessel and detain it until its owners post a substantial bond. Typically the ship or bond is held for security until the dispute is heard in court. However, if a plaintiff can show good cause, the vessel may sometimes be sold before the merits of the action have been adjudicated fully.

Under Rule C, there is no provision for notice or a hearing prior to the seizure to insure that it is justified. A defendant, under Rule E, may request a post-seizure hearing but there is no guarantee that it will happen very quickly. Moreover the plaintiff need only give notice of the arrest by publication in the ten days following the seizure. Thus, if a shipowner lives in Liberia, he must rely on his captain or his charterers to tell him that his ship has been seized.

In its present form, the Rule C arrest is one of the most drastic remedies known to modern civil law. Since docking fees are so high and since time is of critical importance in maritime trade, the consequences of an *in rem* arrest can be devastating. In spite of this, the procedure has had a virtually unchallenged acceptance by the courts in this country until the past decade.

In 1974, this calm was disturbed by a line of cases initiated by the Supreme Court's decision in *Sniadach v. Family Finance*, 395 U.S. 337 (1969). In *Sniadach*, a state garnishment statute was challenged under the Fourteenth Amendment as failing to protect one against the deprivation of his property without due process of law. The Court found that the statute was unconstitutional because it did not provide for notice or a hearing prior to the garnishment. In its opinion, the Court indicated that the type of property involved in this case, a person's wage, deserved special consideration.

This led many to believe that *Sniadach* would be limited to its fact. But this illusion was dispelled by the subsequent case of *Fuentes v. Shevin*, 407 U.S. 67 (1972). In *Fuentes*, a 4-3 decision, the Court made it clear that notice and a hearing prior to the seizure of any kind of property by government officials were guaranteed by the Constitution. In *Fuentes*, however, the court defined one narrow situation when the general rule would not apply. To qualify as a *Fuentes* exception, a three-prong test has to be met: (1) the seizure must be "directly necessary to secure an important governmental or general public interest"; (2) there has to be a "special need for very prompt action"; and (3) the government has to keep "strict control over its monopoly of legitimate force." Since the replevin statute at issue in *Fuentes* did not qualify under the exception or the rule, it was struck down under the fourteenth amendment.

If *Fuentes* had been the last word on seizures of property, it would be difficult to argue that Rules C and E satisfy the requirements of the Constitution. However, the Court relaxed its position somewhat in the later case of *Mitchell v. W. T. Grant and Sons*, 416 U.S. 600 (1974). In *Mitchell*, the Court upheld a state sequestration statute which (1) required that seizures had to be authorized by a judicial order; (2) required an affidavit setting forth the facts giving rise to the claim and (3) provided for an immediate post-seizure hearing. In its opinion the Court recognized that due process is a flexible concept, and that in this situation, its primary objective was to protect against wrongful seizures. The opinion indicated that as long as a statute offered reasonable protection, it would be upheld.

Even after *Mitchell*, the *in rem* arrest in admiralty falls far short of the due process guarantees that apply to seizures of property on the shore. Its primary defect is that no judicial determination of the right to arrest a vessel has to be made either before or immediately after the seizure has taken place. Moreover, the arrest does not exactly qualify as a *Fuentes* exception because one could hardly argue that the government keeps "strict control over its monopoly of legitimate force." For these reasons, a number of district courts have found Rules C and E to be unconstitutional.

Other courts, including the Fifth Circuit, have not felt compelled to extend the due process guarantees of property on the shore to vessels at sea. For the most part, these courts seem particularly concerned that requiring notice or a hearing prior to an *in rem* arrest would frustrate the purposes of the action by allowing some vessels to escape the jurisdiction of American courts. The courts that have upheld Rules C & E have found generally that the differences between shore law and admiralty are substantial enough to justify different constitutional standards for maritime activities. This is the approach that was followed recently by the Fifth Circuit in *Merchant's National Bank v. Dredge General G. L. Gillespie*, 663 F.2d 1338 (5th Cir. 1981).

In *Gillespie*, the plaintiffs arrested a number of barges because their owners were behind in their payments. Since the barges were deteriorating rather quickly, the plaintiffs also filed a motion asking that the barges be sold before the hearing on the merits of their claim. The barge owners challenged the motion on a number of grounds including an allegation that Rules C and E violated the due process guarantees of the Fifth Amendment. The court rejected this claim. In its opinion the court noted that Rule E has a provision for a post-seizure hearing. It found further that local rule 21 allowed a defendant to present evidence at that hearing concerning the impropriety of the seizure. If the defendant takes advantage of this opportunity, the plaintiff must prove that he had the right to arrest the vessel or it will be released at that time. The majority found that these rules, taken in conjunction, offered sufficient protection against wrongful seizures to satisfy the Constitution.

The Court, however, still had to reconcile its opinion with the holdings in *Sniadach* and its progeny. While recognizing that maritime seizures are subject to due process constraints, the court found that the Fifth and Fourteenth Amendments are flexible enough to allow consideration of the context in which due process rights are invoked. As it observed, the evolution and enforcement of a maritime lien bears little or no resemblance to the evolution of the seizures of property on the shore. The court paid particular attention to the jurisdictional aspect of the *in rem* arrest and its unique historical purpose. Because of these differences, the court found that *Sniadach* and its progeny had no application to proceedings in admiralty. The only other case of this type that has reached the Circuit Courts since *Gillespie* is *Amstar v. MIV Alexandros T.*, 664 F.2d 904 (4th Cir. 1981). In *Amstar*, the Fourth Circuit rejected a constitutional challenge to the *in rem* arrest using a similar line of reasoning.

While these decisions might appear to insulate the *in rem* arrest from further constitutional challenges, this may not be the case. While the Supreme Court has not expressly ruled on the constitutionality of Rules C and E, it has applied the test for a *Fuentes* exception to an *in rem* arrest that was authorized by a criminal statute in *Calero Toledo v. Pearson Yacht*, 416 U.S. 663 (1974). In that case, the court upheld the arrest because the criminal statute which authorized it insured that the government kept strict control over its monopoly of legitimate force. The court also expressly distinguished this situation from one where private, as opposed to governmental, interests were at stake. Maritime liens, of course, usually benefit private parties. *Pearson Yacht* was of particular concern to Judge Tate who discussed it in his dissenting opinion in *Gillespie*.

Moreover, as the court indicated in *Fuentes*, the Constitution has never condoned distinctions between the types of property that it protects any more than it condones the unequal protection of different types of people. As one district judge has observed, due process rights do not stop at the water's edge, or at least there is a good argument that they shouldn't. For this

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FLORIDA DEPARTMENT OF STATE v. TREASURE SALVORS, INC.

50 U.S.L. W. 5056 (No. 80-1346, July 1, 1982)

In an earlier issue (Vol. I, #4, Oct.-Dec. 1981), we presented an introduction to the *Treasure Salvors* cases, the second and third of which were still being litigated at that time. *Treasure Salvors II*, an admiralty *in rem* action, concerned a federal court's attempt to arrest certain seventeenth-century artifacts held by two state officials and bring them within the jurisdiction of the court. The question argued before the U.S. Supreme Court on January 20, 1982 was whether the Eleventh Amendment immunized this property from the federal court's process. The Supreme Court's decision, affirming the District Court's holding that the Eleventh Amendment was *not* a bar to the action, was announced on July 1st.

Briefly summarized, the *Treasure Salvors* history begins with the 1971 discovery of the wreck of a seventeenth-century Spanish galleon, "Nuestra Senora de Atocha," off the coast of Florida's Marquesas Keys. The State of Florida immediately claimed ownership of the discovered ship and its treasures, pursuant to Florida Statute §267.061(1)(b)(1974). This statute gives title to the state of all treasure trove and artifacts abandoned on state-owned lands.

Treasure Salvors, Inc., leading the salvage expedition which had located the wreck, was threatened with arrest if the company continued operations on the "Atocha" without a salvage contract with the state. Consequently, the Salvors entered into a series of such contracts, whereby they were to conduct salvage operations in exchange for the Florida Division of Archives' agreement to transfer ownership of 75% of the appraised value of all material recovered from the galleon. It is important to note that the contracts themselves did not purport to transfer ownership of any property to the State of Florida, whose claim was based entirely on a provision of state law.

During the next few years, salvage operations on the "Atocha" were highly successful and its artifacts were transferred to the Florida Division of Archives according to the contract terms. Meanwhile, *United States v. Flordia* (420 U.S. 531)—an action unrelated to the present case—determined that as against Florida, the United States was the rightful owner of the lands in the area of the wrecked ship. Anticipating that this ruling would void Flordia's claim to the "Atocah", Treasure Salvors filed an admiralty *in rem* action in the Federal District Court for the Southern District of Florida, naming the galleon (not the State of Florida) as defendant. This suit, *Treasure Salvors I*, was for declaration of title to the galleon and its artifacts, most of which were duly served with process and brought into the custody of the court. The antiquities which had been delivered to the Archives in Tallahassee (the Northern District of Florida), however, were not arrested at this time.

The United States intervened in *Treasure Salvors I* to defend its title to the "Atocha", but both the District Court and the Court of Appeals rejected the United States' claim to ownership. The court entered judgment in favor of Treasure Salvors, holding that "possession and title are rightfully conferred upon the finder of the res derelictae" as against all the world.

Subsequently, Treasure Salvors filed a motion in the District Court for an order commanding the U.S. Marshal to arrest and take custody of the artifacts which were still held by the Division of Archives in the Northern District, to bring them within the court's jurisdiction. The arrest warrant, which forms the basis of the *Treasure Salvors II* controversy, was addressed to the two state officials of the Division of Archives. The State of Florida, however, stepped in to file a motion to quash the warrant, arguing that since it was not a party to *Treasure Salvors I* the court did not have jurisdiction to determine its own claim to the portions of the "Atocha" which lay beyond the territorial jurisdiction of the court. The District Court denied this motion, but the Court of Appeals stayed execution of the warrant. The District Court then issued an order to show cause why the State should not deliver the artifacts into the Marshal's custody.

The State's argument (and the main issue of *Treasure Salvors II*) was that the Eleventh Amendment barred the exercise of the District Court's jurisdiction. The District Court held, however, that the State had waived Eleventh

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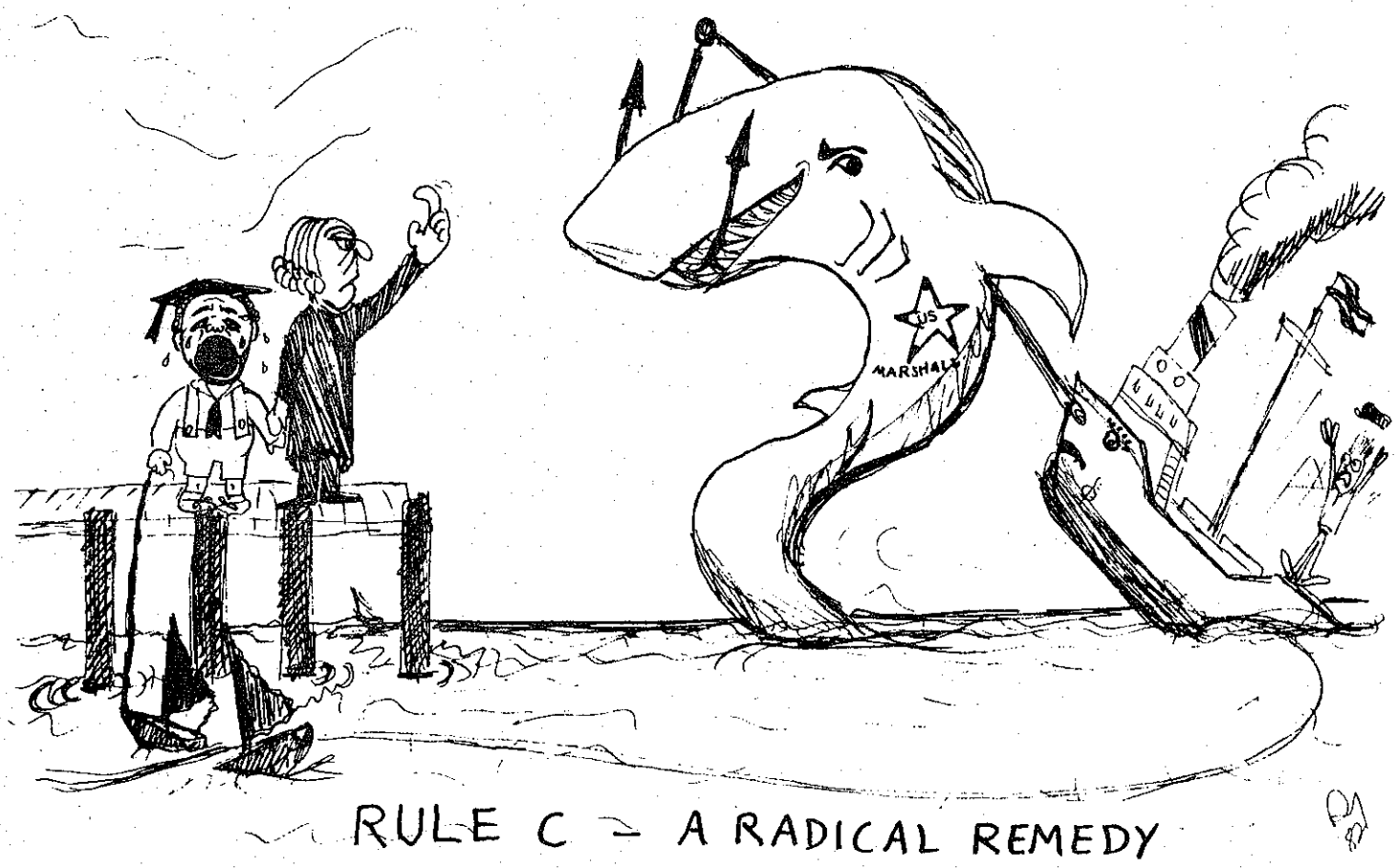

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Amendment immunity as to any claim to the property. On the merits of the case, the court also rejected the State's claim to the property based on the salvage contracts. This judgment was affirmed by the Court of Appeals.

On July 1, 1982, the U.S. Supreme Court reversed to the extent that the District Court had adjudicated the State's rights to the antiquities. On the Eleventh Amendment issue, though, Justice Stevens' majority opinion reduced the problem to an analysis of three specific questions: (a) Was the action against officials of the state, instead of the State of Florida itself?; (b) Did the challenged withholding of the artifacts by state officials amount to an unconstitutional action, or merely a tortious interference with property rights?; and (c) Was the relief sought by Treasure Salvors permissible prospective relief, or would it require payment of funds from the State Treasury?

The Eleventh Amendment bars a suit directly against the State or a State agency, but does not prevent an action against a state official. Such an action must be based on the theory that the official acted beyond the scope of his statutory authority or, if within that authority, that such authority is unconstitutional. In addition, the Eleventh Amendment limits the relief that may be recovered in the latter type of action; the judgment may not compel the State to use its funds to compensate the plaintiff for his injury.

Despite a persuasive argument by the dissent that the essence of the litigation was a dispute between the State of Florida and Treasure Salvors over ownership of property, the majority opinion answered Justice Stevens' first question in the affirmative. Severing the ownership dispute entirely from the service of process against the two named officials, the Court held that the process was not barred by the Eleventh Amendment as a direct action against the State, since it was directed only against the officials.

Addressing the second question, the Court held that "actions of state officials in holding property on the assumption that it was found on state land and *for that reason* belongs to the state—when it is undisputed that the property was *not* found on state land—is beyond the authority of any reasonable reading of any statute . . . cited to us by the State." As to the salvage contracts, the Court found them irrelevant to the question unless they provided a basis upon which the officials may claim a right to withhold the property. Since the contracts themselves did not purport to transfer ownership of the artifacts to the State, the officals were held *not* to have a colorable claim to the artifacts. (The dissenters, on the other hand, posit that "before concluding that the state officials' exercise of rights under the contracts was *ultra vires*, it is necessary to reach the merits of the contract and dispose of the 'mistake of law' contention." They also argue that the voidability of these contracts does not make them so invalid as to render possession of the artifacts by the state officials beyond their authority.)

Finally, the relief sought was found to be consistent with previous cases against state officials, in that the warrant of arrest sought possession of specific property rather than attachment of state funds.

For these reasons, the Court held that the service of process on the Archives officials for the arrest of the "Atocha" artifacts was not barred by Eleventh Amendment immunity. It should be mentioned, however, that "the warrant itself merely secures possession of the property, and its execution does not finally adjudicate the State's right to the artifacts." It is no gamble to say that the resolution of *Treasure Salvors II* does not signify the end of the *Treasure Salvors* dispute. There continue numerous on-going suits, as well as state and federal attempts to introduce legislation for the protection of shipwrecks from future private salvage operators and treasure hunters. It is not certain how much longer the rights of private salvors will remain intact, in spite of the *Treasure Salvors* victory.

Catherine L. Mills

THE WRECK REMOVAL ACT OF 1899

The Wreck Removal Act [33 U.S.C. §409 et. seq. (1970)] was passed by Congress in 1899. This statute makes it unlawful to voluntarily or carelessly sink, or cause to be sunk, vessels in navigable channels. Whenever a vessel is wrecked and sunk in a navigable channel, accidentally or otherwise, it is the duty of the owner of the sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night. The sunken craft must remain marked until it is removed or abandoned. The neglect or failure of the owner of a sunken craft to comply with these provisions is unlawful. The owner of a sunken vessel has a further duty under the Act to commence the immediate removal of the vessel and prosecute such removal diligently.

The plain purpose of the Wreck Removal Act is to maintain and promote safety of navigation. This includes deterring avoidable sinkings of vessels by imposing criminal sanctions, protecting other vessels plying the same waters and insuring the prompt elimination of obstructions to navigation.

The duty impressed upon the owner to immediately mark and remove the sunken vessel does not arise until the owner receives knowledge that his vessel has been sunk. The word "immediately" as used in this statute means the owner must mark and remove the craft within a reasonable time after he is notified of the wreck. The owner of a sunken craft must make all reasonable efforts to find the wreck and mark it, whether it was accidental, intentional or negligent. After the owner has made a full, good faith search for his craft and cannot find it, his duty to mark and remove the vessel is extinguished. This failure to commence removal will be considered abandonment of the craft and subjects the craft to removal by the United States. Even after the duty to mark the vessel is cast upon the United States, the owner still remains liable for the expenses incurred by the Government in marking the vessel.

The initial obligation of removing a wreck rests upon the owner of the vessel regardless of whether the sinking was accidental or negligent. If the owner of the vessel was responsible for the sinking then his duty to remove the vessel is presumed to be non-delegable. However, in reality, if the owner fails to remove the obstruction, the Government would most likely undertake the task in the interest of navigational safety. The negligent owner will still be liable for the removal cost plus any damages caused by the wreck in the meantime. After the United States removes an abandoned vessel, it may maintain an action *in rem* against the vessel or *in personam* against the negligent owner. The Government's claims for removal expenses cannot be limited by the Limitation of Liability Act.

The law concerning the options which the non-negligent owner of a sunk vessel has to consider to remove or abandon a wreck are summarized in *Tennessee Valley Sand and Gravel Co. v. M/V Delta*, 598 F.2d 920 (5th Cir. 1979):

> The owner of a vessel sunk without any negligence on his part is still subject to the statutory obligation to remove the wreck, but is given an option: he may either raise the vessel himself and seek recovery of the expenses from the party responsible for the sinking, or he may abandon the vessel and allow the United States to bear the burden of removal and recovery of expenses from the negligent party. If the non-negligent owner exercises his right to abandon, he is liable neither for the costs of removal nor for damages suffered by third parties as a result of the wreck.

Depending on the circumstances, the owner of the wreck may have the burden of proving the sinking was accidental and without negligence. Because the Wreck Act is designed to maintain open navigation and is liberally read to the benefit of the Government, proving the wreck was accidental and not negligent may be a difficult task.

The Wreck Act also imposes criminal sanctions on violators. A violation of the Act is a misdemeanor punishable by a fine of not less than $500.00 and not more than $2,500.00 and/or by imprisonment for not less than thirty days and not more than one year. Any master, pilot or engineer who willfully violates the Act may upon conviction have his license revoked or suspended for a term to be fixed by the Court. Even though the Act was primarily a criminal statute when passed, these sanctions are rarely imposed on violators.

Today the Wreck Removal Act of 1899 has lost its usefulness as a criminal sanction. However the Act is still a viable civil tool used by the United States in promoting navigational safety and clearing waterways necessary for the development of our economy, welfare and recreation.

Paul Gunn

In Rem Arrest
(Continued from page 3)

reason, it seems that the courts would do better to devise some other way to reconcile Rules C and E with the requirements of the Constitution, even if it requires a finding that the rules are unconstitutional. The considerations that come into play when one is seizing a ship or an airplane simply may not be different enough to justify an entirely different rule.

Cathy Jacobs

FOREMOST INSURANCE CO. v. RICHARDSON

50 U.S.L.W. 4778 (U.S. June 23, 1982), affirming 641 F.2d 314 (5th Cir. 1982)

In a recent 5-4 decision, the U.S. Supreme Court significantly enlarged the scope of federal admiralty law at the expense of state court jurisdiction. This case, *Foremost Insurance Co. v. Richardson,* was an action to recover for the death of an occupant of a pleasure boat which had collided with another pleasure boat on the Amite River in Louisiana. Brought in Federal District Court on the asserted basis of admiralty jurisdiction under 28 U.S.C. §1333(1), Foremost Insurance co. was dismissed for lack of jurisdiction because the necessary element of "commercial maritime activity" was absent. The 5th Circuit Court of Appeals reversed, reasoning that "the federal interest in protecting maritime commerce can be fully vindicated only if *all* operators of vessels on navigable waters—not just individual actually *engaged* in commercial maritime activity—are subject to uniform rules of conduct." Thus, in arrant deviation from previous case law, the Court of Appeals concluded that even pleasure boating is subject to federal admiralty law, as long as the tort involving such vessels occurs on navigable waters. This decision went before the U.S. Supreme Court on January 12, 1982, and was affirmed on June 23.

The leading case on point prior to the *Foremost Insurance Co.* decision is *Executive Jet Aviation v. City of Cleveland,* 409 U.S. 249 (1972), which denied admiralty jurisdiction to an aviation tort that occurred over navigable waters. Both the majority and dissenting opinions of *Foremost Insurance Co.* relied heavily on their respective interpretations of the ambiguous language in the *Executive Jet* holding that "a cause of action sounding in tort is not cognizable under admiralty jurisdiction unless the alleged wrong occurs on navigable waters *and bears a significant relationship to traditional maritime activity*" (emphasis added). Since the *Executive Jet* Court did not explicitly define the second of these jurisdictional requirements, the only clue to its meaning appears in the cases cited in the opinion. On one hand cases involving pleasure craft torts, swimming and skiing injuries, etc. were cited as footnotes with disapproval, as "lacking significant relationship to maritime navigation and commerce." Approved cases on the other hand, defined the proper scope of admiralty jurisdiction as including "all matters relating to the business of the sea and the business conducted on navigable waters." It would seem that the Supreme Court's *Executive Jet* holding intended "maritime activity" to mean "maritime commerce or business."

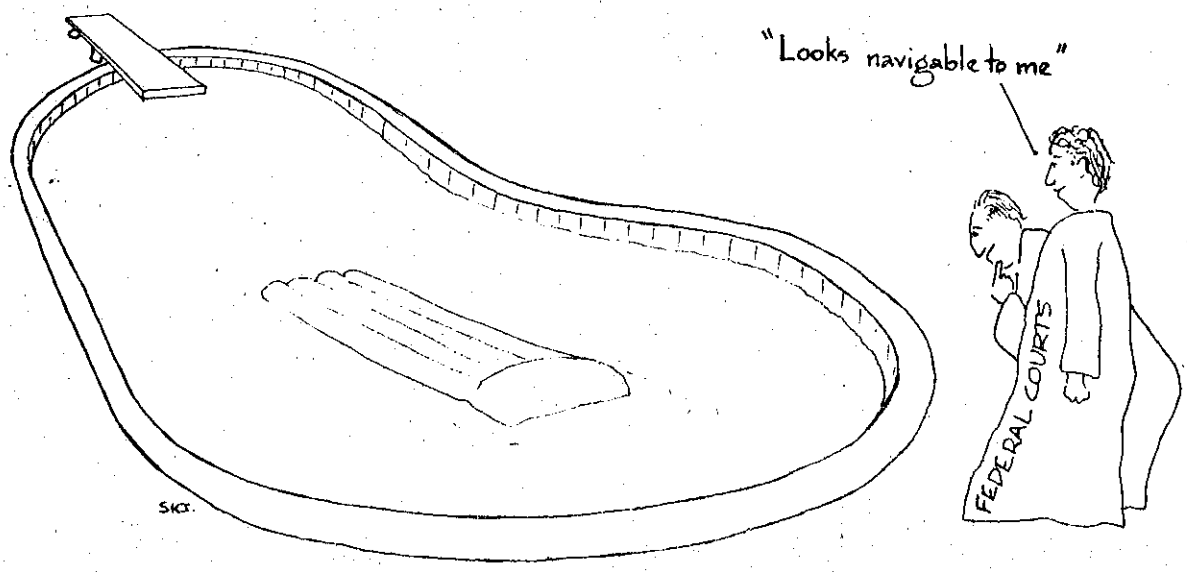
The majority opinion of *Foremost Insurance Co.*, however, gives premier authority to the former line of cases by affirming the Court of Appeals decision that "two boats, regardless of their intended use, purpose, size and activity, are engaged in traditional maritime activity when a collision between them occurs on navigable waters." The decision is premised on three specious claims. First, that there is in fact a special federal interest in having uniform "Rules of the Road" to govern *all* boats on navigable waters. Second, and closely related, that a collision between two vessels of any type on navigable waters inevitably has potential impact on maritime commerce, even if the vessels themselves are not commercial. Third, that a requirement of commercial use for "traditional maritime activity" would result in arbitrary and confusing standards, since a vessel once used for commercial purposes may not necessarily be so used at the time of the tort. Furthermore, the Court explained, Congressional legislation which deals with shipping and navigation defines "vessel" as including all types of waterborne vessels, without regard to whether or not they engage in commercial activity.

The inconsistency of this holding with *Executive Jet* is well-noted in the dissent, which denies the existence of *any* substantial federal admiralty interest in the case at hand. Traditional federal admiralty jurisdiction concerns itself with maritime *commercial* activity, asserts the minority opinion of *Foremost Insurance Co.* Pleasure boating, which is a comparatively new phenomenon, has no connection with this historic federal interest. "Thus, the 'traditional' connection emphasized in *Executive Jet* is absent where pleasure boats are concerned."

As to the majority's characterization of traditional maritime activity as the "potential disruptive impact" which occurs when any two boats collide on navigable waters provides a sufficient connection, . . . then the crash of an *airplane* necessarily would support admiralty jurisdiction," and *Executive Jet* holds to the contrary, since admiralty jurisdiction was denied.

The *Foremost Insurance Co.* dissent quite fairly identifies the issue as not whether *Executive Jet's* "traditional maritime activity" includes pleasure boating, but whether the federal law of admiralty (rather than traditional state tort law) should apply to an accident on the Amite River in Louisiana between two pleasure boats. Having identified this federalism concern as the dominating issue, the minority opinion explains that "the chief objection to application of admiralty law to pleasure boating is that it implicitly prohibits the exercise of state legislative power in an area in which local legislatures have generally been thought competent. . . ." The dissenters conclude that as the *Foremost Insurance Co.* decision stands, federal courts have new pre-emptive jurisdiction over what should be governed by state tort law, in a regrettable trend towards the erosion of federalism.

Viewing this decision as a purposeless expansion of federal authority and displacement of state responsibility, the *Foremost Insurance Co.* minority opinion hypothesizes that now, even children playing in rowboats which collide and sink near the shores of a navigable stream would be subject to federal admiralty law. The possibility of results of this nature is underscored by a subsequent 5th Circuit decision in *Boudreaux v. American Workover, Inc.*, No. 80-3287 (5th Cir. July 6, 1982). *Boudreaux* held that a worker on an offshore oil-drilling vessel in state waters was engaged in "maritime employment" by virtue of the fact that his work (and injury) took place on navigable waters; thus, his injury was covered by the Longshoreman's and Harbor Worker's Compensation Act and federal maritime law, rather than state workman's compensation law. As the *Boudreaux* dissent points out, the result is that "any work whatever, no matter how landside in nature, becomes 'maritime employment' if performed at a location actually *on* [navigable] waters. . . ." As in *Foremost Insurance Co.*, it seems that the remnants of "status test"—with emphasis on the maritime nature of the activity— are fading from view, while "situs" on navigable waters is becoming all-important for invoking federal admiralty jurisdiction and law.



Admiralty Law

(Continued from page 1)

after the trial has been concluded and the judgment has been entered. In admiralty, however, traditionally the plaintiff sued the vessel. The vessel was deemed personified. The vessel was a juridical person, much like a corporation, and it could be named as the defendant. Such a proceeding is called an *in rem* proceeding. The net effect of an *in rem* action was that, immediately upon the filing of suit, the vessel was seized. The vessel was served with process, was "arrested" and taken into the custody of the U.S. Marshal. This had the dual effect, favorable to plaintiff, of providing security for the payment of the judgment if plaintiff won and of requiring the vessel's owner to come into the jurisdiction selected by plaintiff and there defend the suit.

The *in rem* process, as a form of seizure of a person's property without prior notice, is under considerable attack today. Many claim that the procedure presently in use unconstitutionally deprives a vessel owner of his valuable property without due process of law. The Fifth Circuit, as well as at least two others, have rejected this Constitutional attack. Several district courts, however, have sustained it. The Supreme Court ultimately will have to resolve the issue.

A third major difference between the two courts was that different rules of substantive law applied. The general maritime law developed and evolved out of felt needs of seagoing people, largely throughout Europe and in the Western hemisphere. The needs of those who go down to the sea in ships were not necessarily identical with their landlubber brothers. Distinct rules of law emerged in many cases. We will have more to say about this later. Suffice it to say, for present purposes, that, if a case were an admiralty and maritime case within the meaning of Article III of the Constitution, the substantive maritime law would govern the rights, liabilities and remedies of the parties, without regard to whether the actions were brought in federal or state court.

IV.

General maritime law is largely judge-made law. True, there have been several significant occasions in which the Congress has enacted statutes which form a part of the general maritime law—the Carriage of Goods by Sea Act, the Limitation of Liability Act, the Maritime Liens Act, etc. But for the most part, the Congress has stayed its hand. The Supreme Court on numerous occasions has remarked that "the Congress has traditionally left to this Court the business of fashioning the substantive rules of the general maritime law."

Numerous policies and principles are relied upon by courts when deciding questions arising under general maritime law. Admiralty law has a tradition of simplicity and reasonableness. Many of the highly technical distinctions of the common law never made their way into the general maritime law.

Admiralty courts have always acted under the compulsion of a strong sense of natural justice in promulgating rules of the substantive maritime law. If a rule does not commend itself as being just and fair, admiralty courts are likely to reject it. On the other hand, almost all major Supreme Court decisions announcing substantive rules of the general maritime law conclude by emphasizing the court's reasons for perceiving that the rule is fair and just to all concerned.

Uniformity is a major policy within general admiralty law. Ships touch many ports. They enter many jurisdictions. Well over half the states of the United States have ports regularly visited by vessels plying the navigable waters. Ocean-going vessels, of course, encounter even more diverse jurisdictions. For centuries the maritime industry has felt the need that the rules of law governing their conduct, their rights and liabilities, be uniform throughout the world, to the maximum extent possible. In this country, of course, the Supreme Court has the power to assure that the general maritime law will be uniform and will be enforced uniformly throughout the United States. When concerned with lawsuits arising out of international voyages, the courts are still sensitive to, even though they may not be bound by, the substantive rules of other countries, particularly the country whose flag each vessel flies.

What happens when a transaction or occurrence giving rise to a lawsuit arises on navigable waters but within the territorial limits of a state? Assume an outboard motor boating accident occurs within the territorial waters of a state. First and foremost, the substantive maritime law—to the extent that there is such—should apply. But what about state law? Is it wholly displaced? The answer is not entirely clear. The better view is that, except to the extent that it runs counter to the policies implicit in the positive maritime law, state law should also apply—state law should supplement the maritime law. Not a few federal judges, however, insensitive to the real meaning of admiralty's uniformity policy, have in the name of uniformity refused to apply otherwise governing state substantive law.

V.

In the early years of the development of the admiralty and maritime jurisdiction of the United States, most litigation was centered in New York. The United States District Court for the Southern District of New York was considered the Supreme Court of admiralty. A silver oar was placed in front of the bench when the court was sitting in admiralty. The United States Court of Appeals for the Second Circuit was likewise a leader in the development of rules of the substantive maritime law.

In recent years, however, the old Fifth Circuit became the nation's pre-eminent admiralty court. In a sense the United States District Court for the Eastern District of Louisiana began to supplant the Southern District of New York. The judges on the Fifth Circuit came to be looked upon as the most prominent admiralty judges in the country, rather than those on the Second Circuit. This should continue, even though the Fifth Circuit has been shorn of Florida, Georgia and Alabama, which have formed the new Eleventh Circuit.

The chasm between the substantive maritime law and that governing the rights and liabilities of landlubbers has never been quite as wide as many have imagined. In 1966, however, the gap was rendered even more narrow, for in that year the civil rules governing practice in the United States District Court for admiralty cases and non-admiralty cases were merged. For years admiralty had operated under different terminology, different nomenclature. The concepts were very similar, but the use of almost a different language created the appearance of vast differences. A plaintiff at law was a libellant in admiralty. A defendant was a respondent. An attorney at law was a proctor in admiralty and, of course, left was port and right was starboard. Unification in 1966 brought the practice together and has had the effect of bringing admiralty law and non-admiralty law much more into harmony one with the other.

Since that time the substantive maritime law has gradually looked more and more like the common law, and vice versa. In 1970 the maritime law recognized the right of action for wrongful death. In 1975 division of damages in collision cases according to comparative degrees of fault was approved. Many lower courts have all but incorporated into admiralty the land-based law of products liability and strict liability in tort. Equitable remedies such as the injunction, hitherto unheard of in admiralty, have been granted in the First and Fifth Circuits.

Yet in the final analysis the twain cannot meet. The maritime law has never been embarrassed to steal a good idea from the common law. But it has never hesitated to reject a bad one. More importantly, admiralty courts have generally had the wisdom to reject common law rules which, no matter how workable they may be shoreside, do not fit the affairs of the seas. The Navy is different from the Army. Carriage of cargo by sea is different from railroads or trucking. Though the differences have narrowed—with commonality, intermodal transport and the like—they will never disappear. There will always be a kernel of truth to the notion that maritime law is strange and foreign, that admiralty courts are alien forums full of traps for the unwary—if only just a kernel.

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Recent Legislation

(Continued from page 2)

*MISS CODE ANN. §29-7-3 was amended to: (1) prohibit private parties from developing or extracting oil, gas and other minerals from state-owned lands without a lease from the Commission on Natural Resources; (2) authorize the Commission on Natural Resources to promulgate rules and regulations governing such leases; (3) prohibit any seismographic or other mineral exploration or testing activities on any state-owned lands within the mineral leasing jurisdiction of the Commission without first obtaining a permit from the Commission; (4) remove the restriction on the maximum amount of lease royalty on such oil, gas and minerals; and (5) provide that of the monies received in connection with such royalties, that a certain amount be paid into the "Gulf and Wildlife Protection Fund," half of which is to be used by the Department of Wildlife Conservation for the purpose of clean-up, remedial or abatement actions involving pollution resulting from such exploration or production of oil or gas, and the remaining half to be used by the Wildlife Heritage Committee for use first in the prudent management, preservation, protection and conservation of existing water, lands and wildlife of Mississippi and, second, for the acquisition of additional waters and lands.

*Section 17-17-43 was added to the Solid Wastes Disposal Law to provide a procedure by which hearings may be obtained for violations of such law and the rules and regulations promulgated pursuant to it.

*Section 49-2-9 was amended to allow the Commission on Natural Resources to: (1) promulgate standards, rules and regulations necessary to prevent, control and abate both existing and potential pollution and (2) enter into contracts and agreements with federal, state and private entities to carry out the provisions of the Air and Water Pollution Control Law.

WATER LOG

This newsletter is a quarterly publication reporting on legal issues affecting the Mississippi-Alabama coastal area. The purpose of the newsletter is to increase public awareness of coastal problems and issues.

If you would like to receive future issues of the WATER LOG free of charge, please send your name and address to: Sea Grant Legal Program, University of Mississippi Law Center, University, Mississippi 38677. We welcome suggestions for topics you would like to see covered in the WATER LOG.

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NOTES

The first issue of FORCE FIVE, a new quarterly newsletter of the Mississippi-Alabama Sea Grant Consortium was published in September. Articles cover Sea Grant activities as well as other issues and events that affect the people and resources of the Mississippi and Alabama coasts. Any inquiries regarding FORCE FIVE can be made to the main office of the Mississippi-Alabama Sea Grant Consortium at (601) 875-9341.

An error was made in the text of the *Cinque Bambini* article in the last issue of the WATER LOG. The quote from *Martin v. O'Brien* on page 3, column 1, paragraph 3 should read: "the shores of the sea below the highwater mark belong to the state as trustee for the public, and may not, by grant, become private property, or the subject of an exclusive private right."

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